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Section of Taxation
NEWSQUARTERLY

SECTION MEETING SPOTLIGHT

Estate Planning for Boomers and Beyond

Editor's Note: At the Tax/RPTE Joint Fall CLE Meeting, the Sections' Diversity Committees sponsored a program entitled "What a Difference a Generation Makes: Tax, Estate, and Retirement Planning for Generations X, Y and Beyond." Using a multigenerational case study, Tracy Oishi, Amy Hess, and Elizabeth Lindsay-Ochoa covered various aspects of planning for different generations' needs. The articles below are adapted from presentations concerning the Boomer Generation and their children. – *Gail L. Richmond, Nova Southeastern University Law Center, Fort Lauderdale, FL*

Estate Planning for the Baby Boomers: Will They Have Estates to Plan?

By Amy Morris Hess*

INTRODUCTION: WHO ARE THE BABY BOOMERS?

The Baby Boomers are the post-World-War-II generation, people born between 1946 and 1964. Nearly 76 million Americans alive today, or about 25%, are Baby Boomers. The oldest members of this generation are in their early 60s. These leading edge Baby Boomers either have retired or are thinking about retiring in the next 10 years.

How are they different from their parents, the generation whose retirement and old age we helped to plan during the last 20 years? What lies ahead for the Baby Boomers in retirement and old age?

A SHORT COURSE IN LONGEVITY

In 1930, a few years before the first Social Security law was enacted, average life expectancy at birth was about 59 years (57.7 M; 60.9 F). At age 65, average life expectancy was just over 12 years (11.7 M; 12.8 F). Thus, when Social Security was enacted, most people were not expected to live long enough to collect it. Those who did live to be 65 were truly "old" when they became eligible for Social Security; they were expected to die at about 77 years of age.

By 1970, when the Baby Boomers were beginning their working lives, the average life expectancy at birth was almost 71 years (67 M; 74.6 F). At age 65, average life expectancy was almost 15 years (13 M; 16.8 F). Thus, Baby Boomers could expect to live six years beyond the "normal" retirement age when they began work. Those who did live to 65 could expect to survive to 80.

By 2003, the figures had risen still farther. The average life expectancy at birth was about 77.5 years (74.8 M; 80.1 F); the average life expectancy at age 65 was 18.3 years (16.8 M; 19.8 F). According to the most recent statistics available, the average American can expect to live 12.5 years beyond the normal retirement age, and those who live to 65 can expect to spend almost 20 years in retirement. But the concept of 65 as the "normal" retirement age has changed little; in fact, some Baby

continued on page 13

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CONTENTS

Section Meeting Spotlight 1
Estate Planning for Boomers and Beyond

From the Chair 3
William J. Wilkins

Interview 4
Randolph Paul

Opinion Points 7
(1) Should a Mailbox Be Enough? A Proposal to Redefine Domestic Corporation Status; (2) Section 162(m)(5) May Not Be Effective in Limiting Executive Compensation

Point To Remember 10
Not Just Whistling in the Dark: Recent Guidance on Whistleblower Awards

Government Submissions Boxscore 17

Tax Bites 17
Tax Bites Takes a Law School Exam

News Briefs 18

CLE Calendar 19

2009 - 2010 Nominees 20

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Section Meeting Calendar

www.abanet.org/tax/calendar

DATE	MEETING	LOCATION
May 7-9, 2009	**MAY MEETING**	Grand Hyatt – Washington, DC
September 24-26, 2009	**JOINT FALL CLE MEETING**	Hyatt Regency – Chicago, IL
January 21-23, 2010	**MIDYEAR MEETING**	Grand Hyatt – San Antonio, TX
May 6-8, 2010	**MAY MEETING**	Grand Hyatt – Washington, DC
September 23-25, 2010	**JOINT FALL CLE MEETING**	Sheraton – Toronto, ON

SECTION MEETING MATERIALS & RECORDINGS

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

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

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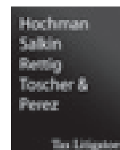

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William J. Wilkins*

The Section of Taxation is at its best when it comes to planning and executing our three annual meetings. By pushing responsibility for CLE programming to the substantive committees, we assure attendees of the most interesting and up-to-date information and networking in their specialty areas. Through the skills and creativity of Section Director Christine Brunswick and our meeting planning professionals, we obtain access to meeting facilities that fit our special needs, and we are able to offer the highest quality CLE at prices that are well below other providers' prices. We offer events and opportunities that seek to make our meetings accessible to new attendees and young lawyers. The panels, the social events, the leadership events, and the hallway interactions are always lively and enlightening.

With our successes, however, come pressures and challenges. I want to share some of the things that your leadership and staff have been dealing with behind the scenes. These issues will ultimately affect the look, feel, and cost of Section meetings.

Our annual Washington, DC, meeting in May has been so successful that we now face severe space and time constraints. For the last several years, we have used overflow space at the Reagan Building, used mostly by the Employee Benefits Committee. This has been unsatisfactory in several respects, but even if it were tolerable it is not a practical solution. In recent years, we have not known until a few months ahead of the May meeting whether we would have overflow space at all. Possible providers, including the Marriott, the DC Convention Center, and the Reagan Building, have either turned us down or waited to be sure they could not get a better customer. We must have a more durable and reliable arrangement.

We have explored many alternatives, including having a maximum registration limit and adding a Thursday afternoon session. After consulting with leaders of the Committees who would have been most affected by adding a Thursday afternoon session, we were encouraged to explore another path. In response, we expect that at our May 2009 meeting, we will run three time slots for Friday committee meetings, instead of the usual two. We expect there would be an early morning slot, a mid-day slot, and an afternoon slot, with an hour or so break between the second and third slots. At this writing, we are conducting conference call discussions with Council and with Committee Chairs to listen to concerns, to determine whether this plan is feasible, and to gather suggestions for improvement.

Unfortunately, there is no plan under which we can have everything we might like. Having three committee sessions on Friday will mean that committee lunch meetings will be difficult to accommodate. We will offer box lunches at a low price or at no additional price, with limited seating space for dining. We expect that many attendees will use the one hour lunch break just like they do at home, keeping up with calls and e-mails as they eat. This arrangement will also mean that we will not be able to host a Section-wide Friday breakfast, which has recently been a good way to recruit a prominent government speaker. We will instead have our plenary session in the Saturday lunch hour. On the other hand, having more sessions will make it easier to avoid overcrowded meeting rooms, and should result in fewer schedule conflicts among committee CLE sessions.

Unfortunately, there is no plan under which we can have everything we might like. Having three committee sessions on Friday will mean that committee lunch meetings will be difficult to accommodate.

This arrangement will only affect the May meeting. Following the May 2009 meeting, there will be a full examination of how it went and what might be improved for the future. The quality of the May meeting is of paramount importance, and we would not be considering these changes if we did not have to. We will appreciate your willingness to try something new, and we look forward to your reactions and suggestions.

The other issue that your leadership has been dealing with is the prospect that the American Bar Association's management and Board of Governors could require the Section of Taxation to use the ABA's centralized staff for hotel negotiations, and to follow ABA hotel contract practices that generate revenue for the ABA (with the revenue being split between the Section and the ABA's Meetings and Travel Department). The

continued on page 6

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Randolph Paul

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

Few lawyers know that the "Paul" of Paul, Weiss, Rifkind, Wharton & Garrison LLP was Randolph E. Paul, who was probably the most complete federal tax expert of all time; fewer know that the Mertens treatise was originally Paul and Mertens. Paul died in 1956 of a heart attack in the Old Supreme Court chamber in the Capitol while testifying on tax matters before Wilbur Mills. He had gotten into tax by accident, taking a job with a New York lawyer, George Holmes, who happened to be an early tax expert and prolific tax writer, as Paul was to become. Paul was a part-time advisor to the Treasury and President Roosevelt before he became Secretary Morgenthau's tax counsel and then General Counsel to the Treasury in 1942, where he served until March 22, 1944. He formed Paul, Weiss in 1945.

Q How do you feel about consumption taxes?

A "[We proposed a 'spendings tax' in 1940.] It hits directly at spending, permitting debt repayment, insurance premiums, … regular savings, and the like to be deducted. …but at the same time it is progressive and places a severe penalty on luxury spending and would serve as a control over inflation. … The first $2,000 a married couple spent would be free from tax. [Then] they would pay 10% [on the next] $2,000 and 20% on the next $2,000." NEW YORK TIMES, Obituaries Section, Sept. 8, 1942, at 25.

Q Have you seen a shift in the reliance of Congress on the Administration in tax matters?

A "[Yes.]" According to the *Times*, over a period of years both the Ways and Means and the Finance Committees have come to rely more and more upon the staff of the Joint Committee on Internal Revenue, established in 1926, and less and less upon the Treasury, which caused Paul to consider resigning, the topic of the article. NEW YORK TIMES, Oct. 31, 1943, at 1.

