

2010年度宁波市社会科学学术著作出版资助项目



On Tax Justice

From the Insight of Constitution Science

# 论税收正义

——基于宪法学角度的省察



陈丹 著



法律出版社  
LAW PRESS · CHINA

浙江省哲学社会科学规划课题成果  
课题编号：08CGFX006YBB

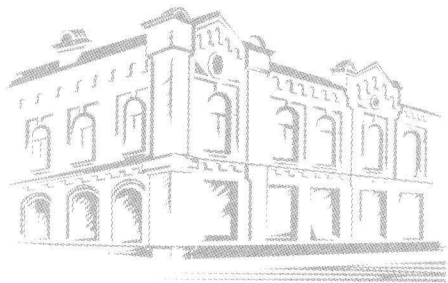
On Tax Justice

From the Insight of Constitution Science

# 论税收正义

——基于宪法学角度的省察

陈丹 著



法律出版社  
LAW PRESS · CHINA

法律门  
Access To



www.falvm.com.cn

## 图书在版编目(CIP)数据

论税收正义:基于宪法学角度的省察 / 陈丹著. —  
北京:法律出版社,2010.7

ISBN 978 - 7 - 5118 - 0881 - 3

I. ①论… II. ①陈… III. ①税法—研究—中国  
IV. ①D922.220.4

中国版本图书馆 CIP 数据核字(2010)第 116199 号

© 法律出版社·中国

责任编辑/彭 雨 何 敏

装帧设计/马 帅

出版/法律出版社  
总发行/中国法律图书有限公司  
印刷/北京外文印刷厂

编辑统筹/法律出版社上海出版中心  
经销/新华书店  
责任印制/陶 松

开本/787×960 毫米 1/16  
版本/2010 年 8 月第 1 版

印张/13.25 字数/193 千  
印次/2010 年 8 月第 1 次印刷

法律出版社/北京市丰台区莲花池西里 7 号(100073)

电子邮件/info@lawpress.com.cn

销售热线/010-63939792/9779

网址/www.lawpress.com.cn

咨询电话/010-63939796

中国法律图书有限公司/北京市丰台区莲花池西里 7 号(100073)

全国各地中法图分、子公司电话:

第一法律书店/010-63939781/9782 西安分公司/029-85388843 重庆公司/023-65382816/2908  
上海公司/021-62071010/1636 北京分公司/010-62534456 深圳公司/0755-83072995

书号:ISBN 978 - 7 - 5118 - 0881 - 3

定价:34.00 元

(如有缺页或倒装,中国法律图书有限公司负责退换)

## 致 谢

历时两年,书稿终于在此瞬间画下最后一个句号。回首往事,顿觉百感交集,创作的艰辛又历历在目。笔者在此期间既经历了痛失亲人的大悲大痛,也遭遇了文思枯竭、搜肠刮肚的不眠之夜;既有过百思不解、苦闷彷徨的焦虑,也有过渴望脱稿、急功近利的浮躁。然而,值得庆幸的是,这一路上我并不孤单寂寞,因为背后有那么多的师长、亲人、朋友、同事帮助、支持我,让我在迷惘时重拾信心,在颓废时振奋精神。也许不善于感情外露的我,平日未对他们表达过只言片语的感谢,但他们的名字早已铸入我感恩的内心。

本书撰写期间,恰逢我在浙江大学攻读博士学位。首先我要感谢恩师林来梵先生的悉心指导。从本书题目的厘定、提纲的撰写到初稿的修改,先生都倾注了大量心血;没有他的鼓励、点拨以及针针见血的批评,作者或许根本无法完成本书的写作。而先生高尚的品格、豁达的心胸和严谨的治学态度,更让弟子终身受益,不敢苟忘。在此,我还要衷心感谢导师组胡建森教授、孙笑侠教授、章剑生教授、朱新力教授给予该书的诸多建议与提点,他们各具魅力的学术风范和弘扬法治的法律人格都给我留下了难以忘怀的记忆。

我在读博期间有幸结识了方建中、何永红、凌维慈、翟国强、郑磊、刘义、刘练军、余静植、陈运生、骆正言、朱玉霞、马平、林在明、白斌、陈玉山、杨吉、陈亚飞、高慧铭这些同门师兄姐妹,还有孙菲菲、姜芳、张豪、余军、傅蔚冈、林艺聪、楼利明等众位学友,他们在日常学习生活中给予我的启迪与关怀同样是本书得以最终完成的巨大推动力。

感谢我所在单位同事孙祥生、王宏志、王崇兴等老师以及揭明、丁寰祥院长为我提供的宽松的写作和工作环境!

