

3.8 Million and Counting

The Complexity and Wordiness of Tax Law

By Marjorie Gell

It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood.

—James Madison

Last week, I received an e-mail from the chairperson of the State Bar's Libraries, Legal Research, and Legal Publications Committee on which I serve. The e-mail was to remind me of an upcoming deadline for a *Michigan Bar Journal* article on "any tax research-related issue that you choose: 1,250 words."

As I read the message, I had several thoughts. First, how could I possibly write an interesting article on such a barnburner of a topic? Second, how in the world was I going to meet the short deadline? And finally, what did "1,250 words" mean? No more than 1,250 words? At least 1,250 words? Exactly 1,250 words?

Afraid to inquire, I was taken back to my high school days (yes, before the days of personal computers). And suddenly I was there, late at night at the kitchen table with my mother, a former English teacher. As I scribbled down the words on paper, my mother typed them on the electric Smith Corona. The goal: a 750-word essay on *The Grapes of Wrath* or *Madame Bovary* or *The House of Mirth*. I don't remember caring much about the quality or substance of what I wrote; my main concern was meeting the 750-word requirement. The pressure was excruciating. As my mother would finish a page, I would count the words. And, I recall, I usually cut it pretty close.

While we were encouraged back in the '70s to express ourselves in as many words as possible, the more modern less-is-more approach emphasizes a clear, concise writing style. Succinctness. Brevity. Clarity. Which

brings me to the tax research topic of my choice: the inherent complexity and wordiness of tax law.

If there is a doubt as to the complex nature of tax law, consider that I (and many tax law professors across the country) teach an advanced law school course called Federal Tax Research. With the exception of tax and perhaps patent and insurance law, law schools do not typically offer research classes on specific areas of law. While many schools offer LLMs in taxation, post-JD degrees are not offered in most law disciplines (for instance, to my knowledge, there is no such thing as an LLM in torts, contracts, or civil procedure). When I advise students who want to enter the field of tax law, I tell them that in addition to a JD, an LLM in tax or a CPA designation is recommended. Why is this so? What makes this necessary? And what is so special about tax law? To answer these questions, let's take a look at a fundamental source of tax law, and one which most of our state tax laws follow: the Internal Revenue Code (the Code).

It Takes More Than an Einstein to Understand the Internal Revenue Code

The Code is hard to understand. It just is. In fact, tax law in general is hard to understand. Even Albert Einstein admitted: "The hardest thing in the world to understand is the income tax."¹ In her annual report to Congress in 2010,² National Taxpayer Advocate Nina Olson identified the complexity of the Code as the number-one problem facing taxpayers. As she pointed out, the Code's sheer complexity and regulations result in honest taxpayers making frequent errors that lead to either tax overpayments or, perhaps worse, tax underpayments that become subject to IRS enforcement. And so-

phisticated taxpayers—the ones who can afford to hire tax lawyers and accountants to find ways to reduce or eliminate taxes—are often viewed in a cynical light as receiving special tax breaks not available to everyone else. Such cynicism ultimately compromises tax compliance.³

The cynicism is not hard to detect, particularly in an election year. For instance, much has been made of GOP candidate Mitt Romney's reluctance to publicly release his tax returns. When his 2010 income tax return was finally disclosed, it became almost a symbol of how complex our tax system has become. The implications of releasing his returns were not lost on Romney, who warned: "You'll see my income, how much taxes I've paid, how much I've paid to charity. You'll see how complicated taxes can be."⁴ So how complicated did we find it? Romney's 2010 return was a staggering 547 pages, including 6 IRS schedules, 8 forms, and 69 income statements.⁵ Imagine the fun his accountants and tax lawyers had preparing his returns; the instructions alone for the 2010 Form 1040 (including schedules) were 189 pages. By comparison, in 1913 (the first year of the income tax), Form 1040 was a mere three pages long and included one page of instructions.⁶ It is no wonder that taxpayers in this country spend an estimated 6.1 billion hours annually trying to figure out how to comply with U.S. tax laws.⁷

One Man's Loophole is Another Man's Public Policy

Does our current federal tax system really need to be so complicated to achieve goals that include fairness, revenue generation, and economic stimulation? The answer depends on whom you ask. One man's loophole, as they say, is another man's public policy.⁸ There is little doubt that the

Code has been shaped by politicians representing interested parties who successfully persuade Congress that a particular provision is in the public interest. And there is also little doubt that many of these so-called special interests are not you or I. Tempting as it is, however, to blame the complexity solely on special interests that lobby for tax breaks and benefits, the biggest tax breaks in the Code are actually the ones that benefit a large segment of taxpayers; the three largest are the exclusion for employer health insurance, exclusions for employer contributions to pensions/employee contributions to 401(k) plans, and the mortgage interest deduction.⁹ Olson put it this way: "Narrow tax breaks certainly exist, but the reality is that the biggest 'special interests' are us—the vast majority of U.S. taxpayers."¹⁰

Who's Counting?

