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Book Review. Cases and Materials on Federal Taxation, 5th ed. by Erwin N. Griswold

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Book Review

CASES AND MATERIALS ON FEDERAL TAXATION (Fifth Edition).

Dean Griswold's casebook on federal taxation is now in its fifth edition, published in 1960 twenty years after the first edition in 1940. This casebook now has been in use longer than any of the other three federal taxation casebooks which are currently in general use. The first edition represented an important innovation in 1940. Federal taxation in that edition was treated as a subject worthy of consideration by itself, without being combined with state taxation, as had been the practice previously. Furthermore, the material devoted in that first edition to constitutional questions was, with justification, limited; and this also was a point of departure from the past. No doubt that first edition played an important role in the belated recognition of federal taxation as a separate course in the curricula of law schools in this country.

The fifth edition marks no significant departure from the fourth edition. The arrangement of materials is virtually the same: some old cases have been deleted and materials from the annual supplement and other recent materials and cases have been inserted. In length the casebook has grown from the 1030 pages of the fourth edition to 1152 pages, but there had been 200 pages in the 1959 supplement to the fourth edition. The first edition in 1940, incidentally, was only 744 pages long.

The amount of material contained in this casebook is about the same as that in two other current casebooks on federal taxation—Bittker's Second Edition and Bruton and Bradley's 1955 Edition. The Griswold casebook does contain more up-to-date material than Bruton and Bradley, which, furthermore, is not kept current with annual supplements as in Dean Griswold's casebook. Each of these three casebooks deals in separate portions with federal estate and gift taxation, as well as covering federal income taxation. This is in contrast to Surrey and Warren who have separate casebooks, one for estate and gift taxation and another for income taxation.

The coverage in Dean Griswold's casebook is much narrower than in the lengthier works of Surrey and Warren. While there would scarcely be a concept to which I would want to introduce my students which would not be found in Surrey and Warren, this is less true of the Griswold casebook. Indeed, Dean Griswold in his preface disclaims any effort to make his work encyclopedic. This, however, is a virtue, for it makes the casebook manageable in the three hour course in federal income taxation which I teach. (Of course, I would like more time than three semester hours for teaching federal income taxation.)

Dean Griswold's reputation as a scholar and the reputation of his casebook are both securely and justifiably established. Some details of arrangement of materials and the occasional omission of a case might be criticized in this review, but such trivial criticisms hardly seem worth the effort. The important question, of course, is the usefulness of this casebook in teaching federal taxation to law students.

The reviewer believes that this casebook, accompanied (as the author, of course, contemplated) by material from the Code and Regulations is not the most effective method for teaching federal taxation. Another
ingredient is in my opinion needed—a set of problems drafted for use in teaching a law school course in federal taxation.

In my taxation courses I give the students a series of fact situations. These form the basis for our classroom discussion, with supplementation by some lectures. The students have available Dean Griswold's casebook and the Commerce Clearing House paperbound editions of the Code and Regulations. (All are, of course, indexed.) The students are told to research each problem in the Code, the Regulations, and the casebook and be prepared to discuss their findings and analysis in class. I suggest to the students the possibility of forming teams of two to four persons in order to cross-check their work before class.

My experience and an overwhelming consensus expressed to me by my former students convince me that the problem method is clearly superior to the case method for teaching federal taxation. Here are some reasons in support of my conclusion being valid:

1. The problem method has the great virtue of the case method—fact orientation. This focuses on the concrete and lessens the probability of the classroom becoming a forum for generalizations for which the student has no frame of reference for meaningful understanding and assimilation.

2. The case method has reached the point of diminishing returns by the second half of the second year or the first half of the third year of law school, the usual place for federal taxation in the curriculum. This, of course, is my conclusion and others may not agree. But my recollection of my days as a law student, my observations of law students since becoming a teacher, and my discussions with students and alumni lead me to believe the facts support my conclusion that the case method becomes much less effective in the last half of law school. This is what students (other than one-fourth or less for whom persistent efforts are indicated for graduation) are typically doing in courses taught by the case method during the last half of law school—merely reading, not studying, the cases so that if called upon they can recite without undue embarrassment and if not, take notes on the analyses and concepts developed in class. Then only during the “big push” of review the three weeks or so before examinations do they, if at all, become “full time” law students. (How else explain the students with substantially full time outside jobs and those on law review?)

This is not particularly a criticism of the students. They have by then developed to a substantial degree the ability to analyze and compare cases, even including paying some attention to the notes and other materials in the casebook. Further continuance of the same type study has become boring. There are no new skills to master, and the students are intelligent enough to know that the range of substantive doctrines to be mastered in most courses can be learned in less than fifteen weeks.

3. Statutory material and administrative regulations have generally been neglected in the law school curriculum. Use of problems in the federal taxation course in conjunction with the Internal Revenue Code and Regulations helps correct this defect. A significant new skill—statutory analysis—can be developed while acquiring an understanding of some of the basic concepts and problems in federal taxation. (Dean Griswold is well aware of the need to focus attention on the Code. See for instance page 285 of his casebook, as well as the preface, page ix. But can you get the students to pursue and ponder Code sections by
cases [generally with pre-1954 Code section numbers and often involving variations from the present statutory language] and exhortations? I believe you can with problems.)

4. There is a shock effect upon the students from close contact with the complex Internal Revenue Code, comparable to the shock effect of cases in the first semester of law school. This is desirable, for there is presented a challenge to the students and also a deflation of any belief by the students that they have little else to learn from law professors.

5. There is a close correlation between the problem method and the practice which will be encountered by those students who upon graduation go into the better law offices. The problem method places emphasis upon research and synthesis, as well as upon analysis.

6. The change of pace to the problem method improves motivation and morale among the students.

7. There is fair play in the use of hypotheticals. The problem method is essentially a new and extended use of hypotheticals. But instead of the professor being the only one with the opportunity for advance reflection on the hypotheticals so that he is in a vastly superior position for sleight of hand and dazzling feats, under the problem method everyone is let in on the act so all can reflect in advance.

8. Much of the judicial process involves what Leon Green calls "competing formulas." With problems, many of the major competing formulas can be injected into the course early in simple fact situations, and then fed back again later in more complex fact situations along with an increasing circle of new formulas and concepts from the Code, Regulations, and materials in the casebook.

9. With the apparently never ending proliferation and amendment of the Internal Revenue Code, there will always be many important statutory provisions as to which there are no case opinions and which cannot be studied by case material.

It would be imbalanced, however, to study federal taxation solely from problems and the Code and Regulations. Cases play a role, and Dean Griswold's casebook contains most of the outstanding judicial landmarks in federal taxation and a great many other helpful cases and materials, besides. I counsel my students in federal income taxation to study the entire contents of Chapters 3 through 9 of Dean Griswold's casebook and in federal estate and gift taxation the entire contents of Chapters 11 and 12 of that casebook, even those parts of those chapters that are not brought into the discussion of the problems.

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