A Tax Section Looks at 75*

GEORGE C. HOWELL, III**

As most of you know by now, the Section of Taxation is in the midst of celebrating its 75th anniversary. *The Tax Lawyer* is joining in this celebration by dedicating its 68th volume to papers that chronicle the history, achievements, and evolution of the Section over the last 25 years. The first issue of the 68th volume (Fall 2014) addressed the major achievements of the Section during the past quarter century. This second issue is a compendium of papers describing the evolution of tax practice over the past 25 years and the Section’s role in that evolution. Future issues will address the role of the Section in providing representation for underserved clients and its work in the state and local tax arena.

I was thrilled when Armando Gomez, the current Section Chair, asked me to author this foreword for two reasons. First, the Section has played a critical role in my development and growth as a tax lawyer. All of the Section members and staff with whom I have worked and all of the committees and projects with which I have been involved have left an indelible and salutary imprint on me. Being a tax lawyer would be a lot less enjoyable and rewarding without the Tax Section, so I am delighted to play even a small part in the anniversary celebration.

Second, writing this foreword is particularly meaningful to me because *The Tax Lawyer* was my first home in the Section. Many years ago, when I was a newly-minted tax lawyer, I began my ABA career as an articles editor for *The Tax Lawyer*. I then served as managing editor from 1987 to 1989. Yes, I am one of those antediluvian beings who was already active in the Section well before its 50th anniversary celebration. Time surely flies when you are having fun.

To paraphrase that great American songwriter, Jimmy Buffett:

Mother, mother Tax Section, I heard you call,
Wanted to join your committees
since I was six feet tall.
You’ve seen it all, you’ve seen it all.

Mother, mother Tax Section, after all these years I’ve found
My occupational hazard being my occupation’s
chasin’ all around.
Feel like my email’s down.
Gonna head out of town.

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* With apologies to Jimmy Buffett and his song “A Pirate Looks at 40.”
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Without more ado (or more tortured lyrics), let’s preview the well written and enlightening papers that you are about to read.

Our evolutionary journey begins with a paper by Stef Tucker, who served as Section Chair from 1998 to 1999. Stef is a revered member of the Section who is known for his keen intellect, his quick wit, and his quirky sense of humor. His paper reviews recent changes in our profession, including its evolution into a business and the declining demand for legal services, and looks to the future of the practice of tax law. It will not surprise readers who have had the pleasure of knowing Stef for many years as I have that his paper provides keen evolutionary insights and his crystal ball seems spot on.

The second paper, by Kathryn Keneally, a former Assistant Attorney General for the Tax Division of the Department of Justice, provides her reflections on the power of diversity and inclusion in propelling organizations forward. Kathy’s paper provides invaluable advice to the Tax Section as a whole and to Section committees as to how they can gain strength and numbers and provide a better experience for all. The interwoven concepts of diversity and inclusion are core values for both the ABA and the Tax Section. Kathy’s paper is very timely because diversity and inclusion are key planks of the current Section Chair’s platform, as they will be of mine. The Section has made some progress with respect to diversity and inclusion—witness the election of three women to chair the Section—but much more remains to be done. I am thrilled to have Kathy back from the Justice Department and active in Section affairs once again. I know that she will play a key role in making us a more diverse and inclusive (and better) organization.

The next paper discusses the evolution of the United States Tax Court as an institution. Its author is the Honorable Paige Marvel, a preeminent Judge on the Tax Court and a friend of mine from my early days in the Tax Section. Judge Marvel provides a concise and informative history of the Tax Court since 1969. Among other things, her paper describes how the court has learned to handle a deluge of low-income taxpayer and pro se cases and how it has transitioned into the electronic age. It also touches on the pro bono role that Section members have played in representing low-income taxpayers before the court. I commend Judge Marvel’s insightful paper to you.

Joan Arnold, the current Vice-Chair (CLE) of the Section, writes next about the Section’s multitudinous contributions in the international tax area and the growth of its international community over the last 25 years. Joan was asked to write this paper because she has been heavily involved in many of those contributions and the corresponding expansion of the Section’s international tax related activities. Her paper chronicles the evolution of the Section’s efforts from a single committee that addressed international tax issues to the

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1 Pam Olson served as Section Chair from 2000 to 2001, followed by Susan Serota, who served as Chair from 2006 to 2007. Karen Hawkins was the Section’s Chair-Elect from 2008 to 2009 and, under the Section’s bylaws, would have become Chair for the 2009–2010 bar year had she not stepped down to become Director of the IRS’s Office of Professional Responsibility.
four that do so today. It also describes the opening of the Section to participation by non-U.S. lawyers—another form of diversity that has enriched the Section. Finally, Joan’s paper recounts the more recent involvement of the Section in numerous international tax CLE programs and the ongoing international tax reform effort. I am grateful for her many insights in this important area of Section activities.

One of the Section’s most important goals is to attract law students to the practice of tax law and to the Section. The next paper addresses the topic of why law students decide to become tax lawyers. It was written by Linda Galler, a tax professor at Hofstra University School of Law and a long-time member of the Section. Professor Galler has had a lot of experience and success over the years in convincing students to enter the practice of tax law. Her paper lays out an intriguing list of reasons why law students develop an interest in tax law. The list includes a number of reasons that played into my decision to become a tax lawyer, including an interest in business or financial transactions, professors who made the study of tax law interesting, tax touches everything, and intellectual challenge. Because Professor Galler’s paper rings so true, I hope that Section leaders will pay close attention to it as they continue to ponder how to entice law students to practice tax law and ultimately to join the Section.

The final paper, contributed by Tom Greenaway, the Secretary of the Section, reflects on common threads and trends in the evolution of tax practice. Because Tom is a 2003 law school graduate, his paper brings a young lawyer’s perspective to the topic. However, it also evinces an uncommon wisdom that belies his relatively short tenure as a tax practitioner. Tom’s paper discusses a variety of topics, including the Service’s status as a worthy adversary to tax practitioners, the complexity of the tax law, the increasing specialization of tax practice, the sometimes uneasy relationship between tax lawyers and tax accountants, and the diminishing importance of the corporate income tax. The paper concludes with a wonderful description of how I view the practice of tax law today: “For now, . . . tax continues to be a collegial, challenging, and rewarding subject, despite some of the gripes set out in this article. Let’s leave the flash and sizzle to others, while we quietly keep doing the work we love.”

These six papers eloquently describe the evolution of tax practice and the Section of Taxation over the past 25 years. Perhaps more importantly, they provide some guideposts for the future direction of the Section. Yes, during this celebratory year, we must also focus on the path forward. A key building block of the Section’s future is a long-term strategic plan to improve diversity and inclusion in our membership and leadership. Another important step is enhancing the Section’s public service programs. My hope is that our current fundraising campaign will create a significant endowment for those programs and allow them to flourish into the far distant future. The Section also needs to maintain a laser focus on helping tax lawyers understand their ethical duties to clients and the tax system. Finally, we need to redouble our
law improvement efforts by regularly providing thoughtful, timely comments and submissions to the government. Let’s hope that 25 years from now, when the Section celebrates its centennial, we can all be proud of the progress made by both the Section and our tax system.
The Future of Our Profession

STEFAN F. TUCKER

“Those who cannot remember the past are condemned to repeat it.”
—George Santayana

To paraphrase Mr. Santayana, those who do not realize that the practice of law has changed rapidly over the past two decades are not going to understand, or be able to cope with, the changes that will occur over the next two decades.

I. Lawyers: Professionals or Business Persons? Or Both?

Focus first on the status of lawyers in private law firms, gigantic, large, medium, or small, whether situated in one state, in one region, in the United States, or everywhere (it seems) in the world.

Are lawyers, whether referred to as associates (rising to a more exalted status or permanent associates), partners (equity or non-equity), or counsel (permanent or on the way to or from partner), simply “employees at will”?

Kimm Alayne Walton, in her book What Law School Doesn’t Teach You . . . But You Really Need to Know, articulated the reality all lawyers face after a few years in practice. In Chapter Two (“ECON-101 - The Business of Law”), she notes three lessons for all lawyers to learn and remember. First, as in all businesses—and we MUST remember that, like it or not, law today is a business—those who bring in the clients are worth more than those who do the work. In other words, finders (that is, those who bring in the clients) will, in most firms, be paid more than grinders (or worker bees). And, unfortunately, in way too many law firms, yesterday is quickly gone, and the lawyer has to produce all over again today and tomorrow, and tomorrow, and tomorrow. Everyone who wants to look back to a prior year to justify this year’s or next year’s compensation needs never to forget the old saying, “That was then, and this is now!”

Second, the law firm must make money on a lawyer to justify what he or she is paid. This means that the person who does not bring in business must, in the not-too-long run, develop an expertise in a field that makes the person incredibly valuable to his or her professional firm or other employer. But we must remember two key concerns—how narrow does the field of expertise need to be (such as tax planning for real estate versus tax planning for REITs,


or tax planning for U.S. companies abroad versus tax planning for U.S. companies doing business in Kazakhstan) and what if the person’s field of expertise is no longer in demand or has diminished substantially.

Third, no matter what the party line may be, with very few exceptions (most of which are found in large firms with a person or persons dedicated to pro bono matters), billable hours count much, much more than nonbillable hours. Assume that an associate is earning $240,000 in a calendar year and that the firm expects to realize 40% overhead and 60% profit. Assume further that benefits and other costs attributable to that associate are 25% of compensation or $60,000. The associate is costing the firm $300,000, and in order to achieve 60% profitability, the firm must be receiving “good” billable hours from the associate in an aggregate total of at least $750,000. Thus, if the associate is billing $400 per hour, that means 1,875 “good” billable hours, and if the associate is billing $500 per hour, that means 1,500 “good” billable hours. How does the associate have time for learning and for marketing? And, more importantly, how does the associate achieve a balanced life?

In a Wall Street Journal article captioned Law-Firm Partners Face Cuts, the author focused on a Nashville, Tennessee law firm and reported that,

> When the recession caused business to sag, the . . . firm overhauled its partnership structure. Managers recalibrated pay and assigned specific hour and revenue goals to partners at the . . . firm.

> Over that time [the firm] went from almost 85 equity partners to about 55. . . . [There were] a lot of hard conversations, and so some people left.

> Those who stayed . . . became much more engaged in developing new lines of business.\(^2\)

As can be seen, not only associates are at risk of losing their jobs, but partners are also at risk. Whereas at one time attaining partnership in a law firm meant having a position and income in good or bad times because partners with thriving practices helped support those without the same (illustratively, when mergers and acquisitions were up, bankruptcy was down), that is certainly no longer the case. As was noted in the Wall Street Journal piece,

> Even before the downturn, some law firms were starting to trim low performers. For many firms, selective partner culls [became] . . . good housekeeping.

