10-1-1950

Tax Law and Natural Law

Roger Paul Peters

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.nd.edu/ndlr/vol26/iss1/2

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
TAX LAW AND NATURAL LAW

Tax law is ever changing, complicated and highly technical. It seems far removed from the natural law, which is immutable, elementary and written in the hearts of men.\(^1\) The great contrast between the two illustrates the acute difference between a body of law containing rules of conduct drawn from many particular transactions and the general principles underlying all positive law.\(^2\) Despite the great contrast, there is an intimate and vital connection between tax law and natural law which has been recognized by eminent tax practitioners. In a report presented to the Real Property, Probate and Trust Section of the American Bar Association, dated June 15, 1948, the Committee on State and Federal Taxation made forthright affirmations as to natural law limitations to which the tax laws should be subject.\(^3\) The Committee stated the first principles of the practical human reason, of which the natural law primarily consists, in almost the same language\(^4\) that is used by St. Thomas Aquinas. St. Thomas said:\(^5\)

\[\ldots\] the precepts of the natural law are to the practical reason what the first principles of demonstrations are to the speculative reason, because both are self-evident principles. \ldots the first principle in the practical reason is one founded on the nature of good, viz., that \textit{good is that which all things seek after}. Hence this is the first precept of law, that \textit{good is to be done and promoted, and evil is to be avoided}. All other precepts of the natural law are based upon this; so

---

\(^1\) \textit{Romans} 2.15; Calvin’s Case, 7 Co. 12(a), 77 Eng. Rep. 377, 392 (1608).


\(^3\) Committee on State and Federal Taxation, Real Property, Probate and Trust Section, American Bar Association, \textit{The Moral Issue}, 27 \textit{Taxes} 9 (1949).

\(^4\) Compare with St. Thomas, quoted below in the text: “Strictly speaking, the natural law consists of those first, self-evident principles of the practical human reason, such as ‘do good to others’ and ‘avoid injuring others,’ which are the principles of general justice, and ‘render to each his own’ which is the principle of special justice. Conclusions which are immediately and necessarily drawn from those principles by all reasonable men are often called the secondary principles of the natural law.” \textit{Ibid.}

\(^5\) \textit{St. Thomas, Summa Theologica,} I. II, quaest. 94, art. 2.
that all the things which practical reason naturally appre-
hends as man's good belong to the precepts of the natural
law under the form of things to be done or avoided.

The Committee also invoked the maxim "render to each his
own" as a fundamental principle of the natural law and re-
ferred to what are known as the secondary principles of the
natural law—the conclusions of right reason derived from
the first principles. But the Committee was not content
with these generalities with which disquisitions on the nat-
ural law are replete. Two principles with specific reference
to tax law were formulated in the report: first, that there
should be a just purpose in imposing a tax; second, that
justice should be observed in distributing the burden of the
tax. Indeed the Committee adopts more concrete expres-
sions, but it is not my purpose here to reproduce the exact
positions adopted by the Committee. I have sought a dif-
f erent approach to the relationship between the natural law
and the law of taxation, and have assumed that the rule of
elementary justice of rendering to each his own is a prin-
ciple of the natural law. It is that principle which the rea-
s onable man, so well-known in our law, recognizes as a self-
evident guide of conduct. Its validity does not depend on
the Constitution or any statute or court decision. It is a
principle of reason, which is an intimate faculty of the na-
ture of man. This article will attempt to determine how the
natural law operates in concrete situations in the field of
federal income taxation, which is at the present time the
most important and highly developed branch of tax law.

The subject will be examined under two aspects: with re-
spect to the government and with respect to the taxpayer.
Inasmuch as tax law originates as a legislative enactment
statutory provisions will receive primary consideration.

