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SUMMER 2006
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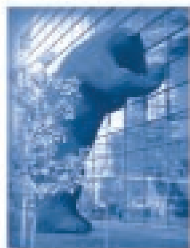
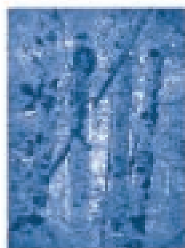
SECTION OF TAXATION

JOINT FALL CLE Meeting





October 19-21, 2006
Hyatt Regency | Denver, CO

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ABA SECTION OF TAXATION

SUMMER 2006 VOLUME 25 NUMBER 4

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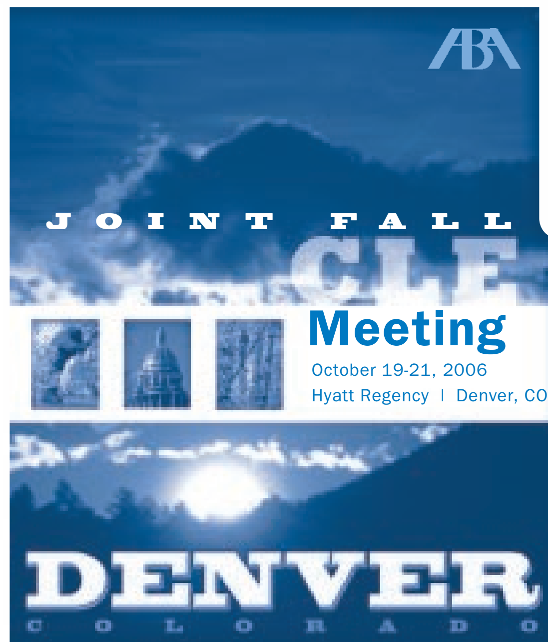

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FROM THE CHAIR

by Dennis B. Drapkin, Dallas, TX

DENNIS B. DRAPKIN

MAY MEETING

The Section's May Meeting attracted over 2,000 registrants, who were able to choose from an extensive menu of first-rate committee and Section programs. At the plenary session, the Section honored Marty Ginsburg with its Distinguished Service Award, recognizing his outstanding contributions as a teacher, author, practitioner and participant in the development of the tax law. Nina Olson, the National Taxpayer Advocate, was the keynote speaker. Her remarks focused on current issues relating to the sharing of tax return information by return preparers. We were fortunate to have numerous government participants in our programs, including IRS Chief Counsel Don Korb, Assistant Attorney General Eileen O'Connor, and Acting Deputy Assistant Secretary of the Treasury for Tax Policy Eric Solomon.

TAX STAFF COURTESY CALLS

On April 21, 2006, several Section Officers visited with the tax staffs of the Joint Committee on Taxation, House Ways and Means Committee and Senate Finance Committee to consider issues of current interest. The agenda focused on the sharing of tax return information by return preparers under section 7216; patenting of tax strategies (see "From the Chair" in the Spring 2006 issue of the NewsQuarterly); pending legislative matters, including exempt organization reform proposals and codification of economic substance; and issues raised by section 470 and the uniform definition of child. The discussions were productive and helped provide guidance to the Section in establishing its priorities on these and other tax matters.

OVERSIGHT SUBCOMMITTEE TESTIMONY AND BUDGET LETTER

On April 6, 2006, I testified on behalf of the ABA on the tax return filing season and IRS budget before the House Ways and Means Oversight Subcommittee. My remarks emphasized full funding of the IRS, the need for balance between enforcement and service, and the continuing need for simplification of the tax law. On April 17, 2006, on behalf of the ABA, I wrote the leadership of the House and Senate Appropriations subcommittees with jurisdiction over the IRS budget, again urging adequate funding of the IRS. The Section has frequently brought these issues to the attention of Congress, as they go to the heart of sound administration of the tax law.

MODEL STATE ADMINISTRATIVE TAX TRIBUNAL ACT

At the May Meeting, the Section approved and sent to the ABA House of Delegates for adoption a resolution in support of a Model State Administrative Tax Tribunal Act for consideration by the states. The Model Act is the result of years of effort by the Section's State and Local Taxes Committee, and represents a major contribution to furthering taxpayer rights and fundamental fairness in proceedings relating to state tax controversies.

RECENT GOVERNMENT SUBMISSIONS

Once again, I commend our committees for their outstanding efforts in drafting comments on proposed regulations and other items to be submitted to the government.

- The Tax Accounting Committee prepared comments on proposed regulations under recently enacted section 199.
- The Employee Benefits Committee produced comments regarding proposed regulations under section 411(d)(6) on distributions from qualified plans, and several additional comments on the section 409A proposed regulations.
- The Exempt Organizations Committee commented on the Treasury Department's Anti-Terrorist Financing Guidelines applicable to U.S.-based charities.
- The Corporate Tax Committee commented on the proposed no-net-value regulations.

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FROM THE CHAIR-ELECT

by Susan P. Serota, New York, NY

SUSAN P. SEROTA

This has been an exceptional year for the Tax Section under the superb direction of Dennis Drapkin, the Officers and Council Directors, and the Section's many Committee Chairs and Vice-Chairs. Special thanks to our Committees and Task Forces for their outstanding work in analyzing new tax law and regulations, preparing comments on proposals and providing the many valuable Section CLE programs.

MEMBERSHIP GROWTH AND DIVERSITY

As Chair, I plan to focus on "Growth of the Section," encouraging more tax lawyers to join and become involved with Committee and Subcommittee projects. Our very talented, diverse membership is what makes the Section so highly regarded.

Our Young Lawyers Forum provides an open door to those who want to meet other young tax lawyers, get involved with the Section and learn how to run a program. The YLF sponsors a Mentor Program for new members and the Law Student Tax Challenge Program, which this year expanded to include LL.M. as well as J.D. students. Through the Section, young tax lawyers also have the opportunity to co-author articles with more seasoned Tax Section members; the articles are published in The Practical Tax Lawyer.

At our Fall and Midyear Meetings, we invite local young tax lawyers who have never attended a Tax Section Meeting to do so at no cost. There, we introduce them to the CLE programs and the networking opportunities that the Section offers. The YLF Orientation Breakfast on Friday morning of each Meeting provides an informational roadmap for first time attendees. With the experience of attending the Section's programs and Committee meetings, we hope first-time attendees will join the Section and become involved.

The John S. Nolan Fellows Program recognizes six fellows each year who have shown interest in Section activities and hold promise to be the future leaders of the Section. Nolan Fellows are expected to be actively involved in at least one substantive committee by working on a project or participating on a panel or CLE program. In addition, Nolan Fellows are invited to attend one Council meeting during the year and related social events, where they can meet Section leadership and get an inside look at the Section's decision-making process. The success of the program is reflected in the number of fellows in the current roster of Council Directors and Committee Chairs.

Finally, and most importantly, the Section is focused on increasing diversity within our membership. We encourage tax lawyers of color to join the Section and participate in our activities. Our goal is to increase diversity in the pipeline and to support Goal IX of the ABA—to promote full and equal participation in the legal profession by minorities. The Section's Diversity Committee provides programs of interest to women and minorities. Currently, through a joint outreach project with the Real Property, Probate and Trust Law Section, members are organizing speakers and topics for CLE programs in urban areas in cooperation with local minority and ethnic bar associations. We will continue to do more to encourage law students of diverse backgrounds to choose tax law as a career. We hope to reach a level where we can truly say the Tax Section has met its goal of being a Section that welcomes and thrives on diversity.

We encourage more of you to participate in projects such as commenting on proposed regulations, presenting a paper at a Committee meeting or speaking at various CLE and other forums.

WORK WITH OTHER ABA SECTIONS

The 2006 Joint Fall Meeting with the Section of Real Property, Probate and Trust Law (RPPT) will mark the fourth year that the two Sections have met together. This year the meeting will be in Denver for the first time, and our Plenary Program will focus on patenting tax strategies, an emerging issue which should be of interest to all attendees. By joining forces with RPPT, we provide additional programming, networking and the opportunity to further our mutual interests in the tax law and the ABA.

Over the years, we have learned that combining some of our activities with those of other Sections allows us to produce better CLE, bring more expertise to a project and provide broader input to the ABA on issues of

CONTINUED ON PAGE 26

FROM THE **EDITOR**

by Alice G. Abreu, Philadelphia, PA

Like Dennis Drapkin, whose last column as Chair appears in this issue, I too will say goodbye. This is my last issue as Supervising Editor. I was writing my first column as Editor on the morning of September 11, 2001, and although my memories of that day will always include the NewsQuarterly for that reason, I've enjoyed my time as Editor, just as my predecessor, Ellen April, predicted. I'm pleased to have introduced the Spotlight on Committees, Challenge Points, and especially, Tax Bites, which has been ably overseen by Gail Richmond, currently a Special Features Editor blessed with a rapier wit and an endless reservoir of creativity. I have also benefited from the supreme competence, sound judgment, and dedication of Anne Dunn, Director of Publishing and Program Development, who is really the person who makes publication happen. Most of all, I will miss working with Anne.

It is now my pleasure to pass the baton to Gail, whom I know to be a fabulous editor. Gail is a stickler for detail, an expert on research and citation form, (having authored a book, often updated, on tax research), and a punctilious grammarian. Her Blackberry is always on and she has edited pieces before I have even opened the attachment. Gail has served the Section in a number of capacities, including as Chair of the Individual AMT Task Force and the Committee on Individual Income Tax. She frequently wrote or worked on the Important Developments Reports for the Committees on Individual Income Tax and Low Income Taxpayers and she is now a member of the Nominating Committee. Gail is a frequent speaker on panels at Section meetings, and has functioned as head puzzlemaster of the NewsQuarterly, making numerous crossword and other contributions to Tax Bites. I wish Gail well. I know that the NewsQuarterly, and the Section, will be better for her efforts. ■

TAX ISSUES IN DRAFTING

PARTNERSHIP AGREEMENTS

Denver, Colorado
September 7, 2006

Using a panel approach, this 3-hour CLE program is part of the ABA Tax Section's "Tax CLE on the Road" series, and is designed to promote a high level of audience participation and to provide a session that will be extremely useful to partnership and tax attorneys in drafting the more complex provisions of partnership agreements.

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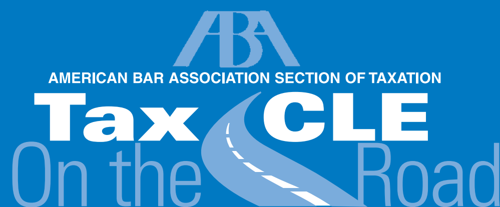


For more information, go to
www.cobar.org/cle or **www.abanet.org/tax**

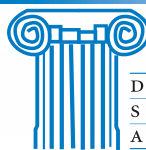
Rhoda Baer, Photographer

ABA Section of Taxation
2006 Distinguished Service Award Recipient:
Professor Martin D. Ginsburg

On May 5, 2006, the Tax Section presented its Distinguished Service Award to Martin D. Ginsburg, professor of law at the Georgetown University Law Center and of counsel to the law firm Fried, Frank, Harris, Shriver & Jacobson LLP in Washington, DC. Prof. Ginsburg has been active in the tax bar for nearly 50 years. Fully enumerating all of his accomplishments and achievements would fill a book; unfortunately, space permits no more than a Reader's Digest version commencing with his college years.

Prof. Ginsburg played golf at Cornell University—quite well by most accounts—and then studied law at Harvard University. Without the golf game to distract him from his studies, he graduated magna cum laude. On a blind date at Cornell, he met a young woman named Ruth and eventually married her. It may fairly be said that he married well. Though it comes as a shock to the tax-centric among us, Prof. Ginsburg's wife is actually more famous than he.

After finishing law school, Prof. Ginsburg joined Weil, Gotshal & Manges in New York City in 1958. He began teaching at New York University School of Law in the 1960s, and, to the benefit of the many students who have enjoyed his classes (and the fright of some overwhelmed by his awesome intellect), joined the faculty of Columbia Law School on a full-time basis in the late 1970s. His tenure there would be brief.



Ruth Bader Ginsburg's appointment to "a good job in Washington," as Prof. Ginsburg termed it, the United States Court of Appeals for the D.C. Circuit, brought Prof. Ginsburg to Georgetown University in 1980. In 1993, President Clinton appointed Judge Ginsburg to an even better job—Justice of the United States Supreme Court. Since then, it has been observed that the Supreme Court is at least 11 % right in tax cases.

