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FROM THE CHAIR

Interesting Times

By William H. Caudill, Norton Rose Fulbright LLP, Houston, TX

As I write this column, we are well into the Tax Section’s 2016–2017 year. I am pleased that we have made good progress on many tasks, but there is much that remains to be accomplished, not least of which is how we as tax lawyers will prepare for the tax reforms that will likely come our way as a result of this last election cycle and how the Section can contribute to the process. As has been said many times over the last several months, “May you live in interesting times,” aptly describes our current environment. Whether you believe this is good or not, we, as tax lawyers, are in for an interesting ride.

Tax Reform and Law Improvement

The Tax Section should not involve itself in partisan politics as the process unfolds, but we should respond to the several proposals that have been advanced. As past Section Chairs and I have urged, the Tax Section should be prepared to lend its voice to those of others who seek to reform our tax system, to make it simpler, fairer, and more transparent.

We were fortunate at our Joint Fall Meeting last year to have had the Chief Tax Counsel of the House Ways and Means Committee, Barbara Angus, present an outline of the Committee’s ambitious proposals to reform the Internal Revenue Code with a goal of making our nation’s businesses more competitive. Those proposals, entitled “A Better Way,” were released last June as a blueprint for lowering individual and corporate tax rates, lowering capital gains tax rates, and creating a border-adjustable, international business tax system. With Ms. Angus’ presentation at the Joint Fall Meeting, we have advanced the timetable for our learning about and working with these proposals.

One way that the Section continues to lend its voice is through commenting on legislative and regulatory matters, an effort that has taken on greater significance with the shrinking resources available to the Internal Revenue Service. We have been requested to provide more government submissions on an urgent basis. I encourage each of you to become involved in one or more law improvement projects with your Committee. You will find participation in these projects to be one of the most rewarding aspects of your Section membership.

Midyear Meeting

Approximately 1,000 people attended our Midyear Meeting in Orlando. Consistent with the high standards of the Section, 35 of our committees presented well over 100 CLE panels on a broad array of current practical and policy-related topics. I commend our very active Young Lawyers Forum (YLF) and Diversity
Committee for organizing an impressive number of programs, including a four-hour “Tax Bridge on the Road” program with introductory sessions on crowd funding transactions, expert witnesses in Tax Court, Subpart F, and section 385. In addition, the Diversity Committee presented panels focusing on cultural issues affecting family business succession planning and providing economic stimulus to low-income communities. The YLF also presented a session on the nuts and bolts of criminal tax. 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 they deserve our support.

ABA President-Elect Hilarie Bass attended the Council meeting on Thursday morning. At our meeting, President-Elect Bass emphasized that recruiting new members continues to be “Job One” for all ABA members, including Tax Section members. The task presents new challenges as we devise strategies to attract millennials, a generation known to be less inclined to join professional organizations. We know that retention rates increase significantly when ABA members become active in a Section or other entity. Please do your part to recruit one or two young lawyers to the Section and help us discover how to encourage them to stay.

President-Elect Bass also outlined a number of projects that the ABA will undertake at home and abroad during her tenure. At home, one of her initiatives will be to engage the various stakeholders—outside the law school accreditation process—in developing innovations for the legal education system to address the challenges facing new and future lawyers. Beyond our borders, through its Rule of Law Activities, the ABA is exploring how it might assist the Viet Nam Bar Federation in increasing the number of lawyers in that country to help instill the rule of law.

G. William (Bill) Hoagland, Senior Vice President for the Bipartisan Policy Center with more than 30 years of government service (including 4 years as Policy Advisor and top budget aide to the Senate Majority Leader and 20 years as Director of the Senate Budget Committee) presented the keynote address entitled “The Federal Budget, Guns-Butter—Debt & Taxes” at Saturday’s Plenary Session. Bill is widely recognized as one of the brightest and most experienced individuals on budget and tax issues in the country. His presentation on U.S. budget issues was well done and inspired us all as to our obligations as responsible citizens. You can listen to Bill’s presentation and view his materials here.

The Section also presented a number of awards and honors at the Midyear Meeting, most notably the Janet Spragens Pro Bono Award to C. Wells Hall III of Charlotte, North Carolina. I am delighted to recognize Wells for his extraordinary efforts on behalf of the military and the Section’s Adopt-A-Base program. The Section also welcomed the incoming class of Nolan Fellows: Elizabeth Blickley of Potomac, Maryland, Matthew Cooper of Arlington, Virginia, Nikki Hasselbarth of Baltimore, Maryland, Vanessa Lafleur of Baton Rouge, Louisiana, Rafi Mottahedeh of Chicago, Illinois, and Susanna Ratner of Philadelphia, Pennsylvania. You can read more about Wells and our Nolan Fellows program inside this issue of ABA Tax Times. Please join me in congratulating them on their well-deserved honors.

I want to thank the Section’s staff, led by our Acting Director, Ty Hansen, for all their hard work in connection with the Midyear Meeting. We are fortunate to have the opportunity to work with such a talented and highly motivated group of individuals. I also want to thank the Section’s Committees for organizing such outstanding panels. Once again, all of them assured a successful and well-run meeting.
Law Student Tax Challenge

In its 16th year and enjoying immense success, the Annual Law Student Tax Challenge finals, organized by our Young Lawyers Forum, were held during the Midyear Meeting. Congratulations to Tyler Johnson and Anna Peckjian of Northwestern University Pritzker School of Law, who were awarded first place in the J.D. Division, and Samuel Hampton and Daniel Neumeyer of the University of Washington School of Law, who were awarded first place in the LL.M. Division. The competition winners and video clips from the oral rounds are available in the Young Lawyers Corner section of this issue of ABA Tax Times.

Pro Bono, Public Service, and TAPS Endowment

The Section has strong pro bono and public service programs. We have funded recent law school graduates (Brunswick Fellows) for two-year Fellowships designed to provide representation for low-income taxpayer communities. The Section also participates in the Tax Court calendar call, Volunteer Income Tax Assistance and Adopt-A-Base programs. All of us have an obligation to give back to the tax system, and participation in one or more of these programs is a great way to do that.

Funding is required for these programs. As described later, the Section currently is suffering significant budget issues, and these programs must be reconsidered by Council in the process of reconciling these issues.

The endowment for the Tax Assistance Public Service (TAPS) program has been established to address those funding issues, make permanent the public service fellows program, and remove the program from the vicissitudes of the Section’s budget.

The TAPS endowment received an initial contribution of $2.5 million from the Section's reserves. The endowment has an additional fund-raising goal of $2.5 million for a total of $5 million, the income from which is designed to support the Brunswick Fellows for the foreseeable future.

Approximately $500,000 of the additional $2.5 million has been raised, and we will work to raise the remaining target over the next three years. All of the Section’s officers and Council members have made commitments, but we need broader support. I encourage each of you to make your own commitment to the TAPS effort. The blue ribbon on your meeting name badge shows that you have made a commitment. Please consider obtaining your own blue ribbon.

Budget Deficit

A critical issue that I have previously mentioned in my columns is our Section’s current budget deficit. Our expenses have been just about the same over the past three years, but our revenues have declined due to reduced membership, reduced corporate sponsorships, and reduced external CLE revenues. The Section continues to review every significant expenditure while we strive to maintain the important networking opportunities and events that support our goals and add value for Section members. The Council is also considering increases to the Section’s dues and meeting registration fees.

Unsung Heroes

As I noted in remarks to the Plenary Session at the Orlando meeting, many of our officers, directors and Committee leaders are recognized, from time to time, for their hard work, such as Shelly Banoff from the
Partnerships and LLCs Committee and Eric Solomon from Corporate Tax, but there are many other hard-working participants in our Section who also deserve to be recognized.

Two that I commended from the podium are Prof. Linda M. Beale of Detroit, Michigan, who serves as the Supervising Editor of our ABA Tax Times and as a Vice Chair of the Publications Committee. She is a past Chair of the Standards of Tax Practice Committee and is also a member of the Government Submissions, Corporate Tax, and Financial Transactions Committees. I’d also like to recognize Craig A. Houghton of Fresno, California, who served for many years as Chair of the Business Cooperatives and Agriculture Committee, and is a member of the Corporate Tax, Government Submissions, Individual and Family Taxation, S Corporations, and Sales, Exchanges and Basis Committees.

If there are others whom you believe should be recognized in this way in the future, please let me or our Acting Director, Ty Hansen, know.

Looking Forward

Next up is the May Meeting. I encourage you to attend this meeting, which will be held May 11-13, 2017, in its traditional location at the Grand Hyatt in Washington, D.C. The May Meeting is always our most well-attended meeting, full of excellent 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.
AT COURT

Taking Issue with the Tax Court in Analog Devices, Inc. v. Commissioner

By Professor Kevin A. Diehl, Western Illinois University, Moline, IL

Introduction

In Analog Devices, Inc. v. Commissioner, the Tax Court overturned the BMC Software case that was the applicable precedent. It did so largely because the Fifth Circuit overturned its own BMC Software ruling. This choice comes with significant consequences.

Background

When Analog Devices took advantage of the section 965 one-time repatriation holiday in 2005, it had no related-party indebtedness for purposes of section 965(b)(3) testing. The IRS argued, however, that a section 482 settlement that led to a Rev. Proc. 99-32 secondary adjustment in fact created related-party indebtedness that existed during the testing period. Nonetheless, the Rev. Proc. adjustment arose in time well after the repatriation had occurred. The Tax Court found for Analog Devices without clearly indicating a factual distinction. It merely overturned its prior BMC Software case.

Factual Distinction

There was an opportunity to emphasize a factual distinction. Analog Devices B.V. (ADBV), the debtor as to the related-party indebtedness, and its directors never acquiesced to the closing agreement between Analog Devices itself and the IRS. Some would argue that the IRS could not then claim ADBV agreed to have the related-party indebtedness treated as in existence during the section 965(b)(3) testing period. In contrast, all the necessary parties had apparently agreed to the closing agreement in BMC Software. Consequently, the Tax Court could have relied on this factual distinction, instead of completely overturning BMC Software, to find for Analog Devices.

Golsen Inapplicable

The Golsen rule did not even require the Tax Court to amend its BMC Software ruling. Analog Devices arose in the First Circuit, not the Fifth Circuit.

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1 147 T.C. No. 15 (2016).
3 780 F.3d 669 (2015).
**Schering Corp. Questions**

In addition, finding a way to square the Tax Court’s decision overturning *BMC Software* with its continued support for *Schering Corp. v. Commissioner* is extremely difficult. *Schering Corp.* found that a closing agreement governed a payment’s characterization for federal income tax purposes without regard to collateral effects (such as the Swiss authorities treating the payment as a dividend). *Analog Devices* instead emphasized in part that other factors such as collateral effects can indeed be considered beyond, if not in place of, the closing agreement.

**Unreal Justification**

To justify its complete reversal of *BMC Software*, the Tax Court mentioned that the issue had only come to it once before, and no other opinions had cited to it. While these facts may be true, many tax advisers had already relied on it to structure settlements with the IRS.

**The Future**

Contesting IRS additional assessments is already costly. All administrative remedies must be pursued at the IRS before any party can bring suit in court. Then, a party must choose whether to bring the case before the Tax Court, Court of Federal Claims, or district court for the relevant jurisdiction. This choice is further complicated by what the relevant U.S. Court of Appeals has said about the issue.

All the while, though, a tax adviser could at least assume for general purposes that Tax Court decisions would remain valid as settled legal precedent. Unfortunately, *Analog Devices* signals in a big way that what may have seemed possible before, though unlikely, is now fully operational: The Tax Court may simply decide to disregard its prior precedents, perhaps based on a single appellate court’s decision. This situation is even more dire when one considers that Tax Court judges have fixed rather than lifetime terms. With its composition almost constantly in flux, at least in comparison to other federal courts, Tax Court decisions are more vulnerable to later regrets.

