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FROM THE EDITOR

by Alice G. Abreu, Philadelphia, PA

As befits a publication that goes to press in mid-April, this issue includes several articles that provide an insight into the current workings of the Internal Revenue Service. Not only are we fortunate to be able to feature a very informative interview with B. John Williams, the Chief Counsel of the Internal Revenue Service, but Points to Remember examine some of the Service's new compliance initiatives, describe the Service's reaction to certain transactions involving partnerships, and even discuss the ways in which the Service might react to a possible decision of the United States Supreme Court.

In his column, Section Chair Herb Beller provides a comprehensive look at the Sections' many activities, from government submissions to tax court nominations, tax shelters, Sarbanes-Oxley, CLE, law student tax competitions, and new pro-bono initiatives. That the Section can command the efforts and dedication of so many talented, experienced and busy practitioners is testament to its leadership and the importance of its work. We see further evidence of this in this issue's Committee Spotlight, which shines on the newly formed Pro Bono Committee. Under the leadership of former Section Chair Dick Lipton, this Committee is off to a rousing start. I hope many of you not only read about the Committee's activities but also join Dick and others in their effort to encourage all of us to become more active in doing pro bono work.

As always, our Interview Editors, Jack Cummings and Alan Swirski, have brought us a perceptive and informative look into the life and work of an important public official. They asked B. John Williams the very questions most of us want to know the answers to, and the Chief Counsel responded with forthright, revealing answers that provide an important insight into matters ranging from the anticipated increase in published guidance and the demise of FSAs to personnel changes in the Chief Counsel's office, the genesis and operation of various tax shelter settlement programs, and a host of other important issues. Our thanks to the three of them.

In a forthcoming issue, Jack and Alan will use their talents to interview M. Bernard Aidinoff, this year's recipient of the Section's Distinguished Service Award. As you will learn from the piece which announces the award in this issue, Bernie Aidinoff not only chaired the Section and was at the helm of many Section initiatives, but his ideas influenced both the operation of the tax system and the practice of tax law.

In the first of the four Points to Remember in this issue Nancy Beckner describes a number of the compliance initiatives recently undertaken by the Service. Her article provides a useful digest that is not only informative, but will help anyone who has a client in a position to participate in the initiatives.

The next two Points deal with partnerships as tax planning vehicles. First, in their debut as Associate Editors, Monte Jackel and Matt Belcher explain the use of leveraged partnerships. They discuss a recent Chief Counsel Advice Memorandum that reached a result adverse to the taxpayer, and offer suggestions on how to structure such partnerships to achieve the desired objectives.

Second, David Silverman, one of our veterans, explains the ways in which limited partnerships and limited liability companies can be used to reduce the transfer tax bite, and offers some suggestions designed to ensure that the Service agrees with the transferor's position. His piece offers a concise explanation of the ways in which such family entities are used in transfer tax planning and is enlightening even for those who do not specialize in the field.

Finally, David Brennen gives us a thoughtful analysis of the ways in which a case set for oral argument before the United States Supreme Court on April 1 could affect tax exempt organizations. The case is *Grutter v. Bollinger*, which involves the constitutionality of the University of Michigan's Law School's admissions process; Michigan considered race as one of several factors in making admissions decisions. As David explains, a decision that such practices are unconstitutional could have serious implications for tax exempt organizations, depending on how the Service interprets the scope of the public policy limitation.

In assembling this issue's Point/Counterpoint debate Special Features Editor Chris Rizek has once again worked his magic, combining a provocative topic with two expert and passionate advocates. The question debated is whether a U.S. lawyer has any duty, ethical or otherwise, to observe foreign law. Joan Arnold questions whether there is such a thing as a "U.S." lawyer but concludes that such an obligation exists, and that lawyers have had to face disciplinary boards for violations of foreign laws. David Rosenbloom, on the other hand, asserts that nothing in U.S. law obligates a lawyer to follow a foreign law simply because it is a law. Their debate is lively, timely and important.

I close on an optimistic note: the future of the tax bar is bright, as demonstrated by the law students who are participating in the Young Lawyer's Forum Tax Law Challenge in significantly increasing numbers. Michael Lloyd, a semifinalist in last year's Challenge and now a YLF member, has written a piece which explains the competition and describes the very sophisticated problem that students were asked to tackle for this year's Challenge. You can test your skills by thinking about how you would have responded to the Challenge. I also urge you to drop by the final round of next year's Challenge, which will be held at the Midyear Meeting. If it is anything like the last two, I guarantee an intellectually stimulating and uplifting hour. ■

FROM THE CHAIR

by Herbert N. Beller, Washington, DC

HERBERT N. BELLER

The Section continues to be very busy on a number of fronts. An update on some of our major areas of activity over the past few months follows.

SAN ANTONIO MEETING

The Midyear meeting in San Antonio attracted over 1,200 attendees and, but for some unfortunate weather, was a huge success. We were pleased to welcome many government guests from IRS, Treasury, the Tax Division, the taxwriting committees and the courts. These folks always add an important dimension to our meeting programs and panels; and we are grateful for their participation and their friendship.

Our Saturday luncheon speaker, Assistant Treasury Secretary Pam Olson, shared valuable insights regarding several front-burner areas on the tax policy agenda, including the possibility of important changes in the international tax arena. This set the stage for our plenary session panel on that very subject, moderated by Len Schneidman. Panelists included Steve Shay (who, along with Len, co-chairs our International Tax Reform Task Force), University of Michigan tax economist Jim Hines, Ways & Means Democratic Chief Tax Counsel John Buckley and Senate Finance Committee Republican Tax Counsel Ed McClellan. Their informative and spirited discussion left little doubt as to the serious and difficult issues involved, and the pressing need to deal with them in ways that are fair, relatively simple, administrable and protective of U.S. interests in the world economy.

San Antonio was also the venue for the final rounds of the Student Tax Law Challenge, an annual legal writing and oral advocacy competition conceived in 2001 by the Section's Young Lawyers Forum. University of Michigan Law School students Erika Andersen and Jeremy Dardick emerged as the winning team. (A full report about this innovative event appears at p. 26 of this issue.) The Section is very excited about the rapid success of the Tax Law Challenge and the tremendous promise it holds for attracting aspiring young tax lawyers to our ranks.

GOVERNMENT INTERFACE

Improvement of the tax law and the tax system remains a major focus of Section activity. We do this principally through written technical comments to Treasury, IRS and the taxwriting committees in connection with proposed regulations, other administrative proposals and initiatives and proposed legislation. Since last September our committees have prepared and submitted some 20 sets of technical comments on a wide range of subject areas.

I am happy to report that all of these submissions were first-rate, balanced and constructive in content and timely made. Our committees welcome and thrive on this important opportunity to help shape the contours of the tax provisions that they work with on a daily basis. Much credit is due as well to our Committee on Government Submissions. COGS Chair Al Groff and his leadership team have done a terrific job in making sure that all comments are promptly reviewed by knowledgeable COGS members and that they conform to Section format and style requirements. This behind-the-scenes work is by no means glamorous, but it's critical to maintaining the consistently high quality and integrity of the Section's government submissions.

Our government interface activities take other forms as well. A number of our committees regularly hold informal meetings with IRS National Office personnel who specialize in the areas of the committee's jurisdiction. These interchanges provide an excellent opportunity to discuss candidly issues of current interest and often generate new committee projects.

In December the Section officers paid our annual "courtesy call" visits to IRS, Treasury and the Justice Department Tax Division. Agenda items included, among other topics, tax shelter initiatives; off-shore credit cards; voluntary disclosures; offers-in-compromise; international tax reform; published guidance initiatives; and prospects for tax simplification. The discussions were lively and informative, and confirmed to me that the work of the Section continues to be much appreciated by our Government counterparts. Prior to the May Meeting we will make similar visits to the taxwriting committees to discuss the status of proposed tax legislation, and to raise issues and concerns that our committees may have regarding particular legislative proposals.

Bob McKenzie, the Section's Division Coordinator for the IRS Wage and Investments Division, testified in January before the IRS Oversight Board and in April before the Ways and Means Oversight Committee on the "offer-in-compromise" program (written

statement available on Section website). He pointed out several deficiencies in the existing operation and administration of this program, and offered specific recommendations for change. The testimony elicited significant press coverage and hopefully will serve as a catalyst for improving the effectiveness and fairness of this important aspect of the tax system.

In February Don Korb represented the Section at a 3-day conference convened by the Service's Large & Mid-Size Business Division. The purpose of the conference was to gain input from LMSB field specialists, IRS and Treasury officials and stakeholder groups for use in developing the Division's strategic plan for the remainder of the decade. This is but one example of the Section's enhanced effort to be as responsive as possible to specific requests for assistance from the various IRS Operating Divisions.

TAX SHELTERS

As reported in my last column, the Section is monitoring closely the continuing flow of administrative, legislative and judicial developments in the tax shelter area. Most recently, we submitted Council-approved comments on the re-proposed disclosure and list maintenance regulations. These comments, which are available on the Section website, included specific recommendations for exceptions to the "loss-transaction," "book-tax difference" and other "reportable transaction" triggers under the proposed regulations. As recently adopted, the final regulations incorporate several reportable transaction exceptions along the lines we suggested, as well as certain other Section recommendations. Special thanks are due to Dick Stark, George Howell and Caroline Root for their excellent work on this important project.

TAX COURT NOMINATIONS

In recent months, President Bush has nominated several individuals to fill Tax Court judgeship vacancies. As a result, the activity level of our Tax Court Appointments Committee has been much higher than usual. Under the very able leadership of Brook Voght, the Committee has conducted a thorough and discrete review of each nominee's professional background. It also has given much thought to the appropriate qualification criteria for serving on the Tax Court — including, particularly, whether significant experience with federal taxation matters should be an absolute pre-requisite to appointment. Committee members hold differing views on this question. There is general consensus that a federal tax background is certainly an important credential; but some feel that it is not necessarily essential, and that a strong non-tax litigation background, or significant experience involving non-federal taxes, may be sufficient.

The Section's ability to participate in the process of filling Tax Court vacancies has varied over the years. Some Administrations have actively sought our input on potential candidates during the pre-nomination phase, while others have chosen not to talk with us at all. Still others have consulted with us only with respect to sitting Judges who are up for reappointment. Irrespective of any such communication, our views as to whether a particular nominee is "qualified," "well qualified" or "not qualified" are sometimes sought by Senate Finance Committee members or staff in connection with the confirmation process.

As the country's largest organization of tax lawyers, the Section can and should play a meaningful role in evaluating the professional qualifications of potential Tax Court judges. It is of course recognized that judicial appointment decisions normally have political underpinnings. Nonetheless, particularly where the court involved is one of specialized and limited jurisdiction (like the Tax Court), bar groups whose members practice in that specialty area can often provide especially valuable information and insights regarding the experience and qualifications of peer professionals who are being considered for judgeships. I hope that, in the future, the Section's role in the process for Tax Court appointments can become better defined and more consistent in terms of when and to whom our input is given. In the meantime, we will continue to review carefully and reach conclusions regarding the qualifications of all nominated individuals; and we will express those views to Administration officials and/or the Senate Finance Committee if and when given the opportunity to do so.

CLE ACTIVITIES

In addition to the terrific array of CLE programs and panels presented at each of the Section meetings, our "Live from Meeting" and between-meeting teleconference programs (e.g., the "Last Wednesday" series) continue to flourish. These offerings typically focus on practice-oriented topics of interest to most or at least a significant segment of our members. In recent months, excellent programs were presented by panels of experts drawn from relevant Section committees on a wide range of subjects, including (among others): compensating executives of closely-held businesses; worker classification; state taxation of E-commerce; the final ESBT regulations; the impact of Sarbanes-Oxley upon tax practitioners; current developments in tax accounting; and increasing activity in the summons enforcement area. Our December free-to-members program on engagement letters (presented by the Tax Practice Management Committee) drew over 350 registrants. Kudos to Sam Braunstein (Chair of our Professional Services Committee) and Karen Hawkins (Section Vice-Chair for Professional Services) for their tremendous effort in the planning and implementation of these programs.

PRO BONO/ PUBLIC SERVICE

Our newly formed Pro Bono Committee, chaired by Dick Lipton, held a well-attended inaugural meeting in San Antonio. Its charge is to facilitate participation by Section members in tax-related pro bono/ public service activities. (Dick's full report of the Committee's plans appears at p. 25 of this issue.)

Last year the Section established a public information website, www.taxtips4u.org, to help individual taxpayers, small businesses and non-profit organizations better understand and comply with various aspects of the tax laws that affect them. The site recently was redesigned to provide more user-friendly features, and useful information has been added regarding the new free electronic filing program launched this year by IRS in coordination with several commercial tax preparation firms. In addition, a Section-produced news release on the free-filing program has been distributed to and aired on television and radio stations throughout the country.

Our VITA training sessions in San Antonio were well received, and many of our members are volunteering to prepare returns for low-income taxpayers at VITA sites around the nation. We also continue our support for the very important activities of low-income taxpayer clinics. Our LITC 800 number assistance line is up and running on a pilot basis in the mid-Atlantic region. We are coordinating with individual LITCs and the IRS National Taxpayer Advocate's Office on ways to publicize its availability.

We also are co-sponsoring, with the American University Washington College of Law, the 5th Annual Workshop on Low-Income Taxpayer Clinics. This event will be held in Washington on May 7 and 8 (further information available on Section website). It draws participants from all over the country, including law professors who run or are interested in starting LITCs; representatives from local bar associations interested in organizing LITC-oriented programs and activities; and individual practitioners who provide volunteer assistance to LITCs. Scheduled speakers at the Workshop include Treasury Secretary Pam Olson, IRS Chief Counsel B. John Willliams, National Taxpayer Advocate Nina Olson and U.S. Tax Court Chief Special Trial Judge Peter Panuthos. Janet Spragens, a member of the Section's Council, is one of the organizers of the Workshop.

SARBANES-OXLEY/AICPA

As was reported in my last column, in December the Section filed comments with the SEC on the "tax services" aspects of the "auditor independence" rules under the Sarbanes-Oxley Act. These comments were prepared by members of our Sarbanes-Oxley Task Force and were approved by Council. Task Force Chair Stu Offer and several others put together this excellent work product under very tight time constraints. Council believed that it was important, and entirely appropriate, for the Section to weigh in on these admittedly delicate issues—and I believe that we did so in a thorough, balanced and highly professional manner.

In a nutshell, our comments described and analyzed the various types of tax services from the perspective of whether such services, if performed by an accounting firm for an audit client, might violate certain core principles of auditor independence. This same basic approach was suggested by the commentary that accompanied the release of the proposed SEC rules on this subject. The AICPA (as well as certain members of the ABA Business Law Section) filed comments that took a less restrictive view of the appropriate criteria for evaluating audit client tax services. The final rules adopted by the SEC in late January are more in line with this other view. According to the final commentary, "accountants would impair their independence by representing an audit client before a tax court, district court, or federal court of claims." However, "accountants may continue to provide tax services such as tax compliance, tax planning, and tax advice to audit clients, subject to normal audit committee pre-approval requirements"—and subject also to the admonition that audit committees "should scrutinize carefully the retention of an accountant in a transaction initially recommended by the accountant, the sole business purpose of which may be tax avoidance and the tax treatment of which may be not supported in the Internal Revenue Code and related regulations."

Whether this disposition of these difficult questions will prove sufficient remains to be seen. The Section will continue to monitor further developments in the area and will consider whether to comment on any new administrative or legislative proposals that may emerge.

I do want to take this opportunity to state, without equivocation, that the Section continues to value highly its relationship with the AICPA. Our ongoing joint effort on tax simplification (along with TEI) is an excellent example of how well we can work together; and our regular communication on other matters has unearthed much common ground, as well as useful insights regarding issues on which the two organizations may differ. The tax system is the ultimate beneficiary of this relationship; so it's very important that we continue to look for new ways to combine forces.

