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A Study of Interests and Interest Equilibrium Regime in Tax Law

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图书在版编目（CIP）数据

税法中的利益及其平衡机制研究 / 龚伟著 .—北京：中国法制出版社，2016. 10

ISBN 978-7-5093-7937-0

Ⅰ. ①税… Ⅱ. ①龚… Ⅲ. ①税法—研究 Ⅳ. ① D912.204

中国版本图书馆 CIP 数据核字（2016）第 251842 号

责任编辑：薛 强（editor_xue@163.com） 封面设计：蒋 怡

税法中的利益及其平衡机制研究

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经销 / 新华书店

印刷 / 北京京华虎彩印刷有限公司

开本 / 710 毫米 ×1000 毫米 16 开 印张 / 14.75 字数 / 210 千

版次 / 2016 年 12 月第 1 版 2016 年 12 月第 1 次印刷

中国法制出版社出版

书号 ISBN 978-7-5093-7937-0 定价：45.00 元

北京西单横二条 2 号 值班电话：010-66026508

邮政编码：100031 传真：010-66031119

网址：http://www. zgfzs. com 编辑部电话：010-66038139

市场营销部电话：010-66033393 邮购部电话：010-66033288

内容摘要

法律的背后是利益，这是一切行为的初始动机和最终目的。在法学理论中，利益法学具有悠久的历史，长期以来，人们习惯将其作为法律解释的方法之一，用于法官的个案处理之中。随着法学的发展，利益理论逐渐走出了法律解释和司法适用的领域，成为适应性极强的基础理论之一，被各个部门法所吸收和利用。应该承认，利益理论作为一种法学基础理论本身具有很大的价值，被不同的部门法吸收以后，表现出了更加活跃的适应能力。正如加藤一郎教授所言，利益衡量不限于民法，凡涉及一切法律判断，亦即法的解释，就有利益衡量问题，无论是对民法的解释，还是对其他法律，如宪法、刑法等，只要是对法律进行解释，都可以观察到其中存在伦理和利益衡量的关系问题，只是在不同的部门法中运用利益衡量的方法之时会有具体的差异。而实际上，利益理论除了在民法和刑法中主要承担的解释功

能以及为实践提供指导以外，在行政法和经济法中，该理论被赋予了更为基础的功能，比如行政法中的平衡论就是作为现代行政法的理论基础被提出来的，其适用范围从法的解释延伸到立法以及法律适用领域。这表明，法学的利益理论具有很强的生命力，任何部门法都离不开对特定利益的调整和保护，因此，部门法完全可以根据自身的特点来建构自己的利益理论，税法亦是如此。本书从利益的视角出发，尝试以利益的方法解读税法制度，书中关于税法中利益理论的研究主要从以下七个部分展开：

第一章是对税法利益理论的研究逻辑进行探讨。利益是理性思维的逻辑起点，自人类社会形成以来，人类的一切活动都无法绕开利益二字，中西方都有自己古老的利益思想，而功利主义对于利益的认识，以及边沁对个人利益和社会利益的划分为后世法学的发展做出了重要贡献。从理论上说，利益法学有着清晰的学术脉络，德国法学家耶林的著名论断“目的是法律的创造者”可谓是利益法学的发端，图宾根大学的民法学家赫克的利益冲突理论则是真正意义上的开创，美国伟大的法学家庞德是利益法学的集大成者，他的理论十分宏大，内部逻辑也非常清晰。他对利益的区分方法，即个人利益、公共利益和社会利益的区分标准，以及对三种利益的保护范围、保护程度的说明，对于法学利益理论的本体构建做出了巨大的贡献。利益理论经过庞德的体系化提升之后，具备了坚实的理论底蕴，并且极大地增加了其适用的广泛性，除了在民法中有大力的发展以外，还被行政法、刑法等部门法吸收，“利益衡量论”“法益论”“平衡论”等理论都在各自的学科中展现了惊人的生命力，在税法中也同样如此。在税法的语境中研究利益问题乃是对税收历史以及现实的一种必不可少的视角，也是对税法理论的一种深层次和更加务实的理解。在确定范围和对象时，税法同样可以遵循庞德的理论逻辑：利益分类→利益选择→确定保护界限→利益衡量→利益评价，即：首先，考虑生活上的利益如何体现为税法上的利益，进行利益识别，再划定法律保护的界限；其次，考虑利益冲突之时如何权衡和取舍；再次，还需要对利益平衡的方法设置基本的约束规则，以防止利益平衡这一方法在税法中被滥用；最后，因

