

FROM THE CHAIR

by Herbert N. Beller, Washington, DC



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Much is going on in the world of taxes these days, so it's not surprising that the Section's activity level over the past few months has been quite high. I'd like to take this opportunity to fill you in on some of the things we've been doing and have on the drawing board.

TAX SHELTERS

Devising effective measures to curb abusive tax shelters continues to be a high priority for Treasury and the Service, and there's been considerable recent activity in this area on the legislative front as well. In March Treasury released a comprehensive set of administrative and legislative recommendations to revamp and strengthen disclosure requirements for newly-defined categories of "reportable transactions," and also to implement a more stringent penalty regime in non-disclosure contexts. Proposed regulations extending the existing disclosure, registration and list maintenance requirements to individuals and other noncorporate taxpayers were issued in June; additional proposed regulations covering the definition of "reportable transaction" and other administrative aspects of the Treasury recommendations are

expected shortly; and bills pending in both the Senate (Baucus–Grassley) and the House (Thomas) incorporate provisions reflecting several of the recommendations.

The Section has consistently endorsed a disclosure-based approach as the best way to combat abusive tax shelter transactions. This message was reiterated in our recent comments on the Treasury recommendations, the tax shelter provisions of the Baucus–Grassley bill, and parallel provisions of the Thomas bill. We support the core features of these various initiatives, including particularly (i) subjecting both corporate and noncorporate taxpayers to special disclosure requirements in connection with reportable transactions; (ii) imposing a significant separate nondisclosure penalty for both "listed" and non-listed reportable transactions; (iii) increasing the 20% accuracy-related penalty of section 6662 for certain nondisclosed reportable transactions; and (iv) precluding taxpayers from relying on certain "disqualified advisors" and "disqualified opinions" in asserting the reasonable cause/good faith exception of section 6664 to avoid penalties with respect to unsustained reportable transactions.

At the same time, we have urged that the new "reportable transaction" categories be framed neither too broadly (so as to deluge the Service with mounds of paper on numerous legitimate transactions), nor too narrowly (so as to exclude known or suspected types of potentially abusive transactions). We also have urged a rethinking of proposals that would (i) foreclose any chance of the Service waiving nondisclosure and increased accuracy-related penalties; (ii) adopt a "more likely than not" penalty avoidance threshold for undisclosed *nonreportable* transactions (as opposed to the present law "substan-

tial authority" standard); (iii) too broadly define the "material adviser" concept and potentially intrude upon the attorney-client privilege in connection with advice provided taxpayer-clients with respect to reportable transactions; and (iv) codify all of the requisite elements of the "economic substance" doctrine.

With respect to yet another dimension of the tax shelter problem, I heard from a number of our members who were greatly disturbed by the episode this summer involving the release of taxpayer identities in connection with certain highly publicized summons enforcement actions. Please know that I and other Section officers promptly and candidly discussed these concerns directly with high-level officials at both the Service and Justice, but at the same time reaffirmed our unwavering support of governmental efforts to eradicate the still festering tax shelter problem. I for one was heartened by the joint announcement that followed soon thereafter from those officials who shoulder the ultimate responsibility for administering and enforcing our tax laws in a fair, even-handed and circumspect manner.

Our Tax Shelter Task Force—under the leadership of Bill Paul, and with significant contributions from many others—continues to spend a great deal of time on the difficult and important issues that must be addressed in this area. The quality of the deliberations on the various submissions we have made has been absolutely superb, and has served to remind me yet again of the Section's great depth and dedication to making the tax system as good as it can be. (A special word of thanks to Greg Jenner, who before joining Treasury early this summer, served as a member of Council and very ably chaired our Tax Shelter Task Force.)

SIMPLIFICATION

The Section continues to push hard for major simplification of the tax laws. This, of course, is not an easy or quickly accomplished task. But there are definite signs that the movement is picking up steam—witness: (i) the Joint Committee’s comprehensive report in 2001, containing over 100 specific legislative proposals for simplification; (ii) the enactment last year of provisions eliminating, at least on a deferred basis, the so-called PEP and PEASE limitations; (iii) National Taxpayer Advocate Nina Olson’s focus, in her 2001 annual report to Congress, on the need for legislative simplification in a variety of areas affecting individual taxpayers; (iv) Treasury’s issuance this spring of the first of a series of simplification white papers (proposing a uniform Code definition of the term “child”), together with public statements by Treasury Secretary Paul O’Neill and Assistant Secretary for Tax Policy Pam Olson that the Administration is committed to pursuing meaningful near-term simplification measures; and (v) the introduction this summer, by Rep. Rob Portman, of a bill that proposes a broad range of simplification measures affecting both individual and business taxpayers, many of which were previously identified and urged by the joint working group comprised of representatives from the Section, the AICPA and the Tax Executives Institute.

