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FROM THE CHAIR

Assisting the IRS

By **George C. Howell, III**, Hunton & Williams LLP, Richmond, VA

As we all know from reading any major newspaper, the Internal Revenue Service is an organization under siege. The challenges faced by the IRS include inadequate funding, hiring freezes, loss of talented senior personnel, degradation of audit and litigation capabilities, an ever-increasing regulatory workload fed by recent legislative enactments, and loss of credibility with a Republican-controlled Congress. The IRS obviously plays a vital role in our tax system, and these challenges are beginning to erode its capacity to accomplish its critical missions of taxpayer service and collecting taxes properly due. The natural consequence of this capacity erosion is a gradual loss of faith by the American public in the IRS and in our voluntary compliance tax system generally. I worry that, at some point in the not too distant future, the damage to the IRS and our tax system could become irreversible.

Because of the severity of these problems and issues, the IRS now more than ever needs the help of the Section and its members. This column describes some of the ways that the Section is providing assistance to the IRS.

IRS Funding

On March 17th, the Section submitted a letter to the House and Senate Committees on Appropriations expressing strong support for providing increased and adequate funding for the IRS. The letter acknowledges the budgetary pressures facing Congress and applauds the $290 million funding increase for fiscal year 2016. However, the IRS's budget is still approximately $1 billion below its fiscal year 2010 level, which translates into a reduction of about 17% on an inflation-adjusted basis.[1] The letter goes on to make what I believe is a compelling case for increased IRS funding in fiscal year 2017 and subsequent years.

In particular, the letter makes the following salient points about the need for increased and adequate funding:

- More tax revenue. Providing appropriate funding to the IRS is one of the few governmental expenditures that provides both an immediate monetary return – each dollar spent on enforcement produces several dollars of additional tax collections[2] – and a long-term benefit to the capacity and credibility of our tax system. Failure to collect taxes properly due undermines public confidence in our voluntary compliance system by causing honest and diligent taxpayers to believe that other taxpayers are not paying their proper share.

1 *Preface*, Nat'l Taxpayer Advocate Serv., Fiscal Year 2016 Objectives Report to Congress, vol. 1, 1.
2 *Most Serious Problems Encountered by Taxpayers*, Nat'l Taxpayer Advocate Serv., 2013 Annual Report to Congress, vol. 1, 21, 37.

- Improve quality of taxpayer service. Since 2010, there has been a clear reduction in the quality of taxpayer service. For example, the IRS received over 100 million phone calls last year, but was able to answer only 38% of those calls.[3] Moreover, the ability of taxpayers to meet with IRS personnel to resolve disputes administratively has also been negatively affected. While other factors have contributed to some of these problems, the common denominator is a shortage of trained IRS personnel resulting from inadequate funding.[4]

- Loss of personnel. With many senior IRS personnel opting for retirement, and funding pressures preventing many vacancies from being filled and limiting training resources, there is concern that the IRS does not have sufficient personnel to provide appropriate taxpayer service and to properly administer the tax system.

- Modernization of systems and technology. While the IRS has made significant headway in automating its systems and otherwise reducing costs, much remains to be done to assure that the IRS can continue to properly serve taxpayers and enforce the tax laws. There has been controversy recently regarding the emphasis that the Service places on internet and web-based interfaces with taxpayers as compared to personal contact, but there is general agreement that there will be evolution over time towards internet and web-based service delivery.[5] In addition, it seems indisputable that improved cybersecurity and fraud detection are vital to the Service's mission. These developments and objectives will require substantial investments in new and improved technology.

- Implementation of new tax legislation. Congress regularly enacts new tax laws, many of which are complex and require the issuance of substantial regulatory guidance. Recent examples include the Foreign Account Tax Compliance Act and the Affordable Care Act. Inadequate funding compromises the IRS's ability to provide regulatory guidance.

- Support for programs that aid elderly and low income taxpayers. Last year, over 90,000 volunteers assisted with 3.7 million returns through volunteer programs administered by the IRS.[6] If the IRS does not have the resources to support these programs, many elderly and low-income taxpayers will be unable to access important tax services.

Based on the foregoing, the letter urges Congress to provide the IRS with appropriate and adequate funding so that it can fulfill its core functions of providing taxpayer service and collecting taxes properly due.

Comment Projects

Another form of assistance that the Section provides to the IRS is the comment letters that the Section submits on proposed regulations and other administrative guidance. So far during the 2015-2016 year, the Section has made 30 government submissions, including 22 comment letters to the IRS, which is more

3 *Preface*, Nat'l Taxpayer Advocate Serv., 2015 Annual Report to Congress, vol. 1, ix.

4 *Preface*, Nat'l Taxpayer Advocate Serv., Fiscal Year 2016 Objectives Report to Congress, , vol. 1, 1.

5 *Hearing to Review the FY 2017 Budget Request & Budget Justification for the U.S. Department of Treasury Before the S. Sub-comm. on Fin. Servs. and Gen. Gov't. of the S. Comm. on Appropriations, 114th Cong.* (2016) (opening statement of Sen. John Boozman, Chairman).

6 Internal Revenue Service, *IRS Tax Volunteers*.

than were submitted during all of 2014-2015. The submissions to the IRS cover a broad spectrum of topics ranging from the definition of marriage under the tax laws to notional principal contracts to the arcane rules of section 751(b). Based on the high quality and timeliness of these submissions, I am confident that they have provided, and will continue to provide, significant assistance to the IRS in developing regulatory guidance. Details about these submissions are available in the Government Submissions Boxscore inside this issue with links to the full text of the comment letters on the website.

The government submissions completed to date represent the work product of a wide variety of committees, but other committees have yet to participate. I would urge all committees to become involved in one or more law improvement projects. Participation in these projects is both the right thing to do in terms of giving back to the tax system and a wonderful tool for encouraging younger members to become more involved in a committee.

Capitol Hill Courtesy Calls

This year's legislative courtesy calls took place on March 30, 2016. Section representatives met with the majority and minority tax staffs of both the House Ways and Means Committee and the Senate Finance Committee, as well as the staff of the Joint Committee on Taxation. These meetings were very productive and covered a wide range of topics and issues.

There are two topics of discussion with the tax-writing staffs that I want to highlight in particular. First, following up on the letter that had been submitted two weeks earlier to the House and Senate Appropriations Committees, the Section's representatives emphasized the need for increased and adequate funding for the IRS. Although the tax-writing staffs do not have direct responsibility for IRS funding, they periodically communicate with their counterparts on the two Appropriations Committees about this topic. Second, all five of the tax-writing staffs were keenly interested in the partnership audit rules and wanted the Section's views about the need for technical corrections and the appropriate contents of regulatory guidance. In addition to informal dialogue with the tax-writing staffs about this topic, the Section plans to submit detailed comments to Treasury and IRS about the regulatory guidance that is needed to implement the new rules. The tax-writing staffs have indicated that they also will review our comment letter as an aid in determining where technical corrections may be appropriate. This is an exciting opportunity for the Section to have a significant impact on the development of the new partnership audit regime.

May Meeting

The May Meeting in Washington drew over 2,000 attendees, including nearly 500 government guests—150 of whom spoke on committee panels and other programs. The presence of so many government representatives greatly enhanced the experience of the other attendees.

I sat in on a number of committee programs, all of which were interesting and well done. Bracketing the meeting on Thursday and Saturday afternoons were the excellent programs geared to new tax lawyers and those interested in representing low-income clients.

The meeting was kicked off by the popular "Tax Bridge to Practice" program, which is organized by the Young Lawyers Forum and Diversity Committee and offers nuts-and-bolts panels. This program also included a conversation with Caroline Ciraolo, Acting Assistant Attorney General in charge of the DOJ Tax Division and a longtime member of the Section. I invite you to view video clips from Caroline's remarks and the "Tax

Bridge" program at http://apps.americanbar.org/dch/committee.cfm?com=TX717030.

Also on Thursday afternoon, the Pro Bono and Tax Clinics Committee presented the annual "Low Income Taxpayers Representation Workshop," which was devoted to issues that impact low-income clients, including those that arise outside of federal income tax controversies. One of the Section's key focus areas is pro bono and public service, and the work of the Pro Bono and Tax Clinics Committee in lending a voice to and helping to support low-income taxpayer clinics is an important component of our efforts in this area.

Closing out the meeting on Saturday afternoon, our CLE Committee, together with the Committees on U.S. Activities of Foreigners and Tax Treaties and Foreign Activities of U.S. Taxpayers, presented a three-part workshop on the fundamentals of international tax, designed as an introduction for young attorneys, as well as a refresher for more seasoned practitioners. I applaud all of these programs and their sponsors for giving us a reason to come early on Thursday and stay late on Saturday for Section meetings.

Another highlight of the May Meeting was the Plenary Luncheon remarks of Mark Mazur, Assistant Secretary of the Treasury for Tax Policy. Over his long career, Mark has served in a wide range of positions in the government, experience that was evident in his informative and thought-provoking presentation. You can listen to a clip of the Q&A segment of Mark's remarks here.

Last but by no means least, the Section's highest honor—its Distinguished Service Award—was presented posthumously to Ken Gideon. Ironically, the Distinguished Service Award Committee chose Ken for this award before his untimely passing, but never had the opportunity to inform Ken of his selection. Ken's wife, Carol, accepted the award and gave us a glimpse into Ken's personal world, as not only a brilliant tax lawyer, but as a loving husband, father, and grandfather. I recommend that you read the biographical sketch about Ken inside this issue of ATT, prepared by the chair of the DSA Committee, Ruddy Ramelli.

As always, my thanks goes out to the Section's staff, led by Janet In, for all their hard work in connection with the May Meeting. Once again, the staff's efforts assured a successful and smoothly run meeting. I am fortunate to have the opportunity to collaborate with such a talented and highly motivated group of individuals. ■

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PEOPLE IN TAX

Remarks to the 2016 Midyear Meeting: The Tax Ghosts of Christmas Past, Christmas Present, and Christmas Yet to Come

By **Terence Floyd Cuff**, Loeb & Loeb LLP, Los Angeles, CA

Editor's Note: In this issue of ATT, People in Tax deviates from its traditional interview format to present the remarks of Terence F. (Terry) Cuff, which he delivered at the Real Estate and Partnerships & LLCs Luncheon on January 29 at the 2016 Midyear Meeting in Los Angeles. Terry holds a B.A. from the University of California at Santa Cruz, a J.D. from the University of Southern California, Gould School of Law, and an LL.M. from the New York University School of Law. He speaks frequently on taxation at tax seminars around the country. He is the author of several hundred articles in tax-related publications, principally in the areas of partnership taxation, real estate taxation, like-kind exchanges and drafting partnership and LLC agreements.

I'd like to start by introducing my spouse, Florence Nelson, a person of infinite patience and character. I was going to give my normal, boring, monotonic tax talk, but I have to ratchet it up a bit because Florence is here, so she will not go to sleep.

I address the tax ghosts of Christmas past, Christmas present and Christmas yet to come. If you indulge me, I look back to the ghost of Christmas past.

It may have started with An Act for Better Securing and Encouraging the Trade of His Majesty's Sugar Colonies in America, 6 George II, ch. 13 (1733). Then there was the Sugar Act, the Stamp Act, the Declaratory Act, the Townshend Duties, the Tea Act.

We Americans, we smuggled. We protested. We petitioned. We boycotted. We seized and destroyed revenue cutters. We roughed up and tore down the homes of colonial officials. We tarred and feathered tax collectors. We broke into ships and dumped tea into Boston Harbor.

James Otis, an early tax litigator, argued against writs of assistance used to enforce the tax acts. He said, "Taxation without representation is tyranny." We, as tax professionals, should remember those words. We provide representation to taxpayers. We fight against tyranny. Tax lawyers are vital to the survival of America. That is how our tax history began.

Now, moving ahead a few years, I remember a young tax lawyer who started work one fine day in

September of 1977. The world was filled with hope and promise. The Tax Reform Act of 1976 had fixed all of the problems of the tax system and ended tax abuse and tax shelters—or so we thought.

As a young tax associate, I inhabited the library from morning until night, diligently researching the tax law. We used books. We occasionally used Lexis for research, but it cost a fortune then, and we needed special permission from a partner to use Lexis for computer research. We dictated memorandums and letters with a dictaphone. We had secretaries to type them on typewriters.

We engaged the great partnership tax issues of the 1970s: service partners, partnership allocations, partnership audits, the audit lottery, tax shelters and aggressive tax planning. Am I glad we resolved all of those problems!

Some of the new ideas in 1977 were: tax reform for simplicity, fairness and equity; consumption tax; integration of individual and corporate tax; tax simplification.

Some things have not changed much since 1977. Work in tax law was burdened in 1977 by complexity, by the overwhelming amount of the tax law. Our libraries bulged with volumes of cases. The Code was a big, fat volume. Regulations took up three or four volumes then.

We were challenged by the instability of the tax law. There was new tax legislation in 1939, 1954, 1969, 1976. The torrent just would not stop! It was difficult to keep up with all of these quick changes to the tax law.

Private letter rulings were newly published. We were not entirely sure what to do with them, but they certainly added to the bulk of the tax law.

The Internal Revenue Service in 1977 could not and did not audit partnerships. Auditors did not understand the tax law. The low audit rate created an audit lottery.

The technology of 1977 dramatically changed how we practiced. Correcting typewriters permitted lifting off and correcting small mistakes. You didn't have to retype the whole page. Liquid paper covered larger mistakes and permitted greater corrections. But what was really big was the mag card typewriter. It enabled form documents and standard provisions you could just drop into those documents. We didn't have to dictate our agreements. Mag typewriters typed the documents with a blazing speed of one minute per page.

Computers at the time . . . well, nobody had a computer on his desk then. Computers were limited to billing. Computers would fill a whole room.

The pace of practice in 1977, in retrospect, was leisurely. We had time to research, to think, to write carefully, properly, and grammatically. We even could proof our work.

Let us now move to Christmas present.

Many changes have occurred during nearly 38 years of practice. I've seen boom and I've seen bust in tax practice. The field of tax law once expanded and was prosperous. The ranks of tax lawyers recently have contracted.

We have been through a terribly rough patch with tax shelters and foreign bank accounts. Penalties available to the Internal Revenue Service have multiplied and increased dramatically. We have seen tax lawyers migrate to accounting firms like wildebeests migrating in the Serengeti. Some tax lawyers, unfortunately, have migrated to prison.

The Internal Revenue Service has become despised and unpopular, even in Congress—or should I say, particularly in Congress. It is underfunded, understaffed, underpaid, underappreciated, underqualified, perhaps dispirited. It is overwhelmed with work. Its staff may be over their heads and may not understand partnership tax law. Its responses can be ill thought out and slow. It is badly, badly backed up on guidance. It has very limited audit resources for partnerships or any other audits.

We've experienced tremendous pressure on some of us to generate business, and that may have added to the excesses of some tax shelters.

Complexity, ambiguity, change, and volume of tax law have enormously increased since 1977. The Code now occupies two volumes. Soon maybe there will be a third. You need a wheelbarrow to carry the regulations in print. There's been a flood of cases, PLRs and other authorities. Treasury has promulgated many regulations that are long, intricate, difficult to understand and often unclear and ambiguous. There is much more tax law to know now than there was in 1977.

The Internal Revenue Service has become despised and unpopular, even in Congress—or should I say, particularly in Congress. It is underfunded, understaffed, underpaid, underappreciated, underqualified, perhaps dispirited. It is overwhelmed with work. Its staff may be over their heads and may not understand partnership tax law. Its responses can be ill thought out and slow. It is badly, badly backed up on guidance. It has very limited audit resources for partnerships or any other audits.

Technology has changed our modern practice. Email provides instant written communication, but what you email, you can't take back. Careless email is incredibly dangerous. With email, you can destroy your career in a minute or two of carelessness—and some of us will do so.

The cell phone enables instant communications. You're available to clients and colleagues anywhere in the world at any time. But too often the cell phone may lead you to give an answer before you consider it properly.

We all have computers on our desks. They provide us access to electronic research. Typing our own work reduces overhead, but typing our own work also often reduces quality. Drafting documents and even some research memoranda has become a cut and paste practice. This permits us innocently to repeat mistakes dozens or even hundreds or thousands of times.

Computers have revolutionized tax preparation, but computers also enable Congress and the Internal Revenue Service to require many, many complicated return computations.

There's increasing reluctance of clients to pay for quality work. Clients are more willing to challenge bills, to impose billing limits or to expect billing deals. Too many clients consider tax professionals and their firms to be fungible, like so many bottles of milk. This attitude too often can lead to us cutting corners and to inferior and compromised work.

We all work very hard. This creates increased stress. We often suffer from not enough sleep and relaxation. Stress and lack of sleep negatively impact our work, intrude on home life, result in ignored spouses and forgotten children. Some of us do not even know our children's names. It leads to too many divorces. Too many of us know about that.

In the past, tax reform and simplification typically have led to increased complexity and confusion. We may have a VAT—or we may not. We may move to a consumption tax—or we may not. A consumption tax would require incredible transition rules. We could even have a flat tax—or we might not. I have a binding faith that Congress could make a flat tax complicated, burdensome and ambiguous.

And now, on to the tax ghost of Christmas yet to come.

> "The phantom slowly, bravely, silently approached. When it came near him, Scrooge bent down upon his knee; for in the very air through which this spirit moved, it seemed to scatter gloom and mystery."

I'm not sure about the future. I'm not sure whether the future is dark or rosy. I know that those who are young will see many changes in the future, but I cannot tell what those changes will be. I may not live to see many of them.

> Will there be more partnership audits?
>
> Will partnership audits ever go beyond travel and entertainment expense?
>
> Will the Internal Revenue Service learn partnership taxation?
>
> Will partnership taxation become simpler?
>
> Will we ever start learning about collapsible partnerships?

I'm uncertain where tax reform will lead. In the past, tax reform and simplification typically have led to increased complexity and confusion. We may have a VAT—or we may not. We may move to a consumption tax—or we may not. A consumption tax would require incredible transition rules. We could even have a flat tax—or we might not. I have a binding faith that Congress could make a flat tax complicated, burdensome and ambiguous.

Could the tax laws perhaps be reduced to two pages? Well, perhaps, if someone can just find rolls of paper long enough. Perhaps my friend, who, unfortunately, cannot be here, Professor Julia Grier of Cal Tech, will find a way to etch the Code on nanostructures, using nano-etching.

Truly, it is not clear to me what will happen to partnership tax, but I do fear it will become more difficult, more uncertain and more complex.

Will the future resolve the great partnership tax issues of our time and of 1977—service partners, partnership allocations, partnership audits, Section 752, foreign partnerships? I imagine these issues will be resolved every bit as quickly and competently and decisively as they have been in the past.

Otherwise, my crystal ball is murky.

I can only dream how technology may change the practice of law in the future – as it certainly has done in my career.

I'm not sure what our firms will look like, but I suspect that many will be larger. I'm not sure whether we will even have our own offices or our own tiny cubicles. Many of us may even work from home. Some of us may work great distances from our firms. Some of us may be more specialized.

I do worry about the crushing debt burden of so many new lawyers. I worry about the many young tax professionals who are unemployed or underemployed.

Looking to the future, I see a need for tax professionals with dedication to improvement in the tax system, to resolve the complex, to help clarify the ambiguous and uncertain, to propose solutions to the difficult problems of partnership taxation, bravely to go beyond mere client concerns and personal economic interests.

There is a need for capable tax professionals who practice with energy and compassion and dedication and patience and intellectual brilliance. We need men and women who work hard, who reason carefully, and who write clearly. There is room for each of us. There is a crying need for each of us to work to improve the tax laws.

There is a simple issue that each of us can help to resolve. We can each have our own tax issue. We can give a simple talk. We can teach a class. We can write a simple article. We can participate in an ABA or a state or local bar comment project. We can do something!

My message to you when you're challenged by the overwhelming demands of day-to-day practice, long nights late at the office, trips far away from home, days in distant conference rooms, stressing over transactions where it seems that the pressure never will quit, my message comes from Tennyson's poem *Ulysses*:

> And see the great Achilles, whom we knew.
> Though much is taken, much abides; and though
> We are not now that strength which in old days
> Moved earth and heaven, that which we are, we are,
> One equal temper of heroic hearts,
> Made weak by time and fate, but strong in will
> To strive, to seek, to find, and not to yield.

Between 38 and 39 years of practice have passed quickly. My time to contribute to the tax bar has come and nearly has gone.

I once was young. I have become old.

My vision, once strong, is dim.

My hair is thin and has turned from blonde to gray.

But my mind is a kaleidoscope of the most wonderful memories of times past. It has been a good run.

I have sought to help others. I have sought to be a friend. I have written a little. I have spoken occasionally. I have distributed a few emails to colleagues.

My career has brought me joy and challenge, far exceeding the fondest expectations of a young tax lawyer when he started work on a sunny day on September 19, 1977.

This may be my last opportunity to thank you collectively. I do thank you all. You've been my inspiration, my aid, my comfort, my colleagues, and my friends.

I'm not quite done yet. You're not quite rid of me yet. But the end of my career as a tax lawyer is much closer in sight than it was before.

In closing, I recall a few lines from an old Scottish poem. It was composed in 1601 in Edinburgh by a young man, Johnnie Armstrong, on the way to the gallows for the murder of Sir John Carmichael.

> This night is my departing night,
> For here nae langer must I stay;
> There's neither friend nor foe o' mine,
> But wishes me away.
>
> What I have done thro' lack of wit,
> I never, never can recall;
> I hope ye're a' my friends as yet;
> Good night, and joy be with you all. ■

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AT COURT

Missing Scalia?

By **Jasper L. Cummings, Jr.**, Alston & Bird, LLP, Charlotte, NC

So are we missing Scalia?

A. Not So Much (but Cert Petitions)

Speculation abounds on the impact on pending cases and major issues, such as abortion and the Second Amendment, of Justice Scalia's departure from the Supreme Court. News reports have stated that several big cases, including one involving Dow Chemical, have been settled due to Justice Scalia's death.[1] Some have tried to focus that speculation on tax issues, but that effort faces two hurdles: first, Justice Scalia was not a featured author of majority tax opinions, and second, the Supreme Court has mostly gone out of the business of deciding tax cases, at least federal tax cases.[2]

For example, in the term that ended in 2015 the Court did not decide any federal tax case, and the current term is on track to repeat. Of course state tax cases fare somewhat better, because almost every good state tax dispute worth its SaLT (pun intended) presents a constitutional issue when it reaches the Supreme Court.[3]

Perhaps Scalia's absence might have a more discernible impact on the Court's decisions to grant the writ of certiorari in tax cases, which require four votes. But we can't know how Scalia voted on those decisions in the past because the votes are not published, except when a Justice registers a rare dissent to a cert denial.

After his death the Court declined to hear three appeals from losses by banks and an insurance company in cases involving foreign tax credits in similar cross border transactions.[4] It is regrettable that the Court did not choose to hear those cases because the lower courts are in dire need of guidance on the economic substance doctrine. Unfortunately, no professional association was willing to support the taxpayers in obtaining review and the only amici that asked the Court to review the taxpayer losses were The Chamber of Commerce of the United States and the Cato Institute.

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1 *Apple's Antitrust Anticlimax*, Wall St. J. (Mar, 8, 2016); Robert Cyran, *Justice Scalia's Death Prompts Dow Chemical to Settle Lawsuit*, N.Y. Times (Feb. 26, 2016).

2 *See* Jasper L. Cummings, Jr., *The Supreme Court's 2014 Term in Tax*, 148 Tax Notes 1005 (Aug. 31, 2015); *The Supreme Court's 2013 Term in Tax*, 145 Tax Notes 65 (Oct. 6, 2014); *Tax Decisions of the Supreme Court's 2012 Term*, 141 Tax Notes 635 (Nov. 11, 2013); *Tax Decisions of the Supreme Court's 2011 Term*, 2012 Tax Notes Today 190-9 (Oct. 1, 2012); *222 Years of the Supreme Court, the Constitution and Federal Tax*, 133 Tax Notes 1151 (November 28, 2011).

3 An exception is cases involving possible state violations of federal statutes limiting state taxes, such as the recent *CSX* decisions on the 4-R Act. Ala. Dep't of Revenue v. CSX Transp. Inc., 135 S. Ct. 1136 (2015).

4 *Petitions of Salem Financial, Inc.*, for which The Chamber of Commerce of the United States filed an amicus brief; *American International Group, Inc.*, for which The Chamber of Commerce of the United States and Cato Institute filed amici briefs; *The Bank of New York Mellon Corp.*, for which The Chamber of Commerce of the United States and Cato Institute filed amici briefs.

Had Scalia voted on the petitions he might have been persuaded by those amici. In addition to their legal arguments, both of those organizations have long histories of praising Justice Scalia. The managing editor of *The Cato Supreme Court Review* wrote immediately after his death that "Unquestionably, Scalia's ideas will still be discussed in 100 years, much in the same way we still discuss Joseph Story, Oliver Wendell Holmes, Jr., or Learned Hand."[5] The Chamber of Commerce has several times employed Justice Scalia's son to represent it in litigation against federal regulations.[6]

So that leaves us to review what Scalia has said in his tax opinions, and some other, and to speculate on the effects of the removal of his dynamic from whatever tax cases the Court may choose to hear.

B. Not the "Tax Wreath" Wearer

To whatever extent Justice Scalia had an outsized impact on the law, it did not extend to tax laws. He authored relatively few tax opinions for the majority, and those that he did author were not of major significance. Rather, because he was an ideologue in areas that did not include tax, he probably was disinclined toward tax cases, except when they engaged his special interest in strict construction.

Some Justices have been said to wear the Court's "tax wreath," symbolizing their special expertise and frequent appearance as writers of tax opinions, with Justice Brandeis being the most prominent.[7] Some Justices had a professional expertise in tax before they joined the Court (Justice Jackson was IRS General Counsel and Assistant Attorney General for the Tax Division). Some Justices argued tax cases before the Court for clients (Charles Evans Hughes).[8] Sometimes Justices wrote a lot of tax opinions but thought it meant they were in the dog house with the Chief (Justice Blackmun).[9] Some so-called conservative Justices regularly ruled for the IRS (Justice Sutherland).[10]

Justice Scalia fit in none of those categories. To whatever extent Justice Scalia had an outsized impact on the law, it did not extend to tax laws. He authored relatively few tax opinions for the majority, and those that he did author were not of major significance. Rather, because he was an ideologue in areas that did not include tax, he probably was disinclined toward tax cases, except when they engaged his special interest in strict construction. The noted legal writer Jeffrey Toobin perceptively wrote of Scalia after his death:

> Justice Scalia's views—passionately felt and pungently expressed though they were—now seem like so many boats against the current, borne back ceaselessly into the past.[11]

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5 Trevor Burris, *RIP: Was Justice Scalia the Last Great Supreme Court Justice?*, Cato at Liberty (Feb. 13, 2016).

