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NEWSQUARTERLY

FOCUS ON PRO BONO

Time is of the Essence: Seize the Opportunity for Fulfillment in 2009

By Francine J. Lipman*

Fifty-three percent of workers worldwide surveyed in 2008 reported they would rather work and earn less, but have a happy, stress-free, fulfilling life. For the 78 million baby boomers and their pre- and post-boom colleagues this desire has resulted in a phenomenon that has been labeled "encore jobs." *See* Marc Freedman, ENCORE: FINDING WORK THAT MATTERS IN THE SECOND HALF OF LIFE (Perseus Book Group 2007); Richard J. Leider & David A. Shapiro, SOMETHING TO LIVE FOR: FINDING YOUR WAY IN THE SECOND HALF OF LIFE (Berrett-Koehler Publishers 2008). As these idealistic youth of the 1960s find themselves approaching, reaching and passing 60, they are looking for opportunities for fulfillment in the second act or "encore" of their lives. I suspect that many of you are more than ready for or contemplating your own encore performance.

The desire for fulfillment is not exclusive to the exploding population of pre-, post- and current Boomers. Indeed, pro bono is now a "hot area of legal practice." A recent analysis of emerging trends in the legal industry states that pro bono practice has become a great way to recruit new lawyers, provide professional development and give back to the community. *Memo from ABA Market Research Department Director Laura Metzger to Law School Deans* (June 2008) recounting the Hot Practice Areas found by Robert Denney in late 2007. The Section of Taxation recently announced its first pro bono fellowships for recent law school graduates or judicial clerks for work in tax-related public service organizations. *See* http://www.abanet.org/tax/press/2008/PublicServiceFellowshiprelease8-08.pdf.

So in the wise, wistful, whiney words of the iconic 1960s anti-hero Woody Allen, now 72, "Do something. The years will pass by and you'll be disappointed. . . The trick is to engulf life."[1] As 2008 makes its way into the history blogs and 2009 promises change and hope, this essay will present an opportunity for fulfillment tailored especially for tax professionals. In the haunting words of advice from Randy Pausch's

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[1] Notably 74% of Americans believe in life after death. Pew Forum on Religion & Public Life, U.S. Religious Landscape Survey (August 2008) available at http://religions.pewforum.org/reports. When Woody Allen was asked what he believes he will come back as when he's reincarnated, he responded: "I always thought a sponge."

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2009 MIDYEAR MEETING
January 8-10 • Sheraton New Orleans
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2009 Midyear Meeting

January 8-10 | Sheraton | New Orleans, LA

New Orleans welcomes the ABA Section of Taxation to the 2009 Midyear Meeting on January 8-10, at the Sheraton New Orleans. The city is as vibrant as ever, and offers a wide variety of excellent restaurants, interesting music venues and exciting night life.

Also, for the first time the Section is hosting a **Welcome Reception for all attendees on Thursday evening, January 8th, from 5:30 – 6:30 pm.** Make arrangements to arrive early and meet with your colleagues and with new Section members, swap business cards and discuss current topics of the day.

The 2009 Midyear Meeting provides opportunities to meet with the country's leading attorneys and government officials to discuss the latest federal tax policies, initiatives, regulations and planning ideas. Highlights include a Plenary Luncheon on Saturday, January 10th, featuring a panel of experts on the current financial and economic issues and their implications for tax policy. We also expect that many of our CLE panels will focus on up-to-date information from Treasury and the Service on the many changes resulting from the government's "rescue" plan.

EARLY BIRD REGISTRATION DEADLINE: Thursday, December 11, 2008
Register online at: http://meetings.abanet.org/meeting/tax/MID09

HOTEL RESERVATIONS
Conveniently located in the heart of the city, the Sheraton New Orleans will serve as the headquarter hotel. Hotel Phone Number: 888-627-7033 or 504-525-2500
Hotel Website: http://www.starwoodmeeting.com/Book/TAXATION1
Room Rate: $209 single/$229 double; Club Level Room: $239 single/$259 double
Reservation Deadline: Thursday, December 11, 2008

PROGRAM HIGHLIGHTS
Please visit the website—http://meetings.abanet.org/meeting/tax/MID09—for a complete schedule of CLE programs and networking activities.

Section Meeting Calendar

www.abanet.org/tax/calendar

DATE	MEETING	LOCATION
January 8-10, 2009	**MIDYEAR MEETING**	Sheraton – New Orleans, LA
May 7-9, 2009	**MAY MEETING**	Grand Hyatt – Washington, DC
September 24-26, 2009	**JOINT FALL CLE MEETING**	Hyatt Regency – Chicago, IL
January 14-16, 2010	**MIDYEAR MEETING**	Hyatt Regency – Denver, CO
May 6-8, 2010	**MAY MEETING**	Grand Hyatt – Washington, DC
September 23-25, 2010	**JOINT FALL CLE MEETING**	Sheraton – Toronto, ON

William J. Wilkins*

On September 12, 2008, your Council approved a white paper entitled "Statement of Policy Favoring Tax Simplicity, Stability, and Transparency." We have included the white paper in this issue of the *NewsQuarterly*, and I encourage you to read it.

We created the white paper so that we can publish (and present to policymakers at appropriate opportunities) a clear statement of the core tax policy values that we have advocated since at least the 1970's. As the principal author of the paper, I reviewed several Tax Section recommendations to the ABA House of Delegates that led to tax-related ABA policies. Some ABA policies generally favored tax simplification, low rates, and a broad tax base. Other ABA policies addressed specific areas such as inflation indexing, the individual alternative minimum tax, and the use of exemption and deduction phaseouts as "stealth tax brackets." I also reviewed past letters opposing proposals to add hodgepodges of credits for various purposes, and opposing slipping significant tax measures into tax bills without warning or opportunity for comment. What clearly emerged is that your Section has always spoken up on behalf of the public in these areas.

We prepared the paper against a background of increasingly frequent tax legislation and a prevailing view that most important nontax policy initiatives should be carried out in significant part through the Internal Revenue Code. On the other hand, experience teaches that opportunities sometimes arise where important gatekeepers of tax policy realize that overall discipline is needed to repair the effects of years of accretion of complexity. At those times, we can help supply the arguments in favor of that discipline and help provide public support for the necessary hard decisions.

For example:

- The white paper acknowledges that tax incentives can be crafted to respond to almost any desirable public policy goal, and that beneficiaries almost never object to the complexity. However, it is not enough for the legislative or executive branches to weigh the nontax policy benefits of any *single* tax proposal against the incremental tax complexity added by the single proposal. "Micro-balancing" fosters an accretion of complexity that ultimately leads to a dysfunctional federal tax system.
- The white paper also acknowledges that any tax system will have complexities and compromises under the best of circumstances. For that reason, the paper urges that high tax rates be avoided, in order to avoid having the inevitable practical compromises become either unfair traps or loopholes driving economic choices.
- The white paper also makes explicit a point about transparency that is implicit in our earlier policy statements. In our view, the tax system should not be sneaky.

  In particular:

  - Congress should not hide tax rates within phaseouts or alternative minimum taxes.
  - Congress should not let inflation cause tax increases.
  - The Section urges skepticism toward targeted tax incentives, not just for simplification but also for transparency reasons.
  - We generally urge policymakers to consider, as a transparency test, whether the tax system is one in which a taxpayer can easily estimate the tax effect of an increase in income. Our current system certainly could not pass such a test.
- We point out how frequency of tax legislation is one of the greatest sources of complexity, and how sunset provisions make this problem worse.

Everyone reading our *NewsQuarterly* knows that powerful forces are arrayed against simplicity, stability, and transparency. Policymakers often only give lip service to these values, and even our friends generally put these values somewhere other than number one or two on their priority list. Nevertheless, it is good for the system and good for the Section to keep repeating these points at all appropriate opportunities. ■

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*Wilmer Cutler Pickering Hale & Dorr LLP, Washington, DC

IRS Commissioner Douglas Shulman

By Jasper L. Cummings, Jr. and Alan J.J. Swirski*

Q Can you describe your background, and your work experience in and outside of tax?

A My most recent position was Vice Chairman of the Financial Industry Regulatory Authority (FINRA), which has broad authority to oversee the conduct of securities firms. It is essentially a regulatory organization with a public purpose that happens to be a private institution. FINRA emerged from the merger between NASD and the regulatory arm of the New York Stock Exchange. There are a lot of parallels to the IRS. I think that is why the Treasury Secretary asked me to do this job. FINRA was a major user of sophisticated technology. We ran some of the infrastructure that allowed Wall Street to run, and we ran major surveillance, technology infrastructure as well as an exam program. We had an enforcement program. We wrestled with all the international issues that the IRS faces now as a regulator whose authority stops at the nation's border, but whose regulated community operates globally. I was there seven-and-a-half years—first working on technology and strategy, then as president of one of the divisions, and eventually, vice chairman. Before that, I was a private equity investor.

I also served on the National Commission on Restructuring the IRS, which is where I first wrestled with tax issues. I started at the Commission as senior policy advisor, responsible for looking at the IRS from a management and governance perspective. Later, I was privileged to serve as Chief of Staff.

Q What are the greatest challenges facing the IRS this year and next?

A Well, clearly, ensuring a successful filing season is always something that the IRS has to keep its eye on. And of late, while we have succeeded, it has not been without its challenges. We process nearly 140 million individual tax returns every year. While a lot of what you read in the paper about the IRS is when there are problems or topical events, a lot of people just want to file their return, either to get their refund or get their check processed, and not hear from the IRS until the following year. So we always need to work hard to ensure a smooth filing season.

This year we had the challenge of the late AMT patch. We were in the middle of working through those issues when the Economic Stimulus Act was given to us to execute. It gave us quite a bit to occupy our attention this year. I am incredibly proud of the work we did. The IRS is not necessarily set up to be the most nimble institution in the world, because it runs a big, high volume operation. But 70 days after the stimulus legislation was passed, we started putting $100 billion out into the economy to help working Americans. We still have stimulus work continuing. So, one of our biggest challenges this year is getting through stimulus. Beyond that, I have been actively asking Congress to move as quickly as possible if they are going to give any AMT relief or extenders because we could be put back into the same cycle next year. So those are huge issues for us.

I think another pressing issue is pretty well publicized and that concerns ensuring continuity and success in the face of daunting workforce demographics. We have a lot of employees eligible for retirement; we are competing with the private sector to keep our people. They are highly trained, technical professionals who can get paid more money if they leave the IRS. So we are very focused on workforce issues to make sure we keep our good people. We are also recruiting new people and working on knowledge transfer as people leave the organization.