> [The cuts occurring over the past few years have] come[] as productivity among the highest-paid tier of a firm’s lawyers remains stubbornly low, with some partners billing less than 1,300 hours a year, down about 30% from the prerecession industry benchmark of 1,900 hours.\(^3\)

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\(^3\)Id. (internal quotation marks omitted).
And so, in the current business world, how does one assure survivability in the average professional firm—whether a law firm, accounting firm, or consulting firm? Paul Sax noted that “[r]arely mentioned among lawyers is the regularity with which we are required to refit, retool, and recommence in order [simply] to maintain ourselves in our careers. Law firms disappear with frightening suddenness.”

Paul’s summary brings us back to what is raised above and must never be forgotten, “How to prepare? Don’t overspecialize. Keep several subspecialties going at all times. Be proactive in seeking out new opportunities. There is always room for the new, the interesting, the different.”

II. The Future of “Tax Counsel”

Let us put aside the question of whether the tax profession has a future by assuming that indeed it does. This assumption leaves us wondering where tax lawyers will be situated, what form will the practice take, and how important it will be in a business world. Often, one hears that “tax is the tail that wags the dog.” Is it more likely that tax will be the tail wagged by the dog, or even just a set of hairs on the tail of the dog?

Will the tax lawyer be a specialist in a law firm, serving the clients of others, or be seen as a source of business for the firm? Will tax lawyers be important parts of local, regional, national, or international law firms; or will they be gathered into tax law boutiques; or will they all be working for accounting firms or consulting firms?

Will tax lawyers become key in-house personnel in business enterprises—small, medium, large, or enormous? Will they find more satisfaction working within the federal or a state government; or in a nonprofit; or teaching; or in many other positions? Or, to allow a horrible thought to come to the surface, will tax lawyers become superfluous and end up waiting on tables or selling shoes on the internet?

And so, assuming that the tax profession has a future, we must focus on saving ourselves from the downward spiral of a decreasing need for lawyers nationally by looking at what we can, and must, do for ourselves and the generations to come.

III. The Need for “Business Acumen” and “Common Sense”

In a recent study by University of California, Berkeley Professors Schultz and Zedeck captioned Identification, Development and Validation of Predictions for Successful Lawyering, 26 competencies were identified as forming the basis for effective lawyering. Of the 26 competencies, only a few could be seen as

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5 Id. at 275.
tying success to the traditional factors used by many law firms to determine who will be hired (and thus who is likely to succeed at the firm). These factors are legal research, analysis and reasoning, and writing.

The bulk of the other competencies focus on business acumen, common sense, and networking. These include, inter alia, creativity and innovation, problem-solving, practical judgment, questioning, influencing and advocating, listening, strategic planning, organizing and managing one’s own work, negotiation skills, networking, providing advice and counsel, building relationships with clients, passion and engagement, stress management, community involvement and service, and self-development. In other words, less emphasis in hiring should be placed on LSAT scores and undergraduate and law school grade point averages and more weight should be placed on the other competencies noted and the ability of newer lawyers to reflect those competencies.

IV. Mentors to the Next Generation

Finally, as we focus on the future of tax law as a profession, we must ask ourselves some critical questions. Are we truly sharing our knowledge and experience with younger persons? Are we helping them to learn and, we hope, grow? At such groups as the Tax Section, or state or local bar associations, do we key in on persons to bring forward? Are we networking or limiting our focus at bar association and similar meetings to our “old friends?” Do we encourage calls from others for information and advice? Are we teaching in law schools, business schools, or elsewhere?

In fact, is there value to an LL.M. in tax? If so, is it more or less valuable than an MBA? Is it more or less valuable than learning on the job? Should there be more “practical” courses and less theory in the LL.M. and J.D. law programs?

As previously noted, most law firms are either downsizing or not growing. In view of that, how do we attract the best persons to our profession? Who do we want to attract? How do we compete with the accounting firms or the in-house positions for the top persons, either initially or after the “midlife crisis” at the law firm—four or five years after joining?

V. Summary

The tax law profession clearly has a role in the future. Yet, today no one knows how relevant or important it will be in the overall legal profession, particularly because the legal profession does not know where it is going (and, unfortunately, the legal profession has many “leaders” who are focused on protecting or enhancing their personal, often stratospheric income, rather than protecting and enhancing the profession for the future). To quote from the song I’m On My Way in Lerner and Loewe’s musical Paint Your Wagon, “Where am I going, I don’t know. When will I get there, I ain’t certain. All that I know is that I’m on my way.”
From Clique to Community: The Power of Inclusion

KATHRYN KENEALLY

I want to tell you about some people. First I want to tell you about a few of the people who preceded me as the head of the Tax Division for the Department of Justice. Then I want to tell you about some of the people who helped me in my career and who taught me some interesting things about inclusion. Along the way, I will tell you about us—the leadership and members of the ABA Tax Section, what makes us strong and what will make us stronger.

First, let me introduce you to Mabel Walker Willebrandt. Mabel was born in 1898 in a Kansas dugout, which was a dwelling carved out of some ground in a river bank or hill. She was definitely born into hard times but also into a family that valued education. Mabel was educated first as a teacher and then returned to school at night, earning a law degree and a master’s degree. When Mabel was 32 she was appointed as the first woman to serve as an Assistant Attorney General for the division at the Department of Justice that would later become the Tax Division.

At the time, Mabel was also the highest-ranking woman in the federal government. She began with three assistants, but that number grew under her tenure to a staff of over 100 people. She argued scores of cases before the United States Supreme Court. She developed the first legal strategy to charge tax evasion as a crime. She prosecuted bootleggers and for her efforts was named “Prohibition Portia” by politicians and the press. Apparently a fictional Shakespearean character who was not actually a lawyer was the best female role model for the time. She was also called the First Legal Lady of the Land. She resigned as AAG in 1929 to become Washington Counsel for the Aviation Corporation, moving into the developing field of air travel. She later chaired the ABA Committee on Aeronautics, becoming the first woman to chair a committee of this bar association. All this is impressive for any woman of her era and all the more so for one born in a dugout.

I have been asked, a surprising number of times, if I was the first woman to head the Tax Division. Beginning the count with Mabel, I was the seventh. And my immediate successor makes the number eight.

* Partner, DLA Piper LLP, New York, NY; Cornell University, B.S., 1979; Fordham University School of Law, J.D., 1982; New York University School of Law, LL.M. in Taxation, 1993. This Article is adapted from a keynote speech given by the author for the Section Luncheon and Plenary Session at the ABA Section of Taxation’s 2014 Midyear Meeting in Phoenix, AZ. At the time of the presentation, Ms. Keneally was serving as the Assistant Attorney General (Tax Division), U.S. Department of Justice, Washington, DC.
In 1989, 100 years after Mabel’s birth, Shirley Peterson was sworn in as the second woman to serve as AAG for the Tax Division. Like Mabel, Shirley advanced tax enforcement in significant ways, implementing legislation to bring injunction actions against abusive and fraudulent return preparers, which remains a core focus of tax enforcement today. Shirley also served during a critical time, overseeing enforcement in response to the savings and loan crisis and cracking down on abusive tax shelters. She went on to become the second woman to serve as Commissioner of the Internal Revenue Service, following Peggy Richardson in that position.

Next came Loretta Arnett. Loretta began her career as a chemist and worked with the National Institute of Health. She then earned her law degree at Harvard. While she was the third woman to serve as AAG for the Tax Division, she was the first African-American woman in a leadership position at the Justice Department. Loretta was also a leader of the Tax Section, having served as a committee chair and Council Director. In 2005 she was recognized by the ABA with its Margaret Brent Award for her contributions to women in the legal profession.

When Loretta left, her deputy, Paula Junghans, became the Acting AAG. Paula has also been a leader with the Tax Section and is simply one of the best trial lawyers in any field in any generation. The next woman to serve as Acting AAG was Claire Fallon. Claire was hired into the Tax Division’s honors attorney program right out of law school, and she dedicated her career to the Tax Division, leaving a legacy of great lawyers who benefitted from her mentoring.

The next woman to serve as AAG was Eileen O’Connor. During her tenure, the Tax Division again faced down abusive tax shelters and revised its policies on parallel criminal proceedings. And when my tenure ended, an eighth woman, my former deputy and good friend Tamara Ashford, stepped up as Acting AAG. Tamara has served in several leadership positions at the Service and the Justice Department. Not only is she the second African-American woman to head the Tax Division, in December she became the first African-American woman to serve as a judge of the U.S. Tax Court.

This is the strong legacy of inclusion in the leadership ranks in government. I have my own stories about how I came to learn about the importance of inclusion and what it means to be inclusive. A key moment came in a discussion with Chuck Rettig, one of the men who is a leader in the tax community and in the Tax Section.

Chuck is simply one of my closest friends. We have had similar tax controversy practices over the years, his in Beverly Hills and mine in New York. For several years we coauthored a column together, and more recently we have co-chaired the ABA’s National Institutes on Criminal Tax Fraud and Tax Controversy. This is a friendship that had an interesting beginning.

I started coming to Tax Section meetings when I was an associate of a tax litigation boutique. That firm’s founders were also among the founders of the Section’s Civil and Criminal Tax Section Committee. Within a year, I
was a speaker on a panel program. Somewhere around 15 years later, I was the incoming vice-chair for that committee. This was something that I had worked toward achieving, and I was very proud. That year, the May Meeting for the Tax Section coincided with a black tie dinner to celebrate the 75th anniversary of the Tax Court.

At the dinner, I turned to the person sitting next to me and introduced myself. Chuck introduced himself and told me the name of his firm, which I immediately recognized. I launched into a discussion of the Civil and Criminal Tax Penalties Committee, asserting that, since his practice fit perfectly into the committee’s mandate, Chuck should be participating actively in the committee’s work.

Chuck responded that he was familiar with the committee, that the committee was dying, and that I was part of the problem. Please recall that we had just met. I was admittedly taken aback, but I listened. He explained, painfully accurately as I would realize, that the committee was at this point in its history very much a clique. There was an old guard who brought along people that they knew, and their friends and colleagues were the ones who got to be speakers, subcommittee chairs, vice-chairs, and chairs. He said that he had been coming to the committee meetings for years and that nobody even said hello to him or seemed to recognize him from one meeting to the next. He told me that I was very unlikely to realize this because I had been brought into the committee by the same old guard who were at the very center of the clique.

It was impossible to disagree with what Chuck said. Nobody from his firm, which was and is one of the leading firms in tax litigation in the country, was routinely included in committee programs, projects, or leadership. Chuck himself is both a physical and intellectual presence in any room—he stands at 6 foot 6 inches and is obviously strong in his views and ready to speak. Yet we had overlooked him.