感谢我的家人,谢谢他们在我艰难写作过程中给予我的无私的关爱、理解与宽容,没有他们经济上的支持和精神上的鼓励,我的创作之路将会举步维艰。

最后,谨以本书献给在教育战线工作了三十余年而长辞与世的母亲及所有为我所爱和爱我的人!从此,我将带上一颗感恩的心,踏上新的学术征程……

**Nothing, but my heart!**

**陈丹**

2009年4月20日

## 内容摘要

税收正义 (steuergerechtigkeit) 被视为宪法的一个基本原则,也是税法的核心价值。伴随着现代工商业国家的兴起,中国公民已几乎人人都有了与税法亲密接触的机会。与之相应,面对正在发生或即将到来的税收对公民自由及财产权大规模干预与介入之命运,如何使它的产生及运作符合正义要求,特别是如何充分发挥税收正义功能,以确保宪法基本人权的有效实现,就成为我国当代宪法学研究不可回避的课题,极具理论与现实意义。

本书的主旨即在于阐释宪法语境下与税之正义相关联的一系列问题,为此摆脱不了对“税”之确切内涵与外延的探求,而“税”概念本身及其在不同学科中不尽相同的表述方式和思想内容,也正是这些学科如公共财政学、税务会计学、税法学得以相互区别,并各自进行理论架构的逻辑起点与问题分析工具。基于此,与财政学上的“税”概念不能替代法律上的“税”概念之情形一样,宪法上的“税”概念也绝不能简单等同于法律上的“税”概念;后者只能作为前者解释的协助,而前者则是后者合宪性审查依据,即宪法上的“税”概念在以主权原理为形式、以人权理念为内容、以岁入岁出为外延的开放性结构之中,为法律上的“税”概念划定了其在宪法秩序中的内涵边界。

宪法上的“税”概念作为一应然性范畴,其价值取向与宪法上所构筑之税收正义论紧密相连,即与“什么样的税收在宪法上才是正义(正当)的”这一命题的论证息息相关。尽管欲就“相同事物予以相同对待,不同事物应为不同处理”正义公式中的实质性内容,在任何一种路径选择或思考范式上达成一致,都远非易事,但还是可从各种各样的税收理论及与税收相关的一般正义论中探寻、挖掘出:再分配、完全平等、普遍福利、需求、能力、努力、成就、贡献、个

人赋属、市场供需、运气等若干普遍性标准,作为税收正义在税益与税负两方面所适用的判断方法与原则。不可否认,上述来自一般正义论及相关税收理论的方法、基准或曰之实质性正义原则,始终未曾完成税收正义蓝图的清晰绘制,及自身终极妥当性的证明,但它们本身作为宪政语境下生发出的分配正义原则内容,深深扎根于它们所塑造的近现代宪政民主社会之中,反过来也应为近现代宪政民主社会所塑造;这就为我们宪法上税收正义论的确立和证成提供了重要线索、理论素材及方法论上的指引。

本书将税收正义命题的讨论限定在宪法这一特殊的最高法场景之中,那么其具体的原则内容必定也要作为宪法整体规范秩序的一部分而受制于人权保障这一宪法最高价值与特定目的。而自由、平等、博爱作为宪法基本人权的主要内容,向我们展示了人类对分配正义的理解是多层面、相互冲突和矛盾的,但其都能始终运作于自由与平等的宪政框架之内,被其驾驭、受其制衡,并在博爱的精神怀抱中统一于“道德的经济个人主义”这一西方宪政国家特有的财富道德观念之中。由此,一种宪法上正义的税制乃是能同时体现个人正义与社会正义,包含税收再分配原则、功过原则、需求原则等内容在内的,复杂而多元的税收分配原则体系。且世界上那些相互矛盾的税制模式之所以共存于一部法典或同一国税制之下,也并非单纯地出自政治操纵与妥协之产物,而是内在于人们对自由、平等、博爱及由此形成的分配正义的复杂理解之中。

