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FROM THE CHAIR

A Successful Fall Tax Meeting, Continuing Opportunities

By Thomas J. Callahan, Thompson Hine LLP, Cleveland, OH

The Tax Section’s (Section) Fall Tax Meeting with members of the Real Property, Trust and Estate Law Section (RPTE) was held in San Francisco in October with over 1,000 members in attendance. We appreciate our continued collaboration with RPTE during the Fall meeting. It is always interesting to have a number of programs jointly sponsored by members of RPTE and the Section. We look forward to continuing to work with our friends in RPTE as co-sponsors of the Fall program.

The 2017 tax legislation (TCJA) continues to provide important topics to be addressed by our committees. The panel presentations covered a number of domestic and international topics dealing with the TCJA, and those panels were thought-provoking and well done. In addition to best-in-class CLE programming, we were fortunate to have Martin A. Sullivan, Chief Economist and Contributing Editor of Tax Notes, deliver the luncheon address at the Plenary Session. Marty’s comments touched on a number of unique issues affecting the world economy. These issues include the expanding use of tariffs in connection with trade disputes, the impact of tariffs on supply chains, the use of negative interest rates by central banks to discourage the inflow of capital, and the impact of deficits on the economy.

Diversity & Inclusion

The Section continues to support diversity and inclusion. At the Council meeting on October 3rd, Council passed the Diversity & Inclusion (“D&I”) Scholarship. The D&I scholarship will provide the following benefits to two recipients at each Section meeting:

- Waiver of registration fees.
- Reimbursement of hotel room charges (and applicable taxes) for up to three nights at the host hotel.
- Reimbursement of air travel pursuant to the Section’s applicable zone-rate reimbursement schedule.

The D&I scholarship is available to diverse practitioners, and to practitioners with a demonstrated commitment to promoting diversity within the Section. Upon submitting a completed D&I application, a selection committee led by Chair-Elect, Joan Arnold, will select the candidates to be awarded the D&I scholarship. Although priority will be given to first-time applicants, previous recipients will be considered as well. For more information regarding the D&I scholarship, please consult the Section’s website here.
Pro Bono and Public Service

This Section’s commitment to Pro Bono is outstanding, and I want to thank Sheri Dillon, our Vice Chair for Pro Bono and Outreach, for her able leadership in this area. As another year comes to a close, it’s important to highlight some of our marquis programs that continue to need your support. Early next year, the military VITA/Adopt-A-Base program begins a new cycle. The program currently serves 39 military installations for which the Section needs volunteers to train instructors regarding the tax law and tax return preparation. In addition, the Section has agreed to participate in a pilot program where our members will prepare tax returns for members of the military. Having participated in this program, I can attest to worthwhile benefits. Similarly, the VITA program provides an opportunity for Section members to prepare tax returns for low-income taxpayers. As tax filing season approaches, I invite you to volunteer for one of these pro bono opportunities.

In another advancement of our pro bono commitment, Council agreed to a one-time $5,000 contribution to support the newly-created Center for Taxpayer Rights (Center). Nina Olson, the former National Taxpayer Advocate, has founded the Center to (i) organize the 5th International Conference on Taxpayer Rights and (ii) establish a Low-Income Taxpayer Clinic (LITC) support center. We appreciate Nina’s dedication to supporting taxpayer rights and LITCs, and we wish Nina continued success with the Center. Council also agreed to the continuing appointment of the Vice Chair Pro Bono and Outreach to the Center’s Advisory Board.

The 2019-2021 class of Brunswick Fellows began their positions during the first week of September. Andre Robinson is working with the Southeast Louisiana Legal Services in Hammond, Louisiana, and Evan Phoenix is working with Bet Tzedek Legal Services in Los Angeles, California. Our continuing Brunswick Fellow is Omeed Firouzi who is working at Philadelphia Legal Assistance in Philadelphia, Pennsylvania.

Publications

I am pleased to report that our collaboration with the Northwestern University Tax LL.M. program regarding publication of The Tax Lawyer is running smoothly. Under the leadership of T. Keith Fogg, Vice Chair of Publications, the Section and Northwestern are working well together to publish The Tax Lawyer on a timely basis. I encourage readers to consider submitting an article for publication in either The Tax Lawyer or the ABA Tax Times. The editors are always looking for worthwhile content for both publications.

Government Submissions

Section membership continues to be busy drafting and submitting comments to Treasury and the IRS. Recently, the Section has submitted comments on the proposed PFIC regulations, and the temporary and proposed regulations under Code sections 245A, 951A and 958. The Treasury and IRS welcome the Section’s comments, and they carefully consider our comments when drafting guidance. I encourage you to volunteer for a current comment project as part of the Section’s on-going contribution to the tax system.

Boca Raton

The Section’s Midyear Tax Meeting will be held at the Boca Raton Resort, Boca Raton, Florida, on January 30-February 1, 2020. Michael J. Desmond, IRS Chief Counsel, has agreed to address the Section Luncheon and Plenary Session on Saturday, February 1, 2020. Registration is already open, so please join us then for stimulating committee and plenary sessions.
PEOPLE IN TAX

Interview with Guinevere M. Moore

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

Editor’s Note: Guinevere (Gwen) Moore is a founding partner in Johnson Moore in Chicago IL. She is a recognized tax litigator who represents taxpayers in civil and criminal tax controversies over a broad range of tax areas.

T: I’m here with Gwen Moore from Chicago. Thanks for taking the time to talk to us at Tax Times. Can you tell us how you got into Tax?

G: I got into tax completely by accident! I was a history major in undergrad and, as graduation approached, I debated getting my PhD in history and becoming a college professor or going to law school. I had no idea what going to law school or being a lawyer would be like. I had worked in the History Department at DePaul University when I was an undergrad so I knew what that was like. It dawned on me that I needed to get some perspective. So right out of college I took a job with Ernst & Young for a year while I was deciding what I wanted to do. Ultimately, I decided to go to law school. I was worried that if I didn't like law school, I would be saddled with a lot of loans. So I worked full-time and went to school at night. During the day, I worked full-time for a tax resolution firm that did collections work. That's how I got started doing tax.

Although collections work is a grind—and it is a grind—it gave me a solid foundation for anticipating how the IRS will respond to things, client communication techniques, and understanding how to deal with clients who are in crisis. I really enjoyed helping them through that crisis. When I got my first summer associate position at Katten Muchin Rosenmann in Chicago, I looked up Jenny Johnson (now Jenny Johnson Ware) because she had a great reputation and I knew that she did criminal tax work. She was running the Mock Trial Program for the summer associates. I told her the experience that I had, and I asked her if she had anything for me to work on. I was able to do some projects with her as a summer associate. My start as an associate the next fall happened to coincide with two huge events. One was the John Doe summons on UBS and the other was the collapse of Lehman Brothers. Very soon after I started, the firm laid off something like 16 to 20 lawyers. I was terrified about losing my job, as I know many people were. I was lucky, however, because I was busy working on tax controversy that came in from UBS clients. I was able to keep busy because I had background in an area that was growing and the source of a lot of work. And I really, really enjoyed it.
I wanted to work in an area of law that would give me meaningful client contact from the very beginning of my career as a lawyer, and tax was a great way to do that. The bonus is that it is incredibly interesting. Tax touches every aspect of business and finance and people’s households and jobs and companies. No matter what the tax problem is, there’s often a “people problem” behind it. And that’s the part of it that I really enjoy.

TG: It sounds like your practice was growing as your firm was shrinking. How did you manage that?

GM: Well, I think all firms were shrinking at that time. The economy was in flux, to say the least, and I asked Jenny and some other partners if they had any non-billable work for me to do. I said, “Do you have an article you’ve been meaning to write? Do you have a presentation that you need prepared for you? What can I do to help you?” I wanted to show that I was willing to do whatever was needed. That worked out well for me. The UBS John Doe summons resulted in many new clients and was lucky for me because I had a unique skill set to offer from my experience in tax resolution in law school. I had also done the non-billable work that generated those new clients by helping to write the articles and the presentations, so when the billable work came in, I was staffed on that work. I was able to keep myself really busy at a time when a lot of people just didn’t have a lot of work.

The other thing I did, when I look back on my early days as a lawyer, was to ask for every opportunity that I wanted. As a first-year associate I asked to second-chair a deposition. I knew that it would not be necessary for the client and the client wouldn’t want to be billed to have me there, but I wanted the opportunity and experience. So I asked, “Please can I come to this deposition? I’ll help you prepare for it. I’ll put the documents together. I won’t bill my time.” The next time a deposition needed to be taken or defended, I was in a much better position to get the spot of being there on a billable basis. I had the experience under my belt. I felt like it was worth it for me to offer to do things the first time on a non-billable basis and to volunteer to help with articles and other marketing projects because it put me in a better position to get the billable work when it came around. I had the experience under my belt. I felt like it was worth it for me to offer to do things the first time on a non-billable basis and to volunteer to help with articles and other marketing projects because it put me in a better position to get the billable work when it came around. As a new attorney in the middle of a financial crisis, I needed to find a way to keep myself busy and show my worth. As a young attorney, you’re trying to show partners why you can be valuable to them and what your work product looks like. I was able to demonstrate that in a way that resulted in me getting a lot of billable work and really getting into the field as it was picking up just as I was coming up. But I also was willing to make sacrifices of my own time and just offer to do it to get the experience that I thought I needed. Looking back, I don’t know if I would have offered up so much of my free time to ask for non-billable marketing work or to come to a client deposition on a non-billable basis had it not been for the financial crisis.

TG: I’ve heard people say that you should say “yes” to every opportunity but, of course, you can’t do that. So how did you politely decline the opportunities that you did not want to take?

GM: You know, I didn’t but I should have. It’s funny. I feel like in many regards, lawyers measure their worth to each other in the number of hours that they bill. I have done that and regretted it and wished that I could take it back. I can think of certain specific times when partners who I didn’t even work for on a regular basis asked me to do something, and I said “yes” because I was afraid to say “no.” I missed important family events, and I worked until 2:00 and 3:00 in the morning.

I think I did this for two reasons: number one, because I was afraid to say “no” and, number two, because, quite frankly, I felt like it made me somehow better, more valuable, to always be the person who said “yes.” That was a mistake. It was certainly not in my best interest to do that and, quite frankly, you don’t do your
best work at 2:00 in the morning. I would recommend that people not do that. I didn’t feel like I could say “no,” especially because as a younger lawyer, when I was coming up, there were so many people being laid off because of the economy. But as I got more experience, I got a lot better at saying “no.”

The best advice that I would give is think very carefully about who you’re saying “no” to and whether you need to offer a reason or not. One thing that I’ve learned: if you don’t need to give a reason, then don’t. You can just say, “I’m not available” or “I don’t have the time for that,” of course, in a nice way. Women, especially, have a tendency to offer a reason as to why we can’t do things, and our reason might be different than what somebody else thinks is a good reason. It can be better sometimes just to say, for instance, “Wednesday at 3:00 p.m. doesn’t work for me.” You don’t need to say, “It doesn’t work for me because I’m taking my baby to the pediatrician.” You can just say, “Wednesday at 3:00 p.m. doesn’t work for me. How about Thursday at 10:00?” And people will figure out a way around it. We don’t always have to explain why we can’t do things.

TG: That’s really good advice. Let’s switch gears then and talk about how you and Jenny went about starting your own firm.

GM: Jenny and I had worked together, as I said, from the very beginning of my career as a lawyer, and we knew that we had an exceptional working relationship. We really enjoyed working together, we worked very well together, and we have different strengths and weaknesses. When we were at Holland & Knight, the firm could not have been more supportive of us and our practice. It was a wonderful place to be and build a practice, but we felt like we could do some fantastic things on our own that we could not do at a big firm.

One of the things that we have appreciated about starting our own firm is that we’re able to explore alternative fee arrangements with clients and branch out into new areas. When Congress repealed TEFRA (Tax Equity and Fiscal Responsibility Act of 1982) and gave us the BBA (Bipartisan Budget Act of 2015), we saw this as an exciting new time to be in tax controversy and tax litigation and tax in general because there’s a whole new audit regime for partnerships. It creates opportunity for people to explore new roles and figure out what BBA audits are going to look like. We decided that we would be a natural fit to serve in the role of partnership representative. It seems a natural outgrowth of what we already do, which is representing clients before the IRS. It’s what we’re good at and we really enjoy it. We’re excited to continue that as the partnership representative for various partnerships; that’s something that we would not have been able to do if we were still at a big firm. It’s nice to be able to put our heads together and be creative and try new things and figure out what other ways we can serve clients other than just by billing hours.

TG: That’s a perfect example. Speaking as someone who practices inside a very large firm, I can assure you that we have explored the idea of serving as partnership representatives but our risk management function and other people within the firm have said “no.” So you’re quite right that the autonomy that a small firm brings is special.

