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## Y2K and the Income Tax

by Erik M. Jensen

Erik M. Jensen is the David L. Brennan Professor of Law at Case Western Reserve University, Cleveland.

I don't understand this concern about the so-called Y2K "problem." Most of us U.S. tax types ought to be thrilled by the possibilities.

Let me explain.

I recently spent time working in the Faculty of Law building at the University of Cambridge. It's a wonderful facility but, not surprisingly, the American tax materials aren't what you'd have at an American law school.<sup>1</sup> When I looked for a copy of the tax lawyer's bible, *The Federalist Papers*,<sup>2</sup> I could find only a late nineteenth-century edition prepared by Henry Cabot Lodge. The text of the Constitution in the Lodge edition stopped at the Fifteenth Amendment.

That got me thinking.<sup>3</sup> Everyone assumes we're going to have a terrible time just because our computers on New Year's Day are going to believe it's January 1, 1900. But to a tax professional, that should be an opportunity, not a problem. The Sixteenth Amendment to the Constitution wasn't proposed to the states until July 12, 1909, and its ratification wasn't certified until February 25, 1913.

If it's 1900, and with the *Income Tax Cases* "recently" decided,<sup>4</sup> we have no clear authority for an unapportioned income tax. In any event, if it's 1900, there's no income tax on the books.

At the stroke of midnight on December 31, 1999, we'll be marching shoulder-to-shoulder with Henry Cabot Lodge!

<sup>1</sup>They don't even have *Tax Notes*, if you can imagine that.

<sup>2</sup>It's the bible for Calvin Johnson and me, at least, and that should be enough for a rootin' tootin', down-home revival meeting.

<sup>3</sup>It happens.

<sup>4</sup>*Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), 158 U.S. 601 (1895) (holding 1894 income tax unconstitutional).

Think what this means. Sure, it will lessen the demand for advice about an Internal Revenue Code that doesn't exist, and that's bad for business in some ways. A lot of hard-earned expertise will go down the drain.<sup>5</sup> On the other hand, enterprising lawyers will be able to get in on the ground floor in the new world of tax practice.<sup>6</sup> Be the first firm on your block to advise on the cotton tariffs and whiskey taxes that will constitute a large part of the national revenue system.

Most law schools probably haven't done a tariff CLE program recently, so there'll be a chance to lap the competition (assuming, of course, that we'll care about CLE in 1900).<sup>7</sup> The cost should be low: most schools probably have people in-house who can do the programs with no retooling — those guys with the crumbling class notes that will suddenly be full of cutting-edge material. And any innovative LL.M. director can convert his graduate tax program into a graduate tariff program without missing a beat (or having to change the program's initials).

***Be the first firm on your block to advise on the cotton tariffs and whiskey taxes that will constitute a large part of the national revenue system.***

Tax policy wonks will be able to rethink the tax system, starting almost from scratch. If we want an unapportioned "tax on incomes" to be possible, we can push for something like the current Sixteenth Amendment. Or if we want to make it clear that Congress can do anything it wants in the tax area, we can push for an amendment to do just that.

I've been told that the committee on Sales, Exchanges and Basis of the ABA Section of Taxation (if there'll be a Section of Taxation in 1900) will support the idea of a Sixteenth Amendment, providing for an unapportioned income tax, as long as the Amendment includes special treatment for like-kind exchanges.<sup>8</sup> (There's

<sup>5</sup>Except maybe for purposes of offering transitional advice. See *infra* note 11.

<sup>6</sup>Worlds do have floors, don't they?

<sup>7</sup>A combined whiskey-tax and substance-abuse program should be a natural.

<sup>8</sup>Well, I wasn't really told this, but it could've happened. I'm a member of the committee, and I know the chair.

a possibility that the Committee will recommend constitutionalizing the concept of "qualified intermediary.")

