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FROM THE CHAIR

May Meeting Recap

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

May Meeting Recap

The Section enjoyed another successful meeting in Washington, D.C. Nearly 2,000 were in attendance at the Grand Hyatt to hear from the experts about recent tax legislation, including predictions for future guidance. We have just one more year at the Grand Hyatt—our longtime venue for the May Meeting—before the Section moves to the Marriott Marquis Washington, D.C., which will give us expanded meeting room space to accommodate our many programs and events.

On Thursday before the sessions began, the Section Council met to wrap up, or move to the next level, numerous projects that commenced during my term as Chair. My summary of those items appears throughout. Also on Thursday afternoon, the tenth Tax Bridge to Practice, sponsored by the Young Lawyers' Forum and Diversity Committee, and the annual Low-Income Taxpayer Representation Workshop for new and pro bono practitioners, sponsored by the Pro Bono & Tax Clinics Committee, ran concurrently, both with enthusiastic participants. These two sessions provided a nice segue for the Welcome Reception with its “celebrate pro bono and public service” theme. Guests were greeted with a multi-media presentation covering the Section's pro bono activities in every sector.

As expected, many committees focused their CLE panels on the myriad provisions in the 2017 Tax Act. Because the law is relatively new and because the Office of Management & Budget (OMB) will have greater involvement in significant tax regulations under the recent Memorandum of Agreement (MOA), there were more questions than answers from panelists. During the Friday and Saturday sessions, members expressed some frustration that government panelists were not in a position to comment on much of the law. I believe this is a natural result of the need to clarify how OMB and Treasury will implement the new MOA. Importantly, the thoughtful, articulate analysis and commentary from the private practice panelists more than compensated for any disappointment in the government's perceived subdued demeanor. I heard rave reviews in every hallway.

Those who stayed to hear the Honorable David J. Kautter, Assistant Secretary of the Treasury for Tax Policy, speak at the Plenary Luncheon, heard the latest news: agreement has been reached as to which type of guidance will require OMB-Treasury collaboration; Treasury may, with some but not all guidance, issue a “pre-notice” to alert the public about forthcoming Notices of Proposed Regulation; the IRS expects to have all forms and instructions reflecting the tax law changes for 2019 completed well in advance of the filing
season; and Mr. Kautter expects a significant volume of proposed regulations to be released for public comment before mid-August. Mr. Kautter's presentation at the May Meeting is available here.

As a continuing added benefit, registered attendees at Section meetings can now access the complete set of meeting materials with one click to a zip file that is distributed by e-mail after the meeting. If you were unable to attend the May meeting, I encourage you to review the program 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 all the written materials from past meetings, including the May Meeting, 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. Audio recordings of individual sessions are available through our outside digital conference partner, DCP, at http://www.dcp providersonline.com/abatx/.

Diversity and Inclusion Policy Update

Diversity and inclusion are important principles for the Tax Section and they should be conscious considerations in all our activities. In 2001, the Section adopted a Diversity & Inclusion Plan, with concrete action steps, in furtherance of our commitment. The Plan was updated in 2015 and was just updated for a third time by a unanimous vote of Council at the Washington meeting. The updated policy is posted on our website for everyone to read, and I encourage you to do so.

A related subject at the forefront of everyone’s mind this year has been the continued reporting of incidents of sexual harassment at every level of society, which have become nearly a daily event. The Tax Section fully supports ABA policy that verbal, sexual, or physical harassment of any kind that disrupts another person’s duties or job performance or that creates an intimidating, offensive, abusive, or hostile work environment is unacceptable. I hope you will join me in making sure the Section is a safe and welcoming place for all who wish to participate.

Pro Bono Update and Call for Action

The Section's commitment to pro bono is getting stronger every year and has two main prongs: providing assistance to those without financial resources to afford legal representation; and identifying and creating diverse opportunities for our membership to become engaged in pro bono activity. These are feel-good, do-good opportunities of which every Section member should avail him or herself. Please consider getting involved in one of the many programs coordinated through the Section and, please consider a contribution to the Section's Tax Assistance Public Service (TAPS) endowment fund to help provide stable, long-term funding for the Section's tax-related public service programs for underserved taxpayers.

Bahar Schippel, Vice Chair (Pro Bono & Outreach), reports that significant progress has been made in identifying partners with whom the Tax Section might collaborate in providing pro bono legal assistance to our growing elderly population. The Section has partnered with the Taxpayer Advocate Service (TAS) on their outreach efforts concentrating on elderly taxpayers in Seattle, Pittsburgh, and Kansas City. The Taxpayer Advocate has identified seniors as a significant vulnerable population on which she wishes to have TAS focus. Going forward, Bahar will coordinate our volunteers (a number of whom have already stepped forward) to join with TAS personnel during these targeted problem-solving days which can hopefully expand to other cities.
Existing Section programs can always use more volunteers. For example, the Partnering for Pro Bono Program pairs tax attorneys from the private bar with Low-Income Tax Clinics throughout the country to accept referrals for pro bono assistance, guidance on tax issues, or mentorship.

The process of reviewing performance of the Adopt-a-Base program for the 2018 filing season and thinking about how to improve the program in scope and efficiency for the 2019 filing season has already begun. Over the coming months, Section staff and leaders of the program will develop a recruitment and volunteer management plan. The goal is to use the new Higher Logic Pro Bono community and the improved ABA website capacities to create a centralized registration system.

In order to prepare members who have knowledge of tax law but no experience representing low-income taxpayers, the Section offered a free webinar eligible for CLE credit on March 7. Veteran practitioners from Low-Income Tax Clinics and members with experience handling pro bono matters walked 450 participants through how to approach a collections case for a low-income client. A link to the recording of the program is available on the website. As a result of this first success, and the growing demand for further training, we will be offering the second part in the Nuts & Bolts Collections webinar series on June 13. You may register here.

I strongly encourage anyone interested in getting involved in the elderly assistance program or the Partnering for Pro Bono program, or in taking pro bono cases in general, to participate in these training webinars.

Interested persons can volunteer for any of the opportunities described above by contacting Bahar Schippel at bschippel@swlaw.com, or Meg Newman, the Section’s new General Counsel, at megan.newman@americanbar.org.

Webinars

Prior to the passage of the 2017 Tax Act, the Section identified a demand for up-to-date CLE programming. Starting in November 2017, the Section presented eight CLE webinars on the new tax legislation to 2,195 registrants. A future webinar schedule can be accessed here.

I announced several months ago that I was exercising my discretion to extend access to the Section’s future webinars, at no additional cost, to all full-time teaching tax faculty affiliated with any ABA accredited law school who are also members of the Tax Section. If a full-time tax faculty member is not a Section member, they may pay for the first webinar at the going rate and be automatically enrolled as a Section member for the balance of the year, thereby accessing the balance of the webinar offerings (as well as prior webinars) at no additional cost. Many faculty have taken advantage of this opportunity to join the section. I hope tax faculty around the country will view this as a worthwhile added benefit for their Section membership.

New Tax Act – Redux

As we all know, there are gaps and ambiguities in much of the statutory language contained in the 2017 Tax Act which need clarification/guidance. The Section will continue to address this need in two key ways. First, we will continue to offer quality webinars on key topics affected by the new law. A schedule of upcoming webinars, all being carefully orchestrated by Fred Murray, Vice-Chair (CLE), can be accessed here. Second, I have established two task forces to address technical corrections and guidance needs across multiple committees in two major areas affected by the new law: International, led by Carol Tello (Council Director), and Passthrough Entities, co-led by Ron Levitt (Council Director) and Jeanne Sullivan. Further, several of the other committees impacted by the Tax Act have formed subcommittees to focus on responding to the
Act, and all committees have been asked to generate lists of pressing issues from the Tax Act relevant to their areas of tax law. And, of course, the leadership of each interested committee will be monitoring the government’s activity for guidance which requires comments and on which program topics can be built.

In addition to monitoring for future guidance in connection with the new tax law, Section committees have produced eleven sets of quality comments on various proposed regulations or in response to requests for comments on process during this fiscal year to date. A list of those comments is provided here.

**Distinguished Service Award**

I was delighted to lead the celebration of Susan Serota as this year’s recipient of the Distinguished Service Award during the Plenary Luncheon in Washington. The DSA was established in 1995 to underscore the Section's respect for, and support of, professionalism within the tax bar. The Distinguished Service Award Committee annually selects one Section member to receive the Distinguished Service Award for outstanding service to the profession. Susan, who was only the second woman to chair the Section in its 75 + year history, will be the third woman to be recognized with the award since its inception. I was especially pleased to be presiding over the award ceremony since it marked ten years between Susan’s and my terms as Section Chair. During that period, she continued to serve as a role model and inspiration for me and many others in the tax profession. A biographical sketch about Susan is available in this issue of *ABA Tax Times*: readers may read her remarks or view her presentation here.

**Recognition of Nolan Fellows and Brunswick Scholarship Recipients**

In addition to presenting Susan Serota with the DSA, the Section recognized the current Nolan Fellows whose terms end August 31st and congratulated the new Fellows who will begin their terms on September 1st. The six new Nolan Fellows for the 2018-19 year are:

- Giselle Alexander, Phoenix, AZ
- James Creech, San Francisco, CA
- Yongo Ding, Washington, DC
- Frank DiPietro, Bloomington, IN
- Jeffrey Dirmann, Hackensack, NJ
- Anne Gordon, McLean, VA

The newly selected and continuing Brunswick Scholarship recipients were also announced and acknowledged. They are:

- 2017-19 continuing:
  - Catherine Martin, Community Legal Services, Philadelphia, PA
- 2018-2020
  - Omeed Firouzi, Philadelphia Legal Assistance, Philadelphia, PA
  - Anastassia Kolosova, Accounting Aid Society, Detroit, MI
Next Up – Atlanta, Georgia

I hope you are already marking your calendar to attend the entire Joint Fall CLE Meeting on October 4-6 at the Hyatt Regency in Atlanta, Georgia, when we expect to have a significant number of proposed regulations to analyze, dissect, and critique, as well as top-notch continuing education panels from our committees. You won't want to miss it.
People in Tax

Interview with Dana Trier

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

Editor’s Note: Dana Trier, long-time active ABA Tax Section member and former Corporate Tax Committee chair, most recently served as Deputy Assistant Secretary for Tax Policy in the U.S. Treasury Department. In this interview, he explains how he came into tax, how he helped develop the tax practices at several firms, his role in tax reform, and other topics.

Q Dana, how did you come into tax?

A I did not start as a tax lawyer. I began as a corporate lawyer at Cravath, Swaine & Moore, New York. I worked for what they called the Butler Group, which was probably the most prestigious corporate practice group at that time. The group worked with a guy named Sam Butler, who, like myself, was from Indiana.

My first foray into tax was taking NYU courses at night. In those days it was not uncommon for corporate lawyers to acquire some expertise in tax. Sam Butler himself had an LL.M. in tax from NYU. I initially developed my skills in tax to be a better business lawyer. Cravath has an assignment system, and my first assignment was 18 months or so in the Butler Group. When it came time for my next assignment, I went up to the Wall Street Club with a fellow named Wayne Chapman—who had ideas for what my next assignment should be—and we talked. I won't go into all the details. Alcohol was involved. The result of that conversation was that I would split my time in my next 18 to 24 months between tax and corporate. The corporate work I did was leveraged leasing, a complex financial transaction. It was during that next year or two that two things became evident: I liked complex transactions, and I caught the tax bug. I found that the more I got into it, the more interesting tax was to me. It just was such a fascinating, interesting area, both as a legal matter and because of the policy issues involved.

Q How did your interest in economics develop?