The primary purpose—and originally the only purpose—
of the legislature in devising a tax system is to provide
revenue for the government. It is said that Colbert re-
marked that the art of taxation was to pluck the feathers
without making the goose squall.\textsuperscript{6} Recognition by legislators that justice in the distribution of tax burdens is to be sought is a comparatively modern phenomenon.\textsuperscript{7} Today it is generally contended that justice is, at least, a secondary aim of any tax system,\textsuperscript{8} and it is also acknowledged that from the pragmatic viewpoint principles of tax justice are "vitally important."\textsuperscript{9}

Toward the end of the Eighteenth Century Adam Smith enunciated his famous canons of taxation,\textsuperscript{10} which are referred to with approval at the present day.\textsuperscript{11} The first of these canons is especially pertinent to the subject under discussion: \textsuperscript{12}

The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state.

This maxim has been characterized as the formulation of the principle that taxes are to be levied according to the ability to pay.\textsuperscript{13} The classic example of the application of this principle is the graduated or progressive surtax on incomes under the Internal Revenue Code.\textsuperscript{14} The general effect of the graduated surtax is to increase the tax rate as the net income increases. In achieving this effect the law provides for what are commonly called "surtax brackets": that is, the income which is subject to the surtax is taxed at a certain rate within a particular income bracket; if such

\textsuperscript{6} Green, The Theory and Practice of Modern Taxation 31 (1933).
\textsuperscript{7} See the description of eighteenth century tax systems, \textit{Id.}, at 20.
\textsuperscript{8} Twentieth Century Fund, Inc., Facing the Tax Problem 217 (1937). See also Finer, Theory and Practice of Modern Government 10 (1949) for what is characterized as the "most persistent and intense drive in all men and women, ... the desire to be right and to be acknowledged as right."
\textsuperscript{9} Twentieth Century Fund, Inc., \textit{op. cit. supra} note 8 at 220.
\textsuperscript{11} Green, \textit{op. cit. supra} note 6 at 71; see also Warren and Surrey, Federal Estate and Gift Taxation § 12-16 (1950).
\textsuperscript{12} Smith, The Wealth of Nations 777.
\textsuperscript{13} Green, \textit{op. cit. supra} note 6 at 17.
\textsuperscript{14} Int. Rev. Code § 12(b).
income exceeds the upper limit of that bracket, it is taxed at a higher rate only as to that portion which is in excess of the first bracket, and so on, depending upon the number of surtax brackets that are applicable. For example, suppose a taxpayer has income of $10,000 subject to the surtax. Using the statutory rates in section 12(b) of the Internal Revenue Code the taxpayer would find that since the income subject to the tax is "Over $8,000 but not over $10,000" the tax would be "$1,720, plus 31% of excess over $8,000" which would total $2,340 ($1,720 plus $620). How is the amount "$1,720" derived? A glance at the statutory table gives the answer. If the amount of the income subject to the tax is "Not over $2,000," the rate of tax is 17%, but if it is "Over $2,000 but not over $4,000," the tax is "$340, plus 19% of excess over $2,000," whereupon it is readily apparent that the $340 represents the tax on the first $2,000 at 17%. Similarly, where the amount of the income subject to tax is "Over $4,000 but not over $6,000" the tax is "$720, plus 23% of excess over $4,000," and so on. Thus simple analysis demonstrates that the income of every taxpayer is taxed at the same rate insofar as it falls within the same bracket. The first $2,000 is taxed at 17%, the second $2,000 at 19%, and so on. An obvious objection to the graduated surtax is that under it all taxpayers do not pay the same percentage of their incomes, since the higher the amount of the income the higher is the percentage that is payable. It is charged that the graduated surtax is incompatible with the institution of private property. Although it must be conceded that it is a limitation upon the right of private property, it is generally admitted today that such progressive taxation is equitable and just since it coincides with the principle of the ability to pay. In light of the natural law it results in approximate justice. It is

