

NEW ROADS TO THE SETTLEMENT OF TAX CONTROVERSIES: A CRITICAL COMMENT

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The views expressed in the foregoing article are radical in the extreme. We believe that the views are as unsound as they are radical. Everyone recognizes the existence of certain of the defects in the present system of tax administration to which the authors refer. But many will disagree with the analysis of the causes and most of those having wide practical experience in the field will, we think, disapprove of the remedies proposed.

Shortly after the "plan" was first published in the *Columbia Law Review* for December 1938, several criticisms of it were published, all of which should be read by anyone to whom Mr. Traynor's and Mr. Surrey's proposals may appeal.¹

In the short space here allowed we briefly note some of the most obvious objections to the "plan."

Administrative Procedure. The authors assume that the failure of the Bureau of Internal Revenue to dispose of most of the cases which are appealed to the Board of Tax Appeals, and which are in large part disposed of without trial, is due to the taxpayer's failure to show his full hand during the administrative consideration of the case and to disclose fully the facts within his knowledge. They propose, therefore, to make the administrative procedure, in the last stages at least, very much more formal and to require that a full statement of all the facts to be relied upon—with a complete list of witnesses and documents—be presented to the Bureau before the 90-day letter is issued; and the taxpayer would then be confined to that evidence in subsequent litigation, except for special cause shown.

The diagnosis is wrong and the prescription would be fatal. The failure to reach an early agreement in more cases is not due primarily to a failure of the taxpayer to disclose the facts within his knowledge. It is due usually to a disagreement on facts or law. The Bureau usually knows, before the 90-day letter is issued, most of the

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¹ Prettyman, *A Comment on the Traynor Plan for Revision of Federal Tax Procedure* (1939) 27 *Geo. L. J.* 1038; Prettyman, *The Traynor Proposals—Some Considerations*, 17 *Tax Magazine* 397; Youngquist, *Proposed Radical Changes in the Federal Tax Machinery* (1939) 25 *A. B. A. J.* 291; Angell, *Procedural Reform in the Judicial Review of Controversies under the Internal Revenue Statutes: An Answer to a Proposal* (1939) 34 *ILL. L. REV.* 151; Pearce, *Trends in Federal Tax Procedure* (1940) 69 *J. OF ACCOUNTANCY* 369.

facts it knows when the cases are later settled after appeal to the Board. Not only does the Commissioner have full power to secure what evidence he wants; but the taxpayer is generally anxious to get before the Bureau at the earliest possible moment the favorable facts—and he is not likely to bring forward the unfavorable facts at any time. The failure to settle more cases promptly has been due to the absence, in many places in the Department, of the will to have the cases settled in the earlier stages.

That is a matter of policy and personnel and not of procedure; the procedure which now exists is entirely adequate. If the will is not there, a more formal procedure will not provide it. On the contrary, settlements are promoted by the greatest informality in negotiations and would be seriously hampered by formal requirements such as the authors propose. In the many cases which are settled after appeal to the Board of Tax Appeals the negotiations are completely informal and in many such cases a lawyer is never consulted. Under the "plan" which the authors propose, it would be necessary to have a lawyer in every case before it left the administrative stage, for otherwise important rights might be lost.

It is my understanding that the authors do not propose to deprive the Board of Tax Appeals of the right to exercise an original and completely independent judgment on the evidence presented, or to give to the Commissioner's findings of fact any greater weight than they now have. I therefore do not state the violent objections which I feel the whole Bar would have to any such proposal.

Requirement of Bond in Board of Tax Appeals. The proposal that the taxpayer must give a bond for the tax before he can appeal to the Board of Tax Appeals is tantamount to a requirement that the taxpayer pay and then litigate. Such a proposal is contrary to the fundamental thought out of which the Board of Tax Appeals arose. It would encourage unduly high assessments and undue pressure upon the taxpayer, since it would, in effect, deprive many taxpayers of the right of appeal to the Board of Tax Appeals and would impose a severe burden on many others. It is unnecessary for the protection of the revenue, in view of the right of the Commissioner to make jeopardy assessments where delay is likely to endanger collection.

Exclusive Jurisdiction in Board of Tax Appeals. The authors propose to concentrate all tax disputes, refunds as well as proposed assessments, in the Board of Tax Appeals. The Board has functioned well and has the confidence of taxpayers. But this may be due in large part to the fact that it has functioned along with District Courts. Since taxpayers are not compelled to go to the Board, but may pay and sue in their local courts—with a jury trial if they choose—taxpayers have accepted its decisions with good grace. At the same time there has been little temptation for administrative officers to attempt to bring undue influence to bear upon the Board.

It is of little importance that most of the questions are litigated in the Board. The fact that the other avenue is open is vitally important, however few cases may travel that road.²

² See the statement of Lord Chief Justice Hewart in his *THE NEW DESPOTISM* (1929) 161 (quoted in SEN. DOC. NO. 145, 79th Cong. 3d Sess. (1939) 18), where he says: "It is obvious that critics of depart-

Also if the District Courts were deprived of all jurisdiction in tax cases, tax law would lose a substantial part of the healthy contact which it now has with general law through the litigation of tax questions in courts in which all other types of legal questions are arising.

Single Court of Tax Appeals. In order to reduce conflicts, the authors propose to have all appeals in tax cases go to a single Court of Tax Appeals. All of the objections to making the Board of Tax Appeals the only tribunal in which tax cases may be tried, apply with almost equal force to this proposal. Conflicts would be eliminated and certain lost motion would be saved. But it seems by no means likely that a better system of tax law would be evolved or that justice would be better done. And it may be safely said that confidence in the fairness of the process would not be promoted. And after all confidence in the fairness of the process is not much less important than fairness itself. That is something that reformers are apt often to forget.

In conclusion, while there is undoubtedly much room for improvement, we believe that the needed improvement must come from within the Treasury Department and the Department of Justice. Each employee of the Bureau should be made to feel that it is his duty to get the *right* answer quickly; and those handling litigated cases should be made to understand that their chief duty is the development of a consistent body of sound tax law without regard primarily to the amount of taxes collected in any particular case. No new procedure is needed; no new legislation is needed. It is a problem of policy and personnel. And certainly those charged with the problem should not be hampered by any such legislation as the authors propose.

mental despotism desire, not litigation, but that fairness of decision which, while it renders litigation in general unnecessary, is enormously encouraged and fostered by the prevailing knowledge that, in case of need, there is a law court in the background. It is not in the smallest degree desired that the departmental decisions, when they are given, should be of such a kind as to call for review and correction by a Court of Law. On the contrary, what is desired is the exact opposite. But the best way of securing that result is to provide that the decision which is taken may, if the party aggrieved be so minded, be brought before the Courts in the ordinary way."