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Bittker: Federal Taxation of Income, Estates, and Gifts

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BOOK REVIEW

FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS. By Boris I. Bittker.*
Boston: Warren, Gorham & Lamont, Inc., 1981. Vols. I, II, III & IV. Pp.
xxxviii, 1016; xxxviii, 922; xxviii, 807; xxi, 767. \$295.00 for set of four vol-
umes.

*Reviewed by Anthony R. Parrish, Jr.***

Accumulating and commenting upon the voluminous amount of materials related to federal income and estate and gift taxation can justifiably be deemed an industry. There are two major publishers of multi-volume looseleaf tax services,¹ as well as many other smaller services.² In addition, numerous commentaries on the Internal Revenue Code (Code) are continuously revised to keep pace with the flood of judicial, legislative and administrative information available to tax practitioners. Thus, it is somewhat surprising when one man endeavors to comment upon the whole spectrum of federal income, estate and gift taxation, even if that man is Boris Bittker.

Professor Bittker's longstanding tax expertise is indisputable. Best known for his co-authored treatise on corporate taxation,³ Bittker is also the author or co-author of many other tax-related publications, including student-oriented casebooks on federal income⁴ and estate and gift tax.⁵ It is safe to assert, therefore, that any new work by Professor Bittker would be received with deference by the tax community, *a fortiori* one to which he has devoted five years of his life.⁶

I.

In his recent treatise, *Federal Taxation of Income, Estates and Gifts*, Professor Bittker undertook, in four volumes, the herculean effort of producing a comprehensive treatise covering all the substantive law of federal income taxation⁷ as well as tax practice and procedure.⁸ An additional volume, set for publication in 1982, will address federal taxation of estates and gifts.⁹

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1. FED. TAXES (P-H); STAND. FED. TAX REP. (CCH).

2. *E.g.*, FED. TAX. COORD. 2d (TRIA).

3. B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS (4th ed. 1979).

4. B. BITTKER & L. STONE, FEDERAL INCOME TAXATION (5th ed. 1980).

5. B. BITTKER, FEDERAL INCOME, ESTATE AND GIFT TAXATION (3d ed. 1964).

6. 1 B. BITTKER at vii.

7. I.R.C. §§ 1-1564 (1976).

8. *Id.* §§ 6001-7852 (1976), but excluding I.R.C. §§ 7001-12 (1976 (Licensing and Registration) and I.R.C. §§ 7101-03 (1976) (Bonds). In addition the book covers I.R.C. §§ 3101-21 (1976) (Federal Insurance Contributions Act), I.R.C. §§ 3401-04 (1976) (Collection of Income Tax at Source on Wages), I.R.C. §§ 3501-07 (1976) (General Provisions Relating to Employ-

Despite the author's credentials, a prospective reader may initially doubt whether Bittker undertook more than he could possibly produce. One may wonder, for example, if any work attempting to treat comprehensively all of federal income and estate and gift taxation was not doomed to a degree of superficiality from the outset.¹⁰ Further, it is arguable that the separate code sections, having been enacted over the years for various purposes, are more readily approached as discrete, non-related sections, rather than as an integrated body of law. Certainly the Code does not lend itself to easy assimilation. Nevertheless, when a lawyer expresses a desire to "know more tax," he is not referring to a knowledge of the intricacies of specific code sections, he is instead referring to a general understanding of the underlying principles of federal taxation. Apparently recognizing this need for a general understanding of the Code, Bittker's treatise was designed "to provide guidance and orientation by emphasizing the purpose, structure, and principle effects of the Internal Revenue Code, without bogging down in details; to explain, rather than paraphrase, the statute and regulations; to examine the ambiguities and gaps in the legislative scheme without implying that there are no usable rules and guideposts."¹¹

In producing this treatise, Bittker was assisted by ten principal collaborators,¹² all moderately well-known in the tax field, with whom he credits almost forty percent of the final work. As both author and editor, Bittker has successfully blended their writing styles to create a remarkably homogeneous product.

The individual volumes are organized topically rather than by the sequential tracking of Code sections used in most other works. Volume I examines the history of federal taxation, exclusions from gross income, and business deductions and credits. Volume II analyzes personal exemptions, deductions and credits, sales of property, capital gains and losses and deferred compensation. Volume III deals with foreign income and foreign taxpayers, and with assignments of income. Volume III also analyzes the tax treatment accorded major entities, such as trusts and estates, partnerships, and the

ment Taxes), I.R.C. §§ 4911 (1976) (Public Charities), I.R.C. §§ 4940-48 (1976) (Private Foundations), I.R.C. §§ 8021-23 (1976) (Powers and Duties of the Joint Committee on Taxation), and I.R.C. §§ 9001-13 (1976) (Presidential Election Campaign Fund).

