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FROM THE CHAIR

A Midyear Report

By George C. Howell, III, Hunton & Williams LLP, Richmond, VA

I am now well into my year as Chair of the Tax Section. I am happy with the progress that we are making on a number of fronts, yet much remains to be done. This column highlights some recent activities and accomplishments, but unfortunately begins on a poignant note.

Ken Gideon

I am greatly saddened to report that our friend and colleague Ken Gideon passed away unexpectedly on January 10th. Ken was a wonderful human being, who also happened to be a great leader of the Tax Section and a brilliant tax lawyer. His accomplishments are too numerous to list, but include serving as IRS Chief Counsel, Assistant Secretary of the Treasury for Tax Policy, Chair of the Section, and a member of the ABA Board of Governors. Armando Gomez, my predecessor as Chair and Ken’s partner at Skadden, hit the mark with the following description of Ken:

He was a consummate professional with a remarkable career, but he never let go of the plain-spoken, unassuming ways and values that he learned in Lubbock. Ken believed in government service and in giving back to the profession. Generations of lawyers, including me, are fortunate to have had the opportunity to learn from Ken, and we will all miss him dearly.1

Yes, Ken was a Texan, and Texas never left him, which is a very good thing.

There are so many Ken Gideon stories, but I will pass on one of my favorites, which illustrates some of the many facets of Ken’s personality. As many of you know, Ken frequently attended the leadership dinner that is held on the Thursday night before each Tax Section meeting. As the story goes, if you were seated at Ken’s table and started to discuss a tax issue, he would reach into his pocket and produce a yellow card similar to those used by soccer referees. You had been warned—tax was not to be discussed at dinner. Politics, sports, and current events were acceptable topics, but not tax. Of those familiar with this story, no one ever learned if Ken also carried a red card in his pocket.

We mourn Ken’s passing but are richer because of our time with him.

Midyear Meeting

The Midyear Meeting in Los Angeles drew over 1,200 attendees. I sat in on a number of committee panels, all of which were interesting and well done. Of particular note were the excellent programs put on

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1 Amy S. Elliott, Former Treasury Assistant Secretary Kenneth Gideon Dies, 2016 Tax Notes Today 8-9 (Jan. 13, 2016).
by our Diversity Committee and Young Lawyers Forum (YLF). The Diversity Committee sponsored a panel on “Elimination of Bias in the Profession: The LGBT Ally Toolkit.” Developed by the ABA Commission on Sexual Orientation and Gender Identity (SOGI), the LGBT Toolkit serves as a resource for employers and human resources professionals to support their LGBT professionals and to provide education and training for their workforces. We were honored to have ABA President Paulette Brown speak on this panel, and I invite you to listen to the audio from this program and access the materials on TaxIQ.

In its 15th year and enjoying immense success, the Annual Law Student Tax Challenge finals, organized by our Young Lawyers Forum, were held during the Midyear Meeting. If you were not able to attend the final rounds, I encourage you to watch the clips from the competition here: 15th Annual Law Student Tax Challenge. If you have not attended programs put on by our Diversity Committee or YLF in the past, I hope you will plan to do so at the May Meeting in Washington. The Diversity Committee and the YLF are the future of the Section and deserve our support.

Edward Kleinbard, a tax professor at the University of Southern California Gould School of Law and a former Chief of Staff of the Joint Committee on Taxation, gave the keynote address at the Plenary Luncheon. Ed is universally recognized as one of the brightest tax minds in the country. His presentation on U.S. fiscal policy was well conceived and thought-provoking. You can listen to Ed’s remarks and view his slide presentation here.

The Section presented a number of awards and honors at the Midyear Meeting in recognition of notable members. I am pleased to announce that the recipient of this year’s Pro Bono Award is Andrew R. Roberson of McDermott Will & Emery, Chicago, IL. In addition, we selected the next class of Brunswick Fellows, and we also recognized the incoming class of Nolan Fellows. You can link to the audio of Andy’s Pro Bono Award acceptance remarks and details about our Nolan Fellows in this issue of ABA Tax Times. Please join me in congratulating these individuals on their well-deserved honors.

I want to thank the Section’s staff, led by Janet In, for all their hard work in connection with the Midyear Meeting. I am fortunate to have the opportunity to collaborate with such a talented and highly motivated group of individuals. I also want to thank the Section’s committees for organizing such high-quality panels. Once again, all of these assured a successful and smoothly run meeting.

**Law Improvement Efforts**

One of my three focus areas as Chair is ramping up the Section’s law improvement efforts. I am delighted to report that we have completed 19 law improvement projects so far during the 2015-2016 year, which
is more than were submitted during all of 2014-2015. I am pleased with the high quality of these government submissions and am confident that they will have an impact on the development of the relevant laws, rules, and regulations. Details about these submissions are available in the Government Submissions Boxscore inside this issue with links to the full text of the reports on the website.

Despite the recent surge in government submissions, the Section cannot relax its law improvement efforts. The projects completed so far represent the work product of a wide variety of committees, but other committees have not yet participated. I encourage each of you to become involved in one or more law improvement projects with your favorite committee. I think you will find participation in these projects to be one of the most rewarding aspects of Section membership.

**TAPS Endowment**

As you undoubtedly have heard, the Tax Assistance Public Service (TAPS) endowment has been established to assure long-term funding for the Brunswick Fellowships and the Section’s other pro bono and public service efforts. The Section has raised over $390,000 in gifts and pledges so far, but we have a long way to go to achieve our goal of $2.5 million. This is a lofty objective, but I know that we can do it with your support. Please give TAPS full consideration when you think about donations and where your charitable dollars should go. As noted in Mike Clark’s thoughtful and well written article in this issue of *ABA Tax Times*, contributions to the TAPS endowment are made through the ABA Fund for Justice and Education and therefore are tax deductible. I commend Mike’s article to you.

**Looking Forward**

Next up is the May Meeting. I encourage you to attend this meeting, which will be held May 5-7 in its traditional location at the Grand Hyatt in Washington, DC. The May Meeting is always our most well-attended meeting, full of high quality CLE and many opportunities to hear from and interact with our government guests. I am confident that it will be a rewarding experience for all who attend. I hope to see you there.
PEOPLE IN TAX

An Interview with Kevin Sullivan, Connecticut Commissioner of Revenue Services

By Tom Greenaway, KPMG LLP, Boston, MA

Kevin Sullivan has served as the Connecticut Commissioner of Revenue Services since 2011. He served as Lieutenant Governor from 2004-2007, and he served as a State Senator from 1986-2004. In June 2015, the Connecticut General Assembly passed a bill imposing mandatory unitary filing on many Connecticut businesses as well as sharply limiting the use of net operating loss carryforwards. This interview took place soon after a compromise bill passed the General Assembly in November 2015.

Q Kevin, you’ve been in this role for a while now. What are your biggest challenges and opportunities right now as Commissioner?

A The biggest challenges right now—and they have been since I took this job now almost five years ago—are not related to tax law; they’re related to the capacity to do effective tax administration. Like many states, Connecticut has been challenged financially to support its agencies. Now, we’re lucky: I spend my time making the case that we’re a profit center and that has helped. But we are clearly in the business, as they say, of doing more with less. I have a workforce here that is quite senior. Many people in this agency are staying for 25, 28, 30 years and they remember a time when this agency was three to four times the size that it is today. The challenge is getting people to think differently about work, think differently about teaming across the agency, and think differently about using technology.

I think that the other major challenge has been around policy. When this job was offered to me by the Governor, he said, “It’s always troubled me that somehow tax policy and economic policy have existed in bubbles for the State of Connecticut.” Somehow tax policy and fiscal policy—which is even more amazing—have existed in bubbles in the State of Connecticut. The agency really does need to be at the table in those policy conversations while continuing to bring in the dollars in a fair, efficient way.

In my other life, before coming here, I cannot think of a circumstance where the Commissioner of Economic Development and the Commissioner of Revenue Services were together making presentations, were together having conversations, and were regularly working together. We now
basically provide most of the legal support for the Economic Development Department when it has major issues. So that clearly is just one measure of it.

I understand the legislative process; I was part of that for many years.

We have just stepped up to say that we think there should be a conversation over the next year or so about whether the entity-based approach to business taxation that Connecticut has (a corporate income tax for C-corporations, a distributional income tax for non-Cs and then a business entity tax for everybody who has a certain level of business income) makes sense or whether we could find something more efficient, more effective, more thoughtful, that would be a single tax regime for the State of Connecticut. I’m not saying “gross receipts” because that can scare people; but something looking like a gross receipts tax, with reasonable adjustments, would save us a lot of money in tax administration. I think it would be welcome, depending on how it works out. So we’ll take that lead.

We will not wait for the legislature to come and say: I wonder what kind of other system could work? We will take that lead and we’ll pull experts in from the community. We can do that without being a public forum, which is useful. The result is we’ve picked up that role considerably. We’ve actually done—I won’t call it training because that would be cruel—we’ve actually done sort of a “Tax ABCs” for the legislature. Not everybody participated, but this is probably one of the weakest suits that most policymakers have. They tend to defer to experts and see tax as numbers, not as policy. So they either see it as a way to fill the budget—we need a billion dollars, or they see it as we don’t understand taxes—can you tell us what to do? So we’ve been trying to help the legislature be a little bit more policy-oriented on taxes.

Ultimately, the legislature is going to have to set the framework for any legal change of regime. I mean, we can’t advise our way into a new tax system. The legislature has to take those steps. But to the extent that we can have conversations outside the political hubbub that lead people to some kind of consensus, it’s much easier for the legislature to respond to that consensus. Let me give you an example: in moving to single sales factor apportionment, we’ve had an inside working group, business folks and folks from our agency, who’ve been discussing whether that made sense and for whom that made sense. Most people around the table, particularly Connecticut-based businesses, said, “Absolutely, you should have done it a long time ago.” Obviously, if you were an out-of-state retailer you weren’t too happy about it. But I don’t think Walmart is choosing not to do business in Connecticut as a consequence of either unitary or single factor taxes. The legislature might have said in other circumstances “What is this? Why should we do this?” Instead, for the most part they said, “Okay, so you’ve worked this out, you’ve set this up, you can explain, you’ve explained it to us well. We know why it’s good policy in terms of exporting tax burden and importing tech business headquarters. Good enough.”

Q So the Department of Revenue Services can facilitate the building of that consensus with the affected communities and then help deliver that consensus to the legislature?

A And to the Governor, quite frankly. Our job is to deliver it to the Governor and then the Governor gives the green light to deliver it to the legislature.
Then where do you go next? Market sourcing?

Let’s take it one step at a time. My vision had been that last summer, an inside/out, outside/in working group would sit down and make the case for going to unitary. Well, surprise, the legislature did it. They just did it at the last minute and—while it was the right decision—there was a lot of gnashing of teeth in the business community because a consensus had not been formulated around it or at least it hadn’t come with warning and that’s kind of important.

People do plan, and we were playing catch-up on that one. Now what I’ve said to the Tax Panel and the legislature and to the Governor’s office—and I hope we get the go-ahead to do this—is that there is a probable consensus that we should go to a clear destination-based market sourcing. We have sort of this hodgepodge now. But with that change there will be winners and losers: people will be differently affected.

Rather than come back in February, which is when the legislature next returns, and throw yet another big issue at the world, I’ve suggested that the legislature and Governor just ask us to do a couple of things. One, put together the working group and, two, give us the authority to request pro forma filings for a year on an alternative sourcing model that hopefully would not be too burdensome for companies to respond to. And then we can provide better information to the legislature and the Governor, as we believe this is on balance the right way to go.

You could ask real taxpayers to deliver pro forma returns that would show both your office and the legislature what the results of market sourcing reform would look like?

Yes, that’s what Maryland did and what Rhode Island did when they moved to a single factor. One of my jobs, among many, is to help folks in this agency understand the consequences of what we do and advocate. Similarly, I think it is to help the legislature understand the consequences of what they may do or not do. It’s still their decision, but at the end of the day, I wish we had had a chance on net operating losses to have that conversation with them.

Because we might have said, “Hmm, imagine there’s a company somewhere in Connecticut, just hypothetical, that has been selling off many of its business lines and making a great deal of money from that and was sort of planning on that for a while and was sort of planning to use their net operating losses to offset those gains. It might come as something of a surprise to them to find out they can’t.” But we never had that opportunity. Now, if we have the earlier discussion, the legislature still makes the choice, but at least you know that there’s a consequence, there’s a potential consequence. The change to unitary was the right thing to do, but not overnight without warning. We’ve got $78 billion worth of cumulative NOLs out there, which is ridiculous.
You said you have to work smarter and do more with less. How are you harnessing technology not just to administer your department, but to do a better job as a tax enforcement agency?

Probably the best example of that is the move we made to automated scoring with respect to collections. What that simply means is that it is possible to logarithmically establish criteria that will scan the cases you have and give you a sense of probability of success, probability of speed, and probability of maximum result.

We have reduced our accounts receivable. It has required a change of culture. It’s okay not to pursue an uncollectible account to the end of time. It’s going to be written off anyway because you’re never going to collect it, so why spend years chasing that target and then write it off? It’s better to write it off early, if statistically we can establish that there is only a slim probability of ever getting it. Likewise, we have to be selective which cases to pursue. Don’t sit with a pile of possibilities and do the $500,000 one, which is never going to be collected, when underneath it there’s a $10 million one, which (because of the entity and a whole lot of reasons) can be readily cleared. Technology has given us that ability. I should say, technology has made that possible, combined with a greater willingness to do offers of compromise and settlements. The cultural philosophy has been to use the technology to guide the human decisions so that they are focused on the places where human interaction and judgment really becomes important and useful, not routine. That’s probably the best example of where technology has been harnessed.

We have certainly used technology to give taxpayers the ability to both file and pay electronically. There was a little lesson in that, which I had to learn, and everybody else had to learn. That is this: we were originally set on this goal of universal electronic filing and universal electronic payment, which is still a great goal, except there are slices of the demography out there for whom this is simply not possible. We heard from them as we tried to push them too hard. We heard from the landscaper who describes his accounting system as this box that I think I owe and this box that I think is owed to me; I just throw stuff in there and occasionally I look at it. His response to electronic filing is: “You’re asking me to do what online?” Or when we backed off mandatory electronic estimated payments. Nonetheless, we have moved to well over 90% eFile and ePay in all major tax categories and that is one of the ways that we’ve been able to absorb having fewer people here. Less paper, less process.

Our next generation challenge: we are a state with a very antiquated principal tax platform. Payments get batched in the accounting system, but that entry then has to be transferred over to the tax record system. There are two stand-alone systems that are not automatically interrelated; they’re not interconnected. We can’t verify for several days whether we actually put a payment in the bank.

We have 70 bolt-ons to our current system to address problems. As a result, if we want good tax reports for policy analysis and for financial analysis, we have to go outside the main system to the data warehouse, create an independent inquiry, query the information, create a report and bring it back into the system. We cannot do it through the main integrated tax information system. This is expensive, a waste of time, and annoying. The system is ITAX. I kid people that ITAX is a swearword. We have $300,000 budgeted to retain the services of a provider who will help us write the business plan: then we’ll have to go to the Governor and the legislature and fight for the capital funding to get that out. [Editor’s note: KPMG is participating in that project.]
But it seems obvious that any enterprise needs an enterprise resource planning system that works. It doesn’t sound like you have that right now.

It’s made to work as best it can. It could be more efficient; it could be more effective. It does sound obvious, but sometimes the obvious is hard, especially when it has a high price tag. Making this change is not going to be inexpensive. It’s going to take a major capital budget, and it’s going to take some selling, I think. Again, our rationale is that we bring in money: for every dollar you spend here, you get many more dollars back.

There are two ways of looking at the job of a data-crunching agency. There’s a traditional way of looking at that, which says that the agency doesn’t create the systems that create the exceptions: the agency just deals with the exceptions, and everything ends up being an exception, everything is a case, everything is outside of what can be easily processed. I think getting our folks to think about that has been important, because it means recognizing that the result will be different than what they’ve done before. They’re not going to be as often “in the weeds,” trying to make sense of the big picture; instead, they will be getting some big picture systems that help them stay out of the weeds and operating hopefully at a more global level.

So, to stay with the metaphor, the machine will be in the weeds and if the machine needs help, the machine will kick that “case” out for attention. Do you see that cultural change being complete in your tenure?

Not in my tenure, no. I think it will take time. But it is coming. I think we have to demonstrate to people that their days and their lives and their work will be smarter and easier this way than the alternative once we convince them that they’re not at risk somehow because of the changes.

Inside the agency there’s a focus on this case, and this instance, and this year, and this taxpayer, and this issue. Certainly that is a common affliction. Tax practitioners often think of the tax system in terms of their particular clients, or their issues, or their industry. Do you have any advice for policymakers or anybody who’s involved in the tax system to help them step back and see the rule, see the system?