为税法上的各种利益在法律上必然化身为权利，还必须对纳税人权利和国家税权在税法上进行规范配置，以确保利益平衡方法的实现。

第二章专门探讨税法中的利益识别问题，因为利益概念的复杂性与利益本身的复杂性都是非常突出的，不仅要将现实生活中的利益转化为法律规范上的利益，还需要考虑税法上的特殊利益问题。中西方理论界对于利益概念的认识并不统一，存在着主观说、客观说、折中说等不同的解读。一般而言，主观说否认了利益的客观性，客观说又忽视了人的主体性，而本书采取折中说的观点，兼顾主体需求与客观对象，认为利益是一种具有主观属性的客观存在，反映的是主体和客体之间的关系，并在此基础上，将利益与法进行连接。法学家赫克关于生活利益、实用性利益和描述性利益的经典论述为我们思考这个问题带来了深刻的启示，法律利益虽然来自于生活利益，但生活利益在转化为法律利益的过程中必然经过一定的筛选，只有满足普遍性、正当性以及法律的可保护性标准的利益才是法律中的利益。然而，当这个问题进入税法领域，由于税法具有独特的合理性与合法性标准，因此必须要从两个方面进行论证：第一是税收产生的正当性论证，这是关于税收因何而来的根本性问题，对此，税收债法理论具有很好的说明力，其将国家与纳税人之间的关系界定为公法上的债权债务关系，国家作为公法上的债权人，其税收利益为债权人利益，并且是经过了民主程序，代表了债务人意思的合法利益；第二是征税范围的合理性与合法性论证，正当的征税范围应该具有广泛性、可靠性、适当性与适度性标准。

第三章是税法中利益的类型化研究。在法学利益理论的探讨中，利益划分是必经之路。在税法利益的划分标准上，本书采用三元论的划分方法，既为了解说方便，也是出于利益冲突的客观现实，纳税人的财产利益和国家的税收利益是税法中最基本的利益体系，而随着税制文明的不断推进，在原有的二元框架中社会公共利益也渐渐突显。在利益经过划分的基础上，文中对三种利益及其结构进行了详细的论述：第一，纳税人利益是包括了财产利益与人身利益在内的完整利益，就前者而言，范围很广，基本涵盖了包括了民

事生活中纳税人的所有财产利益，但不同之处在于纳税人的财产利益具有很强的对抗性，这是税法本身所决定的，主要体现为对纳税人合法财产的保护，如未经法定程序不得随意课税，不得随意更改各种课税要素；国家不得随意征收、征用等。就后者而言，包括了纳税人的人格利益和身份利益，这是税法极具特色的一面，往往伴随着技术性很强的制度设计。第二，与纳税人利益相比，国家税收上的利益在大多数时候体现为一种财产性利益，但也包括了类似纳税人人身利益的“国格”利益（“非财产性利益”），前者包括对税款的征收和使用，强制性和无偿性是其显著的特征，后者是对国家荣誉、独立、自由、完整的宣示和彰显，主要体现为国家的税收主权，即一个国家可以自主决定其涉外的税收制度，不受任何国家和国际组织的干涉。第三，税法中社会公共利益的提出旨在解决国家利益和个人利益的冲突，但社会公共利益是一个很难把握的概念，不是个人利益的总和，也不是国家利益的分支，而是一种在利益冲突中抽象出来的具有自身特性的、相对完整的利益。从立法现状来看，法律中对社会公共利益的认可是一种常态，虽然我国税法体系中基本找不到公共利益的字眼，但却随处可见公共利益的思想，在税法上，公共利益包括了保护自然资源、保护“人的资源”、促进社会福利、保障公共基础设施的建设等多个方面，并且大多是以符合税法特征的形式表现出来，如征税范围的特殊选择、设置有区别的税率，或税收优惠的形式等。

第四章是税法中的利益冲突及其实证研究，从个人、国家和社会不同的视角对利益进行了详细的观察和解析。第一，在纳税人利益范畴，存在着法律意义上的纳税人和经济意义上的纳税人，狭义的纳税人和广义的纳税人，以及地域性的纳税人，由于纳税人身份的多重含义造成了纳税人利益在结构上的多重指向，以房产税改革为例，其中地域差异、既有城镇住房结构、租赁市场等因素都会导致纳税人的利益分化。第二，在国家税收利益范畴，由于层级结构带来的利益冲突是不可避免的，本书考察了创维税案以及鹰潭的所得税案例，发现国家税收利益在纵向上表现为中央政府和地方政府之间的税收利益冲突，以及省以下四级地方政府之间大量的税收利益冲突，在横向

