

REFLECTIONS ON RECEIPT OF THE DAN HOLLAND AWARD

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FROM MY SELECTIVE REVIEW OF THE HISTORY of Holland Award recipients, it seems as if the immediate reaction of most recipients is incredulity, or, more simply put, “you’ve got to be kidding.” As Charlie McLure put it on receiving the award in 2005:

When ... Tom Neubig called me “in his capacity as president of the NTA” I wondered why. Would he ask me to serve on some committee? What else could it be? When he told me I would be awarded the Holland Medal, I was dumbfounded. While I am often inarticulate, I am seldom speechless.¹

Roy Bahl observed that “I am sure I felt like most others who have stood here ... I cannot imagine that I deserve this, but am so very pleased to be added to the list of distinguished past recipients.”²

My reaction was similar. When the phone rang late one weekday evening and my wife said it was for me, I remarked that it was awfully late for a telemarketer to be calling. When it turned out to be Ranjana³ on the line informing me that the NTA had decided to award me the Holland Medal, it was hard for me to believe that some error had not been made – didn’t they know that my father’s name was Jerome and that he had passed away several years ago?

Needless to say, like most recipients of this high honor, my incredulity was matched only by my gratitude. To turn the familiar Groucho Marx line on its head – “I just don’t want to belong to any club that would have someone like me for a member” – I cannot imagine *any* club of which I would rather be a member. The list of previous Holland Award recipients is a pantheon of those whose contributions to the study and practice of public finance will long be remembered. I simply hope that today will not go down in the books as one of the NTA’s rare errors in judgment.

GRATITUDE

So much for thanks to the NTA. Now to the thanks to those – known and unknown – that made today possible for me. First, of course, there is my Dad. Anyone who has even a passing familiarity

with the field of state and local taxation and my work knows that the contributions that are most frequently cited are not “Hellerstein” but rather “Hellerstein and Hellerstein.” I am referring, of course, both to the treatise on state taxation⁴ and to the casebook on state and local taxation.⁵ These are works that my Dad originally authored and I was privileged to join as a junior partner. There is not enough time here today to explore the question of whether it was nature or nurture, and how the Oedipal issues were resolved over the course of many editions. All I can say today is “Thank you, Dad.” I am sure you are smiling, knowing that this award belongs in large part to you.

In this connection I cannot resist recounting one episode, which epitomizes my existential problem. The first time someone called me to request that I serve as an expert witness, I said, “Are you sure you are calling the right person, I am Walter Hellerstein, not Jerome Hellerstein.” The caller responded: “Oh, I know you are not Jerome Hellerstein. I couldn’t afford Jerome Hellerstein.”

So much for family. Then there is Charlie,⁶ who is almost family. Frank Shaforth once described us as an “unprecedented tax tag team”⁷ in properly applauding Charlie’s receipt of the Holland Medal. My relationship with (and gratitude to) Charlie goes back 30 years, to the time when both of us had more hair on our heads and were giving papers at an NTA symposium on state taxation of energy resources – back when oil was selling for that then unheard of price of \$40 per barrel!⁸ It was at that time that I first realized that there was an economist who knew more than I did about an area regarding which I liked to think of myself as somewhat of an expert. There is no one who has contributed more to my understanding of state and local taxation than Charlie, and there is nothing that I value more than our collaboration over the past 30 years. I would not be standing here without Charlie’s unstintingly generous contribution to my education.

There are other people whom I need to thank as well, although they may not be aware of it. Richard Bird,⁹ a Holland Medal recipient, was a young lecturer at Harvard when I was an even younger student at Harvard, and he was teaching a course, in which I was fortunate enough to enroll,

on comparative taxation in Africa. At the time, I think I was more interested in Africa than in taxation, but Richard's course opened up to me the possibilities of comparative tax work that has been a major focus of my scholarly interest, particularly in recent years.

I also need to thank the people, two of whom are on this podium, for keeping the "enterprise," as it were, going. Despite our hope for immortality, most of us recognize that sooner or later our tires will wear out. I have been blessed with some very good replacements. John Swain,¹⁰ who has established himself as a leading thinker in the state and local tax field, has joined me over the past few years in keeping the treatise up to date. Kirk Stark,¹¹ whose academic star has risen to the Elysium of Cambridge, Massachusetts, where he is currently a visiting professor at Harvard, has agreed to participate in the production of the next edition of the casebook. And Joan Youngman,¹² who has always known more about property taxation than anyone else that I know, continues to produce the property tax chapter of the casebook, assuring a contemporary treatment of this important topic in a systematic and sophisticated manner.

