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NEWSQUARTERLY

Swallows Holding: Chevron's Growing Traction in Tax Litigation

By Steve R. Johnson*

The proper role of *Chevron* in tax has long been debated. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). By now, it has become generally accepted that *Chevron* provides the analytical framework for evaluating challenges to specific-authority tax regulations. It is taking longer to secure acceptance that *Chevron* usually also applies to challenges to general-authority tax regulations. Fortunately, we are nearing that point.

An important recent step in that direction was the Third Circuit's reversal of the Tax Court's full-court-reviewed decision in *Swallows Holding. Swallows Holding, Ltd. v. Commissioner*, 515 F.3d 162 (3d Cir. 2008), *rev'g* 126 T.C. 96 (2006). The Third Circuit's *Swallows* opinion is, in my view, clearly superior to the Tax Court majority's opinion. Nonetheless, as developed below, the Third Circuit's opinion is flawed in several respects. Thus, my reaction is two cheers (not three) for the Third Circuit's opinion.

The Facts

The taxpayer was a Barbados corporation whose owners were Mexican nationals. The corporation earned rental income from property it owned in San Diego. The corporation did not file its federal income tax returns for tax years 1993, 1994, 1995, and 1996 until 1999.

Congress made proper filing of a return a condition for allowing foreign corporations to claim deductions attributable to their real property activities. Section 882(c)(2) provides, in relevant part, that a foreign corporation may claim such deductions "only by filing or causing to be filed with the [Service] a true and accurate return, in the manner prescribed in subtitle F" of the Code. Subtitle F consists of sections 6001 to 7874, including the sections covering procedure and administration.

Following notice and comment, Treasury and the Service promulgated amended regulations to implement section 882(c)(2). As relevant here, Regulation section 1.882-4(a)(3)(i) requires that, in order to claim deductions, a foreign corporation must file its return for the year within 18 months of the filing deadline established under section 6072. Since section 6072(c) allows a five and one-half month filing period, foreign corporations have 23 and one-half months from the close of the tax year to file and thus protect their deductions.

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2008 JOINT FALL CLE MEETING
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2008 JOINT FALL CLE MEETING

September 11-13, 2008 | San Francisco, CA
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San Francisco, CA welcomes the ABA Section of Taxation and the Trust and Estate Law Division of the ABA Section of Real Property, Trust and Estate Law to the 2008 Joint Fall CLE Meeting, September 11-13, 2008.

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- Joint Section Exhibit and Hospitality Center featuring legal publishers and service providers
- Joint Section Reception at the Hyatt Regency
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Stanley L. Blend*

This is my final message to you as Chair of the Tax Section. I want to thank each of you for allowing me the privilege of serving as your Chair for the past year. Throughout the year, the Section has been very active in our comment projects to Congress and federal agencies, and in our meetings and CLE programming; and serving as Chair during this time has been very rewarding. As Carr Ferguson recently commented in his remarks in accepting the Section's Distinguished Service Award, the Section is an extended family, and the opportunity to lead that family is a very special one.

The year would not have been nearly as successful without the hard work of our very dedicated and committed Section leaders. I want to thank our retiring Vice Chair of Committee Operations, Elaine Church, who did a terrific job in providing support for the committees that allowed them to undertake projects and see them through to completion in a timely manner. I also want to thank our retiring Assistant Secretary, Walter Burford, for his participation and leadership throughout the year. All of the continuing Vice Chairs also deserve recognition for their significant efforts on behalf of the Section, and we know that those efforts will continue as they serve out their terms. In addition, I want to thank the outgoing Council Members and continuing Council Members for the leadership they have provided to the Section. Finally, many thanks to Christine Brunswick and her outstanding staff, all of whom have contributed to making the job doable. Without their efforts, the job would have been much more difficult, if not impossible.

At our May Meeting in Washington, DC, Commissioner Douglas Shulman was the keynote speaker at our plenary session. Commissioner Shulman mentioned that he would continue to seek enforcement of the tax laws, adding that he hopes the Section will work with him and the Internal Revenue Service in effective administration of the tax laws. He asked that the Tax Section work with the IRS in a spirit of partnership, with a high level of dialogue. Also at the May Meeting, Carr Ferguson, a former chair and longtime member of the Section, received our Distinguished Service Award.

The Section's Committees have been very active over the last year. By last count, we have submitted approximately 50 technical comments to the Hill and to Treasury and the Internal Revenue Service. More important than the number of comments, however, is the quality of our comments. At our liaison meetings on Capitol Hill, at Treasury and the Internal Revenue Service, those with whom we met commented on the value and importance of the substantive comments that the Section provides. It is incumbent on the Section, as a leader in the profession of tax law, to continue its efforts in this regard, and to ensure that we maintain the highest standards of quality in our submissions, our white papers, our testimony and other Section work. Many thanks to our Vice Chair of Government Relations, Armando Gomez, for his time and outstanding effort in this area over the last year.

We are very pleased that our pro bono activities will be enhanced and expanded by the addition of a new pro bono staff attorney, Catherine Engell. Cat will be working with the IRS to coordinate our activities with the VITA program, and also will liaise with the National Taxpayer Advocate's office and the Office of the Tax Court. She is currently in the process of developing new and exciting pro bono projects that we hope will motivate Section members to get involved. One that I particularly want to mention is a Section proposal to establish an endowment to fund a maximum of four legal positions with non-profit service oriented organizations, preferably low income taxpayer clinics. This proposal was approved by Section Council at the May meeting, and has been approved by the American Bar Association's Board of Governors.

Our membership and marketing activities, under the leadership of Stuart Lewis, are continually developing programs that focus on bringing in new and younger lawyer members. The Section's membership is now approximately 21,000, with about 4,000 of them being law student members. Our new Membership and Marketing Manager, Yolanda Lee, who joined the Section staff in June of this year, will focus her efforts on retaining these students as they become practicing lawyers, and getting them involved in Section activities so that they continue their memberships. Yolanda will be looking for ways to provide value to our members, and she welcomes any ideas you may have in that regard.

We are also expanding the Section's publishing program, and Vice Chair Lou Mezzullo has established a Publications Committee dedicated to this effort. By the end of 2008, we are planning to release the Fourth Edition of *Effectively Representing Your Client Before the IRS*, also know as the Section's "Low Income Taxpayer Clinic Manual," which is provided gratis to low income taxpayer clinics around the country. Also, in the last year, the Section decided to dedicate one issue of *The Tax Lawyer* to state and local tax issues, a change that has been well received by our members and by our student volunteers at Georgetown University Law Center who edit the publication.

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

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William J. Wilkins*

The prospect of becoming Chair of the Section of Taxation made me more aware than ever of how deeply the Section relies on the dedication and excellence of volunteer Section leaders and professional Section staff. We have enjoyed remarkable volunteer leadership, especially from Stanley Blend as Chair, but also from energetic and dedicated Vice Chairs, Council Directors, and Committee officers. Our professional staff, led by Christine Brunswick, is extremely effective. I am pleased that all staff slots are currently filled, so that we can now serve our members, plan our meetings, and carry out our public service missions more effectively than ever. In recognition of the increased importance of certain Section activities, we now have staff devoted to areas that in past years were either understaffed, overly reliant on volunteers, or just left undone. These areas include communications, sponsorships, government submissions, and pro bono and public service activities.

At this writing, memories of the May 2008 meeting are still fresh. I was tremendously impressed with the depth, quality, and variety of the Committee offerings; the willingness of so many government and private sector panelists to volunteer their time to keep us up to date on important issues; the reflections of Distinguished Service Award recipient Carr Ferguson on what his career in tax law has meant to him; the first exposure for nearly all of us to our new IRS Commissioner Douglas Shulman; and the constant bustle of old friends catching up with one another, and of shop talk spilling out of the meeting rooms and into the hallways. Our meeting experience is something special. While we should constantly consider ideas for improving our meetings, my basic plan is to get out of the way and let everyone who has been doing such a great job on recent meetings keep us on a roll.

The volume and quality of our government submissions have also been impressive. This is very important Committee work. I believe that taking advantage of the opportunity to comment on IRS guidance is the mark of the best Committees and Committee officers. The arrival of a new President and Congress will also present opportunities for Section participation in the development of tax legislation. We have started a process of drafting white papers in core tax reform areas that can serve as a basis for future Section comments and testimony. It takes time to consider what is appropriate for the Section to say (and not say) when it comes to tax legislation. It also takes time for clearance of such testimony through the Council and through the ABA process for obtaining so-called “blanket authority.” The white paper process will let us use time we have in 2008 so that we are prepared as opportunities for comment arise in 2009 and 2010—even if the opportunities come with a short fuse attached.

Another area for attention is outreach to young lawyers and lawyers of color. Thanks to creative initiatives of prior Chairs and Councils, the Section of Taxation has an outstanding collection of outreach programs that are the object of admiration of (and we hope eventual imitation by) other ABA entities. While our Section membership is still not especially diverse, nurturing and enhancing programs like the Young Lawyers Forum, the Nolan Fellows, and the Tax Law Challenge will help. The effectiveness of these programs obviously improves as more and more classes of lawyers participate, stay in the Section, and stay involved in outreach activities.

We are also exploring ways to improve our ability to connect our members with pro bono and public service opportunities. The Tax Court, low income taxpayer clinics, the IRS Taxpayer Advocate Service, and the VITA program are all interested in our capacity to link volunteers to areas of need. With increased staff resources we hope to be able to select areas that we can focus on and be truly effective. In a related area, the Council has approved use of Section reserves (derived from sponsorship revenues) to create a Tax Section Public Service Fellowship. We will form a committee that will consider and award grants to organizations such as low income taxpayer clinics for the purpose of hiring a recent law school graduate for two years. Fellows under this program will be included in Section meetings and leadership activities. We are optimistic that Fellows will not only help carry out our public service mission in their jobs, but will also be important contributors to Section meetings and Section activities.