6 *See, e.g.*, U.S. Chamber Joins Business Roundtable in Lawsuit Challenging Securities and Exchange Commission, U.S. Chamber of Commerce (Sept. 28, 2010).

7 *See* Jasper L. Cummings, Jr., The Supreme Court's Federal Tax Jurisprudence 79 (2010).

8 *See*, *e.g.*, Duffy v. Mutual Ben. Life Ins. Co., 272 U.S. 613 (1926).

9 *Resolution in Tribute to Harry A. Blackmun*, 1999 J. Sup. Ct. U.S. 241, 254 (1999-2000) (large number of tax opinions indicated he was "in the dog house with the Chief").

10 *See*, *e.g.*, Gregory v. Helvering, 293 U.S. 465 (1935). Sutherland was one of the Four Horsemen who regularly ruled against New Deal legislation.

11 Jeffrey Toobin, *Comment, Looking Back*, The New Yorker (Feb. 29, 2016).

C. The Majority Tax Opinions

Justice Scalia's most useful majority opinion in a tax case was Commissioner v. Bollinger, 485 U.S. 340 (1988). The Court had gotten itself into a bind through its earlier opinion in National Carbide Corp. v. Commissioner, 336 U.S. 422 (1949). That opinion purported to establish the "six *National Carbide* factors" for determining when to treat a corporation as the agent of its shareholders. Inevitably the 1949 opinion could not foresee all possibilities, and the 1988 opinion had to loosen up the factors.

Scalia wisely stated: " … we decline to parse the text of *National Carbide* as though that were itself the governing statute." Unfortunately, most lower court judges and the Service do not have the same understanding, and so tend to hang on every word of Supreme Court opinions, often leading to surprising results that the Court never intended.

More recently Scalia wrote the opinion most readers probably remember in United States v. Woods, 134 S. Ct. 557 (2013). Writing for a unanimous Court, Scalia gave the Service a total victory, holding (1) that the trial court had jurisdiction in a TEFRA partnership audit proceeding to impose the 40% valuation/basis misstatement penalty (on the partners), and (2) the penalty applies to a basis misstatement without regard to whether it was the result of a legal or factual error. In *Woods*, the legal error was that the partnership was found not to exist for tax purposes.

Many have noted the unusual rise in the number of unanimous Supreme Court opinions generally, at least outside the politically charged cases. *Woods* fits into that pattern. It is possible that the rest of the Justices simply were not that interested, once they realized the taxpayer had pursued a "tax shelter," and so they let Scalia have fun with statutory interpretation, one of his favorite hobbies. That was unfortunate, however, because Scalia so focused on statutory interpretation as it related to the precise penalty issue that his opinion reflected no understanding of, or interest in, the substantive law of the case.

Instead, Scalia reasoned that the trial court had jurisdiction over the 40% penalty issue under section 6226(f) (an issue the Court interjected into the appeal) because the penalty "relates to" the adjustment of the partnership item. Focusing on that statutory phrase (which Scalia said was "essentially indeterminate") set Scalia off to the races with statutory interpretation. This is the opinion in which Scalia dissed Joint Committee Bluebooks as aids in interpretation.

Along the way the opinion made random references to shams and the economic substance doctrine in footnotes that indicate either a profound disinterest in those substantive subjects, or ignorance of the substantive tax law; they did not bode well for his future involvement in an economic substance case. Indeed, returning to the speculation about cert petitions above, Justice Scalia might have provided the necessary fourth vote to hear those foreign tax credit cases this term if he had remained on the court, based on his brush with analogous issues in *Woods*.

Woods illustrates the problems faced by a Justice who is Larger than Life. Because he was famous for knowing so much about statutory interpretation (he had just published a 500-plus page book on the subject), he tended to focus on that part of a case, while at the same time assuming he did not need to understand the other aspects of the case. Of course that can also be an aspect of appellate judging, but he took it too far in *Woods*.

Beyond these, Scalia wrote the majority opinion in only three other federal tax cases that are not memorable.

D. Concurrences

It is no surprise that not being a majority tax opinion writer, Scalia turns up often in concurrences and dissents. Frequently concurring with Justice Thomas, Scalia liked to disagree with the interpretive tools used by the majority to reach a result that he was willing to support for reasons satisfactory to himself.

Scalia did his best service in concurring in United States v. Home Concrete & Supply LLC, 132 S. Ct. 1836 (2012) and providing the fifth vote for the taxpayer, although it would have been better if he had joined Justice Breyer's plurality opinion. Scalia's heart was in the right place, in that he correctly viewed the current case to be the same as The Colony Inc. v. Commissioner, 357 U.S. 28 (1958), on which taxpayers should have been able to rely. But he could not stomach Justice Breyer's refinement of the *Chevron* Doctrine, mainly because Scalia seemed to be done with *Chevron*. He knew how to interpret statutes and did not need any doctrines to tell him what to do. After all, he wrote the book.

Breyer said *Chevron* deference was not due to the Treasury regulation that had tried to overturn the Supreme Court's construction in *Colony*, because—wait for it—the Supreme Court had already interpreted the statute. Even though Scalia was not a fan of *Chevron*, he on occasion had expressed some willingness to give deference to the IRS interpretation of tax laws.[12]

Justice Scalia also wrote or joined concurrences declining to find a Commerce Clause violation in state tax cases, but complaining that there is no negative Commerce Clause.[13] And he wrote concurrences to restate his distaste for reliance on legislative history and worse (mere testimony).[14]

E. Dissents and State Tax Cases

Justice Scalia dissented in Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015). The majority opinion is a deeply flawed ruling that a county tax could not apply to all of the income of its residents, without apportionment or tax credit. [15] It applied the "negative Commerce Clause." Justice Scalia said he could not find a negative Commerce Clause in the Constitution. Better still, he joined Justice Ginsburg's dissent, which was the only one of the opinions that accurately discussed the relevant precedents. This case, among all of those mentioned here, may best explain why Ginsburg and Scalia were "best buddies." He would follow his convictions wherever they led, which sometimes coincided with Justices not appointed by Ronald Reagan.

It is no surprise that not being a majority tax opinion writer, Scalia turns up often in concurrences and dissents. Frequently concurring with Justice Thomas, Scalia liked to disagree with the interpretive tools used by the majority to reach a result that he was willing to support for reasons satisfactory to himself.

But his record on the negative Commerce Clause was mixed. Scalia ruled for the taxpayer in New Energy Co. v. Limbach, 486 U.S. 269 (1988) where he cited and apparently relied on the negative Commerce Clause. Likewise in Ala. Dep't of Revenue v. CSX Transp., Inc., 135 S. Ct. 1136

12 *E.g.*, United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001).
13 *E.g.*, Am. Trucking Ass'ns v. Mich. PSC, 545 U.S. 429 (2005); Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175 (1995).
14 *See, e.g.*, United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001).
15 For discussion of why the ruling was wrong, see Jasper L. Cummings, Jr., *Internal Consistency and the Federal Income Tax*, 148 Tax Notes 99 (July 6, 2015).

(2015), he cited "our negative Commerce Clause" cases. Again it is likely that the *CSX* opinion was assigned to him because it seemed to be a tedious technical statutory construction case, and Scalia resolved it that way, inventing a twist on *ejusdem generis*: it should not be applied to an "asymmetrical statute."

The issue was whether CSX was discriminated against under the test of a peculiar federal statute and peculiar facts. Scalia uttered a phrase that may come back to haunt the Court: "There is simply no discrimination when there are roughly comparable taxes." The Court has taken exactly the opposite view when evaluating allegedly compensatory taxes at the state level, and has never found any to be truly compensating but the sales and use taxes.[16]

Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993) was a case involving an alleged state tax violation of intergovernmental immunity. The Court had decided the substantive issue in 1989 and the question was whether to apply its ruling retroactively to other states, which was projected to (and did) require states to cough up billions of dollars in refunds. Justice Scalia joined the majority approving retroactive application of its decision and wrote a concurrence. It appears that the concurrence was sparked by a desire to refute Justice O'Connor's dissent. O'Connor was more sympathetic to the plight of the states. Scalia would have none of it and viewed prospective-only decisions as judicial activism.

Recently commentators have said that Chief Justice Rehnquist kept Justice Scalia from writing some majority opinions in earlier years just because he was trying to head off disagreements with Justice O'Connor. Evidently Justice Scalia did not have the same problems with Justice Ginsburg, an unlikely friend.

The problem with so called strict construction and ignoring of legislative history and other interpretational tools and focusing on the text is that its appearance of value-free judging is a charade. It always involves a choice, only the choice is easier to hide.

F. Conclusion

There are two principal characteristics of Justices that can be identified and may help predict how they might rule on particular cases: (1) interpretational style, and (2) political/policy ideology. As to the first, if a taxpayer had a $1 + 1 = 2$ tax argument to make in the Supreme Court, Justice Scalia might be counted on to agree with the taxpayer. If the taxpayer was looking for equity, or for a purposive reading of the statute, probably not. As to the second, if the taxpayer was looking for a Justice sympathetic to taxpayers, Scalia was not necessarily your man; but if you could show administrative overreach, he might be with you.

The problem with so called strict construction and ignoring of legislative history and other interpretational tools and focusing on the text is that its appearance of value-free judging is a charade. It always involves a choice, only the choice is easier to hide. The best example is Justice Thomas' opinion in PPL Corp. v. Commissioner, 133 S. Ct. 1897 (2013). He looked at a British tax and concluded surely it was an income tax because income was mentioned somewhere in the formula. But it could as well have been a tax on an income-producing property's value, with the value determined with reference to the income produced, a standard technique for valuing property.[17]

16 *See* Fulton Corp. v. Faulkner, Secretary of Revenue of N. C., 516 U.S. 325 (1996).

17 *See* Jasper L. Cummings, Jr., *Form, Substance, and PPL*, 140 Tax Notes 365 (July 22, 2013).

The charade of objectivity is revealed by the fact that the Thomas opinion referred three times to the "Conservative government" that privatized PPL's subsidiary, and 14 times to the "Labour government" or "Labour Party." Perhaps Thomas was only copying the terminology used by the taxpayer, whose brief referred to "Labour" 15 times. In contrast, the United States' brief referred to "Labour" only five times. So Justice Thomas (joined by all Justices but Sotomayor, who concurred) purported to argue that the Devil made me follow the facts, ma'am, just the facts.

At the end of the day, you would think that formalism of the Scalia and Thomas varieties would aid taxpayers, because taxpayers usually rely on form and technical compliance with the law. After all, that's what Mrs. Gregory relied on. But at the real end of the day, a tax law cannot run on pure formalism. There are just too many things that can go wrong (see the section 367 regulations for a master class in administrative error). Therefore, while Justice Scalia might have been your man for a given tax appeal, he was not the tax law's man. ■

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AT COURT

U.S. District Judge Rejects Tax Promoters' Plea Agreement in *United States v. Crithfield*: A Rare Event, but a Warning to Defense Counsel

By **John Colvin** and **Claire H. Taylor**, Colvin+Hallett, Seattle, WA

Duane Crithfield and Stephen Donaldson led the captive insurance promoter Foster & Dunhill, which marketed a Business Protection Plan (BPP) that the government alleges was fraudulent. In the latest twist in the prosecution of the two promoters, a judge in the U.S. district court for the Middle District of Florida has rejected a plea agreement reached by the defendants and the prosecution, even though the Court had previously accepted it, because there was no "meeting of the minds."[1] This unconventional move by the judge is not only surprising, but offers a cautionary tale and some lessons for defense counsel.

In May 2013, Crithfield and Donaldson were indicted for promoting a tax shelter scheme relating to their marketing of a captive insurance arrangement, known as the Business Protection Plan (BPP). Both were charged with conspiracy to evade taxes, and aiding and assisting fraud and false statements pertaining to two particular clients (each client constituted a separate count).

The scheme is laid out in the indictment but is also discussed in substantial detail in the *Salty Brine* case[2] in which Foster & Dunhill clients John Thomas and Lee Kidd challenged the Service's disallowance of the tax benefits claimed under the arrangement. The arrangement is further described in court filings in lawsuits against Donaldson and Crithfield by disgruntled clients.[3] The arrangement involved the following. Clients, through their business entities, set up offshore cash-value life insurance accounts that they owned or controlled (often through various entities and/or trusts). These were known as segregated accounts and were maintained entirely separately from other insurance accounts, for the purpose of receiving the profits from the clients' investments in BPPs. Clients then paid insurance premiums for Business Protection insurance policies that insured them against what the government alleges were remote and unlikely risks, virtually guaranteeing that no claims would be paid out, in a purported captive insurance arrangement. Clients' funds, however, were segregated, and risk was not distributed among the various contributors. At the end of the year, the client's share of the BPP profits (85% of the premiums paid, consisting of profit

1 United States v. Crithfield, et al. No. 8:13-cr-00237 (M.D. Fla.).

2 Salty Brine I, Ltd. v. United States, 111 AFTR2d 2013-2308, 2013 WL 4038993 (N.D. Tex. 2013).

3 *See*, *e.g.*, Vento v. Crithfield, et al., No. 09-174 (D. U.S.V.I. filed Dec. 4, 2009); Wendt v. Handler, Thayer & Duggan, LLC, et al., No. 08-3612 (E.D. Ill. filed June 24, 2008).

less a management fee) would be transferred into the client's own cash-value life insurance account. After transfer of the funds to the cash-value policies, the client business would have access to the funds through tax-free loans from the life insurance policy account. Meanwhile, client businesses deducted the premium payments to BPP as ordinary and necessary business expenses.

In the *Salty Brine* case, the Court found that the arrangement marketed by Foster & Dunhill did not qualify as a captive insurance arrangement, as it was neither insurance in the traditional sense nor a means of risk distribution or risk shifting; instead, it was merely a conduit used to funnel income from the business to its owners tax free.

The indictment alleged facts relating to Crithfield and Donaldson's promotion of the BPP plan more generally under its conspiracy count, but also laid out facts specifically pertaining to two different clients in separate charges in the indictment.

On August 11, 2015, Donaldson and Crithfield entered guilty pleas to one count of aiding and assisting fraud and false statements pertaining to one particular client's tax return and a $60,000 deduction attributable to BPP premiums, which the Court accepted by order on September 2, 2015. The crime to which the defendants pled guilty (26 U.S.C. § 7206(2)) carried a maximum sentence of three years. In exchange, prosecutors dropped a conspiracy to defraud count and a separate count of aiding and assisting fraud and false statements pertaining to a second client. Unlike many plea deals, the parties did not agree to a tax loss computation for purposes of the Sentencing Guidelines, but instead agreed to reserve arguments on the tax loss issue for sentencing.

Donaldson and Crithfield's sentencing hearings were scheduled for February 23 and 24, 2016. However, in court filings before sentencing, the parties submitted widely variant calculations of the tax loss attributable to the offense, specifically including contrasting interpretations of what, if any, "relevant conduct" should be considered under the Sentencing Guidelines. Two months after the acceptance of the pleas, defense counsel submitted a memorandum regarding their relevant conduct analysis. Defense counsel argued that the tax loss should be limited to the tax loss stemming from the conduct pertaining to the single client and single charge to which the defendants had pled (i.e. the $60,000 deduction, with a resulting tax loss of just $4,500, up to a maximum of $16,000).[4] Prosecutors, on the other hand, argued in their Sentencing Memorandum that the total tax losses "attributable to the offense" were between $8 million and $13.8 million once all relevant conduct pertaining to the BPP scheme was considered (including the facts alleged in the conspiracy count to which defendants did not plead guilty).[5] The United States' tax loss computation would have supported the maximum statutory sentence available.

In the *Salty Brine* case, the Court found that the arrangement marketed by Foster & Dunhill did not qualify as a captive insurance arrangement, as it was neither insurance in the traditional sense nor a means of risk distribution or risk shifting; instead, it was merely a conduit used to funnel income from the business to its owners tax free.

In response to the United States' tax loss calculations,

4 Memorandum in support re Plea Agreement—Regarding Defendant's Relevant Conduct Analysis, United States v. Crithfield, et al. No. 8:13-cr-00237 (M.D. Fla. filed Nov. 13, 2015) PACER # 252.

5 The prosecution cited USSG § 2T1.1, comment (n.2) and USSG § 2T1.4 comment (n.1). *See* Sentencing Memorandum, United States v. Crithfield, et al. No. 8:13-cr-00237 (M.D. Fla. filed Nov. 27, 2015) (PACER # 259).

the defendants moved to enforce the plea agreement, arguing that they had only pled to a singular and distinct instance of selling an insurance policy to a taxpayer who, the defendants knew, lied on one insurance policy application about not participating in an excluded and dangerous activity (motorcycle racing), which meant the business deduction for that particular insurance premium (1 of the 4 insurance policies the taxpayer had purchased) was not an ordinary and necessary expense.[6] As a result, according to defendants, the conduct relevant for the tax loss only included the tax loss stemming from that particular improper deduction for just a single policy, and at most, for the four policies relating to that single client.

While the judge's rejection of the plea agreement is unusual, this case presents a cautionary tale and offers some lessons for defense counsel.

The United States responded in turn that while the defendants did plead guilty to a discrete instance of selling the BPP to that particular client, that offense was emblematic of and implicated the entire scope of the BPP as to all clients, so all of those instances should be considered as relevant conduct in calculating the tax loss for sentencing purposes.[7] The United States indicated it planned to prove, at a two-to three-week hearing, that the defendants' conduct with all of its BPP customers should be considered and that its tax loss computation was proper.

The Court held a hearing on the defendants' motion to enforce the plea agreement and the loss calculation issue on February 16, 2016. Following the hearing, the Court concluded that, "despite the execution of a plea agreement, the parties have not agreed, that is, have no 'meeting of the minds,' on matters essential to the plea agreement."[8] As a result, the Court vacated its prior orders accepting the plea agreement and instead rejected the plea agreement, ruling that the case was to proceed to trial. A bench trial has now been set for June 6, 2016.

While the judge's rejection of the plea agreement is unusual, this case presents a cautionary tale and offers some lessons for defense counsel. First, while potential disagreements over the scope of relevant conduct and the appropriate tax loss figures are bound to happen, it may be advisable to attempt to secure an upfront agreement on the tax loss issues in the plea itself. As a general matter, courts are fairly liberal in permitting the government to include the tax loss from similarly situated customers in prosecutions of tax shelter promoters, so it is unclear how much is gained as a tactical matter in reserving disputes over the tax loss for sentencing. The judge's decision to reject the plea may have been driven in part by the fact that the court was essentially going to have a mini-trial (if a two week hearing can be called a mini-trial) on the tax loss issue, which not only undermines the efficiency of the plea process, but also perhaps suggested little or no agreement had been reached between the parties.

Furthermore, it is possible that defendants may now be in a worse position, not only because they have no plea agreement in hand that limits their exposure to three years and may instead be found guilty of all the charges and thus increase their exposure to 11 years (not to mention the legal fees that will be required to

6 Motion for Miscellaneous Relief, specifically to Enforce Plea Agreement and Memorandum of Law, United States v. Crithfield, et al. No. 8:13-cr-00237 (M.D. Fla. filed Jan. 28, 2016) (PACER # 264).; Amended Motion for Miscellaneous Relief, specifically to Enforce Plea Agreement and Memorandum of Law, United States v. Crithfield, et al. No. 8:13-cr-00237 (M.D. Fla. filed Jan. 30, 2016) (PACER # 265).

7 Response in Opposition, United States v. Crithfield, et al. No. 8:13-cr-00237 (M.D. Fla. filed Feb. 15, 2016) (PACER # 273).

8 Order as to Duane Crithfield and Stephen Donaldson, Sr.: withdrawing acceptance of plea agreements and rejecting plea agreements at 3, United States v. Crithfield, et al. No. 8:13-cr-00237 (M.D. Fla. ordered Feb. 16, 2016) (PACER # 275).

try the case), but also because this tactic likely frustrated both the prosecution and the court. In attempting to parse out as entirely singular the conduct in the one count to which the defendants pled for purposes of the tax loss calculations, perhaps being a little too clever for the judge's taste, defense counsel now must try the case before the court where credibility may have been lost. Further, this conduct probably incensed and alienated the prosecutors (now forced to prepare again for trial) against whom they must try the case or potentially secure another plea.

Had the tactic succeeded, it would have been an astonishing victory for the defendants. However, its failure did not simply result in a return to status quo ante (where the defendants retained the protection of a three-year maximum sentence in the plea agreement), but rather generated some real consequences, and offers a warning in a world where it has otherwise been rare for judges to reject a plea agreement. ■

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AT COURT

NorCal Tea Party Patriots Opens a Crack in Taxpayer Privacy Protections

By **Lloyd Hitoshi Mayer**, Professor of Law, Notre Dame Law School, Notre Dame, IN

In *In re United States (United States v. NorCal Tea Party Patriots, et al.)*,[1] the U.S. Court of Appeals for the Sixth Circuit resolved a discovery dispute by holding that the names, addresses, and taxpayer-identification numbers of applicants for tax-exempt status are not "return information" and so are not protected from discovery by section 6103, even if their applications are pending, withdrawn, or denied. (Section 6103 generally protects the confidentiality of returns and return information.) Faced not only with the IRS conduct that gave rise to this litigation but also apparent government foot-dragging with respect to discovery, the court adopted a relatively narrow interpretation of section 6103's scope. What remains unclear, however, is whether this relatively minor crack in the taxpayer privacy protections provided by section 6103 could be used to reach a broader range of information held by the IRS.

Background

The *NorCal Tea Party Patriots* litigation arose out of the now well-known controversy involving the IRS Exempt Organizations Division's decision to subject certain applications for recognition of exemption under section 501(c)(4) to greater scrutiny based on applicant names, which had the effect of disproportionately targeting conservative-leaning organizations, including the named plaintiffs in this case, although organizations with progressive and other liberal indicators in their names were also scrutinized.[2] In 2015 the U.S. District Court for the Southern District of Ohio ordered the government to produce various documents listing the organizations that had been targeted for increased scrutiny, concluding that section 6103 did not protect those documents from discovery.[3] The plaintiffs sought this information because those organizations make up the class that the district court later agreed to certify.[4] The government objected to this discovery order and so petitioned the Sixth Circuit for a writ of mandamus to reverse it.

1 *In re United States* (United States v. NorCal Tea Party Patriots, et al.), 817 F.3d 953 (6th Cir. 2016).
2 For a sample of the range of commentary on the controversy, see the TaxProf Blog's continuous commentary under *IRS Scandal*.
3 NorCal Tea Party Patriots, et al. v. Internal Revenue Service, No. 1:13-cv-341, 115 A.F.T.R.2d 2015-1371, 2015-1 USTC ¶ 50,274 (S.D. Ohio, Apr. 1, 2015).
4 NorCal Tea Party Patriots, et al. v. Internal Revenue Service, No. 1:13-cv-341, 2016 WL 223680 (S.D. Ohio, Jan. 19, 2016).

The Opinion

The Sixth Circuit began its opinion by highlighting both the seriousness of the allegations that form the basis for the litigation ("[a]mong the most serious allegations a federal court can address are that an Executive agency has targeted citizens for mistreatment based on their political views") and the apparent foot-dragging of the government with respect to discovery ("at every turn the IRS has resisted the plaintiffs' request for information regarding the IRS's treatment of the plaintiff class").[5] The court then discussed the general rules regarding disclosure of applications for recognition of exemption, noting that successful applications are open to public inspection under section 6104 and that denied applications (with identifying information removed) are similarly open to public inspection under section 6110.[6] This discovery dispute, therefore, boiled down to whether the IRS was correct to treat identifying information with respect to both denied applications and pending, withdrawn, or other applications for which the IRS has not made a determination as "return information," which section 6103 protects from disclosure.

The heart of the opinion is the Sixth Circuit's parsing of section 6103 and how that section's protections for "returns" and "return information" apply to applications for recognition of exemption. First, at the urging of the government the court rejected the basis on which the district court had found section 6103 protection to be unavailable for the requested documents. The district court had agreed with the parties that the requested documents were "return information" covered by section 6103. The district court found, however, that an exception to section 6103's protection for return information applied under section 6103(h)(4)(B).[7] That provision permits disclosure "in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only . . . if the treatment of an item reflected *on such return* is directly related to the resolution of an issue in the proceeding" (emphasis added). The Sixth Circuit focused on the "on such return" language and concluded that this exception was not available because the parties correctly agreed that the applications for recognition of exemption are not "returns" within the meaning of section 6103.[8]

The Sixth Circuit did not end its analysis there, however. It further noted that the names and other identifying information of successful applicants for tax-exempt status are a matter of public record under section 6104 and so to the extent the government was trying to deny access to that information it was clearly in the wrong. With respect to the names and other identifying information for applicants with pending, withdrawn, or denied applications, the court acknowledged that the applicable Treasury regulations treat information submitted as part of those applications as not subject to disclosure, presumably because they are deemed to be "return information."[9] But the court then focused on the fact that under section 6103(b)(2)(A) "return information" includes "a taxpayer's identity," and that "taxpayer's identity" is in turn

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5 *In re United States, supra* note 1, at 955.
6 *In re United States, supra* note 1, at 956 (citing I.R.C. §§ 6104(a)(1)(A), (d)(1)(A)(iii), 6110(a), (b)(1)(A), (b)(2), (c)(1)).
7 *NorCal Tea Party Patriots, supra* note 3, at *4-*7.
8 *In re United States, supra* note 1, at 961-62.
9 *In re United States, supra* note 1, at 963 (citing Treas. Reg. § 301.6104(a)-1(d), (g)).

defined by section 6103(b)(6) as "the name of a person with respect to whom *a return is filed*, his mailing address, his taxpayer identifying number . . . , or a combination thereof" (emphasis added). Focusing on the "a return is filed" language, the court concluded that since an application for recognition is not a "return," information identifying an applicant could not be considered "taxpayer's identity" and therefore "return information."[10] In reaching this conclusion it rejected a contrary decision of the U.S. Court of Appeals for the District of Columbia Circuit because that court had not considered the definition of "taxpayer's identity."[11]

The government argued in response that applicant identifying information should be considered "other data, received by, recorded by, furnished to, or collected by the Secretary . . . with respect to the determination of the existence, or possible existence, of liability . . . for any tax," which section 6103(b)(2)(A) also includes in the definition of "return information." The Sixth Circuit rejected this argument on the basis that it would make Congress's decision to list "taxpayer's identity" separately and to provide a separate definition for that term unnecessary. The court also noted that section 6104(c)(2) separately authorizes the disclosure to state authorities of "names, addresses, and taxpayer identification numbers" (section 6104(c)(2)(A)(iii)) and of "returns and return information" (section 6104(c)(2)(B)), indicating that return information does not automatically include the former information. The Sixth Circuit therefore concluded that "the names, addresses, and taxpayer-identification numbers of applicants for tax-exempt status are not 'return information' under section 6103(b)(2)(A)" and so denied the government's petition for a writ of mandamus.[12]

Congress intended section 6103 to broadly protect information provided to the IRS, and the court's narrow interpretation of "taxpayer information" runs counter to that intent. Nevertheless, the Sixth Circuit's decision is now the law within that circuit and so its possible effect needs to be addressed.