Q Where do you stand on corporate integration?

A "[Even before the war] the corporate tax was believed to be rough on equity owners; it has frequently been blamed for frightening potential venture capital into 'safer' investment outlets. [It might be attacked by following the example of the public utility industry.] The deduction of preferred dividends from surtax net income of public utility companies is more than a straw in the wind. Where preferred dividends have led, common dividends may follow." NEW YORK TIMES, Jan. 15, 1944, at 6.

Randolph E. Paul was probably the most complete federal tax expert of all time. Paul died in 1956 of a heart attack in the Old Supreme Court chamber in the Capitol while testifying on tax matters before Wilbur Mills.

Q In 1945 all of the courts decided a total of 1700 tax cases. Is that too few or too many?

A "[It is too many.] Dean Griswold has rightly declared: 'The whole field is essentially one of administration rather than of law.' When we once decide that questions of statutory interpretation are not questions of right or wrong or of finding the only correct rule to fit the occasion, but are rather questions of policy in shadowy territory, we come closer to understanding the problem to be resolved. And we know who can best perform the task of interpretation. It is a task calling for skilled and sensitive wisdom, operating on a highly technical level, rather than for the traditional learning of judges. Tax cases are hard cases. … The very factors which disqualify the courts points to the Treasury as the logical administrative body. It is inured to a daily diet of complexities. … It has learned through grim necessity, as well as contact, the relationships between one taxing provision and another. It has a weather eye on results as well as rules. …. In interpreting tax statutes it would operate on home territory. Moreover, it has a legislative delegation of authority; it may prescribe 'all needful rules and regulations' for the enforcement of the provisions of the Internal Revenue Code." Randolph E. Paul, TAXATION FOR PROSPERITY 397-98 (Bobbs-Merrill 1947).

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

Q What do you think about the "social security lockbox"?

A " …. The Federal Government cannot practicably create a reserve in any form except its own obligations. Consequently, social security reserve accumulations in excess of current needs are used for whatever current expenses the government is required to meet. Since the payroll tax is imposed on all covered workers alike with no regard for ability to pay, the great mass of contributions not used immediately for benefit payments constitutes regressive taxation to meet current governmental costs." *Id.* at 320.

Nothing is more misleading than the attempt of the courts in these days to fetter tax law by 'almost invariably misleading' maxims. One of the most overworked of maxims is the tiresome slogan used by Mr. Justice Pitney of the Supreme Court in an early income tax case [*Southern Pacific Co. v. Lowe*, 247 U.S. 330 (1918)] when he referred to the test of 'truth' and 'substance,' as distinguished from 'form' and 'appearance.'

Q Do you feel that the income tax law has been adequately developed as a policy matter?

A "[No. In 1938] … the system is only 25 years old. In true perspective, the amazing thing may be that it works as well as it does. …. In 25 years of development federal taxation has had little direction on the legal side. There has been no chart or compass. Growth has been *ex necessitate*. … Back in 1921 a small group at Columbia University sponsored a series of lectures published later under the title 'The Federal Income Tax.' Since this promising beginning most tax talking and writing has been addressed to immediate problems and has been a description of trees, not of the forest. '…. *good* general theory can plow good earth deep …' There is pressing need today for more careful thinking in terms of our federal tax system as a unit." Randolph E. Paul, preface to Selected Studies in Federal Taxation, Second Series, at v-vi (Callaghan 1938).

Q What is your opinion of the "substance over form" approach to deciding tax disputes?

A "Nothing is more misleading than the attempt of the courts in these days to fetter tax law by 'almost invariably misleading' maxims. One of the most overworked of maxims is the tiresome slogan used by Mr. Justice Pitney of the Supreme Court in an early income tax case [*Southern Pacific Co. v. Lowe*, 247 U.S. 330 (1918)] when he referred to the test of '*truth*' and '*substance*,' as distinguished from '*form*' and '*appearance*.' Ever since 1918, when the Macomber case was decided, the courts have been learnedly pretending to apply this test, thus avoiding by the use of pompous generalities the task of distinguishing between form and substance in particular cases. An ubiquitous distinction is obviously impossible. Mr. Justice Cardozo has said: 'Philosophers have been trying for some thousands of years to draw the distinction between substance and mere appearance in the world of matter. I doubt whether they succeed better when they attempt a like distinction in the world of thought.' All that can be done—indeed, the difficult thing that needs to be done—is to distinguish between form and substance in particular cases and to frame a loose-fitting generality in the most tentative terms.

"In tax cases the attempt to distinguish between form and substance has certainly been outstandingly unsuccessful, and the substance-form maxim has, unfortunately, more than fulfilled Lord Esher's characterization in connection with the problem of dealing with the taxable effect of business transactions. Judge Learned Hand recently referred to the words 'form' and 'substance' as 'vague alternatives' and 'anodynes for the pains of reasoning.' The condemnation is deserved. The form-substance maxim has misled; it has been a substitute for painstaking analysis; and predictability, in which the law of taxation has its peculiar value, has become virtually impossible." Randolph E. Paul & Philip Zimet, *Step Transactions*, in Selected Studies in Federal Taxation, Second Series, at 200-02 (Callaghan 1938).

Q How do you feel about the resort of courts to considerations of the taxpayer's motive or intent?

A "[It should be recognized that in many cases the statute explicitly or implicitly indicates that the taxpayer's intent or motive is critical.] A prime example of the [implication cases] is the celebrated and worrisome case of *Gregory v. Helvering*, involving the sections of the income tax act relating to reorganizations. … Like *Eisner v. Macomber*, an equally familiar landmark, this case, with its equivocal implications, is all things to all men. The Supreme Court's opinion carefully avoids any display of moral indignation over the motive of tax avoidance; …

such [subjective] tests actually stack the cards in favor of the taxpayer rather than against him; the advantages of sweeping definitions and of whatever presumptions may be available to the government will remain more than offset by the fact that the evidence as to motive is almost entirely in the possession of the taxpayer, unless psychology devises a better mental X-ray than has so far been discovered. [Note: Paul did not anticipate discoverable e-mail] … [A] highly complicated statute and a chaos of judicial legislation on the subject of federal taxation … are not solely the product of ineptitude. They bespeak a need; it is putting the cart before the horse to call them a result of bungling administration, legislation, and judicial review. They reflect a deep necessity of times in which unprecedented revenues must be collected and determined tax avoidance prevented without undue dislocation of legitimate transactions in a business world that was never more complicated than it is today. … The resort to subjective standards is one mechanism making for fluidity and enabling the doing of justice in the many cases which cannot be assigned to one side of the line or the other by any Euclidean formula." Randolph E. Paul, *Motive and Intent*, in Selected Studies in Federal Taxation, Second Series, at 290-91, 301-03 (Callaghan 1938).

Q So what was *Gregory* about? What is its "rule"?

A "What is not apparent, except from a careful reading, is that the case involves an interpretation of a statute. The court states what is meant by a transfer 'in pursuance of a plan of reorganization.' The transaction upon its face lay outside the 'plain intent of the statute.' … An excellent test of whether a thing claimed to have been done has really been done … is: Are the parties to a transaction bound to unite to undo the transaction or is the transaction so firm as to require a new agreement to undo it?" Randolph E. Paul, Studies in Federal Taxation, Taxation without Misrepresentation, at 125, 129 (Callaghan 1937).

Q So can you capsulize your "rule" for how the courts in fact deal with tax avoidance?

A "[Yes] (1) In deciding a fact issue the courts will analyze and scrutinize with special zeal where tax avoidance appears to be a motive. But that motive will be immaterial except as an eye-opening mechanism or interpreter of equivocal conduct; it will not negative the effect of a transaction which has really occurred.

(2) (a) In interpreting a tax statute the courts will in their natural and perhaps imposed duty to protect the revenue, adopt an attitude of skepticism as to the meaning urged by a tax-avoiding taxpayer, whether the language subject to construction is tax-imposing or tax-exempting, and will on occasion decide that a statutory provision is not meant to protect the taxpayer who seeks to avoid the burden which would be his but for the provision in question.

(b) Much the same, and perhaps a broader, attitude of revenue protection will be adopted by the courts in interpreting the Constitution, their attitude being particularly emphatic on the point that vested rights are not secured by legislative lapses, but must be linked to substantial equity and good conscience." *Id*. at 152-53. ■

FROM THE CHAIR *continued from page 3*

revenue would be generated by asking our meeting hotels to pay a travel agent commission to the ABA—a practice that the Section has not used in any of our Section-wide meetings.

