## CONTENTS

### FROM THE CHAIR
Tax Reform Discussions and Other Developments ...... 1

### PEOPLE IN TAX
Interview with Pat Metzer............................................. 6

### PRACTICE POINT
Sales and Use Tax Laws – Differentiating Between Exemptions and Exclusions Under Louisiana Law...... 10

### AT COURT
Sexton Opinion Further Restricts What Conduct Can Be Regulated Under “Practice” Before the IRS............. 13
Dealing with Tax Court Judges’ Conflicts of Interest: Battat v. Commissioner .............................................. 16
Canadian Tax Authorities Denied Routine Access to Tax Accrual Working Papers ....................................... 18
Captive Transaction Disclosures Remain for Now: Federal Court Rejects Last-Minute Injunction Request and Affirms Anti-Injunction Act Applies to Penalties... 21

### PRO BONO MATTERS
An Interview with 2016-2018 Christine A. Brunswick Public Service Fellow Catherine Strouse ................... 25

### IN THE STACKS
Call for Book Reviews............................................................... 31

### TAX BITS
Tax Reforming........................................................................ 32

### SECTION NEWS & ANNOUNCEMENTS
............... 33
2017 Distinguished Service Award Recipient: Nina E. Olson
2017-2019 Christine A. Brunswick Public Service Fellow
Government Submissions Boxscore
U.S. Department of Treasury Memorandum: Interim Guidance for Responsibility to Process all Requests for Discharge of the Estate Tax Lien
The Tax Lawyer – Winter 2017 Issue Is Available
The Practical Tax Lawyer – Spring 2017 Issue Is Available
IRS Nationwide Tax Forums
Get Involved in ATT

### SECTION EVENTS & PROMOTIONS
Section Meeting & CLE Calendar ........................................ 41
Section CLE Products ......................................................... 43
Sponsorship Opportunities .................................................. 44
TaxIQ............................................................................. 46

### OTHER ITEMS OF INTEREST
ABA Releases Book on Reducing Bias in the Courts .. 47

### SPONSORSHIP ACKNOWLEDGEMENTS
2017 May Meeting .......................................................... 48
Thomson Reuters | Publishing Sponsor ............... 49
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FROM THE CHAIR

Tax Reform Discussions and Other Developments

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

Tax Reform

We are now heading into the last part of this 2016-2017 Tax Section year, having most recently completed the Section's May Meeting in Washington—the third and largest meeting in our annual cycle of Section meetings. We have made good progress on many tasks, not least of which is the vital role of educating and informing our members and the public at large about tax reform.

We were fortunate at the 2016 Joint Fall CLE Meeting to have had Barbara Angus, the Chief Tax Counsel of the House Ways and Means Committee, address the Committee's 2016 tax reform proposals. Bill Hoagland, Senior Vice President for the Bipartisan Policy Center and a long-term government servant, continued the exploration of tax reform ideas at our 2017 Midyear Meeting, with a clear overview of the fiscal challenges facing the Trump administration and the tax debate already unfolding, including how the tax reconciliation process impacts reform and what we might expect in the discussions for “rebalancing” the federal government. Most recently, at our May Meeting last month, Mark A. Prater, Deputy Chief of Staff and Chief Tax Counsel of the United States Senate Committee on Finance, presented the Plenary Session keynote on “Prospects for Tax Reform.” He discussed the likely prospects for tax reform currently being considered by Congress. The audio-recording of his remarks are available here.

These three important presentations provided much food for thought during our discussions at these meetings and were an excellent framing for the many committee sessions dealing with tax reform topics. At the May Meeting alone, over two dozen CLE sessions featuring key government speakers from Treasury, IRS, and Capitol Hill were devoted to the many practical and policy implications of tax reform. The Tax Section should be proud not only of the expertise and technical knowledge that our committees bring to these discussions but also of the important longstanding relationships we have forged with the government. We should continue to work with those who seek to reform our tax system, to make it simpler, fairer, and more transparent.

May Meeting

While tax reform is foremost in many of our minds, as tax lawyers we are well-acquainted with the dynamic nature of our tax Code. The regular change is what attracted many of us to the tax law in the first place and what continues to make Section Meetings a must for staying up-to-date. With approximately 2,000 attendees and 150 panel presentations, the May Meeting showcased the hottest legislative and regulatory
topics and also provided a complete picture of tax practice today across the range of practice areas, from basic to highly technical. Another bonus of the May Meeting was access to the most experienced tax practitioners and high level government representatives who spoke on committee panels each day.

If you don’t attend Section Meetings, I urge you to give it a try. Even if you do not choose to attend, as a benefit of membership you have exclusive access to all of the CLE materials that are offered at these meetings. The materials are searchable by committee name in a members-only database on our website called “TaxIQ” and are also more fully searchable in a Westlaw database provided by the Section’s publishing sponsor, Thomson Reuters. You can access both databases on our website here.

2017 Distinguished Service Award

Each May Meeting the Section may present its most prestigious honor, the Distinguished Service Award. The Award was established in 1995 to underscore the Section's respect for and support of professionalism within the tax bar. It is an honor to be able to announce that the recipient of this year's Distinguished Service Award is Nina E. Olson, National Taxpayer Advocate, for her long and outstanding career serving taxpayers, the government, and our country. I invite you to read a more detailed biography inside this issue of ABA Tax Times and also listen to the audio of her acceptance remarks here.

Government Activities

LB&I Compliance Campaigns

In February 2017, the Large Business & International (LB&I) Division of the Internal Revenue Service approached the Section of Taxation and others to assist in the coordination and rollout of LB&I's new Compliance Campaigns. The Administrative Practice Committee responded to the request. LB&I has requested eight webinars for general public consumption: 1. Campaign Process; 2. Campaign Process Followup; 3. Deferred Variable Annuity Reserves, Micro Captive Insurance, Basket Transactions; 4. S Corp Losses, TEFRA Linkage Plan; 5. Inbound Distributor, OVDP Declines-Withdrawals; 6. Domestic Production Deduction, Form 1120 Non-Filer; 7. Repatriation, Related Party Transactions; and 8. Section 48G Energy Credit, Land Developer Completed Contract Method. Through these Campaigns, the Service plans to centralize and coordinate its considerable resources to pool its talent and produce higher quality, uniform approaches to these important issues.

This project has been a significant success largely due to the leadership of Elizabeth Askey and George Hani. During the first webinar, which was presented on March 7, 2017, Tina Meaux, LB&I Assistant Deputy Commissioner, Compliance Integration, and Kathy Robbins, LB&I Director of Enterprise Activities, discussed how the Campaigns may impact taxpayers. There were approximately 3,000 in attendance. The second webinar was held on March 28, 2017, with Ms. Meaux and Ms. Robbins again leading the discussion. More information about the schedule can be found at https://www.irs.gov/businesses/large-business-and-international-compliance-campaigns.

Estate Tax Lien Release

In our Courtesy Calls last December with the Commissioner and his senior staff, we raised an issue from the Tax Section’s Estate and Gift Taxes Committee (Ben Carter, Chair). As representative of the Committee for the Courtesy Call, T. Randolph Harris explained that the usual procedure on Estate Tax Lien Releases had changed within the last year in a way that holds up processing of estates. For example, a decedent
died with a gross estate in excess of the taxable threshold, but left only approximately $1,500,000 to his heirs. The residue, including the proceeds from two coop apartments, went to charity. It was apparent that no federal estate tax would be due. In order to sell the two coops to pay expenses and settle the estate, the executors filed the regular form for the release of lien for the sale of property with clear title to the buyer. Even though the estate was not taxable, the new procedure required that the proceeds be placed in escrow. This interfered with the sale and the administration of the estate.

The Small Business/Self-Employed Division Commissioner responded that there was no intent to cause undue delay, but Mr. Harris provided several anecdotes that showed estates were being unduly prolonged. A follow-up conference call in March suggested that the Service would revise the procedures to allow estates to receive lien releases or other appropriate responses so that the estates could be settled in regular order and still without harm to the fisc. A Treasury Interim Guidance memorandum issued on April 5 reflects the results of this collaboration. This appears to be a significant accomplishment for our members and taxpayers as a whole. This work, and the Section's work on the LB&I Compliance Campaigns mentioned above, demonstrate the meaningful input that the Section's committees can have on government policies and procedures and the value of membership in the Section.

Government Submissions

Law improvement projects in the form of government submissions are a key component of the Section’s work and have taken on greater significance with the shrinking resources available to the Internal Revenue Service. We have been requested to provide more submissions on an urgent basis. Over this last year, we have issued 11 submissions to the government thanks to the efforts of a number of committees, and I am eager to see us keep up or even improve upon this pace. We regularly report on recent submissions in the Government Submissions Boxscore in ABA Tax Times and on the website, and we have also recently started sending separate government submission alerts by e-mail, which have been well-received by members. 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.

Pro Bono, Public Service, and TAPS Endowment

The Section has strong and longstanding pro bono and public service programs. We have funded recent law school graduates 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. This is an important part of our obligation to contribute to the tax system. For this reason, the TAPS endowment was established in 2014 to ensure continued support of our Brunswick Public Service Fellows and other Section pro bono and public service initiatives.

Currently at $2.9 million, the endowment has an additional fund-raising goal of $2.5 million. Approximately $500,000 of the additional $2.5 million has been contributed or pledged, and we are working hard to raise the remaining target over the next two years. All of the Section’s officers and Council members have made commitments, but we need broader support. If you have not already done so, please consider making a donation. To learn more about the endowment and the Section’s activities in this area, visit the TAPS website at www.abatapsendowment.org.
Budget

As reported previously, the entire Association is facing critical budget issues as a result of declining membership and revenues. While the Tax Section has been a careful steward of its resources due to the past efforts of strong leadership and staff, we are not immune to the challenges imposed by membership and revenue concerns. We have had to make many difficult financial choices this year. As a result, the deficit has been cut in half. This effort will continue after my term has ended. It is our aspiration that the deficit will be further reduced in the next fiscal year. We are committed to maintaining and enhancing the value that you, our members, derive from participating in the Section, and we will keep you posted as these budget issues are resolved.

Unsung Heroes

During my term, I have used this column to recognize not only our more visible members as recipients of awards and other accolades (fine tax lawyers, like Sheri Dillon from Administrative Practice and Bob Schachat from Real Estate), but more importantly, it has also been a mission of mine to recognize the many hard-working members who actively contribute to the work of the Section but do so more often behind the scenes. They are our unsung heroes who have given generously of their time and expertise and without whose efforts the Section would not be what it is today.

Two that I commended from the podium at the May Meeting were Jasper L. (“Jack”) Cummings, Jr., with Alston & Bird LLP in Raleigh, North Carolina, and Washington, D.C., who has served for many years as the author of two books published by the Tax Section and is a past chair of the Corporate Tax Committee, and Maxine Aaronson, a solo practitioner in Dallas, Texas, who has served for many years as a member of the Administrative Practice Committee, Closely Held Businesses Committee, and Sales, Exchanges & Basis Committee. Maxine also serves as an officer of the American College of Tax Counsel and is active in the ABA Section of Dispute Resolution.

If there are others that you believe should be recognized, please let me know.

