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ATTORNEYS-PRACTICE OF LAW-PREPARATION OF TAX RETURNS BY LAYMEN

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RECENT DECISIONS

This section is divided into two parts; notes and abstracts. The abstracts consist merely of summaries of the facts and holdings of recent cases and are distinguished from the notes by the absence of discussion.

NOTES

ATTORNEYS—PRACTICE OF LAW—PREPARATION OF TAX RETURNS BY LAYMEN—The members of Lowell Bar Association brought a suit in equity to restrain respondents, who are not members of the bar, from holding themselves out as qualified to practice law, and from giving legal advice in respect to liability to pay income taxes and to enjoin the preparation and execution of income tax returns. The facts showed that respondents had advertised, by newspaper and placards, an income tax service for individuals, including preparation of tax return and "counsel in handling income tax matters should any develop after the official audit by the U.S. Tax Department." The lower court enjoined respondents from advertising their tax service and from making out income tax returns as a regular occupation. Respondents appeal. *Held,* injunction modified so as to permit respondents to prepare income tax returns, which according to their customary practice were "of the least difficult kind," but affirmed in respect to respondents' undertaking to provide legal counsel in the event of tax disputes with the government. *Lowell Bar Assn. v. Loeb,* (Mass. 1943) 52 N.E. (2d) 27.

In determining that respondents might continue the preparation of income tax returns as their regular occupation the court in effect decided that such activity did not constitute the "practice of law." This phrase seems to be impossible of any comprehensive and satisfactory definition, and the courts have apparently concluded that each case of alleged unauthorized practice must be decided on its own facts.[1] It is clear, however, that although the precise scope of the phrase may be indeterminate it certainly includes more than mere preparation for, and appearance in, court. An oft-quoted attempted definition of the phrase states that it includes "preparation of legal instruments *by which legal rights are secured,* although such matters may or may not be pending in court."[2] Where the law in a particular field is wholly case-made it would seem that such field is exclusively for the licensed attorney; where the law is statutory and the statutes are interpreted by administrative regulations, the current trend is to permit laymen or qualified experts, other than lawyers, to perform services in a representative capacity. Many administrative tribunals have devised their own rules of practice which specifically provide for admission of laymen,[3] and such encroachment

[1] In re Shoe Manufacturers Protective Assn., 295 Mass. 369, 3 N.E. (2d) 746 (1936). Creditors Service Corp. v. Cummings, 57 R.I. 291, 190 A. 2 (1937).

[2] Eley v. Miller, 7 Ind. App. 529, 34 N.E. 836 (1893). "What Amounts to Practice of Law," 111 A.L.R. 22 at note 9 (1937) cities with approval cases giving this definition.

[3] Interstate Commerce Commission, Rules of Practice, § 1-B (1936). Certified Public Accountants are admitted to practice before the U.S. Board of Tax Appeals, Rules of Practice (1942), Rule 2 (b). The power of the Board to promulgate its own

upon fields theretofore reserved exclusively for the attorney is viewed by many practicing lawyers with alarm.

The Illinois courts have taken a very strict view regarding the practice by laymen before its commissions and even have held unconstitutional, as being an invasion of the implied power of the judiciary to define the practice of law, a statute which permitted accountants to practice before its Department of Finance.[4] Other courts, however, have held that the legislature may permit laymen to practice before administrative commissions,[5] and that it may define what constitutes practice of law.[6] The legal profession as a matter of common practice has permitted accountants to operate in the tax field in the preparation of returns and in giving advice as to tax liability, and certified public accountants are admitted to practice before the U. S. Board of Tax Appeals. It would seem that these expert laymen are eminently qualified to practice in this field where the greater part of the work requires the solution of accounting problems, setting up values to be reflected on corporate books, and the determination of inventory, depreciation, and reserves.[7] The question then arises whether in conjunction with the preparation of the return the accountant might advise his clients in respect to methods of avoiding taxation, whether he might suggest formation of partnership, dissolution of a corporation, or creation of a trust. It recently has been held that an organization of laymen was engaged in illegal practice of law where it undertook to effect for its clients "large tax savings" and the scope of its services included, inter alia, studies of individual problems, modification of contracts, analysis of laws, court decisions, and departmental rulings;[8] but the action of accountants in making suggestions to a corporation as to how it could reduce the annual franchise tax on its capital stock by changing its par stock has been held not to constitute the practice of law.[9] There is a conflict in the cases as to whether employment of laymen to secure the reduction of tax assessments on property is unauthorized practice.[10] The opinion in the principal case is specifically limited to instances where laymen prepare tax returns "of the least difficult kind," and the court seems to suggest that a different result might obtain where the problems involved are more complex;[11] this test of complexity would not seem to be a particularly satisfactory criterion, and in at least one case the

rules of practice was upheld in Goldsmith v. Board of Tax Appeals, 270 U.S. 117, 46 S. Ct. 215 (1925).