A In law school I was not a tax-oriented student at all, but I was definitely into law and economics. One of the professors that I was the closest to was actually chairman of the Economics Department. His name was Peter Steiner. The economist’s conceptual cast of mind, plus my interest in economic policy, was important as I moved into practice. That cast of mind naturally found its home in tax. In those days there were very few tax professors that were into economics. But as time has gone on, of course, it’s practically
a requirement to be hired now as tax professor at the more prestigious schools to come with an economics background.

So my natural cast of mind found tax, and it was a good fit. The thing that was a little awkward is that I still had business lawyer tendencies. I liked dealing directly with clients. I liked negotiating deals. I liked structuring deals.

Q Why is that awkward?

A It wouldn’t have been awkward at all outside of the big city practice. If you’re practicing outside the New York/Washington complex, it’s actually quite common for tax lawyers to be business lawyers as well as tax lawyers. But it was always a little bit difficult to fit yourself into the New York model if you were that type of person. At its most stringent, under that model the tax people simply service the Corporate Department. And that probably doesn’t fit me. I wanted a setting where I could do tax and interact with clients like corporate lawyers do. I think it’s fair to say things worked out fine.

Q Let’s talk about how you built that practice.

A I thought it was healthier for the tax department (and healthier for me) to have a tax department that performed its role very well in relation to the corporate department, but also had its own practice—a client-facing practice, where tax lawyers were important to bringing in the business, developing the business, etc. And, to some extent, I just thought it was healthier that the tax department wouldn’t be second-class citizens. Cleary and Skadden, just to name two firms, did a good job of achieving that kind of work environment.

When I left Cleary to go to Davis Polk, which had a very fine tax department, one of my objectives was to develop that broader capacity of a tax department, to make the tax department quite important from the perspective of the business of the firm. You can do that in either of two ways. You can do what we tended to call tax-only work. The other way was to work integrally with other groups within the firm. At Davis Polk, that was very important in the derivatives practice. Actually, the derivatives and convertibles practice. It’s also pretty important in M&A, etc. With some pride, I would say that over the decade-plus period that I was a partner, I think we made a lot of progress at Davis Polk in doing that. And lest anybody think I was particularly important or essential to all of that, I would say since I retired, they’ve done even better. They’ve built the practice further, and it’s a good thing. It’s a good thing for tax professionals to seek to have a broader practice.

Q And how did you come to develop that breadth in your practice?

A It’s a combination of my personality and the accident of history. I’ll start back at Cravath. This is completely accidental. Now, within the small group of people who were doing tax law at that time, a number of us were doing leasing both as tax lawyers and as corporate lawyers, and I was one of those. Mike Schler and I and others were doing tax and employee benefits. And then, of course, I did corporate before I got into tax. So right from the beginning I was actually covering more areas than anybody else was, totally accidentally. It had nothing to do with design or long-term planning. When I left Cravath, one of the partners said, “Trier, you must be doing something right because four partners say, in four different areas, that they need an associate to replace you.” So I always had breadth.
I went from Cravath to a firm called Cohen & Uris, which was a great tax firm that was headed by Sheldon Cohen, the former Commissioner of Internal Revenue and Chief Counsel. That particular firm’s approach was more of a generalist approach. The partners felt that they could handle whatever came in. Because I was working for those partners, I developed breadth from that experience.

Whenever you hold those higher-level tax policy positions, there’s a tendency for the person who’s done that to have considerable breadth. For example, consider the late Kenneth Gideon, one of my bosses at Treasury, who was the Assistant Secretary in the George H.W. Bush administration. I was his Acting Deputy. I was first Tax Legislative Counsel and then his Acting Deputy. If I had to pick one of the people who were important mentors, it would be Ken. Ken was also Chief Counsel of the IRS. The Chief Counsel has to cover all of these areas. And Fred Goldberg has similar breadth and ability. Ron Pearlman likewise had a lot of that breadth and I think he held those positions.

So if you combine my law firm and government experience with the fact that I have a voracious curiosity about things and, some say, I seem to be fearless about what I take on, I think over time it just led to considerable breadth. That is one of my hallmarks. There’re plenty of people that are as good in my principal area as I am. I don’t think there’re so many that can cover as many different areas as I do.

Q

What was your motivation for going back into the government last year?

A

Well, my motivation going back turned out largely to be loyalty to the Office of Tax Policy. And, I would say, an additional loyalty: I’m a Republican. I have a Republican approach to tax policy and this was going to be the Republican time, so to speak. I had no motivation to increase my own prestige and marketability or anything like that. I had already had a fine career. I looked at my career as over, in terms of building a personal reputation and all that. I thought that, under the circumstances, I could help.

Right from the beginning, I knew—and I’m not, by the way, saying anything about anybody personally here—that in terms of policy perspectives on issues that would come up, I was a fish out of water. That was clear because President Trump and Secretary Mnuchin had articulated a clear supply-side-oriented approach. I’m pro-growth, but I’m not somebody that could ever have gotten up in public to say that very low tax rates are going to pay for themselves through their growth effects. I’ve studied these issues for a long time. It goes back, really, to the ’81 Act, if you think about it. So even though I supported strong pro-growth assumptions, I clearly do not share the same views as the higher-ups in the Treasury Department on that point. So when I took the position I knew that this was not the perfect fit for me. Nonetheless, I thought, with my experience, I could really have a positive effect within the Office of Tax Policy.

Q

The time that you spent in the Office of Tax Policy was probably the most exciting time in that office in more than a generation. Can you share some of your experiences?

A

I went to work on July 10 and within a week or ten days, I was going to meetings on the Hill as the crunch was coming for formulating the tax legislation.

Compared to earlier periods, Treasury’s on-the-ground role in this tax legislation was circumscribed; it was not large. There was a Treasury presence, but Treasury was not formulating the technical framework for the legislation. Speaking in terms of my role, I always understood that my role working with House Ways & Means Committee Chief Tax Counsel Barbara Angus, her colleagues, and others was to help them with as much as I could technically and also to be present so I could understand what they were trying to do. But
that was a circumscribed role, certainly a significantly smaller role for Treasury than Treasury had in years leading up to the '86 Act.

Ultimately, legislation is always passed by the Hill, and at the end of the day, the processes of Congress take over. This time, however, the role of Treasury was less substantial than it has been historically in other tax legislation. That doesn't mean that I didn't personally enjoy my participation in the process. I remember a meeting of the House Ways & Means Committee where we happened to be discussing the pass-through provisions that were being developed on the House side. The Joint Committee was present, the House Ways & Means Committee staff was present, I was present, and a few other Treasury people were present. That was such a good, professional experience. It may have been ill-fated, but it was a good, professional experience. I remember thinking to myself, “this is why I came back. This is stimulating, these are good people, we're trying the best we can.”

I suppose I am a big personality, so it's kind of hard to keep me in the box. But even though my role was naturally circumscribed, I still did enjoy that type of experience just like I really enjoyed working with Hill staff back in the Eighties. It was a frustrating experience, I think, for all of us at some level. In spite of the frustrations, I liked getting to know these people, I liked thinking about the tax legislation. I'll keep thinking about it. On balance, it was a good experience.

Q Practitioners now grapple with all of these changes that range across the Code. In your mind—you were there at the creation—is there a coherent policy behind some or all of the changes that we can consider to help animate our thinking?

A I think there is a core to the international changes and there are two or three themes on the domestic side. Of course, to get revenue raisers or enact tax expenditures, there're a bunch of things that don't fit into a particular theme. Obviously, this was not domestically driven legislation as much as it was international corporate-driven legislation.

On the domestic side—and this is something that I want to articulate more as time goes on—the pass-through provisions are one of the core elements, like them or not. It's a truly unique approach to the issues. I intend to speak about it more going forward. But I would say in general that I think the second-best case for the pass-through provisions is stronger than people think it is. I'm not saying that they're not problematic in many ways, but I think that people are criticizing them with too broad a brush. And I'll develop those themes as time goes on. The other theme, which I think of as being articulated by Kevin Brady most centrally, is the expensing, pro-growth, low tax rates theme.

On the international side, I think there is what Danielle Rolfes has called a complexification issue. I think it's a significant issue.

But I do think there's a structure, a very modern structure and a lot of structural thinking. I don't like the idea that this is unsophisticated legislation. In many ways it's very sophisticated. It might not have been pulled off perfectly. That's a different issue. But you have territoriality. You presumably no longer have the lock-in effect that you had in the past. You have what Mark Prater articulates as the “carrot and stick approach” of the GILTI / FDII regime. You have the first large-scale attempt, whether or not you agree with the details, of a base erosion provision that deals with the interface between inbound activities and payments abroad. And, putting it together, this is a pretty comprehensive provision. Now each one of those components may be flawed in particular ways, we'll know more about them four or five years from now. I would say this was a revolution.
I don’t think it’s fair to say there’s no theme there. There’s a comprehensive approach. One thing that the Republicans are not getting quite enough credit for is that those international provisions are not just a giveaway. In other words, a lot of people are complaining, and multi-nationals may be able to do certain kinds of tax avoidance. But those multinationals are not necessarily happy with where the GILTI regime came out. And they’re not necessarily happy with the way the BEAT regime came out.

Q I think you’re right. Most practitioners and taxpayers are coming to realize that territoriality is very much the exception rather than the rule now.

A And pure exemption is certainly not the rule.

Q Let’s talk a little bit about teaching and its role in your career and in your life. How important do you think it is?

A I have this discussion all the time. When you look back at your career, there are themes that are obvious. In my case—and I always say this to my friend, Eric Solomon, that he and I are similar—when the whole story’s been written about us, they have to say that we were practitioners, we were tax policy officials, but we were also schoolteachers. It was an important component of what we did and what we liked to do and how we define ourselves.

There’re a number of us like that in the tax profession. If we go back to the generation that had a formative effect on me, I can pick out two names, both of whom happened to be involved in the ABA significantly, and they happen to have been very good friends. One is my teacher, Carr Ferguson, whom I first got to know when he taught me tax-free reorgs in the fall of 1976. And the other was his good friend, the late Marty Ginsburg. The reason I call myself a schoolteacher is Marty always called himself a schoolteacher. And, even though I didn’t really know Carr, his example when I took his class and I got an A from him, he was always a model. Marty was always a model.

The way I got to know Marty is I started teaching in Georgetown in a business planning class. It was actually a JD class. It was taught by the corporate law professor and the tax law professor. Marty taught the corporate tax part of one section, and I taught the corporate tax part of the other section, and we got to be friends. And occasionally I’d be invited over to his home. He was famous for his short-sleeved shirts and doing all the cooking for Ruth Ginsburg and himself. I think that Marty, in particular, was in many ways a role model for people like Ed Kleinbard and Jim Peaslee, and many other people of my generation. We thought that the role of a tax lawyer was not just to be a practitioner, but was to think more broadly about the system, to participate in the reform of the system. As you know, not only was the ABA very heavily involved in that kind of activity, but the New York State Bar Association as well. And I was a member of both for much of my career. And to some extent I followed in their footsteps. Carr still teaches, and my guess is I will teach for years to come. And Marty was teaching up to his death. So that’s just part of the way I define myself. And, as I said, I think Eric’s very similar in that regard.

Q You’re between jobs right now. Do you want to share with us your thoughts on next steps?

A One thing for sure, for better or worse, I still have a considerable level of energy left. I think that’s one trait among my peer group: some people have maintained their energy and interest into their 60s or 70s. I think Carr is, fair to say, a phenomenon. He’s kind of the Warren Buffet of tax law and he’s still
quite energetic. So I think the time has come for me to get back into actual practice at a fairly significant level, though of course not at the same level as when I retired, seven or eight years ago.

The other thing that influences me is that I really did need this past period with freedom to explore things. After retirement, I got my master’s in applied economics at Johns Hopkins. I taught some more. I needed that period of rejuvenation, and now I think I can be more satisfied going back to practice and going to work every day—with not nearly as heavy a load as I had during the middle two or three decades of my career. So I think that’s what’s going to happen, which is surprising. I mean, if somebody years ago had asked me whether I would want to do that, at this age, I would have been surprised by the question.

