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FROM THE CHAIR

So Much to Do, So Little Time

By Karen L. Hawkins, Hawkins Law, Yachats, OR

Austin

The Section’s Joint Fall CLE Meeting with the Trust & Estate Law Division of the Real Property, Trust & Estate Law Section on September 14-16 was attended by over 900. Notwithstanding the challenges of going forward with a meeting in Austin, Texas, in the midst of one of the worst hurricane seasons in recent history, the committees did their usual stellar jobs in providing top-notch continuing education presentations and materials for the attendees. Cutting-edge discussions addressing the new partnership audit rules, including the Section’s technical comment submissions on specific aspects of the very lengthy regulations; virtual currencies in the tax system; current ACA issues; current sales tax issues affected by cloud computing; ethical duties for technology compliance; and the status of private debt collection are just a few of the presentations worthy of your consideration.

I particularly want to acknowledge the yeopersons’ efforts expended by Section staff and members of the Pro Bono and Tax Clinics and Individual and Family Taxation Committees in pulling together at the last minute a special Saturday morning program (hot breakfast for all!) entitled “Hurricane Harvey—Tax Issues for Disaster Survivors.” The presenters and the materials, including the newly updated “Assisting Disaster Survivors” chapter from the Section’s forthcoming 7th Edition of Effectively Representing Your Client Before the IRS, were terrific. You may listen to the audio of the presentation here. More resources for providing tax assistance to disaster survivors can be found on the Section’s website here. The Section also invited a number of local nonprofit organizations involved in hurricane relief efforts to send representatives to the Joint Fall CLE Meeting. Central Texas Foodbank and the Red Cross were present through signage and a virtual donation station for people who wished to make donations.

The Section Luncheon and Plenary Session featured Michael Graetz, Columbia Alumni Professor of Tax Law at Columbia Law School. His comments on the history and future of tax reform were provocative, and well-received. I invite you to listen to Professor Graetz’s presentation here. I also recommend his recently published article, “Heading Off a Cliff,” which is derived from his presentation in Austin.

As a new added benefit of attending the meeting, registered attendees can now access the complete materials with one click to a zip file that is distributed by e-mail after the meeting. If you were unable to attend, however, I encourage you to review the programming schedule to see what you missed that might be of interest. In addition, whether you attended or not, all Section members have complimentary access to the written materials from Austin (as well as previous Section Meetings) on the website: (1) in a static
database called TaxIQ, which is organized by meeting and committee name, and (2) in an easily searchable
database on Westlaw made available as a member benefit from the Section’s publishing sponsor, Thomson
Reuters. Both options can be accessed from the TaxIQ page. Audiorecordings of individual sessions are
available through our outside digital partner, DCP.

Pro Bono Update

Under the watchful eye of Vice Chair, Pro Bono and Outreach, Bahar Schippel and the tireless contributions
of the Section’s 2017 Spragen’s Pro Bono Award recipient, Wells Hall, the Military VITA/ Adopt-a-Base
program encompasses more than 40 military installations throughout the United States. Recruiting efforts
have been very successful due to increased exposure and improved organization in recent years. We still
have gaps in coverage, however, and are in particular need of volunteers for military installations located in
Texas and California. If you or your firm are interested in a meaningful and rewarding experience assisting
our nation’s active military with tax preparation, please consider getting involved in this very important
Section project. In California, volunteers should contact our Brunswick Public Service Fellow, Catherine
Strouse at catherines@lassd.org. For Texas, volunteers should contact either Bahar at bschippel@swlaw.
com, or Wells at wells.hall@nelsonmullins.com. Key cities with installations needing coverage include Los
Angeles and Fresno in California; and Austin, El Paso, Abilene and San Angelo, in Texas. Other areas in need
of assistances include Colorado Springs, CO, Omaha, NE, Phoenix, AZ, and Little Rock, AR. Please help us
close these gaps before the start of tax season.

As reported in my last column, Bahar Schippel has also begun the process of identifying partners with
whom the Tax Section might collaborate in providing pro bono legal assistance for our growing elderly
population. Through Bahar’s efforts, we have learned that there are several potential opportunities for
Section involvement. Recently, Section representatives met by conference call with representatives from the
Taxpayer Advocate Service (TAS) to discuss collaboration with TAS on its annual taxpayer outreach initiative.
Of particular attraction to me is the opportunity to join TAS during initiatives which promise to heavily impact
our elder population. The Taxpayer Advocate has identified seniors as a significant vulnerable population
on which she wishes to have TAS focus. Over the next several months, Bahar will coordinate information
with TAS and identify major population areas where the Section has a concentration of members who can
volunteer to join TAS personnel during their outreach events. The nature of the volunteer opportunities,
locations, and timing will be announced using a variety of media once the details have been refined. In the
meantime, be aware this opportunity is potentially coming to your locale and consider stepping up when
the call for action is made.

In addition to the above, Bahar has also been communicating with the AARP Foundation and has identified
two existing programs which could use volunteers: Tax-Aide which operates a VITA program aimed at the
elderly from nearly 6,000 sites in the US; and AARP Legal Counsel for the Elderly, a program based in
Washington, D.C., which provides pro bono legal services for the elderly. There is a significant need for
volunteers who can provide tax-related legal services, which typically encompass non-filing, collection, I.D.
thief, household employee, and refund issues. This program is available exclusively to Washington, D.C.
residents. If you find either of these existing pro bono opportunities attractive, please contact Bahar directly
at bschippel@swlaw.com.
Budget and Reimbursement Policy Revisions

As part of our ongoing review of the Section's budget and financial commitments, difficult financial decisions were made during the business meeting of the Taxation Section Council in Austin. These types of challenging, belt-tightening decisions have had to be made over the past two years, and will continue to be required to reach, and sustain, a revenue-neutral budget. If the Section is to maintain its stated commitments to provide services to its membership, tax assistance to vulnerable taxpayers, and leadership in support of a workable tax system, it is imperative that we continue to cut expenses while also seeking additional ways to increase income. The Section has run a substantial deficit for the past several years, an unacceptable situation for the future. In FY 2016-17, under the leadership of immediate past Chair, William Caudill, the Section Council began the difficult process of scrutinizing every budget line-item for potential cost cutting. Significant progress was made, but the work is not complete. Every Council member has been involved every step of the way and has had every opportunity to express his/her positions on multiple occasions on every budget-cutting decision.

The Section currently spends over $150,000 providing travel reimbursement to government and academic speakers; other academics who are in Section leadership positions and members of Section administrative committees; Nolan and Public Service Fellows; LITC scholarship recipients; and the ABA Young Lawyers Division liaison. In addition, many in the foregoing categories are eligible for significantly reduced or waived registration fees. Council Directors, Officers, committee leadership and members of administrative committees who are not full-time academics receive no travel reimbursement or meeting registration fee reduction (this has been the policy since 2012). That policy was revisited, along with other expense items starting in July 2017, culminating at the Austin meeting in September in a nearly unanimous vote to revise the policy.

The revisions have some impact on all the previously referenced reimbursement categories, both for consistency and for cost cutting. The decision was neither easy nor made lightly. Having all categories represented at our meetings is vital to our success as a Section, and we remain committed to doing what we can to support that attendance. In a perfect world, perhaps there is a more perfect solution. The reality for this leadership team is that there is more work to be done to balance the budget, and that requires continued vigilance by the leadership of the Section.

A chart summarizing the new travel reimbursement policy may be accessed here. As an overview:

1. Full-time academics who qualify as young lawyers under the ABA guidelines (36 years or younger, or in practice for 5 or fewer years) will receive reimbursement for airfare at published ABA zone rates if they are speakers or are serving the Section in a leadership capacity. They will also be eligible for the reduced meeting registration fee. This change is effective immediately.

2. Full-time academic speakers who do not qualify as young lawyers under the ABA policy will no longer receive reimbursement for airfare. They will, however, continue to qualify for the reduced meeting registration fee. This change is effective immediately.

3. Full-time academics currently in leadership roles will receive airfare reimbursement and per diem under the former policy for the balance of FY 2017-18 (i.e., the 2018 Midyear and May Meetings). Commencing September 2018, academics in leadership roles will be treated as provided above in #1 and #2.
4. Government speakers whose agencies permit them to accept reimbursement will be entitled to reimbursement for airfare up to the published zone rate and hotel costs at the government rate for up to three nights (if in attendance at the meeting for the entire period). They will continue to have the meeting registration fee waived and will receive complimentary tickets to Section-sponsored events (receptions, luncheon, etc.). This change is effective immediately.

5. Nolan Fellows will receive airfare reimbursement at published zone rates and waived meeting registration fees. This change is effective immediately.

6. Christine Brunswick Public Service Fellows will receive airfare reimbursement at published zone rates, hotel costs for up to three nights, and waived meeting registration fees. This change is effective immediately.

7. LITC Scholarship recipients will continue to receive airfare at published zone rates, hotel costs for up to three nights, and waived meeting registration fees. This change is effective immediately.

8. The Chair, in consultation with appropriate Section officers, may exercise discretion on a case-by-case basis with respect to implementing this policy.

If you are a committee chair, or someone responsible for planning a committee program for San Diego or Washington, D.C., please ensure that these guidelines are articulated to any government and academic speakers you invite to participate.

The Tax Lawyer Looks Forward

Under the strong leadership of Julie Divola, Vice Chair, Publications, the Section has reached an agreement in principle with the Northwestern University Pritzker School of Law to engage students from its full-time Tax LL.M. Program as student editors of our flagship journal, The Tax Lawyer. While negotiations are on-going, all anticipate a smooth and complete transition from our current collaboration with Georgetown University Law Center by September 2018. The Tax Section is grateful to the generations of Georgetown J.D. students who have served as student editors of The Tax Lawyer over nearly 50 years. The Tax Section is excited to undertake this new chapter with Northwestern and believes that partnering with an LL.M. program presents enhanced opportunities in terms of the editorial support, student note-writing, and involvement of Northwestern’s LL.M. graduates as active Section members in the future.

