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POINT & COUNTERPOINT

The Future of Corporate Tax Reform: A Debate

Editor's Note: On Friday, May 10, 2013, the Section's Teaching Taxation Committee presented a two-hour Lincoln-Douglas debate covering three questions posed by Professor Joshua Blank of New York University School of Law, who served as Speaker of the House. The debaters were (in alphabetical order): Professor Deborah A. Geier, Cleveland-Marshall College of Law, Cleveland State University, Cleveland, OH; Professor Omri Y. Marian, University of Florida Levin College of Law, Gainesville, FL; David S. Miller, Cadwalader, Wickersham & Taft LLP, New York, NY; and Professor Adam H. Rosenzweig, Washington University School of Law, St. Louis, MO. Four debaters (constructive affirmative and negative; rebuttal negative and affirmative) spoke on each proposition; the debate also featured audience cross-examination of each constructive speaker. Because debaters were assigned different roles, their remarks did not necessarily represent their views on a particular topic. Statements below are arranged by affirmative and negative rather than by constructive and rebuttal. Space limitations prevent the *NewsQuarterly* from including the entire debate and the audience comments.

The debate included the remarks below from Steven Douglas's opening speech in the first debate in Ottawa, Illinois, on August 21, 1858. They are a fitting introduction to the topics debated on May 10. —Gail Levin Richmond, Davie, FL

> LADIES AND GENTLEMEN: I appear before you to-day for the purpose of discussing the leading political topics which now agitate the public mind. By an arrangement between Mr. Lincoln and myself, we are present here today for the purpose of having a joint discussion, as the representatives of the two great political parties of the State and Union, upon the principles in issue between those parties; and this vast concourse of people shows the deep feeling which pervades the public mind in regard to the questions dividing us.

Resolution #1:
"Be it resolved that the United States should impose a corporate income tax."

Affirmative: We Need to Tax Corporations at the Entity Level

By Omri Y. Marian*

In 1889, 1% of U.S. households owned about three-quarters of all net wealth in the United States. *See* Thomas G. Shearman, *The Owners of the United States*, VIII Forum 262 (1898). Today, the wealth distribution figures are still not great, but

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* The views expressed herein do not necessarily reflect the views of the author.

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Date	Meeting	Location
January 23-25, 2014	MIDYEAR MEETING	Arizona Biltmore Resort & Spa – Phoenix, AZ
May 8-10, 2014	MAY MEETING	Grand Hyatt – Washington, DC
September 18-20, 2014	JOINT FALL CLE MEETING	Sheraton Downtown – Denver, CO
January 29-31, 2015	MIDYEAR MEETING	Hilton Americas – Houston, TX
May 7-9, 2015	MAY MEETING	Grand Hyatt – Washington, DC
September 17-19, 2015	JOINT FALL CLE MEETING	Sheraton Chicago Hotel & Towers – Chicago, IL

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FROM THE CHAIR

No Place to Hide? FATCA and Beyond

By Michael Hirschfeld*

While the income tax is celebrating its 100th anniversary in 2013, efforts to evade paying tax trace themselves back to the foundation of America. If there was no discontent on the part of several Massachusetts residents with a tax on tea, the Boston Tea party may not have occurred, and we may be carrying British passports today. That discontent with taxation has made a voluntary income tax system difficult to insure collection of all taxes due, which has led to creation of complex withholding and reporting rules that affect many of our clients. John Doe summonses served on certain foreign financial institutions have also garnered the names of non-compliant taxpayers.

Despite these efforts, investing money offshore is still perceived by some as a way to avoid paying their taxes. That abuse led to enactment of the Foreign Account Tax Compliance Act (FATCA) in 2010. Starting on July 1, 2014, FATCA will impose new withholding taxes on many foreign financial institutions (FFIs) that fail to agree to disclose to the IRS the identity of their U.S. customers. The concept of cross-border tax disclosure mandated by FATCA is even being adopted by other nations, such as the UK, and being considered by OECD member states. Given the global economy that affects nearly all our clients, this area of international tax is one we all need to understand, which is why I felt compelled to make it the subject of my column.

FATCA's main focus is FFIs, which encompass foreign banks, investment funds, custodians, and insurance companies issuing non-term life policies. With exceptions for certain pre-existing obligations, effective July 1, 2014, these FFIs will be subject to a 30% withholding tax on interest, dividends, and other types of passive income having a U.S. source paid by U.S. persons to non-U.S. persons, unless (i) the FFI enters into a FFI Agreement to agree to be a participating FFI subject to FATCA; (ii) the FFI is a resident of a country that has signed an Inter-Governmental Agreement with the U.S. (IGA) that will mandate compliance with FATCA by local FFIs but only as to their offices in that country; or (iii) an exception can be found that does exist but is limited in scope. Starting in 2017, FFIs also face withholding on gross proceeds from the sale of U.S. stocks and securities unless they comply with FATCA.

A participating FFI agrees to (i) conduct due diligence to discover if they have any U.S. persons or U.S. owned foreign entities owning disclosable accounts (such as bank accounts or interests in a hedge or private equity fund); (ii) report the identity of those persons to the IRS along with other related information; and (iii) impose withholding tax on certain payments it may make to investors who are either (a) recalcitrant holders, who repeatedly refuse to supply information requested by the FFI so as to determine their tax status or (b) other FFIs who refuse to become a participating IGA and are not a resident of an IGA country. If the FFI is a resident of a country that has an IGA, then these local FFIs will be mandated by local law to participate in the FATCA program and do these tasks. The IGA eliminates concerns that local laws restricting account disclosure may impede compliance with FATCA while liberalizing some of the rules that may otherwise apply. IGAs are not limited to countries that have an income tax, but are an option for any nation; nations as diverse as the UK and the Cayman Islands are signatories.

Many FFIs will likely need to register on an IRS electronic portal to obtain a FATCA identification number, called a global intermediary information number (GIIN) and then furnish that to U.S. withholding agents to prevent FATCA withholding. Those agents face a difficult time in determining when they can safely not withhold under FATCA when they pay any non-U.S. person, and even if they obtain the GIIN on new Form W-8s that are being finalized, they will need to confirm the accuracy of those GIINs on a separate IRS webpage. While FATCA withholding will not start until July 1, 2014, action is needed before then to make sure the GIIN can be timely provided and corroborated in order to insure no withholding will occur. FFIs in so-called Model 1 IGAs are given an added six-month breather to get a GIIN, but caution may dictate getting that as soon as they can. While no one can register on the portal until next year, getting on the portal this year is a good move since registration will take time and you can save your input until you next sign in.

On November 15, the Tax Section will host its 2nd Annual International Tax Enforcement Conference in Washington, D.C. Attendance may help lift the confusion that many are feeling now about this brave new world of global tax cooperation and enforcement. I hope to see you there. ■

* Dechert LLP, New York, NY.

Paul H. Frankel: A Life in Tax

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

Paul H. Frankel is Senior Counsel with Morrison & Foerster in New York. While at MoFo he has represented most of the Fortune 100 companies in state tax controversies in almost every state in the Union. He has won outstanding victories and settlements for his many appreciative clients. But that is not why we chose Paul Frankel for our initial "life in tax" mini biography series. Paul is genuinely liked and admired by all of his clients, associates, and even adversaries. He possesses the secret of how to be a fierce and successful competitor (Paul can pound the table and get red in the face), but never make an enemy. This is a brief version of his life in tax.

Internal Revenue Service Years

After graduating from law school at the University of Virginia in 1961, Paul joined IRS Regional Counsel in New York and began an active career in tax litigation. Paul has always lived in Monmouth County, New Jersey and commutes to the city when he is not traveling. He is proud of being a New Jersey lawyer, as was his father (a criminal lawyer).

His first reported case in 1964 involved a $237.13 deficiency. The taxpayer was a single, Catholic, New York working woman, who claimed she put 50 cents or $1 "into the basket" at St. Vincent Ferrer's Catholic Church at three to five masses a week, plus $10 on Sunday, plus $10 she gave to another church she also attended on Sunday. This very religious lady had estimated that she gave 20% of her salary to the church, all of which should be deductible. She thought that was a modest estimate, being exactly one-third less than the maximum deductible contribution. But Paul enforced the *Cohan* Rule on her and the court reduced the deductible contributions to $425. *Bradford v. Commissioner*, T.C. Memo. 1964-196.

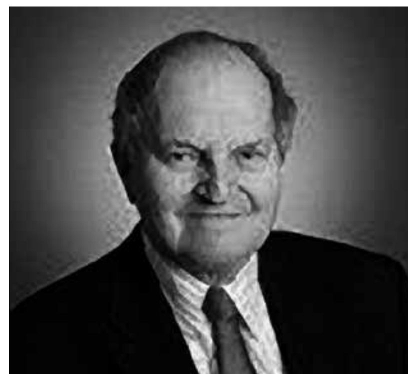
Paul's highest profile case was the Tax Court ruling against Victor Borge. The court held that the Service could apply section 482 to reallocate income from Victor Borge's Cornish game hen corporation. *Borge v. Commissioner*, T.C. Memo. 1967-173. Maybe Paul was specializing in actor audits because he next won a case against Jose Ferrer disallowing business expense deductions. *Ferrer v. Commissioner*, 50 T.C. 177 (1968). But he lost when Harry F. Guggenheim (founder of *Newsday*) claimed his gain on a share in a race horse was capital gain. *Guggenheim v. Commissioner*, 46 T.C. 559 (1966).

Paul won most of these early cases because most of the taxpayers appear to have been at best casual record keepers and at worse shady customers. This no doubt contributed to his suspicions about the effectiveness of today's tax administration.

Private Practice and W. R. Grace Years

Paul left Counsel in 1969 and litigated federal tax cases for W. R. Grace & Co. His conversion to state tax occurred while he was employed in the tax department of W. R. Grace in New York. He often speaks of knowing Mr. Grace and has a high regard for the company.

The first reported court decision involving W. R. Grace was to forecast the big issues Paul would litigate throughout his career: when W. R. Grace sold its stock in Miller Brewing Company, was the gain apportionable business income that Massachusetts could tax when earned by a foreign corporation? *W. R. Grace & Co. v. Commissioner of*



Paul H. Frankel

Revenue, 378 Mass. 577 (1979). Unfortunately, in that case the answer was yes, but Paul has never stopped trying to avoid that tax for his multistate clients.

It was with W. R. Grace that Paul began to travel the country, visiting the corporate tax officers of many of the states, and handling disputes in those states. Being the gregarious fellow that he is, Paul met many of the tax lawyers who represented other similarly situated multistate corporations based in New York and New Jersey. At about that time the Council on State Taxation was being formed. Paul was instrumental in encouraging its development.

MoFo Years

By the late 1980s Paul had joined the west coast firm Morrison & Foerster in its New York office. MoFo had a long history of a strong state tax practice on the west coast and Paul began to build a parallel group on the east coast.

Since joining MoFo, Paul has represented taxpayers in major tax controversies in nearly all of the 50 states. He negotiated settlements in hundreds of cases and won significant state Supreme Court cases in many states, including Kansas, Kentucky, Maryland, Massachusetts, Minnesota, New Mexico, New York, North Carolina and Oklahoma. Indeed, since joining MoFo he has argued before the highest court in approximately 20 states, with

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

his two most recent victories being in May and December of last year: *Scioto Ins. Co. v. Oklahoma Tax Comm'n*, 279 P.3d 782 (2012) and *EchoStar Satellite Corp. v. Tax App. Trib.*, 20 N.Y.3d 286 (2012). He has also won dozens of cases, including public record victories with important issues, at lower levels.

His method at MoFo has been to bring on young lawyers and at first keep them back in the office doing the research and writing the first drafts of briefs and filings while Paul travels the country meeting with revenue officials and trying cases. Then he introduces the young lawyer to the nationwide travel circuit. On the local level Paul is scrupulous to associate local counsel, usually picking the cream of the crop.

Paul had mastered all of the advantages of the iPhone (scheduling, memoranda, etc.) before there was an iPhone. He does it with his note cards, kept in his shirt pocket. The stack appears to be about an inch thick, and Paul licks his finger and peels back just the one he needs to tell him where he is going next. These trips to distant revenue departments have a recurring pattern of which Paul never seems to tire.

First, is the careful preparation. Paul is the consummate lawyer in that he always remembers the facts of his client's case, he keeps everything about the case on one side of one sheet of legal paper, he consults with local counsel, and he has the law of the case fully in mind. Then he arrives the night before, sometimes with the company counsel in tow. That sets the stage for a fine dinner with local counsel and company counsel at which the case will be discussed; but most importantly Paul holds forth.

The subjects on which Paul holds forth are legion, but they circle around these few. First is the western novel, which he loves to read, or perhaps a history book. Second is current political events: Paul could tell you that Obama would be reelected or whatever the topic de jour is. Third is the sad state of tax enforcement.