You know, it’s hard, I think, for practitioners, depending on how specialized they are and particularly if they are in-house corporate, because they do have a job. In a sense, their job is to advocate for their piece of the world. On the other hand, the tax code cannot become the summation of a series of anecdotes, which to some degree it is. The tax code really needs to speak more broadly than that. The risk is if people participate in a larger conversation about the tax system, they may consider themselves at risk of negotiating against their own interests. As long as they stay on their own piece of it, they can be more confident that they know whether they will win or lose.

We have this working group, which is a dozen or so people outside the agency, which was pulled together for the implementation of the conversion to unitary corporate filing. The rule is that participants may not raise issues that sound like hypotheticals but are, in fact, real client situations. Now, if the situation represents a broad swath of taxpayers, business taxpayers who may be affected, that’s fine, it can be used as an example. But the working group is not here to make
the tax system work for a particular participant or client: it’s here to make it work for the State of Connecticut.

Q: Do you think that working group model has been effective at least at throwing off ideas?

A: Yes. It has helped us immensely. It has helped us build a case for changes that are needed. We use it whenever somebody out in the business world says “I don’t understand or like this.” With the working group, we can say, “You don’t have to take my word for it; let me have somebody over here from X Company talk to you about it. They can explain it to you.”

Unfortunately, when unitary filing was passed overnight, the newspapers, as you can imagine, brought it up as Connecticut’s new unitary tax. So the main business association in the State of Connecticut was not pleased and was highly critical. That struck us as odd. On balance, Connecticut businesses should have been for it. What it really reflected was that the change to unitary came as a smack across the face rather than a pat on the back, or a conversation, or a handshake.

So I think these working groups are the way to go as long as everybody follows the rules. We’ll follow that approach on whether and how Connecticut might move to a completely different business tax methodology.

Q: How do you work across state lines?

A: Well, luckily, we have the Federation of Tax Administrators. The FTA is a great resource both in terms of the information that it provides to all of us, but quite honestly, just the opportunity to talk with colleagues and learn from and share with colleagues. As we did the corporate income tax changes, we spent a lot of time talking with Rhode Island because they had the freshest experience. They’ve been through it recently, and we learned from that. We’ve just set up a major Tobacco Enforcement Unit, so we talked to New York and New Jersey because they have a lot of experience in policing tobacco. There’s probably nothing that we’re going through that another state hasn’t been through. There’s probably nothing another state is going through that we haven’t thought about. By and large, these are significant issues. One of the things that has actually helped to rally the states to a large degree (with a few exceptions) has been to press the limits of economic nexus in the absence of federal action on it.

Q: Do you see the economic nexus issue in particular as one where states are collaborating?

A: By and large. I mean, there are exceptions. If you’re in New Hampshire, you’re not too interested in having this issue change. And that’s understandable. But even if you’re in New Hampshire, I think you probably, at the end of the day, understand that a legal regime that preferences one segment of the economy over another nationally, federally, is probably not a good idea.

On this one all of us listen to the arguments against clarifying the authority of the states and sometimes we just sort of roll our eyes when we hear about “the fledging online industry.” Right. Well, when we were negotiating with Amazon and before we reached agreement they’d say, “How
are we going to know who bought what, when and how?” And I said, “Look, I’ve used you. You know every day who bought what, where they bought it, where it’s going, how much it was, how to tax it.” So that’s a place where states, I think, have rallied together around the principle that this is a place where the federal government ought not to be picking winners and losers. Let the marketplace pick the winners and losers, not the federal government.

Q  
So we’ve been touching on some federal legislation—The Marketplace Fairness Act?

A  
Among the states, we all are very pessimistic that the Marketplace Fairness Act is ever going to see the light of day. Certainly not as long as Congressman Goodlatte sits where he sits.1 The new Speaker is not a fan. The Majority Leader in the Senate is not a fan of the states.

Now the Tax Commissioners are in an odd spot. Some of us are political; some of us are not political. Some of us are elected; most of us are not elected. Who speaks for state tax policies is always an interesting question. I know I don’t at the end of the day. My Governor does because I report to him. The head of FTA, Gale Garriott, is a former Commissioner from Arizona and a really good guy. We have this conversation because his experience was in Arizona, a different political culture where you cannot stand too tall because you immediately get your block knocked off. We all come from different places, and we don’t speak to Congress. Luckily the Governors Association and the Multistate Tax Commission Executives are without exception on the same page. So we have very powerful groups, and we work through them.

And the states push the limit as much as we can until somebody says “stop” through litigation. Five or six years from now, we’re going to find that litigation, and finally get back to the Supreme Court.

Q  
There is currently a strategic litigation initiative coordinated across the states?

A  
I would say that FTA has certainly had people in conversation with one another. We know who is pursuing what. We are all looking for the case. Now some of us are equally concerned about the wrong case going forward. It can’t just be any case. It has to be the strongest possible case before the federal courts so that we can get a clear determination. What we want is a case that concludes that the Commerce Clause is not violated unless there is an impermissible burden on interstate commerce. And, p.s., this is not that: right now we have an impermissible burden on intrastate commerce. So we have a regime where there’s an unlevel playing field. That is not what the Constitution or the framers had in mind. And then hopefully let Congress figure out what that means or, alternatively, let the states have the opportunity to fashion varying remedies. Yes, those conversations do take place.

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1 Representative Bob Goodlatte (R-Va.) is the Chair of the House Judiciary Committee. Goodlatte has argued in the past for “tech neutrality,” meaning that the same sales tax should apply to online and in-store purchases; but he has also expressed concerns that the Marketplace Fairness Act could allow states to ‘regulate beyond their borders’. See, e.g., Goodlatte’s Online Sales Tax Principles Review House Debate, Huffington Post (Sept. 18, 2013); Peter Fricke, Internet Tax Ban Passes House, But Could Stall In Senate, THE DAILY CALLER (June 10, 2015).
Q I’d like to spend a minute talking about how federal challenges with respect to tax administration affect you.

A Very practical examples are that the IRS announces that its tax season will begin late and it would be kind of nice if all the states would wait. And we say, no, we’re not going to do that. And why is the IRS waiting? Well, they’re waiting for their authorization. They don’t have a budget yet. Clearly, some folks in Congress, harking back to Grover Norquist, say: “Starve the beast.” The IRS is the heart of the beast for those people. What better thing to do than make it extraordinarily difficult for the IRS to do its job? And in fairness there have been points in the last two years when the IRS has had some issues in terms of tax administration which have fed this sort of paranoia.

How does it affect us? We clearly rely a great deal on access to timely federal tax information. In a perfect world we ought to be doing much more collaboratively on fraud in a more timely way, not: “Here’s some stuff we found last year in Washington. You ought to look at it now that you’ve already given those refunds out.” Real-time, return-season fraud data would be helpful. The more they’re pushed away from real-time capacity, the more difficult it makes it for us.

I can’t say this has been in any way crippling to us, but we do rely on their data. We don’t necessarily rely on their guidance, but we do rely on their data. And if that data is not timely, if it’s not real time, it makes our jobs harder. If the tax season is on two cycles, it makes our jobs harder. We were very excited a few weeks ago when it looked like some folks were going to be pressing the IRS to come up with a W-2 filing deadline that might have some meaning in terms of fraud evasion. So states, one by one, are setting earlier dates for employers to file that data. That shouldn’t be the case. It ought to be just one rule nationwide for business purposes as to when you have to file that data. [Editor’s note: After this interview, Congress moved the 2017 deadline for filing Forms W-2 and 1099 up to January 31, 2017.]

Q And can the states really move that W-2 filing date up and demonstrate that it cuts down on fraud?

A That’s what we’re going to find out. This will be the first year, but we believe that will be one more indicia that we can look at as we question suspicious filings. Just last year that was probably our biggest challenge: a credible spike in ostensible fraud, so much so that other parts of the collection activity and processing activity developed significant backlogs, from the people that we were pulling off to deal with what we perceived to be fraudulent claims. Now, did we create that problem to some degree? Yes, because we toughened our filters. It’s another area where technology helps, right? When you’re able to pre-filter automatically for certain issues, it’s a lot easier to deal with fraud than it is looking at it on a case-by-case basis. But we intercepted probably $25 million more last tax season than we had the year before. I think it’s a combination of there being more fraud and our being more vigilant about it. But this is a major challenge for all tax agencies now, and historically the resources have not been there to be proactive as opposed to reactive when trying to deal with tax fraud.
Q Are there any deep-seated beliefs that surprised you when you came into the world of tax, ones that led you to shake your head? Do you think that most taxpayers want to do the right thing?

A It's a very important distinction, not just attitudinally, but in terms of how you shape the agency. If you believe that most people will cheat, given the opportunity, then you structure an agency that is much like a traditional police force. You're constantly looking at individual violations and trying to correct them. If you believe what all the data says, that with good information and clear guidance, most people want to do the right thing and will do the right thing, it makes it a lot easier.

We're trying to get to that point. Not having that skepticism or cynicism about the vast majority of taxpayers and just instead knowing that they want to do the right thing if we can make it easier, faster, clearer for them. That might be as simple as looking at our communications. A standard letter from this agency would be, “This is to inform you that you're getting this letter because….” The “because” is a list of sections of the Connecticut General Statutes which warrant the letter. Then the letter goes on to say, “If you do not respond to this letter you're going to be in serious trouble.” Now, let me tell you what the problem is. That's not a good communication. First of all, no one plows through that, and we've already pissed them off before they even get to the thing we need them to do. So there are some simple things like that we can do. That was just one thing, changing the internal attitude towards more communication, more conversation, more taxpayer assistance, more clarity, more help, more self-help, helping people craft their own payment plans.

Again, research is absolutely clear. If I tell you how much you have to pay on a payment plan, you will pay it once and stop because you never believed that you could do it. If you tell me and we negotiate over how much you think you can do, you'll stick to that payment plan, and you will not vary from it. These are the kinds of things that we can do differently. That's the internal part.

As to practitioners, even considering the worst tax departments, it's clear that people are not sitting there thinking about ways to make people's lives miserable or to take money out of the economy. So what we're trying to say to folks is that we can work together. We have fought to have a collaborative relationship. It's not necessarily adversarial. When we're in court, yeah, it's adversarial; but when we're here in the review process, it's not necessarily adversarial. We're not “gotcha” and the taxpayer isn't “get away with it.” If we approach it as “get away with it” and “gotcha,” we're going to have a hard time getting to someplace that's good for both of us.

We were not communicative. We were not outgoing. We were not present in the world of taxpayers. We were just here in Hartford sending things to them and demanding things of them. Those are the two things that surprise me, I think. I probably shouldn't have been surprised by the second, but I think the first is an occupational hazard of people who deal often with people who have done something wrong. It starts to get easy to think that most people are doing things wrong.
Q Any closing thoughts?

A Let’s go back to the policy role of tax agencies. If we’re not in a position to advise governors and legislatures and the public at large, if we’re not in a position to provide information and education, I don’t know who is. So being hermetic, being focused on collection, not willing to speak, not willing to get out and say things and not getting out into the community, not getting in front of the legislature, is not serving anybody’s purposes. The traditional view that all we do is collection and crunch data, and we don’t like to talk to people about what we do; we want to keep a low profile and sort of hide out in the tax collection agency—it ain’t working. It doesn’t work for anybody, but it’s certainly not working for tax agencies. ■
AT COURT

Carpenter Says Individuals Cannot Discharge Vicarious Tax Liabilities in Bankruptcy

By Gregory Germain, Professor of Law, Syracuse University College of Law, Syracuse, NY

In Carpenter v. Montana Department of Labor,¹ a bankruptcy appellate panel ruled that an individual taxpayer could not discharge in bankruptcy his vicarious liability for unpaid corporate unemployment taxes incurred by a corporation that he owned and managed. Under the Carpenter court’s theory, individuals who are held vicariously liable for any tax under state or federal law cannot discharge the tax liability in bankruptcy if the tax would not have been dischargeable if incurred directly by the taxpayer rather than by the corporation. The decision opens the door for states to prevent individuals from discharging tax liabilities owed by corporations that they owned or work for, including taxes on corporate transactions from which they received no financial benefit. This article shows that the Carpenter decision rests on a faulty premise.

A. The Carpenter Case

The taxpayers in Carpenter were the sole shareholders and officers of a corporation that sold and serviced fire protection equipment. Montana law imposed vicarious liability for unemployment taxes on the corporate officer who is “responsible” for causing the corporation to pay the unemployment tax.² Montana law identifies the “responsible individual” as the one who directs the filing of the corporation’s employment tax returns and directs the corporation’s tax payments. Id.

It is important to note that while the taxpayers in Carpenter were also the owners of the corporation’s stock, ownership is not the defining characteristic for vicarious liability under the Montana statute. For example, a salaried officer who had no ownership interest in the corporation but was assigned to file the corporation’s employment tax returns and direct corporate tax payments would be held vicariously liable for non-payment even if that person had no control over the corporation’s money, received no benefit from the corporation’s operations, and could not pay the tax on behalf of the corporation because the corporation lacked the funds for payment.

It is a common characteristic of vicarious liability tax rules to impose liability on the individual worker who was required to collect and pay rather than the owners and operators who stood to benefit from the

¹ 50 B.R. 691, 2015 Bankr. LEXIS 3935 (9th Cir. BAP 2015).
corporation’s activities. One can understand the justification for such rules when the accounting officer is supposed to be segregating and turning over trust funds collected from third parties to the government. Trust funds should not be commingled with the corporation’s other funds because they belong to the government and not to the corporation. As legal fictions, corporations can only act through their human agents, so it makes perfect sense to impose on the responsible agent the duty to collect, account for and remit the trust funds to the government.

The policy justification for holding non-shareholder corporate agents personally liable for unpaid trust funds quickly breaks down when there is no specific fund or res over which the accounting officer has control, as was the case with the unemployment taxes in Carpenter. The corporation had an obligation to pay the unemployment taxes, but there was no segregated fund of money set aside to make the payment. As Justice Scalia aptly noted in another case, “A trust without a res can no more be created by legislative decree than can a pink rock-candy mountain. In the nature of things no trust exists until a res is identified.”

Under the Carpenter court’s theory, one can easily conceive of a situation in which an accounting employee would be held vicariously liable for non-payment of corporate employment taxes or income taxes even though that employee had no ability to force the insolvent corporation to pay the taxes. The Montana vicarious liability statute, like most such statutes, contains no defenses for innocent accounting employees who have ministerial responsibility for reporting and payment but lack the actual ability to cause the corporation to pay.

Because states have the ability to impose vicarious tax liability in any way and against anyone they wish, bankruptcy may be the last refuge of the “responsible” corporate individual who is being held personally liable for the potentially enormous tax liabilities of an insolvent corporation.

When the Bankruptcy Code was enacted in 1978, Congress made it clear that a responsible officer would not be able to discharge his or her vicarious liability for trust fund taxes (such as sales and payroll taxes) collected from a third party source (or withheld from a third party) and not segregated and turned over to the government by the responsible officer. The Bankruptcy Code expressed this rule by providing a priority for “a tax required to be collected or withheld and for which the debtor is liable in whatever capacity.” Since priority taxes are always excepted from discharge under Section 523(a)(1)(A) of the Bankruptcy Code, trust fund taxes are never dischargeable by the individual who is held responsible for collecting, segregating and remitting the taxes. In theory, at least, the responsible officer was culpable for failing to segregate and account for the trust funds.

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3 Beiger v. Internal Revenue Service, 496 U.S. 53 (1990) (Scalia, J., concurring). The Court in Beiger held that an instant trust was created when non-segregated trust fund taxes were paid over to the government, preventing the trustee from recovering the funds as preferential transfers under Section 547 of the Bankruptcy Code.

The *Carpenter* panel makes a giant leap, however, when it applies this vicarious tax non-dischargeability rule to non-trust fund corporate tax obligations. The other tax priority provisions (for income, gross receipt, property, employment, and excise taxes, and customs duties) do not contain language prioritizing taxes owed in a vicarious capacity. Congress reserved the “liable in whatever capacity” language solely for trust fund tax liabilities.

The taxpayer in *Carpenter* argued that the only vicarious taxes given a priority on the face of the priority statute and thereby rendered non-dischargeable are trust fund taxes. Since the unemployment taxes in issue were not trust fund taxes but general corporate excise taxes, the taxpayers in *Carpenter* argued that their vicarious liability should be non-priority and dischargeable.

In rejecting the taxpayers’ argument, the *Carpenter* court relied solely on *United States v. Sotelo*, a 1978 Supreme Court case decided prior to the enactment of the current Bankruptcy Code. Does *Sotelo* justify the *Carpenter* court’s expansive reading of the Bankruptcy Code’s priority rules?