16 Somers, op. cit. supra note 15 at 137.
purely a question of degree.\footnote{17} A leading contemporary writer on the natural law takes the position that to the extent that the maintenance of the community demands financial sacrifices by its citizens, inequality in taxation is to be borne by them.\footnote{18} Regardless of the obligations of the individual citizen, there still remains the serious obligation imposed by the natural law upon the legislature to seek justice in framing tax statutes. The legislature may be obliged to subordinate the lesser good to the greater good. In such case the sacrifice of private property rights to the greater good of "the maintenance of the community" is certainly justified. This does not mean that the lesser right may be wantonly sacrificed. There must be a necessity for the sacrifice.\footnote{19}

Less important but, perhaps, clearer examples can be used of the search for justice in tax legislation than the application of the ability-to-pay principle. In defining "gross income," which is the starting point for the determination of the federal income tax, Congress has provided that there shall be included therein, in the case of presidents of the United States and judges of courts of the United States the compensation received as such.\footnote{20} Congress has also provided that compensation for personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one of them shall be included in gross income.\footnote{21} These specific inclusions were provided in order to insure that income derived from political and quasi-political positions will be taxed to the same extent as compensation for the usual types of personal services. This equalization of the tax burden is clearly in ac-
cord with justice and, hence, with the natural law. There is no reason for not requiring persons who receive salaries from various government units to share in supporting the federal government on the same footing as other taxpayers.

Occasionally policy decisions made by Congress involve favorable treatment of certain types of income. Equitable considerations may not always be paramount in arriving at such decisions, but in some instances it appears that there has been a definite effort to secure justice. An important example of this is the exemption from income tax of proceeds of life insurance contracts paid by reason of the death of the insured. Life insurance is believed to be socially desirable, and its purpose would be defeated if the beneficiary were required to pay over a large percentage of the proceeds of life insurance contracts to the government. Accordingly, this exemption is a sound application of that species of justice known as equity.

A considerable number of provisions of the Internal Revenue Code have been enacted to correct what were believed to be unjust rules arising from court decisions. A typical example of this sort of legislation is the income-splitting device which is available to husbands and wives who file joint returns. It's purpose is to overcome the inequality of treatment that formerly obtained under the doctrine of Poe v. Seaborn, whereby a husband and wife residing in a so-called community property state could divide the "community" income in half and so report it for federal in-

---

22 Id., § 22(b)(1).
23 Id., § 12(d).
24 282 U. S. 101, 51 S. Ct. 58, 75 L. Ed. 239 (1930).
25 Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Oklahoma adopted a community property law in 1939, but it was held ineffective in Commissioner v. Harmon, 323 U. S. 44, 65 S. Ct. 103, 89 L. Ed. 60 (1944), because spouse could elect under the law to have their property considered community property. Oklahoma subsequently adopted a compulsory community property law (1945). Some other states did likewise, including Michigan, Nebraska, Oregon, and Pennsylvania. Still other states had similar legislation under consideration before the enactment of the Revenue Act of 1948.
come tax purposes. This privilege was not available to married persons residing in the great majority of the states. The result was that the same amount of income received by a married couple was taxed at a higher rate if the couple lived in New York, for example, than if they lived in a community property state such as California. The congressional solution of this injustice is another illustration of the almost necessarily approximate character of the attempt to achieve tax justice. For it entailed a considerable sacrifice of revenue, which presumably must be made up in some other way (which conceivably might be far from just or equitable), and it also created an inequality of treatment as between married persons and single persons.

Another example of legislative action to correct an unjust situation is the provision for the deduction of so-called non-trade or non-business expenses in computing net income.\textsuperscript{26} In \textit{Higgins v. Commissioner} \textsuperscript{27} it was held that certain expenses, such as office rent, which were incurred by an individual in the course of taking care of his investments, were not deductible as business expenses. This result was undesirable, since it was unfair not to allow the deductions of ordinary and necessary expenses incurred in looking after property held for the production of income when similar expenses might be deducted if incurred in a taxpayer's business. Accordingly, Congress has provided for the deduction of such expenses.

