FLORIDA TAX REVIEW

VOLUME 8 | *2007* | *NUMBER 1*

MAASER KESAFIM AND THE DEVELOPMENT OF TAX LAW

by

*Adam S. Chodorow**

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* Associate Professor of Law at the Sandra Day O'Connor College of Law at Arizona State University. I would like to thank Rabbi Zvi Holland, the Phoenix Community Kollel and Saul Abrams for their patience and perseverance in the face of countless questions regarding *halacha* and tithing. I would also like to thank Saul Levmore, Ellen Aprill, Marjorie Kornhauser, Henry Ordower, Samuel Levine, Michael Livingston, Victor Fleischer, Yariv Brauner, Robert Clinton, Janette Silverman, the members of the Arizona State University Legal Theory Colloquium, and the participants at the Junior Tax Scholar's Conference at the University of Colorado, Boulder, for their comments on earlier drafts. Finally, I would like to thank my wife, Rebel Rice, for her patience, support and editorial assistance.

Maaser Kesafim and the Development of Tax Law

"And whatever You will give me, I shall repeatedly tithe to You."
- Jacob on the Temple Mount[1]

"And once again tithing is 10% off the top. That's gross income, not net. Please people, don't force us to audit. . ."
- Reverend Lovejoy, The Simpsons[2]

1. Gen. 28:22. All Bible quotations are from The Stone Edition of the Tanach, published by the Mesorah Heritage Foundation, as part of the Art Scroll Series, c. 1996 Mesorah Publications, Ltd.

2. The Simpsons: Viva Ned Flanders, The Simpsons, (Fox television broadcast Jan. 6, 1999).

I. INTRODUCTION

Maaser kesafim[3] refers to the practice, observed in many orthodox Jewish communities, of separating out a tithe[4] from one's income each year to be distributed to the poor.[5] The practice can be traced back to Jacob,[6] and arguably to Abraham himself.[7] Unlike agricultural tithing, which involves only produce grown in Israel,[8] *maaser kesafim* encompasses all income, regardless of its source. Thus, it functions to a large degree an income tax, or more precisely as God's income tax.[9]

Conceiving of tithing as a form of income tax raises a number of interesting questions, the most salient of which is how income should be defined. For instance, as reflected in Reverend Lovejoy's statement in the epigraph above, one must decide whether to allow deductions for federal, state, and local taxes. Other questions include whether to include gifts in income, whether to tax nominal, as opposed to real, gains, and whether deductions should be allowed for expenses such as business meals. While these particular

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3. This phrase translates as "a tenth of money." *Maaser* means one-tenth and is often used alone to refer to the amount segregated as a tithe. *Kesafim* means silver or money. Throughout this article I have used the Hebrew terms for most concepts, as opposed to English translations. While this may be somewhat confusing at first, anyone interested in pursuing further study of Jewish tithing must be able to recognize and identify these terms.

4. Literally, "tithe" means one-tenth or 10%, but it is not uncommon to see the term used to refer generically to religious giving, even where the amount given is greater or less than 10%.

5. Most Christian denominations have adopted the practice of tithing in one form or another. In the interests of space, I focus here only on Jewish tithing, leaving for another day the exploration of other of other versions of this practice.

6. Gen. 28:22 ("And whatever You will give me, I shall repeatedly tithe to You.").

7. Gen. 14:20 ("and he gave him a tenth of everything"). The casual mention of Abraham's gift, without further explanation, suggests that the practice pre-dated Abraham. This tradition appears to have its roots in the Temple-states of Mesopotamia and Syria-Palestine in the second millennium B.C.E. For a review of literature regarding the precursors to and possible source of the Jewish tithing traditions, see Jeffery Stackert, Rewriting the Torah: Literary Revision in Deuteronomy and the Holiness Legislation. Forschungen zum Alten Testament. Tübingen: Mohr Siebeck, 2007 at 231 et seq. and n. 397.

8. See, e.g., Deut. 14:22.

9. Just what constitutes a "tax" is a matter of some debate. From an economic perspective, any cost imposed by the government could be considered a tax, including traditional taxes, fees, and even regulation. The legal definition of a tax is more limited, but somewhat flexible. While tithing may not qualify as a tax under some definitions, it operates as a tax for purposes that are relevant here. For a discussion of how one defines a tax, see Victor Thuronyi, Comparative Tax Law (the Hague 2003) at pp. 45-59.

questions are interesting in their own right (and who wouldn't be interested in what medieval rabbis thought about the deductibility of business meals?), when taken together they amount to a religious tax jurisprudence that is as comprehensive and sophisticated as the law we have created for Federal income tax purposes.

The income definition rules for the Federal income tax and *maaser kesafim* were developed under significantly different circumstances. The Federal income tax rules were developed over the past 100 years as part of our modern legal and political process and may be changed at any time by legislative fiat. Their prime goal is to raise revenues to fund government activities, while at the same time promoting a number of unrelated social policy objectives. In contrast, religious authorities developed the tithing rules over thousands of years as part of an interpretive process designed to help people fulfill their religious obligations, which were immutably set down in the Torah and the Talmud. Despite these differences, the analysis of, and answers to, the questions raised above (and many others) are surprisingly similar, reflecting certain universal elements and issues inherent in any income tax system. At the same time, important differences exist, yielding important insights into how the culture and context underlying a given tax system affect its development.

In this article, I describe the origins and scope of *maaser kesafim* and examine a number of income definition rules the religious authorities have developed over the past two thousand years.[10] By comparing those rules to the analogous Federal income tax rules, I demonstrate how the development of tax law is affected by (1) concerns regarding administration, enforcement, and taxpayer compliance, (2) the structure of the legal system, and (3) the values underlying a tax system. In addition, I hope to make this material[11] known to,

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10. This is the second article in a three part series that explores issues in taxation through the lens of Jewish tithing traditions. In the first article, Agricultural Tithing and (Flat) Tax Complexity, 68 Pitt. L. Rev. (forthcoming 2007), I considered questions of tax complexity, using agricultural tithing as a vehicle to examine claims that either a flat-rate income tax or an income-based consumption tax would be less complex than our current income tax. The third article, Biblical Tax Systems and the Case for Progressive Taxation, 23 J. of Law and Religion (forthcoming 2007), I consider questions of progressivity and the extent to which claims that Judeo-Christian values require progressive taxation can be squared with contrary examples of taxation described in the Bible and Talmud.

11. Many of the source materials used herein are collected in two books designed to guide those who wish to separate tithes from their income. Those books are Maaser Kesafim, On Giving a tenth to charity, (4th ed. 1999), (Feldheim Publishers, Jerusalem/New York) edited by Cyril Domb and referred to hereafter as "MK," and The Laws of Tzedakah and Maaser, A Comprehensive Guide, Artscroll Halachah Series, (Mesorah Publications, Ltd. 2001) written by Rabbi Shimon Taub and referred to hereafter as "The Laws of Tzedakah." Unfortunately for the casual reader, both of these books assume the reader has a level of knowledge regarding Jewish law not often found outside the Jewish community (and sometimes not even within it).

and accessible by, American tax scholars, thus contributing to the scholarship comparing Jewish and U.S. law.[12]

The insights gleaned from this study have significant implications as we struggle towards tax reform. First, to the extent that the same pressures that now impinge on our tax system come to bear on any replacement system we devise, we can expect to see the tax laws bend to accommodate such pressures, causing any replacement tax ultimately to take on many of the characteristics of our current income tax. Second, maaser kesafim operates as a flat-rate income tax. This study makes clear that adopting a flat-rate tax will not necessarily eliminate tax complexity.[13]

This article is organized as follows. Part II briefly provides background information regarding the origins and structure of Jewish law and the basic rules of agricultural tithing, to which the rabbis often turned in their efforts to develop the rules of maaser kesafim. Part III describes maaser kesafim's origins, status and scope. Part IV compares selected income definition rules developed for maaser kesafim with their Federal income tax counterparts. Part V analyzes the ways in which culture and context affect income definition. Part VI concludes.

II. JEWISH LEGAL AUTHORITY AND AGRICULTURAL TITHING

The rabbis who developed the laws of maaser kesafim did so within the structure and according to the rules of the Jewish legal system. They sought to ground their decisions in the Torah, the Talmud or other ancient authorities to the extent possible, and they often turned to the example of agricultural tithing for guidance. Thus, in studying the laws of maaser kesafim, it is helpful to know something regarding both the provenance and structure of the Jewish legal

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MK contains the only published English translation of some of the sources quoted in this article. Where I have relied on such translations, I use the notation "MK" and where difficult to find and untranslated sources are discussed in The Laws of Tzedakah and Maaser, I have used the notation "TZ."

12. American scholars have long compared Jewish and American law. Some focus on the substantive law, while others have explored the similarities and differences between the structure of the two legal systems and theories of jurisprudence that motivate them. A search for the term "Jewish Law" in Westlaw's law review database yields over 1,600 hits. For a summary of Jewish law references in American legal scholarship up to 1993, see Suzanne Last Stone, In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory, 106 Harv. L. Rev. 813, 814-21 (1993).

13. This finding is consistent with my conclusion in Agricultural Tithing and (Flat) Tax Complexity, in which I demonstrated that the agricultural tithing rules were quite complex, despite having a limited income definition, no deductions, and a flat rate. See supra note 10. As *maaser kesafim* is more analogous to a modern tax system, it provides even more compelling evidence that tax complexity cannot be eliminated simply by flattening the rate structure.

tradition, commonly referred to as halacha,[14] and the laws of agricultural tithing. I have previously set forth a detailed account of both[15] and will not repeat that material here. Nonetheless, for those unfamiliar with Jewish law or the basic rules of agricultural tithing, I present here a brief summary of the most relevant information.[16]

Significant differences of opinion exist both within Judaism and academia regarding the provenance and significance of the earliest written texts and the extent to which the practices described in the Torah were actually observed. I present here the literal version, as those who developed the laws of maaser kesafim subscribed to that view.[17]

A. Jewish Legal Authority

According to tradition, Moses wrote the first five books of the Bible, commonly referred to as the Torah. These books contain the laws God gave to Moses on Mt. Sinai and during the sojourn in the desert. As God's law, it sits atop the legal hierarchy.

The Mishnah and Gemara, collectively referred to as the Talmud, were created in the third and seventh centuries of the common era, respectively.[18] They contain details of how the laws set forth in the Torah were to operate. The rules recorded in the Talmud can be broken down into three categories. Some were revealed to Moses on Mt. Sinai. However, unlike the rules Moses set down in the Torah, these rules were passed down as part of an oral tradition until committed to writing in these works. Others are rabbinic interpretation of God's laws. Finally, some are rabbinic law, i.e., rules the rabbis developed to "build a fence around the Torah" and thereby prevent people from inadvertently violating God's law. It is often difficult to distinguish which rules are God's and

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14. More formally, *halacha* refers to Judaism's normative rules and encompasses both those that govern interpersonal relationships and those that govern the relationship between mankind and God. See, Elon, Menachem, I Jewish Law: History, Sources, Principles 93-104 (hereafter "Jewish Law") (The Jewish Publication Society Philadelphia Jerusalem 1994).

15. See Chodorow, Agricultural Tithing and (Flat) Tax Complexity, supra note 10.

16. This information is presented largely without footnotes. For those interested in a more detailed explanation of both Jewish law and agricultural tithing, see Chodorow,Agricultural Tithing and (Flat) Tax Complexity, supra note 10. See also Elon, supra note 14 (describing the provenance and structure of Jewish law); An Introduction to the History and Sources of Jewish Law (N.S. Hecht, B.S. Jackson, S.M. Passamanek, D. Piatelli, A.M Rabello eds) Clarendon Press 1996.

17. For a description of the academic scholarship regarding the Bible, see Richard Friedman, Who Wrote the Bible? (1987).

18. Two versions of the Gemara exist, one compiled in Jerusalem and the other in Babylon.

which derive from the rabbis, but the Talmud is generally afforded equal weight to the Torah.

Some of the most distinguished rabbis created commentaries on the Torah and Talmud, which have become an integral part of the legal tradition. For instance, the commentaries of Rashi (1040-1105) and the Tosofists, Rashi's literal and intellectual descendants, are routinely printed alongside the text of the Talmud. Such commentaries are often viewed as authoritative regarding the proper interpretation of the underlying texts.

In addition, several rabbis have attempted to codify the law. The most important of these efforts for our purposes are the Mishneh Torah by Rabbi Moshe ben Maimon (1135-1204), (Maimonides or Rambam), the Arbah Turim, by Rabbenu Yaakov ben Asher (1269-1340) (the Tur), and the Shulchan Aruch by Rabbi Yosef Karo (1488-1575). As with the Torah and Talmud, numerous rabbis have written commentaries on these codes, many of which have become authoritative in their own right. Examples of such commentaries include the Mapa by Rabbi Moshe be Yisrael Isserles (c. 1525 – 1572) (Rema), and the Aruch haShulcan by Rabbi Yechiel Michal Epstein (1835-1905), both commentaries on the Shulchan Aruch.

Finally, a number of respected rabbis have published their legal opinions either from specific cases they adjudicated or in response to questions posed to them on various aspects of the law. These opinions are known as *She'elot U'Teshuvot, Shu't,* or *responsa* literature. Many of the laws of *maaser kesafim* were developed in this literature, as people sought the advice of rabbis in their struggle to understand their obligations in an increasingly sophisticated economy.

As a result of this structure, religious obligations in Judaism can have three sources: the Torah (*de-oraita*),[19] the rabbis (*de-rabbanan*),[20] and custom (*minhag*). The source of the obligation matters because it dictates the extent to which it must be observed. Obligations based on the Torah and on the oral law later recorded in the Talmud have the force of law and must be strictly observed. Rabbinic obligations carry similar weight, but the rules are construed somewhat more leniently, as they reflect human, as opposed to divine, law. Obligations based on custom carry the least weight and allow for the greatest variation.

Given the divine source of the law and the dispersion of the Jewish people into discrete communities, the Jewish legal system differs significantly from that found in the U.S. First, legislative authority is strictly limited, as humans are not permitted to change God's law. Instead, the law must develop as part of an interpretive process, where each new rule must be derived from the Torah or Talmud, or some other respected authority. Second, because the Jewish community has been fragmented since Biblical times, no judicial or

19. An Aramaic phrase meaning "from the Torah."

20. An Aramaic phrase meaning "from or of the scholars."

political institutions exist capable of resolving differences of opinion as to what the law requires or how it should be interpreted. Thus, the legal opinions expressed in the commentaries and codifications are only as persuasive as the reasoning they contain, and the law has developed almost as a conversation across the centuries, with most issues incapable of a final, binding resolution. As discussed below, these two features have a clear impact on how the tithing laws developed.

B. Agricultural Tithing

The obligation to tithe agricultural produce applies only to produce grown in Israel. It derives primarily from Deuteronomy 14:22, which states "You shall tithe the entire crop of your planting, the produce of the field, year by year."[21] In fact, Deuteronomy identifies two tithes. The first is called *maaser rishon* and was to be given to a Levite.[22] The second was to be consumed at a place of God's choosing B which was later revealed to be the Temple in Jerusalem B or given to the poor, depending on the year to which the tithe belonged. The Jewish calendar is based on a seven-year cycle. In years one, two, four, and five, the farmer was to take this second tithe (called *maaser sheni*) to Jerusalem and eat it before the Temple.[23] In years three and six, the farmer was to give this second tithe (now called *maaser ani*) to the poor. In year seven, known as the sabbatical year, the land was to lie fallow, obviating the need for tithes.

The Mishnah, the Tosefta (a supplement to the Mishnah) and the Gemara set forth the specific income definition rules regarding which crops

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21. The obligation to tithe appears at many other points in the Bible. See, e.g., Leviticus 27:30 ("Any tithe of the land, of the seed of the land, of the fruit of the tree, belongs to HASHEM; it is holy to HASHEM."); Num. 18:21-24 ("To the sons of Levi, behold! I have given every tithe in Israel as a heritage in exchange for the esrvice that they perform, the service of the Tent of Meeting...."); Malachi 3:10 ("Bring all the tithes into the storage house. . . ."); Proverbs 3:9 ("Honor HASHEM with your wealth, and with the first of all your produce. . . ."). Hashem literally means "the Name" and is used as a euphemism for God. For a review of the academic literature regarding the origins of this practice, see Stackert, supra note 7.

22. Deut. 14:29; Lev. 27:30. The Levites were the descendants of Levi (the son of Jacob and Leah) and served as God's special servants. Num. 3:5 *et seq*. They were excluded from the division of land that occurred before the Jewish people entered Israel and instead were given cities in which to live. Num. 35:1-8. As a result, the Levites depended on the tithe for their sustenance. This tithe was not due to any specific Levite, and the donors' ability to decide who received it created a market place, where those who wished to receive the tithe had to consider how their behavior or rulings would affect potential donors.

23. Deut. 12:17-18, 14:23. Those who lived far from the Temple in Jerusalem were authorized to redeem the tithe and save the proceeds until they could travel to Jerusalem, purchase food, and consume it there. Deut. 14:24-26.

were subject to tithes, when the tithe had to be removed, and the year to which the tithes belonged. While most of the specific rules have little relevance to the questions raised in the context of *maaser kesafim*, religious authorities routinely turned to agricultural tithing for guidance on the larger, structural questions, such as whether to permit deductions (agricultural tithing permitted none) and what accounting period to adopt.