Following that conversation with Chuck, I got together with the incoming chair of the committee, David Axelrod. David is also a good friend and, probably not coincidentally, had, before going into government service and then returning home to Ohio, also worked at the same New York tax litigation boutique as I did. Together David and I went to those same people, all the old guard who had brought us along, to discuss how to make the committee more welcoming and more inclusive. With their understanding and cooperation, we shook things up a bit. We brought some new people into subcommittee positions and panel programs. We created some positions for work that needed to be done and filled them with younger attorneys. We designated a cadre of the old guard to welcome anyone who they did not recognize at a meeting, to reach out, to invite them to join the regular crowd for lunch, drinks, or dinner.

At the outset of our efforts, committee attendance was hanging in at around 50 or 60 people. By the end of my tenure four years later, we had over 200 in the room. The committee had renewed energy and did better work. We
benefited not just from more people but more importantly from a broader range of thinking about legal issues and about the committee’s work. Today the tax controversy bar is one of the most collegial and mutually supportive networks in the legal profession. Competitors are also friends and will help one another out with a legal issue or with a referral of business. Many of the younger lawyers who came along at the beginning of our efforts are now themselves leaders in the bar. Chuck was right. We are stronger and better for being inclusive. We are also having more fun.

This discussion is not meant to fault those old guard attorneys. When we raised issues of inclusiveness, they fully agreed. More than that, they became engaged. Without them I simply would not be the lawyer that I am.

Young lawyers need mentors and sponsors, and I had some of the greatest—Boris Kostelanetz, Jules Ritholz, Jack Tigue, and Bob Fink. Each has been a leader of the tax controversy bar and has contributed to the work of the Tax Section. They were part of the old guard that I have mentioned of course. I began practicing with them as a young associate in the mid-1980s. Again, I was not the first woman whom they hired. But I joined their firm within a couple of years of the woman who was first.

They never said, “Oh, you are different somehow. You can’t do what we do.” But they did recognize, almost intuitively, that women brought some different skill sets and different perspectives to the table. For example, certainly back then, and sometimes now, I can be a bit soft-spoken. Sometimes, when you are asserting a taxpayer’s case, being soft-spoken best serves the client’s interests. These men were neither soft-spoken nor even particularly subtle in their approach, but they saw the advantage in how I might approach a presentation.

Also to their credit, they pushed back against that soft-spoken tendency when it would not be effective. They pushed me out of my comfort zone and made me a much stronger lawyer. For example, at my first trial, we had to make an argument for the record. The judge was dead-set in his position, but the issue was being litigated in a number of courts and we had to preserve the issue for appeal. Bob Fink stood to make the objection and then pushed into me and said, “You argue it.” No warning, no preparation—he just said, “You know the issue. And you’re a girl and the judge won’t yell at you. Get up.” So I did. That judge in fact did not yell at me, but because good mentors pushed me out of my comfort zone, I can stay on my feet with those who do.

These men, my mentors, were part of the old guard, the clique, that Chuck said we needed to shake up. He was right. But there are lessons to learn from them as well. They were very aware of the importance of mentoring and bringing people along. They did not simply say, “Oh, I see myself in you so I will mentor you and bring you along,” but they saw me, and others, and said, in essence, “I see what you can do. Let me help you with that and maybe teach you a few new things.” We can all learn from their approach.

One more person who taught me important lessons in how to think about inclusion is Rachel Cramer. Rachel is the training coordinator for the
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Tax Division. As part of management and leadership training, Rachel put together a presentation on inclusion. I want to share one part that I thought was especially remarkable. In a room of managers and leaders, Rachel asked everyone to take out a piece of paper and to write down ten or so things that defined them. Then she asked everyone to put a check mark next to the things that you cannot keep secret, that someone would know upon meeting you, or learn in a short conversation. Next, she asked everyone to think about a time when they were excluded. We talk a lot about inclusion, but Rachel took it from the perspective of what it means to be excluded. She invited everyone to look at his or her list and to think about whether he or she had felt excluded for one of the defining characteristics on his or her list. This was a very effective exercise. It was the part of the program that created the most subsequent discussion.

Inclusion does not mean mere presence but also participation. Fostering inclusion means pushing against barriers to inclusion. Sometimes those barriers can be literal. Sometimes they are physical barriers to people with visible and unseen disabilities that in no way limit someone from being a good lawyer. Sometimes there are environmental barriers. Sometimes it is the barrier of coming to work and doing your job but not knowing whether you can talk about what you did over the weekend because you are uncertain whether your colleagues will welcome stories about your partner or spouse. Sometimes it is cultural. There are people who are just taught not to self-promote. This may be gender-based or it may be a cultural value of a particular community or heritage. It may even be an individual’s natural tendency toward introversion.

It is very important to go down the hall at the office, or to go up to someone at an ABA meeting, or to look around the table at a meeting, and to recognize that person and the skills and talents and ideas that person can bring to a discussion.

Sometimes it is the issue of dealing with what it means to someone to be unique or part of a small group in a room. At this stage in the legal profession, there are times when I am still the only woman at a meeting. There were times when this was true when I was heading the Tax Division. Anyone in a leadership position has big and small choices to make, and one of the choices that I routinely made was to run meetings by sitting at the center, rather than at the head, of the table. I believe that this opens up the table to a more inclusive discussion. I would make an exception, however, if I walked into the room and everyone else in the room was a man. Even with the title and with years of professional experience, I felt that I needed that extra assertion of authority when I found myself unique in the group. It is important, always, to recognize that there may be someone else who is not sure if her voice can be heard because she is not like enough other people in the room. This may be a factor of gender, race, cultural background, age, seniority, or any of the many ways in which we are different from one another.

Inclusion is a core value of the ABA Section of Taxation. Those of us who have succeeded in this profession have done so by standing on the shoulders
of giants. We all owe a debt to our mentors and our sponsors, to those who brought us along and who pushed us out of our comfort zones, who listened and taught. We owe it to them, and to ourselves, to pay it forward. We need to eliminate barriers, and we need to reach out. We need to mentor and to sponsor not just those who remind us of ourselves but also those who will bring a new perspective to the profession.

We are made stronger for it. Including people from different backgrounds and with different experiences enriches how we address issues. We are also better able to reflect the clients that we represent, better able to relate to the parties across the table from us, the juries that we appear before, the students that we teach—whomever our constituencies may be. We need to be inclusive because we live and work in a global community. And we need to be inclusive because we need everyone’s talents.
The Evolution of Trial Practice in the United States Tax Court

THE HONORABLE L. PAIGE MARVEL *

I. Introduction

I foolishly agreed to write an article on the evolution of trial practice in the United States Tax Court (hereinafter Tax Court or Court) on the occasion of the Tax Section’s 75th anniversary before I considered what it should include. So much has changed about the Court since I first started to practice before it in 1974 that it is hard to identify the most significant changes, and even then, my decision to write about some changes and not others is necessarily subjective, depending as it is on my own experience as a tax controversy and trial lawyer for 24 years and then as a Tax Court judge for over 16 years. But, having made the commitment to write this Article, I have chosen to write about developments affecting the Court’s jurisdiction, rules, processes, and operating procedures that I think are particularly important to the evolution of the Court.

II. The Evolution of the Court’s Caseload and Jurisdiction

The Tax Court in its present form as an Article I court of record has been in existence since 1969. It is the only court within the federal government devoted exclusively to tax matters, and it is the only court where a taxpayer can challenge the determination of the Service without first having to pay the disputed tax liability. This fact alone may explain why the Tax Court adjudicates more than 95% of the tax cases filed by taxpayers nationally and, for the fiscal year 2013, had approximately 71% of the total dollars in dispute ($22 billion) in its inventory. Historically, the Tax Court has been and continues to be the federal court devoted to the resolution of tax disputes between taxpayers and the federal government, and it offers taxpayers a convenient forum to resolve issues regarding their tax liabilities. Many of the taxpayers who come before the Court represent themselves. As of July 31, 2014, there were 27,245 cases pending in the Tax Court and 19,403 of those cases, or approximately 71%, were brought by taxpayers representing themselves. The Tax Court has been and continues to be “The Peoples’ Court of Tax.”

During the 75 years that the Tax Section has been in existence, the Court’s jurisdiction, which is defined by statute, has grown significantly. The Court’s core deficiency jurisdiction over income tax, estate, gift, and generation-skipping transfer taxes, certain excise taxes, and certain additions to tax,
additional amounts, and penalties consistently generates the vast majority of the Court’s pending caseload at any given time.1 But the Court also has jurisdiction over other types of actions including, but not limited to, declaratory judgment actions involving tax-exempt organizations, retirement plans, certain government obligations, gift tax valuations, installment agreement eligibility for estates under section 6166,2 partnership actions,3 disclosure actions relating to written determinations by the Service,4 claims for reasonable litigation and administrative costs,5 and transferee and fiduciary liability actions.6 Congress has seen fit to give the Court new jurisdiction over the years, which has generated significant additional work for the Court, and these grants of new or expanded jurisdiction have resulted in many opinions dealing with issues of first impression. Several of the most significant changes merit some discussion here.

In 1982, the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) added sections 6221-6231 to the Code.7 Those sections set forth detailed rules governing the audit and litigation of partnerships, effective generally for partnership tax years beginning after September 3, 1982. Before Congress enacted TEFRA, there was no statutory mechanism permitting a unified audit of a partnership or the consolidated litigation of partnership tax issues. The lack of authority for a unified audit and litigation at the partnership level meant that the Service was forced to identify and audit each partner in order to challenge a partnership’s tax treatment of a partnership item, and if litigation became necessary, the Service had to issue a notice of deficiency to each partner and each partner had to pursue a separate deficiency or refund action in one of the federal courts authorized to hear tax disputes. During the heyday of the tax shelter era in the late 1970s and the early 1980s, the resulting torrent of cases requiring repetitive litigation of partnership tax issues flooded the courts and had a particularly egregious effect on the Tax Court’s caseload, which, for example, ballooned in 1986 to over 83,000 pending cases.8

Starting in the 1980s, the Tax Court, one of the courts to which Congress gave jurisdiction over TEFRA partnership cases,9 began the task of learning and interpreting what proved to be one of the most challenging sets of procedural provisions in the Code. The TEFRA partnership audit and litigation provisions introduced a new lexicon comprised of new terms and acronyms

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1 See I.R.C. §§ 6211-6215. All section references are to the Internal Revenue Code of 1986, as amended, unless stated otherwise.
2 See I.R.C. §§ 7467-7479.
3 See I.R.C. §§ 6226, 6228.
4 See I.R.C. § 6110(f).
5 See I.R.C. § 7430.
6 See I.R.C. § 6901.
9 See I.R.C. § 6226(a)(1).
like tax matters partner (TMP), notice of final partnership administrative adjustment (FPAA), administrative adjustment requests (AAR), partnership items, affected items, and computational adjustments and required the entire tax community, including the Tax Court, to learn complicated new procedures. The Court added a new title dealing with partnership tax litigation to its Rules of Practice and Procedure to address some but not all of the procedural matters generated by the TEFRA partnership litigation provisions, and it resolved other issues by opinion. The Tax Section created a task force, of which Robert Wherry and I (before we became judges) were members, to help the tax community make the transition to a new way of dealing with partnership tax disputes. The process of learning, implementing, and interpreting the TEFRA partnership audit and litigation provisions continues today as evidenced by the recently issued opinion of the United States Supreme Court in *United States v. Woods*10 and by a plethora of opinions from the Tax Court and other federal courts in partnership litigation spanning more than a decade.11