Tax Reform – We Have Your Back

As you know the House has released its highly publicized tax reform bill, which has given us much to contemplate in our professional as well as personal lives. The Senate recently weighed in with its version, which not surprisingly looks different from the House version in significant ways. While conference reconciliation will take some time, we know that the President is pushing an aggressive timeline and momentum appears to be in his favor.

As the voice of our nation’s tax lawyers, the Tax Section is monitoring these events closely and making plans to customize and deliver CLE programming on key tax reform topics. Earlier this week on November 13, the Section partnered with the ABA Center on Professional Development to present “U.S. Tax Reform: Are You and Your Clients Prepared?” – a special member-benefit webinar, which members can still access for free at https://www.americanbar.org/cle/free_cle.html. Fred Murray, Vice-Chair, CLE, brought together
a distinguished panel of former Treasury officials, including Lisa Zarlenga and Mark Mazur, to give us the benefit of their experience for this timely presentation. Over 800 attendees participated in the live event. I encourage you to check the Section’s website for updates on additional tax reform programming in the coming months.

**Government Courtesy Calls**

Tax reform notwithstanding, we were very grateful that the leadership and staffs at Treasury and the Internal Revenue Service took the time to meet with me and Section representatives last week to discuss a broad range of issues, among them: (1) the status of the administrative guidance process; (2) guidance on cryptocurrency; (3) guidance under section 402(b) regarding funded foreign plans; (4) implementation of ASC 606, Notice 2017-17, and accounting method changes; (5) guidance regarding the demise of LIBOR; and (6) the new partnership audit procedures impact on state tax administration. Additional topics discussed during our meeting with the IRS included: (1) procedures under section 6511(h) for requesting suspension of the limitations period due to financial disability; (2) penalty abatement for e-filed returns that are not accepted; (3) issues relating to the stated due date for petitions to the Tax Court to review an adverse Notice of Determination in CDP cases; (4) health insurance exchanges and section 6103 issues; (5) issuance of determination letters for certain qualified retirement plans; (5) advance pricing agreements and restricted consents under Notice 2015-41; and (6) Appeals conference practices. Thanks to all the committees who stepped up to raise and brief these topics in advance of the meeting. Our audiences at both agencies were actively engaged in the discussions and expressed their appreciation for the myriad on-going contributions made by the Tax Section to tax administration.

Thanks especially to Julian Kim, Vice Chair, Government Relations, for organizing the meetings, and to our subject matter experts, Lisa Zarlenga, Kurt Lawson, Ellen McElroy, Fred Nicely, Keith Fogg, John Breen, and Sheri Dillon, for their articulate and relevant presentations.

**Next Up – San Diego**

It is clearly an exciting time in our profession, and we will cover it all in San Diego at the Tax Section’s Midyear Meeting on February 8-10, 2018, at the Hilton San Diego Bayfront. Having been privy to some of the planning already underway, I have no doubt that San Diego is shaping up to be another excellent meeting with the usual high quality legal educational programs. Edward Kleinbard, the Robert C. Packard Trustee Chair in Law at the USC Gould School of Law, has agreed to address the Section Luncheon and Plenary Session on Saturday, February 10, 2018. Prior to joining the USC faculty, Mr. Kleinbard was Chief of Staff of the U.S. Congress’s Joint Committee on Taxation. In addition to numerous articles on a large spectrum of tax issues, Mr. Kleinbard is the author of the highly acclaimed *We Are Better Than This: How Government Should Spend Our Money* (Oxford Univ. Press, 2014). I hope you are already marking your calendar for the entire meeting, and that you’ll make plans to attend the Plenary Session to hear Mr. Kleinbard, and what promises to be a thought-provoking presentation.

**Nominating Season Is Here**

The Midyear Meeting is also the important time when the Section’s Nominating Committee meets to make its final recommendations concerning candidates for appointment to various Council positions for the fiscal year 2018-2019. The Tax Section has existed for 77 years. During that period, only two women have chaired the Section: Pamela Olson first stepped up to the task in 2000. Unfortunately for us (but certainly not for her) Pam left to join Treasury and did not complete her term. It was six more years before the
second woman, Susan Serota, was selected by her peers to lead the Section. She served her full term with distinction. Now, as the Section approaches 78, we have our third woman chair. I’m excited about my role and for the opportunity to make what is for me the ultimate contribution to the profession.

I would like to conclude this column with a shout-out to the many women with whom I have enjoyed working over my nearly 40 years as a Section member and who I have had the pleasure of watching as they move into the Section’s leadership ranks. Their presence and contributions have changed the entire complexion of the Section for the better. There is, and has been for quite some time, an ample pool of competent leaders in this Section who happen to be women. I sincerely hope it will not be another ten years before leadership identifies and nominates our fourth woman chair. ■
Gaylor v. Mnuchin—A Step Toward Greater Clarity on Clergy Tax Exemptions?

By Adam Chodorow, Arizona State University, Sandra Day O’Connor College of Law, Tempe, AZ

On October 6, 2017, the U.S. District Court for the Western District of Wisconsin declared section 107(2) of the Internal Revenue Code unconstitutional. The provision permits “ministers of the gospel” to exclude from income compensation designated as a housing allowance, thus giving churches and other religious organizations the ability to provide tax-free housing to their ordained ministers. The provision applies not only to parish priests living in modest housing, but also to televangelists like Joel Osteen, who currently lives tax-free in his $10.3 million mansion. It also applies to ministers who work in church-affiliated schools as teachers and administrators. This affords a significant benefit for certain schools whose religious tenets include the ministry of all believers. In one case, a basketball coach was entitled to exclude his housing allowance from income. The government foregoes around $800 million in revenue per year as a result of this provision, and, if the decision stands, it could have a significant impact on churches and other religious institutions.

Clergy and laypeople have long been able to exclude in-kind employer-provided housing from income, where the housing was provided so that the employees could perform their jobs. In 1954, Congress tightened up rules for laypeople, codified in section 119, while expanding the provision for clergy. Lay employees were only allowed to exclude the value of in-kind housing provided on site, required by the employer and for the employer’s convenience. In contrast, ministers could exempt the value of all in-kind housing, regardless of location or the purpose for which it was provided. In addition, Congress added section 107(2), exempting cash allowances designated for clergy housing from tax. In 2002, the Ninth Circuit raised the question of the cash allowance provision’s constitutionality sua sponte in Warren v. Commissioner, recruiting Erwin Chemerinsky to file a brief on the question. Chemerinsky concluded that the provision was unconstitutional and filed a brief to that effect. However, the parties quickly settled the case, and the court dismissed it over Chemerinsky’s objections, inviting him to file his own lawsuit if he wished to pursue the matter.

The Freedom From Religion Foundation, Inc., soon took up the challenge. In 2013, the U.S. District Court for the Western District of Wisconsin held section 107(2) to be unconstitutional. On appeal, the Seventh Circuit vacated the judgment and remanded with orders that the case be dismissed for lack of standing. The court held that the plaintiffs needed to ask for the benefit and be denied to establish injury, which is an important element for standing. In response, the plaintiffs arranged to receive a housing allowance from

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1. 302 F.3d 1012 (9th Cir. 2002).
their employer, paid tax on it, and then sought a refund. When the IRS failed to respond within 6 months, they filed suit in federal district court. The court’s October 6, 2017 opinion in this second case reaffirms its earlier opinion and addresses additional arguments the parties made.

Proponents again raised standing challenges and made a number of claims in support of the exemption. First, they argued that the exemption, which singles out “ministers of the gospel” for a benefit, should be seen as part of a broader policy of excluding housing that includes sections 119 (the general rule), 911 (expatriates), 134 (military personnel), and 912 (government employees working overseas). Second, they argued that exemption from tax does not pose the same constitutional issues as direct subsidies. Third, they argued that, even if the provision does single out religion, it is appropriate as an accommodation to religion under the First Amendment’s Free Exercise Clause. One claim was that the provision is necessary to avoid the church-state entanglement that would arise were the general rules applied to churches and clergy. Another was that the provision is necessary to ensure that all clergy receive the same benefit, regardless of a church’s housing policy. Supporters also pointed to other exemptions in the Code as support for the propriety of this one.

The court methodically addressed each of these claims, using the longstanding Lemon three-part test as a framework. For instance, it examined the legislative history to conclude that the law did not have a secular purpose. The court noted that the sponsors viewed the provision as a tool in the fight against godless communists and a way to support poorly paid ministers, undermining the claim that it is part of a broad web of similar housing provisions. The court also rejected the claim that tax exemptions did not raise First Amendment concerns in the same way as direct support. The court further noted that requiring clergy to pay tax on all their income does not infringe on the free exercise of religion, thus undermining the claim that the exemption serves as an accommodation. Finally, the court asked the parties to file briefs regarding the appropriate remedy. Plaintiff’s goal in the lawsuit is not to get the refund for which they sued, but rather to have the provision deemed unconstitutional so that the benefit is no longer available. Those briefs were due at the end of October.

This case is certain to be appealed to the Seventh Circuit and eventually to the Supreme Court. It presents a complex mix of First Amendment law and tax policy. If the decision stands, many will view it as appropriately resolving a problem of preferential taxation of religious workers. Clergy will have to pay tax on all their compensation, and churches and clergy may decide to renegotiate their compensation packages. If the higher courts reverse this decision, the consequences will depend on the reasons given. Either way, we may get some clarity in this often murky area of the law.

