Foreword

Jasper (Jack) Cummings is one of the more prolific authors today in the field of tax, writing with a point of view supported by careful research and thoughtful analysis. Whether or not one agrees with his point of view, his work is an invaluable resource. The Second Edition of *The Supreme Court’s Federal Tax Jurisprudence* continues in that tradition, coming at a time when Congress is pushing the tax law into new and uncharted territory while we all hold out hope for the fundamental reform of the Internal Revenue Code that is long overdue.

Since 1803, when Chief Justice Marshall stated in *Marbury v. Madison* that “[i]t is emphatically the province and duty of the judicial department to say what the law is,” the decisions of the Supreme Court have held a role second in importance only to the acts of Congress in establishing the law. The relationship between the Internal Revenue Code and its judicial constructions and interpretations is, however, a complicated one. As Jack notes, “Codes are a particular type of integrated statutes, and for that reason are seen as ‘special’, which is often said of the Internal Revenue Code.” Yet unlike what Jack calls the “extreme purposivism” of the Uniform Commercial Code, the Internal Revenue Code has no overarching principles or stated rules of construction. For tax, this creates “a curious regime that both establishes many rigid rules to which taxpayers must conform, provides virtually no grace for slight and meaningless errors, and applies anti-taxpayer doctrines (substance over form) that stem from the rules of equity.”

The Supreme Court has often been called on to step into the void created by the “curious regime,” so having this book as a form of restatement of its jurisprudence is a useful resource for all. While the Court’s tax cases total over nine hundred, Jack organizes them into a manageable framework. In doing so, he makes the observation—surprising perhaps to those who have focused on the Court’s jurisprudence over only the last several decades—that
“tax cases have occupied a far larger part of the Court’s output than any other single area of the law, and dominated it in some decades.” Measured by volume, much of the Court’s tax jurisprudence came in the years after ratification of the 16th Amendment, when the Court was called upon to explain broad concepts like the meaning of “income.” From a historical perspective, that early case law remains important, and the Second Edition of Jack’s book builds on the First in explaining both the Court’s early case law in the field of tax and its evolution through the New Deal and beyond.

The Supreme Court’s more recent decisions will be more relevant for practitioners and others in weighing and debating current unsettled tax issues. In that context, in updating the First Edition Jack does an excellent job of synthesizing recent developments in two key areas: economic substance and related “anti-abuse” rules and deference to administrative rule making. The Second Edition connects these issues to what the Supreme Court has—and perhaps more importantly has not—said on these topics over time.

On economic substance and related rules that courts apply when considering “intentional tax reduction,” Jack notes that “the location of the line between permitted intentional tax reduction and the tax reduction efforts that can lead to the denial of tax benefits” is “[t]he most debated issue in federal taxation.” Yet the Supreme Court has not spoken on the topic directly since 1978, an eternity when measured against intervening developments in the tax law. When the First Edition of this book was published in 2010, the ink was not yet dry on one of the more noteworthy developments in this area—codification (or at least partial codification) of the economic substance “doctrine,” with “doctrine” being a description that Jack notes the Supreme Court has never embraced.

To the casual observer, codification of economic substance and a review of recent appellate court decisions applying economic substance and related rules might suggest an evolution in Supreme Court jurisprudence over time into a positive rule of law. While codification was a major development, it left many questions open and unanswered. The codified rule also leans heavily on prior case law for resolution of threshold questions like whether the “doctrine” should apply in the first place. As a result, the Supreme Court’s decisions remain more relevant than ever. Building on his work in the First Edition, Jack approaches the subject with a more refined, in-depth perspective, cautioning against construing Supreme Court precedent as supporting the positive rule of law that many assume it has become. For example, he describes several of the Court’s “boundary decisions” that should be viewed as limiting the scope and application of economic substance (and similar rules), rather than as supporting the expansive evolution that is conventionally assumed. Jack also helps the reader understand the scope and limits of the Supreme Court’s jurisprudence in this area by analyzing cases in thirteen “factual clusters.” In these “cluster areas,” Jack notes that the Court’s decisions should be viewed as simply an exercise in judicial fact-finding unique to
the common fact patterns in these cases, rather than supportive of a broader positive rule of law.