Since the enactment of TEFRA in 1982, Congress has often expanded the Court’s jurisdiction as part of new tax legislation. The Technical and Miscellaneous Revenue Act of 1988 (TAMRA)12 expanded the Court’s jurisdiction by adding several provisions supplementing the Court’s deficiency jurisdiction and giving the Court jurisdiction over appeals by taxpayers from Service determinations denying awards under section 7430. TAMRA gave the Court the authority to enforce overpayment determinations,13 redetermine interest on deficiencies,14 modify decisions in estate tax cases involving elections under section 6166,15 restrain assessment or collection,16 review jeopardy assessments and jeopardy levies,17 and review proposed sales of seized property.18 The Taxpayer Bill of Rights 2,19 enacted in 1996, gave the Court jurisdiction to review the Commissioner’s failure to abate interest.20 The Taxpayer Relief Act of 199721 further expanded the Court’s jurisdiction by giving the Court jurisdiction regarding the treatment of items other than partnership items with respect to an over-sheltered return, the valuation of certain gifts, the eligibility of estates regarding installment payments under

13 See I.R.C. § 6512(b)(2).
14 See I.R.C. § 7481(c).
15 See § 7481(d).
16 See I.R.C. § 6213(a).
17 See I.R.C. § 7429(b).
20 See I.R.C. § 6404(h).
section 6166, actions for readjustment and adjustment of large partnership items, and actions to redetermine employment status.

More recently, the Internal Revenue Service Restructuring and Reform Act of 1998\(^{22}\) significantly expanded the Court’s jurisdiction by giving the Court jurisdiction over stand-alone petitions asserting a right to relief from joint and several liability on a joint return under section 6015\(^{23}\) and petitions to review the Commissioner’s determination in lien and levy actions involving taxes over which the Court had jurisdiction.\(^{24}\) And, in the Tax Relief and Health Care Act of 2006,\(^{25}\) Congress amended section 7623 by adding new subsection (b), which authorizes the Whistleblower Office of the Service to determine amounts of awards to whistleblowers based on a percentage of the tax collected. Section 7623(b)(4) gives the Tax Court jurisdiction over appeals of award determinations, effective for determinations with respect to information provided on or after December 20, 2006.

Each significant expansion of the Court’s jurisdiction has required the Court and the tax community to learn the new statutory provisions and has forced the Court to devise new rules and procedures with respect to the new jurisdiction. More often than not, the Court has addressed the initial procedural questions by adding new titles to its Rules of Practice and Procedure. Throughout the years, the Tax Section has maintained an active role in commenting upon proposed rules and communicating with the Court regarding its new or expanded jurisdiction. The Court, as the primary tax litigation forum for federal tax disputes, has also begun the task of interpreting and applying the statutory provisions conferring its new or revised subject matter jurisdiction and will continue that work into the foreseeable future.\(^{26}\)

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\(^{24}\)See I.R.C. §§ 6320(c), 6330(d). In the Pension Protection Act of 2006, Pub. L. No. 109-280, § 855, 120 Stat. 780, 1019, Congress expanded the Court’s jurisdiction over lien and levy cases under sections 6320 and 6330 by giving the Court exclusive jurisdiction over all such actions, effective for determinations made after October 16, 2006.


\(^{26}\)With respect to the Court’s whistleblower jurisdiction, see, for example, Whistleblower 11332-13W v. Commissioner, 142 T.C. No. 21, 3 (2014); SECC Corp. v. Commissioner, 142 T.C. No. 12, 2 (2014); Whistleblower 14106-10W v. Commissioner, 137 T.C. 183, 186-87 (2011). With respect to the Court’s lien and levy jurisdiction, see, for example, Wadleigh v. Commissioner, 134 T.C. 280, 288-89 (2010); Murphy v. Commissioner, 125 T.C. 301, 308 (2005); Sego v. Commissioner, 114 T.C. 604, 609-10 (2000); Goza v. Commissioner, 114 T.C. 176, 182 (2000). With respect to the Court’s section 6015 jurisdiction, see, for example, Porter v. Commissioner, 130 T.C. 115, 117 (2008); Charlton v. Commissioner, 114 T.C. 333, 334 (2000); Fernandez v. Commissioner, 114 T.C. 324, 328-39 (2000); Butler v. Commissioner, 114 T.C. 276, 287-90 (2000).
III. Important Recent Changes Affecting Pretrial Practice

The Tax Court has periodically revised and restated its Rules of Practice and Procedure to address its new and expanded jurisdiction and to deal with issues affecting the timely and efficient disposition of pending matters. The Court, recognizing the importance of providing a litigation experience that is sensitive to the large number of litigants who are self-represented, has also revised its rules and procedures and implemented programs to improve the litigation experience. Some of the most important recent changes include revision of the Court’s rules regarding discovery and privacy, the implementation of an electronic filing (e-filing) and electronic access (e-access) system, the development of new tools and materials to help self-represented litigants understand the litigation process and what they must do to prepare for and try their cases, and the expansion of the low-income taxpayer clinic (LITC) program. The Court has also developed, maintained, and periodically enhanced a website that is loaded with useful information and teaching tools for all litigants, including those who are representing themselves.

A. Discovery

Before 1974, the Tax Court rules did not authorize formal discovery. Effective January 1, 1974, the Court promulgated rules permitting limited formal discovery but continued to emphasize the importance of informal communication and consultation in preparing a case for trial. In contrast, discovery practice in the federal district courts before 1993 permitted broad pretrial discovery in the form of interrogatories, requests for production of documents, and discovery depositions.

In 1993, the Federal Rules of Civil Procedure were amended to require litigants to participate in a conference to plan discovery and make an initial disclosure of relevant information and documents early in the litigation process and to limit the use of certain discovery tools such as interrogatories and depositions. The 1993 amendments were designed to accelerate the exchange of basic information about a case without the need for formal discovery, encourage cooperation and consultation, reduce the costs of litigation, foster more thoughtful and effective discovery, and minimize abuse and delay.

The Tax Court also reexamined its discovery rules. Guided in part by the amendments to the Federal Rules of Civil Procedure, the Court has liberalized the availability of depositions, including nonconsensual depositions of parties and third-party witnesses, and imposed a limit on the number of written interrogatories that a party may serve on any other party unless otherwise agreed by the parties or ordered by the Court. The Court’s Rules of Practice and Procedure continued to emphasize, however, that the Court expects the parties to attempt to obtain the objectives of discovery through informal consultation or communication before utilizing formal discovery27 and requires

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the parties to stipulate, to the fullest extent possible, “all matters not privileged which are relevant to the pending case.”28

B. Privacy Protections, E-Filing, and E-Access

Before 2009, the Tax Court did not permit pleadings and other documents to be filed electronically, and access to its public case files could only be obtained by visiting the Court in Washington, D.C. In 2002, Congress enacted the E-Government Act,29 and the Court began to consider how that legislation affected its operations. The E-Government Act requires federal courts to establish and maintain internet websites containing, among other things, rules of the court, the substance of written opinions issued by the court, and other information and to provide access to documents filed with the court in electronic form. Although the E-Government Act did not include the Tax Court in the listing of federal courts covered by the Act, the Tax Court was already in compliance with most aspects of the E-Government Act by virtue of the information available to the public on the Court’s website, which was launched in 1999 and enhanced over the years to provide ever-greater electronic access to information about the Court, its operations, and its work products. Nevertheless, the Court decided voluntarily to comply with the provisions of the Act and began to explore ways of expanding electronic access.30

In the course of its consideration of the E-Government Act and a possible e-filing program, the Court began to examine privacy concerns regarding personal information contained in the Court’s case files. Guided by amendments to the Federal Rules of Bankruptcy Procedure in 2003, which implemented the privacy policy of the Judicial Conference of the United States regarding the protection of a person’s Social Security number, and by Rule 1005 of the Federal Rules of Civil Procedure, the Court amended Rule 20, effective as of March 1, 2008, to eliminate its long-standing requirement that a taxpayer include in the petition the taxpayer’s identification number and to require instead the submission of a separate statement of the taxpayer’s identification number with the petition. The statement is similar to the Statement of Social Security Number used in the bankruptcy courts and to the civil cover sheets used in other federal courts.31 It is not filed but is furnished to the Service with a copy of the petition to enable the Service to obtain the correct administrative file and prepare to file its answer to the petition.32 The Court also issued a new rule, Rule 27, effective as of March 1, 2008, which provides for redaction of filings and other measures to protect specified sensitive information and for procedures to deal with the failure to redact. Rule 27(b)

31 Tax Ct. R. Prac. & P. 20(b), 130 T.C. 382-83.
32 Id.
limits full remote access to the Court’s electronic files to the parties and their counsel but does permit any other person to have limited remote electronic access to the docket record and any opinion, order, or decision of the Court. People who come to the courthouse may have electronic access to the entire public record maintained by the Court.

The Court ultimately decided to develop and implement an electronic filing pilot program, effective on May 8, 2009, and issued an interim rule to permit electronic filing in cases assigned to the pilot program. Under that pilot program, registered petitioners and persons admitted to practice before the Court could electronically file documents in cases first calendared for trial or hearing after August 31, 2009.33

When the pilot program ended on January 1, 2010, the Court, effective as of that date, adopted Rule 26, which provided that the Court will accept for filing documents submitted, signed, or verified by electronic means that comply with the Court’s procedures, and the Court, effective July 1, 2010, made electronic filing mandatory for most cases where the parties are represented by counsel. As of June 17, 2011, the Court’s website has made available to the public the Court’s orders in searchable format.

Although the transition was a long time coming, the Court has successfully made the transition to an e-filing and e-access platform that is sensitive to the importance of protecting the confidential information of taxpayers while insuring that the parties and their representatives have electronic access to their case files and that the public has electronic access to key documents such as orders, opinions, and decisions. While the tax bar has been very supportive of the Court’s e-filing and e-access program, some commentators have urged the Court to expand the e-access program to permit broader electronic access to electronic case files.34 Whether the Court will expand access is an issue that the Court will have to address in the future, and the ABA Tax Section will play a key role in any discussion about expanded access and its impact on taxpayer privacy concerns.