Obviously, my role cannot be the same as it was. But I do look at the new tax law as unfinished. And I don’t intend to be quiet about how to finish it. In other words, I’d like to have input into how to refine what has been done, how to rationalize what has been done. When I return to tax and return to practice, I will continue to pay attention to the different component parts of this legislation, writing articles and giving speeches on how I think it might be improved.

Q \ How optimistic are you that Congress will return to the tax law and make changes, either technical corrections or substantive changes?

A \ I’m not optimistic.

It’s plausible to me there would be technical corrections some time after the November election. As I’ve said publicly (and I don’t mean to be damning Congress), I think from the Treasury’s and IRS’s perspective, they have to assume the worst as a practical matter, and assume they’re not going to get technical corrections. They may get technical corrections, and they certainly should be talking to their counterparts on the Hill about possible changes. But I would not personally expect there to be technical corrections before the election, at the minimum.

My honest view is that tax reform is a process. My friend Paul Oosterhuis has often said this publicly. And I think the more serious issue about our era today is whether our political system is capable of correcting the tax law. If we go back to my formative times, as I’ve said, it was the ‘81 Act, ‘82 Act, ‘84 Act, ‘86 Act. There was ‘87 legislation, ‘88 legislation, ‘89 legislation. There were adjustments all through that period. I’m a bit worried as to whether our system is well set up for adjustments to what was done last year. And that’s an issue.

Q \ Any last words?

A \ You remember Lou Gehrig, the luckiest man alive? It was an accident that I got into tax law. I don’t know how anybody would have thought I would have gone up to that conversation up at the Wall Street Club around Valentine’s Day 1976. None of us thought that I was going be in the Tax Department, but I ended up in the Tax Department. It turned out to be a good thing. It’s an area that just permits a rich career, I think.

Q \ That’s a great finish. Thanks, Dana.

A \ Thank you. ■
Understanding the burden of proof can make or break a state tax case. “The taxpayer failed to meet its burden of proof” is perhaps the most frequently written phrase in state tax opinions, particularly at the administrative level. Many lawyers, accountants, and even tax practitioners may not have a full understanding of exactly what that means. It is particularly exasperating for taxpayers to hear or read that phrase following long hours of audit review, document production, evidence presentation, and oral hearing testimony. Particularly in state tax cases, it is important to focus on who has the burden of proof, what is the burden of proof, and how can that burden be satisfied?

Which Party Bears the Burden of Proof?

While the burden of proof generally lies with the taxpayer for nontaxable or exempt sales or purchases, the state taxing authority often has the burden of proof on penalties, including fraud penalties and assessments of state tax liabilities against individuals, transferees, successors, and nominees. The state taxing authority also generally bears the burden of proving proper notice; however, proper notice is often satisfied by mailing a notice to the taxpayer’s last known address of record.

What Standard Applies?

Once it is determined which party bears the burden of proof it’s important to ascertain the standard that applies. Knowing whether an item is excluded or exempted from tax goes hand-in-hand with identifying the applicable standard. While many taxpayers and auditors throw around the terms “exempt” and “nontaxable” as if they were synonymous, there is a very important distinction and that distinction has a direct impact on the standard for the burden of proof.

For example, Texas Tax Code Chapter 151 governs Texas Sales Excise and Use Tax, and exemptions are carved out in Subchapter H of Chapter 151. An exclusion from tax—whether a transaction is taxable or nontaxable—requires proof by a preponderance of the evidence. A taxpayer seeking to meet that burden must show that the greater weight of the evidence supports the taxpayer’s position. Establishing a preponderance of the evidence does not necessarily require the taxpayer to bring more witnesses or more pieces of evidence; nonetheless, when all the evidence is weighed and compared, the taxpayer’s evidence must hold greater weight, even if only by a slight amount.

A higher standard generally applies to exemptions. In Texas, that standard is “clear and convincing” evidence. “Clear and convincing” generally indicates that the thing to be proved is highly probable or
reasonably certain.”¹ This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but a lesser burden than “beyond a reasonable doubt,” which is the evidentiary norm for criminal trials.

When an exemption is involved, the higher burden of proof for “clear and convincing” evidence generally requires that documentation be provided, such as completed resale or exemption certificates, to further support an exempt sale. In Texas, taxpayers are given 60 days after receiving official notice to produce or complete any additional resale or exemption certificates that may support an untaxed sale.

When penalties or individual assessments are involved, the taxing authority generally also bears a burden of proof by “clear and convincing” evidence.²

**Presumptions and Shifting the Burden of Proof**

The burden of proof can shift from one party to the other in many instances.

As a general matter, all of a taxpayer’s receipts or deposits are presumed taxable unless the taxpayer can show—through contemporary business records, accounting data, or other evidence—that the source of income is nontaxable or exempt. A state taxing authority’s assessment, once final, generally bears the presumption of validity.

In Texas, a presumption of taxability applies to sales of tangible personal property, but no such presumption applies to sales of services. Some states do not impose sales tax on services at all. Other states, like Texas, impose sales tax on listed services.³ The Texas Comptroller bears the initial burden of proving that a particular service fits into one of the categories of taxable services enumerated by statute. Then the burden shifts to the taxpayer to carve out an exclusion from tax or prove an overriding exemption.

Burden-shifting provisions may also be written into statutes or interpretive regulations. For example, Texas applies a 5% rule to mixed services. The 5% rule is generally established by rules promulgated by the State Comptroller. If more than 5% of a mixed or bundled charge pertains to taxable goods or services, the entire charge is generally presumed taxable. The taxpayer may overcome the presumption by producing evidence such as bid sheets, photographs, blueprints, plans, cost analysis, testimony, or other evidence indicating the portion, if any, that should be subject to tax.

The Multistate Tax Commission promulgates universal forms taxpayers in various states may issue to vendors providing services that benefit multiple locations. Multistate exemption certificates and direct payment permit exemption certificates also shift the burden of proof from the vendor to the purchaser. Once a vendor accepts a completed certificate from a customer in good faith, the burden then shifts to the customer to accrue and remit tax, either to multiple states, as in the case of a multistate exemption certificate, or in accordance with its reporting agreement with the state taxing authority, as in the situation involving a direct payment permit exemption.

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² See, e.g., 34 Tex. Admin. Code Ann. § 1.40, which imposes a burden of proof by “clear and convincing evidence” when the Texas Comptroller seeks to impose the 50% additional tax penalty for willful or fraudulent failure to pay tax.
Statutory Changes Can Also Shift or Modify the Burden of Proof

The legislature may promulgate statutory changes that shift or modify the burden of proof. In 2017, the Texas legislature changed the law regarding the sales and use tax obligations of taxpayers selling and purchasing temporary help services.

Historically, the Texas Tax Code under section 151.057(2) has excluded from sales tax charges for services performed by employees of temporary employment services. Temporary employment services were defined by reference to Labor Code section 93.001: this provision allowed an employer to supplement an existing work force on a temporary basis when the service is normally provided by the employer’s own employees, the employer provides all supplies and equipment necessary, and the help is under the direct or general supervision of the employee to whom help is furnished. For these services to be excluded from tax, the Comptroller imposed on the seller and purchaser of the service the burden of proving the services at issue met all of the requirements of a temporary help service.

Senate Bill 745, passed by the Texas Legislature in the 8th Regular Session, changes the exclusion from tax into an exemption with a higher burden of proof (by clear and convincing evidence) and imposes additional requirements on businesses seeking to qualify as host employers, effective September 1, 2017.

These statutory changes were prompted by a lawsuit involving taxable insurance services. Claims adjustment services are a type of insurance service, which is included on the statutory list of taxable services in Texas Tax Code section 151.0101. In Allstate Insurance Co., the court determined the insurance carrier owed tax on claims adjustment services provided by outside independent contractors because the taxpayer didn’t provide all of the services and equipment necessary for the contractors to perform their work (e.g., electronic voice mail, cell phones, laptop computers, estimating systems, etc.) and therefore they didn’t meet the qualifications of temporary employment service workers. Insider claims adjusters’ services, in contrast, were not taxable because they were stationed within the carrier’s own facilities.

Under the revised statute, which transitioned the exclusion of Texas Tax Code section 151.057 to an exemption under Subchapter H of the Texas Tax Code section 151.3503, a service performed by an employee of a temporary employment service for a host employer to supplement the host employer’s existing work force on a temporary basis is exempt if:

1. The service is normally performed by the host employer’s own employees;
2. The host employer provides all supplies and equipment necessary to perform the service, other than personal protective equipment provided by the temporary employment service pursuant to a federal law or regulation;
3. The host employer does not rent, lease, purchase, or otherwise acquire for use the supplies and equipment, other than personal protective equipment, from the temporary employment service.

service or an entity that is a member of an affiliated group of which the temporary employment service is also a member; and

(4) The host employer has the sole right to supervise, direct, and control the work performed by the employee of the temporary employment service as necessary to conduct the host employer's business or to comply with any licensing, statutory, or regulatory requirement applicable to the host employer.

The revised statute imposes a higher burden of proof on the service provider to show that the service is exempt. That higher burden may shift to the purchaser claiming an exemption to prove that all of the required statutory elements existed during the time frame during which the purchaser was acquiring the services of the temporary employment service. Under Texas law, “[a] sale is exempt if the exemption certificate is accepted in good faith at the time of the transaction and the seller lacks actual knowledge that the claimed exemption is invalid.” Therefore, a temporary help service provider accepting a completed certificate in good faith at or around the time the transaction occurred should be able to rely upon its customer’s representation that its customer (the host employer) met all of its requirements to provide tools, equipment, supervision, and resources referenced in the statute.

**Burden of Proof Versus Burden of Production**

Taxpayers should not become too complacent when the state taxing authority bears the burden of proof. A taxpayer is generally required to offer adequate books and records for audit; otherwise, the state taxing authority is granted the leeway to estimate an assessment based on alternative information.

For example, Texas Tax Code section 111.0041 provides that a taxpayer must produce contemporaneous records and supporting documentation appropriate to the tax or fee for the transactions in question to substantiate and enable verification of the taxpayer’s claim related to the amount of tax, penalty, or interest to be assessed, collected, or refunded in an administrative or judicial proceeding. Contemporaneous records and supporting documentation appropriate to the tax or fee may include, for example, invoices, vouchers, checks, shipping records, contracts, or other equivalent records, such as electronically stored images of such documents, reflecting legal relationships and taxes collected or paid. The legislative history indicates that summary records would be insufficient to substantiate a claim without supporting contemporaneous records.

If a taxpayer fails to produce records, or fails to produce adequate business records, the statute authorizes the Texas Comptroller to estimate tax liabilities based upon any information available. Estimation includes sample projections based upon a review of a sample of transactions within a population and extrapolation of those values to the population as a whole. Estimation also includes using third party records to calculate the amount the Comptroller alleges the taxpayer owes.

In a 2013 case, *FM Express Food Mart,* the court upheld a Comptroller assessment against a convenience store based upon an estimate of sales calculated using third-party purchase records reported to the Comptroller by its alcohol and tobacco vendors. The auditor examined a sample of the records, applied a standard markup, made adjustments for spoilage and food stamp purchases, and assessed tax on the difference between the estimated sales and the reported sales. The taxpayer challenged the estimation methods and

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5 Comptroller Rule 3.287 (d)(2).
7 FM Express Food Mart, Inc. v. Combs, ___ S.W.3d ___ (Tex. App. – Austin 2013), Cause No. 03-12-00144-CV.
contended it had not received adequate notification of the sampling methodology, but the taxpayer was unable to present summary judgment evidence showing that the estimate was “unreasonable, excessive or that it was reached arbitrarily and capriciously,” so it was determined to be within the Comptroller’s authority to uphold the estimate.

