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Introducing October 3, 1913

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INTRODUCING OCTOBER 3, 1913

On the evening of October 3, 1913 at 9:10 pm, President Woodrow Wilson signed H.R. 3321 into law, setting in motion a profound change in the fiscal and political history of the United States. The following morning, *The New York Times* headline read: “Wilson Signs New Tariff Law.”¹ Section I of H.R. 3321, the Underwood-Simmons Tariff Act, slashed tariffs on everything from cash registers to gutta percha, cotton, and wool clothing. It put salt, sugar, meats, condensed milk, fish, flour, potatoes, coal, iron ore, lumber, printing paper, and articles in general use—such as farm machinery and sewing machines—on the tariff-free list. The Act redeemed President Wilson’s “New Freedom” campaign pledge, to reduce the cost of living by cutting high tariffs (enacted by Republican Congresses) and to attack monopolistic economic power.²

But it was Section II of H.R. 3321, the Revenue Act of 1913, that reshaped the fiscal life of the United States. Freed from constitutional limitations on income taxes by the ratification of the Sixteenth Amendment,³ the Democratic majority on the House Ways and Means Committee—now authorized to tax “income from whatever source derived”⁴—moved quickly to propose an income tax on individuals and businesses. The Revenue Act of 1913 provides:

That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum upon such income, except as hereinafter provided; and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere.⁵

Called the “normal tax,” this flat 1% rate applied to individual net incomes exceeding \$3,000 (or \$4,000 for joint returns filed by a married couple living together). Net incomes exceeding \$20,000 were subject to a graduated “additional tax” with rates starting at 1% and rising to 6% on net incomes exceeding \$500,000.⁶ By imposing this new income tax, Congress expected to more than triple the revenue collected from the corporate income tax enacted in 1909. Indeed, the projected revenue from the new income tax represented more than double the revenue loss expected from the reduced tariffs.⁷

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1. *Wilson Signs New Tariff Law*, N.Y. TIMES, Oct. 4, 1913; Underwood-Simmons Tariff Act, Pub. L. No. 63-16, § I, 38 Stat. 114, 114–66 (1913).
 2. *Democratic Party Platform of 1912*, AM. PRESIDENCY PROJECT, June 25, 1912, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29590>.
 3. “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” U.S. CONST. amend. XVI.
 4. *Id.*
 5. Revenue Act of 1913, Pub. L. No. 63-16, § II(A)(1), 38 Stat. 114, 166.
 6. *Id.* § II(A)(2).
 7. See *Wilson Signs New Tariff Law*, *supra* note 1.

A century later, the federal income tax is structured much as it was in the Revenue Act of 1913, except for the more limited use of collection at source in the current law. However, it has grown from a mere twenty sections in fifteen pages in Public Law 63-16 to some 3,437 sections in subtitles A and F of the current Article 26 of the United States Code. Although an alliance of Democrats, moderate and insurgent Republicans, and Progressive Party members ratified the Sixteenth Amendment and enacted the Revenue Act of 1913 with relative ease,⁸ partisan politics have characterized most of the congressional experience with the income tax since then, and have become increasingly bitter in the past two decades. Yet, it is fair to say that no Congress, whether controlled by a Republican or Democratic majority, has turned its back on this revenue source.

At New York Law School's symposium, "100th Anniversary of the Revenue Act of 1913: Marking a Century of Income Tax Law in the United States,"⁹ our panelists and keynote speakers not only revisited the past century of income tax law and practice, but proposed solutions to present income tax challenges. One of the most fascinating lessons from revisiting October 3, 1913 is that so many significant decisions reflected in the Revenue Act of 1913, ranging from imposing worldwide tax jurisdiction over U.S. persons to the uniformity of tax rates on income from all sources and the fairness of the U.S. tax system, are still contentious today. It is said that the questions do not change in tax law, but sometimes the answers do.

Some twenty speakers participated in the symposium, bringing perspectives from tax practice, academic tax law, and tax journalism. Edward Kleinbard, professor of law at the University of Southern California Gould School of Law and former chief of staff of the Joint Committee on Taxation, started off the day with a talk entitled "Progressive Taxation or Progressive Fiscal System." Previewing a chapter from his forthcoming book, Kleinbard reimagined the federal income tax as a more robust revenue-raiser that could fund a progressive social spending program for very low-income individuals to broadly improve equality.

The first panel of the morning, "Withholding and Information from 1913 to FATCA," included: Lee A. Sheppard, columnist and contributing editor of *Tax Notes*; Alan Appel, professor of law at New York Law School; Dr. Valeriya Avdeev, assistant professor at Cotsakos College of Business, William Paterson University; Michael Hirschfeld, tax partner at Dechert LLP and chair of the American Bar Association Section of Taxation for 2013–2014; and myself. We explored the continuing problem of tax cheating and non-compliance, the history of income tax withholding in the twentieth century, the lack of consistency in matching income from pass-through entities to taxpayers, and the emergence of the Foreign Account Tax Compliance Act in the twenty-first century, which may well change the odds on international tax evasion in favor of tax collectors. Ms. Sheppard reminded the

8. John D. Bunker, *The Ratification of the Federal Income Tax Amendment*, 1 CATO J. 183, 183 (1981).

9. Symposium, *100th Anniversary of the Revenue Act of 1913: Marking a Century of Income Tax Law in the United States*, available at <https://www.youtube.com/user/NYLSLawReview/videos>.