Another hot tax topic that I know you’ve been involved with is cryptocurrency and its taxation. Do you want to tell us a little bit about what you are doing there?

GM: This is another area where it is exciting to be able to be a part of figuring out how these cases are going to go and how people will grapple with new issues. People are still wrapping their brains around questions like “What is cryptocurrency?” and “How is this treated as property? Tax lawyers ask, “Does
property treatment make sense? What are the implications of that?” It's been fun to be on the forefront of that area.

After I did a presentation on cryptocurrency in Las Vegas at the ABA National Institute on Criminal Tax Fraud last year, I bought one Bitcoin to see what the process was like. After buying Bitcoin, I have followed much more closely the price fluctuations and the crypto virtual currency community to see what they are saying about where this business is going. I just think it's a fascinating area to be in.

There are a lot of interesting issues. For example, there is the question of how the cryptocurrency miners will be taxed, what their expenses are, and how those expenses will be treated. Obviously, when the IRS issues a press release saying that 10,000 soft letters are coming out, it creates a lot of distress in the community. What I'm hearing is the concern of people who haven’t filed tax returns at all though they should have reported their cryptocurrency transactions. For the most part, they are people who truly do not understand how tax works. They don’t otherwise have a filing requirement and, therefore, they are not familiar with filing thresholds or concepts of income, gain, loss. And it's because they're young kids, they’re in college, they’re on their parents' tax returns. After I presented on cryptocurrency at the IRS Nationwide Tax Forum in Chicago two weeks ago, I had a line of 30 tax preparers with questions. At least half of them said, “I have a client whose kid is in college and they don’t think that they need to report it. Where does it belong on their parents' tax returns?”

There is definitely a disconnect between crypto investors who are young people who don't otherwise have a filing requirement and their compliance, where they need to be. We have to help them get into compliance. But those people are not the people for whom criminal prosecution is warranted. On the other hand, I understand the IRS perspective: they have to prevent cryptocurrency from becoming the next offshore haven, and so they need to make a strong showing of enforcement. I think the soft letter approach was the right approach, because in order to get people into compliance, you want to give them a chance to understand what the obligations are. The problem is that it's so new that the parents may not even know the kids are doing it and the preparers don’t necessarily understand how to treat it. Additional guidance is needed from the IRS. [Editor’s Note: The IRS issued new guidance on the tax treatment of cryptocurrency on October 9, shortly after this interview. See Revenue Ruling 2019-24.]

T: You’d mentioned being a working mom and going to the pediatrician without necessarily explaining that to a colleague who wants to schedule a conflicting call. Can you talk a little more about juggling your responsibilities? You’re a mom with four young kids and a very successful tax attorney. How do you do it?

G: I do it by asking for help when I need it and accepting help when it’s offered. When I just had one child, I was aiming for perfection. I had an idea in my head of what I wanted, what perfection looked like. The perfectly present lawyer who did everything for her clients and the perfect mom. When I became pregnant with twins and my daughter was not even one, I realized that perfection is not attainable. That was the best thing that ever happened to me because perfection isn’t attainable. If you accept that as true, then you can figure out instead what's workable and figure out what you enjoy and spend your time on that.

I particularly enjoy mornings with my kids. I feel like kids are at their best in the morning—at least, my kids are at their best in the morning. I spend my mornings with my kids and I come into the office later, which means I stay at work later. I get home just in time for bedtime, but I don’t sweat it if I miss dinner or other after-school things because I get meaningful time with them in the morning that we enjoy together. Learning what works for you and doing that without feeling like you need to be in two places at once takes practice.
Certainly, for me, if I spend my time feeling guilty about something, then that’s time that I’m not spending with my kids and I’m not being productive working for a client. So you just need to move forward.

The other most important advice I would give people is this: think creatively about what works for you and then figure out if there’s a way to make it happen. For example, in 2014 Jenny and I had two trials back-to-back set for trial in Miami. For the first Miami trial, we had to go down there and interview witnesses, prepare witnesses, try the case. We needed to be down there for about three weeks, and I had a one-year-old daughter. There was no way I was going to be away from her for three solid weeks, and it didn’t make sense for me to fly back and forth on the weekends. Jenny also had a young son at the time. So we talked about it as moms: how are we going to make this work? We decided to rent a condo, bring our kids, and bring a nanny. We were able to see the kids in the morning, and we were able to see them at night and then sit at the dining room table and work together after the kids went to bed. We were still working long hours getting ready for trial and then trying the case, but we weren’t away from our children for three solid weeks. It wound up being more cost effective for the client because paying to rent a condo for three weeks is cheaper than two hotel rooms. It worked out well for everyone and then, happily, we won the case.

After we finished the first trial, there was a debate about when the second trial was going to take place. It was a moving target because of different concerns with IRS counsel. I was pregnant with twins and was approaching my due date. I just raised my hand and said, “My doctor said I can’t travel past this day. The trial has to be by this day.” The judge got creative and said, “We’ll move the trial from Miami to Chicago.” The whole trial was moved, and it wound up working out great because both our team and the IRS Counsel team was from Chicago and most of the witnesses were traveling from different parts of the country. This is one of the great things about Tax Court being a national court: we can move a trial.

My point is that if I had not had a strong female partner as an example, I would probably have been afraid to say, “In order for me to make this work for me and my family, here’s what I need.” Or “Let’s think creatively about ways that we can make this work.” Having come up as a lawyer with Jenny, and because the two of us think alike in terms of balancing our family and our work lives, we’re able to come up with solutions that work for us, our families, and our clients. One of the reasons we have women’s networking events is because not everyone has had the benefit of working with a team who is supportive of the juggling act we have to do. We want to help other women and offer support and ideas about how they can make it work, too.
The Quill Is Mightier than the Sword: The Supreme Court’s Decision in Kaestner Defends Quill’s Due Process Analysis

By Sanders Colbert, Kean Miller LLP, New Orleans, LA and Jennifer Smith, McCollom D’Emilio Smith Uebler LLC, Wilmington, DE

In North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust,¹ a unanimous Supreme Court held that the Due Process Clause prohibited states from taxing undistributed trust income based solely on the in-state residency of trust beneficiaries who have no right to demand such income and no certainty of ever receiving it. While the decision provided little additional insight into the analysis of Due Process nexus and was narrowly drawn to the specific facts presented, it is now clear that the bifurcation of Due Process nexus and Commerce Clause nexus in Quill Corporation v. North Dakota² is still valid in the wake of last year’s historic South Dakota v. Wayfair³ decision overturning the physical presence rule for sales and use tax.

The background in Kaestner concerned North Carolina’s attempt to tax the undistributed assets of a New York trust whose sole connection to the Tar Heel state was a beneficiary who moved from New York to North Carolina several years after the trust was formed. The trust agreement gave the trustee exclusive control over the allocation and timing of trust distributions. Furthermore, New York law gave the trustee discretion to roll the trust into a new trust ahead of its scheduled termination date, making it legally uncertain whether the beneficiary would ever receive any distributions from the trust.⁴ While the applicability of state income tax to distributions from a trust received by a beneficiary residing in the subject state is well-settled,⁵ the North Carolina Department of Revenue took a more aggressive tack. Specifically, the Department of Revenue assessed an income tax deficiency of $1.3 million on the accumulated trust income over a 4-year period during which no distributions were made. The trustee paid the tax under protest and sued for refund in state court on Due Process grounds, winning at every level of the North Carolina legal system.

¹ No. 18-457 (U.S. Jun. 21, 2019).
⁴ N. Y. Est., Powers & Trusts Law Ann. § 10– 6.6(b).
⁵ Maguire v. Trefry, 253 U.S. 12, 17 (1920).
Justice Sotomayor began her discussion by conspicuously citing Due Process Clause language from *Quill*, clarifying that *Quill* was overruled on grounds other than Due Process in last year's *Wayfair* case. The decision went on to flesh out the Due Process analysis from *Quill*.

The Court applies a two-step analysis to decide if a state tax abides by the Due Process Clause. First, and most relevant here, there must be “some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.” Second, “the income attributed to the State for tax purposes must be rationally related to ‘values connected with the taxing State.’”

A footnote in the opinion notes that the North Carolina trial court held that the trust's taxation violated the Dormant Commerce Clause but adds that the issue is not addressed by the Court, leaving little doubt as to the validity of *Quill*'s bifurcation of the Commerce Clause and Due Process Clause post-*Wayfair*.

Starting with the first prong of the *Quill* Due Process analysis requiring “some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,” the Court applied three factors to determine that the beneficiary's residence alone did not provide sufficient “minimum connection” necessary to sustain the tax.

First, the beneficiaries did not receive any income from the Trust during the years in question. ... Second, the beneficiaries had no right to demand trust income or otherwise control, possess, or enjoy the trust assets in the tax years at issue. ... Third, not only were Kaestner and her children unable to demand distributions in the tax years at issue, but they also could not count on necessarily receiving any specific amount of income from the Trust in the future.

The Court reserved judgment on whether a different result would arise if an in-state beneficiary were certain to receive funds at some point in the future. Justice Alito's concurring opinion joined by Justice Gorsuch and Chief Justice Roberts made clear the opinion of the Court was narrowly tailored to the facts immediately at issue by applying existing precedent in *Brooke v. City of Norfolk* and *Safe Deposit & Trust Co. of Baltimore, Md., v. Commonwealth of Virginia*, both of which rejected the state taxation of out-of-state trusts where an in-state beneficiary lacked control or possession of the trust assets.

North Carolina is one of a small handful of states that rely on beneficiary residency as a sole basis for trust taxation, and an even smaller number that rely on the residency of beneficiaries regardless of whether the beneficiary is certain to receive trust assets. Given the fact that the taxpayer prevailed at every level of the North Carolina court system and the narrowness of the Supreme Court’s decision, perhaps *certiorari* was granted to allow the Court to clarify *Quill*'s continuing relevance for Due Process analysis.

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6 *Kaestner* at *5-6* (internal citations omitted).
7 Id. at *15, n. 4.
8 Id. at *5*.
9 Id. at *11-12* (formatting adjusted and citations deleted).
10 277 U.S. 27 (1928).
11 280 U.S. 83 (1929).
12 *Kaestner* at *15*. 
COUNTERPOINT

An Unapportioned Wealth Tax Has Constitutional Problems

By Erik M. Jensen, Coleman P. Burke Professor Emeritus of Law, Case Western Reserve University, Cleveland, OH

Professor Calvin Johnson's argument that the wealth tax proposed by Senator Elizabeth Warren would clearly be constitutional, made in the Summer 2019 ABA Tax Times, is misleading in several respects.1 (Senator Bernie Sanders has now also proposed a wealth tax, and I assume Professor Johnson would see no constitutional problems with that proposal as well. Indeed, Sanders cites the Johnson essay.2) The misleading aspects run from the title to how Johnson interprets the direct-tax clauses in the Constitution to a bewildering failure to discuss a Supreme Court decision from 2012, National Federation of Independent Business v. Sebelius (NFIB),3 in which Chief Justice John Roberts advanced propositions that contradict Johnson's argument about the meaning of direct taxation.

The Article's Title

Misleading proposition number one is the title, “A Wealth Tax Is Constitutional.” (I suppose the title might not have been Johnson's choice.) Of course a wealth tax can be constitutional; that's not news. The congressional taxing power set out in Article I, section 8, is quite broad, permitting Congress to tax almost anything.4 The question isn’t whether Congress can impose a tax on wealth; the question is whether such a tax would be a direct tax that, under two constitutional provisions, would have to be apportioned among the states on the basis of population.5 For example, the residents of a state with one-twentieth of the national population would have to pay, in the aggregate, one-twentieth of any direct tax. (To make Johnson’s intended point, the title should have been “An Unapportioned Wealth Tax Is Constitutional.”) If a wealth tax would have to be apportioned, it couldn't work as Senators Warren and Sanders want it to. To

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2 Tax on Extreme Wealth (Press Release, Sept. 24, 2019) [hereinafter Sanders Press Release] (stating that “[m]any more articles, including a recent one published by the American Bar Association [linking to the Johnson article], make the unambiguous case for the wealth tax's constitutionality”).


4 U.S. CONST. art. I, § 8, cl. 1 (granting Congress “Power To lay and collect Taxes, Duties, Imposts and Excises”).

5 See U.S. CONST. art. I, § 2, cl. 3 (providing that “Representatives and direct Taxes shall be apportioned among the several States which may be included within the Union, according to their respective Numbers”); id., art. I, § 9, cl. 4 (providing that “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken”). Johnson refers only to the provision in Section 9, but the language in Section 2 suggests that apportionment was supposed to have real consequences. See infra notes 25-29 and accompanying text.
make the numbers come out right, it would have to have, as Johnson notes, “substantially higher tax rates in poorer states” than in richer ones. As Johnson indicated, that would be absurd.