For those arguing for or against application of economic substance and related rules, Jack’s tracing of the law from *Gregory v. Helvering* in 1935 to codification in 2010 should be required reading, showing that even with codification (and perhaps even more so because of codification), the tax law is not a Code-based set of rules that can be navigated by turning well-defined corners. Unfortunately (or not, depending on one’s perspective), the law in this area is, as Jack summarizes, now reflective of a “policy of vagueness” that provides an *in terrorem* effect against aggressive tax planning, however the Internal Revenue Service may decide to define it. Although responsibility for that policy may have shifted from the appellate courts to Congress with codification, the policy itself remains the same. Regardless, we now have a paradigm where economic substance and related rules are often the first resort, rather than the last, when the government seeks to challenge what it considers to be an unwarranted tax benefit. Jack’s analysis demonstrates that this may not be the paradigm that the Supreme Court intended.

Deference to administrative rule making is a second key area of tax law that has evolved significantly since publication of the First Edition of this book in 2010. It is also an area where the role of the courts is much different than it is when they are called on to find facts or to interpret a statute in isolation. In contrast to economic substance and related rules of law, where the Supreme Court has been largely silent in recent years, its decisions in *Mayo Foundation for Medical Education & Research v. United States* and *United States v. Home Concrete & Supply, LLC*, among others, have fundamentally reshaped thinking on how the courts, practitioners and the government view administrative rulemaking in the field of tax. The Second Edition provides useful context for and explanations of these decisions.

Until recently, most practitioners and commentators thought they understood there to be a defined line between “legislative” and “interpretive” regulations arising from the landmark Supreme Court decisions in *Skidmore v. Swift & Co.* in 1944 and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* in 1984. They also thought, with some support from the Court’s 1979 decision in *National Muffler Dealers Association, Inc. v. United States*, that tax regulations were treated differently from other areas of administrative law. But in just the last few years, *Mayo* and *Home Concrete* have shifted this thinking significantly, creating a more muddled framework that looks to vagaries in the statute using, as Jack notes, traditional tools of statutory construction that render ambiguous whether a statute is in fact ambiguous to begin with. Since publication of the First Edition, the Court has also marked an outer limit to administrative rulemaking, holding in *King v. Burwell* that, as Jack summarizes, the “statutory conundrum may be so great that it is above the political power of an agency to resolve.” By ruling in favor of the Administration’s position anyway, *King v. Burwell* highlights a practical limitation on adminis-
trative deference arguments: Defeating a rule on deference grounds may not translate into winning the case.

The Second Edition examines the scope and limits of administrative deference by reaching back to before enactment of the Administrative Procedures Act (APA) in 1946, noting that courts then did what they wanted to in construing and interpreting statutes, while mouthing some degree of deference to administrative rule making. Notwithstanding enactment of the APA and more than a half-century of case law interpreting it, that is effectively where we remain today, with some refinement of the analysis (and limit on a court’s flexibility) based on the size of the hole the rule maker is trying to fill. Stating it differently, Jack explains that deference is really just a tool that courts use to protect their “turf;” when Treasury and the Internal Revenue Service attempt to perform what looks like a judicial function, the courts will rein them in. Rather than looking for bright lines between “legislative” and “interpretive” regulations, we now have a more fluid distinction that turns on how large an interpretive gap is left by the statute, the resulting need for administrative guidance, and any Congressional indication (however discerned) that guidance would be issued to fill such gaps. From a practitioner’s perspective, this provides a helpful framework in an area of law that has, as Jack notes, “reached a level of abstraction that places its current resolution beyond the realm of practical applicability by the lower courts.”

After deciding more than nine hundred tax cases, recent developments in the areas of economic substance and judicial deference illustrate that the Supreme Court’s tax jurisprudence is more important than ever in understanding what the law is. Having moved beyond “grand issues of the tax law” like defining income or reading a “business purpose” requirement into the corporate reorganization provisions of the Code, the Court will continue to play the key role in interpreting and construing tax statutes.

Over the course of my career, I have viewed the field of tax through a number of different lenses, ranging from a Justice Department Trial Attorney riding circuit through Eastern California, to serving as the Administration’s representative in Congressional tax hearings, to now handling, as a sole practitioner, matters ranging from individual income tax audits to complex circuit court appeals.

The First Edition of The Supreme Court’s Federal Tax Jurisprudence has served as a vade mecum for me in the varied aspects of my practice and the Second Edition will no doubt be the same. It is a must read for anyone practicing or with an interest in the field of tax.

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October 21, 2016