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audience that political will is the most important factor in tax collection, noting that “[i]f you seriously want to collect, you withhold.”¹⁰

The second panel addressed the complex issue of “Debt, Taxes and the Economy.” Panelist Richard C.E. Beck, professor of law at New York Law School, challenged the conventional thinking regarding cancellation of indebtedness income from consumer debt. Maria Pirrone, assistant professor at The Peter J. Towbin College of Business, St. John’s University, reviewed the state of student debt and its tax history. Diane Fahey, then-associate professor at New York Law School, explored the overall debt burdens of consumers in the current economy. Dennis Ventry, Jr., professor of law at UC Davis School of Law, reported on his groundbreaking work on mortgage debt and its tax impact under current law.

During the lunchtime program, Lawrence S. Feld, Esq. and Professor Appel reviewed the colorful history of federal tax fraud cases from Al Capone in 1932 to the Ernst & Young tax shelter case in 2013.

International tax was the subject of the afternoon’s first panel, “U.S. Tax Policy in a Global Economy.” The panelists joined the current debate on the merits of territorial and worldwide taxation in a business world so full of cross-border transactions—an issue addressed in the first subdivision of the Revenue Act of 1913. Peter H. Blessing, Esq., head of Cross-Border Corporate Transactions at KPMG LLP and former chair of the New York State Bar Association Section of Taxation, took part in this debate, along with international tax academics: Reuven Avi-Yonah, Irwin I. Cohn Professor of Law at the University of Michigan School of Law; Diane Ring, professor of law at Boston College School of Law; and Fadi Shaheen, assistant professor at Rutgers School of Law–Newark.

During the fourth panel of the day, William P. LaPiana, Rita and Joseph Professor of Wills, Trusts, and Estates at New York Law School, and three leaders of the tax bar in New York—Michael Schler, Esq., tax partner at Cravath, Swain & Moore LLP and former chair of the New York State Bar Association Section of Taxation; Elizabeth Kessenides, Esq., principal at Berdon LLP; and Megan Brackney, partner at Kostelanetz & Fink, LLP and chair of the Tax Committee of the New York County Lawyers Association—shared their “Perspectives on the Practice of Tax Law.” Focusing on the role of tax lawyers in the development of tax law from 1913 to the present day, these panelists discussed professional responsibility, the impact of complexity in tax law and the ambiguities it creates, abusive tax shelters, and the regulation of tax practice under Circular 230, which (to the surprise of many present) originated in 1921.¹¹

Stephen Shay, professor of practice at Harvard Law School and former deputy assistant secretary for International Tax Affairs at the U.S. Department of the Treasury, capped off the day with a strongly argued analysis of proposals to combat

10. Steven Seidenberg, *Symposium Marks the 100th Anniversary of the Income Tax*, 33 N.Y.L. SCH. MAG. 20, at 21.

11. C. John Muller IV, *Circular 230: New Rules Governing Practice Before the IRS*, 1 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 284, 292 (2011).

base erosion and profit shifting. In particular, Shay challenged House Ways and Means Committee Chair Dave Camp's "Option C."¹²

On behalf of the *New York Law School Law Review* and the Graduate Tax Program at New York Law School, I would like to thank all of our speakers for making the 100th Anniversary symposium such an exciting day. Academics and practicing tax lawyers alike generously gave us their time and shared their insights.

I would especially like to thank Professor Shay, who jumped in at the eleventh hour to provide our closing keynote address. Karen Hawkins, Esq., director of the Office of Professional Responsibility at the Internal Revenue Service, had long been scheduled to be our closing keynote speaker. However, the failure of Congress to timely pass a budget bill for fiscal year 2014 resulted in a shutdown of the federal government beginning on October 1, 2013. The terms of the shutdown and sequester forbade her from traveling and speaking in her official capacity. The budget impasse itself was part of an ongoing struggle between Democratic President Barack Obama and the Republican-controlled House of Representatives over tax policy and spending cuts. The shutdown did not end until October 17, 2013 following the enactment of the Continuing Appropriations Act, 2014.¹³ These events are a reminder of the irreducibly political nature of tax law and policy. *The New York Times* reported the news of October 3, 2013 the following morning with these front page headlines: "Boehner Pledges to Avoid Default, Republicans Say" and "G.O.P. Elders See Liabilities in Shutdown"¹⁴—a fitting bookend to a century of income tax law and politics.

12. Amy S. Elliott, *Shay Bashes Camp's Option C Anti-Base-Erosion Proposal as 'Utterly Misleading'*, TAX ANALYSTS (Oct. 8, 2013), <http://0-services.taxanalysts.com.lawlib.nyls.edu/taxbase/tnt3.nsf/dockey/01A574B91EE92CA985257BFE00036608?OpenDocument&highlight=0,shay>.

13. *See generally* Continuing Appropriations Act, 2014, Pub. L. No. 113-46, 127 Stat. 558 (2013).

14. Ashley Parker & Annie Lowrey, *Boehner Pledges to Avoid Default, Republicans Say*, N.Y. TIMES (Oct. 3, 2013), http://www.nytimes.com/2013/10/04/us/politics/debt-limit-impasse.html?pagewanted=all&_r=0; Jonathan Martin, *G.O.P. Elders See Liabilities in Shutdown*, N.Y. TIMES (Oct. 3, 2013), <http://www.nytimes.com/2013/10/04/us/politics/gop-elders-see-liabilities-in-shutdown.html?pagewanted=all>.