The Meaning of the Direct-Tax Apportionment Rule

Misleading proposition number two is that the potentially absurd result—“higher tax rates in poorer states”—is an “injustice.” The point of apportionment was to make direct taxation difficult, to limit the national taxing power. If apportionment would make a proposed direct tax unjust, Congress generally shouldn’t enact it. No direct tax, no injustice. And direct taxation wasn’t supposed to be the primary revenue source for the United States.6 It was to be used only in emergencies like wartime, when revenue needs trump arguably unjust effects.7

Wealth taxes, Publius, and Hylton v. United States. From the beginning, the Supreme Court assumed that a tax on real property is a direct tax—as distinguished from indirect taxes, generally taxes on articles of consumption—as had Alexander Hamilton writing as Publius in The Federalist.8 In Hylton v. United States,9 decided in 1796, the Court concluded that a national tax on carriages wasn’t direct and therefore didn’t have to be apportioned. But the three justices who wrote opinions agreed that a tax on land—the most significant form of wealth at the time—was direct. For example, Justice Samuel Chase said that the direct taxes “contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on LAND.”10

Professor Johnson once treated Hylton as gospel because he liked the way the justices defined “direct tax” narrowly. The justices, founders all, were, Johnson wrote, “giants [who] walked upon the earth,”11 and what they said in Hylton was unquestionably correct: they “knew the Constitution far better than we do.”12 Apparently their stature has recently shrunk, however; now we must ignore what they wrote in Hylton about land taxes’ being direct. In contrast to Johnson, I believe the Hylton Court’s understanding of “direct tax” was too narrow,13 but even that narrow conception encompassed taxes on real property.

6 See The Federalist No. 12, at 60 (Hamilton) (Clinton Rossiter ed., Mentor rev. ed. 1999) (“It is evident from the state of the country, from the habits of the people, from the experience we have had on the point itself that it is impracticable to raise any very considerable sums by direct taxation.”). Page cites to The Federalist are to this edition,
7 See infra notes 30-34 and accompanying text.
8 See, e.g., The Federalist No. 21, at 111 (Hamilton) (“Impositions [on articles of consumption] usually fall under the denomination of indirect taxes … . Those of the direct kind … principally relate to land and buildings”); see also The Federalist No. 12, at 61 (Hamilton) (“[F]ar the greatest part of the national revenue [in England] is derived from taxes of the indirect kind, from imposts and from excises. Duties on imported articles form a large branch of this latter description.”); The Federalist No. 36, at 187 (Hamilton) (“[B]y [indirect taxes] must be understood duties and excises on articles of consumption”).
9 3 U.S. (3 Dall.) 171 (1796).
10 Id. at 175 (Chase, J.). The two other justices who wrote opinions agreed that land taxes are direct, although they left open the possibility that other taxes may also be direct. See id. at 183 (Iredell, J.) (“In regard to other articles, there may possibly be considerable doubt.”); id. at 177 (Paterson, J.) (“I never entertained a doubt, that the principal, I will not say, the only, objects, that the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land.”).
12 Id.
13 I’ve never understood the argument that a form of taxation unknown to the founders must automatically be considered indirect because they didn’t put it on their list of direct taxes. How could they have?
And it wasn’t just Publius and Supreme Court justices who understood that a tax on real property was direct. Between 1798 and 1861 Congress enacted several national real-estate taxes, all of which were apportioned. Congress took it for granted that apportionment was required. 14

**Was apportionment intended to be irrelevant?** Professor Johnson has a response to what I’ve just described, of course, which brings us to misleading proposition number three. He argues that apportionment of land taxes was permissible in the early years of the republic because “[i]t was presumed ... that real estate value was equal per capita across the states, and that a real estate tax would qualify as a direct tax.” In that case, apportionment was acceptable because it didn’t lead to injustice. But, he says, “the consequences of apportionment by population when the per capita tax base is uneven rebuts the use of apportionment.” He adds:

Real estate and wealth taxes ceased to be direct taxes because per capita wealth or land value so varied among the states that apportionment by population would require drastically higher tax rates in poorer states. Drastically higher tax rates required by apportionment by population entails that apportionment is not required because the tax is not direct.

So what was considered a direct tax in the late eighteenth century isn’t necessarily one today: “Over time taxes that could not reasonably be apportioned among the states were expelled from being considered . . . direct tax[es], by ordinary language usage or Supreme Court decision.”

Ordinary language usage? Come on. Think about what Professor Johnson is claiming: the apportionment requirement is to be imposed only when it doesn’t matter—only, that is, when the tax base is spread across the country in a way that is proportionate to population. What kind of rule is that? 15 Why are direct taxes even mentioned in the Constitution, if they would, by definition, meet the apportionment requirement anyway and, for that matter, satisfy the uniformity rule that applies to indirect taxes—“duties, imposts, and excises”? 16 (To be sure, capitation taxes, specifically denominated as direct taxes in the Constitution—and confirmed by *Hylton* 17—are close to being automatically apportioned, if it’s understood that a capitation is a lump-sum head tax. 18 Even if that understanding is right, however, something I question, 19 apportionment wouldn’t have been meaningless for a capitation when the Constitution was ratified. 20)

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15 “Supreme Court decision[s]” aren’t on Johnson’s side either. See infra notes 35-45 and accompanying text.

16 U.S. CONST. art. I, § 8, cl. 1 (providing that “all Duties, Imposts and Excises shall be uniform throughout the United States”). Uniformity requires that the tax base and tax rates for duties, imposts, and excises not vary from state to state. Apportionment of direct taxes, not subject to the uniformity rule, makes such variations likely.

17 See U.S. CONST. art. I, § 9, cl. 4; supra note 5; supra text accompanying note 10.

18 Justice Chase in *Hylton* described capitations in that way, see supra text accompanying note 10, and Chief Justice Roberts, in *NFIB*, discussed infra at notes 35-45 and accompanying text, quoted Chase’s language with approval. See NFIB, 567 U.S. at 571.

19 See Erik M. Jensen, The Apportionment of ‘Direct Taxes’: Are Consumption Taxes Constitutional?, 97 COLUM. L. REV. 2334, 2391-93 (1997) (noting that some contemporaneous commentators, including Adam Smith, construed “capitation” more broadly). It’s because of the apportionment rule that a capitulation necessarily becomes something like a lump-sum head tax.

20 The three-fifths rule for counting slaves and not counting “Indians not taxed,” see U.S. CONST. art. I, § 2, cl. 3, meant that not every person would be fully subject to a levy that in form seemed to be a lump-sum head tax.
language usage—the apportionment rule is a limitation on congressional power. It’s because the results of apportionment might be absurd that Congress generally shouldn’t enact direct taxes, particularly those with sectional effects. (Direct taxes aimed at property value concentrated in one part of the country are supposed to be disfavored.)

A special rule limiting Congress’s power was necessary because direct taxation was thought to be much more dangerous than indirect taxes, as Hamilton argued in *Federalist 21*.

It is a signal advantage of taxes on articles of consumption [i.e., indirect taxes] that they contain in their own nature a security against excess. They prescribe their own limit, which cannot be exceeded without defeating the end proposed—that is, an extension of the revenue. ... If duties are too high, they lessen the consumption; the collection is eluded; and the product to the treasury is not so great as when they are confined within proper and moderate bounds. This forms a complete barrier against any material oppression of the citizens by taxes of this class, and is itself a natural limitation of the power of imposing them.21

In contrast, direct taxes contain no “natural limitation” on their use, and an explicit limitation on Congress’s authority to enact them was therefore thought to be desirable.

In a branch of taxation where no limits to the discretion of the government are to be found in the nature of the thing, the establishment of a fixed rule, not incompatible with the end, may be attended with fewer inconveniences than to leave that discretion altogether at large.22

And, as Hamilton wrote in *Federalist 36*,

An actual census or enumeration of the people must furnish the rule, a circumstance which effectually shuts the door to partiality or oppression. The abuse of this power of [real-estate] taxation seems to have been provided against with guarded circumspection.23

The Johnson understanding turns the apportionment rule on its head. His position also implies that the founders, those giants, were engaged in subterfuge: drafting and ratifying a document that in form seemed to constrain the direct-taxing power, but using words not intended to have meaningful effect. Does anyone other than Calvin Johnson think the Constitution would have been ratified if it had been understood that the taxing power was nearly unlimited?24

*The second direct-tax clause*. Professor Johnson quotes and discusses the direct-tax clause in Article I, section 9,25 but there’s a second direct-tax clause in the Constitution. (Some commentators and Supreme Court justices seem to forget this.26) In Article I, section 2, apportionment of direct taxes is tied to apportionment of representatives in the House: “Representatives and direct Taxes shall be apportioned among the several States which may be included within the Union, according to their respective Numbers.”27 That language makes it

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21 *The Federalist* No. 21, at 110-11 (Hamilton).
22 *Id.* at 111.
23 *The Federalist* No. 36, at 188 (Hamilton).
24 Hamilton may have preferred a constitution with an unlimited taxing power but, when he was selling the draft constitution, in his *Federalist* writings, he knew it was necessary to stress limitations on that power.
25 See *supra* note 5.
26 See, e.g., *id.* & *infra* notes 43 & 45. Chief Justice Roberts in *NFIB* also referred to the “Direct Tax Clause,” as if there were only one. See *NFIB*, 567 U.S. at 570.
27 U.S. Const. art. I, § 2, cl. 3.
hard to conclude that the apportionment rule was intended to be meaningless. A serious compromise was involved: states entitled to more representation in the House because of their large populations would also bear a larger share of any direct-tax liability.

Madison made this point in *Federalist 54*. After noting that population would be used to govern both representation and direct taxation, he stressed that the rules are “by no means founded on the same principle.” 28 For representation, the use of population protects personal rights; for taxation, it serves as a measure, however imperfect, of wealth and contributions. The tension between the two principles, despite the “common measure,” is a good thing.

As the accuracy of the census to be obtained by the Congress will necessarily depend on the disposition, if not on the co-operation of the States, it is of great importance that the States should feel as little bias as possible to swell or to reduce the amount of their numbers. Were their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the States will have opposite interests which will control and balance each other and produce the requisite impartiality. 29

It’s only if the apportionment rule was thought to have teeth that there was a real compromise.

The occasional need for direct taxation. The founders nevertheless understood that, even with no natural limitations to prevent congressional overreaching, 30 direct taxation would sometimes be necessary. For example, at the Virginia ratifying convention, James Madison emphasized that national defense requires extraordinary taxing powers in times of emergency.

When ... direct taxes are not necessary, they will not be recurred to. It can be of little advantage to those in power to raise money in a manner oppressive to the people. ... Direct taxes will only be recurred to for great purposes. ... [I]t is necessary to establish funds for extraordinary exigencies, and to give this power to the general government; for the utter inutility of previous requisitions on the states is too well known. 31

Madison also noted that, if war came, when revenue needs would dramatically increase, imports—and therefore imposts—were almost certain to fall. 32 Additional sources of revenue would be essential, so direct taxation had to be a possibility, even with arguably “unjust” consequences in the short run.

Of course, it has turned out that apportionment has been uncommon. No apportioned tax has been enacted since 1861, and the 1913 ratification of the Sixteenth Amendment made an unapportioned income tax clearly constitutional—regardless of source of income—lessening the need for consideration of other direct taxes when emergencies arise.

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28 *The Federalist* No. 54, at 304 (Madison).
29 *Id.* at 308-09.
30 See *supra* notes 22-24 and accompanying text.
31 3 *Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 95-96 (1876) (June 16, 1788).
32 See *id.* at 253 (June 11, 1788).
clearly constitutional—regardless of source of income—lessening the need for consideration of other direct taxes when emergencies arise.

But that doesn’t mean it was assumed at the founding that apportioned direct taxes would never be enacted. (Remember that Congress did enact several apportioned direct taxes in wartime or in anticipation of war.) And it doesn’t mean that the apportionment rule has had no effect. One reason that we haven’t had a national property tax since 1861 is that apportionment has been understood to be required. That should give Professor Johnson (and Senators Warren and Sanders) pause.

The Failure to Discuss *NFIB v. Sebelius*

Here’s where the Johnson article is at its misleading best. Although he claims that “Supreme Court decision[s]” support his position, he makes no reference to Chief Justice John Roberts’s controlling opinion in the 2012 Obamacare case, *National Federation of Independent Business v. Sebelius.* That’s a shocking omission, and this dereliction of duty is evident as well in the two letters from prominent academics (including Professor Johnson) that Senator Warren made public with her proposal—letters supporting the proposition that an unapportioned wealth tax would pass constitutional muster. Those letters also ignored *NFIB,* as did the press release announcing the Sanders proposal.

