

## The Supreme Court's Federal Tax Jurisprudence

An Analysis of Fact Finding Methods and Statutory Interpretation from the Court's Tax Opinions, 1801–Present

By Jasper L. Cummings, Jr.

STUDIES IN TAXATION



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Reviewed by Peter L. Faber\*

Jasper L. Cummings, Jr., an experienced tax practitioner and former Service official, has written an excellent analysis of the Supreme Court's federal tax jurisprudence. Having reviewed over 900 Supreme Court opinions focusing on federal tax matters,

Mr. Cummings concludes that the Supreme Court has had a significant impact on the development of the tax law although its opinions have often been misinterpreted.

This may come as a surprise to some who have noted the Court's apparent lack of interest in tax cases. One is reminded of Justice Souter's comment that it was important to show up at the Chief Justice's annual Christmas party and sing carols along with the others because a failure to do so could get one assigned to write the opinions in the tax cases. More recent appointees to the Court have not had much business experience, and none of the Justices have had a significant tax background (except, perhaps, for Justice Ginsburg, whose late husband, Professor Martin D. Ginsburg, was one of the finest tax lawyers of his or any generation).

Some have argued that tax cases should be taken away from the Circuit Courts of Appeals and the Supreme Court and assigned to special appellate courts that deal only with tax cases and that have technical expertise in tax matters. Mr. Cummings argues persuasively that tax issues are not unusual and that the Courts of Appeal and the Supreme Court have been perfectly capable of dealing with them over the years. This writer agrees. There is something to be said for having the ultimate call in litigation rest in the hands of judges and justices who are not tax technicians but who bring to bear on tax cases the wisdom and experience of mature and thoughtful citizens who are not wrapped up in the technical minutiae

that we tax professionals (perversely perhaps) love so well. Some of the recent tax shelter cases, in which pro-taxpayer trial court decisions were reversed by Courts of Appeal that looked through the technical mumbo-jumbo of elaborate structures put together by tax shelter promoters and focused on what was really going on, prove the point.

Mr. Cummings devotes a considerable amount of attention to the development of the economic substance/business purpose doctrine since the seminal case of *Gregory v. Helvering*, 293 U.S. 465 (1935). He argues (convincingly in this writer's view) that the opinion was not intended by the Court to lay down a general business purpose requirement for all matters in all situations. Rather, it focused on a particular transaction that in the Court's view was intended to disguise a simple sale of stock, which would have been taxable, as a corporate reorganization, which it was not. He argues that the Court in *Gregory* was simply interpreting the words "pursuant to a plan of reorganization" in the statute, holding that the facts presented to it did not involve a transfer pursuant to a "plan of reorganization" but, rather, a taxable sale dressed up in "reorganization" clothes. The Court, and the Second Circuit below, were simply trying to figure out what happened and, once having done so, to determine whether those facts amounted to a "plan of reorganization" within the meaning of the statute. The Court was not attempting to establish a general rule that all transactions must have a non-tax business purpose to be respected. Mr. Cummings

traces the later development of the doctrine and its expansion by lower courts to become a principle of broader application than the Supreme Court envisioned at the time.

Although not directly related to Supreme Court jurisprudence, Mr. Cummings includes interesting material about the recently enacted codification of the business purpose/economic substance doctrine by Congress. Many tax practitioners, including this writer, believe that codification was ill-advised. Although the doctrine may have been expanded beyond the Supreme Court's original intent, it has served the tax system well as applied by the courts, and taxpayers who have engaged in transactions for the sole purpose of inventing a tax deduction or credit to shelter unrelated income have done so at their peril. Attempting to pin down its scope precisely in statutory language may prove to be a mistake, leading to over-reaching by revenue agents to apply it and over-planning by taxpayers to avoid its impact. Some principles of law are better determined and applied by the courts than they are by the legislature, and this is one of them. The in terrorem impact of vague judicial doctrine may be watered down once it is reduced to precise statutory language. Time will tell.

