Mel Thomas

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

Mel Thomas has recently retired from the staff of the Joint Committee on Taxation, which he joined in 1976.

Q How did you come to work at the Joint Committee?

A When I got out of high school, I knew I was going to be a tax lawyer. I majored in accounting in college, and I went to a law school that offered a lot of tax courses, Northwestern. While at Northwestern, I was the research assistant to one of the two tax professors there. The other tax professor at Northwestern, Vance Kirby, who was Tax Legislative Council at Treasury during the writing of the '54 Code, had retained a relationship with the Chief Counsel's office under which he would send a couple of the best people from Northwestern to the Chief Counsel's Office in D.C. each year. As a result of his recommendation, I went to work in the L&R division of the Chief Counsel's Office. In that job, I helped draft some legislation, but primarily wrote regulations for four years. My major regulations project was writing the regulations on charitable remainder trusts under section 664. In addition, I wrote the initial drafts of regulations on reserves for bad debts of banks under section 585 and on split-interest charitable transfers under sections 2055(e)(2) and 2522(c)(2).

At the end of my four-year commitment to the Chief Counsel's Office, Johnnie Walters, who was leaving his job as IRS Commissioner, asked me to go to work with him at Hunton & Williams. The day after I had accepted the job working with Walters I received a call from Bob Shapiro from the Joint Committee inviting me to join the JCT staff. I responded that I just accepted a job with Walters, but I would like such an opportunity if the job with Walters did not work out. When I accepted the job with Walters, I had assumed that there would be a lot of tax work to do since Walters had been both Assistant Attorney General of the Tax Division of Justice Department as well as IRS Commissioner. Nonetheless, later I learned that Mr. Walters had been linked to President Nixon's "enemies list" and when that relationship became public our tax business dried up and, as a result, I called to see if the position on the JCT staff was still available. It was and I joined the JCT on April 1, 1976.

Q At that time Larry Woodworth was the Chief of Staff. Tell us about him.

A Larry was sort of an amazing guy in terms of intellect and political acumen. He was both patient and persistent; he had a sixth sense of what tax legislation was necessary and politically possible. In addition, he had earned after years of service the trust of both Russell Long and Wilbur Mills, so much so that they sort of trusted him in putting together tax legislation. So when you worked for the Joint Committee staff under his tutelage you had the power and responsibility to make most of the decisions in drafting. You were the decider of policy at that point in time. And that power lasted up until the middle of the 1990's. The Joint Committee staff were the people who made the numerous policy decisions in putting a provision together. Of course, that power was not so broad such that you could decide whether or not a provision was going to be in the bill but, again, most of the decisions that implemented those decisions were made by the Joint Committee staff.

Larry was trained as an economist. That helped him a great deal in the long run because he took a longer view of tax legislation than subsequent Chiefs of Staff who were lawyers in terms of where the tax law can and should go. Larry also always realized that any decision he made had to run through a political filter; he realized that he wouldn't urge a provision that would cause problems for either Mr. Mills or Russell Long. These two features really made him special.

Q Most of the other Chiefs of Staff with whom you worked were lawyers. Did that make a difference in the way the office is run?

A After Larry, the Chiefs of Staff who were lawyers were not as adept with political sensitivities as Larry had been. The closest to Larry's style were Bob Shapiro and Mark McConaghy, who were the next Chiefs of Staff after Larry had moved on. But after that, the subsequent chiefs were less sensitive to political realities, probably because they had not been exposed to the tax legislative process as long as Larry.

In addition, maybe Larry, as an economist, had been less burdened with a lawyer's typical approach of seeing lots of problems in legislation and trying to steer things away from them. Larry wrote some classic legislation that stood the test of time better than a lot of the more recently passed legislation.

Q What was the relationship between the L&R Division of Chief Counsel and the Staff at the Joint Committee?

A In order to answer this question, it would be helpful to describe the drafting process when I joined the JCT staff and how it has changed over the years. Drafting on the House side was and still is done in a room in the ground floor of the Cannon House Office Building. The room in which drafting occurred was a long narrow room with two green "black" boards on its left side. There was a long narrow table in the room and

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there were, in substance, assigned seats around the table. Drafting of tax legislation was done principally by the House Legislative Counsel, Ward Hussey. Mr. Hussey and his assistants sat in the first three seats on the left side of the table. Next in order of seating was the most JCT staff person, then other JCT staff, then persons from Treasury's Tax Legislative Counsel's office, then representatives from L&R, and finally IRS representatives.