In addition to the tithe, the Torah sets forth a number of other obligations associated with agriculture. For example, the *pe'ah* obligation required farmers to leave the corners of their fields unharvested so that the poor could partake of the harvest.[24] Amounts left in the fields in satisfaction of this obligation (and the other obligations as well) were excluded when determining the amount to tithe. Thus, while technically not part of the tithing laws, these obligations reduced the amounts subject to the tithe and therefore form part of the income definition. As described below, religious authorities cited to the exclusion of *pe'ah* from the income base as they struggled to develop the laws of *maaser kesafim*.

III. *MAASER KESAFIM* - ORIGINS, STATUS AND SCOPE

As noted in the introduction, *maaser kesafim* refers to the practice of separating out a tithe from all income and distributing it to the poor.[25] Neither

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24. Lev. 19:9; 23:22.

25. The permitted use of *maaser* is beyond the scope of this article. However, it should be noted that there is significant discussion in the *halacha* regarding the proper use of such funds. For instance, there is some debate as to whether one can use *maaser* to satisfy other obligations the Torah imposes. For a discussion of the uses to which *maaser* may be put, see TZ at 39-67.

To the extent that it is indeed distributed to the poor, rabbi Karo identifies eight levels of doing charity. The first is helping someone so that he will no longer need charity. The second level is where neither the donor nor donee know the other's identity. The third level is where the donor knows the identity of the donee, but the donee is ignorant of his benefactor. The fourth level is where the donee knows the identity of his benefactor, but the donor is ignorant of the person he helps. The fifth level is where one gives to the poor before being asked. The sixth level is where one gives the appropriate amount after being asked. The seventh level is where one gives less than appropriate after being asked, but does so in a pleasant and cheerful manner. The final level is where one gives ungraciously. Karo, Shulchan Aruch, Yoreh De'ah 249, MK at 85-121.

The poor are defined as those who do not have sufficient liquid assets to live for an entire year. This definition derives from the agricultural tithing rules which set forth who was allowed to collect the produce left in the field during harvest and to receive *maaser ani*, the agricultural tithe given to the poor in years three and six of the seven year cycle. See Mishnah, Pe'ah 8 and 9. Rabbi Yizchak of Vienna (1190-1260) and Rabbenu Efraim (d. 1175) asserted that this same level defined poor for purposes of *maaser kesafim*. See Tur, Arbah Turim, Yoreh De'ah 253; Karo, Shulchan Aruch, Yoreh De'ah 253:2. Others contended that the level at which one should be defined as poor, and therefore eligible to receive charity, should be updated to reflect the absence

the Torah nor the Talmud contains an explicit command that one separate out this tithe. Thus, the origin, status and scope of the obligation, all of which affect the development of the law, are open to debate. This Part explores that debate. Discussion of the specific income definition rules is reserved for Part IV, below.

Many early sources assert that the obligation to tithe derives from the Torah, based on the fact that the patriarchs Abraham and Jacob are reported to have tithed. The evidence regarding Abraham is somewhat sketchy. In Genesis, after a battle, Abraham is said to have given one-tenth of his possessions.[26] Other than the mention of the amount of the gift and the identity of the donor, the Bible gives no other details. Nonetheless, several respected rabbis have determined that this was the first tithe.[27] The evidence that Jacob tithed is clearer. After seeing the vision of a ladder stretching to heaven and learning that God would protect Jacob and his offspring and give them the land of Israel, Jacob vowed: “And whatever You will give me, I shall repeatedly tithe to You.”[28] The Bible does not describe Jacob tithing, but presumably he kept his promise.

Assuming both patriarchs tithed, the difficulty with these passages as the source of the tithing obligation is that it is not clear how their behavior imposes an obligation on their descendants to do so. Nonetheless, some rabbis read these passages to do just that.[29]

Others sources assert that the obligation to tithe from all income, regardless of source, is Torah-based because it is implicit in the Torah obligation to tithe all agricultural produce. For instance, the Sifre (a midrash[30] from the time of the Mishnah) cites the superfluous use of the word “all” in

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of aid measures available to those who lived in agrarian societies. Thus, they articulated a standard that focused on whether a person had sufficient assets to produce sufficient income to live on for a year. See Rabbi Yitzchak of Korbil (d. 1280) as described in the Tur, Arbah Turim, Yoreh De’ah 253. See also Karo, Shulchan Aruch, Yoreh De’ah 253:2.

26. Gen. 14:20 (“and he gave him a tenth of everything”).

27. Rashi concluded that Abraham gave his tithe to Malkizedek, the king of Salem and God’s high priest, and that the gift was made because Malkizedek was a *Cohen*. Rashi 14:20 Loc. Cit, MK at 18. Rabbi Eliezer, who was involved with the creation of the Mishnah, agreed that Abraham was the first to tithe but insisted that he gave the tithe to Shem, Noah’s son, instead of Malkizedek. (“R. Yehoshua ben Korchah says “Abraham was the first in the world to tithe. He took all the *maaser* of Sedom and Amorah and all the maaser of Lot his nephew and gave them to Shem the son of Noah, as it is written ‘And he gave him a tenth of all.’” Pirkei d’Rabbi Eliezer, Ch. 27, MK at 18.

28. Gen. 28:22. The Bible does not actually describe Jacob tithing, but one presumes that he kept his promise.

29. See, e.g., Baalai Tosafoth on the Torah, MK at 19 (concluding that the obligation to tithe from money is derived from Jacob’s vow).

30. A midrash employs an interpretive technique where every word in a passage is given meaning.

Deuteronomy 14:22 as evidence that the obligation described therein encompasses both agricultural and non-agricultural income.[31] In contrast, the Midrash Devarim Rabbah (from around 900 C.E.) uses notions of horizontal equity to argue that all who receive income are blessed and therefore the obligation to tithe applies to all, and not just to the farmers.[32] These efforts to derive the obligation to tithe on all income from the requirement that one tithe agricultural produce seem tenuous.

Other sources find the obligation to tithe on all income to be based on Bible passages such as Malachi 3:10 ("Bring all the tithes into the storehouse") and Proverbs 3:9 ("Honor HASHEM with your wealth, and with the first of all your produce"). For instance, Rema argued that the Torah obligation for agricultural tithing was not effective at the time Malichai was written and concluded that the passage refers to *maaser kesafim*.[33] In contrast, Rabbi Mordechai ben Hillel (d. 1298) interpreted the Jerusalem Talmud to indicate that the obligation to tithe money is based on Proverbs 3:9.[34] Others dispute these conclusions and insist that these passages refer only to agricultural tithing.[35] Regardless of who is correct, Malachi and Proverbs are not part of the Torah and therefore they cannot create a Torah obligation.

The predominant view is that *maaser kesafim* is not a Torah obligation. Rather, most rabbis believe that it evolved from, and is inextricably interwoven

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31. See the Sifre, as quoted by Tosafoth, B. Talmud *Taanith* 9a, MK at 20. The portion Tosafoth quotes does not exist in the extant copies of the Sifre.

32. This material does not appear in the extant version of the Midrash Devarim Rabbah. Rather, it appears in passages quoted by both Rabbi Yeshayahu Horowitz and Yitzachak Abuhav. See Shenei Luchot HaB'rith, Deut. 28:3; Menoras Hamaor, Deut 28:3. See also Midrash Tanchuma, Deut 28:3.

33. Rema, Shulchan Aruch, Yorah De'ah 274:4, MK at 135. See also Sefer Chassidim § 144 (an early medieval text dating from around 1200 C.E., construing Malachi 3:10 to require that tithes be separated from all income, and not just agricultural income).

34. Mordechai, Bava Kama 192, MK at 24 ("In [the Jerusalem Talmud at Pe'ah 1:1] the law of tithing of money is derived from 'Give honor to the Eternal from your possessions.'").

35.See, e.g., Rabbi Yaakov ben Zvi Emden (1697-1776), Sheilat Yavetz, Vol 1, R3, and R. Yeshayahu Horowitz (the Shelah) (1560-1630), Amsterdam Shelah, p. 242, both of whom argue that the passage in Malachi only refers to agricultural tithing.

with, the *mitzvoth*[36] of *tzedakah*[37] (charity or righteousness) and *gemiluth chasadim* (doing good deeds). Thus, while it is linked to Torah obligations, most rabbis understand that *maaser kesafim* is rabbinic or customary in nature. For instance, Rabbi Chaim Yoseph David Azuli (1724-1806) (Birkei Yoseph) stated:"It seems definite that *maaser kesafim* is not in the category of the *mitzvah* of *maaser ani* (the agricultural tithe given to the poor), but the obligation of giving to charity, the Rabbis said should be a tenth of one's possessions; it is a rabbinic observance coming under the law of *tzedakah*."[38] What follows is a description of the underlying obligations of *tzedakah* and *gemiluth chasadim* and an explanation of how the practice of *maaser kesafim* developed out of them.

The obligation of *tzedakah* is generally traced to Deuteronomy 15:7-11, where Moses instructs that one must open one's hand to the poor. The obligation of *gemiluth chasadim* is also found in Deuteronomy and can most literally be described as an obligation to walk in the ways of the Lord.[39] It is possible to satisfy both obligations by doing good deeds. However, as often as not they are satisfied by giving money or property to those in need. This raises the question of just how much money one must give to satisfy these obligations, a question on which the Torah is silent.

The general rule for *tzedakah* is that, if a poor person appears before you and needs charity, you should meet his needs.[40] If the person has fallen on hard times (as opposed to being perennially poor), you must try to restore that

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36. A *mitzvah* (pl. *mitzvoth*) is literally a commandment of God. Thus, a *mitzvah* is a religious obligation, and the phrase "to do a *mitzvah*" means to fulfill one of God's commandments. Insofar as doing charity is a *mitzvah*,the phrase is colloquially used to mean doing something nice for someone.

37. *Tzedakah* is often translated as charity, but its root (*tzedek*) means justice. Thus, the obligation to do charity is intertwined with the obligation to do social justice. See Samuel J. Levine, Looking Beyond the Mercy/Justice Dichotomy: Reflections on the Complementary: Roles of Mercy and Justice in Jewish Law and Tradition, 45 Journal of Catholic Legal Studies 455, n. 81 (2006).

38. Birkei Yoseph, Shulchan Aruch, Yoreh De'ah 249, MK at 28. See also Rabbi Yaakov Halevi Molin (1355-1422) (Maharil), Responsum No. 54, MK at 28 (". . . *maaser kesafim*, which is Rabbinic,. . ."); Epstein, Aruch HaShulchan, Yoreh De'ah 249:2, MK at 28 ("In truth, these allocations of one-fifth and one-tenth are not Torah obligations, but hte Rabbis associated them with [Jacob's vow to tithe in Gen 28:22]"); Rabbi Yoel Sirkes (1561-1640), Bach, Tur, Yoreh De'ah 331, MK at 29 ("but the tithe which a person separates from his monetary profits, is not in this category (i.e., that of agricultural tithes) . . . for there is no obligation either Torah or Rabbinic.").

39. Deut.5:32-33. Just what the phrase "walk in the ways of the Lord" means is somewhat unclear. The Talmud explains that this means "just as He is merciful, we should be merciful, just as He visits the sick, buries the dead, etc." B. Talmud *Shabbos* 133b; see also Rambam, Mishneh Torah, *Hamada*, *De'oth* 1:6. Thus, the rabbis have generally construed it to mean that one should do good deeds.

40. Deut.15:8.

person to the status to which he was accustomed. This means that, if the person was rich and had servants, you should provide that person with servants.[41] Depending on one's resources, this obligation could either be impossible to meet or it could lead to the person giving charity needing charity himself. Either way, a requirement that forced someone to beggar himself by doing charity would defeat the very purpose underlying the obligation.

To avoid this problem, the religious authorities determined that the obligation should vary according to a person's means to ensure that the obligation did not cause undue hardship.[42] The use of a means-based test to determine the amount of charity and good deeds one is obligated to do raises two questions. The first is what to use as the measure of a person's means. The second is how to determine the amount of charity one should give as a function of the chosen base. At first blush, wealth seems like the better measure of one's ability to do charity; a wealthy person with no income is likely better able to give to others without suffering hardship than someone with no assets and a modest income. Indeed, many of the sources state that one should give of his "possessions," suggesting that wealth, and not income, is the proper base for determining one's obligations.[43]

However, in a discussion of *gemiluth chasadim*, the Talmud notes that if one were to give away 20% of his possessions each year, he would soon be destitute and need charity himself, thus defeating the purpose underlying the obligation. Accordingly, in light of the iterative nature of the obligation, the Talmud concludes that income is the better measure for determining one's obligation to do good deeds.[44] This reasoning applies equally to the *tzedakah* obligation, and it is generally understood that income is the base for determining one's charitable obligations.

The next question was how much one should give to satisfy the obligations. The authorities describe both lower and upper limits. With regard to *tzedakah*, the rabbis noted that the obligation was relieved only for those who were completely destitute. Otherwise, the obligation would apply only to the rich.[45] For the near destitute, the minimum obligation was one-third of a shekel each year.[46] Under normal circumstances, one could satisfy the obligation by giving away 10% of one's income, although the rabbis regarded 20% as the

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41. Rambam, Mishneh Torah, *Zaraim*, *Matanos Anayim* 7:5.

42. Id. (stating that one should give according to his resources if the needs of the poor outstrip one's ability to give).

43. See, e.g. Rambam, Mishneh Torah, *Zaraim*, *Matanos Anayim* 7:5; Midrash Devarim Rabbah, quoted by Shenei Luchot HaB'rith, Deut. 28:3; Menoras Hamaor, Deut. 28:3, MK at 22-23.

44. J. Talmud, *Pe'ah* 1:1; Karo, Shulchan Aruch, Yoreh De'ah 249:1; Radbaz loc. cit. (commenting on Rambam, Mishneh Torah, *Zaraim*, *Matanos Anayim* 7:5).

45. Epstein, Aruch HaShulchan, Yoreh De'ah 251, MK at 38.

46. Karo, Shulchan Aruch, Yoreh De'ah 249:2.

ideal.[47] Several rabbis stated that one should not give more than 20%,[48] but others concluded that the very wealthy could give more.[49] The discussions of *gemiluth chasadim* yielded similar results. While no set amount is described if the obligation is to be fulfilled by doing good deeds, the Jerusalem Talmud establishes a precise allocation of 20% of one's income if the obligation is to be fulfilled by giving money.[50]

These amounts derive from a number of sources, revealing the close link between the obligation of *tzedakah* and the practice of *maaser kesafim*. Gor instance, many rabbis associated the 10% figure with Jacob's vow to tithe.[51] Others viewed this vow as requiring 20%.[52] Others derived the 20% figure by reference to the amounts separated for agriculutral tithing purposes.[53] Regardless of the source, the result is a form of voluntary progressivity. However, unlike most progressive systems, the higher rates apply to all income, not just to marginal income above some threshold.

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47. Id. at 249:1.

48. Some debate exists whether the rabbis imposed the 20% upper limit or whether this limit was part of the revelation to Moses on Mt. Sinai. See, e.g., J. Talmud, *Pe'ah* 1:1; B. Talmud, *Taanith* 20(b); Rabbi Eliyahu (the Vilna Gaon), Commentary on *Pe'ah* 1:1, MK at 25; Rabbi Yitzchak ben Moshe of Vienna (1180-1250), Or Zarua: Laws of Charity: § 13, MK at 23; Rema, Shulchan Aruch, Yoreh De'ah 249; Epstein, Aruch HaShulcan, Yoreh De'ah 249:3-4.

49. See, e.g., Rabbi Avraham Danzig (1748-1820) Chomas Adam, Laws of Tzedakah § 144, MK at 34 ("A very wealthy man may distribute more than one-fifth of his possessions."); Rabbi M. Sternbuch, Moadim Uzuanim, MK at 35 ("It seems obvious that the allocations of one-tenth and one-fifth in regard to charity apply only to one who has inadequate resources."). See also Rabbi S. Z. Auerbach, MK at 36, Hebrew Appendix at 19. Rabbi Feinstein concluded that the amount should be limited to 20% unless there is a question of saving a life. Igroth Moshe, Vol 2, Yoreh De'ah 143, MK at 36.

50. J. Talmud, *Pe'ah* 1:1.

51. For instance, the Baalie Tosafoth commentary on the Torah (dating to thirteenth century C.E) quotes earlier authority stating that "Jacob ordained that tithes should be given from money." Gen. 28:22. See also Epstein, Aruch HaShulchan, Yoreh De'ah 249:2, MK at 28 ("In truth these allocations of one-fifth and one-tenth are not Torah obligations, but the Rabbis associated them with the verse 'and whatever You give me, I shall repeatedly tithe to You.'").

52. The word "repeatedly" in this verse is the English translation of an infinitive absolute in which the verb is repeated. English translators take the repetition to imply emphasis – it is often translated as "surely" – but numerous rabbis believe that it reflects a promise to separate out two tithes. The notion of a double tithe raises the question as to whether one should separate out 20% of the original amount, or give 10% of the original amount, and then 10% of what remains. The Talmud explains that 20% of the original amount is the appropriate figure. See, e.g., B. Talmud, *Kethuboth* 50a; J. Talmud, *Pe'ah* 1:1. This differs from the practice in agricultural tithing, where the second tithe is made net of *terumah* and the first tithe.

53. Epstein, Aruch HaShulchan, Yoreh De'ah. 249:2.

The practice of *maaser kesafim* developed to help ensure that people fulfilled these obligations. Rather than wait to see whether a poor person presented himself, people began to separate *maaser* from their income *ex ante* and then distribute the money to the poor.[54] This practice serves several important functions. First, it makes the doing of charity more systematic and less dependent on chance encounters with those in need. Second, it helps people determine the exact scope of their obligation. Finally, it ensures that people do not spend all their income, thus rendering them incapable of fulfilling the obligation.