In *NFIB,* the Court concluded that the individual mandate penalty as originally enacted in the Obamacare legislation—a penalty for failure to acquire suitable health insurance—was authorized as a tax under the Taxing Clause, and it wasn’t a direct tax that would have to be apportioned. (If apportioned, the penalty couldn’t have worked as intended.)

The Chief Justice cited, with approval, *Hylton’s* narrow definition of direct taxes—land taxes and capitations—and noted that the Court in the 1895 income tax cases, *Pollock v. Farmers’ Loan & Trust Co.,* had extended the *Hylton* understanding to include a tax on any property, not just real estate, in the category of direct taxes. The Chief described the history:

> *That narrow view of what a direct tax might be [i.e., capitations and land taxes] persisted for a century. In 1880 [in *Springer*], for example, we explained that “direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate.”* 40  
>
> *In 1895 [in *Pollock*], we expanded our interpretation to include a tax on any property, not just real estate, in the category of direct taxes.*
>
> That result was overturned by the Sixteenth Amendment,

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33 See U.S. Const. amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”).

34 See supra note 14.


36 See Warren Press Release, supra note 1. Both letters are dated January 24, 2019. One is signed by six law professors, including Bruce Ackerman, Anne Alstott, and Philip Bobbitt (hereinafter Letter 1). The other is signed by eleven scholars, including Dawn Johnsen, Walter Dellinger, Erwin Chemerinsky, Joseph Fishkin, H. Jefferson Powell, Laurence Tribe, Pamela Karlan, and Calvin Johnson (hereinafter Letter 2).

37 See Sanders Press Release, supra note 2.

38 157 U.S. 429 (1895) (holding that a tax on income from real estate is a direct tax requiring apportionment); 158 U.S. 601 (1895) (extending the principle to income from personal property).

39 *NFIB,* 567 U.S. at 571.


although we continued [in Macomber, in 1920] to consider taxes on personal property to be direct taxes.\footnote{Citing Eisner v. Macomber, 252 U.S. 189, 218-19 (1920).}

Taxes on property, both real and personal, thus remain direct, and this passage from NFIB wasn’t dictum. The Chief was writing for a Court majority, and construing the meaning of “direct tax” was necessary to the result. The penalty may have been a valid exercise of the taxing power, but if it were a direct tax, it would have been struck down because it hadn’t been apportioned.

How can commentators on the constitutionality of a wealth tax, a tax on property, ignore this critical passage from the Roberts opinion? Yes, the direct-tax issue in NFIB wasn’t fully briefed and argued.\footnote{In dissent, four justices noted that “the meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters.” NFIB, 567 U.S. at 669 (Alito, Kennedy, Scalia, and Thomas, JJ, dissenting).} The Chief may have been winging it, with little help from his clerks; the apportionment rule isn’t a staple of law school curricula. And yes, the four justices who joined this part of the Chief’s opinion (Breyer, Ginsburg, Kagan, and Sotomayor) weren’t enthusiastic about the taxation analysis. They thought the individual mandate penalty was authorized by the Commerce and the Necessary and Proper Clauses, and it should have been unnecessary to decide whether the penalty was an exercise of the taxing power.\footnote{NFIB, 567 U.S at 605-23 (Ginsburg, J, dissenting in part and concurring in part). But the Chief and the other four justices (Alito, Kennedy, Scalia, and Thomas) had concluded that those clauses didn’t authorize Congress to require purchase of a particular good or service. Id. at 548-58.} They went along with the Chief because that was the only way to keep the individual mandate penalty from being struck down.

But the lack of enthusiasm for Chief Justice Roberts’s position doesn’t make the holdings in NFIB go away. You can argue about the NFIB analysis and explain why you think the Chief got it wrong. You can argue that Pollock was wrongly decided and should be given no weight today. You can argue until you’re blue in the face that the apportionment rule was a mistake to begin with. (It was a clunky way to limit the taxing power.) But, as a good lawyer and academic, you can’t ignore contrary authority from the Supreme Court,
in a case decided less than a decade ago, about the meaning of “direct tax.” Ignoring NFIB borders on the disingenuous.\textsuperscript{45}

Enacting an unapportioned wealth tax without consideration of the relevance of NFIB would be foolhardy. Doing so might be seen as a direct attack on the Supreme Court, and that wouldn’t be helpful if the wealth tax is challenged in court (as it would be).

**Does the Sixteenth Amendment Affect an Unapportioned Wealth Tax?**

One final point is relevant here. The Sixteenth Amendment, ratified in 1913, did exempt “taxes on incomes” from apportionment, making the modern, unapportioned income tax possible.\textsuperscript{46} Even if an income tax is a direct tax, as the Supreme Court had concluded in 1895, it therefore needn’t be apportioned. But a wealth tax is unaffected by the Amendment; it’s a tax on property, not income. The income tax was directed at the wealthy, but late nineteenth-century and early twentieth-century debates regularly distinguished taxes on income from taxes on wealth.\textsuperscript{47} And Senator Norris Brown of Nebraska, who in 1909 introduced the resolution that ultimately became the Amendment, refused to extend the amendment’s scope beyond taxes on incomes. Many members of Congress wanted to do away with apportionment altogether—to make the meaning of “direct tax” irrelevant—but Brown said no, and he prevailed.\textsuperscript{48} As a result, a direct tax that is not a tax on incomes remains subject to apportionment.

\textsuperscript{45} Both letters supporting the constitutionality of the Warren proposal make no mention of NFIB. See Letter 1, supra note 36 (“[N]o thoughtful ‘originalist’ can conclude that Pollock’s dicta, announcing a broad reading of the ‘direct’ taxation clause, has [sic] survived the constitutional decision by the American People to repudiate Pollock in 1913.”). Maybe the Chief isn’t an “originalist,” but he is thoughtful, and his NFIB opinion doesn’t support that statement. See also Letter 2, supra note 36 (“ Constitutional text and history demonstrate that ‘direct’ tax is best interpreted as a narrow category that would not include a net worth tax.”). One would have thought that Roberts’s opinion in NFIB is part of “constitutional history.” (At least Letter 2 recognized the existence of two direct-tax clauses.)

\textsuperscript{46} See supra note 33. Professor Johnson thinks the Amendment was legally unnecessary because Pollock was clearly wrong. As a result, he doesn’t argue that the Amendment made an unapportioned wealth tax possible.


\textsuperscript{48} See id. at 1114-17; 44 *Cong. Rec.* 3377 (June 17, 1909) (quoting Brown: “[M]y purpose is to confine [the amendment] to income taxes alone”).
COUNTERPOINT

A Sur-Rebuttal to Professor Jensen on the Constitutionality of an Unapportioned Wealth Tax

By Calvin H. Johnson, John T. Kipp Chair in Corporate and Business Law, University of Texas

Professor Jensen’s counterpoint in this issue, *An Unapportioned Wealth Tax Has Constitutional Problems*, misses the key point that under the Founders’ meaning of the Constitution, apportionment was never intended to protect wealth from tax nor be a restraint on any federal tax. Under the Founders’ meaning, expressed both by ordinary language and by *Hylton*, if apportionment is not a reasonable administrative measure, apportionment is not required.

Requisitions Were the Framers’ Way of Reaching Wealth

Apportionment of direct tax by population arose in 1783 (not 1787) in a proposal to determine state quotas under requisitions—that is, direct taxes on the states. Under the Articles of Confederation, all national tax was a direct tax because Congress had power to raise tax revenue only by requisitions. The Articles determined states’ quotas under a requisition by value of real estate and improvements, but Pennsylvania submitted appraisals that cut their tax to half of Virginia’s, which the rest of the states thought was cheating. The 1783 proposal would have determined state wealth by population (counting slaves’ contribution to wealth at three-fifths). In the context of the founding, the Framers found that apportioning state tax between Boston and the rest of Massachusetts or between Philadelphia and the rest of Pennsylvania was about the same whether using population or wealth. Madison’s rule was that as long as movement was free, people would move to fertile land and cities where wealth was to be had. Population was the Founders’ best measure of wealth given manipulations of real estate appraisals. The Founders abhorred tax that was the same tax per person. Apportionment by population was always an attempt to make direct tax reach wealth.

The Taxing Power Was Intended to Generate Revenue

Apportionment was never intended to be a restraint on any federal tax. The Articles of Confederation failed because the states stopped paying their requisitions. The Constitution replaced the Articles primarily to give the national government its own plenary taxes to carry the war debts. In the coming inevitable war, the national government would need to borrow again, and it needed to make payments at least to the Dutch to be able to borrow. In that desperate context, no hobble on a federal tax could ever be implied.

Reasonable Apportionment is the Defining Characteristic of “Direct Tax”

The defining characteristic of “direct tax” for constitutional purposes is that the tax must be capable of reasonable apportionment among the states by population without perverse results. If a tax base is not
equal per capita among the states, apportionment requires that the tax rate must be higher where the base is smaller: that is never allowed by the definition of direct tax.

Taxes in which apportionment is not reasonable have been expelled from the definition of direct tax either by the ordinary adaption of language to principle or by Supreme Court holding. All federal taxes started as direct taxes because the only federal taxes under the Articles were requisitions. Taxes that could not be apportioned were not direct. The Constitution, for instance, gave the national government exclusive power to lay taxes on imports, but imposts were not called direct taxes on the states because one could never tell where the goods would end up or what state should get credit for an impost toward payment of its quota. Imposts were thus expelled from the term “direct tax” by ordinary language usage under the principle that all direct taxes were reasonably apportioned, leaving “direct tax” to refer to all internal or dry land taxes that were not imposts.

James Madison as well as Anti-Federalist Brutus and Federal Farmer referred to excises as direct taxes, which fit the usage of the time since they were dry-land internal taxes. Nonetheless, excises were required by the Constitution itself to have a uniform rate in all states, but it was impossible to maintain a uniform rate while also apportioning excises by population (counting slaves at three fifths). The Founders, including Madison, didn’t know that excises could not be apportioned. When they discovered it, ordinary language fixed the problem by expelling excises from the direct tax category and from the apportionment requirement.

The Hylton Opinion

In the Hylton case, the Supreme Court in 1797 adopted a clear rule that if apportionment was not reasonable, the tax was not a direct tax. Hylton involved a carriage tax, which was on Treasury’s inventory of direct taxes—an inventory constructed almost contemporaneously with Hylton in preparation for a requisition. Carriage taxes were common taxes on luxury. In Hamilton’s hypothetical, Virginia had only 1/10th the carriages per capita of New York. Virginians thus would have to pay a tax rate on carriages that was 10 times what New Yorkers paid if apportionment were required. There is no rationale for such idiocy: Virginia simply had a smaller tax base over which to spread its quota.

The Supreme Court Justices in Hylton were Founders, each of whom had contributed at least some paragraphs to the debates over apportionment. They did not see the idiocy in the original debates, but they fixed the problem once they saw it. They held that the Constitution did not require idiocy, and that the carriage tax was therefore not direct.

Over the next 100 years, the Court repeatedly held that if apportionment of a tax would result in unreasonably different rates, then the tax was not a direct tax akin to a requisition directly on a state. The Supreme Court during that period held that an income tax was not a direct tax, under the Hylton rationale, because income varied per capita across the states. Hylton is the wise and binding doctrine on this issue, straight from the Founders sitting as Supreme Court Justices. Hylton is also a decision consistent with the decision already made by ordinary English, expelling “imposts” and “excises” from “direct tax” because they could not be apportioned among the states.
The Presumption of Equal per Capita Real Estate

If any tax base is equal per capita among the states, then apportionment will guarantee uniform tax rates per state. The requirement is then a reasonable enforcement of equity among the states. In the founding debates, it was presumed, without examination, that wealth and population were equal measures of each other. Under that presumption, apportionment was required.

In the original 1783 proposal, the Founders used population instead of the value of real estate (required by the Articles) as the best administrable measure of wealth available. In the 1787 Convention, Madison defeated a proposal that voting in the House would be determined (as under the Articles) by equal votes per state with a proposal to determine House votes by population. To do so, he needed to hold together a coalition of those who believed a government should represent people and those who believed a government should represent wealth, under the presumption that people and wealth would be exact representations of each other. Under that presumption, allocation by population yields equal tax rates on wealth across the states. There are many references during this time to capitations and real estate taxes as direct taxes, because equal per capita wealth, consistent with the presumption, led to the just rule of uniform rates in all states.

Per capita wealth is of course now known not to be equal: with apportionment, the differences would require higher tax rates in poorer states. Mississippi is about half as rich per capita as DC. If tax on wealth, or income or any other measure of economic wellbeing were apportioned, Mississippi tax rates would have to be twice as high as in DC, because Mississippi has too little a tax base over which to spread its quota. Under Hylton that consequence disproves the premise that the tax is direct. Our sacred Constitution, under Hylton, does not require idiocy.

