

税法学研究文库

税 捐 正 义

黄俊杰 著



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出版说明

交流所带来的信息可以使我们站在巨人的肩膀之上俯瞰整个学科的发展,进而推动该领域学科的发展壮大。我国台湾地区的税法研究已经较为成熟,但目前大量读者还不易直接在内地购买台湾地区书籍,而大量复印又有违著作权法的有关规定。在这种情况下,承蒙北京大学刘剑文教授和台湾大学葛克昌教授的大力支持,使我们得以引进了一些已经在我国台湾地区出版的、优秀的税法学著作。我们希望通过这种方式给内地读者提供一个获取信息的捷径,从而可以比较迅速地了解各个地区的教学和学术成果,为深入学习和研究打下更坚实的基础。

我们引进这些学术著作,目的主要在于介绍我国台湾地区有关税法、财政法的理论和方法,推动学术交流,促进学科发育,完善教学体系,而其作者的出发点和指导思想、基本观点和结论等,则完全属于由读者加以认识、比较、讨论甚至批评的内容,均不代表北京大学出版社。

由于海峡两岸的具体情况不尽相同,为方便读者,经作者同意,我们在排版时对原书的某些文字形式作了少量技术性处理。至于原书内容,我们遵从著者的意愿,未作任何改动。需要特别说明的是:(1)台湾地区是中国不可分割的一部分是不争的事实。但目前由于特殊原因台湾地区还实行本地区的法律法规,包括“宪法”。学界从宪法的视角研究、审视税法已经成为一种趋势和必然。因此,从学术研究出发,对书中涉及的“宪法”规定以及据此的分析,并没有加以删减。(2)一些机关和机构,比如行政法院、地税局等,系指我国台湾地区之机构,为了保持行文顺畅,并使读者明确地查证,一般按照原有的称呼,没有进行特别的处理。这当然不代表北京大学出版社对它们的承认。(3)为了行文的简洁,对具体的法律法规并没有一一加以说明,因此如果没有特殊标注,书中所涉及的法律法规均为我国台湾地区的法律。(4)我国台湾地区在税法领域有些用语与内地不尽一致。比如税

捐、稽征机关等用语,为了保持作品原貌,也没有加以修改。特此在这里一并申明,敬请读者注意。希望读者不要因为上述或者书中的其他内容而产生任何的误会、质疑和指责。

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总 序

《税法学研究文库》是继《财税法系列教材》、《财税法论丛》和《当代中国依法治税丛书》之后由我主持推出的另一个大型税法研究项目。该项目的目的不仅在于展示当代中国税法研究的最新成果,更在于激励具有创新精神的年轻学者脱颖而出,在传播、推广税法知识的同时,加快税法研究职业团队建设和形成。

税法学是一门年轻、开放、尚处于成长期的新学科。谓其年轻,是因为它不像民法学和刑法学一样拥有悠久的历史渊源,谓其开放,是因为它与经济学、管理学以及其他法学学科等存在多方面的交叉与融合,谓其成长,是因为它的应用和发展空间无限广阔。在我国加入世界贸易组织之后,随着民主宪政、税收法治等先进理念的普及和深入,纳税人的权利意识越发强烈,其对税收的课征比任何时期都更为敏感和关心。税法学的存在价值,正在于科学地发现和把握征纳双方的利益平衡,在公平、正义理念的指导下,实现国家税收秩序的稳定与和谐。

长期以来,我一直致力于税法学的教学和研究,发表和出版了一系列论文和专著,主持了多项国家级科研课题,对中国税法学的发展以及税收法制建设做了一些力所能及的工作。然而,不容否认,中国税法学的研究力量仍然十分薄弱,有分量的研究成果也不多见,税法和税法学的应有地位与现实形成强烈的反差。我深深地感到,要想改变这种状态,绝非某个人或单位力所能及。当务之急,必须聚集和整合全国范围内的研究资源,挖掘和培养一批敢创新、有积累的年轻税法学者,在建设相对稳定的职业研究团体的同时,形成结构合理的学术梯队,通过集体的力量组织专题攻关。惟其如此,中国税法学也才有可能展开平等的国际对话,而税法学研究的薪火也才能代代相传,生生不息。

近年来,我先后主编《财税法系列教材》、《财税法论丛》、《当代中国依法

治税丛书》这三项计划的开展,不仅使税法学研究的问题、方法和进程逐渐为法学界所熟悉和认同,同时也推动了税法学界的交流与合作。在此过程中,我既看到了新一代税法学者的耕耘和梦想,更感受到了他们在研究途中跋涉的艰辛。这群年轻的学者大多已取得博士学位,或已取得副教授职称,且至少熟练掌握一门外语。最为重要的是,他们对专业充满热忱,愿意为中国税法学贡献毕生精力。正是在他们的期待和鼓励下,为了展示中国税法学的成长和进步,激励更多的优秀人才加入研究队伍,我与北京大学出版社积极接触、多次磋商,终于在2002年达成了本文库的出版协议。