不管税收正义之原则、价值或理念有多美好,作为一种可欲的宪法规范体系,其最终必须通过一整套对政府征税权予以限制的制度架构来落实。在这套制度架构中,来自宪法层面的政治结构与程序、对征税权的合宪性审查制度居于最为根本的地位。前者实际上是一个民主和对民主的控制问题,因而与涉税立法的程序性正义标准相联系;后者主要涉及宪法和税法的解释,不仅是一个关乎涉税立法的程序性控制问题,而且也是一个针对涉税立法的实质性控制问题。且二者都随着税法领域之最高原则——“税收法定主义”之时代的变迁,在各国都面临着潜在的宪法变革或正处于变革当中。

从世界范围来看,布坎南所致力于的,由多数裁定原则向更多数裁定原则改进的政治决策程序变革——“税收立宪”并未大规模到来;而包括形式审查与实质审查在内的对征税权的合宪性审查制度则得到了颇为广泛的实践与理

论探索,这使得对该制度进行国别比较研究,既是必要的,也是可行的。美、德、法三国的税法合宪性审查实践表明,在税法审查强度上,各国虽表现出极大的差异性,但三国合宪性审查机构都不约而同地采行了比政治自由更低的审查标准,且在面临基本权利保障与立法自治两难的宪法价值抉择时,往往倾向于后者。

回望当下中国宪法上税收正义的理论与实践,中国税收领域所存在的理念缺失、制度缺陷并不能简单或首要地归责于中国现行宪法中税条款的粗陋与单薄,现行宪法中所蕴涵的人权价值与理念、人民主权的一般原理、社会主义国家权利义务一致性理论都为我国宪法上税之正义的形式标准及实质标准作出了规范性要求与阐释。因此,在我国践行宪法上税之正义,建立一套能对宪法上税之正义加以解释与适用、具有实效性的合宪性审查制度,远比完善宪法文本本身更为重要。而我国现行税收制度在税之课征与支出两方面,同上述宪法对税之规范性要求之间所呈现的巨大落差,显示出目前处于转型期的中国与“社会国”、“福利国”形态下的西方各国相比,在税制改革背景、目标、方式、具体路径等诸多方面,存在显著差异,其未来税制改革的前景将取决于由有产政府到无产政府、从税收国家到预算国家、从吃饭财政到民生财政、从加强税收征管到保障纳税人权益的四个转变的成败之中。



## Abstract

Tax justice is both a basic principle of Constitution and the core value of the tax law. With the rising of modern industrial and commercial country, almost every Chinese citizen has opportunity to have a close touch with tax law. Confronting with massive impact and interference which imposed on individual freedom and property ownership by tax law, which is occurring, or at hand, it will be a incontrovertible topic in the field of study on contemporary constitution that how to make it compatible with the justice requirement and especially how to exert function of tax justice into guaranteeing the effective realization of basic human right of constitution, which will be of theoretical and practical significance.

This book is mainly on a series of issues related to the justice of tax under the context of constitution, it of course can't stay away from hunting after "tax" connotation and its denotation. The tax definition itself and its different expression or content in different subjects, which distinguish public cameralistics, tax accounting, tax law from one another, are the very logical jumping - off points and the problem-analysis tools while constructing their theoretical system respectively. So just as the same as the definition of tax under the context of cameralistics can not replace that under the context of law, tax definition under the context of constitution is also by no means simply equal to that under the context of law. The latter can give assistance in explaining the former while the former is the standard of constitutional review for the latter. Namely, constitutional tax definition delimits the meaning boundary of lawful tax definition within its opening structure, which has the form of sovereignty principle, the content of human right conception, and the denotation of yearly

income & expenditure.

