

10-1961

## Book Reviews

Winthrop R. Munyan

John W. Fager

Walter P. Armstrong Jr.

Jerry L. Moore

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### Recommended Citation

Winthrop R. Munyan, John W. Fager, Walter P. Armstrong Jr., and Jerry L. Moore, Book Reviews, 14 *Vanderbilt Law Review* 1545 (1961)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol14/iss4/30>

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# BOOK REVIEWS

TAXATION OF FOREIGN INCOME. By Boris I. Bittker and Lawrence F. Ebb. Stanford: Stanford University, 1960. Pp. xii, 580.

This book represents a job which needed doing. It is a job well done.

Numerous articles and books have dealt with various aspects of the United States income tax upon foreign income. Not previously, however, insofar as I have determined, has there been provided in one place a broad treatment of the subject of the taxation of foreign income in its many aspects.

The book deals with four principal areas:

1. The conceptual basis including background and historical material, bases of jurisdiction, definitions and general applicability.
2. Business methods including branch operations, licensing, foreign residence, foreign corporations, Western Hemisphere trade corporations, and a comparison of the Foreign Business Corporation proposed in H.R. 5 and the British Overseas Trade Corporation.
3. Income tax treaties.
4. A special problems section covering foreign exchange and blocked currency, a brief commentary on foreign situs trusts, a somewhat more extensive review of the specific problems of the transportation industry plus material on the enforcement of foreign taxes.

An appendix includes pertinent provisions of the Internal Revenue Code. There is a table of cases but unfortunately no index and no bibliography of articles and books cited. Both would have been helpful additions and will perhaps be added in a definitive edition which will presumably follow this preliminary edition.

The section on theories of jurisdiction is of particular current interest. With the attention which the present Administration is giving to taxation of foreign income and in particular its proposal to tax the income of foreign corporations in which United States corporations or parties have interests, there is and should be renewed thinking at the conceptual level.

The editors cite as bases of jurisdiction (1) citizenship; (2) domicile, residence, local trade and business and physical presence; (3) permanent establishment; and (4) situs of property and economic connection. It is doubtful that there would be general agreement about including all of the foregoing as jurisdictional criteria. Are trade and business, permanent establishment, and situs of property bases of

jurisdiction, or are they determinants only of the applicability of tax upon certain income?

In the "engaged in trade or business" section, the cases of *Commissioner v. Nubar*,<sup>1</sup> *Jan Casimir Lewenhaupt*,<sup>2</sup> and *Continental Trading, Inc. v. Commissioner*<sup>3</sup> afford the basis for an interplay of problem areas in the meaning of this term. In *Moline Properties, Inc. v. Commissioner*<sup>4</sup> and *National Carbide Corp. v. Commissioner*<sup>5</sup> slight activity was held sufficient to constitute a corporation a separate entity engaged in its own business; yet in the *Continental Trading* case the corporation with its numerous activities in the United States was held not engaged in trade or business in the United States. In the *Nubar* case, Nubar, as an investor not apparently even deemed to be a trader, was held engaged in trade or business in the United States. The editors raise the unsolved question of whether, since Nubar was held engaged in trade or business in the United States, the income received by him on the sale of securities should have been taxed at ordinary income rates. The editors also point out the possible changes in results of the cases if a tax treaty had applied.

In the section on foreign personal holding companies, *Alword v. Commissioner*,<sup>6</sup> quoted at some length, relates numerous aspects of the taxation of shareholders of foreign personal holding companies. The editors might consider inclusion in later editions of material on the meaning of gross income.<sup>7</sup> Further, the difference in the meaning of "gross income" for foreign personal holding company purposes and for "personal holding company" purposes might have been more sharply defined. Articles referred to in the notes do cover this important and often not fully understood point.

In the section on allocation of income there is a comprehensive review of the income tax applicability to types of income from different activities and services. While functionally covered elsewhere, a somewhat more extensive consideration might have been given to problems implicit in the use by United States business entities of foreign corporations as management, trading and licensing centers and as holding companies for other foreign corporations. With the growth of interest by United States business firms in the Common Market and with a consistently growing foreign investment, the use of foreign corporations for the purpose of holding and controlling foreign business investments will, unless the present Administration

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1. 185 F. 2d 584 (4th Cir. 1950).

2. 20 T.C. 153 (1953).

3. 265 F.2d 40 (9th Cir. 1959).

4. 319 U.S. 436 (1943).

5. 336 U.S. 422 (1949).