While the use of income as the base for determining one's *tzedakah* obligation suggests the need for an income definition, the *ex ante* nature of *maaser kesafim* requires one. With *tzedakah*, the need for an income definition arises only where the needs of the poor outstrip the resources of the person doing charity. With *maaser kesafim*, people must know what their income is, regardless of the needs of the poor, to be able to separate out the appropriate amount. Over the past two thousand years, the rabbis have developed a sophisticated income definition, setting forth detailed rules that closely parallel those found in the Internal Revenue Code, regulations, administrative announcements and case law.

However, before moving on to explore those rules, two additional points regarding the *maaser* obligation bear mentioning. First, the practice of *maaser kesafim* lacks any kind of audit function to ensure compliance. While it is true that the obligation to do charity was at one time enforced by charity collectors who went door to door collecting money,[55] even then each person determined his own income and therefore the amount to give. Moreover, those who tithed often distributed the funds to a variety of recipients. As a result, no one was in a position to know whether another had properly determined his income or separated out a sufficient amount to meet his obligations.

Second, the obligation to tithe is undertaken by those who believe it to be a sacred obligation, suggesting a strong compliance norm even absent an audit function. Indeed, tithing occupies a special place in Judaism. Normally, it is not permitted to do a *mitzvah* and then expect to be rewarded.[56] Malachi 3:10 contains the one exception: "Bring all the tithes into the storehouse, and

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54. The preëmptive separation of *maaser* raised another issue, namely whether one still had an obligation to do charity for one who appeared before him if he already had separated out and distributed *maaser*. Rambam indicated that the *mitzvah* of *tzedakah* existed independent of the limitations on *maaser*, and one was still obliged. Rambam, Mishneh Torah, *Matanos Anayim* 7:5. At the very least, he concluded, one should do something for such a person.

55. See e.g., B. Talmud, *Bava Basra* 8a; Rambam, *Zaraim*, *Matanos Anayim* 8:4-12.

56. Deut. 6:16 ("You shall not test HASHEM, your God. . ."). Job is, perhaps, the most famous example of this notion. Despite behaving well, God treated him rather harshly, thus demonstrating the principle that one could not make a claim against God.

let it be sustenance in My Temple, Test Me, if you will, with this, says HASHEM, Master of Legions [see] if I do not open up for you the windows of the Heavens and pour upon you blessing without end." This notion that one will be rewarded for tithing is reiterated in the Talmud, *midrashim*, and commentaries thereon.[57] Thus, special incentives exist to encourage fulfilling this *mitzvah*.

IV. DEFINING INCOME

As Stanley Surrey noted, any income tax system must struggle with the basic questions of income measurement, including (1) what should be included in gross income, (2) what, if any, deductions should be allowed against gross income, and (3) what accounting periods and timing rules to adopt.[58] Tithing systems are no exception. *Maaser kesafim* imposes a tax on all income, and therefore the specific issues raised are virtually identical to those found in the Federal income tax.[59] Thus, it is not surprising that the income definition rules of *maaser kesafim* closely mirror those found in the Federal income tax.

The strong similarities between these two systems make the differences stand out and provide a window into how culture and context affect the development of the law. Indeed, it is possible to observe three key effects. The first is the way that compliance and enforcement concerns shape the tax law. The second is the way in which the legal system itself affects the development of the law. The third is how underlying cultural values and the purposes of the tax affect its development.

In this Part, I compare and contrast several income definition rules, using the three categories identified above to organize the discussion. As most readers are likely more familiar with the Federal tax rules than their tithing counterparts, I generally begin with a discussion of the tax rule. I present the analysis in Part V.

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57. B. Talmud, *Taanith* 9a, (construing the words *aser t'aser* in Deut. 14:22 to mean tithe so that you will become rich). See also Rabbenu Yonah Gerondi (1190-1263), Sefer HaYirah, MK at 24 ("even though the Creator forbade us to test Him in all other matters He allowed us (to test Him) in regard to *maaser.*"); Rabbi Yitzchak ben Moshe of Vienna (1180-1250), Or Zarua: Laws of Charity, § 13, MK at 23 ("We learn that it is a *mitzvah* for a person to tithe his money, and as he increases his tithes, so his wealth will increase.").

58. Stanley Surrey, Complexity and the Internal Revenue Code: The Problem of Management of Tax Detail, Law & Contemp. Probs. 675-677 (1969).

59. This is quite different from agricultural tithing, where the general structure is the same, but the specific questions differ significantly. For instance, the determination of whether something is included in income for agricultural tithing purposes depends on whether it is edible, a question not normally asked in the Federal income tax context. See Chodorow, Agricultural Tithing and (Flat) Tax Complexity, supra note 10 for a discussion of the specific income definition rules developed for agricultural tithing.

A. Gross Income

The obligation of *maaser kesafim* applies to all income, from whatever source derived.[60] Thus, the general rule of income inclusion corresponds with the scope of the 16th Amendment and the "accession to wealth" income definition the Supreme Court articulated in *Comm'r v. Glenshaw Glass*.[61] It is also consistent with the Haig-Simons definition of income, in that the source of income is irrelevant. Despite this broad definition, questions arise under both systems regarding the meaning of income and the propriety of including specific receipts in income. This section explores three questions with which both systems have struggled and reached different conclusions. They include: (1) whether gifts and inheritances should be included in income; (2) whether returned property should be included in income; and (3) how one should treat nominal, as opposed to economic, gains.

1. Gifts and Inheritances

The question of whether to include gifts and inheritances in income raises two issues. The first is theoretical: Should these transfers be considered income under some ideal definition of the term? The second is policy-related: Assuming, *arguendo*, that they should be considered income, should they should they nonetheless be excluded from income? What follows is a discussion of how tax academics, Federal tax authorities and the rabbis have approached these issues and the rules they have crafted.

From its inception, the Internal Revenue Code has contained a blanket exclusion for all gifts and inheritances.[62] It now contains a blanket exception to

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60. See, e.g., Gen. 28:22 ("And whatever You will give me, I shall repeatedly tithe to You."); Tosafoth, *Taanith* 9a (quoting a passage from the Sifre on Deuteronomy (not extant elsewhere) that concluded that the word "entire" (*kol*) in Deut. 14:22 reflected an obligation to tithe from all sources of income, "including loan interest, trading and all other profits," and not solely from agriculture); Midrash Devarim Rabbah (a 10th century C.E. commentary on Deuteronomy) (relying on Deut. 28:3 to conclude that tithes should not be paid solely from agricultural profits, but also from profits earned in a city). Shenei Luchot HaB'rith, Deut. 28:3; Menoras Hamaor, Deut. 28:3; Rabbenu Yonah Gerondi (1190-1263), Sefer HaYirah (meaning Book of Awe), MK at 24 ("from any source of income, whether from teaching, or writing, or labor, or findings, or gifts, or any other source, whether silver or gold, from all a tithe should be separated.").

61. 348 U.S. 426 (1955). For a discussion of the historical evolution of the income definition for Federal income tax purposes, see Marjorie Kornhauser, The Constitutional Meaning of Income and the Income Taxation of Gifts, 25 Conn. L. Rev. 1 (1992).

62. This exclusion first appeared in the Tariff Act of 1913, P.L. No. 16, § 2, 28 Stat 114, 167. The house version of the bill did not exclude *inter vivos* gifts from income. H.R. 3321, 63rd Cong., 1st Sess. (1913), reprinted in 93 A Guide and

the exclusion for gifts from employers to employees.[63] The exact reason Congress initially decided to exclude them from income is not known.[64] Howver, under the Supreme Court's current income definition, Congress could include gifts and inheritances in income if it so chose. Thus, the decision to retain the exclusion likely reflects a policy choice, as opposed to a belief that gifts and inheritances do not qualify as income.

Significant debate exists within academia regarding the proper treatment of gifts and inheritances in an income tax. Some early definitions of income excluded such tranfers because they defined income narrowly to include only receipts that were earned from labor, capital, or both. The Surpreme Court endorsed this view in *Eisner v. Macomber,*[65] though not in the context of gifts and inheritances. The Supreme Court has since rejected this narrow view, adopting instead an"accession to wealth" definition of income.[66] The *Macomber* definition of income has lost favor with most academics as well. Nonetheless, the debate rages on.

Current theories as to why gifts and inheritances do not qualify as income often focus on whether gift giving can properly be considered "consumption," one of the component elements that constitute income under the Haig-Simons definition of income. For instance, William Andrews argued that consumption should be viewed on a household basis and that gift giving within the family does not count as consumption.[67] In contrast, Douglas and Jeffery Kahn argue that consumption requires the preclusive use of a good and that transferring property from one person to another does not therefore count as consumption.[68] Under this type of analysis, the giving of a gift should lead to

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Analytical Index to the Internal Revenue Acts of the United States, 1909-1950 (Bernard D. Reams ed., 1979), 192. The senate version did include this exclusion, and the senate's version was adopted in conference. The current version of this exclusion can be found in IRC § 102.

63. IRC § 102(c). In addition to this blanket exception, the courts have determined that, under certain circumstances, transfers that technically qualify as gifts or inheritances may not be excluded from income. See,e.g., Wolder v. Comm'r, 493 F.2d 608 (2nd Cir. 1974) (determining that an inheritance that functioned as a payment for services could not be excluded from income).

64. For a detailed description of the legislative history and possible justifications for excluding gift from income, see Marjorie Kornhauser, The Constitutional Meaning of Income and the Income Taxation of Gifts, 25 Conn. L. Rev. 1 (1992).

65. 252 U.S. 189, 207 (1920). The court defined income as a gain derived from capital or labor or a combination of the two.

66. Comm'r v. Glenshaw Glass, 348 U.S. 426 (1955).

67. William D. Andrews, Personal Deductions in an Ideal Income Tax, 86 Harv. L. Rev. 309, 348-349 (1972).

68. Douglas A. Kahn & Jeffery H. Kahn, "Gifts Gafts and Gefts" – The Income Tax Definition and Treatment of Private and Charitable "Gifts" and a Principled Policy

a deduction for the gift-giver and inclusion of the gift by the recipient. However, this could lead to income shifting, and many view the denial of a deduction and exclusion by the recipient as a second best solution that has the same functional result.[69]

Alvin Warren took a different approach, arguing that income for tax purposes should equate to society's annual social product. Under this theory, gifts and inheritances should be excluded from income because they do not add to societal wealth.[70] As with the arguments above, the exclusion of gifts could be effected either by giving a deduction to the donor and taxing the donee, or by excluding the gift from the donee's income.

Other scholars reject these arguments, insisting that gifts and inheritences do properly qualify as consumption, and rejecting the claim that the tax base should equal societal income.[71] Such scholars reject the notion that consumption requires the preclusive use of a resource. Instead, they tend to approach the question of what constitutes consumption from a welfarist or endowment perspective, where the possession of funds reflects the resources at a person's disposal and the gratuitous transfer is no different from any other type of disposition.

As noted above, the current Supreme Court definition of income permits the taxation of gifts and inheritance. Of course, Congress could disagree with the Supreme Court and decide to exclude such tranfers from income on a theoretical basis. However, little evidence exists suggesting that Congress has been particularly moved by the academic debate on this issue, and it seems likely that Congress understands that it can as tax such transfers both a legal and theoretical matter. Thus, the decision to exclude these transfers most reflects a policy decision.

Unfortunately, it is impossible to know precisely which policy or policies Congress intends to promote by excluding gifts and inheritances from income. The most likely candidates include taxpayer liquidity problems, the difficulty of distinguishing gifts from support obligations (which presumably would not be taxable), the difficulty of valuing gifts absent a market transaction, and the desire to promote gift giving. Whatever the policy, the blanket exclusion

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Justification for the Exclusion of Gifts from Income, 78 Notre Dame L. Rev. 441, 461 (2003).

69. See, e.g., William D. Andrews, supra note 67.

70. Alvin Warren, Would a Consumption Tax be Fairer than an Income Tax?, 89 Yale. L. J. 1081, 1088 (1980).

71. Indeed, some have argued that Congress should repeal the blanket exception for gifts. See, e.g., Joseph Dodge, Beyond Estate and Gift Tax Reform: Including Gifts and Bequests in Income, 91 Harv. L. Rev. 1177 (1978); Kornhauser, supra note 64.

is likely overbroad.[72] For instance, if the concern is liquidity or valuation difficulties, there is no reason to exclude cash gifts. If the concern is difficulties distinguishing gifts from support obligations, one could exclude all gifts up to a certain amount given to minor children, while taxing the rest. The blanket exception to the exclusion – for gifts from employers to employees – is also overbroad in that it likely includes legitimate gifts in income. Nonetheless, the bright-line nature of the rules make them fairly simple to understand and relatively easy to administer.

In stark contrast to the bright-line Federal income tax rule, the tithing rules are partially intent-based and narrowly tailored to exclude non-cash gifts and inheritances from income only where demonstrated liquidity concerns exist. Like their Federal tax counterparts, the rabbis who developed the income definition for *maaser kesafim* considered theoretical and policy questions. However, the rabbis ignored the question of what constitutes consumption and instead focused on receipts. As a result, they have uniformly concluded that gifts and inheritances should be considered income.

Their analysis of the issues under this standard is strikingly similar to our own. For instance, one of the justifications offered for excluding gifts from gross income under the Federal income tax is that including gifts would lead to double taxation of the gift. Thus, if A works, is paid with a $100 bill, and then gives that $100 bill to B, both A and B will pay tax on the same $100 bill if gifts are included in income. Some see a rule excluding gifts from income as necessary to prevent this purportedly unjust result.[73] In response to this claim, Victor Thuronyi raised the following argument:

> If individuals should be treated separately, the fact that the donor paid tax should be irrelevant to the treatment of the donee. . . . Moreover, it is not accurate to say that the gift is taxed twice. What is taxed is, first, the amount earned by the donor, and, second, the amount transferred to the donee. The

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72. Deborah Schenk made a similar point with regard to the realization requirement, showing that it was overbroad to the extent it was designed to address concerns regarding taxpayer liquidity, valuation difficulties, etc. Deborah H. Schenk, A Positive Account of the Realization Rule, 57 Tax L. Rev. 355 (2004). Similarly, the blanket exclusion of gifts cannot be justified on similar grounds because numerous gifts are liquid or readily valued.

73. As described above, another way to solve this perceived problem is to allow the donor a deduction against income and include gifts in the donee's income. Allowing such a deduction is arguably the correct result under the Haig-Simons definition of income, because the giving of a gift may not count as consumption. However, this solution could lead to income shifting if the donee is in a lower tax bracket than the donor. Thus, the denial of a deduction for gifts, combined with the exclusion of gifts from income, can be viewed as a second-best solution to the potential double taxation of gifts. See, e.g., Andrews, surpa note 67.

> gift is taxed only once, to the donee. Thus, a gift is no more subject to double taxation than is a payment for personal services, which is also "taxed twice" – once when earned by the payor and again when received by the payee.[74]

Four hundred years earlier, Rabbi Karo (1488-1575) made this same point, only in the context of dowries and *maaser kesafim*:

> I have seen some who say that *maaser* need only be separated from the dowry which the bride gives the bridegroom, but not from the dowry which the bridegroom's father gives him. The reason put forward is that his father has already separated *maaser* from this money. I was amazed at this suggestion. What is the basis for it? Is there any obligation on the *money* (to be tithed) that one can say that it has been freed? The obligation is on the *person* who is required to give from what the Almighty has granted him, and it is of no relevance that his father or father-in-law has already given (*maaser*). It is certainly an erroneous view.[75]

Rabbi Yeshayahu Horowitz (1560-1630) made the same point regarding inheritances.[76]

These passages reflect a common understanding that the tax or tithe is not attached to money or property, but rather is a personal obligation associated with the receipt of money or property.[77] In the case of Judaism, the obligation

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74. Victor Thuronyi, The Concept of Income, 46 Tax L. Rev. 45, 74 (1990). As discussed more fully in the text above, several scholars disagree with this reasoning, claiming that the giving of a gift cannot properly be considered consumption and that it therefore cannot be considered income. The point here is not to show that Thuronyi is correct but rather that the analysis employed in the Federal income tax and tithing literature is often the same.

75. Karo, Shulchan Aruch, Yoreh De'ah 331:16.

76. Shelah, Laws of Charity and Maaser, MK at 42 ("It seems to me that a person is obliged to give *maaser* from an inheritance which he has inherited from his father. Even if his father was careful to separate *maaser* during his lifetime, this does not exempt the son from separating from what the Almighty has granted him. One cannot argue that the son takes the place of the father since the son represents a different ownership."). See also Epstein, Aruch HaShulchan, Yoreh De'ah 249:6.

77. This conception of the obligation is in marked contrast to that in agricultural tithing, where the obligation follows the property. This difference between the nature of the obligation for agricultural tithing and *maaser kesafim* reflects the underlying sources of the obligations and the functions they serve. God has a special claim on the produce grown in Israel, and food is *tevel* (prohibited) until God's portion has been separated out. Once that has occurred, the food may be eaten, and a second owner of the produce has no obligation to remove additional amounts. However, where

is expressed as a *mitzvah*, which by its very nature applies to people, not objects. In the case of the Federal income tax, the obligation (contained in § 1 of the Internal Revenue Code) nominally applies to the income itself, suggesting a different rule. However, as Thuronyi explained, the same property can be income to more than one person and therefore taxing the property twice does not necessarily raise a double-tax problem.[78]

Despite the rabbinic consensus that gifts and inheritance should be considered income from a theoretical perspectice, numerous rabbis have articulated exceptions that allow people to exclude such transfers from income, and therefore from the obligation to tithe. As described below, these exceptions derive from concerns regarding liquidity and generally apply where the obligation to tithe would impose a hardship on the recipient. Cash gifts must be included in income for *maaser* purposes. While some rabbis would exclude all non-cash gifts from income,[79] most include non-cash gifts but allow exceptions where liquidity is a real issue. As seen below, these liquidity exceptions are as narrow as possible.

