Ernest J. Brown

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This is another of our occasional "interviews" with departed tax greats, conducted through the medium of their writings. Ernie Brown died in December 2001 after retiring from the Department of Justice Tax Division at age 94. Prior to his 30 years at the Justice Department, he had retired from teaching tax at the Harvard Law School.

Q **Do you believe that the Code should be literally interpreted by the courts?**

A "[T]hose who are troubled about the judicial handling of tax statutes should not rally around the standard of an unfailing literalness, certainly not until the skill, thoughtfulness and imagination of our statutory draftsmen approach nearer to perfection." Ernest J. Brown, *The Growing "Common Law" of Taxation*, 34 S. Cal. L. Rev. 235, 240 (1961).

Q **So, should judges be given free range?**

A No. "We can ask of a judge … that he devote energy and effort to acquire knowledge and understanding of the operation and structure even of complex statutes, …; that where the pattern of the statute appears obscure or confused, he follow the practice of a good navigator by taking sight not on one but on every available fixed point of statutory reference in order the more certainly to narrow the margin of error in ascertaining his position and course with reference to the problem before him." *Id*. at 240.

Q **Can you identify any one source of the most troubling judicial action in the tax area?**

A "[I]t is Supreme Court opinions, as opposed to Supreme Court decisions, which constitute the major source of our difficulty, which so often give unexpected—and some would say unwarranted—shape to the tax law…. An almost inevitable decision may be reached by reasoning plausible to the uninitiate, but questionable to the well-informed. When this occurs, we know the sequels which follow. It requires more hardihood than we normally find, or can expect to find, for a lower court judge—himself perhaps not confident of expertness in a difficult field—to dismiss as ill-considered or ill-advised a line of reasoning or a generalized statement appearing within the covers of the *U.S. Reports*. The staff of the Internal Revenue Service has not yet reached such a state of detached and dispassionate judgment as to exercise an ascetic selectivity among Supreme Court opinions which may aid it in holding positions already taken or open enlarged spheres for its activities." *Id*. at 241.

Q **What is to be done?**

A "It is clear that the Supreme Court relies heavily on the briefs of the Department of Justice in tax cases, and it is likely to continue to do so. …. If the Court is going to rely upon the Department of Justice, it seems to me that it is the responsibility of the department to act more as an administrator and less as an advocate. I see no evidence that the department accepts that responsibility.… [I]ts tax briefs appear to me to be those of an advocate bent on winning the particular case." *Id*. at 250.

Q **Is a solution to make the Code more specific?**

A No. "[T]he Internal Revenue Code of 1954 [contains many] intricate formulations [which] will defeat its own ends. The result will inevitably be either the slavish literalism which the British courts have adopted or, what is more likely for American judges, decisions which simply brush aside elaborate formulations in favor of what the individual judge, rightly or wrongly, senses to be the operative force of the statute. I

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should imagine that this judicial leap of faith would quite often be in the wrong direction simply because the very intricacy of the statute obscures both direction and limits designed to be imposed. I believe a statute, even a tax statute, can set forth the shape of its commands with relative clarity, and indicate the elements to be taken into account in applying them." *Id*. at 251.

Q What do you consider to be the hallmarks of a good judge of tax cases?

A [As in the case of Judge Magruder] there must be "the unfailing respect accorded to counsel, litigants, and lower-court judges. Consciously or unconsciously, the address of the opinions [of Judge Magruder] appears often to be to losing counsel or to the judge who is being reversed, never to rebuke but always to explain and, if possible, to convince." Ernest J. Brown, *Viginti Annorum Lucubrationes: The Tax Decisions of Judge Calvert Magruder*, 72 Harv. L. Rev. 1225, 1227 (1959).

Q What do you consider to be an unfortunate tendency in tax judging?

A "Perhaps the greatest difficulty in cases under the Internal Revenue Code, the most frequent source of the 'invisible boomerangs' to which Mr. Justice Jackson referred, lies not so much in the Code as in the tendency of judges to look for some single, and preferably simple, overriding formula or provision with which to dispose of a problem. This may be a judicial gloss. .... [In contrast, properly] the primary and satisfactory referents are legislative, in the history, development, or operation of the statute; only when they fail will he call upon his own assumptions." *Id*. at 1229-30.

Q When should a judge apply to other cases a Supreme Court decision that appears to broaden the reach of a general Code provision over specific Code provisions?

A "[D]ifficulties arise with transactions which undoubtedly are effective for many purposes, whether the criteria of that effectiveness be considered 'formal' or not. It is to the Commissioner's efforts to disregard whatever that effectiveness may be that [Judge Magruder] has shown marked reserve. When the Supreme Court, contrary to what appeared to be the structure of the statute as well as the specific provisions of section 4(a) of the Revenue Act of 1934, held in *Helvering v. Clifford* that the general definition of gross income in section 22(a) might override the allocations of tax liability as between grantor, trustee and beneficiary of a trust contained in Supplement E, Judge Magruder was reluctant to see this as a recasting of the statute instead of a decision which 'rests on its particular facts, as the Court was careful to say ....' ... [Magruder cautioned that] 'In this process of case-law development, courts are apt by insensible degrees to be led to conclusions incompatible with the statutory framework. The corrective of this ... is to get back to the provisions of the Internal Revenue Code itself, ...'" *Id*. at 1231-32.

Q Professor Ginsburg delights in recounting that the Commissioner's stick can turn into a green snake that will bite him on the hindparts. Do you agree, and should this problem inform the judicial process in tax cases?

A "[T]hough a given tax case is inevitably a contest between the claim of the public revenue and the claim of the taxpayer, the point at issue need not be. Many, though not all, tax decisions cut both ways. The considerations advanced on behalf of the revenues today will be as strenuously advanced by a taxpayer tomorrow. This is perhaps a comfort, though I should doubt that this concept of the judicial function would permit Judge Magruder to reach different decisions if it were not so. He has discounted, rather than enlarged upon, motivations. Or perhaps I should say that he assumes the existence of motivations which normally lead to tax disputes and tax litigation, and dispassionately regards them as discreditable neither to the Commissioner nor to the taxpayer." *Id*. at 1246-47. ■