2000 ERWIN N. GRISWOLD LECTURE BEFORE THE AMERICAN COLLEGE OF TAX COUNSEL

HOW WILL A COURT RULE?

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I. INTRODUCTION

The invitation to deliver the Griswold lecture is a formidable honor on many counts, among them Dean Griswold's personal inauguration of the series and the high respect in which we hold each of the prior lecturers in the series. Special tribute is due tonight to two of them who left us within days of each other, John Nolan and Judge Ted Tannenwald. Their professional lives enrich and guide our own. "How would Jack have handled this?" or "How would Judge Tannenwald have ruled?" we can ask ourselves with profit throughout our careers. In a sense, such questions evoke the title of Erwin Griswold's first lecture, "Is the Tax Law Going to Seed?"[1] His remarks that evening were informal and personal rather than scholarly, an example I hope to follow this evening, but they were also characteristically perceptive and blunt.

I did not attend the Dean's law school and became acquainted with him only after his tenures at Harvard and the Solicitor General's office, though I knew him much earlier through my father, who served with him in the Department of Justice in the early Thirties—Dean Griswold as an assistant to Judge Thacher, then Solicitor General, and my father in the Tax Division, or, more accurately, then, the Tax Prohibition Division—a title borne with no sense of irony, since enforcement of the Volstead Act was at least as important then as enforcement of the revenue laws. In those days, the entire staff of Department of Justice could pose for their annual group picture on the steps of the Department's old building at the corner of Vermont and K—from the Attorney and Solicitor Generals, right down to the newest messengers. The camaraderie and sense of privilege in representing the people of the United States shared by that small band of lawyers ran strongly through to my own days in the Department a generation later.

Generations of lawyers respected the Dean's strong leadership of the Harvard Law School, his devotion to his wife of sixty-three years, his blunt, no-frills teaching and scholarship. His casebook, which I used as a beginning teacher of taxation forty years ago, was less concerned with its underlying policies or administration than how courts would apply the law to a given situation. Like Gerald Wallace, whose teaching Professor Bittker so perceptively recalled in our second Griswold Lecture,[2] the Dean sought not a pro-taxpayer or pro-govern-

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[1] Erwin N. Griswold, *Is the Tax Law Going to Seed?*, 11 AM. J. TAX. POL'Y 1 (1994).

[2] Boris I. Bittker, *The Erwin N. Griswold Lecture*, 11 AM. J. TAX. POL'Y 213 (1994).

ment interpretation but the correct interpretation, which for him was how a court would rule, if fully advised. Once convinced of what was right, he could be adamant. Like Boris Bittker, Jack Nolan, and our other Griswold Lecturers, the Dean regarded himself as a lawyer first and only then an expert in taxation. Beyond the tax law, we remember his unflinching championship of the Fifth Amendment rights exercised by targets of Senator Joe McCarthy's loyalty inquisition in the early Fifties, at a time when Harvard itself was in the Senator's gun sights as a haven for liberals—and worse. Professor Berman, then the faculty's Soviet law expert, recalled his anxious inquiry of the Dean as to whether it would be safe for him to attend a professional conference in Moscow. The Dean said brusquely, "If anyone asks, say I told you to go." He was a paragon of honesty, integrity, and courage, which Winston Churchill termed the virtue on which all other virtues depend. But he was also a positivist concentrating on the tax law as it existed. He asked that we first understand what it is and how it affects human affairs in this world, before considering how it might be improved in the next.

Years ago, he appeared with two other senior tax professors on a panel to discuss the art of teaching tax law. One of his colleagues described how he had developed, from one student's question of why home mortgage interest was deductible, a disquisition on the ability to pay, horizontal equity, and distributive justice. A second panelist, impressed with the tax law as a branch of fiscal policy, explained how the question could have been used to further the students' appreciation of how the deduction fueled the home building industry. The Dean finally commented tersely, "If students of mine had been foolish enough to ask such a question, I would have asked them to open the Internal Revenue Code and read Section 163." His former students in the audience probably found his reaction as predictable as his glass of Catawba juice at a cocktail party.

