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Accountant-Lawyer Cooperation

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Since the beginning of World War II many radical changes have taken place in our country in the form of vast programs of expansion in every field of endeavor— business, commerce, finance, science, politics, and the general economy. Our economy has shown amazing growth, resulting in the enactment of new laws and the revision of old ones which, among other things, affected the financial operations of businesses and produced an increased burden on our business enterprises which were mostly in the form of corporations. The shortages of services and labor created by war conditions and subsequent postwar adjustments added to the increased burdens which these new laws imposed upon the business community. This, in turn, had a tremendous impact upon the legal and accounting professions which served the public generally—particularly with respect to financial reporting, management reporting, government reporting, etc., in the application of the federal income tax statutes.

The proponents of the XVI Amendment little dreamed that their brain child would become the main support of not only the Government of the United States but of the entire free world in the short space of a half century. That which started out as a mere revenue-producing device has become with the years a means of realizing social, economic and political objectives. Little did the advocates of the XVI Amendment dream of using the income tax laws to put gangsters behind bars. And the same may be said with respect to encouraging charities, fostering trade in certain geographic areas, providing relief to certain industries, and other social, economic and political concepts. And, of course, our Marshall Plan, our present foreign aid and Alliance for Progress, and all other international ventures, including our Space Programs, depend upon the tax revenues raised by our tax laws—85% of which are derived from income taxes.

Caught in this tremendous increase of functions and purposes of the income tax laws are the attorneys and accountants. Whereas formerly each went about his business without interference by the other, we now find them in a spirited debate seeking to determine what part of the income tax laws are in their exclusive jurisdiction.

From a simple cash basis concept that was evidenced in the first Revenue Act under the XVI Amendment, we now have complicated accrual concepts and intricate computations never dreamed of at that time. Of course, the excess profits taxes of World War II and of the Korean War added further complications in both accounting concepts and tax computations. And the press is full of, and the Finance and Ways and Means Committees has been busy with—new concepts of investment credits, the taxation of foreign incomes, dividend and interest withholdings, etc.

Also not to be forgotten is the change from the simple original concept of accrual accounting to averaging out over a period of as much as seven years the operations of a single enterprise for income tax purposes—the carry-backs and carry-forwards.

Various complications have arisen and increased over the years but it suffices to point out that the first income tax law under the XVI Amendment covered no more than 6 pages whereas the 1954 Code covers about 1,000 pages. Of further interest, on July 1, 1962, the Internal Revenue Service celebrated its 100th Anniversary. Comparative figures go back only to 1866. They show that the new Service at that time had 4,461 employees and collected $310 million in taxes. For the year ended June 30, 1961, the Service had 53,680 employees and collected over $94 billion in taxes. Then, the country's population was 36.5 million; in 1961 it was an estimated 184 million.

The application by the taxpayers and administration by the Government of these tax laws require the knowledge of accounting. The more the changes in the tax laws, the more the variations from generally accepted accounting principles, the more complex became the transition from book net income to taxable net income. Business found that it had to rely more heavily upon the services of its accounting departments because the impact of taxes on the financial results of a corporation were indeed significant. So much so that the success or failure of many business transactions were determined in the light of the tax effects. As the tax laws became more complex, the need for competency and proficiency in their interpretation and application became more acute. As a result of this demand, there developed among the accountants individuals who concentrated their efforts in the tax field.

Harrison Tweed, a partner in a New York City law firm, in an article in the May 1962

American Bar Association Journal, noted that the tax field was one of several in which there developed what he referred to as quasi-professionals or "specialists." Because of their specialized knowledge this group was capable of rendering valuable services to the public. They prepared tax returns and, when necessary, negotiated with the Internal Revenue Service in settling tax controversies. This "hybrid professional" found that the successful performance of these duties produced happy clients who were willing to pay liberal fees; the clients found that in this particular area they were receiving services to their satisfaction. In the beginning, the lawyers raised no objection to this state of affairs, because many felt it was beneath their dignity to give serious attention to this phase of the law. In fact, some turned over tax problems to the accounting profession until they realized that they were losing out on a lucrative business.

After World War II, with the increased complexity of the laws and the increased rates, lawyers became more and more aware of this situation. So much so, that in the litigation which started more than ten years ago on the subject, they strongly asserted the monopoly of lawyers to practice law.