6. 277 F.2d 713 (4th Cir. 1960).

7. *E.g.*, *Garrett Holding Corp.*, 9 T.C. 1029 (1947).

proposals are adopted, certainly grow. The direct discussion is limited to a brief comment on such corporations as "tax havens" with a further reference to the effect of their use under the foreign tax credit provisions for averaging foreign tax rates. In addition to tax rates in the country of incorporation, the number and the provisions of tax treaties of the country of incorporation are pointed out to be important reasons for the choice of a particular country of incorporation.

The discussion of Western Hemisphere trade corporations includes portions of Professor Surrey's critical article on the anomaly of tax preferences granted for a particular reason—in this instance foreign trading and mining, which are used substantially for other purposes, principally export operations, because of the particular phraseology of the source of income provisions of the Code. Despite the Internal Revenue Service's claims of other criteria, the courts, as evidenced by the case of *American Food Products Corp.*,<sup>8</sup> continue to look not to "economic penetration" but to "title passage" as determining source of income; this reading has been confirmed recently by *Barber-Greene Americas, Inc.*<sup>9</sup> and *Pan American Eutectic Welding Alloys Co.*<sup>10</sup>

The discussion of the Western Hemisphere Trade Corporation is a particularly useful one, in that it etches sharply the conflict between the Treasury Department and the taxpayer positions as well as the consistent position of the courts.

Until the recent decisions such as *Barber-Greene*, cited above, it had been noted that because of the uncertainties of the outcome of the Treasury Department claim under the economic penetration theory, the use of the Western Hemisphere Trade Corporation was limited and decreasing. The use of foreign corporations for export operations in the Western Hemisphere could result in a lower tax rate at the operational level and even upon payment of dividends could, depending upon the foreign tax rate, result in an overall lower tax rate. With the Administration's proposals directed at foreign corporations (even though it is now apparent that there will not be any legislation in this field in 1961) and the recent Western Hemisphere Trade Corporation cases, a rejuvenation in the Western Hemisphere Trade Corporation may well occur.

The editors afford the opportunity to compare the British Overseas Trade Corporation and the Foreign Business Corporation as proposed in H.R. 5, the so-called Boggs Bill. Such a comparison helps to illuminate the problems which the United States seem to have in formulating a consistent dynamic foreign policy of which tax policy must be a part. The British Government, beset by export problems

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8. 28 T.C. 14 (1957).

9. 35 T.C. No. 45 (1960).

10. 36 T.C. No. 30 (1961).

and a weakened sterling position, provided for an overseas trade corporation, unlimited in area of foreign activity, untaxed till earnings are repatriated. By contrast, the proposed foreign business corporation, under the pressures of the Treasury Department, was to be narrowly conceived in scope of activity, limited in area of operations, and reduced to impotence as an instrument of economic policy.

Income tax treaties are accorded substantial treatment by the editors with a full quotation of the United States—United Kingdom convention and the Treasury Department technical memorandum on the treaty. Additional material deals with types of income and with other treaties differing somewhat from the United Kingdom Treaty. Particular emphasis is justifiably laid upon the meaning of "permanent establishment." One section is devoted to the tax sparing principle which was negotiated to become a part of the Pakistan Treaty but never became effective.

The troublesome problems of foreign exchange fluctuations and blocked currency are covered briefly to raise issues for the student who may wish to explore these areas more fully.

The subject of foreign situs trusts has a present substantial interest as evidenced by a growth in their number in recent years. Because of the benefits which under current law may be obtained in certain circumstances, the present Administration has proposed to limit the tax benefits of such trusts. Of importance in understanding this area of the law and discussed by the editors is Revenue Ruling 60-181 and the proposed bill, which was not enacted in Congress, to limit the tax advantage of such trusts.

The rather large section on the international transport industry has already been referred to. This is an important but in a sense a narrow area of interest.

The enforcement of foreign taxes is a plaguing problem that the United States internally has not satisfactorily resolved. Earlier theory has given way in part to a view current in only some states (but vigorously still denied in others) that such claims may be enforced in other states. Some United States tax treaties in part, but with variations and with undecided areas of application, attempt to cope with this problem through dissemination of information and by limited undertakings to assist in enforcement.

This is a book which should not be limited to the classroom. All practitioners who are concerned with matters having a foreign aspect will find it a useful tool.

WINTHROP R. MUNYAN\*

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\* Member of Curtis, Mallet-Prevost, Colt & Mosle, Attorneys at Law, New York City.

