

The Tax Section's Role in Assisting Those Affected by Disasters and Other Tragedies

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On September 11, 2001, the world stood in shock as the World Trade Center was struck and then collapsed due to terrorist attacks. In an instant, many lives were lost and a far greater number of lives were disrupted. Within 48 hours of the attack, I received a call from the then Chair of the Tax Section, Dick Lipton, asking for creation of a 9/11 Task Force that would determine a way the Tax Section and its members could help. Canvassing our friends and members revealed that a key issue delaying recovery had tax at its core. The Tax Section took the lead in resolving that issue for the benefit of many, which opened the floodgates for millions of dollars in charitable giving. But how did tax—of all things—have any relevance, and what was this issue?

After the Twin Towers collapsed, Americans and others rushed to the rescue with more than \$2.8 billion in donations.¹ American charities also stepped in, but one issue loomed in the background for the charitable community: What could it do to assist “for profit” businesses whose existence had collapsed along with the Towers? Would aiding businesses jeopardize the charities’ tax-exempt status, and how should that aid be treated for tax purposes? The effect on businesses was not limited to wealthy owners. Rather, many disrupted or destroyed businesses employed many whose very existence depended upon a paycheck. The person in the mailroom, as well as the person in the boardroom, were both out of work. Even the local food vendor on the street whose food cart was destroyed in the collapse did not know where to turn for survival. We learned that many charities wanted to help businesses but wanted a signal that such action was permissible and also wanted an update on the tax treatment of such efforts. Without that signal, action was delayed or not happening.

The Tax Section stepped in by submitting requests for confirmation from the Service on the tax treatment of charitable loans and grants provided to for-profit business affected by all of the 9/11 attacks and the possibility of

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¹ Elizabeth Stuart, *Charitable Giving Trends in the Wake of 9/11 Full of Good Lessons and Bad*, DESERET NEWS, Sept. 8, 2011, <http://www.deseretnews.com/article/700177280/Charitable-giving-trends-in-the-wake-of-911-full-of-good-lessons-and-bad.html?pg=all>.

excluding such amounts from taxable income.² Victoria Bjorkland, Jennifer Franklin, Betsy Buchalter Adler, and Catherine Livingston from the Exempt Organizations Committee deserve special credit for aiding the Tax Section's efforts. Task Force members made trips to Washington to meet with relevant Service personnel, and although the trips were well received, no formal guidance was issued. Finally, the Section's Chair received a pivotal call.

Concern about the delay between when charities were receiving donations to help 9/11 victims and the time when those charities disbursed those funds to the victims caused a public outcry that led the Oversight Subcommittee of the House Ways and Means Committee to schedule a hearing on November 8, 2001.³ Among the many attendees were the Red Cross and other major charities facing questioning on this significant issue, the New York Attorney General, and tax-exempt watchdog groups. The Tax Section was also asked if it wanted to testify, and the Section's leadership jumped at the chance, with the task falling to me.

The Tax Section submitted written comments⁴ and was also allowed to testify. The hearing was to last for two hours and the Section was part of the last panel. All speakers were allocated five minutes to talk and, to make life easy, a tiny traffic light was at the podium, with a green light for the first four minutes, a yellow light for the fifth minute, after which a red light then came on, so you knew when to finish your testimony. Things went quickly astray with the first panel and the first speaker who represented one of the largest charities in America. This impassioned presentation was well done, but when the light turned yellow, it did not look like the speaker was wrapping things up, and when the light turned red, the speaker continued. Despite the value of the presentation, it was now greatly overtime, and it took more than ten minutes to complete the presentation. House members were now not only frustrated with delayed charitable giving, but they were now also clearly annoyed with a speaker who overstepped the bounds of protocol. The members' questions reflected that concern as the main charities took a lot of criticism for delay in giving that caused the hearing to double in length.

²ABA SECTION OF TAXATION, REQUEST FOR CONFIRMATION FROM THE IRS THAT CHARITABLE LOANS AND GRANTS PROVIDED TO FOR-PROFIT BUSINESS ENTITIES AFFECTED BY THE SEPTEMBER 11, 2001 TERRORIST ATTACKS ARE EXCLUDABLE FROM INCOME (2001), *available at* <http://www.americanbar.org/content/dam/aba/migrated/tax/pubpolicy/2001/0110r.authcheckdam.pdf>; ABA SECTION OF TAXATION, EXAMPLES OF SMALL AND MEDIUM-SIZED FOR-PROFIT BUSINESSES IN NEW YORK CITY NEGATIVELY AFFECTED BY THE SEPTEMBER 11TH TERRORIST ATTACKS ON THE WORLD TRADE CENTER THAT WOULD BENEFIT FROM CHARITABLE GRANT (2001), *available at* <http://www.americanbar.org/content/dam/aba/migrated/tax/pubpolicy/2001/0111c911g.authcheckdam.pdf>.

