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NEWSQUARTERLY

Antibribery Laws and the Tax Treatment of a CFC's Payments to Foreign Government Officials and Employees

By Kathryn Morrison Sneade*

In the last several years, multinational companies have become the subject of increased scrutiny for violations of the Foreign Corrupt Practices Act (FCPA) in the U.S. and similar antibribery and anticorruption laws in foreign countries. This scrutiny places additional pressure on U.S. companies with operations abroad to ensure that they understand the U.S. taxation of payments that may become the focus of investigation. Companies failing to do so may be at increased risk for the potential application of civil and/or criminal penalties for tax evasion. This article focuses, in particular, on the tax treatment of illegal payments made to foreign government officials or employees by controlled foreign corporations.

Overview

Section 162(c) disallows deductions for certain payments that would otherwise be deductible under section 162(a) as ordinary and necessary business expenses. Among the payments covered by section 162(c) are those made to an official or employee of a foreign government that are unlawful under the FCPA, which bans many, but not all, payments made to a foreign government official or employee for the purpose of influencing that person's acts or decisions. For instance, certain payments for "facilitating" routine governmental action are allowed. For further discussion of the deductibility of such payments, see Charles Gnaedinger, *Facilitating Payments Are Deductible in U.S.*, 2008 TNT 27-3 (Feb. 8, 2008).

For improper payments made through a foreign subsidiary, the U.S. tax consequences will depend on the ownership form used. The U.S. tax consequences that result when a controlled foreign corporation (CFC) makes an illegal payment to a foreign government official or employee are discussed below. For further discussion regarding the U.S. tax consequences of improper payments made by less than 50 percent owned foreign subsidiaries, by certain wholly owned foreign subsidiaries, and by domestic international sales corporations (DISCs), see Selva Ozelli, *Is This Bribe Deductible? Tax Implications of the U.S. Foreign Corrupt Practices Act*, 48 Tax Notes Int'l 1131 (Dec. 17, 2007).

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EDITORIAL POLICY

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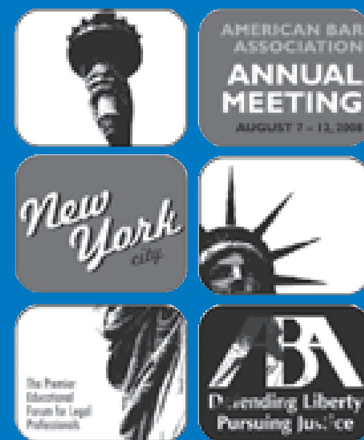
2008 ABA ANNUAL MEETING

NEW YORK, NEW YORK AUGUST 7-12

The Tax Section is sponsoring the following CLE programs at the ABA Annual Meeting in New York. These programs will be held in the Presidential CLE Centre located in the Hilton New York and Sheraton New York hotels. For information regarding the Annual Meeting, go to **www.abanet.org/annual/2008.**

ADVANCE REGISTRATION AND HOUSING DEADLINE: July 8



TAX CLE HIGHLIGHTS AT THE ANNUAL MEETING

FRIDAY, AUGUST 8

8:30am – 10:00am
CONFLICTS AND ETHICAL ISSUES IN PLANNING WITH FAMILY BUSINESSES AND INVESTMENT ENTITIES
Description: This program will examine the ethical issues in representing families in connection with wealth transfer strategies involving business and investment entities. The panelists will discuss hypothetical fact patterns drawn from various planning ideas.
Speakers: Professor Scott A. Schumacher, University of Washington School of Law, Seattle, WA; James D. Spratt, Jr., King & Spaulding LLP, Atlanta, GA; and Bruce H. Gordon, Shumaker Loop & Kendrick LLP, Tampa, FL.
Lead Sponsor: Closely Held Businesses Committee
Cosponsor: Section of Real Property, Trust and Estate Law

2:00pm – 3:30pm
CARRIED AWAY: A DISCUSSION OF THE CURRENT TAX TREATMENT OF “CARRIED” INTERESTS AND THE PROSPECTS FOR CHANGE
Description: This panel will discuss a wide array of issues regarding “carried” and other compensatory interests, including their tax treatment under current law and administrative guidance, proposed regulations, and proposed legislation.
Lead Sponsor: Partnerships & LLCs Committee

SATURDAY, AUGUST 9

8:30am – 10:00am
INTERNATIONAL COMPENSATION AND BENEFITS ISSUES
Description: Many companies conduct business in multiple countries, and it is increasingly common for U.S. employees to spend significant time overseas and for foreign employees to spend significant time in the United States. This raises a host of compensation and benefits issues. Designed for the general practitioner, this panel will cover issues relating to tax-qualified plans and tax treaties, global stock and incentive plans, international aspects of section 409A, international M&A transactions, and individual issues, such as expat allowances, section 911, visa, and Social Security issues.
Lead Sponsor: Employee Benefits Committee

2:00pm – 3:30pm
PRESERVING PRIVILEGE AND AVOIDING PENALTIES IN TRANSACTIONAL TAX ADVICE
Description: This program will cover various topics relating to privilege and penalties for transactional and other tax lawyers. The panel will include a general discussion of attorney-client and attorney work product privilege in tax matters, a more specific discussion of “hot” privilege topics, including the effect of FIN 48, focusing on audit matters with respect to tax positions and contingencies, the *Textron* decision, and other recent cases. The panel also will discuss the new material advisor regulations, the new preparer penalty under IRC § 6694, and selected Circular 230 issues.
Lead Sponsor: Civil & Criminal Tax Penalties Committee
Cosponsor: Section of Business Law Committees on Audit Response, Business and Corporate Litigation, and Tax

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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Ernest J. Brown

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

This is another of our occasional "interviews" with departed tax greats, conducted through the medium of their writings. Ernie Brown died in December 2001 after retiring from the Department of Justice Tax Division at age 94. Prior to his 30 years at the Justice Department, he had retired from teaching tax at the Harvard Law School.

Q Do you believe that the Code should be literally interpreted by the courts?

A "[T]hose who are troubled about the judicial handling of tax statutes should not rally around the standard of an unfailing literalness, certainly not until the skill, thoughtfulness and imagination of our statutory draftsmen approach nearer to perfection." Ernest J. Brown, *The Growing "Common Law" of Taxation*, 34 S. Cal. L. Rev. 235, 240 (1961).

Q So, should judges be given free range?

A No. "We can ask of a judge … that he devote energy and effort to acquire knowledge and understanding of the operation and structure even of complex statutes, …; that where the pattern of the statute appears obscure or confused, he follow the practice of a good navigator by taking sight not on one but on every available fixed point of statutory reference in order the more certainly to narrow the margin of error in ascertaining his position and course with reference to the problem before him." *Id*. at 240.

Q Can you identify any one source of the most troubling judicial action in the tax area?

A "[I]t is Supreme Court opinions, as opposed to Supreme Court decisions, which constitute the major source of our difficulty, which so often give unexpected—and some would say unwarranted—shape to the tax law…. An almost inevitable decision may be reached by reasoning plausible to the uninitiate, but questionable to the well-informed. When this occurs, we know the sequels which follow. It requires more hardihood than we normally find, or can expect to find, for a lower court judge—himself perhaps not confident of expertness in a difficult field—to dismiss as ill-considered or ill-advised a line of reasoning or a generalized statement appearing within the covers of the *U.S. Reports*. The staff of the Internal Revenue Service has not yet reached such a state of detached and dispassionate judgment as to exercise an ascetic selectivity among Supreme Court opinions which may aid it in holding positions already taken or open enlarged spheres for its activities." *Id*. at 241.

Q What is to be done?

A "It is clear that the Supreme Court relies heavily on the briefs of the Department of Justice in tax cases, and it is likely to continue to do so. …. If the Court is going to rely upon the Department of Justice, it seems to me that it is the responsibility of the department to act more as an administrator and less as an advocate. I see no evidence that the department accepts that responsibility.… [I]ts tax briefs appear to me to be those of an advocate bent on winning the particular case." *Id*. at 250.

Q Is a solution to make the Code more specific?

A No. "[T]he Internal Revenue Code of 1954 [contains many] intricate formulations [which] will defeat its own ends. The result will inevitably be either the slavish literalism which the British courts have adopted or, what is more likely for American judges, decisions which simply brush aside elaborate formulations in favor of what the individual judge, rightly or wrongly, senses to be the operative force of the statute. I

If the Court is going to rely upon the Department of Justice, it seems to me that it is the responsibility of the department to act more as an administrator and less as an advocate.

Perhaps the greatest difficulty in cases under the Internal Revenue Code, the most frequent source of the 'invisible boomerangs' to which Mr. Justice Jackson referred, lies not so much in the Code as in the tendency of judges to look for some single, and preferably simple, overriding formula or provision with which to dispose of a problem.

should imagine that this judicial leap of faith would quite often be in the wrong direction simply because the very intricacy of the statute obscures both direction and limits designed to be imposed. I believe a statute, even a tax statute, can set forth the shape of its commands with relative clarity, and indicate the elements to be taken into account in applying them." *Id*. at 251.

Q What do you consider to be the hallmarks of a good judge of tax cases?

A [As in the case of Judge Magruder] there must be "the unfailing respect accorded to counsel, litigants, and lower-court judges. Consciously or unconsciously, the address of the opinions [of Judge Magruder] appears often to be to losing counsel or to the judge who is being reversed, never to rebuke but always to explain and, if possible, to convince." Ernest J. Brown, *Viginti Annorum Lucubrationes: The Tax Decisions of Judge Calvert Magruder*, 72 Harv. L. Rev. 1225, 1227 (1959).

Q What do you consider to be an unfortunate tendency in tax judging?