C. Helping the Self-Represented Taxpayer

The Tax Court has long recognized its obligation to provide an opportunity for taxpayers representing themselves to litigate their tax disputes in a fair, cost-efficient, and timely manner. Among other things, the Court has issued rules of procedure35 for cases where the taxpayer has elected small tax case treatment under sections 7436(c) and 7463. Those procedures confirm that trials in small tax cases “will be conducted as informally as possible consistent with orderly procedure, and any evidence deemed by the Court to

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34 William R. Davis, Limits to Tax Court Online Access Thwart Practitioners, 144 Tax Notes (TA) 1124 (Sept. 8, 2014).
have probative value shall be admissible.”³⁶ It has developed a widely-praised website that includes the Court’s rules, useful forms, an instructional video designed to educate taxpayers regarding the Court with an emphasis on how to prepare for trial and try their cases, and other educational materials. The website permits taxpayers to search the Court’s opinion database, read about the Court’s e-access program, and register for e-access if they choose to do so. The website also contains information about LITCs that are available to assist taxpayers with cases pending before the Court, including a complete list of the clinics participating in the Court’s LITC program.

Currently, 108 clinics are participating in the Tax Court’s LITC program. The clinics provide advice and representation to those taxpayers who meet their eligibility requirements. Although the clinics are not part of the Court, the Court supports the clinics’ efforts to assist taxpayers who might otherwise represent themselves by including notices about the availability of local clinics (stuffer notices) in mailings to taxpayers advising them that their cases have been set for trial. It also supports programs sponsored by the ABA Tax Section and other bar groups that place volunteer lawyers at the Court’s calendar calls so that taxpayers with questions about their case, the Court’s procedures, and other matters may obtain guidance from knowledgeable practitioners on the day of the calendar call. These programs have enabled many taxpayers to resolve their cases without trial and have helped to make what can be a scary litigation process less formidable. Currently, there are 12 active calendar call programs that serve 19 of the cities in which the Court holds trial sessions.

The Court also permits law students who are under the direct supervision of counsel in a case, with the permission of the presiding judge, to assist counsel by presenting all or any part of the party’s case at a hearing or trial.³⁷ The student practice rule enables qualifying law students to obtain valuable experience while assisting taxpayers in resolving their cases.

The Court’s support of the LITC program and its efforts generally to help taxpayers representing themselves to understand and navigate the litigation process are not the only developments worth mentioning. Any discussion of the Court's efforts to assist self-represented taxpayers would not be complete without recognizing the efforts of the judges (including senior judges and special trial judges) who routinely travel to approximately 75 cities to hear and decide cases for the Court. Beginning even before the calendar call of each session, the judges will issue orders, many of which are carefully drafted to explain pretrial procedure to the taxpayers, and will hold conference calls to clarify procedures and deal with pretrial issues that may come up. Although each judge may differ in his or her approach to preparing for a trial session, each judge is mindful of the Court’s commitment to provide a fair trial to all litigants including self-represented taxpayers and conducts his or her trial sessions with sensitivity. Given the large percentage of cases

³⁶Tax Ct. R. Prac. & P. 174(b).
involving self-represented taxpayers and the experience of the Court in managing that litigation, I doubt that there is any federal court that is more skilled in handling pro se litigation. So, on the 75th anniversary of the Tax Section, I urge the Tax Section to continue its support of LITCs and other programs designed to help self-represented taxpayers, and I encourage Section members to volunteer their services to assist the pro bono effort.
INTERNATIONAL TAX GROWS UP
The Tax Section at 75, Subpart F at 53, and the Foreign Tax Credit at 97

JOAN C. ARNOLD

As the Tax Section celebrates its 75th anniversary, I was asked to reflect on the Section's contribution in the international tax arena and on how the Section's international community has grown. I started by recognizing the number years that such reflection needs to cover: In 2015 the foreign tax credit will be 97 years old, and Subpart F of the Code will be 53 years old; I am celebrating the 39th anniversary of my first cross border tax project, and I've been involved in the international committees of the Tax Section for more than half of that time. Although reflecting on the changes wrought over so many years is daunting, it has also been quite interesting.

Ruminating on the changes in the Section's involvement in international tax caused me to think about the changes in the practice of international tax overall. My first cross border project gave me a very visceral feel for the foreign tax credit. It was 1976, and the issue was the amount of credit that the taxpayer could claim. But, it wasn't an esoteric question of whether the tax had been separated from the income, the correct identity of the taxpayer, or even if it was a creditable tax. Rather, the taxpayer had collected receipts from customers who had withheld tax on interest payments on loans and had kept them in cardboard boxes. The receipts were frequently beautiful, with bows, ribbons, and wax seals. But they weren't in English, and the agents required that each receipt be matched, physically, to the specific underlying loan in order to claim the credit. Given the status of IT systems in 1976 that was certainly a challenge, but it was hardly sophisticated tax planning. Fast forward to foreign tax credit planning in the 1990s and 2000s and nobody was looking at matching paper to paper. The planning involved the sophisticated use of structured financial and business arrangements that required the involvement of multiple parties.

Similar changes have occurred in the area of deferral. Having lost the bid to end deferral altogether, the Kennedy administration accepted the introduction of Subpart F, sections 951-959, to try to capture some of the offshore income that was subject to low tax. In my view, the early years of Subpart F were not terribly impactful because much of foreign income was being subject to non-U.S. taxes that were higher than the U.S. corporate tax rates.


¹ All references to a section are to the Internal Revenue Code of 1986, as amended.
and we had a number of foreign tax credit planning tools, including what was referred to as the “rhythm” method of calculating the foreign tax credit (annual determinations of income and earnings and profits, with the ability to defer one or the other) and the overall (as opposed to country by country) foreign tax credit. Both facilitated tax planning.

But the world changed in the 1980s.\(^2\) The discussion on the principles of international tax moved from capital export neutrality to competitiveness of U.S. companies in the global market place—capital import neutrality. The 1986 Act\(^3\) gave us the expansion of the Subpart F regime, the “basketsing” of income for foreign tax credit purposes, the PFIC regime, and the “super-royalty” provisions of Section 482. More taxpayers had to pay more attention to the global taxation of their businesses, and more advisors were needed to navigate the very new world.

The 1980s also brought considerable changes to the “inbound” taxes—the taxation of non-U.S. persons. Prior to 1984 U.S. multinationals borrowed money by issuing “Eurobonds,” so called because they were issued to non-U.S. investors through an issuance in Europe. But there was a problem—if the bonds were issued directly by a U.S. corporation, the interest paid would have been subject to the 30% tax imposed by sections 871 and 881, and that would have made the bonds too expensive to issue as the purchasers would have wanted the interest to be grossed up for the taxes. To manage the issue, the U.S. corporation would set up a Netherlands Antilles subsidiary, which would actually issue the bonds, and the Netherlands Antilles subsidiary would lend the proceeds to the U.S. corporation. Under the U.S.–Netherlands Antilles treaty, the interest paid by the U.S. company to the Netherlands Antilles company was free from U.S. tax, and the interest paid by the Netherlands Antilles company to the investors was foreign source and therefore not subject to tax under sections 871 or 881. So long as the Netherlands Antilles company was properly capitalized and the operations were run correctly, the structure worked.

The fact that the structure worked made Congress and Treasury start to look at the use of treaties to eliminate statutory taxes, but there was also a realization that there was a need to support foreign investment in the United States, so section 871(h) was introduced, giving us the portfolio interest exemption.\(^4\) Once there was an exception to the 30% tax, much planning was needed to use it. International tax practice and the number of practitioners continued to grow.


\(^4\)As an aside, I have always found it curious that portfolio interest was tied to the termination of the Netherlands Antilles treaty, when it appeared to me in 1984 that the exception was really needed to allow the U.S. government to facilitate its issuance of debt to non-U.S. persons. The treaty issues seemed to be a convenient excuse for the change in the law.
During the 1980s and 1990s, source taxation became more important as the financial markets became global, and we learned to deal with the cross border products that our banking brethren were creating. This led to an increasing emphasis on the use of tax treaties. Then in 1997, we had what to my thinking was the most significant change in the international area in my years of practice—the introduction of the check-the-box rules. Adding this election to the tool box of a tax professional was like opening Pandora’s Box. And it required, as in 1986, rethinking historic means of doing business to manage the global tax position of a company.

As the international tax area grew, twisted, and exploded, advisors needed a forum in which to discuss the issues not only with other practitioners but also with governmental personnel. The Tax Section provided that forum. Today, there are four committees that are focused on international tax:

- Foreign Activities of U.S. Taxpayers (FAUST)
- Foreign Lawyers Forum (FLF)
- Transfer Pricing (TP)
- U.S. Activities of Foreigners and Tax Treaties (USAFTT)

The growth of the committees has paralleled the explosion of growth in the practice area. Until 1978, there was one international committee called simply Foreign Tax Problems. In 1978 that committee was divided into FAUST and USAFTT—outbound and inbound. In 1980 FAUST had about 90 members and USAFTT had about 125. In 2010 FAUST had 522 and USAFTT had 472. The biggest jump in membership came in the early 2000s, not surprisingly (to me) corresponding with the adoption of the check-the-box rules and the significant changes in the foreign tax credit area.

In 1997, principally through the efforts of Elinore Richardson, a Canadian tax lawyer who was very active in the Tax Section, FLF was formed. This gave non-U.S. tax professionals an official place at the table, recognizing that cross border tax planning really required an integration of U.S. and non-U.S. laws. The Tax Section was at the forefront of that integration. And in recognition that transfer pricing is at the heart of all international tax matters, in 2001 the TP committee was formed, moving the topic from the Affiliated and Related Corporations Committee. This gave the Section the four corners of the practice—inbound, outbound, foreign law, and transfer pricing.

I had the pleasure of being introduced to the USAFTT committee in the 1990s, and through the outreach of N. Susan Stone, who was then the chair of the committee, was welcomed as an active member. It was quite the time to join the committee—Treasury and the Service were in the throes of the overhaul of the withholding tax systems of sections 1441 and 1442, and there was a meaningful opportunity to work with government personnel as we prepared

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5 The entity classification regulations, Regulation section 301.7701-3.
panels for Section meetings. To this day I hear John Staples’ voice in my head when I think through a section 1441 question.

The consistent interaction of private practitioners and the government personnel is the hallmark of the committee CLE sessions. There are often spirited discussions, and the government’s view of issues is crucial to practitioners. For as long as I can remember we have had the active input of the office of the Associate Chief Counsel International and Treasury on panels and as speakers at our lunch sessions.

The Section outreach goes beyond the three annual Section meetings and beyond the shores of the United States. In 2001, through the efforts and vision of Elinore Richardson and the late Christine Brunswick, then Executive Director of the Tax Section, the Section, together with the Taxes Committee of the International Bar Association (IBA), hosted the first international tax conference in Amsterdam, the Netherlands. Now entitled Tax Planning Strategies – U.S. and Europe, that conference has moved to a different European city each year, and this year will be held in Munich, Germany. In addition to the IBA, cosponsors of the conference now include the USA branch of the International Fiscal Association (IFA) and the Tax Executives Institute, Inc. (TEI).