New Director

It is my pleasure to announce that the Section has a new director. John Thorner joined the staff on April 10. He brings over 20 years of high-level association management experience, most recently as the executive director and CEO of the Academy of General Dentistry, and before that as executive vice president of the American Society of Anesthesiologists. Before pursuing a career in association management, John was a journalist, practicing lawyer, and lobbyist. John received his B.A. from Duke University, M.S.J. from Columbia, and J.D. from the University of Georgia School Of Law. He is a Certified Association Executive (CAE) and has served on the Board of Directors of the American Society of Association Executives and other nonprofit entities. John may be reached at john.thorner@americanbar.org.

I also wish to thank our associate director, Ty Hansen, who served admirably as our acting director for eight months prior to John's joining us. Ty's keen understanding of the Section's budget and knowledge of Section operations have been vital to our budget process this year, and I am deeply grateful to Ty and all of our professional staff for the benefit of their knowledge and hard work.
Looking Forward

Save the date for the 2017 Joint Fall CLE Meeting, which will be held September 14-16, 2017, in Austin in my home state of Texas. Austin is a highly requested destination (“Let’s go home to the Armadillo”), and I am confident that it will be a rewarding experience for all who attend. I hope to see you there.
People in Tax

Interview with Pat Metzer

By Thomas D. Greenaway, KPMG LLP, Boston, MA

Patricia Ann (Pat) Metzer practices tax law with Vacovec, Mayotte & Singer, LLP, in Boston, Massachusetts. She is a long-serving member of the Tax Section who has served in various leadership positions, including as chair of the Committee on Government Submissions (1993-1995), Council Director (1996-1999), Vice-Chair (Publications) and Editor-in-Chief of The Tax Lawyer (2000-2002). She also served as Associate Tax Legislative Counsel at Treasury at the end of the Ford Administration and into the Carter Administration.

Q Pat, tell me a little bit about your family.

A I grew up in a small town in New Jersey most of my life, except when my father spent almost three and a half years working for the U.S. in North Africa and Italy. My dad practiced medicine. My mother was the nurse in the practice. The practice was run out of the house, and my grandmother had been the doctor in the house during the war. She was the first woman doctor in Burlington County, New Jersey and is apparently of some renown these days. She graduated from medical school in 1893. So I would sit around the dinner table and hear these stories about lawyers. And of course I wasn’t going to be a lawyer.

QDoctors don’t like lawyers....

A Well, it was always an issue with doctors and lawyers, not that we didn’t like lawyers. So I went to college and decided I would study international relations because I wanted to be a diplomat. One day I went to the dean’s office, and she said “You know, you really have abilities that would suggest to me that you might be a good lawyer.” And I said, “Lawyer?” (with some surprise). I decided to think about that. Ultimately, I thought maybe I would apply to law school. My friend was dating a law student. And he said, “What? You don’t want to be a lawyer” and then something about women don’t want to be lawyers. So I said, “Well, I’m going to law school so I can become a diplomat. Because getting into the Foreign Service is difficult these days for women. If I have a law degree, it might help.”

The only course I really liked in law school was tax. I fell in love with tax—love at first sight! It was incredible. I had an ineffective tax teacher, but it was my best subject in law school. Then I had Bernie Wolfman when he came back from being a visiting professor, probably at Harvard; he taught corporate tax and estate and gift tax.
Q What was it about tax that grabbed your interest?

A I think I liked the analytical approach. I love numbers. I love puzzles. It all fits. I almost changed to the Wharton School when I was in college because I loved business. And there’s a real connection between tax law and business. I took courses in the Wharton School. I took the accounting course with my friend who also wanted to be a lawyer. She and I took the first-year accounting course: we were, I believe, the only ones that got As. First-year Wharton students were struggling through accounting, but I just loved accounting. So I almost thought I should have been an accountant. Instead, I went to law school in Philadelphia. I’d been in undergraduate school in Philadelphia for four years. Naturally, I was going to practice law in Philly. I had a friend there, so I worked in a three-person law firm one summer for a month. They had something called a preceptor system in Pennsylvania: you worked, generally for free, at a firm to get practical experience, before you could pass the Bar there.

Then it came time to apply for a job, so I applied to the usual suspects in downtown Philadelphia. My tax professor said to me, “There’s a law firm coming down from Boston. You should talk to them. Fran Meaney is coming down from Mintz, Levin, Cohn, and Glovsky. You should just talk to them.” So I interviewed them, and they were very welcoming. “Why don’t you come up and meet everybody at the firm.”

I like being a generalist. In today’s world, though, that’s becoming almost impossible. You don’t have the mentor system in place that supported me. I was literally walked through transactions and learned from the ground up how to do things, which has helped me throughout my career.

Q You interviewed them?

A Yes, I suppose that was the way I looked at it. In any event, I flew up to Boston, interviewed, and I was offered a job. I took it. Boston seemed like a nice place—nice, traditional, I liked it. It had a nice feel to it. There was virtually no development then, and they had the strangest accents when I got off the airplane. So I took the job and it was a great firm. I was lawyer number fifteen, I believe. There were three new associates at the time: Kenny Novak, me, and Larry Buxbaum.

I was hired to deal with Bill Glovsky’s desire to get all his retirement plan work off his desk. After that, I was told that I could be a tax lawyer. So I spent my first period there becoming an expert on retirement plans. This was pre-ERISA. I mean, I got to know the law backwards and forwards. I learned it quickly so I could move on to the next areas I was supposed to master: income taxation of estates and trusts, postmortem estate planning—which is absolutely fascinating. I found that really fun, and so I learned that. Then I went on to drafting wills and trusts, and by then I was starting to do tax.

I had several mentors. One of my mentors was Fran Meaney, who said: “You have to make sure you know all areas of the law.” So I was trained to be a corporate lawyer, a real estate lawyer; I did charitable foundation and trust work. I essentially became a tax lawyer, an ERISA lawyer (because eventually in 1974 ERISA was passed), and a general tax practitioner.
I have remained a generalist all my life, probably because I work seven days a week and read all the time. I’ve kept it up. I like being a generalist. In today’s world, though, that’s becoming almost impossible. You don’t have the mentor system in place that supported me. I was literally walked through transactions and learned from the ground up how to do things, which has helped me throughout my career.

Q You mentioned Fran as one mentor. Are there any other mentors you’d like to note?

A Haskell Cohn. He was a true gentleman. When I went to the firm, he was active in the American Bar Association Tax Section. He said: “You need to join.” And he would take me with him to Tax Section meetings and introduce me to people. That’s how I became active in the Tax Section. I got to know younger people in the Tax Section, because there were some of us who were younger, and we palled around and got to know each other. It was a great way to get started.

Q Was there anything formal in terms of committees or organizations for younger attorneys in those days?

A Not really. I joined the employee benefits committee where I did a lot of work. I also joined COGS, the Committee on Government Submissions, which was absolutely an exciting experience in those days. We would sit, as I recall, all day in a room and edit and discuss comments that were being proposed, quite a different process from what we have today. I think there were all various ages of attorneys around the table. That’s how I got involved with COGS. I ultimately became vice chair of COGS and then I became chair of COGS. And from there, I moved up to be a member of Council for three years. And from there I became vice chair of publications. So it’s been good for me. I’ve developed friendships that I’ve kept throughout my legal career.

Q You talked about the difficulties of being a generalist, but what’s so great about it? Why be a generalist?

A One of the enormous benefits of being a generalist is that you can apply what is relevant under Code section A to the interpretation of Code section B. There are many similar tax concepts, but if you don’t know what Code section B says, you don’t know to consider whether it’s relevant to interpreting Code section A. You have to be able to synthesize all of the concepts and say: “Here’s what it should be here.” It’s also knowing how to spot issues. Being a generalist, you know, you don’t necessarily know the tax law for a particular problem that comes across your desk. But what you do know, having been exposed to being a generalist, is how to spot issues. If you only know Code section 355, you’re going to have a problem spotting a section 83 issue. So I find it fascinating. And I like that ability to bounce around and use what I know in one area and apply it in another area.

Q This idea of the Internal Revenue Code as a coherent statute may be strained at times, but there’s no question that Congress lifts phrases, concepts, and approaches from one part of the Code and applies them in others. And if you don’t know from whence they came, then you don’t know how to apply them. How do you approach a tax problem?

A I was taught that the first thing you do is read the statute. The second thing you do is read the regulations. The third thing you do is look at other things. You might read an article. You certainly want to read relevant cases. But you never start with the article or even the cases. You always start with the tax Code section: you read it carefully. Then you go to the regulations and read them carefully insofar as they’re relevant to your situation. And then you see what other people had to say. My sense is that kind
of disciplined approach to tax research may not be as popular as it perhaps should be.

Q You’re right. I think the reason for that is the time pressure put on staff and associates. People ask associates: “What’s the answer to this question?” And of course the answer to “this question” is not in the Code.

A The only way you can counter that and find the right answer in some article is: once you think you have the right answer, you have to go back and read the statute. You really have to go back and read the statute, and then see whether the answer that was suggested in the article is in fact the right answer. Of course, if it supports your client, you’re going to make that argument. But it may in fact be relevant to know whether there are any pitfalls, especially in the text of the Code.

Q Tell us about your government experience.

A One of the greatest experiences I had was to be Associate Tax Legislative Counsel for about two and a half years, at the end of the Ford Administration and into the Carter Administration. I worked with Larry Woodworth after the Ford Administration left office. The people I met at the Tax Section helped me meet people that made me think about whether this might be something I could do. I was originally asked whether I’d be interested in doing benefits work at the office of Tax Legislative Counsel. I ended up being a generalist again. I did a lot of different things: reviewed rulings, worked on legislation, spent a lot of time up at the Hill drafting. I had enormous fun sitting through drafting sessions up at the Hill with the Joint Committee. I remember one session—it was, I think, on the Senate side—where we were drafting with the staff a provision that was enacted in the Code. I can still say, “There’s a section I remember working on.” So it was great. Ward Hussey was the House draftsman at that point. Ward Hussey was a draftsman par excellence. He had that same generalist ability we talked about before: because he knew what he had done on one Code section, he could pull it over and make it relevant to the current Code section that was being drafted. We’d sit around in these drafting sessions and comment. The Treasury, the IRS, the people on the Hill participated. It was a working relationship. Everybody pulled together to get this legislation through.

Q So you recommend the experience of working for Treasury?

A It was extraordinary, it was absolutely extraordinary.

Q With that perspective, do you want to hazard any guesses about how easy or difficult tax reform might be today?

A I would not hazard any guess. I read what people read in the newspaper like everybody else reads. I have not been in the Washington environment for years. But my impression is that the collegiality that was there when I was there probably is not the same. But I don’t know. Who knows what will happen?
PRACTICE POINT

Sales and Use Tax Laws – Differentiating Between Exemptions and Exclusions Under Louisiana Law

By Jaye Calhoun and William J. Kolarik, II, Kean Miller, LLP, New Orleans, LA

Most U.S. states and many local governments raise revenues through the imposition and collection of sales and use taxes. Compliance with the welter of sales and use tax laws that impact interstate commerce is becoming increasingly complicated. Even the best, most expensive software may not be accurate. In the last few years, another complication has arisen as an increasing number of states have begun to challenge (either directly, as in the case of Alabama, South Dakota and Wyoming, or indirectly through notice and reporting requirements, as in the case of Colorado and Louisiana) the long-standing Supreme Court decision in Quill Corp. v. North Dakota,¹ that limited the exercise of state tax jurisdiction over nonresident businesses. Remote vendors relying on the Quill holding that physical presence nexus is required before the remote vendor can be legally obligated to collect a state’s use taxes ignore this trend at their peril.