In addition to Columbia and Georgetown, Prof. Ginsburg has taught at Harvard, Stanford, and Chicago and abroad in Austria and Holland. He is highly sought after as a speaker for seminars and conferences, both in the United States and abroad, and has testified many times before Congressional Committees, always at the Committees' invitations. His testimony has addressed topics ranging from simplification to complication and included corporate reorganizations, S corporations, straddles, installment sales, tax reform, and tax shelters, topics still relevant today.

Prof. Ginsburg is also a prolific writer. While his best known work is *Mergers, Acquisitions, and Buyouts*, which he co-authored with Jack Levin, and which no corporate tax practitioner would be without, Prof. Ginsburg has also authored articles on diverse topics such as executive compensation, consolidated returns, net operating loss limitations, partnerships, charitable contributions, and the IRS private letter ruling process.

In addition to teaching and writing, Prof. Ginsburg has maintained an active—one might say cutting edge—practice. For example, Prof. Ginsburg designed a class of stock that tracked the performance of a subsidiary within an affiliated group. The special classes of stock, which came to be known as "tracking stock" or "alphabet stock," pleased his client, but perplexed the Treasury Department as it struggled over what to do with Prof. Ginsburg's creation. Eventually, it agreed with Prof. Ginsburg on the taxation of alphabet stock. Out of respect for his creative lawyering, Ross Perot endowed a Chair in Taxation at Georgetown in Prof. Ginsburg's name.

With a gift for color commentary and simple, sage advice, Prof. Ginsburg has brought his enormous practical experience to the classroom, engaging his students in the real world effects of dry and complicated tax laws, and in the process, converting many a reluctant student of tax into an avid tax lawyer. To a student inquiring of the benefits of an LL.M., he advised, "If you have a choice between going to the symphony and the opera or getting an LL.M., you should go to the symphony and the opera." He once explained the dangers of a course of action by warning that the Commissioner's rod would turn into a serpent that would bite the Commissioner on the hind part.

Prof. Ginsburg has served on the Council of the ABA Section of Taxation and as Chairman of the New York State Bar Tax Section. He is a Fellow of the American College of Tax Counsel and the American Bar Foundation and holds numerous other honorary degrees and awards.

Prof. Ginsburg has served as an advisor—formally and informally—to the New York State Tax Commissioner, the Commissioner of Internal Revenue, the Joint Committee on Taxation, the U.S. Department of Justice, and the U.S. Treasury Department. Again and again, he has given selflessly of his time, intellect, and talent. In doing so, he has set an example to which all of us—especially those who have benefited from his tutelage—can aspire.

—Pamela F. Olson, Washington, DC

DISTINGUISHED SERVICE AWARD PRESENTATION - MAY 5, 2006

by Martin D. Ginsburg, Washington, DC

My very old friend Dick Loengard—we began law school together more than 50 years ago—called me to remind that at breakfast one ought not talk too long. With that excellent thought in mind, Dick proposed I speak this morning on "The Progress of Tax Simplification in My Lifetime." It would have been a very short speech.

I am flattered and delighted to receive the Tax Section's Distinguished Service Award. Every prior recipient has been richly deserving. This year's selection committee, great numbers of you suspect, was drinking heavily at the selection lunch. Initially I thought so too. A disproportionate part of my professional life has been devoted to protecting the deservedly rich from the predations of the poor and downtrodden, and it is not easy to see why that deserves a medal.

But it came to me that over a fairly long life I have performed one distinguished service. I propose to use my short time this morning to recall the highlights and claim undue credit. And as this not-previously-public story involves my spouse and home and family life, I shall start there.

In the 1960s I practiced law, mainly tax law, in New York City, and Ruth began her law teaching career at Rutgers Law School in Newark. One of the courses she taught was Constitutional Law, and toward the end of the decade she started looking into equal protection issues that might or might not be presented by statutes that differentiate on the basis of sex—a dismal academic undertaking because, back then, the United States Supreme Court had never invalidated any legislative classification that differentiated on the basis of sex.

Then, as now, at home Ruth and I work evenings in adjacent rooms. In my little room one evening in Fall 1970, I was reading Tax Court advance sheets and came upon a *pro se* litigant, one Charles E. Moritz, who on a stipulated record was denied a $600 dependent care deduction under old section 214 even though, the Tax Court found, the operative facts fit the statute perfectly. Mr. Moritz was a traveling salesman for a book company, his 89-year-old dependent mother lived with him, and, in order to be gainfully employed, during the year he paid an unrelated individual at least $600 to take care of old mother whenever Charles was at work.

There was just one small problem, and in the Tax Court it served to do him in. The statute awarded its up-to-$600 deduction to a taxpayer who was a woman of any classification (divorced, widowed, or single), a married couple, a widowed man, or a divorced man. But not to a single man who had never been married. Mr. Moritz was a single man who had never married. "Deductions are a matter of legislative grace," the Tax Court quoted, and added that if the taxpayer is raising a constitutional objection, forget about it: everyone knows, the Tax Court confidently asserted, that the Internal Revenue Code is immune from constitutional attack.

I went next door, handed the advance sheets to my wife, and said, "Read this." Ruth replied with a warm and friendly snarl, "I don't read tax cases." I said, "Read this one," and returned to my room.

No more than five minutes later—it was a short opinion—Ruth stepped into my room and, with the broadest smile you can imagine, said, "Let's take it." And we did.

Ruth and I took the *Moritz* appeal pro bono, of course, but since the taxpayer was not indigent we needed a pro bono organization. We thought of the American Civil Liberties Union. Mel Wulf, the ACLU's then legal director, naturally wished to review our proposed 10th Circuit brief—which in truth was 90% Ruth's 10th Circuit brief—and when he did he was rightly bowled over.

A few months later the ACLU had its first sex discrimination/equal protection case in the United States Supreme Court—as many of you will remember it was titled *Reed v. Reed.* Recalling *Moritz*, Mel asked Ruth if she would write the ACLU's Supreme Court brief on behalf of Sally Reed. Ruth did and, reversing the decision below, the U.S. Supreme Court unanimously held for Sally. Good for Sally Reed and good for Ruth, who decided thereafter to hold down two jobs, one as a tenured professor at Columbia Law School where she had moved from Rutgers, the other as head of the ACLU's newly created Women's Rights Project.

Now back to *Moritz*. The 10th Circuit found Mr. Moritz to have been the victim of an equal protection violation and reversed the Tax Court. The Government, amazingly, petitioned for certiorari on the asserted ground that the 10th Circuit's decision cast a cloud of unconstitutionality over literally hundreds of federal statutes that, like Code section 214, contemplated differential treatment on the basis of sex. In those pre-personal computer days, there was no easy way for us to test the Government's assertion, but the Solicitor General—Erwin Griswold whom many of you will recall—took care of that by attaching to his petition a list—generated by the Department of Defense's mainframe computer—of those hundreds of suspect statutes. Cert. was denied in *Moritz*, and the computer list proved a gift beyond price. Over the balance of the decade, in Congress, the Supreme Court, and many lower courts, Ruth successfully

urged the unconstitutionality of those statutes.

So Mr. Moritz's case mattered a lot. First, it fueled Ruth's early 1970s career shift from diligent academic to enormously skilled and successful appellate advocate—which in turn led to her next career on the higher side of the bench. Second, with Dean Griswold's help, *Moritz* furnished the litigation agenda Ruth actively pursued until she joined the D.C. Circuit in 1980. All in all, great achievements from a tax case with an amount in controversy that totaled exactly $296.70.

In bringing those Tax Court advance sheets to Ruth 36 years ago, I changed history. For the better. And, I shall claim, thereby rendered a uniquely distinguished service. I have decided to believe it is the service for which you have given me this great award. And even if you had something a little less cosmically significant in mind, I am immeasurably grateful to be so greatly honored by my peers. ■

CLE CALENDAR

www.abanet.org/tax/calendar

DATE	PROGRAM	INFORMATION
August 30, 2006	**"Last Wednesday" Teleconference**	ABA Tax Section **www.abanet.org/tax** 202-662-8670
September 7, 2006	Tax CLE on the Road – Denver **Tax Issues in Drafting Partnership Agreements** Denver, CO	ABA Tax Section, Colorado Bar Association **www.abanet.org/tax** 202-662-8670
September 27, 2006	**"Last Wednesday" Teleconference** Organized by the Investment Companies Committee	ABA Tax Section **www.abanet.org/tax** 202-662-8670
October 5-6, 2006	**13th Annual Advanced ALI-ABA Course of Study: Consolidated Tax Return Regulations** Grand Hyatt Washington - Washington, DC	ALI-ABA **www.aliaba.org** 800-253-6397
October 25, 2006	**"Last Wednesday" Teleconference** Organized by the Energy and Environmental Taxes Committee	ABA Tax Section **www.abanet.org/tax** 202-662-8670
November 1-2, 2006	**17th Annual Philadelphia Tax Conference** Crowne Plaza Hotel - Philadelphia, PA	ABA Tax Section **www.abanet.org/tax** 202-662-8670
April 19-20, 2007	**7th Annual Tax Planning Strategies – U.S. and Europe** Frankfurt, Germany	ABA Tax Section **www.abanet.org/tax** 202-662-8670

SECTION MEETING CALENDAR

www.abanet.org/tax/calendar

2006	**JOINT FALL CLE MEETING**, October 19-21, Hyatt Regency, Denver, CO
2007	**MIDYEAR MEETING**, January 18-20, Westin Diplomat, Hollywood, FL
	MAY MEETING, May 10-12, Grand Hyatt, Washington, DC
	JOINT FALL CLE MEETING, September 27-29, Hyatt Regency and Fairmont, Vancouver, BC
2008	**MIDYEAR MEETING**, January 17-19, Hyatt Regency and Ritz Carlton, Lake Las Vegas, NV
	MAY MEETING, May 8-10, Grand Hyatt, Washington, DC
	JOINT FALL CLE MEETING, October 9-11, Hyatt Regency, Chicago, IL

A POSTHUMOUS INTERVIEW WITH LOUIS EISENSTEIN

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

This "interview" consists of quotations from *The Ideologies of Taxation* written by Louis Eisenstein and published in 1961 (herein "Eisenstein"). Mr. Eisenstein, now deceased, was a tax partner with Arnold, Fortas & Porter. Among other things, he was a litigator. See Lilly v. Commissioner, 343 US 90 (1952), in which he appeared with Randolph Paul when they were both at Paul, Weiss.

But surely his most enduring professional legacy is this book, which merited a citation by Justice Douglas (in dissent):

> "A son who spends $1,000 on his destitute father does not get the same tax benefit as he who pays a like sum to his alma mater. Louis Eisenstein pursues example after example of so-called inequities in tax laws in his book *The Ideologies of Taxation* (Ronald Press, 1961). For example, the profits on the sale of unbred pigs are taxable as ordinary income, while the profits on the sale of pigs once bred are taxable as capital gains. Id., 174. The same is true of turkeys but not of chickens, even though 'a bred chicken and a bred turkey are similarly situated. Each has feathers and two legs.' *Ibid.*" U.S. v. Skelly Oil Co., 394 US 678 (1969).

Mr. Eisenstein's observations on tax were sometimes even more trenchant than that. He was part of the generation of Randolph Paul, Stanley Surrey, Wally Blum and others who did not hesitate to speak out on tax policy issues, even as partners in prominent law firms. It is unlikely that such a book could be written today by a practicing tax lawyer. It is illuminating to see that the same issues that are hot topics today were common topics 45 years ago, and to examine how a prominent lawyer made fun of solemn pronouncements on these issues. In this posthumous interview we pose the questions, much as we would to someone we were interviewing today, and provide Mr. Eisenstein's answers, based on what he said in his classic book.

Q Is it possible to achieve "fair taxation" or do competing interests make that an impossibility?

A "Dr. T.S. Adams … conclude[d] that 'modern taxation … is a group contest in which powerful interests vigorously endeavor to rid themselves of present or proposed tax burdens. It is, first of all, a hard game in which he who trusts wholly to economics, reason, and justice, will in the end retire beaten and disillusioned. Class politics is of the essence of taxation.'" Eisenstein at 4-5.

Q What do you mean when you speak of "class" or "group"?

