

nature of certain institutions, such as the EEC, with its power to modify national law and thereby affect commerce and industry.

What seems fundamental is that institutional developments are beginning to play an important role in decision making on the private and governmental levels. Perhaps nothing has more deeply influenced the job of the American lawyer than the general acceptance of the notion that government must take some part in modern economic life. If the impact of international institutions upon the American lawyer be less immediate and direct than New Deal legislation, it may in the long run require a change in thinking more difficult and profound. A number of American practitioners have already become familiar with the "antitrust law" of the EEC and some have filed the notification of agreements to the Commission required by Regulation 17.¹⁴ In the future, American lawyers will want to know whether an appeal to the Court of Justice lies if the Commission refuses to entertain a complaint by a third party who claims he has been injured by an illegal agreement. The practitioner advising the client doing business in Europe dare not disregard the possibility that a decision by the Commission declaring an agreement void under Community law may serve as the basis for a suit for damages under the civil code of a member state.

Finally, the lawyer must be aware of the extent to which his government no longer feels entirely free to make decisions alone. Although nationalism remains a strong force, many countries have come to realize that to decide independently matters traditionally thought to be exclusively within the domestic jurisdiction of the territorial sovereign no longer makes sense. The lawyer fortunate enough to have contact with the materials of Professors Stein and Hay will greatly increase his understanding of these developments, whose ultimate impact may be felt by his client.

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Taxes, Loopholes and Morals. By JEROME R. HELLERSTEIN. New York: McGraw-Hill Book Co., Inc., 1963. Pp. viii, 245. \$5.95.

The Great Treasury Raid. By PHILIP M. STERN. New York: Random House, 1964. Pp. xviii, 361. \$5.95.

The Cold War and the Income Tax: A Protest. By EDMUND WILSON. New York: Farrar, Straus and Company, 1963. P. 118. \$2.95.

Whenever public hearings are held on proposed major federal tax legislation (as in the case of the Revenue Act of 1964) there is no dearth

¹⁴ 5 JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENNES 204 (1962).

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of loud voices representing special interests. These interests may be either of specific taxpayers or of groups of related industries, businesses, professions or employees. The myriads of unorganized taxpayers, individual or corporate, are, however, generally not represented at those hearings except insofar as it may be said that the Treasury Department is collectively their surrogate. Most taxpayers are either uninformed or disinterested in knowing how the federal tax system operates or why the Internal Revenue Code has become, after 50 years, so complex and cumbersome. It is not surprising, therefore, to learn, for example, that tax questions generally are "of little interest to the public, and among tax questions the issue of distributing the tax burden ranked near the bottom."¹ The voices of the general public—if there be any—are not heard in the land.

Each of the three books under review is an exhortation that the slumbering public bestir itself, awake to the stern realities of the federal tax system, and make its collective voice resound on Capitol Hill.² The three authors, each in his own way, are concerned with economic objectives and with fairness and justice in the legislative imposition and administrative operation of the tax laws. This review describes the substance of each of the three exhortations and attempts to evaluate all of them. Inasmuch as the major concern of each of the three authors is the federal income tax, this review will likewise, in the main, be confined to that tax.

The major concern with the federal income tax involves the way in which the tax is determined. Beginning with the 1913 Act, enacted shortly after the adoption of the Sixteenth Amendment, and continuing through a score of major revenue acts up to, and including, the Revenue Act of 1964, income tax rates have been (with exceptions) progressive, not proportionate.³ Thus, for example, if X has five times as much taxable income as Y, X is expected to pay more than five times as much income tax as Y. How much more will, of course, depend on how steep is the rate acceleration. From time to time the rate acceleration has been changed drastically, the latest one being a slowing down in the Revenue Act of 1964. Although there has been a half-century of national acceptance of the progressive rate technique in income taxation, there has also been a contemporaneous acceptance of tax techniques which debilitate, and in

1 BLUM & KALVEN, *THE UNEASY CASE FOR PROGRESSIVE TAXATION* x (1963 ed.).

2 In a television summary of the Revenue Act of 1964, two days after its enactment, the Commissioner of Internal Revenue also strongly urged the general public to bestir itself more vigorously in taxation matters.

3 See BLUM & KALVEN, *op. cit. supra* note 1, for a critical evaluation of the theories advanced in support of progressive taxation.

some instances destroy, the effectiveness of the progressive rate schedule. It is this dichotomy which has prompted the writing of the first two books under review.