Much of the discussion focuses on gifts and inheritances of land and whether they may be excluded from income for *maaser* purposes. Land is usually quite valuable, and gifts of land are more likely to raises significant liquidity concerns than other types of gifts. In an agrarian society, land is the chief source of wealth and a rule requiring one to give away land is more likely to cause hardship than similar rules applied to other types of property. The discussions of how to treat land reveal an ever increasing sophistication as the rabbis attempt to limit the exception to those instances where liquidity is truly an issue.

For instance, Rabbi Yoseph ben Pinchas Hahn (1560-1637) wrote:

> I have seen here a widespread custom that *maaser* is not taken from land which is acquired as a dowry or an inheritance. It seems certain to me that there is no obligation to give *maaser* according to their (capital) value but to give *maaser* from their "produce," that is, from the rent of the property.[80]

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the first owner failed to remove the tithes, the obligation falls to the second owner. In contrast, for purposes of *tzedakah*, it is not relevant that someone else previously owned the property or used part of it to aid others. The obligation to aid others is individual. See Chodorow, Tithing Taxes and Complexity, supra note 10.

78. Double taxation is an issue in the Federal income tax. For instance, the basis rules are designed to ensure that taxpayers not pay tax twice on the capital invested in property. However, such rules are not designed to excuse the property itself from taxation once a tax has been paid on it.

79. See, e.g., Responsa Yad Halevi, Vol. 2, 44; Yosef Ometz, Ch. Tzedakah and Maaser, p. 306; Derech Emunah 7:67, TZ at 133.

80. Yosef Ometz, Ch. *Tzedakah and Maaser*, MK at 52.

Rabbi Hahn does not mention liquidity as the justification for this exclusion, but it seems certain that the exclusion is designed to address that concern. Income from a gift of land does not raise the same liquidity problems that the gift of land itself would raise, and therefore he limits the exclusion only to the land itself.[81] Despite this limitation, the rule is still overbroad in that it creates a blanket exception for all land, even when the recipient has sufficient liquid assets to tithe.

Rabbi Simchah Bamberger (1899-1958) also determined that land could be excluded from income. However, unlike Rabbi Hahn, he limited the exception to situations where the recipient did not have sufficient other liquid assets:

> . . . it seems to me that if a man has acquired a field as an inheritance or a gift and he has not enough free money to give one tenth of the value of the field to the poor, there is no valid reason which would compel him to sell one-tenth part of the field to give (the proceeds) to the poor; neither have we heard of an instance of this kind in which he is obligated to give one-tenth of the field itself to the poor. Therefore I take the view that the heir is not obliged to give *maaser* on the landed property inherited from his father, even though I have not found this explicitly in the *poskim*.[82]

In reaching this conclusion, Rabbi Bamberger attempted to draw a distinction between the practice of *maaser*, which involves the *ex ante* separation of money for *tzedakah* purposes, and *tzedakah* itself. He conceded that both Rambam and the Shulchan Aruch included land in possessions when determining how much to give to fulfill the *mitzvah* of *tzedakah*, but he argued that the *maaser* obligation applied only to cash and should therefore exclude non-cash gifts, such as land. Nonetheless, he concluded that, if a person received a non-cash gift and could tithe without hardship, he should do so.

Rabbi Shlomo Zalman Auerbach (1900-1995) refined the rule even further. He agreed that only those who truly had liquidity problems could avoid separating *maaser* on gifts and inheritances of land, but he added an important limitation to the exclusion, namely that where no *maaser* is separated at the time of receipt, it should be separated when the land is sold or otherwise converted to cash. Thus, the lack of liquidity does not permanently excuse someone from

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81. This rule mirrors that found in IRC § 102(b), which specifies that the income from gifts excluded from income is not also excluded. In addition to addressing liquidity concerns, it also prevents evasion and erosion of the tax base. If the income from gifts were exempt, people could make reciprocal gifts of income producing property and thereby remove their income from the tax base.

82. Responsa Shaarei Simcha, MK at 53. The term *poskim* literally means deciders and is generally used to refer to preëminent *halachic* scholars.

tithing, it merely defers the time of tithing until the property is converted to cash.[83] In essence, he articulated a realization requirement for gifts or inheritances of land.

Neither Rabbi Bamberger nor Auerbach attempted to define when a person has sufficient liquidity concerns to allow them to exclude land from the *maaser* obligation. Rather, they appear to have left this decision to the individual. Such determinations depend on a host of issues, including a person's liquid assets, illiquid holdings and financial obligations.[84] As a result, if two people receive equivalent gifts and have the same level of liquid assets, one may be required to tithe on the value of the gift, i.e., include it in income, while the other may exclude it. Given the fact specific nature of the inquiry, it would be difficult to design a simple, uniform rule for making liquidity determinations.[85]

To complicate matters, several rabbis have noted that the question of whether someone has liquidity concerns may well depend on his intent. They argue that a gift recipient cannot claim to have liquidity problems associated with the receipt of a non-cash gift if he was intending to purchase the gift for himself. In such cases, the person retains the money he would have spent on the gift and therefore cannot be said to have a liquidity problem with respect to the gift.[86] As a result, he must separate out *maaser* on receipt of the gift.

For instance, assume a person was going to buy a car for $15,000. Instead, he received the car as a gift. As a result, he is able to keep the $15,000 he was intending to spend. He can hardly claim that he would have to sell the

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83. See MK at 53, Hebrew Appendix at 20.

84. For instance, if a person were forced to sell property to tithe, the impact might depend on the property to be sold. One forced to sell property used in a trade or business would likely suffer a much greater hardship than someone being asked to sell a bond that he had saved for a rainy day. Similarly, one's obligations could have a huge effect on the impact of the tithe. A person with a large family and therefore heavy financial obligations would feel the impact of the obligation to tithe more heavily than a person with a small family and more discretionary income.

85. The Federal income tax system has one analogous practice that demonstrates the difficulty of making hardship evaluations. For purposes of determining whether to accept an offer in compromise from a taxpayer who has failed to pay his full tax debt, the IRS has promulgated a series of schedules listing allowable expenses, which include both the type of expense and the maximum amount allowed. These schedules are determined on a regional basis to account for differences in the cost of living. The service determines a taxpayer's income and subtracts allowable expenses to arrive at a figure it claims the taxpayer has available to pay his tax debt. It bases the decision on whether to accept a compromise on this assessment.

This process is difficult to administer and leads to significant conflict between taxpayers and the IRS, as the average costs the IRS allows are often significantly less than the taxpayer's actual expenses, leading the IRS and the taxpayer to reach opposite conclusions regarding the hardship involved in paying past debts. See IRC § 7122(d)(2) and associated schedules and regulations.

86. Tzedakah u'Mishpat, Ch. 5, note 27, TZ at 133.

car or suffer some other hardship to satisfy the *maaser* obligation. He has $15,000 in the bank that he would not otherwise have had. In contrast, if he received as a gift something that he was not intending to purchase for himself, he cannot be said to have increased his cash position by that amount, and the liquidity justification may hold, depending on the factors identified above.[87]

To complicate matters even more, this rule raises the interesting question of what to do if a person receives a gift of greater value than what he intended to spend on himself. To continue with the car example, assume that someone intended to purchase a car for $15,000 but instead received a car worth $25,000 as a gift. On the one hand, he is $25,000 better off than he was before the gift, and should separate out $2,500. On the other hand, from a liquidity perspective, he has only saved $15,000, i.e., the money he would have spent on the car, and should only have to separate out $1,500 for *maaser*. The rabbis who have considered this question have come down on both sides, with some focusing on the money saved,[88] and others looking at the value received.[89]

2. The Return of Lost Property

The treatment of returned property presents another example of how the tax and tithing laws diverge. Here, the recipient's innermost hopes play the primary role in determining the outcome for tithing purposes.

Under the Federal income tax, taxpayers are generally not required to include in income the value of returned property. An exception to this rule arises where one has deducted the loss and later events, i.e., the return of the property, are inconsistent with such a deduction. In such circumstances,

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87. Rabbi Auerbach has extended this reasoning to fringe benefits, which are non-monetary compensation. Although such benefits are not liquid, one must include them in income unless one can demonstrate that one would not otherwise have purchased the benefit. Kol Hatorah Journal Vol. 39, p. 92, No. 5. Of course, insofar as benefits are negotiated, unlike gifts, it would be hard to demonstrate that one would not have purchased such benefits.

88. Tzedakah u'Mishpat, supra note 86.

89. Those who assert that one must separate *maaser* based on the value of the gift received must address another interesting question, insofar as the value of a given gift in the marketplace may not equate to the value the recipient places on the gift. For Federal income tax purposes, when property is subject to tax, one must use the "fair market value," i.e., the value hypothetical unrelated parties would assign to the property in an arm's length negotiation. See, e.g., Regs. 20.2031-6(a). Subjective value is simply ignored as impossible to gauge accurately. Several rabbis suggest the same rule for tithing purposes. See, e.g., Rabbenu Jonah Gerondi, Book of Awe; Mateh Moshe Vol. 2., Ch. 8. In contrast, Rabbi Aaron Kotler asserts that one should separate out *maaser* based on one's subjective value for the object received. Thus, if the recipient of a $25,000 car intended to purchase a $15,000 car, and would only have paid $20,000 for the car he actually received, he should separate out $2,000 for *maaser* purposes. Taub, Laws of Tzedakah at supra note 11 at 134, note 20.

recovered property must be included in income under the tax benefit doctrine. The question of inclusion is objectively answered, removing the decision from the taxpayer's discretion and making it easy to administer. In contrast, for tithing purposes, the *Sefer Chassidim*[90] provides that the recovery of lost property will be treated as as income subject to tithing only if the recipient has given up all hope of receovery.[91]

To frame this issue in the context of the accession to wealth standard, the question is what baseline to use for measuring an increase in wealth. Under both rules, the default baseline is the period before the property was lost. Under the Federal rules, the baseline resets to the period after the loss only if one has taken a deduction for the loss, an objectively verifiable fact. In contrast, under the tithing rule, the baseline for measuring an accession to wealth changes whenever a person gives up hope of recovery.

It is tempting to think that this rule is of little consequence, insofar as the return of lost property is a rare event. However, these rules are critically important in the context of holocaust reparations, which are paid to numerous people and are often substantial. To the extent such reparations represent the return of, or compensation for, property seized during World War II, the question arises as to whether such amounts are exempt from the obligation to pay tax and tithe. The Federal government and numerous states have enacted special bills clarifying that such recoveries will not be subject to tax.[92] In contrast, relying on the *Sefer Chassidim*, Rabbi Eliezer Yehudah Waldenberg[93] concluded that reparations are subject to the obligation to tithe unless the recipient definitely believes that he never gave up hope of recovering the property those reparations represent.[94] Thus, the Jewish rule is stricter, but impossible to enforce.

3. Inflation

Both Federal and religous authorities have struggled with the issue of whether to tax nominal or real (i.e., economic) gains.[95] Economists and tax

90. This translates as the Book of Good Deeds and dates to around 1200 C.E.

91. Sefer Chassidim, § 144, MK at 51.

92. See Economic Growth and Tax Relief Reconciliation Act of 2001, P.L. 107-16, § 803, 115 Stat. 149; Holocaust Restitution Tax Fairness Act of 2002, P.L. 107-358, § 2, 116 Stat. 3015. States that have excluded such payments from income include Arizona, California, and New York, to name but a few. See Arizona Title 43: Taxation of Income § 43-1030; California Revenue and Taxation Code § 17155; New York Consolidated Statutes, Tax Law § 13.

93. Rabbi Waldenberg is one of the preëminent living *halachic* scholars.

94. Shut Tzitz Eliezer, Vol. 6 #27, MK at 51.

95. An example may help illustrate the issue. Suppose A purchased a car for \$10,000 in Year 1 and sold the car for \$15,000 in Year 3. He has a nominal gain of \$5,000. However, because of inflation, some portion of the price increase for the car is attributed to inflation, and not to an increase in the real value of the car, as measured

scholars generally acknowledge that an ideal income definition would take inflation into account. Nonetheless, Congress, with the courts' approval, has consistently imposed tax on nominal gain. In contrast, Rabbi Moshe Feinstein concluded that one could tithe based on real gain. Thus, the Federal income tax rule deviates from the ideal or economic notion of income in this respect, while the tithing rule does not.

Scholars have suggested a variety of means to take inflation into account. Some have suggested indexing basis to account for inflation.[96] Others argue that the best way to account for inflation is to apply a preferential tax rate to gains from property.[97] While this approach is crude in comparison to indexing, it is seen as less complicated. Critics of these proposals argue that taking inflation into account when determining gain is not appropriate because the tax benefits of deferral associated with the realization requirement (another deviation from the ideal) significantly outweigh the detriment caused by taxing nominal gains.[98] Whatever the reason, the Federal income tax has eschewed any attempt to index basis for inflation, taxes capital gains at a preferential rate, and imposes taxes on nominal, as opposed to real, gains.[99]

Several taxpayers have challenged this rule, arguing that the notion of income set forth in the Constitution refers only to real gain and that Congress does not have the power to tax nominal gain. In *Hellerman v. Comm'r*,[100] the

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against other good and services. If the total inflation over the three years were above 50%, he would actually have lost money on the car from an economic perspective. If one were to tax nominal gains, the person would pay tax, even though he lost money in real terms.

96. See, e.g., 1 Treasury Dep't, Tax Reform for Fairness, Simplicity, and Economic Growth 97 (1984); David H. Safavian, Indexing Tax Attributes for Inflation: Dispelling the Myths and Advocating Change, 1995 Det. C. L. Rev. 109 (1995); Daniel Halperin, Saving the Income Tax: An Agenda for Research, 24 Ohio N.U.L. Rev. 493 (1998); Yoram Margalioth, The Case for Tax Indexation of Debt, 15 Am. J. of Tax Pol'y 205 (1998).

97. Joseph Isenbergh, The End of Income Taxation, 45 Tax L. Rev. 283, 320-321 (1990).

98. Noel Cunningham and Deborah Schenk, The Case for a Capital Gains Preference, 48 Tax L. Rev. 319, 337-340 (1993); The End of Income Taxation, supra note 98, (expressing uncertainty as to whether the benefits of deferral associated with the realization requirement offset the detriments of taxing nominal gain caused by inflation); Edward J. McCaffery, The Capital Gains Debate, Take Two: On Indexing and Fairness, 44 Tax Notes 605, 605 - 06 (July 31, 1989) (arguing that indexing for inflation must be considered in the context of the decision not to tax accrued gains).

99. This is not to say that the Internal Revenue Code ignores inflation entirely. Several allowances are indexed for inflation, including the personal exemption and the standard deduction, IRC §§ 51(d)(4) and 63(c)(4), as are the tax tables, IRC § 1(f) and (i), and various floors and ceilings used for phase outs. See, e.g., IRC §§ 221(f) and 68(b)(2).

100. 77 T.C. 1361 (1981).

Tax Court held that Congress has the power to establish the dollar as a "unit of legal value"[101] for purposes of determining taxable income. Thus, even though dollars do not have a constant intrinsic value, they do have a constant legal value.[102]

The issue of inflation does not arise in the sacred texts or in the ancient or medieval rabbinic literature. However, during the 1970s, a time of high inflation both in the U.S. and in Israel, the question was quite relevant, and Rabbi Moshe Feinstein concluded that one was permitted to index for inflation when determining income for tithing purposes:

> . . . for *maaser kesafim* we are concerned with actual profit. . .. Paper money which decreases and increases in value at different times cannot be taken as a fixed standard. Therefore, since it is known to all that the paper currency has depreciated, the nominal profit of £1,000 in England or $1,000 in the USA obtained from the sale of a house purchased ten years previously is not to be treated as a real profit (for *maaser kesafim*). If the house was purchased for 1,000 and sold for 2,000, one must assess how much the 1,000 used in the purchase would be worth today in relation to the 2,000 obtained in the sale.[103]

Rabbi Feinstein then identified a cost of living index to be used to adjust the original purchase price, cautioning that only vital commodities should be included in the index so as to avoid items whose prices fluctuated for a variety of reasons not associated with inflation.[104]

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101. Id. at 1364.

102. The court stated:

> "[the] meaning of income is . . . to be gathered from the implicit assumptions of its use in common speech." Thus the meaning of income is not to be construed as an economist might, but as a layperson might. . . . Petitioners' nominal gain may or may not equal their real gain in an economic sense. Nonetheless, neither the Constitution nor tax laws "embody perfect economic theory." Id. at 1366 (quoting United States v. Oregon-Washington R. & Nav. Co., 215 F 211, 212 (1918)).

For a more recent affirmation of this notion, this time in the context of annuity payments, see Nordvedt v. Comm'r, 116 T.C. 165, 169 (2001).

103. Igroth Moshe,Vol. 5, Yoreh De'ah § 2, No. 114, MK at 48.

104. Interestingly, Rabbi Feinstein came to the opposite conclusion regarding the use of nominal dollars as a measuring stick for purposes of determining whether the repayment of a loan involved interest. Jewish law bars Jews from charging interest to other Jews. Lev. 25:36-37; Deut. 23:20-21; B. Talmud, *Bava Metzia* 60b. However, to the extent that interest is designed to and does account for the devaluation of money over time, it arguably represents an effort to return to the borrower the same value that

B. Deductions

The second step in determining either taxable or tithable income is to decide whether any deductions against such income should be allowed and, if so, which ones. Congress has always permitted deductions for Federal income tax purposes. Deductions are also allowed for purposes of *maaser kesafim,*[105] though their scope and nature is quite limited when compared to those found in the Internal Revenue Code.