In these past weeks, while thinking about what to say to such good friends and distinguished colleagues tonight, like many of you, I was asked to evaluate yet another in the parade of tax schemes offered these days to our corporate clients. Typically, they are based on improbably exploitive reading or even ignorance of the tax law. Especially painful was one of them attributed to a lawyer who had gained prominence while entrusted with high public office. The contrast between the aggressive marketing of such products and the tax law as practiced by respected members of our College prompted me to revisit Dean Griswold's question of whether the tax law is going to seed, and we practitioners with it. Although my remarks address the current wave of aggressive corporate tax schemes, I hope not to trench on Jim Holden's thoughtful discussion last year of our ethical responsibilities under Circular 230 or the Code of Professional Responsibility.[3] Instead, I would like to focus on the contrast between the practice of tax law as conceived by prior lecturers and what we experience today.

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[3]James P. Holden, *Dealing with the Aggressive Corporate Tax Shelter Problem*, 52 TAX LAW. 369 (1999).

II. CORPORATE TAX SHELTERS

What would a man of the Dean's straightforward rectitude have thought of the current fashion of viewing tax departments as profit centers? Tax directors tell us they are expected to contribute to their companies' bottom line earnings as if they were charged with cutting production costs or hiking revenues. Compliance efforts take a back seat to reducing last year's effective tax rate. Accounting firms and others, alert to such trends, have been competing in manufacturing and selling cutting-edge tax planning products. They promise tax directors the tax savings demanded by CFOs. Too often, the edge cut is a corner of the law. Lawyers asked to review these proposals can attest to the flow of truly awful tax reduction ideas sent by corporate clients for review. Typically, these edge-cutters contort the language or mechanics of a provision in a way never contemplated by its drafters. They promise tax reductions out of all proportion to economic reality. Hopes for success depend more upon the failure of the IRS to challenge them than upon a judge feeling compelled, against instinct, to sustain them.

The heat of competition to burn down the corporate income tax has led to practices virtually unheard of even ten years ago. A marketer may request a prospective corporate client to hold a so-called "proprietary" scheme in confidence, either out of fear that competitors will steal it or that Treasury will get word of it and issue a chilling public response, as happens occasionally. As an inducement to buy the product, the promoter may offer to refund the price charged for the idea if it fails on audit. Big Five accounting firms, whose certifications of publicly-traded corporations' financials have long been respected and who oversee preparation of corporate returns, are now competing with investment bankers and others in peddling many of these products. Can they also agree to approve of returns relying on such aggressive positions and leave undisturbed reserves for contingent tax liabilities? Such multiple duties raise questions, not only on the merits of tax devices the accountants may have sold their corporate clients, but the reliability of their certificate.

Contrary to rules mandating independence by accountants,[4] at least one Big Five firm has recently admitted that many of its partners have invested in their clients' securities. The rules against such investments, the firm's spokesman implied, not their conduct, was out of joint. This recalls the debate in the ABA House of Delegates at last summer's meeting on the question of whether the Code of Professional Responsibility should be modified to accommodate lawyers engaged in so-called multidisciplinary practice with non-lawyers, including the growing stream of our numbers working for accounting firms. A special committee established by the ABA had recommended relaxing the rules on fee-sharing with non-lawyers and other rules to conform them to these current practices, on the theory that the ABA should recognize the business reality of

[4] *See* A.I.C.P.A. Professional Standards Rule 101 (1999). Lawyers are not bound by an analogous rule.

multidisciplinary practice and the conveniences provided clients. The proposal was recommitted, after criticism from the floor that it appeared to compromise the guarantees of independent legal counsel. As tax lawyers are hired by accounting firms for positions that seem increasingly proprietary, the need for guidance as to what they may and may not do also grows. Yet, the ABA has yet to clarify their ambiguous status. Are they practicing law? Are they simply "inside counsel" answerable only to their accountant employers? May they share profits with non-lawyers? At what point in providing services to their employer's clients must they recognize the responsibilities of lawyers in private practice? In his inaugural lecture, Dean Griswold suggested the need for such guidance in the coming age of "full service" firms, whether led by lawyers, accountants, or others. The starting point, he suggested, was Roscoe Pound's famous reminder that lawyers in private practice are engaged in the public profession of the law, to which its profitability as a business must be subordinated. In the long run, of course, considering how a court will rule and holding fast to what is right better serves the interests of our client and ourselves than overconfident schemes to reduce taxes.