The author of *Taxes, Loopholes and Morals* is a law teacher and has been also a practicing tax lawyer for more than twenty-five years. He has written scholarly tax treatises, but has eschewed that approach in his present book which he describes as a "modest" endeavor to discuss some of "the key income-tax issues in a way that the intelligent layman will be able to understand, along with one man's views as to how they ought to be resolved in refashioning our income tax."⁴

Professor Hellerstein is one with Eisenstein⁵ and Paul⁶ in staunchly supporting progressive income taxation. To that extent he is, like them, "more enthusiastic about the theoretical as well as pragmatic justification for [progressive] surtaxes in income . . . taxation, than are, for example, Professors Blum and Kalven. . . ."⁷ The main thesis of his book is that the progressive rate structure must be maintained and preserved; therefore, any inroads on such a structure must be resisted and defeated. Those inroads—in essence the "Loopholes" of the title neither defined nor frequently used in the text—are the leaks and sieves which either have been provided for by Congressional insistence or have been invented through legislative or administrative ineptness.

What are the principal sieves and leaks deplored by Professor Hellerstein? He looks askance at "bargain basement" attractions in the area of capital gains—*e.g.*, the flat preferential rate; stock options (the allure of which has somewhat faded under the 1964 Act); lump sum pension separation payments; gains of inventors and their financial backers; and unrealized appreciation of assets on death of the taxpayer. He decries the statutory exemption of interest received on state and municipal bonds; the too-generous deductions for expense accounts (*vide*, the 1964 Act); the permitted dealings with charitable organizations at a tax profit; preferential depletion deductions beyond recovery of cost; and deferral of tax on foreign operating income of domestic enterprises.

The foregoing leaks and sieves described by Professor Hellerstein also make up the substance of Mr. Stern's book, *The Great Treasury Raid*. Mr. Stern is neither a lawyer nor an avowed tax expert; he is, however, an alert and spirited journalist with experience as a legislative assistant to two Senators and as a Deputy Assistant Secretary of State. Consequently, his treatment of brash and subtle raids on the fisc is journalistic

⁴ HELLERSTEIN, *TAXES, LOOPHOLES AND MORALS* 5 (1963).

⁵ EISENSTEIN, *THE IDEOLOGIES OF TAXATION* (1961).

⁶ PAUL, *TAXATION IN THE UNITED STATES* (1954).

⁷ Diamond, Book Review, 9 *RUTGERS L. REV.* 485, 487 (1955).

and most fascinatingly and successfully so. His factual material is, except for minutiae here and there, entirely accurate—reflecting the careful “homework” done by the author under the guidance of numerous unnamed tax experts in and out of the Treasury.

Wherein does Stern differ from Hellerstein if basically each parades the same deviations from the progressive rate structure? Whereas Hellerstein sets forth his own suggestions for “refashioning the income tax,” Stern disavows any purpose other than to describe—as colorfully as possible—the “departures from the uniform taxation of individual Americans.”⁸ Furthermore, notwithstanding his own predilection for graduated tax rates, he does not debate whether tax rates should be progressive or proportionate.⁹ Thus, while Stern is primarily a reporter—an excellent one—Hellerstein goes beyond mere description. Because of its style, Stern’s book will probably be the more widely read—a result, however, which makes serious consideration of Hellerstein’s proposals more urgent.

Professor Hellerstein strongly believes that capital gains are unduly preferred. He wants the capital gain rate *increased*, the holding period *lengthened*, and the preferred treatment limited to bona fide *investors*. On the other hand, he is in favor of an averaging technique comparable to that now in use for taxing compensation for services rendered during three or more years.¹⁰

Professor Hellerstein brings his tax expertise to bear on his proposal that there be a basic distinction between the income taxation of large publicly held corporations and of smaller non-publicly held corporations. For the former, he argues for the re-imposition of a surtax on undistributed profits (unheard of since an unsuccessful experiment in the 1936 and 1938 Revenue Acts) in addition to the regular corporate tax. For the latter, he wants them to be treated either as sole proprietorships or partnerships, as the case may be, in order to eliminate the tax profit in incorporating private or personal activities.¹¹

⁸ STERN, *THE GREAT TREASURY RAID* ix (1964). Interestingly enough, Stern’s book contains a comprehensive list of citations and technical references which is lacking in Hellerstein’s book. Furthermore, Stern’s book has an index and glossary of terms, both of which are absent from the Hellerstein work.

⁹ At the end of his book Stern does affirmatively advocate treating as income *all receipts* which give an ability to buy things and deducting personal exemptions, dependency credits, and costs of getting such receipts. Thus, high surtax rates would be unnecessary.

¹⁰ See INT. REV. CODE OF 1964, § 219, allowing unlimited carryover of capital losses; and INT. REV. CODE OF 1964, § 234 permitting income averaging over a five year period.

¹¹ See Hellerstein, *Mergers, Taxes and Realism*, 71 HARV. L. REV. 254 (1957).