上表现为平行的地方政府之间，无论是省级、市级抑或以下各平级政府之间的税收利益都存在非常明显的竞争关系。其中，政府间纵向的税收利益冲突是我国现行政治体制在税收板块的投影，是国家税收利益中最主要、也是最突出的问题。第三，在社会公共利益范畴，因为社会公共利益本就是一个复杂且难以言说的概念，税法中的社会公共利益选择中也存在价值冲突，另外，社会公共利益的受益对象又难以确定，这使得税法中公共利益中的主体一直是一个无法确定的、动态的过程。以环境保护费改税为例，其中凸显的社会利益就存在多标准、多区域等不同角度的难题。总之，税法中存在的利益冲突非常复杂，不仅是纳税人利益、国家利益和社会利益之间存在冲突，而且由于税法的特殊性，在纳税人利益、国家利益和社会公共利益内部还存在冲突，形成一个在横向上对峙和纵向上延伸，盘根错节的复杂结构。

第五章是对税法中的利益平衡方法的本体论证，由于税法中存在不同层次、不同角度的利益冲突，因而需要通过一定的衡量标准评价并选择相关的利益。但一方面税法中的利益在形式上难以真正区分，不同的利益分类并不代表其具有某种专属性，只是一种从不同角度观察而生成的叙述而已，另一方面不同的利益之间通过交汇融通，实现了本质上的统一，因此纳税人利益、国家利益和社会公共利益不仅在实际上是紧密相连的，并且所有利益的终极目的都在于充分满足个人需要，提升个人福利。然而无论是个人利益至上、国家利益至上或是以社会利益最为优先的标准都会带来很多负面的问题，因此可以认为，税法中并不存在优先的利益。但在这三种利益中，社会公共利益作为个人利益的综合，是协调国家税收利益与纳税人利益的产物，在实质上虽然不是被优先考虑的利益，却是利益分配的结果，体现出的是一种相对的平衡。既然社会公共利益是分配的结果而非分配本身，那么指引利益趋近这个结果的应该是一种天然存在的，对利益冲突的平衡思维，从理论上说所有的冲突和失衡都只能自发地，或强制地通过协调和平衡来实现稳定和有序，而法律规范正是为了保障社会关系的稳定和有序，因此利益平衡的方法是税法发展的必然要求。在税法中，这一方法体现的是过程的平衡，蕴含了评价、

衡量、选择、协调之意，在立法、司法和执法中均能发挥影响。并且，税法中利益平衡的方法也是一个自身不断发展，不断修正并趋向正确的过程。

第六章是税法中利益平衡的约束机制研究。利益平衡的方法在运用时需要考虑社会背景等多种因素，为免使其陷入过于抽象或模糊的处境，成为一种神秘的不可知论，应设置相应的约束机制，以引导利益衡量的程序、力度以及偏好。这些约束机制包括如下内容：第一种约束机制是要进行法律的成本效益分析，在法律世界中，权利与义务的界定和运行是需要将成本因素和收益因素纳入考虑范围的，因此可以对经济学中经济人的假设进行法律上的应用与改进，以“理性人”的标准和有限理性的理论作为研究工具，通过法律的交易成本理论，探讨税收中的立法成本和守法成本，以及税法的经济效益、政治效益、社会效益、文化效益等问题，同时在成本效益的导向下，探讨如何在税收法律规范的数量上，以及选择法律制度的机会成本上实现利益平衡。第二种约束机制来自于税法中的量能课税原则，该原则涉及分配正义问题，核心在于如何实现税收公平，是公平的价值观在税法中的具体体现，并且其突破了形式上的公平，追求实质意义上的公平，对于平衡税法中的各种利益冲突可以起到纠偏扶正的作用。在量能课税理论中，“所得”最适合作为现代社会衡量税收能力的标准，但不能成为过于绝对化的标准，优良的税制也必定是经过优化组合的税制。此外，量能课税原则下也要求达到税收负担能力“质的平衡”，这可以通过区分不同类型的所得进行课税，以及在企业所得税中引入累进税率等方式来实现。第三种约束机制是比例原则，该原则要求国家权力的行使不能超必要的限度，并且国家为保障权力行使采取的手段与国家行使权力所追求的目的之间应保持一定程度的合比例性。虽然我国宪法没有明确的规定，但该原则从根本上契合了现代法治国家的精髓，在税法中具有很强的适用性。在运用比例原则时，首先应该进行税收立法目的合宪性审查，然后才能运用适当性原则、必要性原则和狭义比例原则分别审查税收立法手段的正当性问题。