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4 **69 T.C. 579 (1978).**
**Rio Tinto Alcan v. The Queen: Welcome Expansion of the Canadian Tax Deductibility of M&A Transaction Expenses**

By Claire Kennedy, Bennett Jones, Toronto, Ontario, Canada, and Anu Nijhawan, Bennett Jones, Calgary, Alberta, Canada

Executive Summary

In a welcome decision for Canadian acquirors and targets, the Tax Court of Canada recognized, in *Rio Tinto Alcan Inc. v The Queen,* that certain oversight expenses—including certain investment banking and other professional advisory fees—should be deductible in the context of M&A transactions. This is particularly so where such services are provided to enable the board of directors of the acquiror or target to determine whether to proceed with the transaction. The Court also established a principled basis for the deductibility of transaction expenses in a far broader set of circumstances than those previously accepted by the Canada Revenue Agency (the CRA), in particular, in situations in which a board is discharging its oversight function prior to a decision to implement a particular transaction(s). The decision is under appeal; if affirmed, it will represent a significant expansion of the deductibility of transaction fees. The onus will remain on the taxpayer to prove the expenses are deductible based on the new criteria; engagement letters for advisors and their invoices, clearly demarcating oversight activities in respect of proposed transaction(s) from the implementation phases, should be prepared accordingly.

Background

At issue in *Rio Tinto* was the deductibility to Alcan (the Canadian predecessor to Rio Tinto Alcan) of approximately $100 million in transaction expenses, including legal, investment banking, financial, and other professional advisory fees, incurred in the course of two related transactions—a public corporate acquisition of a French aluminum company and a related spin-off of certain assets as mandated by competition authorities as a condition of the public takeover. Consistent with the CRA’s historical position, the government (referred to as the Crown) argued that the expenses were not deductible on a current basis on the grounds that such expenses were incurred in the context of a capital transaction. Subject to certain statutory exceptions, capital expenses have limited immediate use to corporate taxpayers under Canadian tax law. If the decision is affirmed, it will represent a significant expansion of the tax deductibility of transaction fees.
tax law. In allowing a large proportion of the expenses to be deducted on a current basis, the Court rejected the CRA’s position, recognizing the importance of the board of directors’ oversight function on a corporation’s income-earning process.

**Importance of the Board’s Oversight Function**

Significant to the ultimate result of the case, the Court recognized the importance of the board of directors’ role in determining whether or not to proceed with a transaction and in allocating capital resources. Noting that ineffective oversight over the capital allocation process can lead to a decline of earnings and cash flow and that modern day shareholders demand scrupulous oversight, the Court acknowledged that effective oversight requires independent advice which the board relies on in approving a capital expenditure. The expenses incurred to facilitate this advice are not capital in nature—rather, they are integral to the corporation’s income-earning process.

This conclusion is consistent with prior case law that held that the Crown’s hardline view on expense deductibility was “fundamentally inconsistent with the economic and business realities of the world of mergers and acquisitions” and adding that “it is a basic common sense approach to view maximizing share price as inextricably interwoven with the business of any company”. The taxpayer was assisted in this regard by its evidence which showed that one of its business priorities was the maximization of shareholder value and that it has a long history of acquisitions and transactions entered into for increased revenues, earnings and economic value. Given that most companies, both public and private, would take such a position, the case represents a significant relaxation of the deductibility of M&A transaction expenses to businesses.

**Oversight Expenses vs. Execution Costs: The Distinction**

The Court drew a distinction between “oversight expenses,” which are expenses which assist the board in the decision-making process and in the fulfilment of its oversight function, and “execution costs,” which are expenses incurred as part of the implementation of a specific transaction or set of transactions leading to the acquisition of capital property. In analyzing the category into which a particular expense falls, the Court looks at the primary purpose of the work performed—were the expenses incurred primarily to assist in the oversight or management process or were they primarily linked to the implementation of a transaction carried out on capital account?

Oversight expenses, the Court held, are fully deductible on the basis that (i) they relate to the management of a corporation’s income-earning process, including the allocation of capital for the purpose of maximizing the income earned by a corporation and (ii) such expenses do not per se create an enduring benefit (a hallmark of a capital expense). In contrast, execution expenses are not currently deductible, in that they pertain to the actual implementation of an approved capital transaction that does create an enduring benefit.

The onus will be on the taxpayer seeking a deduction to adduce evidence showing that the expenses in question are properly classified as oversight expenses. The Court did, however, provide assistance to taxpayers by adopting, in the circumstances of *Rio Tinto*, a “bright line” date test for distinguishing between the two categories. Specifically, the Court endorsed a distinction based on whether or not there was a
binding commitment to proceed with the project in question. Expenses incurred prior to formally entering into the transactions were deductible as oversight expenses since the taxpayer was aggressively involved in the pursuit of increased shareholder value on a “frequent and recurring” or continuous basis. Although not discussed in the case, the analysis therein suggests that the oversight expenses should continue to be fully deductible, even if a transaction is not successful.

Once a framework for negotiations had been established, however, expenses incurred in the context of active negotiations were more closely linked with the implementation of the transaction and hence constituted “execution costs.”

Examples of Deductible Oversight Expenses

Within the framework described above, the Court in *Rio Tinto* then considered the specific deductibility of a number of different transaction costs, which broadly fell into five categories: (1) investment advice; (2) public relations; (3) legal and accounting advice; (4) printing and issuance of documents; and (5) representations to government authorities.

With respect to the acquisition, the Court held that certain investment advisory fees were deductible when they were incurred during the deliberation phase of the deal, including fees for financial modelling and for financial and valuation opinions culminating in a fairness opinion. In this respect, the Court was persuaded by the fact that the fairness opinion was necessary to demonstrate that the directors acted with due care in approving the transaction. On the other hand, investment advisory fees incurred in the context of active negotiations and in connection with price negotiations were not deductible, as they were more closely linked to the implementation phase.

With respect to the spin-off, the Court allowed the deduction of investment advisory fees incurred prior to final approval of the transaction. More specifically, out of 389 days spent on the transaction, 345 days predated final approval. Thus 88.69% of the fees were deductible from income.

As an alternative basis for deduction, Alcan raised a provision of the Canadian Income Tax Act that expressly allows for the deduction of certain investment advisory fees incurred for advice as to the advisability of purchasing specific shares. The Court indicated that the fees found to be deductible under the analysis described above would also be deductible under this alternative provision. While the provision does not apply to fees that are a “commission,” the fees in this case were fixed prior to the completion of the transaction. The fees that were found to be implementation costs, however, were still not deductible on the alternative basis.

In contrast, the Court held that public relations fees did not constitute oversight expenses. The evidence showed that such expenses were necessary for the smooth implementation of the transaction, due to the need for careful and strategic communication with the public since the takeover was politically sensitive in France. Query if public relations expenses or communication expenses incurred in the deliberation phase could be deductible as oversight expenses. Printing costs for the preparation and delivery of documents that were legally required were also not oversight expenses as the preparation and delivery of the documents was an essential step in the implementation of the transactions. Notably, certain fees were not deductible due to insufficient evidence describing the nature of the fees, reminding all taxpayers of the necessity to adduce sufficient evidence.
Conclusions

The case demonstrates that significant transaction fees can be deducted on a current basis under Canadian tax law, with proper management and careful maintenance of records. Recognizing that the taxpayer will in all cases bear the onus of proving deductibility, corporations and their boards of directors should take care in documenting all board meetings considering potential transactions to demonstrate that board oversight is part of the everyday business of the corporation. Given the benefit, from a tax perspective, of characterizing an expense as an oversight expense, care should be taken to allocate expenses to ensure that there is a demarcation between the deliberation and implementation phases of a transaction. Expenses that pertain to advice given to the board of directors to assist it in the decision-making process undertaken as part of the exercise of the board’s oversight function should, ideally, be subject to separate retainer agreements and, in all events, clearly identified as such in any invoices.

Transaction fees associated with M&A transactions can be substantial, particularly in the case of transactions with multi-jurisdictional components and those involving pre- and post- closing reorganizations required to meet conditions related to the mandated divestiture of assets or the rationalization and integration of operations. The decision in *Rio Tinto* is therefore a welcome development in Canadian tax law. ■
PRACTICE POINTS

Rev. Proc. 2016-44 Provides a Path for Long-Term Management Contracts with a Few New Challenges

By Adam Harden and Patrick O’Daniel, Norton Rose Fulbright U.S. LLP

Editor’s Note: Rev. Proc. 2016-44, discussed in this article, has now been superseded by Rev. Proc. 2017-13. An article explaining the guidance changes in the new revenue procedure will appear in the next issue of ABA Tax Times.

State and local governments have been able to issue bonds that bear interest that is exempt from federal income tax. Those bonds, however, must meet certain conditions. If there is “private business use,” then a series of rules specific to “private activity bonds” must be taken into account in order to secure tax-exempt interest for those bonds. Management contracts provide an instance where arrangements with service providers can result in “private business use.” This article discusses the recent guidance in this area and highlights a number of new issues and potential pitfalls that practitioners will need to take into account when analyzing management contracts.

On August 22, 2016, the IRS released Rev. Proc. 2016-44, modified on September 2, 2016, which modifies and supersedes existing management contract guidance under Rev. Proc. 97-13, Rev. Proc. 2001-39, and section 3.02 of Notice 2014-67 (collectively, the Original Safe Harbors). Rev. Proc. 2016-44 provides new safe harbor conditions for management contracts and creates a new “eligible expense reimbursement arrangement” that, if satisfied, will not result in private business use under Code sections 141 and 145. Generally, most practitioners have treated a contract for the management of, or services provided at, bond-financed property that does not fit within the Original Safe Harbors as giving rise to private business use for tax purposes, with the understanding that more than a de minimis amount of private business use may disqualify interest on the bonds from tax exemption. Practitioners should be aware, however, that a number of IRS private letter rulings have concluded that various management contracts under various fact patterns that fall outside of the Original Safe Harbors nonetheless do not rise to private business use under

1 All other sections of Notice 2014-67 remain in effect with respect to contracts entered into prior to August 18, 2017 and not materially modified thereafter. Rev. Proc. 97-13, as originally issued, specifies various permitted terms of contracts that depend on the extent to which the compensation is a periodic fixed fee. The greater the percentage of fixed compensation, the longer the permitted term of the management contract. Rev. Proc. 2001-39 only made a minor amendment to Rev. Proc. 97-13. Notice 2014-67 expanded the Rev. Proc. 97-13 safe harbors to address certain developments involving accountable care organizations after the enactment of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119, and also to allow a broader range of variable compensation arrangements for shorter-term management contracts of up to five years.
the general facts and circumstances test of the applicable regulations. Although these private letter rulings cannot be relied on as precedent, they provide an indication of the IRS’s views on this matter.

With Rev. Proc. 2016-44, the IRS replaced the longstanding safe harbor formulas for management contracts under Rev. Proc. 97-13 with a universal or “one-size-fits-all” safe harbor for all management contracts and brought under the purview of the revenue procedure many of the considerations that existed previously in the facts and circumstances test of the regulations. As a result, while many agreements that fail to qualify under the new safe harbor could also fail the facts and circumstances test, the margins of qualification under the fact and circumstances test have narrowed significantly.

Background

Under section 103(a), interest on governmental bonds generally is excluded from the gross income of the bondholder for federal income tax purposes. However, such exclusion is denied under sections 141 and 145 in the case of bonds that are “private activity bonds” but not “qualified bonds.” A private activity bond is a bond of an issue that satisfies both a “private business use” and also a “private security or payment” test. Generally, the private business use test is satisfied if more than a limited amount of the proceeds of the issue are to be “used” by a nongovernmental person in any activity of an entity or an individual that acts in a trade or business (a “private business use”), and the private security or payment test is satisfied if either the obligation of the issuer to pay debt service is secured to a substantial extent by property subject to private business use (“private security”) or the issuer is to receive substantial payments (whether or not made by a nongovernmental user) with respect to a private business use of the proceeds of the issue. In either case, a use of property financed with proceeds of the issue is treated as a use of the proceeds. Thus, in determining whether an issue comprises private activity bonds, it is important to identify any private business use of the proceeds of that issue. A nongovernmental person may enjoy a “use” relationship to

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2 See, e.g., PLR 201228029 (although compensation was not within Original Safe Harbors, it was not based on net profits so, based on facts and circumstances, the management contract did not result in Private Business Use); PLR 201145005 (although the term of the agreement exceeded what was permitted to qualify for the Original Safe Harbors, based on facts and circumstances, the management contract did not result in Private Business Use); PLR 200813016 (although compensation was not within Original Safe Harbors, it was not based on net profits so, based on facts and circumstances, the management contract did not result in Private Business Use); PLR 200330010; PLR 200222006.