Other provisions of the Code are designed to relieve taxpayers from undue hardships. One is to shift the burden of the tax from the person, who without special provision for such shifting, would be required to pay taxes for another who should properly bear the burden. An example is the handling of alimony payments. Under carefully specified conditions, alimony payments are includible in the gross in-

\textsuperscript{26} \textit{Int. Rev. Code} § 23(a)(2).

\textsuperscript{27} 312 U. S. 212, 61 S. Ct. 475, 85 L. Ed. 783 (1941).
come of the recipient and are deductible in determining the net income of the person making the payments. If the person paying alimony were liable for the payment of the taxes attributable thereto, as was formerly the law, he might well find himself without sufficient funds to pay his income tax, because of the higher surtax bracket in which his income would fall coupled with the depletion of his resources resulting from the prior payment of the alimony. The equitable solution requires that the person receiving the benefit of the alimony must pay the tax rather than exempt such income as life insurance proceeds. The alimony deduction is only a minor example of the numerous deductions which represent, in the main, sincere efforts on the part of Congress to effectuate justice in levying the income tax. By far the most important is the allowance of business expenses as a deduction in computing taxable income. Instead of taxing the entire gross income of a business enterprise Congress imposes the tax on the net income, which is gross income less certain statutory deductions. This is necessary because of the different types of business with greatly varying extent of mark-up, and gross income compared with their net incomes. It would be patently unjust to tax the gross income of a dime store with its small mark-up, and relatively large gross income as compared with its net income, at the same rate as a jewelry store with its large mark-up, where the gross income approximates the net income.

The importance of allowing business expenses to be deducted in computing taxable income is readily appreciated by contrasting this practice with a tax law that provides for no such allowance. Without the allowance of costs of do-

---

28 INT. REV. CODE § 22(k).
29 Id., § 23(u).
30 Id., § 23.
31 Id., § 23(a)(1).
32 See, for example the Indiana Gross Income Tax Act of 1933, IND. ANN. STAT. 64-2601 (Burns 1933).
ing business as a deduction the tax could easily absorb the entire profit of an enterprise, and even when the rate is low enough or the profit high enough to avoid such a disastrous result, it is inequitable to tax a business on its gross profit regardless of its net profit.

Similar to the business deductions are the personal deductions, or technically called "other deductions," allowed all taxpayers. These include deductions for interest, taxes, medical expenses, and charitable contributions, or their substitute, the optional standard deduction. The purpose of these allowances ostensibly is to equalize the burden for those taxpayers who have additional expenses or charitable propensities, the latter of which is favored as a matter of public policy. Likewise, the exemptions for dependents, blindness, and age beyond 65 years are attempts to equalize the tax burden.

Similar considerations apply to the allowances for the depreciation and obsolescence of property used in business or held for the production of income and for the deduction of certain losses. It should also be noticed that the Internal Revenue Code, in accordance with the policy of Congress to subject only the net income to the tax, provides for the taxation of gains on sales or exchanges rather than the entire proceeds of such transactions. Congress has gone so far as to accord preferential treatment to gains.

33 Int. Rev. Code § 23(b).
34 Id., § 23(c).
35 Id., § 23(x).
36 Id., § 23(o).
37 Id., § 23(aa).
38 Id., § 25(b)(1)(D).
39 Id., § 25(b)(1)(C).
40 Id., § 25(b)(1)(B).
41 Id., § 23(1).
42 Id., §§ 25(e) and (f).
43 Id., § 22(a).
44 In striking contrast is the decision of Gross Income Tax Division et al. v. Bartlett, ...Ind.,... 93 N. E. (2d) 174 (1950), in which the Supreme Court of Indiana held that a resident of Illinois was taxable on the total receipts from sales of real estate under the Indiana Gross Income Tax Act of 1933.
from the sale of so-called long term capital assets.\textsuperscript{45} This favorable treatment was originally justified as a device which permitted gains representing the realization in one year of the appreciation in value attributable to several years to be taxed at a lower rate than the ordinary income of a single year. The validity of this justification has been impaired in recent years by the enactment of the Revenue Act of 1942 \textsuperscript{46} which arbitrarily has set the dividing line to determine the rate of tax at six months.

