

One major quality of Mr. Ernst will be apparent from the above lists. He is a liberal in the old-fashioned and valuable sense. He really does know and like people on both sides of the fence, and today it is particularly useful to have men who have enthusiasm for both David Dubinsky and the Morgan partners.

Whatever its defects of style and organization, Mr. Ernst's book is always warm, frequently charming, and sometimes incisive. From a full and rich practice he has much to say about law, not only in the civil liberties field, but in taxation, labor relations, ethics, criminology, and divorce as well. However, for the young law student and lawyer his book has a particular relevance. The law, says Mr. Ernst, is the "most exciting of professions." And his book does much to show why he finds it so. It is good indeed to have someone say that again and say it vigorously. We wish Mr. Ernst well and we trust that his title will prove truly prophetic.

HARRY KALVEN, JR.\*

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**Taxable Income**, Revised edition. By Roswell Magill. New York: Ronald Press, 1945. Pp. viii, 491. \$6.00.

Half a century ago a leading figure in American advocacy, Joseph H. Choate, sounded the tocsin in the Supreme Court of the United States: an income tax is communistic. His immediate purpose at that time was to have the 1894 act of Congress imposing an income tax declared unconstitutional. He succeeded,<sup>1</sup> but little did he and his generation foresee that within two decades Congressional authority to impose taxes on income—communistic<sup>2</sup> or no—would be formally imbedded in the organic law of the land.<sup>3</sup> Now, thirty years thereafter, millions take for granted the fiscal necessity of taxes on income.

Since the adoption of the Sixteenth Amendment there have been nearly twenty-five complete revenue acts, each one adding either some new concept or statutory modification of what is to serve as the base for the imposition of a tax on income. This kaleidoscopic movement in statutory patterns and the liberality of inducement to litigate<sup>4</sup> have combined to produce a plethora of court decisions and administrative pronouncements that is equalled nowhere else in the world. The time has long passed when any "tax expert" could truthfully say he was abreast of all that was going on in income taxation, if by that is meant a close daily acquaintance with all that is pouring forth from legislative, judicial, and executive halls.

Tax practitioners are fortunate in the celerity and competence with which the several standard tax services have for years been making available the latest developments in all fields of taxation. They have also been fortunate in the scholastic excel-

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<sup>1</sup> *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895).

<sup>2</sup> Actually, Mr. Choate said, "The Act of Congress which we are impugning before you is communistic in its purposes and tendencies, and is defended here upon principles as communistic, socialistic—what shall I call them—populistic as ever have been addressed to any political assembly in the world." *Ibid.*, at 532.

<sup>3</sup> United States Constitution, Sixteenth Amendment.

<sup>4</sup> The bon mot of Thurman Arnold that "taxation without litigation is tyranny" has become well known.

lence exhibited in the well-known textbooks, treatises, and countless law review articles on various phases and aspects of income taxation. Surprisingly, however, during these past thirty years, only one book has appeared devoted to an analysis of the generic concept of taxable income—and that one is the volume here under review. If for no reason other than its thus-far exclusive position in income tax literature, Mr. Magill's work deserves the plaudits of all persons interested in the subject.

*Taxable Income* was met with generous approval on its original publication in 1936. The present edition, its second, retains all that was discussed before and adds about fifty pages of new textual material discussing the leading Supreme Court decisions rendered since 1936. If the revisions in this edition are so limited, why then, one may properly ask, is a further review justified now? The answer to that inquiry is not difficult.

Ten years ago the primary lesson taught by Mr. Magill in his *Taxable Income* was that income, for tax purposes, is not a fixed, rigid, unalterable, or even wholly logical concept. Whereas many of its aspects are arbitrary, others are altered under the impact of changing legislative and judicial climate. The secondary lesson was that "the dangers of a delusive exactness"<sup>5</sup> are as present in a frozen concept of taxable income as they have been shown to be elsewhere. Today these lessons retain their full vitality, and it is to Mr. Magill's credit that he has had to make so few basic changes in the revised edition, other than those necessary by virtue of the lapse of time.