第七章是税法中利益平衡的实现问题研究。在法律中，利益是权利的基

础和根本内容，而权利是利益的表现，因此税法中的利益平衡也应围绕纳税人权利与国家税权的分配进行。利益平衡、社会公共利益、权利（权力）配置三者之间是内在关联的，利益平衡是方法和过程，权利（力）配置是利益平衡的表达形式，社会公共利益则是利益平衡的结果。在以权利配置实现利益平衡之时，应注意两点，其一是以平衡的思维开解税法中的利益纠纷，这在立法以及法律的适用环节均应该得到体现，但立法中的利益平衡却是核心；其二在于利益平衡会带来税法权利配置范式的嬗变，因为在传统的法理学观点中，平衡意味着主体权利的对等，且在量和质上都足以和对方抗衡，然而在税法领域，纳税人权利和国家税权在本质上是不同的，在量上也无法比较，并且纳税人和征管机关之间的服从与命令关系是事实存在，权利与权力的不对等也是一种实然之态，因此税法中的利益平衡是一种非对称性的平衡：一方面要赋予纳税人足以捍卫自己正当利益的权利，另一方面也要维护国家的税收利益，保障国家的税收权力，二者之间既能够彼此成就对方，也可以相互抗衡。具体到如何实现税法中的利益平衡和权利的规范配置，本书从三个方面展开了论述：首先，利益平衡理论下税法的权利配置必须遵循一个基本前提，即廓清税收法律的制度属性，任何权利或权力都无法脱离整个法律制度的底色，以及传统税制潜移默化的影响，只有与整个背景相协调的税收法律制度，才能在现实的土壤中获得长久的生命力。其次，当前我们需要进行两种努力，一方面是将纳税人的权利进行深层次的推进，通过税收基本法奠定纳税人的生存权、财产权、平等权等基本权利；另一方面则是对国家税权进行多方位的整合，解决目前突出的税收立法权以及地方税权的问题。最后，关于今后的发展模式，应当可以确信的是，在分配税收权利时，片面的“国库主义”和“纳税人主义”思想都不足以承担现代税法的发展基调。税法并不是以保护国家征税权高效行使为最终目的的“征税之法”，也不是纯粹的保护纳税人权利的“权利之法”，在利益平衡的观点中，税法的权利配置只能在“国库主义”和“纳税人主义”中寻找折中。

Abstract

Interests underlying the laws play a role of the incentive and the end to all the performances. In the philosophy of laws, jurisprudence of interests has been used to serve as a method of legal interpretation by judges in individual cases with a long history. With the development of laws, jurisprudence of interest theory has gradually applied beyond as a way as mentioned above in the judicial sphere. Therefore it has become a basic legal theory widely adapted to and utilized by other departmental laws. It should be acknowledged that the theory of interests is of great value as a basic legal thought, and has become more and more active after absorbed by others. Just as per Professor Katou Ichirou, interest equilibrium shall be by no means limited to civil law, as all the matters concerned with legal judgments (legal interpretation) are relative to interest equilibrium,

i.e. all the legal interpretations in respect to civil law, constitution law, criminal law, are referred to the relationship between morality and interest equilibrium, though it varies with different manners in different laws. Actually in addition to the fact that the interest theory functions mainly as legal interpretative ways and guidance for practice in civil and criminal laws, it plays a much fundamental role in the administrative and economic laws. For example, the equilibrium theory in the administrative law is borne as a basic thought in its modern edition, the scope of which has been spanned from legal interpretation to applications of law's area. It can be concluded therefrom that interest theory in the law is so strong that every and each departmental laws is concerned with specific interest to be adjusted and protected. Therefore, departmental law is able to establish interest theory of its own by themselves, which includes tax law without doubt. It herewith tries to interpret taxation system via interest thought and perspective in seven chapters as follows:

Chapter 1 is a discussion on the interest theory's research logic in the tax law. Interest is the starting point of rational thinking, since all the activities of human being could not turn a blind eye on the interest from ancient human society. Generally speaking, though it can get clues of interest theory worldwide, the most significant contribution in this regard can be attributable to Utilitarianism and its proponent Jeremy Bentham, whose thought on interests, particularly delimitation of individual and social interest play an undeniable role for a further legal advancement. Interest thought of laws bears a clear academic evolution e.g. an tentative idea brought out by German jurist Rudolph von Jhering (with the famous saying "law as a means to an end"), a formal initiative in this regard by Philipp Heck from University of Tübingen (with the conflicts of interest jurisprudence), and a mature compilation collected by a prominent American legal scholar Roscoe Pound. With a macro view plus clarified logical thinking, Pound identified interests into three categories: individual, public and

social interests, and additionally explores their protective scope and extents by laws, which makes a distinguished contribution to establishing of interest jurisprudence's main body. Thereafter interest theory has accumulated a solid theoretical background, and widely applied by civil law as well as administrative and criminal law etc, which is represented by a vivid growth of such though as "interest equilibrium" , "legal interest" and "interest balance" in respective departmental laws It is without question the same with tax law. Under tax law scenario, exploring interests is an indispensable viewpoint to obtain a better understanding tax historically and practically, i.e.a much more deep and practical understanding of tax law theory. In fixing research scope and subjects, tax law may also follow the path brought by Pound: interest classification → interest choice → fixing protective limitation → interest equilibrium → interest assessment. This can be taken a closer eye as follows: firstly, consideration should be taken into as of the transformation of daily interest into tax law interest, i.e. fixing legal protective limits after identify different interests; secondly, to make a choice confronted with interest conflicts; thirdly, to impose binding rules on the interest equilibrium to make sure a balance of interest. Finally endeavor shall also made to allocate interest rights in tax laws to realize a balance of interest.

Chapter 2 is to discuss identification of interests in particular. Interest thought is extensively complicated in concept and also in itself, which means not only a transformation from routine interests into legal interests but also a special character in tax law needs assessing. The academic circle in East and West has not reached a consensus with its concept, mainly in the form of three opinions as such Subjective sense, Objective sense and Compromising sense. Generally speaking, Subjective sense does not acknowledge the objectivity of interests, while Objective sense neglect human being's subjectivity. Therefore, a Compromising sense is satisfactory enough in that it opines that interests with

a subjective character exist objectively, and it reflects a relationship between subjects and objects, i.e.a connection with law. The classic proposition on routine interests, utilitarian interest and descriptive interests produced by jurist Philipp Heck inspires enormously to us to address this tough issue. That is, legal interest derives from routine ones, but only those which meet generosity, justification law protected worthiness can be turned into legal interests in the transforming process. Meanwhile if it occurred to tax law, due to tax law's special rational and unique aspects, the exploration should be made in two ways. First, it is about establishment of tax law's justification, i.e. a fundamental question of the reasonableness of imposing tax revenue. In this regard the obligation theory can be referred to, since under this theory the relationship between the nations and taxpayers is defined as a right-obligation one in public laws, i.e. the country is the oblige in public law, and the revenue interest, also a obligor's interest, is representative of obligor's legitimate benefits deriving from a democratic process. Second, it is about reasonableness and legitimate scope of tax levy. In this sense a due tax shall be levied in a wide, trustable and proper manner.

Chapter 3 discusses a classified interest in tax law. It is well-known that delimitation of interests in the legal interest studies could never be neglected. Interest in tax law can be delimited hereunder with a trialism approach due to a convenient research and the fact of interest conflicts in practice. The property interests and revenue interests of taxpayers is the most fundamental ones in tax laws, while with the development of tax regime's civilization, public and social interests are more and more outstanding under the original dualism framework. After a prudential delimitation of interests, three various interests has been examined as follows. In the first instance, taxpayer interest encompasses property and personal interest. As far as the former one, it almost covers all the property benefits in taxpayer's civil daily life, and with a tax law's specific adversarial