Finally, a key challenge we face is how to keep innovating and improving in both service and enforcement. As we confront the tax gap, we need to continue to be more innovative in our enforcement approaches. Those are the big challenges that are on our plate right now.

Q You mentioned the need to keep up with retirements—are there any particular areas of the Service where you are hoping to recruit more employees?

A I have launched an initiative called the Workforce of Tomorrow Task Force, and it is going to focus on several issues. We need to have a clear value proposition in our recruitment efforts. The IRS is a great place to work—you can have several interesting jobs at the IRS and get a lot of training in everything from technical tax issues to personnel issues to technology issues to big-scale operations. We are going to focus on stretch assignments, on mentoring people, on rotating people through different jobs and on training. But frankly if you look at all of government—and the IRS is no different—there is a large number of people who are eligible for retirement, and then you add on to that the fact that there is just normal attrition—we just need to keep our eye on the ball.

* Jasper L. Cummings, Jr., Alston & Bird LLP, Washington, DC, and Raleigh, NC, and Alan J.J. Swirski, Skadden, Arps, Slate, Meagher & Flom LLP, Washington, DC.

This is not rocket science. I think if you focus on your people, you make your organization a great place to work, make sure managers are really good and develop good people, and help put people who are not doing well back on track, you are going to be known as a great employer. My theory is A players attract A players, B players attract C and D players. So what we need to do is make sure that we are focused on our people, and maximize the number of A players. I was just in Albuquerque, New Mexico, and I had dinner with some criminal investigation agents. They were all young, and incredibly excited. One had been a lawyer; one had been an accountant. They joined the IRS because they wanted to get back to their community, have a career in public service, do something interesting and have a challenging and varied work-day. I actually think we have much to offer, a great value proposition; we just need to sell it.

Q What are your main priorities you would like to tackle in your first year or two as Commissioner?

A I have been pretty clear that I think we need to excel at service and enforcement. My service priority is quick and seamless service to taxpayers. My belief is that any great service organization in financial services is actually all about setting clear expectations, telling taxpayers, in our case—customers in other people's cases—what you are going to do and then doing it. And we need to see our interactions with the taxpayer through their eyes. So of course we need to be polite, of course we need to be respectful. Most importantly, taxpayers should move through the system efficiently and effectively. Generally, whether you are dealing with the IRS or you are dealing with your mutual fund company or bank, you do not want to spend a lot of time with your financial service provider, you just want things taken care of quickly. So the concepts of one-stop service, understanding the taxpayer perspective and quick resolution are high priorities for me.

On enforcement, I have a number of priorities. A major theme of mine will be improved third-party reporting, both in terms of the quantity of data we receive and how we utilize it. In this regard, Congress just passed a bill to have credit card and electronic payments to merchants reported to the IRS—so credit card companies and banks will tell us how much they pay a business each year. This is a treasure trove of information that is going to allow us to compare revenues that are reported to us voluntarily with another piece of information. We are working to get the technology and people in place to implement this and to do so in a way that is fair to business taxpayers.

International tax administration is also going to be a priority. Businesses are operating in an international environment, seeking revenues and doing transactions overseas. We need to keep up with business and do proper and fair tax administration for businesses in an international context. In addition, between 2003 and 2005 there was an increase of 30 percent in the number of the individuals who reported paying taxes in a foreign jurisdiction. So the international issue is not just a corporate issue, it is also an individual issue. To succeed here, we need to understand how businesses and individuals operate across borders and recognize how we need to modify our business model to reflect the global economy.

And in a similar vein as my views on service, I am very focused on resolving enforcement matters at the earliest moment possible. This means doing audits close to the time a return is filed, engaging in collection efforts as close as possible to the time we identify a delinquency, and resolving issues in examinations effectively and efficiently. I like to use the analogy of credit card companies—where, if I am late paying my credit card, I get a call within a week saying, "Mr. Shulman, would you like to pay over the phone? Is there something we can do to expedite payment?" With the IRS, sometimes it can take several years, and I think that the quicker we get to the taxpayer and resolve issues, whether it is positive or negative for the taxpayer, the quicker the taxpayer can have certainty and we can free up our resources to do other things.

Q Have you learned anything new and surprising about the IRS since becoming Commissioner that you did not know before?

A Well, as you know, I had done a tour through here during the IRS Restructuring Commission, so I had a decent sense of what it was like. If you look at our service and our enforcement statistics—from 12 years ago when I was last involved with the IRS—both have improved dramatically. So the agency has come a long way. This is not really new, but I am experiencing it firsthand because there is a new cadre of executives. The most pleasant affirmation is that we have great executives who know what they are doing, who are very dedicated public servants, who I would stack up against people I have met in private industry in their ability to execute, stay focused and be accountable. And I find that the same is true for the balance of our workforce. Of course we have issues and of course we have problems, but overall when you look at stimulus, you look at our response to late AMT legislation, you look at our enforcement record, you look at our service record, and then you go out and meet our folks in the field—we are an agency that I think people should be quite proud of.

Q Can you describe your institutional relationship with the Chief Counsel, Donald Korb?

A The Chief Counsel is a key member of my senior staff. The individual Chief Counsel, Don Korb, is my chief legal advisor. His office provides us with corporate, technical and policy advice. By that I mean that my lawyers provide

key advice and counsel on all matters of legal concern, tax and otherwise, while also pursuing litigation and providing formal public guidance to the tax community. I am a big believer in teams, and I have ensured that Don and his office are at the table as we run this agency. I believe that office brings value to any initiative we undertake.

Q And same question with respect to the Tax Division of the Justice Department, Nathan Hochman?

A Clearly, while the Chief Counsel is, by organizational chart, a part of my team, the Tax Division is a separate operation. The Tax Division serves as our lawyers in court, although the Chief Counsel of the IRS represents the Commissioner before the Tax Court. I still consider the Tax Division as part of our team, and have been quite pleased with the relationship. We had a nice string of court victories right before I got here and since I have been here. We have a close working relationship with the Justice Department and the Tax Division. I have been told that the coordination and cooperation in litigation has never been better, whether with our Criminal Investigation Division or with our Chief Counsel's office. I think that it is quite important to tax administration, and I plan on continuing to nurture the relationship in this administration and the next.

Q Are there any areas of the Code you would like to see Congress make significant changes to?

A My main issue with the Code is simplification. The Tax Code is four times as long as *War and Peace*. If I picked up the Tax Code and started reading now and read 24 hours a day—it would take me eight days to read it. Given that every American has to interact with the Code every year, it is incredibly complex. And so, I am a big fan of simplification.

I also am a fan of third-party reporting, which we talked about before. I am very appreciative of the Finance Committee and the Ways and Means Committee for championing third-party reporting on credit cards. Research has shown that when there is somebody else reporting information to the IRS at the same time as the taxpayer, compliance goes up. The W-2 is the most basic example—wage earners know that the IRS is going to get other information, and have very high compliance rates. This credit card reporting is going to have a similar impact with respect to businesses. The IRS will have another lens to see the revenue flowing into these businesses. There is also a basis reporting proposal out there which would allow the IRS to get from brokerage firms basis information when a taxpayer sells stock. The more third-party information we get the better for tax administration. All the studies have shown that it increases compliance. It actually is potentially less intrusive to taxpayers. They do not need to spend hours wrestling with their information—we just get it. It clearly is reflective of the information age that we are in. It is just natural that there is a lot more information flowing. It is easier to get and easier to digest. Third-party information reporting is going to be a major thrust of tax administration for my tenure for the next five years, but also for the next 20 years.

Q Do you have any view of the role of published guidance in the work of the IRS?

A Yes, I do. I am a big fan of clear guidance, and I'm impressed that the IRS puts out a guidance plan each year. I have been involved in regulation for the last eight years, and I think the Treasury and IRS are to be commended for actually saying, "Here is what we are going to try to do this year," and giving some insight to market participants. I just recently sat down with the team that does the guidance plan. We talked about how much of it is things we need to get out, how much of it is guidance that the industry is looking for and how much of it is anticipating trends. So right now we are in the middle of housing issues, and we ought to look at all our housing-related rules and say, "Okay, what is going to be happening for the next year, and what do we need to do in terms of guidance?" I think it is an incredibly important process.

In addition, clarity is essential. We should give guidance in areas where there is confusion. We do not benefit anyone from having ambiguity in the rules. The more clarity we can provide, the more beneficial it is. I recognize that it is not always going to be black and white, there will be areas of gray, but the more we can make things black and white the better. I like to use the analogy of Big Willie in "Guys and Dolls." He runs a craps game, and he throws the dice—but there are no numbers on them. Only Big Willie knows what the numbers are on the dice. And I always tell people, we should not be Big Willie. We should actually have numbers on the dice, and we should tell people exactly what happens when those numbers land so that there is clarity. Then business can function, people can do their tax planning, but we can also run a very rigorous enforcement program if people cross over that line.

Q Have you found it difficult to start as Commissioner in an election year?

A Not at all. The IRS is, and should be, run as a professional, non-political, non-partisan agency. That is clearly the expectation that I have of myself, and it has been the expectation that Congress and the Administration have given to me. That is one reason I have a five-year term. There is really no room for politics in tax administration. I think people in this town understand and respect that. ■

Continuing Problems in the Taxation of Damage Awards: Will Congress Ever Get It Right?

By Toni Robinson*

Congress has long struggled with the question of whether damage awards should constitute income. As long ago as 1944 in *Raytheon Production Corp. v. Commissioner*, 144 F.2d 110, 113 (1st Cir. 1944), the First Circuit stated: "The test is not whether the action was one in tort or contract but rather the question to be asked is 'in lieu of what were the damages awarded?'" That general rule, when applied to most damage awards, would result in their inclusion in income to the extent the damages represent lost wages or earnings and not a non-taxable return of capital. If the damage award represents a return of capital, the taxpayer will have no income if there is a sufficient basis in the asset. (For that reason, Raytheon won the battle but lost the war; it was able to establish that the damages it received from RCA Corporation represented reimbursement for destruction of its goodwill, a capital asset. But it was unable to establish that it had a tax basis in the goodwill.)