The Bercu[1] case was the first such case litigated in the State of New York. The Agran[2] case, a California case, which followed, however was considered the most serious threat to the profession of accounting. It was the first time that a C.P.A. was charged with the unauthorized practice of law for performing acts authorized by the Treasury Department.

Thereupon the two respected professions engaged in a bitter battle over where did the law end and where did accounting begin. It was believed that a definite line of damarcation had to be established to end the contention. In addition to judicial actions, much was written and debated about the subject but every attempt to distinguish one from the other failed of definition.

Referral to the generally accepted definitions of accounting and law were of no help.

The American Institute of C.P.A.s, defining the principles and standards of the profession, has defined accounting as follows:

> "The art of recording, classifying and summarizing in a significant manner and in terms of money, transactions, and events which are, in part at least, of a financial character, and interpreting the results thereof."

But, the principles of accounting laid out by the Institute are not statutory in character.

A generally accepted definition for law is one handed down in 1893 in the *Eley* v. *Miller* case:

> "The doing or performing services in a court of justice, in any manner depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matters may or may not be depending in a court."

Between the two fields lies that of Federal income taxation. Unlike the art of accounting, but like the law profession, income taxation is founded on statute, elaborated and interpreted by administrative regulations and rulings and construed by court decision. But the statute itself requires the application of accounting principles. Therein lies the nub of the controversy between the accountant and the lawyer.

A better understanding of the legal context under which the two professions operate may help. Both an attorney and a C.P.A. must meet state licensing requirements. A non C.P.A. accountant, however, may lawfully practice accounting as an "accountant," "public accountant" and "auditor," as long as "Certified Public Accountant" is not used. An attorney or any layman may legally render counsel and advice on accounting matters but only a lawyer can advise on legal problems. The accountant or C.P.A. who advises on the legal aspects of any accounting problem and any legal problem would be practicing law illegally.

The Treasury Department's attitude on the subject has only tended to aggravate the confusion. While the Department has recognized the C.P.A. as a professional, it has made it perfectly clear that the preparation of federal income tax returns and enrollment before the Treasury is not restricted to members of any particular profession or vocation.

The legislature and courts have likewise indicated disapproval of granting anyone the exclusive right to perform such technical services as bookkeeping and preparation of federal income tax returns. The only functions exclusively within the domain of C.P.A.s and the licensed public accountants would be the certification of statements on which third parties may rely.

[1] *Bercu* 273 App. Div. 524, 78 N.Y.S. 2d 209, 220 (1948) aff'd, 299 N.Y. 728, N.E. 2d 451 (1949)

[2] *Agran* v. *Shapiro*, 127 Cal. App. 2d 807, 273 P. 2d 619, 623 (1954)

Because of this dissension both professions have come to realize that their functions supplement each other and they have recognized the fact that voluntary cooperation between them is preferable to a continuance of the conflict. Attempts have been made and are continuing to be made to reconcile their differences.

In 1951 a "Joint Statement of Principles Relating to Practice in the Field of Federal Income Taxation" was approved by the American Institute of Accountants and the House of Delegates of the American Bar Association outlining an approach to the disposition of the problem.

Among other things, the statement states that only a lawyer may prepare legal documents and condemns the use of the title "Tax Consultant" or "Tax Expert" by an accountant. It recommends that both lawyers and certified public accountants may represent taxpapers in proceedings before the Treasury Department. It further recommends that if questions of law arise, a C.P.A. should advise his clients to seek the advice of lawyers and vice versa when accounting questions arise. It further states that the services of a lawyer should be obtained where claims for refund are to be the basis of litigation, and when a taxpayer is being specially investigated for possible criminal violations of the income tax law. And, if a formal notice of deficiency is issued by the Commissioner, the advice of a lawyer should be sought before further proceedings are contemplated.[3]

The concluding paragraph indicates the general spirit which existed when the Statement of Principles was drawn. It says:

> "This Statement of Principles should be regarded as tentative and subject to revision and amplification in the light of future experience. The principal purpose is to indicate the importance of voluntary cooperation between our professions, whose members should use their knowledge and skills to the best advantage of the public."

Although this Statement is of little concrete value and carries no legal effect, it evidences the cooperative spirit of the two professions and has encouraged subsequent meetings.

More recently, in 1959, a formal agreement between the New York State Society of C.P.A.s and the New York Bar Association was made wherein both bodies concurred in and ratified the aforementioned 1951 Statement of Principles.