衷心感谢北京大学出版社对中国税法学的积极扶持。如果没有对学术事业的关心和远见,他们不会愿意承担该文库出版的全部市场风险,更不会按正常标准支付稿费。此举的意义,远远溢出了一般商业架构,事实上为中国年轻的税法学提供了一个新的发展机遇。正是他们的支持,才使得主编可以严格按照学术标准组织稿件,也使得作者可以心无旁骛,潜心研究和创作。若干年之后,当人们梳理中国税法学进步的脉络时,除了列举税法学人的成果和贡献,也应该为所有提供过支持的出版机构写上重重的一笔。这里,我还要代表全体作者特别感谢北京大学出版社副总编杨立范先生,他的智识和筹划,是本文库得以与读者见面不可或缺的重要因素。

本文库计划每年出版3—5本,内容涉及税法哲学、税法史学、税法制度学、税收体制法、税收实体法、税收程序法、税收收入法、税收支出法、国内税法、外国税法、国际税法、比较税法等多重角度和层面。只要观点鲜明,体系严密,资料翔实,论证有力,不管何种风格的税法专著都可成为文库的收录对象。我们希望,本文库能够成为展示税法理论成果的窗口,成为促进税法学术交流的平台。如果能够由此发现和锻炼更多的税法学人,推动税法理论与实践的沟通和互动,我们编辑文库的目的就已经实现。

刘剑文

2003年元旦于北京大学财经法研究中心

中国财税法网(www.cftl.cn)

中国税法网(www.cntl.cn)

General Preface

Works of Research on Taxation Law Theories is another large research project on taxation law study presided by me after the publications of Text-books Series of Fiscal Law & Taxation Law , Fiscal Law & Taxation Law Review and Rule Taxation by Law in Modern China. Rather than demonstrating the latest achievements on the theoretical study of taxation law , this project focuses more on inspiring the scholars with innovative spirit showing themselves. While promulgating the knowledge of taxation laws , a group of professionals studying on taxation law theories is forming and developing.

Taxation law is a rising , open and growing subject. It is rising because it has not so long a history as civil law or criminal law. It is open because it intersects with economics , management and other law subjects. It is growing because it has promising future for its application and development. The taxpayers will be greatly awakened to their rights on the course of tax levying with China 's entering into WTO and the popularization of the ideas of democracy and rule the tax by laws. The value of theoretical study on taxation law exists in scientifically finding a balance spot between the taxpayers and levier , which would help to realize a stable and harmonious taxation system among the whole country with the direction of equity and justice ideas.

For a long period of time , I have been dedicated to the teaching and studying of the taxation law. Many theses and monographs have been published and many national research projects presided by me , which were all what I could do to the development and construction of the theoretical study on taxation law of China in my own power. However , we should not neglect that neither researching ability nor influential achievements have been satisfactory.

They could not match up the corresponding positions of taxation law and the theoretical study on it. I came to realize that any individual or organization would never be able to better the situations. At present , the most urgent thing is to congregate all the researching resources around the country in conformity and cultivate a group of young but erudite scholars on taxation law. Thus , a relatively stable group of professionals would be organized to form the academic ladders with reasonable structure. We could depend on the collective powers to study on some specified topics respectively. I think it is the only way to equalize the domestic study on taxation law with international study. Also by this way , the study on taxation law would continue generation by generation and never cease.

Recent years , I have successively presided three projects including editing Textbooks Series of Fiscal Law & Taxation Law , Fiscal Law & Taxation Law Review and Rule Taxation by Law in Modern China. During the process , the topics , methodologies and procedures of the theoretical study on taxation law had been gradually acquainted and accepted by the academic circles and the exchange and cooperation among them had also been greatly promoted. During the course , I not only observed that the new generation of scholars on taxation law study worked hard and cherish beautiful dream to the future , but also their hardships in research. Most of the young scholars have acquired Ph. D. degrees or become the associate professors , and at least fluently master a foreign language. Their zealousness shall be more important , and they are willing to devote their whole life to the career. It is under their expectation and encouragement that more and more excellent talents participate in the career. After my positive communications and constant consultations with Peking University Press , a publication agreement has finally come to for this Works in 2002.

I sincerely express my gratitude to Peking University Press here for their support to the theoretical study on taxation law in China. They would neither take risks to publish all the works nor pay the authors ' remunerations accord-

ing to market standard if they were shortsighted to the academic project , which are far from a business activity and provide a good opportunity for the young scholars of taxation law study. It is with their support that the editor in chief could select the works strictly according to the academic standard and the authors could dedicate to their research and composition. I believe that many years later while reviewing the developing history of the theoretical study on taxation law in China , they will not only remember the scholars and their achievements , but also remember the contributions from Peking University Press. Here , on behalf of all the authors , I shall thank Mr. Yang Lifan , Vice Editor in Chief of Peking University Press , for his wisdom to and design for the Works , or they would never be published.

