

FROM THE EDITOR

by Alice G. Abreu, Philadelphia, PA

On the morning of September 11, 2001, I went to my Philadelphia office especially early and sat down to write this column. I was reflecting on the rewards and challenges of putting together this issue of the *Newsletter*, my first as Supervising Editor, when a colleague whose office is next door to mine arrived and by way of greeting asked, “You’ve heard about the World Trade Center, right?” Of course I had not. I had only been thinking about tax.

What a difference a minute makes. As I watched the horrific events of that day unfold on a television in our Dean’s office, I thought about the tax lawyers who had been sitting in their offices, immersed in the world of tax as I had been, when their lives ended or were forever altered. Although the world of tax seemed to disappear for a while, I, like most of you, have returned to it.

Putting this issue together has been especially satisfying. It has allowed me to work with a far-flung group of tax lawyers and given me additional insight into the ways in which one cataclysmic event can affect us all. I now know that Ellen Aprill, who preceded me in this position, was absolutely right: Editing the Section’s *Newsletter* is both rewarding and enriching. I want to thank Ellen for all of her help in making the transition a smooth one, for always answering all of my questions, and for having brought the *Newsletter* to a level where my biggest challenge will be to maintain the high standards she set.

This is the first edition of the *Newsletter* since September 11. Like much around us, this issue reflects both the world as it existed before those events and the world as it exists now. The issue contains the features that Ellen implemented and nurtured as well as others I hope you will like, but it also contains a feature which resulted directly from the events of

that day—a memorial to Section members, friends and family who lost their lives that day. We will remember them long after this issue has been placed in the recycle bin.

The Chair’s column in this issue describes some changes to the ABA’s Annual Meeting which can affect when and how often we meet as a Section. Member opinion is crucial to allowing the Section leadership to make the best possible decision for all of us and I urge you to take up the call to send your thoughts on the matter to Dick Lipton at Rlipton@mwe.com.

The Chair’s column also describes the work of the Member Value Task Force, as well as the comments submitted by the Section on Circular 230. These comments suggest further refinements to the definition of a tax shelter and are designed to balance practitioner concerns with the government’s interests. The Section hopes that it will provide a useful framework for the government’s work on this important issue.

As a bonus to our readers, this issue also contains a Special Report by Jim Holden. The Report describes what could be a tax lawyer’s worst nightmare and provides an incisive analysis of the ethical rules that can help to resolve it. It is fascinating reading and just the sort of piece you should cut out, file, and hope you never need to refer to.

Given the importance of the issues Jim Holden raises in the Special Report, the Section, the Center for Professional Responsibility, and the Center for CLE, in cooperation with LexisNexis™, are sponsoring a no-cost live teleconference (as in telephone) that will enable participants to engage in a real-time discussion of those issues with a panel of experts on ethics and practice. The teleconference will take place on Wednesday, December 12, 2001, from 2 – 3 p.m. Eastern Time. It will feature a panel

consisting of Professor Linda Galler and Michael Saltzman and moderated by Jim Holden. I hope many of you will join in what is certain to be a lively and informative exchange. Registering for the teleconference is easy; information on doing so (and even obtaining CLE credit), appears immediately following the Report.

At this time when so many are lauding hard work and dedication it is fitting that we feature an interview with Sherwin Simmons, recipient of the Section’s 2001 Distinguished Service Award and one of the luminaries of the tax bar. His career as a private practitioner, teacher, scholar and dedicated member of the Section serves as an inspiration to tax lawyers young and old. As usual, our interviewers, Jack Cummings and Alan Swirski, have posed a perceptive set of questions. In response, Sherwin Simmons has shared with us his insights on important topics. He discusses the ways in which the profession has changed, reflects on the ethical questions that tax lawyers must face today, and also shares his views on the implications of the scheduled repeal of the estate tax as well as on the future of legal education. His observations provide a wise perspective on some timely but difficult issues.

