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The Federal Income Tax Practitioner

A. B. Blackburn Jr.

has been extended to include "operations" of trains, stationary or moving. In light of this statutory interpretation the future application of the last clear chance doctrine to collisions involving standing trains is neither necessary nor desirable. All of these developments indicate an evolution from the old rigid standing train doctrine to a more flexible standard allowing for the apportionment of damages in appropriate cases.[51]

RICHARD W. REEVES
WILLIAM A. ZEIHER

THE FEDERAL INCOME TAX PRACTITIONER

The federal income tax has a strange history, which dates back to Civil War days. Following the ratification of the Sixteenth Amendment of the United States Constitution, however, a system of taxation evolved that overshadows all others. Today federal income taxes, individual and corporate, produce over fifty billion dollars annually, with rates exceeding ninety per cent in top brackets. This began in 1913 with a modest tax of one per cent on incomes above $3,000 for single persons and above $4,000 for married taxpayers, plus a "super tax" with maximum rates of six per cent.[1]

It may be reasonably assumed that the complications of the federal income tax multiplied in direct proportion to the increase in rates from 1913 to 1954. At least the desire by the taxpayer to effectively avoid this growing monster rose in direct proportion to the rates. As a result, the taxpayer called upon the legal and the accounting professions for assistance.[2] Since an income tax requires the computation of income statements, it is natural that the accounting profession should accept the responsibility of helping the taxpayer determine his "statutory income," just as the architect determines whether an office building complies with the building code. Determination of income is primarily an economic and accounting function; determination of "taxable" income is a combination of economic, accounting, and legal functions. The legal profession is better quali-

[51]Atlantic C.L. R.R. v. Johnston, 74 So.2d 689 (Fla. 1954).

[1]38 STAT. 166 (1913).
[2]N.Y.U. 9TH ANN. INST. ON FED. TAXATION 1120, 1132 (1951).

fied to determine legal questions, but it needs assistance when difficult accounting problems are involved.

Continuing with the premise that the determination of taxable income is a combination of accounting and legal functions, it is apparent that there is a jurisdictional disagreement between these professions as to which is better qualified to represent the public in federal income tax matters.[3] The controversy usually concerns the nature and extent of the services rendered. The purposes of this note are to explain the nature and extent of this service and to advance suggestions for a solution of the problem. The problem is apparent from a study of several well-known court decisions and the efforts of the American Bar Association and the American Institute of Accountants to remedy this situation.

The contention of the bar is, generally, that only attorneys should practice law and that when an accountant attempts to solve legal problems, such as the determination of taxable income, he is engaged in the unauthorized practice of law. Accountants contend that they are only "doing what comes naturally" and have no intention of practicing law. Many cases are apparent, however, in which the accountant has, perhaps inadvertently, practiced law while practicing accounting.

The general practice of law was defined in early cases as the preparation of legal instruments, the trial of cases, and the giving of legal advice.[4] Obviously these cases did not contemplate the expansion of federal law to its present status.[5] Economic institutions now regulated by federal law include banks, railroads, investment houses, insurance companies, public utilities, trust companies, and radio corporations.

In 1939 the United States Court of Appeals for the District of Columbia, in *Merrick v. American Security and Trust Co.*,[6] set out the "incidental" test regarding laymen practicing law. This test has become famous as a result of the more recent case of In re *Bercu*;[7] it

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[3]Lorinczi, *Unauthorized Practice of Law—What Constitutes the "Practice of Law" in Tax Matters*, 35 MARQ. L. REV. 370 (1952).

[4]*E.g.*, Eley v. Miller, 7 Ind. App. 529, 34 N.E. 836 (1893); *In re* Duncan, 83 S.C. 186, 65 S.E. 210 (1909).

[5]Austin, *Relations Between Lawyers and Certified Public Accountants in Income Tax Practice*, 36 IOWA L. REV. 227 (1950).

[6]107 F.2d 271 (D.C. Cir. 1939).

[7]273 App. Div. 524, 78 N.Y.S.2d 209 (1st Dep't), *aff'd*, 299 N.Y. 728, 87 N.E.2d 451 (1948).

allows laymen to prepare federal income tax returns and even represent clients before tax officials, if this practice is incidental to their own professions. If a layman performs the same service, however, and it is not incidental to his profession, he is engaged in the unauthorized practice of law. The inherent weakness of such a test is borne out by the facts of the *Bercu* case. Bernard Bercu was a New York certified public accountant who was not even admitted to practice before the Treasury Department. He was retained by a taxpayer and rendered services involving a typical tax question with a mixed legal and accounting problem. The New York court found him guilty of the unauthorized practice of law because, for a fee, he researched the taxpayer's problem and recommended a course of action. This service was not incidental to his practice of accounting — the taxpayer was not a regular client. The court stated:[8]

> ". . . the counsellor licensed and trusted to advise the public with respect to the law must be a duly qualified and admitted lawyer. We are unable, therefore, to regard the admission of accountants, subject to certain qualifications and regulations of the Treasury Department and the Tax Court, to practice before those agencies, as an authorization to accountants to practice tax law at large or as an eradication of the distinction between the lawyer's and the accountant's function in the tax field."

