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NOTES AND COMMENTS

Do "Tax Consultants" Practice Law?

There has recently come from the Appellate Division of the New York Supreme Court, through the medium of the decision in Application of New York County Lawyers Association, as a succinct statement of the doctrine juris consultis interpretatio juris as has yet been announced by any court. In meaning, that statement is as certain and exact as the doctrine of stare decisis; in operation, it should prove as lasting and helpful. Without doubt, for New York, it answers the question posed above.

The origin of that decision lay in the fact that a New York corporation, which had not shown any profit for three years and had not paid its sales and compensating use taxes due the state, suddenly made so much money that it was faced with the prospect of having to pay a large federal income tax. The question arose as to whether the payment, in the current year, of the past due sales and use taxes would support deduction by the taxpayer of the amount thereof from the current large profit. The company's accountant, who was also a lawyer, advised against any such deduction. It was then that the company called upon one Bercu, a certified public accountant, and requested his advice. He was not asked to audit any books or prepare any tax returns but was simply asked the abstract question: Does the law permit the taking of this deduction in the current year? He answered the question, charged the company for his advice, and when the company did not pay he sued. Recovery was denied on the ground that Bercu had engaged in the unauthorized practice of law. Thereafter, the New York County Lawyers Association applied to the court to punish Bercu for his contempt as well as to enjoin against his unauthorized practice in the future. Although the initial tribunal denied relief, substantially on the theory that the giving of tax advice was proper tax accounting practice, the Appellate Division, by a divided vote, imposed a fine and issued the injunction. The majority declared that when an accountant passes on a question of law, apart from auditing books or preparing tax returns, he is engaging in the unauthorized practice of law.


2 That maxim may be said to mean that interpretation of the law is the province of lawyers.

3 What that advice was is immaterial to this discussion.
Considering, as a matter of public benefit, whether accountants ought to be entrusted to engage in the abstract interpretation of laws, attention is first directed to differences in education and training between attorneys and accountants. A survey shows that in at least forty states the general educational requirement for the lawyer is a minimum of two years of prelegal training at the college level as opposed to a maximum requirement of only a high school education for the accountant. In over a fourth of the American states, admission to the bar also demands a minimum of three years of law school study, covering every branch of the law, as compared to only two states which require any specialized college training for the certified public accountant. Much more significant, however, is the fact that the scope of the education and training of the great body of self-styled "accountants" or "tax consultants" is absolutely unspecified and uncontrolled. They are on their own and all is fish that falls in their nets. To allow such persons, who have not made a study of the whole body of the law, with its correlated system of statutes and decisions, to interpret statutes would be as absurd as to permit persons who lack a study of the whole human body to operate on the human anatomy.

It must also be remembered that, in order to protect the public against ill-considered interpretations of the law leading to wholesale litigation, attorneys, made officers of the courts by the solemn judicial act of admission to the bar, are responsible directly for moral or professional misconduct. No matter how fine the education and training of accountants might grow to be, they still will not be, and cannot be, under the direct disciplinary control of the courts. Except by enforcing liability for malpractice after the event, there is no way by which the courts can impose upon the laymen the same high standards enforced among members of the bar. For that matter, no accountant is subject to discipline for adver-

4 See Exhibit Four appended to statement of W. McNeil Kennedy, representing the Chicago Bar Association, on H. R. 3214, made before the Senate Judiciary Committee. That measure, as originally introduced, represented the considered opinion of experts and had the approval of many bar associations. Among other things, it was designed to make the Tax Court, now an administrative body, into a court of the United States. On July 7, 1947, with debate limited, Section 2500 thereof was amended to read: "No qualified person shall be denied admission to practice before such Court because of his failure to be a member of any profession or calling." Necessarily, as amended, the bill was then opposed by the bar associations because it would operate to admit laymen to practice before a court because of his failure to be a member of any profession or calling. The sponsors of the amendment refused to concede this principle so the Senate, in order to insure passage of the bill as a whole, struck out all provisions designed to convert the Tax Court into a judicial body. It remains, therefore, an administrative agency. It is probable, however, that its method of operation will have to be changed to meet the requirements of the Administrative Procedure Act, in accordance with the decision in Lincoln Electric Co. v. Commissioner, 162 F. (2d) 379 (1947), unless change is made in the law.

tising or soliciting employment, while members of the bar are prohibited from both of these practices.

In still other important respects, the law treats lawyers differently than accountants. The client, when consulting a lawyer, is generally protected in his right to make free disclosure by treating his communications to his lawyer as privileged. Except as provided by statute, communications to accountants are not so privileged. The security of the confidential relationship, found between attorney and client, may often be an important element in consultations over tax matters; its absence, when the accountant is called upon, may be productive of mischief. By and large, the lawyer's main duty is to advocate his client's cause. The predominant characteristic of a certified public accountant, on the other hand is his independence or objectivity. Advocacy and objectivity are diametric opposites. For these reasons, then, to allow laymen accountants to engage in formulating abstract interpretations of laws would open the door to the same irresponsibility that has jeopardized public welfare by other forms of unauthorized practice.  

6 The history of privileged communications between attorney and client is almost as ancient as the legal profession: Wigmore, Evidence, 3d Ed., Vol. 8, § 2230.