A "Madison … concluded that 'the most common and durable source' [of factions] is 'the various and unequal distribution of property.' … Madison, unlike Karl Marx, had no desire to remove 'the causes of faction.' He sought the more modest relief 'of controlling its effects.'" Eisenstein at 7.

Q Well, since you observe that the majority of voters do not have a lot of property, how do voters protect their property interests in the tax arena?

A "Since heads are to be counted, they must first be persuaded. Reasons have to be given for the burdens that are variously proposed or approved. In time the contending reasons are skillfully elaborated into systems of belief or ideologies which are designed to induce the desired acquiescence. Of course, if an ideology is to be effective, it must convey a vital sense of some immutable principle that rises majestically above partisan preferences." Eisenstein at 11-12.

Q You seem to suggest that "ideologies" are covers for self-interest. Can you give an example?

A "The American Bar Association is an impressive illustration because this eminent organization is replete with energetic ideologists. When they speak for the Association in tax matters, they usually do so through principle…. But at times this general rule gives way to exception. An individual member may resort to the Association as a means of easing the lot of his clients…. One of the major achievements of the Association is that it enables tax lawyers to serve in several capacities without fear of embarrassment." Eisenstein at 15.

Q Are progressive income tax rates based on an ideology of taxation?

A [Yes, but not the one you think.] "[Adam] Smith approved heavier taxes on the wealthy, but he did not try to excuse them in the name of ability to pay or equality of treatment. To Smith a tax was equal only if it was proportioned to ability; and it was proportioned to ability only if it was proportioned to income. He frankly indicated that a higher rate on the affluent subjected them to unequal treatment. But the ideologists of ability are unable to be so commendably candid. They find it necessary to insist that heavier taxes are also equal taxes. They anxiously dissemble where Smith was honest and at ease

[in aiming to mitigate disparities in wealth].” Eisenstein at 30-31.

Q Are you concerned about the income tax improperly impeding productivity and the national economy?

A “The ideology of barriers and deterrents is a doctrine steeped in gloom.... The so-called Special Tax Study Commission [of the Congress in 1947] ... found with the ‘present scale of tax rates ... we have put the brakes on men’s incentives to a dangerous degree by piling heavier and heavier burdens on them as they try to climb up the ladder. Not only is this stultifying to the kind of dynamic long-term growth that has characterized this country in the past but—to the extent it impedes production—it is an element in our inflationary pressures today.’ Taxpayers simply refuse to be as productive as they would be if taxes were lower. And so we now have ‘the builder who doesn’t build the extra house....’ Our dangers hardly end there.” Eisenstein at 58.

Q Surely you exaggerate. Have others made similar claims?

A “The noted lawyer George Wharton Pepper ... states ... ‘the present income tax policy virtually prohibits the citizen from putting his surplus earnings into productive enterprise and, instead, first appropriates them and then pipes them into the treasury .... This process cannot long continue.’” Eisenstein at 60-61.

Q Don’t tax reductions help all taxpayers?

A [It is commonly said that] “If the prosperous are taken care of, they will take care of the rest of us. There are those who unkindly describe such rationalizations as ‘the trickle-down theory of taxation’.... Critics who engage in such unfriendly comments are inexcusably harsh. They fail to understand that the ideologists have no choice but to speak of barriers and deterrents if they are to rationalize what they seek. They are the helpless captives of their own ideology.” Eisenstein at 66.

Q Do you see this as a partisan issue?

A “In 1920 the Republicans announced that ‘one of the chief needs of the country is the revision of taxation as one way to lower the cost of living, restore business confidence, and stimulate enterprise.’ From this program the Republicans have never departed. Nothing can shake their assumption that what has once been said is worth saying forevermore. Such a firm regard for the past is often referred to as an admirable adherence to principle. The precise content of the principle seems unimportant.” Eisenstein at 67.

Q How do barriers and deterrents apply to foreign income?

A “The ideologists of barriers and deterrents assert that foreign income should be more lightly taxed because it is earned in more difficult circumstances. Of course, while all this goes on, the usual assertions are heard that lower taxes will eliminate barriers and deterrents. As one ideologist puts it, businessmen have a ‘spirit of adventure,’ and lower taxes will stimulate them to venture abroad. He compares the plight of discouraged businessmen to the predicament of Columbus, who was also discouraged from going overseas ... to the school of ability, the geographical source of the income is irrelevant. To the school of barriers and deterrents, it is decisive. Here, again, what one sees depends on how one looks at things as well as the things one looks at.” Eisenstein at 153.

Q If you were lobbying for a tax reduction for a group, how would you proceed?

A “... there is more than one route to salvation. A lower tax may also be obtained by emphasizing similarities with others who are already paying less. Even dispensations should be equitably granted; and so one dispensation leads on to another.” Eisenstein at 161.

Q You seem not to favor consumption taxation. Don’t you realize its long history of academic support?

A “Each group or interest that seeks solutions will always have its own views.... I am merely restating what the Penguins of Anatole France discovered many years ago on their famous island. The elders assembled in order to levy a ‘just tax’... [after discussing varieties of income tax].... Taxation according to wealth , Morio concluded, is a seductive illusion. ‘The signs of opulence are deceitful. What is certain is that everyone eats and drinks. Tax people according to what they consume. That would be wisdom and it would be justice.’ The Penguins also had their ideologies of taxation.” Eisenstein at 226-227.

Q You have thrown some barbs at the organized bar. Why?

A “The tax bar is a strange excuse for great expectations. Admittedly, no other group is more familiar with the ramifications of our tax system both major and minor. And no other group is so sensitive to special exceptions, whether they are generously large or grudgingly small. A lawyer is not a competent tax advisor unless he is familiar with the highways and byways of avoidance.... In the process of selling their skills, they soon become the mental captives of those they serve. Before long they either believe what they are paid to say or they hesitate to say what they believe. Dean Griswold has suggested that tax lawyers should ‘sell their services,’ not ‘their souls.’ While there are singular attorneys who have eluded spiritual captivity, they are only the exceptions which prove the general rule. A Randolph Paul does not often appear on the scene.” Eisenstein at 205. ■

POINTS TO **REMEMBER**

INTRODUCTION: The two Points in this issue highlight important recent developments. First, Steve Johnson and Rollin Thorley describe some of the tax provisions of the 2005 Bankruptcy Act, which, as they point out, made the most significant changes to bankruptcy law in a generation. Next, Katy Morrison discusses the recent case of *Swallows Holding*, in which the Tax Court invalidated a regulation unfavorable to taxpayers. Katy thoughtfully admonishes tax advisors to be restrained in their rejoicing because the dissenting judges offer views that may well convince a reviewing court to uphold the regulation.

–Alice G. Abreu, Philadelphia, PA

TAX ASPECTS OF THE 2005 BANKRUPTCY ACT

by Steve Johnson and Rollin Thorley,[1] *Las Vegas, NV*

After a decade of maneuvering, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, was enacted in April 2005. The Act has 15 titles and nearly 200 sections, most of which are effective for bankruptcy cases filed after October 16, 2005. The Act is the most significant set of changes to the Bankruptcy Code (11 U.S.C.) in a generation.

The Act's tax provisions include ideas advocated by the Department of Justice, the IRS, and state and local governments since at least the 1990s. Although some tax provisions help debtors, most facilitate governmental revenue collection.

Chapters 7, 11, and 13 are the principal bankruptcy relief regimes. Chapter 7 involves liquidation of non-individual debtors and "fresh start" for individual debtors, who receive discharge from certain debts in return for giving up nonexempt assets for the benefit of creditors. Chapter 11 allows reorganization (sometimes liquidation) of corporations and also is available to individuals and partnerships. Chapter 13 permits individual debtors to retain nonexempt assets conditioned on payment of some debts out of the debtor's income for up to five years. The 2005 Act affects all of these chapters, as well as other rules. This article summarizes some of the Act's significant tax changes.

FILING RETURNS

Prompt filing of returns is central to our tax system. The Act requires much greater compliance by debtors with tax return filing requirements.

(1) Previously, debtors could avail themselves of Chapter 13 even if they had failed to file some required tax returns. Now, Chapter 13 debtors must file all applicable federal, state, and local returns for the preceding four years as a condition of plan confirmation. Act § 716, adding 11 U.S.C. § 1308, and amending 11 U.S.C. §§ 1307 and 1325.

(2) The debtor must provide copies of certain federal income tax returns to the trustee, creditors, and any party in interest. If a debtor fails to file a postpetition return within 90 days after request of a taxing authority, his case will be dismissed or converted to Chapter 7. Act §§ 315 and 720, amending 11 U.S.C. § 521.

(3) The court may not grant Chapter 7 discharge or confirm a Chapter 11 or Chapter 13 plan of an individual unless requested tax documents have been submitted. Act § 1228.

(4) There has been controversy as to what qualifies as a "tax return." The Act clarifies that a return is "a return that satisfies the requirements of applicable nonbankruptcy law ...." This includes a signed substitute for return under I.R.C. § 6020(a), a comparable document under state or local law, and "a written stipulation to a final judgment or final order entered by a nonbankruptcy tribunal ...." It does not include a substitute for a return under § 6020(b) or a comparable state or local document. Act § 714, amending 11 U.S.C. § 523.

LIABILITY AND PAYMENT

(1) The Act's most widely discussed feature seeks to deflect large numbers of middle and upper-income individuals from Chapter 7 to Chapters 11 or 13, via detailed "means testing" provisions. Act §§ 101-107, amending 11 U.S.C. § 707 and related sections. Chapter 11 individual debtors, like Chapter 13 debtors, must now apply postpetition earnings to payment of claims. Act § 321, adding 11 U.S.C. § 1115.

Part of the means testing involves application of the expense standards developed by the IRS for offer-in-compromise and installment agreement purposes, with certain adjustments. Act § 102, amending 11 U.S.C. § 707(b).

(2) A bankruptcy trustee or debtor-in-possession may request taxing authorities to promptly determine administrative tax liabilities. The Act requires the clerk of each district to keep lists of addresses designated by governmental units for service of such requests. Act § 703, amending 11 U.S.C. § 505. Rev. Proc. 2006-24, 2006-22 I.R.B. 943, obsoletes Rev. Proc. 81-17, 1981-1 C.B. 688 and

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1 The views expressed herein are solely those of the authors and do not represent the positions or policies of the Internal Revenue Service.

identifies the IRS address for § 505 requests.

(3) The Act simplifies interest determinations. The interest rate on all tax claims will be the rate provided by applicable nonbankruptcy law. Act § 704, adding 11 U.S.C. § 511.

(4) Codifying and extending Young v. United States, 535 U.S. 43 (2002), the Act provides that the testing periods as to the priority of tax claims are tolled for the time that the taxing authority is prevented by law from collecting the liabilities, plus 90 days. Act § 705, amending 11 U.S.C. § 507.

(5) The allowed amount of priority tax claims must be paid in regular, cash installments within five years after entry of the Chapter 11 order of relief. Act § 710, amending 11 U.S.C. § 1129.

(6) With certain exceptions, postpetition taxes arising in the ordinary course of business now must be paid by the date due under applicable nonbankruptcy law, without the need for judicial approval. Act § 712, amending 11 U.S.C. §§ 503 & 506 and 28 U.S.C. § 960.

(7) The Act changes the rule as to late-filed priority tax claims. Now, such claims are to be paid if filed by the earlier of (i) ten days after the summary of the trustee's final report is mailed to creditors or (ii) the date the trustee begins final distribution. Act § 713, amending 11 U.S.C. § 726.

(8) Tax authorities now have greater ability to offset prepetition income tax refunds against prepetition income tax liabilities without asking a court to lift the automatic stay. The tax authorities may retain the refund pending resolution of the liabilities unless they receive adequate protection. Act § 718, amending 11 U.S.C. § 362.

DISCHARGE

(1) Previously, a Chapter 13 debtor could discharge taxes that would be nondischargeable under Chapter 7. The Act provides three important exceptions to a Chapter 13 superdischarge: trust fund taxes, no returns or late returns filed within two years of the petition date, and fraudulent returns or a willful attempt to evade or defeat the tax. Act § 707, amending 11 U.S.C. § 1328.

(2) The Act reduces dischargeability of taxes by corporations under Chapter 11. No discharge is allowed for taxes as to which the debtor made a fraudulent return or which the debtor willfully attempted to evade or defeat. Act § 708, amending 11 U.S.C. § 1141.