**B. The *Sotelo* Case**

*Sotelo* was decided shortly before Congress adopted the Bankruptcy Code. The taxpayers were the owners of a corporation that failed to pay $40,751.16 of trust fund taxes withheld and collected from their employees, but not segregated and turned over to the Government. In 1966, Congress identified which taxes would be subject to discharge and which would not. In general, taxes due and owing more than three years before the bankruptcy filing would be dischargeable. However, Congress put certain limitations on the rule allowing the discharge of old taxes. A special rule precluded discharge for taxes “which the bankrupt has collected or withheld from others as required by the laws of the United States or any state . . . but has not paid over.” The question in *Sotelo* was whether the trust fund exception applied only to the direct tax liability of a non-corporate owner or whether it equally applied to the responsible corporate officer. In a 5-4 split decision, the Court in *Sotelo* ruled that Congress intended to prevent the responsible officer from discharging corporate trust fund taxes.

When the Bankruptcy Code was enacted in 1978, Congress added the “liable in whatever capacity” language to the trust fund taxes priority rule to adopt the holding of *Sotelo*: “The U.S. Supreme Court has interpreted present law to require the same result as will be reached under this rule.”

By its terms, both the *Sotelo* decision and Congress’s adoption of its reasoning in the Bankruptcy Code applies only to trust fund taxes. Yet the *Carpenter* panel extends the reasoning of *Sotelo* to non-trust fund vicarious taxes. The *Carpenter* panel’s theory is as follows: (1) *Sotelo* held vicarious trust fund taxes to be non-dischargeable even though at the time the trust fund exception did not contain the “liable in whatever capacity” language that it has now, (2) therefore *Sotelo* stands for the proposition that all vicarious taxes should be non-dischargeable if they would be non-dischargeable if incurred by the debtor directly, and (3) the “liable in whatever capacity” language added by Congress to the trust fund priority rule in the Bankruptcy Code does not prevent other vicarious taxes from being given priority.

The problem with the *Carpenter* panel’s ruling is that it does not consider the Supreme Court’s reasoning.
in *Sotelo*. The statutory language being interpreted in *Sotelo* was ambiguous, even without the “liable in whatever capacity” language. Did the exception only apply to the corporation that “collected or withheld” the taxes from others, or did it apply to the responsible corporate officer who, on behalf of the corporation, also “collected or withheld” the taxes? The *Sotelo* majority thought the language was ambiguous and sought to determine what Congress intended by the statutory language.

The *Sotelo* Court looked to the legislative history of the 1966 amendments to determine the meaning of the statutory language. The Court determined that the 1966 trust fund exception was made at the behest of the Treasury Department. The Court quoted a letter from the Assistant Secretary of the Treasury, Stanley S. Surrey, to the Chairman of the House Judiciary committee considering the Bankruptcy Act changes:

> [The Treasury Department is] concer[ned] with the inequity of granting a taxpayer a discharge of his liability for the payment of trust fund taxes which he has collected from his employees and the public in general. . . . The Department does not believe that it is equitable or administratively desirable to permit employers and other persons who have collected money from third parties to be relieved of their obligation to account for and pay over such money to the government.7

In another letter from a Treasury Department official to the Chairman of the Senate Judiciary Committee considering the Bankruptcy Act changes, the Treasury Department again expressed its view.

> [It would be] most undesirable to permit persons who are charged with the responsibility of paying over to the Federal Government moneys collected from third persons to be relieved of their obligations in bankruptcy when they have converted such moneys to their own use.8

The Court in *Sotelo* concluded that Congress incorporated the final language into the statute to meet the Treasury Department’s concerns.

In response to the Treasury Department’s concern, the House Judiciary Committee added an amendment that became §17a(1)(e). . . . [T]he amendment was specifically intended to meet “the objection of Treasury to the discharge of so-called trust fund taxes.” In agreeing to the House amendment, the Senate Committee noted that Treasury’s “opposition” to the bill, to the extent it was based on the fact that responsible persons would have been “relieved of their obligations” for unpaid withholding taxes, was eliminated by the provision that became §17a(1)(e).

There is no reason to believe that Congress did not intend to meet Treasury’s concerns in their entirety. While the Department may not have focused on the specific question presented here, it left no doubt as to its objection to the discharge of “persons . . . charged with the responsibility of paying over . . . moneys collected from third persons.” Respondent without question is such a person, a point essentially conceded here by virtue of the recognition of respondent’s

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7 *Sotelo*, supra note 5, at 276 (emphasis in *Sotelo*).
8 Id.
liability. . . . Because Congress specifically contemplated that those with withholding-tax-payment obligations would remain liable after bankruptcy for their “conversion” of the tax funds to private use, we must conclude that the liability here involved is not dischargeable in bankruptcy.⁹

Last, the Sotelo Court noted that Congress was concerned with the practical effect of allowing the discharge of corporate trust fund taxes in the usual situation where the corporation was insolvent, was going out of business and so would not repay the stolen trust funds, and the corporate officer was responsible for the nonpayment by wrongfully allowing the funds to be commingled with the corporation’s funds.

There is absolutely nothing in the Sotelo opinion, not even in dicta, that would extend the non-dischargeability rule to non-trust fund taxes. The theory and legislative history upon which the Supreme Court based its decision in Sotelo has no application to non-trust fund taxes.

Moreover, the Carpenter panel cites nothing to support its theory that Congress’s “liable in whatever capacity” language, which was expressly added to the trust fund priority rule to incorporate the specific holding of Sotelo regarding trust fund taxes, does not evidence Congress’s intent to allow the discharge of vicarious non-trust fund taxes. The Carpenter court fails to suggest why Congress, when adding the “capacity” language to the priority rule for trust fund taxes, would not have included similar language for other taxes if they intended to treat all vicarious taxes the same way.

C. Lookback Issues

It is important to note that Carpenter may not prevent responsible persons from ever discharging their vicarious non-trust fund tax liabilities. While trust fund taxes are forever non-dischargeable, other tax liabilities have a shelf life after which they become stale and lose priority. In general, income, employment and excise taxes lose their priority in three years, while property taxes and customs duties lose their priority in one year.¹⁰

The Carpenter panel recognized that vicarious tax liabilities would also lose their priority after the expiration of the lookback period. The Carpenter panel distinguished a prior opinion, In re Hansen¹¹, which allowed a responsible corporate officer to discharge unemployment excise taxes where the responsible officer filed bankruptcy more than three years after the corporation’s excise tax return was due. The Carpenter court emphasized that the corporate officer’s vicarious liability should be treated the same way under the bankruptcy priority rules that it would have been had the officer incurred the tax in his or her individual capacity. If state law holds a “responsible person” personally liable for an entity’s failure to pay its taxes of whatever kind, the Carpenter panel would treat that individual’s vicarious tax liability in bankruptcy as though there were no corporate limitation on personal liability and the taxes had

⁹ Sotelo, supra note 5, at 277 (citations omitted).
¹⁰ See 11 U.S.C. § 507(a)(8). I apologize to the reader for skirt over the complexity of the lookback rules, which require careful tracking of when the time periods begin and end. For example, the income tax rule covers tax years for which a return was first due to be filed within three years of bankruptcy, and thus may extend to tax years four years before bankruptcy, depending on when the return was first due with extensions, and when during the year the bankruptcy was filed. There are additional rules extending priority for even older taxes that were assessed within 240 days before bankruptcy, with the period subject to long tolling and extension by agreement, and to taxes assessable post-petition. See 11 U.S.C. § 507(a)(8)(A)(i)(ii) and (iii).
been incurred directly by the debtor.

The *Carpenter* panel’s theory raises many unanswered questions. Would the *Carpenter* panel’s theory extend indefinitely the responsible individual’s non-dischargeability for older corporate taxes where no tax return was filed, or possibly for late-filed returns under Section 523(a)(1)(B) and (C) of the Bankruptcy Code? Would corporate tolling agreements extend the running of the lookback periods for corporate income taxes assessed within 240 days plus tolling before bankruptcy or for income taxes assessable post-petition for the responsible officers who did not enter into the tolling agreements? The priority and dischargeability statutes were simply not drafted with these questions in mind, and they do not suggest any easy answers. What is clear is that *Carpenter* allows states to impose enormous liabilities on responsible officers that in many cases will not be dischargeable in bankruptcy if other courts follow the *Carpenter* panel’s reasoning.

**The Future**

The result in *Carpenter* is as troubling as its reasoning. While the *Carpenter* case involved rather obscure Montana unemployment taxes, the reasoning of the decision would apply to any corporate tax (and presumably any tax of any kind) imposed by state or federal law on a responsible individual. That responsible individual may be an owner of the corporation’s stock, but it could also be an employee in an accounting department who did not benefit personally from the transaction out of which the tax arose or from the corporation’s failure to pay the tax. Unlike the situation with trust fund taxes, where the responsible individual had control of the funds that were withheld or collected from a third party and the duty to segregate those funds, the responsible individual for other corporate taxes may never have had the ability to cause the corporation to pay the taxes.

At a time when state governments are adopting draconian measures to collect back taxes, such as suspending drivers’ licenses even when taxpayers lack the ability to pay, expanding vicarious liability for “taxes” that were once simply treated as insurance premiums, *Carpenter* presents state collectors with an expanded opportunity to recover unpaid taxes incurred by insolvent corporations that would normally go out of business without paying.

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12 The courts have been ungenerous to debtors seeking to discharge old back taxes when the debtor filed a required tax return after it was due. From its inception, the Bankruptcy Code denied debtors a tax discharge if they did not file a required return at all or filed a late return within two years before bankruptcy. 11 U.S.C. § 523(a)(1)(B). In 2005, Congress added a hanging paragraph at the end of Section 523(a) defining a “return” as one that “satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements).” As a result, the courts have held that late-filed returns are not “returns” at all because they were filed late, thusemasculating the main two-year rule that remains in the statute. See, e.g., Fahey v. Mass. Dep’t of Revenue (*In re Fahey*), 779 F.3d 1 (1st Cir. 2015); McCoy v. Miss. State Tax Comm’n (*In re McCoy*), 666 F.3d 924 (5th Cir. 2012). Ironically, the Ninth Circuit Bankruptcy Appellate Panel (the same court that issued *Carpenter*, although with different members), criticized the *Fahey* and *McCoy* line of cases for “the perceived harshness resulting from their reading of the statute” and their “gloss over one of the most important rules of plain meaning statutory construction: that the meaning of a statutory term only is considered plain and unambiguous if the term is clearly understood in the context of the words surrounding it and in the context of the larger statutory scheme.” United States v. Martin (*In re Martin*), No. EC-14-1180-KuKiTa, 2015 Bankr. LEXIS 4237 (U.S. B.A.P. 9th Cir. Dec. 17, 2015). The *Martin* panel allowed for the discharge of late-filed taxes if the taxpayer made a “return” under the standard non-bankruptcy definition set forth in *In re Hindenlang*: “(1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law.” United States v. Hindenlang (*In re Hindenlang*), 164 F.3d 1029, 1033 (6th Cir. 1999). The *Martin* Court’s reading of the statutory language is compelling, and if a conflict develops within the circuits we may finally see that sensible interpretation of the statutory language prevail.
The ruling also opens the door to states expanding personal liability for corporate taxes to prevent their discharge in bankruptcy. As the Court in Sotelo recognized, insolvent corporations can, and routinely do, avoid tax liabilities by going out of business. Only if the corporation wants to stay in business or is solvent will the unpaid taxes be paid.13

Unlike the dissolving corporation, responsible individuals continue to have lives after a corporation's insolvency. These liabilities may prevent the responsible individual from receiving the fresh start that is the cornerstone of bankruptcy. At a time when state governments are adopting draconian measures to collect back taxes, such as suspending their drivers' licenses even when taxpayers lack the ability to pay,14 and expanding vicarious liability for “taxes” that were once simply treated as insurance premiums, Carpenter presents state collectors with an expanded opportunity to recover unpaid taxes incurred by insolvent corporations that would normally go out of business without paying. Nothing would prevent a state, for example, from providing that the shareholders of a corporation are personally liable for the corporation's taxes, and thereby prevent the shareholders from discharging that corporate liability in bankruptcy during the applicable lookback periods. Carpenter opens the door to state legislation that would undermine the purpose of the federal bankruptcy laws contrary to Congress's intent when it carefully limited the exceptions to discharge.

One would hope that when the issue next arises in the courts they will take a careful look at the reasons articulated in the Sotelo decision for treating trust fund taxes differently from other taxes. Ideally, courts will recognize that Congress—when it added the “whatever capacity” language solely to the trust fund priority rule—intended to limit priority and non-dischargeability to vicarious trust fund taxes that the responsible officer culpably allowed to be commingled and lost.

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14 For example, New York has adopted a program to suspend the drivers’ licenses of taxpayers who owe more than $10,000 in state taxes, even if they lack the ability to pay. According to an Associated Press article titled New York's DMV suspends nearly 8,900 drivers licenses due to overdue taxes, in 2014 New York suspended 8,900 driver's licenses and extracted $56.4 million in payments from 6,500 people using the new law. By 2015, the amount collected had risen to $125 million, and the governor was seeking to lower the delinquency amount for suspension to $5,000. Kenneth Lovett, Andrew Cuomo Wants Driver's Licenses Suspended for People Who Owe at Least $5K in Back Taxes, N.Y. DAILY NEWS (February 8, 2015). The article notes that New York is also seeking to prevent delinquent taxpayers from receiving professional and business licenses, permits and grants. Id. Many other states have enacted or are considering similar legislation, despite media reports on the cycle of poverty created by these laws. See Shaila Dewan, Driver's License Suspensions Create Cycle of Debt, N.Y. TIMES (April 14, 2015).
AT COURT

A Sea Change in Court Analysis of Treasury Regulations: How the Treasury Department Won the Battle but Lost the War

By Ann Murphy, Professor of Law, Gonzaga University School of Law, Spokane, WA

In *Altera*, the U.S. Tax Court recently determined that a transfer pricing regulation was invalid because it was not the product of “reasoned decisionmaking” under the *Administrative Procedures Act* (APA). While the case is hardly earth shattering outside the world of tax practitioners, for those in the tax field it shows how vulnerable the previously nearly “untouchable” regulations have become.

Some background may be helpful. In 2007 and 2008, Kristin Hickman published two articles exploring Treasury’s lack of compliance with the APA. Analyzing Treasury Decisions and Notices of Proposed Rulemaking from 2003 through 2005, she found a discrepancy between Treasury’s acknowledgement of the applicability of the APA (in particular, the notice-and-comment rulemaking procedures set out in section 553) and its practice, which often failed to adhere to the APA. Hickman notes that “the IRS contends that most Treasury regulations are interpretative rules, and thus exempt from the APA's public notice-and-comment requirements.” Furthermore, the Service relies heavily on the “good cause” exception to the procedural requirements. In spite of these APA lapses, “Treasury faced few successful procedural challenges from taxpayers and limited pressure from the courts.”

In *Altera*, a unanimous Tax Court increased the pressure significantly. It found that Treasury’s rulemaking fell far short of its obligations under APA section 553. A series of cases on administrative law created this path to change.

Most tax practitioners are well aware that the Supreme Court’s *Chevron* case established a two-step test for determining the validity of statutory construction in agency decisions or regulations. Courts ask

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first whether the statute under review is ambiguous. If it is not, the agency and court must follow the unambiguously expressed intent of Congress. If it is, “a court must defer to the agency’s authoritative interpretation . . . unless it is arbitrary or capricious in substance, or manifestly contrary to the statute.”7

Treasury won a battle in Mayo,8 the next tax case in the Chevron line. The Court chose the Chevron test over the National Muffler9 test for tax cases, stating:

[W]e are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly [r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.10

As Andy Grewal noted, the government’s win in Mayo essentially eliminated “tax exceptionalism” from the “regulatory-deference context.”11 Once tax became simply another area of law, subject to the APA as other agency actions are, Treasury had lost the larger interpretive war and could no longer “phone it in” for its regulations.

The Altera Corporation is a technology corporation headquartered in Silicon Valley in California. The parent company, Altera U.S., is a Delaware corporation with a subsidiary, Altera International, which is a Cayman Islands corporation. Altera U.S. and Altera International entered into agreements (a license agreement and a cost-sharing agreement) in 1997. Altera U.S. and Altera International entered into agreements (a license agreement and a cost-sharing agreement) in 1997. Altera International paid royalties under the license agreement to Altera U.S. from 1997 through 2003. The cost-sharing agreements were in effect from May 23, 1997 through 2007. The parent treated employees’ cash compensation as a cost under the R&D cost-sharing agreement, but not their stock-based compensation. On audit, the Service issued notices of deficiency increasing Altera International’s cost-sharing payments for 2004 through 2007 for the stock compensation costs, in accord with a 2003 cost-sharing regulation.12

The Tax Court noted the following three requirements for legislative rulemaking under APA section 553:

1. The agency must publish a notice of proposed rulemaking in the Federal Register;

2. The agency must provide “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation;” and

3. After consideration, the agency must incorporate in the rules adopted a concise general statement of the basis and purpose of the rules.13

7 Altera, supra note 1, at 39.
10 Mayo, supra note 8, at 47.
12 Treas. Reg. § 1.482-7(d)(2).
13 Altera, supra note 1, at 33.
The Tax Court noted that these requirements do not apply to interpretive rules.