A "Perhaps the greatest difficulty in cases under the Internal Revenue Code, the most frequent source of the 'invisible boomerangs' to which Mr. Justice Jackson referred, lies not so much in the Code as in the tendency of judges to look for some single, and preferably simple, overriding formula or provision with which to dispose of a problem. This may be a judicial gloss. .... [In contrast, properly] the primary and satisfactory referents are legislative, in the history, development, or operation of the statute; only when they fail will he call upon his own assumptions." *Id*. at 1229-30.

Q When should a judge apply to other cases a Supreme Court decision that appears to broaden the reach of a general Code provision over specific Code provisions?

A "[D]ifficulties arise with transactions which undoubtedly are effective for many purposes, whether the criteria of that effectiveness be considered 'formal' or not. It is to the Commissioner's efforts to disregard whatever that effectiveness may be that [Judge Magruder] has shown marked reserve. When the Supreme Court, contrary to what appeared to be the structure of the statute as well as the specific provisions of section 4(a) of the Revenue Act of 1934, held in *Helvering v. Clifford* that the general definition of gross income in section 22(a) might override the allocations of tax liability as between grantor, trustee and beneficiary of a trust contained in Supplement E, Judge Magruder was reluctant to see this as a recasting of the statute instead of a decision which 'rests on its particular facts, as the Court was careful to say ....' ... [Magruder cautioned that] 'In this process of case-law development, courts are apt by insensible degrees to be led to conclusions incompatible with the statutory framework. The corrective of this ... is to get back to the provisions of the Internal Revenue Code itself, ...'" *Id*. at 1231-32.

Q Professor Ginsburg delights in recounting that the Commissioner's stick can turn into a green snake that will bite him on the hindparts. Do you agree, and should this problem inform the judicial process in tax cases?

A "[T]hough a given tax case is inevitably a contest between the claim of the public revenue and the claim of the taxpayer, the point at issue need not be. Many, though not all, tax decisions cut both ways. The considerations advanced on behalf of the revenues today will be as strenuously advanced by a taxpayer tomorrow. This is perhaps a comfort, though I should doubt that this concept of the judicial function would permit Judge Magruder to reach different decisions if it were not so. He has discounted, rather than enlarged upon, motivations. Or perhaps I should say that he assumes the existence of motivations which normally lead to tax disputes and tax litigation, and dispassionately regards them as discreditable neither to the Commissioner nor to the taxpayer." *Id*. at 1246-47. ■

Ethics for the Tax Lawyer: Test Your Knowledge of the ABA's Model Rules of Professional Responsibility

By Pat Derdenger,* Andrew F. Halaby†, and Janette M. Lohman‡

The American Bar Association's ("ABA") Model Rules of Professional Responsibility (the "Model Rules") have been adopted, with some modification, in the vast majority of states and, therefore, provide useful baseline guidance to all attorneys, including tax attorneys working for both private clients (inside or outside) and the government. Although some states may have rules or codes of conduct that differ from the ABA's Model Rules, the focus of this presentation is based primarily on the ABA's Model Rules, as interpreted by the ABA's Formal Opinions that have been issued over the past twenty years and that are in full force and effect.

The following twenty-nine (29) questions are provided to you as "homework" necessary to prepare for the Tax Section's Annual Tax Link Live member benefit teleconference (of the same name), to be given on Tuesday, June 3, 2008, from 1:00 p.m. until 2:30 p.m., Eastern Time. The authors will discuss these questions and the answers to them at that time, in an effort for all participants to better understand how the Model Rules can be applied to all types of tax practitioners. Audience participation will be widely encouraged. For details on registering and obtaining CLE ethics credit, please see the Tax Link Live announcement immediately following this article.

1. In settlement negotiations with the Internal Revenue Service's ("IRS") attorney over the fair market value of an interest in a family partnership, the taxpayer's lawyer states that the bottom line is a twenty-five percent (25%) concession by the taxpayer, but the taxpayer told her attorney that she would accept a fifty-fifty (50-50) split as the real bottom line. Is such a misrepresentation okay under the Model Rules?

   A. Yes, as long as the settlement is for twenty-five percent (25%).
   B. Yes, it is only negotiating "puffing."
   C. Yes, the taxpayer's lawyer can say anything (even if it is false) in settlement negotiations.
   D. No, the taxpayer's lawyer must be totally honest and disclose that the bottom line is a fifty-fifty (50-50) split.

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2. The taxpayer's lawyer receives a cover letter from the IRS lawyer enclosing a copy of a document filed with IRS Appeals but the envelope also enclosed a memo from the IRS lawyer to his clients, the IRS agent and her manager, with an analysis of the weak points of the IRS's case (marked "attorney client privilege"). What should the taxpayer's lawyer do?

   A. Shred it.
   B. Notify the sender.
   C. Use it to beef up the taxpayer's response to the document.
   D. Celebrate his client's good fortune.

3. The taxpayer's lawyer e-mails his client a memo concluding that the client is not entitled to an IRC section 41 research and development tax credit for certain activities. The memo was marked "attorney-client privilege." May such a document be sent to the client by e-mail, or must it be encrypted?

   A. Unencrypted e-mails are fine.
   B. Such a sensitive document, if sent by e-mail, must be encrypted.
   C. If sent by e-mail, the sender must get a read receipt.
   D. Attorneys cannot send any client confidential information by e-mail.

4. The taxpayer's lawyer wants to call the IRS National Office to talk about settling an ongoing income tax case of first impression. The IRS is represented by a Department of Justice ("DOJ") tax division trial attorney. May the taxpayer's lawyer make such a call?

   A. Not even at gun point.
   B. Yes, but the attorney must give the DOJ attorney a head's up first and only if the sole purpose of the contact is to address a policy issue.
   C. Always.
   D. Only if the taxpayer's lawyer is personal friends with the DOJ Attorney.

5. You represent an individual and are counsel of record in a pending Tax Court case. Your client has just called to let you know that the IRS's lawyer in the case called her directly to ask for copies of back tax returns. Can the IRS lawyer do this?

A. Yes, if the contact was only to ask for returns.
B. Yes, as long as the IRS's lawyer identified himself as the attorney for the IRS.
C. No, no contact may be made unless the consent of taxpayer's lawyer was first obtained.
D. The IRS is omnipotent and can do anything it wants.

6. A taxpayer's lawyer filed a claim for a refund of federal income tax for his client. The IRS requested a meeting to discuss the merits of the claim. The taxpayer's lawyer knows that the claim is barred by the statute of limitations. At the meeting, it appears that the IRS does not know that the statute of limitations has run and appears ready to grant the refund. Must the taxpayer's lawyer disclose to the IRS that the claim is barred?

A. No.
B. No, but only if the taxpayer has a colorable defense to the assertion of the statute of limitations by the IRS.
C. Yes.
D. This is one lucky taxpayer!

7. A taxpayer's lawyer finds out that the taxpayer lied in answering interrogatories from the Government in litigation involving a personal income tax refund pending in federal district court. What must the taxpayer's lawyer do?

A. Notify the Court immediately, but do not tell the client.
B. Nothing. The lawyer is precluded by her duty of confidentiality to the client under Rule 1.6.
C. First, try to persuade the client to rectify the situation.
D. Withdraw from representation immediately.

8. A new client asks his lawyer if she will represent the client in defending a one million dollar ($1,000,000.00) income tax assessment made against the client on a contingency fee basis. The lawyer and the client agree in writing that the contingency fee will be thirty percent (30%) of the savings. The lawyer takes the matter on and after a few meetings with the IRS is successful in getting a settlement for a five hundred thousand dollar ($500,000.00) payment by the client. The lawyer now submits a bill for one hundred fifty thousand dollars ($500,000 x 30%). Is such a "reverse" contingent fee agreement okay?

A. No, reverse contingency fees are not permitted.
B. Yes, if the fee is reasonable and the client is fully informed.
C. Tax lawyers always earn every penny of their fee.
D. The contingency amount should have been fifty percent (50%).

9. You submitted a settlement offer to the DOJ Tax Division attorney representing the Government in your corporate income tax refund case more than three months ago and have not heard back. You think that the DOJ attorney has not sent your settlement offer on to his client, the IRS, for review. You are good friends with the IRS employee who has the settlement review function for your case and you pick up the phone and call her to inquire if she has received your offer and what she thinks about it. Is this okay?

A. Yes.
B. No way!
C. This is okay only if you reasonably believe that the offer has not been communicated to the IRS.
D. You are friends with the DOJ attorney and he does not mind your calling his client with questions about the cases you work on together.

10. Your corporate client has asked you as its tax lawyer to advise it as to whether it may take a particular reporting position on its consolidated corporate income tax return. You may provide the advice provided that:

A. The position is not frivolous.
B. It is more likely than not that the position will be sustained on the merits.
C. There is some realistic possibility of success if the matter is litigated.
D. If it saves taxes, it's a good position, regardless of support for it.

11. You want to hire a particular tax lawyer for just one specific tax issue. The tax lawyer asks you to sign an advance waiver for future conflicts of interest, as long as the conflicts do not involve the tax issue. Is this ethical?

A. No, and it is highly unreasonable for him to ask you for this.
B. Yes, as long as your consent is informed.
C. No, because each future conflict must be separately analyzed.
D. It does not matter, because you would sign anything as long as you get him to represent your company.

12. You discover that an IRS audit supervisor (who is a licensed attorney but is not practicing as an attorney) is taking kickbacks from taxpayers for dropping cases at the audit level. Do you have to report her misconduct to the Bar?

A. Heck no, particularly not if you can get your client a really good deal from her.
B. Yes.
C. No, the Model Rules do not force lawyers to rat out licensed lawyers unless they are actually practicing law when they commit the misconduct.
D. The Model Rules leave it up to the individual lawyer to decide what to do in all situations of other lawyers' misconduct.