It turns out that Paul was captured on YouTube last year where he made a statement that pretty much sums up many a dinner table conversation:

"Those of us who do state tax know how important it is. But the U.S. Supreme Court does not seem to know how important it is, but it's really important [voice rising]! So I hope the Supreme Court will take more state tax cases. … Every time I see an independent tax court created where in the past it had been an internal hearing officer, I think it's a wonderful thing ["wonderful thing" is a Paulism]. Every time pay-to-play goes away and you can get your day in court without paying or posting a bond … those are great things. … I see less enforcement. When I worked at the Internal Revenue Service during the 1960s, five percent of the nation was audited and we had trial calendars of the U.S. Tax Court in New York every two weeks. Now it's something like half of one percent and yet every auditor brings in a huge ten or twenty times what he or she makes. I don't understand it. It makes no sense to me! And the worst example in the area is the cash economy. When I was with the IRS in the 60s they knew how to tax the cash economy. I don't think anyone taxes the cash economy. I don't think they do. There must be so much money out there that is uncollected, it would balance the budget." http://www.youtube.com/watch?v=e9HyiciJB2g.

The clip captures subjects close to Paul's heart: wanting the Supreme Court to hear state tax cases, particularly his state tax cases (one of Paul's greatest disappointments is that he has not yet had the opportunity to argue a case in the U.S. Supreme Court, though he has often tried); state tax courts, which he has been instrumental in promoting in many states; and inadequate tax enforcement.

There is one additional subject that is not mentioned but for which Paul is famous, and it relates to the "pay-to-play" problem in state tax litigation: "Don't pay. Don't pay. Don't pay." That is Paul's mantra.

Paul knows how to be client-focused without being a sycophant. His positive attributes that make clients come back to him again and again and take him around with them all over the country include the fact that he shows loyalty back to them and everyone else. Here is a funny example.

When Paul started coming to North Carolina he would always stay at a certain hotel downtown near the revenue department. But downtown Raleigh had not "revived" in those years and that particular hotel was not then very well run. Despite several episodes of lost reservations or unkempt rooms, Paul stuck with that hotel because he wanted to be loyal. Long after anyone else would have switched hotels, Paul finally relented and went to a different hotel, where he became just as loyal.

Conclusion

Paul hasn't been Chief Counsel. He has not yet argued his dream case in the Supreme Court. He does not hog the spotlight. But he has served his clients well, he has built a national state tax practice for MoFo in New York, and he has friends in state tax in almost every state in the country, including the DOR officers. That is a life in tax that any of us would be glad to have. ■

certainly much better. The top 1% of households own about 35% of the net wealth in the U.S.

The outrageous figures of the late 19th century in the United States are attributable, in part, to the fact that most of the wealth of the top 1% went untaxed throughout that century, because such wealth was kept in corporations. Back then, corporations were not taxable entities. The largest conglomerates of the period all operated in a corporate form, owned and managed by America's richest. To name a few examples, Standard Oil was incorporated by John Davison Rockefeller in 1870 in Ohio. The American Sugar Refinery Company was owned and managed by Henry Osborne Havemeyer. The Vanderbilt and Gould railroad empires operated through multiple state-chartered corporations incorporated during the 19th century, and the Astors' fur trading empire was operated, among others, via the American Fur Company, incorporated in New York in 1808. Such corporations amassed non-taxable earnings throughout the 19th century.

At the same time, low and middle-class individuals carried the brunt of the burden of financing the U.S. government through tariffs and, on several occasions throughout the 19th century, personal income taxes.

It is this sorry state of affairs that eventually led to the enactment of the Corporate Excise Tax in 1909. Scholars are continuously debating what exactly Congress was trying to get at, namely, whether it was the wealth of the Astors, Vanderbilts, and Rockefellers, or whether it was the power they accumulated through the corporations. *See* Reuven Avi-Yonah, *Corporations, Society, and the State: A Defense of the Corporate Tax*, 90 Va. L. Rev. 1193 (2004); Steven A. Bank, *Entity Theory as Myth in the Origins of the Corporate Income Tax*, 43 Wm. & Mary L. Rev. 447 (2001). The bottom line justification for taxing corporations, however, was clear—corporate tax was a just tax. Indeed, corporate taxation supports fairer society in multiple ways.

First, and probably most importantly, without corporate taxation corporations will simply be used as an instrument to avoid taxes. Shareholders would simply stuff earnings in such entities, as historically has been the case. This will not only hurt revenues, but more importantly would simply kill the idea of progressive taxation. Corporate taxation, for that matter, is a much needed instrument to get at the wealth of shareholders, thus maintaining horizontal equity (when it comes to similarly situated taxpayers only some of whom own corporate stock) or vertical equity—which is the more likely case—because rich taxpayers have most of their income generated from capital (such as dividends and selling corporate stock), and not from wages.

Second, in a world where the largest corporations are publicly traded, corporate taxation supports progressivity, administratively speaking, as it is much easier to collect tax at the entity level than at the shareholder level. It also serves to support an argument under which corporate taxation is a fee for liquidity. *See* Rebecca S. Rudnick, *Who Should Pay the Corporate Tax in a Flat Tax World?*, 39 Case W. Res. L. Rev. 965 (1989). In this context, it is important to note that most equity in publicly traded corporations in the U.S. is owned by U.S. taxpayers, which in turn means that taxation of such entities helps to support the taxation of such U.S. residents in their individual capacity.

Third, in the case of publicly traded corporations, corporate taxation is also a necessary tool to support good corporate governance. In the absence of corporate taxation, corporate managers who also own equity in the corporation will have their own interests in mind when making corporate-level decisions that affect shareholder-level taxes. When corporate tax is imposed, managers' and shareholders' interests are more closely aligned, as they all have an interest in reducing corporate level tax. In essence, corporate taxation is an instrument to address shareholder-level tax-heterogeneity. *See* Hideki Kanda & Saul Levmore, *Taxes, Agency Costs, and the Price of Incorporation*, 77 Va. L. Rev. 211 (1991). So again, corporate tax supports the less-powerful in our society, who happen to own some of their wealth in the form of corporate stock.

Finally, corporate taxation, and the reporting requirements associated with it, puts government in a better position to regulate unwanted behaviors by corporate managers. In fact, this is another explicit reason noted in support of the enactment of the first functional corporate tax in 1909. The abuse of power by managers of wealthy corporations was a real concern, and corporate tax was understood to be part of the solution. *See* Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 Ind. L.J. 53 (1990).

We keep hearing that the tax rates in the United States are the highest in the world. We keep hearing that the corporate tax puts U.S. corporations at a competitive disadvantage. The competitiveness arguments are, in fact, false. There is no conclusive evidence to support the argument that U.S. corporations *effectively* pay more taxes than their international counterparts. In fact, a recent study suggests that U.S. multinationals pay on average *less* than their European counterparts. *See* Reuven S. Avi-Yonah & Yaron Lahav, *The Effective Tax Rates of the Largest U.S. and EU Multinationals*, 65 Tax L. Rev. 375 (2012). Some studies even suggest that the corporate tax burden in the United States is the *second lowest* in the industrialized world. *See* Chuck Marr & Brian Highsmith, *Six Tests for Corporate Tax Reform,* Ctr. on Budget & Policy Priorities, rev. Feb. 24, 2012, at 3, *available at* http://www.cbpp.org/files/2-28-11tax.pdf.

Unfortunately, these days it seems that history repeats itself. When the Apples, GEs and Googles of the world operate multinational businesses, they

can engage in tax planning techniques, shifting income to their foreign subsidiaries. These techniques are not available to the local convenience store, or the neighborhood plumber. Once again, the top echelon of U.S. society can keep its earnings untaxed, by stuffing such earnings into corporations. In substance, there is little difference between today and the late 19th century. The only difference is that today's "corporations" are "foreign." Those entities, of course, are not truly "corporations" and they are not really "foreign." They are, for the most part, pocketbook entities, with no real existence (except for a mailbox), wholly owned by a U.S. parent. The burden is thus shifted, once again, to small business owners and to U.S. employees whose main income is from salaries.

It is appropriate to end this argument by quoting directly from President Taft's message to Congress on June 16, 1909, supporting the enactment of the first functional corporate tax in the United States (44 CONG. REC. 3344 (1909)) (Message from President Taft):

> While the faculty of assuming a corporate form has been of the utmost utility in the business world, it is also true that substantially all of the abuses and all of the evils which have aroused the public to the necessity of reform were made possible by the use of this very faculty. If now, by a perfectly legitimate and effective system of taxation, we are incidentally able to possess the Government and the stockholders and the public of the knowledge of the real business transactions and the gains and profits of every corporation in the country, we have made a long step toward that supervisory control of corporations which may prevent a further abuse of power.

Corporate tax is still a just tax. We need to tax more corporations, and we need to tax them more. That is, of course, unless the reality of the 19th-century wealth distribution is the reality we want to get back to.

Affirmative

By Deborah A. Geier

The old saw highlighted in the May 5, 2013, *Wall Street Journal* op-ed piece by Congressman Kevin Brady (*Tax Reform Needs Accurate Tax Tables*, at http://online.wsj.com/article/SB10001424127887323309604578429013359147292.html)—that we need to integrate in order to lower the cost of capital, which will, in turn, increase business spending on buildings, equipment, and software, which will, in turn, increase labor productivity and increase real wages, thus benefiting American workers—is never supported by any showing that businesses are starved for investment dollars because the cost of capital is so darn high, making it difficult for businesses to form and expand. That assumption appears to be not just untrue but glaringly, obviously untrue. Interest rates are at historic lows, with lots of talk of a "global savings glut" looking for places to invest. Indeed, some argue that the chase for a place to invest the global savings glut contributed to the dot-com and housing bubbles. And corporations are sitting on literally trillions of undistributed profits—a huge pool of untapped capital. The CRS report at the time of the 2003 Bush integration proposal said that the proposal was unlikely to stimulate the economy.

The corporate tax levied essentially only on publicly traded corporations can be defended either as an appropriate toll charge for liquidity (an enormous benefit) or as a benefit tax to pay for the costs of the regulated securities market. Maintaining a regulated public market ain't cheap, people. Those who mainly benefit from it should pay for that benefit via the corporate tax.

In 1977, the late, great Professor Mike McIntyre of Wayne State published a short piece in *Tax Notes* against corporate integration in the style of the 17th-century French philosopher and mathematician Blaise Pascal, who wrote *Penseés*. Mike entitled it *Penseés on Integration: Where's the Reform?* (at http://faculty.law.wayne.edu/mcintyre/text/mcintyre_articles/Tax_reform/pensees_revisited.pdf). He updated it in 2003 at the time of the Bush proposal to integrate via dividend exemption. I'm going to channel Mike here by quoting a few of his *Penseés* and adding a few of my own.

- Why does the business community rail against the double tax on profits and keep silent on the double tax on wages in the form of the Social Security and Medicare taxes? Let them answer.
- Integration makes the simplifying assumption that a corporation is the docile agent of its shareholders. For most publicly traded corporations, however, a shareholder cannot obtain his share of the profits at his discretion without selling his stock at a price that reflects retained earnings. If we do not think that the corporation is the alter ego of its shareholders, why do we consider a corporate tax and a shareholder tax to be a double tax? Is it a double tax when a person hires a maid, and both the maid and the employer pay tax on the same income? Double taxation is a slogan, not an explanation.
- The corporate tax has had much greater success than the income tax in placing substantial tax burdens on the rich. Why should we want to end our most progressive tax?
- *Objection*. The incidence of the corporate tax is on consumers (in the form of higher prices) and labor (in the form of reduced wages), both of which are bad policy.
- *Reply*. If so, it results in a double tax on consumers and workers, not on shareholders. Tax relief for shareholders would therefore be doubly wrong.
- Some of the people who argue for shareholder relief on the ground that the corporation is the alter ego of the

shareholder oppose current taxation of the earnings of controlled foreign subsidiaries. A domestic company is an alter ego but a foreign company is not?

- Where is the "double tax" when a tax-exempt foundation receives a corporate dividend?

I will add that the tax-exempt sector plays a major role in U.S. capital markets and in the corporate capital market in particular. The Treasury, in its 1992 integration study, recited that 46% of corporate bonds and 37% of corporate equity were held by tax-exempt entities. The trend lines from 1950 to 1992 were steeply up in that report, so I imagine that their shares of corporate equity and debt are higher today. The corporate income paid out as interest on the corporate bonds held by tax-exempts is not subject to even a *single* level of tax. Rather than integrate with respect to equity distributions, we need reform so that at least a single level of tax is imposed on corporate profits paid to tax-exempts!

Negative: The United States Should Repeal the Corporate Income Tax

By David S. Miller

The United States today does not impose anything remotely resembling a corporate income tax. And the United States shouldn't impose one. Instead, the United States should impose a more rational tax on business.

To begin, the United States does not impose a true corporate tax. Two-thirds of all U.S. corporations are S corporations and are not subject to any corporate tax. And of the remaining one-third of U.S. corporations, many entirely avoid income tax altogether. For example, regulated investment companies, real estate investment trusts, and tax-exempt organizations are completely or effectively exempt. So our current business tax is not really a corporate tax.

And for those relatively few U.S. corporations that are subject to entity level taxation, their tax liability bears no evident relationship to income. Over the past five years, Apple paid federal income tax at an average rate of 8.2%, Amazon paid 6.0%, Ford paid 4.2% and Facebook paid 2.4%. On the other hand, Walmart paid an average annual effective rate of 33.6% and Disney 36.5%.

So the United States doesn't really tax corporations and it doesn't really tax income and it shouldn't.

But let's first ask: Why do we have a corporate tax?

One justification for a corporate tax is that it serves as a proxy for the taxation of shareholders. Quite simply, it's easier to collect the tax from a corporation than the shareholders.

