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October 9, 1941

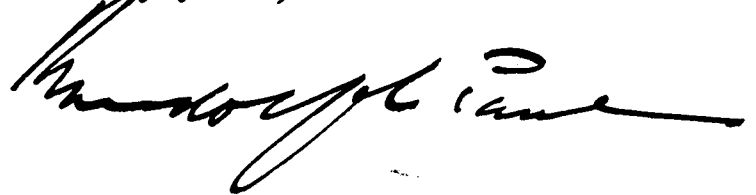
Mr. Elliott Thurston,
Federal Reserve Board,
Washington, D. C.

Dear Mr. Thurston:

I enclose herewith a much rewritten copy of the National Tax Association paper I sent you the other day. You will see how I have benefited from material you have furnished me and Marriner Eccles' statements at various points of time.

Will you write it down on the cuff to send me a copy of whatever Marriner expects to say at the luncheon on Tuesday? I always like to keep up with his mobile ideas.

Sincerely yours,



REP/eh

October 15, 1941.

Dear Mr. Paul:

Let me take this occasion to thank you again for your help in connection with the St. Paul speech and for sending copies of your papers both to the Chairman and to myself.

I am enclosing a mimeographed copy of the Chairman's speech, which was not ready in time to mail to you before you had left to go to the Association's meeting.

Yours sincerely,

Elliott Thurston,
Special Assistant
to the Chairman.

Mr. Randolph Paul,
Lord, Day & Lord,
25 Broadway,
New York.

Enclosure.

ET cm

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WASHINGTON OFFICE
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October 11, 1941

Hon. Marriner Eccles,
Federal Reserve Board,
Washington, D. C.

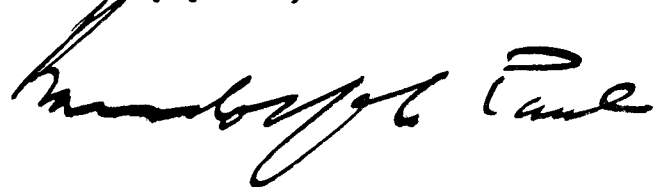
Dear Marriner:

I think I did an injustice to Surrey in a reference to him in the statutory construction paper recently sent to you, and I have revised three pages which are enclosed herewith. Will you substitute these pages for the corresponding ones in your copy?

You will see from the enclosed copy of another paper to be delivered before the National Tax Association on revenue revisions that I have borrowed freely from your prolific ideas.

I am looking forward to seeing you in St. Paul.

Sincerely yours,



REP/eh

approaches are being taken for granted.¹⁵ It is a definite step forward when opinions on constitutional issues are short and almost snappy.

The Bruun case¹⁶ furnishes a striking example of how little is left of the unreconstituted Constitution. The few pages of the opinion in that case, written by Mr. Justice Roberts, courteously distinguish Eisner v. Macomber¹⁷ out of existence. No longer will the concept of income be restricted to the paralyzing requirement that it must be something proceeding from and severed from capital for the separate use, benefit and disposal of the taxpayer. Something else may now answer the description. Importance is all along the line, but in the stock dividend area new test cases are now being advanced so that common stock dividends upon common stock, with no other class of stock outstanding, may soon be taxable income.¹⁸

Mr. Stanley Surrey, Assistant Legislative Counsel of the Treasury, has said, no doubt in the mood of hyperbole, that the Sixteenth Amendment is "an historic relic" and can now "scarcely claim a place even in the attic of the Supreme

15. See Helvering v. Northwest Steel Rolling Mills, Inc., 311 U.S. 46, 52 (1940), to the effect that a corporation's charter, taken together with state law, does not constitute "an executed written contract expressly dealing with the payment of dividends." See 1936 Act, Sec. 26(c)(1).

16. Helvering v. Bruun, 309 U.S. 461 (1940).

17. 252 U.S. 189 (1920).

18. See, e.g., Frank M. Travis, BTA Docket No. 105950.

Court."¹⁹ Some critics have called the "extreme economic philosophy" of the "New Deal majority in the Court" a "trend toward confiscation of private property . . . in violation of the letter and spirit of the Constitution."²⁰ Of course, such statements are gross exaggerations. Constitutional victories for taxpayers in the income tax field have always been noted for their rarity.²¹ It is true that the Constitution needed some reinterpretation; the old interpretation of the Sixteenth Amendment has been the principal impediment to the development of a sound income tax system. In the estate tax field the versatile Fifth Amendment²² has a quota of damage to its discredit; moreover, in both branches of taxation fears of unconstitutionality have frequently distorted the interpretative process.²³

19. Surrey, *The Supreme Court and the Federal Income Tax: Some Implications of the Recent Decisions*, 35 Ill. L.R. 779, 792-3 (1941).

20. Lawrence, *High Court "Captured" in Tax Cases*, *The Evening Star*, Washington, D. C., Oct. 9, 1940. See also Mr. Lawrence's discussion in the *New York Sun*, July 14, 1941.

21. *Eisner v. Macomber*, 252 U.S. 189 (1920); *Edwards v. Cuba R.R. Co.*, 268 U.S. 628 (1925); *Evans v. Gore*, 253 U.S. 245 (1920), overruled by *O'Malley v. Woodrough*, 307 U.S. 277 (1939).

22. Frankfurter, *Law and Politics*, p. 54 (1939).

23. See, e.g., *Lucas v. Alexander*, 279 U.S. 573, 577 (1929); *Lewellyn v. Frick*, 268 U.S. 238 (1925); *Reinecke v. Northern Trust Co.*, 278 U.S. 339 (1929).

Speaking more broadly, in the earlier days of modern taxation constitutional issues were overmagnified and some reaction was inevitable. The Constitution was badly construed, and the Court is now putting constitutional restraints at a much more remote point. It is easy at such a time to lose perspective and to think that all restraints are gone. It would be more accurate to think that some of the gloss of the Constitution - some of the judge-made law of the Constitution nowhere found in the text of the instrument - is going to the attic. To change the metaphor, the reconstituted Supreme Court is chloroforming some of the old rabbits which their predecessors had pulled out of the constitutional hat. We have a reinterpreted Constitution, not no Constitution at all. We shall surely preserve a Constitution to implement the promise that the power to tax shall not be the power to destroy while the Supreme Court sits.²⁴

Statutory Construction

Since our tax statute is anchored in statutory law,²⁵ the principal tax labors of the Supreme Court are in the vineyards of statutory construction. Here we may note in

24. Holmes, J., dissenting in *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928); Frankfurter, J., concurring in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491-2 (1939).

25. Surrey, *The Supreme Court and the Federal Income Tax: Some Implications of the Recent Decisions*, 35 Ill. L.R. 779, 804 (1941).