When I raised concerns about these issues to the President and President-Elect of the ABA, a process ensued in which hotel contracting issues were debated in the Operations and Communications Committee of the ABA Board of Governors. The Committee and the Board endorsed the idea that these were matters for the Executive Director of the ABA to decide. As a result, I am currently engaged in high level discussions with the Executive Director of the ABA on matters of deep importance to the Section. My goals in these discussions are to assure that the Section follows transparent and honest business practices, and that whoever manages our meeting arrangements has accountability to and familiarity with the Section, its leadership, and its members. The leadership of your Section believes that greater autonomy, responsibility, and accountability for Section staff and leadership provide the best course for the Section and for the entire American Bar Association. It was clear from the recent Board of Governors discussions that this view is not universally shared within the Board or within the senior staff of the Association. However, the Executive Director and I have assured each other that we will work diligently to achieve our mutual goals of having the Section and the Association develop and adopt practices that best serve our members.

In my view, our meetings constitute the Section's most valuable member service. I look forward to continuing to see old and new friends at upcoming meetings, and I encourage readers to attend as many meetings as you can. ■

OPINION POINT

Should a Mailbox Be Enough? A Proposal to Redefine Domestic Corporation Status

By Sara A. Giddings*

A mailbox in a low-tax jurisdiction allows a corporation to be considered foreign even if it is headquartered and managed from within the United States. This ability is derived from section 7701(a)(4), which defines domestic corporations as "created or organized in the United States or under the law of the United States or of any State." A foreign corporation is any corporation that is not domestic. I.R.C. § 7701(a)(5). These definitions do not reflect business realities, and, as attorney Stephen Shay stated, "Like water draining from a bathtub, U.S. multinationals are legally shifting increasing portions of their profits to low- or zero-tax foreign countries." Testimony of Stephen Shay before the President's Advisory Panel on Tax Reform, May 12, 2005, at http://www.taxreformpanel.gov/meetings/meeting-05_11-12_2005.shtml. Unless the definition of corporation is changed to better reflect business realities, more corporations will choose to incorporate abroad rather than in the United States, costing the United States significant lost tax revenue.

The Problem

The determination of whether an entity is domestic or foreign is important because the system of taxation differs depending upon the type of entity. A corporation that is a resident of the United States is taxed on its income worldwide regardless of where it is earned. In contrast, a foreign corporation is taxed only on its effectively connected income and on certain types of United States source investment income.

Corporations have sought to take advantage of the difference in the taxation of domestic and foreign entities by reincorporating abroad. The most common type of transactions are corporation inversions. Prior to the inversion, the United States incorporated parent served as the holding company for United States and foreign subsidiaries. After the inversion, a foreign company serves as holding company for United States and foreign subsidiaries. Although the jurisdiction of the corporation is changed through an inversion transaction, no change in the location of the company's headquarters or business operations is necessary. Companies that have engaged in these transactions include Tyco International, Ingersoll-Rand, Cooper Industries, and Fruit of the Loom. Corporate expatriations are estimated to have eroded the tax base by approximately $70 billion dollars, and in the next several years, corporate expatriates are expected to avoid $4.8 billion in federal taxes. Eloine Kim, Note, *Corporate Inversion: Will the American Jobs Creation Act of 2004 Reduce the Incentive to Re-Incorporate?*, 4 J. Int'l Bus. & L. 152, 159 (2005).

The American Jobs Creation Act of 2004 (AJCA), Pub. L. No. 108-357, attempted to address this problem by imposing a tax on so-called inversion gain. Section 7874(a)(2)(B) & (b), as added by the AJCA, applies if: (1) in a transaction completed after March 4, 2003, a foreign incorporated entity ("surrogate foreign corporation") directly or indirectly acquires substantially all of the properties held by a domestic corporation; (2) after the acquisition, former shareholders of the domestic corporation hold at least 80%, by vote or value, of stock in the foreign incorporated entity; and (3) the foreign-incorporated entity, including the expanded affiliate group, does not have substantial business activities in the foreign country in which, or under the law of which, the entity is created or organized as compared with the total business activities of the affiliate group. Unfortunately, the AJCA did not deal with the issue of newly formed corporations that choose to incorporate abroad but still control their business from within the United States.

Recognition of Need for Change

The President's Advisory Panel on Tax Reform, formed to identify the major problems in the Internal Revenue Code, proposed modifying the definition of corporations subject to United States tax. This reform would essentially result in a tax system that taxes business income uniformly. The Panel proposed treating a business as a resident of the United States if either it is incorporated in the United States or if the United States is its primary place of management and control. The Panel believed that changing the definition would ensure that corporations that do business in the United States would pay their fair share and "businesses whose day-to-day operation are managed in the United States cannot avoid taxes simply by receiving mail and holding a few board meetings each year at an island resort." *See* Report of President's Advisory Panel on Federal

* Branscomb | PC, Corpus Christi, TX.

Tax Reform 135 (2005), available at http://www.taxreformpanel.gov/final-report/TaxReform_Ch6.pdf.

The Joint Committee on Taxation (JCT) echoed these sentiments and proposed that the definition of domestic corporation be changed to include the effective place of management. The JCT stated that the current definition allows foreign corporations that are economically similar or identical to domestic corporations to avoid being taxed as one. *See* Staff of Joint Comm. on Taxation, *Options to Improve Tax Compliance and Reform Tax Expenditures* 178-81, JCS 02-05 (2005), available at http://www.jct.gov/s-2-05.pdf.

Despite recognition of the need to change the definition of corporation to include an effective place of management test, nothing has yet been done to effectuate such a change.

Effective Place of Management and Control Test

The effective place of management and control test is the best tool for determining the residency of a corporation. The test provides a connection between the "brains of an entity" and the applicable jurisdiction. This test derives its form from the United Kingdom and was expressed in Lord Loreburn's opinion in *De Beers Consolidated Mines Ltd v. Howe*, [1906] A.C. 455, 458 ("a company resides … where its real business is carried on…. and the real business is carried on where the central management and control actually abides…. This a pure question of fact to be determined, not according to the construction of this or that regulation or bye-law, but upon a scrutiny of the course of business and trading"). The test of effective place of management and control looks to where the highest levels of strategic decisions of the corporation are made, including financial, administrative, and policy decisions. Factors to look at include where major contracts are negotiated, where company accounts are made and audited, and where the main office is located. The place of effective management is often found where an individual or a group of individuals exercise day-to-day responsibility for these decisions. This is often where the executive officers and senior management reside.

This test offers advantages over the current system of defining corporate residency. First, the test is more costly to manipulate. It would require physical relocation of executives and their support staff to a low tax jurisdiction to avoid being taxed under the effective place of management and control test. Second, there is a current advantage to having the everyday management in a centralized location. Third, it better reflects business realities. Although a corporation can be incorporated in a variety of countries it can only have one place of effective management and control.

However, this test does have some disadvantages. The test is inherently uncertain, as the effective place of management could potentially change from year to year. Thus, the system might not be simple to administer. It likely would require an increase in resources in order for the Service to determine if the company has an effective place of management within the United States. However, in the long run the costs are worth the benefits. The current system has allowed many corporations to take advantage of the system, and the solutions to fix it are stop gap in nature. They address one problem at a time rather than a providing a true overhaul to address the underlying problem: the definition of corporation.

Proposal for Change

A successful change to the current system cannot involve merely changing the definition to effective place of management and control but also must take into consideration various other issues. The first such consideration is maintaining some of the current system's administrative simplicity. This can be accomplished by maintaining that a corporation will be treated as a domestic corporation if it is incorporated in the United States or if it elects to be treated as a domestic corporation. The next consideration is to include the effective place of management and control test; however, to truly reflect business realities, an exception should be provided if a corporation can prove that it has a closer connection with another jurisdiction on the basis of effective place of management and control and is incorporated in that jurisdiction. Third, an exit tax should be charged to all corporations that expatriate to discourage further corporate expatriations. Finally, a reasonable time period should be given to allow companies to complete any necessary restructuring and so that the Service could formulate guidelines as to the factors it would consider in determining the effective place of management and control.

My proposal for an amendment to the Code would be as follows:

(a) Definition of Domestic and Foreign Corporation. —

(1) In General. For purposes of this title. —

(A) Domestic Corporation. —A corporation shall be treated as a domestic corporation of the United States if:

(i) Created or Organized in the United States. —Such corporation is created or organized in the United States or under the law of the United States or of any State; or

(ii) Election. —Such corporation elects to be treated as domestic for the current tax year; or

(iii) Effective Place of Management. —Such corporation is deemed to have its place of effective management and control residing within the United States.

continued on page 12

Section 162(m)(5) May Not Be Effective in Limiting Executive Compensation

By Chad R. DeGroot*

Introduction

The Emergency Economic Stabilization Act of 2008 ("EESA"), which was signed into law October 3, 2008, includes the provisions of the Troubled Asset Relief Program ("TARP"). This program authorizes the Treasury Department to purchase distressed assets from financially troubled financial institutions that wish to participate in the program. EESA contains several provisions aimed at further regulating the compensation received by top-paid executives at those financial institutions choosing to take advantage of TARP. These provisions include an expansion of the scope of the penalties imposed on "golden parachute" payments under section 280G to include payments to covered executives on account of involuntary termination. These provisions also include a limitation on deferral of United States compensation for services performed for certain employers located abroad.