But is this really true? The United States is perfectly capable of taxing partners in master limited partnerships and publicly-traded private equity firms. So a corporate income tax is not necessary to collect tax from the shareholders.

The second justification for a corporate tax is that it serves as a fee for the benefits government provides to shareholders (like limited liability) or as a fee for liquidity for access to the capital markets. But if the corporate tax was ever a fee for limited liability, it certainly is not today when limited liability is available for noncorporate entities (like limited liability companies), and the corporate income tax isn't imposed on many corporations. It's also hard to justify the corporate tax as a fee for liquidity because there's no relationship between a corporation's income tax and the liquidity of its stock.

The third justification for the corporate tax is that it is needed to control the excessive accumulation of power in the hands of corporate management. But if that's really true, why do the biggest companies like Apple pay the lowest rates of tax? And why do REITs and mutual funds escape it entirely when they may be managed by people with a very small percentage of the company's stock.

Whatever the justifications for a corporate tax, they are far outweighed by the detriments. Corporate tax is a tax penalty on doing business in corporate form; it discourages dividends; it encourages debt; it encourages foreign accumulation of earnings; and it requires squadrons of tax lawyers to help avoid it. We need to move away from the notion of a corporate income tax towards a rational system of business taxation.

Consider some alternatives. First is Ed Kleinbard's business enterprise income tax (or BEIT). The BEIT would tax all businesses, regardless of their legal form, based on their income less a cost of capital allowance deduction equal to the value of capital invested times the risk-free rate. Interest would not be deductible. Individuals would accrue tax based on their investment times the risk-free rate, plus an additional tax on cash flows in excess of that rate. Individuals could take a deduction if cash returns are less than their risk-free rate inclusions. Notably, the BEIT is an integrated income tax. All income is taxable only once.

Alternatively, we could adopt Joseph Dodge's proposal. We'd retain the current single level of tax for private companies like sole proprietorships, partnerships and S corporations, repeal the corporate level income tax, and tax shareholders of public companies on a mark-to-market basis. Again, under this system, all income would be subject to a single level of tax.

To wrap up, we don't really have a corporate tax because we don't tax most corporations; we don't really have an income tax because tax liability bears very little relationship to income; there's really no good reason to have a corporate tax; and, there are much better alternatives.

Resolution #2:
"Be it resolved that, assuming integration is desirable, the best way to achieve it is by exempting dividends from taxation in shareholders' hands."

Affirmative: Dividend Exemption Is the Best Method of Corporate/Shareholder Integration

By O. Y. Marian†

It is a standard complaint that our classical system of taxing corporations is inefficient. Taxing the same income twice, once at the corporate level and once again at the shareholder level, distorts behavior in many undesirable ways. Thus, calls for the integration of corporate and shareholder taxation have long taken a central role in corporate tax reform debates in the United States. The question is, of course, how to best achieve such integration?

As a preliminary matter, it is worth differentiating between three major schools of thought regarding corporate/shareholder integration. Obviously, each has its own offshoots and sub-schools of thought, but the three major categories are as follows: The first is an *imputation* system, under which corporations are taxed, and shareholders get credit for their proportional share of corporate-level tax; The second is a dividend *deduction* system, in which corporations are allowed a dividend paid deduction, which effectively eliminates corporate level tax; The third, and the one I shall argue for, is an *exemption* system, under which corporations are taxed at the entity level, but distributions to shareholders are exempt.

Selecting between the three methods is hardly a new policy question. As much as we like to think of ourselves as leaders in the formulation of world tax policy, corporate integration is an area in which the United States is not. The United States is in fact tailing the rest of the world. Most other industrialized countries have already engaged the issue, and their comparative experiences offer important insights.

One controlling trend in the past two decades is that countries that abandon the classical system of taxation usually opt for the exemption method. Another interesting trend is that countries that already had integration systems in place tend to abandon imputation systems in favor of an exemption system. No country that I am aware of has a dividend deduction system in place. Strikingly, 24 of the 36 OECD member countries employ some form of exemption. For a discussion on recent trends, see Georg Kofler, *Indirect Credit versus Exemption: Double Taxation Relief for Intercompany Distributions*, Bull. Int'l Tax'n, Feb. 2012, at 77. I believe this comparative experience is a helpful departure point. It demonstrates that exemption is, in the eyes of many jurisdictions, a preferable system of integration. As I show, exemption is at least as good as, but in most instances preferable to, deduction or imputation by any conceived benchmark.

First, there is the standard suggested in the Bush administration 2003 proposal, which is that integration is aimed at eliminating as much as possible distortions created by corporate tax. The Bush proposal mentions at least three such distortions: the preferences for debt over equity financing, the bias against dividend distributions, and the bias against operating in a C-corporation form. Let's address each in turn.

1. In terms of bias against dividend distributions, I think the issue has been largely resolved by the Bush tax cuts, and dividend exemption will not change that. In this context, imputation achieves the same result. However, dividend deduction, while eliminating shareholders' bias against dividends, creates strong incentives for managers to distribute dividends in order to eliminate corporate level tax, even if reinvestment is desirable. This causes a new behavioral distortion.
2. The debt equity issue is unresolved under all systems of integration. Clearly, under an exemption system, payment of interest is preferred at the corporate level, but this is also the case for imputation. One could theoretically argue that debt preference is solved in the case of dividend deduction. *See* Reuven S. Avi-Yonah & Amir Chenchinski, *The Case for Dividend Deduction*, 65 Tax Law. 3 (2011). That is not the case, however. To obtain a deduction, dividends must be distributed, while interest is deducted even if accrued but not paid. Thus, under a dividend deduction system we have a strong bias to distribute cash even if that is not optimal. In turn, this creates an incentive to finance new investments with corporate level debt, rather than using available cash at hand.
3. The main issue stemming from the Bush 2003 proposal is that an integration system needs to achieve the goal of single taxation, thus eliminating the bias against operation in a corporate form. While all three suggested systems achieve this main purpose, this theoretical premise is only true if we view the world as a single

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taxing jurisdiction, where all corporations and all shareholders are "domestic." Once we look at cross-border transactions (aka reality) only an exemption system can unilaterally achieve single taxation, while the other methods would require foreign governments' cooperation to achieve single taxation.

In the case of dividend deduction, single taxation to U.S. shareholders of foreign corporations will be achieved only if the foreign jurisdiction also grants dividend deduction. In the case of inbound taxation, if the U.S. grants deduction, but the foreign jurisdiction in which foreign shareholders reside has a territorial system, then no tax is imposed. (The reverse, of course is also true—if we grant an exemption but a foreign jurisdiction grants a deduction, there will be zero taxation on outbound investment of U.S. shareholders. That said, no country currently grants deduction.) Imputation will only achieve single taxation if the shareholders can obtain accurate information from a foreign corporation's tax returns, which is highly unlikely.

Exemption is preferable because it is the only system that assures single taxation in a globalized environment. In such a case, U.S. corporate tax will function as a proxy for income tax of domestic corporate shareholders, and as a proxy for territorial taxation in the case of foreign shareholders.

The second benchmark under which we should evaluate the three possible systems is as follows: whatever system of integration we adopt must not interfere with the policy purposes for which we tax corporations to begin with. For that purpose let me connect back to the previous discussion, and let's assume that a main purpose of corporate taxation is to exert a tax burden on shareholders, or to regulate managers of publicly held entities.

If we seek to tax shareholders through the taxation of corporations in which they hold interests, this purpose is achieved in both the exemption and imputation methods. It is not necessarily achieved in the context of dividend deduction, because corporate level tax is eliminated. For example, a tax-exempt taxpayer that holds equity in a corporation gets a windfall under a deduction system.

If we want to regulate managers and achieve better corporate governance, exemption is the best system. It aligns shareholders' and managers' tax interests, because it is in the interest of both groups to reduce corporate level taxation, and they have no diverse tax interest at the shareholder level. Exemption eliminates the problem of shareholder-level tax heterogeneity. Imputation and deduction do not achieve such results, because shareholder level tax remains relevant.

The third benchmark, under which we must decide which integration system is preferred, is whether any adopted system is expected to create new distortions. For example, an exemption levels the playing field between foreign and domestic shareholders for inbound investment in publicly traded corporations. Both are subject to the same tax at the entity level. Exemption also creates a competitive environment for outbound investment, because it effectively achieves the same result as a territorial system. Deduction and imputation do not achieve such results. For example, deduction essentially exempts corporations from tax on U.S. earnings, while dividend payment depends on the tax treaty network. In the case of outbound investment, two-level tax remains a problem because we cannot force foreign jurisdictions to grant dividend deductions to U.S.-controlled foreign corporations. Imputation could theoretically achieve the desired result, but it is simply impractical, and indeed, countries who adopted imputation in the past rarely applied it to foreign shareholders.

Finally, the system we opt for should be administratively feasible. Exemption is the easiest system to administer compared with the other alternatives. There is only one relevant taxpayer: the corporation. Imputation is clearly the worst in terms of administration. Deduction is probably not as bad, but shareholders still must account for their dividend income.

I think the comparative experience with which I started is telling, but hardly surprising. As I believe I have demonstrated, compared to other methods of integration, an exemption system achieves most of the purposes of integration, while generating little headache in the process. It is therefore the preferred mode of integration.

Affirmative

By Adam H. Rosenzweig‡

Exemption is the best form of integration for one simple reason: nobody has any idea who bears the incidence of the corporate income tax. Both the deduction and imputation methods implicitly assume that share-holders bear the *entire* incidence of the corporate income tax.

Take the following example: a corporation would earn $1 million in net profit absent an income tax. Now introduce a 35% income tax. The corporation would pay $350,000 in cash tax out of the $1 million profit, leaving only $650,000 to be distributed to the shareholders. Under an imputation method, the shareholders would receive a distribution of $650,000, grossed up to $1 million, and subject to a credit for the $350,000 in taxes paid by the corporation. Assuming a 40% shareholder tax rate, the $1 million dividend would result in $400,000 of tax, offset by $350,000 in credits. The shareholders would owe a net of

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$50,000 in cash tax, leaving a total of $600,000 cash in pocket.

But instead assume that the corporation could cut salaries by $500,000—solely as a result of the tax—such that its pre-tax income is now $1,500,000. The corporation pays $525,000 in taxes, leaving a total of $975,000 in after-tax profits. The corporation distributes the $975,000 to the shareholders, grossed up to $1,500,000 with a credit of $525,000. The shareholders owe tax of $600,000 less the credit of $525,000, for a net of $75,000 in cash taxes. This leaves $900,000 cash in the pockets of the shareholders. Now, instead of a 40% tax on the $1 million of profit, the shareholders bear only a 10% tax on the $1 million of profit. Assuming a 40% tax on salary, labor bears the $300,000 difference ($500,000 lost salary less $200,000 in tax savings). If the tax rate on labor is lower than the rate on shareholders, the problem gets even worse.

Of course, this is a simplified example, but it demonstrates the idea that this result occurs solely because the shareholders are entitled to receive the *entire* tax credit when they may bear only a portion of the economic incidence of the tax. Since there is no way to know who bears the incidence of the corporate income tax, and it could vary depending on company or industry, this problem will always arise under an imputation method.

Under a deduction method shareholders would bear the entire cost of the tax on dividends. For shareholders in many corporations this would result in a net increase in taxes. Presumably, then, at the margin (taking into account capital gains taxes), under the deduction method such shareholders would oppose making distributions and prefer for the corporation to pay an entity level tax. Put differently, if shareholders are not indirectly bearing the incidence of the corporate level income tax why would they agree to directly bear it through a deduction method? For a discussion of the tension between shareholders and managers in the corporate integration context, see Michael Doran, *Managers, Shareholders, and the Corporate Double Tax*, 95 VA. L. REV. 517 (2009).

Even worse, shareholders have different tax attributes (the so-called clientele effect). Some are tax-exempt organizations, some are foreign individuals, some are corporations entitled to the dividends-received deduction, and some are taxable U.S. individuals. All of these constituencies would prefer different dividend policies. So instead of paying the tax through the deduction or imputation method, shareholders would simply sort themselves according to their preferences—exempt shareholders and U.S. corporations would own dividend paying stocks while taxable U.S. and foreign individuals would own only non-dividend paying stocks. *See* Mark P. Gergen, *How Corporate Integration Could Kill the Market for Corporate Tax Shelters*, 61 TAX L. REV. 145 (2008). Don't believe this would happen? Just look at how many mutual fund shares as opposed to tax-exempt bonds are owned through tax-free retirement accounts.

The exemption method avoids all of these problems. As my partner on this resolution points out, for a similar reason the exemption method also addresses a number of international complications as well. Taken together, the dividend exemption method is clearly the best form of integration.

Negative

By Deborah A. Geier

Dividend exemption is the worst form of integration because it ignores crucially important framing effects. With the rise of the behavioral economics movement, we all have become increasingly aware of the importance of cognitive biases and framing effects. Integration using this method requires the corporation to maintain both the EDA (excludable dividend account) and REBA (retained earnings basis adjustment). All corporate-level earnings that are actually taxed would be either actually or deemed to be distributed. Actual distributions from the EDA would be excluded, while deemed distributions from the REBA would increase stock basis, thereby reducing gain on sale of the stock. Even if we assume that the incidence of the corporate-level tax paid falls on these same shareholders, the amount actually included on their individual tax returns would plummet, which would result in the public's perception that the rich are not paying much income tax. Polls show that much of the public already believes that—rightly or wrongly. This particular route to integration would even worsen that perception.