Altera and the Service disagreed about whether the regulation was a legislative rule or an interpretive rule. Altera claimed it was a legislative rule. The preamble to the final rule stated that “it has also been determined that [APA] section 553(b) does not apply to these regulations.” Nevertheless, Treasury and the Service had issued a notice of proposed rulemaking and notice of a public hearing (NPRM) on the regulation in 2002 and received many comments on the proposed regulation. The Tax Court decided the regulation was a legislative rule to which the APA's rulemaking provisions applied because the adjustments to petitioner’s income could be sustained only on the basis of the final rule, and Treasury had invoked its general legislative rulemaking authority under section 7805(a) of the Code in promulgating the final rule.

The parties also disagreed on whether the standard for review of the regulation was set forth in State Farm\textsuperscript{14} or Chevron. This is where Treasury and the Service lost the war. The Tax Court concluded that Treasury regulations must satisfy the State Farm requirements.

Citing Mayo, the court indicated it would not carve out a special tax exception to administrative law and concluded that State Farm’s “reasoned decisionmaking” was the appropriate standard.

The Tax Court then concluded that there was no articulation of a reasoned basis for the regulatory decision; in fact, commentators’ work indicated that no cost-sharing arrangements included stock-based compensation.\textsuperscript{16} The Tax Court slammed the Service's “hail Mary” play asking that the court recognize Treasury's expertise on the issue of cost-sharing of stock-based compensation: “Treasury admits that it had no knowledge of any transaction in which parties operating at arm’s length shared stock-based compensation.”\textsuperscript{17}

Ultimately, the Tax Court determined that the regulation lacked any basis in fact. Although improving administrability is a reasonable agency undertaking, the government failed to identify this as an explanation. Even if this was its intent, the Tax Court concluded that it could not uphold the regulation on that basis without supporting factual findings.

The Tax Court also rejected Treasury's argument for application of the “harmless error” rule of APA section 706. In fact, it excoriated Treasury's “ipse dixit conclusion” and its lack of responses to the data-

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\textsuperscript{14} Motor Vehicle Manufacturers Ass'n v. State Farm Ins., 463 U.S. 29 (1983).
\textsuperscript{15} Altera, supra note 1, at 47.
\textsuperscript{16} Altera, supra note 1, at 22-26.
\textsuperscript{17} Altera, supra note 1, at 55.
based arguments about stock-based compensation, stating that this “epitomizes arbitrary and capricious
decisionmaking.”

It seems clear that Altera is a bellwether of change for Treasury. It can no longer rely on tax
exceptionalism to support a relaxed administrative-law standard. For legislative regulations, the full APA
rules will apply. Challenges to regulations will undoubtedly increase substantially. [Editor’s Note: The
government has filed a notice of appeal to the Ninth Circuit in Altera.] ■
PRACTICE POINTS

Time Will Not Make This Problem Disappear: The Open-Ended Statute of Limitations for Taxpayers With Delinquent Foreign Information Returns

By Megan L. Brackney, Kostelanetz & Fink LLP, New York, NY

Although section 6501(c)(8) has been in the Code for several years, many tax practitioners remain unaware of this exception to the general three-year statute of limitations for assessment of tax for delinquent foreign information returns. This exception can significantly influence a taxpayer’s decision as to whether, and how, to correct past non-compliance. This article first discusses the exception, and then describes the alternative methods for late filing of foreign information returns.

A. The Application of the Exception

The foreign information returns referenced include Form 8938, Statement of Specified Foreign Financial Assets, Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations, and Form 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts, among others. Although section 6501(c)(8) does not apply to the failure to file a Report of a Foreign Bank or Financial Account (FBAR), many taxpayers who have failed to file FBARs also have failed to file Form 8938 reporting their foreign accounts as specified foreign financial assets, and thus they still need to be concerned about section 6501(c)(8). For those uncertain about their responsibilities, the Service provides a helpful comparison of the filing thresholds for FBARs and Forms 8938.

Under section 6501(a), the Service generally has three years from the date a tax return is filed to assess additional tax, but there are numerous exceptions. Since the March 18, 2010 effective date of revised section 6501(c)(8), the time for assessment of tax does not expire until three years after the date that all required foreign information returns have been filed. The application of section 6501(c)(8) depends on the tax year at issue. For tax returns for which the general three-year statute of limitations for assessment had not yet expired before March 18, 2010 and for all returns filed after March 18, 2010, the statute of limitations for assessment is open for all items on the return until the delinquent foreign information return is filed, unless the failure to file the foreign information return was due to reasonable cause and not willful neglect. If the taxpayer establishes reasonable cause, the limitations period is extended only for the items related to the failure to provide the required information. For tax years for which the statute of

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limitations expired before March 18, 2010, the statute of limitations remains open with respect to any items related to the failure to furnish the required information.3

An example of an item related to the failure to file a foreign information return is subpart F income from a foreign corporation for which the taxpayer failed to file a required Form 5471.4

Accordingly, for taxpayers who have not filed required foreign information returns, the statute of limitations remains open at best only for items related to those forms and at worst, for all items on the return. If the taxpayer files the foreign information returns, the statute of limitations begins to run and the Service has three years to assess additional tax, unless some other exception to the statute of limitations applies.

In Chief Counsel Advisory 200748006, the Service explained the standard for reasonable cause in the context of failure to file foreign information returns. The CCA specifically addresses penalties for failure to file Form 5471, but the same rationale applies to the failure to file other foreign information returns and for determining reasonable cause under section 6501(c)(8). The CCA stated that the Service will apply the reasonable cause standard for failure to file income tax returns under section 6651, which requires taxpayers to exercise ordinary business care and prudence. The Service has defined ordinary business care and prudence, as “making provisions for business obligations to be met when reasonably foreseeable events occur,” and “taking that degree of care that a reasonably prudent person would exercise.”5

In deciding whether the taxpayer has met this standard, the Service considers the explanations for the failure to file the foreign information return, the taxpayer’s compliance history, the length of time between the event cited as a reason for the noncompliance and the subsequent compliance, whether there were circumstances beyond the taxpayer’s control, and, in some cases, the taxpayer’s ignorance of the law or inability to get records. The Service has warned taxpayers with business and holdings offshore, however, that “[i]t is not reasonable or prudent for taxpayers to have no knowledge of, or to solely rely on others for, international transactions.”6

The indefinite and open-ended statute of limitations for assessment can be problematic. First, although there is a practical limit to how far back the Service is able to assess tax and penalties due to the difficulty of obtaining information with the passage of time, a taxpayer nonetheless remains vulnerable to audit and assessment of tax indefinitely, if the statute of limitations never closes. Second, a taxpayer’s ability to present a reasonable cause defense decreases over time, because there may no longer be evidence in the taxpayer’s possession to substantiate the claim and because the continuing failure to correct after learning about the error further weakens any reasonable cause defense.

3 Id.
4 See e.g., Chief Counsel Attorney Memorandum, AM 2014-002 (Mar. 7, 2014).
5 Internal Revenue Manual (IRM) 20.1.1.3.2.2 (Feb. 22, 2008).
6 IRM 20.1.9.1.1(4) (Mar. 21, 2013).
Third, federal interest on underpayments is high: for non-corporate taxpayers, it is three points above the federal short-term rate and compounds daily, as indicated in fourth-quarter reports. A taxpayer who failed to report a foreign asset years ago may be unpleasantly surprised to receive a bill that includes more interest than the original tax would have been had it been paid when the error first occurred.

In addition to the statute of limitations issue addressed in this article, failure to file foreign information returns can lead to significant penalties. A full discussion of those penalties is available as part of the ABA Tax Section CLE Nuts & Bolts Series, titled “International Tax Enforcement: FBARs, FATCA, and More”.

B. Options for Filing Delinquent Foreign Information Returns

There are several options available for filing delinquent foreign information returns. As an initial matter, the foreign information returns referred to in section 6501(c)(8) are not stand-alone forms, but are attached to the taxpayer’s income tax return. For example, if an individual taxpayer failed to file a Form 8938, the taxpayer would remedy by filing a Form 1040X Amended Individual Income Tax Return to which the delinquent Form 8938 would be attached.

In order to avoid or reduce penalties, as well as to start the statute of limitations on assessment, a taxpayer with delinquent foreign information returns may be eligible to use one of the Service’s voluntary compliance procedures. Below is a brief description of each program, with hyperlinks to the applicable procedures on the Service’s website. Although these programs are primarily directed to foreign bank account non-compliance, they also can be used to file information returns for other offshore assets and interests.

First, the taxpayer can file through the Service’s procedures for delinquent international information returns. This procedure is appropriate for taxpayers who can establish reasonable cause for their failure to file or whose failure to file has caused no or nominal tax non-compliance. This procedure cannot be used, however, if the taxpayer is already under audit or investigation or has otherwise been contacted by the Service about the delinquent information returns. Under this procedure, the taxpayer files the delinquent returns with a statement of the facts establishing reasonable cause for the failure to file. In the “Frequently Asked Questions” section, the Service explains that taxpayers with tax noncompliance can use this procedure, but that the Service may impose penalties if it does not accept the taxpayer’s reasonable cause explanation.

The next option, available only for taxpayers who are not under audit or investigation, is for the taxpayer to file amended returns through the Service’s Streamlined Filing Compliance Procedures. Under the procedures for U.S. taxpayers who reside in the United States, U.S. residents must file amended returns for the preceding three tax years and FBARs for the preceding six tax years, pay any tax due with interest, and pay a penalty of 5% of the highest aggregate value of assets that should have been reported on the Form 8938—i.e., the value of their previously unreported specified foreign assets. Under the procedures for U.S. taxpayers who live abroad, the terms of this program are the same, except that the procedure may also be used to file original Forms 1040 as well as amended returns, and no penalties are imposed.

This material was presented at the Tax Bridge to Practice program during the Tax Section’s 2014 May Meeting.
Both resident and non-resident U.S. taxpayers must submit a statement to the Service, using either Form 14653 or Form 14654, that explains the circumstances of their non-compliance and certifies that the failure to file was “non-willful.” In this context, “non-willful” means that the taxpayer’s conduct was “due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law.” This is a less stringent standard than reasonable cause.

Finally, there is an option most likely to be used by taxpayers who are concerned that the Service may view their non-compliance as willful or fraudulent and impose steep civil penalties or prosecute them criminally. It is the Service’s Offshore Voluntary Disclosure Program (the OVDP). Under the terms of the OVDP, the taxpayer must file amended returns, including all delinquent foreign information returns and FBARs for the preceding eight tax years, pay the tax due plus a 20% accuracy penalty and interest, and pay a penalty of 27.5% of the highest balance during that period of any unreported foreign accounts and other foreign assets related to tax non-compliance. This penalty will be increased to 50% of the highest balance during the period at issue for those taxpayers who had an undisclosed account with a foreign financial institution or facilitator identified by the Service as under criminal investigation or as having been served with a John Doe summons. The Service maintains an up-to-date list of these foreign financial institutions and facilitators. The OVDP is available to any taxpayer, regardless of whether they acted willfully or committed tax fraud, so long as (i) the taxpayer is not under audit or investigation and (ii) the income being reported is from a legal source.

Because the statute of limitations will not close on an income tax return with incomplete foreign information reporting, “waiting it out,” is not a solution to the problem of non-compliance. Tax practitioners should assess their clients’ unique circumstances and determine the best method for coming into compliance, keeping in mind the tax practitioner’s own obligations under Circular 230. In the context of delinquent foreign information returns, tax practitioners should inform their clients about the extended statute of limitations as well as the potential penalties, and then discuss whether one of the Service's procedures is appropriate for them.8

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8 See 31 C.F.R. § 10.21.
**PRO BONO MATTERS**

**Pro Bono Matters in the City of (Fallen) Angels**

By Francine J. Lipman, William S. Boyd Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas, NV

Income and wealth inequality is grave in the City of Angels. “We have the most millionaires, the most mansions, but also the most acute poverty in the country,” reports Gary Blasi, a law professor at the University of California, Los Angeles. In Los Angeles County, an estimated 254,000 men, women, and children experience homelessness during some part of the year. To put this population in perspective, this is the equivalent of everyone living in Buffalo, New York; Chandler, Arizona; or Madison, Wisconsin. “The human suffering that occurs on [L.A.’s] Skid Row is astonishing—it will literally take your breath away. That kind of suffering, that kind of desperation should not be happening, but it is. It’s a humanitarian crisis and a moral shame,” said Councilman Jose Huizar in late 2015.

On any given night, about 82,000 Angelinos are homeless. Included in this astronomical number are 4,800 to 10,000 unaccompanied youth. About 20% are military veterans and almost 50% are women, many with children. Somehow, about 20% of homeless Angelinos are currently employed, and over 40% were employed at some time within the last year. While unemployment has been decreasing in Los Angeles since 2013, homelessness has increased 12%. As a result, Los Angeles’ Mayor Garcetti and City Council members have once again declared a “state of emergency on homelessness” hoping to stay this steadily rising tide, especially with the looming threat of a severe El Niño in 2016.

Tragically, the problem is more severe than these numbers portend. Los Angeles County’s shortage of affordable housing has similarly reached a state of emergency. An average renter must earn $38.77 an hour to afford average housing. When the high cost of housing is considered, Los Angeles County has one of the highest poverty rates in the nation at 26% or one in four households. With a population of over 10 million, this represents more than 2.6 million people (almost equivalent to the population of Nevada). Because of extreme affordable housing shortages, millions of Angelinos are forced to live in unsafe and unhealthy conditions. Overcrowding for low-income renters in Los Angeles County is three times greater than the national average, contributing significantly to poor health and academic achievement in vulnerable families and children.

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3. For a good overview of the problem, see this LA Times story (Jan. 7, 2016).
Fortunately, the second largest city in the United States has helpers. Helpers include lawyers who work on the front lines day in and day out providing access to justice, including economic “tax” justice or antipoverty relief increasingly delivered through our income tax systems. The Earned Income Tax Credit, the Child Tax Credit, and, most recently, the Premium Tax Credit help lift millions of children and their parents out of poverty each year. Not surprisingly, millions of Angelinos qualify for and benefit from these critical social programs.

Notably, the Taxpayer Advocate Service has listed Los Angeles as an underserved location needing more low-income taxpayer assistance. One of the rising angels answering this demand is tax lawyer Ariel Stevenson. Ariel is a 2014 Skadden Fellow who earned her law degree at Yale and who is presently working with vulnerable Angelinos at Bet Tzedek Legal Services.

In Ariel Stevenson’s own words . . .

When Jimmy came to me for legal help, he had been trying to resolve his tax problem for nearly three years. A retired bus driver in his 80s, Jimmy had lost his entire life savings to a devastating Ponzi scheme that targeted retirees like him. To further compound the nightmare, the Service was including his lost savings as income. Because the savings had been held in an Individual Retirement Account, accounting for the loss was complicated from a tax perspective. Jimmy did his best to explain the loss of his life savings, but he was unsuccessful. What seemed like a straightforward case became inexplicably complex, made more so after years of amended returns and conflicting advice from different government employees and tax preparers. Jimmy needed a tax attorney, but with low income, his options were practically nonexistent. Eventually, the Service assessed nearly $10,000 in taxes, penalties, and interest. Jimmy was devastated.

Access to tax justice is limited for people like Jimmy, who face complicated tax controversies and cannot afford an attorney. Fortunately, Jimmy found his way to the Bet Tzedek Legal Services Tax Clinic (BT-TC), and we were able to take his case. Winning Jimmy’s case was not a foregone conclusion, but with an attorney by his side, at least he stood a fighting chance.

I started the BT-TC during my Skadden Fellowship, with the goal of increasing access to tax justice for low-income Los Angeles residents. With a 2016 IRS Low-Income Taxpayer Clinic (LITC) grant, Bet Tzedek will be able to continue and expand its work after the end of my fellowship. The BT-TC provides tax controversy representation and tax education resources to underserved communities. I launched the clinic because I noticed an urgent need for tax legal services while representing immigrant workers during law school. For example, complicated tax issues arose for workers whose employers had misclassified them as independent contractors, successful plaintiffs who struggled to understand the tax consequences of their wage claim awards, or unauthorized workers applying for Individual Tax Identification Numbers...
(ITINs) to file their tax returns. At the time, the legal service agencies in Los Angeles County were not well connected to the existing pro bono tax legal resources in the area. Even when attorneys were aware of tax services, with so few clinics serving such a geographically expansive area, there simply were not enough services to go around.