This article focuses on section 162(m)(5), another EESA provision that seeks to limit the compensation of the top-paid employees at institutions taking advantage of TARP. It begins by briefly addressing the original intent behind 162(m). It then discusses its impact on executive compensation. It concludes by questioning the likelihood of success the newly enacted 162(m)(5) will have in limiting executive compensation at financial institutions participating in TARP.

Pre-EESA Section 162(m)

A relatively small portion of the Omnibus Budget Reconciliation Act of 1993 ("OBRA '93"), section 162(m)(1)-(4), was actually enacted in an effort to close apparent tax loopholes existing prior to its inception. Those loopholes were allegedly being exploited by companies compensating executives in amounts Congress seemed to feel were inappropriate. Both during the initial proceedings and debates, and in the Conference Reports that supported the passage of OBRA '93, representatives praised the impending section 162(m) for closing loopholes that, according to Congress, favored a fortunate few, by limiting to $1 million the deduction for compensation paid to certain covered employees. *See* 139 Cong. Rec. H2952-03; 139 Cong. Rec. H6224-01, *H6231. Section 162(m) certainly closed the tax loophole that had permitted companies to deduct all of an executive's base compensation that was previously held to a standard of reasonableness, but in the process of closing a loophole, Congress opened up a virtual tax avoidance thoroughfare by permitting deductions for corporations providing executives with "performance-based" compensation.

As mentioned, section 162(m) limits the deduction a publicly held corporation may take for applicable remuneration to any covered employee to $1 million. A covered employee is defined as any employee of the corporation who is either the chief executive officer or an individual acting as such, or any of the next four highest paid officers. The $1 million limitation on compensation has an exception under which such remuneration would not include any compensation paid on a commission basis, or upon the attainment of certain performance goals.

The regulations require that these goals must be (i) pre-established; (ii) stated in terms of an objective formula; (iii) attributable to the attainment of the goal; (iv) approved by a compensation committee; (v) disclosed to shareholders; and (vi) attained. Treas. Reg. § 1.162-27(e). Many argue that the performance criteria result in awards that are based on vague requirements. Nevertheless, so long as these requirements are met, the compensation, regardless of its amount, is deductible.

Since the enactment of section 162(m), executive base salaries at top publicly traded companies have settled around the $1 million threshold, but total compensation packages (which include performance-based bonuses) awarded to executives have continued to grow at an astonishing pace. Despite congressional efforts to limit executive compensation, companies can easily design pay packages with some sort of performance metric, and then, at year-end, pay deductible salaries far in excess of $1 million.

Post-EESA Section 162(m)

EESA section 302 added section 162(m)(5), which provides additional limitations with respect to the deductibility of executive compensation. Section 162(m)(5) applies to certain financial institutions if Treasury acquires, at least in part through auction, more than $300 million of their assets. Note, however, that section 162(m)(5) does not apply if all interests in a distressed

continued on page 12

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POINT TO REMEMBER

Not Just Whistling in the Dark: Recent Guidance on Whistleblower Awards

By Stephen W. Mazza*

Background

Toward the end of 2006 Congress revised section 7623, which authorizes rewards for informants who provide information to the Service that leads to the detection and punishment of noncompliant taxpayers. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406 (enacting section 7623(b)). Encouraging individuals to share knowledge of tax noncompliance on the part of others through monetary rewards is not a new concept in the United States. The practice dates back to shortly after the Civil War. Congress codified the program in 1934, and in 1996 the program began allowing for informant rewards distributed out of proceeds collected by reason of the information provided, rather than a separate fund.

According to a Treasury Inspector General for Tax Administration (TIGTA) Report, the informant program that existed prior to the 2006 amendments was effective in helping the Service detect tax noncompliance, but it was plagued with administrative problems. TIGTA, *The Informants' Rewards Program Needs More Centralized Management Oversight*, 2006-30-092 (June 6, 2006), available at http://www.treasury.gov/tigta/auditreports/2006reports/200630092fr.pdf. Procedures for processing and evaluating tax informant claims were inconsistent, delays were common, and the vast majority of informant claims were rejected by Service reviewers without adequate explanation. In light of these problems, the TIGTA report suggested centralizing the program's management and standardizing procedures for processing claims.

In addition to administrative problems, the prior program suffered from other deficiencies that were thought to limit an informant's willingness to participate. The decision over whether to pay an award and the award amount were based entirely on the Service's discretion and, when it was willing to pay a reward, the amount was typically capped at 15% of the amount collected. Moreover, informants contesting an award amount were usually denied their day in court because of sovereign immunity principles.

2006 Changes

The 2006 legislation addresses many of the problems identified in the TIGTA report. Most importantly, the legislation authorizes, and the Service has created, a centralized Whistleblower Office to examine all informant award claims and make award determinations. Although the discretionary award procedure that existed prior to the 2006 legislation remains in place, section 7623(b) now *mandates* that the Service pay a reward based on amounts collected if it institutes an administrative or judicial action based on information provided by the informant and the informant satisfies the other conditions listed in section 7623(b). Recoveries under the revised program also have increased. They range from 15% to 30% of the amounts collected, with the precise award determined based on the extent to which the informant's information substantially contributed to the amounts recovered. I.R.C. § 7623(b)(1).

At the same time that Congress expanded the existing informant reward program, it also included several limitations and restrictions in order to deter abuse and frivolous claims. For example, if the informant bases his or her allegations on information derived from a public source, the maximum reward drops to 10% of the recovered funds. I.R.C. § 7623(b)(2)(A). In an effort to prevent an informant from benefitting from his or her own unlawful conduct, the statute gives the Service the authority to reduce the award if the informant planned or initiated the transaction that led to the tax underpayment. If the informant is convicted of criminal conduct arising from his or her role in the transaction, no award is permitted. I.R.C. § 7623(b)(3).

In order to deter frivolous allegations, section 7623(b) only applies if the amount in dispute exceeds $2 million. Interest and penalties are included in determining whether the amount in dispute reaches this threshold. If the allegations pertain to an individual taxpayer, the expanded rewards program applies only if the individual taxpayer's gross income during any year at issue exceeds $200,000. I.R.C. § 7623(b)(5). The statute also confirms that the informant must submit information to the Service under penalty of perjury. If not, the informant is not eligible for an award. I.R.C. § 7623(b)(6)(C).

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Recent Guidance

The Service has released several forms of guidance under section 7623(b) during the past year. Notice 2008-4, 2008-2 I.R.B. 253, for example, sets out basic procedures for filing award claims. The claim should include specific information about the noncompliant taxpayer who is the subject of the claim, along with facts supporting the claimant's belief that the taxpayer owes additional taxes. The claimant is instructed to include documentation substantiating the claim and, if the documents are not within the claimant's possession, a description of the documents and their location. The claimant is asked to estimate the amount of tax owed, and to explain the claimant's relationship to the taxpayer and how the claimant became aware of the alleged noncompliance. Notice 2008-4 confirms that Treasury Department and other government employees acting within the scope of their employment duties are generally not entitled to an award.

Later in 2008 the Service released Chief Counsel Notice CC-2008-011 (Feb. 27, 2008), which addresses issues that arise when the informant is also the taxpayer's employee or representative. In cases in which the informant is an employee of the taxpayer, the notice counsels Service personnel to adhere strictly to the "one bite" rule. This long-standing rule allows the government legally to use information obtained from an informant even if the informant obtained the information in an illicit or illegal manner as long as the government was a passive recipient of the information and did not encourage the informant's conduct. As a result of the one bite rule, the notice instructs Service employees, as a general rule, to meet with the informant only once. The notice also warns that it is never appropriate for a Service employee to accept information from an informant who is also acting as the taxpayer's representative. If the representative makes a direct or indirect overture about becoming an informant, Service employees are instructed to no longer treat the informant as the taxpayer's representative and to notify the taxpayer. It then becomes the representative's responsibility to explain to the taxpayer why he or she can no longer act on the taxpayer's behalf before the Service.