By contrast, aggressive corporate tax advice puts corporate tax officers in jeopardy when they certify company returns calculated on artificial tax saving schemes as true, complete, and accurate. A tax return is not simply a first offer in a negotiating process. Yet some tax shelter promoters seem to regard return certifications the way our New York City bicycle messengers treat red lights—mere suggestions. Such aggressiveness is not limited to accounting firms, of course. Most of these proposals come from the minds and pens of lawyers, whether engaged in private practice or employed by accountants, bankers, or others. Complaints are heard, as well, of similarly aggressive, weakly-supported positions advanced by government counsel. Zealots on both sides, seduced by their own creative ideas, repress the probability of judicial rejection.

We all may. Any of us advising corporations would be deluded indeed to imagine ourselves on the sidelines of the corporate tax shelter phenomenon. Joseph Sittler observed long ago that "evil is never more quietly powerful than in the assumption that it resides elsewhere." For G.K. Chesterton's Father Brown, the first task of the criminologist is to detect and restrain the criminal under one's own hatband. The Dean in his inaugural lecture expressed concern over the growing confusion of roles among tax lawyers, accountants, bankers, actuaries, and others. He warned that lawyers should not forget their own profession's obligations to the courts and the public in working with others to provide tax assistance. When we do, we run the risk, as he put it, of going to seed, of straying from the ideals of a good lawyer, expert in taxation.

III. THE LETTER AND THE SPIRIT

These ideals—for tax lawyers in and out of government service—are compounded by a statute as subtle, as evanescent, and protean as the northern lights. It becomes less comprehensible in every Congress, however much its members decry their own handiwork. Older tax lawyers recall with nostalgia the days

when the Assistant Secretary of the Treasury would present to the House Committee on Ways and Means a draft bill, carefully conceived and drafted, introduce and discuss it at the beginning of prolonged, open hearings, and then work for weeks, both before and after introduction, with the Chairman to respond to public criticism and members' requests. The Joint Committee on Internal Revenue, staffed by wise, long-headed, and experienced tax professionals, led by a Chief respected by the chairmen of the tax-writing committees in both houses, monitored the tax policy decisions, coordinated and frequently controlled the actual crafting of language, which proceeded deliberately, carefully, and under the harsh testing of Ward Hussey, truly one of the unsung heroes among career legislative aides. What emerged from that process, gradually, were reasonably coherent legislative compromises with the Administration's tax initiatives.

This rarely happens today. Treasury invests little time in drafting revenue bills for Congress. The modern Assistant Secretary and Tax Legislative Counsel do not propose but react to Congressional proposals. For much of the time, they are simply out of the legislative loop. Drafting is shifting from their office—and even from the Joint Committee staff—to the majority and minority staffs of the tax-writing committees. Their work is often insufficiently edited and drafted too close to deadlines for public response, much less mature thought. Despite campaign rhetoric, Congress seems to like it that way, but the resulting chaos in the statute has fermented the compost of confusion in which aggressive tax strategies thrive.

Overly aggressive corporate tax shelters vex us for several reasons. They are as hard to define as obscenity, and we may not even recognize them when we see them, especially if they are our own. The law's elaborate crannies and flaws can provide even flagrant devices some color of respectability. The Service is hard pressed to detect them or allocate sufficient resources to deal with them. Finally, until Congress discovers a general cure to the problem, such as the passive loss limitation rule[5] for individual tax shelters, the courts—and our own assessment of how a court will rule—remain our major guide for tax planning. This is especially troublesome for the computer-friendly minds among us who chose our specialty in hopes of finding a binomial certainty in practice. The bad news is that we, like lawyers in other fields, must make inexact predictions of judicial reaction to our ideas. The good news is that courts still decide issues on the law, not agency or political bias. This has led at least two recent Assistant Secretaries for Tax Policy to express their preference for a principled judicial forum over Congress to resolve such matters.