Increasing access to justice starts with increasing access. That means taking our direct services to our client communities, rather than waiting for them to find us. With a population of over 10 million people, Los Angeles County comprises over a quarter of the entire population of California. Almost 2 million L.A. County residents live below the official poverty line, over 3.5 million are foreign born, and just over one million are unauthorized community members. Reaching these populations is challenging, but thanks to Bet Tzedek’s well-established partnerships with community organizations, news about our tax clinic spread quickly. Bet Tzedek reaches seniors through outreach at twenty-seven senior centers, and homeless and low-income individuals via outreach at food pantries throughout L.A. County. Bet Tzedek attorneys work with labor centers and unions to reach low-income workers, and immigrant rights advocates to reach underserved immigrant communities. Importantly, by foregoing Legal Services Corporation (LSC) funding (a financial sacrifice for the organization), Bet Tzedek is able to represent undocumented immigrants, who would otherwise have no access to free legal help due to LSC funding restrictions. All of these established connections have enabled the BT-TC to reach L.A.’s underserved communities, connecting them with tax legal services that they could not otherwise afford.

Merely reaching underserved communities, although necessary, is only part of the battle. Even after clients are connected with advocates, low-income clients face complicated barriers that create and exacerbate their legal problems and often limit their ability to receive tax justice. For example, many of Bet Tzedek’s clients have limited English proficiency as well as limited literacy generally. Many others are disabled, or struggling with mental health disorders. These challenges make it nearly impossible for individuals to receive fair treatment without an advocate to assist them. Additionally, living in or near poverty creates obstacles that contribute to tax problems and make legal representation more complicated. For example, many clients cannot maintain a bank account due to bank fees, which means they often lack the necessary financial records to prepare accurate returns, respond to an audit, or file an Offer in Compromise. These types of problems are both symptoms and perpetuators of poverty, and they are issues that come up constantly for legal services clients.

Many lawyers, both inside and outside of the public interest world, are surprised to hear that low-income individuals face complex tax problems. Many people mistakenly assume that the extent of a low-income person’s interaction with the tax system is to claim a refundable credit. In reality, low-income taxpayers
have incredibly complex tax situations. Home foreclosures, early IRA distributions, and cancelled indebtedness are examples of common life events that trigger tax issues for low-income individuals. Additionally, tax levies and liens are extremely destabilizing, making it impossible for a family to pay their monthly bills and even contributing to homelessness. These are serious, life-changing situations.

There are solutions for these systemic problems, not the least of which is increasing government funding for tax services. However, we cannot only rely on the government to help those urgently in need of tax assistance. Meaningfully increasing access to tax justice requires community-wide efforts. Providing pro bono assistance is one simple way that tax attorneys can play a part in expanding access to justice for low-income taxpayers. LITCs are an excellent vehicle for those interested in taking on pro bono cases, but they are not the only option. LITCs are necessarily limited in terms of the clients they can serve and the scope of cases they can accept. Thus, offering pro bono assistance through non-LITC organizations can help expand access to tax justice for those who do not qualify for services through an LITC, including low-income taxpayers whose income is too high for the program’s income thresholds and small-business taxpayers.

I believe that more can be done to expand access to tax justice in the public interest world as well. Through my experience running a tax clinic, I can attest that there are many legal service advocates who want to help their clients with tax problems, but they simply do not know where to start. Unfortunately, many of these advocates lack access to necessary practice aids, especially if they work outside of large law firms or LITCs. The low-income tax practitioner community should be mindful of the needs of non-tax specialists and small firm attorneys who are willing to help their lower-income clients with tax problems. For example, tax practitioners should consider more broadly sharing sample documents and delivering free training events and webinars targeting non-tax audiences. This is commonplace in other legal service fields, and when I offer such trainings, I find an eager audience of practitioners. Ultimately, a national support center for low-income tax law is an ideal, albeit long-term, goal.

If there had been more tax advocates in Los Angeles, Jimmy’s tax problem would never have become so personally devastating and financially crippling. By the time Bet Tzedek took his case, he had already paid over $1,500 for a liability that he did not actually owe. After we took the case, I compiled an audit reconsideration request that included over a hundred pages of supporting exhibits. When an examiner finally reviewed the request—over six months later—she immediately agreed with our analysis and cancelled the entire liability. After three years of struggling to make his voice heard before one of our nation’s most challenged government agencies, Jimmy finally received tax justice.
An Interview with 2015-2017 Christine A. Brunswick Public Service Fellow Frank DiPietro

By Derek B. Wagner, Pro Bono Counsel, ABA Section of Taxation, Washington, DC

Across the United States, immigrants face a number of challenges as they try to become permanent residents or full U.S. citizens. One important element of the naturalization process is that the individual demonstrate compliance with U.S. tax laws, specifically the filing of tax returns and payment of taxes owed. Unfortunately, the federal income tax can often be a confusing web of complex laws and regulations for immigrants, difficult to understand even under the best of circumstances. Many immigrants, particularly those with family members back in their home countries, are likely to make mistakes with respect to filing status and dependency exemptions. Those who seek the assistance of paid return preparers often find themselves in further trouble, as many unscrupulous preparers prey on immigrants by preparing fraudulent returns to inflate the tax refund.1 Victims of these practices do not realize what has happened until the Service contacts them with adjustments seeking the correct amount of tax and, often, additions and penalties. By that time, the refunds have already been spent, the return preparers are nowhere to be found, and the taxpayers are left with a problem they cannot solve on their own. Furthermore, if the tax issues are not resolved, the immigrants cannot become full citizens.

In the Twin Cities and surrounding areas, Frank DiPietro is working to address these and similar issues. Frank is a Christine A. Brunswick Public Service Fellow. Through a partnership with the Robert M. Mankoff Low Income Taxpayer Clinic and the Center for New Americans, both at the University of Minnesota Law School, Frank provides tax education, outreach, and representation services to non-citizens, so that they can better understand their responsibilities and assert their rights as taxpayers.

ABA Tax Times recently sat down with Frank to discuss the important work that he is doing as part of his Fellowship.

ATT: What inspired you to apply for the Christine A. Brunswick Public Service Fellowship?

FD: For more than two years, I worked at the University of Minnesota Tax Clinic as a student attorney and student director. I saw clients with all types of legal issues, but in particular, immigrants who had tried in good faith to comply with the tax laws, regulations, forms, and Service procedures, but who had been penalized when they were unable to do so. Also, I enjoyed working with individual clients who

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were often hard-working, good people. It is a tremendous boon to an immigrant family that is living at the poverty level when they are able to save a few thousand dollars with the assistance of a tax lawyer. One time, I received a tearful “thank you” from a mother who received a refund and said she could not otherwise buy clothes for her kids for the start of school.

Things like that you don’t forget, and I knew I wanted a job that would allow me to keep doing that kind of work.

**ATT:** Can you describe your background and prior work experience, both in and out of tax?

**FD:** Prior to attending the University of Minnesota Law School, I worked first in finance, arranging Small Business Administration loans for small business owners in southern New York. In determining whether people or small businesses qualified for such a loan, I immediately did a financial analysis based on their tax returns.

But that financial analysis of their tax returns was only part of the story. I also had to learn the story of the business, why the business owners created their business, and see how this loan would help them and their business to grow. It was amazing to see the person and story behind the numbers and to help people attain their dreams. Unfortunately, the Great Recession virtually eliminated the availability of these loans, and I needed a new career path.

**ATT:** Please tell me about your sponsoring organization and how you came to choose it.

**FD:** Although the overall sponsoring organization is the University of Minnesota, I work directly for two clinics in the university’s Law School – the Center for New Americans and the Ronald M. Mankoff Tax Clinic. The Ronald M. Mankoff Tax Clinic provides an opportunity for law students to represent low-income taxpayers who have a controversy with the Service. The Mankoff Tax Clinic was an easy choice for the Fellowship because of all the work it does with low-income taxpayers.

I wanted more for the Fellowship, however, than just controversy work with low-income taxpayers. The university’s Center for New Americans, the only program of its kind in the United States, was designed in partnership with leading area law firms and non-profit immigration legal services. Its mission is to expand urgently needed legal services for non-citizens, pursue litigation that will improve our nation’s immigration laws, and educate non-citizens about their rights. Through the Center for New Americans’ existing partnerships with such organizations as the Immigrant Law Center of Minnesota and the Advocates for Human Rights, I knew I could combine my tax work and my interest in immigrant communities. Through the Center, I am able to reach out to local immigrant communities and educate them on how to file their taxes, why they should file their taxes, and where to go if they have any kind of tax issue. The Fellowship has thus provided community outreach opportunities that would not have existed without its support.

**ATT:** Please tell me about the work you do. What sort of projects are you working on?

*It is a tremendous boon to an immigrant family that is living at the poverty level when they are able to save a few thousand dollars with the assistance of a tax lawyer.*
The biggest part of my work is community outreach. I go wherever and whenever I can to speak about tax compliance and to show immigrant communities that there are resources available when needed.

FD: The biggest part of my work is community outreach. I go wherever and whenever I can to speak about tax compliance and to show immigrant communities that there are resources available when needed. I have had meetings and education sessions with the African Development Center, the Karen Organization of Minnesota, and Pangea Care, as well as many other groups that now refer cases to us. In the past, they did not even know our clinic existed.

When I speak to various organizations and communities, I highlight the importance of proper tax filings, especially when it comes to claiming the Earned Income Tax Credit and Head of Household filing status. I believe this is the biggest issue in relation to tax compliance within local immigrant communities, and I want to help them understand the importance of claiming these benefits only when they are entitled to them.

The major project I am now working on is ramping up my outreach schedule for the upcoming tax season. I have found that the period from December to February is when community outreach is most needed and most effective. Essentially, this is the time when most low-income taxpayers who hope to receive refunds begin planning and preparing to file their returns. I will be working with a prominent VITA site, Prepare and Prosper, to try to ensure that the local community knows there is a free and honest tax-preparation site that can serve their needs. I will be working with the Hennepin and Ramsay County Library systems, the immigrant groups I have mentioned above, and other community organizations such as Easter Seals to set up education sessions about proper tax compliance and resources for tax help. The students of the Tax Clinic and the Center for New Americans will attend these sessions and provide their knowledge and experience in dealing with tax issues, as well as interpretation services, so our message can be understood by everyone.

ATT: What has been your biggest challenge so far?

FD: My biggest challenge has been organizing and scheduling community events. Often I am able to meet with various organizations’ staffers who support local immigrant groups. This gets the word out that the Center for New Americans and the Mankoff Tax Clinic are here to help. Nevertheless, it is very hard to meet directly with members of the community because of the need for a captive audience. I have found that just setting up events and advertising them often leads to poor attendance. To make sure I can meet people, often I need a community organization’s assistance: ideally, the organizations will allow me to use their regularly scheduled meeting times with the communities they support. This process can be difficult, because the organizations must be convinced that it is reasonable to allow a relatively unknown person to take up half an hour, if not more, of the organization’s time.
What has been the most rewarding part of your Fellowship?

I feel I really am making a difference in people’s lives. I know I am helping people receive tax refunds who desperately need them. The Karen Organization of Minnesota alone has referred several cases—most of them before the U.S. tax court—in the past few months. Those clients, we believe, are entitled to their refunds, but they would not have had a chance to receive them prior to the Fellowship because they did not understand the Service’s examination process or know how to file a tax court petition. Simply put, imagine an impoverished immigrant family of five losing a $9,000 refund due them because they did not understand what a Notice of Deficiency is.

Also, other families trying to obtain U.S. citizenship have been denied because their tax returns contained errors. Some immigrant communities, including certain East African cultures, do not recognize that there is a difference between “culturally married” and “legally married” and may improperly file a joint return. This simple issue can prevent someone from obtaining U.S. citizenship and has come up many times through the Fellowship outreach program. I believe we have prevented significant problems like this from occurring with the outreach program.

Do you have any immediate plans for your career following the Fellowship? How has the Fellowship impacted your career goals? Do you expect to stay with your sponsoring organization after the Fellowship has ended?

I have no immediate plans. Thankfully, I am only about a quarter of the way through my two-year Fellowship. But the Fellowship has impacted me greatly because I know this is what I want to do for the rest of my career. I have thoroughly enjoyed working with the local community as well as going to all of the ABA Section of Taxation meetings and getting the opportunity to meet the people there and learn more than I ever dreamed possible about working with the low-income taxpayer community. There is a chance I will stay with my organization when my Fellowship is done. The Center for New Americans’ request for permanent funding from its funding sources will be issued around the end of my Fellowship, and I hope to be included in that request.
As tax professionals, most readers of this publication are likely well acquainted with the tax advantages of charitable giving. To summarize briefly, individuals who itemize their deductions are entitled to deduct up to 50% of their adjusted gross income (computed without regard to any net operating loss carrybacks) for cash contributions to tax-exempt public charities described in section 501(c)(3). The fair market value of appreciated securities held for the long-term capital gain holding period and other capital gain property (capital assets—including property used in a trade or business as described in section 1231(b) of the Code—whose sale at fair market value would produce long-term capital gain) contributed to public charities may be deducted up to 30% of adjusted gross income. Contributions which may not be used in a taxable year because of the percentage limitations may be carried forward to the succeeding five taxable years. Partners in professional service partnerships may also deduct on their individual income tax returns their distributive shares of charitable contributions made by the partnership.

What is perhaps less well known is that professional associations such as the ABA, a section 501(c)(6) tax-exempt professional association that is generally not eligible to receive charitable contributions, may establish restricted funds for that purpose. At the behest of the Section, the ABA established the ABA Section of Taxation Tax Assistance Public Service Endowment Fund (TAPS) as part of the ABA's Fund for Justice and Education (FJE). The TAPS fund is intended to provide stable, long-term funding for public service programs for underserved taxpayers. Contributions to TAPS are therefore tax deductible as charitable contributions through the mechanism described herein.

**Associations and Charitable or Educational Affiliates Background**

Most professional organizations are tax exempt as section 501(c)(6) business leagues. Bar associations

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1. I.R.C. § 170(b)(1)(A) (percentage limitation for cash contributions to public charities) and § 170(b)(1)(G) (defining the “contribution base” to which the percentage limitations apply).
2. I.R.C. § 170(b)(1)(C). Deductions for contributions of ordinary income property must be reduced by the amount of ordinary income that would have been recognized if the donor had sold the property at the time of the contribution. I.R.C. §170(e)(1)(A). Special limitations also apply for contributions of tangible personal property where the use of the property is unrelated to the donee's exempt function, and to various other types of property. I.R.C. § 170(e)(1)(B).
4. I.R.C. § 702(a)(4). Under Treas. Reg. § 1.703-1(a)(2)(iv), a “partner is considered as having paid within his taxable year his distributive share of any contribution or gift, payment of which was actually made by the partnership within its taxable year ending within or with the partner's taxable year.” See also P.L.R. 2002-08-019 (Feb. 22, 2002).
generally have this characterization because they engage in substantial lobbying activity and may also engage in judicial evaluation programs that are not permitted for section 501(c)(3) charitable organizations.\(^5\)

Although section 501(c)(6) organizations commonly engage in some activities that might be regarded as “charitable” or “educational” under section 501(c)(3), such as public education or activities that benefit charitable classes or the community as a whole, section 501(c)(6) organizations generally do not operate in a manner which would permit them to qualify for charitable contributions. As a consequence, it is relatively common for trade or professional associations to form not-for-profit corporate affiliates (or, occasionally, charitable trusts) which qualify as section 501(c)(3) organizations. Indeed, the Code specifically acknowledges that organizations carrying out the charitable or educational functions of section 501(c)(6) organizations may be public charities in appropriate circumstances.\(^6\)

Although the most common form of organization for association-related charitable organizations is the corporate form, another option is the creation of a separate restricted fund within the association. In Revenue Ruling 54-243,\(^7\) the Service ruled that tax-exempt organizations not described in the 1939 Code predecessor of section 501(c)(3) could “establish a separate fund exclusively for religious, charitable, scientific, literary, or educational purposes, apart from their other funds.” Provided that the fund “is operated exclusively for such purposes, separate books and accounts are maintained,” and, upon dissolution or otherwise, the fund’s assets are restricted to use for its specific purposes—rather than the general purposes of the exempt organization creating the fund—the fund can qualify for exemption as a charitable organization eligible to receive tax-deductible charitable contributions. Over the years, several published rulings have cited Rev. Rul. 54-243 as also applicable to organizations formed under then-current versions of the Code,\(^8\) and it has not been revoked.\(^9\)

The ABA’s FJE is such an organization.\(^10\) The FJE, created in 1961, carries on a number of educational and charitable activities. It has its own bylaws and is governed by a board consisting of the current members of the ABA Board of Governors. Its officers are the current President, President-Elect, Secretary,
and Treasurer of the ABA, who serve, respectively, as the FJE’s President, Vice-President, Secretary, and Treasurer. The assets of the FJE are required to be kept separate from the assets of the ABA, and the FJE maintains separate books and records, has an annual audit of its financial statements as part of the ABA’s annual audit, and files its own Form 990.  