³*Response by Charitable Organizations to the Recent Terrorist Attacks: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 107th Cong. 84-88 (2001).

⁴*Id.* at 86-88 (statement of Michael Hirschfeld on behalf of the ABA Section of Taxation), *available at* <http://www.americanbar.org/content/dam/aba/migrated/ftp/pub/tax/policy/0111ts911.authcheckdam.pdf>.

I was on the last panel with two speakers from watchdog agencies who roundly criticized the charities. I explained why charities needed encouragement for giving to for-profit businesses and clarification of the tax treatment to the recipient. I discussed how: (1) needs-based relief payments to individuals should be tax-free gifts; (2) disaster relief grants to businesses appear to be tax-free gifts, but clarification was needed; (3) the relationship of loss deductions to relief grants; (4) the treatment of below-market loans and the need for the Service to clarify that no interest imputation applies; and (5) forgiveness of disaster relief loans should not generate taxable income.

I got a few nods of approval and felt good when I finished. However, that was not the end of it. After nearly four hours of testimony and questioning, the final question put to my panel of three was to summarize our assessment of charities reaction to date for 9/11 relief. The other two speakers criticized the major charities and then the committee turned to me for the last comment of the day.

At that moment, I recalled how my wife, Heidi Hirschfeld, had helped me the night before in preparing for the testimony; among many things, she said to keep the testimony simple and try to get their trust and sympathy. With that adage in mind, I testified to the members how one Congresswoman on the committee told the charities earlier in the hearing that children in her district were very upset; the children sold candy to raise cash to help the victims, but then the cash was held up by a charity and was not going to the victims. She was rightly concerned about what to tell these children. I then turned to the Congresswoman and said that I could not comment on the past action or inaction of charities, but we needed their help so that in the future, tax issues will not be an obstacle. Then I followed Heidi's advice. I relayed how my older son worked at 1 WTC and was one of the many lucky survivors. They all looked up from their desk. I then relayed how we New Yorkers always felt that no one in America cared for what happened in our town. As a result, the sales of those candy bars meant more to us New Yorkers for the concern and caring it showed by our fellow Americans than for the actual cash. I asked the Congresswoman to please tell the children when she gets home thanks from all of "us New Yorkers" since their efforts meant far more than the money they raised. All of a sudden, I had everyone listening and nodding approval. I then closed with a brief summary of the tax issues, with universal attention and approval.

After the hearing was concluded, one of the Congressional aides came up to me and said that the committee was very impressed with the ABA's request for clarification and explained that if we did not get it from the Service, Congress would act through legislation. That message got out, and to the credit of the

Service, it released advice⁵ the next year that clarified the rules and allowed charities to give freely to for-profit businesses, which then occurred. In times of need, the Tax Section was able to insure that tax became a benefit and not an obstacle to recovery.

Apart from this effort, Congress itself stepped in with legislation⁶ to help survivors and families of victims of the 9/11 tragedy, and tax was again implicated. On September 22, 2001, H.R. 2926, the Air Transportation Safety and System Stabilization Act (the Act) was signed into law by President George W. Bush. Title IV of the Act, entitled "September 11th Victim Compensation Fund of 2001," provides for the payment of compensation by the U.S. government to those individuals (or their relatives, in the case of deceased individuals) who were "physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001." The amount of compensation payable pursuant to Title IV of the Act, however, is reduced "by the amount of the collateral source compensation the claimant has received or is entitled to receive as a result of the terrorist-related aircraft crashes of September 11, 2001."⁷ Section 402(4) of the Act provides that "the term 'collateral source' means all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State or local governments related to the terrorist-related aircraft crashes of September 11, 2001."

"In its Proposed Rules dated November 5, 2001, at Topic #6, the Department of Justice (the 'DOJ') requested comments on 'whether the [H.R. 2926, the Air Transportation Safety and System Stabilization] Act indeed permits the Department to exclude [charitable] contributions from the definition [of collateral source].'"⁸ The Tax Section quickly reacted and submitted a report⁹ that supported the view that the Act permits the DOJ to do so, on the ground that the definition of collateral source does not extend to payments made by charities to injured victims and relatives of deceased victims of the September 11th terrorist attacks. The DOJ listened and the final rules excluded charitable contributions.

⁵Letter from Lewis J. Fernandez, Deputy Associate Chief Counsel (Income Tax and Accounting), to Richard Lipton, Chair of the ABA Tax Section (Apr. 15, 2002), *available at* <http://www.americanbar.org/content/dam/aba/migrated/tax/pubpolicy/2005/050915kat.authcheckdam.pdf>.