In *Ayeni*, another 2013 case, the court further held that a Comptroller’s certificate of delinquency satisfied the taxing authority’s initial summary judgment burden, shifting the burden to the taxpayer to raise a fact issue in order to avoid an adverse summary judgment. The taxpayer’s verified denial in answering the lawsuit was insufficient to shift that burden without evidence controverting the alleged liabilities. Conclusory affidavits merely asserting that the taxpayer’s amounts were correct and the Comptroller’s amounts too high did not provide sufficient proof to overcome the assessment.

**Conclusion**

Knowing the burden of proof and which party bears that burden for each element of a case is critical to effective trial preparation. In evaluating trial strategy and gathering evidence it is important for clients to understand who bears the burden, the standard applying to evaluate that burden, and what evidentiary deadlines might restrict a taxpayer’s ability to provide relevant evidence to establish the burden. State tax cases may, especially at the administrative level, shift on the burden of proof. Beware of legislative changes, as well: they may impose a higher burden on the taxpayer, such as additional documentation or exemption requirements.

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8. *Ayeni v. State, ___ S.W.3d ___ (Tex. App. – Austin 2013), Cause No. 03-11-00604-CV.*
AT COURT

Wayfair, Quill & The Physical Presence Test: Bright-Line Standard Or Diminished Relevance Paradox

By Jeffrey Krasney, Attorney at Law, Pennsylvania and Washington, DC

On April 17, 2018, the U.S. Supreme Court heard oral arguments in the Wayfair case. The case addresses the taxation of online sales—that is, the physical presence nexus test or the manner in which sales taxes are applied to online retail activity.

In 1992, the Supreme Court in Quill reaffirmed the “physical presence” standard, noting that Bella Hess required some sort of physical presence within the state.

In Bellas Hess, the Court suggested that physical presence was not only sufficient for jurisdiction under the Due Process Clause, but also necessary.

The Due Process Clause “requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.” Further, the “income attributed to the State for tax purposes must be rationally related to values connected with the taxing State.” Thus, a state could only require a business with a physical presence in the state to collect and remit sales tax. In other words, businesses which did not have a sufficient nexus were not required to collect or remit a tax. Justice Stevens in Quill

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1 Jeffrey L. Krasney, a member of the Pennsylvania and District of Columbia bars, holds an MBA, Johns Hopkins University; Certificate of Professional Development, Finance, The Wharton School; LL.M. in Taxation, Georgetown Law; and a J.D., University of Baltimore School of Law.
6 ld. at 307. Even while supporting the physical presence standard, Quill acknowledges that the Court has come to the opposite conclusion in other decisions.
9 504 US at 308, 313. The Quill court noted that “a corporation may have the ‘minimum contacts’ with a taxing State as required by the Due Process Clause, and yet lack the ‘substantial nexus’ with that State as required by the Commerce Clause.” ld. at 333 n.7.
stated that taxing out-of-state businesses would “unduly burden interstate commerce” and added that a bright-line rule under which states can collect state taxes only from retailers with a physical presence in the states “encourages settled expectations and, in doing so, fosters investment by businesses and individuals.”

According to the Supreme Court, one of the goals of the Dormant Commerce Clause was to “avoid the tendencies toward economic Balkanization that hindered, and suppressed interstate commerce for the ... States under the Articles of Confederation.” The Dormant Commerce Clause doctrine was viewed as promoting the development of a truly national economy (rather than prohibiting states from discriminating against cross-border businesses).

Quill was decided prior to the emergence, development and growth of e-commerce and online retailers. Traditional ‘brick and mortar’ retailers and sellers now argue that they are at a competitive disadvantage by collecting sales taxes when online businesses need not do so. As a result of e-commerce and online sales, states are also generally missing out on sales taxes owed to them—potentially losing billions of dollars annually in revenue.

Some Justices have suggested that it may be time to re-think the Quill conclusion. In a 2015 Colorado case that challenged the use tax reporting requirements, Justice Kennedy concluded that the combination of tax losses from individual purchase use tax non-compliance and the far-reaching systemic and structural changes in the economic and social activities wrought by expanding internet use were indicative of a potential need to revisit Quill’s physical presence test. Justice Kennedy essentially invited the states to

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10 Id. at 313.
11 Id. at 316.
12 Id. at 312. The Framers intended the Commerce Clause as a cure for these structural ills. See generally The Federalist, Nos. 7, 11 (Alexander Hamilton).
13 The Supreme Court relied on stare decisis to reaffirm the physical presence requirement and to reject attempts to require a mail-order business to collect and pay use taxes. Quill Corp. v. North Dakota, 504 U.S. 298, 311 (1992). This was despite the fact that under the more recent and refined test elaborated in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), “contemporary Commerce Clause jurisprudence might not dictate the same result” as the Court had reached in Bellas Hess. Quill Corp., 504 U.S. at 311. In other words, the Quill majority acknowledged the prospect that its conclusion was wrong when the case was decided.

provide the Court with an appropriate case to decide whether the physical presence nexus basis which the Court found suitable in 1992 remains viable today.\textsuperscript{14}

Using Justice Kennedy’s concurrence as a stratagem, a number of states have sought to challenge the \textit{Quill} physical presence nexus standard.\textsuperscript{15} In 2016, South Dakota created an economic nexus law that taxes most goods and services delivered in the state.\textsuperscript{16} Specifically, the new economic nexus law requires out-of-state sellers who (i) have gross revenue from sales of tangible property, digital property transfers, or services in South Dakota exceeding $100,000 or (ii) engage in 200 or more separate transactions in tangible property, electronic product transfers, or services delivered within the state, to collect and remit South Dakota sales and use tax.

The new nexus law was challenged, resulting in an opinion by the South Dakota Supreme Court that applied \textit{Quill} to hold that the new law inappropriately extended the scope of South Dakota’s taxing power.\textsuperscript{17} South Dakota sought a writ of certiorari to challenge the \textit{Quill} physical presence standard. That case is now before the Supreme Court, and thus gives the Court an opportunity to clarify the administration and collection of state taxes as well as to offer guidance on any continuing limitations of a state’s power to tax online retailers under the Dormant Commerce Clause.\textsuperscript{18}

Prior to the oral arguments in the \textit{Wayfair} case on April 17, 2018, at least three Justices (Kennedy, Thomas and Gorsuch) appeared inclined to reassess \textit{Quill}. Nonetheless, the arguments revealed, through a series of incisive questions, considerable trepidation about overruling the precedent. By the conclusion of the arguments, it was not at all clear how a majority of the Justices would rule.

For instance, Justice Sotomayor raised her “concern about the unanswered questions that overturning precedents will create” as well as unforeseen consequences not anticipated, if the Court were to overturn a precedent such as \textit{Quill}.\textsuperscript{19} She listed various reservations, including “retroactive tax liability;”\textsuperscript{20} and questions such as “what happens when the tax programs break down?” “how much contact is enough (by a remote seller) to justify (requiring sales tax collection) on an out-of-state seller?” and “what happens when

\textsuperscript{14} Given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court’s holding in \textit{Quill}. A case questionable even when decided, \textit{Quill} now harms States to a degree far greater than could have been anticipated earlier. See \textit{Pearson v. Callahan}, 555 U.S. 223, 233 (2009) (\textit{stare decisis} weakened where “experience has pointed up the precedent’s shortcomings”). It should be left in place only if a powerful showing can be made that its rationale is still correct. \textit{Direct Marketing Association v. Brohl} does not raise this issue in a manner appropriate for the Court to address it. It does provide, however, the means to note the importance of reconsidering doubtful authority. The legal system should find an appropriate case for this Court to reexamine \textit{Quill} and \textit{Bellas Hess}.

\textsuperscript{15} States that have addressed the economic sales and use tax through legislative or regulatory action include the following: Alabama, Indiana, Maine, Mississippi, North Dakota, Pennsylvania, South Dakota, Tennessee, Vermont, Washington and Wyoming.

\textsuperscript{16} South Dakota Senate Bill 106 (effective May 1, 2016).

\textsuperscript{17} The South Dakota Supreme Court issued its decision in South Dakota v. Wayfair, Inc. on Sept. 13, 2017, unanimously agreeing with a state circuit court decision.

\textsuperscript{18} The Dormant Commerce Clause recognizes congressional jurisdiction over interstate commerce. U.S. Constitution, Art. I § 8, cl.3. In \textit{Quill}, Justice Stevens noted that the Court’s “interpretation of the ‘negative’ or ‘dormant’ Commerce Clause has evolved substantially over the years, particularly as that Clause concerns limitations on state taxation powers.” \textit{Quill}, 504 US 298, 309.


\textsuperscript{20} Id.
states and merchants cannot keep track of who received their goods?” 21 “All of these questions are wrought with difficulties,” she noted. 22

Another spirited exchange occurred as Justices Kagan, Roberts and Breyer expressed concern that overturning Quill might be inappropriate when Congress had not chosen to act. Congress is well aware that the change in landscape has been significant. Justice Kagan declared it “a very prominent issue which Congress has been aware of for a very long time and has chosen not to do something about that.” 23 “Congress,” she noted, “is capable of crafting compromises and trying to figure out how to balance the wide range of interests involved here.” 24

“Congress … can craft a compromise in ways that we cannot.” 25

Justice Breyer continued the theme, noting that “Congress was about to act. And indeed, what stopped them from acting was our decision to decide this case.” 26 He suggested that the fifty states should have the power to get Congress to act. 27 Chief Justice Roberts wondered, though, whether the state sales tax issue was “a problem that has ‘peaked’.” If so, perhaps leaving Quill in place would be the best solution. 28

When Justice Kennedy asked what difference it made for the Court whether Quill was correctly or incorrectly decided, 29 George S. Isaacson, a lawyer representing Wayfair and other online merchants, argued the “value in settled expectations and standing by the decision.” 30 Isaacson relied on former Justice Scalia’s concurrence in Quill, in which he argued that stare decisis is most important where Congress can address an issue. 31 Isaacson concluded his response with a strong claim that “stare decisis is not dependent upon the correctness of the decision. In fact, if a decision is correct, (then) stare decisis isn’t necessary.” 32

The questions and responses in the oral argument may well influence the Justices in deciding the Wayfair case. These are dynamic issues in a still-changing field. Congress’s clear awareness of the changed technological situation, Congress’s potential ability to craft a compromise in a way that the Supreme Court cannot, and the oft disregarded but sometimes emphasized doctrine of stare decisis – all raise highly consequential issues.

If the Court does not act, it is not clear whether state actions, laws, and subsequent challenges will be sufficient to spur Congress to enact legislation, under the threat that states across the country may respond to judicial and congressional inaction by enacting their own laws subjecting remote sellers to collection

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21 Id. at 5.
22 Id.
23 Id. at 11 (statement of Kagan, J.).
24 Id. at 23.
25 Id. at 23 -24.
26 Id. at 13 (statement of Breyer, J.).
27 Id.
28 Id. at 17 (statement of Roberts, C.J.).
29 Id. at 43 (statement of Kennedy, J).
30 Id. at 43 (statement of Isaacson, arguing as Respondent).
31 Id. at 51.
32 Id. at 53.
obligations. Such inconsistent standards are a primary reason for a Commerce Clause solution, since they engender fragmentation in compliance and enforcement and leave states and online merchants with many uncertainties. Yet it is clear that little, if any, progress has been made in Congress in spite of mounting pressure on the states due to loss of revenues from remote sellers’ ability to avoid collecting state taxes. Only the Marketplace Fairness Act of 2013 has garnered a Senate floor vote. Failure of the Supreme Court to act thus likely would ensure a continuing uncertain future for sales and use tax nexus.