LESSONS

Beyond the questions of incredulity and thanks, there are matters of substance. If I have now been anointed as an *éminence grise* in the field of state and local taxation – perhaps more *gris* than *eminent* – what lessons do I have to impart to those who are still struggling to get tenure?

I have a few – and now I can unapologetically refer to them based on a lifetime of experience. Some of these lessons are painful (for me) but they are important nevertheless. Experience, after all, is the name that we give to our mistakes.

First, everything – no matter how seemingly unimportant – should be done right. One never knows how the seemingly unimportant error will turn out to have significant consequences. I will never forget when I was a law clerk for the late Hon. Henry J. Friendly, and I had spent untold hours drafting an opinion on an obscure patent law issue. The judge called me into his chambers to berate me – not for any error I had made in the analysis of the patent issue (about which neither of us had much interest) – but rather because I had misspelled counsel's name in the draft of the opinion. "If I can't trust you on this, how can I trust you

on anything?" he demanded. A harsh lesson, but a lesson well learned. You never know when an error will be important. Obsessive compulsive behavior, at least in moderation, may not be a bad character trait, at least for a lawyer. So, lesson one, you can never be too careful. I have tried, not always with success, to adhere to this lesson in my work.

Second, and this may be a variation on my first point, but words matter. I am a lawyer. When I think about what I do for a living I think that, at the end of the day, what I do is to peddle words. Those words presumably represent ideas. We owe it to our readers – our customers or clients, if you will – to get these words right. Sloppiness in writing often reflects sloppiness in thinking. Even if it does not, the reader will never know the difference, if we do not clearly say what we mean. As I am reminded when I read Dr. Seuss's (1940) *Horton Hatches the Egg* to my grandchildren, one cannot overemphasize the importance of adhering to Horton's mantra: "I meant what I said and I said what I meant."

Third, and I am going to switch gears a bit here, from what an economist might call the "micro" perspective to the "macro" perspective, the work to which our professional lives are devoted – taxation – is government work. In the course of this work, I am sure that most of us have encountered the phrase "good enough for government work." This phrase, at least in my experience, is typically employed as a pejorative characterization by those in the private sector – back when there was a private sector – for the less-than-perfect solutions that government sometimes devises to deal with the problems it must address. Nevertheless, I have increasingly become convinced of the value of solutions that are less than perfect. "Don't let the perfect drive out the good" may well be a better guide to tax policy than any particular principle that one can defend against all comers on theoretical grounds. "It works in practice, but does it work in theory?" may be appropriate fodder for academic journals, but we should not underestimate the value of pragmatic solutions to problems of taxation, even if they fall short of some theoretical norm.

PRAGMATISM AND TAX POLICY

Let me give one example – and I know it is a controversial one – in which I was personally involved two decades ago. Back in 1987, Florida, one of the few states without a personal income

tax (and a constitutional prohibition on adopting one), abolished all exemptions (including those from services) from its sales tax in an effort to raise needed revenues.¹³ The result was Florida's famous (or infamous) sales tax on services. I was enlisted to help draft the statute to implement the legislature's will (with the understanding that Florida presumably did not wish to tax *all* services, for example, kidney dialysis).

There is no question that from a tax policy standpoint Florida's expanded sales tax flunked a basic test for an ideal consumption tax, namely, that it was not limited to sales to households but included many business services. However, it was also clear that Florida was implementing sound tax policy in abolishing the nonsensical distinction between goods and services in the sales tax base. As it happened, Florida's sales tax on services was repealed six months after it was enacted for political – not policy – reasons. The tax embraced advertising services (and thus had a significant economic impact on the news media) and the political lesson was: Never do battle with folks who buy ink by the barrel.

The question remains, however, whether Florida was better or worse off without an expanded (albeit deeply flawed) sales tax base, when they already lacked the fiscal resources associated with a personal income tax. It is not my intention here to address this question, but only to point out that we live in a world of second (and maybe third) best solutions, and we should be careful not to sacrifice the good (and, maybe even the mediocre) on the altar of the perfect.

Having made the case for pragmatism, I would be unfaithful to my legal training if I did not also make the case for good tax policy. “On the one hand, on the other hand, etc.,” or, perhaps more to the point, “Yes We Can.” I have spent a fair amount of time in recent years at the OECD dealing with questions of consumption taxation of cross-border trade in services. From the standpoint of consumption tax policy, there is wide acceptance of the proposition that consumption should be taxed where consumption occurs, and equally wide acceptance of the view that this proposition can best be achieved by employing the destination principle as a proxy for where consumption occurs.