Direct Tax Not Intended as a Restraint

Professor Jensen’s counter is that Congress intended the unreasonableness of apportionment to be a constitutional signal against adopting direct taxes. That interpretation is inappropriate to this Constitution in the context in which it was adopted. This was a coast-line nation vulnerable to predation by three rapacious empires. The Founders were desperate and would have not tolerated any monkey wrench preventing imposition of a national tax, including the internal and dry land taxes that were then called direct taxes (once the impost was not considered a direct tax). There is not an iota of tax-hobbling purpose in this Constitution. It was made up only later by anti-tax fanatics, in ignorance of history.

The Federalist framers of the Constitution won the debate in the ratification that the federal government would have plenary power to tax to prepare for the next war. The major issue was whether the federal government would have the power to lay taxes on dry land. The Anti-Federalists strongly favored continuation of requisitions as the only taxing power. Future President and Anti-Federalist James Monroe, for instance, declared that to render the Constitution safe and proper, he would take away one power only – “I mean that of direct tax.” The South did not want Congress to be able to tax slaves to manumission. But Anti-Federalist opposition to direct taxes had no influence on the constitutional text. Anti-Federalists were not at the Federal Convention that drafted the text, and they hated what they saw. The Federalist victors were

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1 James Monroe, Debates in the Virginia Ratification Convention (June 10, 1788), 9 Documentary History of the Ratification of the Constitution 1109 (John Kaminsky, et. al., eds., 1988).

2 Patrick Henry, Virginia Ratification Convention (June 17, 1788), 10 Documentary History of the Ratification of the Constitution 1341 (1993) (arguing that if this Constitution is adopted, the Congress would be able to lay such heavy taxes on sales that they would amount to emancipation, so that “this property would be lost to this country”).
not about to limit the constitutional taxing power of the new national government. As Washington had to explain to Jefferson in far-off Paris, if the new Congress was not to have the direct tax (that is, the internal and dry land taxes), how was it to repay the war debts and redeem congressional honor? If it did not have the direct tax, the country might as well revert to the confederation form. The direct tax quite clearly was not meant as a limitation on the power to tax, but as an expression of a strong power to tax.

Professor Jensen expands his argument with a claim that apportionment was “a special rule limiting Congress’s power [made] necessary because direct taxation was thought to be much more dangerous than indirect taxes.” That is made up history and an error. The Anti-Federalists thought that way, but they lost.

Professor Jensen further objects that Professor Johnson’s analysis results in direct tax being imposed only when it doesn’t matter. That is a fair description of both the Founders’ and Johnson’s stance. If the per capita tax base is equal across the states, then apportionment yields a uniform tax rate in all states, and apportionment in fairness is required. Still, apportionment is part of a rational scheme to apportion taxes to reach wealth and if apportionment does not function reasonably, its range ends and the tax is not a direct tax.

Professor Jensen’s Reliance on the NFIB case

In the recent National Federation of Independent Business v. Sebelius case, the Supreme Court held that a tax imposed by the Affordable Care Act (ACA) on failure to have or buy insurance was not a direct tax, so that it was constitutional without need for apportionment. The Court cited and indeed relied on the Hylton carriage tax case, summarizing its key rationale that “apportioning such a tax would make little sense, because it would have required taxing carriage owners at dramatically different rates depending on how many carriages were in their home State.” That is the first favorable cite of Hylton since the Pollack dissent, and it is the core of the Court’s NFIB holding. Hylton lives and rules!

The NFIB Court’s opinion went beyond its holding, in dicta neither necessary nor helpful to its decision, by repeating the once routine statements that a tax on real estate was direct. The issue of whether apportionment was required was briefed by neither party before the Court, and having decided the ACA tax was constitutional, the Justices’ reflections on other taxes that might need to be apportioned were dicta beyond their authority in the case and not well considered. Statements such as those were fine when population and wealth were presumed to be equal to each other, so that apportionment yielded uniform rates across the states, but they will not survive closer examination when per capita wealth is unequal and apportionment would force extreme differences in tax rates. In any event, we can discuss the Founders’ meaning of the apportionment requirement without spending any significant time on NFIB. If we consider NFIB at all, its reliance on the Hylton rule—that a tax that cannot be reasonably apportioned is not a direct tax—is all that we need to mention.

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4 Jensen, An Unapportioned Wealth Tax Has Constitutional Problems: A Reply to Professor Johnson (emphasis added).
5 Id.
7 567 U.S. at 559.
PRACTICE POINT

The Collection Due Process Summit Initiative

By Erin H. Stearns, Associate Professor of Practice and Director, Low Income Taxpayer Clinic, Sturm College of Law, Denver, CO and William Schmidt, Director, Low Income Taxpayer Clinic, Kansas Legal Services, Kansas City, KS

This article provides some background on Collection Due Process (CDP) and the progress of the Collection Due Process Summit Initiative. Please note that readers are invited to take part in the Low Income Taxpayer Representation workshop on December 3, 2019 in Washington, D.C. The Workshop will consist of a Summit meeting open to all interested practitioners.

What is Collection Due Process?

CDP is a procedural safeguard created by Congress as part of the Internal Revenue Service Revenue and Restructuring Act of 1998. It requires that the IRS follow a set of procedures to ensure that taxpayers have due process protections when facing IRS levy and lien actions. Although it has long been held that taxpayers with assessed federal tax debts do not have any right to due process protections when it comes to the government's authority to collect for those tax debts, Congress required this step in recognition of the need to curb potential IRS abuses in actions seizing and filing Notices of Tax Liens against property rights. Treasury then adopted a robust set of regulations defining the CDP procedures the IRS must follow. A key element of the CDP procedures permits taxpayers (or their representatives) to request a hearing before the IRS Office of Appeals and gives taxpayers the opportunity to present a collection alternative. These collection alternatives include installment agreements, requests for Currently Not Collectible status, and Offers in Compromise proposing a settlement to pay less than the full amount owed. While less common in application, the CDP hearing could also enable taxpayers to challenge the assessed liability, but only if they can prove they received no prior opportunity to do so.

1 I.R.C. §§ 6320, 6330.
2 Den v. Hoboken Land and Improvement Co., 59 U.S. 272 (1856) (discussing the historical analysis dating back to England’s Magna Carta finding no constitutional right to due process when government seizes property to pay past due debts).
3 See S. Rept. 105-174 (1998), at 67 et seq. (noting that “taxpayers are entitled to protections in dealing with the IRS that are similar to those they would have in dealing with any other creditor”).
4 See Treas. Reg. §§ 301.6330-1 (pre-levy) and 301.6320-1 (post-filing Notice of Federal Tax Lien).
5 See Treas. Reg. § 301.6330-1(e).
CDP may be used in a specific—though not uncommon—scenario where the IRS has assessed balances against a taxpayer for one or more years or periods, and the taxpayer has not fully paid the tax due. The IRS must have initiated collections and sent the taxpayer a series of notices. If full payment is not made, then the IRS will send either a Final Notice of Intent to Levy or a Notice of Federal Tax Lien. If the taxpayer is facing a levy, the IRS must send the Final Notice of Intent to Levy prior to actually levying. If the taxpayer is facing a Notice of Federal Tax Lien, the IRS must send a Notice of Federal Tax Lien within 5 business days after filing the lien in the county where the taxpayer resides and/or owns property. The taxpayer has the right to request a CDP hearing within 30 days of receiving either notice. Upon receiving the CDP hearing request, the IRS will send the case to Appeals. Eventually a Settlement Officer from the Office of Appeals will be assigned to handle the hearing. If the taxpayer and the IRS agree upon a collection alternative, then the IRS will close the case and the taxpayer will presumably comply with the terms of the collection alternative submitted. If the taxpayer and the IRS do not agree on a collection alternative (or the taxpayer does not participate adequately to present a cognizable collection alternative), the Settlement Officer will issue a Notice of Determination giving the taxpayer 30 days to petition the U.S. Tax Court for review of the hearing’s outcome. Review by the Tax Court is subject to an “abuse of discretion” standard of review, whereby the Tax Court must determine whether or not the IRS abused its discretion in not accepting the requested collection alternative.

This discussion raises the question of why a taxpayer would want to request a CDP hearing. There are several reasons. First, once a request for a CDP hearing is timely made, the IRS must suspend collection efforts against the taxpayer. While this tolls the collection statute, it can give a taxpayer time to gather documentation for a collection alternative. There may also be some unique situations where it makes sense to submit a collection alternative through CDP. For example, if a taxpayer seeks an Effective Tax Administration offer in compromise on the basis of public policy or equity, submitting this through CDP is the preferable route because of the opportunity for judicial review. The prospect of judicial review can provide additional leverage: for example, in the case of an offer in compromise based on doubt as to collectability with special circumstances, where the special circumstances warrant a departure from the standard income and expense analysis that the IRS would generally undertake. Suppose a taxpayer owes $30,000 to the IRS and has $10,000 of equity in a mobile home but can neither borrow against it nor find affordable alternative housing upon a sale. If a taxpayer argues that the value of the mobile home should not count as equity for purposes of the offer in compromise, it raises a special circumstance that asks the IRS to depart from its regular economic analysis that would otherwise posit the $10,000 equity in the home as part of the offer. It may make sense to submit this offer in compromise through CDP.

In 2011 (coincidentally at the apex of economic woes caused by the Great Recession), the IRS mailed a record 2,778,321 notices, but only 36,755 taxpayers requested CDP, an incidence of only 1.3%. In fact, from 2003 to 2017, taxpayers requested CDP in only 1.4% of all cases. This suggests that the vast majority of taxpayers do not benefit from the CDP protections.

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6 These generally include an initial assessment notice and additional notices issued by IRS Collection (such as CP 503), then a CP504 which is sent via certified mail to taxpayers and indicates that the IRS may levy a state tax refund.
7 If a taxpayer submits an offer in compromise through IRS Collection, and not through CDP, an IRS Revenue Officer will review the taxpayer’s offer. If the revenue officer rejects the offer on its terms, the taxpayer may appeal the rejection to the IRS Office of Appeals. If Appeals sustains the rejection, the IRS will close the offer in compromise leaving the taxpayer without further recourse to challenge the rejection. The taxpayer does not have a right to judicial review in that instance.
to have the possibility of judicial review in the event neither IRS Collections nor Appeals is willing to accept the special circumstances argument.

A final comment is warranted regarding taxpayers’ low usage rate of the CDP process. In 2017, the IRS mailed 1,226,950 notices giving taxpayers rights to CDP hearings.\(^8\) Only 25,928 CDP hearings were requested, an incidence of merely 2.1%. This low usage rate has been consistent over time. In 2011 (coincidentally at the apex of economic woes caused by the Great Recession), the IRS mailed a record 2,778,321 notices, but only 36,755 taxpayers requested CDP, an incidence of only 1.3%. In fact, from 2003 to 2017, taxpayers requested CDP in only 1.4% of all cases. This suggests that the vast majority of taxpayers do not benefit from the CDP protections and explains current efforts to reform CDP to make it more accessible to taxpayers and more efficient for the IRS, taxpayers and their representatives.

The Collection Due Process Summit Initiative

The Collection Due Process Summit Initiative was born at a panel of the Individual & Family Taxation Committee at the Tax Section’s 2019 May Meeting in Washington, D.C., titled “CDP – Beyond the Weeping and Gnashing of Teeth; What Can Be Done to Fulfill CDP’s Beneficial Intent?”\(^9\) The panel was a robust discussion of CDP issues with a goal of looking for solutions by examining CDP in its various stages (more on those later). This was aided by work already done by Keith Fogg\(^10\) and Carolyn Lee.\(^11\) This prompted engaging conversations for what improvements could be made to assist taxpayers, the IRS, and the Tax Court in reaching better CDP.

The panel formed the core of a CDP Summit Initiative. The vision is to continue the discussion, leading to presentations and articles such as this one, with the ultimate goal of bringing about positive CDP changes that benefit all parties involved and have the collateral impact of increasing CDP usage rates. The first step was improvements the panel and audience identified which, along with other CDP issues noted over time, became part of an opportunities and recommendations list. From there, we identified other individuals inside and outside the IRS who have been interested or influential in CDP practice. The list includes private practitioners, law professors, LITC directors, and IRS departments of Chief Counsel, Collections, Appeals, and the Taxpayer Advocate Service. We identified a core group to steer the CDP Summit Initiative as well as working groups focused on the different stages of the CDP process.

Collaboration from the IRS has been key because it would be counter-productive to meet without IRS involvement. The goal of the CDP Summit Initiative is to search out improvements and learn what can be done to implement them. If improvements are not possible with current resources, we want to discuss why that is the case. One suggested approach is a “yes, if” approach – i.e., a determination that the goal could be met with these resources. If a piece of the puzzle is missing, what can be done to find a realistic resolution? It should be noted that the IRS is constantly working to improve their procedures and processes. There have already been improvements to CDP this year, whether as a result of the CDP Summit Initiative or of ongoing developments at the IRS.