4 Lemon v. Kurtzman, 403 U.S. 602 (1971) (finding that a statute concerning religion (i) must have a “secular legislative purpose,” (ii) must not have a “principal or primary effect” that advances or inhibits religion, and (iii) must not result in “excessive government entanglement” with religion.)
AT COURT

Transferee Liability for Unpaid Employer Taxes: *Kardash v. Commissioner*

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

Introduction

*Kardash v. Commissioner*¹ provides an essential 11th Circuit reminder on the extensiveness of transferee liability for unpaid employer taxes. This article reviews the facts and opinion and then discusses planning tips.

Facts

Kardash was both a shareholder and employee of Florida Engineered Construction Products Corporation (FEC). Kardash and three others owned all the stock. Chairman Hughes and President Stanton owned 3 million shares apiece, Residential Division President Robb owned 75,000 shares, and Kardash owned 575,000 shares.

FEC did well from 1999 to 2005, with revenues from $39.9 million to $132.2 million. Revenues tumbled to $55.4 million in the financial crisis of 2007. FEC paid no federal income tax for any of those years, but in an apparent fraud, Hughes and Stanton removed, respectively, $62,037,927 and $56,469,747 from the company. Kardash also received considerable funds: $550,000 “Advance Transfers” in 2003-4 and $3,457,500 in “Dividend Payments” from 2005 to 2007.

The IRS notified FEC in 2009 of tax deficiencies, but never levied FEC’s bank accounts or seized other FEC assets. Ultimately, FEC agreed to a monthly installment payment of $70,000 until $129,130,131.60 was repaid. The IRS also pursued funds transferred by FEC to shareholders, under section 6901’s fraudulent conveyance provisions. Stanton was criminally convicted and paid restitution. Hughes’s estate agreed to a settlement. Robb and Kardash challenged transferee liability, resulting in Kardash’s appeal from a Tax Court decision holding him liable.

At the Tax Court, the IRS argued that both the advance payments and dividends were fraudulent under the Florida Uniform Fraudulent Transfer Act (FUFTA) because FEC was or became insolvent without receiving any value from Kardash. Kardash countered with three primary arguments: (i) the transfers were not fraudulent since they were part of his compensation; (ii) the transfers prior to 2006 could not be fraudulent since FEC became insolvent in 2006; and (iii) the IRS failed to exhaust its collection remedies before seeking transferee liability under section 6901.

¹ No. 16-14254, 2017 U.S. App. LEXIS 14389 (11th Cir. 2017).
The Tax Court ruled against Kardash’s exhaustion argument, because FUFTA allows recourse to all available remedies. The Tax Court accepted the compensation argument regarding the advance transfers but not as to the dividend payments. Furthermore, the Tax Court considered the 2005 dividend payment together with those to the other shareholders, finding that the entire dividend transaction led to the 2006 insolvency. Only the latter ruling was at issue in the appeal.

**Opinion**

The appellate court relied on *Commissioner v. Stern*, in which the Supreme Court treated section 6901’s predecessor (section 311 of the 1939 Code) as procedural, with the result that state substantive rules were used to ascertain transferee liability. Section 6901 permits actions in law or in equity. In equity, the IRS would have to exhaust all available remedies against FEC before pursuing Kardash. In law, however, the IRS follows state rules, and Florida does not have an exhaustion requirement. The IRS thus had no obligation to exhaust remedies against FEC before pursuing recovery from transferee Kardash.

In considering 2005 dividends, the court noted that FUFTA enables creditors to collect against debtor transferees pursuant to constructive fraud where the claim was created before transfer and the debtor transferred without “reasonably equivalent value in exchange and . . . was insolvent at that time or . . . became insolvent as a result of the transfer or obligation.”

The appellate court found that the dividend payments were not compensation. Kardash and FEC labeled the payments dividends on IRS forms. The Tax Court had found the payments to be in respect of the shares owned rather than for services. These were dividends for which FEC did not receive reasonably equivalent value, establishing this element of constructive fraud under FUFTA.

In addition, the debtor must be insolvent at the time of the transfer or become insolvent because of the transfer, which can apply to a series of transactions. FEC was clearly insolvent at the time of the 2006 and 2007 dividend payments, so the court only looked further at the 2005 dividend. Kardash argued against aggregating his dividend of $1.5 million with the dividend transfers to the other shareholders (Hughes, $21.5 million, and Stanton, $16.6 million), claiming that the amount was so small it could not cause FEC’s insolvency. The court concluded that the dividend that led to FEC’s insolvency was paid proportionately to all shareholders, so it would not be appropriate to treat the Kardash payment separately. That was funds due to the IRS under FUFTA and section 6901.

**Planning Tips**

1. Transferee liability for unpaid employer taxes can be brought under state legal rules or in equity. If the IRS brings the case in equity, exhaustion is required. If not, state legal rules control the exhaustion issue.

2. Even if an employee-owner is innocent of an actual fraud that caused the insolvency, that employee-owner can still be held liable under section 6901’s transferee liability provision.

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3 *Id.* at 43 (citing S. Rep. No. 69-52, at 30 (1926)).
5 FUFTA § 726.106(1).
6 *Id.*
PRACTICE POINT

Employment Cases and Planning Implications

By Adam Abrahams, Meyers Hurvitz Abrahams LLC, Rockville MD; Sabrina Strand, Law Offices of Joseph H. Thibodeau, P.C., Denver, CO; and Kevin G. Bender, McGuireWoods LLP, Richmond, VA

The self-employment tax for closely held businesses has become more important in light of a number of self-employment tax cases decided by the Tax Court in the last year. This article, based on a panel at the Joint Fall meeting in Austin, Texas, looks at the statutory provisions and the impact of three of these cases: Fleischer v. Commissioner, T.C. Memo 2016-238 (December 29, 2016); Castigliola v. Commissioner, T.C. Memo 2017-62 (April 12, 2017); and Hardy v. Commissioner, T.C. Memo 2017-16 (January 17, 2017).

Self-employment income is defined under section 1402(a) as “gross income derived by an individual from any trade or business carried on by such individual, less the deductions...plus his distributive share (whether or not distributed) of income or loss... from any trade or business carried on by a partnership of which he is a member...” It does not include any net earnings over the contribution and benefit base ($127,200 in 2017), subtracting the wages paid to such individual during such taxable year (section 1402(b)(1)), or earnings less than $400 in a particular tax year (section 1402(b)(2)).

Section 1402(a)(13) states that “there shall be excluded the distributive share of any item of income or loss of a limited partner, as such, other than guaranteed payments described in section 707(c) to that partner for services actually rendered to or on behalf of the partnership to the extent that those payments are established to be in the nature of remuneration for those services.”

The Code and Treasury Regulations do not provide any guidance on how to treat a member of a limited liability company (LLC) for purposes of the self-employment tax rules. The key provision, section 1402(a)(13), was added to the statute in 1977 to cover conventional partnerships, including limited partnerships. This was before the existence of limited liability companies. In 1994 and 1997, the IRS issued proposed regulations to determine whether distributive shares of partnership income of LLC members are included in self-employment income.1 The intent of the proposed regulations was to treat owners of an LLC interest in the same manner as similarly situated partners in a state law partnership.

Because the proposed regulations were never finalized, tax practitioners have relied on the 2011 Renkemeyer case to advise partnership clients on self-employment tax issues. In Renkemeyer, three attorneys formed a state law limited liability partnership. One year later, the attorneys executed a written partnership agreement that created two classes of partnership units: “General Managing Partner Partnership Units” and “Investing Partnership Units.” Only General Managing Partner units had the authority to act on behalf of the partnership. Each partner had a 1 percent General Managing Partner Partnership Unit and a 32 percent Investing Partner Partnership Unit. The partners on their tax returns claimed that all of their distributive shares of partnership gain or loss attributable to their Investing Partner Partnership Units were items of income or loss of a limited partner for purposes of section 1402(a)(13). The Tax Court disagreed.

In determining the partners’ respective interests in the partnership, the Tax Court considered the following factors relevant: (i) partners’ relative capital contributions to the partnership; (ii) partners’ respective interests in partnership profits and losses; (iii) partners’ relative interests in cash-flow and other non-liquidating distributions; and (iv) partners’ rights to capital upon liquidation. Noting that the statute did not define the term “limited partner,” the Tax Court suggested that the term had “become obscured over time because of the increasing complexity of partnerships and other flow-through entities, as well as the history of §1402(a)(13).” The Tax Court determined that the section’s purpose was to ensure that individuals who merely invest in a partnership and are not actively participating in the partnership’s business operations would not be subject to self-employment tax. Those who perform services for a partnership in the capacity of a partner would not be exempt from liability for self-employment taxes. The exclusion of certain earnings that are of an investment nature from self-employment income does not include guaranteed payments such as salary and professional fees that are received for services actually performed by the limited partner for the partnership. The Tax Court noted that almost all of the law firm revenues were derived from legal services performed by the law partners in their respective capacities as partners in the law firm. Furthermore, each partner contributed only a nominal amount ($110) for their respective partnership units.

On September 5, 2014, the IRS Office of Chief Counsel released a memorandum considering whether partners in a management company LLC were limited partners for the purpose of the section 1402(a)(13) exception. Chief Counsel concluded that they were not because each partner worked full-time for the management company, whereas the exception protected partners who held a passive investment interest in the partnership.

On August 19, 2016, the IRS issued further guidance providing its most expansive application of the self-employment tax rules to an LLC member. The facts outlined by the IRS were as follows. The taxpayer purchased restaurant franchises and transferred ownership of the restaurants to an LLC. The other members of the LLC were the taxpayer’s wife and a trust. The restaurant franchise agreements required the taxpayer to devote full time to the management of the restaurants, including hiring/firing employees, buying/selling property, establishing pension plans, and hiring professionals such as attorneys.