IV. ROLE OF THE COURTS

Legislative reforms too often backfire. Before the enactment of the 1954 Code, tax controversies turned on more general statutory language. The greater specificity (Gordon Henderson called it "hyperlexis" in his celebrated article in

[5] *See* I.R.C. § 469.

the Tax Lawyer a few years ago)[6] of the 1954 Code stemmed from the naive belief that making the law more specific would reduce controversy. As Congress sought a more predictable statute to take the gaming out of tax law, it created only greater complexity—and, unfortunately, more opportunities for gaming.[7] As Marty Ginsburg has observed, by analogy to the Pharaoh's Rod in Exodus,[8] every inflexible rod created for the Commissioner's rule will turn into a green serpent and bite him. Impressive estates have been built by tax professionals doing just that. In counterbalance, the courts warn against exploiting technical language beyond its intent, reminding us of a much later Biblical passage from Paul's Second Epistle to the Corinthians, that the letter killeth but the spirit giveth life.

Judge Tannenwald, in his Griswold Lecture,[9] did not discuss the impact upon the Tax Court of the individual tax shelter epidemic of the Seventies and Eighties, but the court's impact upon them is worth recalling. With little increase in resources, the Tax Court faced a surging tide of tax shelter cases, involving every artificial device promoters could conceive of and sell. It was simply impossible to try them all. Yet, interest rate differentials made deferring payment of tax deficiencies beneficial, and the Tax Court, working with the Chief Counsel's office, had to devise techniques for cutting their inventory. Sample cases were chosen, stipulations were developed, and expedited procedures were ordered, which permitted the judges to dispose of literally thousands of cases a year. Something happened to case law in the process. The opinions of the Tax Court in individual tax shelter cases showed growing skepticism of artificial arrangements. Taxpayers' counsel came to realize that forcing such matters to trial might mean not only a loss of the issue, but penalties as well. While much of the credit for the eventual collapse of the tax shelter docket must be given to the out-of-pocket settlement formula developed by the Chief Counsel, at least as much credit is deserved by the judges, who refused to run from the deluge and dealt with it fairly but with increasing firmness. What emerged from the Tax Court experience with individual tax shelters was a stronger precedent on economic substance and judicial readiness to reject aggressive claims for blatantly tax-motivated transactions.

These decisions now are useful to the court in dealing with abusive corporate tax shelters. A Tax Court memorandum decision by Judge David Laro three years ago heralded a turning point in the battle against abusive corporate tax shelters. In *ACM Partnership v. Commissioner*,[10] the Pharaoh's Rod was the

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[6]Gordon D. Henderson, *Controlling Hyperlexis—The Most Important "Law and . . .",* 43 TAX LAW. 177 (1989).

[7]In his inaugural lecture, Dean Griswold described his esteemed colleague, Stanley Surrey, as the author of this modern trend in tax legislation, overcoming Wilbur Mills' resistance to such a highly articulated statute. *See* Griswold, *supra* note 1, at 5-6.

[8]Martin D. Ginsburg, *Making Tax Law Through The Judicial Process*, A.B.A. J., Mar. 1984, at 76.

[9]Theodore Tannenwald, Jr., *The United States Tax Court: Yesterday, Today and Tomorrow*, 15 AM. J. TAX. POL'Y 1 (1998).

[10]ACM Partnership v. Commissioner, 73 T.C.M. (CCH) 2189 (1997), *aff'd in part* and *rev'd in part,* 157 F.3d 231 (3d Cir. 1998), *cert. denied*, 576 U.S. 1017 (1999).

