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Sept. 21-23, 2011 • Ft. Lauderdale

26th Annual Accounting Show
September 21-23, 2011
Ft. Lauderdale

Streamlining Your Tax Practice and Going Paperless

Bonnie L. Mackey, CPA, CSEP, MBA, AEP®

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Partner

Levin, Silvey, Zelko & Mackey, PA

Bonnie has been a resident of South Florida since 1965 and practiced as a CPA since 1995. She graduated from the University of South Florida in 1992 with an extended Bachelor of Science in Business Administration Degree. In 2000, Bonnie received her Certified Specialist in Estate Planning (CSEP) designation from the National Institute for Excellence in Professional Education, LLC. She is currently in the MBA program at Keller Graduate School. Her background includes all facets of accounting, including financial statement and tax preparation, as well as computer software and bookkeeping assistance.

In addition, Bonnie is an instructor for the Becker CPA Review course, previous mentor for the Take Stock in Children and WorkForce 2020 program, and a third degree black belt in Tae Kwon Do. She is President-elect of the FICPA Goldcoast chapter, Past President of the American Woman's Society of CPAs – S. FL Affiliate and of the North Dade/South Broward Estate Planning Council, Treasurer for the Broward County Guardianship Association, a past board member of the Women's Chamber of Commerce of Broward County, member of the Hollywood and Fort Lauderdale Chambers of Commerce, member of the American and Florida Institutes of CPAs, and American Legion Auxiliary. She is also on the Trust Advisory Committee for CareSource, Inc. and an expert witness for guardianship accounting. Bonnie is currently an Ethics course instructor for the FICPA and in the Speakers' Bureau for Intuit.

During 2006, Bonnie received the Public Service Award from the National Organization of the AWSCPAs, the ABWA's Spirit of Excellence Small Business Leader of the Year and a finalist for the Key Partners Award in the Accounting & Tax category. In 2005, she received the South Florida Business Journal's Excellence in Accounting award in the Estate & Trust category, and in 2001 the NAWBO Vista award and Circle of Excellence award from the Women's Council of Commerce. She is a frequent speaker on various topics and had several articles published as well.

Married for over 33 years, she and her husband have two adult children and one grandchild.

Streamlining Your Tax Practice and Going Paperless

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Can You Really be Paperless? "Less Paper" is More Like it!

WHAT DO YOU THINK OF WITH PAPERLESS?

CLIENT ACCEPTANCE
DOCUMENT MANAGEMENT
DUAL MONITORS & OTHER HARDWARE/SOFTWARE
TICK MARKS/ANNOTATIONS
REVIEW/ REVIEW COMMENTS
WEB PORTALS
EMAILS
BILLINGS

Client Acceptance

HOW MANY CLIENTS DO NOT HAVE INTERNET ACCESS?

HOW MANY CLIENTS QUESTION SECURITY?

WHAT HAPPENS TO ORIGINAL DOCUMENTATION?

WHAT ADVANTAGE IS PAPERLESS TO THE CLIENT?

Document Management

WHERE & WHEN DO YOU START THE TRANSITION?

DO YOU SCAN ON THE "FRONT" END OR THE "BACK" END?

DO YOU PRE-ORGANIZE THE DOCUMENTS BEING SCANNED?

WHAT ABOUT "OCR" CAPABILITIES?

Which Software is For You?

THOMSON'S FILE CABINET

COPANION BY CPA2BIZ/AICPA

TIC, TACK & TIE

ADOBE WORK PAPERS

Dual Monitors & Other Hardware/Software

CONSIDER SIZE, TYPE & COMPATIBILITY.

SOME EVEN HAVE 3 OR 4 MONITORS!

HOW MUCH STORAGE SPACE IS NECESSARY?

BACKUP SERVICES – TAPE, CD, ONLINE

SCANNER TYPE & HOW MANY

FILE CABINET, COPANION, TICK TACK & TIE

Tickmarks / Annotations

USER PREFERENCES FOR COLOR & TYPE
DIFFERENT FOR EACH REVIEWER

HIGHLIGHTERS

TYPED TEXT FOR NOTES

STAMP LIBRARY FOR FREQUENTLY USED NOTATIONS

Review/Review Comments

TAX PROGRAM INPUT ON ONE MONITOR

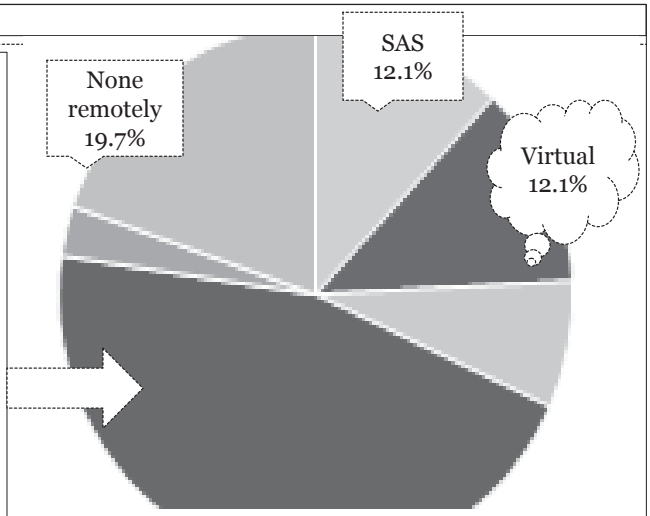
DOCUMENT MANAGER ON ANOTHER
ALLOWS "TICKING" ON BOTH

USE OUTLOOK FOR REVIEW NOTES

CLIENT ORIGINALS IN FILE OR ENVELOPE

ROUTE SLIPS/MONITORING

- SaaS (Software as a Service) (12.1%)
- Virtual software – software provider hosts (12.1%)
- VPN (Virtual Private Network) (7.6%) in lime
- Remote access software (Windows XP Remote Desktop, PCAnywhere, etc.) (45.5%)
- Manually copy/transfer files between home and office (3%) in gray
- None of our staff members work remotely (19.7%)



How do members of your firm work remotely?

Poll provided by "The Pulse" on CS.

Web Portals

SECURITY

CONVENIENCE

UPLOAD/DOWNLOAD DOCUMENTS

Emails

NOT SECURE

PASSWORD/ENCRYPT

ATTACHMENT SIZE

Billings

TIMING OF

ACTS AS REMINDER TO SIGN DOCS

FASTER COLLECTIONS

Thank You

FOR YOUR PARTICIPATION!

Healthcare Reform Act

Keith E. Johnson, CIA, CPA, MBA

Patient Protection & Affordable Care Act Update

Or…The Latest on the Coming Administrative Nightmare

Presentation Outline

- Brief history of Act (PPACA)
- Brief timeline of PPACA rollout events
- Effects already held by clients
- Discussion on 2012 1099 rules
- Current court challenges
- Latest legislative challenges
- Possible changes in term, impact on clients

History of PPACA

- Passed by Congress and signed into law by President Obama 3/23/2010.
- Most sweeping healthcare reform since Medicare in 1965.
- Several reform attempts tried and failed.
- Provisions started taking effect six months after passage.
- Will be rolled out over next eight years.

Intentions of PPACA

- To reduce number of uninsured (50 mill.)
- To rein in skyrocketing health care costs
- To control rapidly rising insurance premiums.
- To provide guaranteed coverage for persons with pre-existing conditions.
- To improve efficiency in health-care system.
- To reduce Medicare/Medicaid fraud.
- To protect against medical-driven bankruptcies.

Timeline of PPACA Rollout

- 2010
  - Young adults covered under parents plan until 26
  - Insurers cannot deny coverage under age 19
  - 10% tax for indoor tanning salons.
  - Health care coverage credit for small business.

PPACA Rollout Cont.

- 2011
  - Report on W-2's cost of health coverage (deferred)
  - 10% bonus payments to PCP's & surgeons.
- 2012
  - 1099 for all goods & services >$600 (repealed).
- 2013
  - Increase medical expense deduction floor from 7.5% of AGI to 10%
  - FICA withholdings increase from 1.45% to 2.35% for individuals >$200K (MFJ >$250K)
  - 2.9% tax on medical devices with some exclusions

More PPACA Rollout

- 2014
  - Healthcare tax credits for people <400% of federal poverty level to get insurance.
  - Premium cap on out-of pocket for those <400% FPL.
  - People required to obtain coverage or pay tax if can't afford it.
  - No pre-existing conditions.
  - Fines for employers whose employees buy insurance on exchange.
- 2018 – Excise tax on "Cadillac" coverage plans.

Effects Already Seen by Clients

- MA Healthcare Reform
  - Had colleague refer a client to handle MA return.
  - To complete return, I needed to prepare the Schedule HC.
  - Needed to get the 1099-HC from client.
  - Shows if coverage met minimum requirements.
  - Additional tax could be assessed if no minimal coverage exists. Exemptions for poverty.

W-2 Healthcare Reporting

- Originally employers were to begin reporting employers healthcare coverage costs on 2011 W-2's (early 2012).
- IRS Notice 2010-69 postponed implementation of rule.
  - 2011 W-2 reporting is optional using code DD
  - 2012 W-2 mandatory for companies > 250 W-2's in 2011
  - Insurance reporting begins with <250 2011 W-2's in 2013.
  - Retirees with no wages not issued W-2
  - Employer paid coverage not taxable (for now).

Small Business Healthcare Credit

- Started in 2010, will be enhanced in 2014
- Up to 35% credit (25% EO)
- Employer must pay 50% of premiums on qualified plan (IRS Notice 2010-82)
- Employer must purchase right type of plan (IRS Notice 2010-44)
- Also based on state average premiums. (RR 2010-13)
- Use IRS Form 8941 to calculate credit.

Broader Eligibility for Small Business

- 12/2/10 Department of HHS releases better guidance for small business
  - More contribution arrangements allowed for employers
  - Multi-employer plans allowed with restrictions
  - Must also take into account non-discrimination policies for executives
  - Look at plan dates for grandfathering status (March 23, 2010)

Self-Employed Insurance Under PPACA

- Self-Employed individuals excluded from small business credit
- Also, owners of businesses with employees are not eligible for credit.
  - C-Corporation 5%
  - S-Corp or Partnership – 2%
  - SE individuals
- However…Small Business Jobs and Credit Act may help
  - Only for 2010 (for now)
  - SE business owners can deduct health insurance premiums to get to Net SE income, couldn't before
  - Generally saves 15.3% of premiums paid.
  - High income taxpayers (>$106,800) savings only 2.9% due to SS cap.

The Coming 2012 Doom

- Section 9006 of PPACA required business to issue 1099-MISC's to *all* providers of goods and services >$600/year
  - Currently, only services is subject to 1099
  - Rental income recipients also required to file for goods and service providers
  - Starting with 2012 tax year (Jan. 2013)
  - Would generate $45B in hidden income
  - Administrative nightmare
    - Getting EIN's from corporations
    - New software and paper costs
    - Time to transmit, receive, and process
    - Individual homeowners subject to compliance

Hallelujah…We're Saved

- Several attempts to repeal 1099 failed on its own
- Sen. Stabenow attached wording to SS reform to repeal amendment.
- Senate Bill passed 81-17 2/2/11
- House passes HR-4 314-112 3/3/11
- President Obama signed law 4/14/11
- Review IRC Section 36B – Credit subject to recapture. Needed to pay for bill,

Recent Legal Challenges

- VA filed first challenge to law 3/23/10
  - Main focus of challenge is the requirement to buy insurance or face penalty (Commerce Clause).
  - Followed by Florida district court action by Florida and other states.
  - 8/2/10 Judge Hudson denied motion to dismiss by US questioning Congress
  - 12/13/10 Judge Hudson strikes down parts of law, conflicts with interstate commerce.
  - 1/11, District Judge Vinson throws out entire PPACA
  - Still in appeal, 4/25/11 USSC denies expedited process to VA.

Congressional Challenges

- Republicans took over House 11/10
  - Seated 1/4/11 Hold 241-193 advantage
- Voted 245-189 to repeal PPACA
  - Failed in Senate 47-51
  - Voted to defund PPACA by opposing budget
- 2011 budget passes
  - Killed provision to create non-profit insurers
  - Also killed, ACA 10108 – Free voucher program
- 4/15/11. Voted 235-193 for H. Con Res. 34 which funds 2012 budget but repeals PPACA

Best Advising for Clients

- Keep accurate cost records of any payroll costs.
  - Insurance
  - Payroll taxes
- For individuals, keep accurate record of insurance policies and carriers,

Conclusion

- Most parts of law are still to come
- Most onerous part of PPACA repealed (Amen!!!)
- Lots of legal and congressional challenges going through pipeline. May see settlement through USSC in 2012
- Stay up to date in news and through FICPA, AICPA, PPC, CCH etc, updates.
- Also, stay in touch with your clients.
  - Explain possible advantages for PPACA
  - Explain need for improved recordkeeping
- Keep checking with software providers.

Contact

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Federal Tax Research

Jonathan S. Ingber, CPA, LL.B., MST

Jonathan S. Ingber, CPA

Kwal & Oliva, CPAs

EDUCATION:

- Florida International University Graduate School of Business, Master of Science in Taxation, 2002 [Outstanding Graduate]

- New York University School of Law, Bachelor of Laws, 1967

- Queens College of the City University of New York, Bachelor of Arts, Major in Accounting, 1964 [Outstanding Graduate]

EMPLOYMENT:

Kwal + Oliva, CPAs, Tax Department (September 30, 2002 to date) [Responsible for conducting tax research and drafting all tax memoranda; reviewing and preparing every type of tax return known to man; fully conversant with Ultra Tax software, a product of Creative Solutions (a Thomson Reuters Company)]

Seldine and Ingber, CPAs, Partner (1973), 1971 to 2002 [Prepared and reviewed in excess of 20,000 tax returns (individual, C & S corporations, partnerships, estates & trusts, tax-exempt organizations)]

United States Navy: Qualified Officer of the Deck Underway, Operations and Senior Watch Officer, USS Adroit (MSO-509), 1969-1970; Administrative Assistant to Executive Officer, USS Jonas Ingram (DD-938), 1968-1969; Naval Officer Candidate School, 1967-1968

ACHIEVEMENTS:

Lecturer: Outstanding seminar leader for the Florida Institute of CPAs for more years than I care to remember; lecture subjects in forty-three states and the District of Columbia included corporate liquidations, partnership taxation, fiduciary accounting, complex individual income tax returns, conversion of existing sole proprietorship into corporate or partnership entity, depreciation under the Modified Accelerated Cost Recovery System, income taxation of estates and trusts, subchapter S corporations, limited liability companies, estate, gift, and generation skipping transfer taxation (with estate planning applications), repeal of the *General Utilities* doctrine, individual and corporate alternative minimum tax (including the adjustment for adjusted current earnings), passive activity losses and credits, function of state law in resolving federal tax controversies (the significance of *Erie Railroad Co v. Tompkins* and *Estate of Bosch v. C.I.R.*), uniform capitalization rules, taxation of contractors, tax-free reorganizations and corporate separations, federalism in the context of state and local taxation, international taxation [resident alien individuals {income} and nonresident alien individuals and decedents {income and estate}; subpart F and foreign base company sales income], payroll taxes and non-taxable fringe benefits, application of the “check the box regulations” to domestic and foreign eligible entities, etc.

Federal[1] Tax Research:
Mastering the Mechanics to Increase Understanding of the Law
{Remembrance of Memoranda Past}[2]

Florida Accounting & Business Expo
[Tampa, Florida—June 9, 2011]

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INTRODUCTION[4]

[1] Other than an occasional reference to issues of state taxation, the author is perhaps guilty of an attitude properly criticized in the following manner by Professor Richard D. Pomp [University of Connecticut School of Law] in his preface for students: "Such [large, prominent] firms have displayed the common bias of federal tax lawyers who traditionally have looked down on their state counterparts as the Rodney Dangerfields of the profession. But the times have changed and these firms are now playing catch up and competing with the accounting firms." (*State and Local Taxation*, 4th Ed., Richard D. Pomp & Oliver Oldman, self-published)

[2] My apologies to Marcel.

[3] The writer is a member of the tax department of Kwal + Oliva, a full service public accounting firm in downtown Miami, where he is privileged to practice with Jose Aparicio, Ernesto Delgado, Adelacio Baldoquin, Rolando Sanchez, and Richard Kwal, and is responsible for drafting tax memoranda and preparing and reviewing tax returns covering the full spectrum of federal and state tax law. As an avid tax research practitioner, the author is most fortunate to have the library resources of Kwal + Oliva available to him on a daily basis as well as work efficient technology. He also wishes to thank his wife, Ellen Ingber, for her editorial prowess and her unfailing support.

[File: N:\CPE\ACCOUNTING SHOWS\2011\FABEXPO\PRESENTATION MATERIALS\F-2 - INGBER.DOC]

Accountants routinely interpret the federal tax law in both the preparation of an exceedingly large variety of tax returns (closed-fact-compliance mode) and the creation of a multiplicity of tax shelters[5] (open-fact-tax-planning mode). It is absolutely impossible to perform either function without performing the indispensable lawyer-like tasks of statutory interpretation and judicial case reconciliation.[6]

Without any desire to relitigate *Sperry v. State of Florida ex rel. The Florida Bar,*[7] the reader is referred to an excellent article by Dr. James R. Hamill entitled *CPAs and the Unauthorized Practice of Law,* The CPA Journal (August 1998) in which the author, discussing the historical anachronism found in I.R.C. 1014(b)(6) for "stepping up" the entire basis of community property in the hands of a surviving spouse, states that "[t]he determination of community property is a strictly legal issue, albeit one with tax consequences, and must be resolved by an attorney." This writer respectfully disagrees. First, the practice of federal tax law necessarily involves the resolution of state law issues on a frequently occurring basis[8]. Second, it approaches the

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[4] Most of the introductory comments herein may be found in *The Indispensable Role of State Law in Resolving Federal Tax Questions: One Aspect of Federalism,* presented by Jonathan S. Ingber at the Florida Institute on Federal Taxation in Orlando on November 13, 2003.

[5] The term is used in its most innocuous, non-pejorative sense to include any scenario that would legitimately reduce contributions to the fisc.

[6] To be drawn into the question of whether such intensively skilled work constitutes the "unauthorized practice of law" (in an era of multidisciplinary practices) would necessitate a dilatory detour into a regulatory quagmire. Note that the Conference Report to the IRS Restructuring and Reform Act of 1998, discussing the new confidentiality privilege relating to taxpayer communications for ***federally authorized tax practitioners***, states that "[n]o inference is intended as to whether aspects of federal tax practice covered by the new privilege constitute the authorized or unauthorized practice of law under various State laws." In Raby, Chairman's Column, AICPA Federal Tax Division Newsletter (Fall 1983) (former National Director of Tax Services for Touche Ross), Mr. Raby stated: "We are engaged in the authorized practice of federal tax law—and I sense that we are more willing to fight now than ever before to maintain our right to continue doing what CPAs have been doing for at least seventy years." [1983 minus 1913]

"It seems almost comical to even be analyzing the question, 'Is tax the practice of law?' Tax practice is based on statutes and regulations and requires in-depth analysis to form an opinion on a tax issue. However, because of economic and political reasons, neither the courts, the legislatures, nor the practitioners seem to be able to answer this question." *A National Tax Bar: An End To The Attorney-Accountant Tax Turf War,* Katherine D. Black & Stephen T. Black, 2004 Saint Mary's Law Journal 3.

[7] 373 U.S. 379 (1963) The petitioner in the case, a non-lawyer, was registered to practice before the Untied States Patent Office. Chief Justice Warren, writing for a unanimous United States Supreme Court, stated: "We do not question the determination that under Florida law the preparation and prosecution of patent applications for others constitutes the practice of law (383)….But 'the law of the State, though enacted in the exercise of powers not controverted [the police powers in the instant case], must yield 'when incompatible with federal legislation.'" *Gibbons v. Ogden,* 9 Wheat. 1,211 (1824). Congress has provided that the Commissioner of Patents "may prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office (384)…." The Florida Bar had argued that the petitioner's practice must be consistent with state law, thereby relegating the "Patent Man's" patent practice to the physical boundaries of the District of Columbia. By virtue of Rule 200(a)(3) [Admission to Practice of Nonattorney Applicants], a certified public accountant may gain admittance to the United States Tax Court bar: "An applicant who is not an attorney at law must, as a condition of being admitted to practice, file with the Admissions Clerk at the address listed in paragraph (b) of this Rule, a completed application accompanied by a fee to be established by the Court. See Appendix II. In addition, such an applicant must, as a condition of being admitted to practice, satisfy the Court, by means of a written examination given by the Court, that the applicant possesses the requisite qualifications to provide competent representation before the Court." Remembering that *Sperry* was not a case involving a tax practitioner, one should perhaps not reduce a federal regulation to a point of no consequence. 31 C.F.R. § 10.32 (2008) [Circular 230] states quite emphatically: "Nothing in the regulations in this ***part*** may be construed as authorizing persons not members of the bar to practice law." At page 4 of the immediately preceding footnote, the Professors Black state: "Either the CPAs did not read that part or chose to ignore it, which alone should be a statement about their ability to practice law."

[8] Footnote 4, supra

ludicrous to suggest that a non-lawyer accountant may investigate the most excruciatingly complex concepts of the federal tax law found in the legislative regulations governing the preparation of consolidated income tax returns, following a tax-free reorganization that constitutes an equity structure shift resulting in a change of ownership, causing a reduction in the utilization of the net operating loss carryforward attribute, but must step aside, as unqualified, if a client professes not to know whether her common law marriage would permit the filing of a joint individual income tax return. Third, permit Stanley Kowalski (an immortal character created by Tennessee Williams in his classic play, *A Streetcar Named Desire*[9]) to speak for the laity: "I'll wait till [Blanche DuBois] gets through soaking in a hot tub and then I'll inquire if *she* is acquainted with the Napoleonic code. It looks to me like you have been swindled, baby, and when you're swindled under the Napoleonic code I'm swindled *too.* And I don't like to be *swindled.*... There is such a thing in this state of Louisiana as the Napoleonic code, according to which whatever belongs to my wife is also mine—and vice versa."

So just how should the tax practitioner go about the demanding, but delightful, chore of engaging in the tax research process, and then, having reached conclusions that may well be tentative, commence the arduous work of drafting a tax memorandum? Dr. George D. Gopen[10] tells us that "[w]riting clear and precise prose is a most difficult task even under ideal conditions, but the lawyer faces the worst of all conditions, a hostile audience….Senior partners will prod [the prose] to discover what someone else would say in opposition; judges will poke holes in it to see if the argument will stand up under attack; and opposing counsel will twist and turn it so that the words belie the thought that bred them." The balance of the present paper attempts to answer the above question by discussing "the tools of the trade", the obstacles strewn along the tortuous path of the methodical tax researcher, ethical considerations that may infiltrate the process, and, finally, to provide twelve examples of prior attempts to draft convincing memoranda.[11]

I. Tools of the Trade

1. <u>One Usually Obtains What One Pays For</u> While the dedicated tax researcher, with a plaintive voice, might be overhead, in a moment of quiet desperation, to cry out: "My kingdom[12] for a tax library worthy of my sweated labor", she should not be reduced to emulating the "poor workwoman who blames her own tools". The neophyte certainly would not come empty handed if her wheelbarrow contained 185 Internal Revenue Service publications.[13], but such publications are essentially informal expositions of the

[9] The New York Times reported that Mladen Sekulovich [Karl Malden], Ms. Dubois' "hopelessly inept suitor", died on Wednesday, July 1, 2009.

[10] *Writing from a Legal Perspective,* page 1, West Publishing Co. (1981).

[11] The "dirty dozen" illustrative memoranda that appear in the fourth and final part of this paper make no pretense of being correct statements of the law, federal tax law or otherwise; rather, they are simply intended to demonstrate end products of the research process to which Lee Marvin, Ernest Borgnine, Telly Savalas, Charles Bronson, and Jim Brown might well have given their respective nods of approval.

[12] My apologies to the Bard of Stratford-upon-Avon.

[13] From Publication 1 (Your Rights as a Taxpayer) to Publication 972 (Child Tax Credit), all of which appear to be non-authoritative.

tax law intended for the general public, and are not considered authoritative by their publisher.[14] The Internal Revenue Service web site[15], www.irs.gov, is indeed a veritable treasure trove of tax information contained in forms, including instructions, and publications. More importantly the Internal Revenue Code (by way of the Legal Information Institute of Cornell University Law School) and the Treasury Regulations (by way of the Office of the Federal Register, National Archives and Records Administration on the United States Government Printing Office web site) are an exceedingly rich and gratuitous source of primary tax authority that may also be accessed from the Internal Revenue Service's web site. And for those avid tax aficionados who thirst for case law, http://lp.findlaw.com will certainly provide enough judicial decisions to satisfy the most voracious appetite at no cost to the viewer, but it would be quite difficult to navigate such a web site efficiently in search of relevant case law interpreting Internal Revenue Code and Treasury Regulation sections. Unfortunately, despite the rhythm and blues performance by Luther Vandross and Janet Jackson declaring that "The Best Things in Life Are Free", a serious tax researcher, wishing to earn a respectable living pursuing solutions to tax problems, must be prepared to part with more than a sou or two. Nevertheless, the so-called Bluebooks (general explanations of tax legislation) are readily downloadable from the web site of The Joint Committee On Taxation, a nonpartisan House-Senate Committee of the United States Congress. (see Subtitle G of the Internal Revenue Code; [www.jct.gov])

2. A Better If Imperfect Model[16] While the proverbial permutations and combinations for the constituent elements of a good tax library have a finite limit, one should start with a so-called electronic[17] commercial tax service to ensure that the content is as current as

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[14] "The IRS publishes numerous general and specialized documents to help answer tax questions. Although the publications contain useful information, you must be careful not to rely solely on these publications. The IRS publications typically do not cite the Internal Revenue Code, Regulations, or other authority upon which the information included therein is based. The IRS disclaims any responsibility for damages that the taxpayer may suffer as a result of relying upon the publications." (**http://www.timbertax.org/research/services/Irs_publications.asp** Last visited on July 2, 2009.)

[15] The fifty-one web sites of the states and the District of Columbia and the five web sites of the United States possessions (Guam, American Samoa, Northern Mariana Islands, Virgin Islands [U.S.], and the Commonwealth of Puerto Rico) are major storehouses of state and local tax law.

[16] After almost thirty-nine years of experimentation, the author presents a suggested tax research library that is most assuredly not the equivalent of a complete Thomson Reuters electronic library of Westlaw and RIA [Research Institute of America] supplemented by the three (U.S. Income; Estates, Gifts, and Trusts; Foreign Income) Tax Management Portfolios of the Bureau of National Affairs and by the Tax Notes of Tax Analysts.

[17] Compact discs are certainly an alternative, but the writer has become most comfortable with the electronic format or "platform" over the last eight years. Professor Julius J. Marke, librarian of the New York University School of Law for three and one half decades, pleaded with the members of the incoming freshman class not to "lift" any of the volumes of a valuable English collection as such an undetected theft would alter the course of legal research for years to come. Having subsequently worked at the Rittenberg Library of the St. John's University School of Law for another two decades, his original plea has become meaningless in an era of electronic data bases filled with seemingly infinite content.

At some point in the not too distant future, the writer, no longer having access to the libraries subscribed to by universities from HeinOnline [www.heinonline.org], such as the American Law Institute Library, English Reports, Foreign Relations of the United States, Law Journal Library, Legal Classics, National Conference of Commissioners on Uniform State Laws, United States Congressional Documents, United States Federal History Library, etc., will seek short term access to the organization's database, consisting of more than 1,200 law and law—related periodicals. A one-week subscription will cost $59.95, permitting the writer to

modern technology permits. If one is not particularly "Code" oriented, presumably the Federal Tax Coordinator 2d of the Research Institute of America (now known as "RIA") is the service of choice.[18] If one desires not to be totally bereft of the printed pages that have an irresistible touch, the printed versions of the three (income, estate, foreign) Tax Management portfolios of the Bureau of National Affairs (better known as "BNA") should be added to the library shelves. From a limited economic resource point of view, the subscription to the printed volumes need only be renewed every five years, more or less, depending on the feverish activities of the Senate Finance Committee and the House Ways and Means Committee. The more than one hundred and fifty volumes produced by the Bureau of National Affairs provides extensive and detailed coverage of a considerable part of the federal tax landscape, but these discrete portfolios would still appear to leave more than a few uncovered interstices within such a huge body of law. The electronic commercial tax service will bring the necessary update to the printed Tax Management material that is purchased again only when the cumulative changes over several years dictate a subscription renewal of the portfolios.

3. Tax Treatises Of Commerce Clearing House Added To The Mix He who desires an intensely concentrated work on a particular aspect of the federal tax law would be a natural consumer of tax treatises. While the editorial staff of West [Publishing] continues to update the venerable Mertens Law of Federal Income Taxation: Treatise and Rulings, that is not exactly what this tax researcher has in mind. Proceeding to the Florida Institute of CPAs web site[19], I would examine the Commerce Clearing House online store that provides an abundance of secondary tax resources, including the following recommended tax treatises with a noteworthy thirty per cent discount: (a) *Charitable*

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download 20 portable data files every 24 hours. Permit HeinOnline to speak for itself: "Today, HeinOnline content spans multiple library collections, and subscribers in more than 180 countries enjoy online access to more than 40 million pages of research material that in many instances is only available online in HeinOnline."

[18] The United States Tax Reporter of RIA (successor to Prentice Hall) and the CCH Tax Research Network (electronic version of CCH's Standard Federal Tax Reporter print service) are sometimes referred to as "Code" oriented commercial tax services. The reality, however, is plain enough to the author. Any serious attempt to avoid ever reading the statutory lines of the Internal Revenue Code of 1986, as amended, does not necessarily guarantee disaster for the tax researcher, but simply encourages dependence on secondary sources for interpretation. The beauty of the language of the Authorized King James Version of the Bible suggests that perhaps Judge Learned Hand overstated the complexity of the tax law: "In my own case the words of such an act as the Income Tax [the Internal Revenue Code of 1939], for example, merely dance before my eyes in a meaningless procession: cross reference to cross reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time." Learned Hand, *The Spirit of Liberty: Papers and Addresses of Learned Hand,* ed. Irving Dilliard (New York: Knopf, 1952), 213. Note that Judge Hand's comments were made decades before the Tax Reform Act of 1986 presented the supreme challenge to tax software vendors to coordinate the calculations under the alternative minimum tax system with the limitations on the deductibility of passive activity losses.

[19] Professional Development/Continuing Professional Education; Self-Study/Materials; CCH Materials Direct. The 30% discount is indeed a membership benefit not to be taken lightly. Noticeably missing from the large discounted collection is Martin D. Ginsburg & Jack S. Levin: *Mergers, Acquisitions & Buyouts: A Transactional Analysis of the Governing Tax, Legal, and Accounting Considerations,* 2009 Ed., Aspen Publishers.

Trusts[20], George B. Jewell, Aspen Publishers; (b) *Estate Planning*[21] 6th Ed., Jeffrey N. Pennell, CCH (a Wolters Kluwer business); (c) *Federal Income Taxation of Estates, Trusts, & Beneficiaries,* 3rd Ed., M. Carr Ferguson, Mark L. Ascher & the late James J. Freeland, Aspen Publishers[22]; (d) *Federal Income Taxation of Debt Instruments,* 5th Ed., David C . Garlock & four contributing authors, Aspen Publishers; (e) *Financial Products: Taxation, Regulation, and Design,* 3rd Ed., Andrea S. Kramer, CCH[23]; (f) *Income Taxation of Fiduciaries and Beneficiaries,* 2009 Ed., Byrle M. Abbin, CCH[24]; (g) *International Taxation: U.S. Taxation of Foreign Persons and Foreign Income,* 4th Ed., Joseph Isenberg, CCH[25]; (h) *Multistate and Multinational Estate Planning,* 2009 Ed., Jeffrey A. Schoenblum, CCH[26]; (i) *Price on Contemporary Estate Planning,* 2009 Ed.,

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[20] Start with the income tax provision found in I.R.C. § 664(d)(1 & 2)(Definitions of charitable remainder annuity trust and charitable remainder unitrust); then move onto the transfer tax provisions found in I.R.C. §§ 2055(e)(2)(A)(estate tax deduction) and 2522(c)(2)(A)(gift tax deduction)

[21] An absolutely superlative treatise originally authored by A. James Casner, Late Austin Wakeman Scott Professor of Law, Emeritus of the Harvard Law School, published then by Little Brown and Company in 1980. And just how many first year law students remember Professor Means' lectures on property using the classic tome entitled *Cases and Text on Property,* authored by Professors Casner and W. Barton Leach?

[22] In the volume's preface, the two living authors, Ferguson and Ascher, pay tribute to two of the original authors of the 1970 first edition: "The legacy of these two scholars [Richard Stephens and James Freeland], who long toiled in the fields of federal tax law, where the sun is hot and the seasons are short, remains rich and vibrant." The original second chapter [Local Law and Local Adjudications in Federal Tax Cases] does not appear in the third edition. That missing chapter made the federal tax significance of state law in our federal system terribly clear, both with respect to express reference to state law [e.g., I.R.C. § 643(b)(Definition of "plain vanilla" income)]. In the 2000 Erwin N. Griswold lecture on *How Will A Court Rule* before the American College of Tax Counsel, Adjunct Professor of Law Ferguson made the following noteworthy conclusive comments for the unrestrained tax planner: "A legal system is effective only to the extent it is supported by a virtuous society. In the context of our tax laws, this has meant voluntary compliance, aided by competent, independent legal advice. Administrators of the system, whether in government or in private practice, are custodians of the virtues of compliance. In our counsel, we must respect the spirit as well as the letter of the law. Otherwise, the corporate income tax could go the way of the Volstead Act [voided by the 21st Amendment's repeal of prohibition]. Where 'aggressive' planning becomes 'trans-gressive' planning, gleefully poured out by tax bootleggers and as gleefully lapped up by corporate tax departments able to see only next quarter's reduced tax rate, not just the companies and their advisors, but the corporate tax itself is threatened." My guess is that Professor Ascher has assumed the "heavy lifting" on this particular treatise, just as he has taken over the leading treatise of *Scott on Trusts.* [5th Ed.] He is also the author of an exceedingly fine casebook on subchapter J: *Federal Income Taxation of Trusts and Estates: Cases, Problems, and Materials,* 3rd Ed, Carolina Academic Press.

[23] In three volumes of 3,600 pages one wonders if the author leaves anything to the imagination concerning the taxation and regulation of securities, derivatives, commodities, options, and hybrid products

[24] This two-volume work of 2,200 pages is an excellent complement to the preceding item (c), particularly for the fiduciary income tax preparer as the latter half of the second volume contains 35 case studies with completed tax and information returns.

[25] This four-volume treatise of 2,400 pages is currently on the writer's Chanukah list of potential year-end purchases on December 12th. He currently uses a very fine thee-volume treatise on *U.S. International Taxation,* Kuntz & Peroni, WG&L; *Fundamentals of International Taxation,* 2004/2005 Ed., Bittker & Lokken, WG&L, consisting of 13 chapters that have been extracted from the authors' larger six-volume treatise on the *Federal Taxation of Income, Estates, and Gifts,* Rev. 3rd Ed., a truly encyclopedic work originally authored by the late Professor Boris I. Bittker, with the able assistance of ten collaborators who accounted for 40 per cent of the end product.; two extraordinarily informative continuing professional education volumes copyrighted by the Florida Institute of CPAs entitled *Foreign Investment in the United States—Tax and Related Matters* and *Estate and Gift Taxation of Nonresident Aliens in the United States*, authored and/or taught by Michael Rosenberg, Jose Nunez, and Leslie Share; and a wonderful little so-called "nutshell" (all 542 pages worth) book entitled *International Taxation: In A Nutshell,* 7th Ed., Richard L. Doernberg, Thomson*West.

[26] This two-volume, 2,632 page treatise also sits on the Chanukah list referred to in the immediately preceding footnote as the writer's withered set, published originally in 1982 by Little Brown & Company, is truly in need of an update as the older edition precedes the enactment of the unlimited marital deduction.

CCH[27]; and (j) *Taxation of Individual Retirement Accounts,* 2009 Ed., David J. Cartano, CCH[28].

4. Warren, Gorham & Lamont Tax Treatises: "Stepping Up One's Research to Another Level" Accepting the notion that secondary tax sources produced by tax academicians and practicing tax professionals are superior to the product development of the editorial staffs of either Research Institute of America or Commerce Clearing House, then "[t]he authoritative secondary sources in the CCH database…are much more limited in number and scope than the authoritative secondary sources in the RIA Checkpoint database, which includes the complete Warren, Gorham & Lamont library of treatises and journals."[29] An active tax research "factory" should give serious attention to acquiring the following tax treatises from WG[30]&L: (a) *The Consolidated Tax Return,* 6th Ed., Kevin Hennessey, Richard Yates, James Banks & Patricia Pellervo, WG&L[31]; (b) *Qualified Pension and Profit Sharing Plans,* Updated Annually, Pamela D. Perdue, WG&L[32]; (c) *Federal Income Taxation of Corporations and Shareholders*, 7th Ed., Boris I. Bittker & James S. Eustice, WG&L[33]; (d) *Federal Income Taxation of Partnerships & Partners,* 4th Ed., William S. McKee, William F. Nelson & Robert L. Whitmire, WG&L[34]; (e) *Partnership Taxation,* 6th Ed., Arthur B. Willis, John S. Pennell & Philip L.

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[27] Dean Price's smaller 1,580-page volume sits on the author's shelf with its original 1983 publication date [Little Brown & Company]. The material found therein is exceptionally readable.

[28] While the writer is not a major devotee of subchapter D (deferred compensation), this 1,160-page tome was purchased for the simple reason that questions concerning individual retirement accounts seem to proliferate in ever-increasing quantity every "tax season".

[29] Katherine Pratt, Jennifer Kowal & Daniel Martin, *The Virtual Tax Library: A Comparison of Five Electronic Tax Research Platforms,* 8 Fla. Tax. Rev. 935, 947-48 (2008)

[30] Noting that Warren, Gorham & Lamont had been a stand-alone publisher with offices in Boston and New York, was there any original relation to Nathanial Gorham? ["Influential Characters: Nathaniel Gorham did not play an active role in debate, but as chair of the Committee of the Whole, the Massachusetts delegate presided effectively over the Convention's early deliberations during the first half of the summer." *Plain, Honest Men: The Making of the American Constitution,* Richard Beeman, Random House (2009)]

[31] As might be expected, the legislative consolidated income tax treasury regulations are a substantive area in which the members of the accounting profession have provided considerable input.

[32] Any old timer that has seen I.R.C. § 401(Qualified pension, profit-sharing and stock bonus plans) amended every year since the enactment of the Employee Retirement Income Security Act of 1974 but for seven intervening years, whose language runs eighteen pages, and whose historical notes run twenty pages, would most assuredly seek refuge in Ms. Perdue's treatise.

[33] Surely the crown jewel of tax treatises making its original appearance in 1959, a time when the *General Utilities* doctrine was alive and well. The fifth edition, published shortly after the passage of the Tax Reform Act of 1986, dedicated to Professor Gerald Wallace, in which the dynamic duo made the following comment (assuming the author's memory has not faded into the forgotten realm of error): "Jerry, over forty years ago, in one of his rare excursions into print, in the inaugural edition of the New York University Tax Law Review, stated that the case of *General Utilities Operating Co. v. Helvering* (*296* U.S. 200 (1935)) was simply wrong." Congress ultimately agreed, not on conceptual grounds but rather a on a need for revenue basis.

[34] As of February 4, 2008, for the third year in a row, Institutional Investor's U.S. Total Securitization Awards had nominated McKee Nelson LLP for "Law Firm of the Year".