At a drafting session, a description of the problem the proposed provision was to address was provided by the most senior JCT staff person at the drafting session. That person and others from the JCT staff sat in the seats immediately adjacent on Mr. Hussey's left side. Comments were made to the senior JCT staff, who passed them on to Mr. Hussey; comments were not to the room as a whole. This description often was supplemented by persons from Treasury's Tax Legislative Counsel, especially when drafting involved a proposal that came from the Administration. Mr. Hussey would listen to this description, occasionally asking a question.

Examples of the provision frequently were put on the black board in order to illustrate how the provision was expected to operate. After some undefined amount of time, Mr. Hussey would simply leave the room for 15 minutes or so. A short period of time after Mr. Hussey returned to the room, his secretary would return with copies of the proposed statute, complete with technical and conforming amendments, that Mr. Hussey had dictated while he was out of the room. After copies were distributed, there were a few moments to read the proposed draft followed by comments by persons from the various staffs in the room. Occasionally, Mr. Hussey would leave the room to dictate a new draft. When the comments would require modifications that could not be easily incorporated in the draft, there was a direction that this issue should be covered in the committee report, with the understanding that this issue subsequently also would be included in any income tax regulations that would be issued by the Treasury Department. Thus, representatives from L&R were included in the tax legislative process. In addition, originally L&R drafted original versions of statutes, committee reports and that sort of thing of Administration tax proposals.

When Mr. Hussey retired after the '86 Act and word processors replaced secretaries taking dictation, drafting radically changed. Now drafting on the House side involves primarily Ways and Mean's Chief Tax Counsel, John Buckley, others from his staff, normally, but not always, JCT staff and occasionally representatives from the Treasury; more often than not, nobody from the IRS. Drafting sessions involve Ways and Means staff setting forth what they want. These sessions are much shorter than before; examples are rarely put on the black board. Drafts typically are distributed as an attachment to an Email; there typically is no meeting to discuss comments on the draft. The finer points of a proposal are just not raised.

Before Larry expanded the legal staff of the Committee in the 70's, there were only a few lawyers on the staff. But when you look back at the legislation of the 1960's you see that they were relatively small bills compared to more recent legislation. There were a lot of things that needed to be done and Larry started building up his staff until he had 20 or so lawyers. This ultimately led to or coincided with the demise of the L&R division. Once the Joint Committee Staff had bulked up, it was unnecessary for L&R to do any drafting of legislation; L&R became unnecessary. In fact, I think the last Act that the L&R Division had a significant participation in was ERISA in 1974. Once L&R was unnecessary for drafting legislation their presence in the drafting sessions was helpful to them only because they would have to write regulations on the same legislation, so it helped to know how the legislation was put together.

Q Would you say that in hindsight the loss of L&R has had a sort of profound effect in removing line attorneys at the IRS from drafting?

A Yes. The L&R Division had about 40 lawyers. After the legislation drafting work dried up, basically their sole function was writing regulations. After L&R was disbanded, you did not have that critical mass of lawyers in Chief Counsel writing regulations on a regular basis. The effect on the regulations process has to me been the most profound thing of the loss of L&R.

There are many cases in writing statutes when you make specific delegations of regulatory power where you do not have time to draft necessary or appropriate language in the statute. There have been numerous cases where Congress has delegated power to write regulations that either have never been issued, or took a very long time to be issued. A couple of cases that come to mind are section 7872 and section 67(e). Due the lack of regulations under section 67(e) the Supreme Court recently had to weigh in. So, to me, the biggest downfall from the loss of L&R was the loss of the regulations drafting function.

Q As you know, the lawyers in L&R were pulled into Chief Counsel and dispersed to the corporate and pass-through divisions and now assist with regulations, but do you think there was better focus on regulations when the 40 lawyers were working on them?

A Being an alumnus of L&R, I think the answer is yes. I think that because you were spending your full time thinking about regs you were better prepared to draft them. In addition, you still had a companion helping you from the technical division so that you were not doing things inconsistent with what they were doing on the technical side. Lastly, someone from Treasury was part of the regulations writing team to make sure you were not writing regulations beyond the scope of the appropriate Tax Policy.

