

Unauthorized Practice of Law - What Constitutes the "Practice of Law" in Tax Matters

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UNAUTHORIZED PRACTICE OF LAW — WHAT
CONSTITUTES THE "PRACTICE OF LAW"
IN TAX MATTERS

The development of taxation over the past quarter of a century in the United States by both State and Federal governments might perhaps best be characterized as a gradual but almost uninterrupted increase in both the size of the tax load on the average taxpayer and the complexity of the tax law itself. Assuming this to be true, it is not difficult to understand why during these years more and more taxpayers sought expert assistance in the preparation of their income and other tax returns, and, generally speaking, in the discharge of their obligations as taxpayers. This in turn produced increasing competition among those who regarded themselves as qualified to render such assistance, and, more particularly, what might be termed a "jurisdictional dispute" between members of the legal and accounting professions, both of which have in the past claimed the right to occupy almost the entire field mentioned above, which we will call "tax practice."¹ This dispute seems not only regrettable but also unnecessary, and much has been done of late to place the relations between the two professions on a harmonious basis.²

The purpose of this comment will be, approaching the problem from a legal point of view, to arrive at a practical as well as legally tenable line of demarcation between the proper functions of lawyers and accountants in the field of tax practice. The best way to define such a line of demarcation would seem to be to arrive at a proper as well as sufficiently inclusive legal test of what constitutes "the practice of law" in tax practice, assuming that activities included under that heading would be open only to attorneys, while all other activities or services could properly be performed by accountants as well as other non-lawyers, whom we shall term "laymen."

In order to intelligently discuss any legal test of what constitutes the practice of law, one must bear in mind the two main purposes for which attorneys are licensed before being allowed to practice their profession. These two main purposes are: (1) the protection of the public from the evils brought about by those who assume to practice law without the proper qualifications; and (2) the supervision of the activities of those who have been licensed to practice law.³

¹ *E.g.*, Gardner v. Conway, 48 N.W. (2d) 788 (Minn., 1951); also briefs in Re Bercu, 273 App. Div. 524, 78 N.Y.S. (2d) 209 (1st Dept., 1948), *aff'd*, 299 N.Y. 728, 87 N.E. (2d) 451.

² Austin, *Relations Between Lawyers and Certified Public Accountants in Income Tax Practice*, 36 IOWA L. REV. 227 (1950).

³ Gardner v. Conway, *supra*, note 1.

With the above in mind we shall proceed to examine the various tests of what constitutes the practice of law propounded by our courts, and their application to tax practice.

THE "MATTERS CONNECTED WITH THE LAW" TEST

An early and succinct statement of this test is found in *Re Duncan*,⁴ in the following language:

"According to the generally understood definition of the practice of law in this country, it embraces . . . the preparation of legal instruments of all kinds, and, in general, all advice to clients, and all action taken for them in matters connected with the law."⁵

The vagueness of this test is readily apparent. It is hard to imagine any phase of human activities today which is not in some way "connected with the law," at least in the sense that there are statutes regulating it or that civil or criminal liability might arise from it. That is perhaps the reason why many courts, while citing and relying on the *Duncan* test in a variety of situations involving the unauthorized practice of law, have done so only by using the *Duncan* test in conjunction with one or more of the other tests evolved on the point and discussed below.⁶

Applying the *Duncan* test to tax practice generally, it would appear that the entire field is necessarily one which belongs under the classification of practice of law, and thus open to attorneys only. Generally speaking, the foundation of all tax liability is in statutes, as interpreted and construed by court decisions and administrative rulings. Thus it would seem that almost anything relative to taxation is a "matter connected with the law" and thus any advice or action taken on behalf of others in tax matters constitutes unauthorized practice of law. This conclusion is quite untenable, because there is no sound rule or policy which would require that the entire field of tax practice be open to lawyers exclusively, as will be seen later. At any rate, there seem to be no cases applying the *Duncan* test alone to tax practice.⁷

THE "STRICT LEGAL INSTRUMENT" TEST

Another test evolved by the courts in order to determine what constitutes the practice of law has been defined as follows:

⁴ 83 S.C. 186, 65 S.E. 210 (1909).

⁵ *Ibid.*, 65 S.E. at p. 211.