As a category of Suitability, the tropism of constitutional tax definition is tightly related to tax justice theory under constitution. That is to say, it is closely bound up the reasoning on “what kind of tax should be considered just constitutionally?” Although it is hard to be unanimous on any kind of path choice or thinking pattern for essential sense of justice formula, we are still able to dig out, or discover some common norms from various theories of taxation and general theories of justice, which are to be applied to judging whether tax is just in the distribution of tax benefit and tax burden. They are redistributive, per capita, general welfare, needs, ability, effort, merit, contribution, ascription, market demand, and luck. Undeniable, the above methods, standards or substantial justice principles, fail to protract a clear blueprint for tax justice all the while, and also they still can not offer final evidence for their own correctness. But serving as the distributive justice principles coming out of the context of constitution, they per se are deeply rooted in constitutionalism democratic societies which they shape, in turn, the constitutionalism democratic societies as well as should shape them similarly. In this sense, they actually provide us important clues, theoretical materials and methodology directions for the establishment and justification of tax justice theory on constitution.

This book confines the discussion of tax justice in the context of constitution, so its specific principle content is to be subject to human right guarantee as a part of the whole constitutional norm order, which is the highest value and particular purpose of constitution. Freedom, equality and fraternity, which are basic frameworks of constitutional human right, demonstrate that the human beings have multi level, even contradictory or ambivalent apprehensions for distributive justice while all the time these apprehensions are capable of running in the circle of constitutional government. They are reined and checked by freedom and equality, and then ultimately consolidated into moral economic individualism, which is a special kind of wealth moral idea in western constitutionalism democratic countries. Thus, a just tax system should be a set of complex and multidimensional distributive principles system of tax, which includes redistribution, merit, and demand principles, and also can embody individual and social justice simultaneously. By this token, why those conflicting

tax patterns in our world are capable of existing in the same tax code or under a homogenous tax system is that the contradictions are simply not the production of political manipulation and compromise but inherent in our complicated sense of freedom, equality, fraternity and distributive justice.

No matter how good the principal, value, or idea of tax justice is, as a achievable constitutional norm system, ultimately it will be put into effect through a set of institutional framework to limit power to tax of government. Among them, political structure and procedure, constitutional review for power to tax occupy are of great primacy, which are the system design on the constitutional layer. Actually, the former is a question referring to democracy and its regulation, so it is relative to criteria of procedural justice; while the latter is involved with interpretation of constitution and tax law, so it is not only a procedural regulation question of tax law, but also a substantial control question of tax law. Now along with the flux of “the tax legalism”, the two of them in different country are faced with potential constitutional reform or are experiencing it.

In the scope of world, political decision—making transformation from majority ruling principle to supermajority ruling principle, namely “the tax constitutionalism” has not come into being cosmically, which is proposed by James Buchanan. On the other hand, constitutional review of power to tax, which consists of formal and substantial review, is extensively being in operation and explored theoretically. Therefore, it is necessary, also feasible to carry through comparative study on it. The practice of constitutional review of tax in American, German and France indicates that as far as intensity of tax constitutional review, there is great otherness among them, but their constitutional review institutions happen to coincide with each other in adopting lower standard than political freedom. Moreover, in face of a dilemma of choice between basic right guarantee and legislation autonomy, they tend to prefer the latter constitutional value to the former.

When thinking back upon theory & practice of tax justice on contemporary China constitution, it is not advisable to attribute so many defects of tax system in our country simply or firstly to clumsiness and weakness of our present constitution. Human right values, general people's sovereign principle and

consistency theory of rights and duties of socialist country cherished in current constitution, all actually already provide tax justice of China with norm requirement and explanation of formal and substantial criterion. So in order to practice tax justice on our constitution, it is more important than to perfect constitution text itself that a set of effectively constitutional review system be established, which is competent for applying and interpreting tax justice on constitution. However, the big gap against those norm requirements of tax on our constitution, reveals that there are so many differences between China during the course of transformation and western country in the form of "welfare state", and foreground of tax system reform of our country will rest on such four success conversions as are from the tax state to the budge state, from the mouth-feeding finance to the people's livelihood finance, from strengthening tax collection to ensuring taxpayers' right, respectively.