3 “Qualified bonds” are listed in section 141(e) and include “exempt facility bonds” issued under section 142 and “qualified 501(c)(3) bonds” issued under section 145. Any discussion of any AMT tax consequences or other collateral federal income tax matters is beyond the scope of this article.

4 Section 145(a) provides generally that a “qualified 501(c)(3) bond” means any private activity bond issued as part of an issue if all property that is to be provided by the proceeds of the issue is to be owned by a 501(c)(3) organization or a governmental unit, and there is to be only insubstantial private business use of the property by any nongovernmental person (other than by a 501(c)(3) organization in an activity that, as to its exempt purposes, is not an unrelated trade or business under section 513(a)).

5 A non-governmental person may enjoy a “use” relationship to bond-financed property if it has special legal entitlements with respect to the bond-financed property such as a direct or indirect (e.g., through a joint venture or partnership) ownership interest; or has a leasehold interest in that property (determined under general federal income tax principles), or will receive a special economic benefit from the property (e.g., by reason of owning nongovernmental property specially benefitted by the proximity of the financed property). See generally Treas. Reg. § 1.141-3. A discussion of these relationships is beyond the scope of this article.
bond-financed property if that nongovernmental person provides services to the governmental owner with respect to any function of the financed property pursuant to a “management contract.”

Over the previous 34 years, the IRS has recognized that not all service arrangements between a governmental owner or a 501(c)(3) organization and a nongovernmental provider should result in a denial to the governmental owner of the benefits of tax-exempt bond financing. Governmental units and 501(c)(3) organizations frequently enter into arrangements with nongovernmental persons to provide management or other services, with respect to all or a portion of a bond-financed property, that do not create in the service provider sufficient indicia of ownership, possession, or indirect benefit to warrant such denial.

In recent years, issuers have relied on the requirements established under the Original Safe Harbors, satisfaction of which would assure that a management contract would not be treated as establishing private business use. The Original Safe Harbors, however, have been quite narrow and overly formulaic, resulting in elaborate efforts to conform the normal commercial practices of the nongovernmental service provider to noncommercial constraints regarding compensation, reimbursement of expenses and, importantly, the term of the service arrangement. Such constraints, for example, have prevented anything but the shortest of Public-Private Partnership (P3) arrangements, essentially precluding the typical long-term design-build-finance-operate-maintain (DBFOM) method of procurement of governmental facilities.

Rev. Proc. 2016-44

Rev. Proc. 2016-44 abandons the traditional structure of a menu of management contract templates that afford safe harbor protection from private business use characterization in favor of a broader and generally more inclusive set of principles. The Rev. Proc. 2016-44 safe harbor relief generally includes long- or short-term contracts providing for any type of fixed or variable compensation that is determined to be reasonable for services rendered under management contracts. Instead of rigid parameters, it applies a principles-based approach focusing on (i) the extent of governmental control over the financed property; (ii) the extent to which the service provider does (or does not) bear risk of profit or loss with respect to the financed property; (iii) the term of the arrangement in comparison to the economic life of the financed property; and (iv) consistency of tax positions taken by the service provider. In short, Rev. Proc. 2016-44 adopts criteria closely aligned to the criteria that would be applied in a traditional tax ownership or lease analysis.

Rev. Proc. 2016-44 generally applies to any management contract that is entered into on or after August 22, 2016. An issuer may continue to rely upon the Original Safe Harbors in evaluating any agreement entered into prior to August 18, 2017, so long as it is not materially modified or extended after that date. In addition, an issuer may apply the new Rev. Proc. 2016-44 safe harbor conditions to any management contract that was entered into before August 22, 2016.

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6 Treas. Reg. § 1.141-3(b)(4)(i). This concept of “use” of property differs from the tax analysis in the converse situation where certain federal income tax benefits, including investment credits and accelerated depreciation, are denied to a nongovernmental owner by reason of a governmental entity’s “use” of nongovernmental property. Under those provisions, “use” is limited to situations of governmental ownership or possession of the nongovernmental property, and does not include situations where the governmental involvement is through the provision or receipt of services involving the nongovernmental property. For that reason, Code provisions such as section 7701(e) (regarding the treatment of certain contracts for the provision of services) are of limited value in identifying under what circumstances a service arrangement should give rise to private business use of a governmental facility.

7 See, e.g., Rev. Procs. 82-14, 82-15, 92-17.
Eight Safe Harbor Conditions

A management contract satisfying all of the conditions below does not result in private business use:

1. **Compensation must be reasonable for services rendered during the term of the contract.** Reasonable compensation has always been required under the Original Safe Harbors and the regulatory fact and circumstances test. For this purpose, compensation now includes payments to reimburse actual and direct expenses paid by the service provider and related administrative overhead expenses of the service provider. Under the Original Safe Harbors, this change would be problematic given the strict percentage limitations on non-fixed fee arrangements. As discussed further below, the focus is now on the overall amount of compensation, so the concern is not whether a percentage limitation has been breached but whether the compensation as a whole results in a proprietary or net-profits type of arrangement.

2. **Contract must not provide the service provider a share of the net profits from the operation of the managed property.** As a safe harbor (within the general safe harbor), a compensation arrangement may be treated as not sharing net profits if no element of the compensation for services takes into account or is contingent upon either the managed property's net profits or both the managed property's revenues and its expenses for any fiscal period. The “elements” of compensation to be considered are (i) the eligibility for compensation, (ii) the amount of compensation and (iii) the timing of compensation. Solely for the purpose of evaluating whether the amount of compensation inappropriately considers net profits or revenues and expenses, any reimbursement of actual and direct expenses paid by the service provider to “unrelated parties” is disregarded as compensation. As an example, a compensation arrangement that provides for incentive bonuses for reaching targeted quality, performance or productivity goals in the service provider’s operation of the managed property will not (in and of itself) be treated as providing the service provider a share of the net profits from the operation of the managed property.

3. **Contract must not, in substance, impose upon the service provider the burden of bearing any share of net losses from the operation of the managed property.** A safe harbor ensures that an arrangement will not be treated as shifting the burden of bearing a share of net losses if (i) the amount of compensation to and of unreimbursed expenses to be paid by the vendor does not take into account either the net losses of the managed property or both the revenues and expenses of the managed property for any fiscal year, and (ii) the timing of payment of

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8 For purposes of Rev. Proc. 2016-44, a “management contract” means a management, service or incentive payment contract between a qualified user and a service provider under which the service provider provides services for a “managed property.” In the case of a contract that covers both pre-operating services (e.g., construction management) and operating services, only that portion of the contract covering the latter is the “management contract.”

9 A “service provider” means any person (other than another qualified user) that provides services to, or for the benefit of, a qualified user under a management contract. For projects financed with governmental bonds, “qualified user” means any government person, and for projects financed with qualified 501(c)(3) bonds, the term means any governmental person or 501(c)(3) organization with respect to its activities that do not constitute a section 513(a) unrelated trade or business. A service provider’s use of a project that is functionally related and subordinated to its performance under a management contract is subject to the same safe harbor conditions.

10 An “unrelated party” is a person other than (i) a related party as defined in Treas. Reg. § 1.150-1(b) or (ii) a service provider’s employee. An arrangement under which the amount of reimbursement of a vendor for its employee expenses (or those of a related party) is contingent on both the revenues and expenses of operation of the managed property would fail this second condition.
compensation is not contingent upon the net losses of the managed property. As an example, a compensation arrangement that provides for reductions for failure to cause the operation of the managed property to satisfy targeted expenses limitations under the safe harbor will not (in and of itself) be treated as imposing a share of net operational losses on the service provider.

4. **Term of contract (including all legally enforceable renewal options) must not exceed the lesser of 30 years or 80% of the weighted average reasonably expected economic life of the property.** For this purpose, “economic life” is determined in the same manner as under section 147(b). A safe harbor under existing law provides that determinations for acquired or improved property may use the property’s midpoint life under the asset depreciation range system in effect in 1984.11

5. **Qualified user must exercise a significant degree of control over the managed property.** This requirement will be met if the contract requires that the qualified user approve the annual budget of the managed property, capital expenditures with respect to the managed property, each disposition of property that is part of the managed property, rates charged for the use of the managed property12 and the general nature and type of use of the managed property. This is a new requirement not present under the Original Safe Harbors; accordingly, any contract that is entered into, extended or otherwise materially modified should be reviewed to ensure compliance.

6. **Qualified user must bear the risk of loss from damage or destruction of the property.** This requirement may be satisfied notwithstanding that the qualified user insures the property through a third party or, under the contract, imposes upon the service provider a penalty for failure to operate managed property in accordance with contracted standards. The latter also is key to facilitating the typical P3 DBFOM transaction, under which the nongovernmental service provider is contractually obligated to “hand-back” the facility in a condition that satisfies specific minimum standards at the end of the arrangement.

7. **Service provider must agree that it is not entitled to and will not take any tax position inconsistent with being a service provider to the qualified person.** The contract must include an express written undertaking by the service provider not to take depreciation or amortization, investment tax credits, or deduction for any payment as rent with respect to the managed property. This express written commitment is a new requirement not present under the Original Safe Harbors. While as a practical matter a service provider under a management contract satisfying the Original Safe Harbors likely would not have been able to claim such return positions, an express contractual covenant is required under the Rev. Proc. 2016-44 safe harbor. In the context of P3 transactions, this may have the effect of

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11 See Rev. Proc. 83-35. For buildings, the asset guideline lives under Rev. Proc. 62-21 may be used. As an alternative, economic life may be established under section 147(b) through the expert opinion of a licensed engineer or other professional, and usually is based on industry experience with the particular type of property and familiarity with the maintenance practices of the governmental owner of the property.

12 Approval of an annual budget for capital expenditures and dispositions described by functional purpose and specific maximum amounts may satisfy these central requirements. Rev. Proc. 2016-44 further provides that a qualified user may show approval of rates charged for the use of the managed property by (i) expressly approving such rates or the methodology for setting such rates or (ii) including in the contract a requirement that the service provider charge rates that are reasonable and customary as specifically determined by an independent third party.
discouraging service-provider investment into non-severable improvements of the managed property, even in those cases in which there is no resulting adjustment to compensation or other financial obligation of the qualified user to the service provider. Many short-term contracts, on the other hand, probably do not contain the required language, which will need to be added if the contracts are materially modified.

8. **Service provider must not have any role or relationship with the qualified user that would restrict the exercise by the qualified user of its rights under the contract.** Among other things, the safe harbor permits: (i) up to 20% of the voting power of the qualified user to be vested in directors, officers, shareholders, partners, members, or employees of the service provider (or of any related person to the service provider); (ii) the chief executive officer (or person with similar management responsibilities) (the CEO) or the chairperson of the service provider’s governing board to be a member of the governing board of the qualified user; and (iii) the CEO of the service provider (or of any related person to the service provider) to be the CEO of the qualified user or any related person to the qualified user.

Certain of these criteria are similar to ones contained in past guidance. Under section 1.141-3 of the regulations, control over managed property and risk of loss are two of the criteria explicitly mentioned in the private business use regulations as factors that distinguish management contracts from lease agreements. Stated differently, a management contract that conveys too much control or the risk of loss to the service provider is not eligible to meet the facts and circumstances test because it is not a management contract. Furthermore, the ability to substantially limit a qualified user’s ability to exercise its rights is a form of control: failing that requirement could arguably cause the agreement to be considered a lease. Although not drafted with tax-exempt bonds in mind, section 7701(e) provides certain relevant criteria to distinguish a lease from a management contract, including whether the service provider has a significant economic interest in the property. In a [2015 letter to the IRS](https://www.irs.gov/individuals/2015-letter-to-the-irs) discussing the impact of section 141 on public/private arrangements, the Tax Section interpreted section 7701(e) and relevant case law as standing for the proposition that a “contract should be treated as a lease (as contrasted with a mere service contract), based upon . . . the operator’s ability to share in both the combined revenues and expenses of the applicable enterprise.”

**Eligible Expense Reimbursement Arrangement**

If a management contract is an “eligible expense reimbursement arrangement,” it does not result in private business use under sections 141 and 145. An “eligible expense reimbursement arrangement” is a management contract under which the only compensation consists of reimbursements of actual and direct expenses paid by the service provider to unrelated parties and reasonable related administrative overhead expenses of the service provider.14

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13 Id.