Postlewaite, WG&L[35]; (f) *Federal Income Taxation of S Corporations,* 4th Ed., James S. Eustice & Joel Kuntz, WG&L[36]; (g) *State Taxation,* 3rd. Ed., Jerome Hellerstein & Walter Hellerstein, WG&L[37]; (h) *Federal Estate and Gift Taxation,* 8th Ed., Richard B. Stephens, Guy B. Maxfield, Stephen A. Lind, Dennis A. Calfee & Robert Smith, WG&L[38]; (i) *Generation-Skipping Transfer Tax,* 2nd Ed., Carol A. Harrington, Lloyd Leva Plaine & Howard M. Zaritsky, WG& L[39]; and (j) *Federal Income Taxation of Intellectual Properties and Intangible Assets,* Philip F. Postlewaite, David L. Cameron[40] & Thomas Kittle-Kamp, WG& L.[41] & [42]

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[35] This special treatise has a lineage almost as ancient as the Bitter & Eustice classic, having been initiated alone by Arthur Willis, a California lawyer, in 1971. John Pennell was the father of Jeffrey Pennell, successor to Professor Casner mentioned in footnote 21, supra. Both partnership taxation treatises make significant inroads into the subject that Judge Raum of the United States Tax Court described decades ago: "The distressingly complex and confusing nature of the provisions of subchapter K present a formidable obstacle to the comprehension of these provisions without the expenditure of a disproportionate amount of time and effort even by one who is sophisticated in tax matters with many years of experience in the tax field….Surely, a statute has not achieved 'simplicity' when its complex provisions may confidently be dealt with by at most only a comparatively small number of specialists who have been initiated into its mysteries." See *David A. Foxman,* 41 T.C. 535, 551 n. 9 (1964) (acq.), aff'd 352 F2d. 466 (3rd Cir. 1966). "Disproportionate amount of time"? Sounds a bit like Judge Hand's lamentation in footnote 18, supra.

[36] The first edition of this treatise appeared shortly before the enactment of the Subchapter S Revision Act of 1982, requiring a thorough and rapid issuance of a "revised" edition. The author, who mistakenly believes that he has mastered subchapter S, never hesitates to resort to this excellent treatise, particularly when faced with tax-free reorganization issues in the context of S corporations.

[37] The author had the distinct pleasure of having Professor Jerome Hellerstein in a federal income taxation class at the New York University School of Law in the spring of 1966. In the summer of 1987, following the enactment of Florida's short-lived sales tax on services, he had the equally distinct pleasure of interviewing Son of Hellerstein [Walter] on the campus of the University of Georgia School of Law in Athens, Georgia. Professor Walter Hellerstein, associated with the law firm of Morrison & Foerster, particularly Prentiss Willson, Jr., played a significant role in the drafting of the Florida statute. The treatise is an indispensable tool for a professional wishing to understand the fundamental principles of public finance expressed in a multitude of state and local revenue raising laws.

[38] A fantastic treatise, which, despite its more limited title, currently includes the generation skipping transfers of chapter 13 and the special valuation rules of chapter 14, both of subtitle B of the Internal Revenue Code. The draftsman cut his teeth on the taxation of gratuitous transfers, utilizing this treatise, in a more than memorable class with the inimitable Professor Philip E. Heckerling at the Graduate School of Law of the University of Miami in the fall of 1971. Any resemblance between Professor Heckerling and Professor Kingsfield, portrayed by John Houseman of Paper Chase fame, was purely coincidental. With Professor Stephens resting comfortably in the Elysian Fields and Professor Maxfield serving admirably as special counsel to and resident in the West Palm Beach office of Fox Rothschild LLP, presumably much of the continuing modifications to this magnificent work is carried on by the last three gentlemen authors.

[39] For one not accustomed to tip toeing on a "regular, continuous, and substantial" basis through the challenging provisions of subtitle B's chapter 13 tax on certain generation-skipping transfers, this treatise is invaluable for obtaining an understanding of the three different kinds of such transfers and the language that draftsmen use to navigate around a potential imposition of the generation skipping transfer tax. Only the Tax Reform Act of 1986 would have been capable of retroactively repealing the generation-skipping transfer tax provisions originally enacted by the Tax Reform Act of 1976 more than a decade earlier.

[40] By "dropping" the name of Dean Robert W. Bennett, I succeeded in getting through the "spam" gate to have a lively e-mail conversation with Professor Cameron, Associate Director of the Graduate Tax Program and senior lecturer at the Northwestern Law School, when faced with the issue of the holding period of a customer base of a medically oriented partnership.

[41] In today's modern economy, the tax ramifications of transactions involving patents, trademarks, trade names, trade secrets, know-how, copyrights, franchises, covenants not to compete, government licenses and permits, information bases, goodwill, going concern value, and customer-based and supplier-based intangible assets, in the context of corporate, partnership, and international transactions, make this specialized treatise a valuable resource indeed.

5. Tax Oriented Law Reviews American law schools[43] produce a wealth of intellectual legal conversation found in the myriad published law reviews. While the law of taxation, federal or state, is of sufficient importance to draw the attention of such law reviews, a few of these schools publish periodicals devoted exclusively to that discipline. The most prominent ones are the Tax Law Review (New York University)[44], the University of Virginia Tax Review, and the Florida Tax Review (University of Florida).[45] To say that the articles found therein are comprehensive would border on understatement.[46] As a member of the tax section of the American Bar Association, the writer should not be faulted for favoring The Tax Lawyer[47], a joint project, if one will, of the American Bar Association and Georgetown Law.[48] One of the more interesting articles appearing in this fine federal taxation law review, written by a tax attorney with the Massachusetts Department of Revenue, concerned state taxation: *State Tax Jurisdiction and the*

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[42] One could certainly go on listing more of the over sixty (according to the authors cited in footnote 29) tax treatises published as the Warren, Gorham & Lamont library of Research Institute of America, but permit this writer to list four more of these precious volumes that perk up his eclectic interests: *Federal Tax Accounting,* Stephen F. Gertzman (for the accountant who is having trouble reconciling tax accounting with generally accepted accounting principles); *Litigation of Federal Civil Tax Controversies,* 2nd Ed., Gerald A. Kafka & Rita A. Cavanagh (for the recently admitted member of the United States Tax Court bar); *Federal Taxation of Financial Instruments and Transactions,* 1st Ed., Kevin Keyes (for the sophisticated investor ready to sample whatever the financial innovators of Wall Street have dreamed up); and *Taxation of Regulated Investment Companies & Their Shareholders,* 1st Ed., Susan Johnston & James Brown (for the tax preparer desiring to understand the end product that miraculously appears in the form of different kinds of taxable income on the ubiquitous Forms 1099-DIV).

[43] As of a year ago, the American Bar Association had approved two hundred institutions of which 199 awarded the first degree in law, namely the *Juris Doctor,* and, as devotees of Harmon Rabb of the Navy's Judge Advocate General might expect, one awarded an officer's resident graduate course at the United States Army Judge Advocate General's School. (**www.abanet.org/legaled/approvedlawschools/approved.html** last visited on July 5, 2009) For the record, Associate Justice Benjamin N. Cardozo was never awarded a bachelor of laws degree by the Law School of Columbia University (*Cardozo,* Andrew L. Kaufman, Harvard University Press (1998), page 49)

[44] "One of the few faculty (as opposed to student) edited journals in the legal academy."

[45] Which ranked first, third, and fourth according to the 2009 ranking of tax journals (2001-2008) compiled by Washington & Lee as reported on the TaxProfBlog.

[46] Professor Leo Schmolka's article on charitable remainder trusts occupied the entire Tax Law Review running a nifty 350 pages. (Schmolka, *Income Taxation of Charitable Remainder Trusts and Decedents' Estates: Sixty-Six Years of Astigmatism,* 40 Tax. L. Rev. 1 (1984))

[47] Non-lawyers may obtain the Tax Lawyer as a separate subscription.

[48] The Tax Lawyer ABA Editorial Board has 25 members, while the Georgetown University Law Center Student Editorial Board has 103 participants. To appreciate the flavor of this fine tax law review, the Winter 2009 volume consists of the following five articles, one comment, and three notes: Articles—*Choice of Forum in Federal Civil Tax Litigation* [Thomas D. Greenaway], *The Doctrine of Election* [Aubree L. Helvey and Beth Stetson], *Regarding the Advisability of a Prohibition on the Taxable Asset Sale to Creditors in Bankruptcy* [Carl N. Pickerill], *Fifty Years of Utopia: A Half Century After Louis Kelso's The Capitalist Manifesto, a Look Back at the Weird History of the ESOP* [Andrew W. Stumpff], and *Constructive Conditions and the All Events Test* [Glenn Walberg]; Comment—*A Role for Tax Attorneys in Antitrust Law?: Variable Cost Savings as a Merger Efficiency Defense* [Catherine A. Clancy]; Notes—*Kentucky v. Davis: A Better Approach to Savings Differential Taxation of Municipal Bonds* [Conor Bennet-Ward], *The Section 6166 Balancing Game: An Examination of the Policy Behind Estate of Roski v. Commissioner* [Britt Haxton], and *Recovery of Attorney's Fee in Tax Litigation Before the Bankruptcy Court: In re Hudson* [Aleksandr B. Livshits]

Mythical "Physical Presence" Constitutional Standard.[49] Membership in the same organization's Real Property, Trust and Estate Law section provides access to its scholarly law review journal, which frequently contains thorough discussions on tangential tax issues.[50]

6. Tax Periodicals and Other Excellent Tax References The variety of the tax literature contained in the format of a periodical almost knows no bounds. Just as the Internal Revenue Code of 1939[51] brought some semblance of order to the numerous revenue acts that Congress had enacted as separate pieces of legislation commencing in 1913,[52]so too does an electronic commercial tax service bring order to a large number of tax periodicals published on a monthly basis, covering a wide diversity of tax subjects.

   The Commerce Clearing House offering of *Taxes – The Tax Magazine*[53]must contend with the competition of three of many Warren, Gorham & Lamont publications: *Journal of Taxation*[54]*, Estate Planning*, and *Practical Tax Strategies.*[55] For fortunate practitioners in the state of Florida, both *ActionLine,* a publication of the Florida Bar Real Property, Probate & Trust Law Section, and the *Bulletin,* a publication of the Tax Section of the Florida Bar[56], frequently have helpful tax articles, including references to Florida

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[49] 54 Tax Lawyer 105 (2000) The article's discussion certainly includes an examination of the Untied States Supreme Court's decision in *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992) and its subsequent denial of a writ of certiorari in a case decided by the South Carolina Supreme Court in *Geoffrey v. South Carolina Tax Comm'n,* 437 S.E.2d 13 (S.C. 1993) *cert. denied,* 510 U.S. 992 (1993). Thank you, Professor Pomp! (See footnote 1). Equally informative was Christina R. Edson's article entitled: *Quill's Constitutional Jurisprudence and Tax Nexus Standard in an Age of Electronic Commerce,* 49 Tax Lawyer 893 (1996).

[50] For example, the most recent Winter 2009 issue contains five articles, two of which are tax related: *No Transfer-Tax Exemption For Preconfimation Transfers of Assets in Chapter 11 Bankruptcies the Supreme Court Rules In Piccadilly* [John C. Murray] wherein the United States Supreme Court, in *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.* held that the Bankruptcy Code's Section 1146(a) transfer tax exemption applies only to post confirmation transfers of the debtor's assets; and *A Trap for the Wary: Delaware's Anti-Delaware-Tax-Trap Statute Is Too Clever By Half (Of Infinity)*[James P. Spica] wherein, as stated in the editors' synopsis—"In enacting this ineffectual protection, Delaware inadvertently baited the 'trap,' for with respect to personal property held in trust, section 504 [of the Delaware statute] is capable only of creating a false sense of security in those whose exercise of a nongeneral power of appointment may spring the Delaware tax trap on GST exempt or GST-exemption sheltered assets."

[51] *Wikipedia,* however, the ultimate secondary source of authority, states that the recodification of the Revised Statutes of the United States (1874) occurred in 1926, which recodification included tax statutes.

[52] The first Form 1040, available on the Internal Revenue Service web site, consisted of three pages and one page of instructions and was denominated: "Return of Annual Net Income of Individuals".

[53] A special annual March issue contains the papers and panel discussions of the University of Chicago Law School's Annual Federal Tax Conference.

[54] Perhaps mistakenly, the writer has the impression that the *Journal of Taxation* tends to be the more comprehensive of the several periodicals, having articles of fifteen pages, including a hundred footnotes.

[55] Warren, Gorham & Lamont offers considerably more variety than the three periodicals listed above, such as *Business Entities, Corporate Taxation, Journal of International Taxation, Journal of Multistate Taxation, Real Estate Taxation, Taxation of Exempts, and Valuation Strategies.*

[56] I am sure that any member of either of these two sections of The Florida Bar would be happy to lend a tax accountant colleague any issue of both publications or even permit the tax oriented accountant to peruse all of the current year's issues.

statutory and case law that may have to be considered even if the overriding issues in the subject transaction are tax-related.

In addition to the six periodicals just referred to immediately above, the author would never leave his office libraries[57] devoid of the following sources of tax or other legal information: (a) *Corporate Tax Planning: Takeovers, Leveraged Buyouts, and Restructurings,* Daniel Q. Posin, Little, Brown & Company (1990)[58]; (b) *Collier on Bankruptcy Taxation,* 2008 Ed., Myron M. Sheinfeld, Fred T. Witt, Jr. & Milton B. Hyman, LexisNexis[59]; (c) *Black's Law Dictionary,* 7th Ed., Bryan A. Garner, Editor in Chief, West Group[60]; (d) *Ethical Problems in Federal Tax Practice,* 3rd Ed., Bernard Wolfman, James P. Holden & Deborah H. Schenk, Little, Brown & Company[61]; (e) numerous so-called "deskbooks" and guides offered by Practitioners Publishing Company[62]; (f) *The Law of Tax-Exempt Organizations,* 9th Ed., Bruce R. Hopkins, John Wiley & Sons[63]; (g) *West's Florida Probate Code with Related*

[57] Despite the availability of the electronic commercial tax service [RIA Checkpoint, featuring Federal Tax Coordinator 2d] in both the Alfred I. du Pont Building in downtown Miami and the home office in Weston, the writer would feel lost without a large quantity of printed tax publications at each location.

[58] While apparently not updated recently, this text, published after the Tax Reform Act of 1986, provides exceptionally lucid explanations of a variety of tax-free and taxable reorganizations, including an Appendix D [Description of Recent Deals], providing 249 "thumb nail descriptions of the tactics and results of most major public deals" within the two years preceding the volume's publication.

[59] LexisNexis, as a comprehensive legal research electronic "platform", is a major competitor of Westlaw. With respect to its tax specific content, the database includes Commerce Clearing House, Tax Analysts, and the University of Southern California and the New York University tax institutes. The tax issues that arise in the context of bankruptcy are known presumably to more specialized practitioners. Unwilling to pay the market price for court decisions found in either the LexisNexis or Westlaw databases, the author has opted for The Law.net [Equalizer 7.0] at a paltry price of $495 to satisfy his need for such cases, recognizing that the annual subscription fee bears a direct relationship to quality.

[60] Just as Chief Justice John Marshall exclaimed in *McCulloch v. Maryland,* 4 Wheat. 316 (1819): "It is a constitution that we are expounding", so too application of state law in a federal tax system may cause the federal tax researcher to exclaim: "It is state law upon which we are expounding", which presumably makes such an admirable law dictionary a vital part of any tax law library.

[61] The text provides an admirable and informative presentation of the different contexts in which ethical problems may arise, that is, in the compliance tax return preparation stage, in the audit and litigation stage of controversy, in the tax planning stage, and in the public arena attempting to espouse tax policy.

[62] PPC, as practitioners frequently call the publisher, has offerings designed to provide significant assistance in the compliance task of tax preparation. The author has only recently added the following volumes to the office library: PPC's 1040 Deskbook, PPC's 1120 Deskbook, PPC's 1120S Deskbook, PPC's 1065 Deskbook, PPC's 1041 Deskbook, PPC's 706/709 Deskbook, and PPC's 990 Deskbook. The Thomson Reuters PPC's Payroll Tax Deskbook is a less recent addition of several years ago purchased during the former period of a traveling lecturer. All the volumes are quite comprehensive and relatively cheap in price, particularly if the subscription is not renewed annually. In addition, these deskbooks are a natural supplement to sophisticated tax software. The publisher also has a large number of guides on the same topics as the deskbooks as well as tax subjects not directly related to a particular tax form. To date the writer has chosen to acquire a small number of such guides, more particularly, PPC's Guide to Compensation and Benefits, PPC's Guide to Accounting & Reporting for Estates & Trusts, and, a new acquisition, PPC's Tax Planning Guide S Corporations, when issues concerning qualified subchapter S subsidiaries appeared on the horizon. Quite frankly, tax department personnel not yet accustomed to reading federal tax statutory language on a daily basis will find all the preceding material of this footnote most helpful.

[63] Without a doubt, for those tax practitioners with a variety of tax-exempt type organizations as clientele, this 1,296-page treatise, by a long-time District of Columbia practitioner, deserves a place in the library. Note too that this apparently less well-known publisher to the tax community offers a considerable collection of books covering tax-exempt organization issues.

Laws and Court Rules, 2009, Thomson*West[64]; (h) *Nutshell Series,* 152 or so discrete volumes, Thomson*West[65]; (i) U.S. Income Portfolios: Procedures and Administration—Portfolio 100 – 1st: U.S. Federal Tax Research by Peter A. Lowy, and (j) *RIA The Complete Internal Revenue Code (December 2008) & Federal Tax Regulations (January 2009),* Thomson Reuters [Quickfinder][66]

A tax law library, as in the case of any kind of library, is a constant "work in process". Remembering United States Supreme Court Associate Justice Oliver Wendell Holmes' well-known statement that "…a page of history is worth a volume of logic"[67], this federal tax researcher is loathe to discard any older members of his collection.[68] In theory, the deeper one's knowledge of the incessant[69] changes in the tax law becomes, the more likely such a

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[64] For accountants with a considerable practice in the estate and trust area, whether estate, gift, generation-skipping transfer, and fiduciary income tax returns or fiduciary accountings for estates, trusts, and guardians, this inexpensive 1,007-page book of primary authority should not be omitted from the library.

[65] These "miniature" tomes are priced right from $28.00 to $34.00 for a particular title. A tax person should acquire *Burke's Federal Income Tax of Partners and Partnerships in a Nutshell,* 3rd Ed., Karen C Burke, Thomson*West; and the nutshell volume on international taxation cited in footnote 25. But the author strongly recommends other nutshell volumes that may have a peripheral influence on tax problems, such as: *Lowe's Oil and Gas Law in a Nutshell,* 5th Ed., John S. Lowe, Thomson*West; *Mennell and Boykoff's Community Property in a Nutshell,* 2nd Ed., Robert L. Mennell & Thomas M. Boykoff, Thomson*West; *Averill's Uniform Probate Code in a Nutshell,* 5th Ed., Lawrence H. Averill, Jr., Thomson*West (While Florida has never adopted the Uniform Probate Code as such, presumably the Florida Probate Code, Chapter 732, Part II, Sections 732.201 through 732.2155, inclusive, has borrowed an idea or two relative to the elective share of a surviving spouse.); *Graham's Federal Rules of Evidence in a Nutshell,* 7th Ed., Michael H. Graham, Thomson*West (A non-lawyer, wishing to be admitted to the United States Tax Court bar, will have to sit in the District of Columbia for an examination a portion of which covers the federal rules of evidence.); *Hornstein's Appellate Advocacy in a Nutshell,* 2nd Ed., Alan D. Hornstein, Thomson*West (Recommended for the *pro se* litigant who, having either won or lost in one of four trial courts whose subject jurisdiction includes federal tax matters, proceeds to the United States Court of Appeals for the 11th Circuit in Atlanta, Georgia.); and, without a doubt, the writer's favorite, *Siegel & Borcher's Conflicts in a Nutshell,* 3rd Ed., David D. Siegel & Patrick J. Borchers, Thomson*West. (Professor Siegel's sense of humor exhibited in his discussion of conflict of laws makes this particular nutshell a personal favorite.)

[66] The author has always preferred the one volume of the entire Internal Revenue Code of Research Institute of America to the incomplete Internal Revenue Code of Commerce Clearing House, which typically excludes provisions found in subtitle C [Employment Taxes and Collection of Income Tax], subtitle D [Miscellaneous Excise Taxes], and subtitle E [Alcohol, Tobacco, and Certain Other Excise Taxes]. Last December 2008, Quickfinder offered the complete Internal Revenue Code in one volume and the Federal Tax Regulations in five volumes for the ridiculously bargain basement price of $150.00.

[67] *New York Trust Co. v. Eisner,* 256 U.S. 345, 349 (1921)

[68] The Alfred I. du Pont Building collection in downtown Miami includes the well-worn two-volume treatise of *Partnership Taxation,* 2nd Ed., Arthur B. Willis, Shepard's Citations (1976). Unfortunately, the tax researcher was not so lucky while serving in the United States Navy, as all his case books from law school were innocently discarded by the custodian.

[69] Did Federalist Paper # 62 (probably Madison) anticipate the federal tax law according to Congress? Judge for yourself:

> *The internal effects of a mutable policy are still more calamitous.*
>
> *It poisons the blessings of liberty. It will be of little avail to the*
>
> *people that the laws are made by men of their own choice if the*
>
> *laws be so voluminous that they cannot be read, or so incoherent*
>
> *that they cannot be understood; if they be repealed or revised before*
>
> *they are promulgated, or undergo such* ***incessant changes*** *that no*

person may be able to dispense with the necessity of updating the tax tomes on an annual basis. Needless to say such a practice has an element of danger if not the potential for the commission of malpractice. The ultimately indispensable tool of the trade is the tax law library that must be allowed to grow with the years as long as a knowledgeable librarian stands by performing the necessary pruning with the skill of the proverbial surgeon.[70]

II. Obstacles Encountered in Research Past

The Mississippi Certified Public Accountant announced that he was giving up his electronic tax research subscription, returning to the more familiar printed pages, as he simply could not "get the hang of it".[71] The author urged him to persevere, as an "old dog" simply requires a bit more time to master a new trick.[72] This second part of the federal tax research paper to be distributed to participants of the roundtable[73] does not make any attempt to discuss the functional features of any electronic tax research platform.[74] Just as one is unable to master the game of basketball without entering upon the court, or to become a "crackerjack" investigative auditor without venturing out into the field, so too it is quite unlikely that one

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man, who knows what the law is today, can guess what it will be

tomorrow. Law is defined to be a rule of action; but how can that

be a rule, which is little known and less fixed?

[70] It is fair to say that once the writer had completed a paper entitled: *Federalism: A View From A Not So Swift Train* (an early attempt to explain the significance of two United States Supreme Court cases (*Erie Railroad Co. v. Tompkins* and *Estate of Bosch v. C.I.R.)*), his greatly expanded Weston library on the subject of federalism was better than the one at the local university.

The author would be remiss if he failed to recommend that any library, whether technical or not, should contain a few reference works designed to delay if not prevent the death of the English language: 1) *Shorter [2 Volumes] Oxford English Dictionary (On Historical Principles),* 5th Ed., Oxford University Press (2003); 2) *The Synonym Finder,* J. I. Rodale, Warner Books (1978); 3) *Eats, Shoots & Leaves (The Zero Tolerance Approach to Punctuation),* Lynn Truss, Gotham Books (2003); and 4) *The Elements of Style,* William Strunk, Jr. & E.B. White, 3rd Ed., Macmillan Publishing (1979)

[71] The conversation took place on the automobile ride to the Jackson, Mississippi airport over a decade ago. It did not quite match the revelation of a Texas certified public accountant, on the trip to the Dallas/Fort Worth airport, who confessed that he was no longer able to eat rice as he described how the perspiration of his body permitted him to eat rice as he crawled along the ground while "in country" [North Vietnam]. Today, as an avid Googler, I would tell the Mississippian that narrowing a worldwide search on **www.google.com** is not wholly unlike the search techniques used by a tax researcher seeking a solution buried in the "volumes" of any electronic commercial tax service database.

[72] The author, having manually prepared federal income tax returns in their several varieties for decades, from 1970 through 1997, inclusive, assured the fellow accountant that given enough time and effort he would ultimately prevail in the efficient utilization of the new tax research methodology. Actually, the ideal time for converting from a manual to a software tax preparation process would have been the first taxable year following the enactment of the Tax Reform Act of 1986. Old ways, however, are slow to give way to newer and better techniques.

[73] Gary A. Fracassi, CPA, of Orlando, a member of the steering committee for the upcoming Practice Management Conference in Fort Lauderdale, has stated that every attendee of the breakout session will be a member of the roundtable, a Committee of the Whole, if one will.

[74] That fundamental and indispensable task is gratefully left to Professor Barbara H. Karlin in her excellent textbook entitled *Tax Research,* 3rd Ed., Pearson [Prentice Hall] (2006) as well as the 262-page Checkpoint User Guide most recently updated by Thomson Reuters on June 9, 2009. While the defrocked adjunct lecturer preferred the Karlin textbook, students may have found *West's Federal Tax Research,* 6th Ed, William Raabe, Gerald Whittenburg, Debra Sanders & John Bost [Thomson*South-Western] (2003) more to their liking.

would become a very proficient electronic tax researcher without constant practice.[75] That, by the sheer nature of the task, requires the reader to enter the office laboratory, continuously working with the tax research software until the complexities and subtleties of the system become second nature.

1. The Tax Bible Accordingly, this second part is concerned with a few of the many problems that may confront a tax researcher after she has mastered the tax research software as a pianist has mastered the keyboard. Before examining such issues, a comment about the Internal Revenue Code of 1986, as amended, is in order. Admittedly, the prose used by the legislative draftsman does not have the rhythmic appeal of either dactylic hexameter[76] or iambic pentameter.[77] Some of the statutory sections may be the essence of brevity[78], while other sections would appear to run on indefinitely.[79] And then, of course, the language of the statute may be so broad as to invite necessary interpretation by either the executive or judicial branches or both.[80]

Reading the Internal Revenue Code, the tax bible, on a regular basis is highly recommended. First, it is, if one will, the unadulterated law. It is the starting point for any attempted resolution of federal tax issues. Second, it contains the language of the cognoscenti, the

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[75] In "office in the home" litigation in the Second Circuit, prior to *Soliman,* Judge Van Graafeiland made the following comment: "An oft-repeated, perhaps apocryphal, story tells of the musician who, when asked the best way to get to Carnegie Hall, replied, 'Practice! Practice!'" (*Drucker v. C.I.R.,* 715 F.2d 67, 68 (2nd Cir. 1983))

[76] The opening line of Longfellow's *Evangeline* comes to mind: "This is the forest primeval, the murmuring pines and the hemlocks."

[77] As in Shakespeare's *Macbeth,* for example: "Hear it not Duncan; that summons thee to heaven or to hell." With regret the writer acknowledges that his copy of "*Ode to the Code"* [36 The Tax Lawyer 759 (1983)] by Edwin S. Cohen, has escaped from the library, literally torn from the spring volume of that year.

[78] The term "Commissioner" means the Commissioner of Internal Revenue. I.R.C. § 7701(a)(13)

[79] An excellent illustration would be I.R.C. § 334(b)(2) before its repeal by the Tax Equity and Fiscal Responsibility Act of 1982:

"(2) Exception. ***If*** property is received by a corporation in a distribution in complete liquidation of another corporation, within the meaning of section 332(b), and if— (A) the distribution is pursuant to a plan of liquidation adopted not more than 2 years after the date of the transaction described in subparagraph (B) (or, in the case of a series of transactions, the date of the last such transaction); and (B) stock of the distributing corporation possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote, and at least 80 percent of the total number of shares of all other classes of stock (except nonvoting stock which is limited and preferred as to dividends), was acquired by the distributee by purchase (as defined in paragraph (3)) during a 12-month period beginning with the earlier of— (i) the date of the first acquisition by purchase of such stock, or (ii) if any of such stock was acquired in an acquisition which is a purchase within the meaning of the second sentence of paragraph (3), the date on which the distributee is first considered under section 318(a) as owning stock owned by the corporation from which such acquisition was made, ***then*** the basis of the property in the hands of the distributee shall be the adjusted basis of the stock with respect to which the distribution was made." That one sentence, concerned with the basis of corporate assets distributed to a corporate parent upon the liquidation of the subsidiary corporation, basically reflects the holding in *Kimbell-Diamond Milling Co. v. C.I.R.,* 14 T.C. 74, *aff'd per curiam,* 187 F.2d 718 (5th Cir.), *cert. denied,* 342 U.S. 827 (1951) as numerically and rigidly clarified by the Congress.

[80] A favorite would clearly be the language chosen by Associate Justice Benjamin N. Cardozo with respect to the meaning of the words "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" contained in the Revenue Act of 1924 and now found in I.R.C. § 162(a): "Here, indeed, as so often in other branches of the law, the decisive distinctions are those of degree and not of kind. One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle." *Welch v. Helvering,* 290 U.S. 111, 114 & 115 (1933)

learned tax practitioners.[81] Third, consistent reading of the Code permits the reader to associate the considerable content of a large number of sections with specific section numbers. Most assuredly those associations enable one to read a particular section without experiencing the "dance" before one's eyes of the "meaningless procession: cross reference to cross reference, exception upon exception" that Judge Learned Hand spoke of so eloquently.[82] Fourth, and perhaps most importantly, familiarity with particular sections of the weighty tome will actually facilitate the research process.[83] Perhaps Dean Erwin N. Griswold said it best: "We can think great thoughts or we can look at the statute."[84]

2. The Treasury Regulations [Interpretative and Legislative][85] The regulations must be used with caution. It is not uncommon to find regulations that have not been amended to take

[81] The writer well remembers a telephone conversation in the spring of 1999 with a very fine tax attorney in downtown Miami. The learned colleague kept using the expression "OI". Net wanting to interrupt, by the context of the conversation, it suddenly became apparent that he was referring to "ordinary income" as opposed to "capital gain". Apparently, the "term" is used frequently in the Ginsburg/Levin treatise found in footnote 19. Gordon Henderson, a partner in Weil, Gotschal & Manages, acknowledging the alleged mathematical and economic illiteracy of secondary school students, wrote: "One observer would be curious how our legal system had adjusted to these facts [the hypothetical illiteracy]. Knowing that in a democracy the area of the law that most directly touches nearly every citizen is the tax law, he would look to the tax law for his answer. He might recall the World War II saying about the United States Navy regulations—that they had been 'designed by geniuses to be applied by fools',… -- and he would expect to find a parallel in the tax law." *Controlling Hyperlexis—The Most Important "Law and …"* 43 The Tax Lawyer 177, 180 (1989)

[82] See footnote 18, supra.

[83] In a memorable class with Dr. Robert R. Oliva, currently Chair of Accounting of the University of Arkansas at Little Rock, as the author prepared to assume the duties of a tax research adjunct, the professor was commencing an electronic search involving the definition of an S corporation, particularly the single class of stock requirement. After a first attempt appeared to produce insufficient results, the author suggested using "1361(b)(1)(D)" in the next search exercise.

[84] The writer remembers Dr. Oliva of the immediately preceding footnote putting the matter a little more directly: "RTDC", meaning "Read The Damn Code". Believing that the "Griswold" story was essentially apocryphal, having first heard it from Professor Norman Dorsen of New York University School of Law, in a memorable class on "Legal Institutions", its authenticity was confirmed by the Lawtech Archives (Listserv 15.5) on the web site of the American Bar Association: "Harvard's Dean Griswold, on the first day of his course in federal income tax, would admonish his students as follows: 'In this area, before you sit down and think great thoughts, read the statute. Then read the regulations. Then if your question isn't answered, read the cases. After you've read the statute, read the regulations and read the cases, then you can sit down and think great thoughts.'" Admittedly, at first the task of reading the Internal Revenue Code may be a difficult read. In that regard the author is reminded of the comments made by Matthew J. Bruccoli in his introduction to James Gould Cozzens' novel *By Love Possessed:* "The use of difficult words in [the novel] irritated readers and reviewers; but James Gould Cozzens did not regard it as an imposition for a reader to consult a dictionary. Sixty-odd words [e.g., presbyopic, tribadism, volutes, theanthropos, crapulous, subauditur, thewy, carapace, etc. (most unknown to Spell Check)] in a 570-page novel is not an outrageous proportion."

[85] Professor Bernard Schwartz, then of the New York University School of Law, spoke of administrative agencies with great reverence. His lectures on administrative law made it abundantly clear, crystal in fact, that the separation of powers doctrine had undergone a major case of radical surgery in an increasingly and technically complex society. [Take the Internal Revenue Service, please. (Apologies to Henny Youngman.) In padlocking the door for failure to remit escrow funds to the federal depositary, the revenuers are executing the law. In assisting the Treasury Department in promulgating estate tax regulations, the agency is assuming the role of lawgiver. Finally, in issuing private letter rulings, the agency performs a quasi-judicial function.]

subsequent legislation into account,[86] regulations that do not even exist,[87] or, for that matter, regulations that formerly existed.[88]

The virtual storehouse of examples found in regulatory material gives greater certainty to the meaning of the language even if one is ready to concede that such language is very precise. Some regulations have a comprehensiveness that is sometimes overwhelming to a tax researcher, particularly if he has inadequate familiarity with the covered material. For example, the treasury regulations interpreting I.R.C. § 704(b)[Determination of distributive share], in terms of whether a special allocation among partners has "substantial economic effect", run almost forty full pages. Since the electronic version does not show at the top of the computer screen exactly which subdivision of which subclause is currently under observation, it is a little too easy to lose one's way in the regulatory forest.

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[86] An issue arose concerning the failure of a recently deceased taxpayer to have received mandatory distributions of trust income during his life. The hoary, but relevant, regulation, Treas. Reg. § 1.652(c)-2, (promulgated on December 19, 1956) had not been taken into account by professionals involved in the matter: "…The gross income for the last taxable year of a beneficiary on the cash basis includes only income actually distributed to the beneficiary before his death. Income required to be distributed, but in fact distributed to his estate, is included in the gross income of the estate as income in respect of a decedent under section 691…." The electronic commercial tax service provided the following cautionary road sign: "The Treasury has not yet amended Reg. § 1.652(c)-2 to reflect changes made by P.L. 99-514." [The Tax Reform Act of 1986] Thus, it would appear the "constructive" distribution rule for simple trusts did not apply in the year of the beneficiary's death. While more than a half-century of Congressional legislation had apparently not made this old regulation inapposite, often that may well not be the case.

[87] The author honestly believes that interpretative regulations will never be issued for I.R.C. 1372 [Partnership rules to apply for fringe benefit purposes], despite its enactment almost twenty-seven years ago. Fortunately, the Treasury has issued guidance for the treatment of health insurance for the more than 2-percent shareholder of an S corporation. See. Rev. Rul. 91-26 and Announcement 92-16.

[88] The issue related to the availability of the installment sales method in the context of dealer dispositions of residential lots: The writer's written comments at that time follow—"Here are some additional thoughts on the viability of utilizing installment method reporting for the dealer dispositions by [Redacted], LLC under I.R.C. §453(l)(2)(B)(ii)(II), recognizing its somewhat ambiguous language:

a. The income tax regulations under section 453 are silent on the issue.

b. The Conference Report to P.L. 100-203 adhered to the Senate Amendment as to the treatment of dealer installment sales, which emphasized the repeal of "old" section 453A (Installment Method for Dealers in Personal Property), referring almost in passing to the residential lot exception to dealer dispositions of real property.

c. Treas. Reg. §1.453C-8T(a)(4), although removed by a "house cleaning" provision in TD 8474 (04/26/93), did provide guidance on our outstanding issue, as the repealed Code section used exactly the same language that now appears in the current section requiring interpretation.

d. Here is what the defunct regulation said: "*Residential lot.* For purposes of paragraph (a)(1)(i)(B) of this section [i.e., 'Any residential lot but only if the taxpayer (or any related person) ***is not to make*** (emphasis added) any improvements with respect to such lot…'], a residential lot is a parcel of unimproved land upon which the purchaser intends to construct (or intends to have another person construct) a dwelling unit for use as a residence by the purchaser….A parcel of land shall not be considered improved merely because it has been provided with common infrastructure items such as roads and sewers."

Another example of "disappearing" regulations in the field of tax accounting would be Treas. Reg. 1.451-3(b)(*3)*[Extended period long-term contract] when Treasury promulgated sufficient regulations under I.R.C. § 460 [Special rules for long-term contracts]. The author's memory insisted that the regulation under I.R.C. § 451 [General rule for taxable year of inclusion] had to exist, having read it on more than one occasion in the past. But the more specific references in the more recently enacted Code section for recognizing income under a long-term contract eliminated the need for the regulations under the older Code section. The electronic commercial tax service has preserved the old regulation that was removed by the Treasury Department.

3. Case Law[89] (a) ***Facts and Law:*** "Rules of law lie naked with limited meaning without a variety of fact patterns to give them vitality."[90] A given case stands for a particular proposition of tax law only to the extent that the detailed facts raise the issue whose solution is the particular statutory, regulatory, decisional, or other primary authority that is cited.

   Questions of law are left to the judge, while questions of fact are left to the trier of fact. The later would be a jury if the tax case is tried in one of ninety-three federal district courts, assuming that a jury trial is not waived.[91] Sometimes the statement of a rule of tax law is, by its very nature, highly factual. Whether or not an expense "paid or incurred during the taxable year in carrying on any trade or business" meets the statutory requirement that such expense be "ordinary and necessary"[92] is, to the author's mind, a highly factual determination to which a trier of fact would bring her life's experiences to in reaching such a determination. Somewhat rhetorically, would a 2009 diesel Mercedes-Benz be a more appropriate mode of transportation for a Texas oil man escorting his guest, a Saudi prince from downtown Riyadh, to numerous drilling spots in Oklahoma, than a practicing proctologist, making the grand tour of the post office, office supply store, and other assorted hot spots to accomplish the mundane tasks of medical administration? Note, however, the judge should provide some legal guidance as to whether "appropriate" would be a substitute for the statutory word "necessary".

   Perhaps, when the tax statute, as immediately above, provides such an amorphous rule, a tax researcher would be inclined to consider such a question as a mixed question of law and fact. The *Deluxe Fourth Edition of Black's Law Dictionary* [The Publisher's Editorial Staff][93] defines such a mixed question of law and fact by citing an old[94] court

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[89] "The collection of reported cases that form the body of law within a given jurisdiction." *Black's Law Dictionary,* 7th Ed., Bryan A. Garner, Editor in Chief, West Group, St. Paul, Minnesota (1999) The reader should note that *Scalia and Garner's Making Your Case: The Art of Persuading Judges,* Antonin Scalia & Bryan A. Garner, Thomson*West (2008) is now available for draftsmen of memoranda.

[90] Jonathan S. Ingber ad nauseam. "[Judge Sonia] Sotomayor also displays deep familiarity with the details of each case—she has been criticized in some quarters as too ***fact-oriented*** and technical—and a delectable enjoyment of the theater of the law." (**www.politico.com** as of July 19, 2009) "' [Justice] White's function-and-***fact-oriented*** approach to jurisprudence,' as [Allan] Ides shows, is hardly limited to the separation of powers cases. To Ides' catalogue, I would add one category and four examples. The category is White's preference for as-applied challenge (a) is narrower than a facial challenge and (b) rests on ***hard facts*** about the real world rather than judicial hypothesizing about possible applications." *Justice Byron White and the Argument the Greater Includes the Lesser,* Brigham Young University Law Review [1994; 227, 230] (Emphasis supplied.)

[91] A tax refund case would typically be filed in a federal district court to have the "benefit" of a jury trial. A taxpayer with a highly technical legal argument would presumably prefer the expertise of the judges of the United States Tax Court, assuming, of course, the proposition of tax law favored the petitioner.

[92] See Associate Justice Cardozo's attempted "definition" in footnote 80.

[93] West Publishing Co., St. Paul, Minnesota (1951), broken binding and all.

[94] *State v. Hayes,* 162 La. 917; 111 So. 327, 329 How old? Do not know as the citation is missing a reference to the year of decision, and the particular case is not available on the writer's TheLaw.net legal research software. T'is a dangerous practice for a tax researcher to cite cases the whole of which are not readily available.

case with the following definitive words: "A question depending for solution on questions of both law and fact, but is really a question of either law or fact to be decided by either judge or jury." Perhaps further enlightenment is available from the more recent *Seventh Edition* (lacking the "Deluxe" binder)[95]: "An issue that is neither a pure question of fact or law. Juries typically resolve mixed questions of law and fact.[96] This definition is then followed by a quotation from a formidable secondary source: "Many issues in a lawsuit involve elements of both law and fact. Whether these be referred to as mixed questions of law and fact, or legal inferences from the facts, or the application of law to the facts, [97]there is substantial authority that they are not protected by the 'clearly erroneous' rule and are freely reviewable. This principal has been applied to antitrust violations, bankruptcy, contracts, copyright, ***taxation*** (Emphasis added.), and to other areas of the law."[98] The concept of "clearly erroneous" will be inspected further below when the discussion shifts to the nature of appellate jurisdiction.

(b) ***A Recent Case—An Illustration of Law Versus Fact:*** Within the last few weeks, on June 30, 2009, to be more precise, the United States Tax Court handed down a decision in *Paul D. Garnett et ux v. C.I.R.,* 132 T.C. No. 19 (2009). The Wall Street Journal, in a July 8, 2009 article by Laura Saunders in the newspaper's Money & Investing section, entitled "Entrepreneurs Win Tax Case Versus IRS", stated that the court decision "makes loss deductions much easier to obtain for some investors" and that "[t]he Tax Court judgment freed the Garnetts from an assessment of more than $350,000 in tax and penalties". A practitioner whom the writer has high regard for announced that the ruling was a landmark decision.