Our next two meetings are in wonderful locations—San Francisco and New Orleans. For those who want to contribute to ongoing neighborhood revitalization efforts in New Orleans, please save your Saturday afternoon (January 10). We are lining up a local nonprofit with expertise in enabling otherwise office-bound volunteers to pitch in on needed work in recovering areas.

Please visit the Section website and watch for your monthly e-news to keep up with public service opportunities, Section public policy comments, and the opening of registration for future meetings and CLE events. I look forward to seeing friends old and new in San Francisco and New Orleans. ■

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

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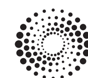

THOMSON REUTERS

Dr. Eric Toder

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

INTRODUCTION: Dr. Eric Toder is a Senior Fellow with the Urban Institute, who works in the areas of taxation, fiscal policy and retirement policy. He was Deputy Assistant Secretary for Tax Analysis in the U.S. Treasury Dept. from 1993-1996, and Director of the Office of Research at the IRS from 2001-2004, and earlier was Deputy Assistant Director for Tax Analysis at the Congressional Budget Office.

Q **You worked at the Congressional Budget Office during the development and enactment of the 1986 Code. What, if any, parallels do you see between that period and the current period, and do you think a rewriting of the Code of that magnitude is likely to occur in the near term, in view of the coming end to surpluses in the Social Security account, growing entitlements, the problems of the AMT and the sunsetting of the Bush tax cuts?**

A The one parallel to those times is we are going to need to have some fairly major tax legislation. There are action-forcing events, even if it is just simply extending the Bush tax cuts, or extending most of them, and I doubt that all of them will be extended in their current form. There will be a major tax bill that will happen before the end of 2010. Now, whether that qualifies as tax reform is another issue. So, major tax legislation, yes, but the kind of tax reform that is as fundamental as the 1986 act, which involved sweeping away a whole slew of tax preferences and lowering tax rates a lot, is not likely to happen.

Q **What is the role of the surpluses in the Social Security account in masking the deficit?**

A Well, that is a very interesting question, and it is clearly a conjectural question. The question is what would other spending and taxes be if we did not have this Social Security surplus. When the Social Security amendments were passed in 1983, there was a massive shift toward a tighter federal fiscal policy. Not only did they solve what was then a short term funding problem for Social Security, which would have been easy to do, but they set off on what they estimated then was a path for 75-year balance for the Social Security system. This means they were for the first time building up very large surpluses in the trust fund against the future retirement of the baby boomers. However, the 75-year balance disappeared quickly, partly because of inadequate economic assumptions, but mainly for reasons that were predictable at the time. As you move on into later years, you are replacing good demographic years with bad demographic years, years in which there has been a very large percentage of workers to retirees, to years where there will be a smaller percentage. So that was bound to need further adjustment down the road to keep in 75-year balance; but nonetheless it was an enormous shift in the funding of the Social Security program away from pay-as-you-go toward at least a partially funded program.

Whether that increase in the Social Security surplus has actually contributed to a reduction in the federal budget deficit is a conjectural question—you have to ask what else Congress might have done if that trust fund had not been built up. There has been some research and these econometric studies are always subject to interpretation. Some find that basically the build up of the trust fund did not reduce the deficit at all—that essentially it was balanced by increases in the deficit in other parts of the federal budget. So this was really the implication of your question—was the trust fund basically just used to cover other deficits? And at least some studies seem to indicate that is the case.

Again, we can never know that for sure because we do not know what would have been done in the absence of that surplus. But I think a good argument could be made that what Congress has been looking at is the unified deficit in setting policy, not the on-budget deficit, and so when the surplus grows in the Social Security funds, they simply see that as enabling them to avoid having to pay for all the other programs with other tax sources. So while you have had this build up in the trust fund, you have this offsetting build up in federal debt owed to the trust fund. Now, of course, there has also been a build up in the unified debt in the last eight years. But I think arguably there might have been less deficit spending if they could not show in the books these Social Security surpluses to offset it. Actually Senator Moynihan made that point back in 1990 when he proposed reducing the payroll tax so that the payroll tax would only fund current expenses. He felt that basically the payroll tax was being used as a regressive revenue source to fund other federal programs instead of building up a surplus to help pay for the retirement of the baby boomers.

Q **In this regard, some have stated or claimed that the special Treasury notes that are held by the Social Security Trust Fund are economically meaningless, that a government with its own bank can only fund itself currently under any circumstances, and to say that the Trust Fund holds notes of the government is simply to say that the government in the future is going to have to raise more money to pay current expenditures. What's your thought**

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on the meaningfulness of the special Treasury notes held by the Social Security Trust Fund?

A Well, you know, I think the Social Security Trust Fund is basically a political construct, not an economic construct, and if you are looking at the ability of the federal government to pay its bills in the future, you need to look at all the assets and all the liabilities. To segregate one account from the other is really not telling you much of the story. And the two reasons I say this are, one, I doubt when you get to the year that the Social Security fund runs out of money the Congress is going to sit by and see Social Security benefits cut by 25 or 30% in one year. It is also hard to believe that they are going to feel that they have to be restricted just to raising payroll taxes to cover the deficit. At that point in time they're going to say "How are we going to solve this problem? How are we going to keep retirees mostly whole? How are we going to spread the burden and what's the easiest way to do that?" So at some basic level, the rest of the budget is available for funding Social Security even though legally under current law it is not. Congress writes the laws and they can change them at any time.

Now, politically it is important for two reasons. One is that it provides a feeling that people have paid into this trust fund so it strengthens their feeling of entitlement to those benefits that they have paid for. And it also basically creates this system where you are funding a program like Social Security through a tax on workers. So in some sense that was the trade off in which past expansions in Social Security were able to take place. It was not being funded by the progressive income tax. Workers were seen to be paying it for themselves. Now, there is some redistribution in that system, but it certainly was part of the political deal by which Social Security was expanded. So in some sense from a conservative point of view, you are using regressive taxes. From a liberal point of view, you are protecting the program. Because as long as there is this surplus coming into the trust fund it is very hard for somebody to make the argument to cut Social Security spending in order to help the rest of the federal budget. It gives a lot of political protection to Social Security.

And if you are being particularly legalistic about your budget projections, you have to say "Well after 2041 we are really not promising Social Security benefits anymore as it says in the law, we are only promising 70-75% of them." But I doubt when you get there, people are going to find it very convincing to say, "Well we never promised you any more money than what was in the trust fund." That is not a politically realistic statement.

I think you need holistic accounting because when you have programs in different buckets, it is really hard to say what is paying for what. For example, you could look at something like the earned income tax credit, which is a refundable tax credit for low income workers and originally started off as refundable only to the extent of payroll taxes. It has since expanded beyond that but if you think of the credit as partly an offset to payroll taxes people are paying, then you have to ask yourself whether people are paying a high payroll tax and getting negative income taxes or are they just not paying so much payroll tax instead of a big income tax rebate. The point being that it has to be looked at in a unified basis.

Q Various official sources have begun to propose substantial Code changes, including Chairman Rangel and the President's Tax Reform Panel; the Treasury has indicated it is considering alternatives. From what source or sources of ideas would you expect any real initiative for change to originate?

A Well, there are various proposals. My colleague Len Burman has floated a tax reform plan. Michael Graetz has floated a tax reform plan which would replace part of the income tax with a VAT. I think there will be all kinds of people, like there were in the early 80's, pushing different kinds of plans because I think when you look down the road, you are looking at a situation where there is not enough revenue to fund the government. The Tax Reform Act of 1986 also came about after many years of reform proposals by scholars like Joseph Pechman and David Bradford, some of which were later incorporated in early reform plans offered by political leaders like Bill Bradley, Jack Kemp, and others.

McCain's economic advisor, Douglas Holtz-Eakin, pointed out at a recent Tax Policy Center forum that the income tax revenues are 18.5% of GDP now. That is pretty consistent with historical long run averages. So in his view or Senator McCain's view we do not really have a revenue problem—we have a spending problem. Logically that is a reasonable point of view except for the fact that given the aging of the population, given the increased needs, and given the need to spend more just to keep people close to the same acceptable high standards of medical care and close to being able to get the kinds of replacement rates from the Social Security program that they have had in the past—you are in the situation where it may not be realistic to say that entitlements should forever remain the same share of GDP that they have been in the recent past where we had a very different demographic situation, a very different health care cost situation. It is just not realistic that the public will accept the kinds of cuts or reduced growth in benefits per retiree offered by these spending programs in order to maintain their costs at a constant ratio to GDP. They may accept the idea of spending cuts in the abstract, but when they see what it really involves, that will not be doable.

In fact I think it will be very hard to get any kind of compromise that would work, both with higher revenues and with lower spending. And the spending cuts will be much harder to do politically than the revenue increases. So although I think certainly most of the adjustment is going to have to come on the spending side, I also believe that to say

that this can be done without additional revenues is foolish. We are going to need to look at ways of getting more revenue in the long run.

Another problem we have is the alternative minimum tax, which is a totally unacceptable way of raising revenues and we have managed to keep it off the backs of most people. I hear a bit of grumbling from some of my colleagues who are hit by it, but these are fairly sophisticated high income people who are not going to get confused doing their tax returns in a way that most people will. I do not think anybody wants to allow 23 to 25 million people to all of a sudden have to go on the AMT. Of course what you have in the AMT law is this built in future tax increase. The revenues are built into all the budget projections and in order to get rid of that AMT growth you are going to need to replace the revenue from somewhere else. It is going to get more and more expensive every year to replace AMT revenues. So the sooner something is done about that the better.