I do not think that the present regulations writing process has the same level of coordination as when L&R existed, or the same level of making sure that there are regulations that cover all the things for which regulations should be written.

Q The Joint Committee has both revenue estimating functions and legal drafting functions, as well as the job of reviewing large refund claims. Have you seen the balance of these functions shift over time and how?

A Yes. When I came to the Committee, aside from the lawyers there were only two or three revenue estimators. Their methodology was more a general familiarity of where and how the government raised money and how things were done. Their work was then more of a judgment sort of thing. That has evolved now that the Joint Committee estimates have become the official estimates of tax legislation to where the estimating team is much larger and their estimating methodology is very sophisticated. Revenue estimating today is based on models built to represent the various areas of the economy to take into account size of that area in the economy, and how those economic functions are taxed under present law. And then when the legislation is proposed to modify these rules, the models can determine how the change would affect revenues; this is a much more sophisticated way of estimating.

As to reviewing refund claims, the size of the refund staff has stayed basically the same over the years because the threshold for cases that are referred to Joint Committee has been significantly increased over time. There are now and have been three or four refund lawyers. That number is basically all they need and generally they have been able to handle the refund function pretty much by themselves. Earlier in my tenure on the staff, there were many times when the legislative lawyers were brought in for counseling on significant refund cases. This happens now a lot less frequently.

As to the legislative function of lawyers on the JCT, what the lawyers do has changed tremendously. As I said before, when Larry Woodworth was Chief, he had built up a relationship with Russell Long and Wilbur Mills that allowed the lawyers to be the deciders of policy. As a result, to my mind the work of the staff was a lot more challenging; some one gave you a project and your job was to make this thing work. With the demise of that relationship over time, you basically are writing up other people's decisions as opposed to making decisions yourself.

In addition, when Larry was Chief of Staff, he viewed the committee report written by the staff as the principal legislative document of Congress. His view was that the statute was only an outline of the committee report. That has been radically changed now to where the committee reports are more sort of Reader's Digest versions of the statute. That is, while the statute generally is written as a complete sentence, the sentence contains a lot of clauses and the committee report takes each of the clauses and turns it into a separate sentence. The predicate of that sentence is often the language of the clause, many times taken almost verbatim from the statute The committee report is easier to read than the statute, but imports no new knowledge or rules. The older committee reports often contained a lot more of the rules necessary for the functioning of the statute.

Q Did an increase in the size and influence of the House and Senate Committee staffs play into that shifting?

A I do not know whether it was a cause or the effect. I think the shift in functions was due to both a change in the leadership from Democratic to Republican and the fact that the Chief of Staff of the Joint Committee has changed lot more rapidly in recent years. Of the 15 Chiefs of Staff of the Joint Committee on Taxation, I worked there for 33 years and worked for 13 of those 15 Chiefs of Staff. This amount of change is fast when one considers that the first two Chiefs of Staff lasted for 40 years. Now the Chiefs of Staff turn over a great deal—two or three years before generally they move on. Because of that turnover level I do not think a Chief has been able to build up that level of trust that Larry had been built up with Long and Mills. So the House Ways and Means and Senate Finance Committee chairmen may feel less willing to safely delegate things to the Joint Committee. They wanted their own personal staff to perform those functions. I believe that is what happened, and that is why the nature of what the lawyers of the Joint Committee staff do has drastically changed.

Q You did a lot of work on depreciation rules. Do you have any stories?

A As I've already said, I was an accounting major during my undergraduate days. While there I did my honors paper on the relationship of generally accepted accounting principles to tax accounting principles. One of the chapters of that paper dealt with depreciation. As I learned from my research for that paper, if you go back to the turn of the 20th century the accounting world did not have depreciation at first. Instead, accounting dealt with capital costs under the so-called RRB method—repair, replacement or betterment, all of which were expensed. In the 1930's, President Roosevelt needed money and he asked his Secretary of the Treasury how he could raise taxes if he could not do it directly. Secretary Morgenthau told him he knew how to do it indirectly; he unilaterally would have moved everyone off the RRB method to straight line depreciation accounting on the grounds that depreciation resulted in a clearer measurement of income. Depreciation drastically reduced business deductions compared to the RRB method. And that is what paid for the build up of Armed Forces without having to raise any taxes in the time of the Depression; all that was done by administrative fiat.