Guidance released in 2008 also responds to various privacy and confidentiality issues surrounding informant awards. With respect to the claimant's confidentiality, Notice 2008-4, *supra*, acknowledges that the Service may not be able to investigate the informant's claim without revealing the informant's identity to the taxpayer. Nevertheless, Notice 2008-4 assures informants that the Service will seek to protect the informant's identity to the fullest extent permitted by law. With respect to the taxpayer's confidentiality, a Joint Committee Explanation of section 7623(b) recognizes that the Service may need to disclose the taxpayer's return information to the informant in order to carry out an effective investigation of the taxpayer. Staff of the Joint Comm. on Taxation, *Technical Explanation of H.R. 6408, the "Tax Relief and Health Care Act of 2006," as Introduced in House on December 7, 2006,* at 89, JCX-50-06 (Dec. 7, 2006). Newly released temporary regulations under section 6103 permit the Service to make such a disclosure as long as the informant acts within the authority of a written contract with the Service. *See* Temp. Treas. Reg. § 301.6103(n)-2T. The regulations are narrowly drawn and include safeguards to ensure that the informant does not re-disclose the information to other parties. These safeguards include the threat of civil or criminal liability for unauthorized disclosure. Temp. Treas. Reg. § 301.6103(n)-2T(c), (d).

Section 7623(b) now grants the informant a right to appeal an award claim to the Tax Court. I.R.C. § 7623(b)(4). A recent decision, *DaCosta v. United States*, 82 Fed. Cl. 549 (2008), confirms that the Tax Court has exclusive jurisdiction in this context. In October 2008, the Tax Court adopted amendments to its Rules of Practice and Procedure that discuss procedural issues surrounding an informant award appeal. These issues include filing instructions, designating a place of trial, and other pleadings requirements. Tax Ct. Rules 340-344. As a general matter, the Tax Court will treat an informant award appeal as it would any action filed in Tax Court. Thus, for example, an informant initiates an appeal by filing a Tax Court petition. Tax Ct. Rules 340(a), 341(a). The rules also recognize the authority of special trial judges to hear an informant award appeal. Tax Ct. Rule 182(c).

Conclusion

Although the expanded informant reward program under section 7623(b) remains relatively new, press accounts report that award claims are already substantial. Stephen Whitlock, the first director of the Whistleblower Office, made the following comments shortly after the Office's creation:

> The idea behind the statute is that there are certain kinds of tax noncompliance cases that the Service may have difficulty identifying without the help of a knowledgeable insider. Some of the things we've received over the past few months are consistent with the statutory purpose, and people who were in a position to know what was going on inside a corporation have come forward and told us about it....

116 Tax Notes 98, 99 (2007). If layoffs in the financial services sector increase, the number of informant claims from former employees may increase as well. Practitioners representing whistleblowers should continue to monitor developments relating to section 7623(b) in order to ensure that they provide effective representation. ■

(B) Foreign Corporation. —The term “foreign” when applied to a corporation is one which is not domestic.

(2) Exception to Domestic Treatment. —A corporation that qualifies for domestic treatment will be treated as foreign if:

(A) Incorporated Abroad. —Such corporation is incorporated under the laws of a foreign country; and

(B) Substantial Presence. —Such corporation establishes that it has substantial presence in the foreign country in which it is incorporated. Substantial presence is deemed to occur when the company’s principal class of shares is listed on the recognized stock exchange in the country in which it is incorporated; and

(C) Effective Place of Management. —Such corporation establishes that its effective place of management and control actually resides within the jurisdiction in which it is incorporated.

(3) Tax Charged for Change in Corporate Status. —

(A) Deemed Disposal of Assets. —A corporation that changes its status from domestic to foreign will be deemed to dispose of all chargeable assets and immediately reacquire them at their fair market value. Tax will be charged on all gains at this time.

(B) United States Source Property. —Such corporation will be taxed on all United States source property for three (3) years as if it were a domestic corporation, despite any treaties to the contrary.

(C) When Charged. —The tax will be charged prior to expatriation. The tax will be charged each time such corporation transfers its corporate status from domestic to foreign.

(4) Effective Date. —This Code section will be effective two years from the date of its enactment. ■

financial institution purchased by Treasury are acquired through a direct purchase. If section 162(m)(5) does apply, it will not apply only to public corporations as section 162(m)(1)-(4) does. It will, instead, apply to all companies taking advantage of the bailout in such a manner.

In the first taxable year following the Treasury’s purchase of a company’s assets under TARP, section 162(m)(5) reduces the $1 million limitation on deductible remuneration to $500,000, it removes the performance-based compensation exclusion from the limitation, and it extends the limitation to “senior executive officers,” as defined in the Securities and Exchange Commission’s proxy disclosure rules. Section 162(m)(5) applies not only to the CEO, but also to the CFO, who was previously not included under 162(m), and the next three highest paid officers.

If section 162(m)(5) does, in fact, apply to a given company, it seems that it should accomplish what Congress initially had sought to accomplish with section 162(m)(1)-(4). It certainly closes the loopholes in the pre-EESA legislation. However, there remains one loophole that should prove more difficult to close—a lack of concern for deductibility of such compensation.

Certainly, the loss of the deduction for performance-based compensation and the $500,000 base salary deduction limitation should provide an extra incentive for a company to reduce an executive’s compensation. As opposed to the current section 162(m)(1)-(4) performance-based exception, which essentially provides an incentive for corporations to pay executives as much as shareholders will accept, section 162(m)(5) provides absolute deduction limits. Unfortunately, the current financial crisis reduces the importance of deductions. Even without applying the performance-based compensation deduction, many, if not all, companies taking advantage of TARP will likely suffer a net operating loss for the year in which the deduction would be applicable. They will already have deductions substantially in excess of income. Large section 172 loss carryforwards would significantly reduce, if not eliminate, the need for the deduction previously permitted for performance-based compensation. Therefore, these companies will likely not shy away from paying their executives that which was promised.

Conclusion

This article does not include an opinion as to whether limiting executive compensation is laudable. Rather, this article suggests that neither pre-EESA section 162(m), nor newly enacted section 162(m)(5), are likely to achieve that goal. The EESA amendment to section 162(m), providing for the loss of a company’s ability to deduct performance-based compensation, or an additional $500,000 that would have been paid to certain executives prior to EESA, will likely have the same irrelevance that 162(m) has had on limiting executive compensation. Although the Congress amended section 162(m) to limit executive compensation at companies that take advantage of TARP, it does not seem that this will be the result. ■

Boomers expect to be able to retire earlier. Looking to the future, the National Center for Disease Control predicts that, by 2040, the population over the age of 75 will exceed the population between 65 and 74. *See generally* http://www.cdc.gov/nchs/data/hus/hus07.pdf.

CHALLENGES IN RETIREMENT PLANNING FOR THE BABY-BOOMERS

Many Baby Boomers have an inaccurate picture of what their golden years will be like. Some common problems that estate planners should expect will need addressing with Baby Boomer clients are:

Planning for the wrong contingencies. Boomers will be eager elderhostelers, not fragile front-porch rockers. On two semi-active elderhostel trips this author took this year, the average age of the participants was about 72.

Expenses of 10-15 years of activity, independence, and health are estimated to run 75%-80% of expenses of the last years of full-time employment. In other words, a couple who spent $100,000 a year (after taxes) while both worked should expect to spend $75,000-$80,000 a year for at least 10 years after retirement (after taxes). In reality, many Baby Boomers seem better prepared for the last phase of retirement than the first. They have long-term care insurance, but they cannot use it to finance a trip to Europe.

Savings Shortfall. Will the Baby Boomers be at their desks at 80? An AARP Study, published in 2004, estimated that the oldest of the Baby Boomers will have about $850,000 total wealth per household at age 67. Total wealth includes "retirement wealth," consisting of pensions and social security, and "nonretirement wealth," consisting of investments and housing. Average annual household income will be $65,000, including incomes of those who still will be working. Barbara Butrica & Cori Uccello, *How Will Boomers Fare at Retirement?* (AARP Public Policy Institute, 2004), at http://assets.aarp.org/rgcenter/econ/2004_05_boomers.pdf.

Note that five percent of $850,000 is $42,500, and most of that would be taxable, reducing spendable income to $30,000. And some of the Baby Boomers' wealth is invested in housing, which does not produce income. How many of our clients can afford to live on $30,000 a year during the active phase of retirement?

Old Assumptions, New Lifestyles. The previous generation's lifestyle during their working years differed from the Baby Boomers' in several important ways. The WWII generation often had a single job, lived in a single city, sometimes even in a single home, for most of their working lives. They had one mortgage, and they paid it off before they retired. The house they owned at 65 often was worth several times what they paid for it. Thus, they could sell their now very-valuable house and buy a smaller house or a condo in a retirement community and have substantial funds left over from the sale of the house to provide for living expenses.