The conference provides for the examination and discussion of current tax topics that are crucial to the tax planning of companies that operate on a multinational basis. Authorities of the tax administration of various countries and the OECD are frequent speakers, and the conference has gained a reputation for being an excellent resource for those involved with tax planning for multinational companies.

In addition to the European focused conference, in 2008 the Section presented the first annual U.S. – Latin America Tax Planning Strategies Conference in recognition of the need to focus on the growing area of Latin America. Held annually in Miami, the eighth LATAM conference will take place in June 2015. This conference is also cosponsored by the Taxes Committee of the IBA, the USA Branch of IFA, and TEI. TEI also plays a significant role in planning this conference, particularly in the half-day workshop for in-house tax advisors that precedes it. While the Tax Section members bring the U.S. view to the conference, for many of us the draw is the ability to gain insight into the laws and practices in Latin American jurisdictions. The conference therefore fulfills a need for Tax Section members.

In both the European and LATAM conferences, networking plays a large role. It is impossible to practice “international” tax in a vacuum, and the conferences provide a community within which to work. For those of us who work in firms that do not have a global reach, participation in that community is crucial to being excellent practitioners. The most recent addition to the international conferences is the International Tax Enforcement Conference. It was developed at the urging of Scott Michel,

6Former Assistant Chief Counsel International.
as he saw the need to examine how taxpayers are treated on a global basis when it comes to enforcement, and benefitted from the significant input of Michael Danilack, the then Deputy Commissioner-International of LB&I. For practitioners in the international area, that conference provided an opportunity to gain firsthand knowledge of the changes at LB&I that would impact their clients. I think of it as the “conference that could.” The first conference was in 2012 in Manhattan, right after Hurricane Sandy and in the midst of a snow storm, but it made it over the hill. The second conference was scheduled for 2013 but was postponed in part by the government shut down; it was successfully held in March 2014. The 2015 ITEC is being scheduled as this is being written.

In addition to the strong focus on practitioner and government interaction, the Section takes seriously its obligation to provide the government input on the development of tax law and tax policy. The international committees have made significant contributions to that goal. Recounting all of the submissions is beyond the scope of this writing, but there are a few that need to be mentioned. The submissions are in two buckets (or “baskets” for foreign tax credit fans)—submissions on proposed regulations or IRS pronouncements and submissions on policy matters.

In the first bucket, I think of the recent comments on section 987, the foreign currency regulations, which were principally drafted by Paul Crispino and David Golden, and the comments on section 871, which were principally drafted by Matthew Stevens. I had the privilege of reviewing those comments, and it was an incredible learning experience. Both were praised by the Service and Treasury for their thoughtful, balanced, and in-depth explication of the issues.

In the second bucket, recognizing the increasing intensity of the debate on international tax reform, the Section formed a task force to evaluate reform proposals for taxing income of U.S. persons from direct investment abroad and considered a series of modifications to current U.S. outbound tax rules. The task force report that was submitted in 2006 discussed the policy objectives of fairness, efficiency, and administrability and the application of those objectives in the international tax context. The task force report then provided separate chapters discussing: (1) U.S. taxation of a U.S. person’s foreign business income; (2) alternatives for reform of the international tax rules,

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7 For those who haven’t had the opportunity to read to a child lately, the reference is to the book, *The Little Engine That Could* by Watty Piper.


specifically exempting foreign income or curtailing deferral of foreign income; (3) entity classification and corporate residence; (4) the foreign tax credit; and (5) reform of Subpart F. Each of the chapters provided background on current law, described policy implications of those rules, and analyzed various proposals for change in law (without making any specific recommendations).

Tax reform in the international area continued to be of acute interest to Congress, and to assist in the conversation, the 2006 task force report was followed in 2009 with an update, reflecting additional analysis, prepared principally by Steve Shay.\footnote{Section of Taxation, Statement Regarding Policy of U.S. International Taxation 2 (2009), available at http://www.americanbar.org/content/dam/aba/migrated/tax/policy/2009/090609policyintltax.authcheckdam.pdf. At the time Steve Shay was a Council Director, overseeing the international committees.}

In 2014, the Section took a look at the inbound side of the issues and developed a report outlining the options that could be considered to effectuate positive changes in the area, again without making recommendations; the goal was to assist in the education of the policy makers, not to advance the goals of a particular group of taxpayers.\footnote{Section of Taxation, Options for Tax Reform in the Inbound International Tax Provisions of the Internal Revenue Code, 67 Tax Law. 331, 331 (2014).}

The future for the Tax Section and the international committees won’t involve any slowing down. We are now working with transparency in international taxation through the global implementation of FATCA. We see a concerted, coordinated approach to avoiding double nontaxation through the OECD Base Erosion and Profit Shifting project that will have a significant impact on worldwide tax planning. And until we have more serious tax reform, we will continue to have corporate self-help in international planning—the inversions of U.S. companies into foreign parented entities. Then we hope for some form of international tax reform.

As it has done over the past 75 years, I expect the Tax Section to continue to be a significant contributor to the debates that arise in the international tax arena and to provide a community in which members can learn, contribute, and grow as professionals.
Why Do Law Students Want to Become Tax Lawyers?

LINDA GALLER∗

I. Introduction

My husband once asked my parents and several of their friends, “What is the secret to a good marriage?” Each of our elders had been married over 50 years to spouses with whom they had rock solid relationships. My husband hoped their insights and advice might help us as we made our way through a life as partners. Instead, as the opportunity to answer circled the room, each person shrugged, extended his or her hands palms up, or otherwise indicated no idea how to answer my husband’s simple but important question.

I thought a lot about that conversation as I prepared to write this essay. Like my husband’s inquiry so long ago, this one is both simple and important, and one might reasonably expect there to be a consensus answer. I asked a few friends who teach tax to law students and eventually posted the question on a listserv populated by law professors. I received no answers—not one. Just virtual versions of shrugs and extended palms. Some individuals shared their own stories, offering reasons why they had opted for careers in the tax field.1 Although some of those tales were interesting (and some were not), none ultimately shed light on my query.

So I created my own list, which I share below. I’d like to think this list is based solely on observations of my students, but I suspect that some of the reasons are mine alone. In the end, I conclude that most tax professionals are attracted to our field by a combination of several, but not all, of the listed items, but that many of the items on the list are shared by all or most of us. With the exception of a growing interest in international tax practice (discussed below), I don’t think that the list has changed much over the last 25 or so years during which I have worked with aspiring lawyers. Perhaps this essay will prompt readers who already practice in the tax field to reminisce about decisions made in their youths. Even better, I hope it will nudge a few neophytes to seek careers in this marvelous field.

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1 Stories like these are compiled in SECTION OF TAXATION, CAREERS IN TAX LAW: PERSPECTIVES ON THE TAX PROFESSION AND WHAT IT HOLDS FOR YOU (John Gamino, Robb A. Longman & Matthew R. Sontag eds., 2009).
As a preliminary matter, I note that the phrase “Death & Taxes” has its own Wikipedia page. A recent study concluded that a majority of college students—and probably, therefore, law students—rely heavily on Wikipedia for course-related research. Perhaps my students comprehend the inevitability of death and taxes without Wikipedia, but once one stops to ponder mortality or the ubiquity of tax burdens, maybe it is only a small step to consider a profession whose members make their livelihoods easing the financial burdens associated with both.

II. Why Do Law Students Choose Careers in Tax Law?

A. An Interest in Business or Financial Transactions, Generally, or in a Discrete Area Like Estate Planning, Employee Benefits, or Nonprofit Corporations

Students with a broad interest in business or in specific areas in which tax issues predominate often choose tax careers. In my experience, these students tend to fall into one or more of the following groups:

1. Undergraduate Coursework in Business or Accounting

Often, students come to law school with undergraduate degrees or majors in accounting or business. These students tend to register for tax courses and are sought out by certain types of employers, most notably accounting firms.

2. Interest in a Particular Type of Client

Students interested in, say, advising small businesses or charitable organizations are attracted to tax careers, as are students who aspire to work on large financial deals or transactions. Students in this group first define the type of client with which they seek to work and then opt to work with those clients as tax advisors.

3. Interest in International Practice

Many students who are interested in international law or international business end up in tax careers. Indeed, an increasing percentage of my students are foreign born or educated (or both) and wish to work with clients in their home countries. When I practiced tax law prior to becoming a law

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professor, international tax was a niche practice area. Today, particularly in large firms, most tax lawyers practice, at least to some extent, in the international arena, with clients who are foreign investors in the United States or domestic persons with interests abroad, or both.

B. An Interest in a Particular Type of Practice

Perhaps a student is interested in a practice that emphasizes one set of skills—for example, litigation or transactional work. Tax offers a way to narrow the scope of such a practice in combination with building a depth of legal knowledge or practice experience. For example, a student who wants to advise small businesses and their owners on an ongoing basis might see an expertise in tax as a way of both attracting and servicing clients. Similarly, a student who is interested in litigation, generally, might seek to become a tax litigator so that her substantive expertise and experience in a limited practice area provide value and demand for her services.

C. Opportunity to Work in Different Professional Environments

Some students aspire to work in a single setting—for example, a large corporate law firm. Others like the idea of moving around. Tax lawyers commonly work in a variety of professional settings—large and small law firms, in-house (at corporations), accounting firms, or government agencies. In many cases, moving among these work environments is considered valuable training and helps to land new professional opportunities. So students who, say, want to work in a large law firm but don’t have the academic credentials to land a dream job right out of law school can build their resumes through jobs in other professional environments. Those with a desire to spend time in government can reasonably anticipate that they will be employable in the private sector should they wish to move on at some point.

Many tax lawyers work in large organizations with substantial offices abroad. Students who look forward to the possibility of practicing U.S. law while living abroad, whether on a short-term basis or indefinitely, seriously consider careers as tax attorneys.

D. Working with Others

Tax practitioners are never isolated. In transactional work, for example, tax lawyers are part of a team consisting of corporate lawyers and lawyers with specialized expertise, such as securities law, labor law, and employee benefits law. There are often accountants involved, as well, not to mention in-house tax staffs. In individual representation, there may be financial planners or life insurance professionals involved. Thus, those who like to work with others often select tax as a career. As a bonus, most tax clients are reasonably

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4Some of us are lucky enough to work in law schools. Other professional environments for tax lawyers include specialized tribunals or courts and consulting firms.
sophisticated in business or financial matters and are able to participate actively in their legal affairs.