My guess is that it is going to be very hard to get rid of things like the lowest income tax bracket, the expansion of the earned income credit, and the child credit expansions that were enacted in 2001. And so you are going to be left with a fight over the high income tax cuts and even getting rid of them is not going to generate enough money to solve the problem. Then you have this incredibly unstable situation with estate taxes where there is the estate and gift taxes, the estate tax is expiring in 2010 and then coming back in 2011 with a $650,000 limit and a 55% top rate. And neither of those will be politically acceptable given the expansion of wealth in recent years and how many people would be hit by the estate tax at that lower limit. So the parties will have to figure out some kind of compromise. In some sense current law had this future time bomb built in going back to 2001. They are going to have to legislate something but I do not think complete elimination of the estate tax is going to be acceptable, certainly not to the Democrats. So, there are a lot of things hanging in the air.

Now, my guess is that given what we have heard from the presidential candidates there will not be anything in the first budget that comes out in 2009 that really addresses any of this stuff realistically, but some adjustments and some negotiation will have to be started in 2010. I cannot pretend to know exactly what the shape of that is going to be. It is going to be fairly messy. They may even try to kick things down the can a little bit, extend the Bush tax cuts for another year, extend the 2009 estate tax rates for another year and push the dates of expiration and then reinstatement to 2001 levels back. There could be in the short term a lot of fooling around with sunsets and extensions. But eventually we will have to face up to it.

Q **You have suggested that a reduction in the corporate income tax rate could be desirable to reduce the cost of corporate capital in the U.S. Could such a reduction actually translate into increased spending on capital goods in the U.S., more employment, and related economic benefits, and if so how much of a reduction would be required to get those results?**

A I think it is hard to give an exact figure for the right level. The statutory tax rates in the OECD have been creeping down relative to the U.S. tax rates but the effective tax rates that determine the overall burden on investment are not that different. So it is not so much that we are discouraging investment but we are creating incentives for income shifting out of the United States. Over time if those trends continue we might be discouraging investment somewhat as well. I think there is an increasing recognition of the fact that in a world where capital is mobile, taxing capital income on the basis of the residence of the investor, which taxes people on their income no matter where it is earned, makes more sense than taxing capital income on a source basis, that is, taxing income that originates within our borders no matter who owns it. But it is hard to impose a corporate-level income tax on the residence of investors when multinational corporations increasingly issue equity shares and borrow money on international markets. Since the corporate tax necessarily is mostly imposed on a source basis, and it would be quite difficult to change it into a residence based tax, and the individual tax is generally on a residence basis, it seems to me that if you are worried about the double taxation or the excessive taxation of corporate income, the relief should be coming on the corporate side instead of the individual side. In recent years, we have actually moved in the wrong direction by cutting the tax rates on dividends and capital gains and leaving corporate taxation alone.

My inclination therefore would be to bring corporate tax rates down a little bit, broaden the corporate tax base, get rid of a few unjustified preferences, and move the tax rates on dividends and capital gains back up. That is my general view of where those taxes should be imposed and the direction we should be going in, without being very precise about the desirable rate levels.

Generally, I am skeptical about integration. I used to think the classical dividend integration plans that were used in European countries, which was an imputation credit system that essentially treated the corporate tax as a withholding tax and allowed shareholders a credit for corporate taxes associated with their dividends, was the best way to go because it meant the shareholders would be taxed once on their income at the individual level. You would treat the corporate tax on dividends just the way you treat wage withholding, but profits retained by the corporation would still be taxed at the corporate level.

But I think one of the problems with those systems is that when they are in place, they do not give any imputation credits to non-profits for revenue reasons and they do not give it to foreign shareholders. So the extent to which they actually are reducing the cost of

capital if they are not benefiting external sources of finance as opposed to just giving U.S. investors a higher rate of return is not clear anymore to me. I do not think the corporate tax does that much damage as long as we are not too far out of line with our trading partners, but I do think the classical kind of integration program, unless we are doing something to attract the inflow of capital, would not help that much, and will not over time be doing that much, to help the cost of capital. That being said, corporate integration plans that give credit to shareholders for corporate tax paid make a lot more sense than the kind of dividend relief we enacted in 2003, which gives shareholders a special tax break on dividends irrespective of whether the corporation has paid any corporate tax.

There are a lot of imaginative proposals floating around that are interesting, so I think this is an area that requires more thought. Ed Kleinbard has a really interesting proposal to exempt in effect the normal return to capital at the corporate level, while imputing equity returns to individual shareholders. His proposal has been criticized by some people in the legal profession so there is a debate going on. Without commenting on the specific details or criticism, I believe he is going in the right direction by shifting the tax on normal returns to capital from the corporate to the individual level, while retaining the corporate tax as a tax on economic profits or above normal profits. His plan also aims to eliminate the distinction between taxation of debt and equity, which he views as an increasingly artificial distinction in today's world of increasingly complex financial instruments and methods of risk-sharing.

Q Do you think we should move toward consumption taxes and a regime that does not tax capital at all?

A I do not believe we should eliminate the income tax. Although theoretically possible, I do not believe any consumption tax Congress is likely to enact will be effective at maintaining progressivity at the very top of the income distribution and I am concerned about the increased tax shelter opportunities if they fail to follow the consumption tax model to its logical conclusion and eliminate all interest deductibility. I do think, however, that given both the need for more revenues and the difficulty in constructing an income tax that does not excessively burden capital, we should look at what just about every other developed country in the world has done and introduce a value added tax, partly to replace part of the income tax, partly to fund more programs such as universal health care, and maybe for other purposes. I would not go all the way to Michael Graetz's proposals and use it to replace 90% of the income tax and retain the income tax only as something for high income shareholders and corporate income. I do not agree with that for a variety of reasons. But I do think he is right that we need this other revenue source and it is a proven revenue source that works.

Q That would be a credit method VAT?

A I would hope we would do a credit method VAT, yes. I know a lot of the people that have proposed it in the United States have talked about subtraction method, which the experts think is definitely inferior. Retail sales tax is crazy, given the enforcement problems.

Q You have observed that 80% of individuals pay more FICA taxes than income taxes, if you count the employer's portion of the tax as effectively paid by the employee. These FICA payers are taxed on half of the FICA tax and generally are taxed on Social Security benefit payments. Nevertheless, FICA taxes tend to be overlooked in most discussions of fundamental tax changes. How would you integrate the concerns about fundamental tax changes with the FICA tax problems?

A I think the FICA tax has not gotten much attention for two reasons. One is the link to Social Security and Medicare and people do not want to mess around with those funding sources. So without opening up those issues you do not really want to reduce the payroll taxes. Of course, payroll tax has been a big driver historically of changes in the tax system. Between about 1977 and 1990, there were huge increases in payroll taxes and these were documented in a study Frank Sammartino, Rick Kasten and I wrote when we were at CBO. We showed, however, that the federal tax burden of middle class and lower income people had actually fallen a bit over the time period because higher payroll taxes for them were offset by lower income taxes.

At the same time the payroll tax was growing, the earned income tax credit was expanding and personal exemptions were increasing. Congress subsequently introduced child credits and made more of the child credit refundable. So we have been making the income tax more progressive and adding refundable elements to it and that offsets the burden of the payroll tax. So I think again, if you are looking at the tax system holistically you do not really need to change the payroll tax. But again there are all kinds of ideas that are being floated, for example, carbon taxes for environmental reasons. If you do that, how do you offset the burden on low income folks? Well, one possibility is to have a refundable credit against the payroll tax.

Senator Obama has a payroll tax credit as one of his campaign proposals to reduce the burden on low income workers. I think it is definitely the case that you can use the income tax system to offset all these effects. People do not complain about the payroll tax, they do not see it, it does not impose compliance burdens on them because it is a single rate tax with both employee and employer shares collected from employers. But it is now the biggest source of federal taxes we impose on most Americans. ■

Because Swallows Holding's returns for the years at issue were filed well beyond the close of that period, the Service disallowed the deductions claimed on those returns. The taxpayer challenged the asserted deficiencies, arguing that the regulation was invalid.

Types of Tax Regulations

The regulation at issue is a general-authority regulation. Tax regulations are of two types. Specific-authority regulations are issued under delegations within particular Code sections. General-authority regulations are issued under the blanket delegation in section 7805(a), directing Treasury to "prescribe all needful rules and regulations for the enforcement of [the Code]." We in the tax community usually refer to specific-authority regulations as legislative regulations and general-authority regulations as interpretive regulations. This use is quite wrong. Legislative and interpretive regulations have clear meanings under administrative law, and the tax misuse of the terms sows the seed of confusion. *See, e.g.*, Steve R. Johnson, *Swallows as It Might Have Been: Regulations Revising Case Law*, 112 Tax Notes 773, 780 (2006), available at 2006 TNT 167-105 (hereafter "Johnson II").

Many cases have held that specific-authority regulations are entitled to greater deference than general-authority regulations. However, I think, along with some other commentators, that these incantations are boilerplate and that there is little difference in practice in how the courts treat the two types of regulations. *See id*.

Tax Court Opinion

The Tax Court held for the taxpayer. *Swallows Holding, Ltd. v. Commissioner*, 126 T.C. 96 (2006). Twelve judges agreed with the majority opinion written by Judge Laro, and two judges concurred in the result. Three judges (Swift, Halpern, and Holmes) filed dissenting opinions.

The majority acknowledged that *Chevron* controls challenges to specific-authority regulations. It concluded, however, that *National Muffler*, a prominent decision of a pre-*Chevron* line of cases, governs challenges to general-authority regulations. *See National Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979).

The majority held the regulation invalid under *National Muffler* but remarked that it would have reached the same outcome had it applied *Chevron* instead. The majority emphasized a portion of the *National Muffler* opinion which adverted to the contemporaneity of the regulation to the enactment of the statute, the manner in which the regulation evolved, the longevity of the regulation, the reliance that may have been placed on it, the Service's consistency, and the degree of congressional scrutiny of the regulation.

Third Circuit Opinion

On appeal, the three-judge panel reversed the Tax Court and unanimously held for the government. The panel held that (1) *Chevron* provides the controlling standard, (2) under *Chevron* Step One, the statute is ambiguous, thus subject to construction by the agency, and (3) the agency's interpretation of the statute in the regulation is reasonable.