TAPS Purposes and Activities

TAPS was created in honor of the Section of Taxation’s 75th Anniversary and its commitment to serving justice for indigent taxpayers. TAPS is a permanent endowment within the FJE: the principal of the fund will be maintained to produce income to support the Section of Taxation’s public service programs. Following the FJE’s approval of the creation of TAPS, the Section contributed $2.5 million of its reserves to fund the TAPS endowment. As of December 31, 2015, TAPS has already received just over $300,000 in additional cash contributions and pledges. The overall fundraising goal is $5 million, a sum which it is anticipated will provide sufficient income to support the Christine A. Brunswick Public Service Fellowships. Contributions are being solicited from individuals, law firms, foundations, corporations, and other outside sources.

The Christine A. Brunswick Public Service Fellowships are awarded to two recent law school graduates each year. These fellows serve a two-year term providing tax-related legal assistance to the underserved. Fellows receive funding for their salaries and benefits (at a level commensurate with federal judicial clerks) and law school debt service, as well as stipends to attend Section meetings. In addition, fellows are assigned Section mentors who are available for consultation throughout the term of the fellowship.

Applicants for fellowships must secure a position with a nonprofit legal services organization that is willing to serve as the fellow’s sponsor to receive the grant funds and supervise the fellow’s work. To date, fellowships have been funded with the following nonprofit legal services organizations:

- Center for Economic Progress (Chicago, Illinois)
- Community Action Program (Lancaster County, Pennsylvania)
- Legal Aid Society of Middle Tennessee (Nashville, Tennessee)
- Legal Counsel for the Elderly (Washington, DC)
- National Women’s Law Center (Washington, DC)
- Neighborhood Christian Legal Clinic (Indianapolis, Indiana)
- Oklahoma Indian Legal Services (Oklahoma City, Oklahoma)
- Philadelphia Legal Assistance (Philadelphia, Pennsylvania)
- Pine Tree Legal Assistance (Portland, Maine)

11 See ABA Greenbook.
12 Providing funds to other section 501(c)(3) organizations for the accomplishment of their charitable programs is a legitimate charitable purpose for a section 501(c)(3) organization such as FJE. See, e.g., Rev. Rul. 67-149, 1967-1 C.B. 133.
• Prairie State Legal Service (Rockford, Illinois)
• Ronald M. Mankof Tax Clinic and the Center for New Americans (Minneapolis, Minnesota)
• SeniorLAW Center (Philadelphia, Pennsylvania)
• South Brooklyn Legal Services (Brooklyn, New York)
• University of Washington Federal Tax Clinic (Pasco, Washington)

TAPS income may also be utilized to carry out other Section public service initiatives. Such programs include VITA programs supported by Section members; an “Adopt a Base” program through which Section members or law firms have adopted 34 bases where they offer programs training military personnel to prepare returns for colleagues as part of the VITA program; representation of pro se taxpayers at U.S. Tax Court calendar calls around the country; publication of guides and support for tax-related continuing legal education for clinicians from low-income taxpayer clinics; and provision of volunteer tax assistance to victims of disasters.\(^\text{13}\) TAPS income might also be tapped to support educational programs or studies regarding the needs of underserved taxpayers.

**Conclusion**

Contributions to TAPS are a great way to secure a charitable contribution deduction while at the same time supporting public service activities of direct interest to tax professionals. TAPS accepts contributions of cash or appreciated securities, and will consider other planned giving options. In addition, donors will be recognized at Section meetings and provided other forms of donor recognition. You can contribute to the TAPS fund [here](#).

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13 Actual funding of Section programs in these areas would be consistent with Rev. Rul. 68-489, 1968-2 C.B. 210, which allows section 501(c)(3) organizations (such as FJE) to carry out their purposes by making grants to organizations which are not themselves exempt as section 501(c)(3) organizations. FJE, as required by Rev. Rul. 68-489, will limit distributions from TAPS income to specific programs that further the section 501(c)(3) purposes of FJE and TAPS, will maintain control and discretion as to the use of the funds, and will keep records establishing that the distributed amounts were used for section 501(c)(3) purposes.
PRO BONO MATTERS

2016 Recipient of the Janet R. Spragens Pro Bono Award: Andrew R. Roberson

By John P. Barrie, Bryan Cave LLP, Washington, DC

As current chair of the Tax Section’s Pro Bono Award Committee, it is my privilege to announce that this year’s recipient of the Janet R. Spragens Pro Bono Award is Andrew R. Roberson with McDermott Will & Emery in Chicago, IL.

This award was established in 2002 to recognize one or more individuals or law firms for outstanding and sustained achievements in pro bono activities in tax law. In 2007, the award was renamed in honor of Janet R. Spragens, who received the award in 2006 in recognition to her dedication to the development of low-income taxpayer clinics throughout the United States.

Andy has set a high bar for others to follow in the giving of his time: he is a great role model for our Tax Section members who seek to volunteer their time to provide legal assistance to low-income taxpayers. Andy serves as the current chair of the Tax Section’s Pro Bono and Tax Clinic Committee. In that capacity, Andy has developed the Partnering for Pro Bono initiative, a new program designed to pair law firms with Low Income Tax Clinics to provide much needed assistance. Andy is also actively involved in organizing and promoting opportunities for attorneys to provide pro bono tax work, as well as coordinating efforts to comment on issues that impact low-income taxpayers.

Andy and his firm have been instrumental in helping the U.S. Tax Court achieve 100% coverage for its Calendar Call program, providing coverage to areas where local bar associations and clinics have been unavailable. He regularly provides pro bono tax controversy representation through the LITC at Center for Economic Progress in Chicago, including successfully litigating the Rand case, which set an important precedent regarding the calculation of the accuracy-related penalty with respect to refundable credits.

ATT readers are invited to listen to Andy’s acceptance remarks delivered during the Plenary Luncheon at the Midyear meeting here.
IN THE STACKS

Surviving Poverty in a Post-Welfare Reform America

By Danshera Cords, Visiting Professor of Law, University of Pittsburgh School of Law, Pittsburgh, PA

In $2.00 a Day, Kathryn J. Edin and H. Luke Shaefer create a clear but disheartening picture of conditions faced by those surviving the deepest poverty in the United States. Through six case studies selected to explore a variety of ethnographic backgrounds, Edin and Shaefer illustrate the grave crisis facing a growing number of Americans. Their case studies demonstrate the failure of the system to provide opportunities for those left behind in the wake of the elimination of the cash safety net during welfare reform in the 1990s and the loss of low-wage jobs during the Great Recession.

At first blush this book and its news of grinding poverty may not seem tax related, but many of the welfare reforms of the last two decades have been implemented through the Code and are administered by the Service. Two tax changes intended to help those less well off include the 1996 expansion of the Earned Income Tax Credit (EITC) and the Child Tax Credit (CTC), which improved conditions for the working poor, and more recently, the Patient Protection and Affordable Care Act of 2010 (ACA), which sought to improve access to health care, especially for the poor. Thus, it seems appropriate to consider what recent studies of poverty tell us about the need for, or efficacy of, tax-based efforts to address these issues.

Following up in 2010 on work she had conducted in the early 1990s on the spending patterns of the nation’s welfare recipients, Professor Edin began noticing dramatic changes in cash expenditures. She began to encounter people who had no apparent access to any source of cash. Edin asked whether there really were very poor who were receiving no cash and if so, what was the cause of this development. Without access to cash, day-to-day survival becomes extraordinarily difficult.

Interviews in the 1990s with the very poor showed that the poor generally received Aid to Families with Dependent Children (AFDC), Food Stamps, housing assistance, and some other types of in-kind and cash assistance; consequently, they limped along with an expectation that they would eventually find a
job and no longer need welfare.\(^1\) Now, however, Edin found that there was a group for whom there was no source of cash aid, little aid for nutritional support, and little housing support—in spite of the group’s strong desire to work. This resulted in a greater sense of helplessness.\(^2\) The one heartening finding, substantiated elsewhere, was that the working poor had become better off, in part because of refundable tax credits.\(^3\) Indeed, recent research shows that the number of Americans living below the poverty line in 2012 was exponentially lower than it was in the 1960s at the beginning of the war on poverty.\(^4\)

While teaching at Harvard for a semester, Edin teamed up with Shaefer, a leading expert on the Survey of Income and Program Participation (SIPP) administered by the U. S. Census Bureau. Shaefer’s expertise with the SIPP dataset was critical to the successful completion of the project.\(^5\) The SIPP dataset contained information on household income and cash resources going back decades: that information would help answer the exact questions Edin’s research raised.

Although focused on welfare, Edin’s and Shaefer’s research has important implications for tax reform. Their conclusions and recommendation are timely and significant as we consider the broader implications of the role that the tax system and the Service should play in anti-poverty programs and health-care administration.

Thinking through these recommendations and prescriptions for helping the poor and working poor gain access to steady nutrition, access to healthcare, jobs and job training, and housing we must bear in mind the things we already know. The EITC brings millions of people out of poverty each year at a low administrative cost.\(^6\) That cost, however, is in the form of higher error rates and more audits.\(^7\) The Patient Protection and Affordable Care Act of 2010 provides millions of people with access to health care, but it may not provide access to everyone who needs it or to all of the health care services needed, any more than Medicare or Medicaid do.\(^8\)

Although the working poor are often in a better position than they were in the early 1990s because of these programs, calls for changes and reduction of benefits continue, based on discontent with the high error rates.\(^9\) Such tax-based anti-poverty programs also raise the costs of tax administration above the level that the current Congress is willing to support. The Service is currently underfunded and short staffed: it has little capacity to take on oversight of new social programs without a budget increase from

\(^1\) Kathryn J. Edin & H. Luke Shaefer, $2.00 a Day: Living on Almost Nothing in America, vi (2015).
\(^2\) Id.
\(^3\) Id. at 8-9.
\(^5\) Edin & Shaefer, supra note 1 at xiv-xvi (2015) (generally describing Edin’s research, the SIPP dataset, and Shaefer’s work with the SIPP dataset). See also, Nina E. Olson, National Taxpayer Advocate, Fiscal Year 2015 Objectives 123.
\(^7\) Olson, supra note 2 (discussing the back-end costs of the EITC). See also Compliance Estimates for the Earned Income Tax Credit Claimed on 2006-2008 Returns, IRS Pub’n 5162 (Aug. 2014).
\(^8\) Edin & Shaefer, supra note 1, at 27, 58, 105, 121 (discussing situations where various subjects were unable to get health or dental care that might have made it possible for them to break the cycle of cashless poverty in which they and their families were existing).
an unwilling Congress.\textsuperscript{10}

According to Edin and Shaefer, those who have fallen out of the work force—e.g., those who have been injured or have a disability, who lack skills or education, who are unable to find work, whose financial instability creates situations that prevent them from maintaining employment, or who cannot work for some other reason—are unable to find a safety net that will allow them to get back on their feet and get back into the mainstream, no matter how strongly they desire to work. Edin and Shaefer use their case studies to demonstrate how these difficulties result from welfare reform and to explore some of the hard choices these families face on a daily basis in order to keep their families safe, fed, and clothed. Reading these stories can be heart wrenching. In places, though, a reader may find the narrative somewhat heavy handed in guiding the reader to the authors’ conclusions.

**Wealth and Income Disparity**

This book highlights a trend often overlooked in the discussion of increased wealth inequality—i.e., the plight of the poorest of the poor and the way that poverty plays out in their daily lives. We all know that the wealthiest among us live in wealth that is nearly unimaginable, but we either do not know or we avoid thinking about the squalor in which the poorest live as they survive with little or no cash, often little access to health care for adults, and frequently in a desperate struggle for shelter because of long waiting lists for housing subsidies, sharing housing, or moving from one shelter to another. For most of us, the degree of instability in daily life for the poorest of the poor may be less imaginable than the incredible luxury of daily life for those of immense wealth. Indeed, many Americans find it hard to accept that these people who are truly poor live here in our own back yards.

On a worldwide basis, the World Bank defines deep poverty as about $2 per person per day.\textsuperscript{11} Worldwide, an estimated 2.2 billion people live in desperate property. In the United States, such abject poverty is much less common but in many ways much more disturbing. Worldwide, $2-a-day poverty is declining, while in the United States such poverty has been increasing since welfare reform passed in 1996.\textsuperscript{12} Further, researchers have mostly ignored such deep U.S. poverty: in fact, Edin and Shaefer found that no one had conducted a thorough analysis of U.S. poverty at this level.\textsuperscript{13} Shaefer’s work with the SIPP data showed that during some period in 2011 nearly one in twenty-

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\textsuperscript{10} See, e.g., *Nina E. Olson, Written Testimony on the National Taxpayer Advocate’s 2014 Annual Report to Congress, Before the Subcommittee on Government Operations Committee on Oversight and Government Reform U.S. House of Representatives*, April 15, 2015, at 4 (acknowledging the inadequacy of the current level of funding for the Service, but not advocating that the Service be given a “blank check”).

\textsuperscript{11} [http://www.worldbank.org/en/topic/poverty/overview#1](http://www.worldbank.org/en/topic/poverty/overview#1). The United States defines poverty at a much higher amount, averaging about $16.50 per person per day throughout a year, with half that amount considered “deep poverty”. *Edin & Shaefer, supra* note 1, at 19.


\textsuperscript{13} *Edin & Shaefer, supra* note 1, at xvii.
five U.S. families experienced $2-a-day poverty. In more concrete terms, $2-a-day poverty that year affected more than 1.5 million families with more than 3 million children.

Many of us—we who analyze tax laws, read budget forecasts, discuss debt levels, and pay attention to legislation scores—are accustomed to thinking in millions, billions or even trillions of dollars. Indeed, on a personal level, few of us give a second thought in the morning to picking up a $5 or more cup of our favorite coffee beverage if we need a little pick-me-up, are running late, or just because. From that reference point, it can be hard to imagine surviving in a situation in which the norm is families that share housing, cash and cash equivalents of $2 a day per person or less. It seems incredible that such poverty is even possible in this country.

In this book, Edin and Shaefer use the case study method, which creates a context in which those of us who are fortunate enough not to have experienced these conditions can attempt to understand how these individuals and families live in a world without cash. In selecting families, they looked for a representative city, a place with long-term poverty, a place that had experienced a recent decline in economic affluence since the 1970s, and a place experiencing recent recovery from decades of long-term poverty. They chose Chicago, Illinois; rural hamlets in the Mississippi River Delta; Cleveland, Ohio; and Johnson City, Tennessee. Each case has some unique characteristics but shares the common thread of many who live in a nearly cashless world.

Welfare Reform

As noted at the outset, welfare reform perhaps should have little connection with tax. The two have, however, become inextricably intertwined because of the EITC, the CTC, the ACA, and intermittent job creation tax credits (among various other items in the Code designed to protect those with low incomes from too-high taxes, such as the personal exemption and low initial rate).

Congress first enacted the EITC in 1975 as a means of providing more of a safety net by returning payroll taxes to the working poor. The EITC became part of the “welfare reform” debate during the administration of President Ronald Reagan, when Congress increased the EITC as a way of encouraging work among the working poor.

Many of the ideas that formed soon-to-be President William Clinton’s original proposal for major welfare reform came from a doctoral thesis by David Ellwood. Ellwood recommended providing greater support to the working poor and providing a means by which those on welfare could become workers. He concluded that the welfare system was “a flawed method of helping people who are poor and disadvantaged. Welfare brings some of our most precious values— involving autonomy, responsibility, work, family, community, and compassion— into conflict.”

Ellwood’s first recommendation was to improve the economic position of the working poor through a

14 Id. at xvii.
15 Id. at xvii.
16 Id. at xix-xx.
18 Edin & Shaefer, supra note 1, at xvi (referencing Elwood’s 1988 thesis titled “Poor Support”).
19 Id. 19-20.
20 Id. at 19.
massive expansion of the EITC. Today, the EITC lifts more than 3 million children out of poverty each year. This is a substantial improvement and a true win for reformers as well as poverty rights activists.