# 目 录

一、导论 .....	1
(一)问题的缘起 .....	1
(二)研究目的与意义 .....	2
(三)研究方法 .....	4
(四)基本思路与主要观点 .....	6
二、税收正义的研究起点:宪法上的“税”概念 .....	9
(一)“税”的词源及理念 .....	10
(二)法律上的“税”概念:税与非税 .....	11
1. 国家公共收入体系 .....	13
2. 法律上“税”之基本特征 .....	16
3. 税之法律特征的相对性 .....	19
(三)宪法上的税概念之论争 .....	21
1. 宪法与法律上的税概念之辨析 .....	21
2. 宪法上税概念之重构 .....	24
(四)本章小结 .....	30
三、税收正义的学理阐释:作为税制基础的正义原则 .....	32
(一)两种一般正义理论 .....	34
1. 罗尔斯的正义论 .....	35
2. 诺齐克的权利理论 .....	39

3. 比较与评析:差别原则与天赋人权 .....	42
(二) 相关税收理论 .....	44
1. 利益说的演进与公共产品论的发展 .....	45
2. “能力说”的演变与发展 .....	50
3. 共存的“利益说”与“能力说” .....	55
(三) 本章小结:税收正义的判断方法与原则 .....	60
1. 税益分配正义方法论:再分配问题 .....	60
2. 税负分配正义方法论:相同对待问题 .....	61
 <b>四、税收正义的宪法解读:税收的宪政精神与原则体系 .....</b>	<b>65</b>
(一) 宪法上的神秘三角:税收正义的宪政之维 .....	66
1. 自由 .....	66
2. 平等 .....	72
3. 博爱 .....	80
(二) 宪法基本价值约束下的税收分配原则 .....	87
1. 税收再分配原则及其限制 .....	87
2. 功过原则之主导性 .....	90
3. 需求原则之辅助性 .....	92
(三) 本章小结 .....	97
 <b>五、税收正义的宪制架构:民主博弈与合宪性控制 .....</b>	<b>100</b>
(一) 程序的限制:税收政治决策结构与程序 .....	101
1. 多数标准与税收立宪 .....	101
2. 法治:普遍规则 .....	110
(二) 结果的约束:征税权之合宪性审查 .....	111
1. 征税权受合宪性审查之必要性 .....	112
2. 征税权受合宪性审查的标准与步骤 .....	115
(三) 本章小结 .....	122

<b>六、税收正义的实践展开:税法合宪性审查制度之比较</b>	124
(一)美国:合理审查标准下的合宪性审查	125
1. 强调征税权之根本性	126
2. 尊重立法机构	128
3. 判决税收违宪的“门槛”有多高	129
(二)德国:以量能负担原则为基准的合宪性审查	136
1. 宪法上量能负担原则之认肯	136
2. 量能负担原则在宪法上之适用	138
(三)法国:税收公平原则在宪法领域的谨慎适用者	148
(四)本章小结	150
<b>七、反观中国:中国宪法上的税收正义</b>	152
(一)引言:税痛之争	152
(二)税的法律思考——中国宪法上的分析	154
1. 宪法上的税条款:作为公民基本义务条款的第 56 条	154
2. 中国宪法语境下的税制评述	159
(三)税收正义的前景和方案:走向真正的税收宪制改革	169
1. 从有产政府到无产政府	170
2. 从税收国家到预算国家	172
3. 从吃饭财政到民生财政	173
4. 从加强税收征管到保障纳税人权益	176
(四)本章小结	177
<b>简短的结语</b>	179
<b>参考文献</b>	182

## 一、导 论

世界上只有两件事是不可避免的,那就是税收和死亡。

——本·富兰克林(Ben Franklin)