I believe that all three of these conclusions are correct. I argued these points at length before the Third Circuit handed down its decision. *See* Johnson II, *supra*, at 784-93. While agreeing with the Third Circuit's main conclusions, I want here to identify three flaws in its opinion. First, the Third Circuit understated the degree of controversy that thus far has attended the issue of whether *Chevron* applies to general-authority tax regulations. The court cited prior Third Circuit decisions and added that its approach "is in accord with the treatment our sister circuits have given to [general-authority tax regulations]." *Swallows Holding, Ltd.*, 515 F.3d at 170 n.10.

Not quite. Most, but not all, circuits use *Chevron* to analyze challenges to general-authority regulations. Judge Holmes' dissent in *Swallows* totaled six circuits applying *Chevron*, four applying *National Muffler*, and two having equivocal precedents. *Swallows Holding, Ltd.,* 126 T.C. at 180-81 (Holmes, J., dissenting). This tabulation should be viewed as illustrative, not conclusive, and *Swallows* moves the Third Circuit from the equivocal camp to the *Chevron* camp. The trend is in the direction of *Chevron*, but the Third Circuit's opinion was premature in implying that the issue is settled or nearly so.

The second problem with the Third Circuit's opinion is that it perpetuates an erroneous reading of *National Muffler*. The opinion remarked in dictum: "[T]he result would not be the same under *Chevron* analysis as it would be under *National Muffler*." *Swallows Holding, Ltd.*, 515 F.3d at 164. This implies that the Tax Court majority was correct that the regulation would be invalid if *National Muffler* were to provide the governing standard.

Wrong. The Tax Court majority seriously misapplied *National Muffler*. As I have argued at length elsewhere, *National Muffler* and the line of cases of which it is a part are deferential, not hostile, to tax regulations. *See* Steve R. Johnson, *Swallows Holding as It Is: The Distortion of National Muffler*, 112 Tax Notes 351, 361-65 (2006), available at 2006 TNT 142-37 (hereafter "Johnson I"). The *National Muffler* Court held that tax regulations should be upheld if they implement the statute "in some reasonable manner," *National Muffler Dealers Ass'n*, 440 U.S. at 476, and it instructed that "[t]he choice among reasonable interpretations is for the Commissioner, not the courts." *Id*. at 488. This is in essence the same as the deferential language of *Chevron* Step Two, which asks whether the agency's interpretation represents a permissible construction of the statute.

The Tax Court majority's use of the specific considerations mentioned in *National Muffler* contravened the deferential spirit of that case. The majority changed conditions which, if present, lead to heightened deference into conditions which, if absent, foreclose deference. This converts *National Muffler* from a shield to protect reasonable regulations into a sword to strike regulations down. *See* Johnson I, *supra*, at 363-64.

The Third Circuit did not elaborate on its dictum that *National Muffler* analysis would properly have led to invalidation of the regulation. Presumably, it uncritically accepted the Tax Court majority's conclusion to that effect. This was unfortunate. The Tax Court majority's inaccurate portrayal of *National Muffler* should be refuted, not accepted.

The third problem with the Third Circuit's opinion is its compressed view of the scope of analysis under *Chevron* Step Two. The opinion rejected the Tax Court majority's invocation of the specific *National Muffler* considerations: contemporaneity, longevity, manner of evolution, reliance, consistency, and congressional scrutiny. The Third Circuit appeared to suggest that Step Two involves only the regulation's substantive reasonableness, leaving no room for the procedurally oriented *National Muffler* considerations. *See Swallows Holding, Ltd.*, 515 F.3d at 168.

Probably not. It remains to be seen whether the law will develop in this direction. However, for this to occur, some precedents would require a bit of explaining (or selective amnesia). Procedurally oriented facts have been considered at Step Two in a number of previous *Chevron* cases. *E.g., Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2346 (2007); *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 263 (1995).

The Next Domino?

Litigation over whether *Chevron* applies to general-authority tax regulations will continue. The next important decision may be in *Mayo*, in which a district court invalidated a general-authority regulation under section 3121. *Mayo Foundation for Medical Education and Research v. United States*, 503 F. Supp. 2d 1164 (D. Minn. 2007).

Mayo twice cited the Tax Court's now reversed *Swallows* decision, and it paralleled that decision in several key respects, including application of *National Muffler* instead of *Chevron*. *Mayo* is now on appeal to the Eighth Circuit. The *Mayo* taxpayer seems to me to have a somewhat better case than the *Swallows* taxpayer, but still not enough. It is probable, I believe, that the Eighth Circuit will reverse *Mayo*. If it does, another circuit will have moved into the *Chevron* camp (from the *National Muffler* camp) in Judge Holmes' tabulation with eight circuits applying *Chevron* (Third, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C.), three circuits applying *National Muffler* (Fifth, Tenth, and Federal), one circuit still undecided (Second), and one circuit silent (First). ■

NEWS BRIEFS

IMPORTANT DEVELOPMENTS WEBSITE

The 2007 Annual Reports on Important Developments are being posted to the Section website as they become available. As a service to its members, the Tax Section's Developments page features both the Annual Important Developments Reports, as well as the interim updates presented by committees at the Section's Midyear, May, and Fall Meetings. The Reports are an important work product of the Section's committees and track the key legislative changes, regulations, cases and rulings over the past year, as well as forecast upcoming developments in over 30 substantive areas of the tax law. This resource is available to Section members only as an exclusive benefit of membership at: http://www.abanet.org/tax/developments/.

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An MTC Mediation Success Story

By Mark Buchi, Bruce Ely, Stewart Weintraub, and Steve Young*

Since the implementation of the Uniform Division of Income for Tax Purposes Act (UDITPA) in the 1950s, courts, commentators and legislators have hypothesized about the pitfalls of a non-uniformly applied multistate corporate income tax system. In 2000, three individuals got caught by the perfect tax storm, and fell squarely into the pit. This is their story.

The case described in this article is commonly known as the "*Chambers*" case, after one of the three individual taxpayers. Fortunately, the story ended positively in 2007 when two states threw equitable rescue ropes to the taxpayers through mediation before the Multistate Tax Commission (MTC). Alabama, Utah and the MTC are to be congratulated for stepping up and doing the right thing, when legally they could have extended the taxpayers' nightmare for many more years. The fascinating case, replete with tax fictions and constitutional issues, is a great case study on several fronts. This article highlights the availability and benefit of MTC mediation in a multistate tax dispute.

Factual Background

In 1987, two Alabama engineers and a Pennsylvania attorney formed River Gas Corporation, an Alabama S corporation, to own and operate coalbed methane wells. In 1991, River Gas joined two major oil and gas companies in forming a joint venture to operate a gas-producing property in Utah. The joint venture was treated as a partnership for federal income tax purposes.

In 2000, the taxpayers sold all of the stock in River Gas to a major oil and gas company. Pursuant to section 338(h)(10), the sale was treated as a sale of the underlying assets by River Gas. Those assets included the interest in the Utah partnership (96%), an interest in an Alabama joint venture interest (3%), and goodwill (1%)—all intangible property. The sale produced a taxable gain of $273 million.

Based upon the decision in *Ex parte Uniroyal Tire Co.*, 779 So. 2d 227 (Ala. 2000), the River Gas shareholders reported the gain for Alabama income tax purposes as a gain from intangible property that produced non-business income allocable to Alabama (the domiciliary state of River Gas). They paid the applicable Alabama tax.

In 2002, Utah audited the shareholders and treated the gain as business income apportionable 62% (the apportionment percentage based on sales, employees, and property) to Utah. The resulting assessment created a classic case of double taxation.

To protect the clients' interest during the pendency of an appeal from the Utah assessment through the Utah courts, the taxpayers' attorneys filed refund claims in Alabama. When their claims were deemed denied due to the passage of time, appeals were taken to the Circuit Court in Montgomery, Alabama.

Legal and Procedural Issues

The case presented several legal issues: (1) whether the gain is business or non-business income; (2) if the gain is non-business income, whether it is allocable 96% (the percentage of real property in Utah for allocation purposes) to Utah; (3) whether the taxpayers could seek a credit in Alabama for any taxes paid to Utah; and (4) whether the U.S. Constitution prohibits 162% taxation by Utah and Alabama.

The case also presented several interesting procedural issues: (1) whether the matter could be pursued in federal court; (2) whether it could be pursued before the U.S. Supreme Court; (3) whether the taxpayers could structure the timing of the respective appeals through the Alabama and Utah courts so both cases could be decided within the narrow window allowing for simultaneous petitions for certiorari being filed with the U.S. Supreme Court; (4) whether the parties could hold binding arbitration before the MTC; and (5) whether Alabama could be forcibly joined as a party in Utah state court or vice versa.

The taxpayers concluded that the legal issues were not clear cut, the answer to the first, third, and fourth procedural questions was "no," and the answer to the second and fifth procedural questions was unclear. Thus, applying equitable apportionment in mediation was the best means of resolving the dispute.

Getting to Mediation

MTC Bylaw 14 provides a voluntary alternate dispute resolution/mediation program. Both Utah and Alabama are MTC "Compact Members"—states "that have enacted the Multistate Tax Compact into their state law."

When Utah first issued its assessments against the shareholders in late 2002, their counsel contacted the MTC regarding mediation. The MTC agreed to mediate the case, but Alabama refused to participate, and Utah refused to participate until the case had proceeded

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through the administrative process. The taxpayers' view was that this case was a perfect opportunity for the MTC to fulfill the purpose of the Compact to "avoid duplicative taxation," and to show taxpayers that the MTC was as much about promoting taxpayer fairness as about generating state revenues. Although the MTC eventually fulfilled this charge, it took several years to reach that point.

In 2007, Joe Huddleston, the MTC Executive Director, understood the opportunity the case presented for the MTC to fulfill its purpose of avoiding duplicative taxation. He began discussing the matter with the Alabama taxing authorities. Alabama soon agreed to attend an MTC mediation with the taxpayers and Utah.