Congress limited the general rule of *Raytheon* when it provided in section 104(a)(2) that damages for personal injury or sickness were excluded from gross income. Until 1996, the Code allowed taxpayers to exclude from gross income damage awards for personal injuries or sickness, even if the amount of the damage award was calculated based on lost wages or earnings. That is, before 1996, taxpayers could exclude from income the amount of damages (other than most punitive damages) whether received on account of either physical or non-physical injuries or sickness.[1]

The old version of the statute led taxpayers who had received damages for such torts as sex, race, or age discrimination to attempt to exclude the awards from income. The Service challenged this position and, after losing an alarming series of cases, did what it does when it can't win in court: it lobbied Congress for a change in the statute. Congress obliged, amending section 104(a)(2) to read: "gross income does not include . . . the amount of any damages (other than punitive damages) received . . . on account of personal physical injuries or physical sickness." I.R.C. § 104(a)(2).

The legislative history of the change reflects the varying judicial guidance on the issue:

> Courts have interpreted the exclusion from gross income of damages received on account of personal injury or sickness broadly in some cases to cover awards for personal injury that do not relate to a physical injury or sickness. For example, some courts have held that the exclusion applies to damages in cases involving certain forms of employment discrimination and injury to reputation where there is no physical injury or sickness. The damages received in these cases generally consist of back pay

In 1996, Congress amended section 104 to exclude from gross income only those damages received on account of *physical* personal injuries or *physical* sickness. This created a distinction between physical and non-physical injuries or sickness. In the non-physical context, the Supreme Court, in *Commissioner v. Banks*, 543 U.S. 426 (2005), held that a successful plaintiff was required to include the full amount of a damage award in income, including attorneys' fees. However, Congress enacted a "legislative cure" under section 62(a)(20) specifically providing that attorneys' fees and court costs paid in connection with unlawful discrimination may be deducted above the line. As Professor Toni Robinson explains, section 62(a)(20) does not account for damage awards arising from contract claims or common law torts and, as a result, Congress still has not provided complete relief to plaintiffs who receive damage awards based on non-physical injuries or sickness.

The *NewsQuarterly* encourages readers to submit responses or comments which may be published in a subsequent issue.

–Christopher M. Pietruszkiewicz, Vice Chancellor & J.Y. Sanders Professor of Law, LSU Law Center, Baton Rouge, LA

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[1] Between 1975 and 1984, Revenue Ruling 75-45 excluded punitive damages from gross income.

> and other awards intended to compensate the claimant for lost wages or lost profits. The Supreme Court recently held that damages received based on a claim under the Age Discrimination in Employment Act could not be excluded from income. In light of the Supreme Court decision, the Internal Revenue Service has suspended existing guidance on the tax treatment of damages received on account of other forms of employment discrimination.

H.R. REP. NO. 104-586, at 142-43 (1996). The Conference Committee adopted the House proposal. H.R. REP. NO. 104-737, at 302 (1996) (Conf. Rep.). Both reports are available at http://www.gpoaccess.gov/serialset/creports/search.html.

The 1996 change drew what some believe is an indefensible distinction between physical and non-physical injury or sickness. And, in drawing a false dichotomy between the tax treatment of physical and non-physical injuries, Congress invited substantial litigation. For example, consider the case of Marrita Murphy, a civilian employee of the New York Air National Guard. Ms. Murphy suffered physical ailments caused by the emotional distress that she endured after being persecuted for being a whistleblower. She claimed that her employer had blacklisted her and provided unfavorable references to prospective employers. There was no issue regarding the reality of her physical symptoms; the only issues were her claim that her damages qualified for exclusion and that section 104 was unconstitutional. She lost on the issue of whether her damage award qualified as one paid to compensate for a personal physical injury. It is the constitutional aspect of the case that provides continuing interest. *Murphy v. Commissioner*, 362 F. Supp. 2d 206 (D.D.C. 2005), *remanded by* 460 F.3d 79 (D.C. Cir.), *vacated*, 2006 WL 4005276 (D.C. Cir. Dec. 22, 2006), *opinion after reinstatement of appeal*, 493 F.3d 170 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 2050 (2008).

Ms. Murphy was determined to show that the injury for which she was compensated was physical because the stakes were so high based on the statutory distinction between physical and non-physical injuries. As a consequence of drawing a distinction between physical and non-physical injuries and sickness, the 1996 change to section 104(a)(2) created extremely unfortunate tax consequences for taxpayers failing to qualify for income exclusion under section 104(a)(2). Instead of receiving the award tax-free (other than any punitive damage award), a successful plaintiff like Ms. Murphy, claiming non-physical injury or sickness, would have to include the damage award in gross income. But how much of the award must the plaintiff include in her income? A controversy ensued: how to treat the portion of any award the plaintiff had to pay to her attorney as a result of a contingency agreement. A majority of circuit courts required the successful plaintiff to include the full amount of the damage award in income while a minority of circuits held that only an amount equal to the net amount of the damage award after payment to a lawyer should be included in income. The Supreme Court settled the issue in *Commissioner v. Banks*, 543 U.S. 426 (2005), siding with those circuits that had concluded that the entire amount of the damage award was income to the plaintiff.

A plaintiff who had to include the entire amount in income sometimes ended up with little or no money left from the damage award after paying legal fees and taxes. This occurred because, while section 212 permits a deduction for attorneys' fees, that deduction is a so-called "miscellaneous itemized deduction" and is deducted "below the line." As a result, the deduction for these fees is subject to the limitations of sections 67 and 68. Section 67, called the "2% haircut," reduces the total of miscellaneous itemized deductions by 2% of adjusted gross income. For many individual taxpayers, adjusted gross income equals gross income. Therefore, the deductible amount of all miscellaneous itemized deductions is the amount that exceeds 2% of gross income. If adjusted gross income increases through inclusion of a large damage award, the 2% floor also increases. This can cause a substantial reduction in the allowable amount of the attorney's fees deduction. Section 68 imposes an overall limitation, which for many taxpayers reduces the amount of the below-the-line deductions still further if 2008 adjusted gross income exceeds $159,950 ($79,975 if married filing separately).

In addition to these limitations, there is a far more sinister provision: the alternative minimum tax ("AMT"). This tax, often called the "stealth tax," affects millions of American taxpayers (more every year) and requires an entirely separate tax calculation. A taxpayer begins with taxable income calculated the normal way, and then makes a series of adjustments. Most important, the taxpayer adds back a number of below-the-line deductions allowed for regular

The 1996 change drew what some believe is an indefensible distinction between physical and non-physical injury or sickness. And, in drawing a false dichotomy between the tax treatment of physical and non-physical injuries, Congress invited substantial litigation.

By amending section 104 to draw the distinction between physical and non-physical injuries and sickness and then amending section 62 to ameliorate the unintended AMT effects, Congress has, once again, made the Code more complex without completely solving the problem.

tax purposes. In the case of damage awards, the significant add-back is the amount of attorneys' fees that were deducted in calculating regular tax. Then, the taxpayer calculates alternative minimum tax and compares it to the tax calculated the regular way. If the AMT exceeds the regular tax, the excess is added to the regular tax. For many successful plaintiffs in non-physical personal injury cases, it is the add-back of the attorneys' fees that produces a total tax which sometimes exceeds the net amount of the damage award retained by the plaintiff after payment of the attorney's fees.

It is said that one of the reasons the Supreme Court ruled as it did in *Banks* was its awareness that Congress had already enacted a "legislative cure" to the problem. In fact, Congress did act; it enacted section 62(a)(20). Section 62 specifically provides which deductions a taxpayer can take in calculating adjusted gross income. These are the so-called "above-the-line" deductions available to all taxpayers, whether they itemize or not. This is significant because attorneys' fees deducted above-the-line under section 62(a)(20) are not added back for AMT purposes.

The new provision, entitled "Costs involving discrimination suits, etc.," provides a "deduction . . . for attorney fees and court costs paid by, or on behalf of, the taxpayer in connection with any action involving a claim of unlawful discrimination . . . or a claim of a violation of [certain federal statutes]." Section 62(e) defines unlawful discrimination to include the violation of any of a host of federal civil rights statutes, including, for example, the Fair Housing Act, the Fair Labor Standards Act of 1938, and ERISA. It also contains a catchall. Unlawful discrimination also includes:

> [a]ny provision of Federal, State, or local law, or common law claims permitted under Federal, State, or local law–
>
> (i) providing for the enforcement of civil rights, or
>
> (ii) regulating any aspect of the employment relationship, including claims for wages, compensation, or benefits, or prohibiting the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted by law.

Thus, Congress cured the AMT problem for a wide variety of claims. But the remaining problem is two-fold. First, there continues to be a distinction between physical and non-physical personal injuries and sickness. Second, and to some extent more perplexing, there is a distinction in the non-physical injuries and sickness category between those damages covered by section 62(e) and those damages not covered by section 62(e). For example, non-civil rights-type claims are not covered by the new provision. Plaintiffs in such cases as defamation do not escape the AMT if they are successful in suits involving the payment of contingent attorneys' fees. As a result, some may suffer the same problem of more total tax than net damage award that prompted Congress to amend section 62.

Is that simply because the Treasury Department was successful in its efforts to convince Congress that a plethora of suits was costing many tax dollars? The legislative history of the 1996 change provides:

> Damages received on a claim not involving a physical injury or physical sickness are generally to compensate the claimant for lost profits or lost wages that would otherwise be included in taxable income. The confusion as to the tax treatment of damages received in cases not involving physical injury or physical sickness has led to substantial litigation, including two Supreme Court cases . . . . The taxation of damages received in cases not involving a physical injury or physical sickness should not depend on the type of claim made.

H.R. Rep. No. 104-586, at 143 (1996).

So long as section 62(a)(20) fails to give relief to many taxpayers with damage awards arising from contract claims or common law torts, the taxation of damages received in cases not involving physical injury or physical sickness will continue to depend on the type of claim made.

Congress's explanations—that courts have interpreted the exclusion too broadly and that, in non-physical injury cases, the awards compensate for lost profits or lost wages—do not justify a distinction between physical and non-physical damages. The calculation of damages in physical injury cases often is based on lost profits or lost wages. By amending section 104 to draw the distinction between physical and non-physical injuries and sickness and then amending section 62 to ameliorate the unintended AMT effects, Congress has, once again, made the Code more complex without completely solving the problem. In other words, Congress still hasn't gotten it right with respect to the treatment of damages. ■

courageous "Last Lecture"–embrace your dreams and seize opportunities for their fulfillment.

A Tax Tailored Opportunity for Fulfillment: Volunteer Income Tax Assistance (VITA)

VITA was established in 1970 to partner with community-based institutions and volunteers and help them help others. This "thirty-something" program administered by the Service provides free preparation and e-filing of their annual income tax returns to low-income and special needs taxpayers, including persons with disabilities, non-English speaking persons and elderly, rural and Native American taxpayers.