### (一)问题的缘起

每年,美国财经杂志《福布斯》都在编制和出版“税负痛苦指数”(tax misery index),为企业和个人在全球选择经营或工作、生活地点提供判断依据。而中国自2000年进入福布斯的统计伊始,中国的税收负担指数便一路上扬,连续几年排名前三甲,2002年位居第三,2004年第四,<sup>①</sup>2005年更是以160的指数“跃升”全球第二,处于年年位居榜首、具有过于慷慨的社会福利制度的法国(税负指数174)之后。<sup>②</sup> 尽管2007年、2008年中国排名分别下降到第三位和第五位,<sup>③</sup>但根据《福布斯》杂志推出的2009年最新全球“税负痛苦指数”排行榜,中国大陆排名再次蹿升至全球第二,排名第一的则又是法国。<sup>④</sup>

中国的税负真的这么高吗?如同《福布斯》报道中所说,中国税负水平高低的判定,历来具有戏剧性。坊间与政府部门对于税负的轻重总是各执一词,莫衷一是。《福布斯》2007年的税负痛苦指数排名就曾引来中国官员的反击,

① 齐雁冰:“痛苦指数引起轩然大波中国税负现状调查”,载《北京青年报》2005年6月5日版。

② Jack Anderson & David A. Andelman, 2007 *Tax Misery & Reform Index*, Forbes Magazine, 2007

③ Jack Anderson, 2008 *Tax Misery & Reform Index*, Forbes Magazine, 2008

④ Jack Anderson, 2009 *Tax Misery & Reform Index*, Forbes Magazine, 2009



中国财政部副部长王军表示,中国的税负并不高,其宏观税负<sup>①</sup>仅占 GDP 的 18%,比发达国家低 12 个百分点,在发展中国家中处于居中的位置。<sup>②</sup>但其表态立即引来一片质疑,被认为不尊重民众的感受。在税负问题上,为什么政府的评价与纳税者的感受存在如此大的差别呢?税负高低,究竟是收税的政府说了算,还是应当纳税人说了算?

透过政府与民众在税负问题上的争议,我们可以发现两者指向的并非单纯的实际税负高低:单纯的税负高低在“取之于民,用之于民”的现代契约法治国中,并无意义。争议的实质乃是公权力和私权利对税负高低背后的正当合理性进行的一场理论角力与博弈,进而言之,实际上是在讨论税负高低背后合理正当性的衡量标准。亦即如下问题:我们的税制是正义之税吗?

## (二)研究目的与意义

罗尔斯认为:“正义是社会制度的首要价值,正像真理是思想体系的首要价值一样。”<sup>③</sup>诚如其所述,正义(justice,或译为“公正”、“公道”)是一个人为之屈膝的词汇,是一个无处不在的话题,我们谋求有公正的制度和在一切人际关系中有正义。<sup>④</sup>而税收,无疑就是“正义”这一古老真理在当代正被重新审视的众多领域之一。在法治国(Rechtsstaat)同时亦应是正义国(Gerechtigkeitsstaat),正义是宪法所蕴涵之理念的现代社会,<sup>⑤</sup>实质意义法治国家中的税收仅当其符合宪法价值秩序下正义之要求时,才具有正当化之基

---

① 相对于《福布斯》的税负指数,有专家认为宏观税负也许是横向衡量国家、地区税负水平的更为合理的指标。所谓宏观税负,是指一个国家或地区一定时期(一般为一年)内税收收入占该国同期国内生产总值(GDP)的比重。参见齐雁冰:“痛苦指数引起轩然大波中国税负现状调查”,载《北京青年报》2005年6月5日版。

② 钟欣:“财政部副部长:中国的宏观税负并不高”,载《南方都市报》2007年12月1日版。

③ [美]约翰·罗尔斯:《正义论》,何怀宏、何包钢、廖申白译,中国社会科学出版社1988年版,第3页。

④ [英]麦考密克、[奥]魏因贝格尔:《制度法论》,周叶谦译,中国政法大学出版社1994年版,第207页。

⑤ 陈敏:“宪法之租税概念及其课征限制”,载《政大法学评论》1981年第24期。