The vast majority of qualified dividends and capital gains are realized by the very rich. Marty Sullivan's work in *Tax Notes* (*Is the Income Tax Really Progressive?*, 125 TAX NOTES 1135 (2009)) demonstrates that even those with AGI between $200,000 and $500,000 realize only 12.5% of that AGI in the form of qualified dividends and capital gains. In contrast, those with more than $10 million of AGI see more than 60% of it in the forms of qualified dividends and capital gains. As Len Burman noted in his recent Senate Finance testimony (*Tax Reform and the Tax Treatment of Capital Gains: Hearing Before the S. Comm. on Finance and the H. Comm. on Ways and Means*, 112th Cong. (2012) (Statement of Leonard E. Burman), at www.finance.senate.gov/imo/media/doc/092012%20Burman%20Testimony.pdf), in 2010 the top 1% realized almost 70% of capital gains and the richest 1 in 1,000 households accrued about 47%. Only 1.1% of the tax preference accorded to net capital gain and qualified dividends is enjoyed by taxpayers in the bottom 60%. The Tax Policy Center estimated that the top 1% would capture 42% of the benefit of the dividend exclusion approach in the Bush 2003 proposal.

Because of this concentration of qualified dividends and capital gains in the richest households, Marty Sullivan has shown that effective tax rates of the merely rich are higher than for the very rich. (*Is the Income Tax Really Progressive?*, 125 Tax Notes 1135 (2009), and *Busting Myths About Rich People's Taxes*, 135 Tax Notes 251 (2012).)

These framing effects are important. In the last election, it was widely reported that President Obama paid an effective federal income tax rate of 26.3% in 2010 on AGI of $1.7 million, while Governor Romney paid an effective federal income tax rate of only 13.9% on AGI of $21.6 million. While the usual suspects argued that Romney's effective tax rate was actually much higher than it *appeared* because he *indirectly* suffered the incidence of the corporate tax, the general public wasn't buying it. (As an aside, I have to add that it's ironic that these same outlets that argued that Romney's effective tax rate was higher than it appeared because he indirectly paid the corporate tax also consistently argue that the corporate tax is unfair because its falls mainly on labor, not capital. Can't argue out of both sides of your mouth, people!) At bottom, because of these framing effects, the tax event *must* remain visually at the owner level if it is to have any chance of broad-based support.

In addition, state and local governments that base their own individual income tax bases on federal AGI would suffer significant reductions in revenue with dividend exemption and REBAs. States would also have a much harder time issuing tax-exempt bonds if dividends are also wholly or partially exempt. Moreover, tax-exempt dividends would significantly increase the opportunities for tax-rate arbitrage tax shelters. Just as section 265(a)(2) is impossible to police with respect to 103 bonds, so would be any concomitant provision with respect to tax-exempt dividends.

Dividend exclusion does nothing to reduce the biggest distortion of the classical corporate tax system: the incentive to capitalize with debt rather than equity.

In the closely held Sub C context (as opposed to the Sub S context), the dividend exclusion would create a new preference for dividend distributions over salary payments to employee-shareholders, which would reduce the amount of payroll taxes going to the Medicare and Social Security trust funds, exacerbating the perilous position of the Medicare fund in particular. In other words, the John Edwards and Newt Gingrich gambits would migrate from Sub S to Sub C.

Under the CBIT (Comprehensive Business Income Tax) as an alternative to dividend exemption, both shareholders and bondholders would exclude the dividends and interest received, and the corporation would deduct neither. The benefit of the CBIT approach to integration is that it does away with the bias for debt-financing, but it suffers from the same fatal flaw as dividend exemption: exclusion at the owner level. That's a no-go.

A much better method of integration is one that lodges the tax event at the shareholder-level, either through a dividends-paid deduction to the extent that the dividend is paid out of actually taxed corporate-level income, a credit imputation method like those once enjoyed by European countries before the ECJ ruled them discriminatory because they provided no credit to foreigners receiving dividends, or a mark-to-market system for publicly traded stock like the one described by Joseph Dodge (*A Combined Mark-to-Market and Pass-Through Corporate Shareholder Integration Proposal*, 50 Tax Law Rev. 265 (1995)). More on a modified version of that third possibility under the third resolution.

There is a final point to stress with respect to either a dividends-paid deduction or dividend exclusion system. Every such proposal deems distributions to come *first* from post-enactment, corporate-taxed income. Under the Bush proposal, for example, distributions would be deemed to come first from the EDA (resulting in exclusion), then from the cumulative REBA (or CREBA) (also resulting in exclusion but also a stock basis reduction), and only last from untaxed corporate income (resulting in inclusion). These includable dividends represent undistributed E&P at the time of enactment or current-year corporate-level preference income. The fair rule—if we are to be stuck with dividend exemption or a dividends-paid deduction—is to treat all distributions as made *first* out of pre-enactment undistributed E&P (until fully distributed)—no dividends exclusion or dividends-paid deduction; *second* out of current-year preference income—ditto; and only *third* out of corporate-level taxed income (excludable under the exemption system or nondeductible under the dividends-paid deduction approach). To defer or even forgive, in effect, the shareholder tax on pre-enactment earnings would be to grant a huge capital windfall to those who had received the maximum deferral benefit from the separate-entity theory of the corporate tax. Here's one of my favorites from Mike McIntyre's *Penseés*: Should a supporter of integration also support a large capital levy to soak up the windfall gain resulting from the end of the two-tier system? Or is the whole purpose of integration to create a windfall gain?

Negative

By David S. Miller

Dividend exemption would be the worst way to achieve integration, especially where, as today, the individual income tax rate exceeds the corporate rate. First, a dividend exemption would provide a pure subsidy to taxpayers in the highest bracket and would dilute the progressivity of our tax system. Second, it would obligate the United States to provide the exemption to residents of its treaty partners. Third, it would tend to

enhance the subsidy of equities over fixed income securities. Fourth, it would be very difficult to ensure that the exempted dividends really are subject to corporate tax. And, finally, a dividend exemption would tend to increase the rates on tax-exempt bonds and decrease state tax revenues, squeezing states and municipalities.

The corporate income tax rate is 35%, and the highest individual marginal rate on ordinary income is effectively 44.7% (after taking into account the 3% Pease limitation and the 3.8% Medicare tax). Assume a corporation earns $100, pays $35 in corporate income tax and distributes the remaining $65. If an individual can exclude the $65, she will be subject to aggregate tax at a rate of only 35%, which is much lower than the highest marginal rate, which is at least 39.6%. In this case, the individual is much better off than she would have been had the business been run as a sole proprietorship.

Moreover, this high income individual would have paid tax on the corporate income of $100 at the same combined marginal rate as a shareholder in the lowest marginal rate so the exemption system is not at all progressive. And, because wealthy taxpayers have disproportionately more stock than poor taxpayers, wealthy taxpayers would enjoy a disproportionate benefit from the exemption.

Second, if the United States exempts its own residents from tax on dividends, under the nondiscrimination provision of many treaties, it would have to exempt dividends paid to residents of the treaty jurisdiction. So the United States would lose the tax it collects from these foreign investors.

Third, because for high income taxpayers, corporate earnings would enjoy a lower effective rate than bonds, exempting dividends would increase the subsidy that equities enjoy over bonds.

Fourth, it will be difficult to exempt only the portion of corporate profits that are subject to corporate tax. Assume that a shareholder contributes $1,000 to a wholly-owned corporation. The corporation has a $100 loss in year one and $100 of income in year two, uses its year one loss to offset the income in year two (so it pays no corporate tax), and distributes $100 in year two. If an individual shareholder could exclude the distribution without reducing his basis, he'd be able to sell his stock for a tax loss without suffering any economic loss. We'd need a complicated system to prevent corporations from being used to generate tax losses in this manner.

Finally, if dividends become exempt, tax-exempt bonds become less attractive, which would raise tax-exempt bond rates. Also, since states piggyback on federal taxable income, if dividends are exempt, states would collect less revenue.

Resolution #3:
"Be it resolved that, assuming the United States imposes a corporate income tax, it should lower the statutory rate below 35% in a revenue neutral way."

Affirmative

By Adam H. Rosenzweig§

The United States has the highest statutory corporate income tax rate in the OECD. More troubling, however, is that this has not occurred due to any affirmative policy choice by the United States to charge a higher corporate tax rate than the other OECD member countries, but rather merely due to attrition over time as every OECD member country other than the United States has lowered its corporate income tax rate. At a minimum, this proves it is time to revisit the statutory corporate tax rate and what it should be. The best answer would be to lower the corporate tax rate below 35% in a revenue neutral way.

It is often argued that having a high corporate income tax rate makes U.S. business unable to compete with foreign owned business. It is often unclear, however, what competitiveness means in this context. Does it mean access to capital? Does it mean prices charged to consumers?

For this reason, competitiveness alone is not a reason to reduce the corporate income tax rate. If it were, the corporate income tax rate should be reduced across the board, and dramatically so, regardless of revenue.

Instead, the corporate income tax should be reduced in a revenue neutral way, but not for traditional competitiveness reasons. Rather, the rate should be reduced due to the combination of the distributional impact of the high statutory rate and the competitive pressures on multinational businesses to manipulate their effective tax rates. More specifically, a high statutory rate results in companies with highly mobile tax bases and multinational business models using aggressive tax strategies to lower their overall worldwide effective tax rate. Meanwhile, those companies with immobile tax bases or primarily domestic business models are left paying the higher tax rates. As an example, it has been reported that Apple paid federal income tax at an average rate of 8.2% and Facebook paid 2.4% while Walmart paid an average annual effective rate of 33.6% and Disney 36.5%.

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Why the disparity? Has there been an affirmative policy choice of the United States to tax Walmart at a higher rate to subsidize Apple? Is there a reason for Disney to pay more to subsidize Facebook? Of course, the answer is no. This is merely the result of the interaction of international competitive pressures and a high statutory corporate income tax rate. Companies like Apple with highly mobile intellectual property and worldwide sales feel the need to aggressively lower their effective rates through offshore planning because their competitors are doing so, while it would be much more difficult for Walmart to do so for the simple reason that Walmart owns (and sells) a lot of real, tangible stuff inside the United States. So if the goal is to equalize the tax treatment of primarily domestic U.S. corporations and primarily multinational ones, the answer must be to lower the nominal tax rate in a revenue neutral way.

There are other benefits from lowering the rate as well. Lower rates would make evasion less profitable, meaning on the margins fewer corporations would engage in wasteful tax planning rather than productive investment. Since corporations on the margin were not paying the tax to begin with, the efficiency gains would be free money to the economy. There is even a chance that corporations would pay slightly more tax in a lower rate world to take advantage of the certainty of completely legal taxes at a lower rate rather than exploiting potentially risky tax avoidance structures under a higher rate. Even so, it is unlikely that the increased efficiency gains plus any certainty gains generated from those corporations on the margin would be sufficient to offset the reduction in corporate revenue incurred by lowering the statutory tax rate on all corporations. So some other revenue would be necessary to lower the statutory corporate tax rate in a revenue neutral way.

The traditional way to do this would be to lower the rate while broadening the base, say by repealing accelerated depreciation, or increasing the scope of the Subpart F anti-deferral regime, or adding to the number of foreign tax credit baskets, or capping corporate research and development credits. The problem with these approaches is that, in the past, the base broadening measures have seemed to have little long-term effect—as increasingly clever corporations find increasingly clever ways around them—while the statutory rate reductions become permanent.

Perhaps, then, it is time to reconsider what revenue neutral means in this context. There is no reason it need be limited to base broadening. For example, what about a corporate excess profits tax to make more profitable corporations subsidize less successful ones? Or a carbon emissions excise tax to force polluting companies to subsidize clean ones? Other proposals, including one described by my partner on this resolution, could be considered as well. All of these would raise revenue to offset the statutory rate reduction. But what becomes clear is that no choice of revenue instrument is neutral. Any choice to increase revenue to offset other cuts must have distributional consequences. Both sides, therefore, should have affirmative policy goals built into them.

Once we move away from tying rate reductions to base broadening, there is no reason to limit ourselves to these more traditional tools. In fact, if the point of lowering the corporate tax rate is to equalize the treatment of similarly situated corporations (at least based on income), why not explicitly tie the corporate tax rate to this goal instead of indirectly trying to get there through other means? In other words, perhaps lowering the corporate tax rate in a revenue neutral way would mean abandoning the notion of having a single corporate tax rate applicable (effectively) to all corporations and replacing it with a dynamic, self-adjusting tax rate in which every corporation would pay its own company-specific tax rate.

What would a dynamic, self-adjusting tax rate look like? First, consider the incidence of the corporate tax. When a corporation pays tax, who ultimately bears the cost—consumers, labor or capital? The well-established answer is … nobody knows. Even worse, it is not just that nobody knows but that nobody can know, as it depends on the relative elasticity of these three groups. But one thing we can know is that during periods of very high unemployment and near zero interest rates, the elasticity of labor becomes much lower than that of capital, at least as compared to more "normal" times of lower unemployment and higher interest rates. In such a case, the incidence of the corporate tax would increasingly be shifted onto labor and away from capital as compared to "normal" times.