13. You represent a corporate client in a huge sales tax case involving a new tax loophole. The IRS's lawyer tells you that she will agree to a very favorable settlement for your client, provided that you agree never to bring a similar case involving the same tax loophole against the IRS representing someone else. Is this agreement unethical?

A. No, and if your client accepts these terms, you must abide by them.
B. Yes. It is unethical to force a lawyer to forego representation of future clients as part of a settlement agreement.
C. No, because the new technique is something your client owns and it is not your place to object.
D. No, because otherwise you would make a fortune trafficking in tax loopholes, which is patently unethical.

14. Your company is looking to hire a new SALT lawyer. One candidate is currently with the Department of Revenue but has not been actively involved in your company's huge state income tax dispute. If you hire him, can he assist in this case?

A. Yes, an exception to the general conflicts rule is carved out for attorneys who leave the government and go in house, rather than to a law firm.
B. No, because attorneys are always precluded from ever suing their former employers for any reason.
C. No, because attorneys are precluded for a reasonable period of time from suing their former employers for any reason.
D. Yes, as long as he has no personal involvement and/or knowledge about the case, it is okay for him to help you fight his former employer.

15. An attorney has a particular expertise in local sales tax law and routinely represents local governments against private taxpayers, including current cases pending against your client. Your client wants to hire him to defend a local sales tax lawsuit against a municipality that he is not currently representing. May the attorney accept this engagement?

A. Yes. Because the engagement would not involve a direct conflict, the attorney may accept the engagement.
B. No. The rules require attorneys to represent either governments or private clients, but never both.
C. Yes, because attorneys always have the right to take both sides of a case representing different taxpayers.
D. That depends upon whether his representation of your client would compromise his representation of his existing local government clients or vice versa.

16. The Honorable I. M. Sovain, who had been a federal Tax Court judge for many years, recently retired and has gone into private practice. His business cards now read "Judge I. M. Sovain (Ret.) – Attorney at Law." Is this ethical conduct on the part of the judge?

A. No. Once he is no longer a judge, he many no longer use the title nor encourage others to call him by either "Judge" or "Honorable."
B. Yes. One of the privileges of holding a judicial position is that you are entitled forever to be known as a member of the judiciary.
C. Yes. The title is honorific and no one will hire him thinking that he will have special influence just because he served as a federal Tax Court judge for the past thirty years.
D. Maybe. He may not use his former title professionally, but he can use it socially, for instance, in making restaurant reservations in order to get a better table and seated more quickly.

17. Court X in State A issues unpublished tax opinions. Court X's rules prohibit specifically any reference to any tax opinion that has been designated as "not for publication." Are you permitted to cite Court X's tax opinions in your case against State B?

A. Yes. State A's rules are not binding on proceedings taking place in State B.
B. No. All of the other states will honor State A's procedural rules.
C. Yes. The designation "not for publication" is meaningless, just like most states' rules against citing private letter rulings as precedent for other cases.
D. No. It would only be ethical to cite an unpublished opinion from a jurisdiction that has no specific ban on citing such unpublished opinions.

18. You want to hire outside counsel on a specific tax matter, but you want this lawyer to agree that if she accepts this engagement, neither she nor her law firm will ever accept a case against your company in the future. Is this ethical?

A. No. Such an agreement would impermissibly limit that attorney's right to practice law.
B. Yes. It is perfectly ethical to require outside counsel to be loyal to your company even after her representation of your company has ended, and even if the adverse future matter has nothing to do with her original representation of your company.
C. Yes, but only if you limit the restriction to the specific lawyer and not include her entire law firm.
D. No. After her representation of your company has ended, neither she nor her law firm owes you any duty of loyalty on any future matters.

19. You engage outside counsel to represent your company on a tax matter. You and the outside counsel are both single and start dating secretly. Is there anything wrong with this?

- **A.** No. You and your outside counsel are both on the same side and this enhanced relationship might improve your ability to work closely together to represent your mutual client.
- **B.** No. You are both single, both consenting adults and the company should keep its nose out of your business.
- **C.** Yes. You and your lover are both the same sex and same sex marriages are not condoned in your state.
- **D.** Yes. This relationship could exploit the outside counsel's fiduciary relationship with the company and may impair the outside counsel's ability to represent the company.

20. You have been in-house tax counsel for X corporation for ten years, but then get an exciting offer to become a partner in a large law firm. The new firm wants to accept a case against your former employer, but you have no official knowledge about the particular matter other than gossip that was discussed at the company's last Christmas party. Can your new firm accept this case against your former employer?

- **A.** Yes. Your firm can accept the case as long as your former company gives informed consent to your adverse representation.
- **B.** Yes. Your firm can accept the case, as long as the firm erects an ethical wall to prevent your involvement in that case.
- **C.** No. Both you and your new firm are disqualified against accepting this case against your former employer.
- **D.** No. You are forever precluded from ever taking a matter adverse to your former employer.

21. In ongoing settlement discussions, the Department of Revenue's lawyer attempts to reach you to convey the Department's latest offer to your client, but finds you persistently unavailable. May the lawyer contact your in-house counterpart directly?

- **A.** No, unless the reason for your absence is a good one.
- **B.** Yes, as long as your in-house counterpart is a lawyer.
- **C.** No, because your client has every right to use you to play "hardball" in the negotiations.
- **D.** Yes, because the Department has the right to expect the taxpayer's outside counsel always to be available.

22. An IRS attorney e-mails to you a draft settlement agreement in MS Word. Using the "Final Showing Markup" mode, you can see IRS's most recent round of internal redlines to the document. May you review them?

- **A.** Yes, because IRS's lawyer should have known better.
- **B.** No, because IRS's lawyer may not have known better.
- **C.** Yes, as long as you promptly tell IRS's lawyer that you have them.
- **D.** No, unless you tell IRS's lawyer and give her a reasonable chance to take corrective measures.

23. You and some law school classmates are considering going into practice together on your own. May you use the "limited liability partnership" form of doing business?

- **A.** No, because a lawyer may not limit personal liability for his own malpractice.
- **B.** Yes, as long as you each remain personally liable for your own malpractice.
- **C.** No, unless you properly disclose this as your form of business in your communications.
- **D.** Yes, because limiting your liability is a smart thing to do whenever possible.

24. While representing a taxpayer in negotiations with the state Department of Revenue, you become aware of an opportunity to "switch teams" and join the state's Attorney General's team, litigating tax disputes for the Department of Revenue. When must you inform your client that you are exploring this opportunity?

- **A.** When you first learn the salary the Attorney General's position will be paying.
- **B.** When you first discuss the prospect with the Attorney General's office.
- **C.** When you first seriously consider taking the Attorney General's position.
- **D.** When you tell your current employer you are leaving.

25. You represent Taxpayer X in proceedings adverse to State A's Department of Revenue. State B's Department of Revenue becomes aware of your expertise and seeks to engage you as special counsel in a similar matter adverse to Taxpayer Y. May you accept the representation?

- **A.** No, if there is a significant risk that the representation of one client will be materially limited by your responsibilities to the other.
- **B.** Yes, as long as you reasonably believe you may fully represent each client's interests and each client consents.
- **C.** No, because as a practical matter, you can't ever adequately represent both the government and taxpayers.
- **D.** Yes, because your ultimate responsibility is to get as much business as possible.

26. You represent Taxpayer X in proceedings adverse to State A's Department of Revenue. State B's Department of Revenue becomes aware of your expertise and seeks to engage you as special counsel in a similar matter adverse to Taxpayer Y, a corporate affiliate of Taxpayer X. You have correctly concluded there is no significant risk that the representation of Taxpayer X will be materially limited by your responsibilities to State B's Department of Revenue, and vice versa, but Taxpayer Y disagrees with your assessment. May you ethically accept the new representation nonetheless?

- **A.** No, because of Taxpayer Y's position.
- **B.** Yes, as long as you reasonably believe you may fully represent each client's interests.
- **C.** No, because Taxpayer X is your client.
- **D.** Yes, because Taxpayer Y is **not** your client.

27. A new client asks his lawyer if she will represent the client in defending a one million dollar ($1,000,000.00) income tax assessment made against the client on a contingency fee basis. The lawyer and the client agree in writing that the fee will be thirty percent (30%) of the savings or the lawyer's normal hourly rate of five hundred dollars ($500.00) multiplied by her hours worked, whichever is greater. After spending four hundred (400) hours on the matter, the lawyer succeeds in getting a settlement for a five hundred thousand dollars ($500,000.00) payment by the client. The lawyer now submits a bill for one hundred eighty thousand dollars ($180,000.00) – less than the amount earned on an hourly basis. Did she do so ethically?

- **A.** Yes, because that was the parties' agreement.
- **B.** No, because the lawyer had no downside risk.
- **C.** Yes, unless five hundred dollars ($500.00) is an unreasonably high hourly rate to charge.
- **D.** No, unless the lawyer fully explains the basis of the one hundred eighty thousand dollar ($180,000.00) charge to the client.

28. You represent a trade association of taxpayers, and are approached by State X to serve as special counsel in litigating a tax matter against one of them. May you ethically accept that representation?

- **A.** No, because by representing the trade association you represent each of the taxpayers individually.
- **B.** Yes, as long as you conclude you may adequately represent each affected client and you obtain any necessary consents.
- **C.** No, because the taxpayers' sense of your loyalty to them would be severely undermined.
- **D.** Yes, unless you would be revealing the trade association's confidences in the course of representing State X.

29. You represent a corporation in a federal income tax dispute with the IRS. Unbeknownst to you, one of the corporation's officers has improperly reported the corporation's finances and has discussed those activities with one of your partners in seeking individual representation. Assuming your partner did not accept the officer's representation, may you use the confidential information shared with your partner in representing the corporation?

- **A.** No, unless the officer unilaterally shared the information with your partner.
- **B.** Yes, because of the imputed knowledge principle.
- **C.** No, because the officer expected that he was sharing the information in confidence.
- **D.** Yes, because no attorney-client relationship was formed.