Mr. Cummings argues that in the 19th Century the Supreme Court and other courts generally presumed that taxes were an infringement of liberty and that tax statutes should be strictly construed against the government. He sees the development of Supreme Court jurispru-

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# ABA Section of Taxation CLE Calendar

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DATE	PROGRAM	CONTACT INFO
October 21-22, 2010	<b>ALI-ABA Course of Study: Tax Exempt Charitable Organizations</b> Washington Marriott at Metro Center – Washington, DC	ALI-ABA <a href="http://www.ali-aba.org">www.ali-aba.org</a> 800-CLE-NEWS
October 26-27, 2010	<b>21st Annual Philadelphia Tax Conference</b> Union League of Philadelphia – Philadelphia, PA	Tax Section <a href="http://www.abanet.org/tax">www.abanet.org/tax</a> 202.662.8670
November 3, 2010	<b>Civil Tax Penalty Abatements – Fact or Fiction?</b> CLE Teleconference & Live Audio Webcast	Tax Section <a href="http://www.abanet.org/tax">www.abanet.org/tax</a> 202.662.8670
November 10, 2010	<b>The Rubber Meets the Road: Understanding the Impact of Schedule UTP</b> CLE Teleconference & Live Audio Webcast	Tax Section <a href="http://www.abanet.org/tax">www.abanet.org/tax</a> 202.662.8670
December 2-3, 2010	<b>27th Annual National Institute on Criminal Tax Fraud</b> Hotel Nikko – San Francisco, CA	ABA Center for CLE <a href="http://www.abanet.org/cle">www.abanet.org/cle</a> 800.285.2221
March 21-22, 2011	<b>2011 ABA/IPT Advanced Income Tax Seminar</b> The Ritz-Carlton New Orleans – New Orleans, LA	Tax Section <a href="http://www.abanet.org/tax">www.abanet.org/tax</a> 202.662.8670
March 22-23, 2011	<b>2011 ABA/IPT Advanced Sales/Use Tax Seminar</b> The Ritz-Carlton New Orleans – New Orleans, LA	Tax Section <a href="http://www.abanet.org/tax">www.abanet.org/tax</a> 202.662.8670
March 24-25, 2011	<b>2011 ABA/IPT Advanced Property Tax Seminar</b> The Ritz-Carlton New Orleans – New Orleans, LA	Tax Section <a href="http://www.abanet.org/tax">www.abanet.org/tax</a> 202.662.8670
April 14-15, 2011	<b>11th Annual Tax Planning Strategies – U.S. and Europe Conference</b> Château de la Muette, OECD Headquarters – Paris, France	Tax Section <a href="http://www.abanet.org/tax">www.abanet.org/tax</a> 202.662.8670
June 15-17, 2011	<b>4th Annual U.S. – Latin American Tax Planning Strategies Conference</b> Mandarin Oriental – Miami, FL	Tax Section <a href="http://www.abanet.org/tax">www.abanet.org/tax</a> 202.662.8670

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dence in the 20th Century as indicating a movement away from this position toward a pro-government slant in which the Court was primarily concerned about protecting the fisc against abusive conduct by taxpayers. Certainly, the proliferation of tax shelters (both individual and corporate) in the latter part of the 20th Century put pressure on the courts. Taxpayers have devised intricate strategies aimed at exploiting specific statutory and regulatory provisions that in many cases led to an odd and pro-taxpayer result. The courts, often applying sophisticated (and less sophisticated)

versions of the “smell test,” have felt a need to fill the gaps that they felt had been left by legislators, the Service, and state revenue departments. If this has seemed to indicate a pro-government bias, arguably it has been prompted by aggressive strategies adopted by taxpayers. It is not clear that a pro-government bias has been evident in cases involving run-of-the-mill business transactions. The Supreme Court's decision in *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978), upholding the form of a financing structure, is a case in point.

Mr. Cummings makes a persuasive case for the proposition that the Supreme Court has had a significant impact on the development of the federal tax laws. His book should be required reading for all practitioners and students of the subject. ■

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