Of course there are conceptual problems here. It's not like we're really going back in time to a world where everyone thinks it's 1900. This isn't *Pleasantville* or *The Time Machine*. Unless the computers in our heads stop functioning, we're all going to know that, with the sub-zero temperatures in our houses and the planes dropping out of the sky,<sup>9</sup> something happened in the past (or was it the future?) that was (will be?)<sup>10</sup> supposed to make an unapportioned income tax possible. It's 1900, but it's not 1900.<sup>11</sup>

But if the computers think it's 1900, that's good enough for me. I compute, therefore I am. And if it's 1900, there's not a Sixteenth Amendment.

So we can look forward to President Clinton's announcement<sup>12</sup> that, unconstrained by the Twenty-second Amendment, he's running for a third term.<sup>13</sup> Hm-m-m, maybe I should think about this Y2K issue a bit more.

<sup>9</sup>Not to mention the babysitters who just earned four years' worth of college tuition in one evening. Or do they get paid on January 1, 1900, at 1900 rates?

<sup>10</sup>It's going to be hard, grammatically, to figure out whether we're coming or going.

<sup>11</sup>These conceptual problems can create delicious legal questions. For example, when does the statute of limitations for tax year 1999 run once we've reached 1900, considering that the limitations rule hasn't (in a sense) yet been enacted?

<sup>12</sup>Or will it be President McKinley's announcement? Ah-h-h, back (forward?) to the time of Ohio presidents.

<sup>13</sup>Without the Nineteenth Amendment, Monica won't be guaranteed the vote.

## And the 1999 Award for the Worst Opinion in a Tax Case Goes to . . .

by Deborah A. Geier

Deborah A. Geier is a Professor of Law at Cleveland-Marshall College of Law, Cleveland State University. In this article, she gives the 1999 award for the worst judicial opinion in a tax case. Unfortunately, no plaque or statue accompanies this award, which is just as well, as that might raise an issue regarding whether its value must be included in gross income.

I know, I know — it's only June. How can I give out the uncoveted award for the worst judicial opinion in a tax case so early in the year? Quite simply, I can't see how it can be topped. This is one of those rare opinions that is so exquisitely wrong as a matter of plain vanilla tax law that I'm certain no court will top it. Only a decision accepting a tax-protester argument that "wages" aren't "income" since equal value is given in exchange would knock it out of contention, and I'm going to be optimistic and assume that we won't see that decision in 1999. So let's forgo the suspense and open the envelope.<sup>1</sup> The award goes to . . . Judge Jerome Turner of the Western District of Tennessee for his opinion in *Owen v. United States*.<sup>2</sup> Lest the poor judge get all the limelight, however, I think an award for best supporting actor in this saga must go to David M. Katinsky, Esq., Department of Justice. I have no doubt that his efforts contributed to the breathtaking performance that Judge Turner was able to give us. Kudos to both for their outstanding performances.

Let's set the scene. Before turning to the actual facts of the case, I'll use a hypothetical situation to illustrate how the judge's opinion would apply. Suppose Dentist, with a newly minted D.D.S., buys a building for \$100,000 in which to open her new practice as a sole practitioner. (By the way, Dentist uses the cash method of accounting — a fact critical to Judge Turner.) Being a cash-strapped graduate (and with Mom and Dad having been milked dry by all her prior tuition bills), she finances the acquisition entirely with debt from the seller. That is, she incurs a purchase money mortgage for \$100,000 by giving the seller her note, which obligates her to pay the \$100,000 in installments (or even in a balloon payment later), together with market-rate interest.

Under the seminal case of *Crane v. Commissioner*,<sup>3</sup> of course, she takes a \$100,000 cost basis in the property

<sup>1</sup>Drum roll, please.

<sup>2</sup>Canned applause here. (The case's citation is 34 F. Supp. 2d 1071, Doc 1999-1276 (14 original pages), 1999 TNT 16-12, (1999)).

<sup>3</sup>31 U.S. 1 (1947).

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