⁶ *E.g.*, Rhode Island Bar Ass'n. et al. v. Automobile Service Association et al., 55 R.I. 122, 179 A. 139 (1935), where a corporation which entered into contracts obligating it to furnish legal services in certain specified cases was held to have practiced law. In Grand Rapids Bar Ass'n. v. Denkema, 290 Mich. 56, 287 N.W. 377 (1939) the preparation of deeds and wills was held to constitute the practice of law. In both of these cases the court applied the *Duncan* test, but relied on other tests also.

⁷ In *Re Opinion of Justices*, 289 Mass. 607, 194 N.E. 313 (1935) the court applied the *Duncan* test along with other tests, but intimated that the entire field of tax practice would not necessarily involve the practice of law.

"In a larger sense it (the practice of law) includes . . . the preparation of legal instruments . . . by which legal rights are secured, although such matters may or may not be pending in court."⁸

In applying this test to tax and other practice situations, we are concerned with the drafting and preparation of documents as distinguished from advice or other action.

This "strict legal instrument" test has been applied by the courts in a number of instances involving a wide variety of documents.⁹ In particular, the following non-tax documents have been held to be "strict legal instruments" subjecting their unauthorized draftsmen to liability: wills,¹⁰ contracts of sale,¹¹ deeds and trust deeds,¹² mortgages,¹³ assignments and leases of letters patent,¹⁴ petitions in dispossess cases,¹⁵ etc.

Applying the "strict legal instrument" test to tax practice, we will first examine the question of preparing income tax returns. It would appear that, generally speaking, income tax returns, while not comparable in effect to deeds or mortgages, might still be regarded as "strict legal instruments" in the sense that legal rights are secured by them. A correctly prepared income tax return, if accompanied by payment of the required tax, would secure to the person submitting the same the legal right to be free from further tax liability on his income. The trend of judicial reasoning, however, has apparently reached the contrary conclusion. Self-assessing tax returns are generally regarded as primarily informative in character and not of the nature of strict legal instruments which establish, limit or terminate rights and liabilities. Consequently the courts generally hold that their preparation, especially those of a simpler sort, is open to laymen.¹⁶

It seems therefore safe to say that the preparation of tax returns and declarations of all kinds does not constitute the practice of law, at least under the "strict legal instrument test," provided the primary purpose of such return or declaration is to inform the tax authorities of facts and figures in connection with a taxpayer's statutory tax liability, rather than to establish or terminate such liability. It will be

⁸ *Eley v. Miller*, 7 Ind. App. 529, 34 N.E. 836 (1893).

⁹ Note 111 A.L.R. 22, and cases there cited.

¹⁰ *Grand Rapids Bar Ass'n. v. Denkema*, *supra*, note 6.; *People v. People's Trust Co.*, 180 App. Div. 494, 167 N.Y.S. 767 (2d Dept., 1917).

¹¹ *People v. Title Guaranty & Trust Co.*, 191 App. Div. 165, 181 N.Y.S. 52 (2d Dept., 1920).

¹² *Union City and Obion County Bar Ass'n. v. Waddell*, 30 Tenn. App. 263, 205 S.W. (2d) 573 (1947).

¹³ *Supra*, note 11.

¹⁴ *Chicago Bar Ass'n. v. Kellogg*, 338 Ill. App. 618, 88 N.E. (2d) 519 (1949).

¹⁵ *In Re Collins*, 169 Misc. 264, 7 N.Y.S. (2d) 188 (Sup. Ct., Queens Co., 1938).

¹⁶ *Blair v. Motor Carriers Service Bureau*, 40 Pa. D & C 413, 87 Pittsb. Leg. J. 155 (1939); also Note 9 A.L.R. (2d) 800 citing *Humphreys v. Commissioner*, 88 F. (2d) 430 (2d Cir., 1937).

shown at a later point that this rule, too, is unacceptable as a safe line of demarcation.

We now turn to the application of the "strict legal instrument" test to the preparation of petitions and other papers incident to administrative or quasi-judicial proceedings before tax boards or commissions. There seem to be no cases in point, perhaps for the reason that rarely, if ever, would a layman draft an instrument in connection with such a proceeding without at the same time rendering advice or performing other functions on behalf of a taxpayer. The courts, therefore, have applied other tests to these situations, which will be discussed elsewhere.

