

wide array of topics about both tax and teaching. Last spring, one of the contributors to this issue's Point/Counterpoint asked about the current state of tax policy. The responses were so eloquent and thoughtful that I asked several of the participants to revise them for this publication.

*Taxprof* enriches the life of all of us who teach taxation in our law schools. I know that I am not alone in feeling personally quite bereft if my e-mail is down or I am out of town so that I am cut off from its help, wisdom, and camaraderie. We tax professors all owe a debt of gratitude to Professor Paul Caron at the University of Cincinnati College of

Law for his willingness and efforts to maintain this listserv.

In the *Newsletter*, the Points to Remember and Special Reports serve for our readers some of the same functions as *taxprof* does for its subscribers—helping us keep up with new developments. In this issue, Dianne Bennett gives us a fascinating look at some of the unusual employee benefits being offered in the marketplace. Of those she describes, I think pet health insurance may be my own favorite! Annette Nellen provides not only a review of recent new authorities, but also a handy checklist regarding capitalization versus expensing. Ed Polisher and Ed Kessel thoughtfully analyze the implication of the recent *Atkinson*

case regarding the administration of charitable remainder trusts. In a Special Report, Stuart Rader demystifies allocation of the GST exemption for lifetime transfers to trusts.

Communication, of course, does not always produce agreement, as demonstrated by the exchange between Mitchell Miller and David Silverman on installment sales to defective grantor trusts or by the letter from Tax Section Chair Pam Olson to ABA President Martha Barnett regarding positions of the ABA. Without such exchanges and willingness to learn from each other, however, agreement will never be possible. May we in the Tax Section continue to learn from each other. ■

## MEMBERS REACT TO **ABA** **JOURNAL ARTICLE**

The following letter is excerpted from an e-mail from Tax Section Chair Pam Olson to ABA President Martha Barnett in reaction to the December 2000 ABA *Journal* cover story, "Where Will They Go?," concerning the Palestinian refugee right to return campaign.

Dear Martha:

The December *Journal* article has certainly caused a firestorm of protest. I appreciate the steps that have been taken to address the apparent one-sidedness of the article. I am writing because I wanted you to be aware of a more fundamental issue that the article appears to have brought to the surface. That issue is a current of general dissatisfaction with

ABA policies among some of our members. I have copied here for your information an e-mail from Michael Shaff, a long time Tax Section member, about his concerns with the ABA. Mr. Shaff writes:

"I have been a section member for 20 years. In that time I have been a committee member (Financial Transactions for the last seven or eight years) and have participated in the FASIT regulation project and on the family partnership ruling project for the Partnerships committee about 12 years ago. I have always appreciated the *Tax Lawyer* publication and the quarterly newsletters."

"Of late, I have become increasingly more intolerant of the political positions taken by the ABA house of delegates and the positions espoused

in the ABA *Journal*. My partners have let their ABA memberships lapse, and only one of our five associates remains an ABA member. Positions on abortion, capital punishment and the Middle East set forth in the ABA *Journal* recently are not in line with my views or even with the views of most Democrats, I dare say....The ABA risks being marginalized into a left wing lobby. Being a member of the tax section of the National Lawyers Guild would have no appeal for me. The NYSBA tax section probably carries more weight than the ABA tax section in Washington these days, and the situation is likely to deteriorate under the new Administration. I call upon you to publicly advocate to the ABA leadership a moderation of the views

stance doctrine applies, the degree of economic substance must be meaningful. I would leave to the courts the determination of when the economic substance doctrine is applicable and what “degree of economic substance” means in particular circumstances. If this statement raises questions about particular transactions based on specific tax incentives, such as the low income housing credit, let the transactions be identified. Congress easily can provide protection if appropriate.

At a “narrow” level, there are instances in which more tightly worded rules also make sense. When the Service finds a loophole in the Code or an infirmity or ambiguity in a regulation that results in taxpayer responses which seem inconsistent with the sensible operation of the statute, a tightly worded statutory amendment or modification of the

regulation might be all that is necessary to correct the problem. The recent Section 357(d) legislation, in my opinion, is a good example.

There is no simple answer to your question regarding broad or narrow rules or to the broader question of how government should respond to aggressive tax planning. Therefore, I do not think it is particularly productive to look for a magical one-shot solution. Taxpayers may be expected to take aggressive interpretative positions no matter what form of tax system is in place and no matter how specific or how general the law may be. It is the Internal Revenue Service's duty to analyze reported positions and seek to enforce fairly the law through administrative pronouncements, litigating positions, and the imposition of civil and criminal penalties when appropriate.

Should Treasury determine that the Service does not have sufficient statutory authority to stop an abusive transaction, it should promptly inform the Congress. Sometimes corrective legislation will be forthcoming, sometimes not. Too often I think Treasury waits too long before conceding that corrective legislation is necessary. The private sector also has an obligation—simply put, not to hide the ball. I am convinced that rules requiring full disclosure, providing the Service a reasonable opportunity to evaluate the merits of the taxpayer's reporting position, will have a dampening effect on tax shelter activity without precluding taxpayers from taking aggressive interpretative positions that they believe are defensible. ■

## MEMBERS REACT TO ABA JOURNAL ARTICLE

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expressed by the ABA. I would regret letting my membership lapse after 20 years.”

“I would appreciate receiving your views.”

Martha, I share Mr. Shaff's concerns about some of the positions the ABA adopts. In completing the annual survey on the ABA's legislative priorities, I found I do not agree with some of them as a policy matter, nor would I rate them as priorities. I fear that is a view shared by many ABA members. I know several attorneys who have resigned from the ABA over positions the ABA has adopted. I know others who remain members despite disagreement with ABA positions because they value their membership in one of the sections—and can ignore the rest of the ABA—or

because they believe the best way to affect the organization's policies is to remain a member and work to change them.

I realize that control of the policies and priorities of the organization is not vested in you as President, but I would urge you to use your position to ensure that the views of the many members of the bar who do not agree with positions we know to be controversial are fully considered. I also urge you, in setting the ABA's legislative priorities for the coming year, to consider the addition to the list of issues of more general importance to the majority of Americans and with which there is much agreement. In considering legislative priorities, it is important to recognize that the fact that a position is of general interest

and not controversial does not mean that necessary legislation will be enacted. Consequently, ABA support of such positions can be important. Were we to include even one such item in the list of legislative priorities, we would signal to dissatisfied ABA members that we are listening to them and addressing their concerns.

As significant, we would indicate to the public that the ABA understands and is willing to speak for the interests of all Americans.

Thank you for your consideration.

Warmest regards,  
Pam Olson