The Sixth Circuit's conclusion with respect to whether section 6103 protects the identifying information of unsuccessful applicants for recognition of exemption is questionable for several reasons. First, the fact that Congress chose in section 6103(b) and section 6104(c)(2) to specifically list "taxpayer's identity" and "names, addresses, and taxpayer identification numbers," respectively, as well as including broader terms such as "other data" and "return information" may indicate an intent to be clear about the treatment of the former type of information rather than relying solely on the broader terms even though those terms could be read as including that specific information. Second, the text of section 6110, its legislative history, and a federal appellate court ruling applying it make it clear that denied applications for recognition of exemption are within the scope of section 6110, which bars the disclosure of identifying information for written determinations unless otherwise explicitly authorized by statute and so prohibits the release of such information when the IRS denies such an application.[13] Section 6103(b)(2)(B) underlines this point when it includes in the definition of "return information" "any part of any written determination or any background file document relating to such written determination . . . *which is not open to public inspection under 6110*" (emphasis added). Third, Congress intended section 6103 to broadly protect information provided to the IRS, and the

10 *In re United States, supra* note 1, at 963-64.
11 *In re United States, supra* note 1, at 964-65 (citing but rejecting Landmark Legal Foundation v. IRS, 267 F.3d 1132, 1135 (D.C. Cir. 2001)).
12 *In re United States, supra* note 1, at 965.
13 I.R.C. § 6110(l)(1), (2)(A); H.R. Rep. No. 94-658, at 321-22 (1975); S. Rep. No. 94-938(I), at 307 (1976); Tax Analysts v. IRS, 350 F.3d 100, 103-04 (D.C.Cir. 2003).

court's narrow interpretation of "taxpayer information" runs counter to that intent. Nevertheless, the Sixth Circuit's decision is now the law within that circuit and so its possible effect needs to be addressed.

What the Decision Means

On its face, the decision by the Sixth Circuit is relatively narrow. It only applies to the names, addresses, and taxpayer-identification numbers of applicants for recognition of exemption, not to other information included in their applications. The IRS grants most such applications, and relatively quickly these days, so only the identifying information for the several thousands of applicants annually that do not pursue their application to completion and the handful of applicants that the IRS denies annually is at stake.[14] And, as former IRS Exempt Organizations Division Director Marcus Owens has suggested, it could be argued that the decision should not reach identifying information for applicants under section 501(c)(3) because such applicants are required to file to claim tax-exempt status, unlike the applicants under section 501(c)(4) at issue in this litigation for which an application is not required to claim that status (although the Sixth Circuit did not distinguish between these two types of applicants).[15]

As a policy matter such disclosure may not be all that problematic and may even be desirable – the Joint Committee on Taxation in fact called for the public disclosure of all pending applications for recognition of exemption (not just the identifying information of the applicants) in 2000.

Disclosure also would only extend to documents already held by the IRS that include this information. This is because the Freedom of Information Act (FOIA)[16]—the main vehicle for seeking federal agency-controlled information, including information controlled by the IRS—does not require an agency to create new documents, only to disclose existing ones to the extent not covered by a FOIA exemption (including the exemption for when disclosure is prohibited by another statute, such as section 6103).[17] Even in this litigation, the district court is only requiring the disclosure of pre-existing documents containing the identifying information sought by plaintiffs.[18] Finally, as a policy matter such disclosure may not be all that problematic and may even be desirable—the Joint Committee on Taxation in fact called for the public disclosure of all pending applications for recognition of exemption (not just the identifying information of the applicants) in 2000.[19]

The bigger issue is whether the Sixth Circuit's reasoning extends to other information previously thought to be protected from disclosure by section 6103, whether that disclosure is sought in litigation or through a FOIA request. Section 6103(b)(1) defines a "return" as "any tax or information return, declaration of estimated tax, or claim for refund," including supporting documents. Courts have tended to read this definition broadly (raising a question whether the parties and the courts in this case were correct that

14 *See* 2015 IRS Data Book 57 (2016).
15 *See* Fred Stokheld, *IRS Court Loss Opens More Info to Discovery in Tea Party Case*, 150 Tax Notes (TA) 1536 (Mar. 28, 2016).
16 5 U.S.C. § 552.
17 Kissinger v. Reporters Committee for Freedom of Press, 445 U.S. 136, 152 (1980).
18 *NorCal Tea Party Patriots, supra* note 3, at *4, *7.
19 Joint Committee on Taxation, Study of Present-Law Taxpayer Confidentiality and Disclosure Provisions As Required by Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998, vol. II, at 86-87 (JCS-1-00, 2000).

applications for recognition of exemption are not "returns").[20] Nevertheless, in the wake of the decision IRS Commissioner John Koskinen raised concerns that identifying information on some other types of IRS filings, such as for requests for private-letter rulings and identification PINs, might not be protected by section 6103.[21] Additional filings with the IRS that may not be returns under section 6103 include requests for taxpayer advocate service assistance (Form 911) and applications for filing extensions, although the latter might be considered a supporting document for a return.

Is Commissioner Koskinen correct about the possible implications of this opinion? Maybe, but there are at least three important limitations to the Sixth Circuit's decision. First, on its face it only applies to applications for recognition of exemption and indeed might not reach all such applications for the reasons already discussed. Second, it only applies to identifying information for the applicant, not to the rest of the information contained in the application. Third, the decision of course only applies in the Sixth Circuit, which is where the IRS Service Center that processes applications for recognition of exemption is located; many IRS filings are made in other jurisdictions that may not follow Sixth Circuit precedents. For example, private letter ruling requests are generally filed in Washington, DC, where the D.C. Circuit previously reached the opposite conclusion.[22] That said, a person contesting a denied FOIA request can bring suit in a federal district court located not only in the District of Columbia or in the district where the agency records are located, but also in the district where that person resides or has a principal place of business.[23] Therefore anyone who resides or has their principal place of business in the Sixth Circuit could take advantage of the precedent established by this decision even if the records they seek are not located in that circuit.

It therefore appears that the decision does open the door for interested parties to seek disclosure, both in litigation and through FOIA requests, of documents listing applicants for recognition of exemption. But whether it will have any effect on taxpayer privacy outside of this narrow context, even within the Sixth Circuit, remains to be seen. ■

20 *See, e.g.,* Ryan v. Bureau of Alcohol, Tobacco, and Firearms, 715 F.2d 644, 646-47 (D.C. Cir. 1983).

21 Naomi Jagoda, *IRS Commissioner: Court Ruling Raises Privacy Concerns for Taxpayers*, The Hill (Mar. 24, 2016); Richard Rubin, *Court Ruling Potentially Opens Taxpayer Information to Public*, Wall St. J. (Mar. 24, 2016).

22 *See Landmark Legal Foundation, supra* note 11, at 1135; Rev. Proc. 2016-1, 2016-1 I.R.B. 1, § 7.04(1).

23 5 USC § 552(a)(4)(B).

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PRACTICE POINTS

EC Anti-Tax-Avoidance Package: Responses from European Tax Practices

By **Willem Bongaerts** and **Ivo IJzerman**, Bird & Bird, The Netherlands

On January 28, 2016 the European Commission (EC) published its Anti-Tax-Avoidance Package (ATA Package). The package is part of a wider plan of the European Commission to address tax avoidance by multinational enterprises (MNEs). Anti-avoidance measures proposed earlier include the altering of the EU Parent Subsidiary Directive to address hybrid mismatches and to introduce a general anti-abuse rule (GAAR) with respect to the holding of shares in other entities (effective January 1, 2016) and the mandatory automatic exchange of cross-border rulings (effective January 1, 2017).

This article provides an overview of the proposed measures in Part I and the reactions from a Dutch perspective in Part II, including the perspectives of tax professionals in several Bird & Bird offices on how the ATA Package was received in different EU member states. Since there is no EU common tax system for direct taxes (such as corporate income tax), the respective member states will be affected differently by the ATA Package. The different impact expected to the tax systems of the respective member states is reflected in the political reactions to the ATA Package. This has been covered in the press.[1]

I. Summary of the ATA Package Features

The package is inspired by the OECD's project on Base Erosion and Profit Shifting (BEPS), the final reports of which were published in October 2015. With the currently proposed package the EC intends to make sure the BEPS outcome is implemented by the member states in accordance with EU law and that taxes are paid in the member states where the corresponding value is created. The core of the proposed package consists of four documents: an Anti-Tax-Avoidance Directive (ATA Directive); a Recommendation on Tax Treaties; a Revised Administrative Cooperation Directive; and a Communication on External Strategy on Effective Taxation. Key points are discussed in this section.

A. Anti-Tax-Avoidance Directive

The proposed ATA Directive contains six anti-avoidance measures which will be legally binding if adopted by the European Council and European Parliament.

1 For example, euinside (an online media focused on, inter alia, EU affairs) published a short overview of political reactions. Click here for more information.

1. *Interest limitation rule*

This rule stipulates that the deductible net interest is limited to the higher of 30% of the taxpayer's earnings before interest, tax, depreciation and amortization (EBITDA) or € 1 million. If a taxpayer has interest expenses exceeding 30% of EBITDA, those interest expenses may be carried forward to subsequent years. Moreover, if 30% of EBITDA exceeds the interest expenses in a certain year, the difference may also be carried forward.

The interest limitation rule does not apply if the ratio between equity and total assets of a taxpayer is equal to or higher than the equivalent ratio of the group, where a ratio of up to two percentage points below the group's will be deemed equivalent to the group's ratio. The excess interest expense will be deductible, however, only if payments to associated enterprises do not exceed 10% of the group's total net interest expense.

This rule does not apply to financial undertakings as defined in the Directive.

2. *Exit taxation*

Based on this rule a tax is levied on the transfer of assets if:

a) Assets are transferred from the taxpayer's head office to its permanent establishment (PE) in another member state or third country;

b) Assets are transferred from a PE in a member state to the head office or another PE in another member state or in a third country;

c) The tax residence is transferred to another member state or to a third country, but not if the assets remain effectively connected with a PE in the first member state;

d) A PE is transferred out of a member state.

The taxable base is formed by the difference between market value and value for tax purposes at the time of exit of the assets concerned. If assets are transferred to member states, those member states are obliged to allow taxpayers to value the assets at market value. Taxpayers may defer tax claims arising from exit taxation by paying in installments for at least five years. If a taxpayer chooses to defer a tax claim, interest may be charged and securities may be demanded by the member state involved. The deferral ends if the transferred assets are disposed of, the transferred assets are transferred to a third country, the taxpayer's tax residence or its PE is transferred to a third country or the taxpayer goes bankrupt or is wound up.

3. *Switch-over clause*

This measure prohibits member states from exempting income (profit distributions and proceeds from the disposal of shares) derived from low-taxed entities or PEs in non-EU states. Entities and PEs are regarded as low-taxed if they are subject to a statutory corporate tax rate lower than 40% of the statutory tax rate in the country of residence. The country of residence will grant an ordinary credit for taxes paid in the low-tax jurisdiction. The prohibition to exempt does not apply to losses incurred by the low-taxed PEs or to losses from the disposal of shares held in the low-taxed entity.

It is suggested in Dutch newspapers that a recent draft of the ATA Directive would apply the switch-over clause only to income that does not arise from active business and only if there is no treaty in place between the state of residence of the parent company and the state of residence of the subsidiary. This has not yet been officially confirmed.

4. *General anti-abuse rule*

This GAAR is similar to the one recently introduced in the EU Parent-Subsidiary Directive implemented in the 'foreign substantial interest' provision of the Dutch Corporate Income Tax Act and in the Dividend Tax Act. Although the latter would only tax foreign parents, this proposed GAAR would work throughout all corporate tax acts of member states and target any situation of alleged abuse. The GAAR stipulates that any non-genuine arrangement (i.e. arrangement or series thereof to the extent that they are not put in place for valid commercial reasons which reflect economic reality) carried out for the essential purpose of obtaining a tax advantage that defeats the object or purpose of the otherwise applicable tax provisions is to be ignored for the purposes of calculating the corporate tax liability. The tax liability shall then be calculated by reference to economic substance in accordance with national law. The GAAR does not affect the applicability of specific anti-abuse rules. Its application should be limited to 'wholly artificial arrangements': a taxpayer may in principle still choose the most tax-efficient structure.

5. *Controlled foreign company legislation*

The Controlled Foreign Company (CFC) rule attributes non-distributed income of a foreign company to the domestic parent company. The proposed CFC rule targets taxpayers that (together with associated enterprises) directly or indirectly hold more than 50% of capital or voting rights or are entitled to receive more than 50% of the profits of low-taxed foreign entities. For the purpose of the CFC rule, low-taxed entities are entities that under the general regime in its resident jurisdiction are subject to an effective corporate tax rate lower than 40% of the effective tax rate that would have been charged under the applicable corporate tax system in the parent jurisdiction. The CFC rule only applies if more than 50% of the income accruing to the low-taxed subsidiary falls within one or more categories included in the Directive. Those categories are passive income such as dividends, royalties, and interest. The CFC rule will not apply to financial undertakings as defined in the Directive.

If a subsidiary is located in a member state or third country party to the EEA Agreement, the CFC rule only applies if the establishment of the entity is wholly artificial or to the extent that the entity engages in non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage. Arrangements are deemed non-genuine to the extent that the foreign entity would not have undertaken the risks which generate income if it were not controlled by a company where the significant people's functions are carried out and are instrumental in generating the controlled company's income. In that case, the income to be included in the tax base of the controlling company will be limited to the income attributable to those significant people's functions in accordance with the arm's-length principle. The income to be included in the tax base of the controlling company will be calculated in proportion to the entitlement of the profits of the subsidiary. The amount of tax due over that income is calculated in accordance with the corporate tax laws of the controlling company's jurisdiction. Losses will not be allocated to the controlling company, but the CFC rule provides for a carry-forward to subsequent tax years.

Finally, the CFC rule includes a provision to prevent double taxation when the income is distributed. It does not, however, contain a mechanism to prevent CFC income from being included in the taxable base of multiple entities: it does not provide for a rule that prescribes the order in which income must be attributed to parents and grandparents in member states.

It is suggested in Dutch newspapers that a recent draft of the ATA Directive would provide the member states more flexibility in determining when a company is considered a CFC.

6. *Hybrid mismatches*

This measure deals with double deductions or deduction/no inclusion situations resulting from different classifications of the same entity by different member states. In such cases, the member state where the payment has its source will follow the legal classification of the member state of the entity receiving the payment. A similar rule applies to cases in which two member states give different classifications to the same payment.

B. Recommendation on Tax Treaty Abuse

The EC advises member states to implement a GAAR based on a principal purpose test in their tax treaties. If the principal purpose of an arrangement or transaction is to obtain treaty benefits, those benefits should be denied under the GAAR, unless it is established that the arrangement or transaction reflects a genuine economic activity or that granting the benefits would be in accordance with the object and purpose of the treaty. Additionally, the EC recommends implementing the outcome of BEPS Action 7 (Preventing the Artificial Avoidance of Permanent Establishment Status). In order to do so, member states should amend Article 5 of their double tax treaties.

C. Proposal for a Directive Implementing Country-by-Country Reporting

This proposal is the EC's effort to implement BEPS Action 13 in the EU. Based on the proposal, the ultimate parent entity of an MNE with a total consolidated group revenue of at least €750 million is obliged to file a Country-by-Country (CbC) report in its member state of residence. If the parent is located in a non-EU state, a subsidiary must file the report. The report must contain *inter alia* information about profits, revenue and number of employees about all companies within the group. Tax authorities receiving such a report will be obliged to automatically exchange the report with other member states where a company of the MNE is resident or liable to tax.

D. Communication on an External Strategy for Effective Taxation

This communication to the European Parliament and the European Council proposes a framework for a new EU external strategy for effective taxation. The EC intends to "help the EU promote tax good governance globally, tackle external base erosion threats and ensure a level playing field for all businesses." It aims to accomplish those objectives by increasing tax transparency and endorsing fairer tax competition. For instance, the EC announces that it investigates public CbC reporting requirements for other sectors than those to which the requirements currently apply (i.e. the banking and financial sector and the logging and extracting sector). Moreover, a common list of countries the EU considers to be tax havens will be drafted. Once a state is on that list, all member states are to take measures against that state in order to protect their own tax bases and to incentivise the state concerned to make adjustments to its tax system.

II. Initial Tax Practitioner Reaction to the ATA Package

The proposal is currently under debate in working groups with representatives from the EU member states and can still (partially) change. On April 12, Dutch newspapers announced that the working group seems to be preparing a new draft ATA Directive that is less stringent than the original draft. For instance, as mentioned above, the proposed switch-over clause would only apply to income that does not arise from active business and only if there is no treaty in place between the EU member state in which the parental company resides and the (third) state in which the subsidiary resides. Without the initially proposed switch-over clause there will be much less resistance by the countries involved.

A. The Netherlands

In the Netherlands, most tax practitioners greeted the ATA Package with great scepticism on its effect and aversion for its impact on the Dutch fiscal climate for MNEs. For example, headquarters based in the EU and especially in the Netherlands may be negatively affected by the proposed switch-over clause because of the impact it would have on the long-standing Dutch participation exemption—one of the cornerstones of the Dutch tax system. The participation exemption currently exempts capital gains and distributions from qualifying participations, including those from subsidiaries in low-taxed jurisdictions as long as they are active. Changing this tax exemption arguably may have a significant negative impact on the competitiveness of EU-and Dutch-based MNEs and contradicts the principles of an open economy. The Dutch Association of Tax Lawyers criticized the proposed measures, stating they would target *bona fide* structures and would end Dutch fiscal sovereignty[2]. The Dutch government is yet to formally respond. Considering its current EU presidency, this response will be received with great interest. Most concerns are aimed at the switch-over clause. If this is amended as suggested in some news commentary, less scepticism is to be expected.

B. Belgium

Belgian tax practitioners generally view an intervention on the supranational level as necessary in order to implement anti-tax-avoidance legislation in a consistent and coherent way. Nonetheless, some points of the proposed ATA Directive have not been warmly welcomed. In general, the entrepreneurial environment fears that the Union will not be at a level playing field with the rest of the world in terms of fiscal attractiveness. Critics also note the absence of an impact analysis, even though it is generally expected that the effective taxation will surely increase for the majority of businesses. In addition, considerable doubt exists with regard to the additional CbC reporting duties, possibly resulting in an excessive administrative burden for *bona fide* companies.

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2 For the underlying report (in Dutch only), please follow this link: http://www.nob.net/sites/default/files/content/article/uploads/nob_commentaar_anti-beps_richtlijn.pdf

Furthermore, three of the specific areas covered by the proposed ATA Directive could have an (in)direct impact on the Belgian tax environment. While Belgium already has exit rules, the nature of the current proposals would probably impose some modifications. Second, the switch-over provision aiming to increase the tax base by neutralizing the numerous tax exemptions for revenues from low-taxed third countries might force the Belgian government to renegotiate certain double tax treaties. Finally, Belgian law does not contain CFC measures and would therefore require rather drastic changes. In addition, implementation of the proposed CFC measures in other countries will seriously affect the Belgian subsidiaries of MNEs, as they envisage changing or eliminating certain preferential tax regimes, such as the excess profit ruling, patent boxes and notional interest deductions.

C. Czech Republic

The ATA Package as recently presented by the EC has the full support of the Czech government and has generally been supported across the Czech political spectrum, including both the socialist/centrist government coalition and the conservative/liberal opposition. The head of the Economic Committee of the Czech Parliament (and a former governor of the Czech National Bank) noted that "despite a relatively low corporate tax level and a relatively narrow tax base under Czech tax legislation, sophisticated tax avoidance structures and transfer of profits abroad are the issues due to which the Czech state budget is deprived of considerable income each year, and therefore hopefully the EU member states would be supportive to the EC's initiative." The views of the leading tax professionals on the ATA Package are also generally positive, although they do emphasize that it is the inexperience and inconsistent practice of the tax authorities, rather than missing legislative measures, which help MNEs avoid Czech taxes.

To summarize, the main goals of the proposals have been seen as mostly positive, but enforcing the ATA Package on the legislative level of each member state may be a rather challenging task.

D. Finland

At first glance, the proposal would not appear to have a major impact on the Finnish tax system. Finnish legislation already corresponds fairly closely to the proposed changes and in some aspects imposes even stricter requirements than the proposals in the ATA package. For example, the CFC legislation is already wider in the Finnish legislation than in the EC proposal.

The Finnish business community does have concerns, however, regarding the additional administrative burden and costs that the proposed package may create for taxpayers. It is also considered important that investors still find Finland an interesting and functional destination in which to operate. The proposed changes should not reduce the certainty of treatment under the Finnish tax system. Furthermore, it would be worrisome if tax law becomes more complex and if multiple regulatory levels (a national-and EU-level) make codification of the proposed measures cumbersome.

To summarize, the main goals of the proposals have been seen as mostly positive, but enforcing the ATA Package on the legislative level of each member state may be a rather challenging task.

E. France

With the recent introduction of the new anti-abuse clause for parent-subsidiary distributions (provided in the

Council directive EU 2015/121 (January 27, 2015)), France's legislation already generally corresponds to the ATA Package. The exit tax, hybrid mismatches and thin capitalization rules are already implemented within French tax law. For many years now, France has been modifying its tax legislation in this direction.

F. Germany

The EU package has not generated significant criticism in Germany to date. The German government has supported the OECD and EU BEPS process from the beginning, so it can be expected that Germany will also be supportive of this EC initiative. Nonetheless, the German Minister of Finance said the EU should exercise restraint in implementing the OECD BEPS reports into EU hard law.

Many of the recommended regulations included in the proposed EC package already exist under German legislation. In particular, German tax rules include similar interest limitation rules as well as strict CFC and exit taxation rules. Hybrid mismatch situations for certain cases are also covered by current German tax laws. Nevertheless, there are rumors that the Federal Ministry of Finance is working on a BEPS bill that could be finalized in the first half of this year. It is expected that this bill will tighten rules in order to adopt the EU initiative.

G. Hungary

Hungary already has general anti-abuse rules similar to the one proposed in the ATA Directive. Other parts of the proposed ATA Package—CFC rules, hybrid mismatches and the interest limitation rule—are also addressed in Hungarian tax law. Nevertheless, tax practitioners generally agree that the introduction of the ATA Package would have considerable impact on Hungary's position in international tax planning. It would likely require significant modification of Hungarian tax law. This could partly be done by amending existing rules and partly (*e.g.*, for the proposed exit taxation rule and the switch-over clause) by introducing new ones.

The Hungarian government stated it supports the fight against tax avoidance and in that respect supports the idea of the ATA Package. Nonetheless, the Hungarian Minister of Finance raised concerns regarding the details of the package. He stated that the EU has to take into account that member states have legal obligations resulting from bilateral tax treaties and that thorough studies are required in order to predict the impact of the proposed package.

If implemented, the proposed measures would negatively affect the relatively simple and favourable tax environment for MNEs in Hungary.

H. Poland

The ATA Package has received support from the Polish government. According to an official statement, "Poland supports all efforts to eliminate tax base erosion and profit shifting and, therefore, the initiative of the European Commission in this regard."

In Poland, a discussion on taxation of holding groups has been ongoing for several years now. Poland does not have particular provisions which would attract foreign holdings to register in Poland, yet there are many foreign companies already present there (mainly due to attractive employment costs and the large amount of EU funds Poland has received). Thus, the consequences of international tax avoidance practice are particularly negative for Poland as it loses potential profits from income tax. Therefore, prevention of tax optimization is one of the priorities for the Polish government. Recently, a draft amendment to the Polish Tax Ordinance was revealed which, *inter alia*, introduces a general tax avoidance clause. Moreover, Poland has always followed the EU's directions and implemented its directives. One would expect that Poland will also support and follow the ATA Package.

With respect to holding companies, practitioners have identified the need for Polish law which would provide clear rules for such companies to operate in Poland. Although Polish provisions concerning tax capital groups do exist, those are not up-to-date and are insufficient to address tax avoidance if international holding companies are involved. A law aiming to address those problems has been drafted, and the market is expecting an update on further progress.

I. Slovakia

So far, there has not been a specific reaction of the Slovakian authorities to the ATA Package. However, the Slovakian government has put long and continuous emphasis on the fight against tax avoidance (especially concerning VAT), and we expect the Slovakian government to positively respond to the ATA Package.

J. Spain

Although no official announcement has been made yet by the Spanish tax authorities on the envisaged implementation of the ATA Package, no significant changes are expected. It may be decided that many of the measures in the proposed ATA Directive have already been implemented in Spanish tax regulations, either because they were inspired by the OECD BEPS-project or because Spain has already enacted recommendations/tax practices generally followed in other jurisdictions with the introduction of new tax regulations in connection with the 2015 Corporate Income Tax Law. Moreover, the CbC reporting obligations will only require the Spanish tax authorities to process the information in a different format. Spanish taxpayers already produce the appropriate information under the current regulations, duly aligned with OECD guidelines.

The recommendation on tax treaty abuse should be a measure with little impact in the short term, as such recommendations are likely inserted in the format of treaty clauses when new tax treaties are reached or when the old ones are amended. As Spain has an extensive network of recently renewed tax treaties, it is not expected to implement the treaty recommendations immediately.

Finally, with regard to the Communication on the External Strategy, there is concern that it lacks strong commitments to reach shared goals such as a common consolidated corporate tax base, specific regulations which envisage transfer pricing requirements for related party transactions or other measures to ensure fair tax competition in areas other than direct taxes.