This book does not advocate any so-called "tax philosophy," and thus is not a controversial document in any political sense. The author has successfully confined himself to analysis and objective explanation. For Mr. Magill's notions and ideas about what constitutes sound income taxation one must search elsewhere, e.g., in his study, *The Impact of Federal Taxes*,<sup>6</sup> his numerous addresses before business and professional groups, and *A Tax Program for a Solvent America*.<sup>7</sup>

A study of the requirement of the realization of income constitutes the opening and largest portion of the book. Realization of income is an orthodox and apparently firmly established requirement but "realization" is not an inelastic concept. *Eisner v. Macomber*,<sup>8</sup> probably the most cited decision in all federal taxation literature, is the keystone of that concept. Were that decision to be overruled a substantial part of what appears between pages 3 and 219 of Mr. Magill's book would have to be rewritten. Close students of taxation appreciate that in *Helvering v. Griffiths*,<sup>9</sup> decided since the appearance of the original edition, a frontal attack by the Treasury on *Eisner v. Macomber* failed by much less a margin than is apparent to the eye. In rejecting the Treasury's position in the *Griffiths* case, the Supreme Court made Mr. Magill's task of revision so much simpler! Some day federal income taxation may approximate the economists' definition of income as net accretion to net worth more closely than it does now; therefore, a later edition of *Taxable Income* may require more changes than did the second.

The other traditional divisions of the book—known as the Magillian categories—relate to characteristics of income and source of payment. He analyzes many debatable

<sup>5</sup> *Truax v. Corrigan*, 257 U.S. 312 (1921), Holmes, J., dissenting at 342.

<sup>6</sup> Magill, *The Impact of Federal Taxes* (1943).

<sup>7</sup> Committee on Postwar Tax Policy (1945), Mr. Magill, chairman.

<sup>8</sup> 252 U.S. 189 (1920).

<sup>9</sup> 318 U.S. 371 (1943).

topics in these sections. For example, there is his discussion of whether the Sixteenth Amendment would permit the taxation of gross income and of gifts and bequests as income. He points out with perspicacity that in taxation problems, as in so many other instances, the Supreme Court often does not venture ahead in enunciating its governing principles but awaits a clear legislative direction.<sup>10</sup> Thus, one cannot confidently say that gross income could not be made the basis of taxation, or that gifts and bequests could not validly be included in taxable income—were Congress to state so unequivocally. And who is to guarantee that some day Congress may not so direct?

Mr. Magill does not appear to be surprised by the decisions on trusts and assignments which have been handed down since 1936. And there is little reason why he should be, for the roots of those decisions are found in the decisions of the twenties and thirties. They illustrate the point that the older federal income taxation becomes, the more expansive becomes the scope of taxable income.

One observation remains to be made. The pattern of the book closely resembles, if it does not follow, that of his casebook.<sup>11</sup> There has been some criticism of the teachability of that arrangement in the casebook;<sup>12</sup> and this reviewer is inclined to agree with that criticism as to the logicity of the sequence of the three major divisions of this book. It is somewhat disconcerting to be "plumped" at the outset into involved discussions about distributions by corporations, reorganizations, and sales and exchanges. It seems to this reviewer that these could be more easily understood if the reader were to be first led into an analysis of what constitutes income and then guided into discussions of realization and liability for tax.

*Taxable Income* merits the serious attention and study of all those interested in taxation either as a matter of livelihood or academic understanding. It was designed as a distillation, rather than a compilation, of the thousands of tax decisions; and as such it is a genuine help to either the self-satisfied expert or the nervous beginner. Multiplicity of decisions give the appearance of endless confusion and hopeless uncertainty, but on closer study one discovers that the author has shown patterns and trends. For an intelligent understanding of income taxation there is not only required a thorough knowledge of the technical aspects of those decisions but also an appreciation of overriding patterns and discernible trends. Mr. Magill's work gives the reader that essential.

A word about the author's qualifications. Mr. Magill has been a professor of law and active practitioner at the bar for twenty-five years. Not to be overlooked is his high official affiliation with the Treasury Department on three separate occasions: 1924, 1934, and 1937 when he was Under Secretary. This rich and varied experience comes in good stead for a well-rounded and balanced analysis of such an elusive concept as taxable income. It negatives any ivory tower or armchair ratiocinations on as practical a subject as taxation.

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<sup>10</sup> "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." Holmes, J., dissenting in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917).

<sup>11</sup> Maguire and Magill, *Cases on the Law of Taxation* (1940).

<sup>12</sup> Bowden, *Review of Maguire and Magill, Cases on the Law of Taxation*, 8 *Univ. Chi. L. Rev.* 192 (1940).

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