During the last five years the VITA program has achieved great growth and success. VITA volunteers have increased the number of tax returns filed by almost 44% and the number filed electronically by almost 82%. In fiscal year 2007, more than 43,000 VITA volunteers prepared more than 1,200,000 tax returns. Almost 90% of the tax returns prepared by VITA volunteers in 2007 were electronically filed. The IRS attributes this tremendous success to a new focus on leveraging the benefits and resources of community based partners, including universities, faith-based, financial and non-profit organizations.

Historically, the government has supported VITA programs solely with in-kind materials. Qualifying VITA sites receive free tax preparation and e-filing software, tax law and coordinator training materials, tax law reference materials and a handy plastic bag to hold these comprehensive and hefty materials. On a very limited basis, the Service has been able to provide tax-season use of computers and printers. The Community VITA Grant program enacted in 2007 will allow it to offer funding in addition to in-kind support to approved applicants.

The recent expansion of this tax tailored opportunity for fulfillment results from persistent demands from numerous low-income taxpayer advocates across the country, including the very determined and effective National Taxpayer Advocate Nina Olson. In late 2007 Congress responded to these demands and appropriated $8,000,000 to establish a grant program for Community VITA. For more information on the New VITA Grant Program see the IRS website at www.IRS.gov/individuals/article/0,,id=184243,00.html or the VITA Grant Program Overview and Application Package, Publication 4671 at www.irs.gov/pub/irs-pdf/p4671.pdf.

The new Community VITA grants, similar to the grants for Low Income Taxpayer Clinics, are contingent upon approved applicants' provision of matching funds. As a result at least $16,000,000 (in addition to in-kind support) will be allocated to VITA programs in 2009. The grant program as established is funded for one year; the funds granted must be used in full by September 30, 2009. I am very hopeful that Congress will continue its commitment to assist low-income taxpayers with the onerous high cost of tax compliance and fund this program for subsequent years. I am also hopeful that you will add your voice to mine supporting this effective, fulfilling and life-changing program. VITA needs you and you may need VITA.

VITA = Life

VITA means "life" in Latin and Italian. "Life" is a perfect description of the breadth and depth of encounters volunteers enjoy from VITA. But like most opportunities, time is of the essence: as the New Year fast approaches, so do VITA opportunities. VITA programs kick off early so that low-income taxpayers anxious to receive their precious tax refunds will not be forced to use paid tax preparers or high interest rate refund anticipation loans. Despite these targeted VITA efforts, almost 70% of low-income taxpayers have used paid preparers and spent billions of dollars on tax preparation products and services.

VITA and Me

I have had the privilege of partnering with the Service in their efforts to assist low-income taxpayers for ten tax seasons. However, VITA, like many pro bono opportunities, takes a village. As a teacher, I have the luxury and pleasure of teaming with student VITA volunteers. While our student volunteers do not receive academic credit, they receive a priceless learning experience about life and tax compliance and the complexity of our federal and state tax systems. These long-lasting lessons open their young eyes, ears and hearts to the importance and challenges of tax law and public service.

Shortly after passing a required exam, students sit down with their clients and quickly develop and refine their client-interviewing skills. Students learn how to instill confidence and trust in their client relationships, with a diverse client base often including seniors who are several times older than the volunteers. Because tax compliance is a complicated human experience, students must ask many personal questions about each client's family structure, age and sources of income and support. They must assimilate information from many different types of client documents and promptly formulate and ask critical follow-up questions. They learn how to ask probing questions respectfully and politely to gather the necessary information in the least intrusive manner.

After gathering the information, the students prepare the client's federal and state tax returns using Service-provided tax software. Once properly processed, volunteers explain the final tax returns to their anxious clients. If a tax liability is due or a refund is not as significant as expected, students must effectively explain the reasons for the unexpected tax liability (*e.g.*, changes in the law or circumstances from one year to the next) to their frustrated and sometimes emotional clients.

Often in these discussions, volunteers learn about the financial hardships of the working poor and get to know the

people, including the children, behind the numbers on the tax forms. Volunteers hear first-hand about the challenges of daily life for millions of low-income Americans and see how our tax system delivers cash refunds to supplement poverty level incomes. Students also witness the importance of retirement benefits for many senior citizens and grasp how critical it is to save for retirement or "rainy days." These valuable lessons are learned from face-to-face and often heart-to-heart interactions.

The VITA program creates a wonderful win-win-win situation, especially in a university setting. Student volunteers learn the substantive nuances of tax law and its application in a real world setting. Students also experience the stress and pressure of meeting time sensitive deadlines and learn how to work with clients very efficiently. They witness the pressing demand for public service and embrace its priceless rewards. Volunteers leave the experience exhausted after April 15th, but enriched in many enduring ways.

Low-income taxpayers also receive a multi-faceted and valuable service. In addition to free tax preparation and e-filing providing fast refunds, university-based VITA programs provide a rare opportunity for low-income neighbors to experience a college campus. On countless occasions, I have talked with young children and their parents about the importance of education. I tell them I look forward to the day they sit in my classroom and volunteer with me to help others.

Finally, as a scholar and an advocate I am very interested in tax issues facing low-income individuals. The VITA program gives me the opportunity to witness and encounter these issues in a living, breathing and very rewarding hands on environment. Reflecting on my VITA participation, I know that I have gained much more than I have given, including lasting friendships with generous students, government outreach personnel and clients; witnessing inspirational courage, perseverance and humor in the face of extreme adversity; and in a small, but meaningful way giving back to the community by easing some of the strife in the lives of those whose circumstances are often very challenging. I feel privileged and fulfilled to have seized this opportunity.

VITA and You

If you too are looking for fulfillment, consider supporting the new grant program and becoming a VITA volunteer this tax season. The Tax Section's Pro Bono Committee has made it very easy for you to navigate the volunteer process with its user-friendly website (www.abanet.org/tax/vita/). This website includes VITA resources, including links titled "How to Volunteer," "VITA Locations," "Training" and "TaxWise" (the free tax preparation and e-filing software provided by the IRS). Last year as part of a new initiative Tax Section volunteers assisted in the training of VITA volunteers who were scheduled to prepare tax returns on military bases in the Metropolitan Washington, DC, area. At a recent Tax Section meeting, Pro Bono Committee volunteers recounted that they truly enjoyed serving in VITA and also had the opportunity to learn about some new and old tax provisions unique to members of the armed forces. But that is the topic of another article. For now cherish and seize the VITA opportunity for fulfillment. ENCORE! ■

Michigan State University Law Students Tackle Hurricane Katrina Victims' Tax Problems

By Drew M. Taylor*

For most Michigan State University (MSU) law students, it is safe to say that a well-spent spring break is not spent filing other people's tax returns. But for a group of MSU Law students and their professors, this year's spring break meant just that.

A group from MSU traveled to New Orleans to take part in an "Alternative Spring Break" Tax Outreach organized by MSU Professor Michele LaForest Halloran, director of the Tax Clinic.

"The goal of this project is to ensure that low-income residents take advantage of all available federal and state tax credits they are eligible for, so they have the monetary resources to help rebuild their lives," Professor Halloran said.

Some students, all too eager to shed their winter coats, appreciated the opportunity to enjoy the weather the

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traditional spring-break way. This at times raised the brows of some in the neighborhood they were serving. One student said, “We were wearing shorts and green short-sleeved MSU Tax Clinic T-shirts, when a man we handed a flier to said, ‘I could tell ya’ll were Yankees the way you’re walking around half-naked out here.’”

All joking aside, this group of Yankees did not have much time to enjoy the weather. “We were kept very busy,” one student said, “We assisted over 150 residents by preparing their current and past years’ tax returns.”

Sarah Cochran, a first-year law student, remarked: “It was an awesome experience for me because that is the reason I came to law school—to help people in a very practical way.”

“People were so welcoming and so appreciative of any help that they received. Some of the problems that arise with Katrina victims’ tax returns are complicated and would cost them hundreds of dollars if they went to a paid preparer,” Eloise Pinto, a second-year law student, said.

“Many of the taxpayers who have sought our advice have a variety of problems relating to casualty losses and the taxability of Road Home payments,” Professor Halloran said.

According to the program’s website, “[t]he Road Home program is designed to provide compensation to Louisiana homeowners affected by Hurricanes Katrina or Rita for the damage to their homes.”

In 2005, many Louisiana homeowners took a casualty deduction for their Hurricane Katrina losses. But the Service decided that taxpayers who later receive a Road Home grant must include in taxable income in the year the grant is received at least the amount previously claimed as a casualty loss.

An example illustrates the challenge this policy presented. In 2005, a couple suffered $90,000 in damage to their home. They claimed the amount as a casualty loss deduction on their 2005 income tax return. The couple then received a $60,000 Road Home grant in 2007, and were required to include the $60,000 as income on their 2007 tax return–a requirement that had the almost certain effect of putting them in a higher tax bracket, forcing them to pay higher taxes.

“The people living in New Orleans have already been through so much,” Professor Halloran said. “The Road Home program was supposed to be a lifeline, and for some it has been. But for others it’s been a trap.”

For months, a legislative fix was promised. But for much of the past year, it was uncertain when or if the needed legislation would ever pass.

Long-awaited relief, however, is finally on the way for Louisiana residents, ending months of worry and concern.

The recently-enacted housing bill—The Housing and Economic Recovery Act of 2008—contains legislation that will allow Road Home recipients who took a casualty loss deduction for hurricane damage in 2005 to amend their 2005 returns to decrease the deduction by the amount of their Road Home payment, so they can avoid paying taxes on the Road Home grant.

“This legislation will make a big difference to the people living in Louisiana,” Professor Halloran said. “We came down there to help people rebuild their lives after Katrina. But there is still a lot of work to be done; New Orleans in no way has fully rebounded. We look forward to coming back next year.” ■

Ninth Circuit Allows Late Challenges to Partnership Allocations by Bankrupt Partners–Does This Open the Door to TEFRA Abuse?