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3 136 T.C. at 144, citing Holder v. Commissioner, T.C. Memo 2010-175; Estate of Ballantyne v. Commissioner, T.C. Memo. 2002-160, aff’d 341 F.3d 802 (8th Cir. 2003); and Treas. Reg. § 1.704-1(b)(3)(ii).
4 136 T.C. at 149.
5 Id. at 150.
6 Id.
7 Chief Counsel Advice (CCA) 210436049.
8 Technical Advice Memorandum (TAM) 201634022.
The taxpayer argued that the LLC should not be subject to employment tax because the taxpayers were not directly responsible for LLC revenue; the restaurant business generated revenue from sales of a good, rather than from providing a service. If the taxpayer did not show up to work on a particular day, the restaurant would still make food and generate sales. The taxpayer also stated that his contribution of substantial capital to the restaurant and delegation of significant management responsibilities to executive-level employees sufficed to make his distributive share a mere return on investment exempt from self-employment tax. The TAM did not concur with the taxpayer’s arguments.

In *Fleischer*, a taxpayer attempted to use an S-Corporation to reduce self-employment tax because S corporation income is not subject to the tax. Ryan Fleischer was a registered financial consultant, certified financial planner, and licensed seller of variable health and life insurance policies who developed investment portfolios for clients. After working as an employee of an investment firm and a bank, Fleischer decided to start his own business. He entered into an agreement with LPL, a brokerage company, that stated that he was an independent contractor. Later, he incorporated Fleischer Wealth Plan (FWP) as its sole shareholder and elected S-Corporation status. Three weeks after incorporating FWP, he entered into an employment agreement with FWP under which the company paid him a salary to “perform duties in the capacity of Financial Advisor.” He then entered into a broker contract with MassMutual Financial Group (MassMutual). The contract was between Fleischer and MassMutual, with no mention of FWP, and Fleischer signed the contract in his personal capacity. The contract explicitly stated that there was no employer-employee relationship between Fleischer and MassMutual. Neither Fleischer nor the companies modified the contracts to include FWP. Fleischer did not report any self-employment tax on the returns.

The IRS issued Fleischer a notice of deficiency for 2009 through 2011. In determining how much should be treated as reasonable compensation and how much should be treated as a distribution from an S-Corporation, the IRS requires the business owner to first prove that the S-Corporation, rather than the individual, provided the services. In Fleischer’s case, the IRS determined that Fleischer’s income for the entire period—reported as pass-through income from FWP on Schedule E—was actually self-employment income that he should have reported each year on a Schedule C, Profit or Loss from Business, and on which he should have reported and paid self-employment tax.

In response to Fleischer’s Tax Court petition challenging the IRS determination, the Tax Court applied the following test:

> For a corporation, not its service-provider employee, to be the controller of the income, two elements must be found: (1) the individual providing the services must be an employee of the corporation whom the corporation can direct and control in a meaningful sense; and (2) there must exist between the corporation and the person or entity using the services a contract or similar indicium recognizing the corporation’s controlling position.

The court held that Fleischer did not satisfy the second element because Fleischer, not his S corporation, had earned all of the income.

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9 *T.C. Memo 2016-238 (Dec. 29, 2016).*

There was no indicium for LPL to believe that FWP had any meaningful control over petitioner as FWP had not been incorporated and no purported employer-employee relationship between FWP and petitioner existed at the time petitioner signed the representative agreement with LPL. Moreover, there is no evidence of any amendments or addendums to the LPL agreement after FWP was incorporated. Although FWP had been incorporated before petitioner entered into the broker contract with MassMutual, FWP is not mentioned in the contract, and petitioner offered no evidence that MassMutual had any other indicium that FWP had any meaningful control over him.11

Given the Fleischer decision, a reasonable question for practitioners is what steps can a financial consultant take to avoid self-employment taxes if he or she is unable to cause an S Corporation to contract directly for service commissions or fees. One possibility would be to have the S Corporation receive a management fee for its staff who assist the primary employee, with the fee providing a reasonable corporate profit after staff compensation and related costs. Commentators have concluded that the IRS should not view a reasonable profit in respect of management services as “a deflection of the financial consultant's earned income.”12 The S corporation could also reinvest its profits or even use them to expand the business reach of the primary employee, rather than merely distributing them out to the primary employee whose earnings paid the management fee.

In Castigliola,13 three attorneys practiced law through a general partnership in Mississippi. In 2011, they incorporated their partnership as a professional limited liability company (PLLC). The PLLC’s only business was the practice of law, and petitioners practiced law solely in their respective capacities as partners of the PLLC. The PLLC did not have a written operating agreement, but the attorneys did have a written compensation agreement. The compensation agreement required guaranteed payments in the amount of the average salary of an attorney with similar experience in Mississippi. The compensation agreement also stated that the partners would distribute to themselves the net profits of the PLLC in excess of guaranteed payments. They reported the guaranteed payments as self-employment income but did not remit self-employment taxes on distributions in excess of the guaranteed payments. The guaranteed payments were calculated based on a survey of legal salaries in the area and designed to represent the value of the services petitioners provided to the PLLC.

The IRS claimed that the firm’s self-employment tax determinations were erroneous because the entire amount paid to the partners was subject to the tax. The firm made three claims in its defense: (i) the guaranteed payments represented the total value of services provided by the partners to or on behalf of the partnership; (ii) any PLLC earnings in excess of the guaranteed payments were attributable to the partners’ investment in the partnership and were items of income or loss of a limited partner under section 1402(a) (13); and (iii) all the members of the PLLC enjoyed limited liability under state law and thus did not possess an essential characteristic of a general partner.

In rejecting the taxpayer’s arguments, the Tax Court noted that a general partner has management power and unlimited personal liability, whereas limited partners lack control of a business and have limited liability. A partnership therefore must have a least one general partner. Since the PLLC had no written operating agreement and no specified general partner, no partner’s management power was limited in any way: all the partners participated in making management decisions, including decisions regarding distributions, 11 Fleischer, supra, at 12.
borrowing funds, hiring, firing, rate of pay for employees, and expenditures. The absence of a general partner in a member-managed LLC, the Tax Court held, meant that all the members function as general partners.14

Castigliola also raises several questions for practitioners. How much management power is too much management power for a limited partner to lose his or her status as such? How does this holding apply to classic state-law limited partnerships wherein limited partners have management rights, often significant ones, yet retain state-law status as limited partners? Does focusing purely on management rights lead to any disparate treatment between shareholders of S corporations and limited partners of partnerships? Perhaps the most significant conclusion from this case is that practitioners should advise their clients of the importance of a written partnership agreement or operating agreement in which the partnership has at least one general partner or, in the case of an LLC, the LLC has a managing member who will be treated as the general partner. The agreement can provide that all members other than the manager or general partner have limited rights to participate in management. Election of the manager would be the only management right for non-managing members or partners.

Finally, in Hardy,15 Dr. Hardy was a plastic surgeon performing pediatric constructive surgery in various facilities while maintaining his own medical practice as a single member PLLC (Northwest Plastic Surgery). He performed surgery at his office or at two local hospitals. The patients paid Dr. Hardy for the surgeries and paid a separate facility fee. Dr. Hardy also invested $163,974 for a 12.5% minority interest in Missoula Bone & Joint Surgery Center, LLC (MBJ). Each member was a manager of MBJ, but Dr. Hardy did not have any role in any management decisions or any day-to-day responsibilities at MBJ. Dr. Hardy received a distribution from MBJ that was not dependent upon the number of surgeries that he performed at MBJ since MBJ did not have a minimum surgery requirement.

Dr. and Mrs. Hardy filed a joint return for the tax years in question. The Hardys reported the MBJ income as passive for 2008-2010, the tax years at issue in the case. They also reported passive losses and carried over unused passive losses to subsequent tax years. The Hardys did pay self-employment tax of $26,745 in 2008 for income from MBJ and NPS. The issues addressed at court were whether the Hardys properly reported the MBJ income as passive, whether they could deduct a passive activity loss carryover from previous years against the positive income, and whether they overpaid self-employment tax.

The Tax Court considered whether it was appropriate to group the ownership interest in MBJ with Dr. Hardy’s medical practice under regulations that permit “one or more trade or business activities or rental activities [to] be treated as a single activity if the activities constitute an appropriate economic unit for the measurement of gain or loss for purposes of Section 469.”16 The regulations set forth five factors for determining an appropriate economic unit: similarities and differences in types of trades or businesses; extent of common control; extent of common ownership; geographical location; and interdependencies between or among activities.17

Section 1.469-4(c)(2) permits a taxpayer to use any reasonable method of “applying the relevant facts and circumstances” to group activities and not all of the five factors are ‘necessary for a taxpayer to treat

16 See Treas. Reg. § 1.469-4(c) (discussing grouping tax items under the passive activity loss rules).
17 Hardy, supra n. 15, at 14.
more than one activity as a single activity.”18 Therefore, the Hardys had flexibility in determining what constituted an appropriate economic unit.19 The IRS claimed that the Hardys had previously reported Dr. Hardy’s MBJ income as non-passive, and therefore asked the Tax Court to infer that Dr. Hardy grouped his ownership interest in MBJ with his medical practice as a single unit in order to treat the income as non-passive.20

The Tax Court, in rejecting the IRS Commissioner’s argument, stated that it “would not infer that the Hardys grouped Dr. Hardy’s regular medical practice with his MBJ interest, because that grouping is not supported by the evidence.”21 The Court held that the Hardys did not regroup their activities for 2008 when they began reporting Dr. Hardy’s MBJ income as passive.22

The Tax Court then considered the application of the rules allowing the IRS to regroup a taxpayer’s activities if “any of the activities resulting from the taxpayer’s grouping is not an appropriate economic unit and a principal purpose of the taxpayer’s grouping (or failure to regroup under paragraph (e) of this section) is to circumvent the underlying purposes of Section 469.”23 A regulatory example24 permits the Commissioner to regroup a taxpayer’s activities in a scenario involving doctors—all of whom participated in other activities that generated passive losses—who formed a partnership, with a general partner selected by the doctors, to buy and operate X-Ray equipment in which they were limited partners. Substantially all of the partnership’s services were provided to the doctors or their patients in proportion to the doctors’ interests in the partnership. The doctors treated their services as a separate activity from their medical practices so that they could offset their partnership income against their passive losses. The example concludes that treating the partnership service income as a separate economic unit from the medical practice income was not appropriate.