State laws may impose the tax directly on the seller in interstate transactions, on consumers or on the transaction itself. States that impose sales and use taxes typically also have statutes allowing collection of tax from a vendor that failed to collect the tax at point of sale. Accordingly, a nonresident remote vendor may find itself fighting an assessment of tax in a foreign state where it has customers regardless of whether the vendor has physical presence in that state. This is problematic in that the vendor may be unaware of its obligations under the laws of a remote state in which it has no property or workers and a limited role, if any, in the political process.

In this environment, it is important to understand sales and use tax concepts that can present pitfalls for the unwary. Louisiana law arguably presents more than its fair share of such pitfalls, the subtleties of which are not always caught by compliance software. By way of example, this article discusses certain nuances of sales and use tax laws that are frequently misunderstood, using Louisiana law as an example.

Louisiana sales tax, like any other state’s sales tax, only applies to sales that occur in the state. That is, Louisiana sales tax law applies to “the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as

defined” under Louisiana sales tax law. A sales transaction occurring outside of Louisiana is not taxable by Louisiana.

This could make it cheaper for Louisiana residents to purchase goods and taxable services in out-of-state transactions, particularly from vendors in states with no sales tax or from out-of-state vendors that do not collect Louisiana tax. Louisiana, however, like many other states, imposes a “use tax” to complement its sales tax and to prevent in-state merchants from operating at a competitive disadvantage to out-of-state merchants. The Louisiana use tax law ensures that an out-of-state purchase triggers a tax liability when the property is brought into the state. The use tax is not imposed on the out-of-state transaction itself: it is due as the result of importing tangible personal property into the state that is to be “used, consumed, distributed, or stored to be used or consumed in Louisiana.”

The difference between sales taxes and use taxes is a source of much confusion but nonetheless important. In Louisiana, as in many other states, sales tax is levied upon sales, rentals or leases, and taxable services purchased in the state; use tax is imposed on the importation of tangible personal property into the state for use, consumption, storage or distribution in the state.

In those instances in which a Louisiana consumer purchases goods or taxable services out of state, pays tax on the purchase to another state, and imports the property into Louisiana, a credit for the tax paid elsewhere is allowed against the Louisiana use tax. There is no credit against Louisiana sales tax for sales that occur outside of the state because they are not subject to Louisiana sales tax in the first instance.

Louisiana, again like many other states, also imposes sales tax on sales of services specifically enumerated in the sales tax law. Sales Tax Regulations provide:

State and local sales or use tax law basically treats the furnishing of services and permission to use certain kinds of property the same as the sale of merchandise, and the law classifies those items as sales of services. Only those services specifically itemized under the provisions of R.S. 47:301(14)(a)-(g), are subject to state and local sales or use tax law.

For example, Louisiana sales tax applies to repairs to tangible personal property, but not to repairs to real property. Louisiana sales tax does not ordinarily apply to charges for transportation, freight or hauling.

Another important nuance under Louisiana law, common to other states which impose sales and use taxes, is how a tax exemption differs from a statutory exclusion. Specifically:

[A] tax exemption is a provision that exempts from tax a transaction that would, in the absence of the exemption, otherwise be subject to tax. That is, there has been a statutory decision not to tax a certain transaction that is clearly within the ambit and authority of the taxing statutes to tax. ... An exclusion, on the other hand, relates to a transaction that is not taxable because it falls outside the scope of the statute giving rise to the tax, ab initio. Transactions excluded from the tax are those which, by the language of the statutes, are defined as beyond the reach of the tax.


Id. See also Fontenot v. S.E.W. Oil Corp., 95 So. 2d 638, 640 (La. 1957).


61 LA ADC Pt I, § 4301 (“Sale of Services”)(a).

The **NISCO** court cited various authorities in stating that a tax exemption is “strictly construed” in the state’s favor and must be “affirmatively established” by the claimant, whereas tax exclusions are construed against the taxing authority.\(^7\) Thus, a taxpayer bears the burden of proving that a transaction qualifies for a tax exemption, but the Department of Revenue bears the burden of proving that a transaction or a taxpayer is not excluded from tax.\(^8\)

Currently, Louisiana sales and use tax law sets out approximately 200 sales and use tax exclusions and exemptions. These exclusions and exemptions are, to some extent, organized by type. Exclusions, which are not taxable by definition, are largely contained in the definitional section of the sales and use tax laws under Louisiana Revised Statutes (La. R.S.) § 47:301. Exemptions are generally contained in the exemption section of the law under La. R.S. §§ 47:305 – 305.71. It is important to note that there are no “magic words” that determine whether something is an exemption or an exclusion. Rather, a taxpayer must look to the specific words used by the legislature to determine whether the legislature intended to create an exemption or an exclusion.\(^9\)

In Louisiana, taxpayers have difficulty on occasion when state and local auditors conflate exemptions and exclusions and try to apply the characteristics of exemptions to exclusions. For example, because the taxpayer bears the burden of proving an exemption applies, a taxpayer traditionally is required to collect and maintain a tax exemption certificate to claim an exemption. In contrast, unless the law otherwise provides, a taxpayer is not required to obtain a certificate documenting an excluded transaction. In Louisiana, the Department of Revenue and Louisiana localities frequently take the position that a taxpayer is required to obtain an exemption certificate for an excluded transaction, even though the law imposes no such requirement. Knowledge of the applicable law may assist a business on audit and such distinctions should be considered when faced with an assessment. ■

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7. Id. at 280.
8. Id.
Sexton Opinion Further Restricts What Conduct Can Be Regulated Under “Practice” Before the IRS

By Arianna Caldwell, Associate, Caplin & Drysdale, Washington D.C.

On March 17, 2017, the U.S. District Court for the District of Nevada issued its decision in Sexton, becoming the first court outside of the District of Columbia to adopt the D.C. Circuit's holding in Loving. As discussed further below, Loving (and the later Ridgeley case) held that the IRS does not have the authority to regulate mere tax return preparation. While the acceptance of Loving outside the District of Columbia is not surprising, Sexton potentially extends the reach of Loving outside of the tax return preparation context and calls into question the regulation of advice rendered by tax professionals. Specifically, Sexton may curtail the ability of the IRS Office of Professional Responsibility (OPR) to regulate tax professionals, lead to limitations on regulatory oversight depending on the service being performed by the professional, and thereby present hazards for tax professionals and taxpayers.

In Loving, tax return preparers challenged an IRS regulation that added provisions to Circular 230 requiring paid tax return preparers to meet certain certification and continuing education requirements. The regulation was issued under 31 U.S.C. § 330(a)(1), which authorizes the Treasury Department to “regulate the practice of representatives of persons before the Department of Treasury.” The D.C. Circuit held that the regulation was invalid with respect to tax return preparers because the mere preparation and signing of tax returns does not constitute “practice” before the IRS. The court reviewed the history of 31 U.S.C. § 330(a)(1) (among other things), and concluded that the statute regulates tax professionals who represent taxpayers in adversarial proceedings before the Treasury Department and that tax return preparers are not “representatives.”

Five months after the decision in Loving, the U.S. District Court for the District of Columbia
issued its opinion in *Ridgeley*. In *Ridgeley*, another tax practitioner challenged a Circular 230 regulation prohibiting contingent fees for certain tax services, including the filing of ordinary refund claims. Unlike in *Loving*, the plaintiff was a CPA that practiced before the IRS. With *Loving* as controlling precedent in the D.C. Circuit, the district court stated that that section 330 does not grant the IRS authority to “regulate ‘practitioners’ generally” but rather grants the IRS authority to regulate “a specific kind of activity” that practitioners may undertake. The court held that ordinary refund claims are outside the scope of section 330(a)(1) because refund claims occur prior to the commencement of adversarial proceedings with the IRS and are, therefore, not “practice” before the Treasury.

The decision in *Sexton* involved another subsection of 31 U.S.C. § 330 and resulted in a further limitation on the types of activity that the Treasury Department can regulate. In *Sexton*, the plaintiff, James Sexton, sought a declaratory judgment regarding his status as a “practitioner” under section 330 (Circular 230). Mr. Sexton had been a lawyer who offered various services as a tax professional, including preparation of tax returns, rendering of written advice to taxpayers, and representation of taxpayers during the course of adversarial proceedings with the IRS. Mr. Sexton was disbarred in 2005 and later suspended from practicing before the IRS. Following his disbarment and suspension, Mr. Sexton continued to offer professional tax services.

In 2012, OPR received a complaint from a former client of Mr. Sexton. According to the complaint, Mr. Sexton had prepared the former client’s tax returns and “offered to send her a written memorandum analyzing her options regarding her business’ tax obligations.” The client fired Mr. Sexton shortly thereafter, and Mr. Sexton never provided her with written advice. Based on this complaint, OPR began investigating Mr. Sexton for violating the terms of his suspension by offering written tax advice. Mr. Sexton filed a complaint in the District of Nevada to determine whether the OPR had authority to investigate him.

31 U.S.C. § 330(e) provides that “Nothing in this section or in any other provision of law shall be construed to limit the authority of the [Treasury Department] to impose standards applicable to the rendering of written advice with respect to any entity, transaction plan or arrangement...having a potential for tax avoidance or evasion.” Under IRS regulations promulgated pursuant to Circular 230, “practice before the [IRS]” includes “rendering written advice with respect to any...arrangement having a potential for tax avoidance or evasion.” In *Sexton*, the U.S. Department of Justice (DOJ) argued that the statute extends to tax professionals who offer written tax advice regardless of whether they represent taxpayers in an adversarial proceeding with the IRS. Thus, DOJ sought a narrow interpretation of *Loving* that would limit its holding to tax professionals who are mere tax return preparers. Such an interpretation would permit IRS regulation of tax professionals who provide services other than tax return preparation even if those services fall short of representation in an adversarial proceeding.

The *Sexton* court rejected DOJ’s argument, and held that
section 330(e) does not extend to tax professionals offering written advice outside of the context of an adversarial proceeding before the IRS.\textsuperscript{15}

The holding in Sexton raises significant concerns. First, the limitation on regulation of advice in Sexton is potentially detrimental to taxpayers and the administration of tax generally. The IRS should have tools at its disposal to regulate professionals who are providing advice, as it appears Congress intended.

Second, the decision raises the question of whether a tax professional who represents taxpayers in adversarial proceedings before the IRS is always subject to IRS regulation under section 330. The court’s assertion that a tax professional “does not subject himself to infinite and undefined oversight by the IRS,”\textsuperscript{16} though made with respect to suspended professionals, could suggest that the IRS’s authority over a tax professional should be evaluated on the nature of services being performed or on a taxpayer-by-taxpayer basis. As a result, Sexton could be interpreted broadly, such that a professional is “representing taxpayers before the IRS” only with respect to the particular taxpayer or matters identified on the Form 2848, Power of Attorney and Declaration of Representative (POA).\textsuperscript{17} Thus, a tax professional may be “practicing” before the IRS and subject to regulation with respect to one taxpayer (for whom the professional submitted a power of attorney during the course of typical tax controversy), but not with respect to another taxpayer (for whom the professional has merely offered to render written advice). Such an interpretation could have significant ramifications for tax professionals who provide a range of services to taxpayers. It would also increase the costs of administering Circular 230 and create potential pitfalls for taxpayers seeking to hire tax professionals.