It is true that some of the deductions set forth in the Code are severely criticized as being too favorable to special interests, such as the percentage depletion allowance for oil and gas wells.\textsuperscript{47} Such defects, however, do not vitiate the generally successful legislative effort to achieve justice in distributing tax burdens. The proceeding illustrations should suffice to show in what way justice, particularly distributive justice, is involved in framing revenue measures.

Much of what is termed tax law, especially federal taxes, consists of various regulations and rulings issued by executive and administrative officials of the government, frequently in the nature of supplementary legislation. The officials responsible for issuing regulations and rulings are usually acutely aware of the necessity of drafting them so that they will "stand up in court." As one would naturally suspect, tax administrators occasionally overstep legal bounds not only because of ignorance of the law but also because of impatience with legal restraint. I recall the emphatic warning that the chief law officer of a government bureau gave to an administrative official who was disposed to issue a ruling of dubious legality. "Remember," he said, "I have to go into court and defend these rulings of yours." If such warnings are not heeded and rulings of doubtful

\textsuperscript{45} \textit{Int. Rev. Code} § 117.
\textsuperscript{46} Revenue Act of 1942, § 150(a)(1), 56 Stat. 843 (1942).
\textsuperscript{47} \textit{Int. Rev. Code} §§ 23(m) and 114(b)(3).
validity are issued, it is likely that the courts will strike them down as unreasonable, unconstitutional, or as usurping congressional authority.

These regulations and rulings as well as legislative enactments are subject to judicial review. So commonplace has this process become in our law that we are apt to overlook its significance. Our judges have a tradition of independence and they continue to be independent. As Professor Corwin has recently pointed out, judicial review of legislation antedates our written Constitution and was originally justified and may still be justified by an appeal to the natural law. In taxation as well as in all other law the power of judicial review will be exercised to upset an unreasonable exercise of either the legislative or executive function. The notion of reasonableness is indisputably a natural law concept. The principles of reason frequently appealed to are the conclusions which man draws by means of the inborn faculty of reason with which he is endowed by God, his Creator. Reasonableness in tax law involves at least two major conclusions: first, that the amount of the tax provisions must not be confiscatory; second, that the enforcement of the tax provisions must be in accordance with due process of law.

The application of tax law to the individual taxpayer in view of the natural law will now be examined.

Citizenship for most persons is a matter of birth, not choice. It is not the result of a contract by the individual citizen but a status, and by reason of that status he has certain obligations, one of which is to contribute to the support of the government. There can be no doubt that this is a valid obligation if the nature of man, Aristotle's politi-

---

Man being a gregarious animal, the duty to support his valid government appertains to his social nature, and is in harmony with the natural law.

Under ordinary circumstances the natural law does not require disobedience to an unjust tax law. In fact, we have already seen that sometimes even unjust tax laws are, under natural law principles, to be obeyed not because they are laws but because disobedience would menace the public order, which is a superior good. Again, it is a question of degree. Natural law, however, does not oblige blind obedience. As natural law is the ultimate criterion of all positive law, a law which is contrary to the natural law is not law at all; thus the citizen and taxpayer has the right, and at times even the duty, to disobey unjust governmental decrees. This right and duty of disobedience to tax law in particular is recognized by the American Bar Association group previously mentioned.

One of the most remarkable features of the federal income tax is that it is, in a sense, assessed by the taxpayer himself. The law requires him to make a return and pay the tax before any governmental action is taken at all. Severe penalties are imposed for willful failure to file returns required by law and for the making of fraudulent

---

49 Aristotle, Politics 1.2 1253 a: “Hence it is evident that the state is a creation of nature, and that man is by nature a political animal.” Historical and anthropological studies as well as one’s own experience tend to support Aristotle’s dictum.