K. Sweden

Bird & Bird colleagues in Sweden report that one of the most frequently heard concerns from representatives of the Swedish business community are the growing difficulties the industry faces in being able to accurately predict their future tax positions. These concerns have grown significantly with the introduction of the OECD BEPS project and are likely to grow even more with the introduction of the EC's extensive ATA Package. Along with domestic anti-avoidance rules, tax practitioners will now have three sets of avoidance norms (domestic, OECD/BEPS and EU) to consider. This is a problem not to be taken lightly.

Given that the BEPS proposals are fairly prescriptive, it is not entirely clear why the EU considers that this additional level of complexity is required. It may be that, as stated in the proposal, the EU is again pushing for an EU corporate tax base (the so-called Common Consolidated Corporate Tax Base), so perhaps this is seen as a useful stepping stone in that direction.

L. UK

Generally speaking, the UK has highly sophisticated anti-avoidance laws which likely cover most of the items within the ATA Directive. Nonetheless, the details of the ATA Directive present a number of areas where UK law will need to change to satisfy the proposals. In particular:

(i) The interest limitation rule is likely to be unattractive in many sectors—in particular the real estate sector—where debt-equity ratios have been high historically;

(ii) The exit taxation provisions which apply to transfers to and from PEs are broader than existing UK exit rules;

(iii) The switch-over clause is likely to be controversial, particularly in respect of capital gains arising on disposals of subsidiaries.

There are also areas where the Directive is less stringent than existing UK avoidance rules.

Tax practitioners generally view the introduction of an additional layer of anti-avoidance rules as a further complication of the tax system. Given that the BEPS proposals are fairly prescriptive, it is not entirely clear why the EU considers that this additional level of complexity is required. It may be that, as stated in the proposal, the EU is again pushing for an EU corporate tax base (the so-called Common Consolidated Corporate Tax Base), so perhaps this is seen as a useful stepping stone in that direction. Given the current political mood in the UK and talk of a 'Brexit', it will be interesting to see whether the UK Government will accept all the proposals and, going forward, what kind of appetite the UK has for being party to a Common Consolidated Corporate Tax Base.

III. Conclusion

The ATA Package must still receive the approval of the European Parliament and the European Council. On May 25th, 2016 the ATA Directive was tabled for (unanimous) approval by the European Council. The European Council adopted that day two texts for: (i) a directive on European CbC reporting rules for multinationals and (ii) conclusions on external taxation strategy (EU-blacklist) and measures against tax treaty abuse.

The Council failed to reach definitive agreement on the ATA Directive. According to a letter of the Dutch Secretary of Finance dated May 13th, the Council generally agrees on the rule on exit taxation, the GAAR and the measure addressing hybrid mismatches. The debate is mostly on the switch-over clause and the CFC rule. A new compromise will be tabled for the upcoming European Council meeting on June 17th, 2016. Clearly, interested parties in each of the countries—and MNEs from outside the EU—will be following these developments closely to understand the impact on their businesses. ■

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PRACTICE POINT

Beyond the Three-Year, 240-Day, and Two-Year Rules: Bankruptcy Rules That Tax Practitioners Should Know[1]

By **Kenneth C. Weil**, Law Office of Kenneth C. Weil, Seattle, WA

Beyond the three-year, 240-day, and two-year rules, there are other rules and traps for the unwary that should be on a tax practitioner's radar. These include finding ways to make your client a non-consumer debtor, conversion of Chapter 7 cases to Chapter 11 under section 706(b) of the Bankruptcy Code, [2] denial of discharges under section 727(a)(2)(A), and filing too soon after a prior bankruptcy discharge has been granted. The following provides a brief discussion of each of these topics.

I. Calculating Non-Consumer Debt

Tax debt is non-consumer debt.[3] The issue arose in cases where tax debtors filed a Chapter 13 case and co-debtors did not file. The government wanted to pursue the nonfiling co-debtor. It argued successfully that the tax debt in question was non-consumer debt and not subject to the co-debtor stay of section 1301, which applies only to consumer debt.

Fast forward to passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[4] BAPCPA added means-testing rules to section 707: these rules apply only to debtors who have primarily consumer debt.[5] Consumer debt is "debt incurred by an individual primarily for a personal, family, or household purpose."[6] In this context, "primarily" means one dollar more than half.[7]

When the means test does not apply, the path to a completed bankruptcy is considerably less bumpy. Tax debtors have a great "head start" in the calculation of non-consumer versus consumer debt. Here are some rules to keep in mind when making those calculations.

Section 101(8) states that consumer debt "means debt *incurred* by an individual primarily for a personal"

1 This article is adapted from an earlier version presented to the ABA Tax Section Midyear 2016 meeting.
2 Section references herein are to the Bankruptcy Code unless otherwise stated.
3 *See, e.g.*, *IRS v. Westberry (In re Westberry)*, 215 F.3d 589 (6th Cir. 2000); *In re Brashers*, 216 B.R. 59 (Bankr. N.D. Okla. 1998) (United States Trustee's motion to dismiss denied because case involved primarily tax debt, which is not consumer debt).
4 PL 109-8, 119 Stat. 23 (2005).
5 11 USC §707(b)(1).
6 11 USC §101(8).
7 *Zolg v. Kelly III (In re Kelly, III)*, 842 F.2d 908, 913 (9th Cir. 1988).

purpose.[8] "Incurred" implies that the question asked is why the debt was originally undertaken. One does not look to the day of filing; instead, one looks to the date the loan was incurred.[9]

Consider a client that has a personal residence, a rental property, and tax debt. The debt on the personal residence exceeds the tax debt plus the debt on the rental. If the debtor disposes of the personal residence and moves into the rental prior to filing, the debtor now has primarily non-consumer debt.

Given the tax rule that educational expenses are not deductible if the education qualifies the taxpayer for a new trade or business,[10] one might think that tuition is a consumer debt for means-testing purposes. That is not necessarily the case. The court in *In re Rucker* found that there is no *per se* rule for determining whether education expenses are consumer or non-consumer debt.[11] The court in *In re Palmer*, however, took a more restrictive view: "the debtor must demonstrate a tangible benefit to an existing business, or show some requirement for advancement or greater compensation in a current job or organization." [12] Still, if the tuition were spent on an education for a new field and the debtor takes a job in that field, the tuition should be considered non-consumer debt. The key is not to be greedy. The parts of the loan that are used for living expenses and not tuition should be treated as consumer debt.

Consider also *In re Cherett*, in which a housing loan made by a company to entice a debtor to work for it was held to be non-consumer debt because it was debt incurred in connection with obtaining a new job.[13] Also consider *In re Mohr*, in which a creditor's claim for unpaid rent was capped under section 502(b)(6), but the debtor could use the full amount of unpaid rent in the consumer/non-consumer determination.[14]

II. Non-Consumer Treatment Too Good to Be True: Section 706(b)

Even though the means testing rules do not apply, non-consumer debtors are not totally safe from conversion or dismissal. Section 706(b) provides:

> On request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time.

This means that the United States Trustee (UST) or a creditor can force a debtor out of Chapter 7 and into Chapter 11. This is the tool used by the UST when the debtor has considerable income and the concomitant ability to pay a considerable portion, if not all, of the outstanding debt.[15] A good example is *In re Parvin,* where the debtor's projected monthly income exceeded $51,000. After deducting expenses, the debtor still had over $34,000 in net monthly disposable income.[16]

Large monthly income will most certainly catch the UST's eye. What is unclear is the threshold amount

8 11 USC §101(8) (emphasis added).
9 *See* *In re Proctor*, 494 B.R. 833 (Bankr. E.D.N.C. 2013).
10 IRS Publ. 17, Chapter 27.
11 *In re Rucker*, 454 B.R. 554 (Bankr. M.D. Ga. 2011).
12 *In re Palmer*, 542 B.R. 289, 297 (Bankr. D. Colo. 2015).
13 *Aspen Skiing Co. v. Cherett (In re Cherett)*, 523 B.R. 660 (9th Cir. BAP 2014).
14 *U.S. Trustee v. Mohr (In re Mohr)*, 436 B.R. 504 (S.D. Ohio 2010).
15 *Proudfoot Consulting Co. v. Gordon (In re Gordon)*, 465 B.R. 683, 694 (N.D. Ga. 2012) ("Conversion to Chapter 11 is an appropriate remedy provided by Congress for a non-consumer debtor with an ability to pay to avoid the same abuses of the bankruptcy system identified in the consumer area.").
16 *In re Parvin*, 538 B.R. 96 (Bankr. W.D. Wash. 2015) (Alston, J.), *aff'd*, 2016 W.L. 1584068 (W.D. Wash. 2016).

that will cause trouble. It appears that $5,000 a month will be sufficient, because this will result in an ability to pay $300,000 of debt with a five-year plan.[17] How much less monthly income would still cause trouble is unclear.

The standard review is abuse of discretion. This means the battle will be won or lost in the bankruptcy court.

No grounds for conversion are specified in the statute. The common law rule, which has been adopted by bankruptcy courts, is that "a court 'should consider anything relevant that would further the goals of the Bankruptcy Code.'"[18]

The major factor is the debtor's ability to pay.[19] Another factor, certainly when dealing with tax debt, is whether the tax debt is dischargeable. If the debt is non-dischargeable, the debtor benefits from a plan because it establishes a repayment schedule.[20]

Other factors, as set forth in *Decker*, include (i) whether there is cause for conversion or dismissal under section 1112(b), making conversion a futile and wasted act; (ii) whether the debtor can propose a confirmable Chapter 11 plan; and (iii) whether the purpose of the conversion is solely to liquidate the debtor's estate, which makes Chapter 7 more sensible.[21]

One case found conversion to be in the best interest of the debtor, as the debtor was "a pawn between two companies which [sic]. . . have seen fit to manipulate this Debtor and ruin his credit, rather than resolve their issues."[22] Another case denied conversion, as the debtor had worked assiduously to pay off debt and there was only one recalcitrant creditor remaining.[23] Constitutional challenges, *e.g.*, claiming that a conversion to Chapter 11 is a form of indentured servitude and in violation of the Thirteenth Amendment, do not seem to work.[24]

The standard of review is abuse of discretion.[25] This means the battle will be won or lost in the bankruptcy court.

III. Planning to Escape an IRS Levy Can Result in Non-Dischargeability

Suppose that your client has an IRA. You are aware that the IRS can levy the IRA and force distribution of the entire account. As a result, you advise your client to convert the IRA to an annuity, because a levy cannot force a distribution of the entire annuity. Suppose, instead, that your client moves money from one bank account with which the IRS is familiar to one with which it is not familiar. In both situations, your client may be ineligible for a discharge.

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17 *See, e.g., In re Decker*, 535 B.R. 828 (Bankr. D. Alaska 2015) (facts showed that debtor's net monthly disposable income could be anywhere from $4,500 to $11,200; case converted).

18 *Proudfoot Consulting Co., supra* 14 (decision to convert is left to the court based on what will best benefit all parties).

19 *In re Decker*, *supra* n. 17, at 839 (the ability to pay "is an exceedingly relevant, if not necessary, factor and the obvious starting point for any analysis under §706(b)").

20 *In re Baker*, 503 B.R. 751, 759 (Bankr. M.D. Fla. 2013) ("Debtor may reduce or satisfy the debts owed to the IRS and the Bank through the Chapter 11 process, a result that may not be possible in a Chapter 7 case").

21 *In re Decker*, *supra* n. 17 , at 840.

22 *In Re Gordon*, 465 B.R. 683, 694 (Bankr. N.D. Ga. 2012).

23 *In re Karlinger-Smith*, 544 B.R. 126 (Bankr. W.D. Tex. 2016).

24 *In re Parvin*, 2016 W.L. 1584068 (W.D. Wash. 2016).

25 *Schlehuber v. First Nat'l Bank & Trust Co. (In re Schlehuber)*, 2014 WL 1042731 (8th Cir. 2014) (unpublished opinion).

Section 727(a)(2)(A) denies a discharge if “the debtor, with intent to hinder, delay, or defraud a creditor” … “has transferred” … “property of the debtor, within one year before the date of the filing of the petition.” Thus, the elements of the non-dischargeability claim are transfer, within a year, and intent to hinder, delay or defraud. The courts make clear that the “discharge provisions are liberally construed in favor of debtors and strictly against the person objecting to the discharge.”[26] Proof must be by a preponderance of the evidence.[27]

Discharge is denied if there is an intent to hinder, delay, or defraud. The majority position is that the use of the word “or” means that an objecting party need only prove one of the three. The minority position, set forth in *Wreyford*, is an interpretation of an old English statute holding that hinder, delay, or defraud is a term of art that refers to actual fraud. Under the minority position, actual fraudulent intent must be shown.

Transfers are broadly defined under section 101(54)(D) to include “each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with” property or an interest in property. Bank deposits and withdrawals satisfy the meaning of transfer.[28] In other words, a transfer is easily proved.

Discharge is denied if there is an intent to hinder, delay, or defraud. The majority position is that the use of the word “or” means that an objecting party need only prove one of the three.[29] The minority position, set forth in *Wreyford*, is an interpretation of an old English statute holding that hinder, delay, or defraud is a term of art that refers to actual fraud.[30] Under the minority position, actual fraudulent intent must be shown.[31]

Under the majority position, the party seeking to deny discharge need not prove intent to defraud because proof of intent to hinder or delay is sufficient.[32] The only useful definition of “hinder or delay” was found under the *Wreyford* minority position test, and it is as follows: “Fraudulent intent to hinder or delay a creditor means ‘an intent to improperly make it more difficult for creditors to reasonably collect on their debts.’”[33] The concept of making it difficult for creditors to reasonably collect makes sense under both the majority and minority positions.

In re Rachel, a 2015 case, has facts that are analogous to the hypotheticals introducing this section.[34] The debtor received insurance proceeds after her father died. She held the check for more than four months before depositing it into an account in her daughter’s name. In so doing, the debtor concealed the receipt of

26 *Khalil v. Developers Sur. & Indem. Co. (In re Khalil)*, 379 B.R. 163, 172 (9th Cir. BAP 2007), *aff'd*, 578 F.3d 1167 (9th Cir. 2009).

27 *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1293 (10th Cir. 1997).

28 *Bernard v. Sheaffer, (In re Bernard)*, 96 F.3d 1279, 1281–1283 (9th Cir. 1996), *citing,* S.Rep. No. 989, 95th Cong., 2d Sess. 27 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5813 (“A deposit in a bank account or similar account is a transfer”).

29 *Id.* at 1281.

30 *Los Alamos Nat’l Bank v. Wreyford (In re Wreyford)*, 505 B.R. 47, 56 (Bankr. D.N.M. 2014).

31 See *Husky Int’l Elecs., Inc. v. Ritz, Jr.*, 136 S.Ct. 1581 (2016) for a definition of actual fraud.

32 *United States Trustee v. Totten, Jr. (In re Totten, Jr.)*, 2014 WL 690616, *4 (Bankr. D. Hawaii 2014), *citing*, *Wolkowitz v. Beverly (In re Beverly)*, 374 B.R. 221, 242-243 (9th Cir. BAP 2007), *aff’d*, 551 F.3d 1092 (9th Cir. 2008).

33 *Wreyford*, *supra* n. 30, at 59, citing *Pher Partners v. Womble (In re Womble)*, 289 B.R. 836, 854 (Bankr. N.D. Tex. 2003).

34 *Burdette v. Rachel (In re Rachel)*, 2015 WL 6659691 (Bankr. W.D. Wash. 2015).

the check from the IRS, and she testified at trial that was a purpose of the transfer. Although other grounds existed to deny discharge, the Court found that her testimony was sufficient to show an intent to hinder or delay IRS collection efforts. Her discharge was denied.[35]

IV. Current Discharge Blocked by Prior Bankruptcy Discharge

Practitioners should be aware of a series of rules that deny discharge if the second case is filed too close in time to a prior case where a discharge was entered.

- If Chapter 7 then and Chapter 7 now, add eight years from the prior file date under section 727(a)(8).
- If Chapter 13 or 12 then and Chapter 7 now, add six years from the prior file date under section 727(a)(9).
- If Chapter 7, 11, or 12 then and Chapter 13 now, add four years from the prior file date, under section 1328(f)(1).
- If Chapter 13 then and Chapter 13 now, add two years from the prior file date, under section 1328(f)(2).

Do a Pacer search. As a tax practitioner, you are likely to have a social security number available. For one ten-cent search, you can look for a prior bankruptcy filing in the entire country. Such a search may save you much grief later. ■

35 *Id.* at *3. *See also* *Standefer v. Kent (In re Kent)*, 397 B.R. 438 (Bankr. C.D. Ill. 2008) (discharge denied when debtors transferred property to relatives for no consideration after notice of intent to levy served and unsuccessful meeting thereafter with IRS).

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PRO BONO MATTERS

Pro Bono Matters in the District

By **Francine J. Lipman**, William S. Boyd Professor of Law, University of Nevada, Las Vegas

As tax attorneys we are comfortable with numbers, but the District's income statistics are harrowing. The average annual income of D.C. households in the bottom quintile is $9,300—down from $10,800 in 2007 and lower than the same statistic for most major cities. The average household income of the top 5% is $487,000, the third highest among large U.S. cities. As a result, D.C.'s highest income earners make 52 times the lowest earners, generating an income inequality gap that is the fifth highest among large cities and just behind New Orleans, Boston, Atlanta, and New York City.

Section Members in a District Dense with Lawyers

Each May since the 1960s members of the Section have come together to meet in our nation's Capital. The Section's meeting in Washington D.C. enjoys the best attendance of the annual meetings—at about 2,100 members or double the attendance of each of the other two meetings. This is not surprising, given that the District is home to 1,116 Section lawyers, ranking third in Section membership behind the much larger geographic regions of New York (1,565), and California (1,459). But D.C. Section members are only about 2% of the 52,000 lawyers residing in the District, by far the densest population of lawyers in America. The Capital City has 775 lawyers per 10,000 people or almost 20 times the average of 40 lawyers per 10,000 people nationwide.[1]

Although Section lawyers come to D.C. each year, many members don't have a chance to venture outside of the conference hotels and traditional tourist attractions given the intense schedule of committee meetings, CLE sessions, and events. Like our beloved tax system, Washington D.C. is multidimensional. Named after America's first president and fifteenth century Italian explorer Christopher Columbus,[2] D.C. is home to almost 675,000 Washingtonians. Living in just 61 square miles (interspersed with 7 square miles of water), housing is limited and expensive (in part because of significant building height restrictions). The result is a cost of living among the highest in the nation. And while higher-income families have seen their

1 By comparison New York has just over 87 lawyers per 10,000 people and California has just over 42 lawyers per 10,000 people. *See* https://lawschooltuitionbubble.wordpress.com/original-research-updated/lawyers-per-capita-by-state/.

2 For more interesting facts about Washington D.C., see http://washington.org/DC-information/washington-dc-quick-facts-kids.

earnings, real estate, and wealth boom, the District's poorest families have suffered deep and persistent losses.

As tax attorneys we are comfortable with numbers, but the District's income statistics are harrowing. The average annual income of D.C. households in the bottom quintile is $9,300—down from $10,800 in 2007 and lower than the same statistic for most major cities. The average household income of the top 5% is $487,000, the third highest among large U.S. cities. As a result, D.C.'s highest income earners make 52 times the lowest earners, generating an income inequality gap that is the fifth highest among large cities and just behind New Orleans, Boston, Atlanta, and New York City. These income and wealth gaps seem to be widening and the consequences are reverberating throughout the District's divergent neighborhoods.

Poverty Is a Problem in the District

The District also has the nation's second highest rate of food insecurity among children. One in three children in Washington, D.C. lives in a home where there is not enough food for them to eat. In the past decade, Catholic Charities has more than doubled emergency food services. Food insecurity is harmful to any individual's physical and mental well-being, but it is particularly devastating for children due to critical brain, bone and organ development.

In 2016, D.C. suffers from a severe affordable housing crisis, rising family homelessness, high unemployment rates, and falling income among the poorest residents. The District's overall poverty rate is above the national average at more than 18%, but for D.C.'s children the poverty rate soars to 28%. One in ten residents live in extreme poverty, or below half of the poverty line. Poverty is concentrated and segregated in D.C., with nearly three-fourths of poor households headed by people of color, and almost half headed by someone who was born in D.C. (only 31% and 17% in the general population, respectively).

These statistics can be mind-numbing, but they have profound daily, as well as long-term, implications for our nation's Capital. From February to May of 2013, one local youth service provider turned away at least 150 unaccompanied minor children due to lack of emergency shelter space. The District also has the nation's second highest rate of food insecurity among children. One in three children in Washington, D.C. lives in a home where there is not enough food for them to eat. In the past decade, Catholic Charities has more than doubled emergency food services. Food insecurity is harmful to any individual's physical and mental well-being, but it is particularly devastating for children due to critical brain, bone and organ development. The adverse long-term physical and mental health and related financial consequences are devastating for our economy and country.[3]

Tax Credits Subsidize Low-Income Wages to Provide a Living Wage

Fortunately, some remedies are being unleashed to try to turn back this debilitating trend. Together with

3 Feeding America offers information on the long-term adverse health consequences of hunger on children "Workers who experienced hunger as children are not as well prepared physically, mentally, emotionally or socially to perform effectively in the contemporary workforce. Workers who experienced hunger as children create a workforce pool that is less competitive, with lower levels of educational and technical skills, and seriously constrained human capital." Child Food Insecurity: The Economic Impact on Our Nation.

With more than $3,000 in average EITC benefits going to working D.C. families, low wages are being meaningfully supplemented. Because these tax benefits are life-changing to these families, it is important to ensure that families receive these benefits and get to keep them. D.C.'s EITC participation rate is just over 75%, about 5% below the national average of 80%.

several other states, the District is raising its minimum wage and enhancing its EITC. Recent minimum wage increases together with an expanded D.C. EITC should make work pay more effectively for lower-income working families. The District has raised the minimum wage from $8.25 per hour in 2013 to $11.50 for 2016 and expanded the already significant D.C. EITC for childless workers. About half of District families who will benefit from the higher minimum wage have incomes below or near the poverty line – a group that should also benefit from the D.C. EITC. The expanded childless worker D.C. EITC should mitigate the harsh reality that America taxes into poverty certain low-wage workers.

Twenty-six states and the District have EITCs that build on the antipoverty benefits of the federal EITC. While twenty-four of these EITCs are refundable like the federal EITC, including New York and California,[4] the balance or three states, including Ohio, Virginia, and Delaware, have nonrefundable EITCs. Washington has a refundable EITC, but with no state income tax it has not been funded to date. In addition, there are eight states without any state income taxes on wages including Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, and Wyoming. Thus, almost 70% or 34 states, plus the District of Columbia, either don't impose an income tax, offset the income tax, or even subsidize low-income wage earners.

State EITCs are simple to administer and implement because they piggyback on the federal EITC traditionally as a percentage ranging from 3.5 to 40%. The District's EITC is the highest in the nation at 40% of the federal EITC for workers with children and about 100% of the childless worker EITC beginning in 2015. The most recently available data, for the 2011 tax year, reveals that 56,000 D.C. tax filers claimed more than $53 million in D.C. EITC, with an average benefit of $954 per household. Similarly, for the same tax year, 54,000 taxpayers claimed $110 million in federal EITC averaging $2,100 per household. With more than $3,000 in average EITC benefits going to working D.C. families, low wages are being meaningfully supplemented. Because these tax benefits are life-changing to these families, it is important to ensure that families receive these benefits and get to keep them. D.C.'s EITC participation rate is just over 75%, about 5% below the national average of 80%. Based upon these numbers 18,000 D.C. taxpayers are not receiving over $35 million dollars of federal EITC for which they are eligible. Tax justice advocates are trying to remedy this gap.

D.C. Tax Justice Advocates Serving the Public Good by Lifting Families Out of Poverty

The District has several tax outreach and education nonprofits that provide free access to tax justice for qualifying D.C. taxpayers.

4 The states with refundable EITCs include California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Maryland, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Washington, Wisconsin, Vermont, and the District of Columbia.

Community Tax Aid (CTA)
www.communitytaxaiddc.org

"Providing Free Tax Assistance to Those in Need"

> *A 2015 Favorite Place to Volunteer (Washington Post Poll):*
> "The best volunteer work there is, because you are providing an obviously important service to people who genuinely benefit from high-quality tax preparation, maximizing the tax benefits they qualify for, and saving them a couple hundred in fees." *Katherine Lucas McKay, Silver Spring*

Under the leadership of Teresa Hinze, Executive Director, and Miren Beitia, Program Coordinator, CTA is on the front lines year-round assisting lower income families prepare and file accurate and timely federal and D.C. tax returns to ensure that they receive the full value of EITCs and other tax benefits. These free services save taxpayers many hundreds of dollars in tax preparation and filing fees, which exponentially benefit their households and communities.[5]

During the 2012 filing season, CTA volunteers helped 5,500 taxpayers receive over $7.4 million in federal and state tax refunds.

Over 500 volunteers annually donate their time and expertise to CTA clinics located in libraries, churches, and community centers in Washington, D.C.; Montgomery and Prince George's Counties in Maryland; and the City of Alexandria, and Arlington County in Virginia. During the 2012 filing season, CTA volunteers helped 5,500 taxpayers receive over $7.4 million in federal and state tax refunds.

CTA was founded in 1987 by an engaged group of tax professionals and concerned citizens who recognized a growing need for free tax preparation, filing, and representation services for low-income taxpayers in the Washington, D.C. area. Due to the increased complexity of the tax system, these individuals sought change within their community, especially for taxpayers with limited education or English language skills.

One of the 2016-2018 Christine A. Brunswick Public Service Fellows, Laura LaPrade,[6] a recent graduate of the University of the District of Columbia, David A. Clarke School of Law, is now working with CTA. Laura represents clients in tax controversies, engages in educational outreach projects, and plans to develop a network of pro bono tax attorneys who will provide assistance to low-income taxpayers.

Low Income Taxpayer Clinics in the District

The Janet R. Spragens Federal Tax Clinic, Washington College of Law, American University
www.wcl.american.edu/clinical/federal.cfm | https://www.youtube.com/watch?v=FP5Ifn1fSbU

Located in a brand new building in the heart of D.C., Nancy Abramowitz, Clinic Director and Professor

5 *See* Paul Weinstein Jr., & Bethany Patten, *The Price of Paying Taxes II: How Paid Tax Preparer Fees Are Diminishing the Earned Income Tax Credit (EITC)*, Progressive Policy Institute: (Apr. 2016) (stating that in a survey of storefront operations in Washington D.C. tax preparation fees for EITC recipients ranged between 13% and 22% of the average EITC; that is, with average federal and D.C. EITCs of $3,000, the fees ranged between $390 and $660).