By Gregory Germain*

Factual Background

When the purposes of the tax laws and bankruptcy laws collide, the courts must determine which should have primacy. In *Central Valley AG Enterprises v. United States*, 531 F.3d 750 (9th Cir. 2008), *rev'g* 326 B.R. 807 (E.D. Cal. 2005), the court of appeals allowed a bankrupt partner to challenge partnership level tax allocations that had become final before bankruptcy. The debtor's subsidiary was a 98% partner in a "lease stripping" partnership called Astropar. The lease stripping partnership attempted to allocate deductions to the debtor, while allocating rental or other income to another partner. The debtor received the tax benefit of the partnership's deductions, resulting in significant tax savings, while the burden of paying tax on the partnership's income was borne by other partners. The Service determined, after an informal administrative appeal, that Astropar's tax allocations lacked economic substance. It mailed a Notice of Final Partnership Administrative Adjustment ("FPAA") to the Astropar partners on March 28, 2001.

According to the court, the Astropar partners had until August 25, 2001 to file a Tax Court petition challenging the FPAA. Because no petition was filed within the statutory time period, the FPAA became final. *See Genesis Oil & Gas, Ltd. v. Commissioner*, 93 T.C. 562, 565-66 (1989) (partners who fail to timely challenge partnership level adjustments "have lost their right to contest, in any court, [the adjustments]").

On December 3, 2001, 100 days after the FPAA became final, the debtor filed a voluntary Chapter 11 bankruptcy petition. The government timely filed a $13.1 million proof of claim for the additional taxes, interest and penalties owing by the debtor as a result of the FPAA. The debtor objected to the claim, challenging the underlying items contained in the FPAA.

Interaction of Tax and Bankruptcy Policies

The issue in *Central Valley* pitted important bankruptcy and tax policies against each other. On the tax policy side is the special system for partnership level tax adjustments contained in the Tax Equity & Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. 97-248, 96 Stat. 324, codified as Internal Revenue Code section 6221 et seq. Because partnerships are not federal income tax paying entities, partnership items of income, gain, loss, deduction, and credit are allocated to and reported on the partners' individual tax returns as if incurred by them. I.R.C. §§ 701-704. Prior to TEFRA, disputes regarding partnership items and allocations were resolved at the partner level when the Service sought to collect from the individual partners the taxes resulting from its claimed partnership adjustments. However, beginning in the late 1970s, the Tax Court's docket became stretched to the breaking point due to the proliferation of tax shelter partnership disputes. To alleviate the inefficiency of numerous separate partner level cases involving partnership items and allocations, Congress enacted TEFRA to efficiently resolve in a single forum most disputes involving partnership level tax allocations. *See Randell v. United States*, 64 F.3d 101, 103 (2d Cir. 1995). Under TEFRA, the government must give the partners (or in certain circumstances a designated "tax matters partner") notice of the FPAA, and of the time-limited right to challenge the FPAA in court. *See* I.R.C. § 6223. If a Tax Court petition is timely filed, all challenges to the FPAA are determined in a centralized partnership level proceeding. I.R.C. § 6226. If the FPAA is not timely challenged, it becomes final and incontestable by the partners. The government then makes a "computational adjustment" of each partner's tax liability, and in most circumstances can immediately assess a deficiency. *See* I.R.C. § 6230. The system eliminates the duplication and potential for inconsistency that previously occurred when dealing with separate partner level challenges to partnership items and allocations.

On the bankruptcy policy side is section 505(a) of the Bankruptcy Code, which allows the bankruptcy court to determine "the amount or legality of any tax." The courts have recognized two

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broad purposes for section 505(a). First, section 505(a) protects the debtor and "the creditor body 'from the dissipation of an estate's assets which could result if creditors were bound by a tax judgment which a debtor, due to its ailing financial condition, failed to contest.'" *In re D'Alessio*, 181 B.R. 756, 760 (Bankr. S.D.N.Y. 1995) (citations omitted). Second, section 505(a) gives the bankruptcy court the power to "'afford a forum for the ready determination of the legality or amount of tax claims, which determination, if left to other proceedings might delay conclusion of the bankruptcy estate.'" *Id*.

Section 505(a)(2)(A) contains an important exception to the general rule of bankruptcy court jurisdiction over tax determinations. The debtor's tax liability cannot be determined by the bankruptcy court if it was "contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the [bankruptcy] case." 11 U.S.C. § 505(a)(2)(A). This exception is based on the principle of *res judicata*.

The district court in *Central Valley*, ignoring the parties' arguments, granted summary judgment in favor of the Service by holding that the expiration of the statutory period to file a Tax Court petition under TEFRA constituted a "contest" and "adjudication" under the exception contained in section 505(a)(2)(A). While those who elevate tax policies over bankruptcy policies might like the result, the district court's holding is inconsistent with the clear language of the bankruptcy statute. The partner's failure to timely file a petition does not constitute a "contest" and "adjudication." Congress recognized that the exception to section 505(a) required an actual adjudication when, in 2005, it added a new exception, section 505(a)(2)(C), to eliminate the bankruptcy court's power to determine *ad valorem* property taxes that were not contested within the applicable limitations period.

The court of appeals in *Central Valley* reversed the district court and remanded the case to determine the debtor's tax liability. The court of appeals held that the debtor's failure to timely file a Tax Court petition in response to the FPAA was not a "contest" or "adjudication," rejected the Service's argument that the administrative appeals process constituted a "contest" and "adjudication" (because it was not a formal hearing with the presentation of evidence before an independent officer), and rejected the Service's argument that reviewing the adjustments contained in the FPAA was outside of the court's power under section 505(a) in a partner level bankruptcy proceeding. Only this last determination strikes me as debatable. In essence, the court of appeals found the bankruptcy policy under section 505(a) to have primacy over the tax policy under TEFRA. Congress did not say which policy should have primacy when the two are in conflict, so the courts have great leeway in resolving the policy conflict.

Predicting Future Judicial Actions

Does *Central Valley* swing open the bankruptcy courts' doors to partners who, even many years late, wish to challenge final partnership tax allocations? Will the bankruptcy exception swallow the TEFRA rule designed to centralize under a time-limited procedure partnership level tax allocations? I think the answer to these questions is "no." As the court of appeals in *Central Valley* pointed out, the Bankruptcy Code has a "built-in remedy [for abuse]: The bankruptcy court may, in its discretion, decline to exercise its authority to redetermine a debtor's tax liabilities." 531 F.3d 764. Section 505(a) is not mandatory—the statute says that the bankruptcy court "may" determine tax liabilities. Bankruptcy courts have long recognized their broad power to abstain from hearing a tax dispute under section 505(a). *See, e.g.*, *In re New Haven Projects LLC*, 225 F.3d 283, 288 (2d Cir. 2000); *In re El Tropicano, Inc.*, 128 B.R. 153, 161 (Bankr. W.D. Tex. 1991). Indeed, the bankruptcy courts have broad power to abstain from any proceeding in the interests of justice. 28 U.S.C. § 1334(c)(1). Interestingly, by using section 1334 to abstain, a bankruptcy court may be able to make its abstention determination unreviewable on appeal. *See In re Cody, Inc.*, 338 F.3d 89 (2d Cir. 2003).

The courts have struggled to determine proper grounds for exercising their abstention power under section 505(a). For example, the court in *In re AWB Assoc.*, 144 B.R. 270, 276 (Bankr. E.D. Pa. 1992), adopted a six-part test for abstention that considers some factors (the debtor's current balance sheet, the court's docket) that have little to do with Congress's purpose in adopting section 505(a). Other courts have more sensibly rejected a rigid test in favor of focusing on the relevant congressional policies. *In re New Haven Projects LLC*, 225 F.3d 283, 288 (2d Cir. 2000) (decision to abstain "must be informed by the purpose underlying the statute").

In exercising their abstention discretion, the bankruptcy courts should consider carefully the underlying purposes of TEFRA and section 505(a). Courts should exercise their discretion under section 505(a) when a debtor's financial circumstances or diverted attention during the pre-bankruptcy scramble prevented the debtor from filing a legitimate challenge. The courts should abstain when a debtor appears to be abusing the TEFRA procedure without a proper bankruptcy purpose, such as when a debtor poses a challenge for the purpose of delay, to achieve improper settlement leverage, or as part of a coordinated attempt to avoid the orderly TEFRA procedure. A debtor or trustee seeking to reopen partnership level determinations after the statutory TEFRA period has expired should be forced, on the pain of abstention, to fully justify the failure to timely petition from the TEFRA determinations. ■

Year-End Actions by Plan Administrators

By David Pratt*

This Point to Remember discusses actions and decisions that must be taken by or around the end of 2008 to ensure (1) compliance with the final regulations under section 403(b), (2) compliance with section 409A, and (3) that qualified plan documents are timely amended to comply with new laws and regulations. *See, e.g., Plan Administrators' Year-End Task Lists More Complex Than Ever, Speakers Say,* Pension & Benefits Reporter (BNA), Aug. 12, 2008, at 1852.

Section 403(b): Tax-Sheltered Annuity Arrangements

The final section 403(b) regulations, published at 72 Fed. Reg. 41128 (July 26, 2007), are generally effective for taxable years beginning after December 31, 2008, but there are several delayed effective dates and transitional rules. The regulations require specifically, for the first time, that every 403(b) program (including governmental plans and other non-ERISA 403(b) programs) be maintained pursuant to a written plan that includes all of the material terms and conditions of the plan. Treas. Reg. § 1.403(b)-3(b)(3). The new rule does not require that there be a single plan document: in many (if not most) cases, the "document" will consist of several separate items, including individual contracts with each vendor (*e.g.*, insurers and mutual fund companies). Preamble, at 72 Fed. Reg. at 41130. In that situation, one major challenge will be to ensure that the various constituent documents are internally consistent, and that responsibility for key administrative functions (*e.g.*, applying plan loan limits and deciding on eligibility for hardship distributions) is clearly assigned. Note that some church programs may receive different treatment: the rule applies to churches only if the funding vehicle is part of a retirement income account. Treas. Reg. § 1.403(b)-3(b)(3)(iii).

Governmental 403(b) programs, and most church programs, are excluded from ERISA coverage. ERISA § 4(b). Many other 403(b) programs that are funded exclusively by employee deferrals have also been excluded under a longstanding Department of Labor (DOL) regulation in situations where the employer's involvement was limited. 29 C.F.R. § 2510.3-2(f). The DOL has confirmed that the sponsor's adoption of a plan document, as required by the regulations, will not, in and of itself, make the plan subject to ERISA. "The employer could not, however, consistent with the safe harbor, have responsibility for, or make, discretionary determinations in administering the program. Examples of such discretionary determinations are authorizing plan-to-plan transfers, processing distributions, satisfying applicable qualified joint and survivor annuity requirements, and making determinations regarding hardship distributions, qualified domestic relations orders (QDROs), and eligibility for or enforcement of loans." DOL Field Assistance Bulletin 2007-2, June 24, 2007, at https://www.dol.gov/ebsa/regs/fab2007-2.html.