Keys to the Successful Mediation

The mediation was held on October 24-25, 2007, at the offices of the Alabama Department of Revenue, with Alan Friedman as the mediator. The specific result of the mediation is confidential, but the result, based on equitable apportionment and allocation, was fair to the taxpayers and both states. It epitomized how an MTC mediation process should operate. Several factors contributed to the successful outcome, including the following:

Confidentiality. The assurance of confidentiality allowed all parties to openly discuss all risks and issues relating to the law, equity, and facts.

Opening Session with Uninterrupted Statements. At the beginning of the mediation, all participants gathered in one room. All individuals present, not just the attorneys, were allowed uninterrupted time to speak their mind at that time. This process was very cathartic for all involved. After five years of litigation, there was significant frustration on several fronts. This opening session allowed each person to speak to the other parties, expressing frustrations, conveying arguments, and recommending solutions. In addition to being therapeutic, the opening session also allowed each party to get a sense for the strength of the opposing parties' cases.

Looking the Other Parties in the Eye. A significant benefit of the opening session was that it added a human element to a five-year litigation. The mediation session was the first time the taxpayers had met the taxing authorities from Utah and Alabama face to face. On paper, people can appear bureaucratic, wealthy, stingy, cold, etc. In person, it is very difficult to look someone in the eye and say "no." Getting in the same room, with a day and a half to focus on the issues, was a substantial key to the successful settlement.

Separate Rooms. Following the opening session, the three parties separated into different rooms for the remainder of the day, while the mediator moved from room to room discussing settlement options with each party. This process had the effect of prompting open and honest discussion with the mediator, with no posturing in front of the other parties. The mediator also used an effective tactic of assuring the parties that he would not convey information shared with him without permission. This further promoted full disclosure by all parties.

Two Days. The mediator wisely insisted that all participants block out half of a second day for the mediation, to allow sufficient time for venting, analysis and debate.

Mediator Equity Questions. The successful mediation was driven in part by three questions the mediator asked prior to the mediation: (1) if only one party gave up something, what is the most equitable outcome? (2) if two parties gave up something, what is the most equitable outcome? and (3) if all three parties gave up something, what is most equitable outcome? These questions prompted each party to think in terms of fairness, and also allowed the mediator to get a sense for what each party saw as a fair outcome.

Settlement Authority and a Papered Agreement. A key to the successful mediation was that each party came with full settlement authority. They signed a temporary version of the agreement at the mediation.

Effective Mediator. Alan Friedman is to be highly complimented for the manner in which he conducted the mediation. While he is the former general counsel of the MTC, he did not view the case with government lenses on. He gave equal credence to the positions of all parties, and even helped crystallize and articulate arguments for each party.

Good Faith Attendance. The mediator helped assure success by asking every party to commit to attending the mediation in good faith.

Conclusion

The *Chambers* case is instructive for multistate taxpayers and governmental entities in many respects: (1) dealing with multiple state agencies and taxpayers; (2) answering specific legal and procedural questions; (3) knowing how and when to involve the MTC in a multistate tax dispute; and (4) knowing how to conduct a successful multistate tax mediation. Taxpayers and governmental entities are well advised to heed this guidance when the multistate storm clouds begin to circle. ■

The specific result of the mediation is confidential, but the result, based on equitable apportionment and allocation, was fair to the taxpayers and both states. It epitomized how an MTC mediation process should operate.

Net Unrealized Appreciation: An Option for the Effective Distribution of Retirement Plan Assets

By Elizabeth Lindsay-Ochoa*

Introduction

Over the next several years, more and more baby boomers will begin to retire. Among other decisions, these boomers will need help to determine the most effective distribution for their 401(k) retirement plan assets.

Because 401(k) plans offer tax-deferred contributions and tax-deferred growth, many employees have significant balances available for their retirement. If the plan is sponsored by a corporation, those employees are likely to have a large portion of their 401(k) portfolio in employer stock. This may be especially true in situations where the employer provides a matching contribution in company stock. This article focuses on planning for employees whose 401(k) plans include employer stock.

Factors to Consider

When an employee's 401(k) plan includes employer stock, the employee must consider both income and estate tax consequences. Unlike employer stock held outside a retirement plan, which—at least currently—takes a date of death basis, stock held within a plan does not necessarily receive this treatment. One of the problems with retirement plans is that they create income in respect of a decedent (IRD) at death. IRD assets are reduced in value, not only by estate taxes, but also by income taxes, if they are passed to the heirs at death.

The employee will also be concerned about his or her own tax consequences. When it is time for retirement, many employees roll the proceeds of their 401(k), including employer stock, into an Individual Retirement Account (IRA) to continue enjoying the tax-deferred treatment of their assets. Asset allocation is also a consideration. If the employee has a high concentration of assets in company stock, an IRA may also provide an opportunity to diversify the portfolio.

Lump Sum Distributions

Although using an IRA in this manner is right for some, it may not be the best option for everyone. An option that is not often considered involves taking a lump sum distribution of company stock from the retirement plan. As a general rule, unless the payment is rolled over into another qualified plan or into an IRA, it can trigger immediate federal income tax recognition of the amount received. If an employee receives the lump sum securities of the participant's employer as a distribution in-kind from a qualified plan, part or all of the net unrealized appreciation (NUA) on the securities can be shielded from current tax. If the participant takes the lump sum distribution in kind, section 402 may provide preferential capital gains income tax treatment on that lump sum distribution. Only company stock is eligible for the preferential treatment. Other assets must be rolled over to an IRA within 60 days to avoid current income tax.

A lump sum distribution is defined as a distribution within one taxable year of certain events for which the account becomes payable to the recipient. These events include when the employee: (1) dies, (2) reaches age 59½, (3) separates from service, or (4) becomes disabled. Two other requirements apply. First, the payment must be from a qualified retirement plan. Second, the employee must have been a plan participant for five or more taxable years preceding the taxable year when the lump-sum distribution is taken.

Section 402(e)(4)(A) gives special favorable tax treatment to distributions of company stock from a qualified retirement plan to the participant. Any growth in value of employer securities that has occurred between the time a qualified plan originally placed the securities in the employee's account and the time of distribution to the employee is NUA. Generally speaking, Regulation section 1.402(a)-1 states that the NUA in employer securities that are distributed by a qualified trust to an employee is the excess of the aggregate market value of the securities (considering both securities that have appreciated as well as those that have depreciated) on the distribution date, over the cost or other basis of the securities, to the trust. The cost or other basis of the securities to the trust for purposes of establishing unrealized appreciation is determined by applying the rules found in the regulations.

If the stock is placed in a regular brokerage account rather than being rolled over into an IRA, income tax will be due on the cost basis of the stock, not on its current value. Exposing the stock to immediate tax may be advantageous in the long run. Although some tax is paid sooner than it otherwise would be, it is paid only on the cost basis. The stock may continue to appreciate, tax-deferred, until it is eventually sold. When it is sold, the difference between the cost basis and the then-fair market value will be subject to capital gains tax. If the stock is instead transferred to a rollover IRA, it will eventually be subject to

*AXA Equitable Life Insurance Company, New York, NY. AXA Equitable Life Insurance Company does not provide tax or legal advice.

ordinary income tax on the full fair market value.

Instead of selling the stock, the employee could contribute it to a charitable remainder trust. Generally speaking, a charitable remainder trust distributes an income stream to the grantor for a term of years (not to exceed 20) or for his or her life. After the term is completed, the remainder interest in the trust is distributed to a charity. The grantor is not immediately taxed on the transfer of the stock to the trust, and the trust can sell the stock to diversify its portfolio. The grantor pays income tax on each payment and may receive an income tax deduction for the contribution. The amount of the income tax is determined by the grantor's income tax rate and the four-tier trust accounting income of the trust.

Interestingly, under section 824 of the Pension Protection Act of 2006, a retiring employee who is eligible to contribute to a Roth IRA, who requests a lump sum distribution, can roll it directly into a Roth IRA under section 408A(e). The tax consequences will be, as previously stated, on the basis of the stock. Generally, when certain conditions are met, Roth distributions are not subject to income tax. It stands to reason that the NUA assets, when distributed, also could avoid tax. This appears to be an unintended consequence of the Pension Protection Act.

Conclusion

Ultimately, using NUA as a retirement strategy may make more sense in estates that have a high percentage of IRD assets. Planners should consider this option in addition to the more traditional IRA rollover option. ■

The Nonprofit Law Professors Blog

By Darryll K. Jones*

Introduction

Web Logs or "Blogs" are all the rage these days. Indeed, these Internet sites serve as the great equalizer for the dissemination of information and ideas. Only a few years ago, during what our children view as really ancient history, the dissemination of information and ideas was the exclusive privilege of the wealthy, or of well endowed publishing houses or TV networks. Blogs have changed that dynamic. Today, almost anyone with a library card (by which to access the Internet) can be a publisher.

Given the growth of blogging, it is no surprise that tax professionals, too, would carve out places in cyberspace for the sharing of all things taxing. Indeed, there are so many tax blogs in cyberspace that it is hard to keep track. Tax Blogs are as common as situation comedies, with names just as enticing, including "Taxalicious" (http://taxalicious.com/), "TaxMama" (http://www.taxmama.com/), and "Don't Mess with Taxes" (http://www.dontmesswithtaxes.typepad.com/). With few exceptions, the names of academic tax blogs are less interesting—but they are no less informative. Academic Blogs include "TaxProf" (Professor Paul Caron; http://taxprof.typepad.com/), "MauledAgain" (Professor James Maule; http://mauledagain.blogspot.com/), "ataxingmatter" (Professor Linda Beale; http://ataxingmatter.blogs.com/tax/), and "Start Making Sense" (Professor Daniel Shaviro; http://danshaviro.blogspot.com/). Blog postings offer academics an alternative venue for presenting their ideas. Unlike student-produced law reviews, whose editors may not have taken a tax course, these blogs attract an audience of other tax professionals.