While it is clear that Sexton could be viewed as further restricting OPR’s ability to use Circular 230 to regulate tax professionals, the breadth of the decision is unclear. The government could argue in subsequent cases that Sexton was a relatively limited opinion about Mr. Sexton himself who was ultimately only involved in tax return preparation and advice relating to tax return preparation. ■

\textsuperscript{15} Sexton at 10-13.  
\textsuperscript{16} Id. at 9.  
\textsuperscript{17} Part II of the POA was recently revised to require tax professionals to certify that they are “subject to regulations contained in Circular 230 (31 CFR, Subtitle A, Part 10), as amended, governing practice before the [IRS].”
Dealing with Tax Court Judges’ Conflicts of Interest: Battat v. Commissioner

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

Battat v. Commissioner, 148 Tax Ct. 2 (2017), is a deficiency case in which the IRS determined a 2008 deficiency of more than $1.7 million, with additional amounts totaling $426,772. The petitioners attempted to disqualify Tax Court judges through a motion for recusal and, alternatively, a declaration that the President’s power in section 7443(f) to remove Tax Court judges (after notice and hearing for cause due to “inefficiency, neglect of duty, or malfeasance in office”) is unconstitutional.

The opinion in the case provides a good historical review of the development of the Tax Court from the original Board of Tax Appeals, established as an independent agency in the Executive Branch, to an Article I court. It discusses key cases and also provides an overview of the various statutory changes that have further aligned the Tax Court with Article III courts.

The Battat petitioners argued that Tax Court judges should be disqualified from ruling on an IRS matter because The Tax Court’s status as a part of the executive branch represents a conflict of interest. Otherwise, if the Tax Court is not part of the executive branch, they claimed that the President’s power to remove Tax Court judges under section 7443(f) should be considered unconstitutional as a violation of separation of powers. The petitioners additionally challenged section 7491, the burden of proof for tax cases; section 7430, the limits on litigation cost reimbursement; and Tax Court Rule 74(c), lack of jury trials, as limitations that set the Tax Court apart from the true judicial power. The only solution to this inherent unfairness, petitioners suggested, was for the Tax Court to cease to operate.

Rule of Necessity

Relying on the Rule of Necessity, the Tax Court found that it could in fact rule even in the face of accusations of conflicts of interest. The rule simply states that, where all judges are disqualified, none is disqualified.

Tax Court’s Place in Three Branches

Over time, the Tax Court has clearly evolved: it is now more like other federal courts and less like executive agencies. The 1969 Tax Reform Act eliminated text making the Tax Court an independent agency in the executive branch, as confirmed by the 1971 Burns, Stix Friedman case. In its 2014 Kuretski opinion, the D.C. Circuit nonetheless avoided addressing the constitutionality of the President’s removal power for Tax Court judges by treating the Tax Court as part of the executive branch. In response, Congress amended

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3 Kuretski v Commissioner, 755 F.3d 929 (DC Cir. 2014).
section 7441 to add a clear statement of the Tax Court’s status: “[t]he Tax Court is not an agency of, and shall be independent of, the executive branch of the Government.”

**Separation of Powers**

The Tax Court held that for-cause removal of Tax Court judges accords with the separation of powers doctrine even though the Tax Court’s judicial power does not extend as broadly as that of Article III courts. The powers assigned to the Tax Court do not include matters that are reserved constitutionally solely for Article III courts. In the 1891 *McAllister* case, the Supreme Court found that the President’s power to remove a non-Article III judge for Alaska was constitutional. The *Battat* opinion emphasizes the Supreme Court’s *Freytag* decision, which concluded that the Tax Court is an independent court that exercises the judicial power under the Constitution and is similar to the district courts, with its decisions appealable to U.S. courts of appeal and, ultimately, to the Supreme Court. The Tax Court accordingly determined that the petitioners had failed to satisfy the high burden of proof necessary to show that the section 7443(f) removal provision is unconstitutional.

**Important Takeaways**

1. While *Battat* in many ways reminds readers of those frivolous litigation cases challenging the constitutionality of the federal income tax, it is worth reading to see the Tax Court’s elaboration of its views on Tax Court recusals.

2. The President can hold Tax Court judges accountable through the statutory power to remove them for “inefficiency, neglect of duty, or malfeasance” under section 7443(f), at least until the Supreme Court says otherwise.

3. It may be that the Supreme Court will ultimately need to weigh in on the question of the President’s power to remove Tax Court judges, given the split now between the Tax Court and the D.C. Circuit.

4. Although the court found no unacceptable conflict of interest here, a litigator can pursue recusal for a Tax Court judge with a conflict of interest.

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Canadian Tax Authorities Denied Routine Access to Tax Accrual Working Papers

By Claire Kennedy and Philip Ward, Bennett Jones LLP, Toronto, ON, Canada

A recent decision by the Canadian Federal Court of Appeal in *BP Canada Energy Company v. MNR*\(^1\) reversed the judgment of the lower court and held that the Canada Revenue Agency (CRA) is not entitled to routinely demand access to taxpayers’ tax accrual working papers in the course of an audit. Taxpayers view this as a welcome curtailment of the CRA’s broad audit powers, reinforcing the public interest in encouraging full disclosure to independent financial statement auditors. The Court was clear that the CRA requires some particular justification in order to demand disclosure of working papers; however, the limits of what constitutes acceptable justification remain unclear.

Tax accrual working papers are prepared by or for independent auditors to facilitate the audit of financial statements, which are generally required to be disclosed by public companies under securities laws. The purpose is to identify uncertain tax positions (or “soft spots”) and establish appropriate reserves. Working papers contain highly sensitive information regarding a company’s uncertain tax positions, including an analysis of the positions and the likelihood of success if challenged by the tax authorities. They constitute a virtual roadmap for revenue authorities conducting a tax audit.

Unlike the U.S., Canada has not enacted legislation to govern the tax authorities’ access to tax accrual working papers. This matter falls instead under the CRA’s general information-gathering powers under the Canadian Income Tax Act (ITA). These powers are extremely broad. Subject to limited exceptions (such as information protected by solicitor/attorney-client privilege), the CRA can demand disclosure of any information that relates or may relate to any amount payable under the Act and can seek a compliance order from the court upon a failure to comply.\(^2\) Canadian courts have interpreted these powers broadly, requiring only a low threshold of relevance. Indeed, in the *BP Canada* case the Federal Court of Appeal commented that the applicable provision “could not have been drafted in broader terms.”\(^3\)

Prior to 2010, it was CRA’s publicly stated policy not to seek general access to “accountant’s working papers” for audit purposes. In 2010, CRA restated its published policy to clarify that its officials were authorized to request and receive any documents needed for a proper audit (subject to privilege), adding that tax accrual working papers would not be routinely required.

\(^{1}\) 2017 FCA 61 (“*BP Canada Appeal Judgment*”).
\(^{2}\) CRA’s powers to demand information are found in sections 231.1 and 231.2 of the ITA, and section 231.7 provides for compliance orders.
\(^{3}\) *BP Canada* Appeal Judgment at para. 58.
Despite this policy, CRA requested working papers in the BP Canada case on a routine, ongoing basis and for multiple taxation years to further the efficiency of its audits by obtaining a clear roadmap of BP Canada’s uncertain tax positions.

The taxpayer, BP Canada, is a Canadian subsidiary of BP, p.l.c., a United Kingdom public company. The dispute stemmed from a request by a CRA auditor for disclosure of BP Canada’s tax accrual working papers in connection with a relatively narrow question concerning BP Canada’s 2005 taxation year. BP Canada provided a redacted version of the working papers showing the amounts of “tax at risk” and annual reserves but redacting the uncertain tax positions and related analysis. The redacted documents answered the auditor’s question. However, they raised the new concern that the identified “tax at risk” appeared to significantly exceed the taxes that CRA proposed to assess, signaling to the auditor that the CRA may have missed an issue. In light of this concern, the CRA demanded the production of the working papers in unredacted form. It maintained this request even after BP Canada demonstrated that the amounts associated with its uncertain tax positions were actually lower than the amount assessed. Ultimately, the CRA reassessed BP Canada’s 2005 taxation year without the tax accrual working papers, but continued to demand the production of the working papers for all subsequent taxation years.

In a 2015 decision that concerned many public corporations, the trial judge at the Federal Court found for the government. He was dismissive of BP Canada’s arguments, framing the issue as one of accountability and holding that tax accrual working papers come within the scope of documents that may be demanded by the CRA. Moreover, he declined to exercise his discretion not to compel disclosure, noting that CRA acted in accordance with its policy and that it was fair and just that uncertain tax positions be identified by the tax authorities, since “if the CRA does not uncover the tax positions in time…the taxpayers of Canada lose.”

In a judgment released on March 30, 2017, the Federal Court of Appeal unanimously set aside the decision of the trial judge. The Court accepted that the CRA could demand access to tax accrual working papers in some circumstances under its broad audit powers, such as where such papers are required to respond to a specific audit inquiry. CRA was not entitled, however, to demand unrestricted access. According to the Court, “Parliament intended that the [CRA’s] broad [information-gathering] power … be used with restraint when dealing with [tax accrual working papers].”

The Court held that there was an unwritten rule that the CRA cannot compel taxpayers to self-audit by revealing their soft spots. It also accepted the argument that allowing the CRA unfettered access to tax accrual working papers would induce public corporations to be less forthcoming in disclosing and documenting their tax risks to their external auditors. This would in turn reduce the utility of audits to ensure that financial statements fairly represent a company’s financial position, to the detriment of investors and the securities markets. It is noteworthy that the Chartered Professional Accountants of Canada were granted intervenor status in the appeal.

In contesting the public policy concern, the government referred to two U.S. cases, Arthur Young and Textron. In Arthur Young, the U.S. Supreme Court held that securities markets would not suffer if it were to deny an accountant-client privilege with respect to tax accrual working papers, and in Textron the U.S. 

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4 2015 FC 714 (“BP Canada Trial Judgment”).
5 BP Canada Trial Judgment at para. 47.
6 BP Canada Appeal Judgment at para. 80.
8 United States v. Textron, Inc., 577 F.3d 21, 26-30 (1st Cir. 2009) (en banc).
Court of Appeals for the First Circuit held that the disclosure of tax accrual working papers would not undermine the disclosure of information to external auditors. The BP Canada Court noted, however, that neither of these cases involved the unrestricted disclosure of working papers on a routine basis; rather, they involved targeted requests for information that occurred within a regulated framework under which the IRS only seeks access to working papers in the context of certain limited designated transactions. Indeed, the Court concluded that the regulated approach employed in the U.S. implicitly supported the view that allowing unrestricted access to working papers would have a negative impact on financial reporting.

Aside from the CRA's legal powers under the ITA, the trial judge found the CRA's published policy to be that tax accrual working papers were compellable without restriction. The Federal Court of Appeal disagreed, finding that the policy was not to use its powers routinely to require the disclosure of working papers. Even if the ITA did permit the CRA to gain unfettered access to tax accrual working papers, the Court held that CRA acted against its published policy on requesting access. Since this policy was based on a public interest imperative, the trial judge should in any event have exercised his discretion not to compel disclosure of the working papers.

