Preface to Second Edition

This book is for practitioners and other students of the federal tax laws. It addresses all issues arising in the application of the Internal Revenue Code that are outside of the operation of the substantive law, constitutional law, and tax procedure. Therefore, this book explores statutory interpretation and construction and methods of fact finding used in applying the Code to taxpayers’ facts. In addition, it collects, categorizes, and explains the significant statements of the Supreme Court of the United States on these subjects.

Many of the subjects here addressed have escaped careful analysis; for them this book provides such analysis, with surprising results in many cases. For other more discussed subjects this book collects and organizes sources that can be hard to find, and states truisms established in those sources that have been overlooked. This book makes existing knowledge accessible and organizes and presents the disparate but integrated issues in a way not elsewhere available, somewhat akin to a restatement, or at least a very thorough Note by a student editorial board. Some subjects may seem obvious when presented, but are not necessarily part of many tax lawyers’ tool kits simply because they have never focused on them; this book identifies such subjects and places them in familiar context. Therefore, this book has some of the characteristics of a (very long) law review article, and also aspires to be a black letter law treatise.

This book is organized with a detailed Table of Contents and is heavily footnoted so that it can serve as a resource. In the age of electronic word searches, it is easy to forget that not all useful information can be found that way.

1 See Jasper L. Cummings, Jr., The Supreme Court, Federal Taxation, and the Constitution (ABA 2013) (addressing all Supreme Court federal tax decisions not addressed in this book because they deal primarily with constitutional issues).
This book is organized around three premises: (1) the federal tax laws are not different from the rest of the law, and do not require special legal processes, apart from standard statutory interpretation and fact finding; (2) a wealth of usually untapped guidance can be derived from the Supreme Court’s extensive federal tax opinions; and (3) rather than episodically picking out phrases from Supreme Court (and other) opinions for citation, practitioners and students need a firm grasp of the progress of the Supreme Court’s federal tax jurisprudence and the meaning of certain high profile decisions of the Court, including particularly those that have established base line concepts of interpretation and fact finding, such as *Eisner v. Macomber*, *Gregory v. Helvering*, *Higgins v. Smith*, *Court Holding*, *Knetsch*, and *Frank Lyon*.

The lower federal courts have developed what they consider to be special legal processes for federal tax cases (called herein “tax specific doctrines”), which with one exception are only applications of standard law methods of fact finding or legal interpretation; the one exception is the economic substance doctrine, which since the 1990’s has come to be treated as a positive rule of law, seemingly enacted by the lower federal courts. The tax specific doctrines are variously described as assessing business purpose, substance over form, economic substance, step transactions, sham transactions, and related tax specific concerns. The economic substance doctrine functions like an uncodified preamble to the Code, albeit applied in episodic and unpredictable ways. Bittker & Lokken applied the term “preamble” to these doctrines generally and overstated their effect: “[T]ransactions are to be taken at face value for tax purposes only if they are imbued with a ‘business purpose or reflect economic reality’ . . . .”2 Throughout, this book contrasts and compares what the Supreme Court actually has done versus tax specific doctrines, and otherwise comments on the doctrines’ wisdom. Many of the doctrines are just names for common fact finding techniques (for example, stepping related transactions together for analysis), although the economic substance doctrine has evolved into a positive rule of law.

Moreover, a careful focus on the Supreme Court’s tax opinions is justified by its huge federal tax caselaw of well over 900 opinions (not counting the constitutional decisions). That body of opinions is sufficiently large and authoritative to be the principal source of guidance on the application of the Code. Advocates can and will always find and cite the recent relevant opinions of the lower courts; this book helps them find the better Supreme Court authority that can overcome adverse lower court rulings.

This book is an objective reference book with two differences: its analyses aim to go deeper than the standard reference works by identifying the most pertinent among competing authorities and questioning spurious authorities; also, it has a stated point of view.

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In going deeper, this book integrates three sources of information not directly related to tax: (1) general legal principles as applied outside the tax law, (2) legal history both generally and in the tax law, and (3) academic viewpoints on statutory interpretation. Ordinarily tax treatises do not attempt to integrate any, much less all, of these sources. They are included here because they are useful to the understanding of the current tax law, because they are often hard to find, and because the tax law has suffered from isolation and from ignoring its own history. Thus, the summaries of academic debates (for example, about *Chevron* deference and strict construction) may seem abstract, but should serve the purpose of alerting the practitioner to otherwise foreign territory and permitting an evaluation of the debates.

As a reference this book contains in-depth analyses of several subtopics related to the application of the Code, such as section 269, the *Chevron* doctrine, the economic substance doctrine in the lower courts, and the several most frequently cited Supreme Court tax opinions. In addition, the discussions of some court opinions and certain issues (like *Chevron* deference and tax equity) are quite detailed and heavily footnoted. That unusual detail is provided either to support a counterintuitive point or as evidence of one of the fundamental assumptions that underpins this book: too often the real tax law is overwhelmed by gloss and cliché, thus necessitating a careful and discerning reading of the apt authorities.

The book’s point of view is one of not necessarily assuming that the current state of the law is the most advantageous, or that current understandings of the law are correct, or that (in some cases) even Supreme Court opinions are correct in all of their reasoning. This book aims for a fresh look at many accepted truths in the tax laws.

This book draws inspiration from the three volumes of *Studies in Federal Taxation* written by Randolph E. Paul between 1937 and 1940. Paul was the consummate practitioner, administrator, and scholar, who had little patience for the inscrutable. He set a matchless standard in extracting concrete meaning from tax case law, and in stating both what the law was and what it should be.

I urge you to use this book to understand the origin and place in the tax law of the tax specific doctrines, to understand the role and views of the Supreme Court in interpreting the Internal Revenue Code, and to find support for more lawyerly approaches to legal interpretation and fact finding in tax cases. That notwithstanding, in the end it may be necessary to develop systemic changes to address the more intractable difficulties of the interpretation and construction of the Code.

Finally, I thank Professor Michael Mulroney for reading the original manuscript and offering many useful suggestions, and Anne Dunn and the American Bar Association Section of Taxation for publishing and republishing this book.

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