Last month, the ABA/AICPA/TEI working group submitted to Treasury specific proposals urging (i) a uniform definition of a qualifying child; (ii) elimination (or at least rationalization) of the remaining phase-out rules of the Code; and (iii) repeal of the individual and corporate AMT regimes (or, if budgeting constraints make that now impossible, at least making permanent the temporary increase in the AMT exemption amount enacted last year).

Several Section members labored during August and early September in the development and drafting of these proposals, including David Glickman and Terri Hyde (co-chairs of the Sec-

tion’s Simplification Task Force), Armando Gomez (one of our current Nolan Fellows), Les Book (Chair of our Low-Income Taxpayer Committee), and Janet Spragens (a member of Council), as well as Nancy Abramowitz, Mary Lou Fahey, Diana Leyden, Susan Morgenstern, Gail Richmond, and Cindy Wofford. We also are very grateful to Helen Hubbard, who preceded Terri Hyde as co-chair of the Simplification Task Force and served as Assistant Secretary of the Section before moving to Treasury in mid-August.

SPECIAL TASK FORCES

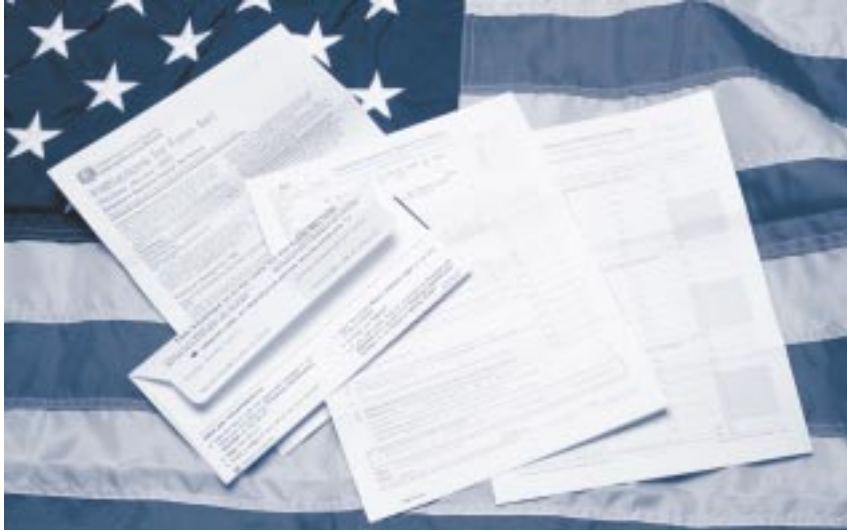
One of the pearls of wisdom that prior Section Chairs have imparted is that the best way to get something important done in this organization is to appoint a special task force. In taking that advice to heart, I have established or reconstituted the four special task forces described below to address areas of particular importance to many of our members and to the tax system generally.

Inversions/International Tax Reform. This task force, co-chaired by Len Schneidman and Steve Shay (both former chairs of our foreign committees), is charged with (i) evaluating legislative proposals relating to offshore corporate “inversions,” “earnings stripping” and other foreign-oriented transactional behavior designed to reduce the impact of U.S. taxation; and (ii) identifying and evaluating alternatives for fundamental changes in the way that we tax foreign business income (a subject that has become especially important in light of the World Trade Organization edict that our FSC/ETI tax regimes constitute an illegal export subsidiary). The task force members are drawn from our foreign and other committees; and they include leading practitioners from law firms, accounting firms and multi-national corporations, a noted international tax professor, and consulting economists from the University of Michigan and Harvard Business Schools. The group hopes to have an initial draft of a comprehen-

sive report completed by the January meeting in San Antonio.

Business Activity Tax. This task force, co-chaired by Steve Salch and Linda Holman, is an outgrowth of our existing E-Commerce Task Force. Its immediate objective is to prepare a white paper addressing the difficult and ubiquitous problem of developing a workable “nexus” standard under which domestic and foreign jurisdictions may appropriately tax business activities conducted over the Internet and otherwise outside of traditional “bricks and mortar” settings. The task force includes representatives from our State and Local Taxes Committee and several other relevant committees. An organizational meeting is planned for Los Angeles, and the target date for completion of the paper is July 1 of next year.