THE "WHOLLY WITHIN THE FIELD OF LAW" TEST

The principal case applying this test is *Lowell Bar Ass'n. v. Loeb*,¹⁷ which on its facts is squarely in point and defined the test as follows:

"... any service that lies wholly within the practice of law cannot lawfully be performed by an accountant or any other person not a member of the bar."¹⁸

In the *Loeb* case an attorney's wife and an accountant, neither of whom was a member of the bar, operated a large income tax service employing over a hundred persons, all non-lawyers. The business of this organization consisted almost exclusively of the preparation, for a fee, of federal and state income tax returns on behalf of individuals whose incomes consisted of wages and salaries. The Massachusetts court held that these activities did not constitute the practice of law because

"... the preparation of the income tax returns in question, though it had to be done with some consideration of the law, did not lie wholly within the field of the practice of law."¹⁹

The question which immediately presents itself, is this: just what is "wholly within the field of law?" The court in the *Loeb* case answered it in the following manner:

"Plainly the commencement and prosecution for another of legal proceedings in court and the advocacy for another of a cause before a court, in cases relating to taxes as in other cases, are reserved exclusively for members of the bar. Doubtless the examination of statutes, judicial decisions, and departmental rulings, for the purpose of advising upon a question of law relative to taxation and the rendering to a client of an opinion thereon, are likewise part of the practice of law in which only members of the bar may engage (citations omitted)."²⁰

¹⁷ 315 Mass. 176, 52 N.E. (2d) 27 (1943).

¹⁸ *Ibid.*, 52 N.E. (2d) at p. 32.

¹⁹ *Ibid.*, 52 N.E. (2d) at p. 34.

²⁰ *Ibid.*, 52 N.E. (2d) at pp. 32-33.

Extending the holding of this case to its full practical application, it would appear that, under the "wholly within the field of law" test the preparation of income tax returns of persons whose incomes consisted solely of wages and salaries would be open to laymen so long as they did not involve the examination of statutes, judicial decisions or departmental rulings for the purpose of deciding questions of law relating to such returns. It is readily apparent that this rule would tend to limit the field to attorneys, since even in simple wage earners returns questions of law frequently arise which must be decided by resorting to statutes, judicial decisions or departmental rulings. For instance, in returns where the taxpayer elects to itemize his deductions, frequently there arises a question as to whether a casualty loss, not compensated by insurance, is an allowable non-business deduction. Indeed, even in the simplest kinds of returns, such as where the taxpayer computes the tax on his gross income by means of a tax table, or where he merely lists his gross income and lets the collector compute the tax thereon, there may be such a question of law relating to the number of exemptions to which the taxpayer may be entitled. Both of these examples would appear to involve the practice of law under the rule of the *Loeb* case.

The next problem which seems to present itself in this connection is this: Would appearance and argument for another before a non-judicial board or administrative body in tax matters constitute the practice of law under the "wholly within the field of law test?" None of the decisions in point seem to rely squarely on that test. Applying the rule in the *Loeb* case abstractly, therefore, it would seem that such appearance would not constitute the practice of law, provided (1) no resort to a court was contemplated at any stage of the proceedings, and (2) the work involved was wholly disassociated from deciding questions of law on which the examination of statutes, judicial decisions or departmental rulings was necessary.²¹ It is interesting to note here that certified public accountants are in fact permitted to practice before the Treasury Department and Tax Court of the United States,^{21a} which would seem to indicate that the *Loeb* case is not followed there.

THE "INCIDENTAL" TEST

A test frequently resorted to by the courts in unauthorized practice cases involving tax as well as other matters, is the so-called "incidental" test, which may be summarized as follows: an activity which would ordinarily constitute the practice of law might still be lawfully performed by a non-lawyer, provided he does it merely incidentally to his

²¹ The courts have substantially reached the result here announced, but applying tests other than the "wholly within the field of law" test. These cases will therefore be discussed at a later point. Note 9 A.L.R. (2d) 802.

^{21a} 2 P-H FED. TAX SERV. ¶ 21,255 and ¶ 21,518 (1952).

ordinary lawful business or occupation, and not as a primary function. One of the earliest cases where this test has been clearly defined and applied to tax matters is the *Merrick* case,²² where the District of Columbia court held that the preparation of tax returns and argument before tax officials by the lay employees of the defendant trust company, as an incidental service to its customers was not the unauthorized practice of law.