Baby Boomers, in contrast, are more mobile while working and less mobile in retirement. They not only changed employers, but because technology moved at a much faster pace during their working lives than it did 40 years ago, they changed occupations, cities, sometimes even countries, several times during their working lives. Even those who stayed in the same city for long periods tended to view a house as an investment as well as a dwelling. Therefore, they "traded up," several times during their working lives. Furthermore, they were much less risk-averse than their parents. Each time they moved, they went to a larger house in a more expensive neighborhood with a larger mortgage. At age 65, they will still be making mortgage payments.

Although their last house may be worth several times what they paid for their first, they bought their last house relatively recently. Therefore, it is unlikely to be worth substantially more than they paid for it. Because it is still encumbered by a mortgage, their equity in this last home is only a fraction of the home's value. The most economical post-retirement living arrangement thus may involve staying where they are.

SUCCESSFUL STRATEGIES FOR BABY BOOMERS

Get Serious About Saving. For the oldest Baby Boomers, if they did not establish a savings plan when they entered the workforce, it may be too late to plan to retire at 65. For the younger baby boomers, active retirement at their current standard of living will require 75%-80% of their current living expenses. Computer programs are available to estimate the necessary minimum asset value to support their current life style at their projected age of retirement. Baby Boomers need to target a retirement age, determine the amount they will need, and establish a savings/investment plan.

Work Longer. Why shouldn't 75 be the new 65? Options open to Baby Boomers include continuing to work and to save, working less or at something new, and becoming a consultant. Younger Baby Boomers can expect postponement or elimination of age caps on retirement compensation, an increase in the minimum age to collect full Social Security, and an increase in (or elimination of) the age of minimum required distributions for qualified deferred compensation plans. Baby Boomers might work even if they have planned for retirement: "The New Volunteer."

Stay Planted. The construction industry can seniorize homes. Modifications include single-floor living; wide doors for wheelchair access; elevators; and separate accommodations for live-in helpers.

Reverse mortgages are another option. These are loans against the equity in a home that need not be paid back until the homeowner ceases using the home as a principal residence. The usual requirements are that the borrower must

own the home, be at least 62 years of age, and have no mortgage (or only a small balance that can be paid from proceeds of the reverse mortgage at closing). The amount that can be borrowed usually is capped by the FHA mortgage limit for the area where the house is located (currently between about $81,000 and $161,000). Local lenders also may cap the percentage of equity that may be borrowed. *See generally* the website of the United States Department of Housing and Urban Development at http://www.hud.gov/offices/hsg/sfh/hecm/rmtopten.cfm.

Reverse mortgages include several payout plans: (a) tenure–equal monthly payments as long as the borrower lives and continues to occupy the property as a principal residence (similar to an annuity); (b) term–equal monthly payments for a fixed term; (c) line of credit–payments in amounts and at times as the borrower requests, until the contracted-for amount is exhausted; (d) modified tenure–combination of line of credit and monthly payments for as long as the borrower remains in the home; and (e) modified term–combination of line of credit and monthly payments for a fixed term.

The advantages for Baby Boomers who have a disproportionate amount of their wealth tied up in their principal residence and do not wish to move should be obvious. Some of the disadvantages may include (a) transaction costs that average $6,500; (b) "moral hazard"–does the availability of reverse mortgages encourage older homeowners to remain in homes they cannot afford to maintain?; and (c) inability to pay for medical costs or assisted living after the borrower's home equity has been spent down for living expenses.

Execute Powers of Attorney and Revocable Trusts. Most estate planners have been drafting durable powers of attorney and revocable trusts long enough to have a checklist of issues to provide for. But a few suggestions are worth repeating. Everyone needs a durable power of attorney with a responsible attorney-in-fact and an alternate. The attorney-in-fact should have authority to transfer assets to the client's revocable trust, but not to revoke it, and to continue the client's estate plan. The revocable trust should include provisions preventing the attorney-in-fact or conservator from revoking the client's revocable trust. The trust should also include provisions expressing the client's wishes concerning custodial care and other forms of assisted living.

SUGGESTIONS FOR FURTHER READING

Barbara Butrica & Cori Uccello, *How Will Boomers Fare at Retirement?* (AARP Public Policy Institute, 2004), at http://assets.aarp.org/rgcenter/econ/2004_05_boomers.pdf.

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Margaret Graham Tebo, *Retired, Then Re-Energized*, A.B.A. J., Apr. 2007, at 52.

What a Difference a Generation Makes: Tax, Estate, and Retirement Planning for Generations X, Y and Beyond

By Elizabeth Lindsay-Ochoa*

GENERATIONS X, Y, AND Z

The definition of X, Y, and Z generations depends on who you speak with. Generally, Generation X refers to individuals born between 1968 and 1979. This group was named after Douglas Coupland's 1991 book, *Generation X*. Author Jane Deverson, however, is the first person known to use the term Generation X (in a book of that title published in 1964).This group is currently the smallest generation, representing approximately 35-40 million people. Their parents are Boomers or pre-boomers (the Silent Generation). Members of Gen X used the first email while in college; they are early adapters of the internet. Gen Xs remember the early days of the internet with "dial up" connections. Xs include Drew Barrymore and Tiger Woods. Their experiences include the Cold War, "Reagonomics," the Challenger Disaster, the fall of the Berlin Wall, and recessions (early 90s, early 00s, and today). They are more pessimistic than Gen Y about meeting their financial and retirement goals.

Generation Y refers to those born between 1980 and 1998; they are also known as Millennials or Interneters. They represent approximately 75 million people. Their parents are Boomers. Gen Ys are well-educated: 64% of women and 60% of men head to college post-high school. Ys are just entering the workplace. They grew up with, and are addicted to, technology. Ys include Natalie Portman and Justin Timberlake. Their experiences include the tech boom/bust, Enron, September 11, 2001, and today's current economy.

Gen Xs and Ys are more culturally diverse than prior generations: two in five are members of minority groups,

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compared with only 23% of Boomers. This is also true of Generation Zs, who were born after 1998 and are many years away from the work-force.

FINANCIAL INDEPENDENCE

Financial independence has different meanings at different stages of life. The actual age of perceived independence also tends to track whether they go on to college or graduate school. Generally, about 60% of the public believe themselves to be financially independent.

About 54% of Gen Xs see themselves as financially independent. Only 25% of them have received financial support from family, friends, or government assistance programs within the past year (at the time of the study). About 62% of Gen Ys see themselves as financially independent. Forty-five percent of them have received financial support from family, friends, or government assistance programs within the past year. Members of Gen Z are too young to think about the future of their finances.

SAVINGS AND DEBT

About half of the Gen X and Y generations save money outside of their retirement plans. If they have a home or a college education, they are more likely to save. Most of those surveyed do not feel that they are saving enough of their income. Just over half of them (53%) report sticking to a monthly budget.

Four out of five report some non-mortgage debt. Debts also include credit cards, student loans, car loans, medical expenses, and other. Their largest concerns are being able to pay bills, making ends meet, avoiding debt, possible job loss, not saving enough for the future or for emergencies, not having enough resources to support themselves and family, and not being able to afford retirement.

FINANCIAL GOALS

Gen X and Y members' top financial goals are advancing one's career, earning more money, and rising to the top, with three quarters of young adults saying this is a goal of theirs (76%). Other goals include putting money away for retirement, minimizing stress, and paying off debt. Their priorities tend to shift with age.

There are generational differences. More than half of the Gen Xs and Ys surveyed believe that, by the time they are their parents' age, they will have accumulated more money than their parents (54%). Just two in ten feel they will accumulate less (19%). Those who indicate that they save on a regular basis (60%) are also likely to expect to amass more than their parents (48% of non-savers). Compared to those in the younger generation (12% of Gen Ys), Gen Xs are less optimistic, as one-quarter say they think they will accumulate less than their parents did (24%).

Financial milestones may be harder to reach. Half of respondents believe that it is harder for people in their generation (either Gen X or Y) than it was for people in their parents' generation to support a family, save for the long-term, save for a child's college education, and buy a first home. Those who currently own their residence are more inclined than non-owners to feel that buying a home is easier for Gen Xs or Ys than for their parents. Slightly fewer feel it is harder.

Why are the objectives harder to meet? Reasons include the cost of living, including inflation, the fact that fewer companies offer pensions, inability to rely on Social Security and Medicare as their parents did, and the fact that their generation spends more and saves less. Pensions tend to make a big difference on whether or not a person feels that he or she can reach retirement goals.

There is some good news. About 44% feel it is easier to "find good employment," and 54% feel that it is easier for people their age to "get an education" than it was for their parent's generation.

FINANCIAL LITERACY AND FINANCIAL ADVICE

Gen Xs and Ys feel they do not know very much about finances. In fact, they are more likely to admit they know more about their iPod (40% very knowledgeable) than how to file their taxes, buy a home, invest outside of the workplace, and save for retirement. *Preparing for Their Future* also includes some interesting statistics: a portion of those surveyed were able to answer some basic question well, when they actually answered the questions. A significant portion did not attempt a guess.