Given the large number of deduction issues that arise in both contexts, it would be impractical to address them all. Instead, I will focus first on the question of whether business and personal deductions should be allowed. I will then turn to the questions of how to treat business meals and civil taxes, two items that have attracted much interest from scholars and legislators.

1. Allowable Deductions

The Internal Revenue Code has always permitted deductions against income. These deductions can be broken down roughly into two categories. The first category includes deductions necessary to measure income, such as the deduction for business expenses under section 162. The second category includes "personal deductions," i.e., deductions designed to promote social policies external to the measurement and collection of income.[106]

Despite the distinctions between these two categories of deductions, the lines often blur. Several income measurement deductions reflect objectives extraneous to income measurement. For instance, while the accelerated depreciation rules are ostensibly designed to match the costs of assets with the income they generate, leading to a more accurate measurement of income, they

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was lent and not a charge for the use of the money. Nonetheless, based on Talmudic discussions of interest, Rabbi Feinstein determined that one should use nominal dollars to determine whether interest was being paid. Accordingly, a lender can only request the borrower to repay the exact amount of the loan, and no more, even where he can show that the dollars paid back were worth less than the dollars lent out. Igroth Moshe,Vol. 5, Yoreh De'ah § 2, No. 114, MK at 48. The Jewish laws regarding what constitutes interest are quite complex and beyond the scope of this article.

105. See, e.g., Rabbi Bachrach ("But in regard to business deals which involve expenses, we can say that it is clear that the expenses are to be reckoned as part of the *keren* [capital]. The profit in excess of the expenses is to be regarded as the 'new produce' from which *maaser* should be separated.") Responsa Havoth Ya'ir, MK at 56.

106. Examples of personal deductions include the deductions for home mortgage interest, see IRC § 163(h)(3), environmental causes, see IRC § 179A, and personal savings. See IRC § 219. In some cases, Congress has used tax credits in place of deductions. See e.g., IRC § 25A (allowing Hope and Lifetime learning credits). These personal deductions override the general rule in IRC § 262 that personal expenses are not deductible and are generally referred to as "tax expenditures."

were also designed to encourage investment and spur economic development.[107] Moreover, while some of the personal deductions clearly have nothing to do with income measurement, significant scholarship exists debating the question of whether some of these deductions are in fact consistent with ideal notions of income and therefore necessary for income measurement.[108] The net result is that the deductions found in the Internal Revenue Code are wide-ranging and often stray far beyond what would be necessary to provide an accurate measure of a person's income.

In contrast, the only deductions allowed for tithing purposes are those that relate to income measurement. Moreover, those deductions focus solely on income measurement and do not aim to promote social policy objectives external to those implicit in the practice itself. Thus, as with the income inclusion rules described above, the deduction rules found in tithing more closely track what one would expect in an ideal income tax than those found in the Federal income tax.

The propriety of allowing business deductions for purposes of determining one's income subject to tithe seems fairly self evident.[109] However, unlike Congress, which was free to create deductions by simple fiat, the rabbis had to demonstrate that such rules derived from, or at the very least were consistent with, the sacred texts.

The Torah and Talmud are silent on the question of deductions for *maaser kesafim*. However, in the analogous practice of agricultural tithing, the most obvious source of authority, no deductions whatsoever are allowed. It was therefore necessary to distinguish *maaser kesafim* from that tithe to justify the allowance of deductions in one, but not the other. Rabbi Oppenheim (1664-1736) distinguished the two practices by contrasting the miraculous nature of agricultural income with the more pedestrian provenance of commercial income:

> But we must conclude that there is no comparison between *maaser kesafim* for business deals and agricultural *maaser* for

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107. See, e.g., IRC §§ 1400L (New York Liberty Zone) and 1400N (Gulf Opportunity Zone).

108. See, e.g., Andrews, supra note 67; Mark G. Kelman, Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World, 31 Stan. L. Rev. 831 (1979); Stanley A. Koppelman, Personal Deductions Under an Ideal Income Tax, 43 Tax L. Rev. 679 (1988); Jeffery H. Kahn, Personal Deductions – A Tax "Ideal" or Just another "Deal"?, 2002 L. Rev. Mich. St. U. Det. C. L. 1 (2002) (arguing that many personal deductions are consistent with an ideal income tax because they effect progressivity).

109. As Rabbi Oppenheim observed, business expenses were often significant and if people were obligated to "tithe the difference between the cost [of a good obtained in trade] and selling price without deduction of expenses they would not earn anything." Responsa Havoth Ya'ir, MK at 59.

> produce of the earth. In the latter case we have a special biblical decree since the whole matter of growth of agricultural produce is a miracle of nature. . . . However, business dealing is a practice among people of the world with no reference to anything miraculous; at the beginning of creation the Almighty divided the beneficial resources which are needed by mankind among various countries, and therefore they need one another and supply one another. This is the source of all business dealings, and the world follows its normal routine requiring large capital outlay to provide a small profit, the opposite of the blessing of the Lord in regard to agricultural produce.[110]

Although addressed to business expenses, this passage also reveals why *maaser kesafim* lacks personal deductions. Rabbi Oppenheim was able to distinguish agricultural profits from business profits, thus removing business expenses from the ban on deductions. His analysis does not support the allowance of any non-business deductions, such as those that can be found throughout the Internal Revenue Code.

Interestingly, none of the personal deductions debated in the tax scholarship as possibly permissible under an ideal notion of income are allowed for purposes of *maaser kesafim*. This fact may lend support to those who insist that such deductions are not appropriate for pure income measurement, or it may simply reflect the fact that many tax scholars approach income questions using the Haig-Simons formulation of income, with its focus on consumption, while the rabbis employ a more traditional receipts approach.

2. Business Meals

Business expenses are deductible under both the Federal income tax and tithing rules,[111] while personal expenses are not.[112] One of the perennial problems both of these systems face is that certain expenses have a dual character, and it may be difficult to determine how best to treat them. Numerous expenditures fall into the gray zone between business and personal expenses, but the most difficult is probably the business meal. On the one hand, meals consumed in the pursuit of business are truly a cost of business. On the other hand, people must eat. Allowing a deduction for business meals may be tantamount to allowing a deduction for a personal living expense. As a result,

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110. Id.

111. See, e.g., IRC § 162; Responsa Havoth Ya'ir, MK at 59.

112. IRC § 262; Epstein, Aruch HaShulchan, Yoreh De'ah 249:6, MK at 66. Some rabbis have contended that one may deduct living expenses before determining the amount of *maaser*, but they are in a distinct minority. See, e.g., Rabbi Matisyahu Trevis, quoted in Shvirei Knesses Hagedolah, Yoreh De'ah 249 and Responsum Avkas Rochel #3, MK at 66.

those developing the tax and tithing laws have struggled with how best to treat these meals.

Originally, the Internal Revenue Code permitted deductions for business meals only to the extent that they exceeded the price "ordinarily required for such purposes at home."[113] Thus, only the extra cost incurred because of the business activity was deductible, with the rest considered a non-deductible personal expense. This rule was difficult to administer, as it was not easy to determine how much the taxpayer would normally have spent on a meal at home. Indeed, depending on the tastes and habits of each taxpayer, the amounts could vary widely between individuals.

In 1921, Congress amended the general deduction provisions to allow taxpayers to deduct the entire cost of the meal, so long as they were consumed while in the pursuit of business "away from home."[114] Not surprisingly, some taxpayers abused this rule and chose to eat their meals away from home at fancy restaurants. Accordingly, in 1962, Congress again amended the rules to preclude deductions for any "lavish or extravagant" costs.[115] Thus, the rule became almost the mirror image of the original, where the ordinary costs of a meal were not deductible, but extra costs were.[116]

In 1986, Congress tried another approach, arbitrarily reducing the amount allowable as a deduction to 80% of the non-lavish cost.[117] The disallowance of the 20% effectively allocated that portion of the expense to the personal side of the ledger.[118] In 1993, in an effort to reduce the budget deficit,

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113. TD 3101, 3 CB 191 (1920).

114. Revenue Act of 1921, ch. 136, § 214(a)(1), 42 Stat. 227, 239. Generally speaking, a taxpayer must be away from home overnight to be considered "away from home" under IRC §162(a)(2). United States v. Correll , 389 U.S. 299 (1967).

115. Pub. L. No. 87-834, §4(b), 76 Stat. 960, 976-77. This legislation also imposed a substantiation requirement upon taxpayers that precluded deductions for meals absent evidence of their cost. See IRC § 274(d). Some taxpayers had claimed deductions based on estimates of their business meal costs. See Cohan v. Comm'r, 39 F.2d 540 (2nd Cir. 1930). Congress was concerned that these estimates might have a persistent error in favor of the taxpayer, causing these deductions to be larger than warranted.

116. This is somewhat of an overstatement insofar as the normal extra costs of a meal on the road were deductible. Only the "lavish or extravagant" costs were disallowed.

117. IRC § 274(n), as enacted in The Tax Reform Act of 1986, P.L. 99-514.

118. The Joint Committee on Taxation's explanation of the 1986 Act stated:

> The Congress believed that prior law, by not focusing sufficiently on the personal-consumption element of deductible meal and entertainment expenses, unfairly permitted taxpayers who could arrange business settings for personal consumption to receive, in effect, a Federal tax subsidy for such consumption that was not available to other taxpayers. The taxpayers who benefit from deductibility tend to have relatively high incomes, and in some cases

Congress further reduced the amount allowable as a deduction to 50% of otherwise allowable costs.[119] The current law thus creates an arbitrary, bright-line rule that represents a compromise between the business and personal nature of the expenditure. It also reflects a need for greater revenues that has little to do with the proper allocation of the costs between personal and business expenses.

Many of the positions described above, and a few others, can be found in the *halachic* treatment of business meals. For instance, Rabbi Shlomo Laniado (d. 1793) concluded that expenses for meals would have been incurred regardless of any business venture and were really personal expenses that could not be considered when determining income subject to tithe. Only those costs in excess of what one would normally have incurred for oneself are deductible.[120] Rabbi Auerbach concurs in this position.[121]

In contrast, Rabbi Rabbi Oppenheim (1664-1736) relied on an analogy with partnership law to conclude that business meals should be deductible. He posited that God is like a partner and that one should consider whether the expense would be chargeable to an earthly partner in determining whether it was deductible for purposes of *maaser*.[122] Yechiel Michael Epstein (1835-1905)

> the consumption may bear only a loose relationship to business necessity. . . .

Staff of the Joint Committee on Taxation, 99th Cong., 1st Sess., General Explanation of the Tax Reform Act of 1986 (P.L. 99-514), released May 4, Part 3.
This reduction rule reflects the fact that all meals and entertainment inherently involve an element of personal living expenses, but it still allows an 80% deduction where such expenses also have an identifiable business relationship.

119. IRC § 274(n); H.R. Rep. No. 111, 103d Cong., 1st Sess. 645 (1993).

120. Rabbi Laniado wrote: "Nevertheless, I am doubtful regarding the expenses of food and drink which a man consumes on a business journey until he returns home, whether they may be deducted; for whether at home or on a journey he must eat and drink. From the writings of [Rabbi Oppenheim], who uses the analogy of a partner, it would seem to be deductible, for in a partnership such expenses are deducted from the joint fund; however, I am still in doubt, and it seems that he should deduct precisely according to the blessing of his own household (i.e., the additional cost above the normal expenditure which he would incur at home.)" Beth Dino Shel Schlomo, Yoreh De'ah No. 1, MK at 61.

121. See MK at 61.

122. Responsa Havoth Ya'ir, MK at 61. As a result, he also concluded that deductions should be allowed for clothing and for losses and theft, so long as no negligence was involved.. As described below in Pat IV.C, several rabbis relied on partnership law when contemplating the appropriate accounting periods and whether to allow the netting losses against gains.

concurred, concluding that all traveling expenses, including meals, should properly be considered business expenses.[123]

Rabbi Yaakov Reicher (1670-1733) provides the most interesting rule. Relying on Rabbi Oppenheim's distinction between the miraculous nature of agricultural income and the pedstrian provenance of normal business income,[124] Rabbi Reicher concluded that deductions should be allowed for business meals if a person went on a trip intending to transact business, but not if he traveled simply open to the possibility that business could be conducted.[125] He reasoned that spontaneous business was akin to the miraculous growth of produce. As deductions were not allowed in agricultural tithing as a consequence of the miraculous provenance of agricultural income, deductions for business meals should not be allowed where business "miraculously" occurred.[126] In contrast, intended business was caused by human endeavor. He thus permitted deductions in such cases.

Rabbi Zvi ben Azriel of Alik (c. 1720) rejected this view, arguing that, even where business was intended, the risks of failure were significant. He beleived that the distinction between intended and spontaneous business could not be maintained and concluded that the general rule allowing business expense deductions should govern both cases. Thus, he held that the entire cost of a business meal should be deductible, regardless of intent.[127]

Although the tithing rules and tax rules are quite similar (other than Rabbi Reicher's intent-based rule and the current, arbitrary tax rule), one important difference bears mentioning. The tax laws described above followed each other *seriatim*. In contrast, the tithing rules co-exist. Thus, those seeking to tithe must determine for themselves, with the aid of their rabbi, which rule to follow.

3. Civil Taxes

One of the persistent questions in tithing is whether one may deduct civil taxes from one's income when figuring out the amount on which to tithe.[128]

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123. "All expenses incurred in the transaction including traveling expenses and food and drink are all considered as business expenses and can be deducted . . ." Epstein, Aruch HaShulcan, Yoreh De'ah 249:6, MK at 61.

124. See Part IV.B, supra.

125. Responsa Shvut Yaakov No. 50, MK at 63.

126. Such a rule presents a similar issue to that presented by the rules regarding the inclusion of lost property. It depends on the self-reported intent of the person tithing. Given the different compliance norms and enforcement needs, such a rule would not likely be found in the Federal tax system.

127. Bet Lechem Yehuda, Yoreh De'ah 249:1, MK at 63.

128. See. e.g., Reverend Lovejoy, The Simpsons, supra note 2 ("And once again tithing is 10% off the top. That's gross income, not net. Please people, don't force us to audit. . .").

This same question – whether to allow a deduction for state taxes – arises in the context of Federal income taxation. Both Congress and the Jewish authorities allow such deductions, though the reasons given differ significantly. What follows is a discussion of the respective positions, including the debate over whether to differentiate between income and sales taxes.

Several justifications have been offered for allowing people to deduct their state and local taxes from their income for Federal tax purposes, including horizontal equity[129] and fiscal federalism.[130] Nonetheless, significant debate exists about whether to retain the deduction.[131] From time to time, reformers have suggested eliminating the deduction, but so far they have failed to garner sufficient political support to do so.[132]

Taxpayers currently may deduct most state and local taxes against their income.[133] State income and property taxes have always been deductible, while the deductibility of state sales taxes has come and gone. In 1986, Congress rescinded the deduction for state sales taxes, asserting that a sales tax should logically be considered as part of an object's purchase price, and therefore personal conusmption to the extent that the object was purchased for personal use.[134] In 2005, Congress restored the deduction for state sales taxes, reflecting

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129. Under this theory, taxpayers with similar means should be subjected to the same level of tax. Those who pay more in state taxes have lower after-tax incomes and therefore should not be subject to the same level of tax. Allowing a deduction for state taxes addresses this concern. See William Vickrey, Agenda for Progressive Taxation 18-24 (1947).

130. Under this theory, the Federal government subsidizes state and local spending by allowing a deduction for state and local taxes. Some have argued that this subsidy is warranted because states do not take into account the benefits they create but cannot capture when setting tax rates. Allowing a subsidy encourages them to collect and spend more than they otherwise would. See, e.g., Brookes D. Billman, Jr. & Noël B. Cunningham, Nonbusiness State and Local Taxes: The Case for Deductibility, 28 Tax Notes 1107 (1985). Others have argued that the subsidy encourages progressivity at the wrong level of government and that it should be revised. See, e.g., Kirk Stark, Fiscal Federalism and Tax Progressivity: Should the Federal Income Tax Encourage State and Local Redistribution?, 51 UCLA L. Rev. 1389 (2004).

131. For a review of the literature on the justifications for and challenges to the deduction for state taxes, see Brian Galle, A Republic of the Mind: Cognitive Biases, Fiscal Federalism, and Section 164 of the Tax Code, 82 Indiana Law Review 711 (2007).

132. For a discussion of the efforts to eliminate the deduction for state taxes during the run-up to the 1986 Tax Act, see Jeffery H. Birnbaum and Alan S. Murray, Showdown at Gucci Gulch: Lawmakers, Lobbyists and the Unlikely Triumph of Tax Reform (1987).

133. IRC § 164. State taxes are not deductible under the Alternative Minimum Tax. IRC § 56(b)(1)(A)(ii).

134.Staff of Joint Comm. on Tax'n. 99th Cong., 2d Sess., General Explanation of the Tax Reform Act of 1986 at 47 (Comm. Print 1987). ("to the extent that sales taxes are costs of purchasing coumer products or other items representing voluntary

a desire to treat all state taxes similarly and not penalize those states (and their residents) that did not have an income tax.[135]

The general consensus among the rabbis who have considered the question of civil taxes is that one should be allowed to deduct income taxes. Significant debate exists about the propriety of allowing a deduction for sales taxes. This debate turns primarily on the individual's right to and control over the amounts paid. I consider first the early authorities and then turn to the modern debate.