arbitrary requirement of Temporary Regulation section 15A.453-1(c)(3)(i), which forces artificial gain at the beginning of an installment sale involving a contingent price. The regulation forces ratable recovery of basis over the full period of a contract, regardless of the probability that most proceeds are received immediately. A tax-shelter promoter, Merrill Lynch in this case, found this separation of proceeds from basis a promising green serpent when a nontaxable offshore partner could be found to absorb this artificial gain painlessly and permit a domestic corporate partner with an equally artificial high basis to claim a capital loss in a later year, after the foreign partner had withdrawn. Merrill Lynch, according to the *Wall Street Journal*,[11] induced a number of highly-respected U.S. companies to buy the scheme. After years of audit and trial, the Tax Court found that the transaction lacked sufficient economic substance to be respected for tax purposes. The Circuit Court affirmed the disallowance of $85 million of artificially-created capital losses, but allowed deductions of another $6 million, found to be the real economic costs of staging the transaction. Even this, however, appeared to be less than the $8 million in fees that the taxpayer paid to Merrill Lynch to set up the scheme. Judge Arthur Nims subsequently reached a similar result in a case involving Brunswick Corporation,[12] despite strenuous efforts by the company to demonstrate non-tax reasons for employing the device. Judge Maurice Foley, considering the same scheme as employed by Allied Signal, took perhaps a more direct path to disallow the capital losses. After examining the parties' expectations outside the formal partnership agreement, Judge Foley concluded that their arrangement was not a partnership for tax purposes at all, because the parties "did not have the requisite intent to join together for the purpose of carrying on a partnership and sharing in the profits and losses therefrom."[13]

Last year, Chief Judge Mary Ann Cohen struck down Compaq Computer's claims of a huge foreign tax credit and capital losses arising from Compaq's purchase of stock in Royal Dutch Petroleum "dividend on," which was sold the same day "dividend off" with little or no market exposure.[14] To Judge Cohen, every aspect of the scheme "was deliberately predetermined and designed . . . to yield a specific result and to eliminate all economic risks."[15] The court noted that Compaq's treasury department had not even bothered to perform a cash-flow analysis before it utilized the scheme.

Within the last few months, an illustration of just how far a good company can be brought into tax straits by such aggressive tax advice was furnished in the *UPS* case.[16] Judge Robert Rune, relying on the business purpose and assignment

[11]Randall Smith, *Collection Drive: IRS Battles Colgate Over an Arcane Deal That Cut Its Tax Bill*, WALL ST. J., May 3, 1996, at Al.

[12]*See* Saba Partnership v. Commissioner, 78 T.C.M. (CCH) 684 (1999).

[13]ASA Investerings Partnership v. Commissioner, 76 T.C.M. (CCH) 325, 1784 (1998), *aff'd*, 201 F.3d *See* 505 (D.C. Cir. 2000).

[14]Compaq Computer Corp. v. Commissioner, 113 T.C. 214 (1999).

[15]*Id.* at 231.

[16]*See* United Parcel Service of America, Inc. v. Commissioner, 78 T.C.M. (CCH) 262, 1999 T.C.M. (RIA) ¶ 99,208.

of income doctrines, denied deductions for insurance premiums paid to a former Bermuda subsidiary which had been spun off to the UPS shareholders. Before UPS instituted the scheme, it recorded excess package insurance premiums as income. Afterwards, with no significant change in economics, UPS offset the income by the premiums paid to its former Bermuda subsidiary. The court rejected UPS's "after-the-fact" list of business purposes proffered by its attorneys, probably due to the fact that UPS had otherwise failed to explore or substantiate any of these business purposes prior to the litigation.

These decisions, with others sure to follow in their wake, should give companies pause. According to its public filings, in 1983, UPS projected a $16 million tax benefit for 1984, the first year of the reinsurance arrangement. After the court's imposition of interest and penalties, that anticipated tax benefit may turn into a cost well over $200 million. The Tax Court decision involved only the 1984 tax year. The reinsurance arrangement at issue seems to have continued until 1999. UPS recently recorded in its financial statements a new tax assessment charge of almost $2 billion for all years.[17]

V. LIMITATIONS OF AUDIT AND LITIGATION

IRS agents participating in large case audits should be increasingly skeptical of unusual transactions or changes in prior years' reporting practices. Unfortunately, they are as handicapped as companies' tax departments by the growing complexity of the law. They are also out-numbered. Over the last four years, as corporate tax departments continue to grow, the IRS announced proudly that it had been able to cut its force by 13,000 positions. This prompted Gordon Henderson to suggest recently that perhaps "the Congress and the White House have decided that tax law is so unmanageable that they should not disturb voters by trying to enforce it." Requests by the agents to extend periods for asserting deficiencies are commonplace, despite recurrent efforts of the National Office to curtail them, and the number and size of threatened adjustments have increased. In 1980, the IRS opened 1.6 million examinations of all sorts. Ten years later, the number of exams opened had dropped, but the number of appeals had doubled. While these trends should level out in year 2000, the case burden on the examinations function obviously continues. Large corporate audits require a disproportionate allocation of resources. Litigation only compounds the problem. However salutary, there is a stern limit on the Service's capacity to mount cases like *ACM* and *UPS*. Obviously, the Service would benefit from more examiners with the skill and training to ferret out abusive shelters and more experienced government tax lawyers to defend the resulting adjustments and prosecute criminal violations. A recent promise by the Commissioner's office to divert additional resources to the examination of earned income credit claims and responsible spouse issues is hard to understand aside from politics. So are the efforts of the