Each generation tends to look for advice when a major life event occurs. Such events include marriage, first job, or first child. These young adults say they turn to their parents or in-laws for financial advice (70% say parents are a major or minor source of advice), and more than one-third say their parents are their primary source of such advice (36%). Nearly half say they turn to other relatives as well (48%). Gen Ys (50%) are nearly twice as likely as those older than them (26%) to cite their parents as their primary source. Friends or co-workers are at least a minor source of financial advice (60%), though far fewer cite their peers as their primary source (5%). Not surprisingly, Gen Xs and Ys also get financial advice from the internet and the media. Just as many say they search the internet for financial guidance (69% cite the internet as a major or minor source) as say they consider their parents a source of advice. However, far fewer indicate that the internet is their primary source of financial advice (16%).

Periodicals, including newspapers and magazines (55%), and television and radio (44%) are at least a minor source of financial advice (55%); few turn to broadcast or print media as a primary source of financial guidance (5% say periodicals are primary source; 2% say TV or radio). Fifty-four percent report that they use a financial professional to obtain advice about their finances; 23% say a financial professional serves as a major source of advice for them; and 20% say a professional is their primary source of financial guidance, second only to parents. Members of Gen X (27%) are considerably more inclined

than Gen Ys (18%) to report that a financial professional is a major source of advice for them. Employers are at least a minor source of financial advice (53%), though employers are much further down the list of primary sources (just 7% cite employers as their primary source of financial advice). Given that neither Gen Xs nor Gen Ys are yet at their peak income-earning years, there is a strong possibility that these generations will turn to financial advisors in the future when their incomes are higher.

RETIREMENT

Gen Xs and Ys have either just vested or have not yet quite vested in their defined benefit or defined contribution plans. They tend to be uneducated about what retirement plans they have or have the ability to invest in. Most Gen Xs and Ys have only defined contributions plans available.

A majority of young adults expect to retire between the ages of 60 and 68. This is a disconnect with a longer life expectancy. They expect to retire at this age, because that's when Mom and Dad will retire. Most Gen Xs and Ys expect to live well into their 80s; a significant percentage expects to live beyond age 90. Not surprisingly, the older generation (Gen Xs) are more likely to have started to save than the Gen Y generation.

Most Gen Xs and Ys do not expect Social Security (or Medicare) to be a significant source of their retirement funds. However, most also admit that they do not know how Social Security actually works. The Pension Protection Act auto enrollment may be a solution that benefits those who may not initially enroll in their 401(k) plans at work. *See* Jack VanDerhei & Craig Copeland, *The Impact of PPA on Retirement Savings for 401(k) Participants*, Employee Benefit Research Institute (Issue Brief # 318, June 2008), at http://www.ebri.org/pdf/briefspdf/EBRI_IB_06-20087.pdf.

POSITIONING YOURSELF TO WORK WITH GENS X AND Y

Realize that they are technologically savvy and may double check your message on the internet. Strategies include drawing them to your website, visiting the social networking sites (many of them use these sites), and using podcasts, RSS feeds, etc.

Keep up with what technology they are using. Encourage current clients to forward communications from your company. If your company sends e-newsletters to current clients, identify clients who have Gen X and Y children and consider including information useful to these generations. Encourage clients to forward the newsletters to them. *See* Mary M. Art & Nilufer R. Ahmed, *Building Connections: Reaching Out to Gen X and Y Online*, LIMRA (2008), at http://www.limra.org. Allow these potential young prospects to sign up for future correspondence. Understand that many of them will go to the internet to research you first and then call.

PLANNING OPPORTUNITIES

Generation Xs and Ys are in the accumulation phase of their assets; they may not have thought much further than their immediate needs. Many do not have wills; they do not believe they need them since they do not have much in assets. They have not thought of premature death, and they may still need to name guardians for their children. This may be a good age to start thinking about long-term care. They also have not considered setting a specific goal for their retirement. Actions they should consider include wills (including A-B planning), life insurance/ILITs, and long-term care insurance. Most of all, they need education to understand why it is valuable to plan now for the future.

SOURCES

American Savings Education Council and AARP, *Preparing for Their Future: A Look at the Financial State of Gen X and Gen Y* (March 2008), at http://www.aarp.org/issues/dividedwefail/about_issues/the_financial_state_of_gen_x_and_gen_y.html.

Mary M. Art & Nilufer R. Ahmed, *Building Connections: Reaching Out to Gen X and Y Online*, LIMRA (2008), at http://www.limra.org.

Jack VanDerhei & Craig Copeland, *The Impact of PPA on Retirement Savings for 401(k) Participants,* Employee Benefit Research Institute (June 2008), at http://www.ebri.org/pdf/briefspdf/EBRI_IB_06-20087.pdf.

United States Government Accountability Office, *Defined Benefit Pensions: Plan Freezes Affect Millions of Participants and May Pose Retirement Income Challenges*, GAO 08-817 (July 2008).

Beth Almeida, *Retirement Readiness: What Difference Does A Pension Make?*, National Institute on Retirement Security (May 2008), at http://www.nirsonline.org/storage/nirs/documents/Readiness%20Brief.pdf.

Society of Actuaries, *Key Findings and Issues: Understanding and Managing the Risks of Retirement* (May 2008), at http://www.soa.org/files/pdf/research-2007-findings-retire-risk.pdf.

Leadership by the New Generation: Bridging the Gap Between Younger and Older Leaders, Mind Tools Newsletter, June 24, 2008, at http://www.mind-tools.com/pages/Newsletters/24Jun08.htm#article2. ■

Boxscore

Since the last issue of the *NewsQuarterly*, 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
U.S. Department of Labor	11/24/08	n/a	Comments on the New "Plan Asset" Rules Under ERISA Section 3(42) Added by the Pension Protection Act of 2006	Employee Benefits	Andrew L. Oringer, Kurt L.P. Lawson
Internal Revenue Service	11/19/08	n/a	Comments Concerning Notice 2008-2	Financial Transactions	Matthew A. Stevens
U.S. Department of Labor	11/19/08	n/a	Comments on the Proposed "Service Provider" Regulations Under Section 408(b)(2) of ERISA	Employee Benefits	Andrew L. Oringer, Kurt L.P. Lawson
Internal Revenue Service	11/17/08	469	Comments in Response to Notice 2008-64	Individual and Family Taxation; Partnerships and LLCs	Jeanne Sullivan
Internal Revenue Service	10/29/08	368(a)(1)(D)	Comments Concerning the Treatment of Stock of the Acquiring Corporation Already Owned by the Target Corporation in a Section 368(a)(1)(D) Reorganization	Corporate Tax	Jasper L. Cummings, Jr.

* 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.

Tax BITES Takes a Law School Exam

By Barry Kozak*

Professor Kozak concluded his summer school income tax exam with the following question. "Because of Steve's stellar guitar playing skills and knowledge of federal tax law, the chair of the American Bar Association Section of Taxation asks him to sing a song at their September meeting in San Francisco that summarizes some of the tax advantages Congress can provide to taxpayers through the Tax Code. Please assist Steve in writing the lyrics of the song." Some of the more creative responses appear below.

1. If you follow the Code and track your expenses,
   from medical bills to depreciable fences,
   then sure as a vacuum will generate suction,
   in 2008 you can claim a deduction.

2. Congress has the power
   to give us a tax advantage shower.
   If you're a business, the water's warm.
   If you're an individual, you'll be forlorn.

3. Congress gives preferential treatment
   to long-term capital gains
   to avoid locking in, bunching up,
   and other financial pains.

4. Enjoy your things while you can.
   Gifting them now is not a good plan.
   Leave them to me in your will,
   and neither of us will foot the bill.
   Inter vivos will force me to pay.
   Testamentary would be the right play.
   Keep those certificates in their cases,
   and I will enjoy the stepped-up basis.

5. I keep a close watch on taxes all the time.
   I try to take my deductions above the line.
   For alimony and law school tuition this is fine.
   Because of these, my AGI will decline.

* John Marshall Law School, Chicago, IL.

News Briefs

2008-2009 NOLAN FELLOWS

The Tax Section congratulates the recipients of its 2008-2009 Nolan Fellows awards. The following six Nolan Fellows were recently honored at the Section's Midyear Meeting in New Orleans, LA.

- Niles A. Elber, Caplin & Drysdale, Washington, DC
- Michelle A. Garcia, Davis & Harman, Washington, DC
- Todd D. Keator, Thompson & Knight, Dallas, TX
- Alexey Manasuev, KPMG, Washington, DC
- Anne M. Meyer, Snell & Wilmer, Phoenix, AZ
- Kathryn Morrison Sneade, Miller & Chevalier, Washington, DC

Named for the late Jack Nolan, a dedicated and respected Tax Section member, the distinction is awarded to young lawyers who are actively involved in the Section and have shown leadership qualities. Each one-year fellowship includes waived Section Meeting registration fees and assistance with travel to some Section Meetings. Congratulations to the new Fellows!