THE PLANNING AND ADMINISTRATION OF ESTATES. Edited by René A. Wormser. New York: Practising Law Institute, 1961. Pp. 324.

A third dimension has been added to post-graduate education for lawyers. Over the years formal treatises on estate planning have been published, and there have been many panel discussions presented on the same subject by the Practising Law Institute and other groups. This new publication embodies the best features of both.

First of all, it is a stenographic report of a two day forum sponsored by the Practising Law Institute, complete with questions from the floor. Secondly, René A. Wormser has added extensive annotations to highlight and complete the panel discussions. These annotations update the learning contained in René Wormser's earlier books on this subject.<sup>1</sup>

As George Kaufman once quipped in the heat of a bridge session, "Please repeat the bidding, with the original inflections." Even where formal papers are published by participants in a legal forum, the atmosphere and nuances of the give and take among the panel have been lost forever. In this book we get the flavor of the two days of discussions as they actually occurred. And the scholarly annotations added by the editor fill in the inevitable gaps.

The book is divided into two parts, since the first day of the forum covered the estate planning for one Androcles Simpson and the second day dealt with the administration of the estate of Androcles Simpson. A different panel of experts was deployed each day, so we have the best thinking and judgment of seventeen different lawyers and trust officers in this bread and butter field. Mr. Wormser was chairman of the first day's panel, and Henry Cassorte Smith of the New York Bar chaired the second day. Over 500 practising lawyers attended this forum.

The discussion was based on three memoranda setting forth hypothetical facts with respect to the estate of Androcles Simpson, which just happened to involve most of the problems practising lawyers are faced with in this field. The first memorandum contained the basic facts with respect to Mr. Simpson's property upon which the experts were asked to develop an estate plan. The second memorandum set forth what steps were actually taken to implement this plan prior to Androcles' accidental death a little over a year later, while the third memorandum summarized the condition of his estate at date of death. These memoranda are included in the book.

This two-day discussion is believed unique in that it integrates estate planning with a follow-up analysis of the problems of admin-

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1. WORMSER, GUIDE TO ESTATE PLANNING (1958); WORMSER, PERSONAL ESTATE PLANNING IN A CHANGING WORLD (8th rev. ed. 1956).

istration arising out of the same estate. While tax considerations were important, the discussion covered all the problems likely to be encountered in the planning and administration of estates.

On the first day, the panel considered the basic ingredients of estate planning, including the use of the marital deduction, life insurance, lifetime giving, charitable and private trusts, how to handle stock interests in a closely held corporation, and such intriguing subjects as how to charge for estate planning work.

By contrast, on the second day the experts dealt with the problems of estate administration arising after death. Again the searching discussion stressed the practical aspects of the subject, starting with the best way to leave burial instructions and including a review of the new Code provision (section 6166) permitting postponement of payment of federal estate tax up to ten years after date of death in the case of closely held businesses.

While this is not a form book, Mr. Wormser has added two excellent check lists at the end, one to be used in the compilation of data for estate planning (pp. 300-04) and the other comprising drafting suggestions on various standard will provisions (pp. 305-11).

One of the great values of this book, in my opinion, is the critical analysis by the lawyers and trust officers from different states and with varied backgrounds of some of the basic principles of estate planning. The reader gets the benefit of different points of view, whereas in the average text the exposition is of necessity more along the lines of one person's thinking. Since the lawyers in attendance came from some twenty-eight states, there was much interesting discussion with respect to actual practise in different parts of the country.

This volume does not pretend to be exhaustive. One should follow up on any particular point with reference to other treatises, such as Mr. Wormser's own books. For example, there was discussion with respect to problems arising from the ownership of interests in oil and gas properties. The discussion was primarily limited to the powers that should be given to an executor with respect to the handling of oil and gas interests. Little or no mention was made of the difficult problems of accounting as between life tenant and remaindermen in testamentary trusts containing oil and gas interests.

As Mr. Wormser points out, the Bar complains that it is losing ground in the planning and administration of estates, with lay groups actively competing against us. The organized Bar has attempted over the years to meet this competition in the courts with injunctive proceedings. My personal feeling is that the only effective way to preserve the position of lawyers is through intensive education of the Bar to the end that lawyers are able to serve their clients better than

any other group. The Practising Law Institute is dedicated to this proposition and has performed valiantly over the past 25 years. This book represents a new extension of this effort to provide practising lawyers with the skills and know-how to discharge their responsibilities. In my opinion, this book should be in the library of every member of the Bar who has any practise in the area of estates and trusts.