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Tax Treatment of CFC Payments

Any illegal bribe, kickback, or other payment to a foreign government official or employee made directly by or on behalf of a CFC constitutes subpart F income if the payment would be illegal under the FCPA if the CFC were a U.S. person. Section 952(a)(4); Treas. Reg. § 1.952-1(a)(4). No exceptions apply to this category of subpart F income, so the entire amount of the currency paid to, or the full fair market value of the property or services given to, the foreign government official or employee will be included in subpart F income. *Id*. Therefore, a U.S. shareholder of the CFC (*i.e.*, a U.S. person who owns 10 percent or more of the CFC) generally must include his pro rata share of the payment in his gross income for the taxable year. Section 951(a)(1)(A)(i). The U.S. shareholder will escape current taxation on the full amount of the CFC's illegal payment only if section 952(c), which provides that a CFC's subpart F income for a taxable year cannot exceed its current earnings and profits, applies.

To further discourage illegal payments of this kind, section 964(a) denies a reduction in earnings and profits for the illegal payment. Section 964(a) was enacted at the same time as Section 952(a)(4), in 1976. Before that time, illegal payments by CFCs reduced earnings and profits, even though they were not deductible. *See* Rev. Rul. 77-442, 1977-2 C.B. 264. A reduction in earnings and profits equal to the amount of the illegal payment would be consistent with the general approach to computing earnings and profits for dividend purposes, which is based upon reasonable accounting concepts that take into account the economic realities of corporate transactions, and illegal payments made by domestic corporations and foreign corporations are generally considered to reduce earnings and profits. *Id*. Therefore, section 964(a) seems to be a purely punitive measure, with multiple negative effects for the U.S. shareholder. For instance, by preventing the reduction of earnings and profits, section 964(a) makes it less likely that section 952(c) will apply to limit subpart F income in the year of the illegal payment, so the illegal payment is more likely to be included in the current income of the U.S. shareholder. In addition, the denial of a reduction in earnings will reduce the amount of foreign tax credits that could otherwise be claimed by a U.S. shareholder with respect to subsequent actual or deemed distributions from the CFC or, potentially, from other foreign corporations. Sections 902(a), 960(a) (the denial of a reduction in earnings results in an increase in the denominator of the fraction set forth in section 902(a), and therefore a reduction in the size of the credit).

On the other hand, in general, income that is deemed distributed to a U.S. corporation as a subpart F inclusion may carry with it an indirect foreign tax credit for foreign taxes deemed paid by the U.S. corporation under sections 960(a) and 902(a). Although the payment of an illegal bribe by a CFC is the only situation in which an expense item, rather than income, triggers subpart F treatment, there is no indication in the Code or Treasury Regulations that the subpart F income in this category may not give rise to a deemed paid credit. This contrasts with the treatment of income attributable to a CFC's participation in an international boycott, which is included in subpart F income under section 954(a)(3), but for which foreign tax credits are specifically denied under section 908.

Allowance of a foreign tax credit with respect to subpart F income resulting from a CFC's illegal payments seems inconsistent with the punitive intent of sections 952(a)(4) and 964(a), and it is unclear whether it was the intent to allow such a credit. Nonetheless, it appears that an illegal payment by a CFC may result in the acceleration of the U.S. shareholder's foreign tax credits by giving rise to a deemed paid credit upon the deemed distribution of the subpart F income. Presumably, the illegal payment, although it is actually an expense item, would be considered general basket income for purposes of the section 904 limitation on foreign tax credits. Section 904(d)(3)(B); Treas. Reg. § 1.904-5(c)(1). In addition, to the extent the foreign country denies a deduction to the CFC for its illegal payment (an action supported by the OECD in its Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, adopted on April 11, 1996, and accepted by full participants of the 1997 OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions), the foreign tax credit will be increased because the foreign taxes will increase.

Conclusion

Given the increasing focus on activities that may fall within the category of bribery or corruption, both in the U.S. and abroad, U.S. multinationals should be aware of the U.S. tax issues that may arise with respect to such activities. In particular, U.S. corporations should take steps to determine whether any payment made to a foreign government official or employee by or on behalf of a CFC is an illegal payment that should be included in subpart F income, and they may wish to seek guidance from the Service regarding the appropriate path to follow with respect to any foreign tax credits that may arise from that subpart F inclusion. In addition, this would be an opportune time for the Service and the Treasury Department to provide general guidance on such issues under current law and consider whether any change in law with respect to these issues would be recommended. ■

Uniformity Clause Limitations on State Taxes

By Steve R. Johnson*

To be valid, state and local taxes must satisfy the requirements of both the federal Constitution and the state's own constitution. State Uniformity Clauses are among the most important of such constitutional provisions. The great majority of state constitutions contain Uniformity Clauses although their contents vary in important ways.

Uniformity Clauses often have been the basis of successful attacks against particular features of state taxes. Below, we first consider some examples of invalidation of state and local tax measures on uniformity grounds. Then, we describe an approach to understanding Uniformity Clauses built around five key questions pinpointing variation in uniformity law among the states.

Examples

Uniformity Clause challenges have succeeded in hundreds of cases around the country. Here are three examples. First, Arizona used to apply different valuation methods to the property of in-state telecommunications companies on the one hand and out-of-state telecommunications companies on the other hand. This practice was invalidated under Arizona's Uniformity Clause. *Citizens Telecomm. Co. v. Arizona Dep't of Revenue*, 75 P.3d 123 (Ariz. Ct. App. 2003).

Second, in New Hampshire, residential homeowners were granted a property tax exemption but only if the remaining value of their properties exceeded a stated dollar amount after taking the exemption into account. This arrangement was invalidated under the state's Uniformity Clause because it disproportionately benefited wealthy homeowners. *Felder v. City of Portsmouth*, 324 A.2d 708 (N.H. 1974).

Third, a Nebraska statute exempted certain agricultural properties from taxation despite the fact that no such exemption appeared in the state's constitution. Since the exemption prevented the imposition of taxes "uniformly and proportionately upon all tangible property," it was invalidated as contrary to the constitution's Uniformity Clause. *MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equalization & Assessment*, 471 N.W.2d 734, 747 (Neb. 1991) (quoting Neb. Const. art. VIII, § 1).

Key Questions

The reach and rigor of state Uniformity Clause provisions vary greatly from state to state. The attorney representing a taxpayer cannot uncritically rely on precedents from different jurisdictions. The attorney must carefully analyze how a particular Uniformity Clause is worded and how it has been interpreted by that state's courts.

Here are five questions to probe in determining the extent to which a given state's Uniformity Clause may be helpful to the taxpayer: (1) To which types of taxes does the Uniformity Clause apply? (2) Has the Uniformity Clause been interpreted as essentially congruent to federal and/or state Equal Protection Clauses, or has it been interpreted as being broader than them? (3) Does the Uniformity Clause permit classification of property, and, if so, to what extent? (4) Does the tradition of interpretation of the Uniformity Clause in the state emphasize form or substance? and (5) What degree of deviation from absolute equality have the state courts permitted? These questions are amplified below.

Type of Tax Covered

All Uniformity Clauses cover real property taxes while many reach personal property taxes and some apply also to other types of taxes or to all taxes levied in the state. *See, e.g.*, Me. Const. art IX, § 8; W. Va. Const. art. X, § 1; Kan. Const. art. 11, § 1; Nev. Const. art. 10, § 1.

The ambit of the Uniformity Clause at issue may lead to issues of categorization. For example, a frequently litigated issue is whether the given exaction is a fee (not covered by uniformity requirements) or a covered tax. *Compare City of Fairmont v. Pitrolo Pontiac-Cadillac Co.*, 308 S.E.2d 527 (W. Va. 1983) (holding that a so-called fire service fee was really an ad valorem property tax subject to the Uniformity Clause), *cert denied*, 466 U.S. 958 (1984), *with Wetzel County Solid Waste Auth. v. West Va. Div. of Natural Res.*, 462 S.E.2d 349 (W. Va. 1995) (holding that a solid waste assessment was a regulatory fee, not a tax). Similarly, there are fairly extensive lines of cases as to the categorizations of property tax versus excise tax, *e.g., City of Huntington Beach v. Superior Court*, 144 Cal. Rptr. 236 (Cal. Ct. App. 1978), and property tax versus income tax, *e.g., Featherstone v. Norman*, 153 S.E. 58 (Ga. 1930).

Same as or Broader than Equal Protection Clauses

The Equal Protection Clause of the Fourteenth Amendment to the federal Constitution applies to state and local taxes, and similar state constitutional Equal Protection Clauses are common. Except when suspect classifications, infringement on fundamental interests, or gender classifications trigger strict or intermediate scrutiny, equal protection challenges to state or local taxes are analyzed under the highly deferential "rational basis" standard of review. *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1 (1992).

In some states, Uniformity Clause protections are essentially congruent

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with Equal Protection Clause safeguards. *E.g., Matter of McCannel*, 301 N.W.2d 910, 916 n.4 (Minn. 1980). In these states, a Uniformity Clause challenge would be largely duplicative of an Equal Protection Clause challenge.

However, in other states, the Uniformity Clause is construed as imposing "more stringent limitations than the equal protection clause on the legislature's authority to classify the subjects and objects of taxation ...." *Sun Life Assurance Co. of Can. v. Manna*, 858 N.E.2d 503, 512 (Ill. App. Ct. 2006). In these states, the Uniformity Clause can be the difference between winning and losing. *E.g., State ex rel. LaFollette v. Torphy*, 270 N.W.2d 187, 192-93 (Wis. 1978) (rejecting an equal protection challenge, but upholding a uniformity challenge to a state tax credit).