The New York courts have unequivocally aligned themselves with this test in the famous *Bercu* case,²³ which drew considerable comment and criticism from legal and accounting circles.²⁴ In this case respondent, who was a certified public accountant, prepared, for a fee, a memorandum in which he advised a corporation on the question of whether a payment of a disputed New York City sales tax was deductible for Federal income tax purposes for the year when made. After examining the relative section of the Internal Revenue Code, as well as a ruling of the Income Tax Unit of the Bureau of Internal Revenue²⁵ respondent concluded that the question must be answered in the affirmative, and so advised his client.²⁶ The court, holding that respondent's activities in this matter constituted the unauthorized practice of law, held that while application of legal knowledge by accountants in the keeping of books and preparation of tax returns is permissible because merely *incidental* to those accounting functions, legal advice *unconnected with accounting work* is unauthorized practice of law. Thus, Mr. Bercu was held to have practiced law principally because of the fact that he was not in charge of the books of the corporation involved, nor did he render any other accounting services for his client apart from the advice above described.²⁷

Carrying the application of this "incidental" test to its extreme under the *Bercu* case, it might be said that any type of service, in tax matters or otherwise, could be performed by laymen so long as it was merely incidental to their main business or occupation which they were legitimately carrying on. The dangers of such a rule are readily apparent, and were not overlooked by the New York court in the *Bercu* case, which said:

"When, however, a taxpayer is confronted with a tax question so involved and difficult that it must go beyond its regular

²² *Merrick v. American Security and Trust Co.*, 71 App. D.C. 72, 107 F. (2d) 271 (D.C. Cir., 1939), aff'g. 22 F.Supp. 177 (D.C., 1939), cert. den. 308 U.S. 625, 60 S.Ct. 380, 84 L.Ed. 521 (1940).

²³ Application of New York County Lawyers Ass'n. In Re Bercu, 273 App. Div. 524, 78 N.Y.S. (2d) 209 (1st Dept., 1948).

²⁴ E.g., Austin, *Relations Between Lawyers and Certified Public Accountants In Income Tax Practice*, 36 IOWA L. REV. 227 (1950).

²⁵ 26 U.S.C.A. § 23(a), INT. REV. CODE § 23(a); I.T. 3441 (C.B. 1941-1 p. 208).

²⁶ See Bercu's memorandum at 78 N.Y.S. (2d) 214 (1st Dept., 1948).

²⁷ *Ibid.*, at p. 216.

accountant and seek outside tax law advice, the considerations of convenience and economy in favor of letting its accountant handle the matter no longer apply, and considerations of public protection require that such advice be sought from a qualified lawyer. At that point, at least, the line must be drawn."²⁸

Where "that point" is or should be, the court does not say. Nor does it appear from a reading of the opinion in the *Bercu* case as a whole, that the above quotation was more than a mere afterthought, or, at best, a secondary test. The New York court clearly relies primarily on the "incidental" test.

It is interesting to note that the "incidental" test, as defined in the *Bercu* case, has been followed and relied upon in a number of cases since.²⁹

A consideration of the practical implications of the application of the "incidental" test to tax practice is deferred to a later point.

THE "DIFFICULT OR DOUBTFUL QUESTION OF LAW" TEST

The only remaining type of test applied by the courts to determine what constitutes the practice of law will be termed the "difficult or doubtful question of law" test. Under this test the determining factor is not the relation of the activity of the alleged practitioner to his other work or activities, nor even the nature of the activity as such. The determining factor is this: does the particular activity involve a difficult or doubtful question of law, or, as some of the earlier courts have put it, does it require more legal knowledge as is possessed by the average layman?³⁰

In formulating the test, the courts have resorted to varying terminology, but the basic considerations in applying this test have remained the same. The North Dakota court defined it in the following language:

"The drawing of complicated legal instruments such as . . . require more legal knowledge than is possessed by the average layman . . . / constitutes the practice of law / even though such instruments might, to some extent, be incident / to the draftsman's business / . . ."³¹

The Oklahoma court defined the test as:

"The preparation for a money consideration of legal instruments to be shaped from a mass of facts and conditions involving the application of intricate principles of law which can only be applied by a mind trained in existing laws . . . comes within the term 'practice of law'. "³²

²⁸ *Ibid.*, at p. 221.

²⁹ *Auerbacher v. Wood*, 142 N.J.Eq. 842, 59 A. (2d) 863 (1949), where the *Bercu* test was applied to the activities of a labor relations consultant.