This indeed was good news—in the space of only 10 years—following the bitter antagonism shown on both sides in the Bercu case there emerged the first agreement of its kind in the Empire State.

One might gather from the aforementioned that a highly desirable service to the public would be an integration of these two highly interdependent fields into a so-called "package service." But this has met with opposition within the law profession. Legal authorities have adjudged this dual practice entirely unacceptable. This tempest in a teapot has been fomenting for years. Very briefly the background is as follows:

In 1958 the National Conference of Lawyers and C.P.A.s had proposed a Code of Conduct on dual practice but no agreement could be reached. The accounting profession would not veer away from a decision published in 1946 by the Committee on Professional Ethics of the A.I.C.P.A. which sanctioned dual practice and concluded that the practice of law is not inconsistent with the practice of public accounting.

More recently, in July 1961, the Committee on Professional Ethics of the A.B.A. made public its opinion on the proper behavior in such situations. This opinion is an authoritative disapproval of dual practice based primarily on the indirect solicitation and feeder aspect of such practice. The lawyer-C.P.A., the opinion states, must make a choice as to the profession he wishes to be identified with and must drop the other.

Some practitioners do not agree with this opinion because it would deter the development and availablity to the public of a worthwhile hybrid profession; some have stated that the troublesome areas of dual practice could be corrected by broadening the canons concerning conflicting interests; others felt that objection to the conflict of interest could be removed by the cooperation of the accounting profession if it would limit certification of audit statements to cases where no legal work is done for the client; still others have admonished that the A.B.A. should face facts and instead of blocking dual qualification, admit that many lawyers are not competent to handle difficult tax matters and take steps to identify the competent by permitting a controlled specialization.

After a certain amount of soul-searching, some members of both professions have recommended more specialization for their respective professions. The May 1962 issues of the Journal of Accountancy and the American Bar Journal, the voices of their respective professions, carried articles on this subject.

[3]49 Kentucky Law Journal 549 (1961)

Mr. Elmer Beamer, C.P.A. and partner of Haskins & Sells, stated:

> "Perhaps thirty years ago the body of knowledge of the accounting function and the common body of knowledge of C.P.A.s or what a C.P.A. should know were one and the same thing. Today, however, the expanding accounting function calls for more and more specialization. Let's agree that no one C.P.A. could have command of the whole body of knowledge of the accounting function."

Mr. Harrison Tweed, partner of a New York City law firm and former President of the Association of the Bar of the City of New York, points out this necessity stating that many lawyers have learned that most clients require a proficiency which the lawyer cannot give without a certain amount of specialization. He further states:

> "No lawyer has the right to complain that another [lawyer] secures professional advancement because he has given himself a better education or has acquired more expertness. The more that lawyers secure clients because of their qualifications, the better."
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> "The most important thing of all is that [lawyers] work for a reversal of the traditional opposition of American lawyers to specialization, and that they show a willingness—more than that, a desire and determination—for once, before it is too late, to make an intelligent and intensive effort to meet, rather than to ignore, a crucial problem."

As troublesome and irritating as these controversies have become, many advantages have been derived therefrom. They have paved the way for a better understanding of the problems between the accounting and legal professions leading to agreement of voluntary cooperation on both a national and state level; more attention has been focused upon ethical matters resulting in the raising of the standards in the accounting profession; better servicing of the public interest has resulted because of a recognition by both professions of the need for specialization; the accounting profession has been able to meet specific demands of business management by contributing men of higher calibre to top-level positions.

Although these two professions have reached a "cease-fire" agreement for the time being, what can be done to bring about permanent peace?

The foregoing discussion has mentioned two factions—the accountant and the lawyer. But there is a third faction often overlooked by those who pass upon these controversial factors which is by far the most important—the client who exerts tremendous influence because he has the final say. True to the Statement of Principles an accountant may recommend a C.P.A. or an attorney, or both; or a lawyer may recommend a C.P.A., but it is the client's decision that prevails. For various reasons of his own, probably financial, psychological or personal in nature, he may not choose to follow the recommendations made to him. Or, maybe due to ignorance, he may feel that he is capable of carrying on—unknowingly to his detriment—and willing to take his chances. An attitude like this to one familiar with tax laws may seem very remote today when businesses are making every effort to control their third highest cost—taxes. But more money is paid to Uncle Sam by corporations and small businesses because they refuse to recognize the importance of the tax accounting function to business. In most instances, this attitude originates with the educational institutions which fail to see that tax training is a vital part of the business realm and therefore do not include in the required curriculum any courses in income taxation. However, this is to some extent offset by the leading universities of a specialized nature which give some extremely fine courses leading to a Masters Degree in taxation, such as Georgetown Law and New York University Law.