So perhaps in response the corporate tax rate should float on a company-by-company basis in some way to reflect this. Although there are a number of potential ways to do so, one would be to reduce the corporate tax rate for corporations that do not shift the cost of the tax onto labor while, at the same time, increasing the corporate tax rate for corporations that do. The details in getting there may be a little messy, for example it may require comparing each individual corporation's employment decisions to some independent metric such as regional or sectoral unemployment. But there is no reason to believe this would be more complex, messy, or difficult to implement than the current income tax with high rates and the resulting transfer pricing, hybrid equity instruments, Double Irish Dutch sandwiches, and reverse hybrid structures, among others.

As a result, the corporate income tax would no longer treat companies differently based on the happenstance of their business model or whether they are primarily domestic or multinational. Some corporations would pay more

under the dynamic self-adjusting tax than under current law and some would pay less, but overall (based on relatively reasonable assumptions) these should wash out over time. Taken together, reducing the corporate income tax rate in this manner could prove not only revenue neutral but also pro-growth and pro-employment, all at the same time. For a more detailed discussion, see Adam H. Rosenzweig, *A Corporate Tax for the Next One Hundred Years: Incorporating Macro-Economic Conditions and Fiscal Policy into the Corporate Income Tax*, 108 Nw. U. L. Rev. __ (forthcoming 2013), available at http://ssrn.com/abstract=2327852.

What is clear is that the current system is not necessarily better than the alternatives simply because it came first. High statutory rates lead to perverse distributional consequences with little to no policy behind them. If the United States wants to subsidize companies with significant intellectual property over those with significant inventory, or capital intensive industries over labor intensive ones, or multinational industries over domestic ones, it should do so explicitly. But the current model where this occurs unintentionally due to the combination of a high statutory rate and the ability of some, but not all, corporations to structure around it is the worst of all worlds.

The time to change the statutory tax rate in a revenue neutral manner is now.

Affirmative

By Deborah A. Geier

I am focusing on the "revenue-neutral way." We need to combine lower section 11 rates with (1) mark-to-market taxation for publicly traded securities (at ordinary rates), extending Dave Camp's proposal to require mark-to-market taxation of derivatives, (2) forced pass-through taxation for all non-publicly traded stock, including corporate subsidiaries, to reduce the games-playing that would otherwise arise with a low section 11 tax and no mark-to-market tax at the owner level, and (3) repeal of CFC deferral. In light of the data that I provided earlier regarding the extreme concentration of these holdings by the very wealthy, mark-to-market taxation of publicly traded stock is the *only* way that would have a hope of being distributionally neutral, and that's imperative.

But it's even better than that! It's the best of all worlds. It would decrease the significant revenue loss under section 1014. It would provide a powerful counter-cyclical effect on the bursting of our inevitable stock-market bubbles. It would be administratively easy (unlike with mark-to-market taxation of other sorts of assets). It would be defensible because holders of publicly traded stocks benefit *hugely* from easy liquidity—or Goldman Sachs and Facebook would never have gone public, and firms would never have rushed to do IPOs during the dot-com craze. They should pay not only for liquidity access but also for the government costs incurred to regulate the public securities market. It would eliminate the need for the E&P concept for distributions, would reduce the lock-in and bunching effects (if real), etc.

Finally, we *must* eliminate deferral of CFC income. It's the second largest corporate tax expenditure (after only accelerated depreciation), and it applies almost wholly in the Sub C context (unlike depreciation). Ending deferral is the *only* sane way to deal with the intractable transfer-pricing abuses that unequivocally eliminate tax on what should be considered U.S.-source income, in addition to creating untaxed stateless income, as so well described by Ed Kleinbard. The territoriality alternative exacerbates these problems.

I would love to get this scored. My guess is that requiring mark-to-market taxation of publicly traded stock (taxed at ordinary rates) and forcing pass-through taxation of all privately held entities, including CFC income, would likely permit a section 11 rate that is lower than any of the current proposals. It's the best of all worlds! Let's do it!

Negative: It Is Impossible to Reduce the Corporate Income Tax Rate in a Revenue Neutral Manner

By David S. Miller

We can't possibly reduce the corporate tax rate in a revenue neutral way, and we shouldn't even try.

First, why would we even try to reduce the corporate tax rate? The only reason ever given is to improve the competitiveness of U.S. multinationals. But that's exactly why Germany lowered its combined tax rate to 30% in 2008; and, as Omri Marian pointed out in his 2012 *Virginia Tax Review* article, this effort was at best only a mild improvement and at worst an utter failure.

In fact, if we reduce corporate tax rates in a revenue neutral way, we imply that the average effective rate remains the same. How are U.S. multinationals going to be any more competitive if their average effective rate stays the same? At best, Disney, which is subject to a 36.5% effective rate, would become more competitive, but GE, which pays tax at a 3.6% rate, would become less so. Moreover, if the real competition is with tax havens (as some have argued), reducing the tax rate won't have any real effect because 25% is still much more than 0% or even 12.5%.

So if the reason to reduce corporate tax rates is to improve competitiveness, but it won't have that effect, we shouldn't bother.

Second, it's utterly impossible to reduce corporate rates in a revenue neutral way. The number one corporate tax expenditure is accelerated depreciation. Accelerated depreciation is responsible for about 30% of corporate revenue loss. But accelerated depreciation is responsible for 80% of individual business revenue loss. Revenue neutrality would mean that we

reduce accelerated depreciation only for C corporations.

But if we eliminate accelerated depreciation only for C corporations, then individuals will develop their businesses and depreciate their assets through sole proprietorships and partnerships and claim deductions at the high individual rate, and then contribute the business assets to C corporations and shelter the income at the lower corporate rate.

While Congress could repeal accelerated depreciation for all businesses in order to generate sufficient revenue to reduce the corporate tax rate, this is hardly revenue neutral from the perspective of the small business owner, who would pay a higher effective rate without any benefit. And because the repeal of accelerated depreciation would hurt small business owners, it has no chance of enactment.

Besides, if we reduced accelerated depreciation, we would remove the single greatest tax incentive for new investment. This is one reason that economists object to the idea of revenue neutral rate reduction. The other objection is that revenue neutral rate reduction would reward old capital, that is, existing investments made in the previous high-tax environment whose returns will enjoy the lower tax environment. ■

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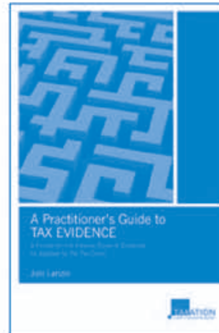

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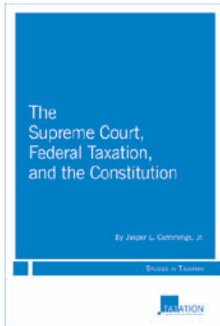

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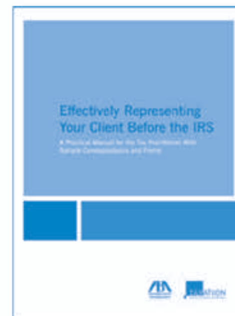

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POINTS TO REMEMBER

Looking Beyond DOMA: The Effects of *United States v. Windsor* on Federal Tax Law

By Laura R. Westfall*

On June 26, 2013, the U.S. Supreme Court held in *United States v. Windsor* (570 U.S. __ (2013)) that section 3 of the Defense of Marriage Act (DOMA) was unconstitutional as a violation of the Fifth Amendment. Under DOMA, all references in the Internal Revenue Code and other federal laws to terms relating to marital relationships, such as the words "spouse" and "marriage," were required to be interpreted as relating only to marriages between a man and a woman. Service Revenue Ruling 2013-17 and two sets of Frequently Asked Questions, all issued on August 29, 2013, helped to clarify *Windsor*'s effects on federal tax law. This article explores those effects and discusses issues that remain outstanding in light of the recent Service guidance. References that do not include DOMA are to sections of the Code.

DOMA and *Windsor*: The Facts

DOMA became Public Law 104-199 on September 21, 1996. DOMA section 2 generally states that no state must recognize a same-sex marriage entered into in another state or any right or claim arising from such a marriage. DOMA section 3 requires federal laws and agency rulings, regulations and interpretations to define the words marriage and spouse as referring only to marriages between a man and a woman. The constitutionality of DOMA section 3 was at issue in *Windsor*. New York State residents Edith Windsor and Thea Spyer married in Canada in 2007; when Spyer died in 2009, she left her entire estate to Windsor. Because DOMA section 3 denied federal recognition of her marriage, Windsor did not qualify for the federal estate tax exemption for surviving spouses under section 2056(a). Windsor paid $363,053 in estate taxes and sought a refund, which the Service denied. Windsor brought a suit for refund in the U.S. District Court for the Southern District of New York, which ruled against the U.S., finding DOMA section 3 unconstitutional. The Court of Appeals for the Second Circuit affirmed that judgment.

In a 5–4 decision, the Supreme Court affirmed the Second Circuit's decision, holding that DOMA section 3 was unconstitutional because it violated the Fifth Amendment's guarantee of equal protection. The Supreme Court's decision in *Windsor* effectively prohibits any legal differentiation for purposes of federal law between same-sex and opposite-sex marriages validly formed under applicable state law. As of August 1, 2013, 13 states and the District of Columbia recognize same-sex marriage. After *Windsor*, it is clear that federal law will recognize the legal marriages of same-sex couples residing in these states and in Washington, D.C.

Choice of Law Issues Raised Post-*Windsor*

Because DOMA section 2 was not challenged in *Windsor* and therefore remains intact, states may continue to ignore a same-sex marriage that was legally performed in another state. Further, the *Windsor* decision did not specify, and there is no unanimous rule at the federal level regarding, whether the validity of a marriage for federal law purposes should be determined using the laws of the state (or foreign country, such as Canada) in which a couple was married (place of celebration), or the laws of the state in which the couple resides (place of domicile). Revenue Ruling 2013-17 clarifies that for federal tax purposes, the Service has adopted the place of celebration rule, and will recognize the validity of marriage of a same-sex couple that is entered into in a state recognizing same-sex marriage, even if the state of the couple's domicile does not. However, the Service will not consider comprehensive civil unions or domestic partnerships, which are currently recognized in seven states (including California, which recognizes both same-sex marriages and registered domestic partnerships), to be the equivalent of marriage for federal tax purposes. The Revenue Ruling applies prospectively as of September 16, 2013, and retroactively for most purposes, as discussed more fully below.

Specific Tax Issues Raised Post-*Windsor*

The *Windsor* decision affects many aspects of federal tax law, including calculation of income taxes and filing of returns, taxation of gifts and bequests to spouses, and tax qualification and taxation of employer-provided benefits.

Same-sex couples who are validly married on December 31, 2013, will be required to file their 2013 federal tax return as married. Not all such couples will benefit from having their marriages recognized for federal tax purposes, however. For example, dual-earner

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couples in higher income tax brackets whose income is relatively evenly split will likely be subject to the "marriage penalty," just like similarly situated opposite-sex couples. Low-income taxpayers who are beneficiaries of the earned income tax credit (EITC) may also be subject to the marriage penalty, because the EITC is reduced if an otherwise-qualifying taxpayer must aggregate his or her income with a spouse's higher income. Similarly, some same-sex spouses may discover that Social Security benefits that were once tax-free will now be taxed due to required income aggregation. Same-sex couples with children who previously could file separately as single and head of household may see their taxes increase as the result of filing one return. Further, same-sex couples living in community property states, who were previously able to split all marital income due to Service guidance, may see an increase in their tax bill going forward.

Revenue Ruling 2013-17 clarifies that the *Windsor* decision applies retroactively for the purpose of filing original, amended, and adjusted returns, or claims for credit or refund for tax overpayments, except with respect to certain retirement plans as discussed below. As such, married same-sex couples who filed tax returns as single rather than married prior to September 16, 2013, for the 2012 tax year and other open years may choose (but are not required) to amend such returns to file as married, but must generally do so within three years of the original return's filing date under section 6511.

The unlimited gift and estate tax marital deductions of sections 2523 and 2056, which were available only to opposite-sex married couples prior to the *Windsor* decision, will now be available to legally married same-sex couples. Such couples will also be able to avail themselves of other tax benefits previously limited to opposite-sex couples, such as the portability provisions of section 2010 and the use of a qualified disclaimer under section 2518. In addition, same-sex couples in community property states that recognize same-sex marriage will now receive a double step-up in basis on community assets upon the first spouse's death.

Sections 105 and 106 state that coverage under an employer-provided accident or health plan to an employee or an employee's spouse or dependents is not taxable to the employee. Prior to the *Windsor* decision, DOMA required the cost of such coverage provided to a same-sex spouse to be taxed as imputed income to the employee. Revenue Ruling 2013-17 states that such coverage will no longer be taxable to married same-sex couples post-*Windsor*, and such couples may file amended tax returns for prior open years to obtain refunds of income tax overpayments relating to such coverage. In addition, employers may claim a refund of, or make an adjustment for, any overpayment of the employer and the employee portions of Social Security and Medicare taxes paid in prior open years relating to such coverage, and may make adjustments for overwithholding from an employee during 2013.