6 For more information about the Christine A. Brunswick Section Fellowships, see http://www.americanbar.org/groups/taxation/awards/psfellowship.html.

of Practice of Law, [7] and Janet Mueller, Practitioner in Residence,[8] work with students to represent low-income taxpayers in the District. Named after Professor Janet R. Spragens, the Section's legendary pro bono advocate and maven,[9] American University's Federal Tax Clinic is a litigation clinic offering legal representation for clients before the Service in appeals conferences and, if the cases do not settle, in U.S. Tax Court. Clinic clients who come from diverse backgrounds and walks of life frequently face barriers such as lack of language proficiency, accounting skills, education, and cultural familiarity. Clinic student attorneys meet regularly with supervisors to discuss cases and strategies, as well as attend a weekly three-hour seminar. The seminar encompasses group case reviews and discussions of other substantive, procedural, and ethical issues related to tax representation.

David A. Clarke School of Law, University of the District of Columbia (UDC-DCSL)
http://www.law.udc.edu/?page=LITClinic

Under the Directorship of Associate Professor of Law Jacqueline Lainez,[10] the UDC-DCSL Low Income Taxpayer Clinic provides students with hands-on experience representing taxpayers who have active tax controversies pending with the Service and in U.S. Tax Court. Students represent qualifying District residents referred to the clinic by the government, and various local non-profit and advocacy organizations. LITC clients have no right to court-appointed attorneys and the vast majority cannot afford to hire private counsel. Tax controversy cases include EITC examinations, tax return audits resulting in tax deficiencies, and the denial of other tax credits.

In addition to representation, the LITC conducts tax outreach events in the community to advise District residents of their rights and responsibilities as taxpayers. Many of these outreach events are conducted in immigrant communities and are conducted in Spanish and Amharic. Participation as a law student in the LITC is good preparation for a poverty law practice, a general law practice, or a future career as a tax attorney.

Pro Bono Tax Law Matters in the District

Supplementing the above and more, the District is home to the Section's office located at 1050 Connecticut Ave. N.W. Suite 400, where together with outstanding and dedicated colleagues, Derek Wagner, Pro Bono Counsel,[11] manages the Section's pro bono efforts, Low Income Taxpayer Clinic relationships, Christine A. Brunswick Fellowship outreach and selection process, and exempt organization support.

Next time you find yourself visiting our nation's Capital (e.g., next May meeting), please consider supporting these social justice advocates delivering pro bono tax services to our less fortunate and vulnerable D.C. neighbors. ■

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7 Nancy Abramowitz specializes in taxation, employee benefits, general business law and alternative dispute resolution. She has served on the Section (Low Income Taxpayer Committee); Board of Academic Advisors, and The Theodore Tannenwald, Jr. Foundation for Excellence in Tax Studies. She is a volunteer mediator/arbitrator for the D.C. Superior Court and volunteer mediator for the U.S. District Court for the District of Columbia. She is also trustee for the Abe Foras Memorial Fund, John F. Kennedy Center and former partner at Arnold and Porter.

8 For more about Janet Mueller, see www.wcl.american.edu/faculty/jmueller/.

9 For information about the Section's Annual Janet R. Spragen Pro Bono Award and named awardees, see http://www.americanbar.org/groups/taxation/awards/probono.html.

10 For Professor Lainez' faculty biography, see http://www.law.udc.edu/?page=JLainez.

11 Derek B. Wagner, Pro Bono Staff Counsel, can be reached at (202) 442-3425, or Derek.Wagner@americanbar.org.

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PRO BONO MATTERS

Characterizing Loss: Tax Consequences for Victims of the 2014 SR530 Landslide

By **Joanna Sylwester**, LL.M. Candidate, University of Washington

As tax attorneys, we are taught to see loss as a number. Loss is malleable: losses are captured, losses are spread over a period of years, and losses can be a benefit to our clients. The term *loss*, however, means something different to tax attorneys than it does to others. To victims of natural disasters, a loss is not a number, but something that is felt; it is something that is grieved.

On March 22, 2014, the small rural community of Oso, Washington suffered the deadliest landslide in U.S. history.[1] The landslide itself covered one square mile along State Route 530, damming the Stillquamish River and causing severe flooding to the surrounding area.[2] Forty-three people died because of the landslide, and forty-nine homes were consumed. Flooding damaged dozens more.[3] Washington State and FEMA declared a State of Emergency almost immediately,[4] and President Obama declared a federal disaster on April 2, 2014 as the death toll and the extent of the devastation continued rising.[5] FEMA provided more than two million dollars of individual and household program assistance and 27 million dollars of public assistance grants.[6]

The residents of the slide area needed assistance of all kinds, and Snohomish County Legal Services[7] did its part by sponsoring a clinic to aid the victims of the SR530 landslide. The clinic was held at a small chapel located less than a mile from the slide zone—the same chapel where President Obama spoke following the disaster. A group of attorneys and CPAs gathered there to meet the victims and help them if they could. Some of the victims had appointments, some walked in, but all had questions about how the tax laws would characterize their losses.

In the aftermath of an overwhelming tragedy, victims of natural disasters almost always face certain questions that most people need never consider in their lifetimes. These questions relate to traumatic life events that carry with them additional worries about tax consequences. Is the aid that city, county, state and federal governments or charities have provided treated as includible income? What about the mortgage on that

1 Christopher Burt, *Worst Landslides in U.S. History*, *Wunderground* (Mar. 31, 2014).

2 *See* *Mudslide Survivors, Rescuers Tell Their Stories of Tragic Day*, Seattle Times (Mar. 29, 2015).

3 *See* id.

4 *Disaster Resources, Washington State Oso Mudslide Resources, March 25, 2014* (describing various agency responses to the emergency and emergency assistance available).

5 ICTMN, *President Declares Major Disaster in Oso, Washington as Landslide Deaths Reach 29* (Apr. 3, 2014).

6 FEMA, *Washington Flooding and Mudslides (DR-4168)*.

7 http://www.snocolegal.org/

destroyed home for which the bank forgave the remaining balance due—is mortgage forgiveness taxed? What if the assistance comes in the form of payments to repair or rebuild property that was destroyed by the disaster—is that income? These are the kinds of questions to which any group of attorneys dealing with victims of natural disasters will need to respond with practical, easy to understand information about the rules that apply and how they affect disaster victims.

I. Is Aid Includible in Victim's Income?

Victims of natural disasters receive aid from a number of sources, including local governments, FEMA, the Red Cross, and other non-profit organizations. Payments from these organizations can be for food, temporary housing, medical supplies, and other living expenses or they can assist victims in replacing or repairing damaged or destroyed property.

Victims of federally declared disasters—such as the SR530 landslide—receive tax protection under section 139 (titled "Disaster Relief Payments"). That section provides that qualified disaster relief payments are excludable from the recipient's income.[8] These payments are not subject to employment taxes such as Medicare, Social Security, or federal unemployment taxes, and no withholding applies to these payments.[9] Qualified disaster relief payments are amounts paid "to or for the benefit of an individual" as a result of a federally declared disaster for living or funeral expenses or repairs and replacements of homes and contents damaged or destroyed by a "qualified disaster," or paid to an individual from common carrier businesses when a death or personal injury is a result of a "qualified disaster," or paid by federal, state or local governments or agencies for the public welfare in connection with a "qualified disaster."[10]

Under this provision, for example, those FEMA payments to individual victims are not taxable income to the extent the payments did not cover expenses otherwise covered by insurance proceeds. Similarly, cash assistance through section 501(c)(3) charitable organizations to cover disaster victims' personal expenses and assist with the repair of their residences are not income to the taxpayer victim.[11]

II. What Are the Tax Consequences in Respect of Property Losses?

Natural disasters can affect property in any number of ways: property can be directly demolished or destroyed, or property can be at risk of future ecological consequences. Aside from the emotional impact that property damage can have on victims, this damage and risk of future damage can diminish the value of property and thus affect the tax treatment of transactions in connection with that property in the future.

8 IRC § 139(a). *See also* IRS Pub. 547, Casualties, Disasters, and Thefts (2015) at 13-15.

9 IRC § 139(d).

10 IRC § 139(b). Section 139(c)(2) defines "qualified disaster" for these purposes to include federally declared disasters..

11 IRC §139(a), (b). The Service formerly took a narrower view of what constituted charitable assistance not subject to taxation, limiting it to assistance to the poor to meet basic needs; but in the aftermath of the September 11, 2001 terrorist attack on New York City and the later anthrax attacks that same year, the Service broadened its interpretation of the kinds of needs for which a charity could provide cash assistance without regard to the financial status of the victim to include such things as assistance allowing a surviving spouse to remain at home with young children; assistance with elementary, secondary, and higher education costs; assistance with rent; mortgage payments or car loans that help prevent further loss and trauma to families; and travel costs for family members to attend funerals and comfort survivors. *See* IRS Pub. 3833, *Disaster Relief: Providing Assistance Through Charitable Organizations* (2002) (applying a "needy and distressed" test). *See also* IRS Pub. 3833 (rev'd Dec. 2014). The terrorist attacks also led Congress to pass legislation to provide special relief for victims: the Victims of Terrorism Tax Relief Act of 2001, Publ. L. No. 107-134 (Jan. 23, 2002), added section 139 to the Internal Revenue Code, among other changes. The explanation of the Act made clear that exempt organizations' cash relief to victims for this broader definition of needs was covered.

A. What is the relationship among property destruction, insurance recovery, and the exclusion of gain on a principal residence?

If a disaster victim's principal residence is destroyed, the destruction may be treated as a sale for purposes of the tax provisions governing the exclusion of gain from the sale of a principal residence. The victim may recognize gain, however, to the extent that insurance proceeds or other compensation received for the property exceed the taxpayer's basis in the property.[12] Under section 121, gain may be excluded up to $250,000 ($500,000 for married filing jointly) so long as the house was the taxpayer's primary residence for two of the past five years.[13]

A natural disaster does not necessarily come with debt relief. To the extent mortgages, credit card debt, and car loans are forgiven, however, disaster victims may be subject to tax on cancellation of debt income ("COD income") unless an exception under section 108 applies. These exceptions include insolvency and bankruptcy, and qualified principal residence indebtedness income.

Additionally, because the destruction is considered an involuntary conversion of the residence, any gain in excess of the $250,000/$500,000 section 121 cap may also be deferred by buying similar or related replacement property under section 1033, so long as:

1) The gain is used to purchase property that is similar or related in service or use to the home; and

2) The purchase is made within 2 years (or 4 years after any payment is received if the receipt of insurance proceeds or other payment is deferred).[14]

B. What is the tax consequence when debt on property is forgiven?

A natural disaster does not necessarily come with debt relief. To the extent mortgages, credit card debt, and car loans are forgiven, however, disaster victims may be subject to tax on cancellation of debt income ("COD income") unless an exception under section 108 applies. These exceptions include insolvency and bankruptcy, and qualified principal residence indebtedness income.[15] This latter exception, originally enacted in the Mortgage Forgiveness Debt Relief Act of 2007 as a temporary provision, extended through 2014 and then again recently extended through 2016, allows taxpayers to exclude up to $2 million (if married filing jointly) of COD income on their principal residence.[16] "Qualified principal residence indebtedness" is debt

12 IRS Pub. 547 at 6 (2015).
13 IRC §121.
14 IRC §1033.
15 IRC §108.
16 Tax Increase Prevention Act of 2014, Publ. L. No. 113-295 (2014) (extending the provision through the end of 2014); Protecting Americans from Tax Hikes Act, Publ. L. 114-113 (2015) (in Division Q of the Act, excluding discharges through 2016 and after 2016 if there is a binding written agreement before January 1, 2017).

Excluding qualified principle residence income under these circumstances would prevent disaster victims from receiving big tax bills at the very time he or she is scrounging for assets to meet immediate needs after the emergency. Otherwise, this could comes at a time when a victim has no assets with which to pay the tax on what seems, at this point, like phantom income.

secured by and used to buy, build, or substantially improve the taxpayer's principal residence.[17]

This exception is particularly important for victims of natural disasters for two reasons. First, the application of this exception is efficient since it can apply in a number of circumstances likely to arise as a consequence of a major natural disaster. As a result of floods, tornados or landslides, some victims abandon their property because it is unsafe to return; some victims give up their property under provisions for deed in lieu of foreclosure because the value of the property has dropped so drastically that it cannot be sold; and some face foreclosure. In each of these situations, the exception for income from cancellation of qualified principal residence debt provides relief from what would otherwise be an additional burden of likely tax liability for disaster victims.

Second, from a policy perspective, excluding qualified principal residence income from COD income provides genuine financial protection for victims. Excluding qualified principle residence income under these circumstances would prevent disaster victims from receiving big tax bills at the very time he or she is scrounging for assets to meet immediate needs after the emergency. Otherwise, this could comes at a time when a victim has no assets with which to pay the tax on what seems, at this point, like phantom income.

Finally, it is worth noting that this protection is limited. The protection only insulates a taxpayer on the sale of the taxpayer's true home (in tax jargon, the "principal residence"): other debt that is forgiven in connection with a disaster, even debt on a vacation home that is eligible for some interest deduction benefits, will be treated as COD income subject to tax. Furthermore, this exclusion is still a temporary provision, reflecting the view that the 2007-8 financial crisis created an especially difficult situation for many homeowners because of the high rates of mortgage indebtedness coupled with significant reduction in housing prices across most of the United States.

C. How does a taxpayer calculate tax losses from damages to property?

Disaster victims facing damaged property in need of repair who continue to have compensation and other income may be able to take advantage of a casualty loss in respect of the property under section 165(c)(3) for the taxable year that the disaster loss is suffered. In general, a casualty loss is a loss due to a sudden, unexpected, or unusual event such as fire, storm, terrorist attack, or vandalism.[18] The amount of the overall casualty loss is the decrease in fair market value of property due to casualty damage; but the amount permitted to be taken into account cannot exceed the taxpayer's basis in the property.[19] Additionally, insurance or other reimbursements reduce the amount of the casualty loss.[20]

17 IRC §108(h) (referring to section 163(h)(3)(B)'s definition of acquisition indebtedness). *See also* Mark Keightley & Erika Lunder, *Analysis of the Tax Exclusion for Canceled Mortgage Debt Income*, Cong'l Res. Ser. (RL34212, Dec. 30, 2015).

18 IRC §165(c)(3). *See also* IRS Pub. 547 (2015) (describing sudden, unexpected and unusual events).

19 Treas. Reg. §§1.165-1(c)(1), 1.165-7(b).

20 IRS Pub. 547 (2015).

To determine the amount of a casualty loss the taxpayer must:

1. Determine the adjusted basis in the property before the casualty;

2. Determine the decrease in fair market value of the property as a result of the casualty; and

3. Subtract any insurance or other reimbursement (such as FEMA payments specifically for property) received from the smaller of the amounts determined in steps one and two.[21]

The reduction in the amount of the casualty loss in step 3 does not, however, include any proceeds from insurance or FEMA (or similar agencies) that are used to provide for temporary living expenses in the wake of a natural disaster. It is therefore very important for victims to ascertain the purpose of any aid and insurance payments they receive.

The tax law also provides additional limitations to the casualty loss that can be reported on a victim's tax return. Under section 165(h)(1), the first $100 of the casualty loss is not permitted as a deduction. Moreover, section 165(h)(2) allows personal casualty losses to the extent of any personal casualty gains, but permits a taxpayer to take a net casualty loss into account only to the extent it exceeds 10 percent of the taxpayer's adjusted gross income. These limitations reduce the tax benefit of the loss, but nonetheless the law provides important support for victims of theft or casualties.

Finally, section 165(i) provides a measure of flexibility regarding the timing of use of casualty losses for victims in federally declared disaster areas. Under that section, the disaster victim may elect to take the loss into account for the taxable year immediately *preceding* the taxable year of the disaster. This ability to amend the prior year's return to take a casualty loss may provide much needed, immediate income in the form of a tax refund, especially for victims whose jobs have been stalled by the disaster, such as fishermen and waitresses in the areas affected by the BP oil spill or loggers in an area devastated by forest fires. Applying a casualty loss in the prior year may also mean more tax relief than would be available if the casualty loss were claimed in the year of the disaster.

III. What Do You Tell a Victim After Loss?

As discussed, there are several strategic decisions disaster victims must make about their losses to mitigate tax consequences. In Oso, those who volunteered could help victims understand the application of the rules discussed in this article about casualty losses, debt forgiveness, and exclusion of charitable or governmental assistance. At the chapel in Oso that afternoon, however, many of the victims did not come with questions about tax planning that could be answered with straightforward application of these rules. Their questions had more to do with how to take the next steps to deal with the loss of a home, its contents, and loved ones. Many victims wondered how to document the most basic facts of their new financial situation. Questions revolved around how to find a loved one's mortgage,

Finally, section 165(i) provides a measure of flexibility regarding the timing of use of casualty losses for victims in federally declared disaster areas. Under that section, the disaster victim may elect to take the loss into account for the taxable year immediately *preceding* the taxable year of the disaster.

21 *Id*.

and how to determine the basis of a home when all the records were destroyed. There were no easy answers for such questions.

The loss that these victims felt was more than just a number that could be entered on a tax return. Working with landslide victims that morning at the Oso Tax Clinic, volunteer attorneys heard stories of tragedy, bravery, and resilience. We hope the Tax Clinic and our efforts helped in some small way to contribute to the peace of mind of these courageous residents of Oso. ■

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PRO BONO MATTERS

An Interview with 2015-2017 Christine A. Brunswick Public Service Fellow Daniel Knudsen

By **Derek B. Wagner**, Pro Bono Counsel, ABA Section of Taxation, Washington, DC

Daniel Knudsen

The poverty rate on tribal reservations in 2010 was 28.4%, compared to a national poverty rate of 14.3%. It reached as high as 68% in some tribal areas. Unemployment rates are persistently high on reservations, and many communities suffer from low education levels, substandard housing, and poor health services. Given the challenges of poverty and the complex legal structure, Native Americans and their tribes have a unique set of needs within the tax system.

Historically classified as "domestic dependent nations," Indian tribes are semi-sovereign entities with distinct political identities within the borders of the states in which they reside.[1] Subject to limitations set by Congress, tribal governments retain the attributes of sovereignty within their territory, including the power to regulate tribal membership, establish courts, regulate tribal and individual property, and provide governmental services.[2]

According to the 2010 U.S. Census, approximately 5.2 million people identified as American Indian or Alaskan Native, either alone or in combination with one or more other races, and approximately 1.1 million of those lived on tribal reservations.[3] The poverty rate on tribal reservations in 2010 was 28.4%, compared to a national poverty rate of 14.3%. It reached as high as 68% in some tribal areas. Unemployment rates are persistently high on reservations, and many communities suffer from low education levels, substandard

1 *See, e.g.*, Cherokee Nation v. The State of Georgia, 30 U.S. 1 (1831); IRM 4.86.1.11, *Tribal Sovereignty Overview* (Feb. 18, 2015).

2 IRM 4.86.1.11, *Tribal Sovereignty Overview* (Feb. 18, 2015).

3 *2010 Census Briefs: The American Indian and Alaskan Native Population: 2010*, U.S. Census Bureau (Jan. 2012), available at: http://www.census.gov/aian/census_2010/.

housing, and poor health services.

Given the challenges of poverty and the complex legal structure, Native Americans and their tribes have a unique set of needs within the tax system. At Oklahoma Indian Legal Services (OILS), Daniel Knudsen is working hard to make a difference. Dan is a 2015-2017 Christine A. Brunswick Public Service Fellow, engaged in tax representation and outreach for taxpayers throughout Oklahoma, with a focus on the experiences of Native Americans.

ABA Tax Times (ATT) recently reached out to Dan to learn more about his work as a Public Service Fellow.

ATT: Can you tell us a little about your background, both in and out of tax?

DK: I am originally from Montana. I am a Kootenai Indian. I have two families, an old Montana farming and ranching family from the eastern side of the state that originally homesteaded in Montana and an even older Native American family on the western side of the state. My tribe is the Confederated Salish & Kootenai Tribes of the Flathead Reservation. Our reservation is the most beautiful place in the world, located just below Glacier National Park on Flathead Lake.

I always wanted to be a lawyer, but felt it was something that was beyond my reach. There were not a lot of Native American lawyers as role models when I grew up, so I always feel like I lacked role models to lead the way. I just did not really know how to get where I wanted to go. I originally began college and studied Public Relations. I still wanted to be a lawyer and had developed a love and knowledge of tax law, but nonetheless went on to graduate school for a master's in public communication. I worked in the Public and Governmental Relations Department of the U.S. Forest Service Region One. I did public relations projects and am fortunate that they gave me a lot of freedom in that position. I was able to "roam around" exploring and discovering new and amazing things to learn about. I went to the University of Montana School of Law and spoke with a professor named Martin J. Burke. I had no idea that he was a god of tax law and had taught at NYU, the University of Washington, and had written one of the most-used Federal Income Tax case law books. I explained what I wanted to do (tax law), and he told me to take my LSAT and come back.

Around this time, I was selected by the Morris K. and Stuart L. Udall Foundation, a federal agency dedicated to the promotion of Indians and the environment, to be a 2011 Native American Congressional Intern. The agency moved me to Washington, D.C., where I spent a summer working for Senator Mark E. Udall of Colorado. There, I realized that regardless of what you want to do, the foundation necessary is the law. So I took the LSAT and applied to law school. I attended the University of Montana because of its federal Indian law program. During the summer after my first year of law school, I participated in the ABA Judicial Internship Opportunity Program, where I had the opportunity to intern for Judge Irma Carrillo Ramirez at the U.S. District Court for the Northern District of Texas. Legal writing had been a challenge for me that first year, but Judge Ramirez really taught me to write that summer. She really is exceptional at a host of things, and notably her written opinions. I knew I wanted to learn more about tax and business law, but because Montana is such a small school, there were not a lot of tax opportunities. In my second year, I took Federal Taxation from Professor Burke, and also applied to the ABA Business Law Section Diversity Clerkship program. I was accepted and, that summer, had the opportunity to work for Judge Gail A. Andler at the California Superior County of Orange Complex Civil Court. Judge Andler hears complex Orange County business cases and California Franchise Board tax cases. I learned more that summer than at any other period of time in my life. It instilled a deeper desire to learn tax—and especially tax controversy. During my last year of law school, I did a tax controversy clinic at Montana Legal Services.

Often, the general public misunderstands the lives we Native Americans lead. There are unending laws and provisions which govern our daily lives which do not impact the lives of non-Indians. For example, we have a separate probate system at the U.S. Department of the Interior, and our adoptions are made pursuant to federal law. At every step of the way, our lives are regulated very differently from those of non-Indian people. Tax is no different.

ATT: What made you apply for the Fellowship?

DK: I applied for the fellowship because I wanted to be able to make an impact on the tax experiences of my fellow Native Americans. Often, the general public misunderstands the lives we Native Americans lead. There are unending laws and provisions which govern our daily lives which do not impact the lives of non-Indians. For example, we have a separate probate system at the U.S. Department of the Interior, and our adoptions are made pursuant to federal law. At every step of the way, our lives are regulated very differently from those of non-Indian people. Tax is no different. One look at the General Welfare Exemption, at commentary regarding Section 139E of the Internal Revenue Code, or the Indian Financing Act of 1974 can give you an idea of the complexity in determining which types of income can be exempt for Indian people. Administering the Affordable Care Act is another major issue. Historically, our healthcare has been provided by the Indian Health Service. Through treaties with the different tribes—in my tribe's case, the Hell Gate Treaty of 1855, the federal government promised to provide for the health needs of tribal members in perpetuity in exchange for our relinquishing our rights to vast portions of the United States. The ACA impacted this treaty-based system. Indians and individuals who receive health care from the Indian Health Services are exempt from the individual mandate of the ACA because we already have an entitlement to federal health care. Anyone who has applied for ACA health care has seen the questions about whether one is an Indian. The IRS does not know who is an Indian, so we are required to apply and send in our tribal documents and receive an exemption number in the mail. That number exempts us from the individual mandate of the ACA for life.

The exemptions, however, are processed by the government Health Insurance Marketplace and impact taxes administered by the U.S. Treasury Department. The rules can be confusing. For example, a non-Indian woman bearing the child of an Indian receives an exemption while carrying an Indian's baby because she can access Indian Health Service care. Once the baby is born, the baby receives a life exemption upon application and the mother's exemption disappears. Moreover, it is terribly tough to get Native people to fill out the ACA exemption paperwork. Our ancestors traded great lands integral to this country in exchange for health care, and many feel that the federal government is breaking this promise to our people by charging us the tax penalty unless they apply for exemption. Because of this, individual Indians often do no seek the exemption. And since the exemption is a required part of the tax return, their returns may be rejected as incomplete. Overall, the tax perspective of the individual Indian is threatened under this new regime.

I applied to be a Fellow in order to aid the individual tax experiences of the members of the 39 tribes of Indians of Oklahoma in the hopes that I might take away some of the mystery and confusion that surrounds the exemption here.

ATT: How did you come to choose OILS as your sponsoring organization?

DK: As I mentioned above, I wanted to work in a position that would allow me to focus on the tax issues that Native Americans face. I first approached Montana Legal Services, where I had done my third-year clinic in Native taxation. When that approach did not materialize, I moved on to the LITC in a state with even more Indian tribes and Native peoples, Oklahoma. Oklahoma Indian Legal Services was incredibly interested and had loads of tax work ready for me, so it has been a win-win situation, despite the ongoing threat of tornadoes.

ATT: Please tell us about the work you do. What sort of projects are you working on?