403(b) plan sponsors and their advisors must consider the effect of the new regulations and the changes that they will require to plan documentation and operational procedures. The Service has taken the position that the document must be in place by the *first day* of the first taxable year beginning after December 31, 2008 (Rev. Proc. 2007-71, 2007-51 I.R.B. 1184, section 6), and this requires prompt action, particularly as many plan sponsors will need to adopt new procedures and negotiate changes to their relationships with insurers and other providers.

In addition, an employer should have information sharing agreements with vendors by January 1, 2009, for post-September 24, 2007, exchanges between vendors that are, and vendors that are not, part of the plan. Treas. Reg. § 1.403(b)-10. In other cases, employers and vendors will need to exchange information, in order to satisfy the regulations, and to memorialize that the exchange has occurred. Andrea L. Ben-Yosef, *Annuities, IRS Official Debunks 'Six Myths' About Section 403(b) Plan Regulations*, Daily Tax Report (BNA), July 22, 2008.

In the Appendix to Rev. Proc. 2007-71, *supra*, the Service provided model 403(b) plan language that may be used by public schools. The model language can, to some extent, be used as a guide by other employers. Section 8 of the revenue procedure also provides transitional relief for certain contracts issued before 2009.

According to Bob Architect of the Service, the Service is working on a preapproved plan document program for 403(b) plans, which may begin as early as July 2009. A determination letter program for individually designed plans may follow. Sam Young, *IRS Says Employee Plan Oversight Continuing to Evolve*, Tax Notes, May 19, 2008, at 701.

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Section 409A: Nonqualified Deferred Compensation

Section 409A was generally effective for compensation deferred after December 31, 2004, under a nonqualified deferred compensation program. On April 17, 2007, Treasury and the Service issued final regulations. 72 Fed. Reg. 19234. *See also Updated Annotated Application of Section 409A to Nonqualified Deferred Compensation Plans*, Pension & Benefits Reporter, June 10, 2008, at 1314-77; Keith A. Mong, *A Roadmap for Complying with the Final Regulations Under Code Section 409A, Parts I and II*, Tax Management Compensation Planning Journal, Aug. 3, 2007, and Sept. 7, 2007.

The preamble to these regulations contains detailed discussions of the definition of "nonqualified deferred compensation plan" [§ 1.409A-1(a)]; the applicability of section 409A to short-term deferrals, stock options and stock appreciation rights, arrangements between partnerships and partners, foreign plans, separation pay, and reimbursement and fringe benefit plans [§ 1.409A-1(a), (b)]; the definition of a "plan" [§ 1.409A-1(c)]; the definition of "substantial risk of forfeiture" [§ 1.409A-1(d)]; the rules governing initial deferral elections [§ 1.409A-2(a)]; the time and form of payment of deferred compensation [§ 1.409A-3]; the prohibition of accelerated payments [§ 1.409A-3(j)]; subsequent changes in the time and form of payment [§ 1.409A-2(b)]; nonqualified deferred compensation plans linked to qualified plans and other arrangements [§§ 1.409A-2(a)(9), 1.409A-3(j)(5)]; and the statutory and regulatory effective dates [§ 1.409A-6].

The plan document(s) must generally be brought into compliance by December 31, 2008.

Plan sponsors must (1) identify plans that are or may be subject to the rules, which will include many plans not commonly thought of as providing deferred compensation (*e.g.*, employment agreements, bonus plans, severance agreements and consulting agreements); (2) identify whether and to what extent any of those plans can qualify for a statutory or regulatory exclusion; (3) identify the changes to each plan that are required to bring the plan into compliance; (4) discuss the required changes with affected employees and corporate officials, and obtain all necessary consents and approvals; (5) decide whether to amend or discontinue any of the plans; (6) prepare and execute the necessary documents; and (7) install procedures to ensure operational compliance. A plan sponsor should also determine whether there are any "grandfathered" benefits that accrued and became vested before January 1, 2005, and, if so, which (if any) should be protected from becoming subject to section 409A. This requires, for instance, avoiding "material modifications" after October 3, 2004.

The Service has issued a voluntary correction procedure for certain "unintentional operational failures" that violate section 409A, but the scope of the relief is quite limited. Notice 2007-100, 2007-52 I.R.B. 1243. A specific correction method is prescribed for each type of failure. In order to obtain relief, the employer must (1) correct the failure, (2) take steps to avoid its recurrence, and (3) provide information to the Service and affected participants. The Service also stated that it is considering a formal, and more extensive, correction program, similar to the Employee Plans Compliance Resolution System.

Some companies may decide to terminate plans, and pay out the benefits, during 2008, because of (1) the complexity of continuing compliance with section 409A and/or (2) a fear that income tax rates for high income individuals may increase sharply in the near future.

Qualified Plans

In Notice 2007-94, 2007-51 I.R.B. 1179, the Service issued the 2007 Cumulative List of Changes in Plan Qualification Requirements. This List is to be used primarily by plan sponsors of individually designed plans that are in Cycle C. An individually designed plan is in Cycle C if (1) it is a single employer plan where the last digit of the employer identification number of the plan sponsor is 3 or 8, or (2) it is a section 414(d) governmental plan. Determination letter applications for Cycle C plans must be filed with the Service by January 31, 2009. The deadline for applying for a determination letter (if needed) for an adoption of a pre-approved plan depends on the date on which the Service approved that plan.

The list of changes does not extend the deadline by which a plan must be amended to comply with any statutory, regulatory, or guidance changes. The general deadline for timely adoption of an interim or discretionary amendment is set out in section 5.05 of Rev. Proc. 2007-44.

Treasury issued final regulations under section 415 on April 5, 2007. 72 Fed. Reg. 16878. An amendment to conform to the regulations is generally required by the due date (including extensions) of the tax return of the employer for the year that ends with or within the first plan limitation year beginning on or after July 1, 2007. Rev. Proc. 2007-44, 2007-28 I.R.B. 54. In some cases, an earlier amendment may be required to avoid potential problems under the anti-cutback rule. I.R.C. § 411(d)(6).

Rev. Proc. 2007-44 also clarified that interim amendments for the Pension Protection Act of 2006 are not needed before the last day of the 2009 plan year. A terminating plan must be amended to reflect all changes that are effective as of the date of termination. Rev. Proc. 2007-44, section 8. ■

Tax (Sound) BITES at the Movies: A Contest

By Gail Richmond*

Given that taxes affect so many aspects of life, it is surprising that relatively few movies focus on taxes or at least include tax-related themes. How familiar are you with these movies? Test your memory by answering two questions for each excerpt: (1) the movie's name; and (2) the identity of the actors whose lines appear below. Submit your entries to Anne Dunn, *NewsQuarterly* Production Editor, at dunna@staff.abanet.org.

1. "That 27½% tax exemption on oil helped out some, didn't it?" …

   "How about an exemption for depreciation of first-class brains, Senator?"

2. "The IRS isn't gonna care as long as the right tax is paid.

   "The FBI will, and they've been looking at tax returns."

   "Only in political cases, and he's not political."

3. "Then you're going every place with me, every party, every opening night, every saloon in town, with a complete new wardrobe at my expense. Oh, it's, it's tax deductible."

4. "You have got one hell of a home office deduction here." …

   "I just mean that everything in this room from floor to ceiling, including that Courvoisier, is a tax write-off."

5. "I was a delivery boy for a pizza parlor. One day the owner got a notice from the IRS. He was an immigrant, didn't know much English, even less about withholding tax. He went bankrupt and lost his store." …

   "I don't know any tax lawyer who's an idealist. When he lost his store, I lost my job."

6. "It's a good thing we have the SPCA to look after dogs and things. I give them $5,000 a year." …

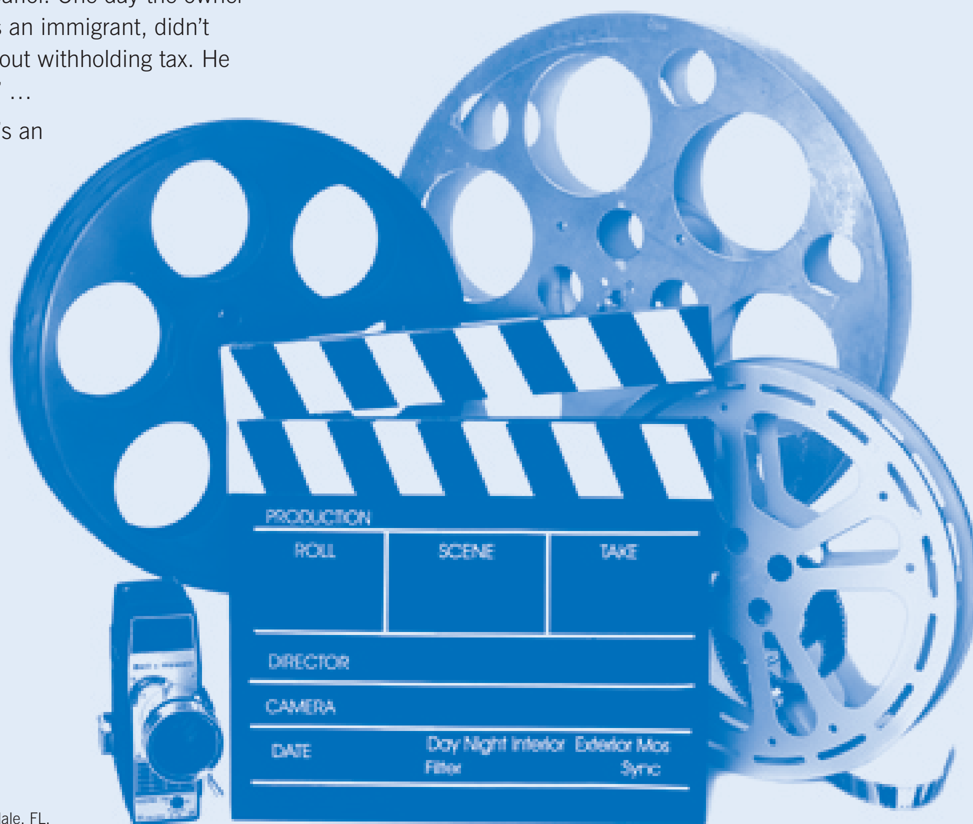
   "In cash?"