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\(^8\) These data were drawn from Keith Fogg, *The Jurisdictional Ramification of Where You Send a CDP Request*; 161 Tax Notes 837 (Nov. 12, 2018) (hereinafter “Fogg, Jurisdictional”).

\(^9\) Panelists in addition to the article co-authors were Professor Keith Fogg, Harvard Law School; Judge David Gustafson, U.S. Tax Court; Mitch Hyman, IRS Chief Counsel; and Carolyn Lee, Morgan, Lewis & Bockius LLP.


\(^11\) Collection Due Process Summit Initiative, Procedurally TaxiNG (July 18, 2019).
We considered three key stages for this initiative. First is an entry-level administrative stage concerned with notices and other communications. Second is the part of the administrative stage concerned with interactions between taxpayers and the IRS Office of Appeals. Third is the judicial phase of CDP, mainly focused on taxpayers’ interactions with IRS Chief Counsel and the United States Tax Court. It has become clear in identifying priorities within each stage that there is also a need to collect data and understand how the possible adoption of future technology by the IRS might impact CDP, so we are contemplating developing a working group focused on data and technology issues.

**Notices and Communications**

In this stage, the focus is on official documents and electronic communications between the IRS and taxpayers regarding CDP. For example, this stage considers items such as the CDP notice that the taxpayer receives based on a lien or levy, as well as the supplemental IRS Publication 594 and Form 12153 (and instructions) that are often included in the envelope with the notice. A main criticism of CDP communications is that taxpayers often do not understand their CDP rights or are confused by the process. The low response rate mentioned earlier may be in part a result of the CDP notice format. The letter the taxpayer receives is framed as a billing notice from the IRS. There is a mention on the first page that the taxpayer has the right to a hearing. For those curious about that hearing, there is a paragraph on the next page discussing the “Right to Request a Collection Due Process Hearing.” These are part of several pages, so that important paragraph may get lost in the mix.

The taxpayer is next directed to Form 12153, Request for Collection Due Process. There, the taxpayer would fill out a two-page form based on attached instructions. Where to send the form may be confusing to taxpayers, since it is mailed to an address on the lien or levy CDP notice mailed to the taxpayer. Those notices often include an address relevant to the CDP hearing request as well as a different address (or multiple different addresses) relevant for taxpayer payments to the IRS for the amount due. Since there may be two or more addresses listed on the first two pages of the IRS notice, taxpayers may not easily find the correct addresses for their responses.

Similar criticisms apply to Publication 594. It is a dense read with technical jargon focused on collection issues beyond CDP hearings. That is a sharp contrast to EITC Publications 962 or 3211, each two-page publications with pictures designed for taxpayers who may have less understanding of intricate tax processes.

The CDP Summit Initiative participants hope to identify opportunities for clearer, more direct taxpayer guidance so that taxpayers understand their CDP rights. Ideally, the initiative will ensure that there are no artificial barriers preventing taxpayers from acting on those rights.

**Interacting with IRS Appeals**

This administrative stage focuses on what happens after a taxpayer requests CDP, the form has been received by the IRS, and there is interaction with the IRS Office of Appeals. The Summit Initiative foresees opportunities for streamlining interactions between taxpayers and the IRS. It is considering how the IRS could better accommodate taxpayers and what improvements could benefit the IRS by reducing the delays and

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12 Typically, this is an LT 11 form.

taxpayer or representative confusion that reduce process efficiency. In many instances, these opportunities offer mutual benefit for both taxpayers and the IRS.

An opportunity that the Summit Initiative has identified involves screening timely filed CDP requests as soon as possible so that an IRS employee can be assigned to contact the taxpayer if they have indicated on the Form 12153 either that they would like an installment agreement or that they cannot pay the balance. The employee could request that the taxpayer fax or mail a collection information statement and try to reach an acceptable collection alternative without having to send the case on to a Settlement Officer within the Office of Appeals. Based on personal experience of the authors, the IRS appears to be assigning employees to handle preliminary screenings of financial information in some CDP cases, but it may not be a consistent practice throughout the country. A broader use of this approach could resolve cases earlier in the process and prevent many cases from being assigned to Settlement Officers, a win-win for both taxpayers and the IRS.

Another opportunity that seems simple to implement and beneficial to both taxpayers and the IRS is to provide a centralized mailing address for taxpayers and practitioners to use to submit their Form 12153 and accompanying documents. This would allow IRS agents to receive and catalog the forms as they come in and apply a centralized screening mechanism based on the suggestion above. Additionally, staff within a centralized office could determine which Appeals Office would best handle the CDP request based on inventory levels and perhaps specialization. Using a centralized mailing address would be an improvement from the current system of requiring taxpayers to send their requests to the address on the notice of levy or lien, as that is confusing for taxpayers and requires the Service to track forms across many different addresses.

**Judicial Stage**

While the statutory and regulatory provisions enabling and defining CDP have been in place for over 20 years, a number of questions still remain regarding the Tax Court’s authority and jurisdiction in CDP cases. For example, it is not clear whether equitable tolling is available for petitions and whether IRS administrative/mailing processes permit adequate notice to identify when the 30-day period to petition the court following receipt of a Notice of Determination begins. The CDP Summit Initiative intends to convene a working group to explore these and other topics and craft recommendations to be shared with the Tax Court and IRS.

Other questions affect how the IRS Office of Chief Counsel handles the CDP cases on its dockets and to what extent it may settle CDP cases by accepting collection alternatives. A recent update to the Chief Counsel Division Manual (CCDM) provides guidance on Settlement of Docketed CDP cases.14 It provides specifically that:

> Settlement through acceptance of a collection alternative such as a new offer in compromise or installment agreement where there has been no abuse of discretion by Appeals may be appropriate when it is necessary for the fair treatment of a taxpayer or when a lack of settlement could result in unfavorable legal precedent. Otherwise, the determination should be defended and the taxpayer should be encouraged to submit a collection alternative after the litigation is concluded.

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14 I.R.M. § 35.5.2.19 (3) (08-06-2019).
This language authorizing settlement through acceptance of collection alternatives in some cases seems to offer an appealing alternative to filing Motions for Summary Judgment (more common) or litigating CDP cases to trial (less common). The CCDM further provides that:

Counsel does not have the authority to directly accept collection alternatives from taxpayers on behalf of the Service. If Counsel seeks to settle a docketed CDP case through a collection alternative, Counsel must request the assistance of the Service to evaluate and accept or reject the proposed collection alternative.15

The CCDM likely describes a practice that has been in place for some time. Nonetheless, it puts a spotlight on the question of how Counsel and Appeals (and possibly Collection) could best collaborate. With these new questions come new opportunities.

The Future of the CDP Summit Initiative

Three panels dealt with the CDP Summit Initiative during the Tax Section's 2019 Fall Tax Meeting in San Francisco. The first panel, led by author Erin Stearns, was part of the Tax Bridge on the Road, sponsored by the Young Lawyers Forum and Diversity committees, called “What is Collection Due Process? A Practical Introduction to the Stages of CDP.” The panel introduced young tax lawyers to the CDP process. The Individual & Family Taxation committee included a panel led by author William Schmidt titled “Collection Due Process Notices: Much Needed Works in Progress,” that discussed in-depth several of the issues raised in this article. The Pro Bono & Tax Clinics committee held a panel titled “Prior Opportunities to Dispute Liability in Collection Due Process: An Oversized Reaction to Insufficient Action.” Led by Carolyn Lee, the panel explored whether an individual had a prior opportunity to dispute a liability in connection with a CDP hearing. Discussions following the panels were encouraging, and with the input of those additional interested parties, the Initiative can move forward and collaborate toward change.

As noted above, in December, the Low Income Taxpayer Representation workshop will be focused on the Collection Due Process Summit Initiative. The event is from 8:30 a.m. to noon on Tuesday, December 3rd, in Washington, D.C. The workshop will be a three-hour summit on these CDP topics. There will be breakout sessions focused on the stages of CDP plus discussions to review the issues and foster solutions. This session is open to interested practitioners, not just those who represent low-income clients. The goal is to hear feedback from any tax attorneys who want to improve the CDP process.

Readers, we want to hear from you. Do you want to see further CDP discussion after December? What issues have your clients faced in CDP that you believe are pressing? If you have ideas or suggestions for the CDP Summit Initiative, please contact William Schmidt (schmidtw@klscinc.org), Erin Stearns (estearns@law.du.edu), or Carolyn Lee (carolyn.lee@morganlewis.com). ■

15 Id. at (4).
PRO BONO MATTERS

Giving Back—An Inside Look at Pro Bono at a Law Firm

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

Tax attorneys and volunteers do pro bono work for a variety of reasons, none of which really matter in my opinion so long as low-income taxpayers are gaining access to our services. In the past, I have written in this column about tremendous results obtained by pro bono attorneys and volunteers and interviewed a long-time tax attorney about his career and work as an advocate for low-income taxpayers. This time I would like to look closer to home and to discuss how tax attorneys at my firm give their time to pro bono. To capture more views than just my own, I've enlisted the help of my firm's head of pro bono and community service, a State & Local Tax partner, and an associate in our Private Client group.

Pro Bono

People often ask me how I get involved in pro bono matters and what opportunities exist in the area of tax law. The opportunities are endless, including federal and state controversies, general tax planning such as entity formation and restructuring, 501(c)(3) work, and state property tax appeals.

For me personally, I tend to stay in my lane and work on pro bono tax controversies in the United States Tax Court. The majority of these opportunities come through referrals from local low-income taxpayer clinics across the country: for example, I have received referrals from, or partnered with, tax clinics from California, Hawaii, Illinois, Los Angeles, New York, Ohio, Oregon, and Washington. Other opportunities have come through participation in the Tax Court’s Calendar Call Program. We generally staff these matters with one or more tax associates and a supervising tax partner, with the emphasis on allowing the associate to obtain meaningful experience in running a Tax Court case.

Each case is unique and has its own story. To name a few, there have been the disabled taxpayer in Hawaii fighting for medical deductions to renovate his home for wheelchair access, the couple in Chicago seeking relief from erroneously computed penalties that resulted in abatement of penalties for taxpayers across the country, individuals in various cities seeking innocent spouse relief to avoid being saddled with the debt of their ex-spouses, and individuals seeking refunds for disallowed refundable credits that allow them to meet their basic living needs. Each case has been rewarding in its own way, and has created memories and experiences (good and bad) that cannot be forgotten. As a bonus, my children can understand much more easily my explanation of these cases than they can of a Supreme Court case over whether a 3-year or 6-year statute of limitations applies. As I've said in the past, we should all strive to do more pro bono work to give back to those who are in difficult financial situations.
With that out of the way, let’s see what some others have to say about their experiences.

**Q&A: Elizabeth Lewis, Pro Bono and Community Service Partner**

Elizabeth Lewis is the head of pro bono and community service at my firm. Prior to stepping into this role in late 2015, Elizabeth was a partner in our U.S. & International Tax group where she focused primarily on international tax planning for U.S. and non-U.S.-based multinational companies.

**Q** Can you explain a little bit how you transitioned from being a tax partner to overseeing the firm’s pro bono activities?

**A** I was an associate and later a partner for almost ten years before transitioning into the role of Pro Bono and Community Service Partner. In many ways it was a natural transition for me as I have been very active in the firm’s pro bono activities throughout my career and had served as the co-chair of the Chicago pro bono and community service committee for several years before the transition. Our firm’s prior full-time pro bono partner was leaving for new opportunities and the role opened up. While I loved my tax practice, I also loved my pro bono practice and it seemed like a once-in-a-career opportunity to be able not only to follow my heart and dedicate my full career to pro bono but also to do so at a firm that I know and love.

**Q** What types of responsibilities do you have in your current role?

**A** I oversee the firm’s global pro bono program across all twenty of our offices. This involves everything from strategic vision, programming and initiatives, to case placement, to risk management, to attorney mentoring and support.

**Q** What are some of the difficulties that you face in your role?

**A** When someone is facing a legal challenge and can’t afford a lawyer, that person faces an uphill battle. The outcomes are very, very different when someone has access to a lawyer. In certain cases, it is very clear why someone needs a lawyer and how having a lawyer will help. In other cases, it is less clear. For large firm lawyers who regularly deal with risk in the millions and billions of dollars, it can be hard to see how, for example, helping a family deal with a $3,000 tax debt will be meaningful. But, it really can be. If the family can deal with the tax debt, it may mean that they can stay in their home, can invest in their children’s educations, and can afford the healthcare that they need. This can make all the difference in their futures.