Degree of Permitted Classification

Some state constitutions declare, with few or no exceptions, that "taxation shall be equal and uniform throughout the State." WASH. CONST. art. VII, § 1. In many other states, however, classification is permitted to a greater or lesser degree. Sometimes, permitted classifications are set out in the constitution itself; other times the legislature is given classification authority. Legislative classifications typically are accorded considerable deference and are upheld as long as some rational basis for them can be discerned or even imagined. *See, e.g., Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979) (setting out elements of constitutionally permissible classifications).

For example, a Minnesota statute separated residential rental properties of three or fewer units into one class for property tax purposes and residential rental properties of four or more units into a different class. The two classes were taxed at different rates. The Minnesota Supreme Court rejected a uniformity challenge to this scheme. It found a rational basis for the classification because of the "differences in size, management, ownership, markets, and appraisal approaches" between the classes. *Hegenes v. State*, 328 N.W.2d 719, 721 (Minn. 1983).

The federal Railroad Revitalization and Regulatory Reform Act of 1976 ("the Act"), Pub. L. No. 94-210, 90 Stat. 31 (codified as amended at 49 U.S.C. § 11501), limits state and local taxation of railroads and airlines. One line of classification cases involves state responses to the Act. Some states have honored the federal requirements as to railroads and airlines but have taxed other types of transportation and related property less favorably. Nebraska's Uniformity Clause does not permit such classification, so the Nebraska courts invalidated the differential. *Northern Natural Gas Co. v. State Bd. of Equalization & Assessment*, 443 N.W.2d 249 (Neb. 1989), *cert denied*, 493 U.S. 1078 (1990), *overruled on other grounds, MAPCO Ammonia Pipeline, Inc. v. State Bd. of Equalization*, 471 N.W.2d 734 (Neb. 1991). In states permitting classification, however, such disparate treatment has been sustained, with the force of the Act providing the rational basis for the disparity. *E.g., Williams Natural Gas Co. v. State Bd. of Equalization*, 891 P.2d 1219 (Okla. 1994) (citing cases from Alabama, Kansas, and Tennessee), *cert. denied sub nom. ANR Pipeline Co. v. Oklahoma Bd. of Equalization*, 516 U.S. 816 (1995).

Substance Versus Form

The familiar rule that substance controls over form usually applies in uniformity litigation. However, interpretational differences exist among the states in this regard. One area in which such differences have emerged involves credits. For example, in South Carolina, proceeds of a local option sales tax funded a property tax credit in some areas of the state. The Uniformity Clause was held not to apply because the feature was viewed as the distribution of state revenue through spending rather than the raising of state revenue through taxation. *Westvaco Corp. v. South Carolina Dep't of Revenue*, 467 S.E.2d 739, 741 (S.C. 1995).

In contrast, a Wisconsin statute provided tax credits to certain property owners. The credits were paid from general state revenues. The state defended the arrangement on the same ground that succeeded in the South Carolina case above. The Wisconsin Supreme Court, however, rejected the argument and invalidated the provision. The court observed: "It is the effect of the statute, not the form, which determines whether it is a tax statute subject to the uniformity clause. . . . The fact that a rebate credit is paid to certain property owners and not to others leads to the indisputable conclusion that taxpayers owning equally valuable property will ultimately be paying disproportionate amounts of real estate taxes. This is not uniformity." *Torphy*, 270 N.W.2d at 192-93.

Permitted Degree of Deviation

"[P]erfect uniformity is not possible since property values fluctuate continuously, and far more frequently than taxing authorities could conceivably perform county-wide reassessments." *Hromisin v. Board of Assessment Appeals*, 719 A.2d 815, 818 (Pa. Commw. Ct. 1998), *appeal denied*, 737 A.2d 1227 (Pa. 1999).

Courts in the various states differ in the degree to which they view disparities as inevitable and, therefore, constitutionally acceptable. In general, temporary discrepancies in treatment are permitted when the state or locality has a program of revaluation which is carried out "in an orderly manner and pursuant to a regular plan, and . . . not done in an arbitrary, capricious or intentionally discriminatory manner ...." *Sator v. State Dep't of Revenue*, 572 P.2d 1094, 1097 (Wash. 1977). *See also Recanzone v. Nevada Tax Comm'n*, 550 P.2d 401 (Nev. 1976). ■

Proposed S Corporation Regulations Close to Final

By Michael L. Griffin*

The American Jobs Creation Act of 2004 (the "2004 Act") and the Gulf Opportunity Zone Act of 2005 (the "2005 Act") made several changes to sections 1361, 1362, and 1366. To implement and interpret these provisions of the 2004 Act and 2005 Act, the Service published proposed S corporation regulations on September 28, 2007. 72 Fed. Reg. 55132. According to a Service representative associated with the proposed regulations (and whom this author contacted), the Service received no written comments on these proposed regulations. Because there were no requests to speak at the public hearing scheduled for January 16, 2008, the Service cancelled the public hearing. 73 Fed. Reg. 1131 (2008).

Given this sequence of events, it seems unlikely that any significant changes will be made before publication in final form. And given that these regulations are listed on the Service's business plan for the period ending June 30, 2008, we might soon expect to see these proposed regulations published in final form. Therefore, this is an appropriate time to discuss what the proposed regulations provide.

Members of a Family

The 2004 Act and the 2005 Act both addressed issues related to "members of a family." The 2004 Act amended section 1361(c) to provide for counting a "common ancestor" and lineal descendants as one shareholder for purposes of the new 100-shareholder limit under section 1361(b)(1)(A). The 2005 Act made aggregation automatic by eliminating a requirement of the 2004 Act to make an election to be treated as "members of a family." In making this change, the 2005 Act provided an "applicable date" on which treatment as a "common ancestor" would be determined. Identification as a "common ancestor" depends upon being no more than six generations removed from the youngest generation of shareholders who would be included as "members of a family." I.R.C. § 1361(c)(1)(B)(ii). The statute does not require the "common ancestor" to have owned stock or even be alive on the "applicable date." No chain of ownership is required.

Because of the six-generation test, on the "applicable date" treatment as "members of a family" is limited to the identified "common ancestor" and the six lineal generations descending from that common ancestor (as well as spouses or former spouses of the common ancestor and lineal descendents, adopted children, and certain foster children). I.R.C. §§ 1361(c)(1)(B)(ii) and 1361(c)(1)(C). Under section 1361(c)(1)(B)(iii), the "applicable date" is the latest of (I) the date the S election is made, (II) the earliest date an individual who is a "member of a family" holds stock in the S corporation, or (III) October 22, 2004.

Proposed section 1.1361-1(e) incorporates the "members of a family" provisions presented in section 1361(c)(1). Of critical importance to S corporations with large numbers of family shareholders, the proposed regulation makes clear that the six-generation test applies only at the "applicable date" and does not later limit treatment as "members of a family" for future generations: "The test is only applied as of the applicable date, and lineal descendents (and spouses) more than six generations removed from the common ancestor will be treated as members of the family even if they acquire stock in the corporation after that date." Prop. Reg. § 1.1361-1(e)(3)(i).

Proposed section 1.1361-1(e) further provides that "members of a family" treatment applies to each person who individually would qualify as a "member of a family" and who also is either a "potential current beneficiary" under an electing small business trust ("ESBT"), the income beneficiary of a qualified subchapter S trust ("QSST"), a beneficiary of a voting trust, a deemed owner of a grantor trust, or an owner of a disregarded entity. Additionally, an estate of a deceased "member of a family" will be considered a "member of a family" during the period in which the estate holds stock in the S corporation.

Further, trusts described in section 1361(c)(2)(A)(ii) and (iii) will be considered "members of a family" during the period in which such trusts hold stock in the S corporation.

It is also worth noting that proposed section 1.1361-1(e)(3)(i) states: "Although a person may be a member of more than one family under this paragraph (e)(3), each family (not all of whose members are also members of the other family) will be treated as one shareholder."

Proposed section 1.1361-1(h)(1)(vii), regarding individual retirement account owners of stock in S corporation bank and depository institution holding companies, incorporates the requirements of section 1361(c)(2)(A)(vi).

ESBTS and Powers of Appointment

The 2004 Act amended section 1361(e)(2) to state that unexercised powers of appointment will be disregarded in determining an ESBT's potential current beneficiaries for any period.

In its current form, section 1.1361-1(m)(4)(vi) conflicts with section

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1361(e)(2) as amended. Under current section 1.1361-1(m)(4)(vi), each potential recipient under a power of appointment is treated as a "potential current beneficiary." This means that a general power of appointment, or even a broad special power of appointment, can result in a number of "potential current beneficiaries" exceeding the 100-shareholder limit.

Under proposed section 1.1361-1(m)(4)(vi)(A), a person is not treated as a "potential current beneficiary" under a power of appointment unless the power is exercised in favor of that person during the period under consideration. Under proposed section 1.1361-1(m)(4)(vi)(B), a class of charitable organizations permitted to own S corporation stock under section 1361(c)(6) is counted as a single "potential current beneficiary" under a power of distribution other than a power of appointment. However, when specific charities are named in the instrument as beneficiaries of a power of distribution other than a power of appointment, each such charity is counted as a "potential current beneficiary." Examples illustrating application of these rules are found at proposed section 1.1361-1(m)(8).

The 2004 Act also extended, to a full year from what had formerly been 60 days, the period during which an ESBT may dispose of S corporation stock after an ineligible shareholder becomes a "potential current beneficiary." I.R.C. § 1361(e)(2). Proposed section 1.1361-1(m)(4)(iii) incorporates this statutory amendment.

Stock Transfers Between Spouses or Incident to Divorce

The 2004 Act amended section 1366(d) to allow transfer of losses or deductions limited by the basis limitation of section 1366(d)(1) to be treated as incurred by the corporation in the succeeding tax year with regard to a transferee spouse, including a divorcing spouse to whom section 1041(a) applies. Proposed section 1.1366-2(a)(5) incorporates this statutory amendment and provides detailed examples.