E. “I Thought I Wouldn’t Like Tax, but I Do!”

Not a school year goes by in which at least one liberal arts major who enrolled in my tax class with trepidation realizes that she really, really likes tax. There’s no way to predict who this will be or when it will happen, but nothing in my teaching career compares with the “Aha!” moments I am so lucky to share. Some of these students take tax because they think they should, while others enroll because they have heard that a particular professor is a good or engaging instructor. Either way, many students opt for careers in tax simply because they like the classes and think they will likewise enjoy the career.

F. “Tax Touches Everything”

Students in my introductory income tax class hear me say, over and over, that “tax touches everything.” While my admonition may be an overstatement, it is only a slight one. Students who seek to become, at once, both specialists and generalists are attracted to tax. They seek a field in which they will develop and offer their clients a specific expertise that affects varied types of financial decisions and life events.

G. Intellectual Challenge

Tax research and problem solving are cerebral exercises not suited for the faint of heart (or brain). While I cannot say that my best tax students are necessarily the smartest students in the law school, high ranking students certainly are overrepresented in my tax classes. Moreover, I am never surprised to see people interested in math and science gravitate toward tax. Tax problems are puzzles yearning to be solved, and students who can’t sleep until they’ve solved the problems in their tax casebooks gravitate to tax jobs. Creative problem solvers are attracted to tax.

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5 Former students who may be reading this essay should know that my second favorite aspect of teaching is hearing from them. (Hint, hint.) These communications enable me to see that the seeds I helped plant have flourished and to entice alumni to mentor my current students and recent graduates.

6 They are right.

7 For example, during my class’s “Tax in the News” discussions last semester, we considered how and whether Silicon Valley employees should be taxed on perks like lavish cafeterias, laundry services, and yoga classes; Olympic medalists’ obligations to pay income tax on their medals and cash prizes; the tax consequences of selling a home for less than an outstanding mortgage; the tax bill faced by a California couple who found old U.S. coins buried underneath their property; and the tax treatment of large amounts of cash left by the anonymous “Tips for Jesus” guy. It’s too bad I’m not teaching this semester when I could discuss the Kickstarter campaign that raised $55,000 for a potato salad project. See Fred Benenson & David Gallagher, Potato Salad: By the Numbers, KICKSTARTER, Aug. 5, 2014, https://www.kickstarter.com/blog/potato-salad-by-the-numbers.

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WHY DO LAW STUDENTS WANT TO BECOME TAX LAWYERS?

Some students like tax enough to spend an extra year in school, enrolling in a tax LL.M. program. In my experience, there are a range of reasons why students decide to take this route, but the possibility of a better job than they could get with only a J.D. is the one I most commonly hear. Students know that the year they spend immersed in tax law will be tough, and they relish the thought of doing it anyway.

Young tax lawyers do a lot of research and memo writing. Those who like this sort of thing generally like tax. Indeed, I know of at least one person whose longstanding arrangement with his firm is that research and writing (and providing advice to lawyers in the firm, but not to clients) are all that he does.

H. **Continuing Demand for Tax Expertise**

Given the substantive difficulty of tax law, expertise matters. Therefore, time invested in learning new concepts or techniques can pay dividends over the course of a career. Forward thinking students understand this. Moreover, tax law is relevant in both good economic times and bad; there are tax issues in mergers and acquisitions, and there are tax issues in bankruptcy and foreclosures. So it is likely that one can make a living over the long haul.

The tax law changes frequently, and those who relish “keeping up” enjoy this aspect of their tax careers. A significant part of tax practice involves studying changes in the tax law, evaluating how those changes affect existing client structures, and advising clients about the effects of such changes on future plans. Students who enjoy perusing the *Wall Street Journal* or the *New York Times* business pages often consider tax careers. (Keeping up with business news also helps lawyers learn about their clients’ businesses.)

I. **Not Rodney Dangerfield**

Tax lawyers don’t have much in common with Rodney Dangerfield. We not only get respect, we command lots of it. Whether it’s because we’re smart, or we know a lot, or our expertise is invaluable to clients and colleagues, when we talk, people listen. When a tax lawyer rejects a proposed corporate structure, that structure almost certainly won’t be used. When a tax lawyer proposes a corporate structure, very likely that structure will be used. Even esteemed lawyers practicing in other fields of law check with us before giving basic tax advice to clients.

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9 Indeed, a reader cannot help but respect me at this moment for working Rodney Dangerfield and E.F. Hutton into one paragraph. An earlier draft also included a reference to the partnership antibuze rules, but that seemed over the top.
III. Conclusion

Recent studies of the relative levels of contentment of lawyers in many areas of practice confirm my sense that tax lawyers are likely to be at the top.\textsuperscript{10}

Common Threads and Trends in Tax

THOMAS D. GREENAWAY*

To try to put the evolution of tax practice in perspective is a humbling task, especially when I consider the collective wisdom of my fellow contributors to (and readers of) this issue of The Tax Lawyer.1 Because I work with the federal income tax, mostly with respect to large organizations, my observations are informed by and limited to that practice.

To date, I have held two tax jobs. First, I served as a field attorney for the IRS Office of Chief Counsel, starting in San Jose and then later in Boston. Second, I joined KPMG, one of the “Big Four” public accounting firms, where I practice today. Of course, there are many differences between government service and public accounting, but common threads and trends have run through my practice. These common threads and trends support the overall and happy conclusion that tax promises to be a collegial and rewarding field for years to come.

Here are the common threads:

• The Service acts as a noble adversary in almost all cases,
• Facts matter more than anything else, and
• Tax is complicated.

Common trends include:

• More and more specialization in tax practice,
• More collaboration across disciplines, and
• The diminishing importance of the U.S. corporate income tax.

This short essay expands on each of these common threads and trends.

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I. Common Threads

A. Noble Adversary

Tax attorneys in the IRS Office of Chief Counsel do the same thing today as they have for generations: they represent the Commissioner of Internal Revenue in Tax Court, counsel the enforcement divisions of the Service, and work with the Department of Justice on other general litigation matters. National Office attorneys establish and coordinate technical positions as well as draft guidance for Treasury and the Service to consider implementing.

Attorneys in the IRS Office of Chief Counsel take on terrific responsibility. The organization usually allows its attorneys time to develop facts and issues in search of the right answer. 2 If a taxpayer or opposing counsel establishes facts or arguments that show that an initial determination by the Service was flawed, most Chief Counsel attorneys learn it is their job to persuade their managers (and sometimes others) to concede the matter in whole or in part. On the other hand, the Service deserves—and gets—vigorou advocates when the facts and the law are on its side. In the main, the Service and the Department of Justice Tax Division are noble adversaries, yielding the immense power they wield when appropriate.

Because most experienced government attorneys tend to yield in the face of new facts and better arguments, in a very real way taxpayers—at least well-advised taxpayers—actively participate in the formation, development, interpretation, and execution of the tax laws that govern all of us.

To be clear, this close working arrangement between taxpayers and the government is no concession by the sovereign. The active role the people play in developing the law of the United States follows from the founding principles of our Constitution. In our system of government, private practitioners serve an essential role together with Congress, the courts, Treasury, and the Service in the creation and administration of the tax law at all levels. A sovereign that unilaterally wielded the power to tax—the power to destroy—would be anathema.

B. Facts Matter Most

Tax rewards the curious. In tax—as in all the law—facts matter more than anything else. Unlike the rest of the law, however, our practice reaches into almost every aspect of life and business. So the variety of facts in our practice is as broad as human experience. One of my favorite examples: the observable spike in December births relative to other months over the past generation has been credited to . . . tax credits. 3 As the example shows, almost every human activity can be affected by tax considerations. So the curious tax practitioner

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learns a lot, for better or worse, about the world when viewed through the prism of tax. We must examine life in all its fullness to answer the riddles.4

And facts are messy. Nothing drives that lesson home better than preparing and trying cases. Tax litigation is rare. But the experience is invaluable, and I recommend it to all tax lawyers, planners included. One must never forget that facts are not created by a group of like-minded people sitting in a room agreeing with each other. Facts exist out in the real world, ambiguous and subject to different interpretations.

Marshal the right evidence, put the right perspective on things, and frame the transaction in the right way. When the facts are lined up right, the technical analysis usually follows along. But do not ignore bad facts or credibility issues. Litigation teaches that lesson over and over. As litigation becomes ever rarer, some tax practitioners—including some in the government—will lose the inclination and ability to test their own plans, facts, and arguments in a clear light, as an independent advisor must.5

C. Tax Is Complicated

As was said, tax reaches into almost every aspect of life and business. And life and business are complicated. So tax must be complicated.6 The best tax practitioners are drawn to and thrive in the complexity. As F. Scott Fitzgerald wrote: “the test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function.”7 There are plenty of opposed ideas in tax. The trick is to reconcile them. For instance, what role does form play versus substance?8 Does this rule trump that standard—or can they both be read together in harmony?9 Maybe our labors are nothing more than a deadweight loss to our friends the economists, but thinking about hard tax questions is still an exciting privilege, and the work is never done.10

We tax lawyers seem to prefer the obscurity the complexity allows us, leaving the flash and the sizzle to the trial lawyers and the dealmakers. Outsiders glaze over when we start talking tax. We let the centenary of the income tax

6 See Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 560 (1935) (“[I]t is difficult to be just and easy to be arbitrary. If the commonwealth desires to tax incomes, it must take the trouble equitably to distribute the burden of the impost. Gross inequalities may not be ignored for the sake of ease of collection.”).
8 See generally Robert Willens, Form & Substance in Subchapter C—Exposing the Myth, 84 Tax Notes (TA) 739 (Aug. 2, 1999).
9 Compare, e.g., I.R.C. § 351(a) (nonrecognition rule with no business purpose requirement) with I.R.C. § 7701(o) (codified economic substance standard).
pass without any fuss whatsoever. We prefer it that way. Our clients and our colleagues know the value we bring.

Yet it is possible to have too much of a good thing (even in tax), and we have more than enough tax complexity. Taxpayers and their advisors have been complaining about tax complications forever, for good reason. The opacity of the tax law can be just too much. For example, take partnership allocations. The section 704(b) regulations are generally inaccessible to most practitioners, largely un-administrable by the Service, and basically unreviewable by the courts.11 In all but the most obvious cases,12 both the Service and courts generally shy away from testing partnership allocations for substantial economic effect.13 The rules are byzantine.

Even experienced tax lawyers risk missing issues. On the “taxpayer-friendly” side of the ledger, over 300 elections await the corporate taxpayer, never mind the hundreds of expired or obsolete elections littered in the Code and published guidance. Of course not all potential elections apply to a given taxpayer, but the sheer volume is maddening.