With due deference to the journalist and my colleague, an actual reading of the decision might reduce the hyperbole.[99] The tax court granted petitioners' motion for a partial summary judgment on the issue of whether a partner in a limited liability partnership or a member in a limited liability company should be treated as a limited partner in applying the limitation on passive activity losses. As a matter of law the court held that all seven tests for determining material participation found in Treas. Reg. 1.469-5T(a) were available to the petitioners rather than any one of the three tests found in paragraph (a)(1), (5), and (6) of that regulation that limited partners must satisfy to be considered material

[95] See footnote 89, supra.

[96] An invasion of the judge's bailiwick? I do not think so as the next part of the definition makes clear.

[97] Or as stated more recently in her Congressional testimony by the now Associate Justice Sonia Sotomayor: "The law is not legal theory, it's facts; then it's taking those facts and making arguments on the law as it exists."

[98] 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2589 at 608-11 (2d ed 1995) One may simply recall that Professor Wright represented Richard Milhous Nixon on constitutional issues that sprung from the Watergate investigations.

[99] The tax deficiencies and accuracy-related penalties for the three taxable years 2000 through 2002 were equal to $433,762, which fails to take into account interest and late payment penalties.

participants.[100] The summary judgment procedure was available as to this issue, namely the applicability of the more restrictive tests to partners in a limited liability partnership and to members in a limited liability company, as the court stated that there were no genuine issues of fact based on the pleadings, affidavits, and accompanying documents.[101] Finally, the newspaper article accurately noted that if such entities, limited liability partnerships and limited liability companies, generate profits rather than losses, the Tax Court's decision "may invite greater assessments of self-employment tax"[102]. In the instant case, however, the court noted "[i]n neither the notice of deficiency nor the answer has respondent asserted any deficiency attributable to underpaid self-employment taxes".

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[100] Reg §1.469-5T. Material participation (temporary).

(a) In general. Except as provided in paragraphs (e) and (h)(2) of this section, an individual shall be treated, for purposes of section 469 and the regulations thereunder, as materially participating in an activity for the taxable year if and only if— **(1) The individual participates in the activity for more than 500 hours during such year.** (2) The individual's participation in the activity for the taxable year constitutes substantially all of the participation in such activity of all individuals (including individuals who are not owners of interests in the activity) for such year; (3) The individual participates in the activity for more than 100 hours during the taxable year, and such individual's participation in the activity for the taxable year is not less than the participation in the activity of any other individual (including individuals who are not owners of interests in the activity) for such year; (4) The activity is a significant participation activity (within the meaning of paragraph (c) of this section) for the taxable year, and the individual's aggregate participation in all significant participation activities during such year exceeds 500 hours; **(5) The individual materially participated in the activity (determined without regard to this paragraph (a)(5)) for any five taxable years (whether or not consecutive) during the ten taxable years that immediately precede the taxable year; (6) The activity is a personal service activity (within the meaning of paragraph (d) of this section), and the individual materially participated in the activity for any three taxable years (whether or not consecutive) preceding the taxable year;** or (7) Based on all of the facts and circumstances (taking into account the rules in paragraph (b) of this section), the individual participates in the activity on a regular, continuous, and substantial basis during such year.

[101] Essentially the decision would typically allow such a partner or member to avail herself of the significant participant activity and the facts and circumstances (regular, continuous, and substantial) tests of regulatory paragraphs (a)(4) and (a)(7) that are not available to limited partners. In attempting to apply the decision to a Florida limited liability partnership, one should note that the Florida statutory provision §620.9001 [Statement of qualification] is found in Part II [Revised Uniform Partnership Act] of Chapter 620 [Partnership Laws] as opposed to Part I [Florida Revised Uniform Limited Partnership Act of 2005]. The significance of this distinction is essentially that under Florida law a limited liability partnership is a general partnership that limits the liabilities of its general partners rather than a limited partnership that limits the liabilities of its limited partners.

[102] The Treasury Department certainly tried to provide some guidance for a more up to date definition of a limited partner for purposes of the self-employment tax in Prop. Treas. Reg. § 1.1402(a)-2(h)(*2*), which must be read in conjunction with (h)(3 through 6): (2) Limited partner. An individual is treated as a limited partner under this paragraph (h)(2) unless the individual— (i) Has personal liability (as defined in §301.7701-3(b)(2)(ii) of this chapter for the debts of or claims against the partnership by reason of being a partner; (ii) Has authority (under the law of the jurisdiction in which the partnership is formed) to contract on behalf of the partnership; or (iii) Participates in the partnership's trade or business for more than 500 hours during the partnership's taxable year. However, the Congress, in § 935 of the Taxpayer Relief Act of 1997, provided that "no temporary or final regulation can be issued or made effective by the Internal Revenue Service on the definition of a limited partner under I.R.C. § 1402(a)(13) before July 1, 1998." It is fair to say that "next Sukkoth" has come and gone more than once as one awaits Congressional action as the "Sense of the Senate" provision, included in its own version of the 1997 legislation, stated that the Senate believed that "Prop Reg. 1.1402(a)-2 exceeded IRS's regulatory authority and would effectively change the law administratively without Congressional action."

(c) ***Nature of Appellate Jurisdiction:*** More than one practitioner of the author's acquaintance has remarked that the two United State Supreme Court decisions[103] that extended the holding in *General Utilities & Operating Co. v. Helvering*[104], a non-liquidating distribution of appreciated property in kind, to two cases of corporate liquidation, seemed to be irreconcilable as the earlier case favored the government while the latter one permitted the taxpayer to prevail, both decisions involving the sale of corporate assets in the context of an entity liquidation. Factually, the question revolved about the identity of the seller of the corporate assets, that is, whether the corporation itself was the seller followed by the distribution of the sales proceeds, or, rather, the corporate assets were distributed in kind followed by a sale of those assets by the shareholders of the corporation.

The identity of the actual seller, whether it is the liquidating corporation or the shareholders of such corporation, is fundamentally a question of fact. As long as there is adequate evidence to support the findings of the trial court on that factual issue, the appellate court, exercising its jurisdiction with respect to questions of law, will not disturb such factual determinations. Associate Justice Black, signing both opinions without one dissenting justice, stated quite simply: "It is for the trial court, upon consideration of an entire transaction, to determine the factual category [corporate seller or shareholder seller] in which a particular transaction belongs. Here as in the *Court Holding Co.* case we accept the ultimate findings of fact of the trial tribunal."[105] Consequently, both cases are clearly reconcilable as the contrary ultimate factual determinations, the identity of the seller, were supported by the evidence contained in the trial court's records and thus could not be disturbed by a higher court exercising its appellate jurisdiction over questions of law.[106]

(d) ***"Clearly erroneous":*** Referring again to the definition of a "mixed question of law and fact" found in the last paragraph of 3(a) above, the reader may wonder what relevance the "clearly erroneous" standard may have in distinguishing questions of law from questions of fact in determining the limits of appellate jurisdiction. "The [clearly-erroneous] standard of review [is what] an appellate court usually applies in judging a trial court's treatment of factual issues. Under this standard, a judgment is reversible [as a matter of law] if the appellate court is left with the firm conviction that an error has been committed [by the trier of fact]."[107] Noting that reasonable triers of fact may differ

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[103] *C.I.R. v. Court Holding Co.,* 324 U.S. 331 (1945); *United States v. Cumberland Public Service Co.,* 338 U.S. 451 (1950)

[104] 296 U.S. 200 (1935)

[105] *Cumberland Public Service Co. at 456*

[106] Footnote 33 is indeed accurate: "Like its predecessors, this [5th] edition of our [Bittker & Eustice] treatise is dedicated to Gerald L. Wallace. More than 40 years ago, in one of his rare excursions into print, Gerry expressed doubt about the *General Utilities* doctrine, whose belated demise [repeal by the Tax Reform Act of 1986] is reflected in almost every chapter of this revision."

[107] *Black's Law Dictionary as referred to in* footnote 89. Or as stated by the United States Supreme Court: "Review under the clearly erroneous standard is significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed.' Concrete v. Const. Laborers, 113 S.Ct. 2264, 80 (1993). 'Thus, an appellate court must accept the lower court's findings of fact unless upon review the appellate court is left with

by reaching diametrically opposed factual determinations from the same evidentiary record, the writer has typically defined the clearly erroneous standard in a somewhat different fashion: "An appellate court may overturn a factual determination predicated on the evidentiary record of the trial court below, if such court believes that no reasonable trier could have made such a factual determination based on such a record." In essence the lack of a minimal evidentiary record could convert what normally would be a question of fact into a question of law.[108]

(e) ***The Golsen Rule:*** While it is well known that a particular federal district court is bound by the prior decisions of the United States Court of Appeals whose geographical area encompasses the location of that particular district court, the same principal applies to the United States Tax Court. The Tax Court and the federal district courts, as trial courts, are courts of original as opposed to appellate jurisdiction. The former, however, has a geographical jurisdiction that is nationwide. Despite that difference, *Golsen v. C.I.R.*[109] is cited for the proposition that, despite a prior decision of the Tax Court to the contrary, the Tax Court will adhere to the decisional law of the circuit court to which an appeal will lie.[110]

4. Miscellany (a) ***Beneficiary of Simple Trust in Year of Death:*** The two tax professionals on the conference call spoke of the allocation of the distributable net income of the simple trust to the decedent's final individual income tax return. In the hidden recesses

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the definite and firm conviction that a mistake has been committed.' Sawyer v. Whitley, 112 S.Ct. 2514, 22, n.14 (1992). 'If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" Anderson v. Bessemer, 470 U.S. 564, 73-4 (1985).

[108] The writer is reminded of Associate Justice Blackmun's decision in *United States v. Generes,* 405 U.S. 93, 107, in which the taxpayer had asserted in the trial court that his indemnification of his corporation's bonding company for $162,000 constituted a fully deductible business bad debt loss as the shareholder/taxpayer attempted to protect the continuance of his $12,000-a-year employment with his corporation: " We conclude on these facts that the taxpayer's explanation falls of its own weight, and that ***reasonable minds could not ascribe, on this record, a dominant motivation directed to the preservation of the taxpayer's salary*** as president of Kelly-Generes Construction Co. Inc." Accordingly, the case was not just simply reversed and remanded to the lower court for proceedings not inconsistent with its opinion, but rather the Supreme Court directed that judgment be entered for the United States. (Emphasis added.)

[109] 54 T.C. 742 (1970), aff'd 445 F.2d 985 (10th Cir. 1971)

[110] Of what significance is the Golsen rule in Florida, Georgia and Alabama (the 11th Circuit of the United States Court of Appeals), after the decision in *Selfe v. United States,* 778 F.2d 769 (11th Cir. 1986) if an S shareholder contends that the bank lender to the S corporation looked solely to the S shareholder for repayment of the loan? "The Eleventh Circuit, however, says that even if a transaction takes the form of a loan to the S corporation and a guarantee of that loan by the shareholder, the shareholder's basis will be increased if the facts show that, in substance, the shareholder borrowed the funds and then advanced them to the corporation. While admitting that taxpayers, rarely, if ever have been able to show that the substance of the transaction was different than the form, the court said that this did not mean that such a claim could never be proven. A shareholder's guarantee of a loan could be treated for tax purposes as an equity investment in the corporation if: ... the creditor looked primarily to the shareholder as the primary obligor, and ... the notes were issued by a thinly capitalized corporation, and ... the notes had more equity characteristics than debt characteristics." RIA Federal Tax Coordinator 2d, D-1776. Note that the 11th Circuit Court of Appeals reversed the federal district in northern Alabama, which had granted the government's motion for summary judgment. Thus the preceding secondary material of the Federal Tax Coordinator 2d is correct in that the issue raised by the taxpayer had to be resolved by an evidentiary trial below.

of the writer's mind an old existing treasury regulation had not been read.[111] The ancient regulation, promulgated shortly after the birth of the Internal Revenue Code of 1954 (12/19/56), caused all of the income undistributed prior to death to be included on the initial fiduciary income tax return of the estate.[112] If this paragraph appears to be more than a mite repetitious of footnote 86 above, then the writer is gratified to learn that he has not yet lost his reader.

(b) ***Income Tax Imposed on Estates and Trusts:*** The statutory language of I.R.C. § 641(a)(2)(second part)[113] seems quite explicit, but its directive seems to conflict with actual practice, as the office would only prepare an individual income tax return for the guardian's ward, never a fiduciary income tax return for the guardianship itself as if a separate entity existed. But Boris Bittker, the supreme secondary authority, has an explanation:

> "Although § 641(a)(2) treats 'income collected by a guardian of an infant which is to be held or distributed as the court may direct' as trust income, it is well established that the quasitrust relationship imposed on parents as natural guardians of their children's property does not create a trust for tax purposes.[114] A guardian or other person having charge of a minor's property may be obliged to file a return, but it is the child's return, not a trust return subject to the rules of subchapter J, and hence it must include all the minor's income.
>
> "These results have been achieved more by tacit agreement than by explicit construction of statutory provisions. Looking at the matter without the benefit of administrative practice, one might interpret § 641(a) to require a guardian to file a fiduciary return….Thus, while at common law a guardianship is 'a trust of the most sacred character,' the Code does not accord it the same honor."[115]

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[111] Treas. Reg. § 1.652(c)-2(third and fourth sentences): The gross income for the last taxable year of a beneficiary on the cash basis includes only income actually distributed to the beneficiary before his death. Income required to be distributed, but in fact distributed to his estate, is included in the gross income of the estate as income in respect of a decedent under section 691.

[112] One simply never knows when the treasury regulations interpreting subchapter J [Estates, Trusts, Beneficiaries, and Decedents], read between watches on an oceangoing minesweeper cruise to Halifax, Nova Scotia, will resurface.

[113] § 641 Imposition of tax.

(a) Application of tax.
The tax imposed by section 1(e) shall apply *to the taxable income of estates or of any kind of property held in trust, including—*
(2) income which is to be distributed currently by the fiduciary to the beneficiaries, ***and income collected by a guardian of an infant which is to be held or distributed as the court may direct.*** (Emphasis added.)

[114] See Reg. § 1.6012-1(a)(4) ("A minor is subject to the same requirements and elections for making returns of income as are other individuals.")

[115] ¶ 82.4.3 (Guardians, Parents, and Custodians of Minor Children)(first and part of second paragraph), F*ederal Taxation of Income, Estates and Gifts,* 3rd Ed., Boris I. Bittker & Lawrence Lokken, Warren, Gorham & Lamont (2003)

Hopefully, the above excerpt will encourage the reader to purchase tax treatises of such high quality.

(c) ***Circular 230:***[116] While the subject document of twenty-five pages (including proposed changes) appears at the end of the fifth volume of Research Institute of America's treasury regulations, just preceding the proposed regulations that complete that volume, the document is promulgated under Title 31[117] of the statutory codification, the United States Code, and the Code of Federal Regulations [Money and Finance: Treasury][118] The omnipresent warning, presumably based on § 10.35 (Requirements for covered opinions), reads somewhat as the following: ***Circular 230 Disclosure:*** *To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used , and cannot be used, for the purposes of avoiding penalties under the Internal Revenue Code or promoting, marketing or recommending to another party any transaction or matter addressed herein. This advice may not be forwarded (other than within the taxpayer to which it has been sent) without our express written consent.*

Rhetorically, putting on one's layman's hat, without the benefit of advice from learned malpractice insurance carrier counsel, what should be the salutary effect of the immediately preceding disclosure if it appears on absolutely every single e-mail emanating from one's computer?[119] While the office kitchen's bulletin board cautions all employees not to transmit any e-mail correspondence that would not meet the approbation of their respective mothers,

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[116] Treasury Department Circular No. 230 (Rev. 4-2008) Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, Enrolled Retirement Plan Agents, and Appraisers before the Internal Revenue Service

[117] Not Title 26, the Internal Revenue Code

[118] The circular contains Part 10 [Practice Before the Internal Revenue Service] of Subtitle A [Office of the Secretary of the Treasury] of Title 31.

[119] It is assumed that the question raised above has no relationship (or does it?) to the following testimonial repartee in a malpractice lawsuit for failure to execute a last will and testament properly:

Plaintiff's Counsel: Ma'am, do you specifically remember the manner in which the decedent's last will and testament was executed.

Defendant Witness: No, sir, I do not have such a specific recollection of the execution of decedent's last will and testament.

Plaintiff's Counsel: Then how are you able to testify that the decedent's last will and testament was, in fact, executed in a manner that satisfies the statutory provision in our state's probate code?

Defendant Witness: All last wills and testament executed by prospective decedents in our law offices are executed in a manner prescribed by an office standard operating procedure that matches the statutory requirements precisely. Thus, in the case of hundreds of such formal executions, I would be able remember and would be able to testify to the occurrence of any deviation from that standard operating procedure.

such a standard presumably does not call for the attachment of the circular 230 disclosure to all e-mail correspondence, whether tax related or not.[120]

(d) ***Tax Research the Tax Software Way:*** Unsubstantiated rumor has it that some tax practitioners do not hesitate to run their tax software through its paces during the relatively short but intensive "tax season" if adequate time is not available to do necessary tax research the good old-fashioned way. Admittedly, the federal individual income tax return, with its multitudinous forms, schedules, and worksheets, does provide a pictorial presentation, if one will, of the interrelationships between Internal Revenue Code provisions enacted by the Tax Reform Act of 1986. The apportionment of the suspended passive activity losses of sixteen limited partnerships and the effect that such temporary (for the current year) disallowances may have on the depreciation adjustment in the alternative minimum tax calculation certainly may be grasped with greater understanding by viewing the pages that come "trippingly off" the Hewlett Packard laser printer than might otherwise be gained by a third reading of the pertinent statutory provisions. There is no question that a careful review of the output of one's software may very well lead to a better understanding of the federal tax law. But a practitioner, assuming mastery of her tax software, perfection of all data input, and solid comprehension of tax law principles in general to the exclusion of the tax issue under consideration, who utilizes the tax software to provide the tax research solution, proceeds at her own peril.

(e) ***Tax Research Mired in Federalism's Swamp:*** Federal law as a general matter is superior to and overrides any state's law that may be in conflict with it.[121] Nevertheless, in interpreting the federal law of taxation as contained in the Internal Revenue Code, more frequently than one might suspect, it may be necessary to resolve an issue of state law before the particular federal tax controversy may be properly resolved[122]. For the diligent reader the

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[120] The author remembers fondly the daily recitation of the Pledge of Allegiance every single morning before classes began at Stuyvesant High School every single school day for almost three years from September 1956 through June 1959. He also remembers the student refrain that occasionally would follow the final words of "…and justice for all." Those added words were: "Cha, cha, cha." The New York Times reported that Frank McCourt, who taught English at Stuyvesant High School for fifteen years, died Sunday, July 19, 2009 [The Storyteller Begat the Teacher Who Begat the Writer]

[121] Article VI, clause [2] of the United States Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Now review the language of I.R.C. § 7852(d)[Treaty obligations](1)("In general. For purposes of determining the relationship between a provision of a treaty and any law of the United States affecting revenue, neither the treaty nor the law shall have preferential status by reason of its being a treaty or law."). Professor Doernberg (see "nutshell" footnote 25, supra) states that "[t]he domestic later-in-time rule often leads to a violation of international law", citing the first sentence of Article 27 of the Vienna Convention on the Law of Treaties [1969]: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Professor Tribe, a major participant in one of Florida's memorable federalism contests, in his treatise on *American Constitutional Law,* cites *Whitney v. Robertson,* 124 U.S. 190, 194 (1888) for the proposition that "treating acts of Congress and treaties as legal equivalents, [the Supreme Court] has held that, when a conflict arises between a valid treaty and a valid act of Congress, 'the last expression of the sovereign will must control.'"

author cites seven court cases in the footnote below to illustrate the process by which this aspect of federal tax research may be conducted.[123] As fascinating as this aspect of federal tax research may or may not be, given the time constraints for transmission of these materials to Tallahassee, and not desiring to "reinvent the exposition" one more once, the author is content to allow the materials accompanying his oral presentation in Orlando almost six years ago, speak for him one more time[124]:

A—IMPORTANCE OF STATE LAW IN FEDERAL TAX CONTROVERSIES[125]

Now the time has come to move more aggressively into the mind-numbing thicket of the federal tax law with the idea of illustrating the "brooding omnipresence"[126] of federalism. Harking back to the opening paragraph's comment on the accountant's role in federal tax compliance and planning, the author postulates, perhaps in self-deception, that most accountants would acknowledge that their participation in the federal tax process necessarily requires them to routinely resolve questions of tax law.[127] However, I also believe that only a few fully appreciate the extent to which the resolution of federal tax issues is so heavily dependent at times on a

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[122] As a 39-year resident of the state of Florida, the writer had a front row seat to two battles in the federalism arena: "It is fair to say that the good citizens of South Florida, in the summer and fall of the first year of the millennium, received an unsolicited civics lesson on the essence of federalism. One: Agents of the Immigration and Naturalization Service (of the Justice Department) seized Elian Gonzalez in the early morning hours of April 22, 2000. Two: The United States Supreme Court held that the Florida Supreme Court's order for a manual recount of the ballots cast by Floridians in the presidential election would be violative of the equal protection clause of the fourteenth amendment to the United States constitution. Some would assert that the opaque theories of historians, political scientists, and lawyers have become grist to federalism's mill." Footnote 162 to the author's *The Indispensable Role of State Law in Resolving Federal Tax Questions: One Aspect of Federalism.*

[123] *Drye v. United States,* 120 S. Ct. 474 (1999); *United States v. Craft,* 122 S. Ct. 1414 (2002); *Boggs v. Boggs,* 520 U.S. 833 (1997); *Deutsch v. C.I.R.,* 197 T.C.M. (R.I.A.) ¶ 97470; *Guaranty Trust Co. v. York,* 326 U.S. 99 (1945); *Estate of Delaune v. United States,* 143 F. 3d 995 (5th Cir. 1998); and *Kerr v. C.I.R.,* 292 F. 3d 490 (5th Cir. 2002). The *Delaune* case in the preceding list has both a local and international flavor as expressed in the words of Judge Jolly: "This case will demonstrate how, under the Louisiana Law Civil, the past is not dead; how the past will not die; and how, indeed, the past is not even past." And again: "[W]hen he to whom a succession has fallen has died without having repudiated it or without having accepted it expressly or tacitly, his heirs may accept it or repudiate it under his authority." En francais: "Lorsque celui a qui une succession est echue, est decede sans l'avoir repudiee ou sans l'avoir acceptee expressement ou tacitement, ses heritiers peuvent l'accepter ou la repudier de son chef."

[124] Once *Narrowing The Nation's Power* by John T. Noonan, Jr. [senior judge of the United States Court of Appeals for the Ninth Circuit], University of California Press (2002) and *The Age of Federalism: The Early American Republic, 1788 – 1800,* by Professors Stanley Elkins & Eric McKitrick, Oxford University Press (1993) have been fully digested, it will be time enough to resume the search for decisional law, primarily in the tax field, that exemplify the intricate interplay between federal and state law.

[125] A classic law review article by Professors Stephens and Freeland heavily influenced this portion of the exposition: *The Role of Local Law and Local Adjudication in Federal Tax Controversies,* 46 Minn. L. Rev. 223 (1961).

[126] The phrase is appropriated from a footnote in Professor Tribe's discussion of *Swift's* critics; only the reference was to the common law.

[127] An uncooperative payroll department of a state utility company refused to verify in advance whether a large qualified plan distribution constituted a lump-sum distribution eligible for favorable ten-year "forward averaging" treatment. "We do not render legal opinions." "Very well. Let us reword the question. On or before January 31 of next year when the corporate employer issues the mandatory Form 1099R, what letter, if any, will the issuer enter in box 7 of such form."

determination of underlying state law issues.[128] After decades steeped in federalism[129] that statement seems innocent enough. But here's the Shakespearean "rub".[130] Fifty independent laboratories percolating different versions of state law is a thing to behold. One perhaps may state with some certainty that the citizens of these several states would like to have a federal tax law that applies uniformly throughout these United States. So the question then becomes, in interpreting the Internal Revenue Code, when did Congress prefer uniformity and preempt the subject, and when did it choose to let federalism run rampant by allowing state law to determine the incidence of a federal tax?

The structure of federalism embodied in the nation's constitution is founded upon a central government possessing certain enumerated powers contained in section 8 of Article I. While the list is not terribly short and includes some fairly extensive powers, the federal government is clearly one of limited powers as so enumerated.[131] Amendment X, as subsequently adopted shortly thereafter, again emphasizes that the great residual law making function remains with the several States.[132] Thus it surely comes as no surprise that the words of a federal taxing statute, a statute capable of invading almost any endeavor that humans pursue, absent a specific definition found in such statute itself, will require an interpretation derived from state law. The ultimate question, of course, is when such state law must be resorted to in order to properly apply it in the manner that Congress intended.

A good starting point is the terribly succinct statement made by Justice Roberts in *Morgan v. C.I.R.*[133]: "State law creates legal interests and rights. The federal revenue acts designate what

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[128] Despite the protestations made in footnote 6, the reader is referred to an excellent article by Dr. James R. Hamill entitled *CPAs and the Unauthorized Practice of Law,* The CPA Journal (August 1998) where the author, discussing the historical anachronism found in I.R.C. 1014(b)(6) for "stepping up" the entire basis of community property in the hands of a surviving spouse, states that "[t]he determination of community property is a strictly legal issue, albeit one with tax consequences, and must be resolved by an attorney." The author respectfully disagrees. First, the practice of federal tax law necessarily involves the resolution of state law issues on a frequently occurring basis. Second, it moves to the ludicrous to suggest that a non-lawyer accountant may investigate the most excruciatingly complex concepts of the federal tax law in the legislative regulations governing the preparation of consolidated income tax returns following a tax-free reorganization that constitutes an equity structure shift resulting in a change of ownership causing a reduction in the utilization of the net operating loss carryforward attribute, but must step aside if a client professes not to know whether her common law marriage qualifies for the filing of a joint individual income tax return. Third, permit Stanley Kowalski (an immortal character created by Tennessee Williams in his classic play, *A Streetcar Named Desire*) to speak for the laity: "I'll wait till [Blanche DuBois] gets through soaking in a hot tub and then I'll inquire if *she* is acquainted with the Napoleonic code. It looks to me like you have been swindled, baby, and when you're swindled under the Napoleonic code I'm swindled *too.* And I don't like to be *swindled*…. There is such a thing in this state of Louisiana as the Napoleonic code, according to which whatever belongs to my wife is also mine—and vice versa." This time the repetition of the immediately preceding opinion is intentionally done for emphasis.

[129] After 35 years *Hart and Wechsler's The Federal Courts and The Federal System, 5th edition* (Fallon, Meltzer & Shapiro 2003) again rests comfortably in the writer's *Soliman-like* office in the home law library.

[130] *Hamlet,* Act 3, scene 1, line 66. How many representatives, unsuccessful in the House Way and Means Committee, have resorted to a soliloquy on the House floor to inject a little Congressional intent into the federal tax statute?

[131] The last clause, number 18, containing the "necessary and proper" phrase, aids in the expansion of such limited powers.

[132] Some constitutional commentators would, casting aspersion on the efficacy of the amendment, say that the provision states nothing of consequence as it merely expresses a "truism". At this very moment [2003], Chief Justice Roy Moore of the Alabama Supreme Court is testing the efficacy of Article VI's supremacy clause somewhat reminiscent of another day of defiance at the "doors to the schoolhouse" of the University of Alabama in 1963. Governor George Corley Wallace said: "Segregation now! Segregation tomorrow! Segregation forever!"

[133] 309 U.S. 78 (1940). The importance of that statement warrants its repetition.

interests or rights, so created, shall be taxed." Such a statement should not lead to the conclusion that the resolution of federal tax controversies would be entirely dependent on state law pronouncements. The Supreme Court recognized the delicate part that such state law plays by stating further: "Our duty is to ascertain the meaning of the words used to specify the thing taxed. If it found in a given case that an interest or right created by local law was the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law." Six of the Court's prior opinions are cited to support these pithy but accurate statements, including *Lyeth v. Hoey.*[134] The latter Supreme Court case dealt with the income tax treatment received by a Massachusetts heir's challenge to his ancestor's will. The taxpayer received property as a result of a compromise to litigation approved by the local probate court. The federal tax issue concerned the availability of an exemption for an inheritance under the income tax statute. As noted earlier in this paper, the meaning of the words found in a federal tax statute enacted by Congress is always a federal question. To what extent, however, should such meaning be dependent upon state law? Clearly the federal taxing statute does not determine the status of a plaintiff as an heir. Such status is determined by resort to that great repository of state law envisioned under our federal system with so ever a gentle reminder from the axiomatic statement contained within the Constitution's 10th amendment. The mere fact that the taxpayer had standing to challenge the decedent's last will and testament on the grounds of lack of testamentary capacity and undue influence clearly demonstrates the status of such litigant under state law. Once that essential legal conclusion was established by such law, the characterization of the heir's law suit by compromise in settlement of the litigation as not constituting an inheritance under that same state law is irrelevant in determining the availability of the income tax exemption for an inheritance under the federal tax law. The characterization of the compromise by the Massachusetts courts was rejected once the one issue of status, determinable solely by state law, had been resolved.[135]

B—EXPLICIT REFERENCE TO STATE LAW

The question remains, however, under which circumstances are resort to state law required for the resolution of federal tax controversies. What are some of the controlling criteria? This question has a multifaceted response. An initial answer focuses on whether the federal tax statute makes an explicit reference to state law. Such a reference is the exception, not the usual situation, but the Internal Revenue Code has illustrations of such definitive cross-references. It is rare but occasionally it happens. Congress explicitly provides in the federal tax provision that state law controls. For example, one is entitled to a dependency exemption for an unrelated individual who was a member of the taxpayer's household unless "the relationship between such

[134] 305 U.S. 188, 193 (1938)

[135] The author was alerted to a more recent case that demonstrates a heavy reliance on state concepts of property law. In *Estate of Forrest*, TC Memo 1990-464, the Tax Court looked to Texas law to determine whether the decedent was a life tenant whose interest expired at death or a fee simple owner, requiring inclusion in the federal gross estate. The deed from the decedent's grandparents contained the following language: "…with remainder over, as to …said grandso[n], to [his] respective bodily heirs…." The technical property question under Texas law was the applicability of the Rule in Shelley's Case which states that the phrase "bodily heirs" are words of purchase as opposed to limitation, i.e., the remainder interest is a future interest of the decedent's children rather than an expression implying a long line of succession by an indefinite reference to "the whole line of heirs". Confessedly, this particular case's appeal to the author's fancy is attributable to a Proustian memory of Professor Means' property lectures of a time so long ago that the memory of man "goeth back not that far".

individual and the taxpayer is in violation of local law."[136] Presumably a state criminal statute penalizing fornication would prevent utilization of the deduction. However, would an arbitrary exercise of state prosecutorial discretion raise a federal constitutional issue of due process if an indictment under the state's penal law had not been sought since the last century? Could the heavier federal constitutional consideration be avoided by resorting to a possible state law doctrine of desuetude?[137] Has the hard working reader been following the bouncing federal/state ball?

A better illustration of such explicitness may be found in subchapter J (Estates, Trusts, Beneficiaries, and Decedents[138]) of subtitle A (Income Taxes), specifically section 643(b). Here, the Internal Revenue Code defines plain vanilla, garden variety "income" in the following manner: "For purposes of this subpart and subparts B, C, and D, the term 'income', when not preceded by the words 'taxable', 'distributable net', 'undistributed net', or 'gross', means the amount of income of the estate or trust for the taxable year determined under the terms of the governing instrument and ***applicable local law*** (emphasis added)."[139] And what pray tell did the State of Florida[140] have to say about that. Florida's former version of the Revised Uniform Principal and Income Act[141] provided in Section 738.02(1) priority to the instrument, the statute, and equity in that order. Assume the narrow issue requiring resolution concerns the availability of the depreciation deduction for fiduciary accounting purposes. Referring the reader to the footnotes for relevant authority, here is the somewhat labyrinthine argument. For federal tax purposes the taxable income of a trust is determined in the same manner as in the case of an individual except as modified by part I of subchapter J.[142] A trust shall be allowed a depreciation deduction at the entity level to the extent not allowable to beneficiaries under I.R.C. §167(d).

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[136] I.R.C. §152(b)(5) (1986). Congress loves morality. A more recent example, a product of the Taxpayer Relief Act of 1997, as enacted in new I.R.C. §25A, is denial of the Hope Scholarship Credit if the scholar is "convicted of a felony drug offense." See I.R.C. 25A(b)(2)(D). The companion Lifetime Learning Credit has no such limitation. Congressional intent in the ever-popular morality play? Drug use by un étudiant vieux is more socially acceptable.

[137] See Justices Frankfurter's and Douglas' opinions in *Poe v. Ullman,* 367 U.S. 497 (1961), which preceded *Griswold v. Connecticut,* 381 U.S. 479 (1965). In footnote 3 of the latter's dissenting opinion regarding the non-justiciability expressed in the former's plurality decision of the Supreme Court, Justice Douglas quotes T. F. Plucknett's *Concise History of the Common Law* (5th ed. 1956), pp 337-338: "On the continent there was some speculation during the middle ages as to whether a law could become inoperative through long-continued desuetude. In England, however, the idea of prescription and the acquisition or loss of rights merely by the lapse of a particular length of time found little favour….There was consequently no room for any theory that statutes might become obsolete." On the "economist's other hand", however, Lon L. Fuller (author of the writer's missing case book on contracts) has put the matter in a somewhat different manner: "[T]he doctrine of desuetude has had in all legal systems a very limited and cautious application. For the anachronistic statute a better remedy may be found through reinterpretation in the light of the new conditions, as [John Chipman] Gray [author of the classic treatise on *The Rule Against Perpetuities*] remarks with some irony: 'It is not as speedy or as simple a process to interpret a statute out of existence as to repeal it, but with time and patient skill it can often be done.'" Definition found in *Black's Law Dictionary* extracting the preceding quotation from Professor Fuller's *Anatomy of the Law,* 38 (1968) (quoting from Professor Gray's *The Nature and Sources of Law,* 192 (1921)).

[138] An area heavily "freighted" with locally provincial concerns.

[139] I.R.C. §643(b). Occasionally a tax preparer (usually an accountant) attempts to prepare a fiduciary income tax return without examining the last will and testament or the trust agreement. Now there is the making of a malpractice special.

[140] The author has practiced accounting and law in the State of Florida since leaving the United States Navy on August 3, 1970.

[141] The new Florida Uniform Principal and Income Act, effective January 1, 2003, will be referred to shortly.

[142] I.R.C. §641(b). Most of the differences are contained in I.R.C. §642.

That subsection states that the depreciation deduction follows the income (in the state fiduciary principal and income accounting sense) in order not to waste such deduction at the entity level to the extent the trust receives a deduction for distribution to beneficiaries, unless the governing instrument creating the trust provides otherwise. Assume that the trust agreement is silent on the issue but the trustee has consistently, on an annual basis, established a depreciation reserve for rental real estate transferred into the trust prior to January 1, 1976[143] Under state law a reasonable reserve for depreciation deducted at the trust level will reduce fiduciary accounting income that is distributable and potentially taxable to the beneficiaries.

More recently, in the context of the delicate balance of federalism, the Treasury Department has responded to the modification of state law concerning accounting for principal and income. The Revised Uniform Principal and Income Act (1997) has been adopted in a majority of the states. Through two provisions, one to permit a trustee the power to adjust between principal and income[144] and a second to permit a total return unitrust, state fiduciary accounting now adopts the total positive return investment strategy (arithmetic sum of ordinary dividend and interest income and capital gains appreciation) under a statutory prudent investor standard. It is not surprising, therefore, that Prop. Reg. §1.643(b)-1[145] was promulgated in the Federal Register on February 15, 2001. Having expressly adopted state law decades ago in this area of federal income tax law, any change in such state law must naturally produce a concomitant change in such federal tax law.

C—By NECESSARY IMPLICATION

[143] Florida Statutes Section 738.13(1)(b) (prior to 01/01/03). If the rental real estate operation were considered a trade or business operated by a sole proprietor or partner, section 738.08(1) would also have required a depreciation charge against accounting income.

[144] One cannot help but be reminded of the medieval and renaissance search for the transmutation of the baser metals (lead, for example) into gold.

[145] The proposal became final by virtue of Treasury Decision 9102, promulgated on December 30, 2003: "…However, an allocation of amounts between income and principal pursuant to applicable local law will be respected if local law provides for a reasonable apportionment between the income and remainder beneficiaries of the total return of the trust for the year, including ordinary and tax-exempt income, capital gains, and appreciation. For example, a state statute providing that income is a unitrust amount of no less than 3% and no more than 5% of the fair market value of the trust assets, whether determined annually or averaged on a multiple year basis, is a reasonable apportionment of the total return of the trust. Similarly, a state statute that permits the trustee to make adjustments between income and principal to fulfill the trustee's duty of impartiality between the income and remainder beneficiaries is generally a reasonable apportionment of the total return of the trust. Generally, these adjustments are permitted by state statutes when the trustee invests and manages the trust assets under the state's prudent investor standard, the trust describes the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee after applying the state statutory rules regarding the allocation of receipts and disbursements to income and principal, is unable to administer the trust impartially. Allocations pursuant to methods prescribed by such state statutes for apportioning the total return of a trust between income and principal will be respected regardless of whether the trust provides that the income must be distributed to one or more beneficiaries or may be accumulated in whole or in part, and regardless of which alternate permitted method is actually used, provided the trust complies with all requirements of the state statute for switching methods…"

Noting that explicit reference to state law is the exception rather than the rule, what second rule guides the relevancy of underlying state law to resolve federal tax controversies? At first the answer almost seems simplistically obvious. Remembering the nature of our federal system, in a part of the legal fabric left to the states with no federal intrusion, it would seem that the relevance of state law as the controlling factor occurs by necessary implication. Having thus stated the obvious, the inherent nature of federal law, be it tax legislation or some other federal bailiwick such as bankruptcy, foreign commerce, immigration, copyright, or national defense, demands its uniform application throughout the United States. It is this expectation of uniformity that places limits on allowing the determination of state law as an underlying issue to control the application of federal tax law. The expression "necessary implication" appears in *Burnet v. Harmel,* 287 U.S. 107 (1932). That particular case involved the issue of whether the receipt of a bonus payment under gas and oil leases will gave rise to a capital gain. Such characterization of the taxable amount was dependent on the existence of a sale or exchange. Texas law, as applied to the bonus payment, operated "immediately upon its execution to pass the title of the oil and gas" rather than at the subsequent time of severance. The court posed the present issue in the following language: "[I]n the absence of language evidencing a different purpose, [the federal statute] is to be interpreted so as to give a uniform application to a nation-wide scheme of taxation…. State law may control only when the operation of the federal taxing act, by express language or ***necessary implication*** (emphasis added) makes its own operation dependent upon state law." The court held that the state law was not determinative of the federal tax controversy because regardless of state characterization, Congress' desire to give more favorable tax treatment to long term capital investments was not implicated by any discernible difference between payments of royalties or bonus payments, whether title to the underlying mineral changed on consummation of the agreement or severance of such mineral from the property subject to exploration.[146]

Freuler v Helvering[147] is a good example clarifying this concept of "necessary implication." In that case the trustee, while failing to reduce income distributable to the beneficiaries by a depreciation charge, had reduced the entity's taxable income by such a charge. Both state law and the governing instrument were silent on the issue. A California court, in a trust accounting proceeding, determined that the amounts distributable during a quarter of a century should have been reduced by depreciation, and, accordingly, the life income beneficiaries had received excessive distributions in the amount of $622,440.90, which, by agreement of all the parties to the litigation, was payable with promissory notes accruing no interest payable at the termination of the trust to whoever should be the remaindermen at that point in time. The case stands for the proposition that nothing in the federal tax statute purports to ascertain the amounts properly

[146] A case of somewhat more recent vintage, *Corn Products Refining Co. v. C.I.R.,* 350 U.S. 46 (1955), discussed the quality of income in hedging transactions designed to insure both the price and quantity of corn inventory. The court, citing the *Harmel* case with approval, stated that everyday transactions were not intended to generate favorable capital gains. While *Corn Products* did not concern a possibly determinative state law issue, the case surely stands for the proposition that the meaning of a federal tax statute is essentially a federal tax question that presumptively requires uniform application throughout the country.