Annually , 3 to 5 books will be published to affiliate the Works. The contents of these books mainly concerns about philosophy of taxation law , history of taxation law , study on taxation law system , taxation law system , taxation law , taxation procedure law , taxation income law , taxation expenditure law , domestic taxation law , foreign taxation law , international taxation law and comparative taxation law. All the monographs with various styles could become members of this Works if they are of clear point of view , rigorous logic , accurate documents and strong reasoning. We hope that the Works could become a window to demonstrate the theoretical achievements of taxation law study and a platform for academic exchanges. If more scholars on taxation law study could be discovered and the practice and theories of taxation law could be exchanged and co-developed simultaneously with the publication of the Works , our targets to edit the Works are fundamentally achieved.

Liu Jianwen

On New Years ' Day of 2003

In Research Center of Fiscal Law and Taxation Law

Peking University

序

租税国与法治国并非对立的,而系紧密结合,法治国之宪法原则,在税法中亦扮演着重要角色。法治国固然亦为立法国,但这并不表示国家应容忍立法者恣意立法,相反的,在一个实质法治国中,立法权有其宪法界限,尤其是应受到基本权利与正义之拘束。任何民主之多数决定,必须重视基本权利作为具有拘束力之价值秩序,而不容许立法者恣意立法及随意课征。因此,税法必须符合正义,而为正义之法,才是宪法之意旨与要求。

税捐宪法制度之形成,在“形式、外观”方面,应由立法机关之立法行为加以规范,以符税捐法定主义之法治国原则合法性之要求;至于在“程序”方面,须由民意代表以民主程序来形成税捐之制度设计,始符民主国原则之宪法意旨,而取得正当性之基础。不过,多数决定之立法并非一定是真理之实现,因此,“实质、内容”之宪法界限,即不得逾越税捐公平原则与过度禁止原则等税捐正义之宪法意旨。

本书仅针对税捐复查限制与相关宪法解释之观察心得,作案例式之实证研究,或许有助于了解税捐正义具体化之成果,但是,税捐正义之研究范围,非常广泛,笔者学识经验有限,尚祈专家学者,批评指正。

本书主要分为五章:

第一章:导论——税捐正义之概念

第二章:税捐复查限制与宪法解释

第三章:境内税救济限制之宪法解释评论

第四章:关税救济限制之宪法解释评论

第五章:省思——税捐正义之实践

Preface

It is not opponent between the levy nations and the law-ruling nations ; instead , they are tightly combined. The constitutional principle of the law-ruling nation is acting an important role in the Tax Law. Although the law-ruling nation is also a nation of legislation , it does not mean the nation shall tolerate the legislator to legislate presumptuously ; on the contrary , in a substantial law-ruling nation , the legislative right has its constitutional limitation , especially it shall be restrained by the fundamental right and justice . Any majority decision in democracies shall take the fundamental right as a bounding Merit Order and shall not allow the legislator to legislate unscrupulously and to levy arbitrarily. Therefore , the tax law shall be consistent with the justice performing as a justice law before the constitutional purpose and demand can be in conformation.

In terms of “Formation and Appearance” , the formation of tax ’s constitutional system shall be standardized by legislating behaviors made in legislative authority to correspond with the legal demand and the tax-statutory principle of law-ruling nation ; in terms of “Procedures” , the constitutional tenor can be consistent with the principle of democratic nation no more than the systematic design of the tax being made by Congress ’s democratic procedure. The legislation of majority decision , however , is not surely a performance of the truth , so the constitutional limit of “Substances and Contents” shall not surpass the constitutional tenor in taxes and justices such as the principle of tax equity and of over-inhibition.

This book is nothing but an observing insight into the restriction on tax review and the interpretation of relevant constitutions , proceeding with an em-

pirical research on various cases , in which it may be in favor of understanding the specific achievement of the tax justice , but the extensive researching range in the tax justice , the writer has only a limited knowledge and still requires the criticism and correction from specialists and scholars.

This book is principally divided into five chapters :

Chapter 1 : Introduction—Conceptions of Tax Justice

Chapter 2 : The Restriction of Tax Review and the Interpretation of Constitution

Chapter 3 : Constitutional Interpretation and Commentary on Interior Relieving Restriction in Taxes

Chapter 4 : Constitutional Interpretation and Commentary on Relieving Restriction of the Custom Duty

Chapter 5 : Speculation—The Practice of the Tax Justice

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