The Federal Court of Appeal decision is likely to be welcome to public corporations and their subsidiaries that are subject to tax in Canada. In particular, the Court's recognition of the unwritten rule against forcing taxpayers to self-audit and of the public interest reasons for resisting routine disclosure of tax accrual working papers to the tax authorities are likely to be well-received. Although the Court found that the CRA is not entitled to demand routine access to working papers without advancing any particular justification for their production, it is clear that the CRA can require disclosure of working papers in certain circumstances. The limits of what constitute acceptable circumstances are unclear. The Court implied that a material gap between the “tax at risk” amounts identified in working papers and the amount proposed to be reassessed could be a legitimate reason for requiring disclosure. It will have to be seen how the CRA will apply this decision in its audit policies and practices going forward. In addition, the judgment is still open to appeal to the Supreme Court of Canada, so we may not have heard the last from the Canadian courts on this matter.
Captive Transaction Disclosures Remain for Now: Federal Court Rejects Last-Minute Injunction Request and Affirms Anti-Injunction Act Applies to Penalties

By John Colvin and Claire H. Taylor, Colvin+Hallett, Seattle, WA

On November 1, 2016, the IRS issued Notice 2016-66, designating certain micro-captive insurance arrangements under section 831(b) as “transactions of interest” that, the IRS contends, have “a potential for tax avoidance or evasion.” The designation requires participating taxpayers and their advisers to file disclosures by May 1, 2017.1 Broadly stated, based on audits to date, the IRS believes that many of these transactions should not qualify as deductible insurance because of the presence of one or more of the following features:

- The insurance coverage involves an implausible risk, does not match a business need or risk of the insured, or is duplicative of other coverage;
- The insured claims deductions for premiums that were not actuarially based;
- The captive does not have defined claims administration procedures and/or insured does not file claims; and
- The captive does not have adequate capital to assume the risks, and/or invests its capital in illiquid or speculative assets, and/or the captive makes loans to insured or other related entities.

The IRS lays out its concerns in section 1 of the Notice, but in section 2, where the IRS actually identifies the applicable “transactions of interest,” the description is not limited to the features identified in section 1. Rather, the “transactions of interest” designation covers all section 831(b) captive insurance arrangements where (1) the captive had combined claims and administration expenses totaling less than 70% of premiums received over a five-year period; or (2) the captive engaged in any loan to the insured or a related person/entity.2 Thus, the definition of the “transaction of interest” is not restricted to the micro-captive arrangements that have the abusive features described in section 1.

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1 IRS Notice 2017-08.
2 Notice 2016-66, § 2.01(e).
Designation as a transaction of interest carries reporting obligations for participants, as well as reporting and list maintenance requirements for those considered material advisors. If a participant in a transaction of interest fails to properly report the transaction and/or a material advisor fails to properly report the transaction and/or maintain and furnish the required list to the IRS, the individual or entity may be subject to substantial penalties. Many states, including New York and California, have reporting regimes that follow the federal regime: designation of a federal transaction of interest therefore can carry additional state consequences.

Two captive management companies recently sought an injunction in federal court prohibiting the IRS from enforcing the Notice. The case was CIC Services, LLC v. Internal Revenue Service, et al., No. 3:17-cv-110 (E.D. Tenn. March 27, 2017). In the complaint, the management companies challenged Notice 2016-66 on the following procedural grounds: (1) the Notice is a legislative rule and was improperly promulgated without complying with Administrative Procedure Act (APA) notice and comment procedures; (2) the Notice is arbitrary and capricious, containing no reasoned analysis, and therefore violates the APA; and (3) the Notice is invalid because it fails to comply with the Congressional Review of Agency Rule-Making Act requirements.

The plaintiffs quickly moved for a preliminary injunction prohibiting the IRS from enforcing the disclosure requirements in the Notice, which the government naturally opposed. The Court held an expedited hearing on April 19, 2017, at which the plaintiffs offered testimony claiming financial burdens and reputational harm caused by the Notice.

Shortly thereafter, on April 21, 2017, U.S. District Judge Travis McDonough issued an order denying the plaintiffs’ request for a preliminary injunction. The Court found the plaintiffs might well suffer irreparable harm due to the compliance costs if an injunction were not issued, but it concluded that the likelihood of success on the merits, which plaintiffs must show to obtain a preliminary injunction, was very low because the Anti-Injunction Act (AIA) likely barred the type of relief sought, i.e., a permanent injunction.

The Court’s analysis of the AIA adds to recent jurisprudence regarding the AIA’s broad scope, including its applicability to reporting requirements that can lead to penalties. It also highlights the difficulty litigants will face in endeavoring to challenge IRS administrative pronouncements preemptively.

The AIA provides that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such
The plaintiffs in *CIC Services* argued that they were not attempting to restrain the assessment or collection of tax, but rather challenging the reporting regime as being improper under the APA. The plaintiffs argued that the AIA does not prevent injunctive relief merely because persons who fail to comply with the Notice might incidentally be subject to a “penalty” under sections 6707(a), 6707A, or 6708(a). The Court, however, looked to the plain language of the governing statute to conclude that such a penalty is a “tax” for purposes of the AIA. Because section 6671(a) provides that any penalty under Subchapter 68B is assessed and collected in the same manner as taxes, references to “tax” are deemed to also refer to penalties under Subchapter 68B; and since all potential penalties under the Notice are in Subchapter 68B, all penalties must be considered a “tax” for purposes of the AIA.9 The Court found further support for this position in the *Florida Bankers* case,10 which held that the AIA prevented banks from challenging a regulation that penalized them for not reporting certain interest payments because the penalty was covered by Subchapter 68B.

The plaintiffs attempted to distinguish their claims from *Florida Bankers* by relying on the 2011 *Cohen* case,11 which held that the AIA does not prohibit a challenge to IRS procedures even though it bars injunctions relating to tax assessments. The *CIC Services* Court distinguished *Cohen* because the *Cohen* plaintiffs were challenging IRS procedures relating to a refund of taxes already paid, which “cannot affect the assessment or collection of taxes after the fact.”12 The Court further relied upon *Florida Bankers* for its conclusion that the AIA cannot be avoided by challenging only a reporting requirement and not the penalties imposed for violating that reporting requirement.13

Although the plaintiffs’ injunction claim was rejected, their APA claims appear to remain alive. Predicting how these claims will be resolved is beyond the scope of this article, but if the plaintiffs succeed on their APA claims regarding the applicability of the APA notice and comment procedures to the designation of transactions of interest, the Court would essentially have to invalidate Treas. Reg. § 1.6011-4, relied on by the IRS to issue notices like Notice 2016-66 designating transactions of interest. Such a holding would have enormous ripple effects for listed transactions as well, because the IRS relies on the same regulation to designate listed transactions without notice and comment procedures. Thus, to the extent that the Court holds the regulation invalid and/or that designation of a transaction of interest requires notice and comment procedures, the same would be true for a listed transaction.

Although it is unknown how the plaintiffs’ APA claims will proceed, this case offers some guidance about the broad scope of the AIA. Essentially, this Court’s reading of *Florida Bankers* and its holding here warns plaintiffs that a refund suit is the only safe venue to seek injunctions challenging IRS pronouncements relating to taxes and penalties, as the AIA will otherwise bar injunctive relief. Flowing from this case and *Florida Bankers*, litigants appear to lack opportunities to obtain pre-assessment relief with respect to IRS procedures or promulgations. Instead, litigants may have to wait until they have actually paid the tax/penalty to seek an injunction even if the reporting system may be procedurally improper. In this context, for

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8  Id.
9  In this, the Court followed the Supreme Court’s holding in *National Federation of Independent Businesses v. Sibelius*, 132 S. Ct. 2566, 2582 (2012).
12  Id. at 725-27.
13  See *Florida Bankers*, 799 F.3d at 1072 (challenge to reporting requirement is “necessarily also a challenge to the tax imposed for failure to comply with that reporting requirement” because “[if plaintiff’s challenge were successful, the IRS would be unable to assess or collect that tax for failure to comply with the reporting requirement”].

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example, the plaintiffs would have to incur a significant penalty in order to be able to challenge the micro-captive Notice. The Court was unpersuaded that there was no adequate remedy at law (which would make the AIA inapplicable14), because a suit for refund is available as a legal matter.15 The holding effectively means that a pre-compliance injunction will be out of reach for most parties wishing to halt application of the Notice. This case and Florida Bankers suggest that litigants have few options to challenge IRS reporting regimes whenever non-compliance could lead to additional tax or penalties. ■

15 Mem. Op. at 6-7 n. 5.
PRO BONO MATTERS

An Interview with 2016-2018 Christine A. Brunswick Public Service Fellow Catherine Strouse

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

As a nation, we owe a great deal to our veterans for the sacrifices they make in service to this country. The active duty challenges faced by soldiers are enormous, but veterans also encounter well-documented obstacles when they transition back to civilian life. Many struggle to cope with physical or psychological trauma, navigate the labyrinthine Veterans Affairs bureaucracy, find housing or employment, or simply readjust to everyday life. A less-discussed but common issue that can burden their return to civilian life is tax trouble.

Military personnel and veterans face a unique set of tax issues. The rules surrounding combat pay, various allowances and exclusions, pensions, and disability benefits can be confusing, and the plethora of federal statutes providing for special procedural rules for servicemembers and their families—though beneficial when properly utilized—can easily entangle those unfamiliar with the details.

With nearly a quarter-million veterans, San Diego County is the home to the third-largest veteran population in the United States. Catherine Strouse, a 2016-2018 Christine A. Brunswick Public Service Fellow, works at the Legal Aid Society of San Diego (LASSD) to help struggling veterans returning from active duty understand the special rules applicable to them. She provides tax representation and financial counseling to veterans throughout San Diego and the surrounding area. The services Catherine provides have helped numerous individuals get a fresh start in civilian life.

ABA Tax Times (ATT) recently contacted Catherine (CS) to discuss the important work she is doing through her Fellowship.

ATT: Can you tell us a little bit about your background and prior work experience, both in and out of tax?

CS: I attended college at the University of California, San Diego. My dad is an attorney, so I knew I wanted to follow in his footsteps. However, like many prospective law students, I was unsure what area of the law I wanted to practice in. I attended law school at Gonzaga University School of Law, where I

1 See, e.g., Albert C. Harvey, A Call to Action, 23 EXPERIENCE 1-2 (Fall/Winter 2014)(published by the ABA Senior Lawyers Division).
3 See U. S. Census Bureau, QuickFacts.
graduated cum laude. I began developing an interest in estate planning after my experience in the school’s Elder Law Clinic and had plans to pursue a career in estate planning after graduation.

Shortly after taking the California Bar Exam, I moved back to San Diego to begin my legal career. While waiting for bar results, I began volunteering with the LASSD. I started in the Domestic Violence/Civil Harassment Restraining Order Clinic. This clinic helps pro se litigants apply for and defend against temporary restraining orders. I started volunteering two days a week, which quickly developed into four days a week due to the high demand for volunteers.

After successfully passing the bar exam, I was fortunate enough to be hired as an adjunct professor for an online law school, Taft Law School. I began teaching an elective course in healthcare law for 2nd and 3rd year students. I have since been the adjunct professor for courses in Contracts, Torts, Constitutional Law, Administrative Law, and Criminal Procedure. Teaching provided me support while I continued volunteering and job searching.