50 Keilen, General Theory of Law and State 285 (Wedberg transl. 1945). “Through the social contract, the ‘state of nature’ is replaced by a state of social order.”

51 Rommen, op. cit. supra note 18 at 66.


53 See note 3 supra.

54 Int. Rev. Code §§ 51, 52.

55 Id., § 56.

56 Id., § 145(a).
returns. Of practical necessity most taxpayers are on their honor. Many frauds, doubtless, go undetected, but by and large, taxpayers, partly through fear of punishment but also by reason of honesty make correct returns. The moral obligation to be fair and square with the government, that is unquestionably acknowledged by most citizens, is probably the greatest single factor in the successful administration of the income tax law. What else is this but the operation of the natural law in the behavior of the citizens? This point cannot be over-emphasized, for without such operation the fiscal system of the government would inevitably break down. The operation of this sense of obligation is particularly well illustrated by the compliance of employers with the withholding provisions for wages paid to their employees. Willful failure to comply is considered so sensational that it is "news."

Just as there is no positive law objection, there is no natural law objection to conduct one's affairs in such a way so as to minimize taxes. But the courts have often supported the government in striking down devices employed by taxpayers that have been indulged in exclusively for tax saving purposes. It is difficult to draw the line in all cases. The distinction made by the courts between legitimate and illegitimate tax-saving devices may be generalized as depending on whether the transaction is actually what the taxpayer purports it to be or whether it is a sham. The leading case on this point is Gregory v. Helvering, in which it was held that a corporate reorganization in addition to meeting the express statutory requirements must have a bona fide business purpose to be recognized as a reorganization under the tax laws, and that the anticipated tax

57 Id., § 3809(a).
58 Id., § 1622.
59 See MAGILL, TAXABLE INCOME 164 (1945), for a devastating comment on a judicial utterance concerning the legal right of the taxpayer to minimize his taxes.
60 293 U. S. 465, 55 S. Ct. 266, 79 L. Ed. 596 (1935).
saving was not sufficient to satisfy that additional requirement. The court stated that the transaction

\[\ldots\] was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else. The rule which excludes from consideration the motive of tax avoidance is not pertinent to the situation, because the transaction upon its face lies outside the plain intent of the statute. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.

The natural law background to the great practical field of tax practice, which is largely concerned with the arrangement of affairs in such a way that taxes will be minimized, is hinted at in the Gregory case and its progeny. That natural law background may be described as esse atque videri, or, as it is expressed again and again ad nauseam, the substance of the transaction will be examined rather than the form, which implies the idea of good faith, certainly a natural law concept.\[62\]

The general use of such terms as “tax-dodging” and “beating the government” implies a moral stigma that is unwarranted in most efforts to minimize taxes. There are many tax-saving devices that are not only legitimate in the natural law sense but under positive tax law as well. For example, there can be no objection on natural law grounds to the decision of a group of businessmen to dissolve a corporation and form a partnership for carrying on the affairs of the dissolved corporation even though the sole reason for such action is to avoid corporation taxes. Indeed, moralists state that tax laws that are only penal laws, such as duties, customs, and excises oblige in conscience only as to the acceptance of the penalty inflicted for their violation.\[63\] This latitude however, does not embrace income taxes, real estate and property taxes.\[64\]