14 Under the Original Safe Harbors, contracts that only reimbursed actual and direct expenses paid by the service provider to unrelated parties did not result in private business use, but contracts (other than those related to public utility property) that provided for reimbursement of administrative overhead expenses were subject to the general rules of the Original Safe Harbors and could result in private business use. In effect, this new arrangement allows entities that were operating a facility at cost to achieve the same tax treatment as those operating public utilities (which are typically run on a break-even basis.)
Questions Raised for Practitioners

At first blush, Rev. Proc. 2016-44 would seem to facilitate long-term variable compensation-based arrangements by for-profit contractors of bond-financed facilities. The most notable feature of Rev. Proc. 2016-44 is that it offers safe harbor treatment to management contracts with terms as long as 30 years, provided that the compensation paid to the service provider under the terms of the contract does not have the indicia of a lease or ownership arrangement—i.e., it is reasonable and does not have a net profits component. This represents a dramatic expansion of the safe harbor provisions of Rev. Proc. 97-13. Rev. Proc. 2016-44 thus appears conducive to investment in long-lived infrastructure, including in certain kinds of P3 projects, while providing enhanced flexibility to qualified users for all types of bond-financed projects.

Many practitioners have noted, however, that increased flexibility comes at the expense of less certainty and heightened facts and circumstances analysis. This is necessarily the case given that the new guidance has replaced the Original Safe Harbors based on numeric parameters with a principles-based approach. Originally, the IRS issued revenue procedures outlining the conditions to be met in order to issue an advance ruling that there was no private use with respect to certain bond-financed facilities.15 These revenue procedures focused on reasonableness of compensation and avoidance of net profit shares. They had very short terms of no more than five years with a unilateral cancellation right held by the qualified user after two years. The 1986 tax reforms provided a statutory directive regarding the general treatment of management contracts as not having trade or business use under similar parameters.16 Rev. Proc. 93-19 expanded the types of allowable compensation while still maintaining the touchstones of reasonable compensation and no net profits (and a term not to exceed five years). Rev. Proc. 97-13 further liberalized the types of compensation and lengths of term with respect to management contracts, maintaining the reasonableness and ‘no net profits’ requirements.

While each piece of new guidance liberalized rules, all of the guidance has been based on the same principles of reasonable compensation and no net profits. The analysis seeks to distinguish those arrangements in which the service provider is merely managing the property from those in which it has some kind of proprietary, partnership or leasehold-type interest. Rev. Proc. 2016-44 makes the principles-based analysis explicit. While removing the restrictive bright-line requirements, it still requires a careful determination of whether the contemplated arrangement vests the service provider with the risks and rewards associated with a proprietary or leasehold-type interest.

Because the new guidance expands rather than restricts the type of compensation arrangements for management contracts, the arrangements specifically allowed under Rev. Proc. 97-13 (e.g., those based on capitation fees, per-unit fees and the like) should still be available. Some practitioners have suggested that the IRS issue supplemental guidance explicitly stating that these prior acceptable arrangements remain valid.

Although contemplated arrangements will no longer be required to meet a specific percentage of fixed compensation, they will still need to be tested to see whether the arrangement provides a proprietary interest in the facility through the sharing of net profits or net losses or creation of a leasehold arrangement. For example, although a 30-year management contract based entirely on a percentage of gross revenues is not explicitly disallowed by the new guidance, that arrangement might not satisfy the principles since a longer time period introduces more uncertainty and hence greater risk with respect to that uncertainty—

15 See Rev. Proc. 82-14; Rev. Proc. 82-15.
both hallmarks of an equity interest rather than an interest as a mere service provider. Further, consider a long-term contract in which the service provider is responsible not only for the expenses associated with the provided services but also for the facility’s insurance, taxes and utilities. These components cause the arrangement to take on the color of a lease as opposed to a management contract (not to mention one with a net loss/net profit component).

As the above examples illustrate, the longer the contract and the more ownership indicia there are, the more practitioners should be concerned that risk may be transferred to the service provider in a manner more in keeping with an owner, partner or lessee. Some practitioners have expressed concerns regarding contracts that provide for a percentage of gross revenues but subordinate part of the fee to other service-provider expenses, including debt service. In such cases, a practitioner may consider requesting revenue projections to establish that there will be sufficient revenues to pay the full management fee. Of course, the longer the contract, the harder it will be to provide reliable projections—indeed, the IRS has considered projections beyond five years problematic.17 Perhaps this concern can be alleviated by strong contractual provisions requiring that the deferred management fee be an absolute obligation of the qualified user that must be paid after a certain relatively short period of time. Again, the touchstone is whether the service provider is morphing into an owner/partner/lessee who is bearing the benefits and burdens of net profits and net losses.

Although this principles-based approach may provide more flexibility in crafting the terms of management contracts, there still may be areas where earlier guidance’s flexibility now falls outside of the new safe harbor guidance and necessitates a facts and circumstances analysis. For example, there may be less flexibility in the conditions under which payments may be subordinated or deferred. The new guidance indicates that timing of payment may not be conditioned on tests involving the managed property’s revenues and expenses for any fiscal period. Another area of uncertainty is the application of the weighted average reasonably expected economic life of the managed property. For example, if an issuer or tax-exempt conduit borrower entered into a 30-year contract for a 40-year property and the entity enters into a new management contract (or materially modifies the existing management contract) at the end of year 15, must it retest the remaining economic life of the managed property? Rev. Proc. 2016-44 states that “[t]he life is determined . . . as of the beginning of the term of the contract.” For practical application, would the new or materially modified management contract have term-length flexibility if the engineers estimate at the end of year 15 that the building has an additional 37.5 years of useful life? Is such an estimate necessary if the safe harbor for depreciation purposes is used? Conversely, would the term length be restricted if the engineers estimate that the building will not last more than an additional 10 years, and, if so, does this mean that the entity would be unable to have a management contract during the last 20% of the project’s useful life or would the determination be 80% of the remaining economic life? Many practitioners believe that retesting would run counter to the other rules relating to the evaluation and estimation of the useful life of a project. However, others have pointed out that even if one cannot retest for this safe harbor, that simply means one is back to facts and circumstances; accordingly, if the new contract under the newly re-tested useful life is less than 80% of that new life, one may become comfortable with having satisfied the principles of Rev. Proc. 2016-44.

Further, section 4.03 of Rev. Proc. 2016-44 refers to “managed property” as opposed to “financed property.” This phrasing was apparently adopted to make clear that one is not to be concerned with all the projects

17 See, e.g., Treas. Reg. § 1.148-1(c)(4)(ii)(A) (for the safe harbor for longer-term working capital financings “in no event can the first day of the first testing year be later than five years after the issue date”).
financed with a bond issue but only that particular part of the financed property subject to a management contract.

Other practitioners have suggested an ambiguity in the term “unrelated parties” (discussed above). Rev. Proc. 2016-44 states that “Unrelated parties means persons other than a related party (as defined in Section 1.150-1(b)) or a service provider’s employee.” This could be interpreted to mean that an unrelated party would be (i) persons other than a related party (as defined in section 1.150-1(b)) or (ii) a service provider’s employee. It could also be interpreted to mean that an unrelated party would be persons other than (i) a related party (as defined in Section 1.150-1(b)) or (ii) a service provider’s employee. Each interpretation is reasonable, yet the outcome of the first interpretation would be markedly different than the outcome of the latter. Practitioners have wondered why a salaried employee would be treated as something other than a pass-through expense.

Additionally, section 5.02(3)(a)(ii) of Rev. Proc. 2016-44, which prohibits the manager from bearing the losses of the operation of the facility, states that “[t]he timing of the payment of compensation is not contingent upon the managed property’s net losses.” Practitioners are left wondering whether deferred management fees would therefore be disallowed.

Finally, practitioners have also questioned the “control over the use” requirement in section 5.04 of Rev. Proc. 2016-44, which states that the “qualified user must exercise a significant degree of control over the use of the managed property.” At first, this requirement appears easily met, but further analysis shows it could be a problem for many common types of contracts. The exempt person needs to either “approve the rates” or the rates charged by the manager are “reasonable and customary as specifically determined by an independent third party.” For the typical toll roads or utility systems financings, this requirement is straightforward and should be easily satisfied. There is some uncertainty, however, as to how this would apply to healthcare systems financings where the facilities frequently are used by specialists such as radiologists, pathologists, or pharmacists. Further, when reviewed in the context of a hotel financing where rates change with frequency based upon a variety of ever-changing factors (i.e., business use vs. personal use, duration of the stay, size and status of the hotel), there is a concern over whether major hotel management companies would be willing to agree to have room rates determined by the local hotel owner or by an independent third party. Indeed, such pricing algorithms tend to be proprietary and an owner would typically not be given access to an independent third party. There is a similar concern over food services at a university. For example, in the case of a dining hall where the service provider wishes to have control over the university’s meal plan pricing, most practitioners would likely treat this as a rate for the use of the property.18

Looking Ahead

While many practitioners may have preferred to see Rev. Proc. 2016-44 encapsulate the Rev. Proc. 97-13 safe harbor with an increase to a 30-year permitted contract term and including the Notice 2014-67 modifications, the release of Rev. Proc. 2016-44 has provided increased flexibility in many areas, perhaps decreased certainty in others, and certainly additional questions. With some slight adjustments to the terms and provisions of existing management contracts (particularly with respect to disavowing an inconsistent tax position and indicating a significant degree of control over the managed property) and with the coupling of the facts and circumstances and the ability to define the “project” at a tailored level, Rev. Proc. 2016-44 should be a workable and beneficial change to the evaluation of what constitutes a qualified management contract.

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18 See Treas. Reg. § 1.141-6(a)(3).
PRACTICE POINTS

SALT Committee Update on Partnership Audit Rules, Work with MTC and States

By Bruce P. Ely and William T. Thistle, II, Bradley Arant Boult Cummings LLP, Birmingham, AL (Co-Chairs of the SALT Committee’s Task Force on the State Implications of the New Federal Partnership Audit Rules)

Partnership tax aficionados will recall that Congress passed the Bipartisan Budget Act of 2015 (the BBA)¹ as amended by the PATH Act of 2015, in record time. That law established a new partnership audit and assessment regime and repealed prospectively the current TEFRA partnership audit rules.² Even though more than a year has passed, much remains unknown—both at the federal and the state level. In fact, none other than the Commissioner of Internal Revenue, John Koskinen, recently remarked that “the statute has turned out to be more complicated, rather than less.”³

The federal rules will take effect on a widespread basis for tax years beginning after December 31, 2017. In the meantime, state legislatures, state departments of revenue (DORs) and the Multistate Tax Commission (MTC) are analyzing the federal rules to address the conformity issues in a reasoned and hopefully uniform way, with input from the business and tax practitioner communities. This article provides an update on how the new partnership audit regime is being addressed at the state level so far and discusses some helpful options.

Background⁴

There have been numerous articles and seminar presentations explaining how, and why, the new partnership audit rules came about. We only set the stage here and defer to others for the details behind the federal legislation. In November 2015, Congress passed the BBA, at the last minute tacking on draft legislative language repealing the existing TEFRA rules.⁵ Within the legislation are new rules tailored to combat the growing problem—from the perspective of the IRS and the General Accounting Office (GAO)—of auditing

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² The current audit rules were enacted as part of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, and are typically referenced, using the legislation’s acronym, as the TEFRA rules.
³ Laura Davidson & Colleen Murphy, Koskinen Skeptical of New Audit Regime for Partnerships, 221 DTR G-1 (BNA Nov. 16, 2016).
⁴ For a more comprehensive review of the new federal partnership audit rules, see Fred F. Murray, New Partnership Audit Rules Require Action Now in Respect to Partnership Agreements, LLC & PARTNERSHIP REP., 17 (ABA October 2016); Jennifer McLoughlin, New Federal Take on Partnership Audits: A Primer, 236 DTR H-1 (BNA Dec. 7, 2016).
⁵ See supra n. 2.
the ever-increasing number of so-called “large” partnerships, i.e., those with more than 100 partners. As the number of partnerships—in particular, the number of large partnerships—has exploded over the past decade, sourcing of income has become a problem for revenue officials before and during the audit process. The new regime is designed to alter the burden of sifting through myriad assortments of partnership structures, saving time and expense for IRS revenue agents who the GAO notes are often not conversant with the intricacies of Subchapter K.