   "Well of course. How else?" …

   "… I assume that you have some stock, General Motors, General Electric, something like that."

   "Well, let's say that a small block of stock was purchased some years ago at $1,000 and today it's worth $5,000. If you were to sell that stock, you'd have to pay a capital gains tax on it." …

   "You see, why don't you give the stock to the SPCA? They'd get full value. They don't pay taxes because they're a nonprofit organization. And of course you'd get the full deduction because you're making a charitable contribution."



* Nova Southeastern University Law Center, Fort Lauderdale, FL.

Statement of Policy Favoring Tax Simplicity, Stability, and Transparency

The American Bar Association Section of Taxation (the "Section") has a long history of advocacy for simplicity, stability, and transparency in our tax laws. At the Section's urging, the House of Delegates of the American Bar Association has adopted policies supporting these principles. Significant policies approved by the House of Delegates include the following:

- 1976 and 1985 policies advocating tax simplification through adoption of a comprehensive and stable income tax base and accompanying rate reductions;
- A 1974 policy advocating inflation indexing of tax brackets, exemptions, and caps;
- A 1999 policy advocating repeal of the personal exemption and itemized deduction phaseouts, including advocacy of explicit rate adjustments as a more transparent approach to the "stealth tax" rate adjustments created by phaseouts; and
- A 2004 policy advocating repeal of the individual alternative minimum tax.

Simplicity

Simplicity in income taxation requires an over-arching bias against delivery of rewards and punishments through the tax system. The core, preferred approach should be an income tax base focused on the measurement of economic income, with due regard for ease of compliance, ease of administration, economic efficiency, and similar treatment for similar taxpayers. Following this approach for individuals whose incomes are limited to wages and a modest amount of investment income would create, for most of them, an extremely simple income tax system. For business taxpayers, measuring net income and placing it in the appropriate taxable year would still be considerably complex, but policymakers should guard against the growth in complexity that comes from adding rewards and punishments for selected activities.

It is difficult to imagine a desirable public policy goal that could not be advanced through a tax incentive. In some cases, the tax system may deliver incentives more efficiently than alternative approaches. In virtually all cases, beneficiaries of an incentive will be pleased to have the benefit, even with the accompanying complexity. However, it is not enough for the legislative or executive branches to weigh the nontax policy benefits of any *single* tax proposal against the incremental tax complexity added by the single proposal. That kind of micro-balancing inevitably leads to a federal tax system that is, in total, overly complex and unworthy of public respect.

An added benefit of a broad tax base is that it helps avoid the need for high rates. Any tax system will include flaws—many of which are necessary compromises. With high tax rates, these flaws can create significant economic and behavioral distortions. With lower rates, economic choices will tend not to be made based on tax factors, even if the system includes practical compromises that would threaten to become loopholes or unfair traps at higher rates. As the experience of the Tax Reform Act of 1986 teaches, tax rates can be significantly lowered if the tax base is broadened.

In the course of advocating tax simplification over the years, we sometimes encounter people who assume that the Section and its members must want the tax laws to be complex, as sort of a jobs program for ourselves. The truth is quite the opposite. The application of any form of tax law to today's complex, global economy will require assistance from professionals who deal with tax issues on a daily basis. Helping clients understand the tax consequences of their business plans, and helping clients avoid tax problems, is a very enjoyable occupation when the rules make sense and are fair. It is when the rules do not make sense, or are not fair, that the work becomes frustrating. Our work experiences thus reinforce our general policy views in support of a tax system that is simple, with a broad base and low rates.

A simple tax system with a broad base and low rates will reduce burdens on the vast majority of taxpayers and the Internal Revenue Service (the "Service").

In the course of advocating tax simplification over the years, we sometimes encounter people who assume that the Section and its members must want the tax laws to be complex, as sort of a jobs program for ourselves. The truth is quite the opposite.

Simplifying the tax filing process for most individuals could reduce the costs of recordkeeping and the need to hire professionals or procure software programs each year to prepare and file tax returns. It also would reduce the likelihood of errors or disputes with the Service regarding the accuracy of returns, thereby reducing burden on both taxpayers and the Service. A simple tax system with a broad base would also enable the Service to streamline filing requirements and compliance efforts for most individual taxpayers, thereby freeing up resources to provide guidance where needed and to focus its compliance efforts on areas where they can provide the greatest impact on dealing with the tax gap.

Stability

For many years, the Section and its members have viewed with alarm the pace and volume of tax law changes. Much of this activity is mandated by budget-driven sunsets and the need to consider what to do about them. Keeping the tax laws the same for five years would present some problems, but it would provide enormous simplification almost without regard to the state of the tax law at the starting point.

The frequency of proposed and actual changes to the tax laws has several significant impacts on the tax system. Taxpayers have difficulty keeping up with changes and making long-term plans that are not upset with each Congressional session. The Treasury Department and the Service have difficulty keeping pace as well. Every time a new proposal is made to change the tax laws—whether originated by the Administration or Congress—the focus of Treasury's Office of Tax Policy necessarily shifts to dealing with the legislative proposal and away from providing guidance on existing laws. When new proposals are enacted, or existing provisions are modified, the Service must immediately revise tax forms, draft new regulations, and update its computer systems to address the changes. The pace of change thus degrades the ability of government agencies to provide prompt and thoughtful guidance on laws that are already on the books.

We strongly advocate a policy bias against sunsets and other similar approaches that require instability in our tax laws. We also urge a bias against change in law—not an insurmountable bias, of course, but one that requires powerful policy merit to overcome and argues strongly against temporary provisions that necessarily will result in additional changes.

Transparency

Transparency is closely related to issues of simplicity, use of tax incentives, and stability. We use the term "transparent" to describe tax laws that apply in a straightforward and predictable way. We accordingly have opposed measures that increase or decrease tax burdens in an indirect or hidden fashion. Examples of hidden tax effects include disguising rate increases as phaseouts, imposing the alternative minimum tax rather than directly addressing tax preferences, and allowing inflation to generate tax increases when rates, brackets, and other key factors are not indexed.

A rough test of transparency is whether a taxpayer can easily estimate the tax effect of an increase in his or her income. There was a time when this was an easy exercise, especially for a taxpayer in the top tax bracket—the answer was that you applied the marginal tax rate to the additional income. The existence of the alternative minimum tax and phaseouts means that this estimation process certainly cannot be performed in one's head; and even if it can be performed with the help of tax software, there are many data inputs required.

A simple tax system with a broad base would also enable the Service to streamline filing requirements and compliance efforts for most individual taxpayers, thereby freeing up resources to provide guidance where needed and to focus its compliance efforts on areas where they can provide the greatest impact on dealing with the tax gap.

Use of the tax system as a provider of incentives is the historical reason for much of today's transparency problems. The alternative minimum tax was intended to be a brake on excessive incentive usage—"help yourself, but don't take too much." The proliferation of incentives for lower income and middle income individuals in turn led to a proliferation of income-based "targeting," under which only certain income levels are eligible for education incentives, individual retirement accounts, energy conservation incentives, and so forth. These limitations have the effect of hidden marginal rate increases and destroy transparency. They also undermine the intended incentive effects, because a potential incentive user cannot easily determine whether he or she will be eligible for the incentive. Any advertising or other promotion of the incentive cannot be broad based and

must be burdened with caveats on eligibility. As a simple example, what had previously been extensive and effective promotion of individual retirement accounts became almost invisible not long after IRAs became subject to income-based restrictions. Adding to the confusion is the fact that phaseout ranges are not consistent from incentive to incentive. We would urge policymakers to be very skeptical about targeted tax incentives. If providing the incentive to all taxpayers is not appropriate, one should question whether the policy merits of the incentive are truly strong enough to merit its inclusion in our tax system.

The so-called "PEP" and "Pease" phaseouts in sections 68 and 151(d)(3) of the Internal Revenue Code of 1986, as amended, do not even have the merit of targeting. They are acknowledged to be "stealth" tax rate increases. These provisions are scheduled to be completely repealed in 2010 (and the phaseouts themselves are being phased out from prior levels from 2006 to 2009), but under the sunset provisions applicable to this and other tax cuts enacted in 2001, they would return in 2011. We would urge that this repeal be permanent, with any revenue effects being adjusted through explicit rate adjustments or other more transparent tax policies.

A related consideration involves the enactment of multiple incentives addressing similar behavior. As detailed in the comprehensive study of tax complexity conducted by the staff of the Joint Committee on Taxation in 2001, "taxpayers are confronted with a confusing array of choices with respect to Federal tax incentives for financing education."[1] In our experience, the result can often be that taxpayers cannot select the best alternative for their particular situation, thereby minimizing the value that Congress intended to provide. The JCT Study also noted that the "Federal laws and regulations governing employer-provided retirement benefits are recognized as among the most complex sets of rules" and may be reducing the number of employees covered by employer-provided plans, thereby putting even greater pressure on Social Security and personal savings to provide for retirement.[2] These are two just examples of how a proliferation of related incentives can, by adding to taxpayer confusion, discourage the very activities that the incentives were intended to encourage.

Conclusion

The Section urges the Congress and the Administration to strive for simplicity, stability, and transparency in our tax laws. These areas can be improved through attention to the following areas:

- Stop adding to complexity by adding new rewards and punishment mechanisms to the tax law.
- Reduce the frequency of tax legislation, and avoid sunset provisions that require constant re-legislation.
- Avoid phaseouts, minimum tax rules, and similar measures that obscure the practical effect of tax law on economic activity.
- Strive for low tax rates and a broad tax base. ■

1 Joint Committee on Taxation, *Study of the Overall State of the Federal Tax System and Recommendations for Simplification, Pursuant to Section 8022(3)(B) of the Internal Revenue Code of 1986* (JCS-3-01) (April 2001) (hereinafter "JCT Study"), volume II, page 135.

2 *Id.* at volume II, page 149.

NEWS BRIEFS

SECTION EXPANDS MILITARY VITA VOLUNTEER OPPORTUNITIES

The Pro Bono Committee has agreed to continue and expand a pilot program whereby volunteers from the Tax Section will agree to assist in the training of VITA volunteers who will be preparing returns on military bases. The program for the 2008 filing season was limited to the Metropolitan Washington, DC, area. For the 2009 filing season, the program will be implemented in San Antonio, Texas, and San Diego, California, in addition to Washington, DC. Tax Section volunteers will not be asked to prepare returns themselves, but instead will be asked to train the preparers. Participation in one of these cities consists of three separate steps:

- Training volunteers will be required to pass the same certification examinations that are required of VITA tax return preparers, *i.e.*, the Basic, Intermediate, and Military modules. Each module includes a multiple-choice examination, and some of the questions are based on

a comprehensive income-tax return scenario. An 80% score is required to be certified at each level, and multiple attempts are permitted.