³⁰ 7 C.J.S. *Attorney and Client* §3 and cases there cited.

³¹ *Cain v. Merchants Bank & Trust Co.*, 66 N.D. 746, 268 N.W. 719, 723-724 (1936).

³² *Crawford v. McConnell*, 173 Okl. 520, 49 P. (2d) 551, 556 (1935).

Applying this test to tax practice, we first come to the field of preparing income and other tax returns. There seems to be agreement among the courts that there exists a category of tax returns which does not present difficult or doubtful questions of law and the preparation of which is open to laymen. The following language is typical in this connection:

"In filling out such returns, printed forms furnished by the State and Federal revenue bureaus are used . . . / They involve / little more . . . than doing what an intelligent man could do for himself . . . I do not enjoin the preparation of tax returns, but when in the course of preparing a return a doubtful question arises which requires the construction of a statute or the consideration of a decision, the problem calls for a lawyer's solution."³³

Assuming, therefore, that the preparation of tax returns not involving difficult questions of law does not constitute the practice of law, the question still remains: what is the line of demarcation between "what an intelligent man could do for himself" and a difficult or doubtful question of law? This question received considerable clarification in the recent and widely acclaimed case of *Gardner v. Conway*.³⁴

The factual picture in the *Gardner* case was the following: plaintiffs, representing the Minnesota Bar, retained an investigator to present to the defendant a fictitious set of facts in order to solicit his advice in connection with preparing an income tax return. Defendant, who was neither an attorney nor an accountant, held himself out as an "income tax expert" and "tax consultant." Plaintiffs' investigator, posing as a taxpayer seeking defendant's advice, presented to him a fictitious fact situation involving the following questions: (1) whether the purported taxpayer had acquired a valid partnership status in operating his truck farm with his wife; (2) whether the taxpayer was entitled to claim an exemption for his wife, with whom he was living but to whom he had never been ceremonially married; (3) whether he should file a joint return with such wife; (4) whether certain produce losses and farm improvements were deductible items. Defendant, for a consideration, resolved all of the above questions, and prepared a federal income tax return on the basis of the above facts.

The Supreme Court of Minnesota unanimously held that defendant was guilty of the unauthorized practice of law in resolving the above questions of law. The test of what constitutes the unauthorized practice of law, said the court, cannot be defined in terms of what is incidental or primary in relation to the alleged practitioner's main occupation. Such a test, said the court, completely ignores the public welfare con-

³³ *Blair v. Motor Carriers Service Bureau, Inc.* 40 Pa. D & C 413, 87 Pittsb. Leg. J. 155 (1939). The court here also relies on the "strict legal instrument" test.

³⁴ 48 N.W. (2d) 788 (Minn., 1951).

siderations for which attorneys are licensed. The "incidental test" is of no value, except perhaps in a negative sense, i.e., where it appears that a particular legal activity is the primary business of its practitioner, it clearly constitutes the practice of law. The real test is

"Generally speaking, whenever . . . a layman, as part of his regular course of conduct, resolves legal questions for another, at the latter's request and for a consideration, by giving him advice or by taking action for and in his behalf, he is practicing law if difficult or doubtful legal questions are involved, which, to safeguard the public, reasonably demand the application of a trained legal mind. What is a difficult or doubtful question of law is not to be measured by the comprehension of a trained legal mind, but by the understanding thereof which is possessed by a reasonably intelligent layman who is reasonably familiar with similar transactions."³⁵

The "difficult and doubtful question of law" test, as thus defined by the Minnesota court, would thus require the intervention of an attorney in tax practice whenever the situation presented legal questions which present difficulty or doubt in the mind of our abstract "reasonably intelligent layman." It is true that this test, too, is somewhat vague in its terms and cannot be mechanically applied to any and all situations which may arise in tax practice. Nor does it seem possible, under this test, to create a definition of "difficult or doubtful question of law" which would be a universally applicable indicator of the type of question to be so regarded. This weakness the court readily confesses in the *Conway* case.³⁶ But, considering the myriad different types of questions of tax as well as non-tax law which may conceivably arise in tax practice, it is hard to see how, under any test, such a definition could ever be created. Therefore, what constitutes a "difficult or doubtful question of law" must be determined from the facts and circumstances of each individual case. In making this determination, it is suggested that no little weight should be given to the information on tax law made available in the form of pamphlets and circulars by the various State and Federal taxing authorities to the average taxpayer, in considering the level of knowledge possessed by our "reasonably intelligent layman."