The debate began with Rabbi David Ben Shmuel (the Taz) (1586-1667), who stated that *maaser* could not be used to pay civil taxes.[136] A logical extension of the Taz's admonition might be that no deduction should be allowed for civil taxes. If one deducts civil taxes in determining income for *maaser* purposes, the amount of *maaser* separated is less than it otherwise would be, and from an economic perspective one could argue that *maaser* had been used to pay such taxes.[137]

Nonetheless, Rabbi Chaim ibn Atar (1696-1743) concluded that a deduction for civil taxes should be allowed, drawing an analogy between such taxes and *pe'ah*, the practice of leaving the corners of the field unharvested so that the poor may partake.[138] Just as produce left in the fields was not included in a farmer's income for agricultural tithing purposes because the farmer never

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purchases, allowing the deduction was unfair because it favored taxpayers with particular consumption patterns and was inconsistent with the general rule that costs of personal consumption by individuals are nondeductible.")

135. See General Explanation of Tax Legislation Enacted in the 108th Congress (2005) Enacted on May 2005 Part Seventeen: American Jobs Creation Act of 2004 (Public Law 108-357) 2005 Bluebooks Pt. 17 ("The Congress recognized that not all States rely on income taxes as a primary source of revenue, and that allowing a deduction for State and local income taxes, but not sales taxes, created inequities across States and may also have created biases in the types of taxes that States and localities chose to impose. The Congress believed that the provision of an itemized deduction for State and local general sales taxes in lieu of the deduction for State and local income taxes would provide more equitable Federal tax treatment across States, and would cause the Federal tax laws to have a more neutral effect on the types of taxes that State and local governments utilize.").

136. Taz, Yoreh De'ah 249:1.

137. Consider a person who earns $10. Such a person would be required to separate out $1 for *maaser*. Now consider the same person who earns $10 and owes $1 in civil tax. Absent a deduction for the civil tax, he would separate out $1 in *maaser* and then another $1 to pay the tax, leaving the government with $1, God with $1 and himself with $8. With a deduction for civil taxes, he would deduct the $1 tax and then separate out the *maaser* from the remaining $9. In that case, the government would still receive its $1, God would get only $0.90, and the person would retain $8.10. From an economic perspective, one could argue that the person had effectively used $0.10 that would otherwise have been God's to pay his taxes, retaining the difference for himself.

138. Rishon Lezion, Yoreh De'ah 249:6, MK at 80.

exercised control over it, he reasoned, so should amounts paid for civil taxes be excluded from one's income for *maaser* purposes. While the treatment of *pe'ah* is handled as an exclusion from income, the way to effect this exclusion for civil taxes is to allow a deduction against income for such taxes.

Rabbi Chaim Yosef David Azuli (1724-1806) (the Birkei Yosef), a student of Rabbi Atar, disagreed, arguing that *pe'ah* is a special Torah obligation in the nature of a gift to the poor, and that one cannot draw an analogy between the practice of *pe'ah* and the payment of taxes. Thus, he concluded that no deduction for civil taxes should be allowed.[139]

Little else was written on this question until the mid-20th century, when the debate picked up again. Rabbi Feinstein construed the passage from Rabbi Atar as applying to income taxes but not to taxes that are transaction based, such as sales taxes.[140] He reasoned that the income tax was like *pe'ah*, in that the person who earned the income never truly controlled the money owed as income tax. The person who earns $10 and owes $1 to the government as income tax really controlled $9 and should tithe on that amount. The same argument cannot be made when this person then takes his $9 and buys something for $2, paying an additional $1 as sales tax. Even though the sales tax is not optional, such a person still had earned $9 and had it at his disposal at one time.

Rabbi Feinstein cited Talmud passages that indicated that *maaser* is owed on amounts the king seizes in satisfaction of a debt to support the distinction between income and sales taxes.[141] He reasoned that the taking of the property described in the Talmud was analogous to the payment of a sales tax. Once a person had control over income, he owes a tithe on such income, even though the government later takes the money from him as part of a transaction separate from the act of earning it.

In contrast, Rabbi Yitzchak Yaakov Weiss (d. 1989) took a more lenient view and construed Rabbi Atar's reasoning to apply equally to all taxes. Rabbi Weiss argued that *maaser kesafim* was customary in origin, allowing significant leniency in the creation of the rules.[142] He further argued that, for purposes of determining income only, one should treat the payment of taxes similarly to the use of funds for *tzedakah*. After all, taxes generally fund the public good and bear some similarity to *tzedakah*. Thus, if someone earned $100 and then gave away $3 to a charity, he would determine the amount to separate for *maaser* by first subtracting the $3. Similarly, he should be allowed to deduct any taxes

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139. Birkei Yoseph, Yoreh De'ah 249:2. This argument is somewhat surprising because it strictly construes the *pe'ah* obligation. As reflected above in note 30, the Rabbi Azuli believed that *maaser kesafim* was rabbinic in origin, thus affording some latitude in the development of its rules. His refusal to draw an analogy between *pe'ah* and taxes reflects a stricter view of the what the Torah allows than one might expect.

140. Igroth Moshe, Vol. 2, Yoreh De'ah § 1, No. 143.

141 B. Talmud, *Gittin* 44a; B. Talmud, *Chulin* 131a.

142 c.f. Maharil, Responsum No. 54, MK at 27 ("For this reason maaser kesafim, which is Rabbinic, has a particular leniency.").

paid. However, Rabbi Weiss suggested that those who can afford not to deduct sales taxes should refrain from so doing.[143]

Rabbi Auerbach took a third approach. He agreed with Rabbi Feinstein that income taxes should be deductible, but not sales taxes. However, consistent with the legislative history of the Tax Reform Act of 1986, he based his argument on the notion that a sales tax was nothing more than part of the purchase price of a given good or service. As such, it could not be deducted. Rabbi Auerbach also took a broader view of the justification for the deduction. He contended that the reason income taxes could be deducted was that they were mandatory. Thus, the focus on taxation was too narrow. He argued that any forced taking, including deposits, mandatory loans to the state of Israel or forced insurance, should be deductible for purposes of determining *maaser*. Consistent with the tax benefit rule, he further believed that if the money were later recovered, then it should be included in income for tithing purposes.[144]

C. Netting and Accounting Periods

Having determined what must be included in income and what expenditures can generally be deducted, the final step in ascertaining taxable or tithable income is to determine whether specific items of income and expeneses may be netted against one another and to set accounting periods.[145] Federal income taxation generally permits taxpayers to net all income and expenses incurred during a one-year period. Within bounds, it allows taxpayers to offset income and losses from different accounting periods. In contrast, several rabbis argue for transactional accounting, where each transaction is considered separately from all others, thus preculding netting altogether. Others argue for tax accounting periods, ranging from three months to one year. In all cases, netting between periods is strictly prohibited. What follows is a discussion of how the different rules developed.

The concept of income necessarily incorporates a time element.[146] From the beginning, the Federal income tax has used an annual accounting period, called the "taxable year."[147] Initally, Congress permitted taxpayers to net all

143. See MK at 80, Hebrew Appendix.

144. Id.

145. In addition, one must develop rules to determine in which period items of income or deductions fall. Examples of such rules include those of cash method and accrual accounting, which specify when taxpayers must report income and may claim deductions. An examination of these rules is beyond the scope of this paper.

146. In Eisner v. Macomber, the Supreme Court contrasted capital, which it described as "a reservoir supplied from springs" to income, which it described as "as the outlet stream, to be measured by its flow during a period of time." 252 U.S. 189, 206 (1920).

147. Income Tax Act of Oct. 3, 1913, Pub. No. 63-16, s 2D, 38 Stat. 166 (1913). See IRC § 441 and regulations thereunder for a description of the current rules regarding the taxable year. Generally it is the taxpayer's annual accounting period, if

income and deductions that fell within a tax year. However, to combat potential abuses, over time, Congress has imposed a number of limitations on this ability. For instance, in 1924, Congress limited the ability to deduct capital losses,[148] a restriction that continues to this day, though in altered form.[149] In the 1980s, in response to aggressive tax shelter activity, Congress imposed restrictions on the ability to deduct losses associated with borrowed funds and from passive investments.[150] Nonetheless, the general rule remains that taxpayers are allowed to net all income and expenditures incurred within a given taxyear, even if they are earned or incurred in different businesses.

Originally, each tax year was independent, and income or losses from one year could not be used to offset income or losses from any other year. This independence created the possibility that (1) taxpayers could owe taxes, even when they ultimately lost money, and (2) two taxpayers who made the same amount of profit when measured over the long run, might end up owing different amounts of tax, depending on when they earned their income and incurred their expenses.[151] To remedy this inequity, the trend in Federal taxation has been to increase the period over which income is measured by reducing the independence of the individual tax years and allowing netting across years.

One of the potential distortions of income inherent in an annual accounting regime were showcased in *Burnet v. Sanford & Brooks Co.*[152] The taxpayer in that case incurred expenses in one tax year, and received payment in another. Although the taxpayer lost money on the project, it was barred by operation of the accounting rules from using the expenses to offset its income. Thus, it was required to pay tax, even thought it ultimately lost money. The taxpayer challenged the constitutionality of annual accounting because it lead to a tax where no profit was earned.[153] The taxpayer argued that income should be measured on a transactional basis.[154] The Supreme Court rejected this argument and affirmed the annual accounting system as the only practical way

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such period is a calendar or fiscal year. IRC § 441(b). In some cases, the code allows for a 53-week year, IRC § 441(f), or for tax periods shorter than one year. IRC § 443(a).

148. Revenue Act of 1924, § 208(c), 43 Stat. 253, 262 (1924).

149. See IRC §§ 1211 and 1212. For a history of this limiation, see 3B Mertens, The Laws of Federal Income Taxation, §§ 22.02-22.03 (1996 Rev.).

150. See IRC §§ 465 and 469.

151. This could arise either because a taxpayer had income in one year and incurred expenses in another or as a result of progressive tax rates, where the bunching of income could lead taxpayers to incur higher tax burdens than others whose income was earned at a constant rate over time.

152. 282 U.S. 359, 51 S.Ct. 150 (1931).

153. This argument is analogous to those raised regarding the taxation of nominal, as opposed to real, gain.

154. Id. at 362-3.

"to produce a regular flow of income [to the government] and apply methods of accounting, assessment, and collection capable of practical operation."[155]

Although annual accounting has been affirmed numerous times since *Sanford & Brooks Co.,*[156] the courts and Congress have created a number of exceptions and modifications to the tax law to allow for netting across years. For instance, businesses are now allowed to carry back and forward net operating losses suffered in a given year, so that such losses can be applied to offset income from other years.[157] Within limits, this rule prevents the situation in *Sanford & Brooks Co.* from reoccurring and makes it more likely that taxpayers who earn the same income over a period of years will pay the same amount of tax. Other examples of rules that modify the strict annual accounting rules include the tax benefit rule, initially created by the courts and then partially codified in § 111,[158] and the rule that events from prior tax years can affect the characterization of events that occur in a later tax year.[159]

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155. Id. at 365. Interestingly, at the time *Sanford & Brooks Co.* was decided, regulations permitted taxpayers to account for their profits and losses on a transactional basis, so long as they kept their books based on such a method. The taxpayer in that case had not done so, and therefore could not avail himself of those regulations. See, e.g., Art. 36 of Reg. 45, Apr. 19, 1919. For a discussion of such regulations, see Myron C. Grauer, Debunking the Myth of the Historic Supremacy of Annual Accounting for Income Taxes: A Coalescence of Non-Literal Interpretation with Original Intent Analysis, 67 Wash. U. L. Q. 165, 187 (1989) (discussing the history of the tax accounting rules).

156. See, e.g., Hillsboro Nat'l Bank v. Comm'r, 460 U.S. 370, 388-89 (1983) (affirming the general principle of annual accounting, while permitting the tax benefit rule to ameliorate some inequities caused by such a system).

157. See IRC § 172. Generally, losses may be carried back two or three years (though under some circumstances up to 10 years), thus potentially allowing the taxpayer to restate previously declared income, and carried forward from five to twenty years, depending on the situation.

158. Under this rule, where a taxpayer received a tax benefit in a prior year and later events are inconsistent with the receipt of that benefit, the taxpayer must recapture the prior benefit in the year the inconsistent event occurs. See, e.g., Hillsboro Nat'l Bank v. Comm'r and United States v. Bliss Dairy, 460 U.S. 370 (1983). For a discussion of how this rule came into being and has evolved over time, see Myron C. Grauer, The Supreme Court's Approach to Annual Accounting and Transactional Accounting for Income Taxes: A Common Law Malfunction in a Statutory System?, 21 Ga. L. Rev. 329, note 12 (1986); Patricia White, An Essay on the Conceptual Foundations of the Tax Benefit Rule, 82 Mich. L. Rev. 483 (1983).

159. See, e.g., Arrowsmith v. Comm'r, 344 U.S. 6 (1952). For a discussion of *Arrowsmith* and its implications for annual accounting, see Deborah H. Schenk, Arrowsmith and its Progeny: Tax Characterization by Reference to Past Events, 33 Rutgers L. Rev. 317 (1980-81); Joel Rabinovitz, Effect of Prior Year's Transactions on Federal Income Tax Consequences of Current Receipts or Payments, 28 Tax. L. Rev. 85 (1972-73). See also, IRC § 1212, which permits a taxpayer to carry back and/or forward capital losses that are suspended by operation of IRC § 1211.

From 1964 to 1986, Congress sought to ameliorate the problems associated with progressive tax rates by allowing taxpayers to average their income under certain circumstances.[160] These provisions allowed taxpayers to avoid the worst effects of steep marginal rates and helped ensure that those who earned the same amounts over the same period paid the same amount in taxes, regardless of when during the period the income was earned.[161] These provisions were repealed as part of the Tax Reform Act of 1986, which significantly reduced the top marginal rates.

The rabbis who developed the accounting rules for tithing seem completely unconcerned with horizontal equity and the possibility that different people might end up tithing different amounts based solely on the timing of their income and expenses. Instead, they are largely driven by the desire to ensure that people not use losses they have incurred to offset amounts owed to God on account of prior profits. This concern affects the decision regarding the use of an accounting period, the length of the accounting period, and the ability to net income and losses across accounting periods.

The Torah clearly indicates that the proper accounting period for agricultural tithing is one year; it is silent regarding the proper accounting period for *maaser kesafim*. Thus, the rabbis were left to interpret the primary legal sources and argue by analogy to develop the timing rules. Many rabbis looked to the agricultural tithing rules to determine the appropriate accounting period for *maaser kesafim*. For instance, Rabbi Yechezkel Landau (1714-1793) relied on the clear reference to annual accounting to argue in favor of a one-year accounting period for *maaser kesafim*, where all losses and gains during the year may be netted.[162] Rabbi Auerbach concurred.[163]

In contrast, Rabbi Yaakov Reicher (c. 1670-1733) relied on the same passage to conclude that transactional accounting is required for *maaser kesafim*. Despite the clear reference to annual periods, he determined that each year was analogous to a separate transaction. As it was improper to use crops from one year to satisfy the tithe of another year, just so, he determined that it

160. See generally Boris I. Bittker and Lawrence Lokken, Federal Taxation of Income, Estates and Gifts (Rev. 3d. ed.) Vol. 4A, ¶ 111.3.10 for a description of these provisions. This idea continues to receive significant attention from scholars. See generally, e.g., Lily L. Batchelder, Taxing the Poor: Income Averaging Reconsidered, 40 Harv. J. on Legis. 395 (2003); Neil H. Buchanan, The Case Against Income Averaging, 25 Va. Tax Rev. 1151 (2006).

161. The loss netting rules described above accomplished the same thing to a limited extent. However, they only came into play when a taxpayer suffered losses.

162. Noda B'Yehuda 2, No. 198, MK at 49. Rabbi Landau also relied on the example in the Jerusalem Talmud, *pe'ah* 1:1 about a person who tithed one fifth of his possessions each year to conclude that tithing should be determined on an annual basis. See also, Rabbi Zvi ben Asriel of Alik (c. 1720). Beth Lechem Yehudah,Yoreh De'ah 249, MK at 78.

163. See MK at 79, Hebrew Appendix at 20.

was inappropriate to offset gains and losses from different transactions.[164] Under this approach, the "accounting period" is the duration of a given transaction, where only income and expenses from that transaction may be netted together.

Other rabbis looked to the partnership accounting rules to develop the rules for *maaser kesafim*. For instance Rabbi Ya'ir Chaim Bachrach (1683-1701) noted that, in partnership law, losses and gains from different deals could be netted so long as they were part of one contract between the partners, such that the different deals were "mutually liable." Thus, where transactions were interconnected, he would allow netting for *maaser* purposes. However, as the time between the transactions grew, the case for netting seemed weaker and weaker. Thus, he recommended establishing an accounting day every three to six months for purposes of determining the amount of *maaser* owed.[165] Others rejected the analogy to Talmudic partnership rules and instead argued that transactional accounting was required.[166]

Still others have articulated the view that the accounting period for tithing should follow the accounting method the person has adopted for his business, a rule similar to the early tax regulations. Thus, as Rabbi Katz (1616-1678) explained, if a person has accounted for a loss on his books, then he may not later use the loss to offset a gain. However, if he has not made an account, but rather determines the total income and expenses for the year together at the same time, then he may offset losses against gains as part of that accounting. Rabbi Zvi ben Azriel of Alik (c. 1720) concurred but noted that, if *maaser* has in fact been separated from an earlier gain, it cannot be used to offset a loss, regardless of how the books are kept.[167]

In many regards, the rabinnic analysis of accounting periods is similar to the concern the Taz raised above in connection with the deductibility of civil taxes.[168] If one is allowed to net losses against gains for purposes of determining one's income, the amounts available for *maaser* are reduced. This is economically equivalent to using *maaser* money for inappropriate purposes, in this case the covering of business losses. Accordingly, most rabbis concurred that netting should be strictly limited to prevent this outcome and pushed for short accounting periods or even transactional accounting.

