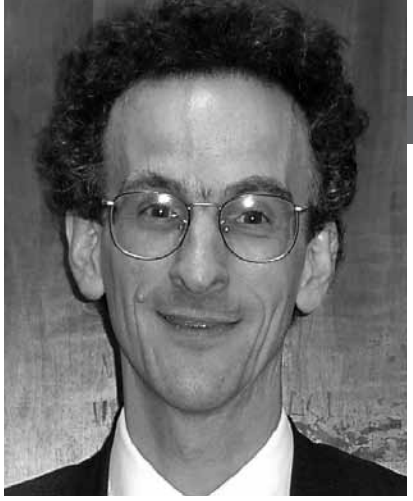

INTERVIEW

Steven A. Musher

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

Steve Musher is IRS Associate Chief Counsel (International).

Q When were you appointed Associate Chief Counsel and what is your history at the IRS?

A I was appointed ACCI in April of 2006 after acting in that position since November of 2005. Prior to that I had been the Deputy Associate Chief Counsel (Technical) from November 2001. Prior to that I was Branch Chief in a couple of iterations of Branch 6. I started out in 1994 as a Senior Technical Reviewer in Branch 2. Branch 2 handled subpart F at that time and a bit of transfer pricing. The first iteration of Branch 6 dealt with both transfer pricing, source and treaty issues, and then it became solely devoted to transfer pricing issues.

Q Some of the Chief Counsel divisions have branches that do not specialize, an example being Corporate. In contrast, the International branches do specialize. Could you outline the specialty areas for us?

A Currently, Branch 1 is our treaty branch, but it also deals with international tax issues involving individuals. Branch 2 deals with subpart F and passive foreign investment companies, the antideferral regimes, as well as withholding taxes. Branch 3 is responsible for everything concerning foreign tax credits, including allocation of income and expenses as well as source rules. Branch 4 is International's combination of corporate, passthroughs, and anything entity related, as well as international cross-border restructurings and the like. Branch 5 is our international financial institutions and products branch, and Branch 6 is our transfer pricing branch. Branch 7 handles getting information across borders, including the exchange of information under treaties and tax information exchange agreements. Four branches administer the Advance Pricing Agreement Program—three of them here in Washington, DC, and a fourth split between Laguna Niguel and San Francisco, California, mainly servicing people for whom it is a closer travel on the West Coast.

Q The majority of issues with which the International Division deals, or at least the more controversial ones, involve corporations, usually foreign. Sometimes it appears that corporate issues are viewed differently by Chief Counsel when they arise in the international context versus the domestic context, despite the lack of any rules treating them differently. Is this a correct perception and if so, why?

A Subchapter N provides an international overlay on our domestic tax rules. In addition, income tax treaties bridge obstacles and gaps that arise between our tax system and foreign tax jurisdictions in cross-border transactions. And section 367 in particular varies the normal operations of important rules of subchapter C. We did a whole series of regulation projects in the area of 367 that involved extensive coordination with the Corporate Division. In doing those regulation projects, and generally, we take very seriously the need for a consistent approach in Chief Counsel to basic subchapter C issues and that goes both ways. Exceptions result from the authorities I mentioned that enable us to adapt our various Code rules for domestic operations to the international context.

Q Responsibility for interpreting section 482 is shared by the Corporate and International Divisions of Chief Counsel. Can you tell us how are the responsibilities divided?

A We need very close coordination between our offices, Corporate and International, because the basic building blocks of what we are dealing with in the section 367 area, in the 1248 area, etc., are the Code provisions. We have similar overlaps with other of the Associate Offices as well. So far as section 482 is concerned, in the transfer pricing area, the initiative, generally, lies with the Associate Chief Counsel International's Office, my office, but when we do have projects or cases or matters that overlap with Corporate we coordinate. In other areas where Corporate has the initiative, they will come and get assistance from us.

Q The Advance Pricing Agreement Program is under your Division. Work on APAs must be quite different from the legal analysis that Chief Counsel attorneys are mostly involved with, due to the intensely factual and mathematical nature of the subject matter. How does your Division deal with these differences?

A The APA Program is devoted, in the main, to multi-year, prospective resolution of transfer pricing issues and, in the great majority of cases, on a bilateral basis with our treaty partners. In many cases there are rollbacks for years in the jurisdiction of Exam of the solutions that are prospectively adopted. Transfer pricing is a very deep mix of law and facts. The APA Program contains people expert

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in the day-to-day development of a functional and factual analysis. They include people with a law background, an accounting background, or an economics background, who in combination can really understand how those functions, risks and resources contribute to creating value across jurisdictions.

