Section on Taxation

Inside Basis

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Interview with Thomas Barthold, Chief of Staff, Joint Committee on Taxation

Thomas Barthold joined the staff of the Joint Committee in 1987, and was selected as chief of staff in 2009. Prior to joining the Joint Committee staff, Dr. Barthold served on the economics faculty at Dartmouth College. He received his B.A. and M.S. from Northwestern University and his M.A. and Ph.D. from Harvard University.

Thomas Barthold

FBA: Could you please tell us a little bit about your background?

TB: I've been on the Joint Committee staff for almost 24 and a half years; I started in June or July of 1987, after the Tax Reform Act of 1986. I was hired as a staff economist. On Joint Tax we have economists, accountants, and attorneys. Some of our economists are more quantitative economists and specialize in model building. I was hired under the generalist title of "Policy Analyst Economist," which is quite a mouthful, but it basically meant I was hired to be a generalist and offer qualitative economic analysis, and to help bring economics into the discussions that we have with outsiders and member offices as policy proposals are developed. And it's been fun, so I stayed here for a while. [Former Chief of Staff] Ken Kies gave me and a couple others the title "Senior Economist." He said in an interview at the time, "Well, we had some guys who've been around here for a while and they're getting gray hair." Former Chief of Staff George Yin asked me to be one of his deputy chiefs of staff when Mary Schmitt, who had been the deputy for a number of years, retired to pursue other interests. After George Yin returned to the University of Virginia, I was acting chief of staff for almost two years. Then Chairmen Baucus brought in Ed Kleinbard [as chief of staff], and when Ed Kleinbard went to USC, he asked me to be chief of staff.

Before that, I was on the economics faculty of Dartmouth College for seven years. That was my first "real job." Prior to that, I did graduate work at Harvard University, and I received a bachelor's degree in mathematics and economics from Northwestern University.

FBA: Did you have a particular spe-

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Message from the Chair

Martin L. MIlner

I hope you enjoy this issue of *Inside Basis*. This issue includes an informative interview with Thomas Barthold, chief of staff of the Joint Committee on Taxation, as well as updates on our activities over the past several months. Many thanks to our editors, Marissa Rensen and Christine Hooks, for their work in putting together an excellent issue.

On March 2, 2012, we will be hosting the 36th Annual Tax Law Conference at Ronald Reagan Building and International Trade Center in Washington, D.C. Featured speakers at the conference include William J. Wilkins, chief counsel of the Internal Revenue Service, and Nina E. Olson, the national taxpayer advocate. This year's conference co-chairs are Stuart Bassin and Andrew Strelka. Immediately following the conference we will present the 2012 Liles Award to Mark Kovey, a former section chair and a legend of the insurance tax bar. The 24th Annual FBA Insurance Tax Seminar, which

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was founded by Mark Kovey, will be held on May 31–June 1, 2012, at the J.W. Marriott in Washington, D.C. More information regarding these two premiere events are available in this issue of the *Inside Basis*.

The section also has a number of exciting programs planned for the coming months, including the next in our very popular "Women in Tax Law" series, our annual Careers in Tax Law lunch for summer interns, a "Beyond the Beltway" event in New York, and the biennial Airlie House Conference, which will feature round-table discussions of topics related to tax policy and tax administration.

I assumed that role of chair in October 2011 after the very capable Steve Sherman led our section through a successful year of conferences and programs. We also welcome Fred Murray as chair-election, Christian Wood as treasurer, and Mary Prosser as secretary. I appreciate the opportunity to serve as section chair, and I know it will be a great experience to work with so many fine tax attorneys within both the government and the private sector. The section relies on volunteers, and I am impressed by the energy and enthusiasm of our section members who have developed programs, monitored our budget, and guided the section. The FBA staff, and in particular Sherwin Valerio and Kate Faenza, have been a tremendous help as well. I am privileged to work with our fine steering committee members as we plan an exciting schedule for 2012.

I look forward to hearing from you, our members, about your ideas or suggestions to improve the section. If you would like to become more involved in the section, or have ideas for a program, or just want to let us know how we are doing, please feel free to contact me. Also, please visit our website (www.fedbar.org/Sections/Section-on-Taxation.aspx) for announcements regarding section programs or to be added to our email distribution list. Thank you for your continued support of the FBA and of the Section on Taxation. ⌘

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cialty in economics?