9. I.R.C. §§ 2001-2622 (1976).

10. There have been many comprehensive analyses made of the federal income tax since the enactment of the sixteenth amendment in 1913. *See, e.g.*, R. PAUL & J. MERTENS, *LAW OF FEDERAL INCOME TAXATION* (1st ed. 1934).

11. I B. BITTKER at vii.

12. Collaborators and principal parts of the work to which they contributed Michael Asimow (contributions to numerous chapters of the treatise); Louis A. Del Cotto (Sales and Other Dispositions of Property); Meade Emory (Tax Returns, Rates, and Payments; Audits, Deficiencies and Refunds); Alan L. Feld (Personal Exemptions, Deductions and Credits); James S. Eustice (Corporations and Shareholders); Thomas J. Gallagher, Jr. (Intangible Drilling and Development Costs—Oil and Gas; the Tax Legislative Process); Norman H. Lane (Trusts and Estates); Michael B. Lang (Business and Profit-Oriented Deductions and Credits); John W. Lee (Business and Profit-Oriented Deductions and Credits; Deferred Compensation); Lawrence Lokken (Foreign Income and Foreign Taxpayers).

author's specialty, corporations. Finally, Volume IV examines tax-exempt organizations, accounting methods, and tax practice and procedure.¹³

Even in four volumes, the treatment of topics covered in the treatise is necessarily highly selective.¹⁴ Ironically, this selectivity is both the debatable weakness and the undeniable strength of the work. Tax practitioners will be aware of the large amount of excluded material. Nevertheless, there is an unmistakable sense of inclusiveness, attributable to the author's thirty-odd years of studying, teaching and writing about federal taxation. Occasionally, there is an unexpected omission, perhaps stemming from Bittker's overfamiliarity with the subject. For example, the reader may search in vain for the text of the sixteenth amendment even though it is mentioned numerous times in the first volume. More often, however, there is an inclusion of material which a less confident author would have deleted. Quotations from Adam Smith's *Wealth of Nations*¹⁵ and humorous dialogue between inexperienced members of the Senate Finance Committee¹⁶ are not standard tax fare, but reflect a conscientious sifting and filing away of diverse materials by someone aware of taxation's place in a broader historical and social context.

The authors eclectic approach does not interfere with the work's highly organized and systematic treatment of various Code sections. The four volumes are divided into 116 chapters, including 458 topics, and on the order of 1500 sub-topics. Within this highly compartmentalized framework, the author labors long and, for the most part, successfully to unlock the doors between compartments. He is aided in his efforts by an admirable clarity of writing style, which should give great comfort to readers frustrated with less than lucid Code sections.¹⁷ Furthermore, Bittker has leavened the work with humor, although some of the levity may be lost on all but his former students and colleagues.¹⁸ The author avoids a hornbook format by liberally interspersing the text with illustrative schematics for making tax calculations, and with many, often lengthy, quotations from judicial opinions and congressional committee reports. The end result is a highly readable product which is less fatiguing than most tax treatises. Nevertheless, its success, as with Bittker's earlier corporate

13. A supplementary soft cover index volume is included with the set.

14. The tailoring of the work is evidenced by the author's own example: "this work allots only seven pages to the indirect foreign tax credit, a subject to which Owens and Ball devote a two-volume work almost 800 pages in length. If this proportion were applied to the entire field, the result would be an exhaustive treatise of 400,000 pages, or about 450 volumes." I B. BITTKER at viii-ix.

15. 4 B. BITTKER ¶ 102.3.1.

16. I B. BITTKER ¶ 5.1.

17. See, e.g., I.R.C. § 509(a) (1976), last sentence: "For purposes of paragraph (3), an organization described in paragraph (2) shall be deemed to include an organization described in section 501(c)(4), (5), or (6) which would be described in paragraph (2) if it were an organization described in section 501(c)(3)."

18. See, e.g., 4 B. BITTKER ¶ 103.3, where the author refers to a special exemption from Unrelated Business Taxable Income which was passed specifically for the benefit of a radio station whose call letters were WWL. I.R.C. §§ 512(b)(15)(A) (1976), 512(b)(15)(B) (1976), & 512(b)(15)(C) (1976) begin with these letters. But Bittker's reference in the same paragraph to another acrostic using the name "Bacon" escapes this reviewer.

treatise, must be judged by whether such a work is needed and if so, how well it meets that need.

II.

In the preface to his book, Bittker remembered the pioneering treatise on federal income taxation by Paul and Mertens¹⁹ first published forty-seven years ago. He asserted that the subsequent growth in the body of tax law mandated a fresh analysis and synthesis. Because modern tax publishing has gone in two directions, both of which are away from Bittker's goal of integration and synthesis, Bittker's initial premise is debatable.