At Risk and Passive Activity Loss Limitations

The 2004 Act amended section 1361(d)(1) to treat S corporation stock disposed of by a QSST as, instead, disposed of by the QSST beneficiary for purposes of sections 465 and 469. Proposed section 1.1361-1(j)(8) incorporates this statutory amendment.

QSSS Relief for Inadvertent Invalid Elections or Terminations

The 2004 Act amended section 1362(f) to provide that a qualified subchapter S subsidiary ("QSSS") is eligible for relief from inadvertent invalid elections or terminations on the same basis as such relief is available to S corporations. Proposed section 1.1362-4 incorporates this statutory amendment.

Increasing Number of Permitted Shareholders

The 2004 Act increased the number of permitted shareholders of an S corporation from 75 to 100. Proposed section 1.1361-1(b)(1)(i) would eliminate reference to 75 as the maximum number of permitted shareholders and would replace it with a simple reference to the statute imposing the limit. This is a wise move in light of this limit's history of periodic increases.

Effective Date

The proposed regulations would be effective on the date of publication in the Federal Register of the Treasury Decision adopting the regulations as final.

Conclusion

While several matters addressed in these proposed regulations merely incorporate statutory amendments made by the 2004 Act and the 2005 Act, the proposed regulations go further. Important additions include clarification on application of the six-generation rule, entity ownership, and membership in multiple families, all under the "members of a family" provision. Of importance to practitioners working with ESBTs and providing estate planning services, the proposed regulations give specific guidance on treatment of powers of appointment and offer detailed examples.

Because the Service received no comments regarding the proposed regulations, practitioners should expect to see these regulations finalized soon. ■

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. ■

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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. ■

Apology Payments

Section 7803 requires the National Taxpayer Advocate to prepare an Annual Report to Congress that includes, among other things, legislative recommendations to resolve problems encountered by taxpayers. In her 2007 Annual Report to Congress, the National Taxpayer Advocate, Nina E. Olson, recommended the creation of a formal Taxpayer Bill of Rights that provides a clear statement of taxpayer rights and of taxpayer obligations.

Tax laws and procedures are becoming more complex and the Service is becoming more compartmentalized. According to the National Taxpayer Advocate, this combination may cause harm to taxpayers by increasing the number of mistakes made in the administration of the tax laws and by increasing the time needed to resolve issues raised by taxpayers. The Taxpayer Advocate believes that a fair and just tax system should acknowledge those mistakes and delays, and, in situations that cause excessive expense or undue burden on the taxpayer, the taxpayer could be compensated.

The Taxpayer Advocate proposes that one of the rights granted taxpayers under the Taxpayer Bill of Rights would be to receive a *de minimis* "apology payment." To implement this taxpayer right, Congress would grant the National Taxpayer Advocate the discretionary, nondelegable authority to compensate taxpayers, in an amount not in excess of $1,000, in cases in which the action or inaction of the Service caused excessive expense or undue burden to the taxpayer. A portion of the Annual Report discussing these "apology payments" is reproduced below.

NewsQuarterly encourages readers to submit responses or comments, which may be published in a subsequent issue.—*Christopher M. Pietruszkiewicz, J.Y. Sanders Professor of Law, LSU Law Center, Baton Rouge, LA*

Apology Payments

[A]s federal tax laws and procedures become more complex and as the IRS becomes more compartmentalized, the likelihood increases that the IRS will make mistakes and cause delays in taxpayer issue resolution, and that such mistakes and delays could harm taxpayers. A fair and just tax system should acknowledge those mistakes and delays, and where such situations cause excessive expense or undue burden on the taxpayer, make a *de minimis* "apology" payment. [The report includes an example of hardship caused by numerous errors and delays and concludes that] simply returning the erroneously levied wages will not make the taxpayer whole. In such a situation, the National Taxpayer Advocate believes an apology payment would be appropriate.

Recommendation

The National Taxpayer Advocate recommends that Congress:

- Amend Internal Revenue Code (IRC) § 7811 to grant the National Taxpayer Advocate the discretionary, nondelegable authority to compensate taxpayers where the action or inaction of the IRS has caused excessive expense or undue burden to the taxpayer, and the taxpayer meets the [IRC § 7811(a)(2)] definition of significant hardship. Discretionary payments should range from a minimum of $100 up to a maximum of $1,000, indexed for inflation.
- Unless otherwise provided by specific appropriation, authorize the Secretary of the Treasury to allocate no more than $1 million per year to "apology" payments.
- Amend IRC § 7803(c)(2)(B)(ii) to require the National Taxpayer Advocate to include in her Annual Report to Congress a section summarizing the awards made under this amendment.
- Amend the Code to exclude these "apology" payments from gross income.

Present Law

There is no present authority for making "apology" payments to taxpayers under U.S. law. However, both the United Kingdom and Australia provide for apology payments to taxpayers.

In the United Kingdom, Her Majesty's Revenue & Customs (HMRC) maintains a specific policy on "Complaints and putting things right." HMRC, Complaints and putting things right, at **http://www.hmrc.gov.uk/factsheets/complaints-factsheet.pdf**. The policy permits HMRC to refund reasonable costs caused by mistakes or unreasonable delay and further states that in certain cases of distress or worry, a payment may be made to apologize to the taxpayer.

The Australian government permits claims against the Tax Office to be assessed for legal liability and/or detriment caused by defective administration. Australian Tax Office, Applying for compensation, at **http://www.ato.gov.au/corporate/content.asp?doc=/content/48904.htm**. If those circumstances do not cover the claim, the taxpayer can seek an act of grace payment from the Department of Finance and Administration, which provides the taxpayer the opportunity to seek compensation for being unintentionally disadvantaged by the actions of the government.

Taxpayers in the U.S. have several means through the judicial system by which to recover certain costs. These remedies are limited and only available under specific circumstances. These remedies include:

- *IRC § 7430–Awarding of costs and certain fees*. Taxpayers who prevail in administrative or court proceedings against the U.S. involving the determination, collection or refund of any tax, interest or penalty may be awarded reasonable administrative and litigation costs where the taxpayer has first exhausted all administrative remedies and has not unreasonably prolonged litigation.
- *IRC § 7431–Civil damages for unauthorized inspection or disclosure of returns and return information*. Taxpayers may seek damages in district court against the U.S. in cases where an officer or employee of the U.S. knowingly or negligently, and without authorization, discloses returns or return information.
- *IRC § 7432–Civil damages for failure to release lien*. Taxpayers may seek damages in district court against the U.S. in cases where an officer or employee of the U.S. knowingly or negligently fails to release a lien under IRC § 6325.
- *IRC § 7433–Civil damages for certain unauthorized collection actions*. Taxpayers who have exhausted administrative remedies may seek damages in the district court against the U.S. in cases where an officer or employee of the IRS, in connection with a collection action, recklessly, intentionally, or negligently disregards any portion or regulation of this Title 26.
- *IRC § 7433A–Civil damages for certain unauthorized collection actions by persons performing services under qualified tax collection contracts*. IRC § 7433 applies to situations where the actor is a person performing under a qualified tax collection contract as defined in IRC § 6306(b).
- *IRC § 7435–Civil damages for unauthorized enticement of information disclosure*. In situations where an officer or employee of the U.S. has intentionally compromised the determination or collection of tax due from an attorney, CPA, or enrolled agent representing a taxpayer in exchange for information concerning the taxpayer's liability, the taxpayer may seek damages against the U.S. in district court.
- *IRC § 7426–Civil actions by persons other than taxpayers*. In a wrongful levy action, any person other than the taxpayer who claims an interest in or lien on the levied property may bring a judicial action against the U.S. for an injunction, recovery of the property or money, or a judgment for the proceeds or fair market value of the property.

Taxpayers who seek assistance from the National Taxpayer Advocate may be eligible for the equitable remedy of a Taxpayer Assistance Order (TAO) under the authority granted to the National Taxpayer Advocate by IRC § 7811. Under IRC § 7811, the National Taxpayer Advocate may issue a TAO when she determines that the taxpayer is suffering or about to suffer a significant hardship due to the manner in which the Secretary or his delegates are administering the internal revenue laws. A significant hardship includes: "an immediate threat of adverse action; a delay of more than 30 days in resolving taxpayer account problems; the incurring by the taxpayer of significant costs (including fees for professional representation) if relief is not granted; or irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted." In cases where the IRS has failed to follow published administrative guidance (including the Internal Revenue Manual (IRM)), the factors taken into consideration when issuing a Taxpayer Assistance Order are to be construed in the light most favorable to the taxpayer. The TAO is used to require the Secretary or his delegates to act in a case in which the National Taxpayer Advocate has determined the taxpayer is suffering or about to suffer a significant hardship, and may require the Secretary to take an action, cease an action or refrain from taking an action involving the taxpayer.

Reasons for Change

The National Taxpayer Advocate believes the authority to make *de minimis* apology payments to taxpayers is appropriate to acknowledge situations where the IRS seriously mistreats a taxpayer, resulting in excessive expense or undue burden to the taxpayer. Faith in the tax system is essential to voluntary tax compliance. The ability to monetarily compensate taxpayers when the tax system has not

Under IRC § 7811, the National Taxpayer Advocate may issue a TAO when she determines that the taxpayer is suffering or about to suffer a significant hardship due to the manner in which the Secretary or his delegates are administering the internal revenue laws.