Arizona and Recommendations Going Forward

Following enactment of the BBA, the Arizona legislature rushed to conform the state’s tax audit procedures to the new federal rules as part of their periodic effort to conform their state income tax to the corresponding federal income tax rules. This was accomplished in large part by engrafting the new federal procedures into Arizona’s existing tax code, with certain material differences.

As outlined by various authors, Arizona’s initial attempt at drafting conforming rules has highlighted various problems and provided a useful case study for those of us reviewing other states’ income tax statutes and assessment procedures for future revisions. For example, consider the scenario in which a partnership doing business in Arizona is determined to have an imputed underpayment of federal income taxes for a prior year. Assuming the partnership elects at the federal level to “push-out” the final adjustments to its reviewed-year partners, those partners (and former partners) will be required to take their share of any adjustments into their current (adjustment) year federal returns, with no amendment to the prior, reviewed-year returns required. This aspect differs from the new regime set forth by Arizona, which presently requires reviewed-year partners, irrespective of federal level treatment, to file amended state returns for the reviewed year. Such a lack of conformity between state and federal rules creates not only significant administrative difficulties but also due process concerns, given the all too likely scenario of a reviewed-year partner who sold all or part of his or her partnership interest after the reviewed year and is assessed Arizona income tax relating to the reviewed year due to adjustments at the federal level. The same issue arises in the case of a partner who was an Arizona resident during the reviewed year but has since moved out of state and now has no nexus with Arizona other than the partnership interest.

To compound the problem, Arizona’s new rules also introduce timing issues through mismatching notice and filing deadlines. This raises the specter of a partnership that chooses to push-out Arizona adjustment items, but isn’t required to provide notice of these adjustments to reviewed-year partners until after the statute of limitations for the original filings by these partners has expired. In sum, one modification to the machine’s components has created a cascading effect for all running processes.

Seeking to correct the problems in the new Arizona law and to prevent similar drafting issues with other states, a number of groups have taken the initiative to suggest various ways in which the states can craft their partnership audit rules to coexist with the new federal regime in a fairer and more administrable way. In particular, the MTC staff and its partnership work group have been active in promoting open dialogue to explore all available avenues to achieving consistent legislation as each state tackles implementation of new

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6 Many partnerships are now limited liability companies (LLCs). All references in this article to partnerships or partners include LLCs treated as partnerships for federal tax purposes and their members as well, unless the context requires otherwise.

7 For an excellent analysis of Arizona’s new partnership audit regime, see Marianne Evans et al., New Partnership Audit Rules Create State Tax Issues, 81 State Tax Notes 955 (Sept. 19, 2016). Despite calls to take a wait-and-see approach, the Montana Department of Revenue pre-filed its own conformity bill, H.47, and is seeking comments. The SALT Committee Task Force has been asked to provide informal drafting suggestions consistent with its recommendations to the MTC, as discussed infra note 9 and accompanying text.
partnership audit rules. As part of those efforts, the MTC staff, with input from the SALT Committee's Task Force on the State Implications of the New Federal Partnership Audit Rules (the Task Force) and others, posted on the MTC's website a very helpful list of the material state conformity issues. It is uncertain whether the MTC will issue a blanket set of recommendations for all member states levying a net income-based tax or will proceed to work individually with state legislatures through proposing or at least editing individualized conformity legislation. Perhaps “both” is the likely answer.

In hopes of furthering the discourse, the Task Force partnered with the Council On State Taxation, Tax Executives Institute, Inc., and the American Institute of CPAs. These groups collectively submitted an informal set of recommendations to the MTC staff and their partnership work group. The Task Force and its partners believe these recommendations will aid the states in designing partnership audit rules that not only operate smoothly with the new federal regime, but also serve to promote the most beneficial operational outcomes for taxpayers. These unofficial recommendations have not yet been vetted by the ABA Tax Section leadership, so at this point they constitute only our members’ personal views.

As an initial matter, the Task Force urged the MTC and the states to take a go-slow approach and to monitor the progress of the pending Tax Technical Corrections Act of 2016, H.R. 6439, S.3506 (introduced Dec. 6, 2016), which makes several material and helpful changes to the audit rules. Also, all parties are anxiously awaiting guidance from Treasury. Second, the Task Force proposed that any state conformity statute or any proposed MTC model statute provide that the designation of an individual or entity as the partnership representative (PR) for IRS audit purposes should be accepted by the states. We recognize that circumstances exist where a sub-PR may be appointed to handle a particular state or perhaps group of states, and we recommended that the sub-PR’s selection be honored by the respective states as well.

Regarding the new “push-out” election under section 6226, the Task Force recommended that states and the MTC offer partnerships the opportunity to elect to remain liable for any underpayment of state income taxes, interest and penalties, irrespective of which election is made (or by default, not made) for federal tax purposes. The rationale here is simply a cost-benefit calculation: while adjustment items elected to be “pushed-out” at the federal level may be significant in terms of dollar amounts, state-level items for one or more states may not be, thereby making it more cost-effective for the partnership to “pay-up” at the state level rather than expending resources on calculating and providing notice of each reviewed-year partner’s share of state-level adjustments. That also allows the states to look to only one entity—the partnership itself—for payment. Along those lines, the Task Force also recommended states consider developing composite adjustment returns for all partners, including residents and nonresidents, of the reviewed year, even if original composite returns were not filed.

8 For more information about the MTC partnership work group, and their efforts in this regard, please visit their helpful website.
9 The Task Force is chaired by authors Bruce Ely and Will Thistle and consists of the following additional members: John Barrie, Dan De Jong, Nikki Dobay, Julia Flanagan, Karl Frieden, Erica Horn, Willie Kolarik, Kelvin Lawrence, Pilar Mata, Alysse McLoughlin, Kelley Miller, Fred Nicely, Kyle Wingfield, and Steve Wlodychak.
10 The Task Force produced a memorandum discussing the state implications of the federal partnership audit rules on September 16, 2016. For additional coverage, see Amy Hamilton, MTC Outlines Reporting Issues Raised by New IRS Partnership Audit Regime, 2016 STT 199-1 (Oct. 14, 2016); and Amy Hamilton, MTC Partnership Audits Work Group to Delve into Federal Push-Out Election, 2016 STT 222-3 (Nov. 16, 2016).
11 In light of President Trump’s new Executive Order requiring agencies to eliminate two regulations before proposing a new one, it is unclear when Treasury will be able to issue such guidance.
12 For prior coverage, see Amy Hamilton, States Advised to Depart From IRS Partnership Audit Regime’s ‘Push-Out’ Election, 2016 STT 188-1 (Sept. 28, 2016).
The Task Force also recognized the need for most states to amend their existing statutes, since in most states partnerships are not currently treated as taxable entities and therefore are incapable of being assessed tax, other than perhaps under a composite return or nonresident partner withholding statute. Further, should a partnership pay any state income tax deficiency, the state conformity statute should provide that adjustment (current) year partners receive credit against their state income tax liability for the payment. Based on our non-scientific review, it’s likely that most if not substantially all state nonresident partner withholding statutes must be amended to take into account this new scenario.

The Task Force also believes that now is an opportune time to amend each state’s federal audit adjustment reporting rules, commonly known as revenue agent’s report (RAR) statutes, to bring them into conformity with the federal rules and promote much-needed uniformity among the states. The Task Force, in conjunction with its partners, recently submitted to the MTC’s Uniformity Committee a draft RAR statute patterned in part after the MTC’s model uniform RAR statute issued August 1, 2003. While the MTC’s model statute contains a number of beneficial components and is a good starting point, the Task Force believes there are some important changes needed—e.g., adopting a uniform 180-day period in which to file either amended state returns or a streamlined multi-year report, and limiting the state assessment (and the scope of the state DOR audit) to only those tax items in the federal audit that directly affect the taxpayer’s state income tax liability.

Another of the Task Force’s recommendations is that any state conformity statute should provide a mechanism (similar to the provision in section 6225) for a partnership to reduce its state income tax liability by proving that lower tax rates are applicable to the state share of the imputed underpayment—e.g., by showing that a partner is a tax-exempt entity under state law, is subject to a lower state tax rate, or is not subject to a state’s income tax regime at all (such as an insurance company or a financial institution, in many states).

Finally, the Task Force recommendations note the existence of due process concerns in several circumstances, including the scenario in which a reviewed-year partner is no longer a resident of a particular state to which the partnership is liable for RAR adjustments when the partnership makes a “push-out” election under section 6226. Similar issues arise with a partnership that was doing business in or otherwise taxable by a state during the reviewed year (or more) but was not doing business in or otherwise taxable in that state during the adjustment year, or vice versa. Of course, any MTC model or state conformity statute should be designed to avoid violating any constitutional provisions, specifically the Commerce and Due Process Clauses. For example, the Task Force stressed that if a reviewed-year partner is required to file an amended state return for each reviewed year, the partnership’s apportionment factor in effect during each reviewed year should be applied, not the currently applicable (adjustment year) factor.

**Conclusion**

President Trump campaigned on a platform of increased infrastructure spending along with federal budget reduction, so it is likely that addressing ambiguities within the new federal partnership audit framework may not qualify as a legislative priority for the Trump Administration. It’s clear, however, that a thorough technical corrections bill and administrative guidance are needed to ensure that this projected $9.3 billion revenue-raiser will work effectively.

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14 Andrew Velarde, New Bill May Require Reproposal of Partnership Regs, 2016 TNT 237-3 (Dec. 9, 2016).
Nonetheless, the new federal audit regime has arrived and the effective date clock is ticking. It is the authors’ hope that the states and the MTC will take a measured and transparent approach to crafting their own partnership audit and RAR reporting rules—after legislative corrections have been made to the BBA and detailed guidance issued by Treasury. Doing so would go a long way toward ensuring that the transition to the new audit regime by multistate partnerships, their partners, and the states is as seamless as possible.
PRO BONO MATTERS

Making a Difference in Pro Bono Tax Cases

By Andrew R. Roberson, McDermott Will & Emery LLP, Chicago, IL

Introduction

For this edition of Pro Bono Matters, I thought it would be interesting to write about some of the tax cases which have been handled on a pro bono basis. Most cases are settled short of trial, and therefore the tremendous results obtained by pro bono volunteers are not publicized. Nevertheless, there have been several reported opinions in the past that are noteworthy and important for the specific taxpayers and the low-income taxpayer community as a whole. The cases discussed below are merely a few examples that demonstrate the difference that practitioners can make by volunteering their time on a pro bono basis to those individuals who cannot afford legal counsel. Stay tuned for more: Professor Keith Fogg is developing an in-depth article on important cases handled by pro bono volunteers.

Tax Pro Bono Cases in the Supreme Court

We all know the Supreme Court rarely agrees to hear tax cases. Thus, it is all the more impressive when the Court takes a tax case involving pro bono counsel. Two such cases are Bufferd v. Commissioner, 506 U.S. 523 (1993), and Commissioner v. Banks, 543 U.S. 426 (2005).

In Bufferd, Stuart Filler\(^1\) of Quinnipiac Law School argued on behalf of the taxpayer. The issue was whether a passthrough corporation’s limitations period on assessment controlled the government’s ability to determine a deficiency for an item flowing from the entity to the shareholder. The Court held that adjustments to a shareholder’s income are governed by the shareholder’s limitations period. This case is noteworthy because it appears that it is the first time a low-income taxpayer clinic handled a Supreme Court case.

In Banks, private law firms represented taxpayers on a pro bono basis in consolidated cases involving the issue of whether the portion of a money judgment or settlement paid to a plaintiff’s attorney under a contingent fee agreement is income to the plaintiff for federal income tax purposes. Although the Court held for the government that such amounts were income, the case reflects the substantial time and effort expended by private law firms to provide pro bono tax services.

\(^1\) For more information about Stuart Filler, including his creation of the first low-income taxpayer clinic in 1974 at Hofstra Law School, see here.
Protections for Innocent Spouses

The so-called “innocent spouse” rules in section 6015 provide relief for certain taxpayers from joint and several liability. Several cases in recent years handled by pro bono volunteers have led to case law and legislative changes ensuring that taxpayers can pursue claims for innocent spouse relief.

