

张晓君◎著

国家税权的合法性 问题研究

A Study of Legitimacy
on National Taxation Power

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内 容 摘 要

一切权力都需要为自身的合法性辩护,合法性是现代民主政治的核心问题之一,其主要解决的是政治权力和政治制度存在的根基。税收权力亦不例外,国家税权的合法性问题主要是指征税权力的正当根据是什么?即国家为什么要征税的问题。国民均需承担某种形式的纳税义务且表现哪怕是最低限度的自愿服从成分,其之所以如此做的理由是什么?在当代,税收国家已是一种常态,国家的财政几乎是以税收为主要经济来源,对税收权力的依赖已成为现代国家生存与发展的基本前提。然而,“征税的权力事关毁灭的权力”,税收这个利益博弈的经济游戏实际上在相当程度上拷问着社会的法治文明水平。

税收和税权自始就与宪政联系在一起。西方国家的宪政实践表明,正是由于统治者与人民在围绕着索取与给付之间所产生的冲突与平衡,才逐步开启了西方宪政体制的篇章。宪政是对国家权力的制约,国家税权合法性问题是关于国家以及国家权力赖以存在的原因性解释,这种解释是根本性的和方向性的,解决的是国家税权何以需要合法性、合法性评判的标准及合法性实现的制度保障。国家税权合法性要想在制度上获得保障,就必须对其所涉及的国家与市场、国家与纳税人之间的经济财产关系在宪政层面进行规范和审视,需要税收宪政的行动框架。

本书以国家税权为主线,以税权的合法性为主题,以政治学、经济学、财政学、宪法学等理论为基础,结合历史与现实,理论与实践,深入研究国家税权的内涵及其合法性的基础、价值和标准,提出构建实现国家税权合法性的税收宪政机制的理论和设想,力图开辟国家税权宪政化分析的新路径。除引言和结语外,本文共分为六章,其中,第一章审视和阐释了国家税权合法性的理论基础;第二章探查了税收正义作为国家税权合法性的评判标准;第三章到第四章阐释了作为国家税权合法性的形式和实质标准的税收法定原则和税收公平原则;第五章论证了税收宪政应作为国家税权合法性的制度保障;第六章分析并提出了构建中国税收宪政的问题和模式。各章内容分述如下:

第一章为“国家税权合法性的基础”。研究的基点在于为国家税权合法性寻求坚实的理论基础。国家税权与纳税人税权是税权的重要组成部分,国家税权统摄了国家这一税权主体所享有的各种权力(权利),是主权权利和权力的复合权。合法性内含着对权威的自愿服从,与国家主权、社会成员的承认与同意的民主协商机制等密切相关的。国家税权的合法性指的是国家基于纳税人认可的基础上所实施的强制税收权力的正当性。社会契约理论特别是“主权在民”的思想为国家权力来源的政治合法性提供了主要的理论支撑。国家的税权只有以纳税人经济自由权、财产权等权益和自由市场经济体制维护为目的,使纳税人对国家税收权力的服从演化成为一种道德的义务,方能获得道义上的征税理由或基础。国家税权要在经济上获得一种合法性的认知,就必须受到约束,承认私人财产权在先以及对私人财产权制度予以确认和保障。

第二章为“税收正义:国家税权合法性的基本价值”。从对分配正义的理论分析出发,对税收正义与国家税权合法性的关系,税

收正义的内涵、价值元素以及税收正义的形态作出较为深入的分析和研究。税收正义是正义在税收领域的反映,它是国家税权合法性的基本价值。税收正义的实现过程,就是对国家税权含有的正义观基础的检验。税收正义具有实体和程序两层内涵,包含有平等、公平和效率等价值元素。税收正义的两层内涵剖析进而也为考察税收正义在税收法治中的价值功能提供新的视野,为国家税权在社会政治经济制度中的运行从形式和实质上提供了可量化的合法性标准。从而为构建起对国家税权进行制约和规范的税收法治(宪政)提供了一种研究思路和方法。

第三章为“税收法定:国家税权合法性的形式标准”。税收法定是从税收法律本身来确定法治下税收法律应遵循的原则和标准,它为主权国家的税收权力提供了更充分的合法性资源,拓展更广阔的税收权力运行空间。本章通过考察西方主要宪政国家税收法定的历史形成,揭示税收法定内涵及其核心价值,概括出税收法定应具有的三大价值功能,进而结合国家税权所涉及领域及其功能效果,归纳出税收法定在立法、执法、程序保障三个层面的主要内容。其目的在于通过设置恰当的程序对国家税权加以控制和规范,构建体现税收程序(形式)正义的法律框架及其运行机制,以实现形式正义对国家税收合法性的要求。