On the “taxpayer-unfriendly” side, does anyone even know how many anti-abuse rules and standards are scattered in the Code and Regulations? Most of us know about section 269, the granddaddy of them all, but what about all the other anti-abuse rules that popped up in the regulations over the past 20 years like toadstools? When was the last time, for example, you considered the anti-avoidance rule of Regulation section 1.1502-13(h)—aimed at arrangements that violate the purpose of the intercompany transaction regulations? Who among us knows offhand the specific, articulated purpose of the intercompany transaction regulations?14

And atop the Code (now including section 7701(o), the economic substance provision) and the published guidance rests the common law of taxation, everything from the sham transaction, step transaction, and substance-over-form doctrines to the tax benefit rule and the doctrine of elections, equitable estoppel, and so on. Too much.

Does the ever-increasing complexity of tax law have a natural limit? One would think so, but thoughtful people have been saying that tax is too complicated for a long time.15 It remains to be seen whether our hyper-complicated tax system will collapse under its own weight (the corporate income tax

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13 See, e.g., Pritired 1, LLC v. United States, 816 F. Supp. 2d 693, 744 (S.D. Iowa 2011).
15 See, e.g., Arrowsmith v. Commissioner, 344 U.S. 6, 12 (1952) (Jackson, J., dissenting) (criticizing the Supreme Court’s “sporadic omnipotence in a field beset with invisible boomerangs”); Foxman v. Commissioner, 41 T.C. 535, 551 n.9 (1964).
is well on its way—more on that below), whether a better option will emerge, or whether we will just manage to tolerate ever-more complicated rules, standards, and regimes in the same way we have over the past century. We all hope for a simpler, more elegant tax system, but neither experience nor Congress offers much hope.16

II. Common Trends

A. Specialization

One necessary consequence, and perhaps cause of, tax complication is specialization among tax professionals. Only the smartest, or the most foolhardy, tax practitioner tries to work alone as a generalist on any real range of substantive tax issues. As tax professionals develop “niches,” they find they can command higher fees, and they find that their generalist competitors may be at a distinct disadvantage, given the sheer number of issues and authorities in play.

We all need help. Certain principles—basis and realization, for instance—serve as guideposts, but one cannot serve clients with general principles. Too many traps lurk in the murk and the details. More and more, business tax lawyers tend to practice in larger tax groups, in larger firms, than they did a generation ago.

A generation ago, some of the titans of the tax bar bemoaned this development, asking whether the growth of larger, full-service law and other professional firms threatened the profession as a whole.17 The answer—after a few scares in the early 2000s—is self-evident. The profession, though different, is still strong.

There are several advantages to practicing in a large firm. First and foremost is access to potential clients. Tax is not much of a retail profession, and it never has been. Tax is private. Close access to and relationships with clients is critical. Second, given the complexity of the tax law, there truly is strength in numbers. In any significant business transaction, potential tax issues can be legion.

While competent tax practitioners should be able to spot many tax issues, the truth is that specialization is now a fact of life for almost all tax practitioners. One missed issue may prove to be the decisive one. Furthermore, as a basic business proposition, well-coordinated teams usually allow more work to be done faster, more efficiently.

Of course, the larger the firm, the less the autonomy. The independent advisor must remember that these large firms are professional associations, not just businesses. The demands of the business must always be balanced by professional pride and responsibility as well as individual intellectual honesty.

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16 Eliminating book-tax differences for publicly-traded entities would be a good start.
B. **Collaboration**

From time to time over the past 75 years, the ever-shifting boundary between tax accountants and tax lawyers has heated up. According to one who would know, in the early days of the ABA Tax Section, “most lawyers felt that tax was essentially work for accountants, and thus, from their point of view, a little beneath them.”\(^{18}\) That view soon changed, at least for the lawyers who saw the value in tax practice.\(^ {19} \)

It is worth noting where courts drew the line between tax accountants and tax lawyers 75 or so years ago, when the ABA Tax Section was founded. For instance, in 1943, the Supreme Judicial Court of Massachusetts held that preparing tax returns for wage-earners was not the unauthorized practice of law. Along the way, the court noted, in dicta:

> Doubtless the examination of statutes, judicial decisions, and departmental rulings, for the purpose of advising upon a question of law relative to taxation, and the rendering to a client of an opinion thereon, are likewise part of the practice of law in which only members of the bar may engage.\(^ {20} \)

It is fair to say that the line has shifted over time.

In the middle of the 20th century, a series of unauthorized-practice-of-law decisions barred accountants from recovering fees for certain tax work,\(^ {21} \) at least until federal regulations authorizing practice before federal agencies were found to preempt state rules regulating the unauthorized practice of law.\(^ {22} \)

In the late 1990s, the ABA grappled with the question of whether to explore so-called multidisciplinary practice changes to the model rules.\(^ {23} \) In 2000, the ABA House of Delegates, dominated then as it is now by representatives from state and local bar associations, rejected the proposals submitted by the MDP Commission, and history moved on. State bar rules still generally bar lawyers engaged in the practice of law from sharing fees with nonlawyers.

Despite the stand taken by the ABA House of Delegates, many clients tend to care more about getting good advice than they care about the professional designations of their advisors. In fact, many clients prefer that their advisory firms work across several different disciplines. Many potential business transactions raise strategic, valuation, transfer pricing, accounting, and financing...


\(^{19}\)Id. at 4-5 (explaining early and active cooperative efforts between the ABA Tax Section and American Society of Certified Public Accountants).

\(^{20}\)Lowell Bar Ass’n v. Loeb, 315 Mass. 176, 183 (1943).


\(^{22}\)Sperry v. Florida, 373 U.S. 379, 399-400 (1963) (patent case). One wonders whether the implications of *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014), if left unaddressed by Congress, might disrupt the settled expectations of the federal tax bar on what constitutes the unauthorized practice of law.

questions in addition to tax and legal issues, issues that often cross over borders and jurisdictions.

Strong professionals listen carefully to how their clients define success and then build teams and approaches to meet their clients’ needs. Law firms add economists and accountants to their staff, and accounting firms hire attorneys, economists, and other finance professionals. Across the board, the general trend runs in favor of professionals and firms that do a better job of collaborating across disciplines and jurisdictions.

Now, aside from litigation and drafting legal documents, which remain the sole preserve of lawyers practicing in law firms and in-house, it can sometimes be difficult (for me, anyway) to distinguish between the work product of those who practice in law firms, on the one hand, and those who practice tax in large accounting firms, on the other.

C. The Shrinking Corporate Tax

According to the old saw, “when you tax something you get less of it.” The secular trend with respect to the corporate income tax base proves the point. Over the last 75 years, U.S. multinational groups, in the aggregate, have been colossal engines for economic growth. Over the same period, however, U.S. corporate tax receipts shrunk relative to other categories of U.S. receipts, as Chart 1 shows below.

Put differently, Chart 1 shows that the massive growth in U.S. receipts over the past 50 years has come almost exclusively from individuals, not corporations.

So while U.S. business worked hard to grow its collective book income over the past half-century, at the same time taxpayers and their advisors worked hard to produce less taxable income relative to that book income. Their efforts have paid off, as Chart 1 shows. The trend does not seem like it will stop anytime soon either since the underlying drivers are firmly entrenched, for better or worse.

24 Around the turn of the century, several of the large accounting firms took advantage of Tax Court Rule 200(a)(3), which allows nonattorneys to enter appearances on behalf of petitioners, but these nascent litigation practices were abandoned after at least one Tax Court judge informally signaled displeasure with the trend.

25 In this Article, I leave aside the different risk tolerances and institutional perspectives different firms and different types of firms take with respect to substantive tax issues. Although those differences can be important, they defy generalities.


28 I do not pretend to know anything about the economic incidence of the corporate income tax. In this context I simply refer to the data presented on tax returns.
In my view, four main drivers work to shrink the corporate tax base.

First and most obvious is the major shift of U.S. business operations away from C corporations and into pass-thrus\textsuperscript{29} like partnerships, disregarded entities, and S corporations, as well as their cousins, Real Estate Investment Trusts, Regulated Investment Companies, and the like. Not only do pass-thrus usually avoid entity-level tax, but in comparison to C corporations they may offer business taxpayers much more tax flexibility in terms of creation, operations, and exit opportunities. The transformative effects of the limited liability company and check-the-box entity classification rules continue.

Second, large and increasing portions of the U.S. economy operate through tax-exempt organizations. Asset management, health care, and higher education are three obvious examples. When combined with pass-thru investment and operational vehicles, large portions of the economic activity in the United States permanently avoid entity-level taxation by design. Not coincidentally, I might add, asset management and health care are two of the fastest-growing elements of the overall economy. An obvious corollary to the old saying I quoted above is that if you don’t tax something you may get more of it.

Third, international growth opportunities, combined with international tax planning, allow companies to create and compensate value outside the U.S. tax base, subject to limitations imposed by Subpart F and transfer pricing principles.

\textsuperscript{29}I adopt the awkward spelling Congress uses for these sorts of entities. See, e.g., I.R.C. § 1(h)(10).
For U.S. corporate multinationals, under current law the benefit of developing and growing business offshore is one of tax deferral rather than permanent tax avoidance since foreign earnings are generally subject to U.S. tax when distributed up the ownership chain to U.S. persons. Generally Accepted Accounting Principles and International Financial Reporting Standards require financial statement preparers to account for these deferred tax liabilities unless filers can produce sufficient evidence to show that the foreign earnings will be invested indefinitely or remitted in a tax-free liquidation (U.S. GAAP) or show that the filer has the ability to control the reversal of the timing difference and the timing difference will not reverse in the foreseeable future (IFRS).30

After the one-time repatriation holiday Congress granted taxpayers in 2004,31 U.S. multinational groups have more than tripled their subsidiaries’ undistributed foreign earnings to over $1.7 trillion, by some estimates.32 That is a lot of cash. These balances cannot grow at this torrid pace indefinitely. Something has to give.

Finally, the last big driver of the shrinking corporate tax base is the collective set of exceptions, allowances, credits, incentives, and elections that Congress, Treasury, and the Service provide to taxpayers. Some of these provisions are targeted at particular industries or groups of industries, some apply to all taxpayers, and the net result is an uneven U.S. corporate income tax base. Some taxpayers—most notably retailers—suffer a high effective rate on their book operating income, while others pay little or no tax relative to book income. The 35% statutory federal corporate tax rate (never mind state and local levies) is a very real thing for some corporate taxpayers, but not all of them by any means.

There are other drivers that have helped to hollow out the U.S. corporate income tax base, but the four I noted above seem like the most important. Whatever the cause, the base of corporate taxable income has shrunk over time relative to corporate book income. It is not for me to say whether that is a good or a bad thing, nor is it for me to say whether Congress should junk the whole thing, but the trends described above do not seem to be slowing down, never mind reversing.


31See I.R.C. § 965.

III. Conclusion

I do not have enough confidence—no, I don’t have any confidence—to guess what might happen in the future of taxation. For now, however, tax continues to be a collegial, challenging, and rewarding subject, despite some of the gripes set out in this Article. Let’s leave the flash and sizzle to others, while we quietly keep doing the work we love.