The *Windsor* decision also affects the design and operation of employer-provided benefit plans. For example, prior to *Windsor*, the rules under section 401(a) relating to qualified joint and survivor annuities and qualified optional survivor annuities under a qualified retirement plan applied only to opposite-sex spouses of participants. Similarly, certain plans were required to obtain consent from a participant's opposite-sex spouse before certain benefit elections and beneficiary designations could be changed. Beginning September 16, 2013, these rules will also apply to same-sex spouses. Further, permitted mid-year "change in status" events for section 125 cafeteria plans, such as a change in marital or employment status or place of residence, will encompass same-sex marriages recognized under federal law. Many other aspects of employer-provided benefit plans that are beyond the scope of this article are also affected by the *Windsor* decision. The Service indicated in Revenue Ruling 2013-17 that it intends to issue further guidance on the retroactive application of the *Windsor* decision to qualified retirement plans, on the effect of the *Windsor* decision on other tax-favored arrangements, and on the timing and requirements of necessary plan amendments and corrections. Further guidance is also expected from the Department of Labor and other relevant federal agencies.

Other aspects of federal taxation affected by the *Windsor* decision include the taxation of alimony and property settlements on divorce, and the availability of the adoption credit. For example, if *Windsor* is applied retroactively to earlier divorces, taxpayers should review their divorce documents to determine whether support payments should be included in the income of the recipient and deducted by the payor. Similarly, in the past, same-sex spouses were able to claim the adoption credit when adopting the child of a spouse due to DOMA's application to the Code, a benefit that will no longer be available post-*Windsor*.

In the absence of comprehensive Service guidance on the retroactive application of the *Windsor* decision to benefit plans, the full impact of the *Windsor* decision on federal tax law remains unknown. In the interim, taxpayers should identify how they are affected by the *Windsor* decision and Revenue Ruling 2013-17, implement any changes that are necessary beginning September 16, 2013, and determine whether to file amended or adjusted returns or claims for refund or credit for prior open tax years. ■

A Trust's "Material Participation" Is No Longer Immaterial

By Michala P. Irons*

Although it has been more than 25 years since Congress enacted the passive activity loss (PAL) rules, guidance on how the rules apply to trusts is limited. Until now, the PAL rules have been largely irrelevant to trusts that hold income-generating activities. Beginning this year, however, those rules will apply in determining whether trusts are subject to the new 3.8% net investment income tax (NIIT). If a trust materially participates in its activities, the income from those activities generally will not be subject to the NIIT. This article explores the existing guidance on how a trust materially participates.

Congress enacted the PAL rules to limit the ability of taxpayers to use losses from so-called tax shelters against their earned income. *See* S. Rep. No. 99-313, 99th Cong., 2d Sess. 713 (1986). Accordingly, section 469 disallows losses from passive activities except to the extent the taxpayer has passive income. I.R.C. § 469(a)(1) & (d)(1). A passive activity is any trade or business in which the taxpayer does not materially participate and any rental activity. I.R.C. § 469(c)(1) & (2). A taxpayer materially participates in an activity if the taxpayer is involved in the operations of the activity on a regular, continuous, and substantial basis. I.R.C. § 469(h)(1).

Section 469 applies to all trusts. Although the Preamble to the temporary regulations provides that rules covering trusts would be included in future regulations, rules on how a trust materially participates have been reserved in the regulations since 1988. Temp. Treas. Reg. § 1.469-5T(g). The temporary regulations provide seven quantitative tests for determining if an individual (including an individual treated as the owner of a grantor trust) materially participates in an activity. Temp. Treas. Reg. § 1.469-5T(a). For example, one test provides that an individual who participates in an activity for more than 500 hours during the year will be treated as materially participating in the activity. Temp. Treas. Reg. § 1.469-5T(a)(1). Although these seven tests do not technically apply to trusts, the Service's *Passive Activity Loss Audit Technique Guide* states that the Service looks to the individual tests as a proxy and will not challenge a trustee that meets one of the tests.

Even if trusts can look to the tests for individuals as a proxy, they must still determine whose hours count toward meeting one of the tests. In the case of a grantor trust, material participation is determined based on the participation of the grantor or beneficiary who is treated as the owner of the trust under section 671. Temp. Treas. Reg. § 1.469-1T(b)(2). Similarly, for qualified subchapter S trusts, material participation is determined based on the participation of the beneficiary who is treated as the owner of the trust. *See* Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1986, at 242 n.33 (1987). For non-grantor trusts, the legislative history simply provides that the trust will materially participate "if [a] ... fiduciary, in his capacity as such, is so participating." S. Rep. No. 99-313, *supra*, at 735.

Trusts that have historically held income-generating activities have probably ignored the PAL rules altogether. Now, however, the PAL rules also apply when the trust has income subject to the NIIT. The NIIT imposes a 3.8% tax on the lesser of: (1) the trust's undistributed net investment income, or (2) the excess (if any) of the trust's adjusted gross income over the dollar amount at which the highest tax bracket for trusts begins (in 2013, $11,950). I.R.C. § 1411(a)(2). Net investment income includes not only portfolio income such as interest, dividends, annuities, royalties, rents, investment gains, and certain trading activities, but also income from a trade or business that is a passive activity. I.R.C. § 1411(c)(1) & (2).

Consequently, beginning this year, many non-grantor trusts will be required to demonstrate that they materially participate in their activities, even if they have never applied the PAL rules in the past. To date, *Mattie K. Carter Trust v. United States*, 256 F. Supp. 2d 536 (N.D. Tex. 2003), is the only case to consider how a non-grantor trust materially participates. The Service argued that a trust materially participates in an activity only if its trustee meets the standard in section 469(h)(1). The trust argued that its material participation should not be based solely on the participation of its trustee, but rather on the participation of its trustee, employees, and agents. The district court agreed with the trust and concluded that its material participation should be determined by reference to the persons who conduct the business on its behalf.

In TAM 200733023 (2007 TAM), the Service considered whether a trust materially participated in the activities of a partnership. The trustees contracted with special trustees to perform services with respect to the partnership, but the special trustees did not have the power to legally bind or commit the trust to any course of action. The Service, ignoring the court's conclusion in *Mattie K. Carter*, concluded that a trust materially participates only if its fiduciaries so participate. Because the special trustees were not fiduciaries, their hours did not count toward the trust's material participation. *See also* PLR 201029014 (concluding that a trust could materially

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participate if the trustee met the standard in section 469(h)(1)).

Taxpayers have attempted to push the limits of the holding in *Mattie K. Carter* as well. In *Estate of Roger E. Stangeland v. Commissioner*, 100 T.C.M. (CCH) 156 (2010), the trust wanted to count the hours of a consultant designated as a successor trustee. The consultant's relationship to the trust was unclear because he was not acting as trustee and was not an employee or agent of the trust. Because the trust could not prove that the consultant had any formal relationship with the trust, the Tax Court would not count his hours toward the trust's material participation. The court specifically noted that the case was materially distinguishable from *Mattie K. Carter* in that respect, and therefore did not opine on how a trust materially participates.

More recently, the Service narrowed its position further in TAM 201317010 (2013 TAM). The 2013 TAM considered whether two trusts materially participated in the activities of an S corporation and its subsidiary. The trusts owned an interest in Company X, an S corporation. Company X was the corporate parent of Company Y. Individual A owned the remaining stock in Company X, was a beneficiary of the trusts, was the president of Company Y, and was a special trustee of the trusts. As special trustee, A had the power to control decisions regarding the sale or retention of the stock in Company X and to vote the stock. The trusts argued that, unlike the special trustees in the 2007 TAM, A was a fiduciary and because A could not differentiate his participation hours as special trustee, shareholder of Company X, and president of Company Y, all of his participation hours should count toward the trusts' material participation in the activities of Company X. Examination argued that A's participation should count only to the extent that A participated in the activities of Company X in his fiduciary capacity as special trustee. The National Office agreed and concluded that the work performed by A as president of Company Y was not in his capacity as a fiduciary and therefore did not count toward the trusts' material participation. The National Office counted the hours A spent voting the stock and considering sales of stock, but those activities were insufficient to meet the standard in section 469(h)(1).

Although the guidance discussed above is conflicting and generally non-authoritative, several principles can be distilled. First, to avoid the result reached in *Stangeland*, a trust must clearly establish the nature of the relationships of the various individuals that act on the trust's behalf (*i.e.*, as agent, employee, fiduciary, etc.). Second, the trust must determine whose hours to count. Trusts will likely seek to rely on the decision in *Mattie K. Carter* and count hours spent by a trust's employees and agents, while the Service will look only to the hours of the trust's fiduciaries. Third, the trust must determine what hours qualify as participation. The Service will count only hours that are worked in a fiduciary capacity. Thus, individuals acting in multiple capacities such as Individual A in the 2013 TAM should keep a separate activity log to record any hours spent in a fiduciary capacity. Realistically though, non-grantor trusts will rarely materially participate under the Service's position in the 2013 TAM.

The Tax Court may reach the issue of how a trust materially participates in the pending case of *Frank Aragona Trust v. Commissioner*, TL-15392-11, which involves whether a trust is eligible to be a "real estate professional" under section 469(c)(7). To qualify as a real estate professional, the taxpayer must perform more than one-half of the taxpayer's personal services and more than 750 hours of services in real property trades or businesses in which the taxpayer materially participates. If the Tax Court finds that a trust can qualify as a real estate professional, it should also reach the issue of how a trust materially participates. The opinion in *Frank Aragona Trust* could finally bring long overdue clarity to this unsettled area of the tax law. ■

OPINION POINT

Did the 2012 ATRA Actually Provide an AMT Relief?

By Oleg Ikhelson*

So much time passed since the Senate, in the early morning hours of January 1, 2013, by a vote of 89–8, passed the American Taxpayer Relief Act of 2012 (followed by the House later that same day), that to some it feels like ancient history. The Act, which the President quickly signed into law on January 2, prevented many of the tax hikes that were scheduled to go into effect this year and retained many favorable tax breaks that were scheduled to expire. However, it also increased income tax rates for high-income individuals and slightly increased transfer tax rates. One of the highly publicized outcomes of that congressional action was an adoption of the permanent alternative minimum tax (AMT) fix.

Brief History of AMT

The AMT was enacted in 1969 to capture taxes that otherwise would have been avoided by very wealthy taxpayers, who used tax shelters and various preferences available at that time to avoid regular income tax. Originally envisioned as an "add-on" tax, it became an alternative flat-rate tax structure in 1986 (at a 21% rate). The rate was subsequently increased to 24% in 1991 and the AMT has existed in its current reincarnation (with rates of 26% and 28%) since 1994.

AMT Permanent Exemption Relief?

Instead of introducing yet another "temporary" patch to the broken AMT system, Congress finally mended, as a part of 2012 ATRA, the Code with a permanent inflation-adjusted exemption (2013 AMT exempt amounts are $80,800 for married couples and $51,900 for single filers). Without this legislative intervention, the AMT exemptions would have reverted to $45,000 and $33,750, respectively. In addition, the eligibility of personal non-refundable credits to reduce taxpayers' AMT liability, not just their regular tax liability, was made permanent. However, there are a number of quirks in our AMT law that make it far from perfect, and in some respects blatantly unfair.

First, as evident from the numbers above, Congress in essence opted to preserve the marriage penalty in the context of the AMT regime, despite calls from some critics to achieve more parity with the regular tax regime and increase the married taxpayers' AMT exemption to double that of single filers. The penalty applies to both the exemption and its phase-out. For 2013, the exemption starts to phase out at $115,400 for unmarried filers, but at $153,900 for married couples.

Second, what has gone unsaid for years, obscured by the annual congressional ritual of "exemption patching," is that, prior to the Act, the AMT exemption phase-out provision had not been increased or indexed for inflation for more than 25 years. And while this amount is now subject to annual cost-of-living adjustments, starting with 2013, the base exemption for 2012 was left at the 1993 level of $150,000 (increased by COLA to $153,900 for 2013). One can only imagine why this significant fact has not once entered the AMT relief debate, either by mass media or by lawmakers. As illustrated below, this seemingly innocuous omission has significant repercussions for a large number of taxpayers in the $200,000 to $500,000 AGI range.

The alternate taxing regime we call AMT uses a concept of AMTI, or alternative minimum taxable income, that is calculated by making various statutory adjustments to ordinary taxable income. For most American households, AMTI is equivalent to their adjusted gross income (AGI), reduced by deductible mortgage interest and charitable contributions. In today's AMT paradigm, a household unit with a so called "taxable excess" of $179,500 or less (AMTI less an applicable exemption), pays a 26% tax on ordinary income, plus 15% on most types of long-term capital gain income. Income exceeding $179,500 is taxed at a 28% rate. Those are nominal rates. However, there are two additional marginal super-rates lurking beneath the surface of this ostensibly straightforward quasi-flat tax system. The first relates to the AMT exemption, which phases out. To wit, because of the phase-out provision of the AMT law, married taxpayers with AMTI in 2013 between $153,900 and $239,020 are effectively subject to a marginal rate of 32.5% on ordinary income and 21.5% on capital gains and qualified dividends. Taxpayers with AMTI between $239,020 and $477,100 are taxed at 35% and 22% marginal rates, respectively. Any additional income over the $477,100 ceiling is taxed in 2013 at stated AMT rates of 28% and 15%.

Why does this happen? Once a taxpayer's AMTI reaches the phase-out threshold, the taxpayer starts to lose 25 cents of the exemption for every additional dollar earned. Thus, a taxpayer in the 26% nominal bracket will see a part of the exemption disappear: 25% of the excess earnings over the applicable threshold, *i.e.,* AMTI over $153,900 for married couples in 2013.