One additional problem which should be considered here is the position of the accountant under this test. It is well known that considerable overlapping exists in the field of taxation between legal and accounting functions.³⁷ One question which presents itself in this connection is this: in determining under a particular fact situation what constitutes a "difficult or doubtful question of law" should a criterion different from the "reasonably intelligent layman" test apply to

³⁵ *Ibid.*, at p. 796.

³⁶ *Ibid.*

³⁷ 1. CATH. UNIV. L. REV. 21 (1950).

accountants? It would be unfair to deny that, through training and/or experience, most accountants have acquired a level of knowledge of tax law higher than that possessed by the average layman. The *Conway* court, however, seems to have been unwilling to place accountants in a different category from laymen in general, as is indicated by the following language:

"When an accountant or other layman, who is employed to prepare an income tax return is faced with difficult or doubtful questions of the interpretation or application of statutes, administrative regulations and rulings, court decisions or general law, it is his duty to leave the determination of such questions to a lawyer."³⁸

There is a similar duty on attorneys, however, said the same court, so far as difficult accounting questions are concerned.

"When difficult accounting questions arise, the careful lawyer will naturally advise his client to enlist the aid of an accountant. In the income tax field, the lawyer and the accountant each has a function to perform in the interest of the public."³⁹

The court does not labor the point beyond the above passage. This dictum therefore appears to be a suggestion rather than a rule.

EVALUATION AND CONCLUSION

Up to this point, we have considered and defined in detail the various tests applied by the courts in determining what constitutes the practice of law, and their application to tax practice. We shall now attempt to evaluate these tests critically, and to arrive at a test which is best suited to protect the public interest, while at the same time not jeopardizing existing professional interests unduly. At this stage it must again be remembered that the principal reasons for the licensing of attorneys are the protection of the public from unqualified practitioners of law, and the supervision of the activities of licensed attorneys.⁴⁰

The "matters connected with the law" test, as evolved by the *Duncan* case,⁴¹ has already been criticized for its vagueness and all-inclusiveness.⁴² No constructive public purpose can be achieved by limiting the field of tax practice *in toto* to attorneys, because both reason and authority indicate that some activities in the sphere of tax practice can competently as well as economically be performed by laymen, with little or no possibility of substantial injury to the public by reason of the fact that such activities were performed by laymen rather than

³⁸ *Supra*, note 34 at p. 797.

³⁹ *Ibid.*

⁴⁰ *Supra*, note 34.

⁴¹ *Supra*, note 4.

⁴² *Supra*, pp. 2-3.

attorneys. For this reason the "matters connected with the law" test is unacceptable for our purposes.

The "strict legal instrument" test, as defined in the *Eley* case,⁴³ falls into the other extreme, by opening without any qualifications the larger part of the field of tax practice, and certainly the entire field of preparing tax returns, to laymen.⁴⁴ It would be hard to deny that in many cases, the preparation of a tax return, although not regarded as a "strict legal instrument" by the courts,⁴⁵ might involve problems which laymen cannot be expected to intelligently solve. It is also clear, that an incorrectly prepared tax return might subject the taxpayer to inconvenience and expense, if not more. This test, therefore, cannot be accepted as a safe rule of demarcation to be applied to tax practice, without ignoring all public policy considerations involved.

Much sounder reasoning appears to be used in the "wholly within the field of law" test, as applied in the *Loeb* case.⁴⁶ There the line of demarcation was defined in terms of the necessity for the examination of statutes, court rulings or departmental regulations in deciding questions of law involved. While it may be assumed that it would not be unreasonable to limit such examinations to attorneys in general, yet it is questioned whether such a rule would be universally applicable to the field of tax practice. It is not inconceivable that some tax statutes, if made available to the average layman in a simple and comprehensive form,⁴⁷ could be correctly applied by laymen in some phases of tax practice. For this reason it is suggested that the "wholly within the field of law" test, as applied by the *Loeb* case,⁴⁸ went too far in restricting the field to attorneys, and is therefore unacceptable.