This is the first issue for which we have had the benefit of the hard work and expertise of Chris Rizek, our newly appointed Special Features Editor. In this new capacity Chris has agreed to develop and oversee our Point/Counterpoint debates. Chris’ experience, including service as Associate Tax Legislative Counsel and in his current position as a partner at Caplin and Drysdale, make him uniquely suited for this job. It has been a pleasure to work with him on this issue and I look forward to his insight and creativity for many more.

marriage. If the highest court of that state has not ruled and lower courts are in conflict, the Service will determine what constitutes a marriage in light of other rulings, if any, of the courts of that state. Under those circumstances, the Service is likely to adopt a narrow view of what type of arrangement will constitute a marriage, precisely as it did in this case.

After concluding that a common law marriage contracted in the decedent's state would not be valid, the Service went on to note that the courts of that state would uphold the validity of a common law marriage contracted in another state. It therefore became necessary to determine whether two states that the decedent and his companion visited would have viewed them as common law spouses. After a lengthy review of the law of those two states, the Service concluded that the highest court of the state in which the decedent had resided would not conclude that the decedent and his

companion entered into a common law marriage while traveling in the other states.

The marital deduction may not be available even where an estate has satisfied the Service that a marriage existed. For example, in *Estate of Mergott v. U.S.*, 86 A.F.T.R. 5877, 2000-2 USTC ¶ 60,383 (D.N.J. 2000), a widow filed an action against her husband's estate and the action was settled out of court. However, under state law the widow did not have an enforceable right to settle her claims against the estate in exchange for a lump-sum payment. Therefore, the Tax Court held that the lump-sum payment to the widow was not a bona fide recognition of her enforceable rights under state law and did not qualify for the marital deduction.

Nevertheless, a surviving spouse's successful will contest does not always render the marital deduction unavailable. In PLR 200127038 (Apr. 10, 2001), a widow contested her husband's will and received a court-

sanctioned settlement. The Service concluded that property passing pursuant to the settlement would be treated as passing from the decedent for purposes of the marital deduction only if the distribution represented a bona fide, arm's length, settlement of a legally enforceable claim.

What differentiates *Estate of Mergott* (which disallowed a marital deduction) from PLR 200127038 (which allowed it) is that the surviving spouse in the ruling had a legally enforceable right in the decedent's estate. Such a right can result from operation of law, a court ruling, or a court-sanctioned settlement. By contrast, in *Estate of Mergott*, the settlement occurred out of court.

Mergott reminds us that will contests can have unintended estate tax consequences. Before agreeing to a settlement, an executor should consider whether the settlement amount will qualify for the marital deduction. In this area, a little planning can produce significant savings. ■

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Chris' inaugural Point/Counterpoint is a spirited debate on the taxation of the foreign-source business income of U.S. corporations. Cliff Fleming, Bob Peroni and Steve Shay argue that U.S. corporations ought to be taxed on their worldwide income and that the current system, which defers taxation of the active business income derived by such corporations, ought to be repealed. At the opposite end of the spectrum, Herm Bouma argues that the current system ought to be expanded so that deferral is made permanent; that is, so that the foreign source income of U.S. corporations is never subject to U. S. tax. The debate on this question is certain to continue for some time and their discussion provides a good introduction to the important issues on each side.

The Points to Remember in this issue take us from international e-commerce to the intricacies of the estate tax marital deduction and even to income tax planning for higher education expenses. Nancy Beckner provides us with a primer on the issues we must consider if we have clients engaged in international e-commerce. Her Point provides a list of references for further guidance and should be useful to anyone with clients who are, or will be, engaged in transnational e-commerce. David Silverman introduces us to section 529 Plans, which promise to become the vehicle of choice for college saving by high bracket individuals. His Point provides us with the information we will need to decide whether investing in such a Plan is desirable, either for ourselves or for our clients. Alexander Drapatsky provides us with a glimpse into the world of unmarried co-habitants and widows who challenge their husbands' wills.

His Point reminds us that sometimes the marital deduction is unavailable, leaving the estate with a tax large tax bill even though a spouse (legally or functionally) actually received the property from the estate.

Finally, I am delighted to introduce a new item. In "Spotlight on Committees" I want to feature committee work that might not be familiar to many of our members. By featuring different committees in every issue, I hope not only to give members a sense of the range of work undertaken by the Section, but also to encourage other members to join in that work. We begin by featuring the Diversity Committee and the State and Local Tax Committee, two committees that have produced best-selling publications and forged new paths by working together to co-sponsor programs with one another as well as with other groups. The range of their activities will surprise and inspire you. ■