The government argued that the Hardys’ situation was identical to the regulation example and supported regrouping, but the Tax Court disagreed because the Hardys were not trying to circumvent the underlying purposes of the passive activity loss rules.25 The Hardys considered opening their own medical facility but decided that joining MBJ was a cost-efficient alternative to affiliating with a hospital. MBJ was not undertaken to generate passive activity losses.26 Instead, the Tax Court found the Hardys’ facts similar to those in the self-employment tax TAM.27 Recognizing that the TAM cannot serve as precedent, the Tax Court noted that it revealed “the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws.”28 The governing regulation and the facts in the case supported that there could be more than one reasonable method of grouping Dr. Hardy’s ownership interest in MBJ and his medical practice.29 The “weight of the evidence supports treating [the two] as separate economic units.”30

18 Id. at 15.
19 Id.
20 Id. at 16.
21 Id.
22 Id. at 17.
25 Hardy, supra n. 15, at 24-25.
26 Id. at 25.
27 TAM 201634022 (providing that there are multiple ways that activities may be grouped – medical practice and surgical center can be treated as separate activities).
28 Hardy, supra n. 15, at 25.
29 Id. at 23.
30 Id.
The passive activity issues discussed in Hardy are unusual in that a taxpayer typically seeks to group activities together in order to use any losses to offset active income. The Hardys were paying self-employment tax on income earned from Dr. Hardy’s medical practice. If the Tax Court determined that the Hardys needed to group Dr. Hardy’s MBJ distribution with his medical practice, the Hardys would have also been liable for self-employment tax on that distribution.

The Court held that the Hardys were not liable for self-employment tax for tax years 2008 and 2009 on Dr. Hardy’s distributive shares of income from MBJ. Although the Hardys did not expressly plead this issue, the Hardys moved that the Tax Court conform the pleadings to treat the issue of self-employment tax. The Tax Court granted the motion because factual issues giving rise to the motion were raised during trial with the Commissioner’s consent; evidence on which the Hardys based their motion was admitted at trial in the parties’ stipulation of facts; and the Commissioner addressed the liability for self-employment tax in his opening brief.

The Tax Court distinguished Hardy from Renkemeyer and determined that Dr. Hardy received MBJ income in the capacity only as an “investor.” Accordingly, the MBJ income was not subject to self-employment tax. Dr. Hardy received distributions based on fees that patients paid to use the facility. The patients paid Dr. Hardy’s surgeon fees separately.

What can we take away from the Hardy case? Hardy appears to contradict Renkemeyer and Castigliola. In Hardy, the Tax Court focused on the actual daily management of the business rather than the Hardy’s legal rights to manage the LLC together with the other equal owners. There was no operating agreement. The LLC’s annual reports did not specify whether Dr. Hardy was a member or member-manager, but also failed to list a non-member manager. It appears as though the LLC members together had exclusive legal authority to run the business. No member had any more rights than any other member. They did not have legal rights akin to limited partners. They were more like passive general partners.

Hardy also appears to contradict Methvin, which found the taxpayer liable for self-employment tax in connection with an unincorporated venture in which the taxpayer had no management rights. The facts in Methvin also appeared to be more favorable for the taxpayer than in Hardy.

If a taxpayer is operating a service firm (i.e. law firm, accounting firm) as a limited partnership, it is likely that the IRS will pursue a partner for self-employment taxes. If a member of an LLC is an investor who does not perform any services related to operating the business, but has made a significant investment of capital, the IRS will likely treat the member as a limited partner for section 1402(a)(13) purposes. One should note that the IRS has not distinguished between a service partnership and a partnership selling a good.

Hardy raises additional questions not resolved here. What if an LLC member performs significant services and has a significant amount of invested capital? Should all LLCs have a designated manager? What capital contribution amount should an LLC member make to be considered an investor so as to satisfy the section 1402(a)(13) exception? Should one conduct business through a limited liability company that is owned by a limited partnership? What about net investment income issues? Should a taxpayer just be an active limited partner in a limited partnership? Should tax practitioners rely only on Renkemeyer? The self-employment tax enigma continues!

31 T.C. 2015-81.
PRACTICE POINT

Let’s (Not) Get Physical: States Challenge Physical Presence Sales Tax Nexus Law

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I. Introduction

The economy has changed over the past 25 years, in large part due to the internet and the digital economy, and there are no signs that the internet is going away any time soon. The internet allows consumers to purchase goods and services without leaving their homes and retailers to reach consumers without leaving their headquarters. This has been beneficial to both consumers and retailers, but state sales tax revenues have suffered.

Sales and use taxes are a primary source of revenue for many states. Due to the Supreme Court’s sales tax collection requirements in Quill Corp. v. North Dakota,1 the movement to online sales has reduced the number of retailers who are required to charge and remit sales tax on their sales.2 Of course, consumers are required to remit a use tax on their taxable purchases for which sales tax was not charged, but this rarely happens in practice. In response to a concurring opinion by Justice Kennedy in the Direct Marketing Association case,3 some states have proposed legislation that flies directly in the face of long-standing sales tax collection law, hoping the Supreme Court will revisit and overturn Quill.

To help understand the current and future sales tax nexus landscape, this article will briefly revisit the history of sales tax nexus under Quill and Direct Marketing Association. It will then examine the statutes or rules (referred to as economic nexus laws) that states have enacted in response to Direct Marketing Association in an attempt to overturn the nexus law under Quill. Finally, this article will explore competing congressional proposals that attempt to resolve sales tax nexus issues at the federal level.4

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2 Estimates regarding the extent to which states’ tax revenues have decreased as a result of the increase in internet sales vary. A 2014 study by the National Conference of State Legislatures estimated that, for 2012, nationwide sales tax losses due to remote sales was $23.3 billion.
4 Recognizing the lost revenue as a result of online sales, on September 21, 2017, the European Commission adopted the Communication on A Fair and Efficient Tax System in the European Union for the Digital Single Market that proposes to impose a tax on digital companies and digitalized products through numerous adjustments to the European Union’s tax laws.
II. History


In Quill, the Supreme Court held that a state cannot require a company to charge sales tax in its state unless the company has a physical presence, such as a “sales force, plant, or office,” within the state. Thus, for online retailers who do not have physical presence in all 50 states, many sales go untaxed.

At issue was whether Quill, a mail-order office supply company that (at the time) did not have offices, employees, or inventory in North Dakota, was required to collect use tax from its North Dakota customers. To reach its decision, the Supreme Court analyzed the Due Process and Commerce Clauses. With respect to the Due Process Clause, the Court stated that “there is no question that Quill has purposefully directed its activities at North Dakota residents [and] that the magnitude of those contacts is more than sufficient for due process purposes.” The Court noted that the inquiry did not end there and analyzed the Commerce Clause.

The Court’s analysis of the Commerce Clause as applied to sales and use tax relied primarily on the Court’s bright-line test applied in National Bella Hess v Dep’t. of Revenue, 386 U.S. 753 (1967): “a vendor whose only contacts with the taxing State are by mail or common carrier lacks the ‘substantial nexus’ required by the Commerce Clause.” The Supreme Court then noted that “it is not unlikely that the mail order industry’s dramatic growth over the last quarter century is due in part to the bright line [physical presence] exemption from state taxation.” Thus, although North Dakota’s imposition of use tax on Quill did not violate the Due Process Clause, the Commerce Cause prevented North Dakota from imposing use tax on an out-of-state seller that did not have physical presence in the state. As discussed in Section IV, below, it is important that the Court decided Quill in this way, as Congress has the power to regulate under the Commerce Clause.

Subsequent to Quill, the mail-order industry continued to grow until catalogues were replaced by more accessible, click-of-the-button internet sales. As a result, sales from out-of-state sellers lacking the physical presence to require sales tax collection have increased dramatically. Whether this growth is due to the bright-line physical presence law set forth in National Bella Hess and Quill is debatable, but such sales have certainly reduced state tax revenues. Although estimates of the extent of that reduction varies, many states’ poor financial condition has caused them to become creative in searching for ways to tax online sales.

5 Quill Corp., 504 US at 308.
6 National Bella Hess v Dep’t. of Revenue, 386 U.S. 753 (1967)
7 Id. at 311.
8 Id. at 316.
9 According to one study, in 2010, total e-commerce has increased almost 200 percent since 1999.
10 See n.2, above.
11 States have enacted Affiliate Nexus, Click-Through Nexus, and “Cookies” Nexus laws, all of which are beyond the scope of this Article.

In Direct Marketing Association, a trade association of retailers challenged as unconstitutional a Colorado law that required non-sales tax collecting retailers (i.e., those without nexus) to notify Colorado customers of their sales and use tax payment responsibility and provide customer-purchase information to the customer and the Colorado Department of Revenue. The Supreme Court did not decide the case on the merits, but considered a technical issue regarding the Tax Injunction Act. While the Court’s decision is underwhelming for purposes of nexus analysis, Justice Kennedy’s concurring opinion provided unexpected fuel to the nexus debate by suggesting that it is time to “reconsider[...]. . . the Court’s holding in Quill.” Justice Kennedy noted the “far reaching systemic and structural changes in the economy” since Quill:

[T]here is a powerful case to be made that a remote seller doing extensive business within a State has a sufficiently ‘substantial nexus’ to justify some minor tax collection duty, even if that business is done through mail or the internet.