**Q** How do you encourage other attorneys to engage in more pro bono work and what types of opportunities are available to private practice attorneys (either inside tax or outside tax)?

**A** I take a two-pronged approach. First, I focus on the human interest side of pro bono emphasizing who the potential clients are, why they need help and the difference that a lawyer can make in their lives. Second, I focus on the professional and business development opportunities that pro bono offers. For a younger lawyer, it is an excellent way to develop skills and gain opportunities years ahead of schedule. For more seasoned lawyers, it is a way to stand out in the marketplace as a good lawyer and a good person. This can only be a positive thing.
In terms of the opportunities, there is a huge range. For a tax lawyer who wants to focus on tax in his or her pro bono practice, there are many individuals who need help navigating audits and Tax Court cases. There are also many nonprofits and small businesses in need of tax support on a wide range of issues. I also think tax lawyers have a lot of skills that, whether they realize it or not, would translate well to a whole range of different types of pro bono cases from government benefits to housing to veteran's issues.

Q: Are there any goals/aspirations that you believe tax attorneys and law firms should strive to meet in terms of pro bono activities?

A: I think every lawyer should strive to undertake at least one meaningful pro bono project each year. What is meaningful and manageable might look different for every lawyer. For some folks, volunteering for three hours at a walk-in clinic might be all that is feasible. For others, it may mean taking a case to trial on behalf of a low-income taxpayer. I think you just need to assess (i) what you have the ability to handle in a given year and (ii) what you hope to get out of it (whether that is skill development, personal fulfillment, etc.).

Q&A: Mary Kay Martire, State & Local Tax Partner

Mary Kay Martire is a partner who focuses her practice on state and local tax disputes. She currently heads the Chicago pro bono subcommittee focused on opportunities in the federal and state tax areas.

Q: What types of pro bono matters have you worked on while in private practice?

A: I've worked on a wide variety of pro bono matters in my career. The first project I worked on as a young attorney was to serve as counsel to a newly formed local school council in the Chicago Public School System. Over the years I've regularly served as guardian ad litem to the Cook County Probate Court in disputes over the custody of minor children. With Andy's help, I represented a client seeking innocent spouse relief from the IRS and the Illinois Department of Revenue. I've represented young immigrants seeking DACA protection, and I have volunteered for Ladder Up. I'm also regularly involved in matters in which we provide pro bono assistance to not-for-profits seeking sales and property tax exemptions. The possibilities are endless!

Q: How do you get associates and partners involved in pro bono activities?

A: Because my practice group is small and close knit, I usually call people personally or send them individual emails. I remind them of our firm's generous pro bono policy and of the minimum requirements we set as a firm for pro bono participation. I usually offer to find a project if help is needed. For people who don't have time to spare, I ask them to at least attend a lunch program during pro bono month in October.

Q: What do you believe are the benefits to tax attorneys in doing pro bono work?

A: Like any volunteer activity, I find that doing pro bono work often gives back to me more than I put into the project. There is a great sense of satisfaction and pride that comes from providing pro bono assistance to someone who wouldn't otherwise be able to engage our services. Depending on the type of project chosen, the work can also increase your knowledge and expertise in billable matters.
What are some of the challenges that you see when it comes to engaging in pro bono activities?

Particularly when I’m busy, it can be challenging to maintain a mindset that the performance of pro bono activities deserves the same time and attention as my billable work. Also I think there can be self-imposed barriers to entry for attorneys who think the only type of pro bono work available is litigation-based. Our pro bono committee works hard to overcome that presumption.

What was the most (or one of the most) rewarding experiences that you have had doing pro bono work?

Very early in my career I was assigned to take on a prisoner rights case pending before the Northern District of Illinois. I was able to settle the case for $15,000 for my client just as he was being released from prison. He was extraordinarily grateful for that result.

Q&A: Jane Zhao, Private Client Associate

Jane Zhao is an associate who focuses her practice on private client matters. Prior to joining the firm, Jane worked at the tax clinic for the Center for Economic Progress in Chicago and was an ABA Section of Taxation Christine A. Brunswick Public Service Fellow (2012-2014).

Given your background working at a low-income taxpayer clinic prior to joining the firm, what were some of the challenges you faced in transitioning to life at a law firm?

Surprisingly, the transition from representing low-income individuals at a tax clinic to representing high net worth individuals and families came with fewer differences than I anticipated. The hours are longer and the legal issues may be different at times, but clients are people, partners are people, and they all need help (in a timely fashion)! More seriously, though, the practice of law at a tax clinic and a large law firm both involve difficult legal issues, interesting clients, and managing several different tasks at once, so the transition was challenging mostly in the sense that starting any new job can be challenging.

How have you continued your pro bono activities since entering private practice and what types of matters have you worked on?

Luckily, my firm is very supportive of pro bono work. Since 2014, I have worked on two Tax Court cases: an income tax audit where the IRS disallowed certain exemptions and credits to our client, a single mother who supported her minor son and disabled sister (the taxpayer prevailed); and an innocent spouse request for a mother of eight children (still pending). I also have worked on non-tax-related pro bono matters (including helping a Rwandan refugee obtain asylum).

What experiences have you been able to draw from based on your prior position in terms of your current representation of low-income taxpayers?

I completed my one and only full Tax Court trial (from filing the petition to closing arguments and briefs) during my time at the tax clinic. This experience was extremely challenging but also helped me appreciate the full life cycle of a Tax Court trial, which is invaluable for both pro bono and non-pro bono matters.
How have you been able to juggle your continuing commitment to pro bono while also meeting your responsibilities as an associate and a new mother?

The good news is that generally, from my experience, pro bono tax cases have time commitments that are reasonably contained and deadlines that are known in advance and can be managed. Of course, it’s still not easy—pro bono clients and paying clients are both clients, and require the same attention to detail and deadlines. Often, I sprint out of the office at 6pm to make it for my one-year-old’s bath and bedtime, and then log back in to do some work or clean up emails. I find that the most successful way to juggle various responsibilities is just to make a list and start getting things done. Overall, I’m grateful that I get the opportunity to do interesting work and still spend time with my little one. It is a busy and fulfilling life.

What advice do you have for other tax associates interested in pro bono work?

Most law firms have someone to coordinate pro bono opportunities for their attorneys. If your law firm does not or if you are a solo practitioner, I have found that tax clinics always welcome volunteer attorneys at a Tax Court calendar call and will add your name to a list of pro bono attorneys who are willing and eager to take on cases. From my experience at the tax clinic, I remember that the problem is never too little work to do, but rather too few volunteers to do the work!

Conclusion

To borrow from the title of this quarterly column—Pro Bono Matters. Pro bono opportunities exist in all shapes and sizes: Tax Court calendar call, assisting members of the armed services, assisting elderly taxpayers, partnering with low-income taxpayer clinics, and VITA and tax counseling for the elderly, to name a few.

If you are interested in doing pro bono work (tax or otherwise), talk to your local pro bono coordinator, contact your local low-income taxpayer clinic, or reach out to me or someone on the ABA Section of Taxation’s Pro Bono & Tax Clinics Committee.
THE INCOMPETENT AUTHORITY: QUESTIONS AND ANSWERS

Documents, Conflicts, and Just Getting Started

By Andy Howlett, Miller & Chevalier, Washington, DC; Guinevere Moore, Johnson Moore LLP, Chicago, IL; and Andrew Strelka, Latham & Watkins LLP, Washington, DC

Editor’s Note: This is to introduce a new feature for ABA Tax Times, The Incompetent Authority: Questions and Answers, to provide some useful responses to your questions about the mysteries of the tax profession, including tax career, business of tax, tax ethics, and other burning tax questions. If we don’t know the answer, we know who to ask. And we hope to offer the answer with a touch of humor. Of course, the standard disclaimer applies: this column does not dispense individualized tax advice, but merely presents the considered views of the writers about tax topics of general interest to the readers.

Andy Howlett is a member at the law firm of Miller & Chevalier in Washington D.C. He focuses his practice on tax planning and helps his clients understand and plan for the federal tax consequences of a wide range of transaction. He is married with two children, all of which made sense from a tax perspective at the time.

Guinevere Moore is a tax controversy and litigation partner with Johnson Moore LLP in Chicago. She's worked at big shops (both accounting and law firms) but has found true tax bliss at her four lawyer firm. She is married with four children, all of whom are still young enough to want to spend time with her. Her favorite section of the Internal Revenue Code is § 7430. Obviously.

Andrew Strelka is counsel at Latham & Watkins LLP. He has worked for the IRS, the D.C. U.S. Attorney’s Office, the Department of Justice Tax Division, and the White House Counsel’s Office, and can therefore speak authoritatively on the varying definitions of what constitutes “business casual attire” in D.C.

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Dear Incompetent Authority,

When you’re working with clients who have been pulled for audit that had been working with tax preparers, are there any common mistakes that you see preparers or other advisors make that result in issues with the IRS or other taxing agencies?

– Wants to Get It Right
Dear Wants to Get It Right,

This is such a great question! Everyone makes mistakes, but some of the most common mistakes we see in audits are completely preventable. We don't have room for all of our exam representation tips here, but here are some big ones.

**Information Document Request (IDR) Responses**

We were going to make a rule prohibiting abbreviations in parentheses in this column, but let's face it. As tax lawyers we can't resist. So let's embrace it and move on. There are a lot of ways to respond to IDRs, and there's no “right way” to do it, per se. But there are a lot of wrong ways, including the following:

- Sending in IDR responses but not keeping a complete copy of what you send to the IRS, including documents produced, the letter attaching the documents, and proof of timely delivery to the IRS;
- Sending in IDR responses without actually reading the documents being produced;
- Sending in IDR responses without actually reading the documents being produced and not noticing that the documents contradict the position taken on the tax return;
- Sending in IDR responses without actually reading the documents being produced, not noticing that the documents contradict the position taken on the tax return and the position the practitioner is defending in the letter enclosing the IDR response;

(Are you sensing a pattern here?)

- Missing IDR Response deadlines;
- Not crafting an IDR response letter that shows that the taxpayer is complying with IRS requests for information, making it harder to argue that burden shifting under § 7491 applies if the case goes to trial;
- Failure to object to IDR questions that are objectionable;
- Allowing taxpayers to create documents in response to IDRs that didn't exist before the audit without thinking through the ramifications of doing so.

**Not Recognizing Conflicts of Interest**

We get it. It can be hard, really hard, to see that you have a conflict, let alone tell your client. But it will be much, much worse if you represent your client all the way through exam and appeals without considering whether you have a conflict if you are the return preparer, the estate planner, or the attorney who planned or implemented the transaction being questioned. So here's a quick reference guide for considering whether you have a conflict:

- You designed the estate plan and there's a potential for your client to pay additional tax and penalties, but the client would likely get out of penalties by raising reliance on professional advice as a defense;
- You prepared a tax return and now it is under exam and there's a chance the client will get out of penalties by raising reliance on professional advice as a defense;
- You represent two clients who have taken different positions on the same tax issue, both are under exam and both want to defend the position;
• You are no longer competent to represent the client and don't raise your hand and tell the client. Things we have seen:
  – There's a potential the case is going criminal and the long-time practitioner can't tell and doesn't take the right action;
  – The case is going criminal and the long-time practitioner can't tell and doesn't take the right action;
  – You feel in over your head but don't want to say so for fear of losing the client.

And this last one doesn't fit into either one of those categories but needs to be said. Do not ever produce your client for an interview without taking detailed notes. First consider carefully whether your client can be interviewed; if so, take detailed notes. There's nothing quite like the sinking feeling of taking over a case after learning the client has been interviewed and there are no notes from the meeting.

Want to see your questions about the mysteries of the tax profession, including tax career, business of tax, tax ethics, and other burning tax questions answered by The Incompetent Authority? Readers may submit questions anonymously for a future The Incompetent Authority column through our Submission Portal.

Dear Incompetent Authority,

A client has asked me about the tax consequences for a very specific kind of transaction, and I don't know where to start! Where do I start?

– Really Wants to Get It Right

Dear Really Wants to Get It Right,

Another great question. Have you tried googling it, er, I mean, running a targeted World Wide Web search on a site like Bing.com or Google.com?

In all seriousness, practitioners sometimes forget that internet search engines can be a great resource for a first level of review. Here, it's a good idea to utilize advanced search terms to isolate exactly what you're looking for (e.g., tax AND “horizontal double dummy”). This might yield a practitioner’s slides or client alert on the subject, which will point you to the appropriate Code section and regulations, and in the right directions.

What if that doesn't work? The next bet is to check through any (searchable) treatise to which you might have access. If it's a common issue, there's a good chance that the relevant treatise at least covers the basics—again we're looking for a jumping off point, not the end-all answer you bring back to the client. Look for terms that describe the transaction as broadly as possible, e.g., “reverse merger” or “partial liquidation” and focus in from there.