The Supreme Court has two choices. It may choose to overturn Quill, articulating a new nexus standard that covers online sales, or it may leave the current laws in place that exempt online merchants under the Quill precedent. Either way, Congress could develop its own solution to remote sales tax collection by overriding or affirming the Supreme Court.33 Perhaps the time is not yet ripe to write Quill’s epithet.

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33 This aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.

Quill, 504 US at 318.
PRO BONO MATTERS

The Taxpayer Bill of Rights: A Primer and Thoughts on Things to Come

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

“At their core, taxpayer rights are human rights.”
—Nina Olson, National Taxpayer Advocate

Background

In 2015, Congress enacted the Taxpayer Bill of Rights (TBOR) in section 7803(a)(3) (https://www.law.cornell.edu/uscode/text/26/7803) of the Internal Revenue Code to ensure that each and every taxpayer has fundamental rights in dealing with the Internal Revenue Service (IRS). The codification of these fundamental rights was an important accomplishment and reflects years of hard work and dedication by National Taxpayer Advocate Nina Olson.

Each of the ten rights enumerated in section 7803(a)(3) is listed below, with links to specific information provided on the IRS’s website on each right.

1. The right to be informed.
2. The right to quality services.
3. The right to pay no more than the correct amount of tax.
4. The right to challenge the position of the Internal Revenue Service and be heard.
5. The right to appeal a decision of the Internal Revenue Service in an independent forum.
6. The right to finality.
7. The right to privacy.
8. The right to confidentiality.
9. The right to retain representation.
10. The right to a fair and just tax system.

The Taxpayer Advocate Service (TAS) has also provided guidance as to what each right means for taxpayers. Additionally, the Internal Revenue Manual repeatedly instructs IRS employees to be familiar with and act in accord with the TBOR.
Application of the TBOR

The TBOR reflects an important development in the administration of the Code and the recognition of the level of service that the IRS must provide to taxpayers in the increasingly complex world of taxation. The TBOR is important for all taxpayers, ranging from low-income individuals to large multinational companies. But many questions remain for taxpayers and practitioners, perhaps most notably how the rights can be enforced and what remedies are available for a violation of the TBOR.¹

To date, courts have not interpreted section 7803(a)(3) or provided guidance as to what remedies, if any, are available for alleged violations of the TBOR. And, it is unclear in what forum taxpayers can challenge any alleged violations. However, it is only a matter of time.

An important development in this area involves pending litigation regarding Right 5, the right to appeal a decision of the Internal Revenue Service in an independent forum. In the litigation, the IRS denied the taxpayer’s request to pursue the IRS Appeals process because it determined that litigation of the case was in the interest of sound tax administration. The taxpayer filed a complaint in district court challenging this denial, relying in part on Right 5 and arguing that access to IRS Appeals is a mandatory right. In response, the government has argued that there is no statutory right to access to IRS Appeals because section 7803(a)(3) merely directs the IRS to ensure its employees are familiar with and comply with the TBOR.²

It will be interesting to see whether the district court decides this issue or finds another way to dispose of the case. Regardless of whether the court addresses the issue, this will not be the last word and one can expect that the Tax Court will be called upon at some point to address issues related to the interpretation and implementation of the TBOR. Depending on the outcome of judicial decisions, it is possible that Congress may be called upon to address the TBOR in more detail.

So, what does this all mean for taxpayers who believe that their rights have been violated? And how can practitioners effectively represent their clients in situations involved perceived violations? The answer is unclear at this point, but given the importance of the TBOR and the potential to use it as a sword against the IRS in appropriate situations it cannot be overlooked in trying to resolve disputes with the IRS. Possible approaches include elevating concerns beyond the revenue agent level, working with TAS, and making members of Congress aware of any issues that might be appropriate for legislative changes.

As noted above, only time will tell whether the TBOR will gain traction with the courts. An analogy could be made to the Administrative Procedures Act (“APA”) and its application to tax law. Although APA challenges were made over the years in tax cases, these challenges historically did not bear much fruit for taxpayers. That all changed when the Supreme Court stated in Mayo Found. for Medical Educ. & Research v. United States, 562 U.S. 44, 55 (2011), that “we are not inclined to carve out an approach to administrative review good for tax law only.” Since that statement, administrative law issues have figured prominently in several tax cases and certain practices of Treasury and the IRS in issuing published guidance have been questioned. Perhaps the same will happen with the TBOR. ■

¹ For example, Alice Abreu and Richard Greenstein of Temple University have suggested in their article “Embracing the TBOR (Taxpayer Bill of Rights)” that “the TBOR has the power to transform the tax practice and the relationship between taxpayers and the IRS.”
² For more background on this case, see Les Book’s post, Facebook Asserts that TBOR Mandates Right to Appeals (March 14, 2018).
PATHS IN TAX

A Conversation with Kathy Keneally

Kathy Keneally, a partner at Jones Day in New York, New York, is the former Assistant Attorney General, U.S. Department of Justice, Tax Division and a former Vice Chair of the Section of Taxation. She also chaired the Standards of Tax Practice and Civil and Criminal Penalties Committees of the Tax Section and served as a member of the Practitioners Advisory Committee to the U.S. Sentencing Commission. She’s a former Regent of ACTC and a Co-Chair of the National Institutes on Tax Controversy and Criminal Tax Fraud. This interview is derived from the Tax Bridge to Practice series “A Conversation with…” presented at the 2018 Midyear Meeting in San Diego, California.

Kelley C. Miller (KM): What led you to tax and law school? What was the process like? Did you have tax lawyers in your family?

Kathy Keneally (KK): The last thing in the world I wanted to do when I went to law school was be a tax lawyer. I wasn’t just, “Oh, wow, I never thought of tax.” When I was in my second year of law school, I gave a guided tour to incoming 1Ls and actually pointed to tax books in the library and said, “If they really want to punish you, they make you read those.”

To the younger lawyers who are starting out, the core message is that your career will take unexpected turns, and I urge you to be open to them. You’ll do some things and then another opportunity will come along and you’ll do something else.

In my case, I never really planned on being a tax lawyer. I actually thought I would go to law school to be a labor lawyer because my undergraduate degree is from the Cornell School of Industrial and Labor Relations. I thought I would grow up to be a labor lawyer because that’s my family background. I come from union people. My grandmother was a seamstress, and my grandfather was a cab driver.

So I started out thinking I’d do labor law generally, and that meant both the kind of negotiation work that people think of as central to labor law and the controversy work that inevitably happens in many labor issues. Somewhere along the line I realized that there are likely people in the world who can do both litigation and transactional work, but that probably isn’t me. For most people, there’s something at the core: you either wake up to the idea that you belong in the dispute arena or you find your fulfillment in problem solving. Somewhere along the line, I realized that I was fiercely in the litigation category—interested in controversy, disputes, the trial lawyer category of work. Labor law had too much negotiation and settlement
and resolution in it for me. I flirted briefly—I think for about a month or six weeks—with trying to be an antitrust lawyer, and that wasn’t working at all. So I became a general litigator with Skadden and then also started to do pro bono criminal cases. Then someone said to me, you know, you can actually do criminal defense work professionally.

So I went to the Kostelanetz firm because I understood it to be a white collar criminal defense boutique. It had a number of former prosecutors who were doing securities law defense and other things, but the core of the firm always was and remains tax defense and tax litigation. At some point, I realized that the same things that engaged me about criminal defense work—vindicating the rights of those who were caught up in the justice system—also applied when the work was vindicating the rights of taxpayers. I also recognized that the civil side of tax was as engaging as the criminal side of tax. Both have been a part of my practice ever since, though sometimes it’s nice to step away from the criminal side so that it is only about money as opposed to the high stakes in criminal defense.

That was my backward path to becoming a tax lawyer.

**K**

**M:** You were in private practice for about a decade before you went to do your LL.M. in Tax, is that right?

**K:** That’s right. I was probably in practice five or six years before I started in the program. I did the LL.M. at night. I did it as slow as was humanly possible. I took one course every semester and one course over the summer. It took me five years to get through the LL.M. program because I was working. And I wasn’t working as a transactional tax lawyer. So it was different.

Why the LL.M. program? One of my mentors at the time was Jules Ritholtz, when the firm was Kostelanetz & Ritholz. Jules was a force of nature who co-founded the Civil and Criminal Tax Penalties Committee. He was a force in the ABA Tax Section—just an amazing person and a difficult human being and a challenging person to have as a mentor. I was in a meeting one day with Jules listening to him give advice to a client, and I realized that I could practice for 50 years without being able to do what Jules was doing. I needed more substantive knowledge than I was going to get in day-to-day. The paths to that were to be a CPA, which was not in the cards at that stage, to get experience through government service, or to do an LL.M. degree. I was enjoying being in practice at Kostelanetz at the time, so I chose the LL.M. program as a way to become more familiar with substantive tax. There was that “spark” moment when I realized, “Okay, the people who are really succeeding did something more than what I’m doing and I need to do that something more.”

**K**

**M:** Was there some type of course work, were there certain classes in the LL.M. program that you were particularly drawn to or areas that you decided to focus on?

**K:** Not at all. In fact, in making this decision I didn’t think anyone cared whether I had an LL.M. or not. I was so uncertain of what I was ultimately going to do that I was even considering leaving the firm and doing civil rights work full time. I thought nobody knew this. I thought I was secretly having these conversations as I was trying to make a decision. When I went into Jules’ office to tell him that I wanted him to be a reference for me to apply for the LL.M. program, he thought I was coming in to tell him that I was leaving to go off and do this civil rights work, and he was ready to talk me out of it. I said, “Jules, I’m applying to the NYU LL.M. program.” He said, “We’ll pay for it.” That was something the firm had never done before in its history and something he just thought he had to put out there in order to convince me not to do this other thing. I found that out later, when I told Bob Fink (one of the other partners) that Jules had
agreed to pay for the LL.M. program. He was like, “Yeah, he thought he had to bribe you out of this other thing which you never wanted to do!”

I guess the moral of that tale is to play your cards carefully. But I’ve got to give credit to Bob and to Jules. They were very clear. “We don’t care if you get the degree. We don’t need you to have the credential. But it’s great to get the education.”

I went into the LL.M. program with that rare grace of being able to go to school and say “I’m here simply to learn what I think I need to know.” To me, as a controversy lawyer, that’s really important. I can be litigating a partnership issue today, and I can be litigating and talking about transfer pricing tomorrow. I can be dealing with OID the next day. There was no way I was ever going to become an expert in any of those areas, but it is extremely helpful to understand the concepts that underlie them, so that when I’m brought into a case, I can understand what is going on.

KM: It sounds like it was Jules and Bob who had the greatest impact on your career. Were there other people over the years?

KK: There’s no way that I’m going to mention Jules and Bob without also mentioning Boris and Jack. Boris Kostelanetz was the grand Dean of all of this. I mean, Boris was just legendary throughout and he was remarkable. It was a grace to be there while Boris was still engaged in the practice. Jules and Bob Fink I’ve already mentioned. Another is Jack Tigue, who eventually became one of the named partners at the firm of Kostelanetz Ritholz Tigue & Fink. Jack was also a great mentor. He was a CPA, but his practice was a bit broader and he brought me into a lot of other things. To this day there are times when I am in a meeting and I hear myself say something and realize that I sound just like Jack.

I’ll give you an example. The other day, I said something to an associate who works with me regularly more harshly than I would have intended. I actually said, “Oh, my God, I’ve become Jules.” And I apologized to him. “I never meant to do that.” And his answer back was, “Well, it made you tougher. I need to get tougher.”

The four of them were a remarkable influence. There wasn’t a day when I was working with them that I felt anything other than encouraged to be the best lawyer that I could be, even when they were critical or challenging or difficult.