Finally, Justice Kennedy called on the Supreme Court to “find an appropriate case . . . to reexamine” sales tax nexus laws.

Not coincidentally, subsequent to Justice Kennedy’s concurring opinion, states have enacted or proposed legislation or administrative rules setting forth new economic nexus laws that fly directly in the face of Quill. The intent of such laws is either to collect additional sales tax or, more likely, to challenge Quill and lead to its overturning at the Supreme Court.

III. Economic Nexus Laws

Generally, the new economic nexus laws require an out-of-state seller lacking physical presence in the state to collect and remit sales tax if the seller makes a certain number of sales or sales of a certain dollar amount to parties within the state. The following is a brief description of each state’s economic nexus laws.

A. Alabama

Effective January 1, 2016, an entity that lacks physical presence in Alabama is deemed to have sales tax nexus if it has (1) over $250,000 in sales into the state per year based on the previous calendar year’s sales and (2) conducts one or more listed activities, some of which do not require physical presence. On June 8, 2016, Newegg, Inc., an online retailer, appealed its final sales and use tax assessment, which was based on Alabama’s economic nexus laws.

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12 The Direct Marketing Association entered into a settlement with the Colorado Department of Revenue, withdrawing its claims. Under the settlement, the law is considered to be effective as of July 1, 2017.
13 The Tax Injunction Act prevents federal courts from hearing cases involving attempts to "enjoin, suspend, or restrain the assessment, levy or collection of any tax sue under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.
14 135 S.Ct. at 1135.
15 Id.
16 Id.
17 Many of the economic nexus laws are similar and have requirements in addition to the economic nexus provisions. For example, some laws allow the state to bring a declaratory judgement against an entity that the state believes meets the criteria of the economic nexus requirement, without auditing the entity first. Additionally, some states are prevented from collecting tax from out-of-state sellers while the courts are resolving the constitutionality of the state’s economic nexus provisions. Furthermore, in a rush to resolve this issue, many of the new laws require that the appeals go directly to the state supreme court. Finally, some states’ laws provide that, in the event the economic nexus standards are ultimately upheld, the law will only apply going forward and not retroactively.
18 Alabama Admin. Code Rule 810-6-2-90.03.
**B. Indiana**

Effective July 1, 2017, an entity that lacks physical presence in Indiana is deemed to be an agent for the state of Indiana and to have sales tax nexus if the entity has, for the calendar year preceding the calendar year in which the sale is made, either (1) gross revenue in excess of $100,000 from the sale of tangible personal property, products transferred electronically, or services in Indiana or (2) more than 200 separate transactions in which it sells tangible personal property, products transferred electronically, or services into Indiana.19

**C. Iowa**

Although Iowa has not enacted economic nexus legislation, it enacted a law, effective July 1, 2017, that appears to run afoul of the aforementioned long-standing nexus laws set forth in *Quill*. Iowa’s new law requires out-of-state sellers of “alternative nicotine products or vapor products” to, among other things, register for an Iowa sales tax permit and collect sales tax on sales of such products in the state of Iowa.20 The new law applies to telephone, mail, or internet sales of alternative nicotine products or vapor products in Iowa “regardless of whether the seller is located in” Iowa. Although the law applies to sellers located outside of Iowa that have sales people soliciting sales in Iowa, it would also require a seller without a physical presence in Iowa to collect and remit sales tax. As of the date of publication, this law has not been challenged.

**D. Maine**

Effective October 1, 2017, an entity that lacks physical presence in Maine is deemed have sales tax nexus if, during the prior calendar year or current calendar year, the entity has either (1) gross revenue from the sale of tangible personal property, products transferred electronically, or services into Maine in excess of $100,000 or (2) more than 200 separate transactions in which it sells tangible personal property, products transferred electronically, or services into Maine.21 Interestingly, the Maine Legislature overrode the Maine Governor’s veto of the bill containing the economic nexus provisions.22

**E. Massachusetts**

Massachusetts is still deciding how, or if, it wants to tax out-of-state sales. On April 3, 2017, the Massachusetts Department of Revenue issued Directive 17-1 establishing economic nexus; but the Department withdrew that guidance on June 28, 2017, in Directive 17-2.

On September 22, 2017, the Department promulgated rules that set forth economic nexus provisions. Massachusetts’ economic nexus rules are different than those of other states. Specifically, the rule applies to “internet vendors” that have sales in excess of $500,000 and have 100 or more transactions. The rules define an internet vendor broadly as a

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19 Indiana Code § 6-2.5-2-1.
20 Iowa Code § 453A.1(7A).
21 36 MRSA § 1951-B.
22 State of Maine Legislature, Summary of LD 1405.
A vendor that derives sales from transactions consummated over the internet, whether such transactions are: (a) completed on a website maintained or operated by the vendor itself, or a website maintained or operated by a related person or a person with which the vendor contracts, including a marketplace facilitator and/or (b) fulfilled by a related person or a person with which the vendor contracts. An internet vendor, in addition to its internet sales, may also derive sales from orders completed other than over the internet.23

This regulation applies to the same out-of-state sellers targeted by many of the other states imposing economic nexus laws, but it also applies to marketplace facilitators such as Amazon that provide a marketplace for third parties to sell goods. On September 25, 2017, the Department sued Amazon subsidiaries to obtain documents on sales and inventory stored in the state, in order to determine whether third-party vendors making sales through the Amazon Marketplace have sales and use tax liability.

F. North Dakota

North Dakota’s economic nexus provisions become effective “on the date the United States Supreme Court issues an opinion overturning” Quill or otherwise confirms that a state may impose economic nexus standards on out-of-state retailers.24 North Dakota’s law would impose collection requirements on entities that lack physical presence if, during the prior calendar year or current calendar year, the entity either has (1) gross sales from the sale of tangible personal property or other taxable items delivered into the state in excess of $100,000 or (2) more than 200 separate transactions in which it sold tangible personal property or other taxable items into the state.

G. Rhode Island

Rhode Island enacted new chapter 18.2 of Title 44 of the General Laws, effective August 17, 2017, which takes aim at taxation of internet sales.25 Included within the new chapter 18.2 is the requirement that “non-collecting retailers” that had sales of tangible personal property or services to Rhode Island within the preceding calendar year of (1) at least $100,000 or (2) more than 200 separate transactions collect and remit sales tax on taxable sales.26 In lieu of collecting and remitting sales tax, the non-collecting retailer can provide Rhode Island with certain notice and sales reports, a provision that is similar to those challenged in Direct Marketing Association.

The definition of “non-collecting retailers” is broad and includes a person who, among many other activities, sells, leases, or delivers in Rhode Island “or participates in any activity in [Rhode Island] in connection with the selling, leasing, or delivering in [Rhode Island] . . .of tangible personal property, prewritten computer software delivered electronically or by load and leave, and/or taxable services or use, storage, distribution, or consumption within” Rhode Island.27 Rhode Island imposes harsh penalties for non-compliance—$10.00 for each failure but not less than $10,000 per year.28

24 North Dakota Code § 57-39.2-02.2.
25 Chapter 18.2 also creates Affiliate Nexus, Click-through Nexus, Marketplace Nexus, all of which are beyond the scope of this Article.
27 Id. § 44-18.2-2(4).
28 Id. § 44-18.2-5.
H. South Dakota

Effective May 1, 2016, all entities with either (1) annual sales into the South Dakota of greater than $100,000 or (2) more than 200 separate transactions in the state are deemed to have sales tax nexus. Three out-of-state sellers—Wayfair, Overstock.com, and Newegg—challenged this law. On September 13, the South Dakota Supreme Court, in *South Dakota v. Wayfair, et al.* 2017 S.D. 56 (S.D. 2017) ruled on the economic nexus laws and stated that it saw “no distinction between the collection obligations invalidated in *Quill* and those imposed by” South Dakota's economic nexus law. Notwithstanding the persuasiveness of South Dakota's arguments on the merits, the court held that “*Quill* remains the controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes.”

South Dakota is expected to appeal the decision to the United States Supreme Court.

I. Tennessee

The Tennessee Department of Revenue enacted an economic nexus rule that would have required certain out-of-state sellers to collect Tennessee sales tax beginning July 1, 2017. After the rule was challenged by vendors, the Department issued Notice #17-12 indicating that out-of-state sellers are not required to comply with the new rule “while the court challenge is pending.”

If the rule is resolved in favor of Tennessee, out-of-state sellers without physical presence in the state who engage in regular and systematic solicitation, by any means, of consumers in Tennessee and who have made sales exceeding $500,000 to Tennessee consumers during the previous 12-month period are deemed to have sales tax nexus.29

J. Vermont

Effective the later of July 1, 2017, or the beginning of the first day of the quarter after a controlling court or federal legislation overturns *Quill*, out-of-state sellers without physical presence in Vermont are deemed to have nexus with Vermont if the seller made (1) sales of tangible personal property into Vermont totaling at least $100,000 or (2) at least 200 separate transactions within a 12-month period preceding the period that the seller is required to remit sales tax.30

K. Washington

Effective January 1, 2018, Washington implements a “new program” that requires “remote sellers” to elect one of two options relative to sales tax.31 If a remote seller has at least $10,000 in gross receipts from retail sales sourced to Washington during the current or preceding calendar year, the seller must elect either (1) to collect sales or use tax or (2) to comply with the sales and use tax notice and reporting requirements.32 A remote seller is any seller who does not have a physical presence in Washington and makes retail sales to Washington purchasers.

