The Evolution of Government Submissions

KENNETH W. GIDEON* & WILLIAM J. WILKINS**

The Section of Taxation has been a regular and influential commentator on tax legislative proposals and proposed regulations for decades. The Section has been a reliable advocate for adequate funding for the Service, adequate funding for the Joint Committee on Taxation, and prompt confirmation of Tax Court nominees. Our committees have routinely commented on tax treaties before the Senate for ratification. Over the years, submissions have been made to bodies as diverse as the National Bankruptcy Reform Commission, the 2005 President’s Advisory Panel on Federal Tax Reform, the Treasury’s Office of Terrorist Financing and Financial Crime, the Public Company Accounting Oversight Board, and the IRS Oversight Board.

The comment process has evolved over time. As late as the early 1970s, significant resources were devoted to developing and debating legislative recommendations that had little impact on actual legislation. Section leaders and the membership recognized that a better approach was needed to match the technical expertise of Section members with the current policy formation concerns of tax policymakers on the Hill, at the Treasury, and in the Service. Approximately 40 years ago, Section governmental submissions began to focus on providing timely comments which brought the expertise of Section members to bear on policy issues currently being considered by policymakers.

The Section has devoted significant efforts to enhancing the effectiveness and impact of its government submissions. Some of the most important enhancements have addressed key risks inherent in making such submissions: the risk that the Section would be ranging beyond its areas of expertise; the risk that comments would be seen as (or worse, actually be) mere lobbying for client positions; and the risk of not being timely.

These risks arose in part from the fact that Section members were not only expert in tax matters; they were also smart, educated, and opinionated observers of policy and political processes. When economic or social policies became part of the tax policy discussion, it was all too easy to claim expertise on subjects that, at heart, were not really tax law questions. However, providing Section commentary on such matters as economic stimulus or social justice risked undermining the Section’s credibility. Recognizing those risks, the Section evolved a written policy to confine its submissions to its areas of professional expertise.

The risk of perception of partiality or conflict of interest has led to several cycles of internal Section policymaking. As a result, the Section has detailed written policies and processes addressing conflict issues. Discussions of these policies have always involved the balance between conflicts concerns and the need to involve the Section’s best experts, who will necessarily have clients in affected businesses. The Section’s conflicts policies include:

• An admonition that no member should permit the interest of a client to cause him or her to take a position on a Section proposal different from the position he or she would take otherwise.

• An admonition to active participants to disclose any material client interest in support or opposition of a proposed Section position.

• A prohibition on participation in drafting where a member or a member’s firm has a client engagement to influence a government position on the same issue.

• Inclusion of standard language in all Section submission cover pages stating that no participant (or participant’s firm) has been engaged to influence the outcome of the subject matter of the submission, while also disclosing that participants have clients who may be affected by the tax principles being addressed.

The timeliness risk is greatest in legislative comments. The first problem is that modern tax legislation often has not benefitted from the studied, deliberate ideal of introduced bills, followed by hearings, Committee deliberations, floor action, conference, and final passage. Highly significant tax legislation can materialize as quickly as a summer thunderstorm. To make matters worse, policies of the American Bar Association add extra, time-consuming layers of review and processing to the Section’s legislative policy commentary.

At one year’s gathering of the officers of all of the Sections of the Association, Tax Section officers learned that a few other Sections had wrestled with the same problem. The Antitrust Section had come up with a creative response—the “White Paper.” Soon thereafter, the Tax Section began using the white paper concept to good effect.

A white paper is a broad policy document drafted, not in the heat of legislative battle, but in a period of calm. The drafting takes a long time, and the Section and ABA approval processes take a long time. But if the topic is chosen with foresight and the white paper is well drafted, the Section is then armed with authority to comment on the subject matter on short notice. The commentary may take the form of the white paper itself; or, just as likely, it may take the form of testimony submitted to committees of Congress, drafted so as to be consistent with the white paper.

The Section was able to persuade the full ABA to approve the white paper on tax simplicity as an ABA position. This was the first white paper, and it forcefully advocates important core principles of sound tax policy. It argues for an overarching bias against delivery of rewards and punishments through
the tax system; for a broad base and low rates; for stability (and thus against expiring provisions); and for transparency (and thus against minimum taxes and phase-outs).

The Section now has white papers on tax simplification, tax penalty reform, health care reform, international tax reform, and wealth transfer tax reform. The Section has also submitted “Options for Tax Reform” to Congress in recent years, covering a diverse set of topics including financial products, real estate, partnerships, Subchapter S, insurance, tax-exempt bonds, loss carryovers, bankruptcy tax issues, transfer pricing, employee benefits and executive compensation, estate, gift and GST tax, and international tax as well as the white paper topics.

There are many examples of Section commentary leading to positive changes in tax law and regulations. One example is the Section’s early and ultimately successful support of the enactment of section 197 providing for amortization of purchased intangibles. Before the then new provision’s enactment, virtually all asset acquisitions involved uncertain tax treatment and often actual tax controversy. Chair Peter Faber testified before the Ways and Means Committee on October 2, 1991, that while “it will never be possible to eliminate all controversies between taxpayers and the IRS over the amortization of intangibles, but the proposed legislative approach . . . would eliminate most of them and would represent a major step forward.” The Tax Section’s early support for the proposal as a significant simplification of the Code led other national associations of tax practitioners to support the measure. The Tax Section’s testimony was also prescient in opposing the exclusion of sports franchises from the new provision; in 2004, Congress eliminated the exclusion.

The Section provided important support in 2001 to the Service in its efforts to respond to the September 11 terrorist attack on our country. Just over a month after the attacks, the Section requested that the Service confirm that charitable loans and grants provided to for-profit business entities affected by those attacks were excludible from income. Later reports to the Service and Congress provided examples of the ways in which small- and medium-sized businesses were adversely affected and how relief might be provided. Comments filed in early 2002 catalogued potential issues arising from the destruction of property and receipt of funds due to the September 11 attacks. Section volunteers provided important support in implementing the relief programs that the comments addressed.

The Section and its Standards of Tax Practice Committee have provided important commentary on the evolving rules promulgated by the Treasury in Circular 230. Those comments provided support for Treasury efforts to clarify the requirements for formal opinions intended to provide “penalty protection.” At the same time, the Section expressed its reservations about burdening informal advice, which is not intended to provide penalty protection, with the extensive diligence and coverage requirements developed for formal advice. The first compromise to emerge—the famous (or infamous)
disclaimer language and the related classification of advice into different categories—represented a workable, if awkward, solution. Later on, Section commentary assisted in the development of a more modern and nuanced approach to the regulation of written advice, including institutional issues such as “best practices” and appropriate supervision processes.

Section comments identified important issues to be addressed in health care reform and provided important policy perspectives and technical comments in the recent debate on estate and transfer taxes.

There are many other examples of effective Section commentary. Some of the Section’s most valuable work is in relatively narrow specialty areas, taking advantage of the Section’s subject-based committee structure. The history of Section submissions is filled with examples of helpful commentary that relies on specialized knowledge of members of committees such as Employee Benefits, Financial Transactions, Partnerships and LLCs, Tax Accounting, Tax Exempt Financing, and the various committees working in areas important to tax controversy, corporate transactions, and international transactions.

In all its commentary, the Section leverages the specialized knowledge and experience of its members. Policymakers do not know many things that working tax lawyers do know. At its best, Section commentary fills in that knowledge gap, makes balanced and thoughtful observations and recommendations, and leads to better policy outcomes.