第四章为“税收公平:国家税权合法性的实质标准”。税收公平是近代平等的政治和宪法原则在税收法律制度中的具体体现,是判断税收法律制度是否为“良法”的标准,是独立于税收法律制度之外的法治理念和价值目标。本章从税收实质正义的角度,通过对税收公平观的历史考察,揭示出税收公平所具有的法治内核已经从经济学意义上发展到法治的一个基本原则,与税收法定一起,从不同侧面来实现对国家税权的约束和规范。指出税收公平

的价值功能是充分体现经济公平和社会公平。这一价值功能实际上也是国家税权制度功能的具体化。同时,对税收公平具有的法治思想和价值功能进行了多层面的分析,概括出税收公平五个方面的内容,以期为实现国家税权合法性在税收实质正义方面提供可操作性的具体原则和标准。

第五章为“税收宪政:国家税权合法性的制度保障”。税收宪政是指通过作为社会契约的宪法来控制 and 限制国家税权,保障人民财产和自由权利,实现税收正义的一种社会治理机制。本章将国家税权合法性问题置于税收法治和税收宪政的框架内。首先从宪政的角度解释了税收正义与法治、税收与宪政、税收宪政与市场经济体制之间的深刻联系,指出税收宪政是税收法治的制度载体,蕴含着税收形式正义和实体正义的价值目标,是实现国家税权合法性的制度保障。其次,剖析了税收宪政的内涵及其应有的对国家税权的限制和纳税人权利保障的核心内容,进而概括提出了税收宪政包含的六个方面的基本原则。其三,从经济学、政治学、财政学、法学等不同视角分析税收宪政的理论基础,实际上揭示了税收宪政的必然性和现实性以及对国家税权合法性的重要意义。第四,分析税收法定的局限,指出应将国家税权纳入宪政之道,同时,通过对国家税权的宪法约束模式和分权制衡制度考察,提出了相应的原则和措施。最后,分析税收公平的局限,指出税收正义的实现仰赖于以人权保障为核心的纳税人基本权利的落实。进而在宪政维度下探讨纳税人在征税、用税以及其他方面的宪法权利,提出纳税人基本权利入宪,不仅是税收宪政终极目标,也是国家税权的合法性获得宪政保障的基础。

第六章为“中国税收宪政构建:国家税收合法性的制度实践”。本章主旨在于中国税收宪政制度的构建。在全面分析中国

税收宪政现状与问题的基础上,深入探究税收宪政缺失的主要原因,在税收宪政相关的理念、基本原则、国家税权和纳税人权利等方面进行了研究,以宪法层面的税收问题作为切入点,立足于国情,提出了我国税收宪政构建的基本思路 and 模式。

Abstract

All powers require for defending its properness or legitimacy. It constitutes one of the core issues of modern democratic politics, which serves as the basis of political power and political systems. So does taxation power. The legitimacy of national taxation authority mainly refers to the proper basis for the power of levying tax, which implies the reason for national taxation. It raises the following question: what is the reason that the people are required to take certain form of tax-paying obligation, and that at least indicate the lowest degree of compliance? In modern times, taxation country is normal, in which taxes become the principal source of national finance, and push forward the existence and development of modern country. Nevertheless, power of taxation means the power of extermination, to some extent, which is actually testing the level of legal civilization in terms of interest games.

Taxation and taxation right are closely combined with constitution form the beginning. Constitutional practice in western countries makes clear that the conflicts and stability, resulting from exaction and provision between ruler and the public, commences the chapters of western society gradually. Constitution restrains the power of state. Legitimacy

of national taxation explains the existence of country and national power, which implies the ground for the legitimacy of national taxation, criteria of legitimacy and the realization systems of legitimacy.

