Tax Scholarship: Useful and Useless

By Lawrence A. Zelenak

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Zelenak responds to a recent Tax Notes article by Jasper L. Cummings, Jr., in which Cummings criticizes what he perceives to be a decline in quality and quantity of practical scholarship produced by tax law professors.

In his article “Academic Articles on Tax” (Tax Notes, Mar. 7, 2011, p. 1189, Doc 2011-3104, 2011 TNT 44-11) Jasper L. Cummings, Jr. claims that “from the viewpoint of the [tax] practitioners, judges and government lawyers . . . there is very little [scholarship by tax law professors] now appearing in the academic journals to assist the policymakers in understanding the tax law as it exists and operates and how it might be improved interstitially.” In contrast to the golden age of practical tax scholarship dominated by the likes of Erwin Griswold and Boris Bittker, we are living — according to Cummings — in an era in which “much of the academic work [of tax professors] is practically useless.” Cummings predicts, “If Tax Notes endeavors to bring the useful [law review tax] articles to the fore, it will have to search far and wide.”

Cummings is a highly regarded practitioner who has made major contributions to tax law literature. If this is his opinion of the work of today’s tax professors, I suspect it is also the opinion of more than a few of his fellow tax lawyers. In my view, however, Cummings’ judgments are mostly wrong. Cummings undervalues the utility of the work of tax professors; he understates the quantity of practitioner-oriented scholarship they produce, and he adopts an unduly narrow view of what qualifies as useful when he excludes scholarship advocating legislative reforms. After explaining these two points, this response concludes with an argument that tax scholarship of no obvious utilitarian value also has a legitimate place in the tax scholarship universe.

Useful Tax Scholarship Has Not Disappeared

Cummings reports that from the late 1930s to the early 1950s, Griswold “seemed to treat the Harvard Law Review as his personal journal, using it to expound right thinking on very mundane issues of the nuts and bolts of the tax law.” Today, he claims, leading student-edited law reviews publish few tax articles, and those few articles seldom focus on “mundane . . . nuts and bolts.” Cummings is surely right that the percentage of law review pages devoted to tax articles — both tax articles in general and practitioner-oriented tax articles in particular — is lower today than in the age of Griswold. Nevertheless, for several reasons I disagree with his claim that today’s tax professors are thereby failing to fulfill their duty to today’s practitioners.

First, the situation isn’t quite as dire as Cummings suggests when he claims that in 2010 “essentially no tax articles appeared in what some might consider the 30 law reviews in the Top 10, and the statistically insignificant exceptions were mostly student pieces.” Because of a six-way tie for 28th place, there are currently 33 law schools in the U.S. News top 30. In 2010 the 33 flagship student-edited law reviews of those schools published 15 tax articles by law school tax professors. Most of those 15 articles presented proposals to reform the tax laws rather than nuts and bolts explorations of current law (although about a third of the articles had significant nuts and bolts aspects), and two topics — international taxation and the tax treatment of charities — which apparently were of particular interest to student editors, were arguably overrepresented. I also concede that 15 is not a huge


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number and that it would have been nice if there had been more. With all these qualifications and concessions, however, 15 articles is not my idea of "essentially no" articles.

Second, I would be thrilled to use the Harvard Law Review — or even some journal slightly less august — as my "personal journal" to comment on tax issues, mundane or otherwise. To the extent leading student-edited law reviews have become less hospitable to tax articles, the cause is a shift in the preferences of the student editors, not a lack of interest among tax professors in publishing in those journals.

Third, although tax articles have no doubt declined as a percentage of all articles published in law reviews, it is far from clear that law review tax articles have declined in absolute numbers since the golden age, when there was typically one law review per law school. There are now 219 student-edited general law reviews and 431 student-edited specialty journals in the United States, according to the Washington and Lee Law School library website. In the golden age, the Tax Law Review (founded in 1945) stood in lonely splendor as the only tax specialty journal published at an American law school. It has since been joined by the Akron Tax Journal, the Columbia Journal of Tax Law, the Florida Tax Review, the Houston Business and Tax Law Journal, the Pittsburgh Tax Review, and the Virginia Tax Review. Even using Cummings's narrow definition of what constitutes a useful tax article, I'm willing to bet that law reviews published more useful tax articles in 2010 than they did in, say, 1950.

Fourth, most of the practitioner-oriented scholarship produced today appears in venues other than law reviews. Tax professors still write treatises — perhaps to a greater extent than law professors in law reviews. Tax professors still write treatises — despite publishing copious amounts of useful scholarship — are offending by also publishing too much useless scholarship. I'll consider the former possibility first.

As noted earlier, if not enough tax articles are appearing in the Harvard Law Review, it is because the editors of the Harvard Law Review aren't much interested in tax articles and not because tax professors disdain to publish there. But regardless of who's to blame for this sorry state of affairs, the more important question is why it matters to practitioners where useful tax scholarship is published, as long as they can find it. If anything, practitioners should prefer treatises and BNA portfolios to law review articles for the simple reason that it is easier for them to find useful material in those sources than in law reviews. If what Cummings is really lamenting is the loss of the warm glow tax practitioners formerly derived from knowing that the Harvard Law Review considered the nuts and bolts of tax practice a worthy subject for its pages, I recommend the same approach I use whenever the Harvard Law Review rejects one of my article submissions: Ask oneself a consoling rhetorical question ("What do a bunch of law students know about tax, anyway?") and then move on.

