



Stanley L. Blend*

The first quarter of 2008 has been a very productive one for the Section.

Thomson Sponsorship

We were able to secure a significant sponsorship with Thomson West and Thomson Tax and Accounting (TTA) as a primary sponsor of the Section of Taxation. You may be familiar with Thomson West products, including Westlaw; Thomson Tax and Accounting offers such brands as Checkpoint and RIA. We are very pleased that this sponsorship will provide enhanced benefits for Section members, and look forward to providing those benefits as we move forward.

Patenting of Tax Strategies

Dennis Drapkin testified on behalf of the Section at an IRS hearing held in February, addressing proposed regulations issued by the Internal Revenue Service that would make the patenting of tax strategies a listed transaction. In addition to the testimony, the Section submitted comments endorsing the proposed regulations. The comments were prepared by the Section's Task Force on Patenting Tax Strategies, co-chaired by Ellen Aprill and Dennis Drapkin, both of whom assumed primary responsibility in developing the comments. Thank you!

Law Student Tax Challenge

At the Midyear Meeting at Lake Las Vegas, the Young Lawyers Forum successfully organized and administered the 7th Annual Law Student Tax Challenge. We had a record number of participating students and schools this year, in both the J.D. and the LL.M. divisions. Information about this year's problem, as well as the winning schools and students, may be found on the LSTC web site:

<http://www.abanet.org/tax/lstc/>.

Congratulations to the winners, and to the young lawyers who organized the event, Pete Lowy and Kathryn Morrison Sneade.

Pro Bono Award

Also in Lake Las Vegas, the Section was pleased to present its Janet Spragens Pro Bono award to Joseph Barry Schimmel. Joe has been active in the Legal Services of Greater Miami, Inc., where he provides legal assistance and also training. He has also been very active with the Section's Low Income Taxpayer Committee and currently serves as Chair of that Committee. A more detailed presentation of Joe's involvement may be found in this issue.

Military VITA Program

In January, the Section completed its initial training with the Internal Revenue Service on the new Military VITA program. Our Chair Elect, Bill Wilkins, led a delegation of Section members who received training from the IRS, and then assisted in training volunteers at Andrews Air Force base who assist military personnel in the preparation of federal income tax returns. The Section was pleased to participate in this program, and hopes to expand it during the next filing cycle.

Law School Outreach

The Section has also continued to present "Careers in Tax Law" programs in law schools. The panels feature various tax professionals who share information about their careers and network with students at a reception. On February 7, the Section hosted a panel at George Washington University Law School, with representatives from private practice, the IRS and DOJ; approximately 40 students

attended. Additional panels were held in March: one at Boston University School of Law on March 4, and one at Georgetown University Law School's LL.M. program on March 26. We hope to expand this program in the coming years, to include many more schools and localities.

At the beginning of the year, the Section introduced its new job locator program, which is available on the Internet. We immediately received a good number of job listings, and the number continues to grow. This service is available to all Section members, including the over 3,700 law student members who are just entering the practice. We encourage any of our members that have positions available to consider listing them on our site:

<http://www.abanet.org/tax/lawstudents/jobs/home.html>.

Public Outreach

In furthering its media activity, the Section issued two additional audio news releases during the tax season. One was to make the public aware of "too good to be true" tax avoidance schemes; the other discussed the Internal Revenue Service's top 12 tax scams. Both audio news releases had significant audience penetration.

The Section also produced a video news release highlighting an individual taxpayer who was the victim of a tax avoidance scheme. After winning the lottery, the taxpayer was approached with an "investment opportunity," that was in reality a scam. The video news release warns taxpayers about such scams, that seem too good to be true.

While the Section continues to be active in submitting comments to various government agencies, our level of activity

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* Oppenheimer, Blend, Harrison & Tate, Inc., San Antonio, TX.

Swallows Holding Update

By Kathryn Morrison Sneade*

Recently, the Third Circuit reversed the Tax Court's 2006 decision in *Swallows Holding v. Commissioner*, and upheld the validity of Treasury Regulations promulgated under section 882 that require a foreign corporation to file timely returns to receive the benefit of deductions otherwise allowed. See *Swallows Holding Ltd. v. Commissioner*, 515 F.3d 162 (3d Cir. Feb. 15, 2008), *rev'g* 126 T.C. 96 (2006). The Service victory was not unexpected—the dissenting judges in *Swallows Holding* offered a more satisfying explanation of the law than the majority did, as I noted in a previous Point to Remember on this topic. See Kathryn J. Morrison, *Are Timely Filed Returns a Prerequisite for Foreign Corporation Expense Deductions*, 25 ABA SECTION OF TAXATION NEWSQUARTERLY 13 (Summer 2006).

The Tax Court, relying mainly on the analysis set forth by the Supreme Court in *National Muffler Dealers Association v. United States*, 440 U.S. 472 (1979), held that the regulations under section 882 were invalid to the extent that they imposed a timing requirement. The majority of the Tax Court, which took the position that a plain reading of section 882 showed that the statute included no timely filing requirement, noted that the result would be the same under a *Chevron* analysis. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court applied a two-prong

analysis to determine the validity of agency regulations: (1) if the statutory language is clear and unambiguous, the agency must give effect to the unambiguously expressed intent of Congress; and (2) if the statutory language is ambiguous, the agency may “fill the gap” with a reasonable regulation.

The dissenting Tax Court judges disagreed with the majority's conclusion that the statute unambiguously precludes the imposition of a timing requirement, and took the position that the regulations reasonably filled a gap in the statute and therefore were valid under *Chevron*. Unlike the majority's decision, the

dissent's decision was consistent with cases decided by the Board of Tax Appeals and the Fourth Circuit, which imposed limitations on taxpayers' ability to claim deductions based on delinquent returns. See, e.g., *Taylor Securities v. Commissioner*, 40 B.T.A. 696 (1939). In 2006, I predicted that circuit courts reviewing the regulations might choose to adopt this approach. The Third Circuit, in reversing the Tax Court's decision, has done just that, holding that the regulations at issue reasonably interpret an ambiguous statute and are therefore valid. ■

*Miller & Chevalier Chartered, Washington, DC.

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has slowed. I encourage all Committee Chairs to review the Internal Revenue Service and Treasury business plan to identify projects worthy of a submission from the Section. It is most important that the Section continue regular and ongoing submissions to the Internal Revenue Service and the Treasury.

Distinguished Service Award

Congratulations to M. Carr Ferguson, Jr., who will receive the Section's Distinguished Service Award at the May 2008 meeting. Carr Ferguson's distinguished

career began in 1954 when, after graduating from Cornell Law School, he served for five years in the Tax Division of the Department of Justice as a trial attorney and special assistant to the Attorney General. After his term at Justice, Carr earned an LL.M. from New York University School of Law, and, for the next 17 years, was a professor of law at Iowa, Stanford, and New York University law schools. From 1968-1977, he was of counsel for Wachtell, Lipton, Rosen & Katz, and from 1977-1981, he went back to Justice to serve as the Assistant Attorney General in charge of the Tax Division. Carr currently serves as senior counsel in Davis, Polk

& Wardwell's Tax Department, where his practice includes tax controversies, and federal and international taxation of corporations and individuals. In addition to his extensive trial experience, Carr has argued tax appeals in most of the Federal Courts of Appeal and the U.S. Supreme Court. Carr has been active in the Tax Section for many years and served as Section Chair in 1993-94. It will be an honor and pleasure for me to present the Section's 2008 Distinguished Service Award to Carr this May. ■