DK: I do all aspects of tax controversy. I have had big cases and small cases. Most involve non-filing or compliance issues. I have been successful and have developed a great working relationship with the local IRS folks here, who have been helpful along the way. They often tutor me on how best to proceed when I am learning or unsure. They have been great. I have been doing education and outreach on many issues which touch Native people, such as Earned Income Tax Credit issues and how the IRS rules apply to family structures in tribal communities. We sometimes do not have the same family structures as non-Indian communities. For example, the Crow people of Montana give their oldest child to their grandparents to care for them in their old age. Such arrangements can impact dependency deduction claims, but the tax code is difficult to understand on this issue. So I educate and inform. The Chickasaw Nation of Oklahoma has generously provided me with an outlet on their public radio system so that I can broadcast a call-in tax question-and-answer show. It gets rebroadcast around the state of Oklahoma at certain times (3:00 a.m. likely). I've never heard it, but people have and tell me they learn from it. I also write a repeating piece for the tribal newspapers here. I cover topics like the ACA exemption and Form 8857 for Innocent Spouse Relief. The tribes have requested more articles; I just have not been able to write as many as I would like. I believe the circulation is 54,000 households, or at least that is what I was told. I also hold tax outreach and education events in conjunction with will clinics. There is a big push in Indian Country to get every Indian to make a will, because there are some complex laws, including the American Indian Probate Reform Act,[4] which affect how our property is inherited at our death. Other than that, I do controversies of all sorts, big or small. I think I opened 5 new cases last week and have closed 4 already this week. I'm busy and I work fast (or so they tell me). I don't know, I just love tax.

ATT: What has been your biggest challenge so far?

DK: My biggest challenge to date has been grasping the procedural aspect of the IRS and its operations. I'm lucky that my local IRS office is so helpful and I can go down and bug them or bug the local Taxpayer

4 *See also* American Indian Probate Reform Act of 2004, with Dec. 2, 2008 Technical Amendments Incorporated.

Advocate for help. The local Oklahoma City field office has been an outstanding resource. Ms. Denny, Mr. Allison, Mr. Howe, Mr. Higginbotham, Ms. Hensley, and Mr. Suarez all work hard to assist me in seeking tax solutions for my clients. If I had to wait 6 hours on the phone to get anything done only to receive a "courtesy disconnect" I don't know what I would do.

ATT: What has been the most rewarding part of your Fellowship?

DK: The most rewarding aspect of my fellowship has been the people I have been able to successfully help. They are so grateful. To them, tax seems like such a mystifying world. To me, tax is a blast. It is that Rubik's cube of fun that makes the rest of the world possible. Line up all the colors: schools, fire stations, entitlement programs, and roads all pop up. Another rewarding part of my fellowship is the people you meet along the way and the happiness they experience when their tax controversies get resolved. Earlier this month I helped a disabled retired woman go from owing $145,000 to the IRS all the way to receiving a $100 refund. She was so grateful and thankful, it blew me away. Just today, again, another disabled retiree who owed $60,000 settled her case with the IRS Offer In Compromise office for $7,500. She can now go on and enjoy being retired like she should. We even helped one client find $111,000 in a bank account she hadn't known about; it was set up by her deceased spouse without her knowledge.

ATT: Do you have any immediate plans for after the Fellowship? How has the Fellowship impacted your career goals? Do you expect to stay with your sponsor organization after the Fellowship has ended?

DK: I don't have any immediate plans. Montana Legal Services has tax people in place, so going home to Montana isn't on my immediate radar. Oklahoma Indian Legal Services has Mark Widell, who is a good mentor, so they are covered. By then I hope to have finished the LLM program at Georgetown University and have both my SALT Certificate and my International Tax Certificate, so maybe I will be doing something with those. I will say that I have become fascinated by SALT taxation and the never-ending varieties of issues that crop up. It really has opened up a whole new world of controversy that seems fascinating. Maybe I will be doing something there as tribes and states often find themselves fighting over tax. Who knows? One day at time. ■

The most rewarding aspect of my fellowship has been the people I have been able to successfully help. They are so grateful. To them, tax seems like such a mystifying world. To me, tax is a blast. It is that Rubik's cube of fun that makes the rest of the world possible. Line up all the colors: schools, fire stations, entitlement programs, and roads all pop up.

Since 2009, the Section has funded two Christine A. Brunswick Public Service Fellows each year, including these amazing young lawyers. Details about the Fellowship are available at http://www.americanbar.org/groups/taxation/awards/psfellowship.html.

2009-2011
Laura Newland (AARP's Legal Counsel for the Elderly, Washington, DC)
Vijay Raghavan (Prairie State Legal Services, Rockford, IL)

2010-2012
Douglas Smith (Community Action Program of Lancaster County, PA)
Katie Tolliver Jones (Legal Aid Society of Middle Tennessee and the Cumberlands, Nashville, TN)

2011-2013
Sean Norton (Pine Tree Legal Assistance, Inc., Portland, ME)
Anna Tavis (South Brooklyn Legal Services/Immigrant Workers' Tax Advocacy Project, New York, NY)

2012-2014
Ana Cecilia Lopez (University of Washington, Low-Income Taxpayer Clinic, Pasco, WA)
Jane Zhao (Center for Economic Progress, Chicago, IL)

2013-2015
Susanna Birdsong (National Women's Law Center, Washington, DC)
Susanna Ratner (SeniorLAW Center, Philadelphia, PA)

2014-2016
Patrick Thomas (Neighborhood Christian Legal Clinic, Indianapolis, IN)
Lany Villalobos (Philadelphia Legal Assistance, Philadelphia, PA)

2015-2017
Daniel Knudsen (Oklahoma Indian Legal Services, Oklahoma City, OK)
Frank DiPietro (Ronald M. Mankof Tax Clinic and the Center for New Americans, Minneapolis, MN)

2016-2018
Laura LaPrade (Community Tax Aid, Inc., Washington, DC)
Catherine Strouse (Legal Aid Society of San Diego, San Diego, CA)

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IN THE STACKS

Legal Guidance for Same-Sex Couples Considering Marriage

Book Review by: **Patricia A. Cain**, Professor of Law, Santa Clara University, Aliber Family Chair in Law, Emerita, University of Iowa

WHETHER TO WED: A LEGAL AND TAX GUIDE FOR GAY AND LESBIAN COUPLES, BY SCOTT E. SQUILLACE, PAPERBACK, $32.55 (DECEMBER 15, 2013), ISBN-10: 098604900X; ISBN-13: 978-0986049002

Tax law became somewhat simplified for same-sex couples on June 26, 2013, the date of the *Windsor* opinion.[1] It became even more simplified on June 26, 2015, the date of the *Obergefell* decision.[2] Scott Squillace's book, *Whether to Wed*, was published in the interim between *Windsor* and *Obergefell*, but the book continues to set forth important issues for same-sex couples to consider as they ponder whether or not to marry. Of course, now that we live in a world of marriage equality going forward, the issues are pretty much the same for opposite-sex and same-sex couples.

The book is directed at lay couples, not lawyers. But for any lawyer who has LGBT[3] clients it would be a useful read, especially for any lawyer who has not engaged with the many questions raised by same-sex couples after the *Windsor* decision. After *Windsor*, many practitioners in the LGBT community found themselves being asked for advice on the whether-to-wed question. In response to that question, I suggest offering the client a copy of this book. No one should make such an important decision on the basis of how tax law and other federal benefits apply to married couples. However, no one should marry without understanding the consequences of that decision. This book explains the most important consequences.

The first three chapters of the book present background information on the struggle by the LGBT community to gain the right to marry. These chapters include historical detail on the meaning of marriage as an institution, useful information on the LGBT community, and discussion of the widespread litigation efforts around the country that would eventually lead to the *Obergefell* decision, which would establish the right to marry for same-sex couples. The story of Edith Windsor and her spouse, Thea, is highlighted. Windsor's battle against the IRS, claiming she was entitled to a marital deduction for her deceased spouse's estate, resulted in the demise of federal discrimination against same-sex spouses. The Defense of Marriage Act

1 United States v. Windsor, 133 S. Ct. 2675 (2013).
2 Obergefell v. Hodges, 135 S.Ct. 2584 (2015).
3 Lesbian, Gay, Bisexual, Transgender.

(DOMA)[4] enacted in 1996, eight years before same-sex marriage was legal anywhere in the United States, forbade the federal government from treating same-sex spouses as legally married. The *Windsor* Court ruled that such a ban violated the equality principle in the Fifth Amendment.

With DOMA gone, and with the IRS pronouncement[5] that it would recognize all marriages validly entered into in a state that recognized the marriage no matter where the couple might reside, same-sex couples began considering the marriage question more seriously. Chapter Four then sets forth the various considerations at the federal level. Will the couple face a tax penalty or bonus by filing jointly? It depends, of course, on how much each spouse earns. Squillace uses examples that can explain the effect of joint filing even to clients who might suffer from math anxiety.

The penalty, however, may come from things other than the rate structure. For example, one spouse might have been receiving tax-free social security benefits, but when her income is aggregated with that of her spouse, she may find herself over the income limit for the exclusion of such benefits.[6] And Squillace also points out what so many have asked when faced with this taxation of social security dilemma. What if I just file separately? Ah, then, you cannot exclude any of your social security benefits. Why? Because there are special rules for married people who file separately.

Squillace covers this married-filing-separately terrain in more detail. He lists all of the tax benefits one might lose if filing separately. He also identifies the key tax benefits of being married, including tax-free health care coverage provided by one spouse's employer to the other spouse, the ability to exclude up to $500,000 of gain on the sale of a principal residence even if only one spouse is the owner,[7] and the ability to shift the tax burden on alimony at divorce[8]. In fact, just knowing for certain what the rules are for both alimony and property divisions at divorce is a huge benefit of the *Windsor* decision.

In addition to tax law, the book discusses other federal laws that are implicated by the recognition of a couple's marriage, both going forward and retroactively for any issues that are still open. These include social security, ERISA, federal pension benefits, Veteran's Benefits, immigration, and bankruptcy. The reader should be aware, however, that this book was written when there was ongoing debate about which federal agencies would recognize which marriages. For example, the Social Security Administration is bound by statute to recognize only those spouses who are domiciled in states that recognized their marriage.[9] Post-*Obergefell*, of course, all states must recognize such marriages.

Chapter 5 addresses the pros and cons of marriage at the state level. At the time the book was written these pros and cons only existed for spouses who lived in recognition states. Today all of these state law considerations should be relevant in all states since all states must recognize same-sex marriages.

One key consideration is the existence of certain marital property rights. I do have one quibble here. Although

4 Pub. L. No. 104–199, 110 Stat. 2419 (Sept. 21, 1996), 1 USC § 7 and 28 USC § 1738C.
5 *See* Rev. Rul. 2013-17.
6 *See* IRC § 86.
7 *See* IRC § 121.
8 *See* IRC §§ 71, 215.
9 Note that spousal social security benefits are also extended to registered partners if the partner inherits a spousal share under state intestacy laws, which is the case for all partners who are treated as spousal equivalents and even for some partners who are accorded fewer rights but are granted intestacy rights. That is because the language in the Social Security Act treats as a spouse anyone who would inherit as a spouse under state intestacy law. *See* 42 USC § 416(h)(1)(A)(ii).

Squillace correctly describes the effect of the community property regime on spouses, his description of the tax consequences is misleading. Yes, each spouse has to report 50% of the community income and claim 50% of the deductions, but that division is irrelevant if the couple is filing a joint tax return.

In addition, although he correctly identifies Nevada (a non-recognition state at the time the book was written) as a community property state that applies community property rules to registered partners, he fails to explain the problem that exists for such couples. It is a problem that existed before *Windsor* and it continues to exist. Registered partners in California, Nevada, and Washington are all subject to the state community property rules. But the IRS 2013 revenue ruling[10] that established which marriages would count for federal tax purposes concluded that registered domestic partners (RDPs) and Civil Union Partners (CUPs) would not be treated as spouses. That has resulted in some strange tax consequences. Those states that do recognize such unions treat them the same as spouses, meaning that if there is a state income tax (e.g., California, but not Nevada or Washington) they must file as married. But when they file their federal returns, they must file as single. The consequences are even stranger for RDPs in the community property states who are required to file as single at the federal level. Since the Service does recognize state property law, including community property rules, the Service will apply those rules to RDPs in the three community property states. That means that under *Poe v. Seaborn*[11] all community income and deductions must be split 50/50.[12]

In Appendix A, which describes the marriage states, the Registered Domestic Partnership/Civil Union states, and the non-recognition states, I have another quibble. Since California and Washington were marriage equality states as of the writing of the book, the author identifies them as such and fails to discuss the possibility of partnership registration in those states. This shortcoming is mitigated by Appendix D which describes the relationship recognition history of all states and includes marriage recognition as well as alternatives to marriage, such as registered partnerships and civil unions. Both Appendices are very useful in giving the marriage history of the first states to recognize same-sex marriage. They are also useful as historical descriptions of where the non-recognition states stood on the issue as of late 2013.

In fact, all of the appendices are valuable. What are the best web resources? See Appendix B. Are any of the terms used in this discussion not clear? See the Glossary in Appendix C. What is the relationship recognition timeline for each state—as of late 2013? See Appendix D.

And so, in sum, this book is a good source of information about the things that same-sex couples have had to ponder after *Windsor* and *Obergefell*. Even though the book was written before *Obergefell*, the points about whether or not to wed remain important considerations. For anyone contemplating marriage, and especially for same-sex couples who may not have thought about these issues before, this book provides a good overview of what every couple ought to know. ■

Both Appendices are very useful in giving the marriage history of the first states to recognize same-sex marriage. They are also useful as historical descriptions of where the non-recognition states stood on the issue as of late 2013.

10 Rev. Rul. 2013-17.
11 282 US 101 (1930).
12 *See* CCA 201021050.

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PATHS IN TAX

Introduction to a New Feature: Paths in Tax

By **Matthew Sontag**, Tax Manager, RSM US, LLP, McLean, VA

One of the defining characteristics of the ABA Tax Section membership is the fascinating variety of our career paths. Each of us brings a different perspective to being a tax lawyer. Our unique backgrounds and experiences combine with the many possibilities within our profession to produce a profoundly interesting set of stories on how we each arrived where we are today, and where we want to go next. Many of these perspectives were captured in the book, Careers in Tax Law, a compilation of essays from more than seventy practitioners across our profession. This resource provided insight into our varied worlds—but as with any printed publication, it was a snapshot in time and limited in scope.

The evolution of the printed *NewsQuarterly* into the all-digital *ABA Tax Times* has made it possible to bring in additional content. As part of this process, we are launching *Paths in Tax*, a regular column that will feature career insights from different perspectives within our profession. Each issue of *Tax Times* will include a discussion with a different individual, highlighting their path, the challenges they have faced, and the solutions they have found to make their practice their own. Coupled with *People in Tax*, the interview column focused on the movers and shakers of our profession, we will seek to expand our perspective, to educate and entertain, and ultimately to deepen our collective appreciation for the practice of tax.

To kick off this process of exploration, let me start with updating my own story. My contribution to *Careers in Tax Law* focused on the power of "Showing Up"—the massive impact of the simple act of grabbing opportunities. In the intervening time, the power of Showing Up has truly been driven home. Each opportunity I've taken has multiplied into new opportunities, leading in different and unexpected directions.

One of the most interesting components of that journey was the chance to go in-house. After five years with Big Four accounting (itself a less than traditional path), one of my colleagues recruited me to join the headquarters tax planning group for a U.S.-based multinational. This was a chance I was open to, if not specifically seeking out, and I jumped at it.

I want to be clear at the outset that in-house roles are as varied as the professionals who fill them—no two are the same. The differences are sometimes fundamental gulfs rather than modest variations. This column will definitely explore others' experiences in different in-house roles. As for mine, it presented a very different set of challenges compared to client practice. To be fair, in many ways it still *was* client practice, just for a closely related set of clients. The key difference came in the scope: my colleagues and I were stewards not just of technical analysis, but of the mechanics of execution, in a seriously hands-on way.

When I made the switch, part of my rationale was to see transactions through "soup to nuts" and that rationale was realized in spades. As an in-house professional, a significant part of my work consisted of (almost literally) digging out the facts, and another significant part was doing post-transaction documentation,

Networking is every bit as critical in-house as in private practice. While it's true that you no longer live by the billable hour (and that really is as nice as it sounds), your ability to be effective depends directly on your ability to stay informed. Staying informed often depends directly on your network.

clean-up, and follow-up. Whether it was pouring over detailed trial balances and working with local accounting teams to figure out how (mechanically) to extract individual journal entries from the accounting systems or deciding what short phrase best describes the myriad contents of an Iron Mountain file box, the in-house role was at least one part project administrator for every part tax technician.

This beginning-to-end lifecycle involvement often facilitated one of the great joys of in-house work. Provided you have built the right relationships, you get involved long before there is the proverbial "chalk outline on the floor." Colleagues bring you in at the start, giving you the luxury of a seat at the table at a time when you can still impact the facts. The buyout of a strategic partner, rather than an exercise in cleaning up after an unexpected Rev. Rul. 99-6 transaction, becomes an opportunity to rework a holding structure. Panicked research on the short-term exceptions under the section 956 "Investment in U.S. Property" rules – or, if fate really has it in for you, a massive un-budgeted U.S. income inclusion – can be stopped before it ever gets started. Without billing rates—real or imagined—working against you, your "clients" aren't discouraged from seeking your input. The end result, when things are going well, is an environment of collaboration producing substantially better results than would otherwise be possible. All of this, of course, is dependent on the "front-line" professionals knowing to call you.

It is this last point that catches many, myself included, somewhat flat-footed. Networking is every bit as critical in-house as in private practice. While it's true that you no longer live by the billable hour (and that really is as nice as it sounds), your ability to be effective depends directly on your ability to stay informed. Staying informed often depends directly on your network. Unfortunately, the standby mechanisms of relationship-building—the business lunch, golf outings (if that's your thing), peer introductions, the dreaded cold-call—feel even more artificial when used within the structure of a single organization. As a result, a key to success is being able to network organically, through leveraging the casual introduction, following up on chance meetings, and rigorously maintaining ever-longer chains of contact. Water-cooler chats or the off-topic follow-up email become vital components of professional success.

Here is where Showing Up comes to the rescue again. Separated from the standard tools of business development, the opportunities for natural, unforced interaction are critical. Those opportunities primarily occur not through ordinary work, but through raising your hand—that is, through agreeing to take on the cross-functional project, volunteering for roles that broaden your exposure to the organization, and jumping on every chance to meet new people. You have to build connections in a context where it isn't necessarily obvious to others why you are building them, all so they remember to call you when you need them to. The ability to build in this way naturally is a rare skill, but thankfully one that responds well to practice and determined effort. That said, if networking isn't your thing, it's entirely possible that in-house wouldn't be either.

The other opportunity often afforded in-house is the chance to explore. The corporate world offers a much greater variety of "hats" than any client practice. This is partly because corporations have many roles that simply aren't replicated in a client practice, and partly because the number of individuals available to fill the roles is significantly reduced, lowering the barriers to entry. Being able to try new challenges with the safety net of having an established presence within a company facilitates moving outside a comfort zone. This is certainly not to say that everyone uses this flexibility, but it is an option that exists. All you have to do is grab the opportunity when it comes: in other words, Show Up.

My own move from international planning through tax accounting to becoming a technology professional was absolutely made possible by this ability to explore. I truly don't believe I would have taken the leap of faith without the benefit of a hands-on test-drive. In my case, I ended up (re)discovering a true passion, and I ultimately made what started as an exploration permanent, moving back into client service as a technology professional. However, without having jumped at the opportunity, made possible by my in-house role, my risk-averse nature would never have allowed me to make such a drastic change.

So that is my story. It is certainly not one of the most interesting but rather serves as a teaser of what is to come. Going forward, we will explore many of the fascinating and diverse stories of the members of the Tax Bar, highlighting both the unique challenges overcome and profound successes realized by our colleagues.

And that leads me to the next phase since, to borrow a turn of phrase, "I don't know half of you half as well as I should like!" With this introduction comes a request. If you know an individual whose story you would like to see told (perhaps even your own), let me know! Some of the most interesting, insightful, and inspiring histories are silently among us, hiding behind modesty, introversion, or competing priorities. Help me find these stories, bring them forward and share them. Please do not hesitate to reach out to me at Matt.Sontag@RSMUS.com with suggestions (or volunteers) for interviews. And, until next time, keep Showing Up! ■

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YOUNG LAWYERS CORNER

2nd Annual Young Tax Lawyers Symposium

By **Travis A. Greaves**, Caplin & Drysdale, Washington, DC

The Section of Taxation, the Young Lawyers Division, and the Federal Bar Association Tax Section cosponsored the 2nd Annual Young Tax Lawyers Symposium at Caplin & Drysdale's Washington, DC office on April 1, 2016. The event brought together more than 65 young attorneys and law students to hear judges, government attorneys, and private practitioners discuss various areas of tax law as well as to network and learn from other tax professionals.

The Young Tax Lawyers Symposium featured substantive presentations that introduced young attorneys and law students to foundational concepts in four distinct areas of tax law. Speakers included the following attorneys from the government and private sector: Drew Cummings, U.S. Tax Court; Richard Lilley, PwC; Robert Russell, Alliantgroup; Ben Gross, Joint Committee on Taxation; Andrew Mirisis, U.S. Tax Court; John Horne, Mayer Brown; Judge Cary Pugh, U.S. Tax Court; Maura Winston, Morgan Lewis & Bockius; T. Joshua Wu, Caplin & Drysdale; Jason B. Freeman, Meadows Collier; Giovanni Alberotanza, Rosenberg Martin Greenberg; Travis A. Greaves, Caplin & Drysdale; Judge Kathleen Kerrigan, U.S. Tax Court; Brian McManus, Latham & Watkins; Vivek A. Patel, Baker & McKenzie; and K. Christy Vouri-Misso, McDermott Will & Emery. Topics discussed included the basics of IP tax law, privilege issues in the U.S. Tax Court, the evolution of a criminal tax case, and an introduction to choice of forum in tax litigation. Following the program, attendees were invited to a networking reception at Rural Society.

The Young Tax Lawyers Symposium is part of the Section of Taxation's effort to increase programming for young attorneys and law students. The Section of Taxation Young Lawyers Forum regularly hosts young attorney networking events during the fall, winter and May meetings as well as webinars, panels, and happy hours throughout the year. In addition, the Tax Section encourages young attorneys to join one of the Tax Section's many committees. By participating in a committee, young attorneys not only meet with and learn from experienced practitioners, but also have opportunities to present or write on issues related to their practice areas. Young tax attorneys or those new to the tax profession that are interested in receiving more information on events or speaking and publishing opportunities should contact Travis A. Greaves at tgreaves@capdale.com. ■

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LET'S CONFER

National Taxpayer Advocate Holds Public Forum to Discuss IRS Future State

By **Derek B. Wagner**, Pro Bono Counsel, ABA Section of Taxation

In her 2015 Annual Report to Congress, National Taxpayer Advocate (NTA) Nina E. Olson raised concerns about the IRS's comprehensive "Future State" plan to overhaul agency operations as it adapts to an environment of constrained funding and expanding responsibilities.[1] A central component of this Future State plan is to transition from relatively costly telephone and face-to-face interaction with taxpayers to online taxpayer accounts as the primary means of interaction.[2] Although the NTA praised many of the IRS's goals as laudable, she expressed concern that the IRS had not adequately disclosed its plans or solicited input from taxpayers and tax professionals.[3] She also questioned whether the IRS would be able to achieve the desired level of cost-saving while still meeting taxpayer needs. In response, she announced a series of public forums around the country to permit taxpayers and tax professionals to comment on the IRS Future State. [4]

The first of these public forums was held at the IRS Headquarters in Washington, DC, on February 23, 2016. The forum featured three panels, each followed by a question-and-answer session with the NTA and questions from the audience.[5]

Ms. Olson applauded efforts by the IRS to improve the tax administration system, but emphasized two critically important and interrelated items that the IRS should bear in mind in designing its future state: opening the design process to the public and working to build trust.

Panel #1

The first panel featured Pamela F. Olson, Washington National Tax Services Practices Leader at PricewaterhouseCoopers, and Leslie Book, Professor of Law at Villanova University Law School. Both

1 *See Most Serious Problem #1: Taxpayer Service: The IRS Has Developed a Comprehensive "Future State" Plan That Aims to Transform the Way It Interacts With Taxpayers, But Its Plan May Leave Critical Needs and Preferences Unmet*, in Nat'l Taxpayer Advocate Serv., 2015 Annual Report to Congress, vol. 1, 3-13.

2 *Id.* at 3-5; *see also Preface*, Nat'l Taxpayer Advocate Serv., 2015 Annual Report to Congress, vol. 1, xii.

3 *Id.* at viii.

4 *Id.* at xv.

5 In advance of the forum, the IRS posted additional information concerning its Future State plans on its website.

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panelists discussed the importance of openness and public trust in designing the Future State, but each from a different perspective. Ms. Olson's remarks focused on corporate taxpayers and the planned reorganization of the IRS Large Business and International (LB&I) division. Ms. Olson applauded efforts by the IRS to improve the tax administration system, but emphasized two critically important and interrelated items that the IRS should bear in mind in designing its future state: opening the design process to the public and working to build trust. The distrust and suspicion that the IRS and taxpayers often exhibit toward each other could impede the success of the reorganization of LB&I. She called for more collaboration between the IRS and the taxpayer and tax professional communities to improve the tax administration system.

Focusing on the experiences of lower-income taxpayers within the system, Professor Book's remarks also emphasized the importance of trust in tax administration. He called for acknowledgement of the trend for the IRS as the primary administrator of a growing list of federal benefits. Because of that role, it is imperative that the IRS bear in mind the particular kinds of challenges and limitations that low-income taxpayers face.

Among the primary issues the panelists discussed were the threat of identity theft and other online security concerns, the decline in taxpayer service, and the need for clear and up-front guidance on emerging issues. Each of these matters is worsened by the ongoing budget constraints under which the IRS operates.

Panel #2

The second panel featured representatives from various IRS advisory committees, including Jennifer MacMillan and Timothy McCormally, chair and vice chair, respectively, of the Internal Revenue Service Advisory Committee (IRSAC); Michael Gangwer, chair of the Information Reporting Program Advisory Committee (IRPAC); Jim Buttonow, chair of the Electronic Tax Administration Advisory Committee (ETAAC); and Gina Jones, chair of the Taxpayer Advocacy Panel (TAP).

Each of the panelists spoke favorably of the IRS's plans to improve administrative efficiency and agreed that expanding digital services for taxpayers is a much-needed step. That said, panelists found a number of matters of concern facing the IRS. Among the primary issues the panelists discussed were the threat of identity theft and other online security concerns, the decline in taxpayer service, and the need for clear and up-front guidance on emerging issues. Each of these matters is worsened by the ongoing budget constraints under which the IRS operates.