In the same vein, the Section greatly values the contributions of our more than 1,000 members who practice in accounting firms, many of whom hold committee and other leadership positions within the Section. These folks bring an enormous wealth of talent and depth of experience to our organization. We are very fortunate to have them on board!

As I write this column, our Washington meeting is just around the corner and, as usual, promises to be heavily attended by government guests and packed with excellent programs. I hope that many of you will be able to attend and look forward to seeing you there. ■

COUNCIL **ACTIONS**

By N. Susan Stone, Secretary, Houston, TX

The Council of the ABA Section of Taxation met on January 23, 2003, for the Midyear Meeting of the Section at the Marriott Hotel in San Antonio, Texas. The Council heard reports and took action on the following items.

FALL 2002 GOVERNMENT **COURTESY CALLS**

Herb Beller, Chair of the Section, reported to Council that the Section Officers' Courtesy Calls to the Treasury Department, the Internal Revenue Service and the Department of Justice on December 13, 2002, had been highly successful. Although the topics discussed with each governmental agency differed somewhat, a common issue addressed by all three agencies was tax shelter identification, litigation and settlement initiatives. Herb further reported that the areas needing priority guidance from the Treasury Department and the Internal Revenue Service, identified by Section Committee Chairs and Vice-Chairs, had been presented to those two agencies for their consideration.

ELECTION OF **NOLAN FELLOWS**

Dick Shaw, Chair-Elect of the Section, reported that the John Nolan Fellowship Selection Committee had received 10 nominations for 2003-2004 fellowships, and six nominees had been selected by the Committee for consideration by Council. The six nominees selected for Council consideration were:

Adam Cohen, Denver, CO
Charlene Luke, Philadelphia, PA
Allen D. Madison, Palo Alto, CA
Christopher S. McLoon, Portland ME
Bonnie A. O'Brien, Washington, DC
Norma Sharara, Washington, DC

After discussion of the qualifications of each candidate, the Council unanimously approved the election of each individual listed above as a John Nolan Fellow for the Section's 2003-2004 fiscal year.

ABA LABOR SECTION'S RESOLUTION ON CIVIL RIGHTS RELIEF ACT

Stef Tucker, one of the Section's Delegates to the ABA House of Delegates, reported that the ABA Section of Labor and Employment Law had requested that the Tax Section co-sponsor a resolution recommending that Congress enact the Civil Rights Tax Relief Act (H.R. 840 and S. 917, as introduced in the 107th Congress) to provide relief to civil rights and employee complainants by (1) treating compensatory damages (other than back pay and front pay) in civil rights and employment cases in the same manner as compensatory damages in personal physical injury cases; (2) providing that no portion of the award or settlement paid in civil rights and employment cases to cover attorneys fees and expenses should be taxable to the client; and (3) allowing income averaging for complainants who receive in one year awards or settlements of back pay or front pay covering more than one year. Council discussed the proposed resolution and noted that it would create significant complexity in existing law and would require substantial amendments to be technically sound. Consistent with the Section's emphasis on tax simplification, Council determined that the Section should not co-sponsor the resolution in its current form.

COSPONSORSHIP OF **GATEKEEPER REPORT AND RECOMMENDATIONS**

Karen Hawkins, Vice-Chair Professional Services, reported that the ABA Task Force on Gatekeeper Regulation and the Profession had prepared a report and recommendations to be delivered to the ABA House of Delegates in February 2003. The report states that although the ABA supports the enactment of reasonable initiatives designed to prevent money laundering and terrorist financing, the ABA opposes any law or regulation that would compel lawyers to disclose confidential client information to government officials or otherwise compromise the lawyer-client relationship. Karen noted that the report and recommendations are co-sponsored by the Real Property, Probate and Trust Law Section, the Criminal Justice Section, the Section of Litigation and the Section of International Law and Practice. After discussion, the Council unanimously voted to add the Tax Section as a co-sponsor of the report and recommendations.

PARTNERSHIP COMMITTEE **RECOMMENDATION TO AMEND SECTION 751**

Herb Beller reported that Council, by electronic ballot conducted in December 2002, had approved the Partnership Committee's recommendation to amend Code section 751 to remove the "substantial appreciation" requirement from section 751(b) in order to conform the tax treatment of transactions under subsections (a) and (b) of section 751. The recommendation, as approved by Council, was forwarded to the ABA House of Delegates for its consideration.

TAX SECTION COMMENTS ON SEC'S AUDITOR INDEPENDENCE PROPOSED RULES REGARDING TAX SERVICES

Herb Beller reported that Council, by teleconference held December 20, 2002, and by subsequent electronic ballot, had approved the Section's submission of comments to the SEC on its proposed auditor independence rules as such rules related to the provision of non-audit tax services to a client by the client's auditor.

INVESTMENT AND PERMANENT RESERVE POLICY

Stanley Blend, Vice-Chair Administration, reported that he, together with a small subcommittee of Council members, had developed a conservative Asset Allocation Policy for the Section's investment portfolio, the highlights of which include: (1) the maintenance of a substantial permanent short-term cash reserve, (2) investment of the balance of the Section's funds in a conservative mix of equity and index funds, foreign funds and fixed income funds, and (3) reallocations among funds no more frequently than quarterly. After discussion, Council unanimously approved the Asset Allocation Policy.

JOINT FALL MEETING

Karen Hawkins reported that planning for the joint Fall 2003 meeting of the Tax Section, together with the Real Property, Probate and Trust Law Section, continues. She stated that the two Sections are presently working to coordinate CLE credit and identify and promote mini programs that appeal to the members of both Sections. Profits, if any, from the joint meeting will be allocated according to an appropriate formula between the two Sections. ■

2003-2004 NOMINEES

In accordance with sections 6.1 and 6.3 of the Section of Taxation Bylaws, the following nominations have been submitted by the Nominating Committee for terms beginning at the conclusion of the 2003 Annual Meeting in August. Under the Section Bylaws, the current Chair-Elect, Richard A. Shaw, San Diego, CA, will become Chair at the conclusion of the 2003 Annual Meeting.

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POINTS TO **REMEMBER**

Editor's Note: POINTS TO **REMEMBER** are individual submissions to the *NewsQuarterly* from Associate Editors and Section of Taxation members with insights to share. Although these items are subject to selection and editing, the Section conducts no systematic review of these items. Accordingly, each item states the views of the individual contributor and does not necessarily represent the views of the ABA or of the Section of Taxation. We welcome new submissions as well as responses to previously published material found in this section.

TARGETING OFFSHORE ABUSE: AUDIT PRIORITIES, JOHN DOE SUMMONSES AND THE OFFSHORE VOLUNTARY COMPLIANCE INITIATIVE*

by Nancy Beckner, Washington, DC

AUDIT PRIORITIES AND COMPLIANCE

The new audit strategy of the Internal Revenue Service (the "Service"), announced in FS-2002-12 (16 September 2002), sends a strong message to taxpayers and practitioners: compliance has high priority. The new approach realigns audit resources to focus on high-risk areas of taxpayer non-compliance. Offshore credit card abuse, abusive schemes and promoter investigations, high-income taxpayers, and unreported income are among the areas receiving enhanced scrutiny. Congress, too, has concerns about transfers to tax havens and other abusive arrangements, as exemplified by The Tax Haven and Abusive Tax Shelter Reform Act of 2002, S. Bill 2339, introduced on April 26, 2002, by Massachusetts Senator John Kerry. Thus, efforts to increase taxpayer compliance and eliminate offshore abuses now have the attention of both the Service and Congress. The Service's audit strategy and other changes, such as the Service's modification of its voluntary disclosure practice (discussed below), pose special challenges for practitioners representing taxpayers having unreported offshore income and undisclosed offshore accounts or financial arrangements.

JOHN DOE AND INDIVIDUAL SUMMONSES

One successful and well-publicized investigative tool has been the Service's attack on offshore credit card abuse through the issuance of John Doe summonses to American Express, MasterCard and VISA, and to various vendors. Targeted credit-card schemes generally involve U.S. taxpayers using offshore payment cards to tap unreported income held in undisclosed offshore bank or other financial accounts. The Service has issued almost 100 summonses to these credit card companies and received information about account holders in 77 countries. These summonses, in turn, have identified vendors from whom goods and services have been purchased using offshore cards and have resulted in additional summonses to such vendors seeking the identity of their customers. On March 13, 2003, the Justice Department, for the first time, filed enforcement summons petitions against individual credit card holders. How such schemes are utilized by taxpayers (or non-taxpayers as the case may be) is summarized in the Service's Memorandum in Support of Ex Parte Petition for Leave to Serve "John Doe" Summons in 'In re Does,' United States District Court, Southern District of Florida, Miami Division, August 15, 2002 (BNA TaxCore, August 16, 2002). The Memorandum cites two articles describing these offshore credit-card schemes: Scott D. Michel, *Advising a Client with Secret Offshore Accounts – Current Filing and Reporting Problems*, 91 J. Tax'n 158 (1999); and Sherwin P. Simmons, *Our Client has 'What?' A Discussion of Undisclosed Cash Hoards, Foreign Bank Accounts, etc.*, SF68 ALI-ABA 491 (February 22, 2001).

MODIFICATION OF THE SERVICE'S VOLUNTARY DISCLOSURE PRACTICE

To encourage more taxpayers to return to compliance, the Service recently modified its voluntary disclosure practice to provide a more objective standard for determining when a taxpayer's disclosure will be timely (IR-2002-135, December 11, 2002, announcing revised IRM 9.5.3.3.1.2.1). Under the revised practice, disclosure is timely if received before the Service has: (a) initiated a civil examination or criminal investigation of the taxpayer (or notified the taxpayer of its intent to do so), (b) initiated an examination or investigation directly related to the specific liability of the taxpayer, (c) acquired information directly related to the specific liability of the taxpayer from a criminal enforcement action, or (d) received third-party information about the specific taxpayer's noncompliance. This modification and factors practitioners will now need to consider in counseling clients are discussed in Muller and Katz, *IRS Makes Important Changes to its Voluntary Disclosure Policy*, 98 J. Tax'n 79 (February, 2003). In particular, this modification

* **EDITOR'S NOTE:** One of the initiatives discussed in this Point, (the Offshore Voluntary Compliance Initiative which applied to credit cards) closed on April 15; nevertheless, Associate Editor Nancy Beckner has written a longer version of this piece which provides much more detailed information on that initiative. That longer version was posted on the Section's website as a service to members in advance of the hard copy publication of the *NewsQuarterly*, as we expected such publication would not occur before expiration of the deadline. Members who would like to access the longer version of the piece can do so by going to the Section's website: www.abanet.org/tax/.

addresses concerns that once John Doe summonses are issued (as discussed above), a taxpayer's subsequent disclosure of participation in an offshore credit card scheme would not be timely. The Service's News Release of this modification noted that "... general publicity regarding enforcement and compliance efforts will not bar a taxpayer from making a voluntary disclosure."

OFFSHORE VOLUNTARY COMPLIANCE INITIATIVE AND APRIL 15 DEADLINE

The Offshore Voluntary Compliance Initiative ("OVCI") is part of the Service's effort to implement the new audit strategy and encourage voluntary return to compliance. The OVCI, unveiled on January 14, 2003, in Revenue Procedure 2003-11, 2003-4 I.R.B. 311 (the "Rev. Proc."), is directed to users of offshore payment card schemes and other abusive offshore financial arrangements; the initiative offered such persons the opportunity to come back into compliance with U.S. tax law without risk of civil fraud or certain other civil penalties, and with reduced likelihood of criminal prosecution. The OVIC was also intended to provide greater information to the Service about such schemes and to identify promoters and other involved persons. According to Treasury's Assistant Secretary for Tax Policy, Pamela Olson, the Service will pursue persons who fail to come forward [under the OVCI] and such taxpayers will be subject to more significant penalties and possible criminal sanctions (10 DTR GG-1, 2003).

April 15, 2003, was the deadline for taxpayers to submit requests for participation in the OVCI, and the Rev. Proc., in its current form, does not permit taxpayers to seek an extension or make a late filing of the participation request. Practitioners with clients who failed to meet the deadline but were otherwise eligible for participation will need to determine whether the Service subsequently announces an extension of the deadline or provides some other mechanism for submitting a request after April 15, 2003.

The OVCI developed from the Service's on-going investigation of offshore accounts and the previously described use of "John Doe" summonses to identify taxpayers using tax-avoidance schemes involving offshore payment cards and promoters of such payment cards. As might be expected, a key requirement for taxpayer participation in the OVCI is full disclosure of information about the promoters of offshore payment cards and offshore financial arrangements as well as the accompanying promotional materials. Promoters and persons with illegal income or activities are ineligible, as are taxpayers who fail to meet the standards of the Service's modified voluntary disclosure practice. Participation in the OVCI required not only submission of extensive information to the Service and compliance with other requirements of the Rev. Proc., including filing amended or omitted tax returns and paying (or arranging to pay) all back taxes, penalties and interest but also entering into a closing agreement with the Service. Additional information about OVCI is available at http://www.irs.gov/businesses/small (the "IRS Web Site"); *see also*, Marcovici, O'Donnell, Lewis, Michaels, Albright and Garofalo, "U.S. Announces Partial Tax Amnesty," 14 J. Int'l Tax'n __ (April, 2003).

THE SERVICE ISSUES ADVERSE CHIEF COUNSEL ADVICE ON LEVERAGED PARTNERSHIP TRANSACTION

by Monte Jackel and Matthew Belcher, Washington, DC

BACKGROUND

In a typical leveraged partnership transaction, a corporation ("X") wants to reduce its ownership in one of its businesses in exchange for cash, but wants to defer recognition of gain. Strategic Investor ("Y") wants to make a strategic investment in that business. In order to achieve these objectives, X contributes appreciated assets to a newly formed partnership in exchange for cash, funded by a partnership borrowing and guaranteed by X, and a minority equity interest in the partnership. Y contributes crown jewel assets in exchange for a majority equity interest in the partnership. At some point in the future, X's interest in the partnership may be redeemed for cash or other assets.

EXPECTED TAX CONSEQUENCES

Neither X nor Y should recognize gain upon the formation of the partnership because of section 721(a). In order to extract cash from the partnership in a tax deferred manner, however, X must: (i) avoid the disguised sale rules of section 707; and (ii) have sufficient basis in its partnership interest to avoid gain recognition under section 731. Sections 707 and 731 are described briefly below. Though beyond the scope of this column, a taxpayer must also consider the application of sections 704(c)(1)(B) and 737 (the "anti-mixing bowl" rules), 731(c), 751(b), Treas. Reg. § 1.701-2 (the "partnership anti-abuse regulations"), and various judicial doctrines before entering into a leveraged partnership structure.

The disguised sale rules generally provide that a transfer of property to a partnership by a partner, followed by a transfer of cash or other property from the partnership to such partner, is treated as a sale between the partnership and the partner (i.e., a "disguised sale") if the facts and circumstances indicate: (i) the transfer to the partner would not have been made except for the fact that the transfer to the partnership occurred; and (ii) the transfer to the partner is not dependent on the entrepreneurial risks of partnership operations. Treas. Reg. § 1.707-

3(b)(2) contains a list of ten factors to be considered in determining whether a transfer should be treated as a disguised sale. In considering the factors set forth in the regulations, one point is clear: entrepreneurial risk is critical. Thus, the more the contributing partner reduces its economic risk in the assets transferred to the partnership and does not increase its risk with respect to other partnership assets, the more the transaction will look like a disguised sale.

Section 731 generally provides that distributions by a partnership to a partner are tax free to the extent the partner has basis in its partnership interest. To the extent a partner receives a distribution of money in excess of such partner's basis, such excess is treated as proceeds from the sale or exchange of a partnership interest and taxable to the partner. Therefore, in addition to avoiding the disguised sale rules of section 707 discussed above, X must have sufficient tax basis in its partnership interest immediately prior to any distribution by the partnership.