Specialized Tax Blogs

The Code's length and complexity forces specialization in tax practice and tax education. One can easily find tax professionals who specialize in one or another area of tax. But blogs devoted exclusively to specific areas of taxation are few and far between. I did a quick Internet search to find blogs devoted exclusively to corporate taxation and came up empty. Surely, there must be a blog somewhere that covers only corporate taxation, just as there are numerous practitioners and scholars who specialize in that area.

The one exception to the dearth of specialization in the tax blog world relates to the area of nonprofits and tax exemption. Alexis de Tocqueville noted that America is a nation of independent, well-meaning do-gooders, so it should come as no surprise that the nonprofit specialty is already well represented in the newest frontier, certainly better represented than other tax specialties. A search of the internet for "nonprofit blogs" will result in pages and pages of links. And because nonprofit law is increasingly regulated, even on the state level, by section 501(c)(3), nonprofit blogs inevitably talk about taxes.

Nonprofit Law Prof Blog

The academic nonprofit frontier is a relatively new one in Cyberspace. On December 1, 2007, Professors David Brennen and Darryll Jones launched

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the "Nonprofit Law Prof Blog," found at http://lawprofessors.typepad.com/nonprofit/. The Nonprofit Law Prof Blog is actually a "descendant" of Paul Caron's TaxProf and a member of the Law Professor Blogs Network, found at http://www.lawprofessorblogs.com/. The overriding purpose of law professor blogs is, as explained on the website, "to assist law professors in their scholarship and teaching. Each site focuses on a particular area of law and combines both (1) regularly-updated permanent resources and links, and (2) daily news and information of interest to law professors. Our editors are leading scholars and teachers who are committed to providing ***the*** web destination for law professors in their fields." Visitors to LawProf websites, though, will quickly discount the explicit disclaimer against ruminations on politics, social issues, current events and the like. Tax is all about those things, and a quick search of TaxProf and the Nonprofit Law Prof blogs will prove those blogs are not at all shy about discussions relating to topics mistakenly thought to be unrelated to taxation. Indeed, tax law is *all about* war and peace, diversity, presidential election campaigns, environmental preservation and just about any other topic thought to be the exclusive domain of first year law school. "Federal Income Tax I" and indeed "Taxation of Exempt Organizations" tell us much of what we need to know about contemporary life. For example, a recent Nonprofit Law Prof Blog post by Professor Brennen dealt with nonprofit law as it relates to racial profiling and the global war on terror:

> Professor Nina J. Crimm (St. John's) posted an abstract of her draft Roger Williams University Law Review article about the challenges Muslim-Americans face when giving to some charities on **SSRN's Nonprofit and Philanthropy Law Abstracting Journal**. The article is entitled "Muslim-Americans' Charitable Giving Dilemma: What About a Centralized Terror-Free Donor Advised Fund?" Here is the abstract:
>
> In the post-9/11 national security oriented environment, many Muslim-Americans face an inhospitable philanthropic environment and the dilemma of how to satisfy their religious charitable giving obligations and goals. The Article addresses the chilled philanthropic climate by suggesting that it might be moderated through the creation of a centralized terror-free donor advised fund aimed specifically at enabling Muslim-Americans discreetly to direct their diaspora philanthropy to needy Muslims in a few targeted regions and communities abroad. It presents the financial feasibility of, and the essential requirements for, creating such a terror-free donor advised fund. The Article suggests how the benefits of a terror-free donor advised fund would inure not only to Muslim-Americans and the neediest Muslims abroad, but also to the American public.

Other posts have discussed diversity in private foundation giving and governance, Reverend Jeremiah Wright's alleged endorsement of Senator Barack Obama, romantic interludes at the American Red Cross (as such things relate to "private inurement" and "excess benefit"), salaries paid to nonprofit hospital executives, allegations that the Russian government is stifling civil society, nonprofit law in China, high tuition at Harvard, Yale and other places, and a host of other issues—all dealing with life and all inevitably related to taxation.

The primary complaint most law professors have with respect to their publishing activities is that it just takes too long for an idea to go from the written word to the published word. The Nonprofit Law Prof Blog's solution is typical to all blogs. These blogs are not so concerned with making sure footnotes comply with a formalistic view of citations; they are, instead, much more concerned with the immediate sharing of ideas related to important topics of the day. As noted above, the Nonprofit Blog is necessarily concerned with contemporary as well as enduring issues of our time. In this regard, it is also typical of legal blogs in that it effectively bridges the gap between legal theory and legal practice. While its name implies a focus on academics, most readers are nonprofit practitioners who contribute to and benefit from it on a daily basis, as indicated by daily comments submitted in response to topics discussed on the blog.

In law schools, as well as the media, "nonprofit" is still a topic in search of a definition. "Nonprofit law," for example, relates not only to helping the poor, but arts, science, politics and political theory, taxation, economic theory, education, sports law, constitutional law, and estate planning. A blog purporting to explore nonprofit law, then, would seem almost impossible to maintain, except by the most boring but well read person in the world. None of the Nonprofit Law Prof Blog editors fit that bill, thankfully; together, they very nicely cover a difficult to define field. In addition to Professors David Brennen and Darryll Jones, the blog is staffed by seven contributing editors with various backgrounds and specialities relating to nonprofit organizations: Professors John Colombo (Illinois), Susan Gary (Oregon), Vaughn James (Texas Tech), Robert Katz (Indiana-Indianapolis), Lloyd Mayer (Notre Dame), Sophie Smyth (Temple), and Alice Thomas (Howard). Each contributing editor brings a different perspective to nonprofit law and helps the blog retain its daily relevance to all areas nonprofit.

Blogging, as noted above, is a democratized method of disseminating ideas and information relating to a given topic. Consistent with this brave new world ethos, the editors and contributing editors of the Nonprofit Law Prof Blog welcome comments, suggestions and ideas from anyone interested in nonprofit law. Their email addresses are accessible via the blog. ■

Changing Tradeoffs Confront Employee-Shareholders Who Want to Access Corporate Profits

By Richard Winchester*

An employee-shareholder of a closely held C corporation can access the earnings of the business in at least two ways. The corporation can pay the employee-shareholder compensation for any work performed for the company. It can also distribute its profits as a dividend.

In each case the business enjoys a measure of flexibility in choosing how to structure a payout. If the payout takes the form of compensation, the business can deduct the payment as long as the amount is reasonable for work actually performed. I.R.C. § 162(a)(1). It faces no tax restrictions if it pays out earnings as dividends. To the contrary, the tax law actually penalizes a corporation that accumulates earnings beyond its reasonable needs instead of paying the profits out to shareholders. I.R.C. §§ 531–537.

Each option for accessing corporate earnings has different tax consequences to the corporation and to its employee-shareholder. Prior to the Bush dividend tax cut, the combined tax cost to the employee-shareholder and the firm was always lower if the payout took the form of compensation. However, the Bush dividend tax cut changed the math, making it more tax advantageous for a payout to take the form of a dividend in a considerable number of cases. *See* Richard Winchester, *Working for Free: It Ought to be Against the (Tax) Law,* 76 Miss. L.J. 227 (2006). Unless the dividend tax cut is extended or otherwise made permanent, the current set of tradeoffs will expire along with the law.

This article identifies the various rules and factors that determine the total tax cost to the corporation and its employee-shareholder when a payout takes the form of compensation or a dividend. The article highlights how the expiring dividend tax cut and other scheduled changes to the law introduce a timing element into the analysis.

Compensation

If an employee-shareholder receives compensation, two sets of tax rules determine the net tax effect to the company and the individual. First, there are the income tax rules. As noted above, the corporation can deduct any amount paid out as compensation, provided that the amount is reasonable. I.R.C. § 162(a)(1). The value of this deduction will depend on the corporation's marginal tax bracket—15, 25, 34, 35, 38, or 39%. I.R.C. § 11(b)(1). Therefore, the tax savings could range from 15 cents to 39 cents on the dollar.

The employee-shareholder, meanwhile, is taxed on any amounts received as compensation. I.R.C. § 61(a)(1). The recipient's tax cost depends on his or her marginal tax bracket—currently 10, 15, 25, 28, 33, or 35%. I.R.C. § 1(a)–(d), (i). The same six brackets will remain in effect through 2010. Pub. L. No. 107-16, § 901(a)(1), 115 Stat. 38. After 2010, the existing temporary tax rate schedule will be replaced by the five marginal tax rates that were in effect before 2001. Those rates are: 15, 28, 31, 36, and 39.6%. I.R.C. § 1(a)–(d). The tax cost thus depends on the year in which the compensation is received and the recipient's income level at that time.

The payment of compensation also triggers an employment tax (FICA) liability for both the business and the employee-shareholder. The employment tax itself consists of two components. The first component is the old-age, survivors, and disability insurance component, often referred to as OASDI, which is earmarked to cover Social Security benefits. It is a 12.4% levy imposed on amounts that constitute "wages from employment." I.R.C. §§ 3101(a), 3111(a). One-half of that tax is deducted from the employee's compensation. I.R.C. § 3102(a). The business pays the other half. I.R.C. § 3111(a). There is a limit on the amount of wages that can be taxed. This limit is $102,000 for 2008. Notice 2007-87, 2007-45 I.R.B. 966. The limit is adjusted annually to reflect increases in average wages of the U.S. economy. 42 U.S.C. § 430.

The second component of the FICA tax is the hospital insurance component. It is a 2.9% levy on an individual's wages from employment. As with the OASDI component, one-half of this tax is deducted from the employee's compensation, while the employer pays the other half. However, unlike the OASDI component, there is no limit on the wage base for this tax.