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164. Shvut Yaakov No. 84, MK at 77-8. Others who support transactional accounting for *maaser kesafim* include Rabbi Shlomo Laniado (d. 1793) (who reached the same conclusion by distinguishing the Talmudic partnership laws), Beth Dino Shel Shlomo, Yoreh De'ah No. 1, MK at 78-9, and Rabbi Seligman Baer Bamberger (1807-1878). See Yad Halevi, Yoreh De'ah No. 131, MK at 79.

165. See, also Ahavath Chesed, Ch. 18, MK at 50 (in which Rabbi Yisrael Meir HaCohen (1838-1933) argues that six months is desirable, but one year acceptable).

166. See, e.g., Rabbi Shlomo Laniado (d. 1793), Beth Dino Shel Shlomo, Yoreh De'ah No. 1, MK at 78-9.

167. Once *maaser* has been separated, it is dedicated to God and cannot be used for other purposes. See Beth Lechem Yehudi, Yoreh De'ah No. 249, MK at 78.

168. See Part IV.B.3, supra.

V. ANALYSIS

As should now be evident, those who created the laws of *maaser kesafim* struggled with the same basic issues as those who crafted the Federal tax laws. The rules the rabbis developed are often similar to our tax laws, though significant differences exist. These differences stem from a number of causes, including (1) the concerns, or lack thereof, regarding compliance and enforcement, (2) the different sources of legal authority and the structure of the legal systems itself, and (3) the values underlying and motivating the different systems. In this Part, I explore the ways in which these factors affect the development of tax law.

A. The Effect of Compliance and Enforcement Concerns on the Development of Tax Law

One of the key differences between the Federal tax system and *maaser kesafim* is the need for enforcement. Compliance with the tithing laws is left to the individual, who generally views it as a sacred obligation. God acts as the arbiter over whether the individual properly fulfilled his obligation. Accordingly, the practice lacks any human audit function or enforcement mechanisms. The lack of enforcement concerns allowed the rabbis to develop rules that accurately reflect theoretical notions of income, but which would be largely unworkable if they had to be administered. In contrast, the government must enforce the tax laws against a population that largely resents the obligation and constantly seeks ways to avoid it. Thus, the tax laws must take into account compliance norms, the resources available to administer the laws, and the government's ability to evaluate and adjudicate taxpayer claims in a fair and consistent manner. These concerns cause the Federal tax laws to deviate significantly from ideal notions of income, as authorities adopt broad, bright-line and objective rules that are capable of enforcement.

In this section, I explore the impact compliance and enforcement concerns have on the development of the law by comparing the tithng and tax rules for gifts,[169] returned property and meals, all of which were described in greater detail above in Part IV.

The different gift exclusion rules found in tithing and the federal income tax clearly bear the stamp of enforcement concerns, or the lack thereof. I begin with the tithing rules. Although the rabbis recognized that gifts normally should be included in income, they crafted limited exceptions for gift recipients who would suffer undue hardship if they had to tithe on the receipt of a non-cash gift. Thus, the rule deviates from the ideal, but only as much as is necessary to account for liquidity concerns. Each individual decides for himself

169. For ease of reference, I refer here only to gifts, even though the same rules apply to inheritances..

whether the exclusion applies to his situation, a determination that may depend on his unstated intent (or lack thereof) to purchase the gift for himself and possibly his subjective valuation of the gift.[170]

Simply recounting the steps that would be necessary to resolve a dispute reveals how unworkable these rules would be in a system where the rabbis, or some other authority, sought to enforce the obligation to tithe. At the outset, one would have to determine whether the gift recipient intended to purchase the gift for himself. If the answer were yes, he could not claim that tithing on the receipt causes liquidity problems and would have to include the value of the gift in income. Each individual whose decision to exclude a gift from income was challenged would claim that he did not intend to buy the gift for himself, and the government would be hard pressed to prove otherwise. The same problem would arise if the person conceded that he was going to buy the gift, but claimed that he would have spent far less than the value of what he received and therefore should tithe on the lower value.

Assuming the government conceded that the recipient did not intend to buy himself the gift in question, it would nonetheless still be necessary to make an individualized determination as to whether tithing on the gift would cause hardship. This would require a detailed inquiry into the recipient's income and financial obligations. Litigating this question would require significant resources, similar in many regards to the inquiry now undertaken in the context of the IRS's offer-in-compromise program, where it considers whether taxpayers have sufficient assets to pay their past-due tax liabilities.[171] Thus, it would be necessary to determine which financial obligations are allowable in determining hardship, the amount allowable for each type of allowed obligation, etc. Unlike the IRS, the religious authorities lack the manpower and resources to conduct such inquiries.

In contrast, the Internal Revenue Code contains a blanket exclusion of all gifts. While this rule deviates significantly from the definition of income the Supreme Court has embraced, it obviates the need for the types of inquiries described above. Thus, it is easy to administer.[172] To be sure, the exclusion of all gifts requires one to distinguish between gifts and other types of transfers, a task that admittedly raises administrative difficulties and must be done on a case-by-case basis. However, even here, the task is easier than what would be required to enforce the tithing rule.

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170. See Part IV.A.1, supra, for a more complete description of these rules.

171. See supra note 85.

172. It also avoids the game playing that might arise were the rule more narrowly crafted. For instance, if cash gifts were included in income, while non-cash gifts were excluded, people might purchase property, give the property, and have the recipient sell it to recover the cash. Given the government's revenue requirements and need to protect the tax base, rules targeted to specific policy concerns would likely require anti-abuse rules, which could significantly complicate the tax code and impose significant compliance costs.

The characterization of a transfer as a gift turns on the donor's intent.[173] However, unlike the question of whether someone intended to buy himself a gift, determining whether something is a gift may be done in a somewhat objective manner. For instance, it is possible to observe whether the donor received anything back in return for the purported gift. This ability to rely on objective evidence means that the court's determination of a donor's intent is far more likely to be accurate than the assessment of a gift recipient's intent.

In the one area where it may be most difficult to determine intent and where controversies are most likely to arise, i.e., gifts from employers to employees, Congress created a bright-line exception to the exclusion, including all such gifts in income. While this rule is overbroad – it undoubtedly leads to taxation where true gifts are intended – it simplifies matters by avoiding the need for difficult inquiries.[174]

The lost property rules provide another example of how enforcement concerns affect the development of the law.[175] The question of whether to include returned property in income for tithing purposes depends entirely on whether the person receiving the property ever gave up hope of recovering it. While it might, under some circumstances, be possible to asses whether someone intended to buy himself a gift, there is simply no way to determine someone's innermost hopes regarding property that might have been lost fifty years earlier. Nonetheless, the rule is designed to ensure that only "new" receipts are subject to tax.

Such a rule would be unthinkable in the context of the federal income tax, as taxpayers would have every incentive to claim that they had not given up hope of recovery, and the government would be unable to gainsay such a claim. In light of these concerns, it is not surprising that the Federal income tax rule is objective and therefore capable of administration. It requires taxpayers to include returned property in income only if they previously received a tax benefit associated with the loss of the property. In the case of holocaust

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173. Comm'r v. Duberstein, 363 U.S. 278, 285-86 (1960).

174. This is not to say that the Internal Revenue Code is devoid of difficult to administer rules. A number of tax outcomes depend on a taxpayer's intent, such as with gifts, reasonable compensation, and whether property is held for appreciation or for sale to customers. However, the courts and Congress have attempted to develop objective criteria, presumptions and bright-line rules to help guide such inquiries. See, e.g., Suburban Realty Co. v. U.S., 615 F.2d 171, 177-79 (5th Cir. 1980) (establishing factors to be used to determine whether property is held for investment); Exacto Spring Corp. v. Comm'r, 196 F.3d 833, 838-39 (7th Cir. 1999) (establishing an objective test to determine whether compensation is reasonable); IRC § 1237 (capital gain treatment for certain real estate sales); IRC § 183(d) (creating a presumption regarding profit seeking motives in the hobby-loss context). See also Edward Yorio, Federal Income Tax Rulemaking: An Economic Approach, 51 Fordham L. Rev. 1, 48-49 (1982) (advocating replacing rules based on taxpayer intent with more efficient economic tests).

175. See Part IV.A.2, supra.

reparations, for which it seems extermely unlikely that a Federal tax loss deduction was taken, Federal tax law simply excludes all recoveries,[176] a rule far more lenient and easier to enforce than the intent-based rule described above.

Finally, the different business meal rules found in tithing and Federal income tax reflect the effects of enforcement concerns on the development of the law.[177] The Federal tax rules reflect a progression from the theoretically correct, but difficult to administer, law to an arbitrary, bright-line rule allowing a deduction of only 50% of business meal costs. Not only was the original rule difficult for the taxpayer, as he had to determine what portion of his expense he would have incurred absent the business need, but it was impossible to police should a dispute arise, as the government would have had a very difficult time demonstrating what the taxpayer would have incurred absent the business need. The current rule eliminates these problems while recognizing that some portion of the expense is personal and therefore should not be deducted.

In contrast, the rabbis who considered the rules for tithing purposes did not need to consider enforcement. As a result, they were free to adopt difficult to administer rules. While some rabbis argued that either none or all of the expenses should be deductible, many argued for a more nuanced position. For instance, Rabbi Auerbach in the late twentieth century endorsed the excess cost rule, which Federal tax authorities abandoned in 1921 as too difficult to enforce. Rabbi Reicher endorsed an even more difficult rule, one based on whether the person incurring the expense intended to conduct business. He reasoned that profits earned from unintended business were miraculous, and therefore analogous to agricultural tithing. Just as agricultural tithing allows no deductions owing to the miraculous nature of the income, just so *maaser kesafim* should provide no deductions for unintended income. Given the difficulties of determining intent, such a rule would be unworkable if the obligation were enforced.

To characterize the Judaic tithing system as one in which enforcement is of no concern overstates the situation. A more accurate statement might be that, in this religious system, the authority to enforce the law belongs to God. God has both the right and ability to enforce compliance and to mete out punishment for failure to comply. His resources are limitless, rendering irrelevant concerns regarding the cost and energy necessary for case-by-case analysis. His omniscience makes concerns about unverifiable intent irrelevant. Thus, the difference between the two systems is not that one is enforced, while the other is not. Rather it comes down to the resources and efficacy of the enforcer. The reliance on broad, bright-line rules in the Federal tax system reflects the limited capacity of humans to fund enforcement efforts and doubt as to whether such efforts will yield accurate determinations.

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176. See note 92, supra.

177. See Part IV.B.2, supra.

The need for, and limitations of, human enforcement of the federal tax laws suggest a more fundamental reason for the differences between U.S. tax and Jewish tithing laws: the different compliance norms observed by members of the two communities (e.g., taxpayers and tithers). Given the religious nature of the tithing obligation and the special status it holds (one who tithes is promised earthly riches), one would expect willing and honest compliance with the rules. In contrast, as evidenced by the large tax gap, i.e., the difference between what is owed in taxes each year and what is actually paid, the tax laws do not inspire similar devotion. Thus, to a large degree, the concessions made for enforcement purposes reflect the underlying sense that taxpayers cannot be trusted to report and pay the proper amounts. If taxpayers could be trusted to report their income accurately, the difficulties of enforcement would diminish in importance, and the rules might well change in response.

The compliance norm in this country reflects a strong impulse to avoid paying taxes whenever possible. Thus, while Justice Holmes famously stated that he did not mind paying his taxes because they are the price we pay for civilization,[178] a more accurate reflection of the sentiments of most American taxpayers is Judge Learned Hand's statement that one does not have a patriotic duty to pay more in taxes than is absolutely necessary.[179] Unfortunately, as seen in the continuing difficulties witht abusive tax shelters, this aversion often manifests itself as improper evasion.

There are certainly many reasons for weak compliance norms and tax avoidance in the U.S., but one factor contributing to a lack of compliance is that the government decides how taxes will be spent. Given the variety of government expenditures, which include defense spending, spending on social programs, and earmarks for "bridges to nowhere,"[180] it is likely that a person will disagree with the use to which at least some portion of the money is put, decreasing the incentive to comply or even providing a moral justification for tax avoidance or evasion. When combined with the knowledge that audits are rare and that the government's success in such audits is limited, significant incentives for cheating, or, at least, taking aggressive positions, is quite strong.

Under these circumstances, rules that give a taxpayer significant discretion to decide whether he has income or which are based on intent are likely to lead to an understatement of income. Even if taxpayers do not

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178. Compania Gen. de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

179. Helvering v. Gregory, 69 F.2d 809, 810 (2nd Cir. 1934) (citations omitted), aff'd, 293 U.S. 465 (1935) ("[A] transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.").

180. See, Shailagh Murray, For a Senate Foe of Pork Barrel Spending, Two Bridges Too Far, Washington Post, Oct. 21, 2005, p. A08.

intentionally cheat, they will likely decide in their own favor in close cases. Thus, the Federal income tax rules generally contain few provisions that give such discretion to the taxpayer and which are difficult to enforce.[181]

In contrast, the obligation to tithe represents a commandment from God and is a part of the religious morality of Jews and Christians. As noted above in Part III, tithing is the one area where one is allowed to test God. The more one tithes, the richer one may expect to become.[182] Thus, there is a special incentive to fulfill this obligation. In addition, many of the factors that may lead to a poor compliance norm in the U.S. are absent for tithing. For instance, though Jewish law establishes the general uses of the tithes, those who tithe have a great deal of discretion about where and how to distribute their money, eliminating the sense that the money is being misspent. This is not to say that in close cases self-interest will not sometimes sway a tithe-payer, but one who voluntarily undertakes the obligation to tithe because he believes that God commands and encourages it is not likely to cheat when it comes to determining his income.

While this observation make intuitive sense, two recent studies provide empirical support. The first study, by Gordon Dahl and Michael Ransom, surveyed 1,200 members of the Church of Latter Day Saints to test how financial self-interest affected how those who tithed defined income.[183] Like Judaism, the Church of Latter Day Saints includes a tithing obligation. Members are required to attest to their bishop each year that they have tithed.[184] Unlike Judaism, the Church of Latter Day Saints intentionally declines to define income, leaving it up to the individual to fashion his or her own definition.[185] Dahl and Ransom set out to test whether people would make decisions consistent with their financial self-interest. They created a number of hypothetical choices and asked participants to indicate whether they would include the hypothetical items in income for tithing purposes.[186] Based on the responses, they concluded that the church members' choices did not correspond

181. Taxpayers voluntarily report their income to the government, and they do get to decide for themselves in some cases whether they are entitled to deductions. For example, taxpayers determine in the first instance whether stock is worthless or whether debts are unrecoverable. See IRC §§ 165(g) and 166. Nonetheless, such decisions are reviewable and judgments can be made based on evidence other than the taxpayer's intent or subjective belief. Thus, while some discretion exists, it is nothing like the Jewish tithing rules described in the text above.

182. See supra note 57.

183. See Gordon B. Dahl and Michael R. Ransom, Does Where You Stand Depend on Where You Sit? Tithing Donations and Self-Serving Beliefs, 89 The Am. Econ. Rev. 703 (Sept. 1999).

184. Id. at 704-05.

185. See Id. at 704.

186. Id. at 706.

to their financial self-interest.[187] While this study focuses on Mormons, nothing about it suggests that this finding would be specific to Mormons.

A second study, this time of Jewish attitudes towards tax evasion, strongly supports the conclusion that the compliance norm among religious Jews is quite strong. Robert McGee and Gordon Cohn conducted a survey of Orthodox Jewish students at a branch of Tuoro College in New York.[188] They found that, these students were strongly opposed to tax evasion, even where the taxes were used for unjust purposes.[189] This empirical finding is consistent with the opinions of two seminal articles describing Jewish ethics of tax evasion from a theoretical perspective.[190] While compliance with the obligation to pay state taxes is different from compliance with the tithing obligation, it is hard to imagine that the compliance norm would differ significantly.[191]

The net effect of these differences in compliance norms on the development of the law is that the laws of tithing more closely mirror ideal or theortical constructs of income than the Federal tax counterparts. Jewish authorities can entrust to those who tithe signfiicant discretion to determine what constitutes income or whether they are entitled to a deduction. Thus, the extensive use of intent-based rules. In contrast, Federal tax authorities routinely act to remove discretion and craft rules that are easy to administer, causing the Federal tax definition of income to deviate signfiicantly from ideal notions of income.

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187. Interestingly, the income definition that emerges from the survey corresponds closely to what we see in the Federal income tax and *maaser kesafim*. It is not clear whether this reflects knowledge of the income tax rules or reflects a more intuitive sense of what counts as income, and when exceptions from the general rules make sense.

188. McGee, Robert W. and Gordon Cohn M. (2007) Jewish Perspectives on the Ethics of Tax Evasion, Academy of Accounting and Financial Studies Journal, forthcoming.

189. Id. The study revealed that, even though students generally favored compliance, even when the taxes were used for unjust purposes, the strength with which they favored compliance was far less than under other circumstances. Id. at 26-36. This finding supports the notion that those who tithe will have a stronger compliance norm than those who pay taxes because of the ability to control what the money is spent on.

190. Gordon Cohn, The Jewish View on Paying Taxes, Journal of Accounting, Ethics & Public Policy 1(2) 109-120 (1998); Meir Tamari, Ethical Issues in Tax Evasion: A Jewish Perspective, Journal of Accounting, Ethics & Public Policy, 1(2) 121-132 (1998).