Sections 705(a) and 752 generally provide that a partner's tax basis in its partnership interest upon contribution equals its tax basis in the assets contributed to the partnership, increased by the partner's allocable share of partnership liabilities, decreased by distributions received from the partnership, and decreased by a partner's liabilities assumed (or taken subject to) by the partnership.

X may guarantee the loan to ensure that the loan is allocated to X under Treas. Reg. § 1.752-2(a). This should avoid a disguised sale and a distribution of cash in excess of basis because it will put X at risk with respect to the partnership assets
and increase X's basis in its partnership interest.

CCA 200246014

On November 18, 2002, the Service released Chief Counsel Advice 200246014 (the "CCA"). While it is difficult to determine all of the relevant facts from reading the CCA, the transaction the CCA addresses clearly involves a leveraged partnership. The CCA sets forth a complicated, and heavily redacted, set of facts. The following is a very simplified version of those facts.

On Date 1, Taxpayer announced that it planned to either spin-off or sell all of its business operations. On Date 2, Taxpayer announced an agreement with Strategic Investor to dispose of its U.S. assets. As part of the disposition planning, Taxpayer sold certain high basis assets to Strategic Investor (apparently reporting a tax loss on the sale). Taxpayer also contributed certain low basis assets to a partnership, both directly and through a wholly-owned corporation ("SPV"), in exchange for cash and a small amount of common and preferred equity issued by the partnership. Strategic Investor contributed cash and certain of the assets that it purchased from Taxpayer to the partnership in exchange for common managing member interests. The partnership then made a cash distribution to Taxpayer (through SPV), funded by the cash contributed by Strategic Investor and by a loan incurred by the partnership.

In order to support the position that the cash could be received without causing gain recognition under section 707(a)(2)(B) or 731, SPV guaranteed the partnership's borrowing. In addition, the partnership and Taxpayer treated part of the distribution as a reimbursement of preformation capital expenditures. The facts of the CCA indicate that the SPV was thinly capitalized. Further, the partnership agreement contained put and call options on Taxpayer's common and preferred interests.

The Service raised the following issues in the CCA:

1. Whether the guaranty by the SPV of the indebtedness of the partnership may be ignored pursuant to Treas. Reg. § 1.752-2(j).
2. Whether the contribution of Taxpayer's assets, and the ensuing distribution, should be recharacterized as a disguised sale by Taxpayer to the partnership pursuant to section 707(a)(2)(B).
3. Whether the transaction can be recast as a sale between Taxpayer and Strategic Investor pursuant to Treas. Reg. § 1.701-2.
4. Whether the form of the transaction should be ignored and recharacterized as a sale between Taxpayer and Strategic Investor.
5. Whether the partnership is a valid partnership for federal income tax purposes.

The Service provided the following conclusions regarding the issues raised:

1. Yes, the guaranty by SPV of the indebtedness of the partnership can be ignored pursuant to Treas. Reg. § 1.752-2(j).
2. Yes, once the guaranty by SPV is ignored, the related contribution and distribution will be treated as a disguised sale under section 707(a)(2)(B). (This conclusion only related to the portion of the distribution that was debt-financed; Taxpayer had already conceded the application of the disguised sale rules to a portion of the distribution that was not debt-financed by reporting such portion as consideration in a disguised sale.)
3. Yes, it appears that the transaction is inconsistent with the intent of subchapter K and was entered into with a principal purpose of tax avoidance. Accordingly, the transaction can be recast under Treas. Reg. § 1.701-2.
4. Yes, under the substance-over-form doctrine, it is appropriate to ignore the form of this transaction (contribution and distribution) and treat it in accordance with the underlying substance (sale).
5. It did not appear that the Taxpayer had the necessary intent to become a partner. Accordingly, the partnership should not be treated as a partnership for federal tax purposes, and Taxpayer should be treated as having sold assets rather than as having made a contribution.

ANALYSIS

As a threshold matter, it is important to recognize that the CCA merely reflects the Service's views regarding the particular transaction at issue. It is not authority that is binding on taxpayers generally. In addition, the CCA addresses a leveraged partnership transaction that involved facts that were weak from Taxpayer's perspective in a number of respects, particularly when viewed in their totality. For example, as was indicated above:

- Taxpayer had announced a plan to either spin-off or sell all of its business operations prior to forming the partnership with Strategic Investor (and had not mentioned as one of its disposition options a joint venture).
- Taxpayer sold high basis assets to Strategic Investor (apparently reporting a loss for federal tax purposes). Strategic Investor then contributed certain of these assets to the partnership, while Taxpayer contributed low basis/high value assets.
- Although the exact amount of Taxpayer's interest in the partnership was redacted, the CCA indicated that such interest was nominal.
- The purported value of SPV's assets apparently was quite low, causing the SPV to be "severely undercapitalized with respect to the loan guaranty."

It is not surprising that the Service would challenge the substance of the guaranty given the under capitalization of the SPV. Nonetheless, certain aspects of the legal analysis in the CCA are very questionable. For example, we believe that the analysis of the application of the partnership anti-abuse regulations to the transaction is poorly reasoned and that the CCA's conclusion in this regard is incorrect. The partnership at issue appears to have been a bona fide partnership and the facts of the CCA do not appear to be otherwise. Nevertheless, because the CCA was heavily redacted, it is truly difficult to reach a conclusion on this issue until all of the facts are disclosed. Treas. Reg. § 1.701-2(a) states that "[s]ubchapter K is intended to permit taxpayers to conduct joint business (including investment) activities through a flexible economic arrangement without incurring an entity level tax." Merely forming a partnership to conduct business activities in a tax advantaged manner in accordance with its economic substance does not allow the Service to challenge the transaction under Treas. Reg. § 1.701-2 just because it does not like the results obtained by the taxpayer—that is a choice for Congress not the Service to make. We similarly question the legal analysis with regard to the "substance-over-form" doctrine and the "shamming" of the partnership, for similar reasons, and we believe that the Service would fail were it to seek to apply that analysis to a more taxpayer-favorable factual situation.

CONCLUSION

Although the CCA is taxpayer adverse, and although the Service subsequently issued another CCA to similar effect (CCA 200250013), we continue to believe that a properly structured leveraged partnership is a valid business structure that should be respected for federal tax purposes. The CCA highlights the importance of paying careful attention to each aspect of a leveraged partnership structure.

ANTICIPATING CHALLENGES TO FLPS AND FLLCS

by David L. Silverman, Mineola, NY

INTRODUCTION

Family limited partnerships (FLPs) and family limited liability companies (FLLCs) have proliferated over the past decade and have become an integral part of many estate plans primarily because they have favorable tax attributes and provide tremendous planning flexibility. FLPs and FLLCs ("family entities") can be used to manage a family business, to implement a plan of family succession and can even serve as extremely effective testamentary instruments. Recognized as separate legal entities, family entities also accomplish formidable asset protection objectives.

The income tax attributes of family entities are winning: taxed as partnerships, they can boast passthrough taxation for federal and most state income tax purposes—income flows through to partners or, in the case of an FLLC, to its members (assuming no election has been made under the check-the-box regulations). C corporations, by contrast, suffer from double taxation (this could change if the administration's dividend exclusion proposal is enacted, but that, of course, is another subject).

While S corporations do not attract a double tax and are for the most part taxed as partnerships, they are not taxed quite as favorably as are partnerships (and LLCs). Moreover, S corporations are not governed by operating or partnership agreements, and can have only one class of stock; accordingly, they are not as flexible as partnerships or LLCs. Furthermore, in general only a person, certain trusts, or an estate, may own S corporation stock. If an "ineligible" shareholder acquires S corporation stock (e.g., at the death of shareholder), the corporation will lose its S corporate status, and will thereupon be taxed as a C corporation. The use of S corporations in estate planning is thus not particularly desirable.

VALUATION DISCOUNTS AND FAMILY ENTITIES

Family entities possess extremely attractive gift and estate tax attributes. For transfer tax purposes, various discounts apply to the valuation of interests in family entities, so that an asset that is transformed into a partnership or membership interest when dropped into a family entity may be worth 10 to 80 percent less than it was when it was held directly. When sales of such discounted interests are made to "defective" grantor trusts in exchange for a promissory note

utilizing favorably modest APR interest rates, a cascade of enticing leverage opportunities may result.

In general, real estate and closely held family businesses generate the highest valuation discounts; marketable securities generate the lowest. Of course, another estate planning objective is accomplished when interests in family entities are gratuitously assigned: future appreciation of the assets, as reflected by the value of the family entity interests, will also be removed from the transferor's gross estate.

Although at first blush it might appear surprising that real estate worth $1 million could result in a transfer for gift tax purposes of only $500,000 (or perhaps $350,000 if a sale is subsequently made to a defective grantor trust), the economics of the transaction indeed justify the discounts, and courts have repeatedly so held. Thus, a restriction on management rights in the operating agreement produces a "lack of control" discount, and a restriction on transfer rights results in a "lack of marketability" discount.

To illustrate, assume that a venture consisting of unimproved real estate in the Adirondacks worth $1 million is transferred by parent to a family entity, in exchange for all of the interests in the entity. Shortly thereafter, parent makes gratuitous transfers of the interests in the entity to the children. Assume further that the operating or partnership agreement restricts the ability of the assignee members to manage the company, to vote, or to cause a liquidation. What would an outside buyer be willing to pay for such a membership interest? Probably very little, if anything. For this reason, a discount of at least 50 percent might apply when valuing the interest in the family entity. This translates into substantial transfer tax savings.

If the transferor has fully utilized his entire $1 million gift tax exemption, the gift tax savings would be equal to the marginal gift tax rate, approximately 40 percent, multiplied by the difference between the asset value and the value of interests in the entity, after applying the discount. In the example, had the transferor instead fractionalized the interest by deeding undivided portions of the real estate to his children, discounts would still be available; however, since each transferee would have the right to bring a partition action to force the sale of the real estate, considerably smaller discounts for gift tax purposes would result.

The Service has kept a wary eye on family entities utilized in estate planning, but has had limited success, at best, in challenging valuation discounts where the family entities have been properly implemented and maintained. Courts have repeatedly asserted that family entities validly created under state law with attributes business persons would not ignore should not be ignored for income, gift, or estate tax purposes.

The Service has fared somewhat better in challenging the family entity discounts where (i) no professional valuation discount appraisal has been obtained at the time of the transfer or (ii) the transferor has retained direct or indirect control or enjoyment of the assets transferred into the family entity. As will be discussed below, courts have handed the Service complete victories, wiped out any discounts claimed, and even brought the asset back into taxpayers' estates at their death, where the taxpayers have been sloppy, have used the family entities merely as personal bank accounts, or have made a transparent attempt to reduce the size of their gross estates through deathbed transfers clearly having no other purpose.

RECENT DECISIONS PLACE A PREMIUM ON CAREFUL PLANNING

Mistakes made when forming or funding family entities can vitiate any transfer tax savings. For example, father deeds property into an LLC on June 1, and thereupon assigns LLC membership interests to his children on June 5. Articles of organization are not filed in Wilmington until June 10. Under these facts, father has made a gift of land to his children, and only relatively small discounts will be allowed for gift tax purposes. The serious mistake was transferring property to a nonexistent entity. Since the LLC was not formed until after the initial transfer into the (nonexistent) entity was made, the Service successfully argued in *Shepherd v. Commissioner*, 283 F.3d 1258 (11th Cir. 2002), that father made an indirect gift to his sons of a 25 percent undivided interest in timberland rather than a gift of an interest in a partnership to which the land was transferred. The case underscores the importance of proper documentation and planning when forming family entities.

Assume the previous mistake was not made, but that after making the transfers and prior to filing a gift tax return, father declines to advance the $5,000 in required fees for a current valuation of the real estate, and for an expert valuation discount analysis of the family entity. Instead, father reads summaries of all of the Tax Court cases of the past five years, and determines that no case with similar facts returned a discount of less than 25 percent. Accordingly, father decides to be "safe," and instructs his accountant to take a 15 percent discount, and also to prepare a one or two page valuation discount analysis to be annexed to the gift tax return, as required. If challenged by the Service, the discount analysis may not fare well in court unless the accountant is experienced in valuation discount analysis. It is not enough that a valuation discount can be justified after the fact—courts have required that any valuation discount be supported by an expert's appraisal at the time the gift tax return is filed.

On the other hand, if father is prudent and obtains the required recent real estate appraisal and expert valuation discount analysis, as his attorney suggests, then the discounts claimed, even if on the high side, will be on more solid footing. Thus, the Tax Court in Estate of *Strangi v. Commissioner*, 115 T.C. 478 (2000) held that a validly created business entity will not be ignored for gift or estate tax purposes where an expert appraisal is obtained.

Assume that in the foregoing example father invites his children to dinner, and advises them that he is transferring all of his assets to a newly formed FLP in exchange for all of the partnership interests, the vast majority of which he subsequently intends to assign gratuitously to the children. His children assure him that they will take care of him and, true to their word, after the transfers, regular distributions of cash are made from the FLP to father.

If many years later after father's death his estate is audited, the Service might not only disallow the discounts taken, but might also attempt to bring all of the assets back into the father's estate under section 2036, since it appears that not only was the separate nature of the entity ignored, but that father retained enjoyment of the assets. Even if the children had said nothing at dinner, but had tacitly understood that distributions to father were required, the Service would argue that an implicit agreement existed. Finally, even if there were no implicit agreement, and father asked for and expected nothing, if regular distributions were in fact made to father during his lifetime, the Service might persist in challenging the bona fides of the transfer tax aspects of the FLP.

POTENTIAL APPLICATION OF SECTION 2036 TO FAMILY ENTITIES

Recently, the Service has attempted to reign in tax savings resulting from transfers to family entities by invoking section 2036 at the transferor's death, as briefly described above. Section 2036 provides that the value of the gross estate includes the value of any interest in which the decedent has retained the possession, enjoyment or right to income from property, or has retained control over who enjoys income from the property. An exception provides that if full consideration is received for the property, Section 2036 does not apply, since in that case the transaction would constitute a sale, rather than a gift.

Section 2036 is an especially potent tax weapon for the Service since, if successfully invoked, the result would be not only to eliminate any valuation discounts claimed, but also to return the assets, and all appreciation on those assets, to the decedent's gross estate. Accordingly, persons contemplating transfers and transactions involving family entities must be vigilant.

Many thoughtful practitioners agree that family entity arrangements are vulnerable under section 2036 if (i) the separate nature of the entity was not respected; or (ii) the decedent retained control or enjoyment over the transferred assets, either by agreement or by understanding, and even perhaps without any understanding; or (iii) the decedent transferred most of his property to the family entity, and was unable to cover his own living expenses without distributions from the entity.

The Service raised the section 2036 argument with success in Estate of *Harper v. Commissioner*, T.C. Memo 2002-121. There, the tax court held that the value of assets contributed to a FLP should be included in the decedent's estate based upon (i) commingling of funds; (ii) delay in transferring assets; (iii) disproportionate partnership distributions; and (iv) "testamentary" characteristics of the transfers. Interestingly, the terms of the partnership agreement in *Harper* provided that the transfers were complete and unconditional: Harper held only a limited partnership interest; his two children held the only general partnership interests. Yet, the tax court concluded that the "practical effect [of the transfers] during the decedent's life was minimal." The case starkly illustrates the danger of allowing the transferor either to retain control of or to receive distributions from the family entity, without regard to the existence of any prior agreement and, at the same time, illustrates the importance of respecting the separate nature of the family entity.

More recently, in *Kimbell v. United States*, 2003 U.S. Dist. Lexis 523, 2003 WL 138081 (N.D.Texas), the court ruled for the Service where the decedent-transferor, a 99% limited partner, had retained the power to remove the general partner. In deciding that all assets must be included in the decedent's estate, the court concluded that the power retained by the decedent enabled him to benefit personally from partnership income, or to choose those persons who would, and so caused the transaction to run afoul of section 2036.