In the late 2000s, the issue arose as to the validity of a two-year rule on requests for equitable relief in Treasury regulations promulgated under section 6015(f). Pro bono volunteers took up the cause, with low-income tax clinics and private practitioners entering appearances in several cases throughout the country and working together to argue that the regulation in question was invalid. In 2009 and 2010, the Tax Court agreed, holding in Lantz v. Commissioner, 132 T.C. 131 (2009), Manella v. Commissioner, 132 T.C. 196 (2009), and Jones v. Commissioner, T.C. Docket No. 17359-08 (May 28, 2010), that the regulation was invalid under Chevron. The government appealed all three cases and ultimately obtained reversals of the Tax Court. Meanwhile, the Tax Court had continued to hold the regulation invalid in cases outside of these circuits. See, e.g., Young v. Commissioner, T.C. Docket No. 12718-09 (May 12, 2011); Pullins v. Commissioner, 136 T.C. 432 (2011); Stephenson v. Commissioner, T.C. Memo. 2011-16; Hall v. Commissioner, 135 T.C. 374 (2010), appeal dismissed (6th Cir. Aug. 2, 2011); Buckner v. Commissioner, T.C. Docket No. 12153-09, appeal dismissed (6th Cir. July 27, 2011); Carlile v. Commissioner, T.C. Docket No. 11567-09, appeal dismissed (9th Cir. Dec. 8, 2010); Payne v. Commissioner, T.C. Docket No. 10768-09, appeal dismissed (9th Cir. July 25, 2011); Coulter v. Commissioner, T.C. Docket No. 1003-09, appeal dismissed (2d Cir. Aug. 4, 2011).

The National Taxpayer Advocate and various pro bono volunteers tirelessly and vigorously advocated for change during the Lantz saga. Dozens of members of Congress took up the cause, sending a letter to the IRS Commissioner in 2011 stating that Congress did not intend to limit the time period for bringing a claim for equitable relief in enacting section 6015(f). A separate letter was sent requesting a review of the regulation. The IRS listened, and later in 2011 issued guidance indicating that it would allow claims to be made during the 10-year collection period after assessment. Because this guidance applied to all cases pending on the date of issuance, it was a tremendous victory for taxpayers with equitable claims for relief. For more detail on the Lantz saga, see Robert Nadler’s article on the issue.

During this same time period, another innocent spouse victory for taxpayers came in the form of Harbin v. Commissioner, 137 T.C. 93 (2011). Pro bono volunteers acting on a referral from a low-income taxpayer clinic argued that the previous concession as to the underlying deficiencies in a Tax Court case by the taxpayer and his former spouse did not create a res judicata bar to a later section 6015 claim by the taxpayer. After a trial involving testimony from both the taxpayer and the former spouse, the Tax Court held that res judicata did not apply and the taxpayer was entitled to relief under section 6015. On the res judicata issue, the court reasoned that (1) the former spouse exercised control over the items for which the taxpayer was currently seeking relief, and (2) the taxpayer’s former attorney in the deficiency case had a conflict of interest when he represented both parties in the deficiency proceeding, thus impairing the taxpayer’s ability to raise a claim for innocent spouse relief in that case. On the substantive merits, the court found that the taxpayer had established his right to innocent spouse relief for the items at issue.

In November 2015, the IRS issued proposed regulations relating to portions of section 6015, including some rules designed to partially overturn Harbin. The American Bar Association Section of Taxation has provided comments on these proposed regulations.
Obtaining Attorney’s Fees in Pro Bono Cases

Under section 7430, taxpayers may be entitled to attorney’s fees if a qualified offer is submitted, the IRS fails to respond or rejects the offer, and the taxpayer later prevails in the case. In Knudsen v. Commissioner, 793 F.3d 1030 (9th Cir. 2015), the IRS did not respond to the taxpayer’s qualified offer to settle her case and subsequently conceded the entire case after the Tax Court agreed to hear the case on a fully stipulated basis. The Lewis & Clark Low Income Taxpayer Clinic, which represented the taxpayer, sought attorney’s fees for costs incurred after the qualified offer was made. The Tax Court held in favor of the IRS, but the Ninth Circuit rejected the IRS’s position that its unilateral concession was a “settlement” not subject to the qualified offer rules. The Ninth Circuit then remanded the case to the Tax Court for a determination of reasonable attorney’s fees and costs to be awarded to the taxpayer.

It remains to be seen how the IRS and the courts will respond to Knudsen, but it is an important development for tax clinics seeking to recoup fees for their time and effort in representing low-income taxpayers. The Procedurally Taxing blog offers further discussion of the Knudsen case that practitioners may find useful.

Protecting Against the Imposition of Penalties

Most low-income taxpayers are unsophisticated in tax matters, which can lead to tough decisions as to whether penalties are appropriate for incorrect tax return positions. One of the most difficult areas to navigate can be the rules regarding the entitlement to refundable tax credits such as the earned income tax credit and the child tax credit. It is common for low-income taxpayers not to owe any tax after claiming the standard deduction and dependent exemptions and to file a tax return solely to obtain one of the refundable tax credits. But what happens when the refundable credits are improperly claimed and the IRS asserts a penalty under section 6662 equal to 20 percent of the disallowed refundable amount, since the Code imposes such penalties only when there is an “underpayment” of tax?

This issue arose in Rand v. Commissioner, 141 T.C. 376 (2011), a case that was referred to private practitioners by the Center for Economic Progress in Chicago. The Tax Court held that, in the case of improperly claimed tax credits, the 20-percent penalty can only be imposed on the amount of tax shown on the return that is reduced to zero and cannot extend to the amount of any negative tax. After Rand was decided, the IRS embarked on a project that resulted in the abatement of approximately $215 million in penalties where refunds had been frozen in cases with facts similar to Rand. Although Congress recently amended the Code to apparently retroactively overrule Rand, several low-income taxpayer clinics and private practitioners continue to fight this issue for taxpayers that filed returns before Congress amended the Code. For additional information on Rand, see Rand Timeline and Update, Low-Income Taxpayer Representation Workshop (Dec. 12, 2016).

Important Filing Status Issues

A taxpayer’s filing status can have major implications for his or her ability to claim certain tax credits. In Ibrahim v. Commissioner, 788 F.3d 834 (8th Cir. 2015), the issue arose as to whether a taxpayer that incorrectly claimed head of household status could, after receiving a notice of deficiency and filing a Tax Court petition, change his status and receive the earned income tax credit. Frank DiPietro, then a third-year student attorney at the University of Minnesota Tax Clinic, litigated the case under the supervision of Professor Kathryn Sedo. The Eighth Circuit, overruling the Tax Court, found in favor of the taxpayer. As with the situation in Rand, pro bono volunteers are continuing the fight to get the IRS and the Tax Court to follow
the Eighth Circuit’s opinion in *Ibrahim*. Here again, the Procedurally Taxing blog offers more discussion of the *Ibrahim case* that practitioners may find useful.

**Conclusion**

As the above examples demonstrate, pro bono volunteers can have a significant impact on the tax judicial system and in the lives of low-income taxpayers. For those not already engaging in pro bono tax matters, there are several options available to get involved. These opportunities include, but are not limited to, the Tax Court’s calendar call program, the Partnering-for-Pro Bono initiative, and the Adopt-a-Base program. For tax litigators such as myself, there are also ample opportunities to seek involvement in important cases affecting the low-income taxpayer community through the *amicus* process.

As a conclusion to this article, I thought a few anonymous comments from pro bono volunteers would be appropriate.

—I represented a taxpayer with cultural and language barriers before IRS Appeals and was able to obtain a partial grant of innocent spouse relief and to explain to the taxpayer why the remainder of his claim was not valid. As a result of my efforts, the taxpayer’s view of the tax system changed and he understood that he was getting a fair shake. He must have thanked me and the LITC I was working with 50 times – one of the few times I have received such profuse praise for only obtaining partial relief.

—One of my most memorable moments as a pro bono volunteer was when I received a Christmas card from two elderly clients I had helped avoid a penalty. The letter simply said “Thank You.”

—After helping a client who suffered severe brain trauma obtain a 100% concession in a Tax Court case, I received a box of dried fruit from his farm with a note referring to me as his “Guardian Angel.”

—After my clinic and I helped a client who had been victimized by a predatory lender, had lost her home, and had received Forms 1099-COD, she insisted in giving a huge, long hug of thanks to my student and me. How many private clients give you hugs for your work?
PRO BONO MATTERS

2017 Recipient of the Janet R. Spragens Pro Bono Award: C. Wells Hall

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

As chair of the Tax Section’s Pro Bono Award Committee, I am honored to announce that this year’s recipient of the Janet R. Spragens Pro Bono Award is C. Wells Hall, III, the former Tax Section Vice Chair of Pro Bono and Outreach. Wells is a partner at Nelson Mullins Riley & Scarborough LLP in Charlotte, North Carolina.

This award was established in 2002 to recognize 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 of her dedication to the development of low-income taxpayer clinics throughout the United States.

Wells’ career includes many pro bono achievements. His primary primary focus over the past few years has been the Tax Section’s Adopt-A-Base program, in which Tax Section members partner with the Armed Forces and the IRS to provide training to military Volunteer Income Tax Assistance (VITA) participants on bases across the country. Under Wells’ leadership, the Adopt-A-Base program has grown exponentially, expanding coverage from two bases in 2013 to 47 bases in 2017. In addition to being actively involved in improving the program and in recruitment, Wells personally volunteers and provides instruction at the military bases. Countless members of the Armed Forces and their families have benefitted from Wells’ work.

Wells’ commitment to pro bono work and public service is an inspiration to us all, and the Tax Section is proud to honor him with this award. If Wells has inspired you to volunteer with the Adopt-a-Base program, you can learn how to get involved at http://www.americanbar.org/content/dam/aba/administrative/taxation/military/AdoptABaseFAQ%20updated.authcheckdam.pdf and http://abatapsendowment.org/adopt-a-base.html.
IN THE STACKS

The Supreme Court’s Federal Tax Jurisprudence, Second Edition

Foreword by Michael J. Desmond, The Law Offices of Michael J. Desmond, APC, Santa Barbara, CA


Jasper (Jack) Cummings is one of the more prolific authors today in the field of tax, writing with a point of view supported by careful research and thoughtful analysis. Whether or not one agrees with his point of view, his work is an invaluable resource. The Second Edition of The Supreme Court’s Federal Tax Jurisprudence continues in that tradition, coming at a time when Congress is pushing the tax law into new and uncharted territory while we all hold out hope for the fundamental reform of the Internal Revenue Code that is long overdue.

Since 1803, when Chief Justice Marshall stated in Marbury v. Madison that “[i]t is emphatically the province and duty of the judicial department to say what the law is,” the decisions of the Supreme Court have held a role second in importance only to the acts of Congress in establishing the law. The relationship between the Internal Revenue Code and its judicial constructions and interpretations is, however, a complicated one. As Jack notes, “Codes are a particular type of integrated statutes, and for that reason are seen as ‘special’, which is often said of the Internal Revenue Code.” Yet unlike what Jack calls the “extreme purposivism” of the Uniform Commercial Code, the Internal Revenue Code has no overarching principles or stated rules of construction. For tax, this creates “a curious regime that both establishes many rigid rules to which taxpayers must conform, provides virtually no grace for slight and meaningless errors, and applies anti-taxpayer doctrines (substance over form) that stem from the rules of equity.”

The Supreme Court has often been called on to step into the void created by the “curious regime,” so having this book as a form of restatement of its jurisprudence is a useful resource for all. While the Court’s tax cases total over nine hundred, Jack organizes them into a manageable framework. In doing so, he makes the observation—surprising perhaps to those who have focused on the Court’s jurisprudence over only the last several decades—that “[t]ax cases have occupied a far larger part of the Court’s output than any other single area of the law, and dominated it in some decades.” Measured by volume, much of the Court’s tax jurisprudence came in the years after ratification of the 16th Amendment, when the Court was called upon to explain broad concepts like the meaning of “income.” From a historical perspective, that early case law remains important, and the Second Edition of Jack’s book builds on the First in explaining both the Court’s early case law in the field of tax and its evolution through the New Deal and beyond.