The rationale for a *de minimis* apology payment to such a taxpayer is not to repay him or her for the time and expense of seeking a remedy, but instead, to serve as a symbolic gesture to show that the government recognizes its mistake and seeks to make amends.

functioned in an appropriate manner will work to restore taxpayer confidence in that system and encourage future compliance on the part of taxpayers who may be downtrodden or discouraged by their experience. A monetary apology to a taxpayer who has suffered emotionally and financially due to an improper handling of his or her situation may not make the taxpayer whole, but it will show the ability of the tax system to recognize and try to correct its mistakes. A tax system that is fair and just encourages taxpayer compliance. *See* Marjorie E. Kornhauser, *Normative and Cognitive Aspects of Tax Compliance: Literature Review and Recommendations for the IRS Regarding Individual Taxpayers*, report completed for the Taxpayer Advocate Service (Dec. 2007).

Current provisions permitting cost recovery to taxpayers are limited and narrow. Under present law, in order for a taxpayer to recover the costs of prevailing against the IRS, he or she must first exhaust all administrative remedies available, and then, when those options are exhausted and the taxpayer still has not received the outcome he or she was seeking, take the IRS to court and prevail. . . . [I]t can take years for a taxpayer to exhaust his or her administrative remedies, with no final conclusion reached, all for a situation where the IRS itself has caused the problem. Such remedies do not assist a taxpayer, who as a result of IRS action or inaction, is embroiled in a tax situation that takes years and significant expense to unwind. Going to court increases the taxpayer's costs further and is also expensive for the government.

The rationale for a *de minimis* apology payment to such a taxpayer is not to repay him or her for the time and expense of seeking a remedy, but instead, to serve as a symbolic gesture to show that the government recognizes its mistake and seeks to make amends. This payment would be separate from any other judicial remedy otherwise already provided by current law.

Explanation

The authority to make *de minimis* apology payments to taxpayers is a mechanism that would help restore taxpayer faith in the tax system when a taxpayer has been seriously mistreated by the IRS. This authority, vested solely in the National Taxpayer Advocate, would be nondelegable. The National Taxpayer Advocate, at her discretion, would be authorized to make a *de minimis* payment to a taxpayer where the taxpayer has incurred excessive expense or experienced undue burden as a result of an IRS mistake, action, or failure to act. The National Taxpayer Advocate's decision with respect to an award under this authority would not be appealable or reviewable. To be eligible for such a payment, the taxpayer would have to meet established criteria. Payments would only be awarded in cases that meet the definition of significant hardship in IRC § 7811, and additional criteria could be described in regulations or other guidance.

A payment under this authority would not exceed $1,000 and would be paid from the IRS general appropriations fund. The Secretary of the Treasury would allocate no more than $1 million per year for this purpose, unless otherwise provided by specific appropriation and would issue regulations in accordance with this authority. The IRC should be amended to specifically exclude these payments from gross income.

The National Taxpayer Advocate believes that the ability to make a *de minimis* apology payment to taxpayers in situations where the taxpayer experiences excessive costs or undue burden due to gross mistreatment by the IRS is an important aspect of taxpayer service. Such payment is a symbolic acknowledgement of the government's error and the taxpayer's resulting burden, and enhances taxpayers' perception of the tax system as just and fair. The National Taxpayer Advocate could also include a general description of apology payments authorized during the preceding year in her annual reports to Congress, which would keep Congress apprised of both the nature of significant IRS errors and areas that might warrant congressional attention. ■

Publications

by Louis A. Mezzullo*

Created in 2007, the mission of the Tax Section's new Publications Committee is to lend focus to and develop the Section's publishing program in order to provide high quality information on tax law and practice and to serve the needs of Section members, the tax profession, and the general public in a manner that enhances the reputation of the Section and generates revenues.

The Committee on Publications meets at the Section's three annual meetings and brings together the editors of *The Tax Lawyer*, *The Tax Lawyer - The State and Local Tax Edition*, *NewsQuarterly*, *Important Developments*, and other interested members to discuss common issues and to research and identify new publishing opportunities for the Section.

In addition to volunteering on a new publication, members may contribute to the Section's current publishing activities in a variety of writing, editing, and mentoring capacities, including:

The Tax Lawyer (Including the State and Local Tax Edition)

The Section's flagship publication, *The Tax Lawyer* (TTL) is a quarterly law journal featuring scholarly articles by practitioners and academics and case notes and comments by Georgetown law students on topics and comments believed to be of professional interest to members of the Section and other readers. Three issues of TTL are devoted to federal subject matters. Beginning in 2007, the Summer Edition of the TTL features legal scholarship devoted to state and local taxation. In addition to submitting articles to TTL, members are encouraged to contribute to TTL as Law Student Note Mentors. Most Georgetown students who write for TTL have very little exposure to tax and ABA volunteers are needed to provide guidance and feedback on their analysis. Contacts: Managing Editor of TTL, Prof. Bill Lyons (**wlyons2@unlnotes.unl.edu**); Managing Editor of TTL- State and Local Tax Edition, Debra Silverman Herman (**dherman@rhtax.com**). Website: **www.abanet.org/tax/pubs/ttl**.

NewsQuarterly

The Section's newsletter—the *News-Quarterly* (NQ)—like TTL is published quarterly, and it provides short articles on developments pertaining to taxation, Section news, and other information of professional interest to Section members and others. Regular features include Points to Remember—concise, 1500 word pieces dealing with specific developments and hot topics, Point & Counterpoint—an opportunity for two or more authors to provide differing viewpoints on a specific tax practice or policy matter; the annual Challenge Point—published in conjunction with the Law Student Tax Challenge Writing Competition organized by the Young Lawyer Forum; and Tax Bites—puzzles, poems, and other interesting trivia on how tax touches everyday life. In addition, members are encouraged to contribute special reports and opinion pieces. Contact: Supervising Editor, Prof. Gail Richmond (**richmondg@nsu.law.nova.edu**). Website: **www.abanet.org/tax/pubs/nq**.

Important Developments

The Section's substantive committees are required to submit Annual Reports on Important Developments (due Feb. 1). Beginning with the Annual Reports on Important Developments for the calendar year 2005, the Section discontinued publication of the annual report in the summer print edition of *The Tax Lawyer*; however, the reports continue to be a useful and required committee work product, and they are published as an exclusive member benefit on the Tax Section website, via an online important developments database featuring both the Annual Reports and the current developments reports presented at section meetings. Members interested in writing a committee's Annual Report should contact the committee chair. Members interested in assisting with editing the reports should contact Prof. Stephen Black, Teaching Tax Committee, Important Development Subcommittee Chair (**sblack@piercelaw.edu**). Website: **www.abanet.org/tax/developments/**.

The Practical Tax Lawyer

Published by ALI-ABA in cooperation with the Tax Section, *The Practical Tax Lawyer* (PTL) offers concise, practice-oriented articles covering all aspects of tax law. The articles are written by practitioners and are reviewed by an expert board of editorial advisors who are members of the Tax Section and are appointed by the Section. For more information, visit ALI-ABA's website: **www.ali-aba.org**. As a component of PTL, the Section organizes The Young Lawyer Writing Project, which partners young lawyers with senior lawyers in the Section to write articles for PTL. Young Lawyer Writing Project Contact: Sam Braunstein (**sam@btlawfirm.com**).

Other Publications

In addition to the periodicals described above, the Section also publishes the following single titles, which are available through the ABA webstore, and also on *Westlaw*:

- A Comprehensive Analysis of Current Consumption Tax Proposals
- Effectively Representing Your Client Before the IRS: A Practical Manual for the Tax Practitioner with Sample Correspondence and Forms
- Guide to Nonprofit Corporate Governance in the Wake of Sarbanes-Oxley
- The Property Tax Deskbook
- The Sales & Use Tax Deskbook
- The State and Local Tax Lawyer (Vols. 1-11)
- Value Added Tax: A Model Statute and Commentary

To learn more about these titles, visit the Section's publications website: **http://www.abanet.org/tax/pubs/**.

The Publications Committee welcomes participation by members who are interested in writing for the Section and in proposing and developing new publications. Contacts: Lou Mezzullo, Section Vice Chair – Publications (**lmezzullo@luce.com**); Anne Dunn, Director-Publishing & Program Development (**dunna@staff.abanet.org**). ■

*Luce, Forward, Hamilton & Scripps LLP, Rancho Santa Fe, CA.

News Briefs

NEW PRIMARY SPONSORSHIP BENEFITS FOR MEMBERS

Thomson Tax and Accounting (TTA) and Thomson West are now a primary sponsor of the Section of Taxation. Together, they will provide enhanced publishing opportunities and member benefits to the Section. Thomson will also provide discounts and product offerings to Section members in months to come.

THOMSON TAX & ACCOUNTING

THOMSON WEST

As a component of the Tax Section's new sponsorship relationship with Thomson, the Section is pleased to present TaxIQ (formerly Comm-Online). With thoughtful insights and useful analysis, this online resource provides current, high-level work product on the latest tax developments. Thousands of pages of cutting-edge committee program materials presented at **Section of Taxation Meetings** from May 1999 to the present can be viewed and searched on the Section's website. These documents contain analysis of the latest federal tax policy, initiatives, regulations, legislative forecasts, and planning ideas developed by the country's leading tax attorneys and government officials. Section members can access TaxIQ free of charge at: **http://www.abanet.org/tax/taxiq/**.

TAXIQ
Thoughtful Insights. Useful Analysis.

COMMUNITY OUTREACH PROGRAM AT MAY MEETING | LIKE-KIND EXCHANGES AND COMMERCIAL REAL ESTATE PRIMER

The Section of Taxation Professional Services and Diversity Committees, and the Section of Real Property, Trust & Estate Law Community Outreach Committee are pleased to present the Community Outreach Program, a special continuing legal education program at the 2008 May Meeting on Thursday afternoon, May 8th. The program is designed to teach lawyers what they never learned in law school but need to know to get started in a specialized field and it seeks to assist lawyers having a hard time finding a professional niche.