Ellwood's second recommendation was that assistance should be accompanied by job training and jobs that pay living wages. Ellwood recognized that this might require government-provided jobs, as in the New Deal, or government-subsidized jobs. Under the Clinton administration, however, the significant welfare reform implemented in 1997, purportedly intended to tie aid to values respected by both recipients and taxpayers, was touted as replacing handouts with hard work but it did little or nothing to ensure the availability of actual jobs (leading Ellwood and others to quit the administration). Welfare reformers portrayed Temporary Aid to Needy Families (TANF), for example, as a poor program because it lacked any requirement that recipients work while receiving aid, leading to stories of “welfare-queens” and deflecting sympathy away from the truly needy families in which a job had been lost, a parent had died, or some other calamity had occurred.

Edin and Shaefer found that these “reforms” meant that even the neediest of families were unlikely to receive cash assistance in 2012, regardless of the circumstances. The Supplemental Nutrition Assistance Program (SNAP), formerly known as Food Stamps, is not a true cash-aid program, as its benefits can only be used for limited items and cannot be legally exchanged for other goods or services. (Nonetheless, there is some illegal trade in SNAP benefits at a very high discount.) Even including the value of SNAP as a cash benefit leaves a disturbingly high number of families with little cash with which to buy groceries or pay for water, electric, gas, and other essential goods and services.

The Role of Taxation in Continued Poverty Relief

As enacted, welfare reform provided an increase in the EITC but put time limits on the receipt of many other forms of aid, gave states greater control over the form of payments through block grants, and did not effectively create job training or new jobs for those coming off welfare. The increase in the EITC increased the likelihood that wages from a low-income job would support the employee and his or her dependents. As the authors note, however, the EITC’s success depends on a person first obtaining a low-wage job, a hurdle that many in poverty cannot overcome.

The Great Recession and its aftermath exacerbated the problems resulting from Congress’s failure to ensure the availability of jobs for those who would otherwise fall into deep poverty when it removed the cash-support safety net that once existed. Obtaining even a low-wage job has become increasingly

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21 Id. at 20.
22 Id. at 159-160.
23 Id. at 158-159.
24 Edin & Shaefer, supra note 1, at 21, 61.
difficult for those who spend time in periods of $2-a-day poverty: Edin and Shaefer note that spending prolonged periods staying with friends and relatives, in shelters, and other alternative arrangements makes it hard for the very poor to effectively look for work.

The authors suggest that we need to focus on ensuring the availability of jobs and services to those who are at times among the $2-a-day poor.25 There is no excuse for a wealthy nation having an increasing portion of the lower-income quintile among the poorest of the poor in the world. Edin and Shaefer advocate government funding for the creation of jobs targeted at this population. They point to the TANF Emergency Fund model.26 Targeted employer tax credits might also be used, but those credits would face the same challenges as all tax credits.

Presented as case studies profiling taxpayers living in varied socio-economic communities, Edin identified common themes among these individuals and families, including a strong desire to earn their own living and a belief that they do not need a government handout. Throughout the book, Edin and Shaefer pause to emphasize the points they want readers to remember and the changes in government policies they support.

$2.00 A DAY convincingly makes the case that changes in the welfare system were not intended to eliminate as much aid as they did, but it also carefully documents the way changes doomed the recipients to become stranded. These measures may have been intended to push able-bodied adults to seek work, but they have actually made it even more difficult for the poor to find work. Without a home address or a home phone where a potential employer can reach a potential employee, the jobseeker may never receive an offer or even significant consideration for the job. Without a home or adequate transportation or clothing, a jobseeker cannot arrive on time for interviews or be properly groomed in appropriate attire.

As these case studies show, these are real, insurmountable problems for too many Americans. These problems prevent people, often single mothers who are ready, willing, able, and even eager to work, from finding the kind of low-wage employment that means the difference between their children having full bellies or going hungry. Few of the participants in these studies fit the “welfare queen” image used to disparage welfare recipients during the Reagan administration: the stereotype of a black woman wearing furs and driving a Cadillac to pick up her check at the welfare office.27 Rather, the majority of welfare recipients are white, most are proud, most want to work and do not think of themselves as the kind of people who ask for government aid; nevertheless, as a result of circumstances they cannot control they

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25 Id. at xxiv, 159-162.
26 Id. at 159-160.
27 Edin & Shaefer, supra note 1, at 16 (describing an image of a welfare recipient used by former President Ronald Reagan, although black families had never been the majority of welfare recipients).

While our tax policy has changed in some ways that help workers who have regular work get out of poverty, through the EITC and the CTC, we have also eliminated the safety net that once kept those unable to find work from living in destitution. Today’s society makes living without work income a desperate struggle, yet our government policy has made it nearly impossible for those who are unable to find work to manage, despite their desire to earn their own keep. The lost piece of welfare reform in the 1990s was Ellwood’s recommendation for job training coupled with subsidized employment or government-sponsored jobs, when necessary.
are unable to support themselves or their families through traditional work.28

This book is a powerful reminder that the frequently discussed growing divide between the rich and the middle class is not the whole story. There is also a growing disparity between the lower middle class and the poorest of the poor. While our tax policy has changed in some ways that help workers who have regular work get out of poverty, through the EITC and the CTC, we have also eliminated the safety net that once kept those unable to find work from living in destitution. Today’s society makes living without work income a desperate struggle, yet our government policy has made it nearly impossible for those who are unable to find work to manage, despite their desire to earn their own keep. The lost piece of welfare reform in the 1990s was Ellwood’s recommendation for job training coupled with subsidized employment or government-sponsored jobs, when necessary.29

Edin and Shaefer emphasize the importance of TANF and puzzle over its relative inaccessibility in post-welfare reform America and the conversion from AFDC.30 The authors note repeatedly the ways in which advocates of welfare reform described cash grants to individuals and families, given without condition of work or future work, as at odds with American values. Yet emergency cash aid when disaster strikes may be the difference between a family remaining in a stable environment or falling permanently through the cracks into a cycle of $2-a-day poverty. Once there, Edin and Shaefer demonstrate, such poverty is hard to overcome.

Perhaps the most effective message in this book is the need to do more to help raise up those around us most in need. The book’s only real failing is to overlook the importance of properly funding the Service to provide support in this endeavor. As they note, the upfront administrative cost of the EITC is low, but the National Taxpayer Advocate and others have shown that the back end costs in the form of audits and erroneous claims are higher. While the Service may be able to “hand out” the EITC, its current budget and staffing leave it ill-equipped to provide a “hand up” to those who need work, discretionary programs, and other more traditional assistance provided by public assistance agencies. Thus, Congress should provide more funding for the Service to enable it to administer the ACA and EITC efficiently and accurately, but it must also provide more funding, manpower, and expertise to aid these families in dire poverty. If it provides that assistance through the tax Code, it must provide the Service with corresponding staffing and budget increases to administer the programs.

28 See, e.g., id. at 159.
29 Id. at 160-162.
30 Id. at 7-10, 169-170.
YOUNG LAWYERS CORNER

Winners of the 15th Annual Law Student Tax Challenge

The Section is pleased to announce the winners of the 15th Annual Law Student Tax Challenge, a contest designed to give students an opportunity to research, write about, and present their analyses of a real-life tax planning problem. The competition is open to both J.D. and LL.M. law students. The teams presented oral arguments before a panel of distinguished tax lawyers and tax court judges attending the Section of Taxation 2016 Midyear Meeting in Los Angeles, CA, with the winners honored at a reception during the meeting.

The awardees from this year’s competition include:

**J.D. Division**

**1st Place:**
Scott Woody and Frank Cardoza
University of New Mexico School of Law
Coach: Mary Pareja

**2nd Place:**
Angela Doyle and David Berke
Yale Law School

**3rd Place:**
Alexander Bruin and William Dolan-Galaviz
Loyola Law School – Los Angeles

**Best Written Submission:**
Scott Woody and Frank Cardoza
University of New Mexico School of Law

**Semi-Finalists:**
Oliver Braunwalder and George Anezinos
Chapman University Dale E. Fowler School of Law
Karen Richards and Collette Bonvillain
Thomas Jefferson School of Law
Nathalia Solis and Sevag Kechichian
Loyola Law School – Los Angeles

**LL.M. Division**

**1st Place:**
Janelle Darnell and Ester Santana
Northwestern University Pritzker School of Law
Coach: Robert Wootton

**2nd Place:**
Colleen Redden and Samuel Neece
Northwestern University Pritzker School of Law

**Best Written:**
Daniel Wharton and James Baker
Northwestern University Pritzker School of Law

**Finalists:**
Daniel Wharton and James Baker
Northwestern University Pritzker School of Law
Aaron Burton and Gregory Janssen
University of Denver – Sturm College of Law

Watch Scott Woody and Frank Cardoza deliver their winning J.D. presentation to a judging panel of tax law experts.

CLICK HERE TO WATCH THE VIDEO
An alternative to traditional moot court competitions, the Law Student Tax Challenge (LSTC) is organized by the Section’s Young Lawyers Form. The LSTC asks two-person teams of students to solve a complex business problem that might arise in everyday tax practice. Teams are initially evaluated on two criteria: a memorandum to a senior partner and a letter to a client explaining the result. Based on the written work product, six teams from the J.D. Division and four teams from the LL.M. Division receive a free trip to the Section’s Midyear Meeting, where each team presents its submission before a panel of judges consisting of the country’s top tax practitioners and government officials, including tax court judges. The competition is a great way for law students to showcase their knowledge in a real-world setting and gain valuable exposure to the tax law community. For more information about the LSTC, go to www.americanbar.org/groups/taxation/awards/law_student_taxChallenge.html.
LET'S CONFER

Conferring in The City of Brotherly (Tax) Love: Philadelphia Tax Conference

By Jesse Tsai, Staff Counsel, ABA Section of Taxation, Washington, DC

For the past 26 years, the Philadelphia Tax Conference (PTC) has brought together corporate tax professionals to discuss the latest federal, state, and international tax developments. Over the course of two days every fall, a unique mix of over 300 tax professionals, from government and from private sector in-house and outside counsel, meet in Philadelphia to swap war stories and discuss the latest topics captivating the tax world. Since 2005, the ABA Tax Section has cosponsored this annual event. This article highlights some of the topics covered during the November 5-6, 2015 conference. Conference materials are linked where available and appropriate.

Day One

In the corporate tax update, Douglas Bates and Eric Solomon discussed the consolidated and corporate tax items under the Priority Guidance Plan. Concerning the movement of tax attributes in reorganizations, the panelists discussed the recently finalized amendment to regulations under section 312 confirming that only an acquiring corporation, and not the acquiring corporation’s subsidiary, may assume the target corporation’s earnings and profits. The final regulations under section 381 further clarify that the target corporation’s earnings and profits must stay with the acquiring corporation. As a result, if the parties desire that an acquiring corporation’s subsidiary obtain the target corporation’s tax attributes, the transaction must be structured as a triangular reorganization rather than as a merger and drop of the assets into the subsidiary. Additionally, the panelists discussed the final regulations under section 368(a)(1)(F) concerning F reorganizations. These regulations finalized and added to the 2004 proposed regulations (only part of which had been finalized in 2005): those 2004 proposed regulations set forth four requirements for transfers of property to be treated as a “Mere Change” in an F reorganization. The final regulations expand those four requirements to six to address overlap transactions (i.e., a transaction that may qualify as an F reorganization and as another kind of reorganization) and to ensure that F reorganization treatment is limited to non-divisive, non-acquisitive transactions in which there is just one
continuing corporation. Finally, the panelists also addressed the three new no-rule areas for spinoffs noted in Rev. Proc. 2015-43.

A popular panel was What’s Keeping Tax Directors Up at Night? Four corporate tax directors from large multinational corporations engaged in a candid dialogue on matters of concern to in-house tax departments. The panelists shared their views on successfully staffing their tax departments as well as their perspectives on hiring outside advisors. They emphasized the importance of finding and securing creative and trustworthy personnel who can appreciate the corporation's level of risk tolerance rather than advocate for overly aggressive tax positions. Additionally, the panelists discussed their experiences with foreign audits and expressed their frustrations in dealing with foreign taxing authorities.

On the ethics panel, Karen Hawkins, Jeffrey Frishman, and Michael Schler discussed changes under the new Circular 230 rules. With the elimination of the former “covered opinion” rules, it is no longer appropriate for practitioners to use disclaimers in communications that indicate that the disclaimer is “required” by Circular 230. The panelists went on to discuss what it means to “practice before the IRS” following the Loving and Ridgley cases. As a practical matter, the panelists emphasized that the Office of Professional Responsibility will strongly defend the validity of all of Circular 230. Accordingly, it is ill-advised to proceed as if section 10.37 were invalidated.

**Luncheon Keynotes During the Conference**

Each day of the conference featured a luncheon with a keynote speaker. The luncheons provided the attendees with an opportunity to network and absorb valuable insight from the guest speaker. The first day’s luncheon featured Robert Stack, Treasury’s Deputy Assistant Secretary (International Tax Affairs). He provided a thoughtful overview of the interaction between Treasury and the G20/OECD, as the group progresses with its Base Erosion and Profit Shifting (BEPS) Project. While the United States must adopt rules to protect its own tax base from erosion, Mr. Stack stressed that no such rules could be successful without multilateral participation in eliminating loopholes that result from tax regime differences. Mr. Stack lamented that a few countries had already taken unilateral action that may be detrimental to the

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4 In brief, the six requirements are the following: (i) all the stock of the new (“resulting”) corporation must have been distributed to shareholders in exchange for stock of the old (“transferor”) corporation; (ii) with certain exceptions, the same persons own the stock of the resulting corporation at the end of the transaction as held the stock of the transferor corporation at the beginning of the F reorganization (but an F reorganization can involve recapitalization, redemption and distribution transactions); (iii) the resulting corporation can have only certain loan proceeds and de minimis assets and related attributes immediately prior to the F reorganization; (iv) the transferor corporation must liquidate following the transfer (though as in other liquidations, it may retain de minimis assets to preserve its legal existence); (v) no other corporation may hold assets that were held by the transferor corporation before the F reorganization if such corporation would succeed to such assets under section 381(c); and (vi) the resulting corporation may not hold items acquired from another corporation immediately after the transaction, if it would succeed to items of such other corporation under section 381(c).

5 These include (i) RIC or REIT spinoffs (wherein corporate assets become property of a RIC or a REIT, unless both the distributing and controlled corporations are RICs or REITs and there is no plan for either to change status); (ii) comparatively small active trade or business spinoffs (for which the gross fair market value of the assets on which the active trade or business requirement rests for distributing or controlled is less than 5 percent of the total gross fair market value of the assets of that corporation, applying the separate affiliated group concept); and (iii) disproportionate investment asset spinoffs (where (1) the fair market value of investment assets of distributing or controlled is equal to or greater than two-thirds of that corporation's total fair market value; (2) the fair value of the trade or business assets on which distributing or controlled relies is less than 10 percent of that corporation's investment assets; and (3) the ratio of investment asset value to non-investment asset value of either distributing or controlled is at least three times the ratio for the other corporation).

6 Loving v. IRS, 742 F.3d 1013 (D.C. Cir. 2014).

BEPS objective, but he hopes such behavior will change in the post-BEPS environment. At the luncheon on the second day, Richard Weber, Chief of the Service’s Criminal Investigation (CI) division spoke. He discussed CI’s current status, including the difficulties they have encountered in light of the funding issues of the previous years. Despite these difficulties, Mr. Weber indicated that he and his team will continue to thoroughly investigate criminal tax violations and related financial crimes.

Day Two

The second day of the conference opened with the partnership tax panel. True to the conference’s reputation for covering the latest developments, this panel pivoted from the originally planned programming to discuss the Bipartisan Budget Act of 2015 (P.L. 114-74), which became law immediately prior to the conference. The legislation contained major provisions that significantly impact partnership taxation, including a complete overhaul of the procedures for partnership audits. Panelists Ashley Griffith, Beverly Katz, and Eric Sloan compared the new audit rules to the replaced TEFRA rules and ruminated on the technical corrections that will be forthcoming even before the new rules become effective for years after December 31, 2017. On a related topic, government speaker Cliff Warren noted that the Service is actively working on guidance concerning publicly traded partnerships under section 7704.