nature, taxpayer's legitimate property should be protected, e.g. tax shall not be levied randomly and its factors not easily changed without due process; the property shall also not be requisitioned. As for the latter, it covers taxpayer's personal and identity interest which is specialize in tax law with an extensive technique system designation. In the second instance, besides "national" interest (a kind of "non-proprietary interest") similar to taxpayers' personal interest, country's revenue interest is mainly and most often a proprietary interest with a comparison of taxpayers'. Revenue interest is referred to levy or utility of revenues, which characterizes with compulsory and free nature, while national interest is related with country's honour, independence, freedom, completeness, i.e. kind of tax sovereignty to decide their own foreign related tax rules but without intervention from outsiders. In the third instance, in tax law social public interest has hammered up aimed at addressing the interest conflicts between nations and individuals. However as being a difficult concept, law social public interest, is not a collection of individual interest, not a branch of national interest, but a comparative complete concept abstracted from interest conflicts. From the perspective of legislation, it is common to acknowledge thereof in the law, though almost non of relative phrases can be found out in our tax rule system. Nevertheless it can be concluded here and there. In tax law, public interest contains protection of natural resources and "human resources" , improvement of public welfare and infrastructure and so on, which is most often typical of tax law's characteristics such as a special choosing scope, a various interest rate or a different favored form of revenues

Chapter 4 positively examines the interest conflicts in tax law. It is carefully and prudentially carried out from the different viewpoint of individuals, nations as well as society. Firstly, as for the scope of taxpayer interest, there are couple of taxpayers in different meanings, such as, legal or economic taxpayers, narrow or wide meaning taxpayers, and also different localized ones, which leads to

their interest respectively refers to different orientations. Take housing tax for example, various factors includes but not limited to localization, original housing structure in town, renting market etc will contribute to their interest classified. Secondly, in terms of national revenue interest, due to the fact that the interest conflicts arising from tier construction is undeniable, cases (*Skyworth* case and *Yingtan City Income Tax* case) are analyzed to find out that vertical conflicts in this regard between central and local governments and between the fourth tier beneath provincial government, in addition to horizontal conflicts in parallel government regardless a competitive status within provincial or municipal level beyond. Amongst the foresaid different government interest conflicts, the vertical aspect, as a projection of statehood in our current nation into tax regime, is most pivotal and outstanding problem. Thirdly, social public interest is thought to be a troublesome concept in this field, and this concept in tax law also presents a value choosing puzzle. Moreover, the benefited subject is hard to define, which renders the subjects of tax law's public interest a pending, take environmental tax revised from fees for example, it emerges a touch question from multi benchmarks and localizations. In conclusion, it is a complicated issue in tax law since not only conflicts amongst taxpayers, countries and society, but also within their inside conflicts, in the form of horizontal confront against and vertical interwoven status.

Chapter 5 tries to find an approach for interest equilibrium theory. Interests in tax law need assessing and choosing by means of some kind of standard due to interest conflicts in various levels or perspectives. However taxpayers' interest, national interest and social public interest are so closely connected that their eternal purposes is to realize individual welfares. Although on one hand, it is hard to distinguish different form of interests in tax law, on the other hand, different interests are assimilated to be unified in essence. Nevertheless a priority of any one of the three aforesaid three kinds of interests will come up

with a negative outcome. Thus it can be said that there is no priority interest in tax law. Social public interest as a collective individual interest and outcome of coordinated national and taxpayer's interests, is not taken into consideration in priority, but it is a production made from interest allocation, and also means a comparative balance. Since social public interest is resulted from such an allocation, this approach thereto shall be a natural thinking for balancing interest conflicts. In theory, all the conflicts or chaos develops naturally or compulsorily coordinate to make it, which means the interest equilibrium is a reasonable requirement for tax law's evolution. Under the circumstance of tax law, it embodies a balance of proceeding, which refers to assessing, balancing, choosing and coordinating and plays a role in legislation, judicature and legal enforcement. Besides, this approach is a continuously growing and revising to be more and more genuine.

Chapter 6 focuses on a binding regime for interest equilibrium in tax law. When it is applied a great variety of factors shall be considered such as social background. To walk away from a mysterious unknown thought in a metaphysical or ambiguous status, a binding regime is supposed to be introduced to make a direction for that in respect of proceedings, extents or preferences, which can be summarized as follows. Firstly, legal cost and effect shall be analyzed. Since delimitation and performance of legal rights and obligations shall be referred to cost and efficacy, economic human being principle in economics can be applied after a amendment thereof. This is to say, applications of principle of "reasonable man" and bounded rationality as research approach, and discussions of legislation and complying with law costs and a wide variety of issues on efficacy via transaction cost theory in law, such issues as on economics, politics, society, culture etc. Meanwhile examinations on how to balance volumes of tax rules and sunk cost on choosing legal systems is preferred under the guidance of cost-efficacy principle. Secondly, the binding regimes come from