But the legal issues of necessity come up in investigating the valuation facts, and require that the APA Program partner very closely with the technical branches, which we described earlier, particularly the transfer pricing branch – Branch 6. Conversely, since APA is really working on the frontier in the most current transfer pricing issues, they serve as a laboratory for transfer pricing valuation experience. As a consequence, we have drawn upon the APA Program in assisting our transfer pricing regulations teams.

Q You recently were quoted in *Tax Notes* as saying that the "commensurate with income" standard in sections 367(d) and 482 and the arm's length standard are a unified transfer pricing principle. If that is your view, does that mean that the one is inherent in the other or simply that they must be applied together because they are both in the law—or can you expand?

A They act as joint or corollary principles. Commensurate with income is like a detective's tool that assists the IRS in smoking out the true facts of a related party deal. The arm's length evaluation of a deal is challenging, particularly the more complex deals involving high profit potential transactions within a multi-national group. By its nature, arm's length is addressed at the outset of a deal before the risks have played out and the results are known. The IRS, the detective if you will, comes later on examination after the die has already been cast. It may be unclear based on a particular taxpayer's documentation what the true allocation of risks was among the related parties to the deal. So what the commensurate with income principle says is that if there is a very material divergence between the purported initial expectations and what actually occurred, the IRS has the ability to say, "you really need to convince us that what the results have turned out to be, were not what you really foresaw at the beginning of the deal." In this regard the regulations operate as this detective tool.

Q Various officials and commentators have suggested that the "next big wave" of tax controversies following the tax shelters of the 1990's and early 2000's would be in the international area. Do you agree, and if so, what have you seen occurring to indicate that trend?

A Undoubtedly litigation has increased in the international area. I can recall when I started in international practice more than 30 years ago the relative paucity of international case precedent. So, both with the burgeoning of international cross border transactions, and possibly the litigious natures of the parties, it was probably inevitable that we would fill the container with litigated cases. To me, the interesting question is how and whether taxpayers and the IRS can reach resolution short of controversy.

I think everybody agrees that litigation can be a protracted, no-holds-barred, costly, and inefficient process. One of the worst vices is the uncertainty that these types of huge and long lasting cases create. The irony is, of course, and I am sure it goes both ways, that the IRS needs to be prepared to litigate. Indeed that is part of the overall administration—to litigate issues in the international area on a strategic basis in order to keep a healthy tension in the system. We are at the same time creatively thinking and pursuing compliance approaches. These approaches comprise an alphabet soup, from the APA Program, to the Competent Authority Program, through the Compliance Assurance Process (CAP), through the prefiling programs, etc. So, I think it is the right mix of being prepared for and pursuing controversy, but also emphasizing the earlier and more efficient certainties that one can achieve through alternate dispute resolution mechanisms.

Q Please describe the relationship between your office and the IRS operating divisions. Are there international specialists in those operating divisions who are the first line of legal advice on international matters that may never be elevated to the national office, your office? If so, what contacts does your office have with those operating division specialists and what authority does your office have over them?

A The ACCI deals with international issues as the technical go-to Associate Office on international issues in all their various procedural manifestations, whether it is a quick question, through to litigation, whether a PLR, through to a regulation project, an income treaty or a multinational process of some sort or another. Going back to International's stand up at the end of the 1980's, there has been a team approach with what are now called the Division Counsels. The field pieces of the Division Counsels are co-located in the field with the field IRS, and certainly the day-to-day advice on international matters is something that they deal with as their bread-and-butter.

If they identify a significant international issue or it otherwise comes up, they know to loop into ACCI. We have many ways of letting them know who we are, whether by continuing legal education or technical training provided by our office, or otherwise, so the field knows whom to contact in my office. Then a team is created to deal with the significant legal issue. Conversely, if ACCI happens to be involved because of a phone call from an IRS agent or otherwise, and in dealing with that inquiry it becomes more than simply a routine matter, we loop in the field counsel. So, the important thing is not where the process starts, but when things are more than a phone conversation and there is an issue that is a tough one, the important thing is to get the right national office and field team together with the right resources to address the issue appropriately. This has been the longstanding coordination approach and it has worked well. ■