⁶Victims of Terrorism Tax Relief Act of 2001 and select provisions of the Job Creation and Worker Assistance Act of 2002.

⁷*See* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 405(b)(6), 115 Stat. 230, 239 (2001).

⁸ABA SECTION OF TAXATION, REPORT ON EXCLUDING CHARITABLE CONTRIBUTIONS FROM THE DEFINITION OF COLLATERAL SOURCE (2001), *available at* <http://www.americanbar.org/content/dam/aba/migrated/ftp/pub/tax/policy/0111c911ats.authcheckdam.pdf>.

⁹*Id.*

The Service also stepped in to delay tax reporting and payment deadlines and other assistance.¹⁰ The Tax Section and its members aided in publicizing these efforts and also in submitting comments, along with others, to make them more effective. Our website suddenly became a source for tapping into available guidance so that not only members but anyone could access relevant tax advice and guidance.

Less than four years after the Towers collapsed, another tragedy hit America, but this time it did not arise from the acts of humans but from an act of nature. In August 2005, Hurricane Katrina started out as a mild Category 1 hurricane, crossed over Florida, and headed out to the Gulf, sparing much of that state from significant damage or death. However, Katrina then gained strength and became a Category 5 hurricane over the Gulf. By the time it hit the shores of Louisiana on the morning of August 29, 2005, Katrina had weakened to a Category 3 hurricane, but categories can belie the power and damage a hurricane can cause. Katrina caused severe destruction along the Gulf coast from central Florida to Texas, much of it due to the storm surge. Particularly hard hit was New Orleans, where the most significant number of deaths occurred, when the levee system failed in numerous places. Hurricane Katrina was the nation's costliest natural disaster, as well as one of its five deadliest hurricanes.

The ABA stepped in¹¹ with aid from several Sections. The Tax Section created a Katrina Task Force to marshal the efforts of our members. I chaired that Task Force with the assistance from several people, particularly LaVerne Woods, then Chair of the Exempt Organizations Committee, and its members. The Task Force suggested creation of a Tax Section Hotline that was quickly formed and widely publicized on the ABA website¹² and the webpage for the Tax Section. Janet In, who was then Staff Counsel and is now the Tax Section's Executive Director, was the contact person. She fielded calls from people around the country and put them in touch with many of our members for help with federal as well as state tax matters.

The prior experience with 9/11 made the Service aware of many issues and the need for guidance, so the Service started to release formal guidance that was posted on the Service website for all to see.¹³ This site is constantly being updated for the latest national disaster.¹⁴ But concerns remained at the time

¹⁰ *Tax Relief for Victims of Terrorist Attacks*, IRS, Jan. 22, 2015, <http://www.irs.gov/Individuals/Tax-Relief-for-Victims-of-Terrorist-Attacks>.

¹¹ See ABA, *IN THE WAKE OF THE STORM: THE ABA RESPONDS TO HURRICANE KATRINA - A MIDYEAR REPORT (2006)*, available at http://www.americanbar.org/content/dam/aba/migrated/leadership/executivedirector/reports/aba_katrinareport.authcheckdam.pdf.

¹² ABA Standing Comm. on Pro Bono & Pub. Serv. & the Ctr. for Pro Bono, *Hurricane Disaster Recovery, Tax Information, ABA Tax Section Hot Line*, ABA, Aug. 3, 2009, <http://apps.americanbar.org/legalservices/probono/katrina.html#tax>.

¹³ *Katrina News Releases & Legal Guidance*, IRS, last updated Oct. 11, 2006, <http://www.irs.gov/uac/Katrina-News-Releases-&-Legal-Guidance>.

¹⁴ *Tax Relief in Disaster Situations*, IRS, last updated Oct. 28, 2014, <http://www.irs.gov/uac/Tax-Relief-in-Disaster-Situations>.

of Katrina. Within two months of the disaster, the Tax Section submitted a written set of comments.¹⁵ The comments focused on private foundation giving, which needed clarification, as well as other matters, such as reconfirmation that charities could give to businesses, the forms that might be needed to document such requests and grants, and the need for greater publicity as to certain related matters.

While many years have passed, 9/11 and Hurricane Katrina remain in our memories as tragic times for our fellow Americans. However, those disasters brought out the best in people who wanted to help. The Tax Section is proud that its members were part of those concerned Americans and that it helped to shape tax issues affecting disasters so that tax, which is so often maligned by many, has become part of the helping hand to those afflicted by disasters.

¹⁵Letter from Dennis Drapkin, Chair of the ABA Section of Taxation, to Honorable Mark Everson, Commissioner (Sept. 15, 2005), *available at* <http://www.americanbar.org/content/dam/aba/migrated/tax/pubpolicy/2005/050915kat.authcheckdam.pdf>.