Argument in favor of eradicating the distinction between the lawyer's and the accountant's function in the tax field has been based upon the fact that accountants are admitted to practice before the Treasury Department and the Tax Court. There is no valid foundation for this argument. The Treasury Department rules expressly prohibit accountants enrolled with it from practicing law, and the Tax Court has permitted very few laymen to be admitted before it. Since January 1, 1943, non-lawyers have been admitted by it only upon examination. In one five-year period, ninety-two non-lawyers took the examination but only seven passed, of whom five were certified public accountants. Up until recently, not one of the seven has tried a case in the Tax Court, and an analysis of the decisions thereof in the same five-year period shows that out of 3661 cases decided only 166, or 4.5%, were handled by non-lawyer certified public accountants who had been admitted prior to the examination requirement. Statistics such as these speak for themselves.

It cannot be denied that tax laws and tax regulations today are so tightly bound up with interpretations of the courts that legal concepts necessarily become the basis upon which accountants outline the facts with which they must work. It is unavoidable that an accountant, when performing his accounting duties, must attempt to understand and follow the provisions of the law. In this process, he uses his knowledge of the law, perhaps even interprets it, for his own purposes in the performance of his accounting duties, but he does so merely as an incident to his primary hiring as an accountant. What he gets paid for, what he sells to the public, however, is not legal advice but an accounting product the legal sufficiency of which has not been tested and may never need be. The scope of accounting practice is well understood and the province of the certified public accountant is well defined. When an accountant in-
interprets the law for his own use in connection with these limited fields, time-honored forms and formulas will tend to be a check upon his interpretations. But interpretation of the law by accountants, apart from preparation of financial statements or when needed in the process of auditing books, falls clearly beyond the realm of accounting practice.

Insofar as the preparation of income tax returns is concerned, some courts have indicated that the preparation of anything but the simplest of returns amounts to practicing law.\textsuperscript{15} The view expressed in the instant case is that the accountant should be allowed maximum freedom of action within the field of “tax accounting” to the end that a taxpayer be not required to go to a lawyer to have his tax return prepared.\textsuperscript{16} Somewhere between these extremes, the line of demarcation will eventually be drawn.\textsuperscript{17} In the meantime, when an accountant comes face to face with a difficult tax law problem in his legitimate practice, one which he recognizes requires interpretation hence calls for legal research and an analysis of court decisions, he should not hazard a guess at the solution but should guarantee to his client the best possible solution by recommending that he consult legal counsel.

With respect to drawing that line of demarcation, it should be remembered that a Pennsylvania court once said, “It is obvious that no wall can be built around the field of the law that will keep all lawyers within it and all laymen outside it.”\textsuperscript{18} Likening the situation to an old English case where a railroad’s fence was defective and defendant’s pigs strayed and did damage to a trolley car,\textsuperscript{19} that court also quoted from the learned Baron Bramwell’s remarks therein as follows: “Nor do we lay down that there must be a fence so close and strong that no pig could push through it, or so high that no horse or bullock could leap it. One could scarcely tell the limits of such a requirement, for the strength of swine is such that they would break through almost any fence, if there were a sufficient inducement on the other side... [It is] bound to put up such a fence that a pig not of a peculiarly wandering disposition, nor under any excessive temptation, will not get through it.”\textsuperscript{20} Putting it differently,


\textsuperscript{16} See 78 N. Y. S. (2d) 209 at 220.

\textsuperscript{17} The amicable discussions between accountants and lawyers referred to in note 9, ante, should some day lead to an acceptable compromise.


\textsuperscript{19} The court referred to Child v. Hearn, 9 L. R. Ex. 176 (1874).

\textsuperscript{20} 9 L. R. Ex. 176 at 181.
the doctrine of the instant case should be applied sensibly to avoid any imputation that the legal profession seeks to establish a monopoly. Lawyers are not artisans joined into a trade union acting to serve only their own selfish ends. In fact, the term "monopoly" has no place in the vocabulary of the learned professions. It does not apply to those who are bound to their calling by a vow; it belongs in the jargon of the market-place. Lawyers are not, nay cannot be, in the market-place so the problem as to what shall constitute the practice of law is not to be solved by the competition of the market-place. Truly, in the public interest, it is up to the courts to solve that problem. The instant case supplies a proper solution to at least one aspect thereof.

GRACE THOMAS STRIPLING

21 It has been followed, with approval, by the highest court in New Jersey: Auerbacher v. Wood. — N. J. Eq. —, 59 A. (2d) 863 (1948), affirming 139 N. J. Eq. 599, 53 A. (2d) 800 (1947).

22 In 28 Iowa L. Rev. 116, at 117, appears the statement: "No person of intelligence supposes that the organized medical profession makes war on quacks in order to get more business for reputable doctors. If that were its real purpose, the better professional strategy would be to let the quacks go ahead, since their practice would inevitably increase both the number of patients for legitimate physicians and the seriousness of their ailments. The same thought is true in the problem of the unauthorized practice of law. The reports are full of cases which never would have arisen had an attorney been employed at the start." The fight against unauthorized practice of law is, most often, conducted by unselfish and uncompensated groups acting solely in the public interest.