The employment tax increases the tax cost of any payout taking the form of compensation, but those tax costs are partially offset by income tax savings. The business can deduct its share of any employment tax paid on the employee's compensation. I.R.C. § 162(a). As is true for the compensation itself, the value of the deduction depends on the corporation's tax bracket. Thus, it will range anywhere from 15 cents to 39 cents on the dollar. *See* I.R.C. § 11(b)(1). The deduction is available for both the OASDI and the hospital insurance components of the tax.

*Thomas Jefferson School of Law, San Diego, CA.

Dividends

If an employee-shareholder receives a dividend, the only federal tax rules to consider are the income tax rules. For the corporation, the analysis is simple because the corporation cannot deduct any dividends it pays. Nor is there a tax cost to the corporation.

On the employee-shareholder side of the equation, any dividend received is subject to tax because it counts as gross income. I.R.C. § 61(a)(7). The amount of tax depends on up to three factors: the year in which the dividend is received; the recipient's tax bracket; and, in the case of a dividend received before 2011, the length of time the recipient held the stock.

Until 2011, dividends from stock held at least 61 days are treated more favorably than dividends on stock held for shorter periods. If the stock was held for less than 61 days, the dividend will be part of the recipient's ordinary income, making it subject to tax at the recipient's marginal rate. Accordingly, it will be subject to tax at one of the six rates currently in effect for 2008 through 2010 (ranging from 10% to 35%). *See* I.R.C. § 1(a)–(d), (i).

If the dividend is paid on stock that was held for more than 60 days, the dividend constitutes a qualified dividend. I.R.C. § 1(h)(11)(B). As such, it is taxed at the rates that apply to long term capital gains. I.R.C. §§ 1(h)(3)(B), (11)(A). For 2008 through 2010, one of two long term capital gains tax rates will apply, depending on the taxpayer's marginal tax bracket. If the recipient is in the 25% tax bracket or higher, the dividend is taxed at 15%. I.R.C. § 1(h)(1)(C), as amended by Pub. L. 108-27, § 301(b)(2)(A), 117 Stat. 752. The dividend is taxed at a 0% rate, and thus is exempt from tax, if the recipient falls below the 25% tax bracket. I.R.C. § 1(h)(1)(B), as amended by Pub. L. 108-27, § 301(a)(1), 117 Stat. 752.

After 2010, a dividend will be taxed under the rules that apply to ordinary income. *Cf*. I.R.C. § 1(h); Pub. L. No. 108-27 § 303, 117 Stat. 752, as amended by Pub. L. No. 109-222, § 102, 120 Stat. 345. Accordingly, the tax on the dividend will depend on the employee-shareholder's marginal tax bracket, which will range from 15 to 39.6%. *See* I.R.C. § 1; Pub. L. No. 107-16, § 901(a)(1), 115 Stat. 38 (sunset of interim rate schedules); Pub. L. No. 108-27, § 107, 117 Stat. 752 (sunset of dividend tax cut).

Conclusion

Understandably, the dividend tax cut reduced the tax cost associated with corporate dividends. If an individual needs to access a closely held corporation's earnings, there may now be an overall tax advantage to receiving a dividend instead of compensation. Because the incentives and tradeoffs are not the same in all cases, tax advisors must carefully consider the tax effects of each payout scenario. Their analysis must include whether the payout is made before or after the dividend tax cut and temporary tax rate tables expire. ■

FROM THE CHAIR *continued from page 3*

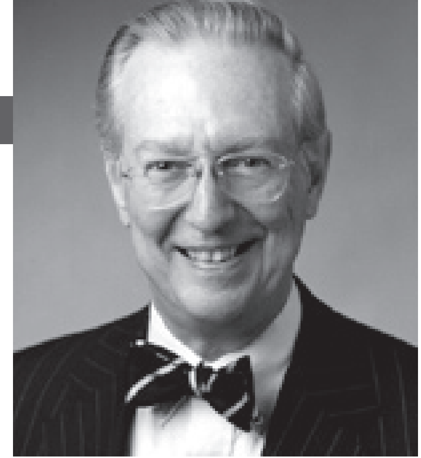
The Professional Services group, led by Sam Braunstein, has been expanding the outreach of our CLE presentations, and increasing the number of people that we reach. We are pleased that we have been able to cosponsor CLE programs in various geographic areas, working with state and local bar associations to provide high-quality materials, subject matter and presenters. We have received a good deal of positive feedback for these efforts.

Our communications outreach under Vice Chair of Communications, Ellen Aprill, has been very successful this year. In light of the housing foreclosure issues that have been in the forefront of the news, we produced an audio news release to inform affected consumers of the tax implications they may be facing. As that issue continues to develop, we will expand our outreach in that regard. During tax season, we produced a video news release and two audio news releases on tax scams and what to look out for when offers appear "too good to be true." The audio news releases have been more successful in reaching taxpayer audiences, drawing some eight million listeners each, while the video is less well-received by broadcast networks and affiliates. Our efforts will be more focused on audio outreach in the future.

I want to thank our Vice Chair of Administration, Ruddy Ramelli, for his work in securing a new primary sponsor for the Section. Thomson Tax and Accounting and Thomson West signed a three year sponsorship contract that became effective January 1, 2008. That relationship has already been successful for the Section and its membership, and we are extremely pleased that our meeting materials are now accessible and searchable from the TaxIQ link on the Section's website. We hope that this relationship will continue for many years to come.

Finally, we missed those of you who were not able to attend the May Meeting in Washington, DC. The Meeting was very successful, with more than 2300 registrants, and more than 200 representatives from various government entities participating in our many continuing legal education programs. We hope that you will be able to join us at the Joint Fall Meeting in San Francisco with the Trust & Estate division of the Real Property, Trust and Estate Section. We look forward to seeing you there.

Again, thank you for the privilege of serving as your Chair this past year. ■



2008 Distinguished Service Award Recipient M. Carr Ferguson, Jr.

by Kenneth W. Gideon, Washington, D.C.

The Section of Taxation honors M. Carr Ferguson, Jr. as the 2008 recipient of its Distinguished Service Award in recognition of his outstanding career in the tax law and contributions to our profession and the Section.

Carr was Chair of the Section in 1993-94. Along with his signature bow-tie, Carr brought to the Section his experience as an outstanding teacher of the tax law, a distinguished public servant, and senior partner in a major New York law firm. He successfully led the Section's efforts to comment effectively on the Clinton tax proposals for 1993. Before becoming our Chair, Carr led our Section's committees on Simplification and on Court Procedure as well as committees of the New York State Bar Tax Section. He currently serves as a member of the Editorial Advisory Board of *The Tax Lawyer.*

A longtime friend, Marty Ginsburg, recalls that when he first met Carr as a Cornell undergraduate, Carr was a member of the Cornell wrestling team. At over six feet and less than 120 pounds, Marty believes that Carr was the skinniest wrestler in the Ivy League and must have seemed like a "four-limbed spider" to his opponents. After undergraduate years that included participation in the Big Red Band and the Seal and Serpent Society, Carr graduated from Cornell University in 1952. In 1954, he received his LL.B. from Cornell Law School and was elected to the Order of the Coif. He then returned home to Washington, D.C., as one of the original 30 lawyers in the Department of Justice Honors Graduate Program. (Carr's father had been a Tax Division trial attorney about twenty years before Carr joined the Division in 1954.) From 1954 to 1959, he served as a trial attorney and special assistant to the Attorney General in the Tax Division of the Department of Justice.

Carr would later return to Washington to head the Tax Division as Assistant Attorney General from 1977 to 1981. In that role he argued cases before the Supreme Court and several Courts of

Appeal and led the fight against the late-1970's wave of tax shelters. Marty Ginsburg recalls a game of golf with Carr while both were speaking at a tax conference in Hawaii during Carr's second tour at the Justice Department. A local real estate developer asked to join their threesome (consisting of Carr, Marty, and Gordon Henderson) and promptly began boasting about his involvement in many clever tax schemes. The developer then asked the three what work they did. Marty replied that he taught, and Gordon said he practiced, tax law in New York City. Carr paused, then said, "My name is Ferguson and I live in Washington, D.C., where I am the Assistant Attorney General in charge of the Tax Division at the Justice Department. I'd really like to know your name." The developer blanched, jumped in his golf cart, and drove off, nameless. Carr turned to the others and said, "We'll play faster as a threesome."

After leaving the Justice Department for the first time in 1959, he earned an LL.M. in Taxation from New York University Law School in 1960. For the next 17 years he was a professor of tax law at Iowa, Stanford, and New York University where he inspired a generation of future tax lawyers including future Tax Section Chairs Dick Shaw and Susan Serota. At NYU, he held the Charles L. Denison Chair and also found time to be of counsel to Wachtell, Lipton, Rosen & Katz from 1968 to 1977. During the academic phase of his career, he wrote several books and many articles on federal taxation, including the original edition of *Federal Income Taxation of Estates* and *Beneficiaries* and *Federal Tax Legislation in Perspective* (ALI, 1965). In 1975, he was part of the legal team that found a way to save New York City from financial collapse.

At the end of his service as Assistant Attorney General in the Carter Administration in 1981, Carr joined Davis, Polk & Wardwell in New York City as a partner (and he remains active today as a senior counsel to that firm). One of his remarkable achievements as a tax litigator was *Dunn Trust v. Commissioner*, 86 T.C. 745 (1986), in which he not only persuaded the Tax Court that no part of AT&T's spin off of the PacTel Group constituted taxable "other property," but also persuaded the Internal Revenue Service that that decision should be applied to all AT&T shareholders receiving distributions. In 1992, he demonstrated that it is not always a bad idea to be your own lawyer when he persuaded the Tax Court to enforce the terms of a Form 872-A against the Service in a case involving his own return, *Ferguson v. Commissioner*, T.C. Memo. 1992-451.

Over his distinguished career, Carr has been quoted on tax issues in *Time* and the *New York Times*, served as a consultant to the United States Department of Justice and the Secretary of the Treasury of the Commonwealth of Puerto Rico, appeared as a witness before Congressional tax-writing and judiciary committees, and litigated many tax cases. He once described Subchapter C as "a meaningless minuet danced to a meaningless tune."