* This review was originally published as the Foreword in The Supreme Court’s Federal Tax Jurisprudence, Second Edition.
The Supreme Court’s more recent decisions will be more relevant for practitioners and others in weighing and debating current unsettled tax issues. In that context, in updating the First Edition Jack does an excellent job of synthesizing recent developments in two key areas: economic substance and related “anti-abuse” rules and deference to administrative rule making. The Second Edition connects these issues to what the Supreme Court has—and perhaps more importantly has not—said on these topics over time.

On economic substance and related rules that courts apply when considering “intentional tax reduction,” Jack notes that “the location of the line between permitted intentional tax reduction and the tax reduction efforts that can lead to the denial of tax benefits” is “[t]he most debated issue in federal taxation.” Yet the Supreme Court has not spoken on the topic directly since 1978, an eternity when measured against intervening developments in the tax law. When the First Edition of this book was published in 2010, the ink was not yet dry on one of the more noteworthy developments in this area—codification (or at least partial codification) of the economic substance “doctrine,” with “doctrine” being a description that Jack notes the Supreme Court has never embraced.

To the casual observer, codification of economic substance and a review of recent appellate court decisions applying economic substance and related rules might suggest an evolution in Supreme Court jurisprudence over time into a positive rule of law. While codification was a major development, it left many questions open and unanswered. The codified rule also leans heavily on prior case law for resolution of threshold questions like whether the “doctrine” should apply in the first place. As a result, the Supreme Court’s decisions remain more relevant than ever. Building on his work in the First Edition, Jack approaches the subject with a more refined, in-depth perspective, cautioning against construing Supreme Court precedent as supporting the positive rule of law that many assume it has become. For example, he describes several of the Court’s “boundary decisions” that should be viewed as limiting the scope and application of economic substance (and similar rules), rather than as supporting the expansive evolution that is conventionally assumed. Jack also helps the reader understand the scope and limits of the Supreme Court’s jurisprudence in this area by analyzing cases in thirteen “factual clusters.” In these “cluster areas,” Jack notes that the Court’s decisions should be viewed as simply an exercise in judicial fact-finding unique to the common fact patterns in these cases, rather than supportive of a broader positive rule of law.

For those arguing for or against application of economic substance and related rules, Jack’s tracing of the law from Gregory v. Helvering in 1935 to codification in 2010 should be required reading, showing that even with codification (and perhaps even more so because of codification), the tax law is not a Code-based set of rules that can be navigated by turning well-defined corners. Unfortunately (or not, depending on one’s perspective), the law in this area is, as Jack summarizes, now reflective of a “policy of vagueness” that provides an in terrorem effect against aggressive tax planning, however the Internal Revenue Service may decide to define it. Although responsibility for that policy may have shifted from the appellate courts to Congress with codification, the policy itself remains the same. Regardless, we now have a paradigm where economic substance and related rules are often the first resort, rather than the last, when the government seeks to challenge what it considers to be an unwarranted tax benefit. Jack’s analysis demonstrates that this may not be the paradigm that the Supreme Court intended.

Deference to administrative rule making is a second key area of tax law that has evolved significantly since publication of the First Edition of this book in 2010. It is also an area where the role of the courts is much different than it is when they are called on to find facts or to interpret a statute in isolation. In contrast to economic substance and related rules of law, where the Supreme Court has been largely silent in recent years, its decisions in Mayo Foundation for Medical Education & Research v. United States and United...
States v. Home Concrete & Supply, LLC, among others, have fundamentally reshaped thinking on how the courts, practitioners and the government view administrative rulemaking in the field of tax. The Second Edition provides useful context for and explanations of these decisions.

Until recently, most practitioners and commentators thought they understood there to be a defined line between “legislative” and “interpretive” regulations arising from the landmark Supreme Court decisions in Skidmore v. Swift & Co. in 1944 and Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. in 1984. They also thought, with some support from the Court’s 1979 decision in National Muffler Dealers Association, Inc. v. United States, that tax regulations were treated differently from other areas of administrative law. But in just the last few years, Mayo and Home Concrete have shifted this thinking significantly, creating a more muddled framework that looks to vagaries in the statute using, as Jack notes, traditional tools of statutory construction that render ambiguous whether a statute is in fact ambiguous to begin with. Since publication of the First Edition, the Court has also marked an outer limit to administrative rulemaking, holding in King v. Burwell that, as Jack summarizes, the “statutory conundrum may be so great that it is above the political power of an agency to resolve.” By ruling in favor of the Administration’s position anyway, King v. Burwell highlights a practical limitation on administrative deference arguments: Defeating a rule on deference grounds may not translate into winning the case.

The Second Edition examines the scope and limits of administrative deference by reaching back to before enactment of the Administrative Procedures Act (APA) in 1946, noting that courts then did what they wanted to in construing and interpreting statutes, while mouthing some degree of deference to administrative rule making. Notwithstanding enactment of the APA and more than a half-century of case law interpreting it, that is effectively where we remain today, with some refinement of the analysis (and limit on a court’s flexibility) based on the size of the hole the rule maker is trying to fill. Stating it differently, Jack explains that deference is really just a tool that courts use to protect their “turf;” when Treasury and the Internal Revenue Service attempt to perform what looks like a judicial function, the courts will rein them in. Rather than looking for bright lines between “legislative” and “interpretive” regulations, we now have a more fluid distinction that turns on how large an interpretive gap is left by the statute, the resulting need for administrative guidance, and any Congressional indication (however discerned) that guidance would be issued to fill such gaps. From a practitioner’s perspective, this provides a helpful framework in an area of law that has, as Jack notes, “reached a level of abstraction that places its current resolution beyond the realm of practical applicability by the lower courts.”

After deciding more than nine hundred tax cases, recent developments in the areas of economic substance and judicial deference illustrate that the Supreme Court’s tax jurisprudence is more important than ever in understanding what the law is. Having moved beyond “grand issues of the tax law” like defining income or reading a “business purpose” requirement into the corporate reorganization provisions of the Code, the Court will continue to play the key role in interpreting and construing tax statutes.

Over the course of my career, I have viewed the field of tax through a number of different lenses, ranging from a Justice Department Trial Attorney riding circuit through Eastern California, to serving as the Administration’s representative in Congressional tax hearings, to now handling, as a sole practitioner, matters ranging from individual income tax audits to complex circuit court appeals.

The First Edition of The Supreme Court’s Federal Tax Jurisprudence has served as a vade mecum for me in the varied aspects of my practice and the Second Edition will no doubt be the same. It is a must read for anyone practicing or with an interest in the field of tax.
CALL FOR BOOK REVIEWS

The move to a digital-only format has allowed ATT 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, income inequality and poverty. 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 issue of ATT.

Reviews 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.

Here is an eclectic sampling of titles in our stacks for which ATT will consider a review.

- **Beginner’s Guide to Tax-Exempt Bonds for Affordable Housing**, Alysse Hollis & Richard M. Froehlich (ABA 2016)
- **Carbon Pricing**, ed. Larry Kreiser et al. (Edward Elgar 2016)
- **Economic Behaviour and Taxation**, James Alm & J. Sebastian Leguizamon (Edward Elgar 2016)
- **Environmental Pricing**, ed. Larry Kreiser et al. (Edward Elgar 2016)
- **Judicial Interpretation of Tax Treaties**, Carlo Garbarino & Emile Noël Fellow (Edward Elgar Publishing 2016)
- **Social Security Law, Policy, and Practice**, Frank Bloch & Jon Dubin (West Academic Publishing 2016)

If you are interested in submitting a review of any of these titles or in discussing other content ideas for ATT, contact Supervising Editor, Linda M. Beale at lbeale@wayne.edu.
YOUNG LAWYERS CORNER

Winners of the 16th Annual Law Student Tax Challenge

The Section is pleased to announce the winners of the 16th 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 2017 Midyear Meeting in Orlando, FL, with the winners honored at a reception during the meeting.

The awardees from this year’s competition include:

**J.D. Division**

1st Place:
Tyler Johnson and Anna Peckjian
Northwestern University Pritzker School of Law

2nd Place:
Joshua Jacobson and George Gray
University of Florida Levin College of Law

3rd Place:
Nicholas Bjornson and Brian Lynn
University of Kansas School of Law

Best Written Submission:
Joshua Jacobson and George Gray
University of Florida Levin College of Law

**LL.M. Division**

1st Place:
Samuel Hampton and Daniel Neumeyer
University of Washington School of Law

2nd Place:
Jake Allison and Andrew Ralls
University of Missouri-Kansas City School of Law

Best Written:
Lindsey Holcumbrink and Brynne Brown
University of Missouri-Kansas City School of Law

Finalists:
Lindsey Holcumbrink and Brynne Brown
University of Missouri-Kansas City School of Law

Anthony Garcia and Sarah Bechtle
University of Denver Sturm College of Law

Watch the winning J.D. and LL.M. students deliver their presentations to a judging panel of tax law experts.
An alternative to traditional moot court competitions, the Law Student Tax Challenge (LSTC) is organized by the Section’s Young Lawyers Forum. 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_tax_challenge.html.
TAX BITS

A Post-Election Reg-time Tune

By Robert S. Steinberg, Law Offices of Robert S. Steinberg, Palmetto Bay, FL

Without the Regs

(To the tune of “Without a Song,” by Vincent Youmans, Billy Rose and Edward Eliscu (1929).)

Spoken Intro
Trump’s presidential order quite incredible
Mandating that all agencies, that is, those federal
Eliminate two Regs for every new one promulgated
Has coast-to-coast tax lawyers agitated.

Verses

Without the Regs
We search the Code for signs.
Without the Regs
We read between the lines.
What Congress pegs
Paints only broad designs
Without the Regs.

The tax law begs
For rules to clarify.
Without the Regs
Tax law would mystify.
Go tell the Prez,
Big deals hang out to dry
Without the Regs.

The TRA 69, hung out on the line Sec. 385.
Now Regulations have passed, and we’re all aghast.
Will big debt survive?

Still all in all
The Regs keep us on call.
Without the Regs
Our gross receipts would fall.
Go find a job
Wallpapering a wall
Without the Regs.
LET'S CONFER

Report on the 33rd Annual National Institute on Criminal Tax Fraud and the Sixth Annual National Institute on Tax Controversy

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

The National Institute on Criminal Tax Fraud and the National Institute on Tax Controversy held their annual gathering December 7-9, 2016, in Las Vegas. This conference—now in its thirty-third year as the National Institute on Criminal Tax Fraud, and its sixth year since combining with the National Institute on Tax Controversy—brings together tax practitioners, judges, and representatives from the IRS and the Department of Justice for three days of workshops and programming topics related to tax controversy, tax litigation, and criminal tax prosecution and defense. Programming is presented by the Tax and Criminal Justice sections of the ABA as well as the American Association of Attorney-Certified Public Accountants and the California Society of CPAs. The conference offers two program tracks, one focusing on civil tax controversy and the other focusing on criminal tax controversy. Attendees may choose to attend panels from both tracks. This article highlights a few of the nearly two dozen offerings this year.

Low Income Taxpayer Assistance: Representing the Taxpayer with No Books and Records—Best Practices in Reconstruction and Estimates from Tax Return to Tax Court

The conference opened on Wednesday afternoon with the Low Income Taxpayer Assistance workshop, “Representing the Taxpayer with No Books and Records—Best Practices in Reconstruction and Estimates from Tax Return to Tax Court.” The panelists began with a discussion of the pro bono Calendar Call program, relating their own personal experiences providing legal advice and other assistance to unrepresented litigants at the U.S. Tax Court. Roughly 70% of the more than 24,000 petitions filed in the Tax Court each year are filed pro se. Through the Calendar Call program, volunteer attorneys are present at the beginning of the trial session in each of the 74 cities in which the Tax Court sits. The volunteer attorneys are available to assist unrepresented taxpayers, explaining to them what documents they will need to make their cases, helping to organize their arguments, or providing representation before the IRS or the Tax Court, where appropriate.

