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The Taxing Power--State Income Taxation (Book Review)

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BOOK REVIEWS

THE TAXING POWER—STATE INCOME TAXATION. By Walter K. Tuller. Chicago: Callaghan & Company, 1937, pp. i, 460.

The tax situation today has been aptly described as a tax jungle.[1] With the federal and state governments both tapping all possible sources of revenue, both in many instances taxing the same sources of income without regard to duplications and overlappings, a jungle morality may be said to prevail today instead of what should be a scientific tax order. The helpless taxpayer groans under the ever increasing burden, seeking weapons of defense against the never ceasing onslaught of taxes.

Into this tax morass has come, out of the West, a young Lochinvar, who proposes to stem the tide with nothing less than a return to the basic law of the land, the Federal Constitution. In his book on *The Taxing Power* with particular application to *The State Income Tax,* Mr. Walter K. Tuller of the Los Angeles, California Bar goes back to first principles. What power to tax does the Federal Government possess? The Constitution defines these powers. The Constitution speaks of direct taxes and excises, of apportionment and uniformity. Mr. Tuller defines these terms clearly and unmistakably, with ample references to cases and sources. Nowhere, for example, has this reviewer read a more illuminating discussion of such an elusive term as excise taxes. The author emphasizes the fact that the term is significant primarily in its historical aspect. At least, that is the way the term is used in the Federal Constitution. An excise tax is basically the kind of tax that was known as an excise under the British system of taxation in use since 1643. Such taxes are carefully enumerated and explained for the purpose of demonstrating the important point that property taxes may be either direct taxes or excises. Most of the confusion in this country as to the power to tax, both on the part of the Federal Government and the states, arises from an attempt to make a classification between taxes on property and excises, whereas such taxes are not mutually exclusive.

Much has been written on the Supreme Court decision in *Pollock* v. *Farmer's Loan & Trust Co.*,[2] the case that determined the unconstitutionality of the income tax feature of the Tariff Law of 1894. It was somewhat of an intellectual treat to revisit this case, after these many years, and to follow the argument of the Court, expertly clarified by the author. To the author the significant point in the case was the agreement of the minority and majority opinions on the proposition that an income tax is a tax on property.

From this premise the author proceeds to annihilate the powers that states have presumed to assume in levying income taxes. The argument runs as follows: The power of a state to tax incomes is far more limited than the power of the Federal Government. A tax on the income derived from things owned, whether real or personal, tangible or intangible, is a tax on property.

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[1] Crowell, *Our Tax Jungle* (Nov. 1937) Harpers Magazine.

[2] 157 U. S. 429, 15 Sup. Ct. 673 (1895); 158 U. S. 601, 15 Sup. Ct. 912 (1895).

A tax on the income derived from business operations or from professional or personal services is a tax on property. This thesis is developed by references to court decisions defining property and property rights, the *Restatement of the Law of Property,* and the author's own vigorous presentation of what he keeps emphasizing as facts. The Fourteenth Amendment prohibits graduated taxation on property and the income tax is a tax on property.

The author distinguishes between the above types of income and the income from a privilege granted by a state. A tax on the latter, says the author, is not really a tax, but a method of payment for the privilege granted. Not being a tax on property, such privileges may be subject to a graduated tax. The inheritance tax is an example of a tax on this type of privilege.

Aside from the fact that states have been levying income taxes unconstitutionally at graduated rates, such income taxes are vulnerable on another count. They presume to tax subjects over which a state has no jurisdiction. Because of a supposed jurisdiction over the person, on the theory of domicile, states reach out to tax subjects having a definite situs in other jurisdictions. The concept that domicile alone establishes a jurisdiction to tax is to the author a false assumption. It gives a state extra-territorial rights. Under the equal privileges and immunities clause of the Federal Constitution, a citizen of New York may engage in business in California, for example. He does so by virtue of his right as a citizen of the United States, and yet under the concept of domicile this citizen is subject to tax by California and again by New York. The recent case of *Colgate* v. *Harvey*[3] gives the author a real prop for his contention that a state may not tax a domiciled individual on income earned without the state, on business carried on without the state, and on property located without the state. For a state to have jurisdiction to tax, the subject of the tax must have an actual situs within the territorial boundaries of the state. Numerous citations are offered by the author to prove this trend in recent decisions, among which *Senior* v. *Braden*[4] might be mentioned. This case held that income from beneficial interests in lands outside the state of Ohio could not be taxed by Ohio. Unfortunately, in an analogous case, *People ex rel. Cohn* v. *Graves,*[5] the New York Court of Appeals held that the state of New York could tax a resident on income from rents derived from real property located in New Jersey, reversing its own position taken in an earlier case, *Pierson* v. *Lynch.*[6] There was a strong dissenting opinion. The Supreme Court,[7] in a decision rendered since this book was published, upheld the majority opinion in *People* v. *Graves,*[8] in effect reversing its own opinion in *Senior* v. *Braden.*[9]

The author makes a strong and effective argument for the proposition that an income tax must be a tax on net income, and that state legislatures may not prescribe what deductions shall be taken to arrive at net income. To

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[3] 296 U. S. 404, 56 Sup. Ct. 252 (1935).
[4] 295 U. S. 422, 55 Sup. Ct. 800 (1935).
[5] 271 N. Y. 353, 3 N. E. (2d) 508 (1936).
[6] 263 N. Y. 533, 189 N. E. 684 (1933).
[7] Cohen v. Graves, 300 U. S. 308, 57 Sup. Ct. 466 (1937).
[8] See note 5, *supra.*
[9] See note 4, *supra.*

limit such deductions is virtually to tax gross income or gross receipts and this is unconstitutional, in the author's opinion. All deductions must be allowed to arrive at net income. Today states refuse to allow a deduction for federal income taxes paid or state income taxes paid. Many states refuse to allow deductions for actual losses, etc.

The author's presentation of his thesis is made with much vigor and passion. He is profoundly disturbed by what he feels is an unconstitutional usurpation of power on the part of state legislatures. To quote the author, "The action of the legislative or executive branches which conflicts with the limitations (as the author sees them) in the Constitution is void, *even though it is action which would advance social justice.*" This quotation indicates a positive point of view, one that the reader will sense throughout the book. It presents a vital issue that has been clamoring for solution during the past ten years.

Certainly this book has done much to help by analyzing the principles which govern and control the taxing power of the Government of the United States and the governments of the several states. In an attempt to solve the larger problem of advancing social justice, such an analysis must be a starting point.

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THE SUPREME COURT AND POLITICAL QUESTIONS. By Charles G. Post, Jr., Ph.D. Baltimore: Johns Hopkins Press, 1936, pp. vii, 145.

The primary object of the Constitutional Convention was to create and establish a strong Federal Government. To this end, the first three Articles of the Constitution provide that the legislative power shall be vested in the Congress; the executive power shall be vested in the President; and the judicial power shall be vested in one Supreme Court and such other inferior courts as the Congress shall ordain and establish. This separation of powers has been consistently recognized throughout our history. The framers realized that an absolute demarcation was neither possible nor desirable. Express provision was made for the exercise of a power by one department which would ordinarily vest in another. For example, the President might exercise the power of vetoing legislation; the Congress might sit as a court of impeachment; and the courts might promulgate rules for their practice and procedure. In the development of our Constitutional Law many other instances may be cited where it is recognized that one of the branches of government may act in respect to a matter that belongs within the jurisdiction of another branch. To cite but one example, the Constitution provides that Congress has power to regulate commerce among the several states. Congress may pass a general law on this subject leaving to an administrative board or to the Executive Department the power to carry out the details. "The filling in of details" has never

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