This year's program will provide three hours of CLE on the basics of like-kind exchanges and commercial real estate. Please note that registration is required for this program. To register, please contact the Tax Section Registrar at 202.662.8670 or **salmont@staff.abanet.org**.

MISSED A MEETING?

Audio CDs and MP3s of programs presented at Tax Section Meetings are available from Digital Conference Providers. Audio files of specific committee programs may be purchased separately. In addition, members can purchase the "Ultimate CD-ROM" complete conference package, including both audio files and program materials for each Section Meeting. For more information: **https://www.dcporder.com/abatx/** or phone 630.963.8311.

NEW JOB LOCATOR PROGRAM

The Section recently introduced a new Job Locator feature on its website: **http://www.abanet.org/tax/lawstudents/jobs/home.html**. The site is a great resource for young lawyers and law students and offers a directory of available tax opportunities around the country. Member law firms and other organizations are also encouraged to use the site to post job openings. For additional information, please e-mail **tax@abanet.org**, or call 202.662.8670.

CONSUMER OUTREACH

As part of its outreach to taxpayers and consumers, the Tax Section regularly produces audio and video news releases that are sent to radio and television stations around the country. In conjunction with these broadcast pieces, relevant information is also made available to the public on the Section's consumer website, **www.TaxTips4U.org**. During the 2007 filing season, two audio news releases—one warning taxpayers about tax scams, and one informing them about tax rebates included in the Economic Stimulus package—were produced and sent to radio stations around the country. In addition, a video news release featuring Section chair Stanley Blend, Pro Bono Committee Chair Robert McKenzie, and taxpayer Richard Sherwin, was produced to raise awareness of potential tax scams and how to avoid being a victim. The Section's video and audio news releases are available on the Section's website and at **www.TaxTips4U.org**.

IRS TAX FORUMS

As a component of its communication and outreach efforts, the IRS is conducting a series of tax forums across the nation this summer. Designed for tax professionals, the forums present the latest news and information from the IRS over three days of seminars taught by representatives of the IRS, the American Bar Association Section of Taxation, and other national organizations. The 2008 dates and locations are:

Location	Date
Atlanta, GA	July 1-3
Chicago, IL	July 22-24
Orlando, FL	August 5-7
Las Vegas, NV	August 19-21
New York, NY	August 26-28
San Diego, CA	September 9-11

For more information, visit **www.taxforuminfo.com**. ABA members qualify for a discount. Please note that CLE accreditation has not been requested in advance for these programs, and attorneys interested in attending and obtaining CLE credit are encouraged to check with their state regulatory boards.

GOVERNMENT SUBMISSIONS UPDATE

The Tax Section has coordinated—and gratefully acknowledges the contributions of the Task Force on Patenting Tax Strategies, and the Civil and Criminal Tax Penalties and Employee Benefits Committees on—the following government submissions this quarter, which can be viewed on the Section's website at **www.abanet.org/tax/pubpolicy**.

- Comments on the New Service Provider Exemption Under Section 408(b)(17) of ERISA
- Comments Concerning Proposed Regulations Under Section 6011 and 6111 of the Internal Revenue Code Relating to Patented Transactions
- Comments Concerning ERISA Bonding Rules
- Comments on the 2007 Amendments to the Section 6694 Preparer Penalty Rules ■

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

DATE	PROGRAM	CONTACT INFORMATION
May 14, 2008	**4TH ANNUAL SALT SYMPOSIUM: THE STORY BEHIND COMBINED REPORTING** Georgetown University Law Center – Washington, DC	Tax Section/Georgetown CLE **www.law.georgetown.edu/cle/** | 202.662.9890
May 21, 2008	**ABA CONNECTION TELECONFERENCE: PROBATE IS DEAD – OR IS IT?**	ABA Center for CLE **www.abanet.org/cle** | 800.285.2221
May 23-25, 2008	**7TH ANNUAL NORTH CAROLINA/SOUTH CAROLINA TAX SECTION WORKSHOPS*** Kiawah Island Golf Resort, Kiawah Island, SC **Cosponsored by ABA Tax CLE on the Road*	North Carolina Bar **www.ncbar.org/cle** | 800.228.3402
May 28, 2008	**LAST WEDNESDAY TELECONFERENCE: UPDATE ON RECENT STATE TAX SYSTEM REFORMS (Case Studies: Ohio, Texas and Michigan)**	Tax Section **www.abanet.org/tax** | 202.662.8670
June 3, 2008	**TAX LINK LIVE – MEMBER BENEFIT TELECONFERENCE: ETHICS FOR THE TAX LAWYER**	Tax Section **www.abanet.org/tax** | 202.662.8670
June 5-6, 2008	**ALI-ABA COURSE OF STUDY: CHARITABLE GIVING TECHNIQUES** Langham Hotel – Boston, MA	ALI-ABA **www.ali-aba.org** | 800-CLE-NEWS
June 11-13, 2008	**ABA/IBA U.S. – LATIN AMERICAN TAX PLANNING STRATEGIES CONFERENCE** InterContinental Hotel – Miami, FL	Tax Section **www.abanet.org/tax** | 202.662.8670
June 12-13, 2008	**ALI-ABA COURSE OF STUDY: TAX PRACTICE CONTROVERSY – FROM ADMINISTRATIVE AUDIT THROUGH LITIGATION** Renaissance Chicago Hotel – Chicago, IL	ALI-ABA **www.ali-aba.org** | 800-CLE-NEWS
June 25, 2008	**LAST WEDNESDAY TELECONFERENCE: REVIEW OF REGULATIONS ON CAPITALIZATION OF TANGIBLE ASSETS**	Tax Section **www.abanet.org/tax** | 202.662.8670
July 9-11, 2008	**ALI-ABA COURSE OF STUDY: ESTATE PLANNING FOR THE FAMILY BUSINESS OWNER** Taj Hotel – Boston, MA	ALI-ABA **www.ali-aba.org** | 800-CLE-NEWS
August 7-12, 2008	**ABA ANNUAL MEETING** New York, NY	ABA Meetings and Travel **www.abanet.org/annual/2008/** | 800.285.2221
September 25-26, 2008	**ALI-ABA COURSE OF STUDY: CONSOLIDATED TAX RETURN REGULATIONS** Hotel Monaco – Washington, DC	ALI-ABA **www.ali-aba.org** | 800-CLE-NEWS

Section Meeting Calendar | www.abanet.org/tax/calendar

DATE	PROGRAM	LOCATION
September 11-13, 2008	**JOINT FALL CLE MEETING**	Hyatt Regency | San Francisco, CA
January 8-10, 2009 May 7-9, 2009 September 24-26, 2009	**MIDYEAR MEETING** **MAY MEETING** **JOINT FALL CLE MEETING**	Sheraton | New Orleans, LA Grand Hyatt | Washington, DC Hyatt Regency | Chicago, IL
January 14-16, 2010 May 6-8, 2010 September 23-25, 2010	**MIDYEAR MEETING** **MAY MEETING** **JOINT FALL CLE MEETING**	Hyatt Regency | Denver, CO Grand Hyatt | Washington, DC Sheraton | Toronto, ON

TAX BITES
REVOLUTION #10.35

TO THE TUNE OF THE BEATLES' "REVOLUTION"

By William J. Wilkins*

Editors Note: Incoming Section Chair Bill Wilkins authored this issue's column. We invite our readers to contribute tax-related parodies of other classic songs.

You want a tax deferred transaction, well, you know
I think I could find a way
From penalties you want protection, well, you know
That's gonna change the price you pay
A covered opinion the way that the rules allow
Will probably cost an additional hundred thou

Don't you know it's gonna be, all right
If you can't take the penalty, it's all right
But the fee is gonna be, out of sight

My practice is now regulated, and, you know
I don't wanna go to jail
Last year I was investigated, well, you know
For leaving legends off my e-mail
Losing my license to practice would not be cool
Brother, I got seven children in private school

Don't you know it's gonna be, all right
If you can't take the penalty, it's all right
But the fee is gonna be, out of sight

I need this list of representations, 'cause, you know
I gotta ascertain the facts
Then I do investigations, 'cause, you know
I gotta cover my own ass
You want a quick email or tax advice on the phone
All I can tell you is, brother, you're on your own

Don't you know it's gonna be, all right
If you can't take the penalty, it's all right
But the fee is gonna be, out of sight
All right, all right ... [to end] ■

*Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC.

Joseph Barry Schimmel

This year, the ABA Section of Taxation is proud to present its Janet Spragens Pro Bono Award to Joseph Barry Schimmel, Cohen, Chase, Hoffman & Schimmel, Miami, Florida. With this award, established in 2002, the Tax Section recognizes one or more individuals or law firms that have provided meritorious pro bono service in the representation of low-income taxpayers. The award is intended to encourage pro bono activities by all members through public recognition of the pro bono services of the annual award winners.

Joseph Barry Schimmel has been dedicated to pro bono service for low income taxpayers since volunteering for the Legal Services of Greater Miami, Inc. (LSGMI) federally-funded Tax Clinic in 2000. He continues to provide that assistance, in addition to presenting LITC training and accepting referrals of LITC cases.

Joe is very active in the ABA Tax Section, most recently as chair of the Low Income Taxpayer (LITP) Committee. He has worked on numerous comment projects, including the uniform definition of a qualifying child, processing of offers in compromise, collection due process procedures, installment agreement procedures, and U.S. Tax Court small tax case procedures. He has written Important Developments reports and served on panels for the LITP Committee and LITC Workshops. He is also vice chair of the Membership & Marketing Committee.

As an active member of The Florida Bar, Joe chairs the Council of Sections, and has served on the Tax Section's Director's Committee and Executive Council, as well as the Tax Law Certification Committee.

Joe received his B.E.E. from Georgia Institute of Technology, his J.D. from Florida State University College of Law, and his LL.M. in Taxation from New York University School of Law. ■

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