[147] 291 U.S. 35 (1934)

distributable to the income beneficiaries. That of necessity is determinable under state law as enunciated in the trust accounting proceeding in the local court.[148]

Another Supreme Court decision, *Blair v. C.I.R.,*[149] states that the validity of an assignment of a life tenant's interest in a testamentary trust was a question of state law.[150] Whether such an equitable interest in property was not assignable in the case of a spendthrift trust had to be determined under the law of Illinois. "To derogate from the authority of that conclusion [reached by an intermediate state appellate court] and of the decree it commanded, so far as the question is one of state law, would be wholly unwarranted in the exercise of federal jurisdiction."[151] The court properly distinguished this initial issue from the one that naturally follows from the determinative state conclusion on the validity of the assignment, namely, will a valid assignment permit the shifting of the incidence of the federal income tax. That second question, involving the meaning of the federal taxing statute, remains a federal question.[152]

Perhaps one more and relatively simple illustration of the concept of "by necessary implication" is appropriate prior to exploring the final part of this rather extended "preamble". If one as a taxpayer has survived numerous tax preparation sessions with the author, such taxpayer comes bearing some computer-generated label. So it is not necessary to ascertain the taxpayer's name, address, and social security number. Typically, the next question[153] concerns filing status. Is the taxpayer married? Most taxpayers do not hesitate in responding to that deceptively simple interrogatory. Given the pertinent facts, where does the answer to this legal question repose? State law (statutory or case law) or the "Good Book"[154], all three thousand pages or so? While the Internal Revenue Code frequently refers to the marital state (as in married filing separately for applying many provisions) it really does not attempt to define the constituent elements of a valid marriage. That, by "necessary implication", in a federal system, is left to state law. So if the taxpayer and her partner have been co-habiting since July 4, 1967 without benefit of clergy or other official ceremony or state license, are they validly married? Is a common law marriage

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[148] A more recent case, following the reasoning of the Supreme Court in *Freuler,* reversed the Federal District Court's decision that had approved the government's motion for summary judgment. While an estate prior to receiving probate court approval had made distributions, such court's approval of the final accounting was itself to demonstrate that the amounts distributed to the beneficiaries were "properly paid" under the federal tax provision. The federal statute does not purport to determine the issue of propriety that is, of necessity, left to state law.

[149] 300 U.S. 5 (1937).

[150] *Lucas v. Earl,* 281 U.S. 111 (1930), involving an anticipatory assignment of income earned by the assignor ("sweated labor"), was not apposite.

[151] Supra footnote 149 at 7.

[152] *Blair* is cited favorably in *Meisner v. United States,* 133 F. 3d 654 (8th Cir. 1998), where the transfer of royalty rights associated with intellectual property in the context of a divorce was properly submitted to a jury as to whether the "fruit" or the "tree" itself was the subject of the assignment.

[153] If one follows the order prescribed on page 1 of the standard Form 1040 for the individual income tax return.

[154] Having lectured on a wide variety of federal subjects in 43 states and the District of Columbia, the author yearns for the day when every hotel room will provide not only the Bible from the Gideon Society and the Church of Jesus Christ of Latter-Day Saints, but also the most recent version of the Internal Revenue Code published by the Research Institute of America.

still recognized by the couple's state of residence?[155] Try it from the opposite perspective. If the wife "gets on board", without baggage, a train heading for Boise, Idaho, remains there for the requisite period of time to establish residency, and then returns to the Empire State after the Idaho court has exercised its jurisdiction in a divorce proceeding, has a valid divorce occurred? If the initial state court had jurisdiction, in the quasi in rem sense, then a court in a different state could not permit relitigation of the issue of the severance of the marital res. This result is not an application of general federalism, but is dictated by the full faith and credit clause of Article IV, section 1 of the Constitution. However, when a taxpayer resorts to a "quickie" holiday divorce in the Dominican Republic followed by remarriage to the same person in early January on returning to the mainland, the Internal Revenue Service has not felt compelled by the concept of comity to recognize the divorce. So much for reference to state law by necessary implication.

D—The "Penumbra"[156 & 158]

The last issue to be considered before an attempt is made to review a host of federal tax cases to see whether or not the foregoing principles in a federal system are observed is one that suggests that the "by necessary implication" principle does indeed have its limitations. Put more directly when will state law as the underlying determinant be ignored in favor of an overriding federal principle dictating the ultimate federal tax result? *Helvering v. Clifford*[159], in the context of a progressive income tax system, ignores the property interest of an income beneficiary in a short-term trust on the ground that to do otherwise would defeat the overall Congressional plan for a progressive income tax system. Needless to say the facts are an essential underpinning for a conclusion that ignores state law despite the federal system in which the tax law operates. In Justice Douglas' words: "The broad sweep of this [statutory] language indicates the purpose of Congress to use the full measure of its tax power within those definable categories…. Technical considerations, niceties of the law of trusts or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes should not obscure the basic issue. That issue is whether the grantor after the trust has been established may still be treated, under this statutory scheme as the owner of the corpus." The operative facts of the short five-year duration of the trust, the settlor's wife as the income beneficiary, and the husband's considerable control over the trust's corpus, all supported the legal conclusion that such taxpayer continued to

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[155] "No common-law marriage entered into after January 1, 1968 shall be valid, except that nothing contained in this section shall affect any marriage which, though otherwise defective, was entered into by the party asserting such marriage in good faith and in substantial compliance with this chapter." Florida Statutes Section 741.211 [History.—s. 1, ch. 67-571.]

[156] As stated previously in footnote 125 the analysis pursued here draws considerable inspiration from Professors Stephens and Freeland, who, with M. Carr Ferguson, produced a marvelous treatise on *Federal Income Taxation of Estates and Beneficiaries.* The last of the three authors is a former Assistant Secretary of the Treasury for Tax Policy who subsequently represented a shareholder of American Telephone & Telegraph, challenging an Internal Revenue Service determination that the famous corporate division (technically not a divisive type D reorganization) was partially taxable as it related to Pacific Telesis. See *Dunn Trust v. C.I.R.,* 86 T.C. 745 (1986).

Apparently footnote 157 is absent without leave.

[158] The expression brings to mind Justice Goldberg's concurring opinion in *Griswold v. Connecticut,* 381 U.S. 479 (1965): "In reaching the conclusion that the right of marital privacy is protected as being within the protected **penumbra** of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment…." (Emphasis added).

[159] 309 U.S. 331 (1940).

be the owner of the property producing the trust income. In the context of a single economic unit the Supreme Court could not hold as a matter of law that the "respondent ceased to be the owner of the corpus after the trust was created."[160]

Continuing application of the holding in *Clifford* is uncertain. Federalism and its influence on the federal tax law is not scientifically determinable science. An example of current relevancy in this huge legal reservoir may be found in today's political rhetoric: "The time has come to eliminate the marriage penalty." Now how could one be against such a noble objective? [161] And what does federalism have to do with such an irresistible political platform? "Return with us now to those thrilling days of yesteryear!" How about 1948? The warriors have returned and Goldie Hawn and the other factory surrogates have been told to go home. With rationing, double daylight savings, and lack of consumer goods, the home front was producing a store of taxable income requiring the implementation of the income tax withholding mechanism. "They said that the 'class tax' became a 'mass tax.'"[162]

In an earlier decision an opportunity to insure uniform application of a progressive income tax system with the concomitant rejection of state law as the conclusive determinant was rejected. The significance of the Supreme Court's holding in *Poe v. Seaborn*[163] now hits home in the proverbial pocket book. Despite the desirability of a uniform individual income tax for all of the then forty-eight states and pertinent territories, the Court held community income earned by one spouse is taxable one half to each spouse.[164] Referring to state law property notions first to resolve the second issue of the incidence of the federal income tax liability, the constitutional concept of federalism raised its familiar head. Clearly such an interpretation favored community

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[160] Interestingly, Robert H. Jackson, as attorney general, in the Clifford litigation, represented the government. In reading an entertaining book of considerable legal scholarship by Professor Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court-A Judicial Biography* (New York: New York University Press 1983), the author first became aware of Justice Robert Jackson's pithy description of the Supreme Court's role in the legal hierarchy: "However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. *We are not final because we are infallible, but we are infallible only because we are final."* (Emphasis added) *Brown v. Allen,* 344 U.S. 443, 540 (1953).

[161] Congress frequently attempts to use the tax system to foster any number of worthy objectives. Econometric models designed to measure the efficacy of tax policy might suggest more efficient methods to accomplish such social policies. And just how accurate are the budget projections of the Congressional Budget Office let alone the Office of Management and Budget?

[162] That turn of phrase appears in *The Greedy Hand* by Amity Shlaes, a senior columnist on political economy for the Financial Times. Her title comes from Thomas Paine's *Rights of Man: "*If, from the more wretched parts of the old world, we look at those which are in an advanced stage of improvement, we still find the greedy hand of government thrusting itself into every corner and crevice of industry, and grasping the spoil of the multitude."

[163] 282 U.S. 101 (1930)

[164] The community income at stake "comprised Seaborn's salary, interest on bank deposits and on bonds, dividends, and profits on sales of real and personal property." One wonders why *Lucas v. Earl,* 281 U.S. 111 (1930) was not decisive on income attributable to labor as opposed to property. While it is true that case was decided more than eight months prior to *Seaborn* (see Justice Holmes' comments in *Lucas v. Earl)* "…we think that no distinction can be taken according to the motives leading to the arrangement by which the *fruits are attributed to a different tree from that on which they grew."* (Emphasis added) It should be noted that the *Lucas* case involved joint property with right of survivorship as opposed to community property. In addition, the *Poe* case, recognizing that the community property regime is not monolithic with no differences among the eight states adhering to that property regime, noted that California law, as interpreted by its courts, "gave the wife a mere expectancy and that the property rights of the husband during the life of the community were so complete that he was in fact the owner."

property states over common law jurisdictions in a progressive tax environment.[165] To prevent the wholesale conversion to a distinctly different state property regime Congress came to the rescue with appropriate federal tax legislation. The Revenue Act of 1948 said that in the context of federalism and uniform federal tax law, the former must give way to the latter with respect to the following four issues: [a] Married couples will be permitted to elect to file a joint income tax return.[166] [b] & [c] Married donors and decedents will be allowed a marital deduction equal to one-half the value of the transfer or one-half the adjusted gross estate, respectively.[167] [d] Gifts by either spouse to a third party are eligible for the election to split gifts.[168]

E—Crucible [169]

It would nice if *stare decisis* solved all the problems. While it is true that structurally the Constitution implicitly reflects the relationship between the central government and the several states denominated as federalism, the resolution of federal tax problems rarely raise questions having a constitutional dimension.[170] That being the case adherence to precedents is more likely. If Congress does not like the results of the statutory interpretative process it may readily amend the law to override the "erroneous" judicial decision. But the reality is that federalism "isn't easy". Accordingly, prior decisions, over time, might not be as authoritative as would otherwise be the case. The countervailing thought, however, is that an economy needs a predictive legal base in order to participate in a highly competitive global economy. Having struggled through the preceding "preamble" to acquire a knowledge and rudimentary understanding of the process,

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[165] More than one Florida domiciliary undergoing the throes of a divorce, on exposure to the doctrine of equitable distribution, would be hard pressed to distinguish between community property and common law jurisdictions.

[166] Sen. Rep. No. 1013, 80th Cong. 2d Sess. (1948), 1948-1 C.B. 326: "Under the provisions…the combined normal tax and surtax that would be determined if the net income and the applicable credits…were reduced by one-half."

[167] In a non-Code provision of early Reagan tax legislation (Economic Recovery Tax Act of 1981), section 403(e)(3) gave the individual states an opportunity to interpret the expression contained in a will executed or a trust created before September 12, 1981. If a formula pecuniary amount or fractional share clause provided "that the spouse is to receive the maximum amount of property qualifying for the marital deduction allowable by federal law," state legislation could treat such a clause as referring to the subsequent federal tax law change. Florida responded to the invitation.

[168] Last comment on the ancient legislation enacted in 1948. Every tax accountant in Phoenix, Houston, Albuquerque, and Shreveport knows the answer to the following query: "Is property which represents the surviving spouse's one-half share of community property…" treated as "acquired from or to have passed from the decedent" and thus entitled to a complete step up in basis? When Goldie Hawn went back to the kitchen, the contribution rule for including jointly owned property in the federal gross estate of a deceased husband favored the surviving wife, on the income tax issue of adjusted basis, in a common law jurisdiction, as women were not a major portion of the work force. Accordingly the 1948 Revenue Act enacted, to insure parity, a provision in the 1939 Code (now section 1014(b)(6) of the 1986 Code). But this provision has clearly become a historical anachronism with the unlimited marital deduction wrought by the Economic Recovery Tax Act of 1981 and the qualified joint interest as enacted by the Tax Reform Act of 1976 (see I.R.C. §2040(b) (1986)). The author submits that federalism demands its repeal. Tell that to Senator Breaux, formerly on the Senate Finance Committee. See I.R.C. §1022(d)(1)(B)(iv)(1986), enacted as part of the Economic Growth and Tax Relief Reconciliation Act of 2001, which will become effective after December 31, 2009, and which retains this currently incongruous provision.

[169] Or trial by fire.

[170] "Only to the extent that the Constitution so requires may this Court interfere with the exercise of this plenary power [police power over the health, safety, morals or welfare] of government. But precisely because it is the Constitution alone which warrants judicial interference in sovereign operations of the State, the basis of judgment as to the Constitutionality of state action must be a rational one, approaching the text which is the only commission for our power ***not in a literalistic way, as if we had a tax statute before us***, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government." *Poe v. Ullman,* 367 U.S. 497, 540 (1961) (J. Harlan, dissenting) (Emphasis added).

it now becomes the immediate task of examining a sufficient number of illustrative specimens of the quantitatively voluminous case law to begin the process of mastering the technique of divining the relevancy of state law for the ultimate resolution of federal tax controversies.[171]

III. Ethical Considerations

For a little inspiration, on a quiescent evening in Weston, the author selected his dog-eared copy of the Laws and Rules {Chapter 455 (Business and Professional Regulation: General Provisions) & Chapter 473 (Public Accountancy), Florida Statutes and Chapter 61H1 (Division of Certified Public Accounting/Board of Accountancy) of the Florida Administrative Code [April 2008]} from the upper shelf of his Soliman office-in-the-home library.[172] Next, an article entitled *Ethical Issues for Tax Preparers* was read for the first time.[173] Third, the Review & Outlook editorial of the Wall Street Journal dated Tuesday, July 10, 2007, was reread for its comments on *The KPMG Fiasco.* ("Why Judge Kaplan should toss the entire tax shelter case.") And finally, with something a little stronger than soda pop in hand, resort was made to the e-mails found in the Congressional records accompanying the written transcripts to "Hearings before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs of the United States Senate" that occurred on November 18 and 20, 2003, which centered on the "U.S. Tax Shelter Industry: The Role of Accountants, Lawyers, and Financial Professionals."

Here is the troubling e-mail selected for late night viewing:

> KPMG email, February 2000, re: Product champions needed for S Corp strategy (I want to personally thank everyone for their effort during the approval process of this strategy. It was completed very quickly and everyone demonstrated true teamwork. Thank you! Now lets (sic) SELL, SELL, SELL!!)[174]

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[171] Judicial interpretation always insures that every legal instrument, statute, or constitution will have its own gloss. "Interstitial legislation" is a phenomenon to the laity; it is standard operating procedure for the lawyer. In the age of *Erie,* federal question jurisdiction ensures an infinite supply of federal common law.

[172] Hopefully there will be no withdrawal symptoms from cessation of participation in the biennial exercise, compliments of the 2009 Florida legislative session.

[173] Florida CPA Today, March/April 2009 by Keith E. Johnson, CPA. More than three months following the throes of the typically tumultuous tax tournament, the author had an opportunity to read his Jacksonville colleague's comments. On page 16, middle column, first paragraph under the rubric, The Law, Mr. Johnson states: "To combat ethical erosion, on Dec. 20, 2004, the U.S. Treasury Department and the IRS developed Treasury Circular 230, which took effect on June 20, 2005." But the incontrovertible "web" asserts: "Following the Revenue Acts of 1918 and 1919, a number of circulars dating back as far as 1886 were combined with other statutes into a singular Treasury Departmental Circular known as Circular # 230. Effective February 19, 1921, this ***first Circular 230*** addressed "the laws and regulations governing the recognition of agents, attorneys and other persons representing claimants before the Treasury Department and offices thereof. [www.accessmylibrary.com on July 26, 2009] Note that the § 10.32 [Practice of law] provision first appeared on August 13, 1966.

[174] Accepting the possibility that the Congressional staff had taken the particular exhibited e-mail out of context, the writer began to wonder if he should have taken marketing as his sole elective course in four years of undergraduate study at Queens College of the City University of New York rather than the one starring four brilliant professorial musicians providing live performances of Beethoven's complete quartets. Hucksterism or professionalism at its finest?

Alas, once again, with the transmission lines to Tallahassee scheduled for closure in the not too distant future, the writer is quite content, on a subject as vast and perhaps as uncertain as the ethical standards to which a tax researcher ought to adhere to, to allow a portion of the written materials accompanying his remarks to the Asocíacíon de Contadores Públícos de Cuba en el Exílío, given on January 24, 2009, express some of his ever developing thoughts.

A—In The Beginning

This presentation makes no attempt to discuss the subject of ethics[175] as an academic discipline; rather it seeks to provide a limited view of the subject from the perspective of a long-time working tax practitioner.[176] The lecture itself, in the Middle Earth portion, details one not too ancient illustration of descent into a sinking bog of potential ruin, only to rise as a Phoenix from the ashes of a Pyrrhic victory. In essence, on the assumption that the professional, immersed knee-deep, on a daily basis, in issues of tax research, planning, and compliance, may derive more benefit from a visceral reaction to the unethical than a Diogenean search for an elusive definition of "ethical" that would satisfy the most critical mathematician,[177] I have opted for instructive examples of obvious clarity.[178]

A few false truisms:

1. Definition of an honest person: An individual who has never been tempted.[179]

2. Definition of an honest politician: One who remains loyal to the special interest groups that have purchased his fidelity.[180]

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[175] "The rules of conduct recognized in respect to a particular class of human actions or a particular group, culture, etc.: *medical ethics; Christian ethics*." (*The Random House Dictionary of the English Language, Unabridged Edition* [New York, 1973])

[176] For those participants desiring a more in depth, but highly readable, discussion of problems faced by tax professionals, the lecturer heartily recommends: *Ethical Problems in Federal Tax Practice, 3rd Edition (1995);* Bernard Wolfman, James P. Holden, and Deborah H. Schenk

[177] Unabashedly, the lecturer credits former Associate Supreme Court Justice Potter Stewart with this more demonstrative approach: "In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable….I shall not attempt to define the kinds of material I understand to be within that shorthand description ['hard-core pornography']; and perhaps I could never succeed in intelligibly doing so. ***But I know it when I see it,*** and the motion picture involved in this case is not that." (Emphasis supplied) *Jacobellis v. Ohio,* 378 U.S. 184, 197 (1964) (concurring opinion)

[178] "Crystal" clarity, in fact. (See testimonial colloquy between Colonel Jessep and Lieutenant Kaffee in *A Few Good Men*)

[179] Presumably not an original thought attributed to Dr. Levinson in a course on macroeconomics at Queens College of the City University of New York, fall of 1962.

[180] See *The Broken Branch: How Congress is Failing America and How to Get It Back on Track (Institutions of American Democracy Series);* Thomas E. Mann and Norman J. Ornstein (Oxford University Press, USA 2006)

"Can't we put in something about rich white guys don't have to pay taxes?" (Founding fathers discussing taxation) © Michael Shaw (ID: 70413, Published as a cartoon in *The New Yorker* April 19, 2004)

3. "Greed, for lack of a better word, is good."[181]

4. Speaking of the Northern Mariana Islands[182], former House Majority Whip[183] Tom DeLay (R-Tex.) said: "It is a perfect Petri dish of capitalism."

B—Middle Earth [KPMG LLP[184] {A Belated Resurrection?}]

For thirteen former partners and employees of this highly regarded public accounting firm, the decision of the Second Circuit Court of Appeals, upholding District Judge Lewis A. Kaplan's order dismissing defendants' indictments[185], marked the end of a three-year nightmare that commenced with their respective indictments on August 29, 2005, the same day that KPMG executed a deferred prosecution agreement with the federal government.

The appellate court's opinion, after providing a detailed but succinct summary of prior district court and appellate court decisions[186] in the case, proceeded in a logical and methodical manner to discuss four points leading to the affirmance of the lower court's order of dismissal.

1. Chief Judge, Dennis Jacobs, writing on behalf of a three-judge panel, rejected "the government's challenges to the district court's factual findings, including its [ultimate] finding that but for the Thompson[187] Memorandum and the prosecutors' conduct KPMG

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[181] Gordon Gekko, addressing the Teldar Paper stockholders in the movie, *Wall Street* (1987)

[182] "In the case of an individual who is a bona fide resident of a *specified possession* during the entire taxable year, gross income shall not include—…(2) income effectively connected with the conduct of a trade or business by such individual within any specified possession." I.R.C. §931(a)(2)(1986) The Northern Mariana Islands are a specified possession.

[183] "The Hammer" became majority leader in 2002 prior to his ignominious departure, stage right, in April 2006.

[184] The reader is referred to Appendix I of the full written exposition for a detailed review of the pre-indictment and pre-trial maneuverings in the United States District Court (Southern District of New York) of District Judge Lewis A. Kaplan on or before June 26, 2006.

[185] *United States v. Stein,* No. 07-3042-cr (2nd Cir. 08/28/2008)

[186] The first "visit" to the appellate court, *Stein v. KPMG,* 486 F.3d 753 (2nd Cir. 2007), involved an appeal from a rather unusual proceeding in the lower district court in which District Judge Kaplan presided over a separate civil trial, supposedly ancillary to the criminal jurisdiction of that court, in which the criminal defendants, as plaintiffs, sued KPMG for failure to pay the legal fees of the plaintiffs' lawyers in the criminal prosecution. "The parties were invited to file supplemental briefs on the issue (whether 'it might be more appropriate to exercise our mandamus power'), and Judge Kaplan *himself* (emphasis supplied) filed a submission on the issue."

[187] Recalling Judge Kaplan's comments about Mr. Thompson found in footnote 11 of Appendix I of the author's full written exposition, on August 27, 2007, the New York Times reported that both "Christopher Cox, the head of the Securities and Exchange Commission; and Larry D. Thompson, a former deputy attorney general who is now senior vice-president and general counsel of PepsiCo", following the resignation of besieged Attorney General Alberto Gonzalez, were both mentioned as possible successors to head the Department of Justice. *Res ipsa loquitur?* [*Question*: Some 70 professors at Texas Tech have signed a petition that

would have paid employees' legal fees—pre-indictment and post indictment—without regard to cost." Reviewing the evidentiary record below, the appellate court could come to no conclusion other than such ultimate finding of fact and its supporting subsidiary facts as determined by the trial judge were not "clearly erroneous".[188]

2. Not wanting to engage in unnecessary constitutional adjudication, Chief Judge Jacobs next considered the prosecutors' assertion that "the government cured the purported Sixth Amendment [right to counsel] violation by the [assistant United States attorney's] in-court statement on March 30, 2006 that KPMG was free to ['exercise its business judgment' and] decide whether to advance [legal] fees [to the thirteen defendant-appellees]". While the appellate court, again reviewing the record below, acknowledged that it is quite plausible that KPMG, absent government interference, "would not have advanced legal fees indefinitely and without condition", Judge Kaplan's central finding below that "[a]bsent the Thompson Memorandum and the actions of the [United States Attorney's Office], KPMG would have paid the legal fees and expenses of all its partners and employees both prior to and after indictment, without regard to cost", means that "the prosecutor's isolated and ambiguous statement in a [criminal] proceeding to which KPMG was not a party (and the nearly 16-month period of legal limbo that ensued), did not restore the defendants to the status quo ante."

3. Where is the necessary state[189] action required for a Sixth Amendment violation? After all, it was KPMG that withheld the funds necessary for the criminal defendants to mount an effective defense. On this first of two questions of constitutional import, the Second Circuit Court of Appeals recognized that its appellate jurisdiction permitted it to review District Judge Kaplan's decision de novo, as a question of law rather than one of fact. With a potential indictment of KPMG itself, "the government had KPMG's full attention. It is hardly surprising, then, that KPMG decided to condition payment of fees on employee's cooperation with the government and to terminate fees upon indictment: only that policy would allow KPMG to continue advancing fees while minimizing the risk that prosecutors would view such advancement as obstructive." Quoting a law review article by Professor Lisa Kern Griffin, entitled *Compelled Cooperation and the New Corporate*

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protests your appointment and cites your "ethical failings," including misleading Congress about the firing of nine federal prosecutors. What will you tell your students about that? *Answer:* All the inspector-general investigations, they're now over with. They found that I had not engaged in any criminal wrongdoing. (See *Questions For Alberto Gonzalez—The Counselor* by Deborah Solomon of the New York Times, August 9, 2009.)]

[188] While the lay public does not always appreciate the nature of appellate jurisdiction as losing trial counsel promises to pursue justice all the way to the steps of the United States Supreme Court, an appellate court, not able to observe the witnesses squirming in their chairs or to hear their quavering testimony, is not likely, under such a difficult standard, to reverse such findings from a cold, dry trial record.

[189] The federal government in the instant case.

Criminal Procedure, 82 N.Y.U. L. Rev. 311, 367[190] (2007), the appellate court concluded: "An adversarial relationship does not normally bespeak partnership. But KPMG faced ruin by indictment and reasonably believed it must do everything in its power to avoid it. The government's threat of indictment was easily sufficient to convert its adversary to its agent." Obviously, then, the actions of such agent would be attributed to the principal, producing the requisite "state action".

4. On the fourth and final question, "whether the government deprived defendants of their Sixth Amendment right to counsel[191]", while it is true that the right to counsel does not attach until a prosecution is commenced, and while Judge Kaplan below correctly stated that "[a]ctions by the government that affected only the payment of legal fees and defense costs for services prior to the indictment…do not implicate the Sixth Amendment", "the government's pre-indictment conduct was of a kind that would have post-indictment effects of Sixth Amendment significance". Accordingly, the appellate court "reject[ed] the government's argument that its actions (virtually all pre-indictment) are immune from scrutiny under the Sixth Amendment." While the government would seem to be correct in its assertion "that a defendant has no Sixth Amendment right to a defense funded by someone else's money", so that "[a] robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended", that was clearly not the same case before the appellate court "of an employee who reasonably expects to receive attorneys' fees as a benefit or a perquisite of employment, whether or not the expectation arises from a legal entitlement."[192]

C—ARMAGEDDON?[193]

The ethical practice of tax law has its origins in the high moral fortress found in the home, the house of worship, and the schoolhouse. Five luxury[194] automobiles in the multi-vehicle garage, four roomy residences in and out of the continental United States, three nautical vessels in

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[190] "The threat of [ruinous indictment] brings sufficient pressure to bear on corporations, and that threat 'provides a sufficient nexus' between a private entity's employment decision at the government's behest and the government itself."

[191] Or as stated in the last clause of Article VI of the Bill of Rights: "…and to have the Assistance of Counsel for his defence."

[192] Judge Kaplan, in an earlier opinion in 2006, had characterized the KPMG partner/employee indictments as one that "is said to be the largest criminal tax case in our nation's history". In deciding to permit the extreme action of dismissing the thirteen criminal indictments, the appellate court was no doubt persuaded by Judge Kaplan's non-erroneous findings (quoting Chief Judge Jacobs): "Defendants were indicted based on a fairly novel theory of criminal liability; they faced substantial penalties; the relevant facts are scattered throughout over 22 million documents regarding the doings of scores of people; the subject matter is 'extremely complex'; technical expertise is needed to figure out and explain what happened; and trial was expected to last between six and eight months; these defendants 'have been forced to limit their defenses…for economic reasons and …they would not have been so constrained if KPMG paid their expenses.'"

[193] **"Well, we've licked taxes—that just leaves death." (One executive talking to others.)** © Lee Lorenz (ID: 52374, Published as a cartoon in *The New Yorker* July 22, 2002)

[194] **"I've been thinking about the flat tax and how it would inflict hardship on the poor, and I can live with that." (Rich man to other rich man in upscale restaurant. Refers to Republican presidential candidate Steve Forbes' campaign promise of a flat tax.)** © J.B. Handelsman (ID: 32762, Published as a cartoon in *The New Yorker,* March 11, 1996)

various ports of call, two cases of authentic non-costume jewelry, and one chilled wine cellar of sauvignon blanc are heady competition for the Complete Internal Revenue Code and the five-volume set of Federal Tax Regulations (compliments of Thomson*RIA). If perchance such a fortress appears inadequate to survive the rigors of laboring in the vineyards, then hopefully the professional literature will set a moral compass that will permit avoidance of catastrophic shoal water. The inadequacy of such literature, including required courses in continuing professional education relating to ethics, leaves the ultimate civil[195] and criminal sanctions to effectuate a sufficient deterrence.

While the adoption of a code of ethics is certainly one hallmark of any organized group of specially trained and educated individuals that purport to view themselves as professionals, the writer's favorite definition of a professional, in terms of pride in one's calling, was expressed by Dr. Martin Luther King, Jr., decades ago.[196]

Herman Wouk, in the foreword to his extraordinary novel, *War and Remembrance,* states: "The beginning of the end of War lies in Remembrance." William L. Shirer, in the page prior to the foreword to his historical classic, *The Rise and Fall of the Third Reich: A History of Nazi Germany,* quotes George Santayana: "Those who do not remember the past are condemned to relive it." Inclined not to be overly optimistic, the writer recalls Associate Supreme Court Justice Kennedy's comments about the semi-abstruse concept of federalism: "But every generation has to learn it all…over…again. Democracy isn't inherited. It is not something in your genes."[197] So, too, the ethical lessons of an advanced free enterprise economy must be experienced by each new generation, to the everlasting sorrow of those individuals and business entities who will not be quite as lucky as Frank Quattrone, KPMG LLP and its partners and employees, or the successors in interest to Arthur Andersen LLP.[198]

If all the prior material does not avail against the temptations and mine fields found in the everyday practice of tax law, then, perhaps, only the Holmesian comment made in a dissenting opinion may serve as the requisite North Star for the solution to ethical problems in federal, state, and international tax practices.[199]

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[195] More than two decades ago, the writer vaguely recalls an airport conversation with Louis W. Dooner, former President of the Florida Institute of CPAs and former Chairman of the State Board of Accountancy. To the best of his recollection, the chance meeting took place shortly after a public hearing of the Board, which included one case of a former certified public accountant who had participated in a scheme to diminish the coffers of his employer. Mr. Dooner: "As long as I sit on the State Board of Accountancy that fellow will never regain his license." (Or words to that effect) The writer thought it more politic not to remind Chairman Dooner of the concepts of rehabilitation and redemption.

[196] "If a man is called to be a streetsweeper, he should sweep streets even as Michelangelo painted, or Beethoven composed music, or Shakespeare wrote poetry. He should sweep streets so well that all the host of heaven and earth will pause to say, here lived a great streetsweeper who did his job well."

[197] U.S. Supreme Court Associate Justice Anthony Kennedy speaking to students visiting the U.S. Supreme Court, recorded December 14, 1999, aired on C-SPAN's "America and the Courts" program, August 25, 2001

[198] The writer is confident, but not to a mathematical certainty, that James B. Stewart's *Den of Thieves* [Simon & Schuster 1991] will be heard from again, but hopefully, in the distant future (Frank Quattrone and Arthur Andersen LLP were examined in the author's extended written materials.).

[199] **"When I think of the as yet undreamed-of loopholes that are going to be available to you guys!" (Father talks to his son and friend at graduation)** © William Hamilton (ID: 67521, Published as a cartoon in *The New Yorker* June 2, 2003)

IV. Illustrative Memoranda of the Past

1. Challenge to Unavailability of Qualified Terminable Interest Property Election
This specimen represents an attempt to convince the draftsman that a qualified terminable interest property election was available to the decedent's estate:

Dear Mr. Sparks:

Permit me to introduce myself. My name is Jonathan Ingber, an employee of Kwal + Oliva, and I will be assisting Richard Kwal in the preparation of the United States Estate Tax Return for the estate of Hubert L. McCord.

At this preliminary stage, I would like to discuss two points that arose in the course of your meeting with Richard and others yesterday afternoon.

1. Our office would like the representative from Merrill Lynch, Pierce, Fenner & Smith to provide the fair market values of the stocks and bonds comprising part of the corpus of the Amended and Restated Hubert L. McCord Revocable Trust dated August 21, 2004. To properly reflect such values on schedule G of the estate tax return, we will require both the highest and lowest[200] selling prices of such securities on the day of death, April 15, 2006.

Interestingly, Frederic G. Corneel, a well-known Boston tax lawyer, in his *Guidelines to Tax Practice Second,* 43 Tax Law. 297 (1990), made the following prefatory remarks: "These guidelines are in no sense official; indeed, it would be a mistake to try to develop official guidelines. Guidelines should suit the condition and circumstances of the firm that adopts them. They should be straight forward, without the sanctimony and hypocrisy which is all too common in efforts of this kind. They should reflect what others may reasonably expect of us; and, just as important, what we need to do to feel good about ourselves. A large national firm with offices in many cities should have different guidelines than a small criminal tax law boutique." Mr. Corneel put the matter more simply in *Guidelines to Tax Practice Third,* 57 Tax Law. 181 (2003) when he opened the article as follows: "A well-known tax lawyer, when asked for the source of the ethics governing his conduct, answered: 'I don't know; I suppose it is my parents.'" Continuing along the same line of thought, but replacing parents with professional mentors: "The guidance they [exemplary practitioners] provide is in values and attitude, in our self-respect and in the sense of our obligation to other individuals, to the government and to the various communities of which we are a part. It is these that we bring to bear on our problems, where usually ***the question is not what a rule provides or how it applies, but what we should do when different principles pull us in very different directions***."

In conclusion, one should not look to the most recent example of ethical deviation as illustrated by the conviction of Senator Ted Stevens (R-Alaska), subsequently overturned, again because of prosecutorial misbehavior. Rather one, instead, might recall the simple lines from Harper Lee's *To Kill a Mockingbird:* "Miss Jean Louise, stand up. Your father's passin'." [Quoted by Hank Coxe in his inaugural speech as president of The Florida Bar.]

[200] Treas. Reg. 20.2031-2(b)(1)(1992): "In general, if there is a market for stocks or bonds, on a stock exchange, in an over-the-counter market, or otherwise, the mean between the highest and lowest quoted selling prices on the valuation date is the fair market value per share or bond…."

2. Having dispensed fairly summarily with the minor point, I would now like to discuss the major point, i.e., the availability of the allowance of a marital deduction for the marital trust described in Article 7 of the governing instrument. The issue concerns the availability of such deduction if the surviving spouse's interest in such marital trust constitutes a terminable interest. The general rule would deny the marital deduction since the spousal interest passes to the residuary trust of Article 8.[201]

3. Prior to the enactment of the qualified terminable interest property election with respect to a life estate for a surviving spouse, the most popular deductible terminable interest exception to the general rule was the life estate with a general power of appointment in the surviving spouse.[202]

4. Fortunately, the Congress, by means of the Economic Recovery Tax Act of 1981, provided another flexible exception to the non-deductible terminable interest rule, namely, the election with respect to the life estate for a surviving spouse.[203] Permit me to explore the possibility that the terms of the subject revocable inter vivos trust, more specifically, the provisions in Article 6 establishing the marital trust on the death of the trustor, satisfy all the definitional elements of that particular exception—

    a) Qualified terminable interest property is deemed to satisfy the passing requirement of Section 2056(a) and is not considered to have passed to any person other than the surviving spouse, which is part of the definition of a terminable interest found in section 2056(b)(1)(A).[204]

    b) Since the estate would make the so-called Q-TIP election on schedule M of the federal estate tax return[205] for the marital trust assets that are deemed to pass to the surviving spouse, the last remaining requirement for satisfying the definition of qualified terminable interest property is to determine if the surviving spouse has a ***qualifying income interest for life.***[206]

    c) To satisfy the definition of a qualifying income interest for life, two requirements must be satisfied—

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[201] I.R.C. §2056(b)(1)(A & B)(1986)

[202] I.R.C. §2056(b)(5)

[203] I.R.C. §2056(b)(7)

[204] I.R.C. §2056(b)(7)(A)(i & ii)

[205] Simply by listing the assets of the marital trust on such schedule, as there is no longer a requirement to "check a box" thereon.

[206] I.R.C. §2056(b)(7)(B)(i)(I, II & III)

(i) The surviving spouse is entitled to all the income from the qualified terminable interest property, payable at least annually or at more frequent intervals.

(ii) "No person has a power to appoint any part of the property to any person other than the surviving spouse."[207]

Having reviewed statutory law concerning the availability of the marital deduction in the instant case, I must now turn to the governing instrument itself to see whether or not it satisfies "these rules of the game".

5. Section 6.1 [Distribution of Income] of Article 6 [Administration of Marital Trust] of the subject revocable trust states that "[t]he Trustor's wife *will*[208] have the continuing right to withdraw at any time during each year all or any part of the income of the Marital Trust. Any income earned during a calendar year that has not been withdrawn by the Trustor's wife may be withdrawn by her at any time thereafter." While one might argue that the failure to require withdrawal of all the income is violative of the statutory prescription: "the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals", I think Example (2) in Treas. Reg. §20.2056(b)-7(h) would suggest otherwise. In the regulatory example "S [decedent's spouse] has the power, exercisable annually, to require distribution of all of the trust income to herself", resulting in a full deduction for all of the qualifying terminable interest property.

6. Section 6.2 [Distribution of Principal] of said Article provides for distributions of principal for the surviving wife's "health, education, support, and maintenance" under an ascertainable standard. Such a power does not rise to the level of a general power of appointment.[209] More importantly it does not violate the statutory requirement that "no person has a power to appoint any part of the property to any person *other than the surviving spouse."* [Italics added][210]

7. Section 6.3 [Withdrawal Rights] of the same Article supplies a so-called "5 and 5" power.[211] Here, again, the statutory prohibition with respect to a non-marital appointment of property is not violated.

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[207] I.R.C. §2056(b)(7)(ii)(I & II)

[208] The word "will" is defined in Section 21.1(c)(iv) to be a mandatory expression to be used interchangeably with the word "shall".

[209] I.R.C. §2041(b)(1)(A) If it had constituted such a general power of appointment, then the other exception to the non-deductible terminable interest rule (life estate with power of appointment in surviving spouse) might have some relevance to the validity of a marital deduction.

[210] See also Treas. Reg. §20.2056(b)-7(d)(6)

[211] Which again, by a somewhat different statutory reference, I.R.C. §2041(b)(2)(A & B), does not give rise to a general power of appointment in the hands of the surviving spouse in the context of a lapse of such a power constituting a taxable release.

If I have not properly applied the federal estate tax law to the marital trust of Article 6, or some other provision in the governing instrument is responsible for the inability to make a qualified terminable interest property election, giving appropriate weight to the marital savings clause in Section 19.2, I would be pleased to receive any edifying or elucidatory comments that you may have concerning the inability to make a valid Q-TIP election.[212] I still carry around a pencil with a huge eraser to correct my own mistakes.

In the meantime, I certainly look forward to working with you as the preparation of the federal estate tax return progresses.

2. *Letter Attached to E-Mail Addressed to Associate Librarian and Lecturer in Legal Research at the Yale Law School Professor Shapiro responded in rapid fashion, recommending his more recent publication for my reading pleasure:*[213]

Dear Professor Shapiro:

I must admit that I resisted purchasing the *Oxford Dictionary of American Legal Quotations* for several years, but, quite honestly, the 2006 holiday sale of the Oxford University Press overcame my resistance.

As a tax practitioner for more than thirty-six years, my attention was drawn to the quotation from Associate Justice Cardozo's opinion in *Welch v. Helvering,* 290 U.S. 111 (1933). Without attempting to quote Associate Justice Potter Stewart in *Jacobellis,* I would say that Cardozo made an admirable attempt to define the indefinable.

At first blush I thought that you had omitted the best part of the opinion that immediately followed in the next paragraph of the decision (last four sentences):

> Here, indeed, as so often in other branches of the law, the decisive distinctions are those of degree and not of kind. One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle.

But, after learning to circumnavigate your very fine volume, I found that above gem in a most appropriate category—distinctions.

I have used that distinctive quotation to demonstrate the quintessence of appellate review. Most practitioners, primarily accountants, believe that the two cases that gave rise to the so-called

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[212] References to primary authorities would be deeply appreciated.