The important lesson of *Harper* and *Kimbell* is that compliance with formalities is necessary but not sufficient to withstand the Service's scrutiny and avoid tax court disapproval where substantially all of the partnership assets are derived from one person. Practitioners had often assumed, based upon Estate of *Jones v. Commissioner*, 116 T.C. 121 (2001) and Estate of *Strangi v. Commissioner*, 115 T.C. 478 (2000), that a transferor who received a proportionate interest in the family entity would have received "adequate and full consideration in money or money's worth," thus precluding the application of section 2036. Apparently this is not the case. The tax court in *Harper* observed that *Jones* and *Strangi* were not dispositive with respect to the applicability of section 2036, because they "say nothing explicit about adequate and full consideration but do refer to enhancement, or lack thereof, of other partners' interests."

PREVENTING LOSS OF TAX BENEFITS

Based on the foregoing, careful practitioners should:

1. Determine whether (i) accurate and complete gift tax returns have been filed for all transfers; (ii) capital accounts have been properly maintained; (iii) income tax returns have been filed; and (iv) financial statements have been prepared. The importance of accurately prepared gift tax returns, fortified by expert valuation discount analyses, cannot be overemphasized.
2. Determine whether the separate nature of the family entity is being

respected, and whether the entity is truly being operated as a business. While some errors may seal the fate of the family entity for tax purposes if discovered on audit (e.g., the transferor receiving a distribution to take a cruise), the timely correction of other operational errors may lessen the risk that the Service will succeed in "piercing the veil" of the entity for tax purposes. At a recent conference the author of a popular treatise on tax planning for family wealth transfers counseled that (i) family entities should maintain minutes and hold regular meetings; and (ii) correspondence should be on company letterhead with the name of the Managing Member printed on the stationery.

3. Periodically review and amend operating agreements. Members should consider restricting the ability of the transferor, as Managing Member, to make distributions to him- or herself. Although some planners have often assumed that an agreement which held the Managing Member to a fiduciary standard in determining whether to make distributions was adequate, new cases suggest that this may not be sufficient: it may be necessary to place real restrictions on the amount of cash available for distribution to the transferor parent.
4. Think carefully before altering the "default" provisions in state statutes governing family entities. For example, under section 2704(b), operating agreements with restrictions that "effectively limit" the ability of the family entity to liquidate will be ignored for purposes of determining the value of the transferred interest if the restrictions are more stringent than those provided by state law. Section 2704(b) could therefore result in the complete loss of valuation discounts. While the default provisions of most state statutes attempt to eliminate this risk, drafters must ensure that terms of the agreement do not unintentionally override the safety net provided by the state statutes, possibly resulting in disastrous federal tax consequences. If after careful review it is determined that a tax-sensitive provision in the state default statute has been disabled, the family entity agreement should be amended to avoid the potential application of section 2704(b).
5. Determine whether multiple transferors, rather than just one parent, have made contributions to the family entity. It is generally preferable to have more than one transferor. If intended assignees of transferred interests (generally the children), are without sufficient cash to purchase initial interests, consider having them execute a secured note bearing adequate interest in exchange for a partnership interest.
6. Remember that family entities holding only one asset, or a "basket" of marketable securities, may generate a lower valuation discount and may also be more susceptible to attack from the Service. It may be advisable to consider funding a family entity with more than one type of asset, especially if aggressive valuations are contemplated. (However, it should also be noted that there are liability risks associated with having multiple assets within one entity, especially multiple parcels of real estate.)
7. Transferring all or nearly all of an individual's wealth to a family entity may prompt an inquiry from the Service, since the result of such a transfer would be to necessitate distributions from the entity to support the transferor. Courts have expressly indicated that section 2036 could apply to transfers with a retained interest, express, implied, or merely in fact. If too many assets have been transferred to the family entity, it may be possible for the transferor to purchase some of the assets back from the family entity.
8. Ensure that distributions to a parent comport with business realities rather than with the needs of the parent. Distributions should not approximate the living expenses of the parent, or the amount of cash required by the parent in the years immediately preceding the formation of the family entity.

In sum, reaping the tax benefits that can result from transfers to family entities requires the presence, not the mere suggestion, of business realities in the arrangement. Attempting to justify such discounts on a gift or estate tax return simply by choosing a familiar form for the transaction—much like one would have purchased a writ in medieval times—without giving adequate consideration to the formal business aspects of the plan, can backfire. Proper planning, followed by adherence to the plan, are both necessary.

THE POTENTIAL IMPACT OF THE SUPREME COURT'S PENDING DECISION IN GRUTTER V. BOLLINGER ON PRIVATE UNIVERSITIES AND OTHER TAX-EXEMPT CHARITIES

by David A. Brennen, Macon, GA

On April 1, 2003, the United States Supreme Court heard oral arguments in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *cert. granted* 123 S. Ct. 617 (2002), a case involving a white student's Equal Protection Clause challenge to the University of Michigan's affirmative action plan for admitting racial minorities. Many expect that *Grutter* will be pivotal in the realm of constitutional law jurisprudence because it will likely outline the parameters of appropriate affirmative action by government actors. Specifically, the Court in *Grutter* may finally answer a question that has divided federal circuit courts for many years: May the government ever use race as a factor when making important decisions about matters like admission to state colleges and universities? Although *Grutter* has nothing

directly to do with tax law, it may have a major impact on how certain tax law decisions are made. The *Grutter* case will affect decisions that concern the permissible use of race as a factor by private tax-exempt charities when making important choices.

Private tax-exempt charities are entities exempt from the federal income tax by virtue of being described in section 501(c)(3) of the Code. The guiding principle for charities when it comes to race conscious decisions and similar concerns is the public policy limitation, as outlined by the Supreme Court in *Bob Jones University v. United States*, 461 U.S. 574 (1983). In *Bob Jones University*, the Supreme Court revoked the tax-exempt status of a charity (in that case a private religious university) that discriminated against black people in making admissions decisions. In determining that there was an "established public policy" against such discrimination, the Court in *Bob Jones University* analyzed decisions by various federal authorities. The authorities had unanimously concluded at the time that discrimination against black people in public education is unconstitutional and against public policy. Accordingly, the Court in *Bob Jones University* upheld the Service's revocation of Bob Jones University's section 501(c)(3) tax-exempt status.

Since its decision in *Bob Jones University*, the Supreme Court has never again addressed the issue of whether particular action by a charity violates the public policy limitation. In fact, other than in the obvious case of racial discrimination against black people, the Service has never used the public policy limitation as a basis for revoking or denying tax-exempt charitable status. However, the Service has indicated a willingness to consider the prospect of using the public policy limitation in this way in contexts other than racial discrimination against black people. Thus, when a charity uses racial preferences, not against black people, but in the context of a broader policy aimed at helping blacks and other minorities, the Service has implicitly asked: Do race-based affirmative action policies violate "established public policy"?

To date, the Service has concluded that race-based affirmative action policies by private tax-exempt charities do not violate the public policy limitation. The Service apparently bases this position on the fact that race-based affirmative action by the government is not necessarily unconstitutional. The most telling example of the Service's position in this regard is a statement it made in a 1999 Technical Advice Memorandum issued to a private tax-exempt trust, which is commonly referred to as the Bishop Estate. (*See* National Office Technical Advice Memorandum from the Service to the Kamehameha Schools/Bernice Pauahi Bishop Estate (Feb. 4, 1999), on file with the author, hereinafter "Bishop Estate TAM.") The trust involved in the Bishop Estate TAM operated a school that only admitted students of Hawaiian ancestry. In the Bishop Estate TAM, the Service concluded that by denying admission to non-Hawaiians, the trust did not violate tax law's public policy limitation. However, the Bishop Estate TAM continued on to advise that the trust "should consider requesting a private letter ruling on whether the [then pending Supreme Court] decision [in *Rice v. Cayetano*, 528 U.S. 495 (2000)] would have any effect on the analysis." *Rice* concerned the constitutionality, under the Fifteenth Amendment, of Hawaii's practice of denying non-native Hawaiians the fundamental right to vote for trustees of the Office of Hawaiian Affairs.

In suggesting that the then-pending *Rice* case was relevant to its decision on the permissibility of the trust's "Hawaiian only" policy in the Bishop Estate TAM, the Service relied on "several Supreme Court opinions addressing the constitutional challenges to governmental actions under the Equal Protection clauses of the Fourteenth [and] Fifth Amendment[s]." The Supreme Court opinions identified in the 1999 TAM and relied upon by the Service generally recognize that race-based affirmative action by the government is permissible so long as the government has a "compelling" interest and that consideration of race is "necessary" to accomplish this interest. Since these Supreme Court opinions were issued, however, some federal circuit courts have decided that it may be necessary to consider race in the context of remedial affirmative action. *See, e.g.*, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 617 (2002); *Smith v. Univ. of Wash. Law School*, 233 F.3d 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001). Other circuits have decided that it is never necessary to consider race in this context. *See, e.g.*, *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001); *Hopwood v. Tex.*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996). Thus, whereas when the Court decided *Bob Jones University* there was general agreement that racial discrimination against black people was always unconstitutional and never appropriate, today the federal circuit courts are divided on the question whether considerations of race might be appropriate in the context of remedial affirmative action by governmental actors.

This division among the federal circuits, coupled with the prospect that (unlike invidious racial discrimination against black people), race-based affirmative action may at times be appropriate, supports the Service's position that race-based affirmative action does not violate the public policy limitation imposed on tax-exempt charities. The current state of affairs—the split among the federal circuits—may change when the Supreme Court renders its decision in the pending *Grutter* case. If the Court in *Grutter* decides either that racial diversity can never be a compelling interest or, even if racial diversity is a compelling state interest, it is never necessary to consider race to serve this interest, then the Service might be forced to

re-examine the issue of whether race-based affirmative action policies violate the public policy limitation imposed on charities. If the Service continues to rely almost exclusively on constitutional law jurisprudence to decide the extent of the public policy limitation, it will likely view the decision in *Grutter* as decisive. Hence, the possible connection between the *Grutter* decision and tax law.

The Service, however, is not necessarily bound to this approach. First, the constitutional provision at issue in *Grutter* (the Equal Protection Clause of the Fourteenth Amendment) applies directly to state actors, not private actors like tax-exempt charities. Thus, while state colleges and universities must abide by the Court's constitutional decision in *Grutter*, private colleges and universities are not directly obligated to follow this decision. True, these private institutions may be indirectly affected by the Court's decision in *Grutter* by virtue of statutory civil rights laws that deny federal financial assistance to private entities that discriminate based on race, (*see, e.g.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d) and, in many cases, racial preferences that violate the Constitution may also violate these civil rights laws. However, the Service has never before used violation of these civil rights laws as a basis in and of itself for denying or revoking a charity's tax-exempt status.

Second, nothing in the *Bob Jones University* opinion mandates that every act that the Supreme Court declares unconstitutional also violates the public policy limitation. Indeed, the Court in *Bob Jones University* did not conclude that charities must comply with the Constitution. Instead, it concluded that charities must comply with "established public policy." As the Supreme Court's analysis in *Bob Jones University* illustrates, a decision about whether a particular act or policy violates "established public policy" includes consideration of not only Constitutional permissibility, but other factors as well. Thus, a constitutional decision that forbids any consideration of race by governmental entities is not necessarily a public policy decision about whether private tax-exempt charities may consider race in making particular decisions.

In sum, tax practitioners should advise clients that are tax-exempt charities that the Service has taken the position that constitutional decisions by the Supreme Court have a significant bearing on whether race-based affirmative action policies violate the public policy limitation. This means that the Court's pending decision in *Grutter* could cause the Service to deny or revoke the tax-exempt status of charities that engage in race-based affirmative action. However, tax practitioners should also realize that a decision in *Grutter* that declares considerations of race unconstitutional does not have to mean that such policies violate the public policy limitation. The Service might be persuaded to consider other factors besides constitutional jurisprudence when deciding if a particular charity's race-based affirmative action or similar policy violates the public policy limitation. Conceptually, at least, the public policy limitation need not be coextensive with the totality of constitutional jurisprudence.

For additional reading on this and related issues, readers can consult the following literature: "Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law's Public Policy Limitation for Charities," 5 Fla Tax Rev. 779 (2002); "Tax Expenditures, Social Justice and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities," 2001 B.Y.U. L. Rev. 167 (2001); "The Power of The Treasury: Racial Discrimination, Public Policy and 'Charity' In Contemporary Society," 33 U.C. Davis L. Rev. 389-447 (2000). ■

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POINT & COUNTERPOINT: ETHICAL ISSUES IN CROSS-BORDER TAXATION

INTRODUCTION: In the globalized economy and business environment of today, tax practitioners are regularly called upon to assist in planning transactions that cross national borders. And more and more frequently, therefore, U.S. tax practitioners must be familiar with foreign law. But what happens when a client proposes to take an action that might violate some rule of foreign law? Does the U.S. practitioner have an ethical obligation to investigate, or to offer advice concerning that rule? Should the U.S. lawyer be sanctioned for failing to prevent a fraudulent violation of the foreign law? And what practical guidance can we give to clients in this situation?

The contributors to this edition's Point-Counterpoint offer some initial thoughts on a U.S. practitioner's obligations, if any, to respect or follow foreign law. First, Joan Arnold of Pepper Hamilton LLP in Philadelphia, PA, suggests that attorneys have an ethical obligation to not engage in the fraudulent avoidance of foreign law and can be sanctioned in the U.S. for so doing. David Rosenbloom of Caplin & Drysdale, Chartered in Washington, DC, replies that foreign law is beyond the scope of a U.S. lawyer's practice and that U.S. ethical principles may at any rate conflict with the rules of foreign law.

This is a potentially enormous topic, and our contributors make no pretense that they have exhaustively considered every issue. The *NewsQuarterly's* editors hope, however, that the essays below will stimulate further analysis of this issue, whether near the water cooler, in the lunchroom, or by written replies. — Chris Rizek

POINT: ETHICAL OBLIGATIONS EXTEND TO FOREIGN LAW

by Joan C. Arnold, Philadelphia, PA

The question to be addressed sounds so simple: What are the ethical constraints placed on a U.S. tax lawyer involved in a cross-border practice? More specifically, may a U.S. tax lawyer be sanctioned for activities that do not impact the U.S. fisc, but that are improper under the tax laws of another jurisdiction? For tax lawyers involved in multi-jurisdictional practices, this issue arises all the time, and their answers are all across the board. Often the bottom line is that the lawyers involved simply do not want to take on the reputational risk of being engaged in transactions that may be questionable under foreign law. But, that is by no means the approach of all lawyers, and it's time to address it directly, under our rules of conduct.

The debate focuses on U.S. tax lawyers involved in transactions that implicate another country's tax laws, as well as U.S. federal and (when we are being complete) U.S. state and local tax laws. But there's an error in the question. The question presumes that there are "U.S." lawyers. From an ethical perspective I think there is no such thing as a "U.S." lawyer. There are Pennsylvania lawyers, District of Columbia lawyers, New York lawyers, etc., but there is no such thing as a "U.S." lawyer. We are admitted to the bar and regulated by a particular state or the District of Columbia. Compare that to a lawyer admitted to the bar in France, or England. She is truly a French avocat, or a British barrister.

What's the impact of this not-so-startling revelation on the question raised? It puts the review of the ethical rules in context. Some lawyers will take the position that because we are admitted state by a state, a lawyer's ethical allegiance is to the substantive laws of that state. That is, some will say that if the activity doesn't offend a law in the state of admission, it is not the basis for sanction by that jurisdiction. Perhaps that has some appeal when you are considering non-U.S. activities, but after reflection, I don't see how it can be the right answer.

Would anyone claim that a Pennsylvania lawyer could not be sanctioned in Pennsylvania for assisting a client to commit fraudulent behavior in New York? Rule 1.2 of the Model Rules of Professional Conduct (2003) provides in part that a lawyer shall not assist a client in conduct the lawyer knows is fraudulent. It does not go on to say "in the state of admission," and the commentary specifically notes that the obligation applies whether or not the defrauded party is a party to the transaction. So, for instance, a tax lawyer must not participate in a transaction to effectuate fraudulent avoidance of tax liability. That rule is not limited to "tax liability in the state of admission." The case law and the actions of the various state disciplinary boards make it very clear that a Pennsylvania lawyer may be sanctioned in Pennsylvania for activities that occur in another state.