I don’t think I can sit here and fail to acknowledge what it means to come up through this profession as a woman. I don’t think it ever occurred to my four mentors at Kostelanetz (and they never let it show that it occurred to them) that my being a woman meant I could do anything less than the guys could do. I experienced no sense of discrimination or limitation. To the contrary, I felt pushed out of whatever my comfort level was to move on by all four of them. And I find that remarkable because I have not found that to be true at other places. I found that to be a problem at other firms, and it came as a shock to me.

Because those guys were just like, “Here’s how you become a good and strong lawyer.” At the time I was quiet, soft-spoken. They were like “Yeah, get out of that. You know, push yourself out of that.” And so I’m incredibly grateful to them.
K: It's an incredible master class that you had.

KM: When I first got to the firm there were these cases that were predominant throughout New York at the time. The guy who was at the center of the case was a Hasidic rabbi and his son-in-law. For years in New York, this became known as a rabbi scheme, just because the biggest case that New York ever saw involved a rabbi. This rabbi and his son-in-law were selling fraudulent invoices. Basically, they would issue the invoice, you would pay the invoice by check, and you would get 80, 90 percent back in cash. That really works well from the tax evasion standpoint because you've got the deduction for cost of goods sold, the “goods” which you've paid for in connection with that invoice, and you've got cash that you've now pulled out of the business for whatever you want to use it for. The rabbis are just, you know, taking their 5 to 15 percent.

When I got to the firm, it was representing maybe a dozen of the companies that had bought these invoices. It was a classic hub and spokes conspiracy from a criminal standpoint. This was a remarkable experience for me. Kostelanetz had the largest concentration of these cases, so I got to meet all the other criminal defense lawyers in New York who were handling them because I became the repository of a lot of knowledge. We realized fairly early that there was a potential conflict and that each client needed to sign a conflict waiver to understand that the firm was representing other people involved in the investigation and that the clients would be informed. It was a waivable conflict and they needed to waive the conflict. So one of the very first things I did at the firm was draft that conflict letter.

There were three or four other partners at the firm, who also were good mentors at the time: Larry Feld, Peter Zimroth, Ed Dawes. Each of them had to send out this letter, so I watched each of them do something different with the letter.

Bob Fink sent the letter out the way I drafted it. To this day, I regret it had one typo in it. Bob just read the letter, said basically “good,” signed his name and sent it. God bless him for that. But he didn't catch the typo that everybody else caught. Jules edited the letter and to this day, I don't understand why he did it, but I had words like buyer/seller in it and he changed it to words like vendor/vendee, because that made sense to him. Jack made the letter very personal. Glad to have seen you at dinner last week, blah, blah, blah. Peter Zimroth, I will always remember, became very upset that we weren't sending out identical letters when he came in with his heavily edited version of the letter.

What I learned from that was there's no right way to do anything. You take from your mentors what you take from them, but there are equally valid ways to accomplish something. The letter worked no matter which iteration of it was used: the core paragraphs remained the same, the points made in the letter remained the same. But it was a remarkable insight into each of them, you know? It illustrated how the differences in their personalities indicated what each would expect from me. And I learned to proofread anything that I was giving to Bob more carefully.

It also showed me that I wasn't going to perfectly meet everybody's expectations because people bring what they bring to the practice. But they passionately loved what they did, so it was contagious.
K: I want to talk about when you left the firm and your decision to do other things. You’ve had an incredible career – a career that goes from private practice into the government and back to private practice. For many attorneys in their career, there will come a time when they consider those moves and whether it makes sense. Can you explain your thought process behind making these career moves?

KK: The question why I left Kostelanetz is one I don’t know that I can answer anymore. It was a long time ago, and a lot of factors played into it. They remain friends and colleagues and part of what I do every day.

I will say this, not as an answer to that question, but in that context. There is a point where you need to move past your mentors and sometimes that means you have to move away. I think you need to keep growing through your entire career. There’s never a point where you don’t need mentors, but there is a point where you have to believe in yourself enough to say “I can do this without you.”

I’m not sure that there’s a magical moment. Again, I’ll just credit Kostelanetz for this. There were enough times when—because it was a small firm and somebody had to cover something—I had done things on my own that I felt like “You guys didn’t see it because you weren’t there, because you were busy trying a case and I had to keep this one going. And I’ve done all these things.” You begin to realize you’re fine doing those things without somebody watching. You just need to find your own voice and move forward. It just begins to happen. As you start to become professionally known on your own, as people start to recognize who you are, as they start to bring you in instead of the people that you viewed as your mentors, you grow into it.

I think I’m going to think about that question for the rest of the day.

K: I want to talk about your time with the Department of Justice (DOJ) because it’s such an interesting role. I think many young lawyers and older lawyers look at the DOJ and look at the Tax Division as a place that they might want to spend time in a career. Can you talk about your decision to go to DOJ, your time there and what you feel were some of the best accomplishments of that time?

KK: Well, the decision to go there came because the opportunity presented itself. Quite literally, I was serving on the Tax Section council at that point, and Miriam Fisher, who is in D.C. at Latham and is just a phenomenal tax litigator, came up behind me. I had my laptop in front of me. I was trying to keep my bagel from falling on the laptop and Miriam whispers in my ear, “Do you want to be the AAG?” And I was like, “Can you do that?” The White House had actually called her and she, for personal reasons, could not. The third time they called her, they said, “Can you give us the name of someone like you?” That’s how it started. We all knew the vacancy was there, but I hadn’t thought about it. It just happened.

After I talked to Miriam, I called my husband to say, “She wants to put my name in.” He said, “Yeah, you have to do it, you know? I mean, you just need to do that.” Now, I’m a New Yorker. I live in New York. I never left the city. I took the 6:00 a.m., the Acela, down every Monday morning—the high speed train from New York to Washington. And the 6:00 p.m. train back every Friday night. I am remarkably grateful to my husband that he was patient through all of that.

It was an extraordinary experience. I’ve never worked with more dedicated, mission-oriented, and talented people than those at the DOJ Tax Division. I have unending respect for everybody there, from the secretaries to the deputies and especially for the frontline litigating attorneys there. It was an absolute privilege to work with that group of people, and I know that everybody who’s been in and out of Chief Counsel’s office and in the various offices will feel the same. The Service has just got so many dedicated, mission oriented people in it.
One of the questions that you had sent me in advance was whether I would do anything differently if given the chance. I don’t know that I would do my career differently because I like everything that happened. The experience of government service is extraordinary and nothing matches it. You can get all the LL.M.s in the world, but the hands-on will teach you so much more in that context.

KM: To go from being a practicing attorney, working cases and then overseeing a huge staff there, what was that like?

KK: It was mindboggling. I mean, in my case, you take somebody who was never in government service at all and then you put them in charge. And, you know, you’ve got to go into something like that with a degree of humility. I was incredibly fortunate. Now Judge Tamara Ashford was there when I got there. She had extraordinary experience in and out of the IRS. Ron Cimino was the Deputy for Criminal at the time. I knew Ron from before and Ron’s breadth of experience and patience was tremendous. It’s similar to the question you asked before. You spend some amount of time absorbing what they’re telling you and what they know and then at a certain point you realize you have to stand on your own feet and say, okay, but I’ve got the title, I’ve got the responsibility, and I will make the judgment call.

You know, another story just popped into my head. The AAG’s office has a very large conference room that connects to it. I was there for about two weeks and there had been this series of meetings going on in the conference room. This was effectively my conference room and people were meeting in it. So I asked what they were doing in my conference room. The issue was identity theft. I knew nothing about identity theft at the time. We had a briefing with all of the people at the Service and the Division who were working on the issue, at the end of which I realized that this is a huge problem that somebody has to do something about. And then I realize “Oh, right, that’s my job now.” So, yes, there was a learning curve, but eventually, I found my way. Eventually we changed some of the Division’s policies so that we could prosecute cases faster because that’s what the local U.S. Attorneys’ Offices needed. We created more information flow between the Division and the Service so the Service could improve its systems based on what the Division was learning through the prosecutions.

We came up with the acronym “SIRF” (Stolen Identity Refund Fraud). We created a group within the Division to handle all of this. Rather than call themselves a task force, they decided they were going to call themselves the Stolen Identity Refund Fraud Advisory Board, for which the acronym was “SIRF Board.” At one point when they had won an award, the award was given by the Attorney General in his office with the department photographer present. After the first official picture was taken, I said, “You know, these guys are the SIRF Board.” And there is a photograph. I’ve got a copy of it in my office. Eric Holder dropped down into a surf pose and said, “No, I mean it, guys.” And everybody else dropped down into the pose and the photographer took that picture.

So, that’s what it means to work for the Department of Justice—at least in the Holder years.

KM: After you left the DOJ, you went back into private practice. How do you see the practice, going forward? With tax reform encompassing so much of our lives for the last six weeks, are there trends, types of cases or areas in particular that you think will continue to be hot areas? I’m just curious about your thoughts on that.

KK: Well, in terms of enforcement, I think you can see where the Service has been heading, which goes hand-in-hand with the international impacts of the new statute. Certainly while I was at DOJ, we saw not only the use of bank accounts outside the United States to evade U.S. taxes, but also the use of
structures to keep money outside the United States on the extreme end where there was criminal intent. I think enforcement will be unrelenting in that area. The Offshore Voluntary Disclosure Program has brought in so much information that is going to go on for a long time.

On the criminal enforcement side, you need to look at where the money goes. When we were looking at the issues with the Swiss Banks, that was the question we were always asking. We knew the money had, to some degree, left Switzerland and certainly had left the Swiss banks that had U.S. presence. And now crypto currency is adding a whole new layer of complexity. I think some of the money will go into things where the money has always gone—into real estate and art and jewelry and things that you can move in this world as easily as you can move currency—or maybe more easily.

Then you move into what has been a focus of the Service for a very long time, which is high-wealth individuals. For a long time that has meant looking at not just people who have money, but people who have a global footprint, which overlaps with international initiatives. When the Service originally announced this program, they used a word that was mindboggling to hear from the IRS: the word was “holistic.” The Service is taking a holistic approach to looking at taxpayers. They look at, for example, the LLCs and the partnerships and the whole picture for the taxpayer and particularly taxpayers with a global footprint and what’s going on there in terms of whether it makes sense in the flow of money. You go from there to the fact that we’ve got new partnership audit rules now, which is what the Service wanted. Presumably they’re going to use them to make it easier than TEFRA. They’ve got this nice shiny useful toy. So you would think that there would be enforcement there. And then international has been part of the focus for a very long time. I mean, to some degree the “I” part of LB&I has swamped the other parts for some time so I would think you’re going to see international enforcement.

But it’s going take some time until you see the enforcement under this statute. There are a lot of questions about what the statute means, and the parts of the statute that have gotten all the press, obviously, are the things that affect individuals because that’s what the media focuses on. But the core of this Tax Act is international tax reform. We have a complete paradigm shift in how we are thinking about taxation of multinational companies. We’ve become territorial instead of global, which is a remarkable change. And there’s a lot of complexity in this law. I know that they talked about the statute going through very quickly, but a lot of this has been out there in theory and people have been looking at it for a long time. Nevertheless, there are anomalies. There are places where the statute could have been written more clearly. There are places where the statute is inconsistent with what was already in the Code. I mean, everybody’s going to look and there’s nothing wrong with following the law to your tax advantage, but everyone’s going to be looking at that tax advantage. The Service is going to need to come behind that and figure out where it wasn’t just to the advantage. So I think that’s where you’re going to see most of it.

There’s a lot of work to be done in the coming years. And that’s an understatement. And for this, it is essential for this country that the Service receive more resources.

K: It’s a good question to end on because I do want to ask you one more thing. With all of the opportunity that could be created for tax lawyers, with all of these ramifications of federal tax reform, what advice would you have? What is your best advice for somebody new to practice to be the best practitioner that they can be?