In recent years, he has returned to the teaching of law at the University of San Diego. His interest in and support of legal education has been a hallmark of his career. He serves on the council of Cornell University and the board of visitors of Cornell Law School; he is vice chair of the board of trustees of Lewis & Clark College in Oregon and chair of the board of visitors of the Lewis & Clark Law School; and he is a trustee of the New York University Law Center Foundation. He regularly serves on law school accreditation teams for the American Bar Association and the Association of American Law Schools.

Along the way, he and his wife, Marian, also managed to raise four daughters and play a little golf. (Carr and Marian were the 2001 Net Champions of the International Husband & Wife Golf Championship.) Their four daughters and their spouses have increased the Ferguson clan to include eleven grandchildren.

Carr's outstanding career in academia, government, private practice, and service to the bar, and his continuing dedication to the development of young lawyers, is an inspiration to us all and an outstanding role model for aspiring tax lawyers. The Tax Section is pleased to present him with the 2008 Distinguished Service Award in recognition of a remarkable career of achievement that we hope will continue to enrich us all for many years to come. ■

Editor's Note:
To read Carr Ferguson's remarks given at the May Meeting, please go to:
www.abanet.org/tax/awards.

TAX BITES: *COLTEC* ON MY MIND

TO THE TUNE OF *GEORGIA ON MY MIND*

By Herbert N. Beller*

Editor's Note: Past Section Chair Herb Beller authored this issue's column. We invite our readers to send additional contributions to our tax-oriented songbook.

Coltec, Coltec, the case we dread,
'Cuz for Uncle Sam, it's better than sliced bread!
I say *Coltec, Coltec,* will rob you blind,
Just a sad, sad song, keeps *Coltec* on my mind.

Extra steps won't do the trick,
If cutting tax is your only shtick.
Mrs. Gregory lies in wait,
To seal you with a sorry fate.

Coltec, Coltec, you're awfully tough,
The Code says it works, why isn't that enough?
I say *Coltec, Coltec,* don't be so cruel,
What makes you think, we're tryin' to bend a rule?

LILOs, SILOs, Midcos too,
BLIPS and FLIPS, a tempting brew.
A dab of substance added in,
Might bring a very tasty win.

But watch out for *Coltec, Coltec,* Dear Lord, it sucks,
Makes it really hard, to save a client big bucks.
I say *Coltec, Coltec,* will ruin your day,
Just one false step, and thru the nose you'll pay!

Some other courts reach out to find,
A ray of sunlight thru the pines.
And when they do, you'll hear Korb state:
"We'll win the next one, just you wait!"

So watch out for *Coltec, Coltec*, the case we dread,
For the IRS, it's better than sliced bread!
I say *Coltec, Coltec*, will rob you blind,
Just a sad, sad song, keeps *Coltec* on my mind.
…. Just a sad, sad song, keeps *Coltec* on my mind.

*Sutherland Asbill & Brennan LLP, Washington, DC.

Boxscore

Since January 2008, the Section has coordinated the following government submissions, which can be viewed and downloaded free of charge from the Section's website at www.abanet.org/tax/pubpolicy.

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

TO	DATE	CODE SECTION	TITLE	COMMITTEE	CONTACT
Internal Revenue Service	6/10/08	Various	Comments Concerning Real Estate Investment Trust Liquidations and Notice 2007-55	REAL ESTATE, US ACTIVITIES OF FOREIGNERS AND TAX TREATIES	Peter J. Genz
Internal Revenue Service	6/10/08	n/a	Recommendations for 2008-2009 Guidance Priority List	MULTIPLE COMMITTEES	Section of Taxation
Internal Revenue Service	5/8/08	367, 1248	Comments Concerning Example 4 of Regulation Section 1.367(b)-4(b)(1)(iii)	TASK FORCE ON INTERNATIONAL ASPECTS OF SUBCHAPTER C, FOREIGN ACTIVITIES OF U.S. TAXPAYERS	Joseph Calianno
Senate Appropriations Subcommittee and House Appropriations Subcommittee on Legislative Branch	5/5/08	n/a	Letter Regarding Funding of Joint Committee on Taxation	SECTION OF TAXATION	
Internal Revenue Service	5/5/08	529	Comments Concerning Guidance Under Section 529	ESTATE AND GIFT TAXES	Christopher Houston
Internal Revenue Service	5/1/08	409A	Comments on a Correction Program for Nonqualified Deferred Compensation Plan Failures Under Section 409A	EMPLOYEE BENEFITS	David A. Mustone, Wayne R. Luepker
Internal Revenue Service	5/1/08	337(d)	Comments Concerning Final Regulations Under Section 337(d) Relating to Conversion Transactions	REAL ESTATE, CORPORATE TAX, INVESTMENT COMPANIES	Jim Sowell, Peter Genz, Daniel Cullen
Internal Revenue Service	4/29/08	125	Comments Concerning Proposed Regulations Under Section 125	EMPLOYEE BENEFITS	Mark L. Stember, David A. Mustone
Senate Subcommittee and House Subcommittee on Financial Services and General Government	4/29/08	n/a	Letter Concerning IRS Funding	SECTION OF TAXATION	
Internal Revenue Service	4/18/08	704(c)(1)(B), 737	Comments on Proposed Regulations Concerning Consequences of Certain Mergers Under Section 704(c)(1)(B) and 737	PARTNERSHIPS & LLCS	Jennifer Alexander, Glenn Mincey
Internal Revenue Service	4/16/08	368(a)(1)(D)	Comments on Proposed and Temporary Regulations Under Code Section 368(a)(1)(D)	CORPORATE TAX	Jasper L. Cummings, Jr.
Internal Revenue Service	4/3/08	6694	Comments on the 2007 Amendments to the Section 6694 Preparer Penalty Rules	CIVIL AND CRIMINAL TAX PENALTIES	Michael B. Lang, Bryan C. Skarlatos
Department of Labor	2/29/08	n/a	Comments on the New Service Provider Exemption Under Section 408(b)(17) of ERISA	EMPLOYEE BENEFITS	Andrew L. Oringer, Kurt L.P. Lawson
Internal Revenue Service	1/29/08	6011, 6111	Comments Concerning Proposed Regulations Under Section 6011 and 6111 of the Internal Revenue Code Relating to Patented Transactions	TASK FORCE ON PATENTING OF TAX STRATEGIES	Dennis B. Drapkin, Ellen P. Aprill
Internal Revenue Service	1/23/08	n/a	Comments Concerning ERISA Bonding Rules	EMPLOYEE BENEFITS	Andrew L. Oringer, Greta E. Cowart

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

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

DATE	PROGRAM	CONTACT INFORMATION
July 30, 2008	LAST WEDNESDAY TELECONFERENCE: USING STATE LAW LLCS AS S CORPORATIONS	Tax Section www.abanet.org/tax | 202.662.8670
August 7-12, 2008	ABA ANNUAL MEETING* New York, NY *The Section will not meet at the ABA Annual Meeting. Instead, the Section will hold a stand-alone Fall Meeting.	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
October 27-28, 2008	HEALTH AND WELFARE BENEFIT PLANS 19TH ANNUAL NATIONAL INSTITUTE Arlington, VA	JCEB www.abanet.org/jceb | 202.662.8676
November 6-7, 2008	ERISA LITIGATION – 18TH ANNUAL NATIONAL INSTITUTE Chicago, IL	JCEB www.abanet.org/jceb | 202.662.8676
November 10-11, 2008	COMPENSATION FOR EXECUTIVES AND DIRECTORS – 23RD ANNUAL NATIONAL INSTITUTE New York, NY	JCEB www.abanet.org/jceb | 202.662.8676
November 12-13, 2008	19TH ANNUAL PHILADELPHIA TAX CONFERENCE Loews Philadelphia Hotel – Philadelphia, PA	Tax Section www.abanet.org/tax | 202.662.8670
November 13-14, 2008	ALI-ABA COURSE OF STUDY: TAX EXEMPT CHARITABLE ORGANIZATIONS Hilton Embassy Row Hotel – Washington, DC	ALI-ABA www.ali-aba.org | 800-CLE-NEWS
January 3-7, 2009	26TH ANNUAL NATIONAL CLE CONFERENCE TAX LAW PROGRAM Marriott Vail Mountain Resort & Spa – Vail, CO	Tax Section www.abanet.org/tax | 202.662.8670
April 2-3, 2009	9TH ANNUAL TAX PLANNING STRATEGIES – U.S. AND EUROPE CONFERENCE Amsterdam, The Netherlands	Tax Section www.abanet.org/tax | 202.662.8670

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

ABA Section of Taxation publications:

The Tax Lawyer (TAXL)

ABA CLEs (ABATAX-CLE)

ABA Section of Taxation Comments to the U.S. Congress, Federal Agencies and Tax Court (ABA-FTXCOM)

Guide to Nonprofit Corporate Governance in the Wake of Sarbanes-Oxley (ABA-NCORPGOV)

State and Local Tax Lawyer (SLTAXL)

The Property Tax Deskbook (ABA-PTD)

A Comprehensive Analysis of Current Consumption Tax Proposals (ABA-CONSTAX)

Value Added Tax: A Model Statute and Commentary (ABA-VALADTAX)

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MISSED A MEETING?

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

2009 VITA PROGRAM GRANTS

The Volunteer Income Tax Assistance (VITA) program, administered by the IRS, offers free tax help to low to moderate income individuals who cannot afford professional assistance. VITA volunteers prepare basic tax returns for low income taxpayers in general, but also for those with special needs, including persons with disabilities, non-English speaking persons and elderly taxpayers. For more information on the VITA program go to http://www.irs.gov/pub/irs-utl/rpt_2_congress_vita_grant_042408.pdf. Applications for 2009 VITA site grants are expected to become available on July 1, 2008, at www.irs.gov.

IRS TO HOST SIX 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 agencies.

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