[213] *The Yale Book of Quotations,* Edited by Fred R. Shapiro, Yale University Press (2006)

General Utilities doctrine were not reconcilable.[214] Recognizing that Cardozo's classic distinction demonstrates that, not infrequently, ultimate legal conclusions are terribly dependent on underlying factual determinations, the two cases are indeed reconcilable on the simple ground that the Supreme Court merely affirmed the judgments of the trial courts in both instances.

So, having failed initially to provide "contributions of additional quotations", let me suggest the following two specimens:

1. Without having been able to identify the source, I believe that the following quotation (as best as I remember it), attributable to Judge Jerome Frank, came from a "cases and materials" textbook on civil procedure:

   > A jury may at times act as an ad hoc ephemeral legislature.

2. With greater specificity, the second quotation comes from Professor Archibald Cox's *The Court and the Constitution* (Houghton Mifflin 1987):

   > "Why do people support constitutionalism and the rule of law, and as their instrument, the courts?…[T]he fragile faith that 'law' has a separate existence not merely because it applies to all men equally, but because it binds the judges as well as the judged, not just today but yesterday and tomorrow. Learned Hand, one of the great federal judges who never reached the Supreme Court, once put the matter to me, a young law clerk, from a judge's perspective. 'Sonny,' he asked, 'to whom am I responsible? No one can fire me. No one can dock my pay. Even those nine bozos in Washington, who sometimes reverse me, can't make me decide as they wish. Everyone should be responsible to someone. To whom am I responsible?' Then the Judge turned and pointed to the shelves of his law library. 'To those books about us. That's to whom I'm responsible.'"

I look forward to reading from your delightful tome for years to come.

3. *<u>Letter to Florida Department of Revenue Seeking Expiation for the Taxpayer's Sins</u> A telephonic reply was received nine and one half months later.[215] The fraternity of tax*

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[214] Compare *C.I.R. v. Court Holding,* 324 U.S. 331 (1945) with *United States v. Cumberland Public Service,* 338 U.S. 451 (1950)

[215] While the writer would be inclined to vote for a Florida individual income tax, increased interaction with the Florida Department of Revenue would give him cause to pause. As for the allegedly existing constitutional prohibition against such a tax, judge for oneself: **SECTION 5. Estate, inheritance and income taxes.** -- (a) NATURAL PERSONS. No tax upon estates or inheritances or upon the income of natural persons who are residents or citizens of the state shall be levied by the state, or under its authority, ***<u>in excess of the aggregate of amounts which may be allowed to be credited upon or deducted from any similar tax levied by the United States</u>*** or any state.

controversy specialists must be commended for their unlimited patience and perseverance:

Corporate Tax Collection Services
Florida Department of Revenue
Bonham Building
5050 W Tennessee Street
Tallahassee, Florida 32399-0135

Re: Palatial Properties Limited
Notice of Amount Due [Late Filing Form F-1120]
Compromise of Penalty [Reasonable Cause]

Dear Madam:

By virtue of the Power of Attorney and Declaration of Representative (Form DR-835) enclosed[216], I am the duly authorized representative of Palatial Properties Limited [EIN 11-2325336], a foreign corporation of the United Kingdom Overseas Territory of Gibraltar. I am responding to the subject Notice of Amount Due, dated December 11, 2006, after conversing with Florida Department of Revenue personnel on Friday, December 22, concerning the late filing penalty imposed on the subject foreign corporation with respect to the calendar year 2005 Florida Corporate Income Tax Return [Form F-1120].

Permit me to briefly summarize the facts associated with the late filing of such corporate income tax return, before I attempt to seek a compromise of the imposed penalty predicated on the presence of reasonable cause and the absence of willful negligence, willful neglect, or fraud:

1. Form 7004 (Application for Automatic 6-Month Extension of Time to File) was stamped by the Internal Revenue Service field office representative in downtown Miami on March 14, 2006.

2. Since Palatial Properties Limited does not maintain an office or place of business in the United States, the Federal filing deadline for such a foreign corporation, normally June 15, 2006, was extended to December 15, 2006.

3. Form F-7004 (Application for Extension of Time to File Return) was mailed to the Florida Department of Revenue on March 13, 2006.

4. Again, since Palatial Properties Limited does not maintain an office or place of business in the United States, the Florida filing deadline for such a foreign corporation, normally July 3, 2006 (as July 1, 2006 was a Saturday), was extended to January 2, 2007.

[216] Executed by the directors of the foreign entity and accompanied by an Apostille executed by a representative of the Governor and Commander-in-Chief of the City of Gibraltar, authenticating the authority of the Notary Public in Gibraltar pursuant to the Hague Convention of October 5, 1961 to authenticate documents used in a foreign country.

5. Finally, the Florida Corporate Income Tax Return was e-mailed to Gibraltar in the earlier part of November for signature by the authorized officers, and ultimately received by the Florida Department of Revenue on December 1, 2006.

   Now for a brief summary of Florida statutory law and Florida Administrative Code provisions governing the relationship between the payment of Florida corporate income tax and the filing of Florida corporate income tax returns:

   A. Florida Statutes §220.32 (Payment of tentative tax) states: (1) "In connection with any extension of the time for filing a return under s. 220.222(2), the taxpayer shall file a tentative tax and pay, on or before the date prescribed by law for the filing of such return, determined without regard to any extensions of time for such filing, an amount estimated to be the balance of its proper tax for the taxable year after giving effect to any estimated tax payments under s. 220.33…."

   B. Florida Administrative Code Rule 12C-1.0222 (Returns; time and place for filing) states: (2)(a) 2.b. "…the corporation shall remit with the application [for extension] an amount estimated to be the balance of its proper tax due for the taxable year after giving effect to payments and credits on its declaration of estimated income tax. Failure to make payment with an application when one is required will void an otherwise automatic extension of time to file. In such a case the taxpayer will be subject to the penalty provided in s. 220.801 F.S., for failure to file a timely return…."

   C. Florida Statutes §220.801 (Penalties; failure to file timely returns) provides a late filing penalty equal to 10 percent of the amount of tax due with such return for each month or fraction thereof that the income tax return is filed late. In (1)(second sentence) that statute states: "The department [of revenue] may settle or compromise such penalties pursuant to s. 213.21."

   D. Florida Statutes §213.21 (Informal conferences; compromises) states: (3)(a)(third sentence): "A taxpayer's liability for penalties…may be settled or compromised if it is determined by the department that the noncompliance is due to ***reasonable cause and not to willful negligence, willful neglect, or fraud***. (Emphasis added)

Finally, permit me, to explain all of the pertinent circumstances surrounding the filing of the subject corporate income tax return for Palatial Properties Limited [2005 Form F-1120]:

1. Taxpayer chose not to file the Florida corporate income tax return until the Federal corporate income tax return [2005 Form 1120-F] was completed as the two income tax returns are very much related to each other, since the Florida legislature has "piggybacked" the entire Internal Revenue Code of 1986, as amended, onto the Florida Income Tax Code [Chapter 220] according to Florida Statutes §220.03(3)(Future federal amendments).

2. The filing of the federal corporate income tax return was delayed by the necessity to resolve the following issues:

   (a) Taxability of interest income under I.R.C. §§881(d) and 871(i)(2)(A)

   (b) Applicability of the branch profits tax under I.R.C. §884 relating to the dividend equivalent amount, accumulated effectively connected earnings and profits, and change in United States net equity

   (c) Necessity and difficulty of obtaining Form 8288-A (Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests), Copy B stamped by the Internal Revenue Service, from Jarndyce & Jarndyce (attorneys for the buyer), to support payment of federal income taxes[217]

   (d) Difficulty of verification of Florida estimated income tax payments disbursed from Gibraltar trust account rather than from local Florida bank account

   What one has here, in the instant case, is a foreign corporation attempting to abide by the local governmental requirements of the State of Florida, given the rather out of the ordinary statutory rules, outlined immediately above, that such a corporation is obligated to adhere to. It is most important to recognize that the issues described above were certainly not resolved at the time that the Florida extension to file was executed and forwarded to Tallahassee on March 13, 2006.

Permit me to apply the statutory standard for compromising Florida tax penalties. The statutory definition of "reasonable cause" would appear, at first blush, to be a simple one. Appropriate synonyms for this statutory phrase[218] might include such words as "justifiable", "defensible", "excusable", "pardonable" or "forgivable". The myriad variety of life's circumstances to which such a simple definition is applied tends to convert the simple into the complex. Add the complexities of an exceedingly convoluted federal tax law, which serves as the underlying foundation of the Florida Corporate Income Tax Code[219], and simplicity suffers a swift and certain death. Fundamentally, however, the determination of what set of circumstances constitutes reasonable cause is quintessentially a factual determination more than it is a question of law, ultimately leading to the legal conclusion required by the statutory provision.[220]

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[217] After months of unsuccessful requests, Jane Roe, real estate paralegal for Jarndyce & Jarndyce finally forwarded the unamended Form 8288-A, Copy B, by e-mail, to my office on August 10, 2006.

[218] Florida Statutes §213.21(3)(a)(third sentence)

[219] Chapter 220 of the Florida Statutes

[220] Justice Cardozo, in describing the relationship between law and facts, once stated: "One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle." *Welch v. Helvering,* 290 U.S. 111, 114-15 (1933)

In addition, it would appear pertinent to note that the phrase "reasonable cause" is followed immediately by the statutory language "and not to willful negligence, willful neglect, or fraud". Surely, given the difficulties accompanying an earnest attempt to apply substantive tax provisions with the difficulties found in Subchapter N[221] of the Internal Revenue Code ("piggybacked" onto the Florida Corporate Income Tax Code) to a foreign corporation engaged in a United States trade or business with effectively connected income, one should not fail to recognize that the Florida statutory provision is essentially penal in nature. Certainly the imposition of a late filing penalty equal to half of the remaining corporate income tax liability at the time of filing would appear to be a bit Draconian given the difficult substantive tax issues raised with respect to a foreign corporation.

As noted above, Florida Statutes §220.32(1), relating to the payment of tentative tax at the time of filing an extension, clearly recognizes that such a payment is an estimate. The use of the words "an amount estimated to be the balance of its proper tax" shows a legislative understanding that complete precision in the calculation of the tentative tax payment that must accompany the request for extension of time to file may not be possible in every instance. This corporate taxpayer, for the preceding taxable year of calendar 2004, paid a tentative tax payment of $8,000 with that prior year's extension, fully recognizing that a valid extension required the payment of an estimated amount. In addition, the taxpayer made estimated income tax payments in the amount of $9,000 for the current calendar year of 2005 in order to insure that an adequate provision for potential corporate income taxes would assist in reducing any possible tentative tax for such current taxable year if, in fact, another extension was deemed necessary. Those payments made in the past demonstrate the corporate taxpayer's good faith effort to comply with all Florida statutory requirements. Unfortunately, the complexity of the substantive tax issues, enumerated on page 3 hereof, caused an unexpected remaining balance at the time of filing.

In conclusion, perhaps one should dwell for a moment on the function of a penal statutory provision. Outside the context of criminal activity, the punishment meted out for the failure of this foreign corporation to measure up completely to the tentative tax payment requirements (accompanying a request for an extension of time to file) seems inappropriate. Is rehabilitation the true objective of the penal sections of the Florida statutes? While the taxpayer does not lay claim to perfection, its compliance attempts in the context of difficult substantive tax provisions that apply to foreign corporations is not so deficient as to require the corporation to undergo some kind of restorative treatment to mend its misdirected ways. If not punishment or rehabilitation, then perhaps deterrence must be the statutory goal. For the present taxable year of 2005, deterrence comes too late. For other corporations who have yet to follow, deterrence requires awareness if such deterrence is to be effective. Interest and penalty impositions for late payment of corporate income tax liabilities are well known. A penalty for late filing that arises from the avoidance of a timely filed extension, *ab initio,* is not nearly as well known.[222]

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[221] Tax Based on Income from Sources Within or Without the United States

[222] In eighteen pages of elucidatory instructions of F-1120N (R. 01/06) found in the F-1120 Instructions for Corporate Income/Franchise and Emergency Excise Tax Return for taxable years beginning on or after January 1, 2005, the solitary word "void" is found only once in a printer's unit of measurement that is not overpowering in size.

Again the "escape hatch" reads: "…noncompliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud." From my nonobjective position I honestly believe that the subject foreign corporation meets the penal exception with respect to the late filing penalty. If this severe penalty is to go unabated at this time of year, then I can only take comfort in the words of a clergyman from Georgia: "Unearned suffering is redemptive."[223]

4. *Letter of Apology to Fellow Vineyard Worker The addressee quite understandably preferred to communicate with the attorney for the estate as opposed to working with an irascible personal representative and successor trustee [The "hat in hand" approach with an introductory "I may be mistaken" is more likely to produce a positive response from the mistaken practitioner]:*

Dear Mr. H.R. Blocker:

Permit me to apologize for my comments today. I would very much like for you to continue your past services as the tax accountant for the Goodwin & Glacial real estate partnership. John Goodwin has been very satisfied with your past services and there is no reason to terminate such a good relationship.

My only concern relates to my responsibility as a fiduciary as successor trustee to the Barry Glacial Revocable Trust [that is the correct name, recognizing that said trust by Barry's death has become irrevocable]. It is that responsibility and my alleged expertise in federal taxation[224] that compels me to insist on appropriate action on your part. I stand ready to assist you at any point at no cost to you. In addition, any additional time and costs incurred by you should be billed separately to the trust.

Recalling our "hurried" conversation this afternoon, I cited I.R.C. §708(b)(1)(B)(1986) to emphasize that in the absence of a sale or exchange of a 50 percent or more interest in the partnership capital and profits, a termination of the partnership has not occurred. Death, per se, and the dispositive transfers effectuated by such death, do not in and of themselves constitute such a federal statutory termination.

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[223] I include the information detailed in Rule 12-13.008 FAC:

Palatial Properties Limited; c/o Triay & Triay, 28 Irish Town, Gibraltar; 11-2325336

Corporate Income Tax; Late Filing Penalty; Calendar Year Ended December 31, 2005

Amount of Late Filing Penalty: $2,469.59

[224] With the indulgence of Jose de la Torre, Dean of the Alvah H. Chapman, Jr. Graduate School of Business, and Dana A. Forgione, Director of Accounting, College of Business Administration, both of Florida International University, I have been privileged, in my unofficial capacity as a loose canon adjunct professor, to lecture on tax research, partnerships, S and C corporations, state and local taxation, current developments, federalism, and fiduciary accounting in Florida.

William A. Snyder, Esq., my attorney, will forward a copy of the real estate appraisal to your office to permit the partnership to make a timely section 754 election to allow an optional basis adjustment under section 743(b) in the manner prescribed by the regulations under section 755. Again, I am at your beck and call to assist you in anyway that you require.

I look forward to working with you, and again, offer my sincere apologies for my intemperate remarks. Oh, before I forget, the employer identification number for the trust partner is 09-6817246.

5. *Responding to an Outside Request for Tax Memorandum Drafting Services It is hard enough to prepare a written memorandum for one's own clients where the operative facts are known or more readily discoverable. Preparing such a memorandum for another professional's client puts the ultimate taxpayer at a greater distance, which may or may not be preferable depending on whether one chooses to work through such a professional:*

Tax Memorandum

ISSUE

If "…property [is] held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business"[225], may the cost of such property be written down to reflect its current and lower market value?

RULES

1. If the method of accounting used by the taxpayer "does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Secretary, does clearly reflect income."[226]

[225] I.R.C. §1221 (which defines the term "capital asset" in a negative manner), in the first paragraph of subsection (a), attempts to distinguish "inventory" in a broad sense from a capital asset. The paragraph reads in full as follows: "stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or ***property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business".*** (Emphasis added) All references to the Internal Revenue Code, cited herein, are to the most recent 1986 version, as amended, and to the treasury regulations promulgated thereunder, unless otherwise indicated.

[226] I.R.C. §446(b)

2. "Whenever in the opinion of the Secretary the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer on such basis as the Secretary may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income."[227]

APPLICATION

Rules of law lie naked with limited meaning without a variety of fact patterns to give them vitality. The two legal rules stated above are assuredly not particularly complicated ones, but the relevancy of those rules in the instant tax memorandum are dependent on the facts peculiar to the taxpayer and the apparently settled treasury regulatory interpretations and the decided court cases relating to those two rules. This memorandum attempts to resolve the issue posed above by applying the two rules contained within the Internal Revenue Code to a taxpayer that is engaged in the trade or business of converting rental apartments into condominium units that are offered for sale to the public once the process of conversion is completed. Given the current real estate market, which is experiencing a reduction in value coupled with a decrease in available credit, it is quite understandable and exceedingly desirable for such a taxpayer to suggest that the taxable income in the year of such cataclysmic events should be reduced[228] to permit the recognition of real economic losses that have surely been realized.

The tax discussion that follows will assume, arguendo, that the proposed diminution of the carrying values of the unsold condominium units is consistent with the application of generally accepted accounting principles. That not insignificant fact hardly resolves the tax problem posed, however. More specifically, the United States Supreme Court case of *Thor Power Tool Co. v. CIR*[229] stands in the way of automatically assuming that the tax authorities will not contest an accounting procedure simply because it appears to have the blessing of those entrusted with the promulgation of acceptable accounting rules.[230] While the Supreme Court affirmed the two lower courts on the failure of the taxpayer to satisfy the regulatory evidentiary burden of writing

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[227] I.R.C. §471(a)

[228] Conceivably such a reduction might even produce a net operating loss for the current taxable year, permitting a carryback of such loss to the two preceding taxable years. Clearly, in such an economic environment, the carryback authority under I.R.C. §172(b)(1)(A)(i) offers a far more attractive alternative than does a new loan application to a presently more conservative lender.

[229] 439 U.S. 522 (1979)

[230] When asked whether the Congress would forestall the effective date of the adjustment for adjusted current earnings in computing a subchapter C's alternative minimum taxable income under I.R.C. §56(g)(4), the semi-apocryphal tale tells of Chairman Rostenkowski insisting that the "book income adjustment" of subsequently repealed section 56(f) could not be allowed to survive beyond its legislatively mandated three year existence as tax laws should never be subordinated to rules promulgated by non-governmental accounting authorities. As stated on page 434 of the General Explanation of the Tax Reform Act of 1986, as prepared by the Staff of the Joint Committee of Taxation, "…Congress concluded that the goal [of applying the minimum tax to all companies with substantial economic incomes] should be accomplished by means of a preference based upon ***financial statement or book income reported by the taxpayer pursuant to public reporting requirements or in disclosures made for nontax reasons to regulators, shareholders, or creditors."*** (Emphasis supplied)

down the cost of "subnormal" goods[231], the major significance of the decision is the Court's statements on the relationship between generally accepted accounting principles and the tax accounting rules to which the Commissioner of Internal Revenue adheres:

a) The decision states with crystal clarity that the mere fact that the taxpayer observes generally accepted accounting principles, does not, in and of itself, raise the presumption that the particular inventory costing method used by the taxpayer clearly reflects taxable income.[232]

b) The presumption is insupportable as "[t]he primary goal of financial accounting is to provide useful information to management, shareholders, creditors, and others properly interested; the major responsibility of the accountant is to protect these parties from being misled. The primary goal of the income tax system, in contrast, is the equitable collection of revenue; the major responsibility of the Internal Revenue Service is to protect the public fisc."[233]

c) Driving home the distinctions between tax and financial accounting, the Supreme Court noted that while "[f]inancial accounting, in short, is hospitable to estimates, probabilities, and reasonable certainties; the tax law, with its mandate to preserve the revenue, can give no quarter to uncertainty." And finishing on this dichotomy with a flourish: "Accountants have long recognized that 'generally accepted accounting principles' are far from being a canonical set of rules that will ensure identical accounting treatment of identical transactions. 'Generally accepted accounting principles', rather, tolerate a range of 'reasonable' treatments, leaving the choice among alternatives to management….Variances of this sort may be tolerable in financial reporting, but they are questionable in a tax system designed to ensure as far as possible that similarly situated taxpayers pay the same tax."[234]

Having somewhat summarily disposed of the first rule above that adherence to generally accepted accounting principles, by not raising a presumption as stated in the *Thor* decision, does not assure that the taxpayer's selected accounting method meets the statutory requirement of "clearly reflect[ing] income", it becomes necessary to determine if the second rule, an inventory rule, that "conform[s] as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting income" will permit the taxpayer to reduce the present carrying cost of its unsold condominium units without running afoul of tax accounting rules. Noting that the Supreme Court in *Thor* made the non-gratuitous comment that the term "best accounting practice" that appears in I.R.C. Sec. 471(a) is "synonymous with 'generally accepted accounting

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[231] See Treas. Reg. §1.471-2(c)

[232] "[The presence of such a presumption] is insupportable in light of the statute, the Court's past decisions, and the differing objectives of tax and financial accounting." Id. fn. 229 at page 540

[233] Id. fn. 229 at page 542

[234] Id. fn. 229 at page 544

principles'", the Court states, nevertheless, under Treas. Reg. Sec. 1.471-2(a)(2), it is still necessary to show that such an inventory method satisfies the statutory requirement of clearly reflecting income.[235] While that is undoubtedly true, the statutory and regulatory inventory provisions are more specific than and not as amorphous as the "clearly reflecting income" standard. Therefore, if the taxpayer is able to fit neatly into one of the inventory methods that are accepted for tax purposes, then, presumably, the clearly reflecting income standard will be satisfied at the same time.

Accordingly, referring to the originally stated issue above, including the accompanying footnote that begins the negative definition of a capital asset by excluding inventories, perhaps, a dealer in or a developer of real estate, by using "inventories" would be able to take advantage of favorable rules that govern the treatment of inventories for tax accounting purposes.

It should be axiomatic that a converter of rental apartments to condominium units is a taxpayer that offers such units "primarily for sale to customers in the ordinary course of his trade or business". By including such a description in the first paragraph of I.R.C. Sec. 1221(a), the sale of such units will generate ordinary income as opposed to capital gain. Is one able to make the argument that the three separately stated items in that paragraph simply repeat the same point that inventory is not a capital asset, and that all three items, namely, "stock in trade", "other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year", and, finally, "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" are merely three different ways of referring to "inventory"? An affirmative answer would permit the taxpayer to utilize Treas. Reg. Sec. 1.471-4 that explicitly permits the use of a method that values inventories at cost or market whichever is lower.[236] Thus the critical question for resolving the issue posed by this tax memorandum is whether rule 2 permits a real estate dealer or developer to use an inventory method.

The answer could conceivably be implied from the statutory structure found in the Internal Revenue Code with its separate treatment of Section 460 [Special Rules for Long-term Contracts] and the statutory exception for long-term contracts found in Section 263A(c)(4) [Capitalization and Inclusion in Inventory Costs of Certain Expenses]. But such creative musing is obviated by treasury regulations and court decisions that provide a very definitive answer.

[235] Note that I.R.C. §471(a) uses the conjunction "and" between "best accounting practice in the trade or business" and "most clearly reflecting income". The regulation cited in the text makes that double requirement clearer by listing each of the two requirements with its own separate number.

[236] The distinctly separate issue of obtaining the consent of the Commissioner of Internal Revenue to change one's method of accounting if the taxpayer has been using the cost method of valuing inventories under Treas. Reg. 1.471-3 is not addressed. Treas. Reg. §1.471-2(c) explicitly states that the cost or market, which ever is lower, inventory method satisfies the requirements of I.R.C. §471.

The trail, an old and long one, starts with *Atlantic Coast Realty Co. v. CIR*[237], where the predecessor to the United States Tax Court held that a taxpayer holding real estate for sale to customers is not permitted to inventory such real estate. Treas. Reg. Sec. 1.471-1, promulgated in 1958,[238] provides: "In order to reflect taxable income correctly, inventories at the beginning and end of each taxable year are necessary in every case in which the production, purchase or sale of ***merchandise*** is an income-producing factor."[239] (Emphasis added) Admittedly, the above-cited *Atlantic Coast Realty Co.* case is not of recent vintage, but another case, *W.C. & A.N. Miller Development Co. v. CIR*[240], held: "[A] company engaged in the business of developing real estate was not entitled to elect to use the LIFO method of accounting for its completed homes and homes under construction, because, '[I]n our view, real property should not be considered "merchandise" within the contemplation of the regulation.'"

Homes by Ayres[241] is probably the most noteworthy court case at the federal appellate level. In the trial court below[242], the taxpayer made the following analogy, recognizing that a failure to fit real estate within the generic category of inventory would be fatal to such petitioner's case:[243] "Today's homebuilder is a manufacturer who transforms bricks, lumber and mortar into houses. *** He has created his own factory—the building site; machinery is the hammer, saw and nail. He is essentially a manufacturer whose workers move along a stationary assembly line. For

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[237] 11 B.T.A. 416 (1928) The writer has no access to that hoary decision but its characterization in the text above appears in Rev. Rul. 86-149, 1986-2 CB 67. Presumably quoting the Board of Tax Appeals from page 419, the following appears in the ruling: "The use of inventories must be reasonably necessary to the determination of income. The basis of their use must be prescribed by the Commissioner, not arbitrarily, but in conformity to the best accounting practice in the trade or business and as most clearly reflecting income. The language indicates no intention to recognize in any trade a new method of determining income or a new limitation upon income, but only a recognition of the use of inventories in such trades or business, like 'manufacturing and merchandise concerns', as had been found to require such accounting practice." This ruling amplifies Rev. Rul. 69-536, 1969-2 CB 109, which states in exceedingly pithy prose: "A taxpayer is engaged in the real estate business and holds real estate for sale to customers. Held, the taxpayer in computing taxable income is not permitted to inventory real estate held for sale", citing the *Atlanta Coast Realty Co.* case

[238] T.D. 6336

[239] The words "production, purchase or sale" could certainly be applied to real estate, but the use of the word "merchandise" restricts the regulatory provision to manufacturing and mercantile operations.

[240] 81 T.C. 619 (1983) While the Tax Court case is not available to the writer, Professor W. Eugene Seago of Virginia Polytechnic Institute & State University—Department of Accounting and Information Systems, in his treatise on *Inventory Tax Accounting and Uniform Capitalization* [Clark Boardman Callaghan (1991)], §1-4.10, states that Congress has acquiesced with the court decisions that hold "that real estate should not be subject to the inventory rules", while the taxpayer engaged in real estate activities must, nevertheless, capitalize acquisition and construction costs associated with development. In support of that contention, the good professor cites the Senate Committee Report [No. 313, 99th Cong. 2d Sess at 146] that explicitly refers to the *Miller Development* case. While, again, that committee report is also unavailable to the writer, he is able to confirm that in the "Blue Book" of the Joint Committee of Taxation (see id. fn. 229 at page 523), the *Miller Development* case is cited as authority for the following statement: "In the case of ***noninventory*** property produced for sale, the rules [Uniform Capitalization, I.R.C. §263A] are effective for costs paid or incurred after December 31, 1986. No restatement of beginning balances [absent inventories] and no section 481 adjustment is required." (Emphasis added)

[241] 795 F. 2d 832 (9th Cir. 1986)

[242] 48 T.C.M. (CCH) 1050 [T.C. Memo 1984-475] Note that a tax memorandum decision of the United States Tax Court is indicative of the case being treated as one whose underlying law is well settled.

[243] To avail oneself of the last-in, first-out inventory method, Treas. Reg. §1.472-1(a) provides: "Any taxpayer permitted or required to take inventories pursuant to the provisions of section 471 and pursuant to the provisions of §§1.471-1 to 1.471-9, inclusive, may elect with respect to those goods in his application and ***properly subject to inventory*** to compute his opening and closing inventories in accordance with the method provided by section 472, this section, and §1.472-2." (Emphasis supplied) Thus, the LIFO election is dependent on satisfying the definition of inventory; otherwise the election is unavailable.

example, workers will install pre-cast fireplaces in all units; others will add windows to each unit while others will add doors, etc. Thus each unit produced has a similar percentage of costs incurred. The construction process currently applied to today's tract housing is therefore virtually no different from that employed in the aerospace industry, automobile industry, mobile home industry or by manufacturers of prefabricated housing."[244] While praising the petitioner on its imaginative presentation, the trial court simply stated that it is bound by precedent, citing *W.C. & A.N. Miller Development Co.*, quoting the portion of that prior decision that provides a devastating blow: "We do not accept petitioner's contention that capitalization is an inventory method."[245]

The 9th Circuit decision in the *Homes by Ayres* case is instructive. Despite rejection at the trial court level, the appellate court states quite clearly that "[w]hether I.R.C. Sec. 471 permits property other than merchandise to be inventoried for tax purposes is a question of law reviewed de novo." [246] Similarly, whether or not tract homes fall under the rubric of "merchandise", as the Code term inventory is defined by the regulations, is equally a question of law, fully reviewable at the appellate court level.[247] With another bite at the apple, the taxpayer attempts to argue that the regulation that interprets the term "inventory" in that statutory section as meaning "merchandise", does not necessarily prohibit a more expansive definition. The appellate court, however, views the Treas. Reg. 1.471-1 requirement to inventory merchandise as mandatory, while stating that the interpretative regulations allowing dealers in securities, livestock raisers and other farmers, and miners to use inventories, Treas. Reg. Sections 1.471-5, 1.471-6, and 1.471-7, respectively, are permissive. While it might be plausible that such additional regulations do not constitute an all-exclusive definition for the term "inventory", the appellate court states most emphatically: "The Commissioner has a broad discretion over accounting techniques and, as a matter of law, real estate cannot be inventoried until he changes his position or the Congress changes the law….The Commissioner has never consented, either in a regulation or a revenue ruling, to inventory accounting for real estate or real estate developments."[248]

It is not uncommon for taxpayers to capitalize direct and indirect costs, relating to acquisition, development, and construction expenditures, into accounts that they may choose to denominate as "inventory" accounts, particularly if such costs are treated as inventory costs under generally accepted accounting principles. But as the *Homes by Ayres* case states: "Although taxpayers allocate their accumulated costs in a way which resembles an inventory method, there is no basis

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[244] Id. fn. 242 at page 1053

[245] Id. fn. 240 at page 631

[246] Id. fn. 241 at 834

[247] As to whether a particular inventory method satisfies the "clearly reflect income" statutory standard, the appellate court would appear to view such a question as one of fact to be determined by the expertise of the Commissioner of Internal Revenue, not to be overturned unless such determination is "plainly arbitrary", dutifully citing the *Thor Power Tool Co.* case decided previously by the United States Supreme Court.

[248] Id. fn. 241 at 836

under the Code or established precedent for the contention that tract homes may be inventoried."[249]

Penultimately, the 9th circuit appellate court, citing *W.C. & A.N. Miller Development Co.,* quotes from that well recognized United States Tax Court case: "It has been consistently held that the costs of improvements to subdivided real estate held for sale are capital expenditures, allocable to the basis of the taxpayer in the various unsold lots."[250] Citing the Code and regulations thereunder relating to capital expenditures[251], the court states that gain from the sale of such property is determined quite simply by calculating "the excess of the amount realized therefrom over the adjusted basis."[252]

Finally, without innumerable citations to Code sections and interpretative regulations, perhaps the words of Associate Justice Blackmun, in *Thor Power Tool*, sum up best the predicament of a taxpayer unable to use an inventory method, but "condemned" to the rule that an unrealized loss, in the technical sense of I.R.C. Sec. 1001(a), is not currently deductible: "If this is indeed the dilemma that confronts Thor, it is in reality the same choice that every taxpayer who has a paper loss must face. It can realize its loss now and garner its tax benefit, or it can defer realization, and its deduction, hoping for better luck later….but there is no reason why the Treasury should subsidize Thor's hedging of its bets. There is also no reason why Thor should be entitled, for tax purposes, to have its cake and to eat it too."[253]

CONCLUSION

The carrying cost of real estate held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business may not be written down to reflect its current and lower market value. Any potential loss will only be recognized upon actual disposition of the property.

Respectfully submitted

Jonathan S. Ingber, C.P.A.

Perhaps a few afterthoughts are in order.

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[249] Id. fn 241 at 835

[250] Id fn. 240 at 632

[251] I.R.C. §263 and Treas. Reg. §§1.263(a)-1(a)(1), 1.263(a)-2(a), and 1.263(a)-2(d)

[252] Id. fn. 241 at 835 with further citations to I.R.C. §§1001(a) and 1012 and Treas. Reg. §1.1016-2(a)

[253] Id. fn. 229 at 545

There is a well-known quotation from Associate Justice Oliver Wendell Holmes, Jr.'s opinion in *New York Trust Co. v. Eisner,* 256 U.S. 345, 349 (1921), a case deciding the legitimacy of a federal estate tax over the constitutional objection of a direct tax not subject to apportionment among the several states. The learned justice simply said: "Upon this point, a page of history is worth a volume of logic."

Black's Law Dictionary, 7th Ed., Bryan A. Garner, Editor in Chief [West Group 1999] defines "specific performance" in the following manner: "A court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate, as when the sale of real estate or a rare article is involved."

Finally, in *Calamari and Perillo on Contracts,* 5th Ed., Hornbook Series [Thomson*West 2003], Professor Perillo states: "Today, despite the frequently non-unique character of parcels in housing subdivisions, the medieval doctrine still holds. Every interest in land is conclusively presumed to be unique and a contract to convey will be specifically enforced, even when the presumptive unique value of the land is rebutted as when the vendee has in turn contracted to resell the interest to a third party."

The writer notes that the historical uniqueness of land would even today seem to have an influence on the interpretation of the Federal income tax law. Treas. Reg. §1.471-10 [Applicability of long-term contract methods] refers the reader to §1.460-2 "for rules providing for the application of the long-term contract methods to certain manufacturing contracts." I.R.C. §460(f)(1) defines a long-term contract to mean "any contract for the manufacture, building, installation, or construction of property if such contract is not completed within the taxable year in which such contract is entered into", and §460(f)(2)(A) states that "[a] contract for the manufacture of property shall not be treated as a long-term contract unless such contract involves the manufacture of any unique item of a type which is not normally included in the finished goods inventory of the taxpayer."

Thus, in the so-called final analysis, the federal tax law which is the subject of the instant memorandum, stands for the proposition that widgets that come "trippingly off" the assembly line are controlled by provisions that differ markedly from those that control all phases of real estate development. Having made that somewhat simple observation, the writer notes that one would be hard pressed to make meaningful distinctions between the treasury regulations that govern long-term contracts and those that govern the uniform capitalization rules.

6. *<u>It Is Not Uncommon For Trial Lawyers To Suggest That Recoveries For Injuries Are Not Taxable</u> Remembering how a litigator in a wrongful death case called my attention to the non-taxability of future income arising from a structured settlement [defendant insurance company using annuities as a funding medium], I am slow to contradict assertions of non-taxability without authoritative backup:*

The gross income exclusion of compensation for injuries has a long venerable history dating back to 1918.[254] Prior to its amendment in 1996, I.R.C. Sec. 104(a)(2) provided that "gross income does not include the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness". While defamation[255] clearly constitutes a tortious act producing personal injury, the 1996 legislation responded to two decisions of the Supreme Court.[256] As a result of the legislative amendment, the federal tax statute now reads: "[G]ross income does not include—(2) the amount of any damages (other than punitive damages)[257] received (whether by suit or agreement

[254] See Revenue Act of 1918, § 213(b)(6).

[255] A generic term encompassing both slander and libel.

[256] P.L. 104-188 [Small Business Job Protection Act of 1996]. See *United States v. Burke,* 504 U.S. 229 (1992) and *C.I.R. v. Schleier,* 515 U.S. 323 (1995). It should be noted that the Congressional response does not "apply to any amount received under a written binding agreement, court decree, or mediation award in effect on (or issued on or before) September 15, 1995." [Historical note to I.R.C. § 104]

and whether as lump sums or as periodic payments) on account of personal ***physical*** injuries or ***physical*** sickness." (Emphasis supplied) Consequently, regardless of how painful the "slings and arrows" of defamatory aspersions may be to the psyche, any allocation of a portion of a mediated settlement to defamation of character or reputation would still constitute fully taxable gross income.[258]

Taxable settlement proceeds give rise to deductible attorney fees. Prior to the 2004 amendment to I.R.C. Sec. 62(a), legal fees payable out of the gross proceeds awarded to a litigant were included in her gross income without a potentially effective offsetting deduction available. Typically, the benefit of the deduction for such legal fees was significantly eviscerated by the phase-out of an individual's itemized deductions as well as by her alternative minimum tax adjustments.[259] While a number of decisions among divided Courts of Appeals had permitted such legal fees to be excluded from the successful litigants' gross income[260], the conflict was definitively resolved against the taxpayer by the Supreme Court in 2005.[261] The relief granted by the legislative amendment, allowing the successful litigant a deduction from gross income in the calculation of adjusted gross income, is limited primarily to causes of action claiming unlawful discrimination.[262]

Given the conclusions reached in the two preceding paragraphs, the tax "mechanics" would presumably play out as follows:

1. The payer, either the defendant or its insurance company, would issue a Form 1099-MISC (Miscellaneous Income), including the entire settlement amount in Box 3 (Other Income), attaching an explanation to the form that describes the nature of the income, such as "proceeds from litigation settlement".[263]

2. The reported income would be shown as "Other income" on line 21, page 1, of the individual taxpayer's Form 1040, and litigation costs, including legal fees, if any, deducted by

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[257] The 104th Congress also anticipated the Supreme Court's subsequent decision holding punitive damages in a personal injury lawsuit as taxable. See *O'Gilvie v. United States,* 117 S. Ct. 452 (1996).

[258] Note that the penultimate sentence of the flush language to I.R.C. § 104(a)(5) reads: "For purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness."

[259] See I.R.C. §§ 67(b), 68(f), and 56(b)(1)(A)(i).

[260] One theory permitting the partial exclusion was predicated on state law entitling counsel to a special lien or property interest in the litigation recovery.

[261] See consolidated cases in *C.I.R. v. Banks and C.I.R. v. Banaitis,* [No. 03-892 & No. 03-907] (S. Ct. 2005).

[262] See I.R.C. § 62(a)(20) as enacted by the American Jobs Creation Act of 2004 [P.L. 108-357]. In 2006, by virtue of the Tax Relief & Health Care Act of 2006, paragraph 21 was added to this Code section to extend such deduction relief to plaintiffs in whistleblower lawsuits for reporting violations of the internal revenue laws.

[263] Some payers have erroneously included such settlement recoveries in Box 7 (Non-employee Compensation) of the above referenced form, suggesting that the recovery amount is subject to self-employment tax.

the defendant or its insurance company and paid over to third parties, would be shown as "Certain Miscellaneous Deductions" on line 23 of Schedule A (Itemized Deductions).[264]

7. An Interplay of Subpart E of Subchapter J, Subchapter S, and Subtitle B Unlike the textbook study of tax law, both planning and compliance involve transactions that have a nasty habit of invading more than one tax alcove:

Far Rockaway, Inc./The Coconut Grove Trust

During our telephone conversation of this past Friday, I had apparently misunderstood that the subchapter S regulations[265] had imposed an additional requirement on the subchapter S Code[266] provision concerning the eligibility of a subpart E trust to be a shareholder of an S corporation. The mere use of the word "qualified" in those regulations apparently added nothing to the Code provision, but rather it is subpart E of subchapter J, both by Code [267]and regulatory[268] provision, that caused the concern about general powers of administration exercised in a non-fiduciary capacity as a threat to the continuing validity of the S election upon the introduction of a new shareholder to the existing S corporation.

I did, however, correctly understand the other issue raised, namely, the possible conflict of satisfying the income tax requirement for an intentionally defective grantor trust provision for a grantor potentially exercising a power in a non-fiduciary capacity in terms of the possibly detrimental effect such a power might have on the estate tax provisions[269] determining inclusion in the federal gross estate.

Permit me to make a comment or two regarding the Internal Revenue Service rulings and then possibly ask a gift tax question. In case my conclusion gets loss in the following thoughts, I am in favor of the transaction moving forward in the manner suggested by Satan:

1. As to the Private Letter Ruling[270], focusing on the continuing viability of an S election and given the wording of the income tax regulation[271], it certainly is not surprising that

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[264] No attempt is made to discuss the tax "mechanics" if the plaintiff in the mediated settlement were a professional association, say, a subchapter C corporation. In such a case the settlement proceeds would, of course, still be a fully taxable amount, but any offsetting fees would be fully deductible as "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business…" under I.R.C. § 162(a).