The explanation for why tax laws are so complicated is just that: complicated. Much of the Code's complexity, however, can be attributed to the fact that our tax rules are so voluminous. And just how voluminous are they? In the words of James Madison, "so voluminous that they cannot be read."¹¹ Literally. According to Olson, as of two years ago, the Code consisted of more than 3.8 million words; with tax regulations, the count jumps to more than 9.4 million words. In book form as available from tax publisher CCH, a copy of the current Code and its regulations would take up more than nine feet of shelf space.¹²

Let's put this into perspective. An average reader reads 300 words per minute. At that rate, it would take almost 212 hours of uninterrupted reading to finish the Code and more than 522 hours to read the Code and regulations. In billable hours, at \$200 an hour, it would cost \$42,222 in legal fees to read the entire Code and \$104,444 to read the Code and regulations. Never mind that merely reading the Code and regulations will not likely render a precise understanding of federal tax law. At the very least, case-law and administrative guidance would be needed to fill in the gaps. And this doesn't take into account the thought required to digest and analyze the complex provisions of the Code and regulations. As Madison

warned us about voluminous and complex laws, there is no possibility that anyone could read the entire body of federal tax law, let alone fully interpret it.

Why does the Code have so many words? After all, when it was enacted in 1913, it consisted of slightly more than 11,000 words. Part of the explanation, aside from the fact that we are a more complex society than 100 years ago, is that when new ways of avoiding or minimizing taxes are discovered, more tax provisions are enacted to counteract the effects. As new revenue sources are sought, more phase-outs and sunset provisions are put into place. And of course, the additional deductions, exemptions, tax credits, and ever-changing tax rates generally mean more Code provisions and regulations. According to Olson, there have been at least 4,428 changes to the Code in the last 10 years alone.¹³ I haven't done the research, but I can bet (and you can, too) that most of these changes involved the addition, not the elimination, of words. All this translates into challenges to keep up with and understand—not just for taxpayers, but for tax practitioners as well.

I'm no Einstein, but I believe he was right: there is probably nothing more difficult to understand than tax law.

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What a relief it is to have finished another article on the fascinating topic of tax research.¹⁴ If you are reading this, you know that I made the *Michigan Bar Journal* deadline. Indeed, the topic was a tax research issue of my choice. And I think I have met, give or take, the 1,250-word requirement. But please do me a favor: don't count. ■



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FOOTNOTES

1. Internal Revenue Service, *Tax Quotes* <<http://www.irs.gov/newsroom/article/0,,id=110483,00.html>>. All websites cited in this article were accessed June 17, 2012.
2. Olson, *National Taxpayer Advocate: 2010 Annual Report to Congress* (Washington, DC: Taxpayer Advocate Service, 2010), p 3, available at <http://www.taxpayeradvocate.irs.gov/files/ExecSummary_2010ARC.pdf>.
3. Olson, *Complexity and the Tax Gap: Making Tax Compliance Easier and Collecting What's Due* (Washington, DC: United States Senate Committee on Finance, June 28, 2011), p 1, available at <http://www.irs.gov/pub/irs-utl/nta_testimony_taxgap_062811.pdf>.
4. Hechtkopf, *Mitt Romney: People "will talk," but "no surprises" in tax returns*, CBSNews, January 23, 2012, available at <http://www.cbsnews.com/8301-503544_162-57364439-503544/mitt-romney-people-will-talk-but-no-surprises-in-tax-returns/>.
5. Editorial, *Romney's Fair Share*, Wall Street Journal, January 25, 2012, p A16, available at <<http://online.wsj.com/article/SB10001424052970203718504577180932481728706.html>>. Romney's Form 1040 was 203 pages. For a copy of the return, see <<http://www.mittromney.com/learn/mitt/tax-return/2010/wm-rad-return>>.
6. United States Internal Revenue, Form 1040 (1913), available at <<http://www.irs.gov/pub/irs-utl/1913.pdf>>.
7. Olson, n 3 at 2.
8. Cooper, *Overtaxed by Tax Revision*, New York Times, September 10, 1984, p A21, available at <<http://www.nytimes.com/1984/09/10/opinion/overtaxed-by-tax-revision.html>>.
9. Gravelle and Hungerford, *The Challenge of Individual Income Tax Reform: An Economic Analysis of Tax Base Broadening* (Washington, DC: Congressional Research Service, March 22, 2012), p 7, available at <<http://www.fas.org/sgp/crs/misc/R42435.pdf>>.
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11. The Federalist Papers, No. 62, available at <<http://www2.hn.psu.edu/faculty/jmanis/poldocs/fed-papers.pdf>>.
12. Chris Edwards, *The Tax-Code Mess* <<http://www.cato.org/publications/commentary/taxcode-mess>>.
13. Olson, n 3 at 12.
14. See Gell, *Warhol meets tax: Electronic tax law sites to beautify your life*, 88 Mich B J 50 (December 2009), available at <<http://www.michbar.org/journal/pdf/pdf4article1616.pdf>>; Gell, *A "top ten" list of online tax law resources*, 86 Mich B J 66 (August 2007), available at <<http://www.michbar.org/journal/pdf/pdf4article1203.pdf>>.