(3) If the government fails promptly to determine postpetition tax liabilities after a request that it do so, the trustee or debtor-in-possession is discharged from liability. The Act clarifies that the bankruptcy estate also is discharged. Act § 715, amending 11 U.S.C. § 505.

STATE AND LOCAL TAXES

In addition to already noted changes, several other provisions have particular significance for states and localities.

(1) The Act reduces the circumstances in which liens securing claims for *ad valorem* real and personal property taxes will be subordinated to other claims and expenses. The Act also protects holders of such liens (and the Service) from erosion of their claims as a result of expenses under Chapter 11. In addition, the amount or legality of *ad valorem* taxes may not be challenged in bankruptcy after the period for contesting them under nonbankruptcy law has expired. Act § 701, amending 11 U.S.C. §§ 505 and 724.

(2) Several bankruptcy provisions were keyed to "assessed" taxes. Assessment has an understood meaning under the Internal Revenue Code but was less clear in state and local contexts. The Act changes "assessed" to the more flexible "incurred." Act § 706, amending 11 U.S.C. § 507.

(3) The Act harmonizes administrative treatment of federal and state taxes in bankruptcy, conforming state practice to Internal Revenue Code practice as to division of tax liabilities and responsibilities between the estate and the debtor, tax effects as to partnerships and property transfers, and taxable years. Act § 719, amending 11 U.S.C. § 346 and related sections.

OTHER CHANGES

(1) The Act clarifies and expands protections for certain tax-favored retirement plans and education savings plans. Act §§ 224 & 225, amending 11 U.S.C. §§ 522, 523, 541, and 1322 *inter alia*.

(2) The Act discourages bad faith repeat filings and abusive filings. In particular, it limits the use of so-called "Chapter 20 plans," in which the debtor files a Chapter 7 petition to eliminate unsecured dischargeable debts, followed by a Chapter 13 petition. Act §§ 302 & 303, amending 11 U.S.C. § 362; Act § 312, amending 11 U.S.C. § 1328.

(3) The Act limits the homestead exemption. In general, the exemption is capped at $125,000 if the home was acquired less than 40 months before the bankruptcy petition was filed or if the debtor violated securities laws or committed certain criminal or tortious acts. Act § 322, amending 11 U.S.C. § 522.

(4) Formerly, the automatic stay prohibited *inter alia* the commencement or continuation of any Tax Court case concerning the debtor. The Act provides that, as to individual debtors, this stay applies only to prepetition taxes. Act § 709, amending 11 U.S.C. § 362.

(5) The Chapter 11 disclosure statement must now discuss material federal tax effects to the debtor, debtor's successor, and hypothetical investors typical of holders of interests or

claims in the case. Act § 717, amending 11 U.S.C. § 1125.

As a result of the changes described above, as well as others not described here, the 2005 Act significantly affects how tax issues are handled in bankruptcy. We will see considerable litigation in the years to come as parties and the courts strive to clarify ambiguities in some of the changes.

ARE TIMELY FILED RETURNS A PREREQUISITE FOR **FOREIGN CORPORATION EXPENSE DEDUCTIONS**?

by Kathryn J. Morrison, Washington, DC

The Tax Court recently held that Treasury Regulations promulgated under section 882 were invalid to the extent they require a foreign corporation to file timely returns to receive the benefit of deductions otherwise allowed. In Swallows Holding, Ltd. v. Commissioner, 126 T.C. 96 (2006), the Tax Court ruled that the timely filing requirement conflicted with the unambiguous meaning of section 882 and settled case law. Nevertheless, taxpayers should be advised that the dissenting opinions offer a reasonable alternative interpretation of section 882 and of settled case law, which may be adopted by the circuit courts in reviewing the regulations.

Swallows Holding, Ltd., a foreign corporation that was not engaged in a U.S. trade or business, owned and received income from, and incurred expenses with respect to, U.S. real estate in each of the years 1994 through 1996. On July 23, 1999, the corporation filed late returns, reporting its income, claiming deductions, and reporting a loss for each of the years. The corporation filed the delinquent returns before being contacted by the Internal Revenue Service and before the Commissioner had prepared substitute returns. The Commissioner subsequently issued a notice of deficiency, disallowing the deductions claimed on the subject returns because the returns were not timely filed.

Under section 882(c)(2), "a foreign corporation shall receive the benefit of the deductions and credits allowed to it only by filing a true and accurate return, in the manner prescribed in subtitle F." Treasury Regulations issued in 1990 interpret section 882(c)(2) to require the foreign corporation to timely file the return. Treas. Reg. § 1.882-4(a)(2). The due dates of the Swallows Holding 1994 through 1996 tax returns were November 15, 1994, 1995, and 1996, respectively, but the taxpayer did not file the returns until July 23, 1999.

Clearly, the returns were not timely filed. However, the taxpayer argued that section 882(c)(2) does not include a timely filing requirement, and that Treas. Reg. § 1.882-4(a)(2) is invalid to the extent it imposes such a requirement. According to the taxpayer, it fulfilled the requirements of section 882(c)(2) by filing a true and accurate return. The Commissioner argued that section 882(c)(2) includes a clear timely filing requirement and that the disputed regulations are a valid construction of that requirement. Therefore, the taxpayer could not deduct its expenses because it did not file timely returns. The Tax Court agreed with the taxpayer, holding that section 882(c)(2) does not include a timely filing requirement and that the disputed regulations are invalid to the extent they impose a timely filing requirement.

To determine the validity of the disputed regulations, the Tax Court applied the analysis set forth by the Supreme Court in National Muffler Dealers Association v. United States, 440 U.S. 472 (1979), having decided that the Supreme Court did not intend for its later decision in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) to replace the *National Muffler* standard. *National Muffler*, like *Swallows Holding*, involved an interpretative regulation issued under the general authority vested in the Secretary under section 7805(a). Under *National Muffler*, an interpretative regulation is a valid exercise of the Secretary's authority to issue regulations and must be upheld if it implements a congressional mandate in a reasonable manner. *National Muffler* provides a six-part test for determining the reasonableness of a regulation and, more significantly in this case, also provides that an interpretative regulation is reasonable only if it "harmonizes with the plain language of the statute, its origin, and its purpose." *See also* Koshland v. Helvering, 298 U.S. 441 (1936) (holding that when a statute's provisions are unambiguous, the Secretary has no power to amend that statute by regulation).

The Tax Court determined that the disputed regulations did not harmonize with the plain language of the statute because a plain reading of the statutory text in the context of the Code shows that the text includes no timely filing requirement. The Tax Court cited Anglo-American Direct Tea Trading Co. v. Commissioner, 38 B.T.A. 711 (1938), and its progeny to support its determination that the plain meaning of the word "manner," as used in section 882(c)(2) and its predecessors, does not include an element of time. In *Anglo-American Direct Tea*, the Board held that the taxpayer, a foreign corporation, was entitled to deductions claimed on delinquent tax returns filed after the Commissioner's revenue agent had prepared substitute tax returns, but before the substitute returns were accepted by the Commissioner. Interpreting the statutory requirement that foreign corporations file returns "in the manner prescribed in this title" to claim deductions, the Board concluded that Congress did not intend the word "manner" to include a timeliness requirement because Congress had typically used the words "time" and

"manner" together when it intended to include the meanings of both words in a single statutory provision.

The Tax Court held that the regulations therefore exceeded the Secretary's authority and were invalid. According to the Tax Court, any deference to the Secretary's interpretation under the six-part test of *National Muffler* would therefore be unwarranted. Moreover, in this case, the regulations were also unreasonable under the six-part test for reasons including that they were promulgated long after section 882 was enacted; they were a departure from the Secretary's previous interpretation of section 882 set forth in the 1957 regulations, which had no timely filing requirement; they were issued after the Court of Appeals for the Fourth Circuit and the Board of Tax Appeals had repeatedly held that the relevant text did not include a timely filing requirement; and they were issued after multiple reenactments of section 882, none of which altered the judiciary's construction of the text. In addition, the Tax Court chose not to follow National Cable & Telecommunications Association v. Brand X Internet Services, 125 S.Ct. 2688 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion"), distinguishing the case because, among other reasons, section 882(c)(2) qualified as unambiguous.

Though it invalidated the disputed regulations based on the determination that they exceeded the Secretary's authority, the Tax Court recognized that the Board of Tax Appeals and the Court of Appeals for the Fourth Circuit had adopted a judicial limitation on a taxpayer's ability to claim deductions based on a delinquent return. In Taylor Securities v. Commissioner, 40 B.T.A. 696 (1939), and later in Blenheim Co. v. Commissioner, 42 B.T.A. 1248 (1940), and Georday Enterprises v. Commissioner, 126 F.2d 384 (4th Cir. 1942), the courts adopted a "terminal date" for the filing of a return by a foreign corporation to claim deductions: a foreign corporation could not file a tax return in order to deduct its expenses if a return had already been prepared for it by the Commissioner. The Board explained in *Taylor Securities* that allowing delinquent returns filed by a foreign corporation after the respondents' determination to constitute the returns required as a prerequisite to the allowance of deductions and credits ordinarily allowable to the corporations would encourage tax evasion, since a taxpayer would have nothing to lose by not filing a return as required by statute. The Board concluded that Congress could not have intended such an outcome.

In *Swallows Holding*, three separate dissenting opinions (by Judges Holmes, Swift, and Halpern) present a number of different arguments against the majority opinion, including the following: several regulations, such as those promulgated under the section 179 option to expense capital purchases and the elections by a reciprocal insurer under section 835(c)(2), include an element of time where the statute referred to regulations on "manner" only; the majority gives too much weight to the legislative reenactment doctrine, given that there was no affirmative evidence that Congress was aware of the Fourth Circuit and Board decisions; the regulations do not conflict with earlier regulations, which were silent on the question of a deadline for filing. Most significantly, the dissenting judges disagree with the majority's conclusion that the statutory language in section 882(c)(2) unambiguously precludes the imposition of a timely filing requirement. *Taylor Securities* and other cases, in the dissenters' view, establish that some timely filing is required under section 882(c)(2), and the regulations therefore do not improperly amend an unambiguous statute, but rather fill a gap in the statute. Therefore, in the dissenters' view, because the regulations reasonably fill the gap, the regulations are entitled to deference under *Chevron* and *Brand X*, 125 S.Ct. at 2700 ("Allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute…would allow a court's interpretation to override an agency's. *Chevron's* promise is that it is for agencies, not courts, to fill statutory gaps.")

The Tax Court concluded that the statute unambiguously precludes a timely filing requirement for foreign corporation returns claiming deductions, leaving no gap to fill. The Tax Court therefore held that a regulation purporting to fill such a gap is invalid. However, the court seemed to accept a judicial limitation that does just that. The dissenting opinions set forth an alternative explanation of the law that is reasonable and avoids such inconsistencies. Circuit courts reviewing the regulations may choose to adopt this interpretation and uphold the validity of the regulations. ■

POINT & COUNTERPOINT:

TEXTUALISM AND THE INTERNAL REVENUE CODE

INTRODUCTION: Statutory interpretation plays a considerable role in a majority of the cases decided by the Supreme Court each year, including tax cases. Textualism is one important theory of statutory interpretation, but it has many meanings. This Point/Counterpoint considers two of the more popular textualist interpretations. First, Tom Greenaway offers the view that textualism relies on the plain meaning of a statute to reach a result and points to the Supreme Court's decision in *Gitlitz* as an example of "plain meaning" textualism. Next, Danshera Cords argues for a broader approach to textualism that includes not only the plain meaning of a statute, but also considers the background and context of the terms of the statute to reach a result.

The NewsQuarterly encourages readers to submit responses or comments to these essays, which may be published in a subsequent issue. – *Christopher M. Pietruszkiewicz, Baton Rouge, LA*

POINT: TEXTUALISM AND THE PLAIN MEANING OF THE INTERNAL REVENUE CODE

By Thomas D. Greenaway, Boston, MA[1]

What is textualism? Justice Scalia, the avatar of modern textualism, relies on the language of a statute to determine its meaning: "[I]f the language of a statute is clear, that language must be given effect--at least in the absence of a patent absurdity." INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring). Textualists transform this erstwhile unremarkable canon of statutory construction into the decisive rule of statutory interpretation.

The principal virtue of textualism is its simplicity, and its subscribers delight in deflating the assumptions supporting more elaborate methods of statutory interpretation. Perhaps for that very reason, textualists have had limited success in the Byzantine world of tax law—after all, most tax lawyers thrive on elaborate assumptions.