In the international tax update, panelists Joe Calianno, Michael DiFronzo, and Gretchen Sierra covered the new section 956 temporary regulations. The Temporary Regulations modified the existing anti-avoidance rule in various ways to ensure that funding mechanisms, or creation of a second controlled foreign corporation (CFC) by an initial CFC, are not used to avoid the application of section 956. The modified rule also applies if “a principal purpose” of a transaction is avoidance of section 956, acknowledging that there may be more than one principal purpose for a transaction. Furthermore, the existing temporary regulations only applied to foreign corporations controlled by CFCs, but the government was concerned that taxpayers were interposing partnerships to avoid the rules. The Temporary Regulations also expanded the anti-avoidance rule to cover partnerships controlled by CFCs. For example, if a CFC contributes cash to a partnership for a partnership interest and the partnership then lends that amount to a U.S. shareholder of the CFC, the U.S. shareholder may claim that its obligation to the CFC is only to the extent of the CFC’s interest in the partnership. The new partnership rule treats an obligation to a foreign partnership in some cases as an obligation to the partnership's CFC partner. There is also a new rule governing distributions to a U.S. partner of a foreign partnership, when a CFC related to the U.S. partner lends money to the foreign partnership to fund the distribution—i.e., where the obligation would be United States property for section 956 if it were held by the CFC rather than the foreign partnership. In addition, the panelists discussed the changes in scope to the “active development” and “active marketing” tests for rents and royalties in temporary regulations under section 954. These changes add the phrase “through its own officers or staff of employees” in several places, indicating that the CFC must use its own personnel to manufacture, create, produce, acquire or add substantial value to the item and must be

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10 For purposes of section 956, Temp. Reg. §1.956–1T(b)(5) treats the partnership obligation as an obligation of the distributee partner to the extent of the lesser of the amount of the distribution that would not have been made but for the funding of the partnership or the amount of the foreign partnership obligation. See supra note 8, at 52,978.
11 Temp. Reg. §1.954-2T.
regularly engaged in that activity with its own personnel. Furthermore, cost sharing transaction payments and platform contribution transaction payments from one CFC to another do not result in the activities undertaken by the other CFC counting as activities of the first CFC’s own personnel.

In addition to the panels that were highlighted in this article, the Philadelphia Tax Conference annually covers several other topics of concern to the corporate tax practitioner, including updates in the areas of state and local taxes, employee benefits, and state and federal controversy. For more information about the 2015 program, please see the conference webpage here.
LET'S CONFER

IRS Commissioner John Koskinen
Addresses International Conference on Taxpayer Rights

By Derek B. Wagner, Pro Bono Counsel, ABA Section of Taxation, Washington, DC

On November 18 and 19, 2015, tax professionals gathered at the National Archives in Washington for the first-ever International Conference on Taxpayer Rights. Over the course of this two-day event, panels composed of scholars, practitioners, and government officials from nearly a dozen countries explored the relationship between a country's tax agency and its taxpayers and the role of taxpayer rights as a foundation for effective tax administration.

A prevailing theme was the importance of trust between taxpayers and the state. Although the coercive arm of the state backs tax collection, a tax system functions more effectively when taxpayers comply voluntarily, and voluntary compliance depends on taxpayers’ trusting that the administration of the tax laws will be fair and just. Panelists focused on means by which such trust is achieved, including administrative and judicial review processes, taxpayer bills of rights, and taxpayer advocates or ombudspersons.

U.S. Commissioner of Internal Revenue John Koskinen addressed the Conference on the first day. Echoing sentiments expressed by a number of panelists, Commissioner Koskinen focused on the importance of public confidence in tax administration. In the Commissioner’s view, there are two primary elements of effective tax administration: service and enforcement. Historically, most of the U.S. effort has been on enforcement, yet the amounts brought in by enforcement pale in comparison to the revenues from voluntary compliance. The Service’s efforts to enforce and collect taxes bring in approximately $60 billion in revenue each year, while voluntary compliance yields approximately $3.1 trillion. With so much of the tax system reliant on voluntary compliance, lack of faith in the system represents a serious threat to the system’s integrity and threatens its effectiveness. A greater focus on providing quality service and improving the experiences of the vast majority of taxpayers who attempt to follow the law voluntarily is needed—particularly in the current anti-IRS political environment. Believing that every successful interaction with individual taxpayers, no matter how small, improves public confidence in the tax system, the Commissioner highlighted efforts currently being undertaken within the Service to help taxpayers and protect their rights.

A prevailing theme was the importance of trust between taxpayers and the state. Although the coercive arm of the state backs tax collection, a tax system functions more effectively when taxpayers comply voluntarily, and voluntary compliance depends on taxpayers’ trusting that the administration of the tax laws will be fair and just.
The Commissioner’s remarks focused on the IRS Taxpayer Bill of Rights. The Taxpayer Bill of Rights is not a newly established set of rights: the webpage merely compiles various taxpayer rights scattered throughout the Internal Revenue Code provisions and presents them in a clear and easily accessible list. Commissioner Koskinen emphasized that the Taxpayer Bill of Rights is becoming a more visible part of the Service, as part of a concerted effort to make taxpayers more familiar with their rights and comfortable with asserting them. Efforts include updates to Publication 1 – Your Rights as a Taxpayer, which is now included with a wide range of Service notifications sent to taxpayers; updates to the Service’s internal procedures; a new page called Taxpayer Bill of Rights on the IRS website focusing on taxpayer rights; and generally putting taxpayer rights at the forefront. It is clear that this Commissioner has concluded that a focus on fairness, taxpayer rights, and improved service will promote confidence in the system, increased compliance, and better tax administration.

More information about the International Conference on Taxpayer Rights can be found on the Conference website. All of the panels, including Commissioner Koskinen’s remarks, will soon be available on the National Taxpayer Advocate YouTube channel: https://www.youtube.com/user/TASNTA

In addition, the following conference papers will be published in the Spring 2016 issue of The Tax Lawyer: Alice G. Abreu and Richard K. Greenstein, Tax as Everylaw: Interpretation, Enforcement, and the Legitimacy of the IRS; Amanda Bartmann, Making Taxpayer Rights Real: Overcoming Challenges to Integrate Taxpayer Rights into a Tax Agency’s Operations; Leslie Book, Bureaucratic Oppression and the Tax System; and Keith Fogg, How Can Tax Collection be Structured to Observe and Preserve Taxpayer Rights: A Discussion of Practices and Possibilities.

Day One:

Welcome Remarks
Panel 1 - Taxpayer Rights: A Roadmap for Effective Tax Administration
Panel 2 – The Right to be Informed: Transparency and Tax Administration
Remarks from the IRS Commissioner
Panel 3 – The Rights to Confidentiality and Privacy in an Age of Transparency
Panel 4 – The Right to Appeal to an Independent Forum: A Conversation with the Judiciary

Day Two:

Panel 1 – Taxpayer Rights, Due Process, and Procedural Justice
Keynote Address – Slippery Slope Framework: The Impact of Power and Trust on Taxpayer Compliance Behavior
Panel 2 – Fostering Voluntary Compliance: A Conversation with Tax Administrators
Panel 3 – The Right to a Fair and Just Tax System
Panel 4 – Challenges in “Operationalizing” Taxpayer Rights
Closing Remarks

Note, however, that a version of the Service’s Taxpayer Bill of Rights was also included at section 401 of the Protecting Americans from Tax Hikes Act of 2015, enacted in December 2015.
SECTION NEWS

Report of the Nominating Committee:
2016-2017 Nominees

In accordance with Sections 4.2, 6.1, and 6.3 of the Section of Taxation Bylaws, the following nominations have been submitted by the Nominating Committee for terms beginning at the conclusion of the 2016 Annual Meeting in August. Under the Section Bylaws, the current Chair-Elect, William H. Caudill of Houston, TX, becomes Chair of the Section at the close of the ABA Annual Meeting.

Chair-Elect:  Karen L. Hawkins, Yachats, OR

Vice Chairs:  Charles P. Rettig, Beverly Hills, CA (Administration)
             Scott D. Michel, Washington, DC (Committee Operations)
             Joan C. Arnold, Philadelphia, PA (CLE)
             Julian Y. Kim, Washington, DC (Government Relations)
             Bahar A. Schippel, Phoenix, AZ (Pro Bono and Outreach)
             Julie A. Divola, San Francisco, CA (Publications)

Vice Chairs:  (For a one-year term)

Secretary:   Catherine B. Engell, New York, NY
            (For a one-year term)

Assistant Secretary:  Katherine E. David, San Antonio, TX
            (For a one-year term)

Council Directors:  Adam M. Cohen, Denver, CO
                   Sheri A. Dillon, Washington, DC
                   Ronald Levitt, Birmingham, AL
                   Christopher S. Rizek, Washington, DC
                   Melissa Wiley, Washington, DC

            (For a three-year term)

            (For a one-year term)  R. David Wheat, Dallas, TX
SECTION NEWS

Government Submissions Boxscore

Since August 31, 2015 the Section has coordinated the following government submissions, which are available to the public on the Section's website at http://www.americanbar.org/groups/taxation/policy.html.

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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.
SECTION NEWS

2016-2017 John S. Nolan Fellowships

The Section is pleased to announce the recipients of the 2016 John S. Nolan Fellowships. Named for the late Jack Nolan, a dedicated and respected Tax Section member, Nolan Fellows are young tax lawyers who are actively involved in the Section and have demonstrated leadership qualities.

The six 2016-17 Nolan Fellows are:

- Jeff Chadwick, Winstead, P.C., Woodlands, TX;
- Clay Collins, PWC, Washington, DC;
- Vincent Kan, Office of the Illinois Attorney General, Chicago, IL;
- Lee Meyercord, Thompson & Knight, Dallas, TX;
- Larry Sannicandro, Agostino & Associates, P.C., Hackensack, NJ; and
- Anna Tavis, Brooklyn Legal Service, Brooklyn, NY.

The fellows were recognized during the Plenary Luncheon at Section’s 2016 Midyear Meeting in January. “The Section is privileged to announce these young lawyers as our Nolan Fellows for 2016-2017,” said Section Chair George Howell, who continued, “It is my expectation that the new fellows will follow the honored tradition of their predecessors by becoming actively involved in the leadership of the Section.”

Each one-year fellowship includes the waiver of meeting registration fees and assistance with travel to Section meetings. For more information about the Nolan Fellows program, visit the Section website at http://www.americanbar.org/groups/taxation/awards/nolans.html.
ANNOUNCEMENTS

Support the Section’s Public Service Efforts with a Contribution to the TAPS Endowment

Through the Tax Assistance Public Service (TAPS) endowment fund, the Section of Taxation seeks to provide stable, long-term funding for its tax-related public service programs. The TAPS endowment fund will primarily support the Christine A. Brunswick Public Service Fellowship program. The Public Service Fellowship program provides two-year fellowships for recent law school graduates working for non-profit organizations offering tax-related legal assistance to underserved communities. Consider giving to the TAPS endowment fund today. Your generous support will help ensure that the Section can continue its mission to provide legal assistance to those in need.

February Issue of The Practical Tax Lawyer Is Now Available

Produced in cooperation with the Tax Section and published by ALI-CLE, the Practical Tax Lawyer offers concise, practice-oriented articles to assist lawyers with all aspects of tax law. The articles are written by practitioners and are reviewed by an expert board of editorial advisors who are members of the ABA Tax Section and are appointed by the Section. Published four times yearly, each issue of The Practical Tax Lawyer brings you pragmatic, nuts-and-bolts advice on how to solve your clients' tax problems. The February issue features the following articles:

- Robert F. Reilly, What Lawyers Need To Know about Distinguishing Personal Goodwill from Entity Goodwill in the Closely Held Company Valuation
- Jerald David August and Stephen R. Looney, Tax Planning for S Corporations: Mergers and Acquisitions Involving S Corporations (Part 1)

Tax Section members are entitled to a subscription discount. For more information, visit PTL's webpage: https://www.ali-cle.org/index.cfm?fuseaction=publications.periodical&pub=PTL
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- 32% of meeting attendees represent government
- 25% come from firms of over 100 attorneys
- 23% come from firms of 1-20 attorneys

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For additional information, please visit [http://www.americanbar.org/groups/taxation/sponsorship.html](http://www.americanbar.org/groups/taxation/sponsorship.html) or contact our Sponsorship Specialist at [taxmem@americanbar.org](mailto:taxmem@americanbar.org) or at 202/662-8680.
Call for Book and Article Reviews

Our move to digital-only opens the door for us to expand the types of materials we publish. One new feature is reviews of books and articles on topics of interest to our members. Reviews inform readers of recent publications pertaining to tax policy and emerging issues, as well as broader concerns about the interrelationship between tax policies and economic growth. Reviews may be of single books or articles or they may be review essays that discuss and compare two or more books and articles addressing the same topic, similar to such review essays in the New York Review of Books. Reviews will be considered for publication in each quarterly issue.

Members from all practice settings are invited to submit review proposals, which should provide a complete citation for the item(s) to be reviewed and a brief statement about each item’s significance to tax scholarship, practice, or policy. Proposals also should include a brief summary of the author’s background and interest in the item(s).

Authors of accepted proposals will be invited to write a review for a specific issue. The review should be no more than 2,000 words in length, though on rare occasions longer submissions will be accepted on consultation with the editor. Reviews should provide a concise introduction to the item’s primary themes and a critical analysis of its significance that considers strengths, weaknesses, and relevance to the field.

If you are interested in submitting a review or in discussing other content ideas for ABA Tax Times, contact Supervising Editor, Linda M. Beale at lbeale@wayne.edu.
EVENTS & PROMOTIONS

ABA Section of Taxation Meeting Calendar

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

ABA Tax Section meetings are a great way to get connected, get educated, and get the most from your membership! Join us for CLE programming and the latest news and updates from Capitol Hill, the IRS, Treasury and other federal agencies.

- **May 5-7, 2016**
  - MAY MEETING
  - Grand Hyatt – Washington, DC

- **September 29-October 1, 2016**
  - JOINT FALL CLE MEETING
  - Westin Boston Waterfront – Boston, MA

- **January 19-21, 2017**
  - MIDYEAR MEETING
  - Hilton Bonnet Creek & Waldorf Astoria – Orlando, FL

- **May 11-13, 2017**
  - MAY MEETING
  - Grand Hyatt – Washington, DC

If You Missed the Last Section Meeting

**Materials / TaxIQ**

View and search hundreds of materials submitted for the Section's Fall, Midyear, and May Meetings on TaxIQ and Westlaw. This member service is made possible by Thomson Reuters—a publishing sponsor of the Section of Taxation. For more information, go to the [TaxIQ page on the website](https://www.americanbar.org/groups/taxation/events_cle.html).

**Recordings**

Audio recordings of CLE programs from recent Tax Section Meetings are available from Digital Conference Providers (DCP), the Section’s audio service provider. Orders can be placed through the DCP website at [https://www.dcporder.com/abatx/](https://www.dcporder.com/abatx/) or by calling 630/963-8311.

**Online CLE from West LegalEd**

The ABA is a content partner with Thomson Reuters, and many programs presented at the Tax Section’s Fall, Midyear, and May Meetings are subsequently made available through the Thomson Reuters West LegalEd Center. For more information, go to [http://westlegaledcenter.com](http://westlegaledcenter.com).
## EVENTS & PROMOTIONS

### ABA Section of Taxation CLE Calendar

[www.americanbar.org/groups/taxation/events_cle.html](http://www.americanbar.org/groups/taxation/events_cle.html)

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| February 29-March 4, 2016 | 2016 ABA/IPT Advanced Income, Sales/Use & Property Tax Seminars  
Ritz-Carlton New Orleans – New Orleans, LA | Tax Section 202.662.8670 |
| March 9, 2016         | The Nuts and Bolts of the Taxation of Mergers and Acquisitions: A Survey of Relevant Topics  
Member Benefit CLE Webinar - Free for Tax Section Members | Tax Section 202.662.8670 |
| March 16-18, 2016     | 16th Annual Tax Planning Strategies - U.S. and Europe  
Hotel Gallia – Milan, Italy | Tax Section 202.662.8670 |
| May 5-7, 2016         | MAY MEETING  
Grand Hyatt – Washington, DC | Tax Section 202.662.8670 |
| May 18-19, 2016       | ERISA Litigation National Institute  
American Bar Association – Chicago, IL | Tax Section 202.662.8670 |
| May 20, 2016          | Advanced ERISA Benefit Claims Litigation  
American Bar Association – Chicago, IL | Tax Section 202.662.8670 |
| September 29-October 1, 2016 | JOINT FALL CLE MEETING  
Westin Boston Waterfront – Boston, MA | Tax Section 202.662.8670 |

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**The Nuts and Bolts of the Taxation of Mergers and Acquisitions**

**Wednesday, March 9, 2016**

1:00-2:35 PM ET (12:00 PM CT, 11:00 AM MT, 10:00 AM PT)

This webinar will cover the most relevant building blocks for understanding the taxation of mergers and acquisitions. The topics covered will include the basics of taxable and tax free stock and assets transactions (including sections 338, 338(e), 1060, 368 and 355). Particular emphasis will be placed on the application of these rules to real life fact patterns.

**Featured Speakers:**

- Devon M. Bodoh, KPMG LLP, Washington, DC (Moderator)
- Layla J. Asali, Miller & Chevalier Chartered, Washington, DC
- William A. Curran, Davis Polk & Wardwell LLP, New York, NY
- Ross E. Poulsen, Jones Day, Washington, DC

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