Moving the analysis up a notch, assume a lawyer subject to the Model Rules assists a client in the fraudulent avoidance of U.S. federal tax. As that would not be a violation of the laws of the state of admission, would that state be able to sanction the lawyer? As noted above, the commentary to the Model Rules clearly indicates that such sanctions are appropriate. The cases and rulings under the states I've reviewed would all take the same position, and impose sanctions.

What then is the difference if the lawyer's activities assist in the fraudulent avoidance of a foreign country's tax? If the state of admission can sanction for inappropriate activities with respect to another state's taxes, or with respect to federal taxes, is there a difference when it comes to non-U.S. taxes? I cannot construct a rational basis for drawing such a distinction, and I think the lawyer's state of admission has the right to impose sanctions for such behavior.

This position is informed by the outcome of a case in which a lawyer was disbarred for activities that involved foreign law. In The Matter of Application for the Discipline of Thomas K. Scallen, 260 N.W. 2d 834 (Minn. 1978). In *Scallen*, Mr. Scallen was a licensed Minnesota lawyer who was appealing his disbarment, which was imposed on the following facts. Mr. Scallen oversaw the production of a prospectus through which his company was going to issue debt in Canada. The prospectus was governed by Canadian securities rules. A court in Canada found Mr. Scallen guilty of knowingly making a false statement in the prospectus.

Although it modified the discipline imposed, from disbarment to indefinite suspension, the Minnesota court upheld the right of the state to impose sanctions. It specifically noted that its disciplinary rule 1-102, which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, is not restricted by political or geographic boundaries. Rather, the disciplinary rules regulate the conduct of a Minnesota lawyer anywhere in the world.

Mr. Scallen also argued that because the commission of a foreign crime is not expressly mentioned in the disciplinary rules, he should not be disciplined under the general ethical duties established by disciplinary rule 1-102. The court summarily dispensed with this argument, noting that they were entirely unimpressed with it. Instead, the court pointed out that the ethical rules govern the activities of all lawyers who have chosen to avail themselves of a Minnesota license, and express an expectation that the lawyer will comport himself or herself in accordance with the principles and aspirations set forth in the rules. It is not necessary to list all of the things one may not do, said the court; it is enough that the action at issue involved conduct that was prohibited under the general rules.

The court's finding in *Scallen* is consistent with the analysis I follow in reaching my conclusion: There is no rational basis for saying that a state may impose sanctions for actions in another state, or for violations that involve federal law, but not allow sanctions to be brought for violations that involve non-U.S. tax law. The clarity (at least to me) of my conclusion notwithstanding, I think it is just the tip of the iceberg. From here the question is, under what circumstances *should* the jurisdiction of admission exercise its right to sanction? Three questions immediately arise:

- What is a lawyer's duty to investigate whether the client's plan would result in a violation of non-U.S. tax law?
- What if the activity would not constitute fraudulent activity under U.S. tax rules, but might still be a technical violation of foreign law? A good example would involve foreign exchange violations, which are not U.S. issues since we have no foreign exchange rules.
- What if under the disciplinary rules applicable to lawyers in the non-U.S. jurisdiction, there is no prohibition against assisting a client in tax avoidance?

A thorough analysis of each one of those questions can easily fill volumes, and I'm about out of space, but I offer the following thoughts to prompt readers' consideration of these questions:

A lawyer must provide competent representation, which requires the legal knowledge reasonably necessary for the representation. But a lawyer is allowed to limit the scope of representation if the limitation is reasonable and the client gives informed consent. At least under the Model Rules, a lawyer must know or reasonably should know that a client expects assistance in a fraudulent action before the lawyer can be sanctioned. So, if the client agrees that non-U.S. tax advice is beyond the scope of the U.S. tax lawyer's responsibility, may the lawyer proceed, with the proverbial blinders on? What does "reasonably should know" mean? What if the lawyer is sufficiently experienced to know there is a problem, but is advised by the client that it's not within the scope of the representation?

In the disciplinary proceeding in *Scallen*, the judge at the trial level noted that the facts leading to the conviction in Canada for filing a false prospectus would support a similar result under Minnesota law. Does this mean that if the facts and legal conclusions had been different, the lawyer could not be sanctioned? That seems contrary to the goals of the Model Rules, at least in this type of circumstance, and would dramatically complicate my conclusion.

The third question—What if a lawyer in a non-U.S. jurisdiction would *not* be subject to disciplinary sanctions in that jurisdiction, should the lawyer's U.S. state of admission sanction?—raises the full panoply of similar issues that are being considered as we move to multijurisdictional practice in the United States. Consider the 2003 version of Model Rule 8.5. In choosing which ethical rules to apply, other than in litigation, should the rules of the jurisdiction in which the attorney's conduct occurred govern, or should it be the rules of the jurisdiction in which the predominant effect of the conduct is realized that apply? Under this provision, if the predominant effect of the conduct is in country X, and country X would not impose sanctions on its lawyers for assisting in the work, then the lawyer's state of admission would also not be allowed to impose sanctions. According to the commentary, this choice of law provision applies to lawyers in transnational practices unless

international law, trustees, or other agreements between competent regulatory authorities in the affected jurisdiction provide otherwise.

Finally, I would add that my comments are restricted to the ethical sanction that may be imposed by a lawyer's jurisdiction of admission. All tax lawyers are also subject to discipline under Circular 230, which contains Treasury's standards for practice. I do not find anything in Circular 230 that addresses whether the Service may sanction a practitioner for activities that assist in the fraudulent avoidance of non-U.S. tax. I find that a bit curious, as U.S. tax rules have never shied away from addressing U.S. taxpayer behavior in non-U.S. jurisdictions (what immediately comes to mind is the foreign tax credit disallowance related to violations of the Foreign Corrupt Practices Act, and on a more subtle note the branch rule in foreign base company sales income in Subpart F). In my informal (i.e., non-attributed and non-binding) conversations with personnel in the Service's Office of Practice, I confirmed that the focus in Circular 230 is practice before the Service and before U.S. courts; Circular 230 is not intended to provide sanctions for non-U.S. activities.

COUNTERPOINT: U.S. ETHICAL STANDARDS SHOULD NOT DEPEND ON FOREIGN LAW

by H. David Rosenbloom, Washington, DC

The growing cross-border nature of legal practice has confronted the practitioner with difficult problems that only a short time ago would have been seen as rare and exotic. It is not at all rare these days to be called upon to deal with issues arising under, and directly pertaining to, foreign law. What (the practitioner may be asked to say or advise) are the applicable standards when the question is whether to observe or not observe, perhaps even actively attempt to circumvent, a foreign legal mandate? An important subset of that question would be whether the answer is subject to any ethical constraints.

It is easy to confuse the question with others: whether the course of action facing client and practitioner raises pragmatic issues, such as potential harm of one sort or another in the foreign jurisdiction, or outside the foreign jurisdiction but stemming from the foreign legal mandate; whether that course presents moral questions subsumed in, but independent of, the foreign law; whether U.S. law is somehow implicated, for reasons of reciprocity or otherwise, by the foreign law. These are important questions in many situations, and the attorney facing an issue of foreign law would be best advised to keep them in mind. But they are different from the question that concerns us here: whether there are ethical requirements placed upon an attorney licensed to practice in the United States by the mere fact of a foreign law mandate.

The inquiry could, of course, be further refined. The law may have a criminal aspect or it may only sound in civil jurisdiction; the foreign country may be a close ally of the United States, or it may be a foe; it may have a legal or political system resembling our own, or it may not; the foreign law may or may not have an analogue in U.S. jurisprudence; the case may involve mere disregard of a foreign requirement or active planning to violate the requirement; the role of the attorney may range from affirmative advice to simply paying no heed; there may be special local practices of which the attorney is or is not aware. The common question here is whether a member of a bar in the United States, because he or she is a member of the bar, has an ethical obligation to obey a foreign law, because it is a law.

I am inclined to favor the negative side of that question. An attorney may have many and varied reasons for paying close attention to foreign law, but there is no solid basis for ethical considerations to rank among those reasons.

Persons licensed to practice law in the United States are rightly held accountable for adhering to U.S. laws simply because they are U.S. laws. We are members of a profession integral to the U.S. legal system and legitimately required to observe a variety of rules and requirements for the practice of that profession. It is entirely proper to include among those rules and requirements a respect for, or at least the absence of an active disrespect for, the laws that form the core of the legal system. Moreover, although regulation of the bar generally occurs at the level of the several states, the intertwining of state and federal laws and the overarching importance of a single Constitution and a single nation fairly call for an attorney's compliance, on ethical grounds, with all U.S. laws, state and federal, regardless of the geographical or subject-matter orientation of a particular legal assignment or practice.

It is quite a different matter, however, when the laws of a foreign jurisdiction are at issue. That jurisdiction, by definition, has nothing to do with the license to practice law in the United States, and I cannot see any reason why fitness to practice in this country should be influenced by foreign laws simply because they are laws. Globalization has not reached that level—yet. A contrary conclusion could place the attorney in the difficult position of advising or acting against the client's interests in circumstances that have not passed the filter of the U.S. democratic process.

It would be easy to justify the position I espouse on the ground that, as we all know, there are some foreign laws that would be wholly unacceptable to every U.S. lawmaking body. Singapore, for instance, harshly punishes what appear to U.S. eyes to be, at most, petty offenses. Transfer pricing issues in Italy can easily give rise to criminal charges. It is criminal in India to harm a cow, even inadvertently. And there are numerous other situations where foreign laws are either inexplicable to our sensibilities

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INTERVIEW WITH
B. JOHN WILLIAMS

by Jasper L. Cummings, Jr., Raleigh, NC, and Alan J.J. Swirski, Washington, DC

B. JOHN WILLIAMS

INTRODUCTION: B. John Williams is Chief Counsel, Internal Revenue Service. Mr. Williams has had a long and distinguished career in both the public and private sectors. Before assuming his current position, Mr. Williams headed the tax litigation practice of Shearman & Sterling and litigated many notable cases, including Rite Aid v. United States, 255 F.3d 1357 (July 6, 2001), *rev'g* 46 Fed. Cl. 500 (April 21, 2000). Mr. Williams also served as a Judge on the U.S. Tax Court (1985-1990), a Deputy Assistant Attorney General in the Tax Division of the Justice Department (1983-1984), and a Special Assistant to the Chief Counsel of the Internal Revenue Service (1981-1983). Mr. Williams is an honors graduate of the George Washington University and its Law School, where he was a member of the law review.

Q You have indicated that you want to see more published guidance issued by the Service. Why do you think this is important, and what changes have you implemented to accomplish this?

A It is fundamentally critical, in my view, to the health of the tax system that we increase published guidance for a number of reasons. First of all, taxpayers are entitled to know what positions we are going to take in our statutory interpretation and revenue agents are entitled to know that as well. We have to be very efficient in the use of our resources, and we don't want revenue agents focused on issues that will lead nowhere.

Among the ways that we communicate with agents is through revenue rulings, published notices, the Internal Revenue Manual, and the Division Commissioner's memos to agents. I also communicate with field attorneys through Chief Counsel notices. It is, I think, terribly important to the health of the system that we put out guidance so that everybody can rely on it—the agents know what our positions are going to be, the public knows what our positions are going to be and everybody knows that we're not going to be inconsistent with those positions. So I view published guidance as, really, critical to the confidence that the public has in the administration of the tax law.

That confidence begins to break down when we are inconsistent in our enforcement efforts. It may simply be an oversight. Somebody just gets it wrong. But we have to have in place a system that will bring back to the surface those instances of potential conflict and contradiction.

I've done a number of things to reduce those inconsistencies. One is to work with Treasury to increase published guidance and this year, actually we'll triple the number of revenue rulings over last year. I look for even more growth as the process matures without cutting back on the number of regulations we put out. I think if you look at the kinds of regulations we worked on, they are important projects. A number of them are controversial but they are out there so that the public can comment on them—so we can get reactions from folks.

While doing that, I have instituted a practice where if the field in the course of litigation wants to distinguish our published guidance, that brief will come into the National Office for review to make sure that, in fact, the facts of the particular case warrant the distinction that the particular lawyers in the case want to make. I've also instituted a practice that went by the boards (since the last time I was here), which was basically that when a request for technical advice comes in to the National Office, the Associate Chief Counsel's office will either open a published guidance project or write a memo explaining why one is not necessary. I'm hopeful that will again increase the integration and coordination between the positions we are going to take in the field and our published guidance and will also alert us to guidance that needs to be clarified or changed.

Given the shelter problem that we have had over the last few years, I have created a new office of senior counsel to me to focus on making sure that we bring to bear early technical analysis of shelters. And as part of that, one of the things that I have done in the last year is make sure the client understands that we are fully supportive of the promoter audits that have been conducted and that we will pursue summons, as we have done that with the Justice Department and have been pretty successful. This is important because those issues that we look at lead to published guidance, either in the form of a notice or revenue ruling where we will say either this is a transaction that works or this is a

transaction that doesn't work, or this is a transaction that works but we don't like it and the only reason it works is because of a regulation which we are going to change or look at changing.

And the public should understand that. We talk a lot about transparency of taxpayers in dealing with us and we think the public deserves that from us as well in terms of the positions that we take and the transactions that we think will work or will not work. So I think we're making significant progress on all those fronts.

Q In that regard concerning revenue rulings, has there been any institutional change in the processes by which revenue rulings are reviewed at Treasury?

A Yes. We are starting a pilot program for rulings that the Associate Chief Counsel can agree with Treasury are technical in nature and do not involve significant policy issues. Once the Associate Chief Counsel and Treasury agree that the ruling can move forward that way, there is a group here that will review those rulings for my signature. When I have signed off on them, they go over to Treasury for a thirty-day turnaround. If Treasury wants to hold the ruling up, Pam Olson basically has to make a personal call to me to do that and explain what Treasury's problems are. That is one of the reasons that I think we're going to significantly increase rulings.

Q What role do you and your immediate assistants play in the approval of published guidance, the issuance of private guidance, and the pursuit of court cases?

A I have to sign off on any published guidance. It doesn't go out unless I sign it, which means I approve it. Other guidance I may review depending on the guidance. I get into some more deeply than others. I rely a lot on my deputies and the associates. I work very closely with Treasury. One of the things that we have done is reinstitute joint briefings so that Pam Olson, who has ultimate approval, and I are briefed jointly on policy issues, on major regulations and rulings, and we work together to get them out. While I have approval authority, I work very closely with Pam to make sure that there is nothing that is going to get to me or to her that either one of us would have a major problem with.

Litigation is an enforcement activity, so Treasury doesn't get involved in that. I get briefed regularly on cases that are pending; major cases in LMSB, SBSE and TEGE, ones that are sensitive, ones that are large in terms of dollars or large in terms of issues. My name goes on all of the briefs in the Tax Court, so I do take an interest in what is being said there. And I expect not to be surprised by the positions that we are taking there. I have been involved in making sure that our litigation positions are consistent with published guidance as I mentioned earlier. With regard to private guidance, TEGE, on the Commissioner's side, provides that, and otherwise all of the private guidance and private letter rulings are done in the Chief Counsel's office. I will get involved in that basically where the associate alerts me to a policy issue or to a position that may be controversial. I generally don't get involved otherwise. If the associates alert me to potential problems or they want my views on the case, then I'll get involved.

Q What will the National Office be doing with regard to Field Service Advice and Strategic Advice Memoranda?