A rigorous textualist reading of the Internal Revenue Code, however, would lead to tax law that we would not recognize. In many cases, this would be a good development for taxpayers. In other cases, however, the results would not be so felicitous.

Federal tax law is statutory, and the Internal Revenue Code is swaddled in regulations, rulings, and notices like no other title of the U.S. Code. The Supreme Court prescribed a two-step method for dealing with statute-based administrative law like this in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). First, if the meaning of the statute is clear, then it must be given effect. Second, if the statute is ambiguous, the Court gives a certain amount of deference to the agency's interpretation of the statute, should one exist (and it almost always does in tax). After more than twenty years, tax lawyers have begun to admit that yes, *Chevron* and its progeny apply to tax law, too. *But see* Swallows Holding, Ltd. v. Commissioner, 126 T.C. 96 (2006), discussed in the Point to Remember appearing on pages 13-14 of this issue.

Textualists are making progress in tax cases. The Supreme Court's decision in Gitlitz v. Commissioner, 531 U.S. 206 (2001), is the high-water mark. In *Gitlitz*, a creditor of an insolvent S corporation cancelled $2 million of corporate debt. Because the S corporation was insolvent, it excluded the cancellation of debt from gross income under section 108. Gitlitz, a shareholder of the S corporation, increased his basis by his share of the cancelled debt under section 1367. By increasing his basis, the taxpayer was able to deduct losses from earlier years that were suspended precisely because of the lack of basis. The Service disallowed the losses. The Tax Court and the Tenth Circuit upheld the Service.

The Supreme Court reversed, rejecting the argument of the Service that the discharge of indebtedness was not an "item of income" that could increase the shareholder's basis. Plainly, according to the Court, cancellation of debt was an item of income. The Court declined to consider the Service's "purposive" argument that allowing the shareholder to increase his basis with an "item of income" excluded from gross income meant that the item of income would never be taxed. In other words, Gitlitz would get a double deduction--a windfall. But the Court was not interested: "Because the Code's plain text permits the taxpayers here to receive these benefits, we need not address this policy concern."

The "policy concern" the Supreme Court disregarded in *Gitlitz* was a variation on a long-standing judicial presumption against allowing double deductions. After *Gitlitz*, this presumption seems to be little more than a bygone relic. Furthermore, in rejecting the Service's concern, the Court granted the plea that counsel for Gitlitz made as he closed his oral argument:

1 This essay reflects only the individual views of the author and does not represent the views held by the Internal Revenue Service or the Treasury Department.

> I submit, Your Honor, a plea on behalf of tax practitioners in this country. They should be able to read the Code as written. They shouldn't have to speculate as to whether or not a result that is called for on the plain language of the statute is too good to be true or is a wind fall. The tax laws are too complicated to get into that kind of speculation.

Transcript of Oral Argument, *Gitlitz*, 531 U.S. 206 (2001) (No. 99-1295), 2000 WL 1474136.

That, in a nutshell, is the textualist argument. And in *Gitlitz* at least, the Supreme Court agreed with it.

So what would happen if a textualist approach were applied faithfully to the Code? What would happen if the entire Code was interpreted as the Supreme Court interprets statutes in the main these days? In some cases, of course, the text of the Code matches the current state of the law. In other cases, the meaning of the Code is ambiguous, triggering the second step of *Chevron*, and a more complicated inquiry. In a third subset of cases, however, the plain meaning of the statute *cannot* embrace the current understanding of the law. This is where textualism compels a different result. Two examples highlight the circumstances in which textualism diverges from present law: (1) the definition of a corporate reorganization under section 368, and (2) the priority of recorded federal tax liens versus purchase money mortgages under section 6323.

REORGANIZATIONS

A transaction that is a reorganization is usually granted non-recognition treatment—it is tax-free, or more properly, tax deferred. The term "reorganization" is a term of art, with its own statutory definition. Section 368 defines a reorganization and provides various, specific definitions of what constitutes a reorganization. For instance, section 368(a)(1)(A) provides that "the term 'reorganization' means . . . a statutory merger or consolidation." This seems clear enough: if two corporations merge under rules set out by state statute, the merger is a reorganization. As new students of corporate tax are dismayed to learn, however, the answer is not that simple. A long-standing judicial gloss to the statutory definition, now incorporated into the regulations, adds several elements to the statutory definition. A corporation seeking to satisfy section 368(a)(1)(A) must also satisfy the extra-statutory requirements of business purpose, continuity of proprietary interest, and continuity of business enterprise.

But a textualist confronted with an unambiguous statute never gets to the regulations, much less the judicially created gloss. Section 368(a)(1)(A) is just not ambiguous. Unless the Supreme Court held that the plain meaning of section 368(a)(1)(A) includes all the curlicues that have developed around the text of the statute (and it hasn't), then *Chevron*—and National Cable & Telecommunications Association v. Brand X Internet Services, 125 S. Ct. 2688 (2005), by implication—teach textualists that the search for meaning ends with the words of the statute.

Generations of corporate dealmakers have been bedeviled by tax counsel's invocations of "continuity of interest" and other mysteries. Perhaps an intrepid investment bank will set up a case putting a reliably textualist court, assuming they can find one, to the test on section 368(a)(1)(A) (Hint: It is not the Ninth Circuit; *see* Amalgamated Transit Union v. Laidlaw Transit Services, Inc., 448 F.3d 1092 (9th Cir. 2006) (denying rehearing en banc). A favorable result would be gratifying for the bankers, if not for their tax lawyers.

FEDERAL TAX LIENS

A federal tax lien arises automatically once an assessed tax goes unpaid, and it attaches to "all property and rights to property" owned by the delinquent taxpayer, including property acquired after the federal tax lien arises. Section 6323 of the Code provides, however, that some creditors enjoy priority over the federal tax lien. For example, a lender who records a mortgage before the United States records notice of the tax lien takes priority over the tax lien. On the other hand, once the United States records notice of the tax lien, the "first in time, first in right" rule applies, and most subsequent creditors will lose out in a priority fight with the government.

Nevertheless, ever since Congress enacted the predecessor of section 6323, the IRS refuses to assert the priority of the federal tax lien over purchase money mortgages in cases where the notice of federal tax lien is recorded first. Rev. Rul. 68-57, 1968-1 C.B. 553. This systemic concession rests on the reasonable assumption that purchase money lenders would be less likely to lend to their customers—who are, after all, taxpayers—if a federal tax lien would automatically prime the mortgage. Furthermore, the mortgaged property would not be the property of the taxpayer but for the purchase money mortgage, so it makes sense for the IRS to step aside. The concession by the IRS is not based on the text of the statute. Rather, the authority for the concession comes from a brief reference in the legislative history of the Federal Tax Lien Act of 1966, providing that "purchase money mortgages . . . are protected whenever they arise."

But the textualist, remember, is beholden to the text alone. A textualist judge, confronted with the issue of the relative priorities of the federal tax lien versus a purchase money mortgage should find that section 6323(a) is clear: the result follows from the statute. If the IRS recorded the notice of federal tax lien before the purchase money lender did, then the IRS takes priority over the lender, and the concession set out in the revenue ruling is nothing more than an irrelevant distraction.

A textualist takes great comfort in the clarity of the approach. But before textualists prune the overgrowth from the plain meaning of the Code, we should first consider whether we really want the Code cut down to its text.

COUNTERPOINT: TEXTUALISM AND THE INTERNAL REVENUE CODE—MORE THAN PLAIN MEANING

By Danshera Cords, Columbus, OH

Although the "plain meaning" theory of interpretation is perhaps the most familiar type of "textualism," textualism itself encompasses more than just a plain meaning interpretation. Under the plain meaning theory of textual interpretation, if the text has a plain meaning, that meaning must be given effect, except in the rare case where the result of a plain meaning reading is patently absurd. While the plain meaning approach suggests simplicity, modern textualism is more complex, takes multiple forms, and considers more than dictionary definitions of the words of a statute.

Proponents of textualism argue that courts must apply the law as written, focusing on the text of a statute, because the court's role is to apply rather than to write the law. Textualists believe that the role of the court is to apply the law that is written, not the law that Congress thought it wrote. A strict textualist interpretation does not stray from the text. When the text of the law is clear and unambiguous, a textual approach will not tolerate the use of nontextual materials, such as legislative history. However, most proponents of this approach to statutory interpretation acknowledge that the text does not have its own meaning, independent of its context.

Justice Scalia describes textualism as requiring that a judge:

> [F]irst, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.

Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

Acknowledging that words of a statute are not self-interpreting, Justice Scalia's approach does not stop at the plain meaning of the text, but counsels for a broader approach to textualism:

> The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.

Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

Under this view of textualism, because the terms of a statute do not have independent meaning, the terms of a statute must be interpreted. This approach requires a court to consider not only the words of the statute, but also a court must consider the syntax, grammar, structure, and context of the statute. However, unlike other traditional methods of statutory interpretation, such as purposivism, intentionalism, and dynamism, textualism generally refuses to consider external sources, and particularly legislative history. Textualists' refusal to consider legislative history in the first instance arises from a number of concerns about its constitutionality, validity, and meaning.

First, some textualists assert that consideration of legislative history violates the separation of powers because legislative history is unenacted and has not been subject to bicameral approval and presentment to the President. Second, many textualists assert that legislative history is subject to manipulation because many, if not most, Members of Congress are unlikely to know the legislative history, as they may not read the committee reports and may not attend floor debates. Moreover, many statements are prepared and simply inserted into the Congressional Record, often at the behest of lobbyists who are seeking a result that may not be possible if the issue were brought to a vote. Third, textualists argue that it is unlikely that the 535 members of Congress and the President all had the same subjective intent regarding a statute. Therefore, the language of the statute is the clearest indication of what law means.

Thus, it is important to textualists that, "[w]here the language of . . . law[] is clear, [judges] are not free to replace it with unenacted legislative intent." INS v. Cardoza-Fonseca, 480 U.S. 421, 453 (1987) (Scalia, J., concurring). Notwithstanding the general reluctance of textualists to consult the legislative history, it appears that even Justice Scalia is willing to consider the legislative history, insofar as it is necessary to understand the background or terms of the text. In other words, legislative history may be consulted "to elucidate a text that is ambiguous." Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989). Of course, the dispute generally arises in the determination of whether a text is ambiguous.

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GOVERNMENT SUBMISSIONS **BOXSCORE**

Since March 2006, the Section has coordinated the following government submissions, which can be viewed and downloaded free of charge from the Section's website at www.abanet.org/tax/pubpolicy.

COMMENTS ON REGULATIONS AND ADMINISTRATIVE RULINGS—SUBMISSIONS TO U.S. TREASURY DEPT. AND IRS*

I.R.C.	DATE	TITLE	COMMITTEE	CONTACT
409A	06/15/06	Comments on Code Section 409A Proposed Regulations Regarding Distribution Issues	Employee Benefits	David Mustone Kurt L.P. Lawson
409A	06/07/06	Modification of Stock Rights under Proposed Treasury Regulations under Section 409A	Employee Benefits	Greta E. Cowart James R. Raborn
n/a	06/06/06	Comments Regarding the Proposed Amendments to Circular 230	Standards of Tax Practice	Ronald M. Wiener
7874	05/19/06	Comments Regarding the Proposed Regulations under Section 7874	Foreign Activities of U.S. Taxpayers	Giovana T. Sparagna
148	05/03/06	Proposed Regulations under Section 148	Tax Exempt Financing	Scott R. Lilienthal
Sub-chapter C	04/24/06	Comments Concerning Subchapter C No-Net-Value Regulations Proposals	Corporate Taxation	Jasper L. Cummings, Jr.
n/a	04/05/06	Anti-Terrorist Financing Guidelines	Exempt Organizations	LaVerne Woods
411(d)(6)	03/31/06	Section Comments on Proposed Regulations under Section 411(d)(6)	Employee Benefits	Russel E. Hall David W. Ellis
409A	03/09/06	Section Comments on Deferral Elections under IRC Section 409A Proposed Regulations	Employee Benefits	Wayne R. Luepker
199	03/03/06	Section Comments Concerning the Proposed Regulations under Section 199	Partnerships and LLCs	Christopher McLoon

GOVERNMENT SUBMISSIONS RELATED TO ABA POLICY—SUBMISSIONS TO CONGRESS AND U.S. TAX COURT

TO	DATE	TITLE
Subcommittee on Oversight of the Committee on Ways and Means	04/06/06	Testimony to Oversight Subcommittee Regarding Simplification of Federal Tax Laws
Senate Appropriations Subcommittee on Transportation, Treasury, the Judiciary and Housing and Urban Development, and the House Appropriations Subcommittee on Transportation, Treasury, the Judiciary and Housing and Urban Development	04/17/06	Letter Regarding Internal Revenue Service Funding

* These technical comments represent the views of the ABA Section of Taxation. They have not been approved by the ABA Board of Governors or the ABA House of Delegates and should not be construed as representing the policy of the ABA.