One such direction is taken by tax services which attempt to provide their subscribers with a complete reference source, including section-by-section analysis of the Code, together with directions to, or verbatim transcripts of, all related judicial, legislative and administrative materials. *Mertens* itself has moved in this direction, although its hallmark remains impeccably thorough analysis. The other trend has been toward specialized publications. There are comprehensive books on practically every aspect of federal taxation. These publications demonstrate the magnitude of the body of tax law, and the desire of tax practitioners for detailed and specific guidance in specialized areas of tax practice. Bittker's own co-authored work on corporate tax, though far broader than most, is a good example of this trend. In addition, the tax services and, increasingly, the specialized publications, are regularly supplemented to keep the main volumes current. One initially wonders, then, just where on the lawyer's tax shelf Bittker hopes to insert his four volumes covering all of federal income tax.

The reader is not far along into the first volume before realizing the author does not intend to compete with either the tax services or the specialized publications. Instead, he attempts to employ the full breadth of his knowledge to show that "the Code is more than a laundry list of discrete items, that almost all provisions can be understood in the light of their antecedents and relationships to the rest of the Code, and that routes through the bog can be picked out."²⁰ His pursuit of this goal is successful provided the reader's expectations are not unrealistic. Throughout the treatise, Bittker fulfills his promise to explain rather than to paraphrase the Code. However, if the pervasive structural principles he sought to reveal at times seem obscured in detail, the fault lies more with the complexity of the Code than with Bittker's efforts to unravel its meaning.

Despite the book's success in overcoming the reader's initial skepticism regarding the potentially overbroad scope of the work, it is still subject to criticism as being neither fish nor fowl, caught between the tax specialist's need for complete knowledge of a narrow area of tax law, and the general practitioner's need for a quick and practical manual geared to specific Code sections. For example, a tax attorney concerned that his client's corporation might be

19. R. PAUL & J. MERTENS, *supra* note 10.

20. I B. BITTKER at vii.

“collapsible” within the meaning of Code section 341²¹ might well consult Bittker’s book on corporate tax where that topic receives forty pages of analysis.²² An attorney might feel uneasy relying instead on the seventeen page treatment of collapsibles provided by the treatise.²³ Similarly, a leading authority on partnership taxation²⁴ devotes twenty pages to the bewildering subject of disproportionate distributions of inventory and unrealized receivables.²⁵ Bittker’s treatise, however, employs only six pages on that subject.²⁶ This disparity in length of treatment increases dramatically as the tax topics become more exotic.²⁷ Nevertheless, the author is aware of this potential weakness and advises the reader that the treatise was intended to be selective, not exhaustive.²⁸ Furthermore the work is extensively footnoted, slightly more so than the author’s corporate tax treatise. The footnotes include citations to a wide variety of both primary and secondary materials. Nevertheless, there remains some validity to the criticism that the treatise, by attempting to encompass such a broad area, lacks practical usefulness in researching specific issues.

Because of this potential Achilles heel, the work may not appeal to all. Tax practitioners generally subscribe to one of the tax services, supplemented by various specialized publications, and may well have a set of *Mertens* available for in-depth research into unfamiliar topics. Whether tax specialists will regularly consult Bittker’s general treatise is debatable. General practitioners, on the other hand, should find it an invaluable reference tool. Further, lawyers who remorsefully wish they had taken more tax courses in law school, or had been allowed to tape record those they did take, should find the book a wonderful tonic, though not a panacea, for many tax ills.

Unfortunately, perhaps the most receptive market for the treatise will not be able to afford it. Tax students, particularly those involved in intensified programs such as those leading to an LL.M degree in taxation, would find the book ideally suited to their needs, but for its cost. A readable overview of every area of federal income tax, which is comprehensive and specific without being laborious, is the LL.M. student’s dream. Accordingly, Bittker should encourage the publisher to bring out a soft cover student edition of the treatise. Indeed this would fulfill his pledge to “write for the *entire* profession — for judges, teachers, students, and government employees, as well as for practitioners.”

III.

The first four volumes of Bittker’s treatise attempt and accomplish a great

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21. I.R.C. § 341 (1976).
 22. B. BITTKER & J. EUSTICE, *supra* note 3, at §§ 12.01-.09.
 23. 3 B. BITTKER §§ 95.4.1-4.6.
 24. 1 A. WILLIS, PARTNERSHIP TAXATION 547-68 (2d ed. 1976).
 25. I.R.C. § 751(b) (1976).
 26. 3 B. BITTKER ¶ 86-3.
 27. See note 11 *supra*.
 28. 1 B. BITTKER at viii.
 29. *Id.*

deal. The author has made a clear and concise examination and synthesis of all of federal income tax law and of procedural matters relevant thereto. A mammoth task lies ahead, however, because Bittker has committed himself to supplementing the work three times annually. Given the growth rate of the body of tax law over the last decade, and the absence of any indication of its slackening, the magnitude of the effort required to update the treatise may eventually cause it to drift towards the realm of the tax services. Nevertheless, the treatise represents a worthy addition to the author's already enormous contribution to the understanding of federal tax law.