[265] Treas. Reg. §1.1361-1(h)(*1*)(i)

[266] I.R.C. §1361(c)(2)(A)(i)

[267] I.R.C. §675(4)

[268] Treas. Reg. §1.675-1(b)(*4*)(iii)

[269] I.R.C. §§2036(a)(2) and 2038

[270] PLR 199942017 [10/25/1999]

the Internal Revenue Service was reluctant to issue a ruling on the administrative power to substitute assets of equivalent value considering the highly factual nature of such a determination. While my favorite subchapter S treatise[272] does not cite the 1999 ruling, it does refer to Private Letter Ruling 9253010 (Sept. 30, 1992) where the authors summarize its conclusion on the subject power of substitution: "Citing IRC §675(4)(C), the Service held that the trusts would be grantor trusts, *provided* that the power to substitute was held in a nonfiduciary capacity. The local District Director[273] on audit would determine how the power was held."

2. If the government is unwilling to rule in the case of a living grantor, I would recommend moving forward with the transaction, after providing the requisite caveat to our taxpayers, and possibly incorporating some of the drafting language suggested by Professors Westfall and Mair. It is not sonar that will permit the navigation of troublesome shoal water for the tax planner, but rather a sense of proportion with an earnest attempt to adopt realistic procedures. While many statutory provisions are inherently factual in nature[274], to allow such language to inhibit legitimate estate planning in the instant context, seems to ignore the old adage: "Nothing ventured, nothing gained."[275]

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[271] Id. fn. 268, last sentence: "If a power is not exercisable by a person as a trustee, the determination of whether the power is exercisable in a fiduciary or a nonfiduciary capacity depends on all the terms of the trust and ***the circumstances surrounding its creation and administration."*** (Emphasis added)

[272] *Federal Income Taxation of S Corporation,* 4th Edition, Eustice & Kuntz [Warren, Gorham & Lamont, 2001]

[273] Or her administrative equivalent today, following major structural reconfigurations in the administrative agency

[274] My favorite, in a terribly prosaic context, is the amorphous "ordinary and necessary expenses paid or incurred…in carrying on any trade or business" of I.R.C. §162(a). Let Associate Justice Cardozo provide the necessary inspiration: "Here, indeed, as so often in other branches of the law, the decisive distinctions are those of degree and not of kind. One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle." *Welch v. Helvering,* 290 U.S. 111, 114 & 115 (1933)

[275] Put a slightly different way, one will never be as certain in the tax planning process as a physicist might be in determining the melting point of lead.

3. As to the publicly promulgated Revenue Ruling[276] that is the subject of the most recent Journal of Taxation article[277], it should be noted that the grantor discussed in the ruling was deceased. At that point in time all ***the circumstances surrounding its creation and administration*** are no longer speculative events subject to revelation in the future.[278] Apparently, the government feels comfortable with relying on local law or terms of the governing instrument to ensure that the well-known fiduciary standards are adhered to, which, of course, would prevent the grantor, exercising her powers in a nonfiduciary capacity, from so exercising those powers in a manner that would run afoul of the estate tax inclusion provisions.[279] While presumably such faith is well placed in the selection of an institutional fiduciary as trustee, recent in house experience[280] would suggest that the choice of a related, non-professional trustee has inherent problems.

4. Finally, I pose my gift tax question: A provision in subtitle B would suggest that the instant grantor trust would not require the filing of a gift tax return.[281] Reading of the presumably pertinent regulation[282]does not appear to address the grantor trust being considered in the current planning. Does the "seeding" of the trust on initial formation require the filing of a gift tax return?[283]

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[276] Rev. Rul. 2008-22, 2008-16 IRB 796 [04/17/2008]

[277] *Power to Substitute in Grantor Does Not Cause Inclusion, With a Significant Caveat,* Michael D. Mulligan, Journal of Taxation, July 2008

[278] *Burnet v. Logan,* 283 U.S. 404 (1931), an income tax case in the context of a corporate liquidation, established the doctrine of the "open transaction" when the assets received in liquidation could not be ascertained with reasonable accuracy to determine the shareholders' individual income tax liability, despite the fact that the "[v]alue of the …interest which each acquired by bequest was fixed at $277,164.50 for purposes of [the] federal estate tax at the time of the [shareholder's] death." (at page 414)

[279] Either permitting the grantor "to designate the persons who shall possess or enjoy the property or the income therefrom" [§2036(a)(2)] by somehow altering the division of the property or income among the beneficiaries by exercising her nonfiduciary powers of administration, or, by not adhering to the equivalent substitution rule, effectively amending or partially revoking the inter vivos grantor trust by reducing the value of the corpus in violation of §2038.

[280] Borrowing of $500,000 of trust corpus by one trustee; failure to fund and thereby segregate the credit shelter trust from the marital disposition by another are two recent examples. Most assuredly, the then Judge Cardozo's words of a fiduciary's [partner in the litigated case] obligations should be mandatory reading for the selected amateur: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honestly alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court." *Meinhard v. Salmon*, 249 N.Y. 458 (1928)

[281] I.R.C. §2511(c)(treatment of certain transfers in trust): "Notwithstanding any other provision of this section, and except as provided in regulations, a transfer in trust shall be treated as a transfer of property by gift, *unless the trust is treated as wholly owned by the donor or the donor's spouse under subpart E of part I of subchapter J of chapter 1.*" (Emphasis added)

[282] Treas. Reg. §2511-2(Cessation of donor's dominion and control)

[283] Note that the filing of a gift tax return reporting an incomplete gift does not seem to cause the statute of limitations to commence running. Treas. Reg. §301.6501(c)-1(f)(*5*)(penultimate sentence)

Criticism of any of the above comments is indeed welcome.[284]

8. <u>Entering Unfamiliar Terrain As If One Belonged There</u> So-called contracts of adhesion are no match for the common interest realty association documents developed by contractors. When no attorney seemed interested in the matter, the homeowner acquired a fool for a client as he delved into the "foreign" law of real estate. Having been transmitted by e-mail to the commissioners of the City of Weston, the letter below became a public document. Our good neighbors, the Cuzas, improved a beautiful house, unexpectedly providing additional hurricane protection from any easterly wind that blows no one well. Thinking back a moment to the Save Our Homes legislation enacted by the Florida legislature, perhaps the present Governor should occasionally listen to a knowledgeable Georgian lawyer as Nordlinger v. Hahn, 505 U.S. 1(1992) may not ultimately be sufficient protection for such discriminatory schemes:

July 1, 2006

Board of Directors
W. H. Maintenance Association, Inc. and/or
Central Hills Maintenance Association, Inc.
c/o Richard Omana
Post Office Box 559009
Fort Lauderdale, Florida 33355

Carol Hayward-Zoning Administrator
City of Weston
Zoning & Landscaping
2700 South Commerce Parkway-Suite 103
Weston, Florida 33331
Dear Mr. Omana and Ms. Hayward:

This is a letter of disappointment, containing the thoughts of two unhappy homeowners. Whatever constructive effect it may have on the future course of conduct of the authorized governing bodies of the City of Weston, I must of necessity leave entirely within the discretion of the good citizens who serve on those bodies.

On the morning of Thursday, June 29, 2006, my wife, Ellen, hearing the sounds of construction equipment, received her first notice of our neighbor's request for an architectural modification. Later, the neighbor, Mrs. Carmen Bou de Cuza, informed my wife as she left for work, that a two-story addition and a pool would be erected on the property. Such an improvement would occupy most of the remaining portion of the lot on which the existing structure of a two-story house currently stands.[285]

[284] The question posed never received a response. The correct answer is affirmative. The citing of I.R.C. § 2511(c) in footnote 281, supra, is erroneous as, by virtue of the Economic Growth and Tax Relief Reconciliation Act of 2001, as amended by the Job Creation and Worker Assistance Act of 2002, subsection (c) of the cited Code provision would go into effect for gifts made after December 31, 2009.

[285] For ease of reference, permit me to list the affected owners and the legal descriptions of their respective properties:

Stepping back in time for a brief moment, on October 1, 1994, Ellen and I, with our son, Jeffrey, and our two dogs, Goose and Mascara, left north Miami-Dade County, seeking "a far, far better place" to spend the rest of our lives. Landing in an unincorporated part of Broward County known as Weston, an Arvida Community, we clearly had found a little piece of heaven here on Earth. At the time of closing on October 2, 1995, following a period of construction, I was aware of the proposed two-story building on adjoining "Cuza" Lot 50, which would leave a significant amount of open space between the back of the proposed two-story building and the other two-story home on "Mendoza" Lot 49, the front of which borders Jardin Court, the street that runs perpendicular to Jardin Lane ("Cuza" Lot 50 is, of course, the lot that stands at the intersection of the two named streets.).

I must tell you, quite frankly, without exaggeration, that completion of the new architectural modification will obliterate that "open space" and destroy our negative light-and-air easement. The wall, thirty feet or more in height, stretching to the back of "Cuza" Lot 50, when combined with the existing two-story structure on "Mendoza" Lot 49, will eliminate our dominant estate's exposure to the direct rays of the eastern sun and will block the air that hitherto has provided refreshing breezes for our barbecue meals. The marvelous view through both the French doors of the family room and the master bedroom will no longer exist.[286]

Again, on the morning of Thursday, June 29th, my wife, Ellen, asked Mrs. Cuza whether a property owner should feel compelled to inform the adjoining property owners of pending construction; stating, most emphatically, that the proposed architectural modification would "completely block us in", "overwhelming"[287] the eastern side of our house, limiting the exposure of our home and backyard to the sun light and air; that our home would be "walled in" not by our choice but by their design since the "Mendoza" lot, an existing two-story structure, would, in conjunction with the proposed Cuza modification, have exactly that effect.

The laity tends to view property as something tangible, as "terra firma" one might say. But the reality is that property consists of a variety of rights, a "'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property."[288] I do not wish to bore the reader with the constitutional niceties of procedural due process, but I am compelled to state

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A. Jonathan S. & Ellen E. Ingber; Sector 7 Parcel J-1 157-38 B, Lot 51 (2544 Jardin Lane)

B. Jesús E. Cuza & Carmen Bou de Cuza; Sector 7 Parcel J-1 157-38 B, Lot 50 (2542 Jardin Lane)

C. Alicia Mendoza; Sector 7 Parcel J-1 157-38 B, Lot 49 (2567 Jardin Court)

[286] The rising sun has been an inspiration for me since my days as the Senior Watch Officer aboard the USS Adroit (MSO-509), reserving to myself the 0400 to 0800 watch as a qualified officer of the deck underway. Today, Mascara, our one surviving dog, is enjoying the view of her domain as well as "soaking up" the rays of a warm sun.

[287] To use a technical word of art as expressed by Sarah, an employee of the Castle Group, who indicated that there was no file on the Cuza addition.

[288] In *United States v. Craft,* 122 S. Ct. 1414 (2002), Justice O'Connor cited Benjamin Cardozo's classic, *Paradoxes of Legal Science,* substituting the expression "bundle of sticks" for Cardozo's use of a British term.

that the quintessential nature of such a process is the simple expedient of "notice". Again, the hum of the bulldozer's motor that Thursday morning was the only notice given to the Ingbers.

Testing the conceptual boundaries of "neighborliness", my wife asked Mrs. Cuza if she had ever wondered why, despite the five foot bronze aluminum flat handrail style fence that surrounds three sides of our property, Goosie and 'Cara never appeared in the backyard without a leash. The rather simplistic answer was our concern for the safety of her children, as seemingly friendly dogs constitute an attractive nuisance for children who are wont to place their fingers through the interstices between the bars of such a fence.

Without wishing to subject the patient reader to further expressions of our unhappiness, my wife, in her characteristically succinct manner has asked me: "Where do we go from here?" Not conversant with the procedural methods of protecting whatever proprietary rights we possess in the instant case, I would say, at the very least, that Ellen and I are entitled to present our views before the appropriate governing body in the City of Weston, whether it is an architectural review board of either the W.H. Maintenance Association or the Central Hills Maintenance Association. In the absence of such a review board, we would request an opportunity to be heard before the Board of Directors of the maintenance association possessing the requisite jurisdiction.

I am compelled to call the reader's attention to the Declaration of Master Covenants for Weston Hills, a pithy document presented to Ellen and myself at the time of the closing on our castle in Weston. My favorite part is Article VII that pertains to a multitude of use restrictions, including Section 8 thereof, which states in part: "…No dogs or other pets shall be permitted to have excretions on any Common Areas, except areas designated by the Association, if any, and Owners shall be responsible to clean-up any such excretions…." Remembering that the standards established by the Architectural Review Board "are not intended to stifle the imagination or creative desires of the residents of the community, but, rather to help maintain the appearance of the overall community and thereby the value of [one's] property", I find it a bit mind boggling that an architectural modification may have been approved without any input from adjoining property owners who are directly affected, if not irretrievably injured, by such a modification.[289]

Finally, I wish to state for the record, that our son, Jeffrey Harrison Ingber, while not a co-owner of the subject property, as a long-time resident of the City of Weston, living in our home, would definitely approve of the comments made herein.[290]

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[289] I am not totally unsympathetic to the cognizable governmental body's desire to permit a variety of architectural modifications designed to keep existing residents from being forced to acquire more suitable accommodations through acquisitions as opposed to improvements. That noble desire must also take into consideration those existing residents that must bear the brunt of ill-advised modifications.

[290] As a member of the Army National Guard, by an order to mobilize in support of Operation Iraqi Freedom, Jeffrey arrived "in country" on November 4, 2005. He was initially stationed in Iskandariyah, along the perimeter of the Sunni triangle, as part of a military intelligence unit.

Possibly Robert Frost got it right when he opined: "Something there is that doesn't love a wall." In the interest of full disclosure, however, he also said: "Good fences make good neighbors."

Very respectfully,

Jonathan S. Ingber

cc: Mayor Eric M. Hersh [ehersh@westonfl.org]
Commissioner Sharon Cheren [scheren@westonfl.org]
Commissioner Mercedes G. Henriksson [mhenriksson@westonfl.org]
Commissioner Daniel J. Stermer [dstermer@westonfl.org]
Commissioner Murray Chermak [mchermak@westonfl.org]
William A. Snyder, Esq. [bill@snyderlaw.pa]

9. The Burden of Proof—Where Does It Properly Belong? I.R.C. § 7491, as enacted by the IRS Restructuring and Reform Act of 1998, in a court proceeding, places such burden, if the taxpayer produces credible evidence, on the Secretary of the Treasury. To what extent do the limitations of subsection (a)(2) effectively reduce the benefit of the statutory provision?[291]
Tax Memorandum: Application of Burden of Proof Statutory Provision in the Prosaic Setting of a Potentially Late Filing of a Subchapter S election

ISSUE

How does the ultimate burden of proof (persuasion), as opposed to the burden of "coming forward" (production), influence the resolution of a litigated case concerning the filing of Form 2553 (Election by a Small Business Corporation) one day before the ides of March?[292]

[291] "(a)(2) Limitations.
Paragraph (1) shall apply with respect to an issue only if— (A) the taxpayer has complied with the requirements under this title to substantiate any item; (B) the taxpayer has maintained all records required under this title and has cooperated with reasonable requests by the Secretary for witnesses, information, documents, meetings, and interviews; and…." Ignoring the politically popular approach, perhaps the burden of proof in a civil court proceeding really should be on the taxpayer.

[292] A troublesome but familiar practice area of federal corporate income taxation was chosen to illustrate the memorandum's subject.

RULE

I.R.C. § 7491 (1986)[293] shifts the burden of proof to the Secretary[294] in any court proceeding in which the "taxpayer introduces credible evidence with respect to any factual issue….", provided the following four conditions are met: First, the taxpayer has complied with any substantiation requirements contained anywhere in the Code.[295] Second, the taxpayer has satisfied the general record keeping requirements provided anywhere in the Code.[296] Third, the taxpayer has cooperated with the Secretary in providing evidentiary material to assist the government in meeting such burden. Fourth, and finally, the taxpayer, in the case of small businesses and trusts, has met the net worth limitations that apply for awarding administrative and litigation costs.[297]

APPLICATION

A statutory provision such as the one that is the subject of the instant memorandum lies naked with limited meaning until it is clothed with a particular fact pattern to give it vitality. It is assumed that the lawyer representing a nurseryman (philodendrons, not pediatricians), a sole proprietor with several employees that frequently operated his trucks to deliver plants, has finally persuaded her client to incorporate in the name of limited liability. To avoid the effect of the repeal of the *General Utilities* doctrine[298] a recommendation to have the small business corporation elect to be an S corporation is agreed to. Accepting the calendar year as the required taxable year, the election form and an application for employer identification number (Form SS-4) are simultaneously enclosed in the same envelope for regular non-certified mailing and placed on the secretary's desk on Thursday, March 14, 1992. The letter carrier picks up said envelope early the following morning.[299] Ultimately, an employer identification number is assigned but the corporate taxpayer never receives a notice of acceptance from the Internal Revenue Service

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[293] All references to the Internal Revenue Code, cited hereinafter, are to the most recent 1986 version, as amended, unless otherwise indicated. This particular section was enacted by the Internal Revenue Service Restructuring and Reform Act of 1998 (P.L. 105-206, § 3001). RIA Checkpoint provides 21 citations to the Internal Revenue Manual in its parts covering the examining process, rulings and agreements, appeals process, criminal investigations, and tax litigation.

[294] Secretary of the Treasury Fowler is the current occupant of the position in President George Bush's cabinet.

[295] The statute refers to "this title" which of course refers to all of Title 26 of the United States Code. Interestingly enough this "general rule" only applies with respect to any tax imposed by subtitles A and B (income taxes and the transfer taxes, respectively) and therefore omits most noticeably the employment taxes of subtitle C as well as a variety of excise taxes found elsewhere in the Code.

[296] The absence of records makes it impossible for the enforcer to determine whether the law has been complied with. See Endnote A.

[297] See I.R.C. § 7430. American Telephone & Telegraph can fend for itself.

[298] See I.R.C. §§ 336 and 1374. See Endnote B.

[299] The writer has taken a few liberties in describing a malpractice special that actually occurred somewhere outside of south Florida.

with respect to its timely filed election. These then are the facts to which an attempt will be made to apply the statutory provision that is the subject of the instant memorandum.

Before that task is attempted, however, it would be helpful to more fully analyze I.R.C. § 7491 that is briefly summarized in the rule stated above. Even before discussing the section's somewhat revolutionary approach to tax litigation, a few preliminary comments on the subject of "proof" itself might be helpful. Jimmy Hoffa used to say, "The federal government ain't proved nothin' against me, yet." He apparently considered a verdict of "not guilty" as the equivalent of angelic innocence. The reality, of course, as it relates to criminal litigation, is that the state can obtain a favorable decision only if it can "prove" its case beyond a reasonable doubt.[300] Moving into the realm of civil conflict, if the government seeks to impose a civil fraud penalty, it must prove the presence of such fraud utilizing a standard of proof that is known as "clear and convincing evidence".[301] The typical burden of proof standard in civil lawsuits, however, has been one that requires the party bearing such burden to demonstrate by a "preponderance of the evidence" that the questions of fact that are the subject of litigation have been established.[302] That simply means that it is more likely than not (Dame Justice's scales having tipped so ever slightly to one side or the other) that a particular fact is true or not.

Having taken a brief diversion into the general subject of proof, it clearly is time to peruse with considerable care the relatively new statutory provision.[303] "Commence dissection when ready Gridley"[304], subsection (a) of the subject Code section contains the essence of the legislative change enacted in 1998. Once the taxpayer has satisfied its burden of "go[ing] forward with

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[300] The beauty of mathematics lies in its proofs. There, utilization of rules of logic, itself a tightly constructed subject (see B. Russell, Principles of Mathematics (1902)), in conjunction with undefined terms (e.g., point or line), definitions (see the precision brought to the calculus' concept of the limit by Augustin Cauchy {"undreamed of by Leibniz and Newton"}) postulates (the Euclidean parallel postulate being one of the more famous ones), and theorems, have led to "proofs" with a certainty that far transcends the demonstrations encountered in the typical courthouse. See Endnote C.

[301] Interestingly enough, Michael Saltzman, author of the class treatise, cites I.R.C. § 6663(b) in support of this proposition. Examination of that statutory provision, however, reveals no specific reference to that high level of proof. Apparently, support for such a standard of proof in the case of the civil fraud penalty must be found in the judicial decisions. See *Gromacki v. Comm.,* 361 F.2d 727 (7th Cir. 1966), for example.

[302] The three different standards of proof enunciated above are relatively easy to mouth but these qualitative words clearly support different quantitative levels of proof. Yet one wonders whether a trier of fact, particularly a lay jury as opposed to an experienced trial judge (only bench trials are available in the Tax Court and the Federal Court of Claims), is able to distinguish such different levels of proof that almost imply that the evidence is weighed quantitatively both with respect to the sheer number of documents and witnesses as well as the level of their persuasiveness. A doubting Thomas might suggest that many such fact-finding decisions are to a large degree a product of viscera drawing upon inferences compelled by one's life experiences. Was it not Judge Jerome Frank of the Second Circuit, a colleague of Learned Hand, who once referred to a jury as an "ad hoc ephemeral legislature"?

[303] Recalling a classroom discussion: RTDC or read the damn Code (attributed to Professor Oliva). As the writer stated in class several weeks ago: Solicitor General, Erwin Griswold, once said in a Harvard tax law class: "Fellas (it was a different time), we can think great thoughts or we can look at the statute." An apocryphal quote that a fading memory attributes to Professor Dorsen, a professor of constitutional law at the New York University School of Law (circa 1964).

[304] See Endnote D.

prima facie[305] evidence"[306] (sometimes referred to as the burden of production), which the statute refers to as "credible evidence", the ultimate burden of proof (some times referred to as the burden of persuasion) shifts to the government. The limitations that follow that courageous thrust reduce the final result to something more reminiscent of a straw man.[307] Subparagraph 2(A) states quite authoritatively that a shift of the burden of proof in a court proceeding[308] with respect to a factual[309] issue occurs only if "the taxpayer has complied with the requirements under this title to substantiate any item." Examples of particular substantiation requests contained in the Code include those relating to charitable contributions[310] and entertainment and travel (including business meals).[311] Frankly the writer finds it difficult to believe that any taxpayer who has assiduously complied with such substantiation requirements would even find herself litigating the deduction issue in any court proceeding.

The second condition contained in subparagraph 2(B) that states, "the taxpayer has maintained all records required under this title" seems to make a bit more sense. Here one committee report or another[312] cites I.R.C. § 6001 which provides that "[e]very person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe." One could hardly quarrel with a requirement that insists on some modicum of substantiating documents. The latter part of the immediately preceding quote has sometimes, of course, led to the more onerous substantiation requirements referred to in subparagraph 2(A) of the subject Code section. Continuing with the present subparagraph 2(B) it gets even more interesting. It includes a third requirement that the taxpayer "has cooperated with reasonable requests by the Secretary for witnesses, information, documents, meetings, and interviews".

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[305] One establishes a "prima facie" case by adducing sufficient evidence that would permit a trier of fact to decide in favor of the litigant providing such evidence if evidence to the contrary is disregarded (See Black's Law Dictionary (1951)). In the past one might state that the burden of coming forward had shifted to the government knowing that the failure to submit such contradictory evidence might well cause a decision in favor of the taxpayer even though the ultimate burden of proof still remained with the taxpayer. Now, under new I.R.C. § 7491, unlike prior law, that burden of persuasion has also shifted to the government. See endnote E.

[306] The discussion that follows is gently "lifted" from the Joint Committee on Taxation's General Explanation of Tax Legislation Enacted in 1998 (the so-called "Blue Book"). While presumably somewhat less authoritative than the actual committee reports emanating from the House Ways & Means Committee, the Senate Finance Committee, and the Conference Committee, with limited time available for the writer's own reconciliation, it represented the "report of choice". See Endnote F.

[307] The words of T. S. Eliot come to mind: "This is the way the world ends (three times, s'il vous plaît), Not with a bang but a whimper." {*The Hollow Men*}

[308] Note the absence of any reference to an administrative proceeding.

[309] The statute gives the appearance that it is a somewhat simplistic process to distinguish between questions of fact in contradistinction to questions of law. See Endnote G.

[310] Rhetorically, was I.R.C. § 170(f)(8) prompted to some degree by an attempt to obtain a deduction for a sectarian education by making the check for tuition payable to the eleemosynary institution itself.

[311] Apparently former Commissioner of Internal Revenue, Sheldon Cohen, has voiced a touch of dismay that his obituary will include a reference to the promulgation, during his watch in the Kennedy administration, of the detailed regulations under I.R.C. § 274(d).

[312] Remember that the reference material is the amalgamated joint explanation.

Semi-rhetorically,[313] does not this requirement clearly show that the attempt to shift the burden of proof to the federal government is a bit absurd? Put somewhat differently, from a non-politically motivated point of view, is it not more sensible to require each taxpayer to maintain records for one person[314] rather the government be obligated to acquire adequate records for all taxpayers so that it may then be in the position to "prove" its case. The reality is that the burden of proof, as a general proposition, ought to lie with the taxpayer. The committee reports recognize that prior law was predicated on a judicially created rule that the Congress had impliedly accepted by enacting specific statutory rules to shift the burden of persuasion to the government in limited instances where such exceptions had better justification than leveling the playing field for the "little guy".[315]

The fourth condition upon which the shifting of the burden of proof is predicated is found in subparagraph 2(C). All individuals (human beings)[316] are automatically entitled to the relief, hedged as it is, under I.R.C. § 7491. The same is true of an entity such as a decedent's estate.[317] "Wealthy" (net worth in excess of seven million dollars)[318] taxpayers which are businesses (corporations and partnerships) or trusts (other than the exception for the qualified revocable trust following the grantor's death) are not eligible for the statutory relief.

A few more comments will be made concerning the new general "burden of proof" section before the issue of the timely filing of an election to be a small business corporation is finally addressed. The coordination rule of paragraph 3 must never be ignored. It states that the general rule contained within the subject section does not apply if a specific provision, elsewhere in any part of the entire Code, explicitly refers to the burden of proof issue. Such a specific provision will override the general one of I.R.C. § 7491(a)(1).

Subsection (b) raises the issue of the sufficiency of "statistical information on unrelated taxpayers" to support a finding of reconstructed (unreported) income. The statute simply shifts

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[313] See Endnote H.

[314] Lui-meme!

[315] Specific statutory rules cited in the Senate Report (105-174) include fraud (§ 7454(a)), transferee liability (§ 6902(a)), illegal bribes, kickbacks, and other payments (§ 162(c)(1) and (2)), and § 530 of the Revenue Act of 1978, among others listed seriatim. See Endnote I with respect to the last preceding non-Code provision.

[316] The North Carolina statute permitting the formation of a single member limited liability company defines an individual to be a "human being". The need for such a definition that appears on the surface to be ridiculous is attributable to the fact that the word "person" when it appears in a statute is used in a far more generic way than colloquial language would suggest. This is particularly true of the Internal Revenue Code.

[317] An amendment to I.R.C. § 7491 by the Tax and Trade Relief Extension Act of 1998 (P.L. 105-277)

§ 4002(b)), by means of "flush" language at the end of subparagraph 2(C), allows revocable trusts that would qualify for an election to merge with the grantor's estate to be eligible for the burden of proof relief from the date of the decedent's death to the "applicable date" regardless of net worth (See I.R.C. § 645(b)(2) for a definition of the latter term.)

[318] I.R.C. § 7430(c)(4)(A)(ii) makes a cross reference to a different part of the United States Code covering the judiciary (title 28) to arrive at the monetary amount.

the burden of proof in such cases to the Secretary. The committee reports state that it is "inappropriate for the IRS to rely solely on [such] statistical information on unrelated taxpayers to reconstruct unreported income of an individual taxpayer." Frankly it would appear that subsection (a) would have produced the same result.[319]

Finally, with respect to subsection (c), a burden of production (not persuasion) is placed on the government relating to any court proceeding where, in the case of an individual, "any penalty, addition to tax, or additional amount imposed by this title" is imposed on such individual. The committee reports state that the Internal Revenue Service will not be permitted to rely on "its presumption of correctness" without introducing any evidence whatsoever. Thus the government may not be allowed to be silent with impunity (to prevail) in such penalty cases.[320]

Having analyzed the Code's relatively new provision covering the subject of burden of proof, it is now time to attempt to relate such statutory law with the facts initially submitted near the beginning of this memorandum. Under prior law, involving similar facts (i.e., the simultaneous filing of both an S corporation election and the application for an employer identification number), the lower court granted the government's motion for summary judgment. The appellate circuit court of appeals[321] reversed on the grounds that viewing the pleadings in their most favorable light from the taxpayer's viewpoint, a question of fact existed that could only be resolved at the trial level. Accordingly the case was remanded to the trial court. Such a decision, prior to the adoption of new I.R.C. § 7491, indicates that, if the taxpayer could prove the facts asserted in the pleadings, it was possible that the trial judge could decide against the government in a case in which the taxpayer bore the ultimate burden of proof. From such a conclusion it would be even easier to conclude that the taxpayer would be more likely to demonstrate that a prima facie case existed shifting the ultimate burden of proof to the Internal Revenue Service. Once such a prima facie case is shown to be present, the government, in the instant case, will have to demonstrate that the election form was never received or was mailed after the filing deadline. A postmark would definitely support a finding with respect to the latter possibility. However, the ability to demonstrate the former, namely that the Form 2553 was in fact never received is quite problematic,[322] particularly when the government bears the burden of proving such a fact by a preponderance of the evidence. Assuming that the trier of fact believes the taxpayer's allegation that both forms were mailed together in the same envelope, the assignment of an employer identification number by the government strongly suggests that the S

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[319] Perhaps the controversy within the litigation community over the validity, let alone probative value, of such statistical evidence compelled the Congress to provide explicitly for the shifting of the burden of proof in such cases.

[320] The new section added to the Internal Revenue Code by the 1998 legislation has an effective date for court proceedings arising from examinations commencing after July 28, 1998. The committee reports also provide the revenue effect of the section for the government's fiscal years from 1998 to 2007, inclusive. See Endnote J.

[321] With regret the writer has been unable identify the case, which most assuredly exists, using RIA Checkpoint this evening in the closing seconds of play.

[322] Somewhat reminiscent of the most recent presidential campaign, the government would have to "prove a negative". Merely testifying to the normal procedures for handling documents received at the IRS service center would appear inadequate to prove that a particular election form was not received.

corporation election form was in fact received. Appellate courts are loathe to upset the fact findings made at the trial level since, viewing the cold dry written record, such higher courts do not have the distinct advantage of observing the witnesses testifying in person. Presumably "body language", tone of voice, and eye contact are all vital in assessing the truth of the testimony.

A concluding comment is in order. In a case such as the instant one where a simple question of fact, the timely filing of an election, controls the ultimate resolution of the litigation as opposed to a complicated question of law, prevailing in the court of original jurisdiction is tantamount to final victory. The nature of appellate jurisdiction dictates such a result.[323]

CONCLUSION

The shifting of the burden of proof as provided by I.R.C. § 7491 would significantly assist the taxpayer in prevailing in litigation on the factual question of whether or not it had filed a timely election to be treated as a small business corporation under I.R.C. § 1362(b).[324]

ENDNOTES

(NOT AN INTEGRAL PART OF THE MEMORANDUM ATTACHED HERETO, BUT HOPEFULLY INFORMATIVE NEVERTHELESS)

A. When the "contemporaneous" log keeping requirement for supporting the expenses associated with the luxury auto first appeared in the Tax Reform Act of 1984, Congress deleted the provision shortly thereafter in 1985. Some uninformed taxpayers concluded that a log was no longer required to demonstrate personal as opposed to business use. In fact the committee reports to the legislative repeal made it crystal clear that a contemporaneous record had far more probative value.[325]

B. In the preface of the fifth edition to their classic treatise on corporate taxation[326] professors Boris Bittker and James Eustice paid homage to their colleague, Gerald Wallace. "Jerry", in the inaugural edition of the Tax Law Review in 1944, had stated that the *General Utilities* case had been wrongly decided. In the Tax Reform Act of 1986 Congress signaled their agreement with Professor Wallace.[327] The function of I.R.C. §

[323] While appellate courts may reverse on questions of law only, factual findings that have no support whatsoever from the evidentiary record submitted on appeal may also be reversed on the ground that such findings are "clearly erroneous". Author Saltzman, in his treatise on IRS Practice and Procedure, reminds the reader that I.R.C. § 7482(a) provides for appellate jurisdiction with respect to the Tax Court in the following manner": "…in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury…." Further, findings of fact will not be disturbed on appeal absent a showing that they are "clearly erroneous". Fed. R. Civ. P. 52(a). Absent a meaningful evidentiary record to support factual findings, the appellate court has jurisdiction in any case posing a "question of law".

[324] See Endnote K.

[325] Compared to a diary prepared following receipt of a notice of an imminent examination.

[326] B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders (1987), a secondary source cited by the United States Supreme Court on more than one occasion.

[327] Not really. They simply needed the money.

1374 (Tax imposed on certain built-in gains) was to buttress the repeal of the doctrine spawned by the case. The length of the 10-year "recognition period" as well as the authorization of legislative regulations by I.R.C. § 337(d) are both indicative of the exceedingly strong legislative policy underlying the repeal of such a hoary line of cases.[328]

C. Frankly, I think Pogo had it right when he defined parallel lines as two lines that never intersect unless you bend one of them. One can imagine the furor that ensued when a mathematician proposed a geometry based on an axiom that rejected Euclid's parallel postulate. In his *Relativity: The Special and the General Theory,* New York: Three Rivers Press (1961), Professor Einstein credited the German mathematician, Georg Riemann, an early adherent to non-Euclidean geometry, with helping him to envision "the possibility of a 'finite' and yet 'unbounded' universe." The hyperbolic axiom from such a non-Euclidean geometry may be stated as follows: "There exist a line *l* and a point P not on *l* such that at least two distinct lines parallel to *l* pass through P." See M. Greenberg, Euclidean and Non-Euclidean Geometries: Development and History (1993).

D. A NAVOCS training film attributes the following order by Captain John Paul Jones to his gunner's mate: "Fire when ready, Gridley."

E. E-mail to Professor Oliva on May 20, 2001: If I live to be one hundred I think I will always remember that, on Saturday night, Perry Mason (Raymond Burr) always made the same motion at the end of the prosecution's case. He stated that the People, represented in the person of that repeated loser, Hamilton Burger, had failed to establish a prima facie case and accordingly requested a directed verdict in favor of the criminal defendant. From a purely dramatic point of view, at the denouement, Perry was never compelled to make a motion for judgment *non obstante veredicto.* The real murderer invariably confessed on the witness stand.[329]

F. Article I, section 7, paragraph 1 of the United States Constitution provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." Considering the latest tax

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[328] Apparently, the Court failed to consider the issue that the distribution of appreciated stock in another corporation extinguished a liability ("dividends payable") since it had not been raised in a timely manner below. Was it Justice Frankfurter who once stated in a dissenting opinion for an estate tax case that "the fact that wisdom comes late is no reason to reject it"? Governor Chiles used the same expression in the 1996 Florida gubernatorial campaign. One wonders whether the *General Utilities* case might have been decided differently if the United States Supreme Court had had the benefit of a later case decided by the Second Circuit Court of Appeals that pondered the result of funding a pecuniary amount with the use of appreciated property. See *Kenan v. C.I.R.,* 114 F.2d 217 (2nd Cir. 1940). Judge Learned Hand (cousin to Augustus who actually authored the opinion emanating from Foley Square), who sat on the Second Circuit Court of Appeals at that time, in his correspondence with Justice Felix Frankfurter, would sometimes question the competency of the Supreme Court to decide federal tax cases. In a conversation with his clerk, Archibald Cox, Judge Hand referred to "those nine bozos in Washington…." (A. Cox, The Court and the Constitution [1987]) Needless to say it was Justice Jackson who had the final word on Supreme Court expertise to decide any case: "We are the court of last resort not because we are always right; rather we are always right because we are the court of last resort." See B. Schwartz, Super Chief (1984).

[329] Until dementia sets in I shall always remember my lawyer's comment after nine years of litigation culminating in a completed jury trial: "The trial court judge is seriously considering directing a verdict for the defendants (my cousin and I) or, in the alternative, letting the case go to the jury and then entertaining a motion for judgment *non obstante veredicto*." To his everlasting credit, the judge refused to allow the jury to decide the case.

creation of the Congress[330], a cynic might assert that the bill originated in the {White} House and the "Conference" Committee consisted of Representative Thomas[331] and Senators Grassley, Backus, and Breaux.[332]

G. When one is not really sure how to apply such a dichotomy to a given issue, there is a tendency to refer to the problem as a "mixed" question of law and fact. One thing, however, is certain. Whether a question is one of law or fact is itself a question of law. The distinction may well vary depend on the nature of the substantive law involved.[333] Take the concept of "materiality", for example. Is the evidence material? Is the allegation material to the pleadings? Is the element material for defining the criminal act? Is the fact material to the consummation of the contract? Is the alteration to the agreement material enough to deprive it of "grandfather" protection under a revenue act?

H. David Frye used to refer to President Lyndon Johnson's "semi-beautiful" daughters.

I. The Small Business Job Protection Act of 1996 (P.L. 104-188) amended the non-Code § 530 of the Revenue Act of 1978 (see § 530(e)(4)) in a manner that seems clearly to have anticipated the changes wrought by the Internal Revenue Service Restructuring and Reform Act of 1998.

J. On the "tax policy" junket for next calendar year (July 18 & 19) would it be appropriate to ask the host whether their faith in the econometric models that produce such estimates is solidly based for the particular Code section at hand.

K. One juror commenting to another juror on the lawyer's talent for persuasion: "His logic certainly isn't <u>my</u> logic." (Cartoon from the New Yorker Magazine)

10. <u>One Small Tax Issue As The Internal Revenue Code Has More Than A Few Health Care Concerns, A Number That May Well Expand Rapidly</u> The memorandum below was completed more than eight years ago in a tax research class conducted by Professor Robert R. Oliva. The author continues to be indebted for Dr. Oliva's support and encouragement as the writing of tax memoranda began to become a fun activity:

[334]July 18 & August 14-16, 2001

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[330] The Economic Growth and Tax Relief Reconciliation Act of 2001 or in less verbose prose P.L. 107-16.

[331] Oh where have you gone, Charlie Rangel?

[332] On a small naval vessel, such as an oceangoing minesweeper, a static chart exhibiting the chain of command rapidly moves to a more dynamic one when a young executive officer fails to rise to a level dictated by the occasion.

[333] With a federal government of limited powers, the residual lawmaking power having been left to the 50 independently percolating laboratories of the states by the tenth amendment to the federal constitution, it is frequently necessary to first resolve an underlying question of substantive state law before the federal question of tax law may be answered. See *Morgan v. C.I.R.,* 309 U.S. 78 (1940).

[334] This would appear to be an errant footnote in search of verbiage.

From: Jonathan S. Ingber

To: Client

Info addee: Andreea Cazaçu (federal government representative)

Tax Memorandum: Income Tax Deductibility of Private School Tuition and Related Costs as a Medical Expense (a personal itemized deduction)

ISSUE

Are tuition fees and related costs of a private school (e.g., transportation; meals and lodging) deductible in computing the taxable income of the taxpayer parents, if a licensed medical practitioner, as a necessary part of psychological treatment, prescribes such school for their student child expelled from a public junior high school for severe behavioral problems?

RULE

I.R.C. § 213(a) (1986)[335] allows a deduction for the "medical care" of the taxpayer, her spouse, or a dependent, provided the cumulative total of medical expenditures, unreimbursed by health insurance, exceeds 7.5 percent of the taxpayer's adjusted gross income. Subparagraph d(1)(A) thereof defines "medical care" to include amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body."[336]

APPLICATION

A rule of law lies naked with limited meaning without a variety of fact patterns to give it vitality.[337] The legal rule stated above is assuredly not a particularly complicated one.[338] It is

[335] All references to the Internal Revenue Code, cited hereinafter, are to the most recent 1986 version, as amended, unless otherwise indicated.

[336] While there are several statutory requirements that must be satisfied, applying the quoted definition to the facts of the subject case is the only issue considered by this memorandum.