K: Enthusiasm. If you’re not enjoying what you’re doing, you’ve at least got a law degree, you’ve got some resources available to you. Figure out something else to do. This brings me back to the beginning, right? I mean, I figured out even before I got out of law school that labor law wasn’t going to work for me.
I figured that out as a summer associate. I figured out fairly quickly that antitrust wasn’t going to work for me. I never expected tax would. If tax is what intellectually interests you, there are a lot of different ways to be a tax lawyer. Do what brings you pleasure. You spend so much of your life involved in your work, you will be better at what you do if you are fundamentally enjoying what you’re doing.

K: Well, I just want to thank you. I know for me, personally, you have always been someone I have looked up to since my earliest involvement in the Section many years ago and with incredibly good reason. I think you’re a gift to all of us, especially to women in the Section. You’ve been an incredible role model in always being open to answer questions and helpful to anyone who comes up to you. I know that for myself as well as others who have sought your advice. And so I just want to thank you so much again for sitting down for this hour to speak with us.

K: Thank you. The thought I want to leave with is this. I probably was very soft-spoken when I was younger. I needed to be pushed; I needed a lot of things. From my vantage point now, I can assure you that a lot is attainable and that you should never sell yourself short. The tax bar is an extremely welcoming place to anyone who seeks it out. The tax law provides new and interesting challenges all the time. With the new law, this is the perfect time for young tax lawyers to make a mark. Just go for it.
YOUNG LAWYERS CORNER

The BEAT and Bilateral Tax Treaties: Where Might the Tension Lead?

By Troy Ware, Associate, KPMG LLP M&A Tax, New York, NY

In response to a senator’s fall 2017 question regarding whether the Joint Committee on Taxation (JCT) included “somebody on staff that is an expert on treaties to make sure we are not violating any of the treaties”, JCT Chief of Staff Tom Barthold acknowledged the importance of tax treaty expertise to the legislation’s drafting. He then spoke about the actual concern he perceived:

I believe in particular you were talking about the proposed base erosion anti-abuse provision of the chairman’s mark. ... [...] It is structured as an alternative tax. ... I think our view is that there is not a treaty override.2

Since the enactment of the 2017 tax reform legislation and passage of a new section 59A, the base erosion and anti-avoidance tax (BEAT) provision, commentators have differed on whether the BEAT runs afoul of U.S. bilateral tax treaties, more specifically the non-discrimination articles of those treaties.3 A treaty’s non-discrimination provision treats nationals of one country that is party to a tax treaty the same as nationals of the source country that is party to a tax treaty if both sets of nationals are in the same circumstances.4 In light of the differing views, it may be helpful to consider the BEAT’s operative mechanism, non-discrimination arguments that may arise, as well as practical outcomes regarding the future of U.S. bilateral tax treaties.

The BEAT Explained

The BEAT defends against domestic base erosion by addressing applicable taxpayers’ cross-border, deductible payments to related parties.5 To do so, BEAT imposes a tax called the “base erosion minimum tax amount”. Arriving at the base erosion minimum tax amount requires two computations: ten percent of modified taxable income and regular tax liability. To the extent modified taxable income exceeds regular tax liability, the difference represents the base erosion minimum tax amount.

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1 The views expressed herein are those of the author and do not necessarily reflect the views of KPMG LLP.
4 Carlo Garbarino, Judicial Interpretation of Tax Treaties 500 (2016).
5 S. Comm. on Finance, supra n. 1, at 20-21.
The first computation is to determine ten percent of modified taxable income. In broad terms, modified taxable income is taxable income taking into account neither deductions linked to base erosion payments to a foreign related party nor the base erosion percentage of any section 172 net operating loss deduction. The base erosion percentage consists of aggregate base erosion tax benefits, deductions based on payments to related foreign payees which the statute targets, divided by the sum of all deductions with some reductions. The second computation is section 26(b) regular tax liability decreased by most credits. The computation does not reduce regular tax liability by the section 38 research credit and applies a reduction for only a portion of other section 38 credits.

The base erosion tax amount resulting from the above steps only applies to applicable taxpayers. Applicable taxpayers include corporations (excluding regulated investment companies, real estate investment trusts, and S corporations) that have at least $500 million average annual gross receipts in the preceding three-taxable-year period and that possess a base erosion percentage of three percent or higher. Of note, the applicable taxpayer definition does not distinguish between foreign or domestic taxpayers. The base erosion payment definition hinges on a related payee being a foreign person, a distinction that underlies tax treaty non-discrimination concerns.

Nondiscrimination, Courts, and U.S. Bilateral Tax Treaties Going Forward

The text of Article 24, the non-discrimination article, in the 2016 U.S. Model Income Tax Convention and U.S. bilateral tax treaties appears sweeping relative to other treaty provisions. For instance, while a majority of provisions in U.S. treaties apply to treaty party residents and income taxes, Article 24 extends coverage to non-income taxes and offers protections to signatory country nationals in paragraph 1. Article 24 offers four protected areas for classes in the same circumstances as domestic nationals: signatory country nationals, permanent establishments operated by a signatory country enterprises, corporations owned or partially owned by signatory country residents, and deductions on amounts paid to a payee signatory country resident. For practical purposes, the “same circumstances” requirement and a narrow nationality construction take the teeth out of the four protections imposing hurdles for discrimination arguments.

In bringing a deficiency or refund action in U.S. courts for the BEAT, a taxpayer would likely base the action on either capital ownership under Article 24(3), or deductibility under Article 24(4). Several commentators raising discrimination concerns focus on the BEAT’s limitation on deductions. The concerns derive from the view that section 59A potentially strips Article 24(4) protections against discrimination from the allowance of deductions.

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6 I.R.C. § 59A.
of deductions.10 Paragraph 4 includes a commitment to impartially allow for deductions whether the connected payment goes to a domestic or foreign payee.

[Amounts] paid by an enterprise of a [State A] to a resident of the other [State B] shall, for the purpose of determining taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned [State A].11

In particular, the words “as if they had been paid to a resident of the first-mention [State A]” gives the appearance amounts paid to related foreign payees under the BEAT would not be deducted under “the same conditions”12 as if they had been made to a U.S. payee and accordingly would violate U.S. treaties. As a counter, others argue the law’s application to companies with U.S. parents or the authority to make profit adjustments to payments between related entities under Article 9 prevails over any nondiscrimination claim.13 This second defense of BEAT refers to the power under Article 9 to allocate profits among a related enterprise’s profit centers to reach an arms-length result: the argument is that this allocation does not require a facts and circumstances analysis.14

Although Article 24(4) seems straightforward in impartially protecting deductions, commentators note that U.S. courts interpreting tax treaties often “unmoor” themselves from a plain meaning approach and adopt a pragmatic one.15 As a first step, a court generally rules under “the last in time rule” in favor of whichever authority was enacted last, the statute or the treaty. Even so, interpretive rules and past case law suggest that courts attempt to construe authorities to avoid conflict unless Congress expresses a clear intent for one to override the other.16 Furthermore, in a nondiscrimination case courts generally interpret the “same circumstances” hurdle to apply to the taxpayer. Cases suggest that courts consider carefully “on what basis should comparison be made.”17 Additionally, courts examine the facts and the challenged domestic tax provision’s text to inquire whether the result targets nationality or instead addresses a broader but defined foreign party category.

Published opinions do not address Article 24(4), but three opinions on Article 24(3) provide a potential guide to a deduction discrimination argument. In American Air Liquide, a U.S. corporate taxpayer receiving royalty income from a controlled foreign corporation (CFC) argued that it was in the same circumstances as

11 U.S. Model, supra note 7, at art. 24(4).
12 2006 U.S. Model Technical Explanation, art. 24, Nov. 15, 2006 (the “same conditions” and “same circumstances” have the same premise treating different treatment based on tax-related differences as not discriminatory).
13 Wells, supra note 3.
14 Id.
16 Id. at 1443-44, n. 337.
a U.S. subsidiary receiving royalties from a foreign parent.18 The Tax Court, citing tax-relevant differences in circumstances under Subpart F and sections 951 - 964, rejected that argument. In UnionBanCal Corp., the Ninth Circuit Court of Appeals ruled that denial of a loss on a loan portfolio sale by a former U.S. member of a controlled group to a British group member did not subject the former U.S. member to a more burdensome tax than a U.S. subsidiary.19 Examining the temporary regulation’s operation, the Court found that the outcome remained the same whether the parent was an American or British corporation. Square D Co., a Seventh Circuit case, cited the taxpayer’s failure to identify a “burden . . . directed at nationality” as rationale for upholding an IRS position disallowing interest deductions in the year accrued.20 In that case, a regulation required use of the cash method of accounting for all interest payments to foreign related parties.

The arguments and the case law create uncertainty. Even if court challenges do not occur or go against the taxpayer as the prior decisions suggest, possible treaty partner responses could vary. Two key concerns held by treaty partners include reaching a deal and commitment to the deal.21 The BEAT brings the latter concern into focus. Options could include renegotiation, commitment to memoranda of understanding addressing when the treaty or the new law applies, or enforcement restraint by the IRS in certain instances.22 There is historical precedent for renegotiation: several renegotiations with treaty partners followed the 1986 Tax Reform Act.23 By contrast, renegotiations seem less likely today given the U.S. Senate’s failure to ratify any tax treaties since 2011. On the other hand, many countries continue to negotiate with the U.S. on tax treaties despite the Senate impasse. If negotiations did occur, the BEAT could potentially serve as leverage in support of other U.S. negotiating positions. In past testimony, Treasury officials explained to Congress that U.S. negotiators agreed to eliminate withholding taxes on intercompany dividends in exchange for other countries accepting limitation on benefit provisions.24 Still, some treaty partners may see the BEAT as a lack of good faith or commitment by the United States. Regardless of the exact outcome, if the past provides a guide to the present the tension between the BEAT and tax treaties will likely invite more uncertainty as treaty partners negotiate taxing rights with the U.S. ■

19 UnionBanCal Corp., v. Comm’r, 305 F.3d 976 (9th Cir. 2002).
20 Square D Co. v. Comm’r, 438 F.3d 739 (7th Cir. 2006).
Kicking the Can Down the Road

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

(To the tune of “Raindrops Keep Falling on My Head,” by Burt Bacharach and Hal David, from the 1969 movie, “Butch Cassidy and the Sundance Kid.” ¹)

Kickin’ the can on down the road
When responsibility becomes a heavy load
Congress won’t decide.
They kick that ole can again a little bit further.

Because to make a decision takes a stand.
And taking a stand in an election year is banned.
Campaign suicide.
They just kick that ole can again a little bit further.

But they must surely know.
They’re putting on a show there.
And we know here -
A country kickin’ cans is heading nowhere.

Because kickin’ the can on down the road.
Is just like the hopping of a narrow-minded toad.
Feeling satisfied.
But toads never make it to the end of a long road.
Your feet are free.
Kick ‘em out of D.C.

¹ https://www.youtube.com/watch?v=bhaXFUvBSsl.
SECTION NEWS & ANNOUNCEMENTS

2018 Distinguished Service Award Recipient: Susan P. Serota

By Richard M. Lipton, Baker McKenzie, Chicago, IL, and Armando Gomez, Skadden, Arps, Slate, Meagher & Flom LLP, Washington, DC

The Distinguished Service Award is the highest honor awarded by the Section of Taxation of the American Bar Association. The award is reserved for individuals who have had a distinguished career in taxation and who have provided an aspirational standard for all tax lawyers to emulate. The 2018 recipient of this award—Susan P. Serota—is a trailblazer who has been a leader in her law firm, in the field of employee benefits, and in the organized bar.

Chicago Upbringing

Susan was born in Chicago, Illinois. Her father was a partner at a Chicago law firm and practiced until he was 89. Her mother was a social worker and managed to raise Susan and her older brother, Harry Perlstadt, until she died when Susan was 13. Her father remarried a pediatric cardiologist who instilled in Susan a desire for a professional career.