Finally, don't neglect the possibility that a public entity has done something similar to what your client is contemplating. If so, it's likely that the entity described the tax treatment of their transaction in a document
filed with the Securities and Exchange Commission, such as a 10-K (the annual report) or an 8-K (a report for significant transactions and events). These forms are filed on SEC EDGAR (formally, “Securities and Exchange Commission Electronic Data Gathering, Analysis, and Retrieval). While the search engine on the SEC’s website is only okay, some private companies (e.g., Bloomberg Law) allow for enhanced filtering based on a variety of criteria, including the type of transaction. As to what to search for, just think about how the company would describe its transaction to an investor (or, failing that, a grizzled securities lawyer).

Still stumped? Try showing up to an ABA Tax Section Meeting or event and asking there (though being careful not to reveal any client confidence). We’ve no doubt the answers you receive will be informative (and what’s more important) entertaining. ■
PEOPLE IN TAX PODCAST

Keith Fogg

In S02E01, James Creech and Keith Fogg discuss working in the IRS Chief Counsel office, transitioning to teaching, clinical law, and blogging. Listen here.

In S02E02, they discuss the advantages of ABA Tax Section membership, the quality of Tax Section programming, taxpayer uptake of LITC services, and advice to young lawyers. Listen here.

(Interviews at the 2019 Midyear Tax Meeting, New Orleans, LA.)

Alison Helland

In S02E03, James Creech and Alison Helland discuss the atmosphere of involvement at Tax Section meetings, the practice of helping business owners with estate and succession planning, using Tax Section meetings to stay current, and the benefits of volunteering within the Section. (Interview at the 2019 May Tax Meeting, Washington, DC.) Listen here.

Andy Grewal

In S02E04, James Creech and Andy Grewal discuss working in academia, disagreeing respectfully on social media, teaching tax law, and the shortfalls of the tax code. (Interview at the 2019 May Tax Meeting, Washington, DC.) Listen here.

Caroline Bruckner

In S02E05, James Creech and Caroline Bruckner discuss working on Capitol Hill, the tax code and women business owners, the need for data and practitioner perspectives to inform tax policy, and the social impact of tax policy. (Interview at the 2019 May Tax Meeting, Washington, DC.) Listen here.

John Colvin

In S02E06, James Creech and John Colvin discuss work on the Tax Section Committee on Government Submissions, the attractions of Tax Meetings, and taking a case to the U.S. Supreme Court. (Interview at the 2019 May Tax Meeting, Washington, DC.) Listen here.
Christine Speidel

In S02E07, James Creech and Christine Speidel discuss tax law work helping victims of domestic violence, volunteering for the Tax Section Pro Bono and Tax Clinics Committee to advocate for better tax law administration, teaching tax law to clinic students, and advice to law students interested in social advocacy through tax. (Interview at the 2019 May Tax Meeting, Washington, DC.) Listen here.
I’ve Grown Accustomed to No Tax

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

(To the tune of I’ve Grown Accustomed to Her Face, by Frederick Loewe and Alan Jay Lerner, from the 1957 Broadway Musical My Fair Lady, as sung by Rex Harrison or Dean Martin (1960) or Diana Krall (2016).)

I’ve grown accustomed to no tax;
I’ve gotten used to paying none.
Served by tax lawyers on M Street
Quite legally I cheat.
They smash my bill
While on the Hill.

There are some people I won’t name,
Through contributions I make claim,
Whom I’ve corrupted to my purpose
Of my wealth becoming more.
Should a Tax Bill threaten that—
It never sees the Floor.

To never paying one-red-cent.
Of that they’re smugly confident.
They know the people I’ve been mentioning
And use them without shame.
Nothing new in all of this.
It’s always been the same.

I’ve grown accustomed to no tax.
Some may not like those facts.
I still will pay no tax.

I’ve grown accustomed to no tax
And I am not the only one.
My classmates whom my shoulders rub
Nights at the Harvard Club
All brag, and boast
And raise a toast
SECTION NEWS & ANNOUNCEMENTS

Call for Applications: Diversity and Inclusion Scholarships to 2020 Midyear Tax Meeting

The Tax Section is pleased to announce its new Diversity and Inclusion Scholarships, designed to encourage diversity and inclusion at Section Tax Meetings, and to invite applications for scholarships to attend the 2020 Midyear Tax Meeting, in Boca Raton, Florida. The application deadline will be November 22, 2019.

The Section embraces diversity and inclusion in every aspect of its activities, including its meetings, and the new scholarships will defray the cost of meeting attendance, including waiver of the registration fee and some coverage of room and travel costs. Applicants must meet eligibility requirements, including Section membership and understanding of the Section’s Diversity and Inclusion Plan.

Scholarship recipients will be required to fulfill several duties during and after the Tax Meeting, including attendance at certain panels and events, and subsequent reports to the Section’s Diversity Committee.

Applicants should review the full eligibility requirements, selection criteria, and recipient duties found in the scholarship application.

The Tax Section Council approved the new scholarships at its October 2 meeting in San Francisco. Scholarship decisions will be made by the new Diversity and Inclusion Scholarship Selection Committee.

Applications, as well as any questions, should be directed to Meg Newman, at taxlserve@americanbar.org. Applications are due by 5pm ET on November 22, 2019.
SECTION NEWS & ANNOUNCEMENTS

Government Submissions Boxscore

Government submissions are a key component of the Section’s government relations activities. Since June 7, 2019, the Section has coordinated the following government submissions. The full archive is available to the public on the website: [https://www.americanbar.org/groups/taxation/policy/](https://www.americanbar.org/groups/taxation/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

Featured Publications

The SALT Deskbooks

The Tax Section is pleased to offer the latest annual editions of two key publications developed by our State and Local Tax Committee. Both annual deskbooks provide comprehensive and current guides to key principles and positions in every state, specific tax statutes, regulations, and case law, and important interpretive information gleaned from rulings and bulletins. Updated annually by local experts, these deskbooks are essential for in-house tax professionals, attorneys, and accountants.

Available as an ebook or in print/CD/PDF format.

**Sales & Use Tax Deskbook, 32nd Edition, 2018-2019**

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SECTION NEWS & ANNOUNCEMENTS

Accepting Nominations for the 2020 Janet Spragens Pro Bono Award

The Section of Taxation Pro Bono Award Committee is seeking nominations for the 2020 Janet Spragens Pro Bono Award.

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

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

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

Nominations should include a brief statement addressing how the nominee satisfies the above criteria and must be submitted by Friday, December 6, 2019, to DeMarcus Freeman at: demarcus.freeman@americanbar.org. All nominations will be maintained in confidence by the Pro Bono Award Committee.

Accepting Nominations for the 2020-2021 Nolan Fellowships

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

The deadline for nominations for the 2020-2021 Nolan Fellowships is March 1, 2020. Visit the Nolan Fellowships webpage for more information about the award criteria and to download the nomination form.

TaxIQ: 2019 Fall Tax Meeting Materials Available

Original materials from the 2019 Fall Tax Meeting are now available on TaxIQ. TaxIQ offers online access to the latest committee program materials presented at Tax Section Meetings.
In March 2019, we launched our searchable Section-hosted database, and access to it is an exclusive benefit of membership in the Section of Taxation. Click here for access. You will be prompted to log in, so please have your ABA-associated email address and password handy.

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**The Tax Lawyer—Fall 2019 Issue Out Soon**

The Fall 2019 issue of *The Tax Lawyer*, the nation’s premier, peer-reviewed tax law journal, will be available soon. *The Tax Lawyer* is published quarterly as a service to members of the Tax Section.

**Fall 2019 Issue** (Click here to go to *The Tax Lawyer* homepage.)

**Articles**

- Steven Z. Hodaszy, *The Curious Case of Section 461(l): Why This Unclear and Unwise New Rule Should Be Construed as Narrowly as Possible*
- Shay Moyal, *Back to Basics: Rethinking Normative Principles in International Tax*
- Mary Roche Waller, *Sex Inequality in the United States and French Income Tax Filing Systems*

**Report**

American Bar Association Section of Taxation, *Comments on Proposed Revenue Procedure in Notice 2019-07 Regarding Section 199A and Rental Real Estate Enterprises*

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**The Practical Tax Lawyer—September 2019 Issue Now Available**

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

- Bradley T. Borden, *Partnership-Related Relatedness: Measuring Partners’ Capital Interests and Profits Interests*
- Robert S. Schwartz, *Centralized Partnership Audit Procedures*
- R. Eric Viehman, *Generation-Skipping Transfer Tax Planning (Part 2 with Sample Language and Forms)*

For more information, visit PTL’s webpage: https://www.ali-cle.org/legal-periodicals/PTL.
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 provides 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, which provides two-year fellowships for recent law school graduates to work for non-profit organizations offering tax-related legal assistance to underserved communities.

In its four-year existence, the TAPS endowment fund has supported 18 fellows. Not only have the fellows produced impressive results, but many have secured positions in the field of low-income tax assistance and continue to serve low-income communities and train a new generation of law students to provide these services. Other fellows have clerked for judges of the U.S. Tax Court who value their experiences working with underserved taxpayers and their perspectives gained from their first-hand involvement in low-income tax issues. Fellows who practice tax law in other settings such as major law firms and the government, continue to contribute to the Tax Section by remaining active in pro bono initiatives, speaking on panels, leading committees, drafting comments, and mentoring fellows and other new lawyers. This program has been incredibly successful both in serving taxpayers who otherwise might not have representation, making systemic change in local communities and in providing a springboard to careers in low-income tax services.

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.

For more information on how to get involved in tax pro bono assistance, please see our website or contact Meg Newman at megan.newman@americanbar.org.

Get Involved in ATT

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

Section Meeting & CLE Calendar

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

https://www.americanbar.org/groups/taxation/events_cle/

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, MS, MO, MT, NV, NM, NY, NC, ND, OK, OR, SC, TX, UT, VT, WA, WV and WI. Recordings and course materials from the following recent Tax Section webinars and more are available through the ABA Web Store.

GILTI, FDII, and Consolidated Groups: An Introduction

Section 163(j) Proposed Regulations and S Corporations

A Whole New World: The 2017 Tax Act, Tax Advice, and Lawyer Ethics

The Rise of Injunction and Disgorgement Actions under Section 7402 of the Internal Revenue Code

Boilerplate Tax Distribution Provisions Can Get You Into Hot Water

Broken Hearts & Higher Taxes - Divorce Under the 2017 Tax Act

Tax Advice in the Age of the 24-Hour News Cycle

Nuts & Bolts Collection Series Part IV: Addressing Complicated Issues and Negotiating an Offer-in-Compromise

Affiliated and Related Corporations and Proposed 163(j)

Post-Tax Reform Planning for Cross-Border Investments by Private Funds

Section 1202: Tax Planning in Light of the 2017 Tax Act

New Law, New Regulations, New Practitioners: Legal and Ethical Obligations When Advising Taxpayers in an Uncertain Legal Environment

The IRS's Modern Use of Artificial Intelligence and Big Data in Tax Enforcement

Transparency Tide or Tsunami? The New Wave of Global Reporting Rules and IRS Tools to Unearth Foreign Financial Accounts

Repatriation of Foreign Earnings (Real or Imagined, Voluntary or Otherwise)

Tax Planning for Law Firms Under the 2017 Tax Act – The Effects of The Proposed Regulations
SECTION EVENTS & PROMOTIONS

Sponsorship Opportunities

ENHANCE YOUR VISIBILITY. GROW YOUR NETWORK. EXPAND YOUR REACH.

ABA Section of Taxation Sponsorship Provides Invaluable Returns.

ABA Section of Taxation Meetings are the premier venues for tax practitioners and government guests to connect on the latest developments in tax law and practice. Section Meetings draw up to 2,000 tax practitioners from across the U.S. and internationally. With over 150 panel discussions presented over two days by the country’s leading tax attorneys, government officials, and policy makers, Section Meetings are your opportunity to maximize your organization’s visibility and build relationships with key figures in the world of tax law.

The Section of Taxation is the largest, most prestigious group of tax lawyers in the country, serving nearly 16,000 members and the public at large.

- Over 10,000 Section members are in private practice
- 1,100 members are in-house counsel
- 32% of meeting attendees represent government
- 25% come from firms of over 100 attorneys
- 23% come from firms of 1-20 attorneys

Sponsorship Opportunities are now available for the following meetings:

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<td><strong>2020 MAY TAX MEETING</strong></td>
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For additional information on the above conferences or any of our other conferences, please visit [https://www.americanbar.org/groups/taxation/sponsorship.html](https://www.americanbar.org/groups/taxation/sponsorship.html) or contact our Sponsorship Team at taxmem@americanbar.org or at 202/662-8670.
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— Kym Anderson, CPA, CVA, CGMA, Director, Jones & Company

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