If legitimacy of national taxation wants to be set up in terms of system, it is necessary to regulate and examine the economic property relation between nation and market, as well as between nation and taxpayers in terms of constitution, and to establish the action framework for taxation constitutionalism. Hinging upon national taxation, this paper takes the theme of legitimacy of taxation rights, combining with history and reality, theory and practice, analyzes the concept of national authority of taxation and its legitimacy criteria, brings forward the conception of taxation constitutionality for the purpose of realizing legitimacy of national taxation, devoting to new theory and new format for constitutional analysis on national taxation. This paper contains six chapters except preface and conclusion, in which Chapter One reviews and explains the theoretical basis of national taxation; Chapter Two puts forward the concept of taxation justice, which shall be the criteria for national taxation; Chapter Three and Chapter Four jointly explain the principles of statutory taxation and taxation fairness which constitutes the substantial standard of legitimacy of national taxation; Chapter Five discusses that taxation constitutionality offers systematic defense for legitimacy of national taxation; Chapter Six combines theoretical discuss with Chinese current and future systematic practice in national taxation from the perspective of Chinese taxation collection constitutionalism.

Chapter One is "Theoretical Basis of Legitimacy of National Tax-

ation". This chapter brings forwards the conception of legitimacy of national taxation from the definition of taxation rights and legitimacy. Taxation rights mainly consist of national taxation rights and the taxpayer's rights, in which national taxation rights contain all the powers of government, combining sovereignty and power. Legitimacy indicates to be subject to authority, closely related with the national sovereignty, and democratic consulting system recognized by the public. Legitimacy of national taxation refers to the properness to levy tax on the basis of taxpayer's recognition. Social contract theory, especially the idea of peoples' sovereign, provides theoretical support for national power. Only taking the purpose of protecting taxpayer's economic free rights and property rights and free market economy, transferring the voluntary obey to moral obligation, national taxation obtains the moral reason and basis of levying tax. If national taxation demands to meet the requirement of legitimacy, it must be restrained, and recognizes the priority of private property, and private property system.

Chapter Two is "the Criteria for Legitimacy of National Taxation". Stemming from the theory of distributing justice, this chapter analyzes relation between taxation justice and legitimacy of national taxation, implication of taxation justice, value factors of taxation and formats of taxation justice. As justice in taxation, taxation justice is the fundamental value and standard of legitimacy of national taxation. The process to realize taxation justice is the process to test on the justice implied in national taxation. Taxation justice has the meanings both in substantiality and in procedure, including the value factors of impartiality, equity and efficiency, which provide a new field of vision

in reviewing the value and function of taxation rule of law, and a concrete standard of legitimacy of national taxation in social, political and economic systems, finally sets up a research method and way for taxation rule of law (constitutionality).

Chapter Three is “Formal Standard for Legitimacy of National Taxation”. Statutory taxation is the principle set up in tax law followed by the taxation law, offering sufficient legitimate ground for sovereign country in taxation, expanding the functioning space of taxation rights. Pursuing the histories of western countries, this chapter discloses the implication and central value of statutory taxation, i. e. regulating and limiting the power of national taxation to protect the public freedom and rights of properties. This chapter explains three valuable functions of statutory taxation, states the functioning area and effects of national taxation, and induces the main content of statutory taxation in litigation, implementation, and procedure. With proper procedures to control and regulate national taxation, we are constructing legal structures to realize procedural justice, and meet the formal requirement for national taxation.

Chapter Four is “Substantial Standard for Legitimacy of National Taxation”. Stemming from equity principal in politics and constitution, taxation fairness in tax law is the criteria for judging whether tax law is good or not, independent in legal philosophy and values. This chapter thinks that the legal implications of taxation fairness have been improved to law from economy in terms of historical view, which could be realized to limit and regulate national taxation together with statutory taxation. Moreover this chapter points out that the valuable function

of taxation fairness is to realize economic fairness and social fairness, which is actually more concrete than the function of national taxation system. Meantime, this chapter analyzes the legal philosophy and valuable functions of taxation fairness in various respects, summarizes five meanings therein, for the purpose of providing concrete principles and standards for the legitimacy of national taxation in substantial justice of taxation.