A More Generous Definition of Usefulness

Almost two decades ago, Judge (and former professor) Harry T. Edwards published in the Michigan Law Review a scathing critique of most legal scholarship. He lamented the "clear decline in the volume of 'practical' scholarship published by
law professors." According to Judge Edwards, practical legal scholarship should "aim to instruct attorneys in their consideration of legal problems; to guide judges and other decisionmakers in their resolution of legal disputes; and to advise legislators and other policymakers on law reform."8 The article touched a nerve. Nearly an entire issue of the Michigan Law Review was devoted to 17 responses from professors, practitioners, and judges (some largely agreeing with Judge Edwards, but many defending the value of "impractical" scholarship).9 When I first read Cummings's article, I thought of it as a tax-specific version of Judge Edwards's more general complaint. There is a crucial difference, however. Judge Edwards placed "advis[ing] legislators and other policymakers on law reform" on the approved side of the great divide between useful and useless scholarship, whereas Cummings reserves much of his scorn for tax policy scholarship.10 According to Cummings, if tax policy scholarship is useful to anyone, it is only to "government policymakers — and that is a thin layer indeed." Whether law review articles advocating legislative tax reforms belong with the sheep (as Judge Edwards claims) or the goats (as Cummings claims) is a crucial question, given that a high percentage of law review tax articles fall into that category.

In Cummings's view, apparently, the usefulness of tax scholarship is measured by the number of tax professionals who can make use of it in their professional endeavors. Because only a small number of tax professionals are employed in Treasury's Office of Tax Legislative Counsel and on the staffs of the taxwriting congressional committees, no legislative reform proposal can ever be very useful. This is, of course, a peculiar measure of usefulness. Accepting for the moment Cummings's assumption that tax professors have some sort of moral obligation to produce only useful scholarship (an assumption that will be challenged below), surely that obligation is owed to society at large rather than to tax attorneys and judges. A professor's tax reform proposal — whether for a fundamental redesign of the federal tax structure11 or for a more modest reform12 — may be more utility-enhancing for society at large than any number of practical guides for tax practitioners.

One could argue that although a tax professor's reform proposal might be utility-enhancing if enacted by Congress, the chances of any particular proposal being enacted are very low. That is often true, but Congress does occasionally adopt tax professors' proposals. Footnote 12 cites three examples: a proposal by Reuven S. Avi-Yonah regarding dividend withholding on derivatives, a proposal by Joseph Dodge and Jay Soled for information reporting of basis, and George Yin's urging of General Utilities repeal. If a professor believes a particular proposal would be greatly utility-enhancing, its expected utility (that is, its utility if enacted multiplied by the odds of enactment) may be quite high despite the low probability of enactment. Moreover, political climates change over time. A proposal that seemed politically unrealistic when published may become viable years or even decades later.

Tax professors are typically well suited, by both inclination and ability, to offering legislative reform proposals. Although, as detailed above, many tax professors write volumes (literally) of practitioner-oriented scholarship, it is hardly surprising that the opportunity to engage in reform-oriented scholarship is highly valued by many tax academics. If they wanted to spend their entire professional lives thinking only of topics of immediate use to practitioners, they would probably have become or remained practitioners — and reaped greater financial rewards in the process. For many of us, the chance to spend time thinking and writing about tax policy — and to be paid for doing so — is a major lure of academia.

And many of us are also well equipped for the endeavor. As Cummings himself notes, "full-time professors can bring to legal writing advantages that may not be as common among other legal writers, including objectivity, the time and resources to delve into the history and background of issues, and the freedom to follow an idea where it..."
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leads without being bound to pursue only immediately practical results.” And when consideration of legislative reforms requires expertise beyond that of a tax lawyer — in economics, history, psychology, philosophy, or any number of other disciplines — academics are often well positioned to pull together the relevant insights from the several disciplines. In some cases this will be because they are themselves economists or historians (for example) as well as tax lawyers, or because they have the time to educate themselves to the extent necessary for a particular project, or because they are able to attract collaborators from the other disciplines. Of course, some interdisciplinary tax policy scholarship is poorly done, but the same could be said of some of the practitioner-oriented scholarship favored by Cummings. The value of each genre of scholarship should be judged by its best products, not by its worst.