Yet the court failed to point out that the taxpayer chose Bercu because he was dissatisfied with the recommendation of his own accountant, who was a "counsellor licensed and trusted to advise the public with respect to the law" and who had given incorrect advice to the taxpayer. Bercu held himself out as an accountant — not as an attorney.[9]

In 1943 the Massachusetts Supreme Court held that the preparation of income tax returns does not lie wholly within the practice of law; therefore, a layman may prepare a "simple return."[10] By way of dictum the court said that a layman may not give legal advice.[11] Query, what is a "simple return"?

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[8]273 App. Div. 524, 534, 78 N.Y.S.2d 209, 218 (1948).
[9]*In re* Bercu, 69 N.Y.S.2d 730 (Sup. Ct. 1947), 1 U. OF FLA. L. REV. 84 (1948).
[10]Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943).
[11]*See id.* at 183, 52 N.E.2d at 32 (1943).

In 1951 the Minnesota Supreme Court, in *Gardner v. Conway*,[12] rendered a decision that a layman "tax expert" may not determine difficult and doubtful questions of law. The defendant was a former deputy collector of internal revenue but was neither a certified public accountant nor an attorney. Several of the questions the defendant answered were: (1) the validity of a common law marriage in relation to marital deductions; (2) whether certain frost and flood losses qualified for a casualty loss deduction; and (3) whether the taxpayer was in partnership with his common law wife. The decision sounds reasonable but is difficult to apply in a given situation. Who is to decide whether a question involves a difficult or doubtful question of law? Certainly it would be most impractical to require a state court to decide whether each person filing a federal income tax return had a problem involving such a legal question.

Florida, like all other states, prohibits the unauthorized practice of law.[13] In March, 1953, the Florida Supreme Court rendered its first decision regarding the unauthorized practice of law by a federal tax practitioner.[14] The petitioner stated that he was a resident of Florida, a member in good standing of the Bar of the United States Supreme Court and of the Tax Court of the United States, and was authorized to practice before the Treasury Department. He asked the Court to advise him if he could practice as a "federal tax counsel." He agreed to limit his practice to federal tax questions but did not profess to know any Florida law, which undoubtedly would be involved if this were allowed. In the opposing memorandum submitted by the tax section of The Florida Bar,[15] it was pointed out that should the petitioner's plea be granted the courts would be plagued with requests from various types of specialists, such as "Interstate and Foreign Commerce Attorney" and "Federal Communication Commission Counsel." The Court held that "those who hold themselves out to practice in any field or phase of law must be members of The Florida Bar, amenable to the rules and regulations of Florida courts."[16] It should be noted that the Court was not concerned here with a certified public accountant practicing accounting before the Treasury Department or the Tax Court.

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[12]234 Minn. 479, 48 N.W.2d 788 (1951).

[13]See 31 FLA. STAT. ANN. 358 (1950) (integration rule).

[14]*In re* Kearney, 63 So.2d 630 (Fla. 1953).

[15]This was distributed to all members of the tax section of The Florida Bar.

[16]*In re* Kearney, 63 So.2d 630, 631 (Fla. 1953).

In an earlier dictum the Florida Court plainly stated:[17]

> "There is no difference between the admission of a certified public accountant to practice before said board [Tax Appeals] and the admission of an attorney at law to practice before said Board."

The Court referred to Rule 2 of the Board of Tax Appeals, which still admits certified public accountants to practice before the Board but requires them to pass an examination. An attorney is admitted if he is admitted to practice before the United States Supreme Court or the highest court of any state. The Florida Supreme Court apparently would allow a certified public accountant to practice accounting before the Tax Court but would not permit him to practice law.