Transfer Tax Reform. This group is a multi-organizational task force comprised of representatives from the Tax Section, the Real Property Probate and Trust Law Section, the AICPA, the American College of Trust and Estate Counsel, the American College of Tax Counsel and the American Bankers Association. Its purpose is to prepare a comprehensive report, for submission to Congress and Treasury, which analyzes (i) technical and transitional consequences of the significant changes that were enacted in 2001 with respect to the gift, estate and generation-skipping taxes; and (ii) various alternative legislative measures that might be adopted to eliminate the substantial uncertainties that taxpayers and their advisers now face under the existing transfer tax system. The group has received grants from the American Tax Policy Institute and the ACTEC Foundation, and University of Minnesota Law Professor Mary Louise Fellows has been retained to serve as reporter for the project. Members of the joint task force include representatives from our Estate and Gift, Fiduciary Income Tax and Sales, Exchanges and Basis Committees, as well as Council members Lloyd Leva Plaine and Jerry August. The work of



the joint task force is well underway and is expected to span two years.

Sarbanes–Oxley. In the wake of the unfortunate Enron situation and other instances of major corporate misconduct, Congress recently enacted sweeping legislation (the Sarbanes–Oxley Act) that, among other things, imposes prohibitions and limitations upon the types of non-audit services that public accounting firms may perform for audit clients. Among the prohibited activities is the performance of “legal services.” Another provision permits the performance of “tax services” if approved in advance by the audit committee of the client’s board of directors. A number of commentators have begun to express differing views on the scope of the “tax services” exception and its interface, if any, with the “legal services” prohibition. Forthcoming SEC guidance under the Act may address these issues. Council believes that as the country’s largest professional organization of tax lawyers, the Section is well-equipped to consider tax-related questions and proposals arising under Sarbanes–Oxley or other corporate responsibility measures. Towards that end, I have asked Stu Offer, the Section’s liaison to the ABA Task Force on Corporate Responsibility, to head up the Section’s newly-established Sarbanes–Oxley Task Force. This group includes persons who are active in several of our committees and who

practice in law firms, accounting firms and in-house settings. Its purpose is to identify and carefully examine all of the tax-related aspects of the Act, and to make recommendations regarding the nature and content of specific input that the Section might provide. We expect to coordinate these efforts with those of the Business Law Section, which is, of course, considering a much broader range of issues arising under the Act. Although the subject is admittedly delicate, I am confident that we can make a meaningful contribution in this area, and that we can do so in an objective, well-reasoned and fair manner.

VITA INITIATIVE

A major aspect of the Section’s pro bono/public service activities this year will be to provide substantial return preparation support at IRS-sponsored Volunteer Income Tax Assistance Program sites throughout the country. I am asking all Section Officers, Council Members and Committee Chairs to participate in this worthwhile endeavor, and I am hopeful that large numbers of our members will follow their lead. Dick Lipton, the head of our new Pro Bono Committee, is in the process of arranging for multiple VITA training sessions at the January meeting in San Antonio. Please consider pitching in on this important project. As plans crystallize, pertinent information will be posted on the Section website.

NEW MEETING CYCLE

Despite our decision not to meet as a Section at the ABA Annual Meeting, the work of the Section continued at a brisk pace throughout the summer months. In addition to the areas mentioned above, several important government submissions were produced by our committees—including comments on (i) Treasury’s advance notice of rulemaking relating the capitalization of intangibles (Tax Accounting); (ii) a broad range of recommended changes to the private foundation rules (Exempt Organizations); and (iii) proposed changes in Tax Court Rules governing small cases (Court Procedure and Low Income Taxpayers). Also, under the terrific leadership of Sam Braunstein (Chair of our Professional Services Committee) and Karen Hawkins (Section Vice Chair for Professional Services), we recently have sponsored several successful teleconferences and other external CLE programs.

Our new fall-winter-spring meeting cycle will, I believe, serve as a catalyst for unleashing even greater amounts of energy from our talented and resourceful membership. We very much look forward to having regular fall meetings; and we are exploring the possibility of holding combined fall meetings (perhaps as early as 2003) with other Sections whose interests dovetail with our own (*e.g.*, Business Law and Real Property, Probate and Trust Law).

As should be evident from this report, we certainly have a full head of steam as we approach the LA meeting. As usual, you can expect at all Section meetings a wide range of interesting panels and programs, as well as great opportunities to hear from government participants and to network with colleagues from all over the country. But whether or not you are able to attend our meetings, please do not be bashful about contacting me directly (hbeller@sablaw.com or 202/383-0120) with any questions, suggestions or concerns you may have regarding Section activities. ■