Chapter Five is “Systems for Legitimacy of National Taxation”. Taxation constitutionality controls and limits the power of national taxation by constitution, which is considered as social contracts, protects the people’s property and free rights, and realizes the taxation justice as a social regulation system. This chapter puts legitimacy of national taxation into the outline of tax law and taxation constitutionality. It firstly explains the deep relations between taxation justice and rule of law, taxation and constitutionality, taxation constitutionality and market economy in respect of constitution, points out that taxation constitutionality is the carrier of tax law, implies the valuable purpose of formal justice and substantial justice in taxation, and is the system guarantee of the legitimacy of state taxation power; secondly, analyzes the cognition of taxation constitutionality and its central content of limiting national power of taxation and protecting taxpayers’ rights, then summarizes six principles in taxation constitutionality; thirdly analyzes the theories of taxation constitutionality establishment in respect of economics, finance and jurisprudence, eventually discloses the necessity and reality of taxation constitutionality and its significance on legitimacy hereof; fourthly it analyzes the limitation of statutory taxation, put

the national taxation right under the constitutionalism. The Chapter reviews the constraint and balance system of constitutional restraint of national taxation power, and put forwards relating principles and measures. Finally, it analyzes the limitation of taxation fairness, which could be realized in the way that the taxpayer's rights are protected with the core of human right protection, and then consequently discusses taxpayer's rights in tax-levying, tax-using and other related aspects. Where taxpayers rights are stipulated in constitution, the legitimacy of taxation constitutionality could come to true; it is not only the objective of taxation constitutionalism but also the basis for the constitutional protection of legitimacy of national taxation.

Chapter Six is "Systems for the Legitimacy of China National Taxation". This chapter focuses on setting up systems of Chinese taxation constitutionality. Based on the comprehensive study of states realities and problems of Chinese taxation constitutionality, the Chapter analyzes the main reasons therefore. Moreover this Chapter concentrates on such conceptions which are related with taxation constitutionality as ideologies, basic principles, national taxation and rights of taxpayers, puts forward fundamental consideration and modes for the systems of Chinese taxation constitutionality based on state realities.

目 录

引 言	(1)
第一章 国家税权合法性的基础	(9)
一、国家税权及其合法性界说	(9)
(一)国家税权	(9)
(二)国家税权的性质	(15)
(三)国家权力的合法性	(18)
(四)国家税权的合法性	(26)
二、国家税权合法性的政治基础	(28)
(一)国家税权合法性与政治	(29)
(二)社会契约的国家观	(30)
(三)国家税权合法性的政治根源	(33)
三、国家税权合法性的道德基础	(37)
(一)国家税权合法性与道德	(37)
(二)纳税的道德义务	(39)
(三)国家税权的德性	(41)
四、国家税权合法性的经济基础	(45)
(一)税收与私人财产权	(46)
(二)私人财产权制度的确立	(48)
(三)国家税权合法性的经济根源	(51)

第二章 税收正义:国家税权合法性的基本价值	(52)
一、分配正义	(53)
(一)分配正义理论解读	(54)
(二)理论思想的交锋	(61)
(三)分配正义的认知	(64)
二、税收正义的内涵	(66)
三、税收正义的价值元素	(69)
(一)平等	(69)
(二)公平	(71)
(三)效率	(72)
四、税收正义的类型及其内在关系	(74)
 第三章 税收法定:国家税权合法性的形式标准	(78)
一、税收法定的历史形成	(79)
(一)税收与法	(79)
(二)英国的历史	(80)
(三)美国的历史	(83)
(四)法国的历史	(84)
二、税收法定的价值功能	(86)
(一)税收法定的语义	(86)
(二)税收法定的价值	(89)
(三)税收法定的功能	(90)
三、税收法定的内容	(96)
(一)立法层面的税收法定	(97)
(二)执法层面的税收法定	(101)
(三)程序保障法定	(102)

第四章 税收公平:国家税收合法性的实质标准	(104)
一、税收公平的历史演进	(105)
(一)早期的税收公平观	(105)
(二)晚近的税收公平观	(107)
(三)税收公平的法治思想	(110)
二、税收公平的价值功能	(112)
(一)分配的价值功能	(113)
(二)经济公平的价值功能	(114)
(三)社会公平的价值功能	(116)
三、税收公平的内容	(117)
(一)平等赋税	(119)
(二)量能征税	(120)
(三)税收适度	(129)
(四)实质征税	(136)
(五)诚实信用	(149)
第五章 税收宪政:国家税收合法性的制度保障	(158)
一、税收宪政的缘起	(159)
(一)税收法治与宪政	(159)
(二)宪政与税收	(162)
(三)税收宪政与市场经济体制	(168)
二、税收宪政及其原则	(173)
(一)税收宪政的解构	(173)
(二)税收宪政原则	(175)
三、税收宪政理论	(179)
(一)制度供给理论	(179)