[17]In its Form 10-Q, filed with the SEC on August 16, 1999, UPS reported that it recorded a tax assessment of $1.786 billion, including state tax liabilities, for possible assessments related to the package insurance deductions.

Commissioner and congressional oversight committees to reduce auditing and enforcement functions in favor of improved service to compliant taxpayers.

VI. REGULATORY GUIDANCE

Aside from the drain on its resources, litigation often takes years from discovery to final decision. The Service must rely on regulations and rulings to control tax shelters. The Commissioner, once aware of an abusive scheme, has shown a commendable readiness to issue advance warnings. For example, just last month, the Service issued Notice 99-59,[18] attempting to dampen enthusiasm for the so-called "BOSS" tax product being pitched by a Big Five accounting firm as a painless device to generate tax losses. "BOSS" is the salesmen's acronym for "bond and option sales strategy." If you have had the challenge of reviewing the scheme, you may have had the impression that a tax sorcerer's apprentices had been given the run of the workshop and had stirred together, indiscriminately, offshore LLCs with technical partnership entity classification, checked and unchecked boxes, and corporate liquidation rules to whip up short-term capital losses without underlying economic consequences. Our colleague, Alvin Lurie, seems to have had to study the scheme, for we soon may have the privilege of reading in print his questions as to whether those apprentices had gotten as far in their lessons as the Supreme Court's decisions in *Crane*[19] and *Tufts*.[20] In Notice 99-59, the Service chose to mention the equally relevant judicial doctrines of economic substance and step transaction to question BOSS's promised rewards, warning that any such losses claimed by BOSS customers will not only be disallowed, but subjected to penalties, as in *UPS*. The Notice does not stop there. It goes on to threaten penalties not only against the taxpayer, but against promoters of the BOSS scheme. Those mentioned were the section 6694 return preparer penalty,[21] the section 6700 promoter penalty,[22] and the section 6701 aiding and abetting penalty on promoters and advisors.[23] The Commissioner seems to suggest that promoters of such products, after they crash and burn, should not be able to brush off their hands and return, untainted and unconcerned, to their drawing boards with the same aggressive spirit.

Shortly before the warning against BOSS was published in Notice 99-59, the major accounting firm promoting the device sent a representative to testify at last November's hearing on corporate tax shelters before the Committee on Ways and Means. He described his firm's support for sound tax policy principles and respect for the corporate tax. He assured the committee he formerly served that there was no justification for enacting the sweeping changes in the Abusive Tax Shelter Shutdown Act of 1999. When a committee member re-

[18]*See* I.R.S. Notice 99-59, 1999-52 I.R.B. 761.
[19]Crane v. Commissioner, 331 U.S. 1 (1947).
[20]Commissioner v. Tufts, 461 U.S. 300 (1983).
[21]*See* I.R.S. Notice 99-59, 1999-52 I.R.B. 761, 762; I.R.C. § 6694.
[22]*See* I.R.S. Notice 99-59, 1999-52 I.R.B. 761, 762; I.R.C. § 6700.
[23]*See* I.R.S. Notice 99-59, 1999-52 I.R.B. 761, 762; I.R.C. § 6701.

ferred him to his firm's promotional materials for the BOSS scheme, he denied knowledge of it, but persevered in assuring the committee that earlier remarks about his firm's hiring forty professional salesmen to pitch aggressive schemes to prospective corporate clients were "inaccurate." How comforted the committee felt was not reported.