Finding employment in San Diego proved to be more difficult than I had imagined. On the advice of a few practicing attorneys, I decided to pursue an LL.M. in Taxation at the University of San Diego School of Law. I also began volunteering with LASSD’s Low Income Taxpayer Clinic (LITC) to gain more experience in tax law. As a volunteer attorney, I was able to take on my own cases and quickly learned how important the work of an LITC is for low-income individuals. Through this volunteer experience, I felt I had found an area of the law where I belonged and truly could make a difference.

**ATT:** What made you apply for the Fellowship?

**CS:** I was volunteering with the LASSD in their tax clinic during a site visit from the LITC funders in 2015. During the visit, LASSD’s Tax Clinic Supervisor, Shahin Rahimi, introduced me to the LITC visitors—including Bill Nelson, the LITC Program Director at the time. After hearing my volunteer background and my recent graduation from the LL.M. program, Mr. Nelson suggested I apply for the Fellowship. I quickly went home and researched the Fellowship. After reading the description, I felt this was the perfect opportunity for me to continue my passion for helping low-income taxpayers resolve their tax debts with the Internal Revenue Service.

**ATT:** Could you tell me more about your sponsor organization and how you came to choose that organization?

**CS:** The LASSD is the largest poverty law firm in San Diego County. They help low-income residents of San Diego County in a variety of legal areas including consumer, health and welfare, immigration, housing, family, and tax. The organization has over 130 staff members who are all focused on making a difference for San Diego County residents.
I chose LASSD as my sponsoring organization because of the existing relationship I had with the organization and the LITC program. At the time I applied for the Fellowship, I had been volunteering in the tax clinic two days a week for over a year, so it seemed like a natural fit. I was very familiar with the tax clinic, the type of cases we see, and procedures for contacting the IRS. LASSD screens for veteran status during the intake process; at the time I applied, the LITC client list included several veterans making it an easy decision to focus on this deserving group of individuals. I felt confident that I could jump right in and zealously represent our clients, if I was chosen for this Fellowship.

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

CS: My program is designed to provide representation for state and federal income tax issues to the veteran population in San Diego County. The County is home to one of the largest veteran population with more than 230,000 veterans. Outstanding tax debts can provide one obstacle to individuals or families who are trying to obtain housing or employment. I work with individuals and families to help eliminate or manage this obstacle so that clients can maintain their standard of living. Some of the services I provide are assisting clients to challenge a tax liability that was incorrectly assessed, negotiating offers in compromise, setting up installment agreements, and educating clients on the tax law.

Another component of my Fellowship involves providing one-on-one financial counseling to veterans. Many clients have never checked their credit report or are afraid to check their credit report. I work with the clients to access their credit reports and review the information on the credit reports for accuracy. If there is inaccurate information, I assist clients with disputing that information. We also discuss repayment options, how to manage debt, and ways to build credit to improve their credit scores. I also work closely with our consumer team and will refer clients who need more extensive services, such as bankruptcy help, to the consumer team.

Our LITC also actively participates in the Tax Section’s Adopt-A-Base program, where we teach substantive tax law to military personnel who prepare tax returns at the military Volunteer Income Tax Assistance (VITA) sites. This year, we taught on three military bases and also provided an advanced topics training on cancellation of debt, rental income, business income and expenses, and capital gains for one of the military installations.

ATA: What has been your biggest challenge so far?

CS: The biggest challenge of my Fellowship so far has been working with clients to resolve their state income tax issues. During my time volunteering with the LITC, I did not have very much exposure to state tax issues. However, when I started with my Fellowship, I saw state income tax issues come up more often and felt this was a need that I should fill.

Learning about the available programs at the California Franchise Tax Board and how our clients can best utilize these programs has been a struggle. In some cases, my clients have not filed so we can provide assistance preparing returns that clear up the balances that have been assessed. However, in many cases, there is a balance that we cannot dispute. In these cases, I review the collection alternatives available for that client and help the client apply for the best option so that we avoid any garnishments. I am constantly learning new information at the state income tax level and believe representation for low-income taxpayers is critical in these situations.
ATT: What has been the most rewarding part of your Fellowship?

CS: Working in a LITC is a rewarding experience on its own. I feel the most rewarding part of my Fellowship is working with homeless veterans to help them move forward with their lives. Several of my clients come from a rehabilitation program that houses veterans for up to two years, provides job training, and connects veterans with resources such as legal services. These veterans work hard in this program to start a new life and it is a wonderful experience to help manage or eliminate a tax debt that someone believed would never go away.

One client in particular from this program has been working with the IRS to resolve his tax debt for many years. At the time the IRS initially contacted him, this client was employed and was able to hire a tax firm in town to help him set up an installment agreement. Shortly after setting up this installment agreement, the client lost his job and was never able to make a payment. The client eventually ended up in the rehabilitation program after experiencing a period of homelessness and was able to resume dealing with his outstanding tax liability. We successfully placed his active collections accounts into the “currently not collectible” category. Our goal is to resolve his tax debt of $12,000 through an offer-in-compromise before he graduates from his program so he can start with a clean slate.

ATT: Do you have any immediate plans for your work after the Fellowship ends? How has the Fellowship impacted your career goals? Do you expect to stay with your sponsor organization after the Fellowship has ended?

CS: I do not have any immediate plans for after the Fellowship, but I am only about half way through the Fellowship. I would love to stay with LASSD after the Fellowship ends. However, funding can be an issue when trying to work in the public interest sector. My supervisor and I are working on applying for new grants that would allow me to continue my work as a staff attorney. I am hopeful that we will find funding. But no matter what happens, I plan to stay involved with LASSD in any capacity that my future allows.

For more information on how to get involved with the Section of Taxation’s Adopt-A-Base Program, please contact Derek Wagner. For additional opportunities to provide legal assistance to servicemembers, veterans, and their families, please visit the ABA Military Pro Bono Center.

The Christine A. Brunswick Public Service Fellowship is supported by the Tax Assistance Public Service (TAPS) endowment fund. To learn more about how you can support the important work of Catherine and other Public Service Fellows, please visit the TAPS webpage.
IN THE STACKS


Foreword by Keith Fogg, Professor, Villanova Law School, and Visiting Professor, Harvard Law School, Boston, MA


As I read the Second Edition of A Practitioner’s Guide to Tax Evidence in preparation for writing this foreword, I was struck by how many questions it answered that students and practitioners had asked me in the past few years. The book provides a useful guide for the practitioner preparing for a Tax Court trial or evaluating a case for settlement. Re-reading it in its entirety reminded me that I should be consulting it more often.

Professor Larson’s book, unlike any other, provides a detailed passage through the Federal Rules of Evidence (FRE) as applied by the Tax Court. This compilation results in an easy-to-read collection of cases to support or guide a practitioner facing an evidentiary problem in a Tax Court case. The Second Edition updates the cases and the rules changed or created since the First Edition was published.

Many tax practitioners find themselves in Tax Court on an occasional rather than frequent basis. The tendency to settle and the infrequency of taking a case to trial creates challenges in presenting evidence and otherwise complying with both the Tax Court rules and the Federal Rules of Evidence. This book serves as a valuable guide to those, like me, whose actual trial time occurs in varying intervals and who sometimes need to understand the value of the evidence available in order to properly assess settlement.

The biggest benefit of this book comes from the work Professor Larson has done to pull together large numbers of cases on the various FREs. Because Tax Court practice has issues that receive regular attention, this book offers a chance to find those cases easily and to compare the Court’s reaction to the application of the FRE in similar but distinct circumstances. She provides a brief description of the relevant evidentiary issue in each case allowing the reader to quickly compare numerous cases decided under a particular FRE provision. The book is also valuable for alerting readers to issues that have never arisen in Tax Court decided opinions.

The practice pointers at the beginning of many sections offer a quick way to capture the major points and provide an easy entry into topics. While the book covers every rule in the FRE, some of the provisions discussed seemed especially valuable and worth mentioning.

1 This review was originally published as the Foreword in A Practitioner’s Guide to Tax Evidence, Second Edition.
Professor Larson does an excellent job explaining the burden of proof, the burden of production, and the burden of going forward. Section 7491 created much uncertainty regarding the responsibility of each party to put forward evidence and carry the ultimate burden. The burden of proof section allows the reader to see the development of this issue through the cases. The discussion of burden provides the reader with a thorough explanation of what the party must do to prevail. While few cases turn on burden of proof, understanding what you must prove remains an important part of any trial preparation or settlement consideration.

Chapter III addresses judicial notice. Because the Tax Court travels and the judge coming to a city to try a case usually does not know the city as a local judge would, practitioners have to take care to prove matters which, in front of a local judge, the practitioner might expect the judge to formally (or informally) take judicial notice. The chapter on judicial notice not only provides guidance on how to establish judicial notice but also serves as a reminder that when dealing with a judge unfamiliar with the locality many matters will require proof that the practitioner might take for granted at their peril.

The role of expert testimony continues to factor prominently in many cases. Early in a case in which an expert will testify, the practitioner should review the chapter on expert testimony in order to properly prepare for the use of the expert in the trial and the submission of the report. Because Professor Larson combines her discussion of the Federal Rules of Evidence (FRE) with the relevant Tax Court rules, this section allows the practitioner to walk through each step necessary to successful use of expert testimony. The recent Tax Court decision in Estate of Kollsman v. Commissioner, T.C. Memo 2017-40, shows the dangers present when the expert’s report is disregarded. Using the guidance in the book in planning for expert testimony can greatly assist in avoiding the disqualification or the disregard of the testimony of an expert.

Having a book that focuses on the Tax Court’s rulings regarding FRE issues greatly aids the bar of that Court. Professor Larson's condensed and well-organized sections allow one to easily spot a particular issue or the Evidentiary Rule at hand and to find the supporting cases. The case discussions have sufficient detail to allow the reader to know whether to go and read the full case. Overall, those practicing in the Tax Court owe a debt of gratitude to Professor Larson for her work to assist in preparing for trial.
IN THE STACKS

Call for Book Reviews

ATT welcomes the submission of book and article reviews on tax topics that might be of interest to our members. 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)

Business, Human Rights, and Sustainability Sourcebook, ed. Lelia Mooney (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)

It’s Not Like I’m Poor: How Working Families Make Ends Meet in a Post-Welfare World, Sarah Halpern-Meekin et al. (University of California Press 2015)

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)

The Economics of Tax Avoidance and Evasion, ed. Dhammika Dharmapala (Edward Elgar Publishing 2017)


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

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

(To the tune of Love and Marriage* by Sammy Cahn and Jimmy Van Heusen and introduced by Frank Sinatra in the 1955 TV production of Thornton Wilder’s “Our Town.”)

Tax reforming, tax reforming,
Mention it and battle-lines start forming,
“Don’t touch MY deductions
Lest you favor job reductions.”

Tax reforming, tax reforming,
Going to take some serious brain-storming.
Hear NGOs explaining,
“Charities are worth sustaining.”

Bills to minimize deductions
Meet opposition.
Donors roar until the bill’s
Withdrawn, with no contrition.

Tax reforming, tax reforming,
Harder sell than even climate warming.
The devil’s in the details.
And that explains
And that explains
Why nearly every effort derails.