Not too long ago a sampling of opinion made at the Harvard Law School revealed that students were completely unaware of the existence of a Tax Manager or Tax Executive in the corporate structure. For over five years the Tax Executive Institute has tried to foster educational programs and to impress business management with this need.

Here lies the crux of the whole problem. Individuals who expect to embark upon a business career should start their tax education at the lowest levels possible—schools, universities and industries. In this field, in addition to the accounting principles and an understanding of the taxing statutes, he should be taught to distinguish between matters that are within the bounds of professional competence and be able to make decisions on the authorities to be sought.

Thus, he, the public, and the businesses will benefit from the results gained by the legal and accounting professions through many years of cooperation and conflict. Because, what good does it do to have the professions realize the need for cooperation, specialization, etc., if the person responsible for making

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age is vital, so that each level of government can design, construct and maintain in operating conditions, systems capable of providing rapid and reasonably accurate estimates of the degree of damage from the attack effects, especially radiological contamination, and what has survived the attack that will be useful for recovery.

Time is not unlimited, and time that passes without plans to insure that preservation of our national economy, should attack occur, only adds to the practical difficulty of achieving national security.

If we do our work well, keep growing, keep the "Fabric" strong; if we do our jobs well; be interested in world affairs; join groups that have voice; if we acquaint ourselves with choosing proper representatives in the government; in the end this will contribute greatly to our surviving.

Survival will be possible if we are prepared. We will be prepared if we plan. So let us plan, prepare and survive.

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the ultimate decision is ignorant of the respective values which each of these two professions have to him?

This training will be the most important contribution an individual can make to the success of his business, be he head of a business, a member of the policy making group, head of a department related to the business's financial structure, or an employee in any of these departments.

An outstanding example of the consequences of effective cooperation between a client and a careful competent counsel may be demonstrated by a comparison of the Agran case which came before the California courts in 1954, and the Zelkin[4] case which was also litigated in California in 1961.

> Agran, a C.P.A., lost his case and was unable to collect his fees from his client. The court held that the services he rendered before the Treasury Department concerning a tentative carry-back adjustment claiming a net operating loss was illegal because such services constituted the practice of law by one not a licensed member of the Bar.
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> Zelkin, a C.P.A., won his case and was entitled to collect his fee. The court held that the services he rendered in settling with the Treasury Department a tax controversy involving dealers' reserves was not practicing law.

After this case was analyzed in the May 1961 issue of the Journal of Taxation, the article summarized as follows:

> "It would be a mistake to infer that this indicates a change in attitude of the California court from the Agran doctrine since the two cases are clearly distinguishable on their respective facts. * * * Nevertheless, Zelkin does exemplify an appreciation by the courts of the fact that where matters of apparent complexity are involved in negotiations with the Internal Revenue Service their resolution is not presumably to be considered as involving the 'practice of law.'"

With proper coordination between a client's alert tax accountant and competent tax counsel (the latter having sought the cooperation of a competent C.P.A.), millions of tax dollars are saved as a result of proper timing of transactions, proper casting of the form of transaction, and proper assertion of rights which would have escaped attention in the every-day routine.

Another factor not to be overlooked is the subject of privileged information. A lawyer has the legal right of keeping tax files and confidential information out of the Internal Revenue Service's hands. This privilege is not enjoyed by an accountant and is a very important consideration in investigations which smack of criminal charges.

The proper education of the individuals in business as to their tax duties as described above should minimize or eliminate forever the serious conflicts between the professions and should allow more time and energy to be devoted to the application and practice of tax law.

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as set forth by the Congress and interpreted by the Courts.

To close I would like to give you a quotation from the article "Accounting as a Social Force," by Arthur M. Cannon in the Journal of Accountancy of March 1955, "Income taxation has been most important in the development of accounting, but the opposite is also true: the development of accounting has been absolutely essential to the development of income taxation."

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[4]Zelkin vs. Caruso Discount Corp., *et al.*, No. 704-525, SC L.A. County, Calif., aff'd Dist. Ct. App., 2nd Civ. No. 24663, 186 ACA 875.

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