JOHN W. FAGER\*

HOW TO EVALUATE AND SETTLE PERSONAL INJURY CASES. By Allen Bush. Indianapolis: The Bobbs-Merrill Company, Inc., 1959. Pp. x, 148.

This little book should be in the hands of every claims adjuster; and for those who will not acquire it for themselves, it might well prove a good investment on the part of the lawyers with whom they deal to purchase a copy and place it there.

Mr. Bush writes from a wealth of experience—sixteen years, to be exact. His thesis is that both claims adjusters and lawyers are, or at least can be if they put their minds to it, human beings. The age-old tradition of claims adjustment where the lawyer makes an exorbitant demand and the adjuster counters with a “nuisance value” offer the author characterizes as “hickling and hackling, the who-is-kidding-who routine.” “For years,” he says, “we pondered these cheerless matters. We were tired of the sham and shabbiness that wormed negotiation. We longed for a fresh, grown-up way to settle cases with attorneys: on one true offer, one genuine price-tag.” He points out that the initiation of settlement negotiations by the adjuster through the making of a realistic offer frequently by-passes a considerable amount of jockeying for position, which is no more than a waste of time if both the adjuster and the attorney are competent and know the true value of the claim. Mr. Bush claims that he has done this, and it works. Not with everyone, of course, because it is premised upon the fact that the attorney will take the offer at its face value and not as a sign of weakness. But it does work, according to Mr. Bush, in enough cases to give hope for a better future, where in at least some of the cases the “horse trading,” which many lawyers now consider inevitable, can be dispensed with, and the attorneys can devote their time more profitably to trying the cases which can't be settled.

While this is the burden of his song, there is much else in Mr.

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\* Member, Hughes, Hubbard, Blair & Reed, New York City.



Bush's book which adjusters and attorneys alike will find both interesting and instructive. He writes in an easy and informal style, interspersing his text with anecdotes drawn from his own background to illustrate his points. Obviously he has thought a great deal about the problems of his calling, and he detects an antipathy growing up between its members and those of the legal profession. This he deplors, as should we. Perhaps if both sides followed his precepts more, that trend would be reversed.

WALTER P. ARMSTRONG, JR.\*

THE TAX PRACTICE DESKBOOK. By Harrop A. Freeman and Norman D. Freeman. Boston and Toronto: Little, Brown and Co., 1960. Pp. vii, 581. \$17.50.

For the lawyer who has studiously avoided tax practice in the belief that the procedural as well as the substantive rules can be mastered only by the specialist, *The Tax Practice Deskbook* may well be the key to a broader and more lucrative professional career. Devoted almost exclusively to the procedural rather than the substantive aspects of the federal tax structure, this is probably one of the most practical and useful publications available on this subject.

Although the authors state that the book has been directed to the general practitioner, the tax specialist, the accountant, the teacher and the business man, it would seem that the general practitioner is the one who stands to gain the most from their efforts. In this one-volume work he can get a good over-all picture of tax procedure or find a citation to an authority dealing with a very narrow point of procedural law. Through the use of this book he can develop a confidence that is often lacking when he uses a multi-volume tax service. In short, it helps eliminate the problem of "not being able to see the woods for the trees."

The authors have followed a pattern that is familiar to lawyers, that is, text followed by numerous footnotes. This makes it possible for one to read the book from beginning to end and cover the entire subject without getting bogged down in detail. But where the detail is needed it is available in citations to the Code, the cases, the Regulations, Revenue Rulings and exhaustive law review and other tax articles.

The book contains chapters dealing with filing requirements, inter-

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\* Member, Armstrong, McCadden, Allen, Braden, & Goodman, Memphis, Tennessee.

nal revenue service organization, audit of returns, conferences, waivers, agreements, tax court jurisdiction and practice, appeals, tax practice in the district courts and the court of claims, periods of limitations, collection problems and penalty cases. The importance of a good working knowledge of these subjects is best summed up in the words of the authors: "Attention can be focused on the real tax questions far better if tax practice is so smoothly and knowingly followed that procedural errors do not divert attention."<sup>1</sup>

For one already engaged in tax practice the book would be a useful addition to the present library; for one presently contemplating entering the field, it is a must.

JERRY L. MOORE\*

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1. THE TAX PRACTICE DESKBOOK vi (1960).

\* Associate, Bell, Orr and Reynolds, Bowling Green, Kentucky.