\[61\] Id., at 470.
\[62\] The term "bona fide" is found in the statute itself; for example, see Int. Rev. Code §§ 116(a), 811(i).
\[63\] Jones, Moral Theology 141 (Adelman transl. 1945).
\[64\] Id., at 142.
A word should be said about the judicial procedure that promotes justice in tax law. In the field of federal taxation there are two methods available to adjudicate controversies between the government and the taxpayer to determine the correct amount of the income, estate, and gift taxes. The taxpayer may either pay the additional amount of tax that the government asserts to be due and then sue in the federal courts for a refund of the alleged over-payment of the tax, or he may refuse to pay the additional assessment and file a petition with a special tribunal, known as the Tax Court, to determine the amount of the tax deficiency, if any. The great body of case law that has developed in recent years involving federal taxation has been inaugurated almost exclusively by one or the other of these methods, as criminal prosecutions for fraud are of negligible quantity or importance. The fact that the federal courts and the Tax Court stand guard to check over-zealous tax gatherers indicates the operation of natural law principles. While exact justice is not to be expected of the courts any more than it is to be expected of the legislature, it is safe to say that the courts strive to see that the taxpayer shall not be obliged to pay more than he is required by law. That the courts do not exact the most that the strict letter of the statute could be interpreted to require is illustrated by the tax-benefit rule. This rule is now partially embodied in the statute, but it was originally applied by the Board of Tax Appeals, which was the title of the Tax Court prior to 1942. Under this rule certain items which would otherwise be considered gross income are not considered includible as such if they represent recoveries of deductions in prior years which did not result in any benefit to the taxpayer because he had other deductions which wiped out his gross income. This

65 Int. Rev. Code § 1100.
66 Id., § 22(b)(12).
67 See, for example, Estate of James N. Collins, 46 B. T. A. 765 (1942). This decision was reversed by the Court of Appeals for the Eighth Circuit, 133 F. (2d) 732 (1943), sub nom. Harwick et al. v. Commissioner, which in turn
rule was criticized by the Court of Appeals as seeming "to be an injection into the law of an equitable principle, found neither in the statutes nor in the regulations." 68 The Supreme Court, however, sustained the position of the Board of Tax Appeals.69

On the other hand, equitable considerations may weigh against the taxpayer in the eyes of the courts as we have previously seen in the Gregory case. Illustrations of such a result are to be found in those cases in which a taxpayer is denied, on grounds of "public policy" the benefit of a deduction to which he seems to be entitled under the letter of the law. For example, in McDonald v. Commissioner,70 the Supreme Court held that campaign expenses of a candidate for public office were not deductible as expenses incurred in the production of income. Clearer examples are set forth in the opinion in Commissioner v. Heininger: 71

Where a taxpayer has violated a federal or a state statute and incurred a fine or penalty he has not been permitted a tax deduction for payment. Similarly, one who has incurred expenses for certain types of lobbying and political pressure activities with a view to influencing federal legislation has been denied a deduction. And a taxpayer who has made payments to an influential party precinct captain in order to obtain a state printing contract has not been allowed to deduct their amount from gross income.

The examples just given are contended by some authorities to be a misguided application of natural law principles; that is, the improper use of revenue laws as a penalty for moral breaches, but, be that as it may, they do illustrate a natural law background in our tax law. It should be noted, however, that the purpose of the state is to secure the common good, and that the common good is promoted by such
applications of the revenue laws. Hence, the revenue laws are properly applied to discourage moral breaches.

In summary, it may be said that the natural law though leaving an unobtrusive record in the express provisions of the tax statutes or in the opinions of the courts in tax cases, is an essential foundation for the enactment of tax statutes, decisions of tax cases, and the operation of the tax system. Without it there would be no attempt at justice in the ever present necessity of distributing tax burdens, no justice in tax litigation, and, perhaps, most important of all, no justice on the part of the taxpayer himself who would be induced to "get away with" paying as little tax as possible.

It may be objected that distributive justice and the idea of fair play are pursued in tax law merely because of constitutional limitations, and the necessity of winning elections. I do not wish to minimize the importance of such considerations. It must be remembered, however, that the Constitution itself and our democratic processes are based on the natural law. We disregard this natural law foundation of tax law or any other law at our peril. Injustice, no matter how it is imposed, is still injustice. The _ultima ratio_ is not force, political or legal, but right reason itself. And right reason is the foundation of natural law, which must be the foundation of all our law, tax and otherwise, if our system of government is to survive.

Roger Paul Peters