A First of all, we are not issuing FSAs anymore. What we are doing is trying to move toward more informal case-specific advice that will involve field counsel but will also very much involve National Office counsel. This is not an attempt to cut out National Office counsel, but it is an attempt to put the advice that is being given in the relative posture that it should have. That is, if we are going to take a position in litigation, it ought to be done through technical advice in a process that involves the taxpayer's opportunity to contribute to both the factual development of the issue and the legal analysis. What I have tried to do is emphasize a reduced timeframe for producing technical advice and developed an expedited procedure.

We have had fairly good reception from LMSB, in particular, in reacting to the changes. What I would hope is that essentially what was done as an FSA will now be done as technical advice (TAM). If there is an informal need for strategic advice, then that will be provided in a SAM (Strategic Advice Memo). If there is a need for more elaborate explication of existing law, which doesn't really involve our taking a position, but rather just explaining what the law is to the field, then that will be done in a background advice memo that would be a more extensive discussion of the law.

Q You have played an important role in the settlement initiatives on various tax shelters. Are you satisfied with how these initiatives have progressed and will this pattern be repeated in the future, or is this viewed by the Service as a "one time" cleanup preceding a new type of enforcement effort?

A One of the points that I have tried to make is that one size doesn't fit all. You can't necessarily make a cookie-cutter settlement initiative and expect it to be successful. If you look at the three initiatives that I was most personally involved in, you will see they are all very different. The COLI settlement offer is just the termination of the program, but that was a new policy direction for the Service. There were somewhere between thirty and forty large cases that were outstanding at the time of the announcement; there are now five left. Everybody else came in and took the initiative. So I view that as very successful. The timing of terminating that offer was based on our win of a second Court of Appeals case that essentially affirmed our position.

I thought that was a particularly good time to go back and say look, we have won in two circuits, and we think that this settlement initiative more than generously reflects the litigating hazards and it is time for you to take it, or, if you want to go to court, we'll do it. I think that had a very positive effect on the effort to resolve COLI.

The 302/318 shelter settlement initiative was again very successful. More than 90 percent of the taxpayers have taken it. More than seventy-five percent of the tax years involved are part of the settlement initiative. People wondered how it was that we could come out with an initiative when we had not yet taken a case to court. I felt, particularly based on my experience, that I could pretty confidently state what I thought the litigating hazards of our position were. Since that initiative has closed, the *Merrill Lynch* opinion came down from the Tax Court, which was very much on all fours with the position that I was advancing in the 302/318 shelter initiative. I think that what I anticipated our litigating hazards to be, at least so far, have continued to pan out. At this point, I think they have improved with the *Merrill Lynch* case as precedent. That settlement initiative was basically one number. Taxpayers conceded eighty percent of the case and then any penalty was applied case by case. That reflected our confidence in our position and our desire not to litigate what we didn't have to litigate and yet put taxpayers in a position where they would understand that it was not to their benefit to have gotten into this transaction. If you look at the way the numbers work out, the benefit, if you can call it that, that they get from the transaction for our offering a settlement initiative, is less than what they are out of pocket for. I don't think any taxpayer looking at that would be very satisfied about having bought into that shelter.

And then the third is the contingent liability shelter, the 351 transaction. That was a very interesting project to work on because there is a very wide divergence of views on the relative strengths of the positions. If you come out with one number as we did with the 302/318 initiative, we would essentially be settling with the worst cases and litigating cases that taxpayers felt very strongly about. And because of the factual variety that was presented in those cases, that approach would consume a lot of my resources.

So what we did was come out with a two-step program. One involves a single number that people could buy into. But we also introduced another program where if they felt that their case was quite strong, even though we disagreed with it, ultimately the program provided an opportunity for them to present their case to a neutral third party and to get the benefit of that neutral third party's views on the relative merits of their settlement offer versus our settlement offer. And that was the baseball arbitration part of that package.

We made sure the worst cases were not going to get the benefit of the settlement. Taxpayers, at a minimum, have to execute the transaction in conformity with the documents. So, if there were transactions that were just papered over, they were not going to qualify.

We had some difficulty in the contracting area in getting to the point where we could choose an organization to serve as the arbitrators. So, we had to extend the deadline. We chose the American Arbitration Association to administer the program with people who had been identified by them as arbitrators. The AAA could run the conflicts check on those arbitrators and then come up with a list of people who would be available, except as their schedules may not permit. Any ethical conflicts had already been checked out. So as far as we were concerned, these people were qualified. They had to have, I think, ten years' tax experience. The American Arbitration Association then went to the list of qualified arbitrators who had that experience, checked out the conflicts with them and then came up with a list of thirty people from whom taxpayers could choose their arbitrator. Taxpayers nominate three; one will be chosen. We will honor the taxpayer's order of preference as schedules permit.

It seems to me that even taxpayers who believe that their case is better than 50/50, which of course we disagree with, would come in under the settlement initiative because they choose their arbitrator, it is done expeditiously, it is done in confidentiality and there is a resolution of the issue very much safeguarded by the process that we have established. My knowledge of clients' interests leads me to believe that they will buy into that. We offer a fair process, a quick process, a confidential process, and I think we should see quite a few taxpayers signing up for it.

I think there are four or five that have signed on. I think it's because it's still early. I expect that taxpayers will sign on close to the end of the term sometime in March, around March 5th. And if they don't, then we'll just deal with it. We want to offer creative settlement initiatives wherever appropriate and wherever we think we can come to a reasonable fashioning of a remedy like we did with the contingent liability offer. But I can't guarantee that we are going to do it again because it may be that we just cannot develop an appropriate settlement initiative for a particular transaction. But I'm optimistic. We overcame a very difficult sticking point with the contingent liabilities because, as I said, both this institution and taxpayers feel very strongly about the strength of their respective positions. There are a couple of novel aspects about it, aside from the baseball arbitration, such as the fact that we are willing to acknowledge that taxpayers can legitimately believe their cases are stronger than ours without giving in, and yet we are going to try to avoid litigation. And that was novel because prior to this, a taxpayer thinks the litigating hazards are "x" while we think they're "y," and if we cannot negotiate to a middle ground, typically the alternative is to go to litigation.

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2003 DISTINGUISHED SERVICE AWARD RECIPIENT:
M. BERNARD AIDINOFF

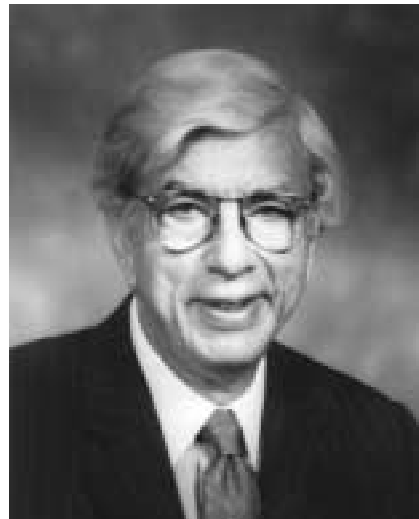
by Paul J. Sax, San Francisco, CA

Our Tax Section, grateful for the success it has enjoyed by reason of the inspiration and direction of M. Bernard Aidinoff of New York, is delighted to bestow its Distinguished Service Award upon its good friend and esteemed colleague, known everywhere as Bernie. Conveying the passion of his commitment to scholarship and excellence, Bernie charted the course for *The Tax Lawyer* as an early Vice Chair-Publications, guiding it to its current status as the preeminent work of scholarship in the tax law. Vigorous in promoting the role of the Section as the voice of tax law professionals of America, he persuasively urged the Section to avoid parochial "Washington and others" status, achieving a rotation of leadership throughout the country that continues to characterize our position as the tax law voice for America. Dedicated to fairness in the tax system, he was a leader in the successful movement to abolish "secret law" and require publication of private letter rulings. His firm insistence on a tax lawyer's duties to the tax system and the law drove him to push the Section and the ABA to restate the standard for asserting a position in a tax return, effectively reversing the erosion of the "reasonable basis" standard.

Bernie traveled a long way from his home town of Newport, Rhode Island to the Manhattan headquarters of the senior management of Sullivan and Cromwell. The training of legends doubtless helped. After Harvard Law School, for Bernie there was a clerkship with Judge Learned Hand, service as protégé of the legendary Norris Darrell, and time as a junior lawyer under the stern leadership of Arthur Dean at S & C.

His career and service at the bar have been extraordinary by any measure. Bernie became active in the Section as a leader of the Special Committee on Regulations Process, setting the respective roles of the Treasury and the Service in writing regulations. He rose to Vice Chair (Publications), to Chair of the Section, followed by years of service on the Section's Formation of Tax Policy, Special Projects and Nominating Committees. He was instrumental in the planning of two invitational tax compliance conferences, and for five years chaired the blue ribbon ABA Commission on Taxpayer Compliance. Bernie served six years in the House of Delegates, and at the American Law Institute was Chair of the Tax Program Committee and a consultant on every major corporate, partnership or foreign tax project since 1974, receiving the John Minor Wisdom Award for his contributions to ALI.

Bernie's stature in the community rivals that of his stature at the bar, as a member of the Council on Foreign Relations, the Lawyers' Committee for Human Rights, Counsel for President Clinton's Legal Defense Fund, long time corporate director of American International Group, Inc., ten years as Chair of the Orchestra of St. Lukes and as Advisory Director of the Metropolitan Opera, and most recently chair of the capital campaign to maintain the oldest surviving colonial area synagogue, the 250 year old Tuoro Synagogue in Newport, Rhode Island.



M. BERNARD AIDINOFF

Never at a loss for guile, Bernie is remembered best by some for the carefully tailored Section resolution that banned smoking at (a) committee meetings and (b) plenary sessions, enabling him, cigar in hand, to rule out of order a motion to ban smoking at a Council meeting.

It is not only with great pride but also thanks for what he has accomplished professionally and in the larger community, that we present the American Bar Association Section of Taxation 2003 Distinguished Service Award to our cherished friend and colleague, M. Bernard Aidinoff. ■

SPOTLIGHT ON COMMITTEES: PRO BONO COMMITTEE

by Richard M. Lipton, Chicago, IL

As part of its commitment to increasing pro bono activities by Section members, Council approved the formation of a Pro Bono Committee, beginning in 2002. The Committee held its first full meeting at the mid-year meeting in San Antonio this year, and more than 25 Section members attended. The Committee intends to serve as a catalyst and a facilitator for pro bono activities, and several subcommittees have been formed to assist in this effort.

VITA SUBCOMMITTEE. This Subcommittee will focus on tax return preparation for low-income taxpayers in conjunction with the Service's volunteer income tax assistance (or VITA) program. A number of Section members already participate in this program, in which clinics are held at hundreds of sites around the country to provide free tax-return preparation for needy individuals.

The Subcommittee intends to focus on two aspects of the VITA program. First, it will assist members who want to be trained as VITA volunteers. In this regard, a 3-hour training program was held in San Antonio, and more than 40 Section members received the training necessary to enable them to prepare returns for low-income taxpayers. The Subcommittee will consider how to make additional training programs available for Section members around the country.

In addition, the Subcommittee determined that there often is a need for a lawyer at VITA clinics. Frequently, taxpayers who come into a clinic have not filed in prior years or have filed incorrect returns; these individuals need privileged legal advice. The Subcommittee hopes to work with the Service to establish procedures whereby Section members can be present at VITA clinics to assist any individuals who need legal advice. This work would not require significant training for most tax lawyers and would provide an immediate opportunity to assist people in need.

TAX CLINIC SUBCOMMITTEE. The second focus of the Pro Bono Committee will be to work with the various tax clinics around the country to assist taxpayers who are involved in disputes with the Service. Many of these clinics are associated with law schools, and the clinics are always in need of mentors to help the young lawyers and law students who handle cases on behalf of needy clients. This Subcommittee hopes to help Section members locate the clinics that could use their services and act as a "bridge" between Section members and the clinics. In addition, the Section will continue to assist the clinics by providing helpful training materials and advice.

CHARITABLE ORGANIZATION SUBCOMMITTEE. The third major focus of the Pro Bono Committee will be to act as an intermediary between Tax Section members and charitable organizations that are in need of legal assistance. In particular, new charitable organizations are established on almost a daily basis, and many of these organizations need help in qualifying for exemption (including the filing of the necessary forms with the Service and relevant state and local authorities). Once a charitable organization has obtained tax exempt status, it needs to operate in a manner that is consistent with that status. This Subcommittee hopes to identify a group of lawyers who will be willing to assist newly formed charitable organizations in these endeavors.

PRO BONO AWARD SUBCOMMITTEE. The Tax Section has established an annual Pro Bono Award, to be given to one or more individuals or organizations to honor their commitment to pro bono activities. Last year awards were made to Elizabeth Atkinson of Norfolk, Virginia, and Victoria Bjorklund of New York City, both of whom were featured in the *NewsQuarterly*. The Pro Bono Committee has been asked by Council to provide nominees for this award for 2003 and subsequent years. To make certain that appropriate standards and procedures are utilized in making this determination, the fourth Subcommittee will establish guidelines for this award and also propose nominees to Council.

Needless to say, these activities will take a lot of effort by the members of the Pro Bono Committee. Fortunately, members of the Committee are committed to its success as well as to increasing participation in pro bono activity by Section members. Future issues of the *NewsQuarterly* will highlight pro bono opportunities for our members, but anyone interested in becoming involved in the work of the Committee or in pro bono activity should contact Dick Lipton at Richard.M.Lipton@BakerNet.com. ■

REMINDER: Section members may apply to join committees with the online *Committee Preference Form* at www.abanet.org/tax/groups/comember.html. You will need your eight-digit ABA member ID number and your password (usually your last name) to access the form. If you do not know your ID number, contact the ABA Service Center at service@abanet.org. *One Committee Rule*: As of July 1, 2001, the Section has rescinded its *One Committee Rule*. Section Members now may join as many committees as they like.

2002 TAX LAW CHALLENGE COMPETITION: A SECOND SUCCESSFUL YEAR

by Michael M. Lloyd, Washington, DC

EDITOR'S NOTE: The Final round of the Competition, which is held at the Midyear meeting, is open to members. The time and place are listed in the meeting materials and experience has shown that it is well worth the trip: Not only will you get to see the best of the future of the tax bar in action, but seeing colleagues assume the roles of ornery partners or vexatious clients can be quite amusing. Michael M. Lloyd, the author of this piece, was not only a finalist in the first Tax Law Challenge competition, held last year, but he also worked on the development of this year's problem and served as a judge in the competition.

On January 24, 2003, at the ABA Section of Taxation's midyear meeting in San Antonio, Texas, the Section of Taxation's Young Lawyer's Forum ("YLF") held the semi-final and final rounds of the 2002 Tax Law Challenge. Now in its second year, the Tax Law Challenge is a competition for J.D. students attending ABA-accredited law schools who are interested in a career in tax law. The Tax Law Challenge is different from other law school tax competitions because it is structured as a tax planning and client-counseling competition rather than as a moot court, appellate argument competition. The competition requires that two-person teams submit memoranda and client letters analyzing a complex fact pattern. The top four teams are then invited to the Midyear meeting for the final rounds of the competition and receive complementary airfare, hotel accommodations, and meeting registration. The semi-final round of the competition is structured as a meeting between associates (the students) and senior partners (the judges). The two teams with the top scores in the semi-final round advance to the final round, which is structured as a client meeting.

This year's competition boasted entries from 29 teams. The winning team consisted of Erika L. Andersen and Jeremy S. Dardick from the University of Michigan; Christopher Bourell and Gianna Ravenscroft from Southern Methodist University took second place. The other semi-finalist teams were Chris Hayes and Rhia Winant from Stetson University and Thomas Greenaway and Thomas Newman from the University of Connecticut.

This year's problem had two major issues: a proposed business combination and a fact intensive sale-leaseback. The business combination involved an up-and-coming biotechnology limited liability company ("LLC"), taxed as a partnership for federal income tax purposes, which had received a merger proposal from an unrelated corporation. The students first had to explain that the transaction failed to qualify as a reorganization under section 368 because an entity taxed as a partnership cannot be a party to a reorganization under section 368(b). Then the students had to determine whether the transaction could qualify as a tax-free exchange under section 351. Based upon the proposed share breakdown in the merger proposal, the transaction fell just shy of the 80 percent control requirement and thus failed to qualify under section 351, subjecting the LLC members to recognition of a substantial gain. The students therefore had to suggest ways to restructure the proposed transaction in a manner more beneficial to their clients.