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29 Tenn. Comp. R & Regs. 1320-05-01-.129(2).
30 32 V.S.A. § 9701(9)(F).
31 65th Legislature, 2017 3rd Special Session, HB 2163. This new law also requires “marketplace facilitators” and “referrers” to make this election.
32 See the discussion of reporting requirements in *Direct Marketing Ass'n* in Section II.B, above.
L. Wyoming

Effective July 1, 2017, all sellers with more than (1) $100,000 in aggregate annual sales to customers located in Wyoming or (2) 200 separate transactions in the state are deemed to have sales tax nexus.\textsuperscript{33} On June 28, NetChoice and American Catalog Mailers Association filed a lawsuit claiming the statute is unconstitutional under \textit{Quill}.\textsuperscript{34} In addition, on July 7, 2017, Wyoming filed a lawsuit in Wyoming District Court seeking a declaratory judgment requiring five vendors with no physical presence in Wyoming to collect tax on sales into the state.\textsuperscript{35} Under the statute, the filing of a declaratory judgement action operates as an injunction: while the action is pending, the Department of Revenue is prohibited from enforcing the statute.

IV. Legislative Proposals to Resolve Sales Tax Nexus Issue

It is important that the Court decided \textit{Quill} under the Commerce Clause. The Commerce Clause explicitly grants “Congress...the Power...to regulate Commerce...among the several States.”\textsuperscript{36} The Court has interpreted this Clause to give Congress broad authority to regulate a wide array of matters including food,\textsuperscript{37} child support,\textsuperscript{38} and guns,\textsuperscript{39} among many others. If the Court had decided \textit{Quill} solely under the Due Process Clause, Congress’ ability to regulate sales tax nexus may have been less clear. Recognizing the need to resolve the state sales tax nexus issue, Congress has proposed legislation that would do so.

The Marketplace Fairness Act of 2017\textsuperscript{40} would authorize states meeting certain requirements to obligate certain out-of-state sellers to collect state sales tax, essentially repealing \textit{Quill}. The No Regulation Without Representation Act of 2017\textsuperscript{41} would prohibit states from forcing out-of-state sellers that do not have physical presence in the state from collecting sales tax on sales made into the state, essentially codifying \textit{Quill}. Congress has had the opportunity to consider both these bills in prior years, but neither has become law.\textsuperscript{42}

V. Conclusion

Each of the laws discussed here is in various stages of implementation or litigation. In some states the effective date is unknown pending the outcome of a Supreme Court case resolving the economic nexus issue. In other states, the laws have not been challenged or have been challenged and appealed. Given the South Dakota Supreme Court ruling that \textit{Quill} is still the law of the land and Justice Kennedy’s suggestion that the United States Supreme Court should consider revisiting \textit{Quill}, it is not unlikely that the issue of economic nexus will be resolved by the Supreme Court in the future. Congressional action before the Supreme Court rules on constitutionality could make the issue moot. Passage of either of the proposed nexus bills \textit{after} the Supreme Court rules on the state question could undo the Supreme Court’s decision, which would have made states’ efforts all for naught. ■

\textsuperscript{34} Am. Catalog Mailers Assn. v. Noble, Wyo. Dist. Ct., No. 188-137 (June 2017).
\textsuperscript{36} 1. U.S. Constitution, Art. 1, §8, cl. 3.
\textsuperscript{37} 21 U.S.C. §602 (inspection of meat).
\textsuperscript{38} 18 U.S.C. §228 (failure to pay child support obligations).
\textsuperscript{40} S.976, 115th Cong. (2017).
\textsuperscript{41} H.R. 2887, 115th Cong. (2017).
\textsuperscript{42} Senator Michael Enzi (R-WY) first introduced the Marketplace Fairness Act (S.1832) in 2011. Congressman Jim Sensenbrenner (R-WI) first introduced the No Regulation Without Representation Act (H.R. 5893) in 2016.
Natural disasters, such as the recent Hurricanes Harvey, Irma, Jose, and Maria (all Category 3 or higher), can wreak havoc on critical infrastructure, the economy, and the livelihood of scores of individuals. In the wake of such disasters, people from all over the world donate time, money, and services to assist those impacted. While the immediate thoughts are often on providing food, shelter, and medical care, the consequences of a natural disaster can continue for several years and affect individuals in many different areas. One such area relates to taxes.

Fortunately for those affected by a natural disaster, the IRS, various organizations, and tax volunteers are available to provide assistance. The remainder of this article looks at some of the assistance available to affected individuals and highlights the need for tax assistance long after the disaster occurs.

The IRS provides a variety of tax relief to those affected by natural disasters. The IRS provides helpful information for those affected on its website at https://www.irs.gov/newsroom/tax-relief-in-disaster-situations. The assistance includes, but is not limited to, extensions of time to file returns and make payments, abatement of penalties, and accelerated deductions for casualty losses.

The ABA and local organizations also provide extremely important services in response to natural disasters, both in general and in the area of tax assistance. In response to Hurricane Harvey, the ABA Tax Section created a resource page, available at https://www.americanbar.org/groups/taxation/tax_pro_bono/disaster_resources.html, containing selected ABA resources and IRS resources. Another excellent resource for those interested in providing tax assistance is the “Assisting Victims of Disaster” chapter in the ABA’s “Effectively Representing Your Client Before the IRS” publication.

The Disaster Legal Services Program for the ABA Young Lawyers Division also compiles important resources and information to assist in meeting the legal needs of disaster survivors, available at https://www.americanbar.org/groups/young_lawyers/disaster_legal_services.html. As of January 2017, the program has

“Even with all our technology and inventions that make modern life so much easier than it once was, it takes just one big natural disaster to wipe all that away and remind us that, here on Earth, we’re still at the mercy of nature.” – Neil deGrasse Tyson, Astrophysicist
responded to 157 declared disasters in 43 states and 2 U.S. territories. Assistance is provided in areas such as bankruptcy, contract and contractor problems, landlord/tenant, wills, and insurance.

Low-income taxpayer clinics (LITCs) are at the forefront of providing tax assistance in response to natural disasters. Four LITCs in Texas provided the following thoughts in the aftermath of Hurricane Harvey:

(1) Please continue to volunteer on LITC cases. Complications caused by the hurricane impact the “regular” problems that low-income taxpayers face.

- For taxpayers affected by the floods, there is a good chance that their records have been displaced or destroyed -- which will make it more difficult to prove their case to the IRS. This affects many types of cases including examinations, identity theft cases, innocent spouse cases, and collections cases.

- Flood survivors may default on installment agreements because they need to pay other expenses. These taxpayers will need help arranging another collection alternative. Some survivors may now qualify for an offer in compromise due to loss of their assets, but they will need assistance with the process.

- Taxpayers will have questions about the taxability of different forms of disaster assistance. Without advice, some people might confuse disaster unemployment assistance with FEMA assistance and end up with an underreporter notice down the road.

- There is a particular need for practitioners who are near Beaumont, Conroe, Angleton or Galveston.

- Not every case can be handled long-distance, but LITCs may refer cases to out-of-state practitioners in appropriate circumstances. Attorneys, EAs, and CPAs licensed in any state may represent taxpayers before the Internal Revenue Service and advise them on federal tax law issues.

(2) There will be a need for volunteer tax preparers equipped to deal with disaster-related tax issues. Both LITC-eligible survivors and those above the income limits will need tax preparation assistance.

- The IRS has extended to January 31, 2018, the deadline for filing business and individual returns that otherwise would have been due on September 15 and October 16.

- Taxpayers who experience personal casualty losses resulting from a federally declared disaster can elect to deduct the loss in the preceding tax year, which can produce an immediate, much needed refund. Whether or not the taxpayer makes this election, if the casualty loss exceeds the taxpayer’s income for the year of deduction, the taxpayer can carry the excess amount back as a net operating loss for the three preceding years, which also can generate a refund.

To donate or volunteer, visit ambar.org/harvey.
At the recent ABA Tax Section meeting in Austin, Texas, a special section program was held on tax issues for disaster survivors. Areas of focus included claiming personal property casualty losses, how and when to exclude disaster relief payments from income (e.g., FEMA payments, property owner hazard mitigation payments, and HUD assistance), substantiation problems, filing deadlines, and post-disaster problems such as identity theft and unscrupulous return preparers. These materials, available at https://www.americanbar.org/content/dam/aba/events/taxation/taxiq/fall17/taxiq-17fall-section-hurricane-matlock-slides.authcheckdam.pdf, are a must-read for those interested in volunteering to help disaster survivors.

There is no shortage of opportunities to provide tax assistance to those impacted by natural disasters. While much of the focus is on immediate help, we should all remember that long-term help is just as important.

In the tax area, many of the individuals affected may face IRS audits involving questions of substantiation. The loss of supporting documentation and records is common in the aftermath of a natural disaster and low-income individuals often find themselves facing requests for supporting information that no longer exists. The failure to provide such information can lead to the denial of deductions and credits that taxpayers depend on to ensure their ability to meet their financial needs.

As tax practitioners know, deductions are a matter of legislative grace and the taxpayer has the burden of maintaining proper documentation to substantiate deductions. Most taxpayers are unaware of ways in which they can substantiate items outside of normal business records that may be lost in a natural disaster. Volunteers can help in this process by assisting taxpayers in obtaining records from third parties such as banks, credit card companies, and other businesses. IRS regulations and other guidance also provide substantiation guidance in situations where records are lost or destroyed due to circumstances beyond a taxpayer’s control. Additionally, the Cohan rule¹ allows certain deductions if there is a reasonable basis on which to estimate the amount of the deductions. The pertinent passage in the Second Circuit’s opinion is as follows:

Absolute certainty in such matters is usually impossible and is not necessary; [a court] should make as close an approximation as it can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making. But to allow nothing at all appears to us inconsistent with saying that something was spent. True, we do not know how many trips Cohan made, nor how large his entertainments were; yet there was obviously some basis for computation, if necessary by drawing upon the [court’s] personal estimates of the minimum of such expenses. The amount may be trivial and unsatisfactory, but there was basis for some allowance, and it was wrong to refuse any, even though it were the traveling expenses of a single trip. It is not fatal that the result will inevitably be speculative; many important decisions must be such.