The "incidental" test, as defined by the *Merrick*⁴⁹ and *Bercu* cases,⁵⁰ would be acceptable from a standpoint of public policy only if it could be assumed in every instance that a layman is necessarily competent to do all things incidental to his main calling or occupation. A mere statement of this assumption is sufficient to show its fallacy. It would be unreasonable to maintain, for instance, that a layman who incidentally to his main occupation performs some services in tax practice, is necessarily competent to perform such service by reason of the very fact that it is incidental to his main occupation, and without regard to the problems involved in the service. This inadequacy was to some extent

⁴³ *Supra*, note 8.

⁴⁴ *Supra*, note 23.

⁴⁵ *Supra*, note 16.

⁴⁶ *Supra*, note 17.

⁴⁷ *E.g.*, Instructions enclosed with tax return blanks and mailed to taxpayers by the Bureau of Internal Revenue, U.S. Treasury Department.

⁴⁸ *Supra*, note 17.

⁴⁹ *Supra*, note 22.

⁵⁰ *Supra*, note 23.

recognized in the *Bercu* case,⁵¹ and clearly recognized in the *Conway* case,⁵² which rejected the test. Because of this basic inadequacy, it is maintained that the "incidental" test is unsafe and untenable as a line of demarcation in tax practice, except perhaps in the negative sense as defined and employed by the *Conway* case.⁵³

The "difficult and doubtful question of law" test, as evolved by the *Conway* case⁵⁴ seems from all points of view to provide the best rule. The protection of the public interest in this instance, is basically a determination of the extent to which laymen can be assumed to be competent to handle tax matters. The "difficult or doubtful question of law" criterion seems to provide a line of demarcation which most nearly approximates that point. When used in connection with the "reasonably intelligent layman" test (as it was in the *Conway* case), and particularly, when this latter test includes a consideration of the availability of tax law information to the public in general, it is both flexible and fair.

In summing up, therefore, the following conclusions seem appropriate:

1. Both reason and authority indicate that there is a sphere in tax practice which is and should be open to laymen.
2. In arriving at a line of demarcation, the competence of the layman to perform the particular service involved appears as the most constructive consideration from the point of view of the protection of the public.
3. In view of the above, the "difficult or doubtful question of law" test appears to be the most acceptable line of demarcation between the proper functions of attorneys and laymen in tax practice.

Our Wisconsin court has to date not enunciated any clear test of what constitutes the unauthorized practice of law. There are no cases in point so far as tax practice is concerned. In *State ex rel. Junior Bar Ass'n. of Milwaukee v. Rice*,⁵⁵ the Wisconsin court held that an insurance adjuster in appearing before a justice of the peace in a representative capacity, and advising his client on legal rights and obligations engaged in the unauthorized practice of law. Our court, however, failed to define any clear test of what constitutes the practice of law, and merely stated that the "incidental" test of itself is not controlling. This holding is particularly significant in view of the fact that the Wisconsin unauthorized practice statute⁵⁶ seems to rely on the "incidental" test. There would be no authority, however, for any conclusion

⁵¹ *Ibid.*

⁵² *Supra*, note 34.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ 236 Wis. 38, 294 N.W. 550 (1940).

⁵⁶ WIS. STATS. (1949), §256.30(2).

to the effect that Wisconsin would necessarily follow any one of the other tests laid down by the courts.

It is interesting to note in this connection the Statement of Principles Relating to Practice in the Field of Federal Income Taxation promulgated by the National Conference of Lawyers and Certified Public Accountants which has been adopted in its entirety by the Milwaukee Bar Association and the Milwaukee Chapter, Wisconsin Society of Certified Public Accountants on June 26, 1951.⁵⁷ The Statement, in substance, provides that while the preparation of income tax returns should be open to both lawyers and accountants, questions of accounting should be handled by accountants while questions of law are within the domain of lawyers. Similarly, in representing clients before the Treasury Department or the Tax Court of the United States, where legal or constitutional rights are involved, lawyers should be consulted. While the Statement does not define what a "question of law" is, on the whole it appears to adhere to the "difficult or doubtful question of law" test, as defined in the *Conway* case, rather than the "incidental" test of the *Bercu* case. If that is so, then, it is felt, an important contribution has been made both in Wisconsin and on the national level toward a rational and legally tenable basis of conduct by attorneys and accountants in the field of tax practice.

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⁵⁷ *The Milwaukee Bar Ass'n. Gavel*, November, 1951, p. 22.