- IRS personnel will provide training for the Tax Section volunteers so that they will be equipped to participate in the training of the tax return preparers. A streamlined course, consisting of not more than four hours of classroom instruction, will be developed and delivered in early December in each of the three locations. This training will focus on matters of tax law unique to members of the military and their families.
- Volunteer return preparers will be trained in a classroom setting over a period of approximately four days, depending on the number of modules for which they are enrolled. A Tax Section volunteer is not expected to participate in the entire training session, but a minimum commitment of four hours is preferred.

For more information, please contact Kevin Anderson at KDAnderson@bdo.com or at 301/634-0222 or contact Catherine Engell at engellc@staff.abanet.org.

SECTION MEETING MATERIALS & RECORDINGS

As a benefit of membership, Tax Section members can view and search hundreds of papers and materials presented at the Section's Fall, Midyear, and May Meetings dating back to 1999 at: http://www.abanet.org/tax/taxiq. This service is made possible through Thomson Reuters Tax & Accounting and West, a Thomson Reuters business—a primary sponsor of the Section of Taxation.

Audiotapes, CDs, and MP3s of programs from recent Section Meetings are available from Digital Conference Providers (DCP), the Section's audio service provider. Orders can be placed through the DCP website at https://www.dcporder.com/abatx/ or by calling 630-963-8311.

2008 LAW STUDENT TAX CHALLENGE (LSTC)

Now in its eighth year as an ongoing project of the Tax Section's Young Lawyers Forum, the 2008-2009 Law Student Tax Challenge is now underway, and is open to ABA–accredited law school students and tax LL.M. candidates. An alternative to traditional moot court competitions, the Law Student Tax Challenge asks two-person teams of students to solve a cutting-edge and complex business problem that might arise in everyday tax practice.

Teams are initially evaluated on their written solutions to a tax business problem. They are required to write a memorandum to a senior partner and a letter to the client explaining the result. Based on their written work products, 6 teams from the J.D. Division and 4 teams from the LL.M. Division will receive free trips to the Section's 2009 Midyear Meeting, where they will defend their submissions before a panel of some of the country's top tax lawyers. This year, the meeting will be held January 8-10 at the Sheraton Hotel in New Orleans, LA. Winners of the LSTC receive cash awards and recognition at Section events and in Section publications.

Written submissions are due Friday, November 7, 2008. This year's problem focuses on a strategy to take advantage of tax credits available for economic development in and around New Orleans, Louisiana. To review the contest rules and this year's problem, visit www.abanet.org/tax/lstc.

IRS CHIEF COUNSEL CLE SUCCESS

This past August, the Tax Section participated in the first ever IRS Office of Chief Counsel CLE event, which brought over 1,400 Chief Counsel attorneys together in Atlanta for three days of top-notch CLE and networking opportunities. The Section provided over two dozen speakers who collaborated with speakers from the Service to present a wide range of topics. Thanks to the IRS Office of Chief Counsel and to the following Section members who volunteered their time and expertise: Alan I. Appel, New York, NY; Stanley L. Blend, San Antonio, TX; Samuel L. Braunstein, Fairfield, CT; Joseph M. Calianno, Washington, DC; David J. Canale, Washington, DC; Derek L. Fletcher, Dallas, TX; Michael R. Ford, Oklahoma City, OK; Leslie F. Grodd, Hartford, CT; Chuck Hurley, Washington, DC; Gerald A. Kafka, Washington, DC; Barbara T. Kaplan, New York, NY; Julian Kim, Washington, DC; Ellen MacNeil, Washington, DC; Heather Maloy, Washington, DC; Robert E. McKenzie, Chicago, IL; Emily A. Parker, Dallas, TX; William E. Prescott, Avon, OH; Celia Roady, Washington, DC; Stanley C. Ruchelman, New York, NY; Priscilla E. Ryan, Chicago, IL; Stephen E. Shay, Boston, MA; Frances D. Sheehy, Cocunut Creek, FL; Bryan C. Skarlatos, New York, NY; Eric B. Sloan, New York, NY; Philip R. West, Washington, DC; Joel Williamson, Chicago, IL. ■

CLE Calendar | www.abanet.org/tax/calendar

DATE	PROGRAM	CONTACT INFORMATION
November 12-13, 2008	19TH ANNUAL PHILADELPHIA TAX CONFERENCE Loews Philadelphia Hotel – Philadelphia, PA	Tax Section www.abanet.org/tax | 202.662.8670
November 13-14, 2008	ALI-ABA COURSE OF STUDY: TAX EXEMPT CHARITABLE ORGANIZATIONS Hilton Embassy Row Hotel – Washington, DC	ALI-ABA www.ali-aba.org | 800.CLE.NEWS
December 3, 2008	"LAST WEDNESDAY" CLE TELECONFERENCE	Tax Section www.abanet.org/tax | 202.662.8670
December 4-5, 2008	25TH ANNUAL NATIONAL INSTITUTE ON CRIMINAL TAX FRAUD Hotel Nikko – San Francisco, CA	ABA-CLE www.abanet.org/cle | 800.285.2221
December 8, 2008	LOW INCOME TAXPAYERS REPRESENTATION WORKSHOP Doubletree Hotel Crystal City at National Airport – Arlington, VA	Tax Section www.abanet.org/tax | 202.662.8670
January 3-7, 2009	26TH ANNUAL NATIONAL CLE CONFERENCE TAX LAW PROGRAM Marriott Vail Mountain Resort & Spa – Vail, CO	Tax Section www.abanet.org/tax | 202.662.8670
January 28, 2009	"LAST WEDNESDAY" CLE TELECONFERENCE Organized by the Civil & Criminal Tax Penalties Committee	Tax Section www.abanet.org/tax | 202.662.8670
March 2-6, 2009	ABA/IPT ADVANCED TAX SEMINARS: INCOME TAX, SALES/USE TAX, PROPERTY TAX The Ritz-Carlton – New Orleans, LA	Tax Section www.abanet.org/tax | 202.662.8670
March 11, 2009	TAX CLE ON THE ROAD: TAX ISSUES IN DRAFTING LLC AGREEMENTS Radisson Milwaukee West Hotel – Milwaukee, WI	Tax Section www.abanet.org/tax | 202.662.8670
April 2-3, 2009	9TH ANNUAL TAX PLANNING STRATEGIES – U.S. AND EUROPE CONFERENCE Amsterdam, The Netherlands	Tax Section www.abanet.org/tax | 202.662.8670
April 2-3, 2009	ALI-ABA COURSE OF STUDY: CORPORATE TAXATION Renaissance M Street Hotel – Washington, DC	ALI-ABA www.ali-aba.org | 800.CLE.NEWS
April 23-24, 2009	EMPLOYEE BENEFITS IN MERGERS & ACQUISITIONS – 23RD ANNUAL NATIONAL INSTITUTE The New York Helmsley Hotel – New York, NY	JCEB www.abanet.org/jceb | 202.662.8691
May 28-29, 2009	ALI-ABA COURSE OF STUDY: HOW TO HANDLE A TAX CONTROVERSY AT THE IRS AND IN COURT: FROM ADMINISTRATIVE AUDIT THROUGH LITIGATION Omni La Mansión del Rio – San Antonio, TX	ALI-ABA www.ali-aba.org | 800.CLE.NEWS
June 9, 2009	TAX CLE ON THE ROAD: BUSINESS PLANNING AND TAX ISSUES FOR TAX AND NON-TAX LAWYERS Anchorage, AK	Tax Section www.abanet.org/tax | 202.662.8670
June 10-12, 2009	ERISA BASICS – 23RD ANNUAL NATIONAL INSTITUTE The Millennium Knickerbocker Hotel – Chicago, IL	JCEB www.abanet.org/jceb | 202.662.8676
June 17-19, 2009	2ND ANNUAL U.S. – LATIN AMERICAN TAX PLANNING STRATEGIES CONFERENCE Mandarin Oriental – Miami, FL	Tax Section www.abanet.org/tax | 202.662.8670

Boxscore

Since July 2008, 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.

SUBMISSIONS AND COMMENTS ON GOVERNMENT REGULATIONS, ADMINISTRATIVE RULINGS, ABA POLICY and BLANKET AUTHORITIES*

TO	DATE	CODE SECTION	TITLE	COMMITTEE	CONTACT
Internal Revenue Service	8/26/08	6694, 6695	Comments on Proposed Regulations Under Section 6694 and 6695	Civil and Criminal Tax Penalties	John Colvin, Bryan C. Skarlatos
Internal Revenue Service	8/8/08	2032	Comments on Proposed Regulations Under Section 2032 Relating to the Alternate Valuation Date Election	Estate and Gift Taxes	Joseph Barry Schimmel
Internal Revenue Service	7/28/08	6503(j)	Comments Concerning Proposed Regulations Under Section 6503(j) Relating to the Suspension of the Limitations Period for Corporations Facing Designated or Related Summonses	Administrative Practice	Sheri A. Dillon
Internal Revenue Service	7/16/08	2642(g)(1)	Comments Concerning Proposed Regulations Relating to Extensions of the Time Under Section 2642(g)(1)	Estate and Gift Taxes (Tax), Generation Skipping Transfers (RPTE)	Lloyd Leva Plaine
Internal Revenue Service	7/16/08	6033	Comments Concerning the Instructions for the Redesigned Form 990 for Tax-Exempt Organizations	Exempt Organizations (Tax), Tax and Accounting Interest Group (Health Law)	Michael A. Clark, Robert W. Friz
Internal Revenue Service	7/15/08		Comments on Notice 2007-88: Proposed Procedural Changes for Obtaining the Commissioner's Consent to Change a Method of Accounting	Tax Accounting	Carol Conjura
Internal Revenue Service	7/7/08	6011, 6111	Supplemental Comments on Proposed Regulations Under Sections 6011 and 6111 of the Internal Revenue Code Relating to Patented Transactions (REG-129916-07)	Task Force on Patenting of Tax Strategies	Dennis B. Drapkin, Ellen P. Aprill

* The technical comments listed in this index 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.

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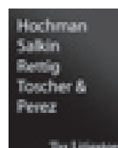

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