2008 LAW STUDENT TAX CHALLENGE

The Law Student Tax Challenge (LSTC) is a national tax planning competition sponsored by the Tax Section's Young Lawyers Forum and is designed to reflect everyday tax practice more accurately than traditional moot court competitions. The LSTC offers students the opportunity to demonstrate their acquired knowledge and interact with experienced practitioners and potential future employers. The top-performing students are recognized by the Section of Taxation and receive prizes, including monetary awards. In the competition's eight-year history, the LSTC has become one of the largest tax competitions for law students in the United States.

For the 2008 competition, the top six J.D. teams and the top four LL.M. teams traveled to New Orleans in January to compete in the oral rounds at the Section's 2009 Midyear Meeting. The following winners and their coaches were honored at a reception during the meeting.

J.D. Division:

- **1st Place:** Lisa Kothari and Jeanmarie Dunn-Kane, Temple University Beasley School of Law
- **2nd Place:** Alicia Buckingham and Christopher Massey, University of Denver Sturm School of Law
- **Semi-Finalists:**
  - Eloise Pinto and Kristi Braind, Michigan State University College of Law
  - Ashley Dorn and Megan Oroszlan, Temple University Beasley School of Law
  - Jessica Kuester and Jillian Farrar, Syracuse University College of Law
- **Best Written:** Lisa Kothari and Jeanmarie Dunn-Kane, Temple University Beasley School of Law

LL.M. Division:

- **1st Place:** Brett Saltzman and Daniel Bergrin, Northwestern University School of Law
- **2nd Place:** Lydia York and David Annecharico, Temple University Beasley School of Law
- **Semi-Finalists:**
  - Jenna Shih and Damon Paxton, University of San Diego School of Law
  - G. Martin Bingisser and Ted Shultz, University of Washington School of Law
- **Best Written:** Brett Saltzman and Daniel Bergrin, Northwestern University School of Law

For more information about the LSTC, visit the website at: http://www.abanet.org/tax/lstc.

PUBLIC SERVICE FELLOWSHIP AWARDS

The Section awarded its first two Public Service Fellowships to young lawyers who will be directly involved in providing services to low income taxpayers in the suburban Chicago and Washington, D.C. areas. Vijay Raghavan, currently an associate in the tax practice at Skadden, Arps, Slate, Meagher & Flom LLP in Chicago, IL, will be implementing a new tax law project with Prairie State Legal Services (PSLS) in Carol Stream, Illinois. Laura Newland, scheduled to earn her J.D. from Georgetown University Law Center in May, 2009, will be working on tax-related matters at the AARP's Legal Counsel for the Elderly program in Washington, D.C.

The Public Service Fellowships were developed this year to address the need for tax legal assistance, and to foster an interest in tax-related public service among those individuals who participate. The Section's Public Service Fellowship Committee plans to award as many as two fellowships each year. For more information about the ABA Tax Section Public Service Fellowships, please go to http://www.abanet.org/tax/awards/publicservice.

LAW SCHOOL TAX CAREER PROGRAMS

The Section of Taxation co-hosts "Careers in Tax Law" programs at law schools around the country to introduce J.D. and LL.M. students to careers in the tax practice area. The panel programs typically include three to four lawyers from various practice settings who discuss their experiences and answer student questions about career opportunities. Upcoming programs include:

1. George Washington University Law School – February 12, 2009
2. Georgetown University Law Center – March 4, 2009

For more information, visit the Section website at: http://www.abanet.org/tax/lawstudents/.

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

DATE	PROGRAM	CONTACT INFORMATION
February 25, 2009	"LAST WEDNESDAY" CLE TELECONFERENCE THIS TREAS. REG. IS WRONG! SUBSTANTIVE AND PROCEDURAL CHALLENGES AND STANDARDS OF REVIEW FOR ATTACKING DEPARTMENT OF TREASURY TAX REGULATIONS *Organized by the Individual & Family Taxation Committee*	Tax Section **www.abanet.org/tax** | 202.662.8670
March 2-6, 2009	18TH ANNUAL ABA/IPT ADVANCED SEMINARS: INCOME TAX | SALES/USE TAX | PROPERTY TAX The Ritz-Carlton – New Orleans, LA	Tax Section **www.abanet.org/tax** | 202.662.8670
March 6, 2009	TAX CLE ON THE ROAD: TAX ISSUES IN DRAFTING LLC OPERATING AGREEMENTS Snell & Wilmer LLP Law Offices – Phoenix, AZ *Cosponsored by the Arizona Bar Association Tax Section*	Tax Section **www.abanet.org/tax** | 202.662.8670
March 11, 2009	TAX CLE ON THE ROAD: TAX ISSUES IN DRAFTING LLC OPERATING AGREEMENTS Radisson Hotel Milwaukee West – Milwaukee, WI *Cosponsored by the State Bar of Wisconsin Tax Section*	Tax Section **www.abanet.org/tax** | 202.662.8670
April 2-3, 2009	9TH ANNUAL TAX PLANNING STRATEGIES – U.S. AND EUROPE CONFERENCE ABN AMRO – Amsterdam, The Netherlands	Tax Section **www.abanet.org/tax** | 202.662.8670
April 2-3, 2009	ALI-ABA COURSE OF STUDY: CORPORATE TAXATION Renaissance M Street Hotel – Washington, DC	ALI-ABA **www.ali-aba.org** | 800-CLE-NEWS
May 13, 2009	5TH ANNUAL SALT SYMPOSIUM: APPORTIONING THE INCOME OF A MULTISTATE TAXPAYER: CHALLENGES AND PRACTICAL INSIGHTS Georgetown University Law Center – Washington, DC	Tax Section **www.abanet.org/tax** | 202.662.8670
May 28-29, 2009	COURSE OF STUDY: HOW TO HANDLE A TAX CONTROVERSY AT THE IRS AND IN COURT: FROM ADMINISTRATIVE AUDIT THROUGH LITIGATION Omni La Mansion del Rio – San Antonio, TX	ALI-ABA **www.ali-aba.org** | 800-CLE-NEWS
June 9, 2009	TAX CLE ON THE ROAD: BUSINESS PLANNING AND TAX ISSUES FOR TAX AND NON-TAX LAWYERS: CHOICE OF ENTITY, TAX PROVISIONS IN PARTNERSHIP AGREEMENTS, TAX ASPECTS OF DEBT WORKOUTS Alaska Bar Association Tax Section – Anchorage, AK *Cosponsored by the Alaska Bar Association Tax Section*	Tax Section **www.abanet.org/tax** | 202.662.8670
June 10-12, 2009	2ND ANNUAL U.S. – LATIN AMERICAN TAX PLANNING STRATEGIES CONFERENCE Mandarin Oriental – Miami, FL	Tax Section **www.abanet.org/tax** | 202.662.8670

NEWS BRIEFS

VITA VOLUNTEERS NEEDED

The IRS Volunteer Income Tax Assistance (VITA) nationwide programs provide free assistance to low-income, elderly, disabled, and other individuals who require assistance in preparing their tax returns and who, now more than ever, cannot afford the services of a paid professional tax preparer. The program is an excellent pro bono opportunity for Tax Section members who want to dedicate their time this filing season. For information on how and where to volunteer, please contact Catherine B. Engell at engellc@staff.abanet.org. ■

2009 - 2010 Nominees

In accordance with sections 6.1 and 6.3 of the Section of Taxation Bylaws, the following nominations have been submitted by the Nominating Committee for terms beginning at the conclusion of the 2009 Annual Meeting in August. Under the Section Bylaws, the current Chair-Elect, Karen L. Hawkins, of San Francisco, CA, will become Chair at the conclusion of the 2009 Annual Meeting.

CHAIR-ELECT:
Stuart M. Lewis
Washington, DC

VICE CHAIRS:
Fred T. Witt, Jr.
Phoenix, AZ
(Administration)

Peter J. Connors
New York, NY
(Committee Operations)

Ellen P. Aprill
Los Angeles, CA
(Communications)

Helen M. Hubbard
Washington, DC
(Government Relations)

Emily A. Parker
Dallas, TX
(Professional Services)

Douglas M. Mancino
Los Angeles, CA
(Publications)

SECRETARY:
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New York, NY

ASSISTANT SECRETARY:
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Phoenix, AZ

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Joan C. Arnold
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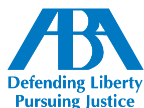
Andrew J. Dubroff
Washington, DC

Miriam L. Fisher
Washington, DC



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