Implementing the destination principle with respect to the taxation of cross-border trade in goods is relatively straightforward. When the seller of goods is in one jurisdiction and the purchaser is

in another, the goods generally are taxed where they are delivered. To accomplish this goal, exported goods are zero-rated¹⁴ or exempted¹⁵ and imported goods are taxed at the border.¹⁶ For the most part, border controls provide an effective mechanism for assuring collection of consumption taxes on cross-border supplies of goods at their destination.¹⁷ In addition, the destination principle is often implemented in the business-to-business context, by “reverse charge” or “direct pay” mechanisms pursuant to which registered business purchasers, who are subject to control and audit by taxing authorities at destination, self-assess the consumption tax.

When we turn to cross-border trade in services, however, implementing the principle that consumption should be taxed where consumption occurs is more complicated. Part of the problem is simply historical. Until relatively recently, most services were in fact consumed where they were performed.¹⁸ Consequently, the general rule in many jurisdictions – that services should be taxed where the service provider is established¹⁹ – although technically an origin-based rule, in fact functioned satisfactorily as a rule that taxed consumption where it occurred.

But this state of affairs changed dramatically with the enormous growth in cross-border trade in services that can be performed in one jurisdiction and consumed in another. These include services such as consulting, accounting, legal and other intellectual services; banking and financial services; advertising; information services; data processing; broadcasting; and telecommunications. With the increasing “disconnect” between performance and consumption of services in a territorial sense,²⁰ the traditional rule for determining the place of taxation of services by reference to the service provider's establishment becomes problematic.

The problem of taxing cross-border trade in services, however, is more than just a matter of recognizing that many services are in fact performed in one jurisdiction and consumed in another and simply changing the place of taxation from origin to destination, although that is certainly a problem that needs to be addressed. The more fundamental problem is that the place where services are consumed is itself uncertain and complex, particularly services provided to and by multinational corporations. The challenge, then, for contemporary consumption tax regimes is to identify the appropriate

proxies for where consumption of services occurs when, in contrast to cross-border trade in goods, the place of such consumption cannot be readily identified by reference to physical flows.

And it is in this context that good tax policy can and, in fact, is having a significant impact. The soft law initiatives of the OECD have already been reflected, in significant respects, in the hard law changes of the EU VAT, and I think we can expect that other consumption tax regimes will reflect the policy guidance that is emerging from the OECD.²¹ So, to end on a glass-is-half-full note, the constituency for sound tax policy appears to be alive and well in many quarters. Although we need to approach tax issues in a spirit of pragmatism, I am hopeful that there will continue to be employment for those of us who have devoted our professional lives to advancing sound tax policy.

Notes

- ¹ McLure (2005, p. 155).
- ² Bahl (2006, p. 165).
- ³ Ranjana Madhusudhan, President of the National Tax Association.
- ⁴ Hellerstein and Hellerstein (1998-2008).
- ⁵ Hellerstein and Hellerstein (2005).
- ⁶ Charles E. McLure, Jr., senior fellow at the Hoover Institution.
- ⁷ Shafroth (2005, 149) (Letter to the Editor).
- ⁸ See Hellerstein (1978); McLure (1978).
- ⁹ Professor Emeritus of Economics, University of Toronto.
- ¹⁰ Associate Professor, James E. Rogers College of Law, University of Arizona.
- ¹¹ Professor of Law, UCLA School of Law.
- ¹² Senior Fellow, Lincoln Institute of Land Policy.
- ¹³ See, generally, Hellerstein (1988).
- ¹⁴ Under the EU VAT, for example, if a taxable supply is zero-rated, the supplier need not collect VAT on the sale of the supply, and the supply is effectively relieved of VAT altogether at origin, because the supplier can obtain a credit for the payment of any VAT related to its acquisition of the supply.
- ¹⁵ Under the American retail sales tax, for example, states generally exempt from tax goods that are exported from the state. See Hellerstein and Hellerstein (1998-2008, ¶ 18.02).
- ¹⁶ See Hellerstein (2003, p. 28).
- ¹⁷ Organisation for Economic Co-operation and Development (OECD; 2001).
- ¹⁸ OECD (2004, p. 4).
- ¹⁹ See, e.g., *Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax*, art. 43 (Official Journal of the European Union).

²⁰ Indeed, even the place of performance may be uncertain as when the warranty of a U.S. resident's computer is fulfilled by a technician in Bangalore who takes electronic control of her laptop and resolves the problem through key strokes performed 8,000 miles away.

²¹ These initiatives are summarized in Hellerstein (2009).

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