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Because 25% of 26% is 6.5%, the combined effect is marginal super-brackets of 21.5% (15% plus 6.5%) for most long-term capital gains and 32.5% for other categories of income (26% plus 6.5%), Once the taxable excess reaches the statutory amount ($179,500 in 2013), the nominal rate of 28% kicks in, which translates, in real life, into marginal super-brackets of 22% (15% plus 25% of 28%) and 35% (28% plus 25% of 28%), while the taxpayer exhausts the rest of the rapidly dwindling AMT exemption.

Let's consider the 2013 tax consequences of Mr. and Mrs. John Q. Public, who own their house, subject to a mortgage, and have two dependent children. They will earn $265,000 from wages. They will pay $10,000 in real estate taxes, $10,000 in state income taxes, and $20,000 in mortgage interest. They will also donate $5,000 to a charity.

Based on the above, the Publics' AGI is $265,000, and their regular taxable income (after $45,000 in itemized deductions and $15,600 in personal exemptions) is $204,400. Thus, the household is comfortably residing within the 28% bracket for regular tax purposes. Enter AMT. The family's AMTI is $240,000, which equals their AGI reduced by their mortgage interest and charitable deductions. As we know, they lose the benefits of personal exemptions and state and local taxes. What most people do not realize is that the Publics at this point crossed the 35% marginal AMT tax bracket. While for regular tax calculations, they are almost $20,000 short of breaking the 28% and entering the 33% bracket, the last $50,000 (out of $265,000) of their salary was subject to a marginal rate of at least 32.5% (due to the AMT phase-out). Also regrettable and frequently shocking to taxpayers is the fact that every additional dollar they make at this point will be taxed at a marginal 35% AMT bracket (while the taxpayers here are nearly $200,000 shy of reaching a taxable income of $398,350 when the 35% threshold officially kicks in per the inflation-adjusted section 1 rate schedule). The 35% AMT rate will apply until they reach an AMTI ceiling of $477,100, at which point their alternative minimum tax rate reverts back to 28% (although they may now be entering the 39.6% rate for ordinary taxes). In our illustration, if Mr. Public receives a bonus of $100,000 in the end of 2013, he will pay $35,000 more in federal tax.

Conclusion

While the 2012 Act seems to have preserved reduced regular income tax rates for married taxpayers making $450,000 or less, it made only a nominal attempt, by virtue of applying a COLA adjustment to the 1993 statutory amount, to rectify the creeping effect of the AMT exemption phase-out, instead touting the increase in the exemption itself. What the lawmakers should have done is permanently increase, and only then index for inflation, both the exemption and the income threshold at which the AMT exemption phase-out kicks in. ■

GOVERNMENT SUBMISSIONS BOXSCORE

Since August 1, 2013, the Section has coordinated the following government submissions, which can be viewed and downloaded from the Section's website at http://www.americanbar.org/groups/taxation/policy.html.

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

TO	DATE	CODE SECTION	TITLE	COMMITTEE	CONTACT
Internal Revenue Service	10/1/2013	n/a	Comments Concerning User Fees for Processing Installment Agreements and Offers in Compromise	Pro Bono and Tax Clinics	Paul Harrison, Andrew VanSingel
Internal Revenue Service	9/3/2013	401(a), 403(b)	Comments Concerning Revenue Procedure 2013-12	Employee Benefits	Lisa A. Tavares, Mark A. Bodron
Internal Revenue Service	8/14/2013	n/a	Comments Concerning Proposed Regulations for Reliance Standards for Making Good Faith Determinations	Exempt Organizations	Morey Ward

The technical comments and blanket authority submissions 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.

PRO BONO MATTERS

Reflections on America the Beautiful: A Past, Present, and Future of Service

By Francine J. Lipman*

On a brilliantly cold Washington, D.C., day in January 1961, John F. Kennedy, just 44 years young, stood tall and confident beside our First Lady and his elegant bride Jacqueline. Jackie, just 32 years young, was a new mother to a precious infant son called "John John" and a beloved three-year old toddler named Carolyn. After taking the presidential oath, JFK told his fellow Americans, "ask not what your country can do for you—ask what you can do for your country. My fellow citizens of the world: ask not what America will do for you, but what together we can do for the freedom of man." In his inaugural address, JFK also reminded us that "[i]f a free society cannot help the many who are poor, it cannot save the few who are rich."

Coming from a family that embodied service and wealth then and today, Kennedy had already served his country as a Navy commander of torpedo boats and had been awarded the Purple Heart, three Bronze Stars, a World War II Victory Medal as well as the Navy and Marine Corps Medal for "extremely heroic conduct" and outstanding courage, endurance and leadership, saving several lives by swimming for hours after he had been injured and his torpedo boat had been destroyed.

On a stifling steamy Washington, D.C., day in August 1963, Martin Luther King, Jr., just 34 years young, stood tall and confident before almost 300,000 marchers for jobs and freedom at the Lincoln Memorial. After several notable speakers, MLK told his fellow Americans about his hopes, ambitions and dreams. "I say to you today, my friends, that in spite of the difficulties and frustrations of the moment, I still have a dream. It is a dream deeply rooted in the American dream. I have a dream that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident, that all men are created equal.'"

Coming from a family that embodied faith and cherished freedom, King was a brilliant student who studied sociology at Morehouse College at age 15 and also graduated as valedictorian of his graduate theology class. At age 25, King earned a Ph.D. in systematic theology from Boston University. King married Coretta Scott, a singer and musician, and served his congregation and country as a brilliant orator and freedom, poverty, and war nonviolent fighter. At 35, he was the youngest person to receive the Nobel Peace Prize. Dr. King reminded America again and again about human dignity, the power of passive resistance, and the prison of poverty. As he said in 1968, "[I]f a man doesn't have a job or an income, he has neither life nor liberty nor the possibility for the pursuit of happiness. He merely exists."

Tragically, Camelot never materialized in America. President Kennedy was murdered in Dallas in November 1963 and Dr. King was gunned down in April 1968. The depth of these losses is unfathomable even 50 years later.

While much has changed since these bold visionaries walked our streets and served our country, much has not. Poverty, prejudice, war, and guns continue to ravage lives. And despite these challenges, young people across America honoring the legacies of President Kennedy and Dr. King rise to the challenge of community service. Included among these everyday heroes are tax attorneys serving underserved communities.

In the windy city of Chicago, Jane Zhao, a 2012–2014 Tax Section Public Service Fellow, is a community servant working for tax justice at the Center for Economic Progress (CEP). Jane and her CEP colleagues fight poverty holistically with financial wellness. Resolving tax liabilities is part of the financial wellness formula. With this formula Jane, the resident tax attorney, is saving families, and the singular and exponential impacts are resounding.

Dr. King once asked "Life's most persistent and urgent question is: What are you doing for others?"

In Jane's own words …

NQ Can you describe your background and your work experience in and outside of tax?

JZ It's a secret, but I'm also a CPA. In my previous life, I worked for a public accounting firm and audited hedge funds. It was not a secret that this job was not for me; I hoped law school would bring me a future of more fitting work. Luckily, I immediately loved the law, especially how it reunited me with my favorite activities—reading and writing. I was excited to be a lawyer of any kind. I started off as a non-tax person (anyone who has worked in public accounting knows that it has little to do with tax), sharing the popular misconception that tax law revolved tiredly around numbers. However, after the first day of my Federal Individual Income Tax course, I learned that tax law, like any other brand of law, is about reading and interpreting words. The

* William S. Boyd Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law, Las Vegas, NV.

Jane Zhao

Internal Revenue Code was a giant word puzzle; I enjoyed spending the time to put the pieces together to reveal the answer. As my tax professor would say, when you find the answer, you reach "tax-vana."

NQ What inspired you to apply for the Tax Section's Public Service Fellowship?

JZ I was a Student Attorney at Syracuse University College of Law's Low Income Taxpayer Clinic (LITC). After two years of solely academic work, it was refreshing to see how the law applied to actual humans. Like most people, I was surprised to learn that "low income taxpayers" (those with incomes at or below 250% of the federal poverty level) had complex tax issues, too. Honestly, I didn't know much about the ABA Tax Section or the Fellowship. One day, the clinic's intuitive Director, Professor Robert Nassau, approached me with the idea of applying for the Fellowship, thinking that it suited me. Was I interested in helping to bring tax justice in my hometown? Why, of course.

NQ What made you choose the Center for Economic Progress as your Sponsoring Organization?

JZ Not only was I was interested in returning to Chicago, but also, the CEP is unique and differs from many other LITCs because it doesn't only focus on helping people resolve tax disputes. Rather, it focuses on helping people achieve overall financial wellness. CEP is comprised of three collaborative elements: (1) the tax preparation (VITA) program, (2) the LITC, and (3) the financial capability group. These three programs work together to help individuals and families "move from financial uncertainty to financial security." Most people with tax problems have other financial troubles as well—in fact, the tax issue tends to be the last issue they tackle. These people can come to CEP's LITC to resolve their tax issues, and then we can direct them to the financial capability program for coaching on what to do with their refund, how to build good credit, or how to set up a budget to pay off outstanding loans. CEP has had a number of clients successfully "flow through" these three programs and, hopefully, get on the path to financial stability.

NQ What are the types of projects on which you're working?

JZ I spend about half my time representing clients in tax controversies. The other half of my time is spent on two main projects. First, I do education and outreach to taxpayers and legal aid organizations on tax rights and responsibilities. With all the unscrupulous tax preparers out there, education is vital. Currently, I am focusing on three main groups of individuals—small business owners, domestic violence survivors, and immigrants. Due to the current economy, many unemployed individuals have embarked on starting their own business; I educate aspiring entrepreneurs and small business owners about the importance of good recordkeeping. I also give presentations to domestic violence caseworkers on the implications of filing joint returns and the possibility of innocent spouse relief. Additionally, I inform immigrant populations of the credits they may be entitled to, and why they should file tax returns, even if they are undocumented. Our materials have been translated into Spanish, Chinese, and Polish, the main ethnic groups in the Chicago area. My second project is focused on the Tax Court trial sessions; in the past six months, I have ensured that CEP has a permanent presence during each Tax Court calendar call. The Service expects (and welcomes) our attendance, and encourages taxpayers to consult with us. I also organize a luncheon at our local bar association to honor each Judge who comes for a Chicago Trial Session—this has facilitated our clinic's relationship with the Service, and has been a great opportunity to promote pro bono work amongst Chicago tax attorneys.

NQ Can you give examples of the types of issues you deal with in providing tax assistance to low-income taxpayers?

JZ The population of low-income taxpayers is one of ungovernable diversity. Our clients are young, old, retired, disabled, and/or have all sorts of employment situations and citizenship statuses. Plus, tax is everywhere! This combination of the variety of life circumstances and the pervasive nature of our tax system leaves room for few dull days. We often get referrals from other nonprofit, non-tax, legal service providers. Tax problems are more likely to appear after a life changing circumstance—marriage, divorce, a new home, a mortgage foreclosure, a new job, unemployment ... the list is unending. For every single client, the goal is always to determine the *correct* amount of tax. Sometimes the Service's determination is wrong, and we will help a client through an examination or audit reconsideration. Sometimes the Service's determination is correct, but the taxpayer cannot afford to pay. For these clients, we help them understand why they owe tax, and what they can do to get back on track. Perhaps it's merely getting into Currently-Not-Collectible status to prevent a paycheck or Social Security

benefit levy; perhaps it's an Offer in Compromise for a "fresh start" with the Service. We also file innocent spouse and worker reclassification petitions, and often help prove Earned Income Tax Credit eligibility.

NQ What has been your biggest challenge as a Fellow?

JZ One of the goals of my Fellowship, of course, is to expand tax-related legal services to the public—that every single person, regardless of income, will know that there is tax help out there, and receive the services necessary to resolve their issue. First, the word must get out; outreach is important. Second, attorneys must volunteer; there should be easy access to pro bono work. However, tax controversy cases can take several months to resolve. During this time, clients may have a sudden change of address, run out of phone minutes, or otherwise be difficult to reach. Coordinating pro bono interest with the current caseload can sometimes be difficult.

NQ What has been your most rewarding experience as a Fellow?

JZ Helping hard-working, low-income people resolve their tax issues is a mostly rewarding experience, every day. Some of my favorite moments happen when I meet new clients. Usually they have ignored many Service letters and have very little confidence in themselves or the availability of help. During the initial conversation, after I have discussed our strategy or the client's alternatives, I can sense significant relief. A plan is all that is necessary to dilute the stress. Similarly, sometimes a non-tax legal aid attorney will call and tell me that her client might have a tax issue, and each sentence will end in the form of a question—"She thinks she owes taxes? She has not yet filed a tax return this year? Her refund was taken?" After a brief conversation, I will let them know that they can refer the case to us. Again, I hear such relief on the phone. Sometimes I cannot believe that my work can relieve people of so much stress. It is quite rewarding.

NQ You have attended several Tax Section meetings. How have they helped you in your work?

JZ Before beginning my Fellowship, I was concerned about the amount of guidance I would receive. Would a rookie lawyer just be set free to represent taxpayers with barely any guidance or supervision? Thankfully, no. The Tax Section meetings have provided extraordinary networking opportunities with tax professionals, especially in the Pro Bono and Tax Clinics Committee; everyone I have met has been eager to help and tremendously supportive of my work. Furthermore, I was relieved to find that our Clinic Director, Paul Harrison, is filled with several years of LITC knowledge, and is one of the leading experts in public service tax work. I have never felt lost.