Susan’s hometown explains some of her passions. She was, is, and always will be a Cubs fan, notwithstanding that she has lived in the shadow of Yankee Stadium for years. And she is a true fan of Chicago hot dogs and the Art Institute of Chicago. Indeed, when she recently visited some old friends in Northern California and was near a stand where they sold Chicago-style hot dogs, Susan had to stop and “feed her passion.”

Susan met her husband, Jamie, who is also a lawyer, in 1971 at the Illinois bar review course. They were married in 1972 and have two sons, Daniel and Jonathan. They travel internationally and enjoy spending time in Bermuda, where they have a second home. Recently, they have spent winters in Santa Monica near their younger son. They have three granddaughters, and Susan is anxiously awaiting the birth of her first grandson, who is due in September.

Susan graduated from the University of Michigan, where she earned a degree in history and served as the business manager of the student newspaper, the Michigan Daily. (She remains a loyal fan of the Maize and Blue football team, with a passion rivaled only by her love for the Cubs.) She went on to the New York University School of Law, graduating in 1971. After law school, Susan practiced in Chicago for a year with Gottlieb & Schwartz before moving to Washington, D.C., where she practiced for three years with Silverstein & Mullins, a tax boutique firm, while her husband worked for the Department of Justice. Susan moved with Jamie to New York in 1975 to join Cahill, Gordon & Reindel, spending time in their Washington and New...
York offices between 1975 and 1982. She then joined the New York firm of Winthrop, Stimson, Putnam & Roberts in 1982 to head up their employee benefits practice. She has stayed at Winthrop ever since, although the firm eventually merged with other firms to become Pillsbury Winthrop Shaw Pittman LLP. She headed the executive compensation and benefits practice at Winthrop and Pillsbury for over 35 years.

A Leader in the Law

In 1972, Susan started to work in the tax/pensions law practice of Silverstein & Mullins. She went into the employee benefits field willingly because her father also practiced in that area. Of course, timing is everything—ERISA was enacted when the number of women lawyers was on the rise—and Susan was one of the first to be known as an ERISA attorney, and she has focused on pensions, executive compensation and employee benefits throughout her career.

Susan is extremely well known in the employee benefits world. She has authored a treatise on ERISA fiduciary law and has written numerous articles and spoken around the world on U.S. employee benefits law. She served as a member of the IRS Advisory Commission on TE/GE from 2008 to 2011. She is a charter member of the American College of Employee Benefits Counsel and was its president from 2004-2005. Susan served as a Regent of the American College of Tax Counsel from 2000 through 2005. In addition, she serves as an officer and director of the American Tax Policy Institute. She is the founder and past chair of the International Pension and Employee Benefits Lawyers Association. She was appointed by the Treasury Department to serve as a delegate to the National Summit on Retirement Savings in 1998 and 2002.

Susan also has served on numerous boards, including the board for Tax Management, Inc. since 1986, and the NYU School of Law Center for Labor and Employment Law since 1999. She was on the board of Legal Momentum (formerly known as the NOW Legal Defense and Education Fund)—the oldest legal advocacy group for women in the United States, which is dedicated to the advancement of women's rights—from 2002 to 2014. She also served as a member of the ALI/ABA Employee Benefits Advisory Panel.

Service to the Profession

Susan joined the ABA Tax Section in 1978, when she attended her first meeting and joined the Employee Benefits Committee, one of the Section’s largest and most active committees. In 1988 she chaired the Joint Committee on Employee Benefits. She then chaired the Employee Benefits Committee from 1992 to 1993. From there, Susan was elected to serve as a Council Director in 1994 and as Vice-Chair, Professional Services from 1999 to 2001. She served as the second female Chair of the Section from 2006 to 2007. Susan continued her deep commitment to the Section by then serving as one of the Section’s two delegates (and first female delegate) to the ABA House of Delegates from 2011 to 2015. In this role, she helped present the Section’s position on several issues confronting the ABA.

During her term as Chair of the Section, Susan focused on growth of the Section, working to bring younger lawyers into the Section and expanding the Section’s efforts to recruit and retain diverse lawyers into the Section’s membership. With Susan’s leadership, the Section’s mission statement was updated to read as follows: “The mission of the ABA Section of Taxation is to lead and serve our members, the legal profession and the public to achieve an equitable and efficient tax system.” Although the wording has been revised in recent years, the essence remains the same. With the hard work and perseverance of the leaders of tomorrow—many of whom joined the Section when Susan was Chair—the aspirations that Susan pursued as Chair might finally become reality, just like the World Series that Susan’s beloved Cubs finally won two years ago.

Published in *ABA Tax Times*, May 2018. © 2018 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association. ISSN 2381-5868.
Susan also used her legal expertise to assist the ABA. She was a member of the American Bar Retirement Association board from 1994 to 2004, serving as President in 1999-2000. She also has served as outside counsel to the ABA’s own pension committee, which administers the pension plan for the employees of the ABA and its affiliated entities. In this role, she assists that committee in assuring that it is in fiduciary compliance.

Susan has made many contributions to the ABA and the Tax Section, but perhaps her greatest contributions have been as a role model and mentor for younger lawyers. One lawyer who worked with her expressed his gratitude for how she both educated him and worked with him. Another lawyer commented that Susan has a big brain and an even bigger heart. Susan is always quick with a smile and a laugh, and she can discuss serious topics in a manner which is both disarming and insightful. Most importantly, as those who have dealt with her can aver, she almost never loses an argument because of her ability to combine reasoning with the human touch.
SECTION NEWS & ANNOUNCEMENTS

2018–2020 Christine A. Brunswick Public Service Fellows

The Section of Taxation is pleased to announce the 2018-2020 Christine A. Brunswick Public Service Fellowship class.

Anastassia Kolosova will be working with the Accounting Aid Society, in Detroit, Michigan, to conduct outreach and education activities for specific vulnerable populations in Detroit and expand the organization’s ability to provide legal representation to low-income taxpayers.

Omeed Firouzi will be working with Philadelphia Legal Assistance to provide education and legal assistance to workers misclassified as independent contractors and conduct advocacy and awareness efforts to decrease the practice among employers in Philadelphia.

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

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

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

Government Submissions Boxscore

Government submissions are a key component of the Section’s government relations activities. 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

Free Webinar Recording
New Federal Tax Cuts and Jobs Act: Increasing U.S. Income and Wealth Inequality

The ABA Section of Civil Rights and Social Justice, Section of Taxation, and Section of State and Local Government Law recently held a webinar entitled “New Federal Tax Cuts and Jobs Act: Increasing U.S. Income and Wealth Inequality.” A video recording of the webinar is available to watch here. You will be prompted to enter your full name and e-mail address when accessing the recording. This information will not be shared with any other group or entity. Also available are the PowerPoint presentations from Alex Thornton, Dean Baker, and Francine Lipman.

Free Webinar Recording
Nuts & Bolts Collections Workshop: A Guide to Assisting Pro Bono Clients with Collection Matters

On Wednesday, March 7, 2018, the ABA Section of Section of Taxation hosted a free CLE webinar designed as a practical training for pro bono attorneys with minimal experience representing low-income taxpayers in collection cases. An audio recording of the webinar, and its materials, are available free here. ABA and Section of Taxation members who wish to receive CLE credit may access the On-Demand CLE webinar here.

TaxIQ: 2018 May Meeting Materials Available

Original materials from the 2018 May Meeting are now available on TaxIQ. TaxIQ offers online access to the latest committee program materials presented at Tax Section Meetings. Using either our static, Section-hosted website—TaxIQ—or a searchable database powered by Westlaw, access is only a few clicks away. Access to these databases are an exclusive benefit of membership in the Section of Taxation. Click here to access the Westlaw and TaxIQ databases. You will be prompted to log into the websites, so please have your ABA-associated email address and password handy.

Update Your Tax Law Library with the Tax Section’s Bestselling Publications

Ready to update your tax law library? View our catalog of Section of Taxation titles designed for practitioners and tax professionals alike. Some of our newest titles include:

- Effectively Representing Your Client Before the IRS, 7th Edition
- The Supreme Court’s Federal Tax Jurisprudence, Second Edition
The Tax Lawyer – Spring 2018 Issue Coming Soon

Coming Soon: The Spring 2018 issue of The Tax Lawyer, the nation's premier, peer-reviewed tax law journal. The Tax Lawyer is published quarterly as a service to members of the Tax Section. Click here to read the abstracts from the forthcoming issue.

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Fred B. Brown, Proposing a Single, Simpler Test for Cash Equivalency (Abstract)

Philip G. Cohen, The Fact of the Liability Requirement in the All Events Test - Flying Lessons over the Dark Clouds of General Dynamics from a Giant Eagle (Abstract)

Bruce A. McGovern & Cassady V. (“Cass”) Brewer, Recent Developments in Federal Income Taxation: The Year 2017 (Abstract)

Eric A. San Juan, The Distributive State and the Logic of Tax Expenditures (Abstract)

Audio Editions of The Tax Lawyer Available from ModioLegal

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The Practical Tax Lawyer – 2017 Tax Act Articles 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 practice. The Winter and Spring 2018 issues feature a number of articles on the 2017 Tax Act, the following of which are available for download without a subscription.

Greta Cowart and M. J. Asensio, A Practical Look at Tax Reform’s Radical New Game Plan for Compensation in Tax Exempt Organizations

Jordan D. August, Business Interest Deduction Limitation: The New Code Section 163(j)

Jerald David August, Tax Cuts and Jobs Act of 2017 Introduces Major Reforms to the International Taxation of U.S. Corporations

Robert S. Schwartz, Some TCJA Provisions Impacting “Pass-Through” Trades and Businesses (with Illustrative Examples)

For more information, visit PTL's webpage: https://www.ali-cle.org/index.cfm?fuseaction=publications.periodical&pub=PTL.
Get Involved in ATT

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

## Section CLE Calendar

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

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ABA Section of Taxation CLE Products

Listen at your convenience to high-quality tax law CLE on a variety of topics. ABA CLE downloads are generally accepted in the following MCLE jurisdictions: AK, AR, CA, CO, GA, HI, IL, MO, MT, NV, NM, NY, ND, OR, TX, UT, VT, WV. Recordings and course materials from the following recent Tax Section webinars and more are available at www.shopABA.org.

Nuts & Bolts Collections Workshop: A Guide to Assisting Pro Bono Clients with Collection Matters

Tax Reform and Implications for Financial Transactions

C Corporation or Pass Through? Analyzing the Decision in the Wake of the 2017 Tax Act

Keepin' It Real: Limitations on 1031 Exchanges Under the New Tax Act


Changes to S Corporation, Partnership and LLC Taxation under the Tax Cuts and Jobs Act

Captives and Pooling After Avrahami


Cloud Computing: Current Sales Tax Issues

Dawn of a New Era – the New Partnership Audit Rules Will Soon Be Upon Us

The Ethical Duty of Technology Competence

The Nuts and Bolts of Consolidated Return Regulations

Common Cross-Border Issues in M&A and Tax Planning

Breaking Bad - Dealing with the Partnership Audit Rules and Partnership Agreement Drafting Considerations

Ethical Issues Under a Changing Legal Environment

“Destroying” the Johnson Amendment and the Future of 501(c)(3) Politicking

LB&I Compliance Campaign: 48C Energy Credit and CCM Accounting for Land Developers

The New Markets Tax Credit: Providing Economic Stimulus to Low-Income Communities
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- 25% come from firms of over 100 attorneys
- 23% come from firms of 1-20 attorneys

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For additional information on the above conferences or any of our other conferences, please visit http://www.americanbar.org/groups/taxation/sponsorship.html or contact our Sponsorship Team at taxmem@americanbar.org or at 202/662-8680.
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