Both Hellerstein and Stern rely on Learned Hand's dictum that taxes are enforced exactions and that no one has any public or moral duty to pay more than the statute demands.¹² Hence, Hellerstein, as a practicing lawyer, explicitly states that he assists clients in availing themselves of any and all so-called statutory "loopholes" and likewise, Stern sees no moral wrong in such an attitude—a view shared wholeheartedly by this reviewer. Thus, there is nothing reprehensible in tax avoidance as distinguished from tax evasion which is *never* legitimate.

Professor Hellerstein discusses morals in taxation—an area left generally unmentioned by Stern. Hellerstein castigates taxpayers and their advisors who participate in or share responsibility for various kinds of income tax cheating, *i.e.*, outright evasion. To him evasions, minor as well as major, are serious offenses and should not be considered as fly-speck violations. Tax advisors have a strong responsibility to help create and maintain a respect for the integrity of the tax law.

And now to Wilson's *The Cold War and The Income Tax: A Protest*. It is a curious book for several reasons. The author is an eminent literary critic, essayist and novelist. He writes not as a tax expert, but as a wounded and greatly enraged taxpayer. His wounds were really self-inflicted since he was, in his own words, the central figure in a "bad case of tax delinquency," consisting of not filing any federal income tax returns between 1946 and 1955. He describes, in detail, his trials and tribulations with the Internal Revenue Service in his attempts to settle his tax troubles. Notwithstanding his conceded literary talent, Wilson does not gain any empathy (at least in the case of this reviewer) or even sympathy. There is, frankly, too much whining and a too easy attitude of making out the Internal Revenue Service to be an aggregation of persons who suspect everyone else of cheating. His tirade against the so-called bureaucratic theology is too shrill, full of sound and fury, but signifying nothing.

It is not, however, with Mr. Wilson's personal problems that this review is really concerned. It is with the second part of his essay, namely, his protest against the relationship of the income tax and the Cold War.

Stern and Hellerstein write about a "tightening up" of the income tax. Wilson is, at least indirectly, attempting to convince people to protest against the imposition of an income tax. His protest, strangely enough, has grown up out of his personal income tax misadventures. Wilson believes that the Cold War, financed so heavily by the income tax, will ultimately ruin America. He concludes we must weaken the income tax and thus reduce Cold War expenditures. But how should a protestor against the Cold War proceed?

¹² See Diamond, *Learned Hand and Federal Taxation*, 3 SYRACUSE L. REV. 81, 91 (1951), reprinted in 30 TAXES 465, 472 (1952).

For himself, Wilson (now nearing age seventy) states he will avoid being civilly or criminally disobedient, but will make as little money as possible to keep below taxable levels. Furthermore, he states that "I have finally come to feel that this country, whether or not I continue to live in it, is no longer any place for me."¹³

Obviously, Edmund Wilson is entitled to any personal view or grudge he wishes to hold (as was Thoreau), but it is to be hoped his is merely a lover's quarrel with America. For the rest of us, we cannot merely make as little as possible to avoid income tax nor do we feel that this country is no longer any place for us. Yet most of us deplore the Cold War and hope that our income tax revenues will help to make our country—and our world—free of fear, poverty, and injustice. This reviewer has always had a profound respect—and still does—for Mr. Wilson as a master of *belles-lettres*, but in this instance the Biblical Preacher's admonition "of making many books there is no end" comes to mind.

The income tax law sorely needs refashioning and reform. From time to time the President has urged, at the insistence of the Treasury, major reforms. By the time, however, the tax legislation is placed before the President for his approval, it bears little or no resemblance to the recommendations which he has made. The late President Kennedy made several sweeping recommendations in 1963 for so-called reform, but the Revenue Act of 1964 falls far short of expectation. True, there are various patchwork corrections in the 1964 Act, but they exist side by side with further inroads on the progressive income tax rate structure. What is not unlikely is that by reducing tax rates the 1964 Act has dulled the impact of both the Hellerstein and Stern books. Most taxpayers are interested only in what they themselves have to pay, not what others are required to pay or, in fact, do pay.

Nevertheless, it is to be hoped that the basic lessons taught by Hellerstein and Stern are still to be considered timely. Those lessons, if carefully learned, should make the public more knowledgeable about tax matters because absent such public awareness there can be no real tax reform¹⁴ and, notwithstanding this reviewer's reservations about the wisdom of Wilson's protest, that essay too might be read with profit.

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¹³ WILSON, *THE COLD WAR AND THE INCOME TAX: A PROTEST* 115 (1963).

¹⁴ As to whether tax reform is merely a dream or real probability, see Blum, *Federal Income Tax Reform—Twenty Questions*, 41 *TAXES* 672 (1963); Blum, *More on "Twenty Questions,"* 42 *TAXES* 180 (1964); and Klein, *Federal Income Tax Reform*, 42 *TAXES* 175 (1964).

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