The hearings at which the witness appeared were part of Congress's present examination of whether further legislation is necessary. Unable to repair the substance of law, our legislators seem ready to turn once again to a politically more digestible substitute: increased penalties for taxpayers caught in the audit lottery. The latest legislative proposals would curb corporate tax shelter abuse by proposing the codification of the substance over form doctrine in the Abusive Tax Shelter Shutdown Act. If enacted, penalties would be substantially increased, in some cases doubling. Instead of simplifying the law, Congress would "clarify" it by imposing still higher penalties for non-compliance. The committee hearings on the proposal have included testimony from private practitioners. Some, including the New York State Bar Association Tax Section, have supported placing a premium on disclosure of unusual transactions and increasing the penalties where an undisclosed transaction is not sustained.[24] Witnesses have also requested statutory definitions and examples at least in the committee reports of what constitutes an abusive tax shelter. As in past efforts, which have led to a multiplication of the provisions for negligent and no-fault civil sanctions, thorny issues arise as to how we are to balance overly-aggressive interpretations of the law and what might constitute adequate disclosure. What does seem likely, however, is that some version of the Bill will become law sooner or later. If so, its application no doubt will be another aspect of future corporate tax controversies.

VII. CONCLUSION

Today's aggressive corporate tax shelters result not just from the complexity of the corporate tax rules. They evidence all too often a lack of concern for how the transactions will appear to a court. We value the magnificent texts on corporate tax law by Bittker and Eustice[25] and by Ginsburg and Levin[26] not for their exegeses of the Code itself but for their thoughtful commentaries on how courts may be counted on to apply the law to corporate affairs in the real world. At the heart of both texts and of our practice is that perdurant, inescapable question, "How will a court rule?" Was it really so difficult for counsel planning the taxpayers' transaction in those recent cases to make this prediction? The opinions are grounded on long-understood principles of business purpose and economic substance. While distressing for the companies involved and their coun-

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[24] *See* NYSBA Testimony at W&M Hearing on Corporate Tax Shelters, 1999 TNT 218-27 (Nov. 12, 1999).

[25] *See* Boris I. Bittker and James S. Eustice, Federal Income Taxation of Corporations and Shareholders (6th ed. 1994).

[26] *See* Martin D. Ginsburg and Jack S. Levin, Mergers, Acquisitions, and Buyouts (1999).

sel, each serve to remind us to test our advice by how it would sound to a judge—or for that matter, how it might appear in the press. After all, the *Wall Street Journal* first broke the story of the ACM-type shelters, and an article in *Forbes Magazine* may have ignited the current interest of Congress in the corporate tax shelter phenomenon.[27] In daily practice, of course, not the courts, but lawyers who may have to defend their advice before them, must administer the tax law. A legal system is effective only to the extent it is supported by a virtuous society. In the context of our tax laws, this has meant voluntary compliance, aided by competent, independent legal advice. Administrators of the system, whether in government or in private practice, are custodians of the virtues of compliance. In our counsel, we must respect the spirit as well as the letter of the law. Otherwise, the corporate income tax could go the way of the Volstead Act. Where "aggressive" planning becomes "trans-gressive" planning, gleefully poured out by tax bootleggers and as gleefully lapped up by corporate tax departments able to see only next quarter's reduced tax rate, not just the companies and their advisers, but the corporate tax itself is threatened.

Voluntary compliance with the revenue laws is less a matter of patriotism than a clear understanding of the law and the certainty of its consequences, if we fail to obey it. This is as true for us lawyers as everyone else. Our code of ethics and our efforts to comply with Circular 230 stem from the instinct for self-preservation more than professional piety. The imprudent legal advice behind today's aggressive corporate tax shelters is being exposed by the courts, and, no doubt will be penalized even further in new legislation. A tax lawyer needs a clear-headed understanding not just of the law as written but as it will be applied. This puts a premium on good judgment even if that attribute must be acquired through past exercise of bad judgment. Maybe that is the ray of hope on which to end these remarks. Our experience with corporate tax shelters may help focus our respect for the importance of how a court will rule. It is a respect shared, I feel sure, by all worthy members of our College.

[27]Janet Novack & Laura Saunders, *The Hustling of X Rated Shelters*, FORBES, Dec. 14, 1998, at 198.