READERS RESPOND

TO CONSUMPTION VS. INCOME TAX DEBATE

INTRODUCTION: In the last issue of the NewsQuarterly, Jack Cummings published a novel Point & Counterpoint debate featuring quotations from the writings of consumption tax proponents as the Point, and then replying to those observations through his Counterpoint. We asked for commentary from our readers and are happy to offer two that we have received. First, Lorence Bravenec uses the same approach, beginning with quotes from the President's Advisory Panel on Tax Reform as well as from individuals who have been interviewed for features in the NewsQuarterly, and then, like Jack, replying to the observations so made. Second, we offer a response we received from Dan Olincy. We continue to welcome additional reactions.

– Alice G. Abreu, Philadelphia, PA

From Lorence L. Bravenec, College Station, TX

POINT: ECONOMIC GROWTH HELD BACK BY THE TAX SYSTEM

Tax "Reform" is again on the agenda, this time under a banner of "removing the bias against savings" (Report of the President's Advisory Panel, 2006) or promoting "economic growth" by relieving the burden of taxation on capital (*Interview with Ernest S. Christian*, ABA Section of Taxation NewsQuarterly, Fall 2005, at 17).

Interview with Ernest S. Christian, ABA Section of Taxation NewsQuarterly, Fall 2005, at 19:

". . . I could get the same economic results simply by taking the current code and allowing expensing, removing the double tax on personal savings, doing something about the treatment of dividends and gains, excluding exports from double taxation, and then adopting a territorial system instead of the silly kind of worldwide system that have now.

"The problem with the tax code is that it is a terrible drag on economic growth. It costs the American people hundreds of billions of dollars of lost income every year. That adds up. GDP is smaller today by a huge amount compared to what it would be if we had had the correct kind of tax system thirty years ago."

The President's Advisory Panel on Federal Tax Reform: "The economic growth effects (largely as a result) of the proposed lower tax on savings and investment would be a national income increase that is estimated to be as high as 2.4% in the budget window, 3.7% over 20 years, and 4.8% in the long run."

Interview with Grover G. Norquist, ABA Section of Taxation NewsQuarterly, Summer 2003, at 18: "You break it into [these] easy pieces: "First, get rid of the death tax. . . .Two, get rid of the capital gains tax. . . Third. . . All savings should be tax-free. . . Fourth. . ., expensing (of capital investment. . . .Fifth: get rid of the alternative minimum tax. . . Sixth: put a single rate on it. . ."

COUNTERPOINT: LET'S ASK SOME FUNDAMENTAL QUESTIONS

I have studied taxation for about 50 years now and readily admit that my reaction is one of skepticism to claims of higher economic growth when tax reform involves removing the "bias" against savings and/or further relieving the burden of taxation on capital. Basic tax "reform" should not be one-dimensional, but should be concerned with the overall impact of the tax system. This was the approach taken during the Reagan administration, and this overall approach would serve us well now. Let's ask some fundamental questions.

1. Are assumptions of increased economic growth from removing the bias against savings and/or relieving the burden of taxation on capital supported by the economic history of the U.S. in the 20th and 21st centuries?

The assumption/conclusion by "reformers" that such a change will result in more growth is troubling, because it has not been generally supported by economists of all stripes nor has it been subject to full public discourse.

Further, this assumption/conclusion of economic growth "reformers" is not consistent with the economic history of the U.S. The income tax collected relatively little revenue until World War II, and I remember post-war rates that were 70% on individuals (with a maximum 50% rate on earned income of individuals). Except for special treatment of long term capital gains, the income tax that came out of WWII was certainly less friendly to capital than the present income tax. Yet the post-war period was an exceptionally good growth period for the U.S.

Further, the Federal income tax rates on ordinary income of individuals were raised in the early Clinton years (from a maximum 28% to a maximum 35%), and again the U.S. had remarkable growth in the Clinton years. The maximum rate on long term capital gains (28%) was unchanged during the Clinton years.

How do you reconcile such growth in the post WWII period and the Clinton years with the income tax rates and/or the failure to remove the bias against savings and to relieve the income tax burden on capital? Could it be that any economist who tells us that we could get more growth with a tax system removing the "bias" against savings and/or "relieving" the burden of taxation on capital is basing his/her conclusion on the wrong assumptions? Perhaps the different tax system advocated by the new "reformers" would lead to excess capacity and bloated investments ("bubbles") in the stock market and in real estate, accompanied by boom and bust cycles that have long plagued the economic history of the U.S. Also, perhaps shifting the tax burden and other economic costs to the poor and the middle class results in less aggregate demand for goods and services, which suppresses growth. On the other hand, perhaps the shifting of the tax burden and other economic costs from the poor and the middle class results in more aggregate demand, which in turn fuels more growth. (We will return to this matter in questions 4 and 5.)

2. Are assumptions of increased economic growth from removing the bias against savings and/or relieving the burden of taxation on capital supported by the economic history of *other major industrialized nations* in the 20th and 21st centuries?

I am doubtful that this economic history supports any relationship between a country's tax system and economic growth. One of my colleagues (an economist) and I once compared OECD data for the U.S., Japan, Great Britain, Germany, France, and Italy, and our conclusion was that there was no real correlation between the tax system and savings. Moroney & Bravenec, *Consumption Taxes & Private Domestic Savings Rates: Evidence from Six OECD Countries,"* 71 TAX NOTES 235-240 (April 8, 1996, #2).

A general consumption tax is usually viewed as not being a tax on savings and not being a burden on capital in contrast with the present U.S. federal income tax. Reflecting on this assumption, the reader undoubtedly will be interested in the following summary figures for Japan as reported by the OECD. *See table below.*

Japan's tax system was put in place after World War II, patterned largely after the U.S. tax system, including the percentage of gross domestic product ("GDP") collected as taxes and the percentage of GDP represented by consumption, income, property, and other taxes, and this pattern has largely endured. However, Japan did not have a general consumption tax until it adopted a value added tax ("VAT") about 1990. The VAT, of course, is not a tax on savings or on capital.

Because of its VAT, Japan soon doubled the amount of taxes collected on all goods and services (including their older taxes on specific goods and services). Unfortunately for the new "reformers," Japan's economy entered a period of stagnation in the early 1990's about the same time that its VAT became effective. This stagnation has endured for an unusually long period of time, i.e., during the OECD reported years, 1990-2003. Further, Japan's GDP actually declined in the years 1998, 1999, 2001, and 2002. Japan is not a high tax country in comparison with other industrialized countries, so it is difficult to blame its economic stagnation on a high level of taxation. However, Japan adopted its VAT as an additional tax and not as a partial or complete replacement for its income tax. Nevertheless, Japan's GDP decline in the years 1998, 1999, 2001, and 2002 occurred at a time when its taxes on incomes and profits as a percentage of GDP matched historic lows and its taxes on consumption as a percentage of GDP reached historic highs.

3. Will the tax reform proposals cure some of the perceived structural problems of the present Federal income tax?

I presume that Mr. Christian considers our "silly kind of worldwide system" to be a major structural problem. Briefly, the U.S. system taxes each domestic corporation on its worldwide income [but in the case of operating companies, only upon repatriation to the U.S. because there's deferral as long as the foreign sub is an operating company and not a CFC], with a credit for foreign income taxes paid on foreign source income, and taxes foreign corporations only on U.S. source income. The U.S. does not require consolidated reporting by related corporations, but generally follows separate accounting for the income of each corporation. Special rules deal with "controlled foreign corporations."

JAPAN	1965	1970	1975	1980	1985	1989	1990	1991
GDP	33877	75531	152887	246130	327182	402311	449671	455442
Tax Revenue as % of GDP	18.2	19.6	20.9	25.4	27.4	30.2	29.1	29.9
Tax on Consumption as % of GDP	n/a	n/a	n/a	n/a	n/a	1	1.3	1.4
Tax on Corp Income as % of GDP	4	5.2	4.3	5.5	5.8	7.5	6.5	6.2
Tax on Personal Income as % of GDP	3.9	4.2	5	6.2	6.8	7.6	8.1	8.3
Tax on Income&Profits as % of GDP	8	9.4	9.3	11.7	12.5	15	14.6	14.5
VAT rate								

It is an open secret (a view based on the author's conversations with both lawyer and CPA practitioners) that there is a hierarchy of ability to lower income taxes within the U.S. rules of international taxation—(1) multi-national businesses with the parent company in low tax jurisdictions have the greatest ability to lower income taxes, with (2) those multinational businesses with the parent in a "mainstream" country other than the U.S. and the United Kingdom ("UK") having the next greatest ability, followed by (3) those multi-national businesses with the parent in the U.S. or the UK, and last (4) domestic U.S. businesses with no international subsidiaries. Income is located abroad in low tax jurisdictions through various arrangements, such as location of intangible assets, shifting of risk between subsidiaries (thereby justifying higher prices for the risk-bearing subsidiary), and location of operations.

The international tax rules of the U.S. undoubtedly contributed to prior migration abroad of some domestic corporations, a concern in the past 10 years, and may even now contribute to "outsourcing" and loss of jobs in the U.S.

Mr. Christian would replace the worldwide system of the U.S. with a territorial system. He is not clear which kind of territorial system he advocates, a territorial system based on present source rules ("source-rule territorial") or a territorial system based on that part of worldwide income apportioned to the taxing jurisdiction ("apportioned territorial"). A source-rule territorial system would continue the very source rules (location of intangible assets, location of risk, and location of operations) that permit the shifting of income to low tax jurisdictions.

On the other hand, an apportioned territorial system could be based on apportioned worldwide combined (consolidated) reporting, an approach held to be constitutional in the Barclays decision of the United States Supreme Court and used in on an elective basis in states such as California. (About one-third of multi-national taxpayers elect to apportion worldwide income in California.) This system is not based on separate accounting but apportions a part of combined worldwide income to a country based on apportionment factors chosen by the country. It thus would ignore the present artificial source rules. To the extent that a worldwide combined reporting system relies on location of sales as a factor in the apportionment of income, it minimizes other countries' income tax rates as a factor in location of business. (California uses an apportionment formula based on sales, payroll, and property located in California, but double-weights sales. Thus, the apportionment formula is [2x (California sales ÷ total sales) + (California payroll ÷ total payroll) + (California property ÷ total property)] ÷ 4. If worldwide profits are to be apportioned, then the denominator would be based on worldwide sales, payroll, and property. U.S. states have been placing increased reliance on location of sales in their apportionment formulas, either making it the exclusive apportionment factor or giving it double weight. My favorite article discussing worldwide combined apportionment is my own: *Corporate Income Tax Coordination in the 21st Century*, 40 EUROPEAN TAXATION 450-463 (Oct. 2000).)

Moreover, the apportioned territorial system could have another advantage. Mr. Christian bemoans the fact that the U.S. does not have a border adjustment for exports: "An export exclusion for American-made goods sold into the international market is a good idea that is intended to alleviate to some extent a large disadvantage that American companies currently suffer. We are the largest economy in the world's marketplace, but we are the only economy that does not have a border adjustment for exports. . . . American corporations are put at a considerable disadvantage." (Page 18 of the interview.) He could be happy with worldwide combined reporting, because to the extent that this system relies on location of sales as a factor in the apportionment of income, the income tax will not tax exports.

Perhaps the American Bar Association Section of Taxation should study the design and implementation of an apportioned territorial system as a replacement for the U.S. income tax rules on multinational corporations, in the same fashion that it studied the value added tax in the 70's and 80's. (*See Value Added Tax: A Model Statute and Commentary*, ABA Section of Taxation (1989) (Alan Schenk, Reporter).)