The sale-leaseback involved a transaction in which the LLC sold a manufacturing laboratory to a third-party and immediately entered into a long-term arrangement to lease the premises. The lease agreement included factors that supported characterization as both a sale and a financing arrangement, including a complicated bargain purchase option that enabled both parties potentially to benefit from appreciation in the property. After recognizing that the Service could possibly construe the sale-leaseback as a financing, the students had to identify the possibility that the LLC members might have to recognize gain under section 357(c) in connection with the proposed merger and had to propose possible ways of mitigating the gain. Thus, the students had to recognize that the characterization of the sale-leaseback affected their analysis and proposed resolution of the business combination proposal.

The YLF was delighted that, as occurred last year, so many accomplished members of the tax bar accepted the invitation to serve as judges. The judges included Pamela F. Olson, the Assistant Treasury Secretary for Tax Policy; B. John Williams, the Chief Counsel of the Internal Revenue Service; Stephen L. Owen, partner at Piper Rudnick and chair of the Tax Section's Partnership Tax Committee; William M. Richardson, partner at Hunton & Williams and the chair of the Tax Section's Corporate Tax Committee; Barbara Spudis de Marigny, shareholder in the San Antonio law firm of Oppenheimer, Blend, Harrison & Tate; Professor Walter D. Schwidetzky of the University of Baltimore School of Law; Robert H. Wellen,

partner at Ivins, Phillips & Barker; and Professor Christopher M. Pietruszkiewicz, of the Louisiana State University School of Law.

The Tax Law Challenge has been praised for both the ingenuity and aptness of its format. Professor Fred Brown of the University of Baltimore School of Law commented, "the Tax Law Challenge is a great concept because it allows students to prepare and orally defend written memoranda that analyze the tax consequences of proposed transactions—a task that tax lawyers are more often engaged in as opposed to tax litigation." Professor Dan Goldberg of the University of Maryland School of Law added, "the format challenges students to present their oral and written advice in a manner that is sufficiently sophisticated for use by more senior lawyers and then reformulate it so that it is understandable to a client. What could be better preparation for tax practice?" ■

POINT & COUNTERPOINT

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or outright repugnant. It would probably be possible to deal with repugnant laws—the passbook laws of apartheid-era South Africa or whatever passed for laws in Taliban-period Afghanistan—or laws that otherwise do not measure up to U.S. standards, by holding the U.S. member of the bar to observance of foreign legal requirements while allowing exception for requirements that shock the conscience, violate accepted U.S. moral precepts, or some other such asterisk.

That approach does not satisfy me, however. The problem lies in the underlying suggestion (regardless of any exceptions to it) that foreign laws, because they are laws, are per se entitled to deference on ethical grounds. It will not do just to exempt the foreign law that the attorney finds immoral, for two reasons. First, that hypothetical ethical standard would carry a presumption favoring the observance of foreign law, subject to exceptions and excuses in particular cases. Such a standard would place bar members in the position of justifying exceptions on the basis of case-by-case moral judgments that are bound to be subjective, individual, and in some instances idiosyncratic. Second, and more fundamentally, the suggestion that foreign laws are presumptively entitled to deference fails to take account of what laws are—expressions of a community's accepted code of conduct. The fact that the expressions bear the label "law" does not, I think, necessarily endow them with any greater status for an attorney in the United States than local custom, practice, or belief, especially since the process by which the expressions entered into "law" was, in no sense, ours. It is not necessary to invoke abhorrent regimes or extreme situations to conjure up examples where differences in community standards and cultural circumstances should be sufficient to deprive foreign laws of a claim to ethical deference in the United States.

The issue arises in the workaday world of planning business transactions for tax efficiency. As noted, Italy sees criminal conduct in certain transfer pricing issues, and many countries have a variety of strict laws on their books relating to foreign currency transactions. Shari'a law in the Moslem world prohibits the earning of interest on money lent, yet some fairly obvious circumventions of that prohibition are in common use and broadly tolerated. Is a member of the bar supposed to take the law at face value and, as a matter of ethics, accept it? If the attorney does so, the client may fail to receive the assistance that is its due. Better, by far, I think, for the attorney (on pragmatic grounds) to steer the client to local expertise that can interpret the foreign requirement, what it means in practice, and what its realistic contours are. Needless to add, there are many foreign laws, just as there are many U.S. laws, that are honored in nonobvious ways or even in the breach.

This is not, of course, to say that an attorney should disregard requirements of foreign law. A client may need to understand, and heed, foreign legal requirements at the peril of civil or even criminal jeopardy in foreign courts. And there are going to be circumstances in which foreign laws mesh precisely with moral imperatives: committing fraud in France is still committing fraud, and there should not be any problem with finding ethical fault in the case of an attorney who abets such conduct, regardless of whether there is an anti-fraud rule in French jurisprudence. The governing standard here is something that should be familiar and acceptable to all bar members, not because they are bar members but because they are human beings. The fact that the standard is embodied in foreign law is quite irrelevant.

With the wonders of the internet and the ability to communicate readily with persons in other countries who, increasingly, speak English, the modern world has tended to confirm a seemingly instinctive American belief that everyone else really is (or wants to be), at bottom, just like us. Not so. Differences still run deep among countries and peoples, and those differences find expression in the laws they adopt. It is difficult enough trying to define, refine, and ensure compliance with our own laws; finding ethical requirements in laws enacted by others is an exercise in ethnocentrism that we would be well advised to avoid. ■

JOINT FALL CLE MEETING: SEPTEMBER 11-13, 2003

Sponsored by the Section of Taxation and the Section of Real Property, Probate and Trust Law

THE FALL MEETING HAS A NEW LOOK

The ABA Sections of Taxation and Real Property, Probate and Trust Law (RPPT) will co-sponsor a Joint Fall CLE Meeting to be held September 11-13, 2003, in Chicago, IL.

The Tax Section Committees will hold their regular scheduled committee meetings on Friday and Saturday, which will include panels of interest to both Tax and RPPT members. On Saturday afternoon, 90-minute in-depth programs will be offered that also will include substantive topics of interest to members of both Sections. Ticketed events, including the Friday Reception and Saturday Luncheon, will offer networking opportunities for all attendees.

The Tax Section and RPPT are very excited about this joint meeting and the opportunities it presents to enhance CLE for Section members who share many common legal interests. Join us and take advantage of the opportunity to meet with the country's leading attorneys and government officials to discuss the latest initiatives, regulations, legislative forecasts, and planning ideas. The Sheraton Chicago Hotel and Towers will serve as the Headquarters Hotel.

DRESS CASUAL

The dress for the 2003 Joint Fall CLE Meeting is casual, so relax and bring comfortable attire.

REGISTRATION

Any Section member attending any part of the 2003 Joint Fall CLE Meeting, *whether or not he or she speaks*, must register and pay the registration fee. Shared registrations are not permitted. Companions are defined as non-Section members not attending substantive meetings. Any companion attending substantive programs must register and pay either the Section member or non-Section member registration fee, whichever is applicable.

The Sections are pleased to offer a discount to advance registrants. To register for the 2003 Joint Fall CLE Meeting, please use the Meeting Registration and Ticket Purchase Form in this *NewsQuarterly* or on the Tax Section website www.abanet.org/tax/. **The final deadline for advance registration is August 7, 2003.**

The registration fee includes one set of meeting materials and permits registrants to attend all meetings, sessions and programs; however, it does not include meal functions and social events listed as "Ticketed Event." All tickets are sold on a first-come, first-served basis. Payment may be made by check or credit card. The Section accepts American Express, Master Card and VISA. **No registration will be processed or considered received unless payment is included.**

The Meeting Registration and Ticket Purchase Form, along with a full payment, must be faxed or postmarked by August 7, 2003, for the discounted advance registration fee and airline ticket raffle. Registrations will be accepted after the August 7 deadline date (until September 3, 2003); however, they will be automatically processed with the "on-site" fee. Please note that all registrants including those who register between August 7 and September 3 will pick up their badge and meeting materials at the advanced registration area in Chicago.

MEETING REGISTRATION FEE WAIVED

The 2003 Joint Fall CLE Meeting registration fee will be waived for law students, LLM candidates and MT candidates. Meeting benefits include Continuing Legal Education programs, legal publications, professional development, networking and access to up-to-date information. To register, use the Meeting Registration and Ticket Purchase Form in this *NewsQuarterly* or visit the Tax Section web site: www.abanet.org/tax.

REFUND POLICY

All cancellations and refund requests must be received in writing and postmarked or faxed by August 7th to receive a refund. All refund requests will incur a $50 cancellation fee. Absolutely no refunds will be granted at the meeting. Please direct all refund requests to the Meeting Registrar at the Tax Section Office.

ON-SITE REGISTRATION AND TICKET PURCHASE HOURS

The Registration Desk will be open at the Meeting during the following hours:

Thursday	12:00pm – 9:00pm
Friday	6:30am – 6:30pm
Saturday	6:30am – 4:00pm

WIN A FREE AIRLINE TICKET

At the Joint Fall CLE Meeting, two meeting attendees will each win a roundtrip airline ticket for travel within the continental United States good for one year. All complete registrations postmarked or faxed by August 7, 2003, will be eligible. The drawing will take place during the Saturday Luncheon at the Meeting. You do not have to be present to win.

AIR TRAVEL INFORMATION

American, Delta and USAirways are the preferred airlines for the 2003 Joint Fall CLE Meeting. To make

airline reservations or to compare rate information, attendees should contact the airlines directly using the ABA reference numbers provided below.

American Airlines
1-800-433-1790
Reference: 15794

Delta
1-800-241-6760
Reference: 189408A

US Airways
1-877-874-7687
Reference: 36632473

Attendees are encouraged to compare all options available, including rates and restrictions between an airline's own zone fares and ABA rates. The ABA rates are available through your travel agent, directly from the airline, or from the ABA travel agency, Tower Travel Management at 1-800-921-9190.

CAR RENTAL INFORMATION

ABA Members can receive special rates through Hertz. Call 1-800-654-2230 and mention the ABA/Hertz reference number CV022R0637; TDD users dial 1-800-654-2280. You will be asked for your ABA membership ID number at the time of rental.

CHILD CARE SERVICES

If you need childcare services, contact the concierge in the hotel where you are registered.

MEETING MATERIALS

All meeting materials, including committee program material, will be available four to six weeks after the Meeting on ***Comm-Online***—an innovative Tax Section and LexisNexis™ joint project that gives members FREE online access to hundreds of pages of Section Program and Committee Meeting Materials. This service is available on the Section's web site www.abanet.org/tax/commonline/.

HOTEL RESERVATIONS

Those wishing to make reservations at the Sheraton Chicago Hotel and Towers may do so by using the Hotel Reservation Form located in this *NewsQuarterly* or on the Tax Section website www.abanet.org/tax/. **The deadline for making reservations is Thursday, August 21, 2003**.

Please note that the Hotel Reservation Form should be sent directly to the hotel, not to the Tax Section Office.

CLE AND ETHICS CREDIT

NOTE: ***You must be registered for the meeting*** in order to be eligible to receive CLE or ethics credit. Accreditation will be requested for this meeting from every state with mandatory continuing legal education (MCLE) requirements for lawyers. Each state has its own rules and regulations, including its definition of "CLE." The Uniform Certificate of Attendance will be available at the meeting for both attendees and speakers and will be included with the Registration Materials. CLE credit will be requested for subcommittee meetings that include a program description and names of panelists. Eligible subcommittees will be listed on the Uniform Certificate of Attendance. Please call the ABA CLE Department in Chicago at (312) 988-6217 with any questions pertaining to the number of credit hours granted by each state.

REQUIREMENTS FOR NEW YORK ATTORNEYS: You are responsible for signing in and out of each session you attend and filling out a New York Uniform Certificate of Attendance Form. The sign-in and out forms will be available in each meeting room, and the Uniform Certificate of Attendance Form will be available at the CLE Information Booth during the Meeting. **In order to receive full credit for all sessions attended, you must stop by the CLE Information Booth before you leave the Meeting to obtain an authorization signature from an ABA staff member**.

AUDIO TAPES

Audiocassette tapes of committee and Saturday programs will be available for purchase on-site as well as following the meeting. Provided by Teach'em, each program typically consists of two cassettes and costs only $20. To place an order, contact Teach'em at 1-800-776-5454 or info@Teachem.org, or www.Teachem.net/aba/.

EXHIBIT

An Exhibit will be held Friday and Saturday in the Headquarters Hotel. Representatives from a variety of publishers and service providers will demonstrate the latest legal research methods and exciting new products to aid you in your daily practice.

LUNCHEON AND RECEPTION

A Joint Section Reception will take place on Friday, September 12th, from 6:30pm to 8:00pm, and Joint Section Luncheon will be held on Saturday, September 13th from 11:45am to 12:40pm. Both events will be held at the Sheraton.

PROGRAM SCHEDULE

For the complete 2003 Joint Fall CLE Meeting Program Schedule, including dates and times, visit the Tax Section website in July at www.abanet.org/tax/.

COMPANION ACTIVITIES

Please wear comfortable walking shoes for these activities and dress appropriately for the weather.

SHEDD AQUARIUM TOUR AND LUNCH AT THE CHICAGO YACHT CLUB

Friday, September 12, 2003
9:00am-2:00pm
(Ticketed Event: $76)

The John G. Shedd Aquarium, situated on the shores of Lake Michigan, is known as "The World's Aquarium."

Opened in 1930, it is one of the oldest public aquariums in the world. The animals at Shedd are naturally the stars of the show, but the facility that houses the animals, and which dates back to the 1920s, has its own interesting story. From the day it opened, the Shedd Aquarium set a new standard for aquariums around the world. It was the first inland aquarium to maintain a permanent exhibition of both freshwater and saltwater fish, and it remains the largest indoor aquarium in the world. The facility houses nearly 8,000 aquatic animals representing some 650 species of fish, reptiles, amphibians, invertebrates, birds, and mammals from waters around the world.

At the Shedd, you will have the opportunity to enjoy a one-hour sea-life experience with an expert guide. The tour will take you through galleries housing a wide variety of freshwater and saltwater exhibits, including a 90,000 gallon Caribbean reef, which is home to more than 250 Caribbean reef animals, and an intriguing and mystical Seahorse Symphony.

Another stop on the tour will be the newly opened *"Wild Reef – Sharks at Shedd"* exhibit, which has one of the most diverse displays of sharks in North America, shown with other large predators in a 400,000-gallon habitat. Floor-to-ceiling exhibit windows will give you a diver's eye view of a Philippine coral reef, teeming with live corals and more than 500 species of reef fishes of all shapes, colors and sizes.

The guided tour will be followed by a short dolphin presentation and time to revisit your favorite spots or stop in the Aquarium's two gift shops.

After the visiting the Shedd, participants will enjoy lunch at The Chicago Yacht Club, at the heart of Chicago's lakefront where breathtaking views of Chicago's skyline, Monroe Harbor, and Grant Park create a sensational dining experience.

OAK PARK THE "WRIGHT" WAY (AN AFTERNOON IN OAK PARK)

Saturday, September 13, 2003
9:30am – 1:30pm
(Ticketed Event: $45)

Those with an interest in architecture should not miss this tour of Oak Park, Illinois - where Frank Lloyd Wright spent much of his illustrious and controversial career. After motoring west to this charming old suburb, guests will disembark at Wright's Home and Studio, where the eccentric architect resided for the first 20 years of his career. A tour guide will describe how Wright lived and worked in this landmark building. The chronology of the improvements and additions Wright made to the structure creates a perfect framework to describe his Oak Park tenure.