191. This is not to say that every religious Jew gladly gives away up to 20% of his income annually and that there is no avoidance behavior. The *responsa* literature deals with many questions aimed at determining precisely what the obligation entails, and it can be assumed that many of these questions stem from a desire to do what is required and no more. However, once the rules are known, the likelihood of outright cheating is less than what one would expect in civil taxation.

B. The Effect of the Legal System on the Development of Tax Law

Several scholars have noted that the structure and characteristics of a legal system, as well as the politics attendant to it, can have a significant impact on the formation of the law.[192] Such effects can readily be seen in the tithing and tax rules compared above. At the same time, despite significant differences in structure and underlying legal authorities, because the policies underlying the rules are often similar, the legal analysis is often similar, and significant convergence of the laws is possible. This Part begins by outlining the major differences between the two legal systems and then explores how those differences have affected the development of the law.

The U.S. and Jewish legal systems differ in two major ways. First, the U.S. system gives Congress legislative power to change the law at will. Thus, Congress is able to eliminate ambiguities in the law, amend the law to respond to changing circumstances and new developments and address even the smallest details.[193] In contrast, Jewish law is based on God's revelation on Mt. Sinai, and that law may not be changed in any regard. Indeed, it is forbidden to add to or subtract from God's law.[194] Instead, the rabbis must develop the law as part of an interpretive process, where each rule is seen to derive from the Torah or Talmud.

Second, and equally important, the U.S. court system is organized in a hierarchical manner, while the Jewish legal system lacks a formal structure that encompasses all decision makers. As a result, in the U.S., a mechanism exists for resolving disputes and creating uniformity in the law, even absent legislation. In contrast, no mechanism within Judaism exists that permits one rabbi to bind others or compel adoption of, or compliance with, a given legal interpretation. Thus, rabbinic opinions are only as compelling as the reasoning they contain, and disputes among rabbis regarding what the law requires or allows can never be ultimately resolved.

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192. For instance, in comparing the relative complexity of U.S. and European tax law, Thuronyi has noted that the relative lack of party discipline in the U.S. and the power afforded to individual legislators, either by virtue of committee participation or through the loose legislative process, may well account for the relative complexity of U.S. law. Thuronyi, supra note 9 at 20. Shaviro reaches a similar conclusion in his effort to assess whether a consumption tax capable of passage in the current political climate will be as simple as consumption tax proponents suggest. His pessimistic conclusion is that sufficient political pressures exist such that any consumption tax that results from the legislative process will deviate significantly from an ideal consumption tax and that such deviations will be the source of significant complexity. Daniel Shaviro, Simplifying Assumptions: How Might the Politics of Consumption Tax Reform Affect (Impair) the End Product? (April 2006). (NYU, Law and Econ. Research Paper No. 06-17, 2006), at SSRN: http://ssrn.com/abstract=896160.

193. For instance, Congress has expressly prohibited a deduction for the first phone line into a house, even if it is used for business purposes. IRC § 262(b).

194. Deut. 4:2.

A key consequence of these differences is that the Federal definition of income deviates signficantly from ideal notions of income, while the Jewish definition tracks the ideal far more closely. The leglislative power gives Congress the ability to amend the law to incorporate new economic insights and address new situations, thereby causing the income definition to better approximate ideal notions of income. For instance, in 1984 Congress amended the tax law to include imputed interest payments in income for below-market loans, once the economic realities of such loans were fully understood.[195] However, more often than not, Congress uses this power to cause the law to stray from economic theory and ideal notions of income. As described above in Part V.A, some of these deviations reflect concessions to administration and enforcement concerns, such as the decision to tax nominal gains, exclude allgifts from income or create a bright-line, partial deduction for business meals. Others reflect political pressures brought to bear on Congress to promote social policies external to tax and to benefit special interests.[196]

In contrast, the interpretive process and lack of hierarchy in Jewish law limit the ability of the rabbis to change the law or add provisions unrelated to pure income measurement. As seen in Rabbi Feinstein's decision to allow tithes to be paid on real, as opposed to nominal, gains,[197] the rabbis have some ability to incorporate economic insights. However, because they seek to ground each decision in the Torah and Talmud, they must fit the insight within an pre-existing rule. One consequence of this limitation is that the laws of tithing are devoid of arbitrary and bright-line compromises, such as the 50% meal deduction found in the Internal Revenue Code. Similarl, when the rabbis felt compelled to create exceptions to the general rules – as in the case of illiquid gifts and inheritances – they could not simply create a new rule. Rather, they grounded their exceptions in principles inherent in the practice and limited the exceptions so as to deviate as little as possible from the theoretically correct rule.

The legal structure also explains the absence of social policy and special interest provisions in the tithing rules. Simply put, it is hard to derive a deduction for alternative fuel cars from the Torah and Talmud. And, even if some rabbi felt inclined to find such a deduction in the ancient texts, the lack of hierarchy would make it difficult for him to introduce such a change. Only those decisions well grounded in the Torah, Talmud or other respected authorities are

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195. IRC § 7872.

196. Examples of social policy/special interest provisions include those supporting home ownership and education, as well as provisions specifically aimed at the oil and gas industries. See, e.g., IRC §§ 121, 25A, and § 611 *et seq*.

197. Where the Torah or Talmud speaks directly to a question, the rabbis do not have such leeway. For instance, the Talmud clearly prohibits using inflation adjusted amounts to determine whether interest is being paid. B. Talmud, *Bava Metzia*, Ch 5. Thus, while Rabbi Feinstein was able to incorporate inflation into the laws of tithing, he was unable to do so with regard to the interest rules.

likely to garner support from other rabbis. Thus, the power to innovate is quite circumscribed.

This is not to suggest that the rabbis were completely powerless to affect the law. Indeed, one of the surprising results of this study is how flexible Jewish law is and able to adapt to modern developments. The power of the rabbis to affect the law derives from two sources. Ironically, the first is the interpretive process, which was seen to limit the rabbis' power above. The second is the status of the practice as rabbinic or customary.

The interpretive process permits significant leeway for creative jurists. Where the underlying authorities are silent on a given issue, as is often the case with the issues raised in *maaser kesafim*, resort must be made to analogies. The more attenuated the analogy, the more leeway exists for creative argument. In such cases, it becomes clear that principles are often more important than the actual authorities on which the rabbis rely.[198] To the extent these principles are the same as those that underlie the Federal tax system, one would expect and does find that the legal analysis converges, despite differences in the underlying authorities.

This effect can clearly be seen in the debates over civil taxes and accounting periods. The rabbis derived the rules regarding the deductibility of civil taxes from analogies to *pe'ah*, the practice of leaving the corners of the fields unharvested so that the poor may eat, and to Talmudic passages not ostensibly related to taxation.[199] The rabbis disagreed regarding whether the analogy to *pe'ah* was warranted and, if so, whether it could properly be extended to cover both income and sales taxes. Underlying the citations to the Bible and Talmud are various principles, such as taxpayer control and autonomy, that guide the analysis. These are the same principles that arise in the Federal tax discussion over whether to allow a deduction for state income taxes. Given the special nature of *pe'ah*, and the differences between income and sales taxes, the process of deriving the rules by analogy provided the rabbis with significant opportunities to craft the law. To the extent that the rabbis looked to the same principles underlying the Federal tax law, they arrived at similar conclusions.

The debate over the proper accounting rules reveals the same creativity and opportunity to shape the law. Absent a direct statement regarding the proper accounting period, rabbis sought out analogous situations to determine the appropriate rule. Some relied on analogies to agricultural tithing, while others

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198. Where one finds authorities on point, this leeway is somewhat curtailed. However, even then, room for innovation exists. For instance, as described in Part IV.A.1, when Rabbi Bamberger sought to exclude gifts of land from the *maaser* obligation, he was faced with authority that clearly included land when determining one's charitable obligation. He was able to distinguish this authority to achieve his desired result by differentiating between the *tzedakah* obligation and the *maaser* obligation.

199. See Part IV.B.3, supra.

relied on analogies to partnership law. Even where the rabbis relied on the same passages, they often reached opposite conclusions, revealing the latitude possible in the absence of legislative authority. Further, the lack of legal hierarchy made it impossible to resolve the differences of opinion. Nonetheless, the modern, mainstream view appears to be the one-year accounting period adopted for Federal tax purposes.

In the case of *maaser kesafim*, the ability of the rabbis to innovate is enhanced by the perceived source of the obligation. Numerous rabbis have pointed out that the obligation is not a Torah obligation, meaning that it need not be strictly enforced.[200] In his discussion of how to treat civil taxes, rabbi Weiss expressly noted that the customary origins of *maaser* allowed him to craft a reasonable rule and permit deductions that might not otherwise be allowed. Although not acknowledged, the rabbis who exclude non-cash gift from income are essentially enforcing the rule of income inclusion more leniently than they might a Torah obligation that required the inclusion of gifts.

C. The Effect of Cultural Values on the Development of Tax Law

The comparison of tithing and tax rules also reveals how a society's values can play a significant role in the development of the law. The Federal tax rules are motivated to a large degree by concerns over horizontal equity, the idea that similarly situated people ought to be treated the same. Such concerns play virtually no role in the development of the tithing law. Instead, the rabbis are concerned that each individual fulfill his obligation to God, regardless of how others might be treated. The effect these different values have on the development of the law can best be seen by comparing the discussions concerning the accounting period rules and the propriety of deducting state sales taxes.

As described above in Part IV.C, the use of accounting periods may lead to inequitable results. In particular, two people who earn the exact same total amount may end up with vastly different tax burdens depending on when they earn their income and incur their expenses. Problems may be exacerbated if the tax system uses progressive rates, as income bunched in one year may be taxed at a higher rate than the same income spread out over many years. This result violates the principle of horizontal equity. To remedy this concern, the trend in both the legislature and courts has been to break down the separation between tax years and allow netting from one year to the next. Thus, the current rules reflect a desire to ensure that those who earn the same amount over time pay the same amount of tax.

Some scholars have proposed going even further to address concerns regarding horizontal equity. For instance, William Vickrey proposed that

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200. See, e.g., Maharil, Responsum No. 54, MK at 27 ("For this reason maaser kesafim, which is Rabbinic, has a particular leniency.").

income should be averaged over a taxpayer's lifetime and taxes adjusted accordingly.[201] Under this proposal, there would still be an annual tax year, but the years would lose their independent quality. In essence, taxpayers would carry over their income and taxes paid from year to year, adding the current year's income to all previous income and dividing by the number of years of income, to determine taxable average income.[202] Under this proposal, two people with the same lifetime income would pay the same in taxes, regardless of when they actually earned their income, thus ensuring that the requirements of horizontal equity, when measured over a person's lifetime, was satisfied. This idea continues to receive significant attention from scholars.[203]

In contrast, Jewish religious authorities focus on preventing people from netting losses against gains in a way that would lead to the improper use of *maaser*. Such money should go to the poor. It cannot be used to offset one's business losses. Netting reduces the amount available to the poor, and therefore is tantamount to using *maaser* for improper purposes. Several rabbis have suggested shortening the accounting period from one year to six or even three months to avoid netting across long periods of time. Other rabbis have rejected the notion of an accounting period altogether, favoring transactional accounting instead. Under such a system, people must separate maaser after each transaction and may not use a subsequent loss to reduce the prior amount of gain. The result of these rules is that two people earning the exact same amount of money over some period will likely separate out different amounts of *maaser*. Unlike the Congress, the courts, and tax scholars, the rabbis are simply not concerned with this result. Consequently, the *halacha* is devoid of discussions about income averaging and proposals to expand accounting periods beyond one year.

The discussions of whether to allow a deduction for sales taxes similarly reflects the different values at play in the two systems.[204] The Federal tax provisions that previously allowed a deduction for state income taxes, but not for state sales taxes, were seen as creating an unwarranted preference for income taxes and as unfair to those states and their residents that did not have such taxes. Thus, Congress decided to allow a deduction for state sales taxes to achieve horizontal equity by treating all state taxes the same. Thus, the decision

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201. William Vickrey, Averaging of Income for Income Tax Purposes, 47 J. Pol. Econ., 379-97 (1939).

202. From 1964 to 1986, the Internal Revenue Code contained limited income averaging provisions. See generally Boris I. Bittker and Lawrence Lokken, Federal Taxation of Income, Estates and Gifts (Rev. 3d. ed.) Vol. 4A, ¶ 111.3.10, (for a description of these provisions).

203. See generally, e.g., Lily L. Batchelder, Taxing the Poor: Income Averaging Reconsidered, 40 Harv. J. on Legis. 395 (2003); Neil H. Buchanan, The Case Against Income Averaging, 25 Va. Tax Rev. 1151 (2006).

204. See Part IV.B.3, supra.

was motivated by Federalism and a desire to treat people similarly, regardless of whehter their state used an income or sales tax to raise revenues.

In contrast, the *halachic* discussion of whether to allow a deduction for state sales taxes focuses solely on perceived differences between the income and sales taxes and the control a person has over the money he earns. State income taxes are deductible because they were owed as the income was earned. Thus, the person paying such taxes never really had control over the money paid to the state. In contrast, sales tax is owed only if a person decides to spend his money on something covered by the tax. Until such time, the money is under the control of the person who earns it. Questions of horizontal equity or federalism simply do not arise, leading to a general rule that precludes deductions for sales taxes.

VI. CONCLUSION

Maaser kesafim functions as an income tax, similar in many regards to our own. Despite the different circumstances under which the tithing and tax rules were developed, the specific income definition rules and the logic underlying them are strikingly similar. Nonetheless, significant differences exist. The study of *maaser kesafim* thus provides a wonderful opportunity to explore the ways in which the culture and context of a tax system affects its development.

In particular, comparing the income definitions developed for both systems reveals the ways in which compliance and enforcement concerns, the legal system itself, and cultural values shape the tax law.

The need for enforcement and Congress's legislative powers cause the Federal income tax to deviate significantly from ideal notions of income. In some cases, these deviations serve to simplify the tax laws, while in others, they serve to create additional complexity. In contrast, the lack of enforcement concerns, coupled with a lack of legislative authority, causes the tithing laws to hew far more closely to ideal conceptions of income, as the rabbis did not feel empowered to create arbitrary, but enforceable, rules or to graft extraneous provisions into the tithing laws. Nonetheless, the rabbis demonstrated considerable ability to shape the law, as they worked to derive the tithing rules from the ancient, and often silent, sources.

These observations are important as we consider serious tax reform, especially if our goal is to reduce tax complexity. It is likely that the same need for enforcement, legal structure, and cultural values that currently bear on our income tax will come to bear on any new tax system we devise. Thus, we can expect that enforcement concerns will cause the tax base definition to deviate from the ideal to create an administrable tax; Congress will likely graft provisions to promote social policy onto the tax system, thus complicating the code and people's ability to comply; special interest legislation will likely arise, further complicating the laws; and society's underlying values, such as

horizontal equity, will likely affect the development of the law. Thus, despite the promise any tax reform might offer, over time there is a strong likelihood that any new tax system may end up looking quite similar to the current system.

More to the point, the comparison of *maaser kesafim* and the Federal income tax refutes claims that flat rate taxation necessarily avoids much of the complexity that plagues our current income tax. Critics of progressivity have argued that graduated tax rates should be eliminated because they are a major source of tax complexity.[205] Critics of the capital gains tax preference have made similar claims.[206] In *Agricultural Tithing and (Flat) Tax Complexity*,[207] I used agricultural tithing, which employs a flat 10% rate, to demonstrate that tax systems lacking such features could also be quite complex. However, because agricultural tithing differs in so many regards from our own income tax,[208] it might be tempting to dismiss the comparison as inapposite.

The study of *maaser kesafim* provides another opportunity to explore the complexity of single-rate tax systems, this time with a tax system that closely mirrors our own. As demonstrated above, even absent the difficulties associated with progressive rates or preferential treatment of capital gains, income definition issues generate significant complexity. Thus, as we consider tax reform, we should be wary of assertions that removing progressivity from the current tax code or eliminating the capital gains tax preference will necessarily produce a simple tax system. While such changes would likely reduce some of the complexity in the current rules, a study of the rules of *maaser kesafim* suggests that significant complexity is simply unavoidable.

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205. See, e.g., Blum & Kalven, The Uneasy Case for Progressive Taxation, U. Chi. L. Rev. (1952). Professors Blum and Kalven assert that progressivity "produces a tax law of almost impenetrable complexity. It invites a distorting attention to the tax aspects of any economic transaction. It affords an excessive stimulus to tax avoidance with perhaps incalculable consequences for taxpayer morale and the general respect for the law." Id. at 434-35. See also Charles Galvin & Boris Bittker, The Income Tax: How Progressive Should I Be? 16 (1969) ("[F]or the principle of progressivity we pay a high price in the extraordinary complexity of our present system.").

206. See, e.g., Office of the Sec'y, Dep't of the Treadury, Tax Reform for Fairness, Simplicity, and Economic Growth: The Treasury Department Report to the President at 180-81 (1984) (describing the capital gains preference as a "source of substantial complexity"); Daniel L. Simmons, The Tax Reform Act of 1986: An Overview, 1987 BYU L. Rev. 151, 179 ("Not only did [the capital gains] preference provide a major advantage to a form of realized gain, it was perhaps the greatest single contributor to complexity in the Internal Revenue Code. Elimination of the capital gains preference may be one of the most significant features of the 1986 Act.").

207. See supra note 10.

208. The agricultural tithe applied only to produce, required in-kind payment, and raised a host of measurement issues not seen in modern income tax systems.