The Tax Court has applied the Cohan rule in situations where a natural disaster has damaged a taxpayer’s property and he or she has no documentation to support the amount of the damage. For example, in Zilberberg v. Commissioner,² the Court allowed $15,500 of a claimed casualty loss deduction of $36,250.

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¹ Cohan v. Commissioner, 39 F.2d 540 (2d Cir. 1930).
² T.C. Memo. 2011-5.
based on the taxpayer’s credible testimony and a list he created after records were lost in 2005, the year in which Key West was impacted by Hurricanes Wilma, Katrina, Rita, and Dennis.

Natural disasters are inevitable and we should all strive to help those affected by them. As detailed above, there are numerous opportunities for tax practitioners and volunteers to assist others, whether in the form of general legal services or tax services. For those of you interested in helping from the tax side, please remember that long-term tax assistance may be just as important as short-term tax assistance.

“I think lawyers who engage in pro bono service to protect those who cannot help themselves are truly the heroes and the heroines of the legal profession.”
– Janet Reno, first female Attorney General of the United States

Accepting Nominations for the 2018 Janet Spragens Pro Bono Award

Speaking of heroes and heroines, the Section of Taxation [Pro Bono Award Committee](https://www.abanet.org/taxation) is seeking nominations for the 2018 Janet Spragens Pro Bono Award.

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

The criteria for selection of an individual recipient of the award are that (i) the individual be a tax lawyer, whether living or deceased; (ii) the individual is or was a member of the Section of Taxation; and (iii) the individual has, through years of service, demonstrated an ongoing commitment to pro bono activities, particularly in the areas of federal and state taxation.

The criteria for selection of a law firm recipient are that (i) the law firm includes members of the Section of Taxation; and (ii) the law firm has, through years of service of its attorneys, demonstrated an ongoing commitment to pro bono activities, particularly in the areas of federal and state taxation.

Nominations should include a brief statement addressing how the nominee satisfies the above criteria and must be submitted by Friday, December 8, 2017, to taxlserve@americanbar.org. All nominations will be maintained in confidence by the Pro Bono Award Committee.
Tax Cuts Now

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

(To the tune of “But Not for Me,” by George Gershwin and Ira Gershwin.¹)

They're touting large tax cuts.
What else is new?
They'd spill the budget's guts
To push them through.

The GOP's hell-bent
To shrink the government
And anything that's spent
On me and you.

For Corporation Bigs
Profit's the chow.
And Congress feeds the pigs
Filling the trough.

We know who's got their backs;
Turns regulations lax;
Who'd vote them Tax
Cuts Now!

¹ For readers who are unfamiliar with the tune: https://www.youtube.com/watch?v=WbQnXsKrsI0
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)
- **Environmental Pricing**, ed. Larry Kreiser et al. (Edward Elgar Publishing 2016)
- **Judicial Interpretation of Tax Treaties**, Carlo Garbarino & Emile Noël Fellow (Edward Elgar Publishing 2016)
- **Social Security Law, Policy, and Practice**, Frank Bloch & Jon Dubin (West Academic Publishing 2016)

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

Government Submissions Boxscore

Government submissions are a key component of the Section’s government relations activities. Since August 15, 2017, the Section has coordinated the following government submissions. 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

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The technical comments and blanket authority submissions listed in this index represent the views of the ABA Section of Taxation. They have not been approved by the ABA Board of Governors or the ABA House of Delegates and should not be construed as representing the policy of the ABA.
SECTION NEWS & ANNOUNCEMENTS

Accepting Nominations for the 2018 Nolan Fellowships

Named for the late Jack Nolan, a dedicated and respected Tax Section member, the Nolan Fellow distinction is awarded to young lawyers who are actively involved in the Section and have shown leadership qualities. Each one-year fellowship includes waived Meeting registration fees and assistance with travel to some Section meetings.

The deadline for nominations for the 2018 Nolan Fellowships is March 1, 2018. Visit the Nolan Fellowships webpage for more information about the award criteria and to download the nomination form.

The Tax Lawyer – Summer 2017 Issue Is Available

The Summer 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.

Articles

Eric S. Smith, Due Process Implications Related to State Notice and Economic Nexus Laws

Kyle Richard, Towards a Standard for Intergovernmental Tax Immunity Between the Several States

Matthew T. Szudajski, The Rising Trend of Sales Tax Nexus Expansion

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Comment

Christopher Brown, Wynne It’s Time for Change: How States and Their Political Subdivisions Must Amend Their Tax Systems to Comply with the Dormant Commerce Clause

Summer 2017 Audio Edition of The Tax Lawyer Available from ModioLegal

How much is an hour of your desk-time worth? Listen to the same content as the print edition of The Tax Lawyer without forgoing billable time – approximately 40 hours of content per year!
The Practical Tax Lawyer – Fall 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 new issue features the following articles.

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

Jerald David August, *Tax Update: Highlights of Treasury’s Tax Reports*

Pamela D. Perdue, *How To Correct Common Qualified Plan Mistakes and Avoid Disqualification*

Megan L. Brackney, *Meet John Doe Summonses*

Caleb Smith, *Form 2848: That Modest First Step*

Mark P. Altieri, *A Primer on Section 409A Nonqualified Deferred Compensation Plans*

John L. Utz, *Using The New IRS Remedial Amendment Period Rules*

Tax Section members are entitled to a subscription discount. For more information, visit PTL's webpage: [https://www.ali-cle.org/index.cfm?fuseaction=publications.periodical&pub=PTL](https://www.ali-cle.org/index.cfm?fuseaction=publications.periodical&pub=PTL).

Choose the TAPS Endowment for Your Year-End Giving and Supporting our Public Service Fellows

Through the [Tax Assistance Public Service (TAPS) endowment fund](https://www.ali-cle.org/index.cfm?fuseaction=publications.periodical&pub=PTL), 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](https://www.ali-cle.org/index.cfm?fuseaction=publications.periodical&pub=PTL) 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, including the following amazing young lawyers. 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.
Christine A. Brunswick Public Service Fellows

2017-2019
**Catherine Martin** (Community Legal Services, Inc., Philadelphia, PA)

2016-2018
**Laura LaPrade** (Community Tax Aid, Inc., Washington, DC)
**Catherine Strouse** (Legal Aid Society of San Diego, San Diego, CA)

2015-2017
**Daniel Knudsen** (Oklahoma Indian Legal Services, Oklahoma City, OK)
**Frank DiPietro** (Ronald M. Mankof Tax Clinic and the Center for New Americans, Minneapolis, MN)

2014-2016
**Patrick Thomas** (Neighborhood Christian Legal Clinic, Indianapolis, IN)
**Lany Villalobos** (Philadelphia Legal Assistance, Philadelphia, PA)

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

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

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

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

2009-2011
**Laura Newland** (AARP’s Legal Counsel for the Elderly, Washington, DC)
**Vijay Raghavan** (Prairie State Legal Services, Rockford, IL)

Update Your E-Mail and Mailing Address, Listserv Subscriptions, and Join Committees on MyABA

Keep your member preferences up-to-date by updating your details in myABA. Visit [myABA.org](http://myABA.org) to:

- Update your contact information, such as your e-mail or mailing address.
- Join a committee or subscribe to a committee listserv.
- Pay your membership dues.

Easily join a listserv, or control the amount of e-mails you receive from the ABA, by logging into your MyABA profile and clicking ‘Communications’ on the left-hand side menu. Here, Section members can update their ‘Communication Preferences.’ For any questions about myABA or joining a listserv, please contact Program Technology Specialist Daniel Swenson at [daniel.swenson@americanbar.org](mailto:daniel.swenson@americanbar.org).
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](mailto: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.

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

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

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

January 17-19, 2019
MIDYEAR MEETING
Hyatt New Orleans – New Orleans, LA

May 9-11, 2019
MAY MEETING
Grand Hyatt – Washington, DC

September 19-21, 2019
JOINT FALL CLE MEETING
Hyatt Regency – San Francisco, CA

January 30 - February 1, 2020
MIDYEAR MEETING
Boca Raton Resort – Boca Raton, FL

April 30 - May 2, 2020
MAY MEETING
Marriot Marquis DC – Washington, DC

September 24-26, 2020
JOINT FALL CLE MEETING
NY Marriot Marquis – New York, NY

If You Missed the Last Section Meeting

Materials / TaxIQ

View and search hundreds of materials submitted for the Section’s Fall, Midyear, and May Meetings on TaxIQ and Westlaw. This member service is made possible by Thomson Reuters—a publishing sponsor of the Section of Taxation. For more information, go to the TaxIQ page on the website.

Recordings

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

Online CLE from West LegalEd

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

Section CLE Calendar

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

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SECTION EVENTS & PROMOTIONS

ABA Section of Taxation CLE Products

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<td>February 8 – 10, 2018</td>
<td>MIDYEAR MEETING</td>
<td>Hilton San Diego – San Diego, CA</td>
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<td>May 10 – 12, 2018</td>
<td>MAY MEETING</td>
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<td>October 4 - 6, 2018</td>
<td>JOINT FALL CLE MEETING</td>
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This new edition cites to at least 100 more opinions that provide views on the interpretive principles covered in the book, and discusses the important Mayo decision and a number of other federal tax opinions issued by the Court since 2010. Mr. Cummings places in context the most widely cited Supreme Court tax decisions—Gregory, Frank Lyon, Knetsch, Cottage Savings, Court Holding—and brings to light many more sometimes overlooked opinions of the Court.

Product Code: 5470817 | List Price: $155 | Section Member Price: $125

A PRACTITIONER’S GUIDE TO TAX EVIDENCE, SECOND EDITION

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. New material in the Second Edition includes:

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