1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
465431	469266	479026	499744	510802	521861	515835	512530	513696	502586	497595	501522
28.2	28.1	27.1	26.7	27.8	27.9	26.8	26.2	26.5	26.8	25.8	25.3
1.4	1.5	1.5	1.4	1.5	1.9	2.4	2.5	2.4	2.4	2.5	2.4
5	4.3	4.1	4.2	4.6	4.2	3.7	3.4	3.6	3.5	3.1	3.3
7.4	7.5	6.4	6	5.6	5.7	5.1	4.8	5.6	5.5	4.7	4.4
12.5	11.8	10.5	10.2	10.2	9.9	8.8	8.2	9.2	8.9	7.9	7.7
		3%		3%		3%		5%			5%

4.Who should pay?

Tax changes "removing the bias against savings" or relieving the burden of tax on capital will negatively impact tax revenues. It seems reasonable to assume that the United States budget will continue to increase, as it has under both major political parties. And the budget may even substantially increase because of military needs, international circumstances, and or the need to pay down the national debt and interest on it. Assuming that after proposed changes the U.S. will need at least the same revenues from taxation, or even that it must raise additional revenue, will the burden of taxation—present and future—shift among the various income classes in the U.S.? To be more blunt, will the call for economic growth result in a shifting of the tax burden from upper-income taxpayers to middle- and low-income taxpayers? Several of Mr. Christian's proposals undoubtedly will decrease revenue that now comes primarily from the upper-income taxpayers. How will the lost revenue be made up?

I am not satisfied with the standard reply that "a rising tide lifts all boats," because my instincts tell me that in the case of tax changes the rising tide will not raise all boats equally or equitably. (A very interesting article on this subject by McMahon & Abreu is *Winner-Take-All Markets: Easing the Case for Progressive Taxation*, 4 FLA. TAX. REV. 1 (1998).)

Nor am I satisfied with the dogma that any economic growth from removing the "bias" against savings or relieving the burden of taxation on capital will supply necessary tax revenues. I prefer to rely on the economic history of the U.S. I do not care to rely on the economic history of countries with low corporate tax rates designed to compete with other countries, because this is a "beggar-thy-neighbors" economic policy. If major industrialized countries have to compete by lowering corporate tax rates, they will only precipitate a "race to the bottom." I do not believe that a "race to the bottom" among industrialized nations in their corporate taxation should solve the question of who should pay.

Multinational corporations have an existence quite separate and apart from their shareholders, who are scattered throughout the world. The U.S. tax burden on multi-national corporations doing business in the U.S. and on their shareholders should not be substantially affected by artificial source of income rules on inter-group transactions. Major industrialized countries such as the U.S. should design their tax systems so that the tax burden is equitably apportioned. They can do so through an apportioned territorial system.

5. Who will benefit from the assumed increased economic growth?

This question is the flip side of the question of who pays. Will the benefits of economic growth be shared equally or equitably within the U.S.? If not, a dramatically different U.S. will emerge in the 21st century. ■

AND, from Dan Olincy, Los Angeles, CA:

Dear Mr. Cummings:

Thank you for the Point/Counterpoint commentary comparing consumption and income taxes. My view of the purpose of the income tax system is colored by my reading, long ago, of Blum and Kalven's *The Uneasy Case for Progressive Taxation*, and I believe that the fairest tax system is one with some progression built in.

I'm not an economist, but intuitively it appears that the burden of a consumption tax is greater on those with less income and less wealth. The latter spend and consume proportionately more of their income and wealth than the more affluent.

Thank You

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IN REMEMBRANCE

The Section said farewell this year to two recipients of its Distinguished Service Award—**Edwin Cohen** (DSA-1997) and **Boris Kostelanetz** (DSA-1999)—and is grateful to Sheldon Cohen and Kathy Keneally for contributing the following special tributes.

EDWIN S. COHEN: SEPTEMBER 27, 1914 – JANUARY 13, 2006

Edwin S. Cohen—or Ed or even Eddie to everyone who really knew him—lived a long and fruitful life. He passed away this past February after almost 70 years of practice and teaching.

I was fortunate in having first met Eddie in 1953. He was one of the leaders of the American Law Institute project to modernize the 1939 Tax Code. When the Eisenhower Administration came to office their prime legislative objective was to modernize the Code and bring more rapid capital recovery into effect.

I was a very young lawyer (just six months out of law school) assigned to rearrange the Code in a more orderly fashion, I was also working on a variety of substantive provisions dealing with accounting, inventories, depreciation, and some corporate reorganization areas. Ed was working with Norris Darrell, then the President of the ALI, and Stanley Surrey and William Warren, the two reporters for the ALI project. It was a sterling staff for a magnificent project.

My roommate in Government then was Leonard Raum, the younger brother of Tax Court Judge Arnold Raum. Through Leonard, I got to know all the leaders of the Bar, particularly the Tax Section. Ed would come in and sit on our radiator (the IRS had an old-fashioned radiator heating system then) and lecture us to be bold and decisive in modernizing the law. It was a tutorial for me every time Ed or Stanley Surrey dropped by, and that was often.

Ed was a practicing lawyer at Root, Cohen, and Knapp from 1949 until he left to teach in 1964. That was the year he left practice to teach at his beloved University of Virginia Law School. Shortly after his arrival there I called him on behalf of President Johnson, to offer him a Tax Court Judgeship. He turned me down as he had only been back at the school for less than a year, and he said he owed them a longer stint than that after making the move. During this time of teaching and further developing his tax philosophy, he continued to work with the ALI project and was always available when Stanley Surrey (the Assistant Secretary for Tax Policy in the Kennedy and Johnson Administrations) or I called on him for assistance. He was never really sorry he didn't take the Judgeship as he had a wonderful career developing new tax lawyers before going into the government. A good portion of Ed's time was always spent on Tax Section or ALI projects.

I had first met Ed's older brother in the mid 1950s when he offered me a job in Richmond in 1956. That was not a vintage year for Virginia, which was in the middle of a "massive resistance" to the Brown v. Board of Education decision which had come down in 1954. I did not move to Virginia and become a lawyer in Ed's brother's firm, but he understood my decision and we remained close friends.

When I served as Chief Counsel and later Commissioner at the IRS (from 1963 to 1969), Ed was very generous with his time and helped me with numerous issues. He served on the Commissioner's Advisory Group and was of great assistance to Stanley Surrey and me as we tried to modernize the Code.

Shortly after I left the government on January 20, 1969, Ed entered the government for the first time. He and Jack Nolan, also extremely active in the Tax Section, were appointed as Assistant Secretary for Tax Policy and Deputy Assistant Secretary, respectively. They were a magnificent pair of public servants. Ed and Jack had a lot of catching up to do as their appointments did not come immediately but were delayed for a while. In the meantime, the Ways and Means Committee was plunging ahead with its reform package, which became the 1969 Tax Reform Act. Ed and Jack took over in this time of frantic rush, and yet, if you went in to speak to them about an issue, you would have thought all was tranquil.

I recall visiting Ed one day when the bill was on the Senate floor for debate. On behalf of a client I was asking him to approve the provisions which one of the members of the Senate Finance Committee wanted to add to the bill. I had discussed the provision with the staff and then Ed invited me into his office to discuss it with him. We sat and talked about the pros and cons of my measure as if he had nothing else on his plate that day. He gave it his full professorial treatment and ultimately approved our drafting. Ed had an amazing level of concentration, you would have thought that this was the only change in the law he had to deal with, but it was one of many. He took the time to do the job right, and right the first time, not later.

Ed left the Nixon Administration in 1972 shortly after he was named the Undersecretary at the recommendation of Secretary John Connally. He

was gone before the worst of the Watergate hearings and impeachment came up. He returned to teaching and practicing with Covington and Burling here in DC. Still when you had a meeting with Ed he reacted like the law professor he was at heart and gave you a full tutorial on the subject being discussed.

I was later on the other side of Ed in the discussion of a bill proposed by Bob Dole to provide carryover basis rather than step-up at death. Ed was representing the Investment Company Institute and the banking industry and was a fierce competitor. He was as tough on me as if I had been a stranger. The bill passed, but Ed and his clients got it repealed before it went into effect. That was one tough competitor!

Ed lived 91 eventful and fruitful years. He was a champion of good government and a fair tax system. If you looked to see who were Ed's friends you would find all political groups represented. He was not interested in your political party, only your ideas. Ed had the ability to judge us on our argument, not on a label. I checked on Ed's political contributions in a couple of years to see if my judgment was right. In one year he gave to John Connally for President and at the same time to the most liberal member of the Ways and Means Committee, Jim Corman, one a Republican the other a Democrat. In other years it was similar, he gave to the members of either party based on his knowledge and friendships, not on political affiliation.

I was honored to give the fifth Erwin Griswold Lecture at the American College of Tax Counsel in 1997. Ed had preceded me by a couple of years having given the third Griswold Lecture, in 1995. He was always out in front in everything he undertook. He showed us the way to practice but more importantly, how to live our lives. His wife of 61 years, Helen, added to his longevity by getting the two of them off each summer to the summer camp she operated in Maine. It added years to both of their productive lives.

We will miss Ed, but we are fortunate that he was with us as our teacher for such a long time.

– Sheldon S. Cohen, Washington, DC

BORIS KOSTELANETZ: JUNE 16, 1911 – JANUARY 31, 2006

On January 31, 2006, Boris Kostelanetz passed from being a living treasure to a treasured legend. While future generations of lawyers will not enjoy the privilege of knowing him personally, his life story will remain an inspiration, and his contributions to the law, already an influence on several generations, will continue.

Boris was born on June 16, 1911, in Russia. He lived to see the nation of his birth cease to be Russia and become Russia again. When he was nine, his family fled St. Petersburg, and after an extended period, found a home in New York. In one story he told often, he was watching the neighborhood children playing in the street, and realized that they were yelling at him. In time, he realized it was because he was standing on third base. He learned the rules of stickball, made friends, and learned the ways of his adopted home.

Boris began his career as an accountant, attending St. John's Law School at night to give him an edge in his first profession. The combination of a legal education and accounting skills led him to a position as an assistant United States attorney, prosecuting complex financial crimes. From that point, Boris made history, becoming Special Assistant to the Attorney General of the United States and Special Counsel to the United States Senate Commission to Investigate Organized Crime in Interstate Commerce, commonly known as the Kefauver Committee. As a defense attorney, he and his long-time partner, the great and long-missed Jules Ritholz, filed the amicus brief that set out the underpinnings of the Kovel v. United States decision. Boris, at one time an accountant, gave us the legal precedent to engage accounting services in giving legal advice. He had many other successes, as both a prosecutor and a defense attorney, but few better illustrate his groundbreaking contribution to bringing together an understanding of complex financial transactions with a litigation and criminal defense practice.

From immigrant beginnings, Boris changed the legal landscape. He was not the only legend in his family. Boris's brother, Andre, became a orchestra conductor of world renown. For his part, Boris acknowledged no musical talent, but would often add that his brother showed little acumen for the legal profession.

Boris's wife, Ethel, pre-deceased him by four years. He was dedicated to her, especially as she faced late-in-life health challenges. He also loved and was loved by a son, Richard, a daughter, Lucy, and a beautiful granddaughter, Eliza. His life was full. The law played a central role, but one he kept in balance. As an example, he had a dog named Judge. As he would tell it, after a long day, he enjoyed telling Judge to sit, to lie down, to be quiet.

I recall Bob Fink and Jack Tigue, each of whom had been Boris's partner, telling me, in one way or another over the years, that I was fortunate to know Boris during the period that he was openly beloved, rather than having been subjected to the many years in which his tenacity, hard drive, and demand for attention to detail, pushed so many that worked with him so very hard. Without doubt, however, his mentoring made those who worked with him better lawyers, and better mentors in turn. As Jack Tigue, who continued to have lunch with Boris years after they ceased to be at the same firm, said recently, "BK, as he was known in the firm, had tons of wit, charm and humor. His integrity, and his commitment to the law, to his

clients, and to his colleagues, is the gold standard we all strive to meet." As Bryan Skarlatos, a partner today of the firm that bears the Kostelanetz name said, "His dedication to the law was true to the end of his life. He was still coming to the office until the week before he died, a reflection of the intensity and energy that he showed throughout his years of practice."