[4] Chicago Bar Assn. v. United Taxpayers of America, 312 Ill. App. 243, 38 N.E. (2d) 349 (1941); see also Chicago Bar Assn. v. Goodman, 366 Ill. 346, 8 N.E. (2d) 941 (1937).

[5] Eagle Indemnity Co. v. Industrial Accident Comm., 217 Cal. 244, 18 P. (2d) 341 (1933).

[6] Creditors Service Corp. v. Cummings, 57 R.I. 291 at 300, 190 A. 2 (1937).

[7] See the brief of the Certified Public Accountants Assn. of Mass. filed amicus curiae in the principal case, and cited in full in 28 MASS. L. Q. 36 (1943).

[8] In re Standard Tax & Management Corp., 43 N.Y. Supp. (2d) 479 (1943).

[9] Elfenbein v. Lukenbach Terminals, 111 N.J.L. 67, 166 A. 91 (1933).

[10] Pro: People ex rel. Trojan Realty Corp. v. Purdy, 174 App. Div. 702, 162 N.Y.S. 56 (1916); Crawford v. McConnell, 173 Okla. 520, 49 P. (2d) 551 (1935); Con: Tanenbaum v. Higgins, 190 App. Div. 861, 180 N.Y.S. 738 (1920).

[11] Principal case, p. 34.

difficulty in the preparation of the instrument involved has been rejected as a proper determinant of the practice of law.[12] Although no specific statement to that effect has been found, it might be inferred from many of the cases that a possible test of the "practice of law" is whether or not a review and analysis of case law is required, in addition to the consideration of statutes and regulations, in the preparation of a tax return or in giving advice regarding it.[13] Some courts have accepted the idea that if common custom in the community permits certain activities to be done by laymen, even though technically within the scope of the practice of law, or if the particular legal service is merely incidental to the main purpose of the employment, it should not be condemned as unauthorized practice.[14] The American Bar Association has considered the situation where questions of accountancy and questions of law are intertwined in the same set of facts, and has made the suggestion, satisfactory to both accountant and attorney, although no doubt distressing to the client, that "it is advantageous to engage both an accountant and a lawyer and to let them adjust the division of effort and responsibility." [15] In arriving at any conclusion as to what constitutes the practice of law it must be remembered that the primary purpose in barring lay persons from certain activities, whether they be the preparation of tax returns, drawing documents, or giving of advice, is not to preserve a monopoly for the members of the bar, but rather to protect the public from the evils of the practice of law by persons who are unqualified, untrained, and without the guidance of suitable codes of professional ethics.[16]

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[12] Concurring opinion of Pound, J., People v. Title Guarantee & Trust Co., 227 N.Y. 366 at 379, 125 N.E. 666 (1919): "I am unable to rest any satisfactory test on the distinction between simple and complex instruments. The most complex are simple to the skilled, and the simplest often trouble the inexperienced."

[13] The rules of practice of the U.S. Treasury Department might run contra to this analysis; see Circular No. 230, 1944 Vol. 1 C.C.H. FED. TAX SERVICE, p. 2695, § 2(c).

"Each enrolled attorney or agent [certified public accountant] who knows that a client has not complied with the law or has made an error in, or an omission from, any return . . . shall advise his client promptly of the fact of such noncompliance, error or omission." Quaere: Does this give accountants unlimited authority to practice all phases of tax law before the department?

[14] People v. Title Guarantee & Trust Co., 227 N.Y. 366 (1919); Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940).

[15] 63 A.B.A. Rep. 325 (1938).

[16] In re Standard Tax & Management Corp., 43 N.Y. Supp. (2d) 479 (1943); State v. Wells, 191 S.C. 468, 5 S.E. (2d) 181 (1939).

For a general treatment of the entire field of unauthorized practice of law see "The Unauthorized Practice of Law Controversy," 5 L. & CONTEMP. PROB. 1 (1939), and for a collection of cases on unauthorized practice see BRAND, UNAUTHORIZED PRACTICE DECISIONS (1937).