The panelists then focused on one of the most common issues that arise in representing low income taxpayers: deficient or nonexistent books and records. Many unsophisticated taxpayers deal primarily in cash and keep poor records of their financial transactions. When subject to IRS examination, they find it difficult to establish their income and deductions. The members of the panel described different methods that may be used to reconstruct these figures as closely as possible for the IRS or the Tax Court. Whenever available, bank and credit card statements, receipts, and other documents can demonstrate that funds

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1 For more information on how to get involved in the Calendar Call program nearest you, please contact Section of Taxation Pro Bono counsel Derek B. Wagner or your local bar association.
were received or expenses incurred. If such documents are unavailable, however, indirect methods may sometimes be used to approximate these amounts. Industry standards, such as those published by the U.S. Bureau of Labor Statistics and certain websites, often allow a taxpayer to make a reasonable estimate of his or her business expenses, taking into account such factors as the type of business operated and the geographic area in which the taxpayer resides.\(^2\)

If the dispute reaches the Tax Court, the taxpayer generally bears the burden of proving an entitlement to deductions.\(^3\) In some circumstances, however, a taxpayer can establish that a deductible expense was incurred but is unable to substantiate the exact amount. In those cases the Tax Court may apply the “Cohan Rule” to permit a reasonable estimate of the deductible amount.\(^4\)

The panel also delved into other issues affecting low income taxpayers, including tips on how to navigate the ongoing ITIN renewal process, Earned Income Tax Credit audits, and recent IRS trends in reconstructing income.

**Civil Tax Workshop**

The Civil Tax Workshop, also held on the first day of the conference, featured a panel of judges and experienced tax attorneys discussing strategies for effectively preparing and presenting a civil tax controversy in each of the different forums in which federal tax cases may be heard. The panelists covered the full lifecycle of a tax controversy, beginning with issues that arise the moment the client walks into a tax lawyer’s office. Vetting the client, gathering information, assessing the case, and managing client expectations are all important elements in taking on a new case. The panelists discussed factors to be weighed in determining whether to file a case in court at all, and if so, in which court to file. Although all options are not necessarily available in every case, the courts that may hear tax cases are the U.S. Tax Court, U.S. District Court, Court of Federal Claims, or, under certain circumstances, U.S. Bankruptcy Court.

The panelists spoke at length about the major stages of a tax case, from the initial filing to motions to trial and finally to brief-writing and judgment. The discussion highlighted key differences between the various courts, particularly between the Tax Court and the district courts, and practical considerations in choosing one court over another. Key differences include that (i) the Tax Court is a prepayment forum, while the district courts handle refund claims, and (ii) district courts operate in accordance with the Federal Rules of Civil Procedure, while the Tax Court has its own Rules of Practice and Procedure.

A major topic in this discussion was the use of expert testimony. Experts may be called upon as witnesses to assist the court in reaching a factual finding on an issue requiring technical or specialized knowledge. The judges on the panel described what they typically look for when an expert witness is called upon to testify. They expressed a general reservation toward having experts, but noted that they find experts more persuasive when they are able to offer an effective cross-examination or rebuttal to an opposing expert.

The panelists also discussed settlement procedures (including the requirements associated with qualified offers under section 7430), offered advice on effective brief-and pretrial-memorandum-writing, and explained the considerations an attorney should make when deciding whether to appeal an adverse decision and the steps involved in doing so.

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\(^2\) See, e.g., [I.R.M 4.10.1.6 (05-27-2011)](#).

\(^3\) Tax Court Rule 142.\(^3\)

\(^4\) [Cohan v. Commissioner](#), 39 F.2d 540, 543-544 (2d Cir. 1930). But see section 274(d), imposing heightened substantiation requirements on certain deductible expenses.
Offshore Enforcement: How Will They Prove It?

On the criminal side, the panel “Offshore Enforcement: How Will They Prove It?” featured a panel of government and defense attorneys that explored the many issues that arise in the context of preparing a foreign bank account report (FBAR) case for trial. A significant portion of the discussion focused on the willfulness requirement. Federal law requires taxpayers to report annually any financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country. An individual who willfully fails to report such an interest may be subject to substantial civil penalties or criminal fines or imprisonment.

What it means for a taxpayer to act “willfully” in this civil context has generated much debate and confusion. In the criminal context, the Sixth Circuit has held that the “test for willfulness is voluntary, intentional violation of a known legal duty.” In the civil context, however, the test is less clear. The panelists considered two prominent judicial decisions on the subject, United States v. Williams and United States v. McBride. They suggested that the courts had adopted seemingly broader definitions that include instances in which a taxpayer fails to file an FBAR when not actually aware of the requirement to file the FBAR, based on concepts of recklessness or constructive knowledge of a legal duty.

The panelists also discussed the government’s burden of proof in such cases, examined methods for the collection and use of evidence in offshore cases, and offered initial responses to the recently decided United States v. Bohanec, in which the government successfully brought civil FBAR penalties against a non-filer.

A complete listing of the programs for the Institute is available here. And the course materials can be purchased here. The 34th Annual National Institute on Criminal Tax Fraud and the Seventh Annual National Institute on Tax Controversy will be held December 6-8, 2017, in Las Vegas.

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6 See 31 U.S.C. secs. 5321(a)(5)(C) and 5322(a).
SECTION NEWS & ANNOUNCEMENTS

Report of the Nominating Committee:
2017-2018 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 2017 Annual Meeting in August. Under the Section Bylaws, the current Chair-Elect, Karen L. Hawkins of Yachats, OR, becomes Chair of the Section at the close of the ABA Annual Meeting.

Chair-Elect: Eric Solomon, Washington, DC

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

(For a one-year term)

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

Assistant Secretary: Robb A. Longman, Bethesda, MD
(For a one-year term)

Council Directors: Gregg D. Barton, Seattle, WA
Michael J. Desmond, Santa Barbara, CA
Catherine B. Engell, New York, NY
Peter A. Lowy, Houston, TX
R. David Wheat, Dallas, TX
(For a three-year term)
SECTION NEWS & ANNOUNCEMENTS

Government Submissions Boxscore

Since January 1, 2016, the Section has coordinated the following government submissions, which can be viewed and downloaded free of charge from the Section’s website at http://www.americanbar.org/groups/taxation/policy.html.

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

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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 & ANNOUNCEMENTS

2017-2018 John S. Nolan Fellowships

The Section is pleased to announce the recipients of the 2017 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 2017 Nolan Fellows are:

- Elizabeth K. Blickley, Washington, DC;
- Matthew Cooper, Ernst & Young LLP, Washington, DC;
- Nikki J. Hasselbarth, Venable LLP, Baltimore, MD;
- Vanessa C. Lafleur, Louisiana Department of Revenue, Baton Rouge, LA;
- Rafi W. Mottahedeh, Jenner & Block LLP, Chicago, IL;
- Susanna W. Ratner, SeniorLAW Center, Philadelphia, PA.

“The Section is privileged to announce these young lawyers as our Nolan Fellows for 2017-2018,” said William Caudill, Chair of the Section of Taxation. “These Nolan Fellows are our young lawyers and those new to practice who have demonstrated exceptional ability and commitment to the Tax Section. We expect they will continue that commitment to the Tax Section for many years to come.”

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.
SECTION NEWS & ANNOUNCEMENTS

The Tax Lawyer – Fall 2016 Issue Is Now Available

The Fall 2016 Issue of The Tax Lawyer, the nation’s premier, peer-reviewed tax law journal, is now available. The Tax Lawyer is published quarterly as a service to members of the Tax Section. Click here to read or download the complete issue.

Contents

Paul J. Sax and Lawrence B. Gibbs, In Memoriam: Phillip L. Mann

Articles


Allen D. Madison, The Legal Consequences of Noncompliance with Federal Tax Laws

Adam S. Wallwork, On the Use and Abuse of Legislative History in the “Preparer Fraud” Doctrine

Coming Soon: The Tax Lawyer Audio Edition from ModioLegal

What is an hour of your time worth? Listen to the same content as the print edition of The Tax Lawyer without forgoing billable time at your desk – approximately 40 hours of content per year!

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.
The Practical Tax Lawyer – Winter 2017 Issue 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 Winter 2017 issue features the following articles.

- Ted David, Learn to Love the IRS (regular feature)
- George Hani & Jarrett Jacinto, Effective Management of IRS Information Document Requests
- William Prescott, Mark Altieri, Kelly VanDenHaute, & Russell Tietz, Worker Classification Issues: Generally and in Professional Practices
- Alyssa DiRusso, Clients Thinking Calexit? Consider Taxexit
- Robert Nassau, An Introduction to Tax Court Litigation
- Katharine Funkhouser, IRS Imposes New Notification Requirement on Section 501(c)(4) Organizations
- Jerald David August, The Repeal and Replacement of the TEFRA Partnership Audit Rules

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.

Get Involved in ATT

ABA Tax Times (ATT) is looking for volunteers to join its ranks as associate editors to assist in writing and acquiring articles for publication. This opportunity is open to Section members with significant writing or publication experience, a genuine interest in helping ATT attract great content, and a willingness to commit to at least one article a year. You can find more information about our submission guidelines here. If you are interested in a regular writing and editing opportunity with ATT, contact Linda M. Beale, Supervising Editor, at lbeale@wayne.edu.
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 11-13, 2017
MAY MEETING
Grand Hyatt – Washington, DC

September 14-16, 2017
JOINT FALL CLE MEETING
Hilton Austin – Austin, TX

February 8-10, 2018
MIDYEAR MEETING
Hilton San Diego – San Diego, CA

May 10-12, 2018
MAY MEETING
Grand Hyatt – Washington, DC

October 4-6, 2018
JOINT FALL CLE MEETING
Hyatt Regency – Atlanta, GA

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.

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/ 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.
# SECTION 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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<td><a href="#">17th Annual Tax Planning Strategies – U.S. and Europe</a></td>
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SECTION EVENTS & PROMOTIONS

ABA Section of Taxation CLE Products

Listen at your convenience to high-quality tax law CLE on a variety of topics, including: Affordable Care Act implementation, new Circular 230 rules, partnerships and S corporations, recent legislation, ethics, international tax planning, and more. ABA CLE downloads are generally accepted in the following MCLE jurisdictions: AK, AR, CA, CO, GA, HI, IL, MO, MT, NV, NM, NY, ND, OR, TX, UT, VT, WV. Recordings and course materials from the following recent Tax Section webinars and more are available through the ABA Web Store.

Out of Ferguson: Misdemeanors as Taxes and Municipal Courts as Tax Collectors
Tax Tales: Seminal Cases and Rulings of Subchapter C
20 Years After ‘The End of Welfare’: Workfare Delivered through Federal and State EITC Systems
Partnerships: The Fundamentals
Holding Company Jurisdictions for Investments in Latin America - What You Need To Know Now
BEPS and Transfer Pricing Implications for State and Local Tax
Data Security, Client Confidences and Ethics Rules Applicable to the Protection of Client Information
Turning the Tables: The United States as a Tax Haven Destination
Civil and Criminal Employment Tax Enforcement Efforts – Employers Beware
The Nuts and Bolts of REITs
Ethical Issues in Setting Engagement Terms
Current Developments in Individual, Corporate Partnership and Estate & Gift Taxation
The Administrative Tax Controversy Case from Examination to Appeals
The Nuts and Bolts of the Taxation of Mergers and Acquisitions
Responding to the Repeal of TEFRA

A New Era in Taxation of Derivatives
Basics of IRS Collection Alternatives
State Income, Double Taxation, and Tax Discrimination in the Post-Wynne World
Current Issues for Private Investment Funds and Their Managers
Designing a Pro Bono Project for Your Firm
Reading and Understanding a Partnership Agreement
Top Ten Revenue Rulings for Estate Planners
Affordable Care Act Implementation Issues Impacting Individuals and Families
Oil and Gas Tax Partnerships
Choosing Wisely: When to Use (or Not Use) Mediation to Obtain Cost Effective Closure in Exam & Collection Cases
Holding Company Jurisdictions for Investments in Latin America - What You Need To Know Now
What's a Young Tax Attorney to Do When...?
Bitcoins: What You Need To Know About Virtual Currency
Update on State Taxation of Tribal Leased Lands: The New Leasing Regulations
Going Out on Your Own and Changing Firms – Practical and Ethical Considerations
# Sponsorship Opportunities

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<td>16TH ANNUAL TAX PLANNING STRATEGIES – U.S. AND EUROPE</td>
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