* For readers who are not familiar with the tune: https://www.youtube.com/embed/xtS46Wfsxnw.

It was back in Eighty-Six—the last year they wrote one.
Our Code needs another fix—but don’t bet they’ll vote one.

Tax reforming, tax reforming,
Talk of it and lobbyists seen swarming.
Rumble like an earthquake.
And that explains
And that explains
Why tax reforming’s a big headache.
SECTION NEWS & ANNOUNCEMENTS

2017 Distinguished Service Award Recipient: Nina E. Olson

By Michael Hirschfeld, Dechert LLP, New York, NY

The Section of Taxation is pleased to honor Nina E. Olson as the recipient of its 2017 Distinguished Service Award in recognition of her service to the profession, service to the government, and service to the Section of Taxation.

Al Hirschfeld was one of the most famous American caricaturists who was known for his portraits of celebrities and Broadway stars. On first impression, a Hirschfeld drawing and the IRS have nothing in common. However, if you take a moment to look carefully, you will see cleverly hidden in a Hirschfeld drawing the name of his beloved daughter, Nina, in multiple places. Likewise, if you look closely at the IRS, you will see another Nina embedded in so many ways such that, just like a Hirschfeld drawing, it is hard to think of the IRS without thinking of Nina Olson, the National Taxpayer Advocate and tireless champion of pro bono tax services, the American taxpayer, and the IRS itself.

Nina was appointed to the position of National Taxpayer Advocate in January 2001. As the National Taxpayer Advocate, she is the voice of the taxpayer at the IRS and before Congress. Under her leadership, the Taxpayer Advocate Service helps hundreds of thousands of taxpayers every year resolve problems with the IRS and addresses systemic issues affecting groups of taxpayers. Throughout her career, Nina has advocated for the rights of taxpayers and for greater fairness and less complexity in the tax system. In calling for fundamental reform in 2012, she wrote, “A simpler, more transparent tax code will substantially reduce the estimated 6.1 billion hours and $168 billion that taxpayers spend on return preparation” and “reduce the likelihood that sophisticated taxpayers can exploit arcane provisions to avoid paying their fair share of tax.”

In the National Taxpayer Advocate Annual Report to Congress, Nina identifies the most serious problems facing taxpayers and recommends solutions. The IRS has implemented hundreds of recommendations she has made for administrative change.

Members of Congress have introduced bills to implement dozens of her recommendations for legislative change, and 15 of them have been enacted into law. In 2015, Congress codified the provisions of the Taxpayer Bill of Rights for which Nina had long advocated, grouping the dozens of existing rights in the Internal Revenue Code into ten clear categories and requiring the IRS Commissioner to ensure employees act in accordance with those rights. In testimony to Congress about IRS Customer Service Challenges on March 8, 2017, she also called on Congress to help the IRS with adequate funding so it can adequately serve the public.
The sharp reduction in IRS funding since FY 2010 has left the IRS with fewer resources with which to meet taxpayer needs. Without sufficient resources, there is simply no way the IRS can effectively serve the 100 million taxpayers who call, the ten million taxpayers who write, and the five million taxpayers who visit the IRS each year.

Last year, she traveled the country and held 12 Public Forums on taxpayer service needs and preferences together with members of Congress. The Taxpayer Advocate Service also held “Future State” focus groups of tax return preparers and practitioners. It conducted a nationwide survey of U.S. taxpayers to learn directly what they need in the way of taxpayer service.

In November 2015, Nina convened the inaugural International Conference on Taxpayer Rights in Washington, D.C., bringing over 170 government officials, scholars, and practitioners from 22 countries together to discuss global taxpayer rights and explore how taxpayer rights globally serve as the foundation for effective tax administration. The 2nd International Conference on Taxpayer Rights was held on March 13-14, 2017, in Vienna, with 41 countries represented. Never resting on her laurels, Nina has already started plans for the 3rd International Conference on Taxpayer Rights to be held on May 3-4, 2018, in The Netherlands.

In 2016, Tax Analysts honored Nina Olson as one of ten outstanding women in tax. The award recognized Nina as a global tax pioneer, influencing tax administration and policy on a global scale. More recently, she received the Jules Ritholz Memorial Merit Award in recognition of outstanding dedication, achievement, and integrity in the field of civil and criminal tax controversies. Nina is a graduate of Bryn Mawr College and North Carolina Central School of Law, and she holds a Master of Laws degree in taxation from Georgetown University Law Center. Ms. Olson has served as an adjunct professor at several law schools.

Before her days at the IRS, from 1975 until 1992, Nina owned a tax planning and preparation firm in Chapel Hill, North Carolina. In 1979, without much fanfare the IRS created the Taxpayer Ombudsman to help individual and business taxpayers resolve problems that haven't been resolved through normal IRS channels. Congress later codified this position, which evolved into the position of the National Taxpayer Advocate and the Taxpayer Advocate Service.

In 1992, Nina’s passion and insight for delivery of pro bono tax service reached a critical junction. Keith Fogg of Harvard Law School and the 2015 recipient of the Tax Section's Janet R. Spragens Pro Bono Award recalls that Nina called him out of the blue and told him that she decided there was no good way for tax lawyers to do pro bono work related to their field of expertise in the way pro bono work was handled then. At the time, Keith was the District Counsel for the IRS in Richmond, VA, and Nina told Keith that she decided the solution to the problem was to start a tax clinic for low-income individuals that used pro bono tax lawyers to represent them. Even though she then lived in North Carolina, she decided that Richmond was the perfect place to start this clinic. Keith and Nina spoke for about an hour about her idea and how it might take form. Keith recalls, “I was struck by what a good idea she had and her passion to make the idea a reality.”

Nina’s drive to help at whatever cost was then demonstrated when she moved to Richmond to start something that had never existed. In 1992, the only tax clinics in existence were at academic institutions and there were only about ten of those. With no model to work from and no ties to the community, she founded the Community Tax Law Project (CTLP), the first independent section 501(c)(3) low-income taxpayer clinic in the United States. As CTLP’s executive director, she was relentless in seeking out leads to assist her in making it happen, but she was also without compensation for many years because the amount of grant money she was able to find in no way provided her with a living wage. She maintained her tax
controversy practice and eventually served as of counsel with a local attorney, who was a board member of CTLP and a big supporter, as a way to have some income, but she made huge sacrifices in time and finances to launch and sustain CTLP.

Another observation about Nina is her doggedness—she does not give up helping. As Keith recalls:

She was relentless. I have seen her represent clients when I was the lawyer representing the IRS. She does not give up in the face of significant odds because many of her clients had very little information to give her to support their position. I have seen her pursue and procure legislation because she was unhappy with a position I took in a case we were litigating. As a result of that case, she testified in Congress that the IRS approach was wrong, and Congress changed the statute.

Keith also remembers she was equally relentless in pursuing attorneys to serve on the pro bono panel of CTLP.

Last, but not least, in a field obsessed with detail that can sometimes overshadow the human nature of the clients that are being served, another admirable character trait of Nina is her caring. She cared deeply about the clients she represented when she was at CTLP and her concern came through to them. She cares deeply about the well-being of the taxpayers of the United States. She also inspires her people to do the best for the American taxpayer. She is indeed a “Woman for All Seasons” serving effectively, and always striving for more, for the benefit of taxpayers, the IRS, and the country she serves so well. The Tax Section is proud to recognize Nina E. Olson as the recipient of its 2017 Distinguished Service Award.
SECTION NEWS & ANNOUNCEMENTS

2017–2019 Christine A. Brunswick Public Service Fellow

The Section has selected Catherine Martin as its 2017-2019 Christine A. Brunswick Public Service Fellow. During her two-year Fellowship, Catherine will be working with Community Legal Services, Inc., in Philadelphia, PA, to provide legal representation to low-income Philadelphians facing tax foreclosure of their properties.

The Public Service Fellowship program was developed in 2008 to address the need for tax legal assistance, and to foster an interest in tax-related public service among those individuals who participate. In 2013, the Public Service Fellowship was re-named the Christine A. Brunswick Public Service Fellowship in honor of the late Christine A. Brunswick, the Section’s former Executive Director. Christine was a strong proponent of the Tax Section’s role in advancing pro bono and public service and fostering a fair and equitable tax system. Under her leadership, the Section has devoted significant resources to further that goal.

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.
**SECTION NEWS & ANNOUNCEMENTS**

**Government Submissions Boxscore**

Government submissions are a key component of the Section's government relations activities. View our most recent submissions here. The full archive is available to the public on the website: [http://www.americanbar.org/groups/taxation/policy.html](http://www.americanbar.org/groups/taxation/policy.html).

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

<table>
<thead>
<tr>
<th>TO</th>
<th>DATE</th>
<th>CODE SECTION</th>
<th>TITLE</th>
<th>COMMITTEE</th>
<th>CONTACT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internal Revenue Service</td>
<td>5/10/2017</td>
<td>n/a</td>
<td>Comments on the History of Tax-Exemption of Interest on State and Local Bonds</td>
<td>Tax-Exempt Financing</td>
<td>Todd L. Cooper, David J. Cholst</td>
</tr>
<tr>
<td>Internal Revenue Service</td>
<td>5/9/2017</td>
<td>n/a</td>
<td>Comments on Recent Practice Changes at IRS Appeals</td>
<td>Administrative Practice; Pro Bono &amp; Tax Clinics</td>
<td>Thomas D. Greenaway, George A. Hani</td>
</tr>
<tr>
<td>Internal Revenue Service</td>
<td>5/8/2017</td>
<td>2, 32, 63, 152</td>
<td>Comments on Proposed Regulations Under Sections 2, 32, 62, and 152 (Definition of Dependents)</td>
<td>Individual &amp; Family Taxation; Pro Bono &amp; Tax Clinics</td>
<td>Joseph B. Schimmel</td>
</tr>
<tr>
<td>Internal Revenue Service</td>
<td>5/5/2017</td>
<td>103(a)</td>
<td>Comments on the Definition of Political Subdivision for Tax Exempt Bonds and other Tax Advantaged Bonds</td>
<td>Tax-Exempt Financing</td>
<td>David J. Cholst</td>
</tr>
<tr>
<td>Internal Revenue Service</td>
<td>5/4/2017</td>
<td>1362(f)</td>
<td>Comments on Draft Revenue Procedure Addressing Issues Under Section 1362(f)</td>
<td>S Corporations</td>
<td>Paul R. Kugler</td>
</tr>
<tr>
<td>Internal Revenue Service</td>
<td>3/7/2017</td>
<td>1001</td>
<td>Comments on Modifications of Debt Instruments under Section 1001</td>
<td>Financial Transactions</td>
<td>David C. Garlock, Eileen Marshall, Michael B. Shulman</td>
</tr>
</tbody>
</table>

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

U.S. Department of Treasury Memorandum: Interim Guidance for Responsibility to Process all Requests for Discharge of the Estate Tax Lien

During the December IRS courtesy call, led by Chair William H. Caudill, the Tax Section addressed recent procedural changes regarding lien release certificates related to Form 4422 (Application for Certificate Discharging Property Subject to Estate Tax Lien). Over the course of the succeeding months, Tax Section representative, T. Randolph Harris, examined the issue with the SB/SE Division. The Interim Guidance memorandum reflects the results of this collaboration, which is an example of the value of participation and membership in the Tax Section: http://www.americanbar.org/content/dam/aba/events/taxation/Resources/042017irsetmemo.pdf

The Tax Lawyer – Winter 2017 Issue Is Available

The Winter 2017 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, In Memoriam: M. Bernard Aidinoff

Articles

John P. Steines, Subsidized Foreign Tax Credits and the Economic Substance Doctrine

Allen D. Madison, The Legal Framework for Tax Compliance

Steven Z. Hodaszy, Tax-Efficient Structure or Tax Shelter? Curbing ETFs’ Use of Section 852(b)(6) for Tax Avoidance

Joseph C. Dugan, Compromising Compliance? The Service Offer in Compromise Program and Opportunities for Reform

Winter 2017 Audio Edition Available 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!
The Practical Tax Lawyer – Spring 2017 Issue Is 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 Spring issue features the following articles.