[337] Rumor has it that a former chairman of the Senate Judiciary Committee carries a copy of the United States Constitution around with him to resolve all constitutional issues that might arise during committee hearings. The meaning of "due process" clearly requires no enigmatic detours for a devotee of the school of "original intent". See endnote A.

necessary, however, to review the facts obtained from the taxpayers to determine whether this piece of statutory law actually applies in the instant case.[339] Before attempting to do so, however, it is instructive to make some general comments on the statute and its interpretative regulations. Here, the Code really does not address the issue raised above. At this early point it is not necessary to engage in the kind of "interstitial legislation" frequently engaged in by the courts.[340] That task, by virtue of I.R.C. § 7805(a)'s general authorization granted to the Secretary of the Treasury for the promulgation of interpretative regulations, has been admirably accomplished in Treas. Reg. § 1.213-1(e)(1)(v)(a) (1979)[341]. One must remember that the Congress was very much concerned that "personal, living, or family expenses"[342] might be deducted in the guise of a medical expenditure as evidenced by the references to "lodging away from home" and "cosmetic surgery" in subsection (d)'s definitions in paragraphs 2 and 9, respectively. The cited income tax regulation further demonstrates the Treasury Department's concern over expenditures that have a tangential relationship to medical disease, but, in reality, are predominantly personal in nature. For example, it states that capital expenditures that improve property and increase its value, such as an elevator installed in the multi-level residence of a person suffering from heart disease, will only be treated as a deductible medical expense to the extent that such expenditure does not produce an increase in the property's value.[343]

The regulation now being examined finally takes a helpful leap into facts closer to the instant case. It does so by addressing the cost of in-patient hospital care which of necessity involves those dastardly personal expenditures such as meals and lodging. While such items, in a hospital setting, are ipso facto treated as medical expenses, any other "institutional" backdrop requires a careful examination of the surrounding facts before a similar legal conclusion is justified. It is

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[338] With the advent of modern tax software, even the arithmetically uninitiated find the numerical calculation hardly a worthy mental challenge. See endnote B.

[339] A review of the court cases later in this memorandum will compel the writer to obtain far more facts than Professor Karlin supplies in the instant case study. Again, a rule of law, unadorned with operative facts, is as illuminating as the isolated definition of a limit in the calculus with no reference to the practical uses of the derivative or the integral.

[340] See endnote C.

[341] As RIA Checkpoint on-line service's editorial "caution" indicates, the last treasury decision dealing with this regulatory section made its appearance in the Federal Register in 1979. Accordingly, it fails to reflect the legislative amendments made by the Health Insurance Portability and Accountability Act of 1996, the Revenue Reconciliation Act of 1993, the Revenue Reconciliation Act of 1990 (of "read my lips" fame), the Tax Reform Act of 1986, the Deficit Reduction Act of 1984, and the Tax Equity and Fiscal Responsibility Act of 1982. Fortunately, other than a redesignation of subsection (e) as subsection (d) by the last of the aforementioned listed legislative acts, there does not appear to be any substantive change in the definitional section cited above. See endnote D.

[342] See I.R.C. § 262(a). The medical deduction section was drafted with one eye on this section that denies deductibility for expenditures that are not business or investment related. The apparent threat to the fisc is expressed in I.R.C. § 213(d)(2)(B) which permits a deductible medical expense for "lodging away from home" if "there is no significant element of *personal pleasure, recreation, or vacation* (italics added) in the travel away from home." Further evidence in the medical section of Congress' fear of the personal non-deductible expenditure by its limitations relative to cosmetic surgery is found in subparagraph d(9)(A). Prior to the amendment enacted by the Revenue Reconciliation Act of 1990 (P.L. 101-508), a plastic surgeon's schnozzle alteration, purely for aesthetic purposes, fit comfortably under the rubric of medical care simply because the operation was performed by a licensed practitioner of the healing arts. The amendment, which limits deductibility to clearly delineated medical necessities of "a congenital abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease" has most assuredly succeeded in distinguishing "medical care" from "personal expense".

[343] Treas. Reg. § 1.213-1(e)(1)(iii).

not in the nature of the institution per se, but rather the nature of the services received by an individual that determines the categorization of payments. As the regulation explicitly declares, "(t)he extent to which expenses for care in an institution other than a hospital shall constitute medical care is primarily a ***question of fact*** which depends upon the condition of the individual and the nature of the services he receives (rather than the nature of the institution)."[344] Finally the regulation reaches the factual setting of the subject memorandum. It recognizes that "institution" does not include a schoolhouse building providing what is normally viewed as personal educational instruction unless the taxpayer can demonstrate that the person's medical illness dictates that the primary reason for availing oneself of the school's special services is the alleviation of a medical condition. In addition, the person's medical illness dictates that the primary reason for availing oneself of the school's special resources is the facilitation of medical treatment that palliates a mental or physical handicap.[345] A non-controversial example is provided in the case of a school that has a course in Braille for a blind student or one in lip reading to assist a student with a hearing deficiency. Both will permit such a student to return to "normal" education or living once the handicap has been overcome or compensated for. If the primary test is not satisfied, then only the services that are clearly related to medical treatment are deductible while all other expenses, which are no longer considered incidental, such as meals and lodging or an ordinary educational curriculum, are personal in nature and accordingly not deductible.

Thus while the Code and the interpretive regulation described above are not particularly complicated, the hard part, as the regulation itself makes quite apparent, is applying the "primary" standard whose satisfaction automatically classifies normally personal expenditures as "incidental" and therefore deductible. This is not a red light/green light criterion that may be applied successfully in knee jerk fashion without a careful review of the facts. In such instances it is unlikely, although possible, that a conclusion reached in any judicial decision[346] that may be discussed below would decide the current case in any authoritative manner.[347] Nevertheless, their examination is instructive for the ideas that may germinate from their perusal as well as the concrete examples they present to give substance and shape to that which at times seems to have no form. That said it is time to view a number of court cases that are frequently cited in this area of the law.

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[344] Treas. Reg. § 1.213-1(e)(1)(v).

[345] Treas. Reg. § 1.213-1(e)(1)(v)(a).

[346] One must accept a decision by the United States Supreme Court if it truly is "on all fours" with the issue presented here. However, one must also say again that to the extent that the question is essentially a factual one, not really a question of law, then the authoritativeness of such a decision handed down from Valhalla is still suspect. See Endnote E.

[347] By its very nature the law (tax or otherwise) poses the never-ending challenge to apply a given rule to a specific set of facts. This means that one trier of facts, assuming a sufficient evidentiary record to establish a prima facie case, will draw one conclusion while another such trier will arrive at a diametrically opposed result. Perhaps no one said it quite so well in describing the process of applying a somewhat semi-amorphous legal rule to constantly varying subsets of facts and circumstances as the Supreme Court in a rather "ordinary" case decided decades ago. I confess a personal preference for Justice Cardozo's definitive statement on the constituent elements of I.R.C. § 162(a)'s definition of "ordinary and necessary expenses paid or incurred…in carrying on any trade or business….": "Here, indeed, as so often in other branches of the law, the decisive distinctions are those of degree and not of kind. One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle." *Welch v. Helvering*, 290 U.S. 111 (1933).

Apparently the United States Supreme Court has not spoken on the issue that is the subject of this memorandum. However, recalling Justice Jackson's aphorism on the high court's infallibility[348], it does not appear to be an empty gesture to review the one case that addresses the topic of medical care regardless how remotely. In *C.I.R. v. Bilder*[349], Justice Harlan, writing for a 6 to 1 majority, stated that while I.R.C. § 213(e)(1)(B) (1954) expressly permits the deductibility of related transportation as a medical deduction, Congress intended to deny a deduction for the lodging of a taxpayer sojourning in Fort Lauderdale, Florida on the advice of his physician for the treatment of heart disease. I.R.C. § 23(x) (1939) had been previously construed by the Treasury Department in an income tax ruling, expanding upon a regulation that permitted a medical travel deduction, to allow a similar deduction for the meals and lodging associated with such travel. Quoting from House and Senate Committee Reports, the opinion states that the government's position disallowing such personal expenses, outside the confines of a hospital, is clearly correct. Accordingly the decision of the 3rd Circuit Court of Appeals, in favor of the taxpayer, was reversed. In a one-sentence dissent, Justice Douglas stated that the opinion of the lower court should have been affirmed for the reasons espoused by Judge Kalodner[350] below. With due deference to the former head of the Securities and Exchange Commission, I would have looked to the more instructive dissent of Judge Hastie below who calls the readers attention to the change in the language exhibited by I.R.C. § 262 (1954) which replaced I.R.C. § 24(a)(1) (1939) which read as follows: "…in computing net income no deduction shall in any case be allowed in respect of—(1) personal, living, or family expenses, except medical expenses under Section 23(x)…" The latter exception was removed by the 1954 legislation and instead now reads: "Except as otherwise **expressly provided in this chapter**, no deduction shall be allowed for personal, living, or family expenses." That change in the statute, particularly in light of the committee reports, and the limited reference in I.R.C. § 213(e)(1)(B) to transportation only with no reference to meals and lodging, seems to overcome Judge Kalodner's seemingly convincing argument concerning statutory construction.[351]

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[348] Paraphrasing from memory: "We are the court of last resort not because we are always right; rather we are always right because we are the court of last resort." I first became aware of this mite pithy way of describing the Supreme Court's role in the judicial hierarchy when reading Professor Schwartz's delightful biography of Chief Justice Earl Warren entitled *Super Chief*. Professor Barbara Perry, of the University of Virginia, in a book entitled *The Supremes*, has attempted more recently to understand the human elements behind the nine persons in black robes. See Endnote F.

[349] 369 U.S. 499 (1962)

[350] *C.I.R. v. Bilder*, 289 F.2d 291 (3rd Cir. 1961) The opinion in the appellate court below is a valiant attempt to ignore legislative history. "The Commissioner's contention is that 'the express proviso [subparagraph (B)] allowing only transportation costs suggest that Congress intended to limit the deduction for expenses of travel to exclude the costs of meals or lodging as allowable expenses includible in "medical care."'" In further derogation of the government's position, Judge Kalodner continued: "In apparent recognition that he is **leaning on the most slender of reeds** in this respect, the Commissioner further resorts [below] to the House and Senate committee reports which state that subparagraph (B) 'clarifies existing law in that it specifically excludes the deduction of any meals or lodging while away from home receiving medical treatment.'" To deliver the crunching fillip to the government's argument, Judge Kalodner quotes the Tax Court's reason for ignoring the Congressional reports: "In view of the **clarity** of the wording of section 213 of the 1954 Code, we see no reason to resort to congressional history for its meaning." See endnote G.

[351] See endnote H.

Having dispensed with what appears to be the only relevant (as it relates to a medical expense deduction) case considered by the Supreme Court, it is now time to review some of the decisions of the Circuit Courts of Appeal. In *Martin v. C.I.R.*[352], in a per curiam opinion affirming the Tax Court, with the taxpayers representing themselves[353], the taxpayer's son, who suffered from a hearing deficiency, attended a private school. In a very simple case involving only one issue of medical deductibility the appellate court made the following telling statement: "With laudatory motivation, rather than submit their handicapped child to institutional training, they endeavored to have his education proceed under as nearly normal circumstances as possible, and to that end enrolled him in private schools which had smaller classes and more individual attention than in the public schools." But that alone surely cannot meet the standard set up by the regulation. With no special medical treatment received at the school itself, taking the same course of study available to all non-handicapped students, the tuition fees do not constitute medical expenses since the education received could not possibly be incidental to medical treatment rendered outside the school environment.[354]

The next two cases from the federal intermediate appellate courts demonstrate how important[355] a change in facts can be when applying the regulations[356]. In *Borgman v. C.I.R.*[357], another per curiam opinion[358], the lower decision of the Tax Court is again affirmed. Taxpayer, an engineer, had suffered a heart attack in 1954. Several months later he was advised by his physician to employ a housekeeper to "obtain non-skilled live-in help for the dual purpose of seeking medical assistance should the occasion arise and of helping relieve him of some household chores". While a peripheral medical purpose appears to be present, it is insufficient to rise to the level of a deductible medical expense. Cleaning and cooking activities performed by such an employee do not constitute the rendition of medical services regardless of the effect such services have in reducing the mathematical possibility of a recurring heart attack. In the language used by the Court they "did not bear such a **direct and proximate** therapeutic relation to some physical or mental function or structure of the body as to constitute a deductible medical expense."

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[352] 548 F.2d 633 (6th Cir. 1977)

[353] Pro se never fails to remind the writer of the adage of the lawyer who has a fool for his client.

[354] Citing *C.I.R. v. Duberstein,* 363 U.S. 278 (1960), which itself cited *Welch v. Helvering* which is referred to in footnote # 347 above, the court stated that "[t]he record provides no basis for regarding these findings as 'clearly erroneous'". Professor Saltzman, in his treatise on IRS Practice and Procedure, reminds the reader that I.R.C. § 7482(a) (1986) provides for appellate jurisdiction with respect to the Tax Court in the following manner: "…in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury…." Further, findings of fact will not be disturbed on appeal absent a showing that they are "clearly erroneous". Fed. R. Civ. P. 52(a) Reminiscent of the comments made in Endnote E, absent a meaningful evidentiary record to support factual findings, the appellate court has jurisdiction as in any case posing a "question of law". See Endnote I.

[355] The tax literature seems to have an excessive love for the word "critical". Despite the issue of medical expense deductibility in the subject paper, the writer is still reluctant to consider tax decisions affecting the size of one's wallet as the equivalent of a "critical" emergency hospital procedure.

[356] One must not lose sight of the "question of fact" referred to in Treas. Reg. § 1.213-1(e)(1)(v) as cited in footnote # 344.

[357] 438 F.2d 1211 (9th Cir. 1971)

[358] The honorable Elbert Parr Tuttle, Senior United States Circuit Judge, from Atlanta, Georgia, was sitting by designation. One remembers him as a member of the Fifth Circuit Court of Appeals in New Orleans. That may be as close as this memorandum gets to a relevant Eleventh Circuit Court of Appeals decision.

In *Kelly v. C.I.R.*[359], another engineer, of the electrical variety, suffers an attack of appendicitis while on a business trip to New York. Before his surgeon allows the patient to return to his home in Milwaukee, he is transferred to a nearby hotel to continue his recuperation. The patient's departure from the hospital was caused by a shortage of rooms needed by other more critical patients. The taxpayer's wife performed nursing services such as changing bandages, provided physical assistance for walking and bathing, administered pharmaceuticals, and took body temperature readings. The issue before the Court concerned the deductibility of the meals and lodging at the hotel. A divided panel reviews the applicability of the Supreme Court case in *Bilder.*[360] Reviewing the 1954 amendments to the 1939 Internal Revenue Code and the accompanying legislative history, the Court distinguishes its own case as one not dealing with the definition of transportation in I.R.C. § 213(e)(1)(B) (1954). Rather the Court grounds deductibility based on facts that satisfy the regulatory requirement that equate expenses incurred in an institution other than a hospital as being medical in nature.[361], and thus deductibility is premised under I.R.C. § 213(e)(1)(A) (1954) which defines medical care itself. The fact that the hotel does not regularly provide medical services is irrelevant, since, as stated in the regulations deductibility "depends upon the condition of the individual and the nature of the services he receives (rather than the nature of the institution)".[362]

While the two preceding opinions give guidance in distinguishing medical from personal expenses, it should be more instructive and relevant to refer to a Circuit Court of Appeals decision that deals specifically with private school tuition. The case (another per curiam, not surprisingly) was decided more than a half century ago.[363] The Commissioner had disallowed both the transportation costs to the rarefied atmosphere of Arizona and the costs of a private boarding school located in that state for the taxpayer's infant daughter of five years who suffered from respiratory ailments. The Tax Court below (with majority, concurring, and dissenting opinions) had held against the government on the transportation issue resulting in both parties prosecuting an appeal. Citing I.R.C. § 23(x) (1939)[364], wherein one found a definition of "medical care" essentially the same as under current law, the appellate court affirmed the holding that the transportation costs as well as the maintenance costs, **exclusive of the expenses attributable to [the child's] education,** were deductible. Presumably the private school tuition covered a normal curriculum. Most significantly, the sixth circuit made the following instructive

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[359] 440 F.2d 307 (7th Cir. 1971)

[360] See discussion above.

[361] Treas. Reg. § 1.213-1(e)(1)(v)(a)

[362] Treas. Reg. § 1.213-1(e)(1)(v) Apparently quoting from the government's brief, the Court states that the Commissioner argues that "experience, not logic, is the basis of the law; and experience has led to the Treasury Regulation…." In a polite rejection of the applicability of Justice Holmes' assertion that "[t]he life of the law has not been logic: it has been experience", the Court concludes the decision of a divided panel by reversing the memorandum decision of the Tax Court decision below with a slightly different appeal to Holmes' jurisprudence: "Experience, as well as logic, teaches that the regulation should be read in *historical* (italics added) context."

[363] *C.I.R. v. Stringham*, 183 F.2d 579 (6th Cir. 1950)

[364] Professor Ledley at Queens College in 1963 bemoaned the fact that the Code section numbers were changed in 1954.

comment to conclude its rather brief opinion: "Each case of this character must be decided on its own particular facts, and an opinion from us could create no rule of thumb[365]for determination of the applicability of the term 'medical care' to all cases which may arise."

An opinion from the eleventh circuit court of appeals (or its 1982 predecessor in New Orleans) would be more valuable to taxpayers residing in Florida, but none have been uncovered.[366] None having been located, several Tax Court decisions that deal specifically with the issue of private school tuition as a deductible medical expense will be examined. Frankly, remembering that the dockets of the Article III courts, especially at the trial level, are flooded with criminal litigation, one might be more inclined to rely on the tax experts that inhabit the judicial halls of the Tax Court for authoritative pronouncements on the tax issue at hand.[367]

What appears to be the most recent regular Tax Court decision (non-memorandum) in *Fay v. C.I.R.,* 76 T.C. 408 (1981), involving a lawyer (representing himself) with four adopted children, two of whom were attending a Montessori type school, the Court gives an exceptionally lucid explanation of the law in this narrow area. The Whitby School had two separate charges, one for the normal curriculum, and a separate significant charge for a language development program that fifteen per cent of the student body participated in. A consultation with a psychiatrist and a pediatric referral to a specialist in learning disabilities led to enrollment in the private school. None of the professional staff were medically trained other than a single nurse. Anywhere from 1 to 3 hours in a 5 and ½ hour day were spent in the special language program.

The Court immediately cites Treas. Reg. § 1.213-1(e)(1)(v)(a) which most assuredly is the definitive law in this relatively narrow area: "While ordinary education is not medical care, the cost of medical care includes the cost of attending a special school for a mentally or physically handicapped individual, if his condition is such that the resources of the institution for alleviating such mental or physical handicap are a principal reason for his presence there. In such a case, the cost of attending such a school will include the cost of meals and lodging, if supplied, and the cost of ordinary education furnished which is incidental to the special services furnished by the school." Next the Court declares, with appropriate citations, "mental and emotional disorders resulting in learning disability can be considered a disease". From the facts the Court concludes that the "raison d'être" for the Whitby School was the promotion of the Montessori method of instruction, not to serve as essentially a medical facility, with the subordinate objective of providing educational services to the mentally handicapped. The decision permits a medical

[365] Clients seem to love that kind of rule, particularly if it is quantitative in nature, because it tends to give a false sense of security. Frankly, the writer is inclined to advocate a "thumb less" practice.

[366] *Golsen v. C.I.R.*, 54 T.C. 742 (1970), holds, in the name of efficient judicial administration, that the Tax Court will abide by a contrary Court of Appeals decision if an appeal would lie to that particular circuit despite the fact that uniformity throughout the United States, at the Tax Court level, would not be achieved. Both a keyword search and a citator search applied to the cases uncovered by the initial keyword search have failed to uncover any cases from the Atlanta brethren. Computer searches, as opposed to the old manual method, still leave the researcher with a sense of unease following a fruitless search. Local practitioners, in the name of *Golsen,* on the issue of subchapter S basis generated by a shareholder guarantee, have cited the *Selfe* case {778 F.2d 769 (11th Cir. 1985)}. A close examination of the procedural aspects of that case (reversal of granting of motion for summary judgment followed by remand) would suggest that *Golsen* may be of limited value in deciphering I.R.C. § 1366(d)(1)(B).

[367] One would not necessarily exclude the Supreme Court from the Article III reference. See Endnote J.

deduction for the separate charge for the language development training only. While the specially trained educators were not medical licensees, their effective treatment of learning disabilities, accompanied by mental distress, constituted a medical handicap or defect qualifying for the medical expense deduction under I.R.C. § 213(d)(1)(A).

A second case, *Greisdorf v. C.I.R.*,[368] involved the Mills School located in Fort Lauderdale. The taxpayer's daughter was a child of a former marriage whose father, a psychiatrist, had committed suicide and had physically abused his children. The girl would have temper tantrums and vomit and "became increasingly more withdrawn from reality". After twelve psychotherapeutic appointments, a psychiatrist recommended the Mills School, founded by a gentleman with a doctorate in education who, along with his staff, had been specially trained in psychology. Further facts to support a finding of a special school within the meaning of the above quoted regulation included:

1. The institution only accepted students with learning difficulties traceable to emotional problems.

2. Small classes limited to no more than six students provided a "total therapeutic milieu".

3. Entrance testing assisted in obtaining psychological and psychometrical evaluations.

4. An hour each day was spent in either individual or group therapy.

5. All staff members participated in training workshops to update their knowledge and improve their skills in psychology.

6. Two psychiatrists were employed in a consultant capacity and the entire staff coordinated their efforts to ensure a consistent approach for each individual student.

Given all these points the Court stated they are the "mental" equivalent to the "physical" references to Braille and lip reading explicitly referred to in the Regulations. Frankly it is difficult to argue with the conclusion reached by Judge Hoyt.

Presumably it is necessary to peruse a Tax Court case where the petitioner was unable to meet the regulatory standard. In *Ripple v. C.I.R.*[369], the taxpayer's son had received psychiatric treatment and, based on a report issued by the Reading Clinic of the Department of Psychology at Temple University, it was determined that the child had a reading disability denominated as "assevere corrective with emotional components".[370] The original headmistress, a psychologist, testified at the trial that the school provided assistance in overcoming reading deficiencies but

[368] 54 T.C. 1684 (1970)

[369] 54 T.C. 1442 (1970)

[370] One should not assume that the law, particularly the specialty in taxation, is the only discipline with its own unique lexicon.

did not state that the course of instruction was intended to be therapeutic in nature. At the time of the child's attendance the school was not licensed by the State of Pennsylvania to serve socially and emotionally disturbed children nor did it maintain a staff to deliver psychiatric care. Simply stated the Court concluded that the record in this case, the evidence adduced at trial, did not support the taxpayer's claim of a medical deduction.

One more Tax Court case against the taxpayer is worth considering.[371] The tuition fees for a military school were held non-deductible under I.R.C. § 213.[372] The "patient" in this case was a young boy suffering from the *grand mal* (epilepsy), who was insolent to adults ("sir" was apparently not a part of his standard vocabulary), uncooperative in a public school, drummed out of a local Boy Scouts troop for destroying a tent with his rapier, and was under the care of a pediatric neurologist who was also a psychiatrist. His physician had "prescribed" for his young patient, who exhibited "aggressive behavior" and "hostility" towards authority, attendance at a boarding school, preferably a military academy that would instill discipline continuously throughout the day.

Williams Military Academy's curriculum did not include any special courses designed to treat emotionally disturbed children. Colonel Williams testified that the preparatory school served young lads who were seeking a good education. While in attendance the young student demonstrated a marked improvement in his manners, became a good student, and "took great pride in his uniform". With this factual background the Court calls attention to Treas. Reg. § 1.213(e)(ii) which prohibits a medical deduction for "an expenditure that is merely beneficial to the general health of an individual, such as an expenditure for a vacation…."[373] The Court proceeds to review the legislative history and regulatory provisions as illuminated by the *Bilder* case discussed above. Given the poor evidentiary record in this Tax Court case it becomes ludicrously apparent that Sidney Goldstein, attorney for petitioner, had based his entire argument that once a physician has "prescribed" such a military school for his student patient, that the requirement for a medical deduction is automatically met.[374]

One could continue an examination of Tax Court cases that have considered the issue of the medical deductibility for private school tuition.[375] For cementing the concepts to the cranium

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[371] *Atkinson v. C.I.R.,* 44 T.C. 39 (1965)

[372] One should not confuse the clients' scenario with the need to instill greater discipline, say, at a juvenile military academy. The motto "*semper fidelis"* may spur Marines to exemplary actions, but it is no substitute for professionally administered medical care.

[373] While one might agree that a resident of Toledo should not be permitted to opt for an appendectomy at the Cleveland Clinic in Naples, Florida, recognizing that multi-vitamins, absent scurvy, beriberi, or pellagra, is subject to the same "general health" objection, the regulation clearly led to more than one ridiculous result. Take Rev. Rul. 79-162, 1979-1 C.B. 116, for example. There the Internal Revenue Service takes the supercilious position (vis-à-vis the scientific community) that [t]he cost of an individual's participation in a program to stop smoking that is not for the purpose of curing any specific ailment or disease (emphysema certainly qualifies), but for the purpose of improving the individual's general health and sense of well being, is not deductible as medical expense." Fortunately, Rev. Rul. 99-28, 1999-1 C.B. 1269, has subsequently vindicated Dr. Koop and his predecessors at the Uniform Health Services. See Endnote K.

[374] Such an imprimatur is not dispositive of the tax issue.

[375] *Lichterman v. C.I.R.,* 37 T.C. 586 (1961) and *Hendrick v. C.I.R.,* 35 T.C. 1223 may be added to one's reading list for the post dog days of summer. See Endnote L.

one could review the pertinent revenue rulings (published and private) that attempt with considerable success to elucidate this area.[376] As laudable as such an endeavor might be it is time to recognize one inescapable fact. The case study presented in the text is woefully inadequate from a fact specific perspective.[377] Accordingly it is now imperative to go back to the given facts, which now must be supplemented if the ultimate conclusion is to be justified.[378]

A 13-year old[379] dependent son has been expelled from a public junior high school not because of some violation of political etiquette. Rather the removal was caused by a severe breach of decorum, namely, a physical attack on a person in authority, his teacher. In addition, the child's removal was further dictated by threats of future violence. Such aberrant behavior is apparently not correctible by standard disciplinary techniques utilized by the public school administration.[380] Further, the child has been under the care of a licensed psychologist[381] on a weekly basis with no positive result.[382]

Many taxpayers have made the personal decision to refuse educational sustenance at the public trough for their children. That is not true in the instant case. The parents have been denied the public access that they chose initially for their son. Here, a psychologist, intimately familiar with his patient's mental disturbances as revealed in weekly sessions, has both admitted failure in

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[376] The reader is referred to Rev. Rul. 78-340, 1978-2 C.B. 124; Rev. Rul. 70-285, 1970-1 C.B. 52; Rev. Rul. 65-255, 1965-2 C.B. 76; and Rev. Rul. 64-173, 1964-1 C.B. 121, all of which are discussed in tax memorandum #2 previously submitted.

[377] From a Euclidean viewpoint, the hypothesis is so limited as to make a unique conclusion unobtainable.

[378] By reiterating the presentation found in tax memorandum #1 the proverbial wheel need not be reinvented.

[379] It is well known to parents and educators that a child of that age not infrequently has difficulty in coping with his educational environment.

[380] The given facts do not indicate that expulsion was purely a disciplinary remedy, punitive in nature, of limited duration, but rather an expression of failure to solve the problem. A consulting psychiatrist (i.e., one that I have consulted) has stated that "the alleged inability of the public school system to provide an educational environment consistent with state [legal] requirements are related to the diagnosis of the child in question". See Endnote M.

[381] Psychiatry, as opposed to psychology, deals with the medical science of mental disease (see Random House Dictionary of the English Language). While a stronger case could be made with an evaluation from such a specialized physician, the deductibility of the psychologist's medical bills is not at issue. The federal government's representative resorts to a competing tome (Merriam-Webster Collegiate Dictionary (2001)) for the purpose of defining "behavior". In good faith (nothing like a healthy dose of *bona fides*), it is earnestly asserted that reliance on such a definition seems to beg the question. Noting the near juxtaposition of "attitude problem" and "mental retardation" in the government's tax memorandum #1, surely there are mental conditions requiring medical care (in the I.R.C. § 213(d) sense) somewhere between these two end poles. Layperson to layperson is it fair to say that both attitude problems and suicide are common among the younger generation?

[382] Permit a verbatim quote from government's tax memorandum #1: "The facts show that this child is not in need of medical care since he is not responding positively to the psychologist's treatment." One cannot be sure that a failure to respond "positively" to one's psychologist is consistent with a healthy disposition not requiring medical care. As a student attending the human scene for more than 59 years, the taxpayer's advocate is reluctant to offer an opinion outside his area of expertise (see Endnote N). Instead the following quotation is offered: "No therapist can be right for every patient, just as some people don't get along with others. Even though a psychiatrist is trained to get along with all sorts of people, why should you waste your time trying to adjust to someone you just don't like if you could hit it off with someone right away?" (David S. Viscott, M.D., The Making of a Psychiatrist (1972)) It is not violence itself that is treated as a medical condition. Rather it is the presence of violence that is symptomatic of either general malevolence or a hidden mental condition. But which is it? Does the laity simply have a distrust of psychiatrists who appear unsupported by the objective reality of easily identifiable physical evidence? See Endnote O.

ameliorating the minor's violent tendencies and now opines that admission to a "special" school is "imperative" if the child is to operate in a civilized society.[383]

Continuing with the recitative of facts, I would suggest that the issue concerning lack of health insurance coverage is not relevant.[384] The entire health care system is a function of economic parameters. Insurance companies, as profit-making organizations, will clearly pay for a medical expense whose preventive aspects will significantly reduce their long term, actuarially determined costs. Employers and individual consumers typically select among a plethora of coverages substantially influenced by the proverbial bottom line. Anyone who has investigated the health insurance market in the United States must take "judicial notice" of the fact that the typical policy has maximum coverage for mental illness that is significantly lower than that provided for physical injuries and diseases.[385]

Penultimately, the taxpayers indicated that they have identified several potential schools that will provide the necessary medical care. In reaching a judicious, if not soul wrenching, choice in the particular educational institution, I would recommend consideration of the following additional factors:

1. How many licensed medical professionals (psychiatrist, psychopathologist, psychotherapist, psychologist, pharmacologist, clinical social worker, ad infinitum) are a part of the school's faculty (preferably) or independent contractors who visit the campus on a recurring basis?

2. What part of the school's budget is allocated to these extraordinary medical services, and is the educational institution able to itemize its billing based on the type of service rendered?

3. How many children in the student body have distinct medical diagnoses of mental infirmities requiring treatment by a highly professional and medically trained staff as well as coordination with off campus individually retained mental health care practitioners?

4. What part of the typical school day is devoted to normal academic studies (mathematics, languages, computer skills) as opposed to sessions that are the equivalent of psychological treatment including group therapy sessions?

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[383] Again, reference is made to tax memorandum #1 submitted by the government's representative on the relevancy of violence: "[V]iolent action does not necessarily represent a medical problem, rather it is considered unacceptable, and punishable by law for centuries…. [T]his child appears to be in need of a behavior correction facility. Again, it would be unreasonable to treat violence as a medical condition, thus emptying the jails and allowing criminals to walk freely, away from their violent crimes." It is assuredly true that the prisons are filled to capacity with reprobates not experiencing any kind of mental illness, but some of the ne'er-do-wells who occupy isolated cells are indeed in serious need of psychiatric treatment. "Punishable by law for centuries" is an interesting turn of phrase. In the context of violent action, however, defining "medical care" is not quite the same task as defending the M'Naghten rule. See Endnote P.

[384] Did health insurance practices presage the revocation of Rev. Rul. 79-162, 1979-1 C.B. 116, cited in footnote # 373? See Endnote Q.

[385] Rhetorically, why would a budget "hawk" like Senator Dominici (R-N.M.) propose federal legislation that would require parity with respect to physical and mental illness reimbursement under health insurance policies?

5. Examine the school brochure as well as its public advertisements to determine the degree to which the availability of psychological help is emphasized as opposed to purely academic concerns.

6. A complete battery of tests must be administered. A full psychiatric and psychological evaluation, including a working diagnosis, must be secured. The home environment must be explored to determine its effect on school behavior, including uncovering the possibility of any physical or sexual abuse.[386] A neurological report, with appropriate imaging studies, should also be obtained. Possibility of the mother's drug or other toxic exposure during pregnancy should be explored. A full battery of educational tests should be conducted to detect [387]learning disorders and to evaluate abilities in all pertinent academic and social areas.[388]

Finally, while an x-ray machine or its more modern equivalents may readily detect broken bones, the inability of modern medical science to detect a 'broken mind" with the same kind of irrefutable evidence should not deter the taxpayers from seeking a deduction for genuine expenditures for medical care as administered by a truly qualified school special in every way. Twelve amendments to the section's first appearance in the Internal Revenue Code of 1954 would suggest that the definition of "medical care" in the statute has not changed significantly. Only administrative and judicial pronouncements may have changed through the years as medical science surely has changed.[389]

CONCLUSION

The taxpayers may deduct the cost of their son's tuition at a special private school as a medical expense as that term is defined under I.R.C. § 213(d)(1)(A).[390]

ENDNOTES

{SEMI-IRRELEVANT, IF NOT IRREVERENT)

A. One wag has asked a bit rhetorically what the original intent of "original intent" was. Can the meaning of "due process" really be gleaned from some combination of the Federalist Papers, the debates of thirteen different state constitutional conventions, and

[386] How to lose a client without really trying? Some clients confuse an accountant with a father confessor. Privileged communications under state and federal law should be understood.

[387] Ah, another footnote that has lost its way or should one say content.

[388] This paragraph is derived from the suggestions made by the in-house expert referred to in endnote M.

[389] See Endnote R.

[390] See Endnote S.

the secret and wranglesome goings-on of that hot summer in Philadelphia? If the minutes kept by Madison would have shed light on the intent of the framers, then why were they released over 50 years later? Was it a constitution that Marshall was interpreting?

B. One elderly, but not particularly wise, practitioner in Ft. Lauderdale publicly stated at a continuing professional education seminar that the diagnostic portion of his individual income tax software was so sophisticated that the end product required no verification on his part. *Res ipsa loquitur?*

C. Black letter law for a *One L* at Harvard Law School[391] states that judges do in fact "make" law. The interpretative process is itself a creative one. When the next Supreme Court justice announces his retirement (Linda Greenhouse says "not now" at the end of the current term) the political rhetoric will again rear its fatuous head and pronounce: "What we need here is a judge that interprets the law, not one that makes law." With due deference to such declarations, I submit that the argument revolves around one of degree, not one of kind. Thus interpretation of the due process clause in the 14th amendment admittedly requires far greater latitude than the computation of depreciation, as one of many calculations, for the determination of adjusted current earnings, in solving for the alternative minimum taxable income of a C corporation as prescribed by I.R.C. § 56(g)(4)(A)(i) through (v).

D. Professor Lubell would have us believe that tax policy is an alchemistic potpourri of economics, politics, and legislative history.

E. When one is not really sure how to apply such a dichotomy to a given issue, there is a tendency to refer to the problem as involving a "mixed" question of law and fact. One thing, however, is certain. Whether a question is one of law or fact is itself a question of law. The distinction may well vary depending on the nature of the substantive law involved. Take the concept of "materiality", for example. Is the evidence material? Is the allegation material to the pleadings? Is the element material for defining the criminal act? Is the fact material to the consummation of the contract? Is the alteration to the agreement material enough to deprive it of "grandfather" protection under a revenue act?

F. As a judicial intern, Dr. Perry came to believe that Justice Rehnquist was right to deny access to the court's inner sanctum to the eye of the television camera during oral argument. Noting that foreign visitors approached the court edifice with the awe of a believer stepping on to holy ground, she concluded that the sensationalism that accompanies trials in the courts of original jurisdiction would severely detract from the Supreme Court's dignity and therefore from its acknowledged authority.

[391] See the first book by Scott Turow as a former English professor.

G. I confess that Judge Kalodner almost had me convinced that the legislative history should not obfuscate the plain meaning of the statute.[392]

H. If the truth were told Judge Kalodner's son taught a hundred other freshman and me the second semester of civil procedure at the New York University School of Law.

I. Until dementia sets in I shall always remember my lawyer's comment after nine years of litigation: "The trial judge is considering directing a verdict for the defendants (my cousin and I) or, in the alternative, letting the case go to the jury and then entertaining a motion for judgment *non obstante veredicto.*" After obtaining an ultimate understanding of the difference between questions of law and questions of fact, Judge Jerome Frank, formerly of the 2nd Circuit Court of Appeals, reminds us not to get too cocky: "A jury sometimes behaves as an ad hoc ephemeral legislature."

J. Despite the direction on page 2, item #7, of the fiduciary income tax return (Form 1041) which refers to a section 643(e)(3) election, and contrary to the understanding of some tax preparers in the subchapter J area, funding a pecuniary marital or credit shelter portion will automatically produce a taxable transaction at the entity level of the estate or the trust. See *Kenan v. C.I.R.*, 114 F.2d 217 (2nd Cir. 1940). One wonders whether the *General Utilities* case might have been decided differently if the United States Supreme Court had had the benefit of this later case. Judge Learned Hand (cousin to Augustus who actually authored the opinion emanating from Foley Square), who sat on the 2nd Circuit Court of Appeals at that time, in his correspondence with Justice Felix Frankfurter (a frequent correspondent of Justice Louis Brandeis), would sometimes question the competency of the Supreme Court to decide federal tax cases. Ignoring Justice Jackson's indisputable assertion found in footnote # 348 of the tax memorandum proper, Judge Hand once said to his law clerk, Archibald Cox (of "Saturday Night Massacre" fame): "Sonny, to whom am I responsible? No one can fire me. No one can dock my pay. Even those nine bozos in Washington, who sometimes reverse me, can't make me decide as they wish. Everyone should be responsible to someone. To whom am I responsible?" Then according to Cox the Judge turned and pointed to the shelves of his law library. "To those books about us. That's to whom I am responsible."[393] (A. Cox, The Court and the Constitution [1987])

K. Foolishly one might ask whether smoking is addictive. It is difficult to forget a client who continued to inhale while undergoing chemotherapy for lung cancer. Her husband, a dentist, surely remembers to this very day.

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[392] He even quotes Chief Justice Taney (Rehnquist would pronounce "Tawney") in saying that one most look to the law in its entirety as well as its object and policy in attempting to expound upon a statute. {So what if he signed on to Storey's *Swift v. Tyson* and wrote his own *Dred Scott*.}

[393] And such is the value of precedent. One could suggest that Brandeis made short shrift of the doctrine of stare decisis by rejecting on constitutional grounds the hoary precedent of *Swift v. Tyson* (See *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938)). In a letter to Felix Frankfurter from Louis Brandeis the latter said on May 3, 1938: "[W]ith Swift v. Tyson removed, won't it be possible now to go further in limiting diversity citizenship jurisdiction?" (M. Urolsky & D. Levy (Eds.), Half Brother, Half Son: The Letters of Louis D. Brandeis to Felix Frankfurter (1991).

L. Yes, "the dog will have his day", misguided Prince. Despite the limitations of ineluctable time the additional cases must be read if they truly add to or clarify the arguments made so far.

M. The writer would be exceedingly reluctant to finalize a recommendation without considerable in put from an expert child psychiatrist. While paralegals and physician assistants proliferate, it seems preferable to have the real McCoy provide testimony at trial. No disparagement of supporting personnel is intended. {See letters attached requesting professional assistance and one positive response thereto.}

N. Expert? Never knew one. If an expert is defined as one who knows more than the average bear, then the woods are filled with them.

O. "Psychiatrists are often hired to put an acre of embroidery around a pinhead of 'fact' so that they bandy about diagnostic categories that are as evanescent as snowflakes." Quoted from George Will following the Hinckley verdict. Richard M. Restak, M.D., The Mind (1988).

P. Simply put, a defendant could not be excused from responsibility unless he was "laboring under such a defect of reason…as not to know the nature and quality of the act he was doing; or…that he did not know what he was doing was wrong." Lawrence M. Friedman, A History of American Law (1985). Was it Professor Graham Hughes (a Welshman?) who once chided a freshman law class in criminal law by asserting, "Americans are a bit uncivilized for imprisoning a murderer for more than twenty-five years."? Do echoes from European civilization reverberate on the issue of capital punishment?

Q. The underwriting guidelines of the Florida Institute of CPAs Health Benefits Trust could not be ignored with impunity (a potential loss of coverage under the re-insurance policy). Recognizing one's fiduciary responsibilities to the trust beneficiaries, it seemed necessary to reject an applicant who had a controlled mental ailment and had survived an indictment under the Code's criminal penalty provisions. It was the hardest vote that I ever had to cast in seven years.

R. "If confirmed, the finding (a change in a basic constant of nature involving the strength of the attraction between electrically charged particles) could mean that other constants regarded as immutable, like the speed of light, might also have changed over the history of the cosmos." Reported on page 1 of the New York Times, Wednesday, August 15, 2001.