Agran v. Shapiro,[18] a recent California case, involved a certified public accountant who was admitted to practice before the Treasury Department. He prepared the taxpayer's returns for several years and dealt with one problem involving a net operating loss. A revenue agent later questioned the deduction and assessed a deficiency. The accountant held several conferences with treasury agents and did considerable research in the matter, resulting in a saving to the taxpayer. The taxpayer refused to pay the fee, however, and the accountant brought suit to collect. The court held that his services were such that in their generally accepted sense they constituted the practice of law; therefore, the fact that the certified public accountant was not a member of the bar prevented him from collecting the fee. Both parties placed much reliance on the *Bercu* case, but the court denied the accountant's contention that the New York court had held that one not an attorney may properly perform services such as those presented in the facts of the *Agran* case. The most important aspect of this case is the presentation of an excellent history of the important cases involving the unauthorized practice of law. The decision may be appealed, however, on the ground that the state court incorrectly interpreted the federal regulation.[19]

The *Agran* decision has already been challenged by the introduction of a bill in Congress[20] "to clarify and extend the authority of

[17]Goodkind v. Wolkowsky, 132 Fla. 63, 66, 180 So. 538, 540 (1938).

[18]273 P.2d 619 (Cal. 1954).

[19]Treas. Dep't Cir. No. 230 (requirements for admission to practice before Treas. Dep't).

[20]H.R. 9922, S. 3801, 83d Cong., 2d Sess. (1954).

the Treasury Department" and to regulate the practice of attorneys, certified public accountants, and others who assist the public in the determination of federal tax liabilities. This bill is acclaimed by the accounting profession and assailed by the legal profession.[21] It would, however, settle questions such as those that arose in the *Agran* case and eradicate the lack of uniformity in state court decisions. The bill, if passed, would serve the Treasury Department in the same manner that the Federal Rules of Civil Procedure serve federal courts.

Long before the *Conway, Bercu,* and *Agran* cases were decided, much bickering ensued between the accounting and the legal professions. A progressive step was taken in 1944 by the formation of the National Conference of Lawyers and Certified Public Accountants, the purpose of which was to work out agreeable limitations on the practice of both professions in the field of federal taxation; many similar state organizations were also formed. The Florida Bar has a committee on co-operation with accountants; likewise, The Florida Institute of Certified Public Accountants has a committee on co-operation with attorneys. Despite limited success of these state committees, the work of the national conference was progressing until the *Bercu* case in 1947. It was not until 1949 that the Conference returned to active duty, but it made up for lost time with a promulgation of principles in 1951.[22] Generally, these principles are:

(1) It is in the best public interest that federal tax services be rendered by both attorneys and certified public accountants.
(2) Accountants or attorneys may prepare income tax returns.
(3) In ascertaining probable tax effects of transactions it is often best to engage the services of both an attorney and a certified public accountant.
(4) Only attorneys shall prepare legal documents, such as trust agreements, wills, and the like.
(5) Neither the attorney nor the accountant shall set himself out as a "tax consultant."
(6) Each may practice only his own profession. This rule would preclude an accountant from practicing law and an attorney from practicing accounting, but it leaves unsolved the basic issue as to what constitutes such practice.

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[21]98 J. ACCOUNTANCY 263 (1954); 40 A.B.A.J. 493 (1954).

[22]*National Conference Adopts Code for Practice in the Income Tax Field,* 37 A.B.A.J. 536 (1951).

(7) A certified public accountant should engage an attorney when going before the Tax Court. This is designed to avoid any possible mishap in choice of forum and preparation of legal pleadings.
(8) Both may prepare claims for refunds. Since a claim for refund is a formal pleading, it might be more appropriate to include it under (4) above as a legal document; it differs from a tax return in that a tax return is merely an opinion while a claim for refund is a binding election.
(9) Criminal investigations are strictly legal problems.

While the Conference recognizes these principles to be tentative and subject to revision, the Florida Institute of Certified Public Accountants has adopted them;[23] but the position of The Florida Bar is doubtful.

The nature and complexity of the federal income tax requires a practitioner to specialize if he is to keep himself abreast of current changes. The vast majority of income tax returns prepared by persons other than the taxpayer are prepared by accountants.[24] As of 1941 accountants outnumbered attorneys eleven to one in the Treasury Department.[25] A large percentage of the cases that are investigated are settled by these revenue agents. While the Internal Revenue Code of 1954 is expressly designed to align its provisions with generally accepted accounting principles, it is still law and its interpretation involves legal questions. The problem, therefore, is to determine who is best qualified to serve the public. In Florida, by rule and court decision, only members of The Florida Bar may practice law,[26] and only certified public accountants may practice public accounting.[27]

It is possible to consider the problem at different levels, such as the preparation of the return or the practice before the Treasury Department, the Tax Court, and other courts. At each level, however, there is the same question regarding substantive law: which matters are to be determined by interpreting the law? Courts have adopted the theory that difficult questions of law shall be handled by attorneys