Ted David, Learn to Love the IRS (regular feature)

Peter L. Faber, State and Local Taxes and Multistate Businesses

Mark G. Sklarz, Jeffrey M. Dirmann, William P. Prescott, & Evangeline V. Kliegman, Personal Goodwill in Asset Sale of “C” Corporations

Richard A. Naegele & Mark P. Altieri, Creditor Protection of Retirement Plan Assets

Matthew D. Lee, FATCA: What to Know About the Final, Temporary, the Proposed Regulations

Jacob M. Oksman, Foreign-Owned U.S. Disregarded Entities Must Now Fulfill IRC § 6038A’S Reportings and Record Maintenance Requirements

Andrew C. Strelka, IRS Summons: Top 10 Questions

Andrew C. Liazos & Allison Wilkerson, Proposed Changes to § 409A Regulations: Greater Clarity and Better Planning Alternatives

L. Morgan Frisoli, Dividing Value in the Sale of Mixed Goods and Services for International Tax

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.

IRS Nationwide Tax Forums

Registration for the 2017 IRS Nationwide Tax Forums is now open. Designed for tax professionals, the forums provide a wide range of educational programming, which is developed and presented by representatives of the IRS, the ABA Tax Section, and other national tax-related organizations.

The 2017 dates and locations follow. A registration discount is available for ABA members. Please contact the Tax Section at 202.662.8670 for the discount code. For more information, visit www.irstatxforum.com.

July 11 – 13, 2017 ORLANDO, FL Hilton Orlando Resort
July 25 – 27, 2017 DALLAS, TX Hilton Anatole
August 22 – 24, 2017 NATIONAL HARBOR, MD (Washington DC Area) Gaylord National Hotel
August 29 – 31, 2017 LAS VEGAS, NV Rio All-Suite Las Vegas Hotel
September 12 – 14, 2017 SAN DIEGO, CA Town & Country Resort
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.

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>September 14-16, 2017</td>
<td>JOINT FALL CLE MEETING</td>
<td>Hilton Austin – Austin, TX</td>
</tr>
<tr>
<td>February 8-10, 2018</td>
<td>MIDYEAR MEETING</td>
<td>Hilton San Diego – San Diego, CA</td>
</tr>
<tr>
<td>May 10-12, 2018</td>
<td>MAY MEETING</td>
<td>Grand Hyatt – Washington, DC</td>
</tr>
<tr>
<td>October 4-6, 2018</td>
<td>JOINT FALL CLE MEETING</td>
<td>Hyatt Regency – Atlanta, GA</td>
</tr>
<tr>
<td>January 17-19, 2019</td>
<td>MIDYEAR MEETING</td>
<td>Hyatt New Orleans – New Orleans, LA</td>
</tr>
<tr>
<td>May 9-11, 2019</td>
<td>MAY MEETING</td>
<td>Grand Hyatt – Washington, DC</td>
</tr>
<tr>
<td>September 19-21, 2019</td>
<td>JOINT FALL CLE MEETING</td>
<td>Hyatt Regency – San Francisco, CA</td>
</tr>
<tr>
<td>January 30 - February 1, 2020</td>
<td>MIDYEAR MEETING</td>
<td>Boca Raton Resort – Boca Raton, FL</td>
</tr>
</tbody>
</table>

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 CLE Calendar

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

<table>
<thead>
<tr>
<th>DATE</th>
<th>PROGRAM</th>
<th>CONTACT INFO</th>
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<tbody>
<tr>
<td>June 7-8, 2017</td>
<td><strong>ERISA Litigation National Institute</strong></td>
<td>ABA JCEB</td>
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<tr>
<td></td>
<td>Chicago, IL</td>
<td>202.662.8670</td>
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<tr>
<td>June 9, 2017</td>
<td><strong>Advanced ERISA Benefit Claims Litigation</strong></td>
<td>ABA JCEB</td>
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<td></td>
<td>Chicago, IL</td>
<td>202.662.8670</td>
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<td>June 14, 2017</td>
<td><strong>M&amp;A Series 2017 Part 2: The Due Diligence Process</strong></td>
<td>ABA JCEB</td>
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<td>CLE Webinar</td>
<td>202.662.8670</td>
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<tr>
<td>June 14-16, 2017</td>
<td><strong>10th Annual U.S. – Latin America Tax Planning Strategies</strong></td>
<td>Tax Section</td>
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<td>Mandarin Oriental, Miami, FL</td>
<td>202.662.8670</td>
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<tr>
<td>June 21, 2017</td>
<td><strong>LB&amp;I Compliance Campaign: 48C Energy Credit and CCM Accounting for Land Developers</strong></td>
<td>Tax Section</td>
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<tr>
<td></td>
<td>CLE Webinar</td>
<td>202.662.8670</td>
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<tr>
<td>September 14-16, 2017</td>
<td><strong>JOINT FALL CLE MEETING</strong></td>
<td>Tax Section</td>
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<tr>
<td></td>
<td>Hilton Austin – Austin, TX</td>
<td>202.662.8670</td>
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<tr>
<td>October 27, 2017</td>
<td><strong>5th Annual International Tax Enforcement and Controversy Conference</strong></td>
<td>Tax Section</td>
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<tr>
<td></td>
<td>Washington, DC</td>
<td>202.662.8670</td>
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<tr>
<td>November 2-3, 2017</td>
<td><strong>28th Annual Philadelphia Tax Conference</strong></td>
<td>Tax Section</td>
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<tr>
<td></td>
<td>Philadelphia, PA</td>
<td>202.662.8670</td>
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<tr>
<td>December 4, 2017</td>
<td><strong>2017 Low Income Taxpayer Representation Workshop</strong></td>
<td>Tax Section</td>
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<td></td>
<td>Washington, DC</td>
<td>202.662.8670</td>
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<tr>
<td>February 9-11, 2018</td>
<td><strong>MIDYEAR MEETING</strong></td>
<td>Tax Section</td>
</tr>
<tr>
<td></td>
<td>Hilton San Diego – San Diego, CA</td>
<td>202.662.8670</td>
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</tbody>
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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. 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 at www.shopABA.org.

- The New Markets Tax Credit: Providing Economic Stimulus to Low-Income Communities
- Something New in the Toolbox: The Installment Sale-Reacquisition Approach to Real Estate Development Projects
- Game Change: The New Partnership Audit Regime
- LLCs, Taxes and the IRS - What Could Possibly Go Wrong?
- Debt/Equity Rules: Applying the Final Section 385 Regulations
- 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
SECTION EVENTS & PROMOTIONS

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- 32% of meeting attendees represent government
- 25% come from firms of over 100 attorneys
- 23% come from firms of 1-20 attorneys

Sponsorship Opportunities are now available for the following meetings:

<table>
<thead>
<tr>
<th>Date</th>
<th>Meeting Name</th>
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<tr>
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</tr>
</tbody>
</table>

For additional information on the above conferences or any of our other conferences, please visit http://www.americanbar.org/groups/taxation/sponsorship.html or contact our Sponsorship Team at taxmem@americanbar.org or at 202/662-1682.
COMING SOON

A must-read for anyone preparing for trial before the U.S. Tax Court, the Second Edition of A Practitioner’s Guide to Tax Evidence: A Primer on the Federal Rules of Evidence As Applied by the Tax Court takes the reader step-by-step through the Federal Rules of Evidence as applied by the Tax Court and brings coverage of Tax Court opinions current through early 2017. This compilation results in an easy-to-follow collection of cases to support or guide a practitioner facing an evidentiary problem before the Tax Court. New material in the Second Edition includes:

- Information as to why an appellate court reversed the Tax Court’s evidentiary decision (and, where applicable, why it affirmed the Tax Court’s decision).
- Information about splits of authority in the appellate courts regarding evidentiary issues.
- Significantly more examples of how the Tax Court has applied the rules of evidence.

The condensed and well-organized sections allow one to easily spot a particular issue or the Evidentiary Rule at hand and to find the supporting cases, and the case discussions have sufficient detail to allow the reader to know whether to go and read the full case. The brief summary of requirements of the major rules presented along with dozens of practice pointers assist the practitioner in charting the proof necessary to succeed.

Product Code: 5470820 | List Price: $99.95 | Section Member Price: $79.95


Several major developments have occurred since the initial publication of A Practitioner’s Guide to Innocent Spouse Relief, such as the IRS abandoning its position that taxpayer’s claiming equitable relief was limited to a two-year statute of limitations. The IRS also published Rev. Proc. 2013-34, which provided new guidance in equitable relief cases. In this newly revised edition, the author explains how to prepare an equitable relief claim under Rev. Proc. 2013-34, how to recover your client’s tax refund when the IRS grants relief under section 6015(c), and what steps to take to protect the client’s innocent spouse claim while the client is going through a divorce and why it may be necessary to file a protective refund claim in some innocent spouse cases.

Product Code: 5470811 | List Price: $99.95 | Section Member Price: $79.95

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Did you know that Tax Section members have access to thousands of pages of cutting-edge committee program materials presented at Section of Taxation Meetings?

TaxIQ is a Section-hosted static database of meeting materials organized by Section Meeting and Committee name. This index is useful to members who attended a past meeting or want to research materials from a specific committee.

Visit [www.ambar.org/taxiq](http://www.ambar.org/taxiq) and click the TaxIQ logo to be directed to the TaxIQ Meeting Index.

Please have your ABA username and password handy, as you will need it to view the materials.

A searchable database of Tax Section meeting materials is available on Westlaw free of charge to Section members.

Search meeting materials quickly and easily across all Committees and Section Meetings by keyword, date, or phrase.

To access the searchable database, visit [www.ambar.org/taxiq](http://www.ambar.org/taxiq) and click on the Westlaw logo. Once you log in with your ABA username and password, accept the User Agreement to begin your search.

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OTHER ITEMS OF INTEREST

ABA Releases Book on Reducing Bias in the Courts

The ABA has recently released “Enhancing Justice: Reducing Bias,” a bench book which examines the different approaches that can be used to lessen the impact of implicit bias in the courts. By bringing together a diverse team of authors, including judges, lawyers, social scientists, professors, and experienced trainers, the book seeks to help “break the bias habit” by increasing knowledge and awareness of implicit bias and showing how to improve understanding and practice of procedural fairness and of culturally competent communication across cultures. A reception to launch the book will be held in New York City on Thursday, August 10, after a full day of CLE programming focusing on the legal profession at the ABA Annual Meeting.
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