NQ Do you have any advice for lawyers or law students interested in public service or pro bono work?

JZ Like tax, public service work is (almost) everywhere. Regardless of where your interest lies, there is a

Since 2009, the Section has funded two Public Service fellows each year, including these amazing young lawyers (fellowship details are available at http://www.americanbar.org/groups/taxation/awards/psfellowship.html):

2009–2011
Laura Newland (AARP's Legal Counsel for the Elderly, Washington, DC; presently the Section's Pro Bono Tax Counsel)
Vijay Raghavan (Prairie State Legal Services, Rockford, IL)

2010–2012
Douglas Smith (Community Action Program of Lancaster County, PA)
Katie Tolliver Jones (Legal Aid Society of Middle Tennessee and the Cumberlands, Nashville, TN)

2011–2013
Sean Norton (Pine Tree Legal Assistance, Inc., Portland, ME)
Anna Tavis (South Brooklyn Legal Services/Immigrant Workers' Tax Advocacy Project, New York, NY)

2012–2014
Ana Cecilia Lopez (University of Washington, Low-Income Taxpayer Clinic, Pasco, WA)
Jane Zhao (Center for Economic Progress, Chicago, IL)

2013–2015
Susanna Birdsong (National Women's Law Center, Washington, DC)
Susanna Ratner (SeniorLAW Center, Philadelphia, PA)

public service to perform. If you work at a law firm, you should reach out to your pro bono coordinator, or the pro bono coordinator at the local bar association. If you are a law student, you can seek an internship at a nonprofit organization. If you have graduated and are currently still seeking employment, you might be able to help as a volunteer attorney. If you want to do what I do, you can reach out to your local Low-Income Taxpayer Clinic! (There are currently 146 in America.)

NQ After the Fellowship, do you currently plan to stay at the Center? If not, will the position you have created exist after you leave?

JZ Funding! The bane of every nonprofit's existence. I do not think that my position will be available after I leave, unless there is some surprise funding. Therefore, I cannot plan to stay at CEP, but I can plan to make sure that the work that I do here has a lasting effect. For example, the training materials and brochures that I am creating now must be easily updated for use in the future. Regardless of where I end up, I know that I want to continue to do rewarding, meaningful work; I will definitely involve myself with public service whenever possible. I hope I never stop learning, reading, and writing about the (tax) law. ■

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PRO BONO MATTERS

Meeting Leads to Changes to Certain Practices in the Tax Court

By T. Keith Fogg*

On Tuesday, April 9, 2013, several members of the Section's Pro Bono and Tax Clinics Committee met with Tax Court judges, the National Taxpayer Advocate, and representatives from the Office of Chief Counsel, IRS, to discuss practices that could improve the processing of cases involving pro se and low income petitioners. Tax Section Pro Bono Counsel, Laura Newland, and committee chair, Keith Fogg, Villanova Law School, led a delegation that included clinicians Charles Jeane, University of the District of Columbia; Jennifer Mueller, American University; vice chair Susan Morgenstern, Cleveland Legal Aid; Caroline Ciraolo, Rosenberg Martin Greenberg; vice chair Catherine Engell, DLA Piper; Andrew Roberson, McDermott Will & Emery; and Kevin Spencer, McDermott Will & Emery. Chief Judge John Colvin chaired the meeting and was joined by several other judges who sit on the Tax Court's Pro Bono Committee. SBSE Division Counsel, Tom Thomas, who was acting as the Procedure and Administration Division Counsel at the time, led the delegation from Chief Counsel, IRS.

The group discussed a wide range of issues that impact pro se petitioners, who file almost 70% of the Tax Court's cases. The meeting followed on recent efforts of the Tax Court and the Pro Bono and Tax Clinics Committee to find potential representation for each pro se petitioner. *See* T. Keith Fogg, *An Access to Justice Milestone*, ABA Tax Section NewsQuarterly, Winter 2013, at 10.

On August 16, 2013, the Tax Court announced six changes to its procedures in its continuing effort to meet the needs of pro se petitioners.

1) **New Sample Stuffer Notice.** The stuffer notice is the document that the Tax Court mails to pro se petitioners advising them of the possibility of representation by a low income taxpayer clinic (LITC) near the city they requested as the place of trial. Each pro se petitioner receives a letter describing the local clinic(s). The letter results from an agreement between the Tax Court and LITCs around the country. This year over 80 LITCs, most of which receive funds under section 7526, signed up with the Tax Court to allow notification of pro se petitioners of the possibility of representation by the clinic. In the past these stuffer notices varied in content because they were prepared by the clinics. Some clinics prepared their notices with little guidance and experience. In some cities, the notice attempted to describe multiple clinics and the drafting of the notice reflected input from multiple sources. The notices sometimes created confusion. The Tax Court will now mail a standard notice for all cities. This will help in getting a clear and consistent message to pro se petitioners, regardless of location.

2) **Additional Notice 30 Days Prior to Trial.** Currently, the Tax Court sends pro se petitioners the stuffer notice twice. It sends the first notice immediately after the filing of the petition as described above, and it sends the second notice at the time it sets the case for trial (five months before the calendar call). Clinicians pointed out that for many pro se petitioners, receiving the last notice five months prior to the trial might be ineffective because many of them do not focus on their Tax Court case until much closer to the trial date. Unlike the two existing notices that ride along with letters that are already part of the Tax Court notice process, the Tax Court will send this new final notice separate from the Tax Court's other correspondence. This new 30 day notice will give pro se petitioners a reminder close enough to the trial date to allow them to focus on the case and the need for representation. This should improve the ability of clinics to assist this group of individuals.

3) **Use of Counsel Room at Selected Cities.** Finding a place to meet with the pro se petitioner and conduct a privileged conversation presents a real problem for pro bono volunteers seeking to assist in the Tax Court's calendar call program. The announcement identifies 20 of the 75 cities in which the Tax Court holds calendar calls. Many of the cities on the list hold multiple calendars each year. In those cities, opening the counsel room to the attorneys coming to calendar call programs has a much bigger impact than in cities holding only one or two calendars every year. Giving calendar call programs access to a counsel room provides much needed space for the conversations that must take place at the courthouse when the petitioner remains unrepresented at the time of calendar call. Those of us in the remaining 55 cities without a counsel room can only hope that someday we will not hold these conversations balancing

* Professor of Law and Director of Federal Tax Clinic, Villanova Law School, Villanova, PA.

LITCs and pro bono tax lawyers donating their time during calendar calls make a difference to pro se individuals who end up in Tax Court. Without assistance, many of these petitioners cannot successfully present their cases.

files on our knees while whispering in the hallways of the courthouse.

4) **Change of Address Form Provided with Acknowledgment of Petition.** Most pro se petitioners do not know the rules of the Tax Court and do not appreciate the need to keep the Tax Court informed of their address. Low income petitioners move with more frequency than the general population. Providing them with this notice alerts them to the need to keep the Tax Court informed if they move. At almost every Tax Court calendar, some petitioners have their case dismissed for failure to appear. With every dismissal, respondent's counsel recites the efforts to reach petitioner prior to the calendar call. The address of record for a significant percentage of petitioners is not up to date. Providing this form should improve the chances of keeping up with these hard to reach petitioners.

5) **Waiver of Filing Fee Simplified.** Many pro se petitioners qualify to have the $60 Tax Court filing fee waived. The Tax Court generally waives the fee upon application. However, the form for requesting the waiver intimidates many pro se petitioners; they pay the fee rather than seek the waiver. Simplifying the form will help by making this request more accessible.

6) **Changes to Clinic Requirements.** One of the discussions with the Tax Court during the meeting on April 9 centered on the difficulty of picking up a case at calendar call and providing meaningful advice between the time the case gets called initially and the time of recall. Another problem presented at calendar call in major cities centers on the ability to just get past the security at the entry point and into the courthouse. In some cities the wait can last one hour or more. Pro se petitioners who have not attempted to enter a federal building in the past several years are unprepared for the waiting time necessary to get into the building and unable to alert the Tax Court to this unanticipated delay.

   To provide better assistance to petitioners at calendar call and to give petitioners a better chance to timely appear at calendar call, the Tax Court agreed to ask petitioners to arrive an hour before calendar call. In the new 30 day notice, the Tax Court will ask pro se petitioners to arrive at 9:00 AM. The clinicians and pro bono lawyers who assist at calendar calls must also arrive an hour early in order to take advantage of this added time with pro se petitioners. This hour should allow the calendar call to move more smoothly, without the interruption of late arriving petitioners and with pro se petitioners better prepared to address the issues in their cases.

The Tax Court should receive kudos for its continuing efforts to assist pro se petitioners by adopting procedures and providing information that will assist these individuals in properly pursuing their cases. LITCs and pro bono tax lawyers donating their time during calendar calls make a difference to pro se individuals who end up in Tax Court. Without assistance, many of these petitioners cannot successfully present their cases. In other cases the Service may be correct, but the individual petitioner has no way to comfortably resolve the case without the aid of a representative. Thanks to the efforts by the Tax Court to provide pro se petitioners with an opportunity to consult with counsel, pro se petitioners in Tax Court have a better chance for representation than in any other federal court handling civil matters. The recent changes by the Tax Court continue to improve the Tax Court experience for the Tax Court, petitioners, respondents, and calendar call volunteers across the country. If you want to assist the pro se petitioners in your area and do not know the local LITC or local calendar call program, contact Laura Newland (laura.newland@americanbar.org) or the 2013–14 Pro Bono & Tax Clinics Committee Chair George Willis (gwillis@chapman.edu), who can assist you in making a connection. ■

ABA Section of Taxation CLE Calendar

www.americanbar.org/groups/taxation/events_cle.html

DATE	PROGRAM	CONTACT
October 16-18, 2013	**ERISA Basics National Institute** Westin Chicago River North – Chicago, IL	ABA JCEB www.americanbar.org/jceb 202.662.8670
October 17-18, 2013	**ALI CLE Course of Study: Handling a Tax Controversy: Audits, Appeals, Litigation, and Collections** Washington Marriott – Washington, DC	ALI CLE www.ali-cle.org 800.CLE.NEWS
November 4-5, 2013	**Executive Compensation, 28th Annual National Institute** Renaissance New York Times Square Hotel – New York, NY	ABA JCEB www.americanbar.org/jceb 202.662.8670
November 6-7, 2013	**24th Annual Philadelphia Tax Conference** Union League of Philadelphia – Philadelphia, PA	Tax Section www.americanbar.org/tax 202.662.8670
November 14-15, 2013	**ALI CLE Course of Study: Tax Exempt Organizations** The Ritz-Carlton Pentagon City – Arlington, VA	ALI CLE www.ali-cle.org 800.CLE.NEWS
November 15, 2013	**2nd Annual International Tax Enforcement Conference** Newseum – Washington, DC	Tax Section www.americanbar.org/tax 202.662.8670
November 15, 2013	**M&A Due Diligence Workshop** Aon – New York, NY	ABA JCEB www.americanbar.org/jceb 202.662.8670
December 11-13, 2013	**30th Annual National Institute on Criminal Tax Fraud** Wynn Las Vegas and Encore Hotel – Las Vegas, NV	Tax Section www.americanbar.org/tax 202.662.8670
March 31-April 1, 2014	**2014 ABA/IPT Advanced Income Tax Seminar** The Ritz-Carlton New Orleans – New Orleans, LA	Tax Section www.americanbar.org/tax 202.662.8670
April 1-2, 2014	**2014 ABA/IPT Advanced Sales/Use Tax Seminar** The Ritz-Carlton New Orleans – New Orleans, LA	Tax Section www.americanbar.org/tax 202.662.8670
April 3-4, 2014	**2014 ABA/IPT Advanced Property Tax Seminar** The Ritz-Carlton New Orleans – New Orleans, LA	Tax Section www.americanbar.org/tax 202.662.8670
April 9-11, 2014	**14th Annual Tax Planning Strategies – U.S. and Europe** Geneva, Switzerland	Tax Section www.americanbar.org/tax 202.662.8670
June 4-6, 2014	**7th Annual U.S. – Latin America Tax Planning Strategies** Mandarin Oriental Hotel – Miami, FL	Tax Section www.americanbar.org/tax 202.662.8670

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PROGRAM TITLE / DATE OF LIVE WEBINAR	PRODUCT CODE
Current Developments in Consolidated Tax Returns: Consolidated Aspects of the Section 336(e) Regulations (9/4/2013)	CETX0913T1CDR
The ABCs of Summons Enforcement Including Recent Developments (8/28/2013)	CETX0813T2CDR
Leases on Tribal Trust Lands: How New BIA Leasing Regulations Affect Tax Policy on Tribal Lands (8/14/2013)	CETX0813T1CDR
Tax Implications for Same-Sex Couples After the DOMA Decisions (7/31/2013)	CETX0713T2CDR
State and Local Tax Concerns for Closely-Held Businesses (7/10/2013)	CETX0713T1CDR
An Ethics Challenge: Identifying and Addressing Conflicts of Interest in Tax Controversies (4/24/13)	CETX0413T2CDR
FATCA: Insuring Compliance After the Final Regulations (3/27/13)	CETX0313T1CDR
Thinking About Tax Malpractice (12/13/12)	CETX1212SCDR

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