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[23]See Minutes of Business Meeting of Florida Institute of Accountants, 1951.
[24]P-H STUDENT TAX LAW SERV. ¶103 (1952).
[25]Austin, *Relations Between Lawyers and Certified Public Accountants,* 36 IOWA L. REV. 231 (1950).
[26]See notes 12, 13 *supra.*
[27]FLA. STAT. §473.02 (1953).

only, laymen being limited to solving simple questions.[28] Procedurally it is a different matter, since only the courts – including the Tax Court, which technically is an administrative agency – have formal court proceedings. In 1924 the accountant may have been the better qualified at the Tax Court level. In 1954 he needs an attorney if he is to be fair to his client. Furthermore, he needs the attorney before he gets to the Tax Court – he needs him when he finds it necessary to litigate. The accountant should not make the choice of a forum, since only one course is open to him, that is, to file a protest and take the case to the Tax Court. The attorney may find it advisable to pay the tax and file a suit for refund in the Court of Claims, or in a district court if a jury is desired. It is interesting to note that the British counterpart of our Tax Court is in fact an administrative agency, with four attorneys and four accountants sitting as judges; and that attorneys and accountants have worked together more amicably in England with regard to the tax practice.[29]

One solution to the basic problem would be to require the federal tax practitioner to be both an attorney and a certified public accountant. There would be an ethical problem, however, for an attorney may perform accounting functions incidental to his law practice but may not hold himself out as both attorney and certified public accountant.[30] The New York County Lawyers' Association, however, complainant in the *Bercu* case, has ruled *contra* and allows dual practice.[31]

A logical solution would result from the application of the elements of specialization used by the medical profession. This would recognize the special qualifications necessary to enable one to practice in the federal tax field. Professor Joiner, of the Michigan Law School, has pointed out the history, operation, and success of recognition of specialization in the medical profession.[32] In general, the recommendation of the American Bar Association Committee on Specialization appears to be patterned after the medical profession.[33] This committee is not concerned with tax practice in particular but

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[28]Gardner v. Conway, 234 Minn. 479, 48 N.W.2d 788 (1951); Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943).

[29]May, *Accounting and the Accountant in the Administration of Income Taxation*, 83 J. ACCOUNTANCY 374 (1947).

[30]See *Report No. 272, Committee on Legal Ethics*, 33 A.B.A.J. 163 (1947).

[31]YEAR BOOK, NEW YORK COUNTY LAWYERS' ASSOCIATION 194 (1950).

[32]Joiner, *Specialization in the Law?*, 39 A.B.A.J. 539 (1953).

[33]See Advance Program, Seventy-Seventh Annual Meeting A.B.A. 88 (1954).

with the many other fields of law in which attorneys specialize without formal recognition as specialists. As a practical matter, federal tax practice could not be limited to attorneys who qualify under the program suggested by the Committee on Specialization. Accountants must continue in tax practice; legislation cannot be enacted overnight to limit tax practice to any one group when two groups are not only involved but are indispensable. Of necessity there would be a period of integration — perhaps five or ten years — possibly resulting in the creation of a new profession.[34] The elements of this integrated specialty must be such that the holder of the title is in fact qualified; general professional qualifications are insufficient. The specialization should be regulated by a governing board which would judge the qualifications of each applicant. The principal idea is to create requirements that are ipso facto evidence of an individual's proficiency.

In Florida, as in most other states, not only the practice of law but also the practice of accounting[35] is regulated. Essentially all unauthorized practice cases in federal tax practice have involved the unauthorized practice of law. If The Florida Bar is to recognize a tax specialist who is qualified to render a complete service, that individual must be a certified public accountant as well as an attorney, lest he be guilty of the unauthorized practice of public accounting. The term "complete service" means performing both legal and accounting services regarding tax matters; it should include serving the taxpayer in all legal and accounting matters, from the filing of a return to the taking of an appeal to the United States Supreme Court.

The solution to this problem can be reached only through an attempt by the members of each profession to recognize their present limitations and the problems of the other. An adequate remedy is sorely needed; it is submitted that the solution is the creation of a hybrid specialist — "The Federal Tax Practitioner."

A. B. BLACKBURN, JR.

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[34]See BICKFORD, SUCCESSFUL TAX PRACTICE 1 (2d ed. 1952); Brundage, *Accountants and Lawyers in Tax Practice: The Accounting View,* N.Y.U. 9TH ANN. INST. ON FED. TAXATION 1132 (1951); Rembar, *The Practice of Taxes,* 54 COL. L. REV. 338 (1954), *The Practice of Taxes: One Attorney's Point of View,* 91 J. ACCOUNTANCY 549 (1954).

[35]FLA. STAT. §473.02 (1953).