In sharp contrast with Cummings, I believe there is no better and more appropriate use of a tax professor’s time than in writing about tax policy issues. Whereas Cummings would apparently consider the Shelf Project (which has featured so prominently in Tax Notes for three years now14) more or less useless, I consider it to be practical tax scholarship at its best. Much of the shift in tax professors’ attention from issues of statutory interpretation to issues of legislative reform simply reflects a shift in the location of the tax policy action. In earlier eras, when the courts were struggling with fundamental structural issues not clearly resolved by the words of the income tax statute, much of the tax policy action was in the interpretation arena and tax scholarship was focused accordingly. Today, because most of those structural issues were resolved long ago, major tax policy battles are usually fought in the legislative arena rather than in the courts. The shift in the focus of tax scholarship reflects that change. To the extent major policy battles continue to be fought in the courts — the application of the economic substance doctrine to post-1986 tax shelters being the most important instance in recent years — tax professors continue to weigh in on interpretive issues.15

A Defense of Uselessness

Most of what tax professors write is concerned with either practical questions of obvious interest to practitioners or tax policy reforms, and is thus clearly useful (despite Cummings’s denial of the utility of work in the latter category). Occasionally, however, some of us publish books or articles of no clear utility to anyone. Not long ago, for example, I published an article considering how standard tax policy arguments (relating to the choice between a consumption base and an income base, and lifetime income averaging) would be affected if one were persuaded by Derek Parfit’s view that personal identity is not stable over long periods of time.16 Because I have absolutely no expectations that any significant number of lawmakers will be persuaded by Parfit’s view in this century, I make no claims for the usefulness of the article. But I also offer no apologies for the choice of topic. At least some of the time, an academic should be free — even encouraged — to pursue a topic in her field simply because she finds it interesting. No one requires a philosopher, a literary theorist, or a historian to point to a clear utilitarian payoff from her scholarship. The same is true even of many scientists — for example, astronomers of deep space and theoretical physicists. In his essay castigating impractical legal scholarship, Judge Edwards complained that some law professors write about impractical topics because the topics “fascinate” them.17 In a rather stirring (at least to me) defense of impractical scholarship, Sanford Levinson challenged Judge Edwards’s “dismissal of any claims that some particular piece of writing would be of great ‘use’ to other members of the scholarly community interested in a given theoretical issue,” and his implicit rejection of the notion that universities should encourage “learning as an end in itself.”18 Levinson also defended academics who allowed their fascination to direct their scholarship: “Fascination,” I believe, is at the heart of the scholarly vocation or indeed, almost any truly enjoyable life. . . Judge Edwards’ denigration of the importance of ‘fascination’ — indeed, of its very legitimacy — is what is most truly disturbing, even authoritarian, about his article.19
By now it will come as no surprise to the reader that I am on Levinson’s side of this debate. Despite Cummings’s call for practical scholarship (and his narrow definition of what counts as practical), there is one intriguing hint in Cummings’s essay that he might be persuaded to join the defenders of fascination. On his rather short list of tax scholarship he approves of, Cummings includes the tax history scholarship of Ajay Mehrotra and Steven Bank. I share Cummings’s admiration for the work of these two scholars (and indeed invited both to write for a recent symposium in Law and Contemporary Problems on ‘‘Turning Points in the History of the Federal Income Tax’’[20]). Like most historians, however, Mehrotra and Bank frequently write without any clear ‘‘presentist agenda’’ (as historians are wont to say). History has its uses, of course, but many historical studies are motivated by sheer intellectual curiosity and lack any apparent utilitarian payoff. It is curious, then, that Cummings’s approved list includes two tax historians — producers of scholarship that would seem to be particularly useless in his view. I can only speculate on the reason, but I suspect it is because Cummings finds tax history inherently fascinating and believes that inherent fascination is sufficient justification for the production of tax history scholarship. I fully agree. I would only add that some of us are also fascinated by other sorts of impractical tax scholarship.


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The Hedge Timing Rule — Realization Not Required
By Michael Yaghmour and Victoria Balacek

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The authors argue that requiring realization on a hedging transaction before applying the hedge timing rules runs counter to the principles established in those rules and may sometimes distort the taxpayer’s income.

When a taxpayer executes a hedging transaction as defined in section 1221, reg. section 1.446-4(b) requires that the taxpayer match the timing of income, deduction, gain, or loss (‘‘income or loss’’) from the hedging transaction to the income or loss from the item or items being hedged (the hedge timing rule). The hedge timing rule is principle-based and requires taxpayers to choose an accounting method that reasonably results in matching.

Some argue that the hedge timing rule does not apply unless or until a taxpayer first realizes an item of income or loss from the hedging transaction under applicable non-hedging methods of accounting. This latter argument is incorrect.

The hedge timing rule represents a separate tax regime for hedging transactions that is not dependent on or limited by general tax realization principles. As we explain below, there is no way to reconcile the words of reg. section 1.446-4 with the view that income or loss must otherwise be currently realized under applicable non-hedging methods of accounting before applying the hedge timing rule. Moreover, a ‘‘realization first’’ convention in many cases would thwart the mandate to ‘‘clearly reflect income.’’ This problematic result is illustrated by two examples below.

A. Background

The hedging regulations under sections 446 and 1221 were finalized in 1994 in the wake of the Tax Court’s decision in Federal National Mortgage Association v. Commissioner, 100 T.C. 541 (1993). The hedging regulations under section 1221 establish the definition of a hedging transaction (later codified in substantially similar form under section 1221(b)(2)). The hedging regulations under section 446 provide general guidance on proper methods of