The studio tour winds up at the Ginkgo Tree Bookshop, which stocks books and gifts related to Wright and Oak Park. Many of Oak Park's 25 Wright-designed buildings are in this historic district, including the Robie House, Larkin Building, and Unity Temple, and guests will learn about them during the ensuing walking tour. These structures and homes include sterling examples of Wright's trademark Prairie Style, as well as three of his "Victorian cottages."

The next stop on the tour is Ernest Hemingway's birthplace, a graceful Victorian, Queen Anne style home where he was born in 1899. It has been completely restored to its turn-of-the-century appearance and is a grand example of the Victorian homes built over a century ago. Authentic period carpeting, light fixtures and furniture owned by the Hemingway family, as well as family artifacts and treasures once again reside in their intended placement. The tour will reflect on the influence and impact that family and the community had on the early life of this Pulitzer and Nobel Prize winning author. ■

A quick way to view
ABA Section of Taxation
Committee Meeting Materials…

Comm-Online

Comm-Online.
www.abanet.org/tax/commonline
Section of Taxation
Committee Meeting Materials
and more, powered by

LexisNexis™ Online Services

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INTERVIEW

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Of course, I'm not afraid to litigate, but I think it's preferable not to. That's why I was very excited about being able to publish this kind of procedure. The kind of thought and work that went into it was extensive and evident. Deborah Butler, who is the Associate Chief Counsel for Procedure and Administration, and her folks were really yeomen in getting it done and worked very closely with LMSB and Appeals. I'll be very disappointed if a large number of taxpayers don't come in. But if they don't, we'll live with it.

Q Will you announce the numbers after March 5th?

A Yes. I think it takes a lot of process. For example, the 302/318 initiative closed in November. Because of processing, the numbers are still changing a little bit two, three months later. Don't expect an announcement on March 6th, but I think probably by the ABA Tax Section meeting in May, we should have some pretty reliable numbers.

Q What major personnel changes have you made in the Office of Chief Counsel?

A By that do you mean whom have I rearranged? There really has not been anybody. Before I was confirmed, Richard Skillman and Judy Dunn, who were the deputies, had indicated to me that they both thought that it was the appropriate time for them to go back to private practice. So I looked for two new deputies. I brought in a number of special counsels. Mike Paup retired. I have Cary Pugh and Matthew Stevens as my special counsel focused on different areas. Gary Wilcox is my Technical Deputy and Emily Parker is my Operations Deputy.

At the associate level, we have had some retirements or people going to other opportunities. Heather Maloy was IT&A (Income Tax & Accounting) Associate Chief Counsel when Paul Kugler retired from Pass Throughs, and I asked Heather to go over to that position. And to my delight, she accepted. Then that left a vacancy in Income Tax & Accounting. James Atkinson was the Deputy in that organization along with Lou Fernandez. I asked James if he would take the Associate position and he did. He has just been invited to head up the Graduate Tax Program at Georgetown, which is a great opportunity for him. Of course, it has been my experience in my career that people have encouraged me to do things that are new and interesting and challenging. Everybody benefits. I believe you should give people maximum flexibility and liberty in seeking out things that will benefit them professionally. So, now we again have a vacancy in Income Tax and Accounting. Then John Staples, the International Associate, announced that he was going back to his old firm as a name partner, which is a great opportunity for him. So that will be open. There will be a couple of other openings that will occur over the next several months as well, but nothing that I have initiated. These are all decisions that people make for their own careers. I'm very happy with the executives that I have reporting to me. And what Charles Rosotti did with the restructuring is really marvelous. He laid a terrific foundation on the IRS side and, of course, we parallel that as I mentioned earlier. The structure in the Chief Counsel's office and the structure on the Commissioner's side work very well.

Q The Chief Counsel has members of his office sitting in the operating divisions, such as LMSB where Linda Burke is Counsel to the Assistant Commissioner. Does she "report to" you or to the Assistant Commissioner, and how is that arrangement working out in practice?

A The Division Counsel reports to me through the Deputy for Operations and I think that it has worked out well. The Division Counsel work very closely with the Division Commissioners. They see themselves, as they should, as the lawyers for that particular part of the organization. And as I said, it's important for us as lawyers to make the programs of the Commissioner as effective as we can and give the Commissioners as much flexibility as we can in implementing their programs.

It's also important I think for the Division Counsel to be in a position to exercise the tax policy responsibilities that we have and to make sure that the client is following the substantive positions that we believe are fair interpretations of the law. I think that the much closer working relationship between the Division Counsel and the Internal Revenue Service that now exists is a major factor in our ability to do that.

Q The Office of Chief Counsel has both field attorneys and technical experts in the National Office. Please compare and contrast how these two groups function, how they interrelate, and any changes you are trying to make in the relationship.

A We have about 1,550 attorneys, with slightly more in the field than in the National Office. The functions of the two are different but integrated. The field attorneys are involved most closely in advising the client, the Internal Revenue Service, in a wide variety of areas including collections, litigating cases in the Tax Court, audits, and assisting revenue agents. The National Office focuses on published guidance, private guidance, assisting Treasury to develop regulations, and case specific advice to the field.

Where these two functions are integrated is at the point where the substantive advice that is being applied in the field with particular cases needs to be consistent with the positions of the

SEE INTERVIEW PAGE 34

2003 Joint Fall CLE Meeting Registration and Ticket Purchase Form

Sponsored by the Section of Taxation and the Section of Real Property, Probate & Trust Law

Advance registration with full payment must be postmarked or faxed by August 7, 2003.
CANCELLATIONS: $50, NO REFUNDS after August 7, 2003.

INFORMATION

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IMPORTANT: Please indicate the Section to which you belong:
☐ Tax ☐ RPPT ☐ Tax & RPPT

Please check here if you need CLE Credit in one of the following states:
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TICKETED EVENTS

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TOUR & LUNCHEON

No.	Event	Price
1	Shedd Aquarium Tour and Luncheon at Chicago Yacht Club	___ at $76 each = $_____

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No.	Event	Price
2	Administrative Practice and Court Procedure & Practice	___ at $47 each = $_____
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No.	Event	Price
13	Joint Section Reception	___ at $70 each = $_____

SATURDAY, September 13th

COMMITTEE BREAKFAST

No.	Event	Price
14	Partnerships, Real Estate and S Corporations	___ at $32 each = $_____

TOUR/ACTIVITY

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LUNCHEON

No.	Event	Price
16	Joint Section Luncheon	___ at $47 each = $_____

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Group Dates: 9/7/03 - 9/15/03

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INTERVIEW

FROM PAGE 31

institution. What I have tried to do is to make sure that the technical people in the National Office know about or are aware of issues that are being raised in the field, and that those issues are being addressed in guidance provided to the public and to revenue agents and other folks on the client side.

What I have tried to do in the field is to make sure that the people who are litigating have the freedom to litigate a particular case the way they believe that the case should be litigated, because they are closer to the issues under the facts. But I also want to make sure that whatever they argue is consistent with the published guidance and the positions of this institution. So I think that if you look over the past year, you will find a series of internal notices as well as some memoranda that I sent out to the field that attempt to achieve that. A memorandum was published last fall on the roles of field counsel and the National Office. It distinguishes what those roles should be and helps to clarify the distinct roles that each plays in making sure that the public is aware of our positions and that our positions are fully consistent with the published guidance that we have.

Q Does your office have much interaction with the National Taxpayer Advocates Office?

A Yes, we do. The counsel to the Taxpayer Advocate reports to me through the Deputy for Operations. I work with Nina Olson on a number of issues at her request. I have frequent interaction with her. Also, my attorneys in SBSE support her in the field. That's an important interaction. It gives her the support that she needs and helps my attorneys as they work with the local taxpayer advocates and gives them a perspective they otherwise wouldn't have. It's good for her office, it's good for the Service generally and for my lawyers.

Q You bring to the Office of Chief Counsel a background both as a Tax Court Judge, a senior Justice Department official, and a tax litigator. How has each of these roles affected your approach to the office?

A Significantly. Each has provided me an opportunity through the course of my career to see how the Internal Revenue Service interacts with the variety of other institutions, such as the Justice Department, the Tax Court and then the private bar and taxpayers generally. I think it has given me an appreciation for the effect we have on people, the effect that we have on taxpayers and institutions. It has given me an appreciation for how the litigation positions are developed in this institution, how we relate to the Justice Department in pursuing appeals and cert petitions. And, I think it has also given me opportunities to observe how we develop policy with the Treasury Department and how we implement the statutes.

So, as an institution, we have client responsibilities and we want to ensure that the Commissioner is able to implement programs and has as much flexibility as is legally permissible in these programs. At the same time, we have tax policy responsibility to the Secretary through the General Counsel to make sure that the positions that we are taking substantively are fair interpretations of the law. So being in those positions has given me perspective from having seen the IRS outside of it; it also has given me perspective on tax administration from within this institution and the interplay between tax administration and tax policy issues.

Q Your position is the only position in the Service aside from the Commissioner that is appointed by the President. How does having a Presidential appointment affect your ability to manage a governmental agency?

A It helps in a number of ways. First, the career people here have a great respect for the policy preferences as administrations change, and they work very hard to ensure that each administration is able to implement the policies that are set essentially by the President and the Secretary. I think that if I were not a Presidential appointee, it would be more difficult for me to represent policies of the Secretary. I think it would probably also diminish the impact that my statements would have publicly on the positions that we should be taking and the directions that we should be moving in.

Particularly in an agency this large, it is critical to have somebody in my position that is a Presidential appointee. I think that it also enhances the relationship developed between the Commissioner's office and the Chief Counsel's office. The 1998 Restructuring Act led to the restructuring of the organization, with the Commissioner's position now being a management position focused on managing and administering the system, whereas the Chief Counsel's position focuses on the substantive positions, the technical positions and the policy positions that the organization has taken. I think having this position as a Presidential appointment is critical to the effective functioning of that division of labor. ■

NEWS BRIEFS

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LexisNexis™, the Section's primary legal publishing sponsor, is pleased to provide a 10% discount on new purchases of LexisNexis publications. This exclusive offer includes books and CD's published by Matthew Bender, Michie and Shepards. To take advantage of this member benefit, you must place your order by linking to the LexisNexis Bookstore via the Tax Section website at www.abanet.org/tax. Click on the ad located at the bottom right of your screen—"Looking for Answers, Search the LexisNexis Bookstore"—to access this money saving and limited-time offer.

E-MAIL CONTEST WINNER ANNOUNCED

Congratulations to Tax Section member **David E. Dunnavant** of Blue Bell, PA, who won the Section's e-mail contest. The contest was announced last fall in the Section's Directory in an effort to encourage members to verify or provide their current e-mail addresses to the ABA in order for the Section to communicate more effectively with its members. Any Section member with an e-mail address on file as of April 7 was eligible for the drawing. Mr. Dunnavant's e-mail address was randomly chosen by computer out of 13,386 member e-mail addresses. He will receive two round-trip airline tickets for travel anywhere in the continental United States, and one complimentary registration to the Section's 2003 May, Fall, or 2004 Midyear Meetings. As a result of the contest, the Section increased its number of member e-mail addresses by 10%. Thanks to all who participated! This contest will be repeated later this year in the 2003-2004 Section Directory—don't miss it! ■

CLE CALENDAR

For additional information, use the sponsoring organization contacts listed next to each program below.

DATE	PROGRAM	CONTACT
May 22-23, 2003	Employee Benefits in Mergers & Acquisitions, New York, NY	ABA JCEB tel. 202/662-8641; www.abanet.org/jceb
May 28, 2003	"Last Wednesday" Teleconference presented by the Tax Section's Corporate Tax Practice Group	ABA CLE tel. 800/285-2221; www.abanet.org/cle
May 29-30, 2003	Charitable Giving Techniques, Chicago, IL	ALI-ABA tel. 800/253-6397; www.ali-aba.org
June 3-4, 2003	First Annual International Tax Institute, Fordham University Law School, New York, NY	ABA Tax Section tel. 202/662-8670; www.abanet.org/tax
June 4-6, 2003	ERISA Basics, Chicago, IL	ABA JCEB tel. 202/662-8641; www.abanet.org/jceb
June 12-13, 2003	How to Handle a Tax Controversy at the Restructured IRS and in Court, Chicago, IL	ALI-ABA tel. 800/253-6397; www.ali-aba.org
June 25, 2003	"Last Wednesday" Teleconference presented by the Tax Section's Exempt Orgs, Estates & Trusts Practice Group	ABA CLE tel. 800/285-2221; www.abanet.org/cle
July 10-12, 2003	Estate Planning for the Family Business Owner, Boston, MA	ALI-ABA tel. 800/253-6397; www.ali-aba.org
July 30, 2003	"Last Wednesday" Teleconference presented by the Tax Section's Pass-Through Entities Practice Group	ABA CLE tel. 800/285-2221; www.abanet.org/cle
Aug. 27, 2003	"Last Wednesday" Teleconference presented by the Tax Section's Financial Products and Institutions Practice Group	ABA CLE tel. 800/285-2221; www.abanet.org/cle
Sept. 11-13, 2003	2003 Joint Fall CLE Meeting, Chicago, IL, sponsored by the ABA Sections of Taxation and Real Property, Probate and Trust Law	ABA Tax Section tel. 202/662-8670; www.abanet.org/tax
Sept. 24, 2003	"Last Wednesday" Teleconference presented by the Tax Section's Employer-Employee Relationships Practice Group	ABA CLE tel. 800/285-2221; ww.abanet.org/cle
Oct. 29, 2003	"Last Wednesday" Teleconference presented by the Tax Section's Tax Accounting Practice Group	ABA CLE tel. 800/285-2221; www.abanet.org/cle

LAST SECTION MEETING

If you missed the Tax Section's last meeting, check the Section's webpage for a wrap-up of events. Audio tapes of the meeting programs are available for purchase from ***Teach 'Em*** at www.teachem.net/aba, and many meeting materials are available free to Section members via ***Comm-Online*** at www.abanet.org/tax/commonline/home.html.

THE SECTION'S REDESIGNED PUBLIC OUTREACH WEBSITE

by George C. Howell III, Richmond, VA

The Section's public outreach website, www.taxtips4U.org, recently was overhauled and redesigned. The website (which is also featured on the ABA homepage, www.abanet.org) contains helpful information and tips for individual taxpayers, non-profit and charitable groups, and small businesses. In addition to assisting taxpayers in understanding and complying with the tax laws, the website serves as a useful reference source for members of the media who are working on tax-related articles or features. The recent changes to the website are intended to make the site easier to use and more appealing to the eye.

The website redesign was timed to coordinate with the launch of the Section's tax season public outreach initiative on e-filing. During the recent tax filing season, millions of taxpayers were considering whether to take advantage of the IRS's new "Free File" program, which allows qualifying taxpayers to link to commercial tax preparers through the IRS website and file their federal income taxes online for free. Soon after the Free File program was announced late last year, the Section recognized the need to increase public awareness of the both the advantages and the possible pitfalls associated with this new program.

To assist taxpayers who were considering e-filing, the Section compiled a list of 10 tips to consider before filing a tax return online. "To E-File, or Not to E-File" includes tips such as: be alert to hidden fees and charges; keep your paperwork; understand the terms and conditions of so-called refund anticipation loans (RALs); and be aware that the Free File program is only available through April 15th. In addition, the Section produced a video news release (VNR) that it distributed to broadcast news stations throughout the country in early March. The VNR featured a taxpayer who encountered problems when his paper return became lost in an IRS warehouse in the Midwest.

Also interviewed for the VNR, Section Chair Herbert Beller drove home the point that taxpayers should take out an RAL only after understanding and carefully considering the interest charges and other costs. He reminded taxpayers that, if they are expecting a refund and use Free File, they should get their refund in as little as a week to ten days, according to the IRS.

Reports of television airings show the VNR was broadcast in many major markets, including Houston, San Diego and Washington D.C. The VNR is available for viewing on the *taxtips4u* website. ■

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