Q Did you specialize in certain issues?

A I did work in all of the areas in which I had some background. This got me doing work in all areas other than pensions and foreign. For example, I worked on all the legislation in the accounting area since accounting was my major in my undergraduate days. This included working on all of the time value of money rules in the '84 Act. I got involved in the taxation of estates and trusts under subchapter J, estate and gift taxation under chapters 11 and 12, taxation of charities and charitable transfers as a result of my writing the regulations on charitable remainder trusts and those for split gifts. I worked on taxation of banks and other financial institutions as a consequence of writing the section 585 regulations while in L&R. I also did a lot of work in pass-throughs such as regulated investment companies and real estate investment trusts while at L&R and so continued in that area while at the JCT. This later included the provisions of the '86 Act on REMICs. I worked on the taxation of cooperatives as a result of an article I worked on in that area as the research assistant of my tax prof. at Northwestern. I worked on legislation relating to tax-exempt debt as a result of several rulings I worked on while at Hunton & Williams. Ironically, I was assigned work on bankruptcy taxation since bankruptcy estates were originally taxed in the same manner as decedent's estates and trusts. There were many other areas in which I worked over the past 33 years; too many to mention here.

Q Tell us about the adoption of section 338.

A The story began when Treasury initially did not like 338. Indeed, Treasury was about to walk away from a meeting on the subject when I told a joke to get them to stay. After everyone laughed at the joke, things calmed down and we worked through the 338 rules.

That reminds me of the savings and loan bailout legislation in 1981. Section 597 was the most difficult thing that I saw in that regard policy wise because it looked like allowing the sale of losses as part of a restructuring of bankrupt savings and loans and almost cost me my job. Well, the idea of the tax law allowing the sale of losses is antithetical to most rules like sections 382 and 265. All of a sudden section 597 comes along as a Senate floor amendment and arguably could be read to allow the sale of losses arising from restructuring of loans of a savings and loan association in bankruptcy. During the conference on the '81 Act, I tried to learn its purpose so that it could be clarified to be consistent with its purpose. My efforts were stopped short when the amendment's sponsor phoned me to say that my efforts to clarify his provision "would not be appreciated." As a result, the purpose of the provision remained unclear for a period of time; eventually though the agency that dealt with the restructuring of savings and loans started organizing sales premised upon the sale of losses. The uncertainty was removed when Treasury announced its interpretation of the statute not allowing the sale of losses—a decision that many felt was a change in interpretation since many losses were thought to be purchased by nonbankrupt savings and loans who said they bought those losses in good faith and now had them being taken away from them.

Q As you know, that has some analogy in recent times to a notice that the Treasury put out last year saying that banks did not have to treat loan losses as built in losses for purposes of section 382 changes of ownership.

A Yes. As you know, that notice was repealed by recent legislation and I was involved in estimating the revenue consequences of that legislation. The interesting question in making that estimate was determining the base line, because there is another rule under section 382 saying that any bad debts written off more than one year after the change of ownership would not be limited. So then you get into the question of whether or not you could effectively avoid the limitation of section 382 through not claiming a bad debt deduction until after the one-year period ending after an ownership change.

Q Do you feel that the Joint Committee is sort of isolated, or did you see a lot of "lobbying" on tax issues from outside, and how does that work?

A Well, first of all, there was a change in that regard. Initially, as I said, the Joint Committee staff made all of the policy calls. Because of that, every lobbyist who was proposing a change in the tax laws scheduled meetings with the JCT staff so that they could tell us what they had been trying to do. Such information would be helpful to us, so that we could help a member who wanted that proposal adopted.

Now that the Joint Committee does not make those policy calls, those meetings do not occur as often and therefore the nature of the process has changed.

Q How does the actual "joint committee" make-up of the senators and congressmen work in connection with Committee staff?