Boris held too many titles, and received too many honors, to even try to do justice with an attempt at a list. He was dedicated to legal education, teaching at N.Y.U., and supporting schools of which he was and was not an alumnus. He was also committed to the American Bar Association, receiving the Section of Taxation's Distinguished Service Award in 1999. On his eighty-fifth birthday, he was inducted as an Honorary Member of the Benchers of the Honorable Society of King's Inn, an honor rare for any American lawyer, and rarer still for one born a Russian Jew, but a fitting tribute for a man who celebrated Bloomsday as his birthday and the entire world as his home.

Boris Kostelanetz has often and rightfully been described as the "Dean" of tax litigation. Boris is survived by another legend, Lou Bender, long in retirement but one long held in regard by Boris. In a notice that appeared after Boris's passing in the New York Times, Mr. Bender wrote in tribute to his "dear friend, coprosecutor, co-lecturer, coathor, and co-defense lawyer," in words that may speak for all of us of "an everlasting debt for your wisdom and guidance, and knowledge of the law.… God bless and keep you." ■

– Kathryn Keneally, New York, NY

POINT & COUNTERPOINT

FROM PAGE 17

Because textualism recognizes the need to consider the context within which the text is found, the rise of the use of textualism, if properly used, will not spell the demise of the tax laws as we currently know and understand them. Textualists will generally resolve questions arising under the Code and changes in the text by looking primarily at the text of the Code itself. However, the resolution should not mean looking at the language in isolation. Those textualists that acknowledge the need to look at the context of the statute to determine its meaning will also consider the regulations, the Code as a whole, and the body of law surrounding the Code. In addition, the context may also include "cultural, political, and ideological impingements on the production and interpretation of meaning." George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 325 (1995).

A prime example of the need to consider the context is found in section 368(a)(1)(A). In isolation and without considering the context, including the regulations, one might come to a very different understanding of what Congress meant by "a statutory merger or consolidation" than the meaning one would come to with an understanding of the background. It is possible that a strictly textual approach to interpreting the Code would, in some cases, lead to results that Congress did not anticipate. However, even if a textualist interpretation of individual sections of the Code occasionally results in consequences that Congress did not foresee or intend, such results are unlikely to lead to substantial harm to the entire tax system because tax litigation usually answers questions relating to individual sections or factual situations, not the entirety of the Code.

Moreover, Congress certainly has the ability to fix results that it did not intend, and has regularly done so. Since 1986, the Code has been amended several thousand times. Thus, it appears that Congress does not view the Code as static and is certainly willing to make changes to the Code as necessary. In fact, when Congress disagrees with the decisions of the courts relating to tax matters, Congress historically has been willing to "fix" the law. Demonstrating its ability and willingness to address problems with the Code itself and the interpretation of the Code by the courts, Congress took less than a year to close the "loophole" created by Gitlitz v. Commissioner, 531 U.S. 206 (2001).

A textualist approach may lead to results unanticipated by Congress, but that possibility seems no less likely than when other methods of statutory interpretation are used. The likelihood that significant changes in the tax law will result from textualist interpretations is much lower when considering the broader, more modern approach to textualism, rather than the narrower, plain meaning approach that seeks meaning without consideration of context. A narrow, noncontextual reading of the Code poses a serious threat to current state of the tax law. As a result, we do not want the Code cut down to its text, but rather interpreted in light of its context. ■

FROM THE **CHAIR**

FROM PAGE 3

- The Tax Exempt Financing Committee submitted recommendations for the modification of regulations on yield reduction payments made in connection with advance refundings of tax exempt bonds.
- The Foreign Activities of U.S. Taxpayers Committee submitted comments in response to proposed regulations and requests for further guidance related to inversion transactions.
- The Standards of Tax Practice Committee prepared comments on the "transparency" proposals made to Circular 230.
- Numerous committees collaborated to submit recommendations for the 2006-2007 Treasury - IRS Guidance Priority List.

TRANSITION

It is with mixed emotions that I prepare my last column as chair of the Section. It has been a challenging year, beginning with the Section's responses to Hurricane Katrina, and including the development of positions on Circular 230 written tax advice and transparency issues, as well as consideration of emerging issues such as the patenting of tax strategies. Throughout, I have received terrific support from the Section's Officers, Council and Committee leadership, and from its extraordinary staff, directed by Christine Brunswick. Susan Serota has made significant contributions as Chair-Elect and will do an outstanding job leading the Section. Thank you for the opportunity to serve the Section in this capacity. ■

FROM THE **CHAIR-ELECT**

FROM PAGE 4

interest to the Tax Section and others. Many of these activities are organized through the ABA Section Officers Committee (SOC), where the Sections' officers meet and exchange ideas, raise issues and suggest strategies. Historically, the Tax Section has been at the forefront of coordinated activities; for example, we proposed the formation of the Joint Committee on Employee Benefits (JCEB) in the early 1980s which now has representatives from six different Sections having an interest in employee benefits law. The JCEB sponsors National Institutes and CLE teleconferences on various employee benefits issues and meets with government officials from six different agencies to discuss policy and regulatory issues. By working together whether in a specialized area like the JCEB or generally through the SOC, the Tax Section is able to better represent its members.

NEW OFFICERS AND COUNCIL DIRECTORS

I am honored to become Chair this August, and look forward to leading the Section in its many activities and challenges. I welcome the opportunity to work with the new Section leadership: Stanley Blend, Chair-Elect, Elaine K. Church, Vice-Chair (Committee Operations), Louis A. Mezzullo, Vice-Chair (Publications), and Rudolph R. Ramelli, Vice-Chair (Administration) who join continuing officers Gregory F. Jenner, Vice-Chair (Communications), William M. Paul, Vice-Chair (Government Relations), Elinore J. Richardson, Vice-Chair (Professional Services), Christine L. Agnew (Secretary) and Armando Gomez (Assistant Secretary). Also, new Council Directors Helen Hubbard, Emily Parker, Priscilla Ryan and Steven E. Shay will join the existing Council Directors and other members of Council. Together we will lead the Section along with our Committee leadership, who provide the engine which produces most of the great work product of the Section. ■

SPOTLIGHT ON COMMITTEES: CLOSELY HELD BUSINESSES

by John O. Tannenbaum, Hartford, CT

The Closely Held Businesses Committee was formed several years ago as an amalgamation of a number of other committees, all of which dealt with closely held businesses and professional organizations. Fortunate to have a history of successful leadership and presentations, the Committee has since successfully presented full-day programs at each of the Section's three meetings. Included among these have been a full-day program on "Forming, Operating and Leaving the Business" at the recent 2006 May Meeting of the Section, and a full-day program in conjunction with the Real Property, Probate and Trust Section's Business Planning Group addressing the various issues involved in "Splitting Up the Family Business" at the Fall meeting in 2005.

At the Midyear Meeting earlier this year in San Diego, the Committee presented an eclectic group of topics including "The New Bankruptcy Act—Tax and Non-Tax Issues Related to the Closely Held Business and Its Owners," which later formed the basis for a teleconference at the end of May. Other topics included intellectual property rights, S corporation audit issues, taxation of farmers, and a review of various asset protection vehicles.

The Committee continues to organize and present all-day programs with well-qualified speakers addressing timely and critical topics on the broad range of issues within its purview. The Committee has proactively sought and participated in joint programs with a number of other committees of the Section, including the Business Cooperatives and Agriculture Committee, the S Corporations Committee, and the Bankruptcy and Workouts Committee. The Committee is currently finalizing plans to again cosponsor a full-day meeting with the RPPT Section's Business Planning Group for the Joint Fall Meeting, which, this year, will also include a mini-program on Saturday afternoon. In addition, the Committee has assumed responsibility for organizing and presenting two teleconferences for the Section, one in the fall of 2005 and the other at the end of May, 2006, as mentioned above.

During each of the last five years, immediately prior to the Section's May Meeting, the Committee has engaged in informal meetings with representatives of the Small Business/Self-Employed Division of the Internal Revenue Service, and members of its counsel's office, to discuss matters of common concern to the Committee and the SB/SE Division. These meetings have been very productive in opening lines of communication with the IRS and have resulted in members of the Committee working actively with members of that Division on its projects. It has also helped to encourage representatives of the SB/SE Division to participate with the Committee in its programs. The Committee intends to continue, and if possible, expand upon its working relationship with the SB/SE Division of the IRS in future years and plans to continue to meet annually with representatives of the SB/SE Division.

The Committee is most proud of involving its younger members in Committee leadership positions, particularly those members who have not previously been active. We have been successful in developing young lawyers for positions of responsibility, including Flora T. Hezel as Vice Chair for Practice Applications and representative to the Professional Services Committee; A. Thomas Skallas, Vice Chair for Committee Operations; and Gregory R. Wilson, Vice Chair for Law Development. The Committee has also welcomed a number of young members as subcommittee chairs, including Eric L. Green, Subcommittee Chair for Estate Planning, and Michael T. Donovan, Subcommittee Chair for Pass-Through Entities. Their energy and drive for excellence have been a force in the Committee's success during the past two years. The Committee also welcomes more experienced lawyers to its ranks, such as the Chair, and William P. Prescott, the Vice Chair for Professional Services, and encourages any member of the Section who is interested in becoming active in the Committee to attend the planning meeting which the Committee holds at the end of the Friday programs at each Section meeting.

As its activities indicate, the Committee continues to serve its members and the Section by presenting a varied array of programs of interest to the attendees at the Section meetings. The Committee seeks new and creative ideas on ways in which it can be responsive and involved in taking positions on new tax law developments and, where appropriate, to be able to play a role in representing the position of the Section with regard to such new tax law developments. The Committee actively and openly welcomes members from the Section of Taxation and encourages its members, both younger and more experienced, to participate in the management of the Committee and the presentation of programs.

To obtain more information about the Closely Held Businesses Committee, including contact information for the officers, go to the Committee's webpage at **www.abanet.org/tax**. ■

NEWS BRIEFS

IMPORTANT DEVELOPMENT REPORTS ON-LINE

The **2005 Annual Reports on Important Developments** are available on the Section's website at **www.abanet.org/tax/developments/2005**. A special feature of *The Tax Lawyer Online* and an important work product of the Tax Section's committees, the Annual Reports track the key legislative changes, regulations, cases and rulings over the past year, as well as forecast upcoming developments in over 30 substantive areas of the tax law. This special benefit is available exclusively to members and may be accessed on the website using your ABA member ID and password.

PHILADELPHIA TAX CONFERENCE – SAVE THE DATE

The ABA Tax Section is pleased to cosponsor this year's Philadelphia Tax Conference, on November 1-2, 2006, at the Crowne Plaza Hotel in Philadelphia, PA. This two-day conference, now in its 17th year, has been called "**the best conference for corporate tax advisors**." Designed for both in-house and outside tax advisors, the program will provide an in-depth discussion and explanation of the latest federal, state, local, and international legal developments and planning opportunities in business operations and reorganizations with nationally recognized speakers from both government and the private sector. CLE credit will be available. Registration opens August 22, 2006. Special discounts are available to Tax Section members, and fees are waived for full-time law students. For more information, go to **www.abanet.org/tax/calendar**.

PRACTICAL TAX LAWYER – YOUNG LAWYER WRITING OPPORTUNITY

As an outgrowth of an ABA Tax Section partnership with ALI-ABA on *The Practical Tax Lawyer (PTL)*, the Tax Section's young lawyer members are invited to participate in a mentoring project that teams young lawyers with senior members to write a series of articles for *PTL*. Published by ALI-ABA in cooperation with the Tax Section, *The Practical Tax Lawyer* is a quarterly magazine that offers concise, practice-oriented articles on all aspects of the tax law. This is a great opportunity for young lawyers to get published as well as to develop contacts within the Tax Section. For more information about this writing project, please contact Sam Braunstein at **sam@btlawfirm.com**. For more information about *PTL*, visit: **http://www.ali-aba.org/aliaba/ptl.asp**.

SALES AND USE TAX DESKBOOK - NEW EDITION AVAILABLE

Year after year, the ***ABA Sales and Use Tax Deskbook*** provides—in one, reliable source—all of the information tax managers, attorneys, and accountants are most likely to need about sales and use taxes. Organized by state, each chapter is authored and updated by some of the most experienced state and local tax practitioners for that state. The chapters are organized in a uniform format to aid the reader in finding guidance on a particular sales/use tax issue easily and to facilitate multistate research. The new 2005-2006 edition comes with a CD-ROM. As with all Tax Section publications, Section members receive 20% off the regular purchase price. For more information and to order this title, please visit the ABA webstore at **www.ababooks.org**. ■

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