Panel #3

The third and final panel of the day, made up of individuals from outside the tax profession, focused on social science research that may shed light on the behaviors and attitudes of taxpayers and tax professionals. Michael Best, Senior Policy Advocate at the Consumer Federation of America, discussed recent research regarding public views on paid tax-preparers. As most will recall, in 2014 the D.C. Circuit Court in *Loving* affirmed the District Court's holding that a Circular 230 regulation requiring testing and registration for paid tax-return preparers was not authorized under the 1884 statute that authorizes the agency to "regulate the practice of representatives of persons before the Department of the Treasury." Congress has so far refused to legislate a remedy. This creates a quandary: many taxpayers utilize paid return preparers, but there is a quite high error-rate in those prepared tax returns. Mr. Best called for federal or state oversight of paid return preparers to protect consumers from errors and fraud.

Aaron W. Smith, Associate Director of the Pew Research Center's Internet Project, reported on American adults' internet usage and access. Research indicates that 15% of American adults do not use the internet from any location or device. Two-thirds of Americans have access to a dedicated, high-speed home internet subscription, but broadband adoption has slowed in recent years. Among non-broadband users, cost factors are the most common reason for not subscribing to home internet. Many of these individuals rely primarily on a smartphone to access the internet, but such reliance can make many tasks—such as applying for a job or filing a tax return—challenging.

Arturo Gonzalez, Chief, Consumer & Community Development Research, Division of Consumer and Community Affairs, Board of Governors, Federal Reserve, discussed a March 2016 Federal Reserve report on consumers' use of mobile financial services. Mobile banking use continues to rise. Among other findings, however, the surveys discovered that banking customers continue to rely—either exclusively or in conjunction with mobile banking—on traditional brick-and-mortar banks and ATMs. These findings suggest that banking customers prefer in-person interaction, even when online accounts are readily available.

All of the panelists' materials are available online on the Taxpayer Advocate Service website at http://www.taxpayeradvocate.irs.gov/news/nta-forum-wdc. Information about subsequent and future public forums can be found at http://www.taxpayeradvocate.irs.gov/public-forums. ■

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LET'S CONFER

Conferring in the Big Easy: ABA/IPT Advanced Tax Seminars

By **Jesse Tsai**, Staff Counsel, ABA Section of Taxation, Washington, DC

Each year in early spring, approximately 300 state and local tax (SALT) professionals convene in New Orleans for the Advanced Tax Seminars, which have been cosponsored for over 20 years by the ABA Section of Taxation and the Institute for Professionals in Taxation. This unique conference is presented over the course of one week and comprises three distinct seminars focusing on state income, sales and use, and *ad valorem* taxation. This article spotlights a few of the many topics that were covered at the 2016 conference. Conference materials are linked where available and appropriate.

Advanced Income Tax Seminar

Historically, states have sourced sales in accordance with the Uniform Division of Income for Tax Purposes (UDITPA) cost of performance (COP) rule.[1] Gregg Barton and Maria Eberle discussed the developing trend to require multistate corporate taxpayers to apportion sales using a Market-Based Sourcing (MBS) regime[2] that primarily affects the sourcing of income from intangibles and services. Given the unsettled MBS landscape, the panelists emphasized that, practitioners should be careful to verify the current law in relevant states and monitor for future changes. As there is relatively little judicial guidance, practitioners should focus on the statutory language, regulations, and any other available guidance issued by the taxing authorities. South Carolina is one state that has seen litigation on this matter. In the *Dish*[3] and *DirecTV*[4] cases, the South Carolina Administrative Law Court held that South Carolina is not a strict COP state nor does it subscribe to an all-or-nothing result. Subsequently, the taxpayers' sales were found to be attributable to South Carolina to the extent that the income-producing activity is performed within the state. In an effort to harmonize the various state MBS laws, the Multistate Tax Commission (MTC) is working on revisions to UDITPA section 17.[5] To what extent the states will adopt the MTC's proposal remains to be seen.

In the *Transfer Pricing Update*, Scott Brandman, Stephen Kranz, and Jill Weise discussed transfer pricing issues at the state level. In the event of a Service allocation adjustment, the taxpayer bears the burden of establishing that the Service's determination was arbitrary, capricious, or unreasonable, and that the arm's

1 *See* Uniform Division of Income for Tax Purposes (UDITPA) § 17, *available at* http://www.uniformlaws.org/shared/docs/uditpa/uditpa66.pdf.

2 Under a market-based approach, the corporation assigns sales of services to the state in which the service is received.

3 *Dish DBS Corp. v. S.C. Dep't of Revenue,* Dkt. No. 14-ALJ-17-0285-CC (S.C. Admin. Law Ct. Feb. 10, 2015).

4 *DirecTV, Inc. v. S.C. Dep't of Revenue*, Dkt. No. 14-ALJ-17-0158-CC (S.C. Admin. Law Ct. May 12, 2015).

5 *See* Multistate Tax Commission Section 17 Model Market-Sourcing Regulations, *available at* http://www.mtc.gov/Uniformity/Project-Teams/Section-17-Model-Market-Sourcing-Regulations.

length standard under section 482 was satisfied.. Although nearly every state has adopted a statutory regime similar to section 482 to allow for intercompany price adjustments,[6] very few states have the depth of expertise or resources to conduct a proper transfer pricing analysis. As a practical matter, practitioners must engage state taxing authorities in fundamental discussions about transfer pricing issues if they hope to overcome an adjustment. Some states have combated income shifting by forcing taxpayers to combine reporting with their affiliate entities. However, in *Rent-A-Center East*,[7] the Indiana Tax Court held that the taxpayer did not have to file a combined report with its out-of-state affiliates, in part because the taxpayer was able to demonstrate that its intercompany transfer prices were at arm's length. States find it difficult to address intercompany transactions that lead to income shifting across state lines because of the high resource requirements.[8] In response, the MTC initiated its Arm's Length Adjustment Service Program (ALAS) in 2013 with the goal of pooling resources together in order to audit a single taxpayer across states.[9]

Advanced Sales Tax Seminar

A highlight of the sales tax seminar was a comprehensive overview of state voluntary agreements by Brian Goldstein, Lynn Gandhi, and Thomas Shimkin. The panelists explored common scenarios in which taxpayers may not realize that they have a jurisdictional nexus and corresponding filing obligation. If taxpayers decide against risking the audit lottery, a few options are available to address their outstanding tax liabilities. Many states have a limited-time amnesty program, whereby taxpayers may be eligible to pay a predetermined amount in exchange for a tax liability pardon without fear of criminal prosecution. Amnesty programs are fickle solutions, however, because they change often and unpredictably, often varying in relation to a state's budgetary needs. If an opportune amnesty program is unavailable, the taxpayer may be proactive and consider a voluntary disclosure agreement (VDA). In exchange for certain benefits, many states allow taxpayers to voluntarily and preemptively comply with their tax laws. (Note, however, that once taxpayers are under audit, they are typically disqualified from filing a VDA.) To aid the VDA process, the MTC assists taxpayers with settlement negotiations through its National Nexus Program ("NNP").[10] A taxpayer may apply for a VDA through the NNP, which facilitates the negotiation and settlement process by serving as an intermediary between the taxpayer and the state.

The increasing pace of corporate mergers and acquisitions makes it important for tax practitioners to keep in mind the various state sales/use and transfer tax issues that are sometimes overshadowed by federal income tax issues. In the *M&A panel*, panelists Stephanie Lipinski Galland, Robert Mahon, and Kathryn Pittman discussed common SALT issues that arise in corporate reorganizations. States typically interpret a "sale" broadly[11] and will liberally apply a sales/use tax to transactions that they characterize as an asset sale.[12] In addition to sale/use taxes, many states levy real estate transfer taxes in the form of a tax on the transfer of the property or a tax on the recordation of the deed. If a sales/use or real estate transfer tax is

6 Delaware, New Mexico, and Pennsylvania are notable states that have not adopted such a regime.

7 *Rent-A-Center East, Inc. v. Department of State Revenue*, 42 N.E.3d 1043 (Ind. T.C. 2015).

8 Panelists noted that one controversial solution that some states have adopted is to hire consultants on a contingent fee basis to review taxpayer transfer prices. *See also* Cara Griffith, *States No-Holds-Barred Approach to Auditing Transfer Pricing Arrangements*, 95 Tax Notes 559, 561 (February 13, 2012).

9 *See* http://www.mtc.gov/The-Commission/Committees/ALAS.

10 The NNP only serves states that are members of the program. *See* http://www.mtc.gov/Nexus-Program/Member-States.

11 *See, e.g.,* Cal. Rev. & Tax. Code § 6006 (defining "sale" as "[a]ny transfer of title or possession, exchange, or barter, condition or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.")

12 Note that New York is the only state that levies a stock transfer tax.

levied, it is important for the practitioner to research whether the transaction qualifies for an exemption.[13] Other M&A SALT issues that may arise include the imposition of non-traditional taxes, bulk sale compliance requirements, and successor liability obligations. Ultimately, the onus is on the practitioner to be aware of the M&A SALT implications and try to mitigate any risk with proper due diligence.

Advanced Property Tax Seminar

The property tax seminar began with a discussion by Judy Engel, David Lennhoff, Linda Terrill, and Jack Van Coevering on valuation issues involving the hotly debated "Dark Store Theory."[14] The controversy surrounding the theory has refocused attention on core valuation questions: what is the proper approach to assess property value, what is a property's "highest and best use" considering comparable properties, and do functionally obsolescent features significantly reduce a property's market value? Addressing these questions, the panelists analyzed the approaches and responses of various states. The Indiana Tax Court held in *Meijer Stores v. Smith*[15] that it was appropriate to consider the sales to second-generation users of similar vacant retail stores in appraising a profitable two-yea-old firs-generation Meijer store property. This methodology was further supported in the *Meijer Stores v. Marion County*[16] and *Kohl's Indiana*[17] cases. In response, the Indiana Legislature passed statutes in 2015, made retroactive to 2014 assessments, to address this Dark Store Theory.[18] In Michigan, the Michigan Tax Tribunal held in *Lowe's Home Centers v. Township of Marquette*[19] that the property should be assessed according to its market value, including comparisons to vacant retail stores available for sale ("value-in-exchange"), rather than its value to the current owner ("value-in-use"). The Tribunal added that build-to-suit and sale-leaseback transactions should not be included in the fair market analysis. Although not all states have directly confronted the Dark Store Theory, many have addressed underlying principles that may lead to future cases.[20] Given the lack of guidance combined with the tax revenues at stake, it is likely that states will continue to grapple with this issue.

Property tax incentives are generally viewed as the most valuable tax incentives. In the property tax incentives panel, Amanda Butler, Janette Lohman, and Joan Youngman explored the process of securing property tax incentives as a business expands or relocates its operations. It is imperative for practitioners to inquire and evaluate available incentives at the earliest opportunity because many incentives are precluded once a decision to expand to a jurisdiction is made. A jurisdiction's incentives may be found through widely published sources, but many valuable incentives are discretionary or "hidden" in administrative

13 While exemptions will vary by state, common exemptions include exemptions for capital contributions, sales for resale, isolated/casual sales, and statutory mergers/consolidations.

14 The Dark Story Theory refers to the assessment practice of valuing property based on comparable, often vacant, "dark stores," within the jurisdiction. The theory proposes that property valuations should not be based on the specific condition of the property, including its business activity, at the time of the appraisal, but rather on the market value it would have if it were vacated and sold.

15 926 N.E.2d 1134, 1137 (Ind. Tax Ct. 2010).

16 Pet. Nos. 44-440-02-1-4-00573, *et al.*, Ind. Bd. of Tax Review (Dec. 1, 2014).

17 Pet. Nos. 34-002-10-1-4-00350, *et. al.*, Ind. Bd. of Tax Review (Dec. 31, 2014).

18 *See* Ind. Code §§ 6-1.1-4-43 and -44 (2015). Note that many practitioners have raised concerns over the constitutionality of the statute's retroactivity.

19 Dkt No. 385768, Michigan Tax Tribunal (December 13, 2012).

20 *See e.g.*, *In re Equalization Appeal of Prieb Properties*, Dkt. 2004-3806 EQ, KS Bd. of Tax Appeals (June 8, 2007) (confirming the proper valuation analysis is fee simple and rejecting build-to-suit leases); *Lowe's Home Centers, Inc. v. Holman*, Dkt. No. 06-34040, MO State Tax Commission (June 6, 2008) (rejecting comparable sales of vacant property on the grounds that they were not sufficiently similar to the taxed property); *Menard, Inc. v. County of Clay*, File Nos. 14-CV-12-1500, *et al*. (MN Tax Ct. Sept. 18, 2015) (holding the use of the cost approach and sales comparison approach to be reliable indicators of market value of the property).

niches. Thus, it is vital for practitioners to be familiar with the local players who can best assist the incentive search.[21] After identifying the property tax incentives available in a jurisdiction, practitioners must determine the actual value of the benefits. This analysis is often complicated by the incentive's requirements. Finally, practitioners must be aware of the various impediments that may arise including negative publicity, negotiation delays, and compliance problems.

In the area of green energy, states are using similar incentives to encourage the development of alternative energy properties. On the green energy panel, John Gadon and Catherine Collins explained that these incentives can lead to various valuation and assessment issues, especially if the properties also generate income tax credits. The panelists emphasized that states typically offer incentives in addition to property tax relief. Although incentive programs are quite common, they also tend to be highly idiosyncratic. Practitioners should first assess what green energies a state is promoting[22] and carefully assess the program's requirements. Items to consider include whether the property is standalone or a component of a larger property, whether any renewable resource produced is meant for personal use or sale, ownership issues in lease situations, the tangible versus intangible value of the property, and the specific assessment methods used by the state.

Over 30 panels covering topics across various state and local tax jurisdictions were presented during the conference. Topics not covered here included navigating the litigation process, ethical issues, digital transactions, and federal and international issues affecting SALT practitioners. For more information about the 2016 conference, the full program may be found here. To become more involved in the SALT community, the State and Local Tax Committee webpage may be found here. The 2017 Advanced Tax Seminars will be held in New Orleans on March 20-24, 2017. ■

21 Such local players include local chambers of commerce, local economic development offices, local politicians and bureaucrats, consultants, and liaison organizations.

22 *State programs typically support green energy projects involving* solar, wind, water, geothermal, biomass, waste conversion, and greenscaping.

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TAX Bits

Offshore

By **Robert S. Steinberg**, Law Offices of Robert S. Steinberg, Palmetto Bay, FL

(To the tune of "Uptown" by Barry Mann and Cynthia Weil, as recorded by The Crystals in 1962.)

He steps off an airplane down in Panama.
A lawyer takes his hand, and it's planned
to be where they are.
It's not very far.

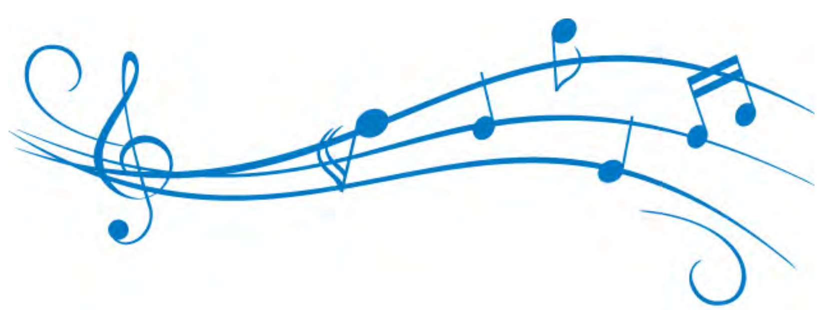
And shortly they're setting up a BVI
and telling him the laws in his country
there don't apply.
He's a lucky guy.

Cause when you go
Offshore, where people know the rules are lax.
Offshore, where no one ever pays no tax.
The creditors and wives, who'd throw knives
at you know the score.
You're underground, you can't be found
when you're offshore.

Now cash ain't the only wealth they come to hide.
They cobble real estate, feeling great
hiding under stones.
In homes nobody owns.

And lawyers. they're doing no due diligence.
Where larceny makes sense, there's a fence
and they hold the keys.
Sweeping in big fees.

That's why you go
Offshore, where anyone can park some dough
Offshore, where people wink, all in the know
Where lawyers are discrete, and you'll meet
not one honest bore.
License to deal, license to steal.
When you're offshore. ■



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SECTION NEWS

2016 Distinguished Service Award Recipient: Kenneth W. Gideon


Kenneth W. Gideon

By **Rudolph R. Ramelli**, Jones Walker LLP, New Orleans, LA*

The Section of Taxation is pleased to honor Kenneth W. ("Ken") Gideon as the recipient of its 2016 Distinguished Service Award in recognition of his service to the profession, service to the government, and service to the Section of Taxation.

The Distinguished Service Award is the highest honor awarded by the Section of Taxation of the American Bar Association. The Award is given to individuals who have had a distinguished career in taxation and "who have provided an aspirational standard for all tax lawyers to emulate." In the fall of last year, the Distinguished Service Award Committee unanimously selected Ken to be this year's recipient. As is the custom of the Committee, the plan was to inform Ken of the Award at the Council Dinner during the January meeting in Los Angeles. Ken unexpectedly died on January 10, 2016, two weeks before the Los Angeles meeting. It is fitting that Ken be honored with this Award, as he truly set an aspirational standard for all tax lawyers.

Family

Ken was born in Lubbock, Texas on July 25, 1946, where he and his sister were raised by their parents and instilled with the virtues that made him treat others with respect and kindness. The humble life he was taught to live gave him an appreciation for the gifts he was given and he shared that appreciation with family and colleagues.

Ken met his wife, Carol, during his senior year in high school. Ken went off to Harvard University, and he and Carol were married in 1968 when he graduated. Carol supported him through Yale Law School by working as a teacher. They were blessed in their life together with four children and three grandchildren. What mattered most to Ken was his family. Ken actively participated in the lives of his children. He attended Boy Scout activities, little league baseball and soccer games, as well as ballet recitals and school plays. Some of the best times Ken had were when traveling with his family. Asking Ken about his grandchildren at dinner was the only question you had to ask him all night. He would spend the rest of the evening with stories of a doting grandfather.

* With special thanks to Armando Gomez and Pamela F. Olson for use of material from their *In Memorium*, which was published in the Winter 2016 issue of *The Tax Lawyer*.

Service to the Profession

After graduating from Yale Law School in 1971, Ken and Carol returned to Texas. Ken served briefly in the United States Army and then began his legal career with Fulbright and Jaworski in Houston. Ken started practice as a corporate lawyer, but soon migrated to tax where he would spend the rest of his career. Ken practiced with Fulbright until 1981, when President Reagan appointed him Chief Counsel of the Internal Revenue Service by President Reagan. Upon completing his tour as Chief Counsel in 1983, Ken decided to remain in Washington and return to the Fulbright and Jaworski office in D.C.

Ken joined Fried, Frank, Harris, Shriver and Jacobson in 1986 where he practiced with Martin Ginsberg, recipient of the Section's 2006 Distinguished Service Award. Ken and Marty litigated a number of cases together is including the precedent-setting *Citizens & Southern* case in which the Tax Court allowed a bank to amortize its basis in core deposits acquired from another bank. The friendship that Ken and Marty developed during those years lasted for the rest of their lives.

Ken's tenure at Fried Frank was cut short in 1989 when he was called back to government by President George H.W. Bush to serve as Assistant Secretary of the Treasury for Tax Policy.

Ken returned to Fried Frank in 1992 but soon thereafter joined the Washington office of Wilmer Cutler and Pickering. In 2000, Ken moved to the Washington office of Skadden, Arps, Slate, Meagher and Flom, LLP. Joining Skadden was somewhat of a homecoming for Ken because he would be practicing with long-time friends and government colleagues Fred Goldberg, Pam Olson, and B. John Williams.

Throughout his career, Ken negotiated and litigated major tax disputes for his clients. He obtained important victories in many areas ranging from capitalization to privileged work product, to transfer pricing and valuation matters.

Clients were well-served by Ken during his career. His colleagues also benefitted from working with Ken. He was eager to share his insights and impeccable judgment. He was a mentor who helped nurture a new generation of tax lawyers.

Service to the Government

Ken served at the highest levels in tax administration for the government. His appointment in 1981 to serve as Chief Counsel for the Internal Revenue Service came at a busy time for the Chief Counsel in that the Internal Revenue Service and the Tax Court were inundated with tens of thousands of cases that involved tax shelter partnerships. Prior to the Tax Equity and Fiscal Responsibility Act of 1982, the Internal Revenue Service was required to pursue partners separately through audit and litigation. Ken played an important role in seeing that these changes were made. While the TEFRA partnership rules have been criticized as being overly complicated, the rules streamlined the audit and litigation process, thereby saving the government significant resources and reducing the docket in the Tax Court.

Ken was also behind the scenes as the Supreme Court considered the Internal Revenue Service's revocation of the tax-exempt status of Bob Jones University for discrimination. The Service's revocation of the exemption was supported in the lower courts and the decision had been appealed to the Supreme Court. Although the Administration decided not to support the Service's position, Ken fought this decision and was a force in ultimately getting the Supreme Court to hear the case. The Supreme Court upheld the Service's revocation of the exemption.[1]

As noted above, Ken returned to private practice in 1983, only to be called back by President Bush in 1989 to serve as Assistant Secretary of the Treasury for Tax Policy. In this role, Ken initiated the study of the integration of the corporate and shareholder tax systems as well as spurred the office to move forward with much needed regulation projects and other guidance. Ken also was involved in the 1990 Budget Act. This bipartisan legislation led to a federal surplus and a return to economic prosperity.

Service to the Section

Ken became involved in the Tax Section as a young lawyer at Fulbright. It wasn't long until he became chair of the Court Procedure & Practice Committee, a committee that fit well with his practice. He served as Chair of the Government Relations Committee after his tenure as Chief Counsel and then served as a Council Director until his appointment as Assistant Secretary of the Treasury.

After his stint with Treasury, Ken continued to work with the Government Relations Committee and was chair of the IRS Guidance Task Force.

The Section truly benefitted from and is a better place because of Ken's service, and it is with great appreciation for this and equal sadness at his passing that the Section presents this Award to Ken, who truly exemplified the highest standards of the profession in his career, his contributions to the Section, and his service to the tax system.

Ken was elected Chair-Elect in 2003 and served as Chair of the Section from 2004 through 2005.

After his term as Chair, Ken continued his service to the Section by chairing the Nominating Committee, the Distinguished Service Award Committee, and the Public Service Fellowship Committee.

Ken's last tour of duty for the Section was serving as a Section Member-at-Large of the Board of Governors of the ABA. As a member of the Board of Governors, Ken was able to advance the interests of the Section and the interests of other progressive Sections of the ABA. Ken also served on the Board of Governors at a time of financial stress for the ABA and he was called upon to provide leadership and guidance to the Board.

The Section truly benefitted from and is a better place because of Ken's service, and it is with great appreciation for this and equal sadness at his passing that the Section presents this Award to Ken, who truly exemplified the highest standards of the profession in his career, his contributions to the Section, and his service to the tax system. ■

1 *See*, Harvey P. Dale, *Public Policy Limits on Tax Benefits: Bob Jones Revisited*, Tax Forum No. 459 (Apr. 2, 1990), at 14, n.51.

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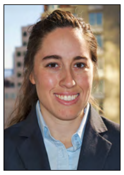
2016–2018 Christine A. Brunswick Public Service Fellows

The Section of Taxation is pleased to announce the 2016–2018 Christine A. Brunswick Public Service Fellowship class.

Laura LaPrade, a recent graduate of the University of the District Columbia David A. Clarke School of Law, will be working with Community Tax Aid, Inc., in Washington, DC. Laura will provide tax representation and educational outreach to low-income individuals in the nation's capital.



Catherine Strouse, who earned her J.D. from Gonzaga University School of Law and her LL.M. in Taxation from the University of San Diego Law School, will work with the Legal Aid Society of San Diego to provide state and federal tax representation to San Diego's veteran population.

The Public Service Fellowship program was developed in 2008 to address the need for tax legal assistance, and to foster an interest in tax-related public service among those individuals who participate. In 2013, the Public Service Fellowship was re-named the Christine A. Brunswick Public Service Fellowship in honor of the late Christine A. Brunswick, the Section's former Executive Director. Christine was a strong proponent of the Tax Section's role in advancing pro bono and public service and fostering a fair and equitable tax system. Under her leadership, the Section has devoted significant resources to further that goal. ■

Support the Section's Public Service Efforts with a Contribution to the TAPS Endowment

Through the Tax Assistance Public Service (TAPS) endowment fund, the Section of Taxation seeks to provide stable, long-term funding for its tax-related public service programs. The TAPS endowment fund will primarily support the Christine A. Brunswick Public Service Fellowship program. The Public Service Fellowship program provides two-year fellowships for recent law school graduates working for non-profit organizations offering tax-related legal assistance to underserved communities. Consider giving to the TAPS endowment fund today. Your generous support will help ensure that the Section can continue its mission to provide legal assistance to those in need.

TAPS
Tax Assistance Public Service
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Funding for the Internal Revenue Service

Introduction: In fiscal year 2016, Congress reversed a multi-year trend of reductions in Internal Revenue Service funding with a welcome $260 million increase. Nevertheless, the Section believes additional funding will be necessary to restore a properly functioning Service. As one of the most efficient tax administrators in the world, collecting $100 in tax revenue for every 35 cents spent, an adequately funded Service is vital to collecting appropriate tax revenues to fund government priorities. Without sufficient staff to serve taxpayers and administer the laws that Congress enacts, we risk permanent damage to the public confidence in a fair and equitable tax system. As with all of its government submissions, the Tax Section's letter of March 17, 2016, to the House and Senate Appropriations Subcommittees on Financial Services and General Government regarding fiscal year 2017 funding for the Service is available on the website at http://www.americanbar.org/content/dam/aba/administrative/taxation/policy/031716letter.pdf. It is reproduced in this issue of *ABA Tax Times* (ATT) as a service to our members. Minor stylistic changes have been made to conform to the ATT format. – *Jesse Tsai*, Staff Counsel

Re: Fiscal Year 2017 Funding for the Internal Revenue Service

Dear Chairmen Boozman and Crenshaw, and Ranking Members Coons and Serrano:

I am writing on behalf of the American Bar Association to express strong support for providing the Internal Revenue Service (the 'Service") with appropriate and adequate funding for fiscal year 2017 and subsequent years. Such funding is vital for the Service to properly carry out its critical missions of taxpayer service and enforcement of federal tax laws. As evidenced by the series of letters that we have sent to Congress over the past few years, we have grown increasingly concerned that the budgetary constraints imposed upon the Service are eroding its capacity to accomplish these missions. The natural consequence of this capacity erosion is a gradual loss of faith by the American public in the Service and in our voluntary tax compliance system generally, which could cause significant harm to our federal government's ability to fund itself.