S. The alienist is standing by. Sometimes historical fiction may enlighten the public on the medical specialty of psychiatry. The reader is directed to Cable Carr, The Alienist (1995). "New York journalist John Schuyler Moore and his friend and former Harvard classmate Dr. Laszlo Kreizler, a psychologist, a pioneer in the new field of psychology,

set out on a revolutionary attempt to identify a vicious serial killer by building a psychological profile. Their quest takes them through a brilliant historical re-creation of turn-of-the-century New York and deep inside a twisted, tortured mind." Lifted from publisher hyperbole.

11. *Availability of Installment Method of Accounting for S Corporation Shareholders Who Jointly Consented With Acquiring Corporation to an Election Under I.R.C. § 338(h)(10) (1986)*[394] *Reading the statutory language of the Code but not the treasury regulations, one would never have imagined that an I.R.C. § 338(h)(10) election was available in the case of a target S corporation standing by its lonesome when acquired by a C corporation:*

ISSUE

May corporate shareholders utilize the installment method of accounting to report the taxable gain generated at the shareholder level[395] by the deemed liquidation of an S corporation triggered by a special election under I.R.C. § 338(h)(10) following a qualified stock purchase by an acquiring corporation.[396]?

RULE

Treas. Reg. § 1.338(h)(10)-1 (2001) makes it abundantly clear in paragraph (d)(8)(ii) that the section 453 installment method is available for such S corporation shareholders to use such method as payments are subsequently received from the acquiring corporation which, in reality, had acquired the shares in the S corporation as a qualified stock purchase. Unfortunately, the cited regulation is effective for such stock purchases consummated after March 15, 2001. For the instant case study[397], however, such a neat definitive rule was not available. Accordingly, the memorandum attempts to reach a conclusion based on the prior regulations, which were essentially silent on the issue, as well as the specific installment sales provisions that have been a part of the law since 1986 and before.[398] In addition, a concluding footnote will also list a number of collateral issues that arose as a part of the transaction viewed in its totality.[399]

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[394] All references to the Internal Revenue Code hereinafter are to the 1986 version unless otherwise noted.

[395] See I.R.C. 331(a).

[396] See I.R.C. 338(d)(3).

[397] A complete factual predicate to which the memorandum is addressed appears immediately after the conclusion of this memorandum. More specifically the qualified stock purchase was consummated on June 30, 1999.

[398] See I.R.C. §§ 453(h) and 453B(h).

[399] Life, unlike law classes, does not come in separate and neatly defined compartments. Consequently, the tax practitioner must deal simultaneously with different and not necessarily related parts of the tax law and must occasionally seek assistance from outside counsel on a wide variety of non-tax legal issues. See footnote # 427.

APPLICATION

Before attempting to apply the law to the facts detailed immediately following the conclusion hereof, it should be instructive to review the two independent parts of the Code that the above stated issue brings together. First, treatment of a corporate stock purchase as if it were the purchase of the corporation's assets requires explanation. The Congress, hoping to provide a more definitive approach than reliance on a judicial rule first enunciated in *Kimbell-Diamond Milling Co. v. C.I.R.,* 187 F.2d 718 (5th Cir. 1951), enacted I.R.C. § 334(b)(2) (1954) that could conceivably have treated the stock purchase, the adoption of a plan of liquidation, and the completion of the liquidation, a sequence of events that could have been stretched out over a period as long as six years, as if the target's assets had been purchased directly. Disaffection with an acquiring corporation's "cherry picking"[400] procedure with respect to the acquisition of different targets from a selling consolidated group caused Congress to enact the present elective provision under I.R.C. § 338 as a part of the Tax Equity and Fiscal Responsibility Act of 1982 which attempted to introduce a modicum of consistency into the mergers and acquisitions process. A qualified stock purchase represents a controlling interest that is acquired over a 12-month acquisition period terminating on the "acquisition date". The election by the purchaser must be made no "later than the 15th day of the 9th month beginning after the month in which the acquisition date occurs."[401] Such an election became a far less attractive procedure once the Congress did radical surgery on the corporate complete liquidation provision[402] by repealing the *General Utilities* doctrine. Subject to the relative strengths of the negotiating parties such an election would cause the tax brunt of such an election to be borne by the acquiring corporation.

Continuing a review of the section's pertinent parts, the Code, in addition to the general election referred to above, also provides a special election under subsection (h) that contains a number of definitions and special rules including paragraph 10. This election, reading the statute literally, applies to a selling consolidated group, whether or not a consolidated income tax return is filed, resulting in the taxable sale of assets by the target subsidiary while a member of the selling consolidated group, followed by an upstream liquidation into the parent corporation. The sale of the target's stock is treated as a non-taxable event and the liquidation of the target is also non-taxable both with respect to the target corporation and the parent shareholder with a concomitant carryover of the subsidiary's tax attributes under the interplay of I.R.C. §§ 332 and 337. In this case the burden of the tax generated as a result of the election is borne by the selling consolidated group subject to the negotiating talents of the two opposing sides. Mechanically, the election is made jointly by both the acquiring corporation and the parent corporation.

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[400] Targets with heavily depreciated low basis assets were liquidated while targets with high basis assets (greater than fair market value) were left in tact.

[401] See I.R.C. § 338(g)(1).

[402] I.R.C. 336(a)

As it relates to the liquidation aspects of the issue raised by the memorandum, one might ask how this special election could possibly apply to an S corporation and its shareholders. Well, that is the beauty of quasi-legislative regulations authorized by I.R.C. § 338(i). While the definition of an "ineligible" corporation no longer prevents an S corporation from being a member of an affiliated group, the Small Business Job Protection Act of 1996 now permits an S corporation to be a parent in such a group as well as a special election relating to a qualified subchapter S subsidiary (a form of non-entity similar to a single member limited liability company). Accordingly the regulations substitute the S shareholders for the selling consolidated group when an S corporation is a target in the case of the special I.R.C. § 338(h)(10) election.

Second, before attempting to apply an uncertain law to the facts provided at the end of the instant memorandum, a review of the other pertinent Code section is required. Installment sales can trace their venerable lineage to at least the 1954 Internal Revenue Code. From the liquidating corporation's point of view, one might argue that I.R.C. § 453B(a) causes recognition of the deferred gain at the corporate level because the obligation is considered to have been "distributed, transmitted, sold, or otherwise disposed of." Today, however, the repeal of the *General Utilities* doctrine would produce the same result, but the premature disposition of the installment sales obligation is still cited since the provision predates the subsequent repeal legislation.[403] From the shareholder's perspective, I.R.C. § 453(h) contains three requirements, which, if satisfied, would prevent immediate recognition of gain that would otherwise be dictated by the subchapter C provision, namely I.R.C. § 331(a). To obtain deferral at the shareholder level it is necessary to adopt a plan of liquidation, the installment note must arise in the course of the liquidation, and the liquidation must be completed with 12 months following such adoption. If these three requirements are complied with, then receipt of the note will not be treated as payment for the stock, but rather the payments made by the purchaser will produce gain at the shareholder level as collections occur.

Any set of major changes inflicted on the Code guarantees to generate its own technical corrections act. Retroactively, the Congress saw the necessity to enact I.R.C. § 453B(h) as part of the Technical and Miscellaneous Revenue Act of 1988. If an S corporation met all the requirements of the installment sales Code provision cited above (§ 453(h)), the disposition provision (or in the alternative *General Utilities'* repeal), would generate gain at the corporate level that would then filter down to the S shareholders by way of their respective K-1 schedules and thus deprive them of the deferred recognition that was the promise of the installment sales provision overriding the liquidation provision. Congress properly understood that the repeal of the Supreme Court doctrine had applicability at the corporate level only. Accordingly, that is exactly what the retroactive applicability of § 453B(h) accomplishes. No gain or loss is recognized at the corporate level of the S corporation, unless because of a prior Subchapter C

[403] Prior law would not have accelerated the deferred gain of an installment sales obligation in the case of a bulk sale of all inventory to a single purchaser or in the case of other property (other than inventory) sold after adoption of a plan of complete liquidation. See §§ 337(b)(1)(C) and 337(b)(2)(B) (1954).

history[404], the corporation is subject to an entity level tax and then only for the purpose of the calculation of such tax.[405]

Finally, attention must be given to one subsection, I.R.C. § 453(f)(3), that raises the greatest obstacle for denying installment sales treatment to the S corporation's shareholders who had jointly consented with the acquiring corporation to the applicability of I.R.C. 338(h)(10). "[T]he term 'payment' does not include the receipt of evidences of indebtedness of the person acquiring the property (whether or not payment of such indebtedness is guaranteed by another person)." Presumably "the person acquiring the property" would be the "new target" which comes into existence the day immediately after the deemed liquidation, while the actual installment sale notes are those of the acquiring corporation which presumably should be treated in the same manner as cash or any other property other than a purchase money mortgage or note issued by the buyer.

Having reviewed the pertinent statutory provisions, the task of applying such provisions to the facts attached to the instant memorandum may now be undertaken with more confidence. Not surprisingly there appears to be almost no direct authority on the very narrow issue raised by this memorandum in an area of the law that is of more recent vintage. P.L.R. 200037043 (Sept. 18, 2000) involves a request for relief to permit a late election under I.R.C. § 338(h)(10) in the case of a target S corporation. The sellers represented that they would not use the installment sales method and most tellingly "to the extent that installment sale treatment has already been utilized on Target's and/or Sellers' income tax returns that included the Date A transaction, *corrective* action shall be immediately taken to rescind such installment sale treatment and to report the full amount of gain resulting from the deemed sale of assets (italics added)." At the risk of stating the obvious, when a taxpayer comes hat in hand seeking dispensation from the Internal Revenue Service by having the agency exercise its discretion to grant permission for a late election, the government sets the ground rules for extending such relief.

More instructive than any private letter ruling would be Treas. Reg. § 1.453-11 (1998). Because the regulation deals explicitly with installment sales treatment at the shareholder level under I.R.C. § 453(h), the Treasury Department rejected a suggestion made by three commentators "that the regulations be expanded to address use of the installment method to the sale of stock of a corporation with respect to which an election under section 333(h)(10) has been made." The suggestion was rejected summarily as being beyond the current regulatory project. However, one should look at paragraph (a)(2)(i) of such regulation which refers to Code section 453(h)(1)(A) discussed above. Note carefully that the shareholder is dealing not with the purchaser of corporate assets but rather with her own corporation. This lack of identity supposedly of some significance because of I.R.C. § 453(f)(3) is completely ignored. Quoting the regulatory paragraph: "[A] qualifying shareholder treats a qualifying installment obligation, *for all purposes of the Internal Revenue Code,* as if the obligation is received by the shareholder

[404] Such history also includes the effect of a carryover of tax attributes under the tax reorganization provisions.

[405] See I.R.C. §§ 1374 and 1375.

from *the person issuing the obligation* in exchange for the shareholder's stock in the liquidating corporation (italics added)."

The Internal Revenue Service is no stranger to ill-considered formalism when applying the statutory provisions of Subchapter S. Prior to a 1996 amendment by the Small Business Job Protection Act, I.R.C. § 1371(a)(2) formerly read: "…For purposes of subchapter C, an S corporation in its capacity as a shareholder of another corporation shall be treated as an individual." Interpreting that provision literally the government had asserted that a parent S corporation could not avail itself of a tax-free liquidation under I.R.C. § 332 or of an election to treat a qualified stock purchase as an asset purchase under I.R.C. § 338.[406] In 1992 the Internal Revenue Service had a change of heart[407] but Congress through its legislative amendment eliminated the government's prerogative to change its mind again.

Surely the literal interpretation of the installment sales provision under Code section 453(f)(3) is just as formalistic and just as clearly erroneous. In a recent technical advice memorandum the Internal Revenue Service makes it abundantly clear that the purpose of this legislative provision was not to make a technical distinction on the identity of the installment note's obligor, but rather to resolve conflicting decisions rendered by the Tax Court[408] and a circuit court of appeals.[409] Accordingly the purpose of the statutory change was to deal with the more substantive issue that "the term 'payment' does not include the receipt of evidences of indebtedness of the person acquiring the property (whether or not payment of such indebtedness is guaranteed by another person)."[410]

With limited primary authority it is appropriate to look at "semi-authoritative" sources for whatever meaningful contribution they provide to resolve the issue of the subject memorandum.[411] To some degree the exceedingly comprehensive corporate tax treatise authored by Professors Bittker and Eustice may not give as thorough a discussion of our memorandum's isolated issue by virtue of its relative unimportance. In its informative chapter on liquidations the authors state "[t]he seller *apparently* cannot report the deemed asset sale under the installment method, because any installment note received would not be an indebtedness of the person acquiring the property (italics added)." A citation to I.R.C. §453(f)(3) is dutifully made in the footnotes along with the indisputable comment that "[t]his result creates an unfavorable timing divergence from the case of an actual asset sale."

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[406] P.L.R. 8818049 (Feb. 10, 1988).

[407] P.L.R. 9245004 (July 28, 1992).

[408] *Griffith v. C.I.R.,* 73 T.C. 76 (1980)

[409] *Sprague v. US,* 627 F.2d 1044 (10th Cir. 1980)

[410] T.A.M. 200105061 (Feb. 5, 2001).

[411] If the United States Supreme Court is not above citing Bittker & Eustice in the realm of federal corporate income tax law, the writer should not shrink from drinking from the same nourishing source.

Fortunately the "dynamic duo" referred to in the preceding paragraph are not the only gurus in town. Recognizing that their entire treatise is devoted to the subject area at hand, greater support seems to be available from Levin & Ginsburg.[412] This "tag team" ventures an extended discussion on the permissibility of an installment sale in the context of a special election under Code section 338(h)(10) without any support from the proposed regulation[413] that ultimately became final and which affirmatively permits such installment treatment for the S shareholders. Basically they make the argument that the special election treats the transaction as one involving the sale of assets (the stock sale is totally ignored) followed by a liquidation of the target in the case of an S corporation (as opposed to a tax-free liquidation under Code section 332 in the case of a C corportion). That pattern is no different than any application of I.R.C. 453(h) as discussed above. The writer would also add that the regulations in effect at the time of the transaction on June 30, 1999 do not specifically prohibit the use of the installment sales method. The same two authors (The writer has summarily dismissed the first set of "experts".) state most succinctly "it is not clear why the IRS would argue for an opposite interpretation in a case arising under the current regulations."[414] Acknowledging that the new target is the deemed purchaser while the installment note is issued by the acquiring corporate purchaser, the authors cite I.R.C. § 453(h)(1)(A) and its treatment in the previously discussed regulations under § 1.453-11.

As a final argument in favor of installment sales treatment at the S corporation shareholder level, one that should avoid the imposition of penalties by the government, it is not uncommon to apply prospective regulations retroactively as a reasonable interpretation of the law at that prior point in time. This seems an even more appropriate reliance given the fact that the prior regulations were virtually silent on the availability of installment sales treatment and no strong policy reason seems present to oppose such retroactive application.

Let the final regulations speak for themselves: "The members of the selling consolidated group, the selling affiliate, or the S corporation shareholders are treated as receiving in the deemed liquidation the *new T installment obligations that correspond to the P installment obligations they actually received individually in exchange for their recently purchased stock (*italics added). *"*[415]

CONCLUSION

The corporate shareholders may utilize the installment method of accounting to report the taxable gain generated at the shareholder level by the deemed liquidation of the S corporation

[412] Mergers, Acquisitions, and Buyouts, Jack S. Levin and Martin D. Ginsburg, Aspen Publishers, November 2000.

[413] Prop. Reg. § 1.338(h)(10)-1(d)(8)

[414] Prior to the proposed regulations becoming final after March 15, 2001.

[415] Treas. Reg. § 1.338(h)(10)-1(d)(8)(ii)

triggered by a special election under I.R.C. § 338(h)(10) following a qualified stock purchase by an acquiring corporation.[416]

FACTS [for above memorandum][417]

On June 30, 1999, a publicly held corporation, in a fully vibrating mergers and acquisitions mode, acquired four S corporations and one C corporation that constituted a controlled group of brother/sister corporations.[418] The S corporations were owned by four Florida shareholders in varying proportions consisting of the estate of the patriarchal founder, his credit shelter trust, his surviving spouse, and his son (groomed to succeed his father since graduation from college), except one corporation had two additional shareholders who were residents of Georgia where one of the corporations operated exclusively. The C corporation was a minority business enterprise (a Minority Business Enterprise company)[419] owned by the surviving spouse, her daughter-in-law, two daughters, the non-marital trust, and the son. The purchase sales agreement required the six S shareholders to consent to the special section 338(h)(10) election that was contractually required to be executed prior to January 1, 2000.[420] All five corporations had contributed to the payment of a stock bonus to the son of over two million dollars two days prior to the closing. The bonus recognized the superlative work done over thirty years and also had the effect of deflecting assets from the growing estate of the surviving spouse.

The stock purchase agreement contained a clause to reimburse the selling shareholders for whatever additional cost in federal and Georgia state income taxes that the special election might

[416] Whether the writer's comments or those of his colleague at a large Miami law firm during several telephone conversations with the buyer's accountant persuaded the latter on the "rightness" of the selling shareholders' position or whether the amount of "reimbursement" monies involved was not considered significant enough the writer will never know. The conclusion of this tax memorandum was accepted in the end. See footnote # 427 to the "facts" attachment for additional issues that were present at one time or another in bringing the transaction to a safe resting slip in a quiet harbor.

[417] Discussing rules of the tax law in a vacuum leaves vague impressions of the law's meaning. Applying such law to detailed specific fact patterns brings the tax principles into high relief.

[418] Simultaneously the acquiring corporation closed with four other closely held corporations that operated in Arizona, Texas, Minnesota, Illinois and Wisconsin. The total acquisition price was over one hundred and ten million dollars. Moving that swiftly to obtain a significant market share in the industry necessitated the filing of FTC Form C4, Notification and Report Form for Certain Mergers and Acquisitions under the Antitrust Improvements Act. The legal fee for compliance with "Hart, Scott and Rodino" was a mere $50,000. The writer is old enough to recognize the names of the legislation's sponsors.

[419] The report from Linda Greenhouse in the New York Times (Nov. 1, 2001) states that the United States Supreme Court, at the urging of Solicitor General Olson, may dismiss the affirmative action case of *Adarand Constructors v. Mineta* as improvidently granted.

[420] The C corporation was not eligible to make such an election and the purchaser opted not to make the general section 338(g) election for that corporation. Two of the S corporations, a management company with minimal assets and an operating company rich with fixed assets, had a prior subchapter C history and had not completed the ten-year recognition period.

cause.[421] Counsel for the sellers was convinced that the buyer would make the election, while the accountant for the sellers seriously questioned that conclusion. The presence of significant depreciation recapture under I.R.C. 1245 and inventory appreciation, reimbursed at a marginal rate of 39.6 percent and immediately recognized in the year of sale, viscerally[422] seemed to pale in comparison to increased depreciation and amortization deductions over the appropriate recovery periods ranging from five to fifteen years. A harried public accountant representing the buyer succeeded in submitting a timely election on March 15, 2000.[423] Once the writer received the adjusted grossed up basis calculations of the buyer to be utilized in preparing the final four short year S corporation income tax returns it became abundantly clear why the buyer had decided to make the special election.[424]

Finally, some thought should be given to why the buyer was willing to reimburse the seller for any additional tax cost resulting from the special election. Theoretically, other than accelerating the recognition and changing the character of income passing to the S shareholders, no increase in taxes should occur if gain at the corporate level simply raises the adjusted basis of the shares of stock as an equivalent offset.[425] The only adjustment taken into account, as part of the adjusted grossed up basis, was the Georgia income taxes that applied to only one of the four S corporations. No such additional income tax would have arisen in the absence of the election since non-residents, domiciled in Florida, would have paid no such state tax on the sale of shares of stock. The tax advisors to the buyer had not accurately seen the sizable effect that the state income tax deduction would have on raising the individual alternative minimum tax.[426] & [427]

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[421] A partial illustration of the reimbursement language follows: "[T]he excess, if any, of (x) the net ordinary income (including…any net Section 1231 gain reportable as ordinary income because of non-recaptured Section 1231 loss and net short-term capital gain), net non-recaptured Section 1250 gain and net long-term capital gain recognized by such Shareholder as a consequence of the Election multiplied by a tax rate that is the effective rate of the Shareholder for ordinary income…over (y) the net long-term capital gain that would have been recognized by such Shareholder on the sale of such Shareholder's Shares if the election had not been made, multiplied by the effective rate of the Shareholder for long-term capital gains, divided by the excess of 100 percent over the appropriate effective tax rate computed using the rates…." Attorneys in a pre-closing conference in Dallas steered away from any detailed discussion of the preceding excerpt.

[422] The calculation must utilize the present value principles of the mathematics of finance.

[423] While timely under the income tax law, it was not in compliance with the contract requiring consent by the six S corporation shareholders to permit the belated election.

[424] The portion of the closing price allocated to the fixed assets as part of class III assets in an applicable asset acquisition (see I.R.C. § 1060) was woefully understated to the point that a section 1231 loss was generated on their disposition. Amazingly, the amount that was allocated to the significant inventory was exactly equal to the cost at which the seller carried such inventory on its books.

[425] No consideration was given to the potential for corporate income taxes attributable to the prior subchapter C histories.

[426] In reality the complicated calculation in footnote # 421 was never utilized. Instead two sets of individual income tax returns (both federal and state) were prepared, one set assuming that an election had not been made and the other set showing the effect of such election, which of course was filed with the appropriate governmental authorities.

[427] A legal transaction of the magnitude consummated on June 30, 1999 cannot but help to require the resolution of other tax and non-tax issues of both greater and lesser importance. A sampling of some of those issues is listed here as a reminder of the perseverance that must always be present from start to finish. The model of the marathon runner is most relevant:

A. The two million dollar stock bonus, allocated among five corporations, produced a net operating loss in the C corporation without causing a reduction in net corporate assets. The benefit of that tax attribute was "sold" to the acquiring corporation by means of a significant adjustment on the closing statement.

12. *<u>Was It Winston Churchill Who Said: "Although Prepared for Martyrdom, I Preferred That It Be Postponed"?</u> Similarly it may sometimes be necessary to defer the performance of one's civic duty. The letter that follows was prepared at the request of my partner of more than thirty-eight years as the footnotes, particularly the first one, directed to a local jurist, proved irresistible:*

February 2, 2003

The Honorable Dale Ross
Chief Judge
Jury Administration
Broward County Courthouse
201 S.E. 6th Street – Room 380
Fort Lauderdale, Florida 33301-3302

Dear Mr. Chief Judge:

I am in receipt of your recent invitation to serve as a juror in the Broward County Courthouse.

First, allow me to say that I remember with great fondness my prior service in the 17th Judicial Circuit. The trial judge did an extremely creditable job of presiding over a civil trial involving the prosaic issue of contractual damages.[428] As a proud United States citizen I am particularly

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B. Application for a refund attributable to the net operating loss involved the calculation of the alternative minimum tax net operating loss deduction as well as an attempt to determine the remaining positive adjusted current earnings adjustment with respect to prior taxable years.

C. In negotiations that literally continued to the day of closing (purchase and sales contract executed simultaneously with closing statement) the buyer agreed to permit a distribution from all four S corporations equal to the remaining balances in the several accumulated adjustment accounts. However, the buyer was unwilling to permit the S shareholders to take the accumulated required payments for the Georgia corporation that had a grandfathered February fiscal year end. An anxious buyer can only be pushed so far.

D. The writer was informed in May 1999 that the credit shelter trust had been funded in the middle of June 1998. Fortunately, a testamentary trust remains a valid S shareholder for two years measured from the time of funding.

E. State law was scrupulously examined in the event that two siblings objected to a major part of the stock bonus that was payable from the C corporation. Cash bonuses of $100,000 each were most persuasive in overcoming familial objections. Reality check: The support of the controlling surviving spouse is indispensable.

F. Legal counsel, in attempting to approximate the ultimate federal individual income tax liability of the son, did not realize that subchapter S stock is fungible in determining losses attributable to the stock bonuses.

G. The possibility of a potential built in gains tax with respect to one of the operating S corporations seemed to give the buyer a minimum of concern. A fading memory compels stopping at the approaching period.

[428] Perhaps Alexis de Tocqueville said it best: "Juries, above all civil juries, help every citizen to share something of the deliberations that go on in the judge's mind; and it these very deliberations which best prepare the people to be free."

sensitive to my privilege and duty to serve as a juror on both civil and criminal trials. However, I have a difficult conflict of time. Permit me to explain.

I am the supervisor in charge of the K-9 Unit at Miami International Airport.[429] As an employee of the Animal Plant Health Inspection Service of the United States Department of Agriculture my primary responsibility is to protect this country's food supply. As you may recall, Vice-President Cheney administered the oath of office to Secretary Tom Ridge on January 24, 2003, as he became this nation's first Secretary of Homeland Security. Along with the Immigration and Naturalization Service, United States Customs, the Coast Guard, the Transportation Security Agency, and the Secret Service, our agency now falls within the jurisdiction of the new cabinet department. This past Thursday I had the distinct pleasure and high honor of meeting with both Secretary Ridge and Undersecretary Asa Hutchinson[430] at Miami International Airport. I provided a one half hour presentation to orient both officials on the extremely critical function accomplished by the canine unit. From March 3rd through March 14th I will be undergoing intense indoctrination in Shepherdstown, West Virginia for Homeland Defense Training on the Infrastructure of Terrorism: Understanding the Enemy. I will again be meeting with officials, primarily located in Washington, D.C., of our new department. The pace of this most important reorganization of the executive branch of the United States government since formation of the Defense Department is now proceeding at high velocity and is expected to accelerate as war with Iraq becomes more likely.

To summarize in a slightly pithier manner, while there are diverse ways to perform one's civic duties, I earnestly believe that at this point in time my presence on the line takes precedence. I sincerely hope that you might agree.

In conclusion I stand ready to serve as a juror early next year when the reorganization should be successfully completed and the threat to these United States might be at a lower level of intensity. Juror service is perhaps one of the more quintessential ingredients in the efficient administration of the justice system. I stand ready to serve next year.

Very respectfully,

Ellen M. Ingber

13. [431]*Reverse Application of the Old Saw of One's Own Mother [Saying Nothing If One Has Nothing Nice to Say] The Florida Institute of CPAs, with the able assistance of The Florida Bar, rightfully takes great pride in the annual International Tax Conference, which is a reflection of Michael Rosenberg's quarter of a century of dedication:*

[429] I am also responsible for the supervision of the inspection and clearing of international passengers arriving from all foreign countries.

[430] Border and Transportation Security

[431] A "Baker's Dozen"? [Assize of Bread and Ale (1267)]

[A]Jonathan S. Ingber
Kwal + Oliva
1101 Brickell Avenue
800 North Tower Suite
Miami, Florida 33131-3149

January 23, 2005

Wendy Johnson
Special Events Manager
Florida Institute of CPAs
325 West College Avenue
Tallahassee, Florida 32301

Donna Byrd
Tax Section Administrator
The Florida Bar
651 Jefferson Street
Tallahassee, Florida 32399

Dear Wendy & Donna:

Bravissimo![432]

In the quiescence of an early Sunday morning with Loyalty Incarnate[433] serving as my astute editor, I thought it would be an ideal time to summit a critique of the 23rd Annual International Tax Conference[434] before the pleasant after glow subsided into an unrecoverable archive file.[435]

FACILITY:

I think that Marriott[436] says it all. The receptionist at the registration desk, the "greeter" on the fifth floor, and all servers were polite and helpful.[437] I vowed not to miss the cocktail party next year as I reluctantly left the mounds of shrimp and assorted alcoholic beverages for work at the office. The salads, vegetables, and chicken served for the noon repast were exceedingly tasty and nutritious and seemed extra palatable when washed down with thirst quenching iced tea. One minor dissonant note for submission: Replace the steak with fish or pasta. For our out of

[432] Or, if one prefers: Bravo Zulu [Allied Signals Book (ATP 1)].

[433] My dog Mascara, an indomitable critic, rests comfortably by the Hewlett Packard laser printer listening to www.beethoven.com.

[434] Apparently my absence of almost 23 years has not been of consequence. Help me out here, Michael. Who else besides Ed Heilbronner and Molly Hill were in attendance at the original planning meeting in the spring of 1982?

[435] Quite honestly I wanted to add something a bit more thoughtful than some of last year's comments {"The parking is horrid at the J.W."; "Why are we constantly subjected to an all male panel of presenters?"; "Why must 'Outbound' always precede 'Inbound'"; and other equally inane comments.}

[436] Somewhere in one of 43 states the "night auditor" of a Marriott asked me how my stay had been as I turned in my room key. I asked her if this facility was a Marriott. She assured me that it was. I then responded with a "res ipsa loquitur", receiving a quizzical expression in return.

[437] Bending down to pick up coffee cups and saucers left on the floor, I was greeted with a "gracias" from a clean up person. I responded with my best Stanley Kowalski version of "por nada", receiving a very gracious smile in reply.

town speakers this superb facility adds to the first class reputation of this long-standing conference on international taxation.

SPEAKERS:

1. *WILLIAM M. SHARP, SR.*—Outstanding job on what typically is a comprehensive somewhat disconnected assignment.[438] The written materials were well prepared, giving lucid summaries of what typically are exceedingly complicated fact patterns. His oral presentation style was brisk, coherent, and easy to listen to. He was more than an adequate surrogate for a large public accounting firm.[439]

2. *OZZIE SCHINDLER*—An excellent speaker on a potentially fascinating subject. Wanting the young fellow to be a perennial favorite, I must adamantly reject as unacceptable a Power Point presentation unaccompanied by written materials.[440] Allow me to suggest a solution for a terribly busy practitioner:

a) Turn the writing assignment over to an eager and energetic intern at Baker & McKenzie.

b) Allow some of his junior colleagues at his fine law firm to undertake the task.

c) Provide a member of the International Taxation Committee with a detailed outline of topics to be included, accompanied by appropriate citations to primary authorities [2 to 5 pages]. Allow the committee member to write all the materials subject to editorial critique by the speaker.[441]

3. *SETH J. ENTIN*—Possibly the best oral presentation of the conference. Superbly smooth coordination with slide presentation. Jurisdiction to subject revenue produced by invisible itinerant intellectual property should pose interesting intellectual property planning challenges for years to come.

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[438] Having taught Current Developments twice in 2004 as part of the Master of Science in Taxation program at Florida International University, I am able to personally attest to the challenges presented by such a broad and diverse subject area.

[439] Hopefully, he will become the "Richard Covey" of the international set.

[440] His first slide of his heir was his best slide.

[441] Again, allow me to paraphrase: The New York University School of Law prototype demands high quality written materials. In the author's tax research course Power Point slides are absolutely prohibited when the graduate student makes an oral presentation of her written tax memorandum.

4. *ALAN LEDERMAN*—Personally I enjoyed the presentation that had the potential for boredom and irrelevance.[442] The gentleman's expertise was self-evident and his participation in the question and answer session was very much appreciated.

5. *WILLIAM B. SHERMAN*—I am not sure that the Treasury Department fully comprehended the mind-boggling planning possibilities that disregarded entities present.[443] This is an area of the law that needs to be revisited in future conferences. The speaker provided an excellent and clear presentation.

6. *ROBERT F. HUDSON, JR.*—Hooray for Chaves![444] I particularly value the fine written materials on foreign trusts.[445] Considering the enormous penalties that lurk in the background[446] this too is an international tax area that should be revisited on a frequent basis. The gentleman's smooth delivery made for a well-received discussion of this intellectually challenging subject.

7. *CARLYN McCAFFREY*—I loved her professorial style. Her written material[447] should complement the material provided by Monsieur Hudson on the subject of foreign trusts.[448] I sincerely hope that her first visit will not be her last. I think that I could have listened to her all day with constant interest.

8. *MICHAEL ROSENBERG*—Michael was Michael and that is always a very good thing. I am particularly delighted in his written material[449] that gives us the benefit of some incites on the practical problems of administering qualified domestic trusts. His

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[442] My long association with the FICPA Health Benefit Trust provides me with a continuing fascination of an intriguing, terribly important, industry.

[443] Similarly, I suspect that the Congress did not fully appreciate the potentially unsettling interplay of the alternative minimum tax and the limitations on passive activity losses found in the Tax Reform Act of 1986.

[444] The 15 professionals sharing office space in the Banco Industrial de Venezuela building next door [1 Japanese, 1 Chinese, 1 Peruvian, 1 Jamaican, 1 Argentinean, 2 Columbians, 5 Cubans, and 2 Jews] welcome a bit of political incorrectness.

[445] In presenting two courses on fiduciary income taxation for the New York State Society of CPAs earlier this month, none of my materials, unfortunately, considered foreign trust issues.

[446] "Traps for the unwary" as I believe the speaker put it.

[447] Note that the materials were prepared with the assistance of two colleagues.

[448] Liked her written treatment of foreign trusts by state jurisdictions.

[449] Adnauseam such materials are a beautiful springboard for further research focusing on problems raised by a varied clientele.

dedication to this area of the tax law needs no elucidatory comments by me.[450] Hopefully his tenure as leader of the conference will continue indefinitely.[451]

9. *MARK H. LEEDS*—His presentation and mastery[452] of the material was matched only by Seth Entin. Both his oral presentation and the written materials provided by *JEFFREY L. RUBINGER* were done at a level of high quality. The semi-arcane subjects of notional principal contracts, collars, caps, and swaps turned out to have an unusual relevance to the international taxation area. Considering limited knowledge by tax accountants in this area of financial instruments, this subject, particularly its relevance to the Foreign Investors Real Property Tax Act, should be revisited in future conferences.[453]

10. *MARJORIE RAWLS ROBERTS*—Initially I would say that the value of the subject is not apparent to this neophyte. Presumably, my subsequent reading will demonstrate the importance of St. Croix, St. Thomas and St. John. Regardless of the value of the subject, Ms. Roberts made an outstanding oral and slide presentation and she definitely should be invited back to share her expertise on international estate planning and utilization of offshore centers.[454]

11. *JONATHAN H. WARNER & FRIENDS*—I appreciated some of the direct comments made by Jason on real estate contracts. I am indebted to their[455] written materials that indicate an individual taxpayer identification number is not required for an officer[456] as the foreign corporation seeks an employer identification number.[457] With the move of the

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[450] Prior to attending his terrific course on international taxation at Florida International University, my only experience in this limitless field consisted of the preparation of a nonresident individual income tax return for a first class Filipino yeoman aboard the USS Jonas Ingram [DD-938] in 1968. Richard Kwal now refers to my office as "FIRPTA Central".

[451] Question left pending: Just as the Economic Recovery Tax Act of 1981 provided a transitional rule to permit state legislatures to deal with the issue of the unlimited marital deduction with respect to existing testamentary documents, do the Florida statutes have any provision that addresses the use of the judicial reformation remedy for qualifying domestic trusts under I.R.C. § 2056A (1986)?

[452] I enjoyed watching the reactions of his parents who were among the listening audience.

[453] Question left pending: Youthful resident alien contemplates working aux Etats-Unis for decades and then retiring to a non-treaty country. Concerned about the continuing economic viability of the Social Security Trust funds, he asks: "Would it make budgetary sense to 'fund' the privatized accounts with notional principal contracts (accounts) to eliminate the initial effect of increasing deficits by obviating the necessity of actually funding the segregated notional accounts?"

[454] Question left pending: Other than Puerto Rico, Guam, American Samoa, United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands, are there any other United States possessions that the international tax practitioner should keep their eye on [Jarvis Island?].

[455] I include our fellow committee member Thomas C. Roberge.

[456] Assuming the officer has no obligation to file an individual income tax return.

[457] Comment left pending: I was left with an impression, presumably incorrect, that a qualified statement for reduced withholding was not available in the case of a deferred nontaxable exchange based on an inability to know, at the time of closing, whether the numerical time parameters would be satisfied.

FIRPTA UNIT to the western environs this aspect of real estate practice should be of continuing interest for the immediate future.[458]

12. *IRS PERSONNEL*—I am proud to have the IRS representatives appearing at the conference to be employees of the United States government. *ROBERT E. PANOFF* did a superb job in soliciting information from the IRS panel. All the government representatives were articulate and amiable. The presence of such knowledgeable and dedicated employees should be a permanent staple of the International Taxation Conference.[459]

SUBJECTS FOR 2006:

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[458] Anecdotal tale left pending concerning a citizen of the United Kingdom attempting to have a copy of his passport authenticated: "Regrettably yesterday was not great. The sequence was as follows:

1. 3-hour trip to the embassy.
2. 1 hour to get through security
3. Notary forms are not completed at the front of the embassy and I was sent round the block
4. The notary section refused to act as they advised it was an IRS issue
5. Sent round the block again to the IRS
6. IRS advised I did not need a notary service
7. I countered that I needed the documentation to avoid tax problems upon sale
8. IRS claimed that I had been misinformed
9. I said 'I did not wish them to keep 10% of my sale'
10. IRS said this would not happen, as I was English, i.e., I am not an alien (my wife doesn't agree!)
11. Stood in line for US Visas
12. Advised this would take 3 hours
13. Tried to fast track with the result that I was told I was argumentative!
14. Subsequently advised I did not need a visa as I was staying in the US for less than 90 days per trip
15. Returned home confused, discontented!

I tried my best but bureaucracy completely defeats me. I have therefore faxed you a copy of my passport if this will help you complete the relevant documentation."

The solicitors in the overseas territory of the United Kingdom [Gibraltar] have successfully authenticated a passport by using a marvelous red seal under the Hague Convention (Incidentally, said counsel assure me that the interminable litigation of Jarndyce v. Jarndyce has reached its ultimate conclusion.)

[459] I confess partiality with a wife who is a supervisor at MIA for the Department of Homeland Security and a son who is scheduled for a year of training at the Defense Language Institute in Monterrey, California.

1. Determination of sources of income

2. Concept of effectively connected income of a United States trade or business

3. Allocation of deductions for determination of taxable United States and foreign source income

4. Expatriation to avoid tax

5. Branch profits tax

6. Role of treaties in taxation of foreign persons and foreign income

7. The many faces of FIRPTA

8. Foreign tax credit

9. Domestic production deduction, repeal of extraterritorial income, and the prior statutory background

10. Controlled foreign corporations

11. Functional and foreign currency

12. Passive foreign investment companies

13. Problems arising in the preparation of federal estate tax returns for nonresident aliens.

ON SITE ADMINISTRATORS

Where would we be without Miss Donna and Miss Wendy? Thank you for making the registration process run smoothly and for making the 23rd International Taxation Conference such a success. I think I got my money's worth.

I have come to the end of my comments. {Praise the Lord.} I am not sure why I decided to make the preceding comments since I have not reviewed evaluations of my own presentations for more than ten years.[460]

If I am fortunate enough to get selected for service in the 24th year I am willing to share a meal at CK's the night before. The Chilean sea bass and the Pinot Grigio are outstanding.

[460] My favorite criticism from the tax illiterate: "He quotes the Code too much." My response: I attended a prayer breakfast in Fort Lauderdale many years ago. The featured speaker was Alvin Dark of the New York Giants. [Way before your time.] I think he cited the Old and New Testaments at least 30 times. Nothing like Higher Authority. Somewhat rhetorically, will the FASB Accounting Standards Codification make the less tax-oriented accountant more respectful of the Internal Revenue Code?

Again thanks for a pleasant two days.[B]

Respectfully,[C]

Jonathan S. Ingber[D]

cc: Michael Rosenberg
Richard M. Kwal
Rolando Sanchez

[A] The luncheon presentations were a disaster in the auxiliary dining rooms for an inability to hear the speakers above the noise level. Recommendation: Shorten the lunch break to 45 minutes and have the "luncheon" speakers make their presentation to the general assembly.

[B] The attorney from Steel, Hector & Davis, who provided his gratuitous book on international taxation, deserves a letter of gratitude. Methinks that Florida Bar President Kelly Johnson might start here on the issue of tasteful lawyer advertising.

[C] Sometime in my lifetime, after completion of "bullet" train construction, the International Taxation Conference should be held every third or fourth year in Tampa.

[D] Michael should be lured from Paternoville this coming summer to attend our committee meeting in person. As Lyndon Johnson would have it, it is sometimes necessary to "press the flesh" of one's constituents.

Subliminal Influences

1. LCDR Jesse H. De Loach {USS Adroit (MSO-509)}. Taught a young naval officer the meaning of eternal vigilance[i], loyalty up and loyalty down, and concern for one's men. Four months after my departure, he had a rendezvous along the Mekong Delta [Tran Hung Dao-26].
2. George Gerson Ingber. My father had an education that included instruction in Latin. He read more books than I can ever hope to read.

[i] The lesson came home, unfortunately, once again when CDR Waddle, commanding officer of USS Greeneville (SSN-772), failed to avoid collision with the Japanese M/V Ehime Maru.

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