A The Joint Committee in terms of the Congressmen does not really function as a separate committee apart from the Senate and House Committees. Nonetheless, all of the members of the Joint Committee were also the most senior members of the Ways and Means Committee and the Finance Committee. As such, they have an interest in the tax legislation, but I have never seen where they have used their office as a Joint Committee member to get a leg up on other members in terms of legislation, other than being the most senior members of the Ways and Means and Finance Committees and, consequently, having some higher priority merely because they have such seniority. Other than that, I think basically the function of the Joint Committee is to make sure that there are sufficient staff to perform the functions that they needed.

Q Did you work on hedge accounting?

A Normally most of the things you get to work on in the Joint Committee is legislation suggested by the administration. There was one project that I worked on where what happened was exactly the other way—a solution to a problem was considered by Congress but was adopted administratively by Treasury. This was the *Arkansas Best* issue. If you recall, *Arkansas Best* was a case that arguably overturned the *Corn Products* doctrine as to what assets would be treated as ordinary even though they did not literally come within the exclusions of what is a capital asset under section 1221. Well the uncertainty caused by that case became a huge issue because it effectively left a lot of people in a no man's land of uncertainty. Efforts to solve that uncertainty legislatively had stalled since, depending upon how you scored the effects of the *Arkansas Best* decision, legislation was going to either raise or cost a lot of money, with the result that it was impossible to move on the thing. I had been attending a study group sponsored by Virginia Tech where the subject of hedge accounting was discussed. In the case of hedge accounting, the two elements of hedge are paired together and not taken into account until the hedge was terminated. The idea of applying that concept to solve the *Arkansas Best* problem sounded like a good idea if a set of rules could be adopted that provided certainty, but could not be abused. Accordingly, I put together a group of people on our staff and Treasury and IRS to work on such a proposal. We worked over a year making sure that it worked and did not create either character or time mismatches. Unfortunately, our work did not solve the revenue problem.

In the meanwhile, the *Fannie Mae* case was decided and allowed ordinary treatment of some assets that did not literally come within the exclusions of section 1221, which meant that the Treasury was able to issue regulations under sections 1221 and 446 that basically adopted the Hill-originated proposal administratively since Congress was unable to adopt it legislatively. ■

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percentage limitations, which cause a taxpayer to lose deductions or credits as income rises.

One of the fundamental characteristics of a fair tax, ability to pay (as measured by income), however, is not adjusted automatically for cost of living differences between geographic areas. Cost of living research indicates that there is no immediate theoretical correlation between the cost of living in a particular area and the wages paid in that area, except in the long term due to assumed migration, as the demand and supply functions are separate for these items. The cost of living is determined by the demand and supply of housing, food, etc., and wages are determined by the demand and supply of labor for a particular job.

For example, New York City has a high cost of living but that does not mean that if you are an engineer and you move there you should expect higher pay. Your pay is determined by the supply of engineers and the number of job openings for engineers. One may argue that theoretically, in the long term, these inequities should equalize due to migration of workers or businesses. However, we certainly cannot assume that there is no need to adjust tax laws to improve horizontal equity for cost of living differences because the other side of the equation, income, will automatically compensate, even in the long term. Workers and businesses migrate for various reasons, not all of which are economic or related to labor costs. Clearly, federal law taxes geographical differences on the income side of this equation. It should also make adjustments for differences on the expense side in order to improve equity.

As stated earlier, horizontal equity is defined as treating taxpayers in the same economic situation in the same fashion. Simply stated, with respect to the income tax, individuals in the same economic scenario should pay the same amount of federal tax. It is important to note that equity measures do not specifically measure the level (amount) of the tax liability. The equity measure simply determines if taxpayers in the same economic situation pay the same amount of tax; it does not determine if that amount is too high or too low relative to that of other groups.

In our study, we calculate HE for married filing joint individual tax return data for 2001. Our results show, on the federal level, an increase in income results in decreased HE. This seems counterintuitive because, as income rises, tax deductions and credits phase out and taxpayers are on more equal footing. However, looking at the detail for each state, HE does not systematically decrease with an increase in income. The interaction effect of owning vs. renting and dependent children vs. no dependent children further complicates the analysis, and is exacerbated (or perhaps explained) by the difference in HE between states and within states due to great variances in housing costs, property taxes, state and local income taxes, and tax credits and exemptions for dependent children. The analysis shows that there is a considerable difference between the tax burdens of individuals across the United States who are deemed to be in the same economic situation or who are deemed to have the same ability to pay.

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