We recognize the intense budgetary pressures that face Congress and our federal government in general. Nonetheless, providing appropriate funding to the Service is one of the few governmental expenditures that provides both an immediate monetary return—each dollar spent on enforcement produces several dollars of additional tax collections—and a long-term benefit to the capacity and credibility of our tax system. Accordingly, we believe that the case for providing increased and adequate funding to the Service is compelling.

While the Service has made significant headway in automating its systems and otherwise reducing costs, much remains to be done to assure that the Service can continue to properly serve taxpayers and enforce the tax laws that Congress enacts. The $290 million funding increase for fiscal year 2016 was a step in the right direction. We applaud Congress for taking this step, but the Service's budget is still approximately $1 billion below its fiscal year 2010 level, which translates into a reduction of about 17% on an inflation-adjusted basis.[1] Consequently, we believe that further budget increases are needed.

We are concerned that a failure to provide increased funding to the Service could result in the following adverse consequences:

- Less tax revenue. As previously stated, every dollar devoted to enforcement produces several dollars of increased tax collections.[2] Perhaps more importantly, failure to collect taxes properly due undermines public confidence in our voluntary compliance system by causing honest and diligent taxpayers to believe that other taxpayers are not paying their proper share. At some point, this erosion in confidence could become irreversible.

- Reduced quality of taxpayer service. During the last few years, when budgetary pressures have been unusually intense, there has been a clear reduction in the quality of taxpayer service. For example, the Service received over 100 million phone calls last year, but was able to answer only 38% of those calls.[3] In addition, the Service's inventory of identity theft cases has grown to approximately 600,000.[4] Moreover, the ability of taxpayers to meet with Service personnel to resolve disputes administratively has also been negatively affected. While other factors have contributed to some of these problems, the common denominator is a shortage of trained Service personnel resulting from inadequate funding.[5]

- A lack of necessary Service personnel. In order to perform the Service's critical functions, in the face of complex and constantly changing tax laws, a sufficient staff must be recruited and properly trained. With many senior Service personnel opting for retirement, and funding pressures preventing many vacancies from being filled and limiting training resources, we are concerned that the Service does not have sufficient personnel to provide appropriate taxpayer service and to properly administer the tax system.

- Insufficient modernization of systems and technology. The Service has made some headway in modernizing its systems and technology, but much remains to be done. We recognize that there has been recent controversy regarding the amount of emphasis that the Service places on internet and web based interfaces with taxpayers versus personal contact through phone, walk-in centers, and other means.[6] Nonetheless, we believe that there is general agreement that there will be an evolution in service delivery over time towards internet and web based systems.[7] In addition, it seems indisputable that improved cybersecurity and fraud detection are vital to the Service's mission and that increased systems efficiency is important to reduce

1 *Preface*, Nat'l Taxpayer Advocate Serv., Fiscal Year 2016 Objectives Report to Congress, p. 1.
2 *Most Serious Problems*, Nat'l Taxpayer Advocate Serv., 2013 Annual Report to Congress, pp. 21, 37.
3 *Preface*, Nat'l Taxpayer Advocate Serv., 2015 Annual Report to Congress, p. ix.
4 *Most Serious Problems*, Nat'l Taxpayer Advocate Serv., 2015 Annual Report to Congress, p. 182
5 *Preface*, Nat'l Taxpayer Advocate Serv., Fiscal Year 2016 Objectives Report to Congress, p. 1.
6 *See, e.g., Preface*, Nat'l Taxpayer Advocate Serv., Fiscal Year 2016 Objectives Report to Congress.
7 *Hearing to Review the FY 2017 Budget Request & Budget Justification for the U.S. Department of Treasury Before the S. Subcomm. on Fin. Servs. and Gen. Gov't. of the S. Comm. on Appropriations, 114th Cong.* (2016) (opening statement of Sen. John Boozman, Chairman).

costs over time. All of these developments and objectives will require substantial investments in new and improved technology. Failure to provide adequate funding for these initiatives will have a long-term adverse impact on the Service and the tax system.

- A negative effect on the Service's ability to administer the laws Congress enacts. The Service has the obligation to implement the tax laws enacted by Congress. These new laws often are complex and require the issuance of substantial amounts of regulatory guidance. Recent examples include the Foreign Account Tax Compliance Act and the Affordable Care Act. While the Service faithfully tries to carry out its responsibilities, and to assist taxpayers in complying with their legal obligations under new laws, inadequate funding compromises the Service's ability to carry out these duties.

- Elimination of programs that aid elderly and low income taxpayers. Last year, over 90,000 volunteers assisted with 3.7 million returns through volunteer programs administered by the Service.[8] If the Service does not have the resources to support these programs, many elderly and low income taxpayers will be unable to access important tax services.

While we appreciate the difficult challenges that the Congress faces, we nonetheless urge Congress to provide the Service appropriate and adequate funding so that it can fulfill its core functions of providing taxpayer service and collecting taxes properly due. We believe that failure to do so will harm taxpayers and erode confidence in our voluntary compliance tax system. We worry that, at some point in the not too distant future, the damage could become irreversible.

Thank you for your consideration.

Sincerely,

George C. Howell, III

Chair, Section of Taxation

8 Internal Revenue Service, *IRS Tax Volunteers,* available at http://www.irs.gov/Individuals/IRS-Tax-Volunteers.

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Government Submissions Boxscore

Since January 1, 2016, the Section has coordinated the following government submissions, which can be viewed and downloaded free of charge from the Section's website at http://www.americanbar.org/groups/taxation/policy.html.

SUBMISSIONS AND COMMENTS ON GOVERNMENT REGULATIONS, ADMINISTRATIVE RULINGS, BLANKET AUTHORITY and ABA POLICY

TO	DATE	CODE SECTION	TITLE	COMMITTEE	CONTACT
Internal Revenue Service, Department of the Treasury	6/6/16	n/a	Comments on New Partnership Audit Procedures Enacted as Part of the Bipartisan Budget Act of 2015	Administrative Practice, Court Procedure and Practice, Partnerships and LLCs	George A. Hani, Jennifer Breen
Internal Revenue Service, Department of the Treasury	6/2/16	n/a	Recommendations for the 2016-2017 Priority Guidance Plan	See Comment Letter for Committee Lis	George C. Howell, III
Internal Revenue Service	5/26/16	2801	Comments on Guidance under Section 2801 Regarding the Imposition of Tax on Certain Gifts and Bequests from Covered Expatriates	Estate and Gift Taxes, ABA Section of Real Property, Trust and Estate Law	Scott A. Bowman, Marianne Kayan
Internal Revenue Service	5/23/16	721(c)	Comments on Notice 2015-54 (Partnership Issues)	Partnerships and LLCs	H. Grace Kim, Christopher Trump, Elizabeth Amoni Hall
United States Tax Court	5/4/2016	n/a	Comments on Amendments to the Tax Court Rules of Practice and Procedure	Court Procedure & Practice	Juan F. Vasquez, Jr. Joshua D. Odintz, Alexandra Minkovich
Internal Revenue Service	5/4/2016	482	Comments on Treasury Decision 9738	Transfer Pricing	John M. Breen

Internal Revenue Service	4/4/16	6015	Comments on Relief From Joint and Several Liability Under Section 6015	Pro Bono and Tax Clinics	Andrew R. Roberson
Internal Revenue Service, Department of the Treasury	3/23/16	various	Comments on Country-by-Country Reporting Proposed Regulations	Transfer Pricing, Foreign Activities of U.S. Taxpayers	John Breen
Senate and House Appropriations Subcommittees on Financial Services and General Government	3/17/16	n/a	Fiscal Year 2017 Funding for the Internal Revenue Service	n/a	George C. Howell, III
Multistate Tax Commission	3/1/16	n/a	Comments on the MTC's Proposed Draft Amendments to its Model General Allocation and Apportionment Regulations	State and Local Taxes	John H. Gadon, Shirley K. Sicilian
Department of State	2/17/16	n/a	Comments on the Application of the Tax Benefit Rule to the Cuban Claims Settlement Process	Sales, Exchanges, and basis	Mary B. Foster
United States Tax Court	2/10/16	n/a	Comments on Proposed Amendments to the Tax Court Rules of Practice and Practice to Modify the Signature and Filing Requirements	Court Procedure and Practice	Juan F. Vasquez, Jr.
Internal Revenue Service	1/25/16	1014(f), 6035	Comments in Response to Consistency of Income Tax Basis Rules	Estate and Gift Taxes; Fiduciary Income Tax	Benjamin G. Carter
Internal Revenue Service	1/19/16	446, 956	Comments on the Temporary and Proposed Regulations Under Sections 446 and 956 Providing Embedded Loan Treatment for Certain Notional Principal Contracts	Financial Transactions, Banking and Savings Institutions	Stefan Gottschalk
Internal Revenue Service	1/7/16	482	Comments on Notice 2015-54	Transfer Pricing	John M. Breen
Internal Revenue Service	1/4/16	148	Comments on Proposed Issue Price Regulations	Tax-Exempt Financing	Darren C. McHugh
Internal Revenue Service	1/4/16	7704(d)(1)(E)	Comments on Proposed Regulations Under Section 7704(d)(1)(E)	Energy and Environmental Taxes, Partnerships and LLCs	Barbara S. de Marigny

The technical comments and blanket authority submissions listed in this index represent the views of the ABA Section of Taxation. They have not been approved by the ABA Board of Governors or the ABA House of Delegates and should not be construed as representing the policy of the ABA.

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ANNOUNCEMENTS

Get Involved in ATT

ABA Tax Times (ATT) is looking for volunteers to join its ranks as associate editors to assist in writing and acquiring articles for publication. This opportunity is open to Section members with significant writing or publication experience, a genuine interest in helping ATT attract great content, and a willingness to commit to at least one article a year. You can find more information about our submission guidelines here. If you are interested in a regular writing and editing opportunity with ATT, contact Linda M. Beale, Supervising Editor, at lbeale@wayne.edu.

The Practical Tax Lawyer – Spring 2016 Issue Is Now Available

Produced in cooperation with the Tax Section and published by ALI-CLE, *The Practical Tax Lawyer* offers concise, practice-oriented articles to assist lawyers with all aspects of tax law. The articles are written by practitioners and reviewed by an expert board of editorial advisors who are members of the ABA Tax Section appointed by the Section. Published four times yearly, each issue of *The Practical Tax Lawyer* provides pragmatic, nuts-and-bolts advice on how to solve clients' tax problems. The Spring 2016 issue features the following articles:

- Mark P. Altieri and William P. Prescott, *Professional Practice Transitions, Section 197, and the Anti-Churning Rules*
- Nicola Lemay, Earl W. Mellott, and Abigail Wolf, *Partnership Audit Regime Shakeup*
- Pamela D. Perdue, *The End of the Determination Letter Program as We Know It—Implications, Options, and Alternatives (with Model Opinion Letter)*
- Jerald David August and Stephen R. Looney, *Tax Planning for S Corporations: Mergers and Acquisitions Involving S Corporations* (Part 2)

Tax Section members are entitled to a subscription discount. For more information, visit PTL's webpage: https://www.ali-cle.org//index.cfm?fuseaction=publications.periodical&pub=PTL.

2015 International Conference on Taxpayer Rights – Videos Now Available

Videos from the November 18 – 19, 2015, inaugural International Conference on Taxpayer Rights are now available on the conference website. Government officials and practitioners discuss the need for transparency and protections in taxpayer rights, and the U.S. Commissioner of Internal Revenue John Koskinen addresses the importance of public confidence in the tax administration. A short description of the conference is also available here.

Education Opportunity: Representation Before IRS

The National Association of Enrolled Agents will hold its national conference August 1-3, 2016, at the Cosmopolitan of Las Vegas. Join CPAs, EAs, and attorneys from around the country who come for high-quality IRS representation education. Nationally-recognized instructors guide attendees through the maze of rules and regulations, and the unexpected nuances of representation as part of NAEA's National Tax Practice Institute™ (NTPI®).

This year, NAEA is offering **one year of free membership with non-member registration** (offer valid for first time members OR those whose membership has lapsed 12 months or more)—that's access to all the tax publications and resources NAEA has to offer at no charge. Visit NAEA's website to learn more or email Alex Rosen with questions.

Earn 24 IRS-approved CE credits, including two in Ethics, by attending.

IRS Nationwide Tax Forums

Registration for the 2016 IRS Nationwide Tax Forums is now open. Designed for tax professionals, the forums provide a wide range of educational programming, which is developed and presented by representatives of the IRS, the ABA Tax Section, and other national tax-related organizations.

The 2016 dates and locations follow. A registration discount is available for ABA members. Please contact the Tax Section at 202.662.8670 for the discount code. For more information, visit www.irstaxforum.com.

July 12 – 14	CHICAGO, IL	Chicago Hyatt Regency
July 26 – 28	NEW ORLEANS, LA	New Orleans Hyatt
Aug. 23 – 25	WASHINGTON, DC Metro	National Harbor Gaylord
Aug. 30 – Sept. 1	ORLANDO, FL	Orlando Hyatt
Sept. 13 – 15	SAN DIEGO, CA	San Diego Town & Country Hotel

The Tax Code and Income Inequality – Audio Available at No Charge

On April 27, 2016, the Tax Section cosponsored "The Tax Code and Income Inequality: Limitations and Political Opportunities," a free webinar presented by the Section of Civil Rights on Social Justice. The program explored how "welfare" is delivered through the Tax Code (e.g., the Earned Income Tax Credit and Child Tax Credit) whether it is really working for low- and middle- income Americans, much less those in poverty, and how changes to the Tax Code can address income inequality in the U.S. Speakers included: Dean Baker, Economist and Co-Director of the Center for Economic and Policy Research; Francine Lipman, William S. Boyd Professor of Law, University of Nevada, Las Vegas; Alexandra Thornton, Sr. Director of Tax Policy, Center for American Progress; and Marilyn Harbur, Sr. Asst. Attorney General, Oregon Department of Justice (Moderator). ATT readers are invited to listen to the free audio here.

Call for Book and Article Reviews

Our move to a digital-only format has allowed us to expand the types of materials we publish. One new feature is reviews of books and articles on topics of interest to our members. Reviews inform readers of recent publications pertaining to tax policy and emerging issues, as well as broader concerns about the interrelationship between tax policies and economic growth, income inequality and poverty. Reviews may be of single books or articles or they may be review essays that discuss and compare two or more books and articles addressing the same topic, similar to such review essays in the New York Review of Books. Reviews will be considered for publication in each issue.

Members from all practice settings are invited to submit review proposals, which should provide a complete citation for the item(s) to be reviewed and a brief statement about each item's significance to tax scholarship, practice, or policy. Proposals also should include a brief summary of the author's background and interest in the item(s).

Authors of accepted proposals will be invited to write a review for a specific issue. The review should be no more than 2,000 words in length, though on rare occasions longer submissions will be accepted on consultation with the editor. Reviews should provide a concise introduction to the item's primary themes and a critical analysis of its significance that considers strengths, weaknesses, and relevance to the field.

If you are interested in submitting a review or in discussing other content ideas for *ABA Tax Times*, contact Supervising Editor, Linda M. Beale at lbeale@wayne.edu.

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ABA Section of Taxation Meeting Calendar

www.americanbar.org/groups/taxation/events_cle.html

ABA Tax Section meetings are a great way to get connected, get educated, and get the most from your membership! Join us for CLE programming and the latest news and updates from Capitol Hill, the IRS, Treasury and other federal agencies.

September 29-October 1, 2016	**JOINT FALL CLE MEETING**	Westin Boston Waterfront – Boston, MA
January 19-21, 2017	**MIDYEAR MEETING**	Hilton Bonnet Creek & Waldorf Astoria – Orlando, FL
May 11-13, 2017	**MAY MEETING**	Grand Hyatt – Washington, DC
September 14-16, 2017	**JOINT FALL CLE MEETING**	Hilton Austin – Austin, TX

If You Missed the Last Section Meeting

Materials / TaxIQ

View and search hundreds of materials submitted for the Section's Fall, Midyear, and May Meetings on TaxIQ and Westlaw. This member service is made possible by Thomson Reuters—a publishing sponsor of the Section of Taxation. For more information, go to the TaxIQ page on the website.

Recordings

Audio recordings of CLE programs from recent Tax Section Meetings are available from Digital Conference Providers (DCP), the Section's audio service provider. Orders can be placed through the DCP website at https://www.dcporder.com/abatx/ or by calling 630/963-8311.

Online CLE from West LegalEd

The ABA is a content partner with Thomson Reuters, and many programs presented at the Tax Section's Fall, Midyear, and May Meetings are subsequently made available through the Thomson Reuters West LegalEd Center. For more information, go to http://westlegaledcenter.com.

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SECTION EVENTS & PROMOTIONS

ABA Section of Taxation CLE Calendar

www.americanbar.org/groups/taxation/events_cle.html

DATE	PROGRAM	CONTACT INFO
June 7, 2016	Health Care Litigation Under ERISA and the ACA CLE Webinar	ABA JCEB 202.662.8670
June 8-10, 2016	9th Annual U.S. - Latin America Tax Planning Strategies Conference Mandarin Oriental – Miami, FL	Tax Section 202.662.8670
June 9, 2016	Nuts and Bolts of Section 409A: Practical Issues to Consider in Every Practice CLE Webinar	ABA JCEB 202.662.8670
July 12, 2016	The Final Answers: The Supreme Court ERISA and Litigation Decisions CLE Webinar	ABA JCEB 202.662.8670
September 8, 2016	New Civil Procedure Rules and ERISA Litigation: One Judge's View (Along With Counsel) – 9 Months In American Bar Association – Chicago, IL	ABA JCEB 202.662.8670
September 29-October 1, 2016	**JOINT FALL CLE MEETING** Westin Boston Waterfront – Boston, MA	Tax Section 202.662.8670
October 5, 2016	Partnerships: The Fundamentals CLE Webinar	Tax Section 202.662.8670
October 28, 2016	**4th Annual International Tax Enforcement and Controversies** Marriott Marquis – Washington, DC	Tax Section 202.662.8670
November 2-3, 2016	27th Annual Philadelphia Tax Conference Union League of Philadelphia – Philadelphia, PA	Tax Section 202.662.8670
January 19-21, 2017	**MIDYEAR MEETING** Hilton Bonnet Creek & Waldorf Astoria – Orlando, FL	Tax Section 202.662.8670

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ABA Section of Taxation CLE Products

Listen at your convenience to high-quality tax law CLE on a variety of topics, including: Affordable Care Act implementation, new Circular 230 rules, partnerships and S corporations, recent legislation, ethics, international tax planning, and more. ABA CLE downloads are generally accepted in the following MCLE jurisdictions: AK, AR, CA, CO, GA, HI, IL, MO, MT, NV, NM, NY, ND, OR, TX, UT, VT, WV. Recordings and course materials from the following recent Tax Section webinars and more are available through the ABA Web Store.

The Nuts and Bolts of REITs

Ethical Issues in Setting Engagement Terms

Current Developments in Individual, Corporate, Partnership and Estate & Gift Taxation

The Administrative Tax Controversy Case from Examination to Appeals

The Nuts and Bolts of the Taxation of Mergers and Acquisitions

Responding to the Repeal of TEFRA

A New Era in Taxation of Derivatives

Basics of IRS Collection Alternatives

State Income, Double Taxation, and Tax Discrimination in the Post-*Wynne* World

Current Issues for Private Investment Funds and Their Managers

Designing a Pro Bono Project for Your Firm

Reading and Understanding a Partnership Agreement

Top Ten Revenue Rulings for Estate Planners

Affordable Care Act Implementation Issues Impacting Individuals and Families

Oil and Gas Tax Partnerships

Choosing Wisely: When to Use (or Not Use) Mediation to Obtain Cost Effective Closure in Exam & Collection Cases

Holding Company Jurisdictions for Investments in Latin America - What You Need To Know Now

What's a Young Tax Attorney to Do When...?

Bitcoins: What You Need To Know About Virtual Currency

Update on State Taxation of Tribal Leased Lands: The New Leasing Regulations

Going Out on Your Own and Changing Firms – Practical and Ethical Considerations

Kicking it Upstairs – How to Elevate Issues Within the IRS

Back to Basics on the Ethics of Federal Tax Practice: Best Practices 101

Tax Opinions 3.0? – Ethical Considerations and Best Practices Under the New Circular 230 Rules

The Tax Consequences of the Legalization of Marijuana

Inversions: New Rules, Continued Challenges

Tax Issues Arising from Tax Sharing Agreements (Part I)

Tax Issues Arising from Tax Sharing Agreements (Part II)

BEPS Won't Wait; It's Here and Now and You Need to Know About It!

The Impact on S Corporations of the New Net Investment Income Tax

Employer's Obligations Under the Affordable Care Act

The Fallout from *Loving*: Impact on Circular 230

Navigating the Exempt Organization Process

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Sponsorship Opportunities

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ABA Section of Taxation Meetings are the premier venues for tax practitioners and government guests to connect on the latest developments in tax law and practice. Section Meetings draw up to 2,200 tax practitioners from across the U.S. and internationally. With over 150 panel discussions presented over two days by the country's leading tax attorneys, government officials, and policy makers, Section Meetings are your opportunity to maximize your organization's visibility and build relationships with key figures in the world of tax law.

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- 32% of meeting attendees represent government
- 25% come from firms of over 100 attorneys
- 23% come from firms of 1-20 attorneys

Sponsorship Opportunities are now available for the following meetings:

September 29-October 1, 2016	**JOINT FALL CLE MEETING**	Westin Boston Waterfront – Boston, MA
January 19 – 21, 2017	**MIDYEAR MEETING**	Hilton Orlando Bonnet Creek & Waldorf Astoria – Orlando, FL
May 11 – 13, 2017	**MAY MEETING**	Grand Hyatt – Washington, DC

For additional information, please visit http://www.americanbar.org/groups/taxation/sponsorship.html or contact our Sponsorship Team at taxmem@americanbar.org or at 202/662-8674.

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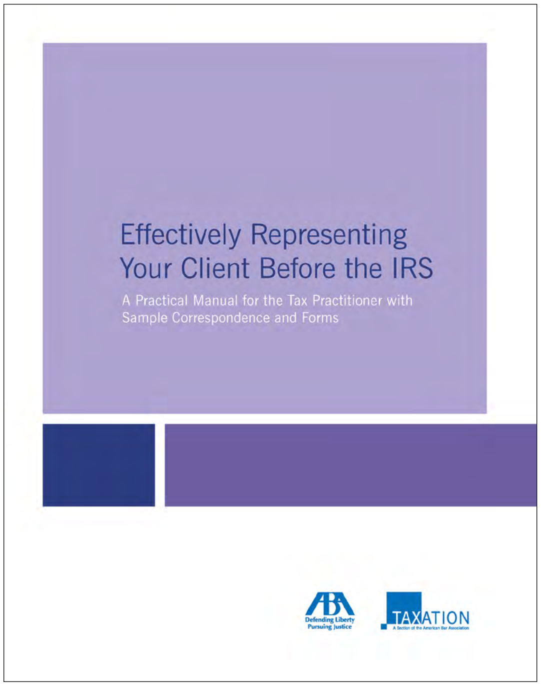
Effectively Representing Your Client Before the IRS, Sixth Edition



Published by the American Bar Association Section of Taxation and now in its 6th Edition, *Effectively Representing Your Client Before the IRS: A Practical Manual for the Tax Practitioner with Sample Correspondence and Forms* is a comprehensive collection of everything a tax professional should know when dealing with the IRS.

Written by some of the most experienced tax controversy lawyers in the United States, this two-volume reference provides an in-depth discussion of the law and is replete with realistic examples and hundreds of practice tips to aid tax practitioners during all stages of representation before the IRS in controversy matters, including exam, appeals, Tax Court, refund actions, and collection matters. The companion DVD contains selected audio and video recordings, gleaned from past ABA Section of Taxation meetings, and is supplemented with meeting materials relevant to your practice.

No tax professional should be without *Effectively Representing Your Client Before the IRS*—it is your go-to manual for successfully navigating the challenging maze of rules governing tax controversies.

List Price: $299 | Member Price: $249 | Product Code: 5470809

Nonprofit / Academic / Government individuals or institutions are eligible to receive a 50% discount off the nonmember price of the printed book by calling the ABA's Service Center at 1-800-285-2221 to place an order.

Selected chapters from the 6th edition of *Effectively Representing Your Client Before the IRS* are available for download. For more information, visit www.ShopABA.org or click on the chapter title below.

- Determining a Taxpayer's Worker Classification (PC: 5470809PDF20)
- Resolving Identity Theft in Tax Administration (PC: 5470809PDF22)
- Assisting Military Clients (PC: 5470809PDF23)
- Assisting Victims of Disasters (PC: 5470809PDF24)
- Understanding the Intersection of Taxation and Immigration (PC: 5470809PDF28)
- Understanding the Affordable Care Act and Its Impact on Low-Income Taxpayers (PC: 5470809PDF29)

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Two Easy Ways to Access Valuable Materials from the Tax Section

Did you know that Tax Section members have access to thousands of pages of cutting-edge committee program materials presented at Section of Taxation Meetings?

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TaxIQ is a Section-hosted static database of meeting materials organized by Section Meeting and Committee name. This index is useful to members who attended a past meeting or want to research materials from a specific committee.

Visit **www.ambar.org/taxiq** and click the TaxIQ logo to be directed to the TaxIQ Meeting Index.

Please have your ABA username and password handy, as you will need it to view the materials.

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A searchable database of Tax Section meeting materials is available on Westlaw free of charge to Section members.

Search meeting materials quickly and easily across all Committees and Section Meetings by keyword, date, or phrase.

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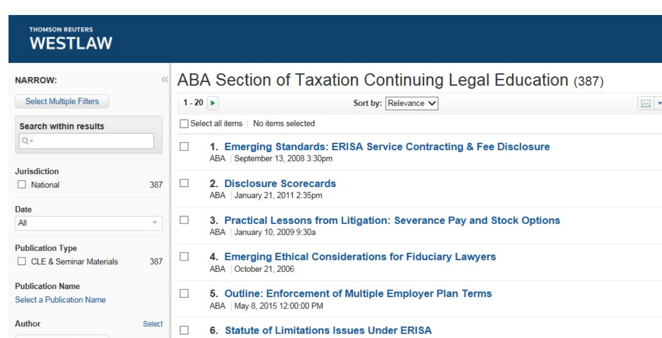

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2016 MAY MEETING

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