TB: Public finance and microeconomics. At Dartmouth they had two different levels, an introduction to public finance and then an advanced second level in public finance. I taught both of those. I also taught a finance course and a couple different levels of basic microeconomics.

FBA: What does your day-to-day role as chief of staff involve?

TB: There is a lot of management of information. We work for all members of Congress. We work most closely with House Ways and Means and Senate Finance, the committees of jurisdiction, but we work with both sides of the aisle. There are a lot of different requests and interests, so a lot of what I have to do is to manage everyone else on the staff who's doing the "real work" and a lot of the detail work: working with a member's office, helping them draft legislation, doing quantitative analysis, or thinking through the economics of the proposals. I let them know what's important, what's up next, how to plan their day, how to plan their week, and what sort of things might be on the horizon. I also assemble project teams and oversee them, read and comment on our written work, and I try to participate in a lot of the meetings where we kick around the ideas and work with members' offices on their proposals.

FBA: Could you describe the Joint Committee's role in the legislative process?

TB: We are a technical and policy resource for any member of Congress. We have, right now, about 42 tax professionals, and also computer support people. We have about 20 attorneys, 20 economists, and currently 2 CPAs. And, in the process, we will do a little bit of everything. If a member of Congress has an idea, their aide might call up and say, "My boss is interested in X because he's heard about a problem from a constituent or he just has an inherent interest in Y." Sometimes they just want to know how the tax law treats that kind of situation. We're an information resource. Other times, somebody might say, "My boss has heard about this, and his constituent thinks this is not the right kind of outcome. What can we do about that?" In that case, we'll explain what the law is and ask, "What is your boss trying to achieve? What does he think is wrong about the outcome? What might he want to change? And, if we change that, if it's in a narrow circumstance, do you mean to keep it really narrow, or do you mean to have a broader proposal? Do you want to treat S corporations and partnerships the same, for example. Or what about a sole proprietor who might be in the same line of business?" We're here to help the members and their staff think through the technical issues as well as help them ask themselves the policy questions about how broad in scope a change might be.

We also provide information when the members have legislative goals that they are developing. A critical part of the process for many years has been the fiscal effect—what happens to the budgetary receipts if we change the Internal Revenue Code. That's what our staff, the quantitative economists, are all about. It's about building good economic models and gathering data so we can give Congress good projections of effects of changes in tax law on receipts to the Treasury—is the deficit going to go up or is the deficit going to go down. We are an information source, but it is to help serve the members. We'll go to the Office of Legislative Counsel where we draft the words that become the new Internal Revenue Code. There are markups; we participate in that. There are committees; we prepare background material for their hearings. As an example, next Tuesday, in a somewhat unusual move, Chairman Camp and Chairman Baucus

of House Ways and Means and Senate Finance have arranged a joint meeting of their two committees to get background information of how the Internal Revenue Code treats financial products, so we are providing a background information packet for the members and their staff addressing issues such as what is the current law? Is there different treatment for different products? Is there symmetry? Are there areas that they might want to think about? We provide that background. If the committees meet in a legislative mark-up session to report a new statute, potentially, to the floor of the House or the Senate they almost always file a Committee Report, which includes the statutory language but also a prose explanation of what they're doing. We write the first through final drafts of the Committee Reports for the Committees. When there is a conference, we participate with the conferees and their staff on the drafting of proposed changes. The Offices of Legislative Counsel will also help write conference agreements, explaining the proposal, what the House did, what the Senate did, and what the conferees agreed on—the key stuff that is part of the legislative history. We also from time-to-time get called on to do some special reports, but mainly we're a big tax resource for the members.

FBA: With respect to the quantitative analyses that your economists perform, do they analyze just the revenue impact or do they analyze the economic impact as well?

TB: That's a question the members will ask. They'll ask, "Who gets affected by this?" We prepare distribution analyses of the tax burden. The background material for the hearings often discuss the economic issues, such as whether they are providing an incentive for one sector that is greater than the incentive for another sector. As a not-too-distant example, one of the committees held a hearing on some of the energy and alternative energy proposals that the Congress has enacted over the past decade. It was to provide background information—what have we done and what is the situation now. Part of what our economists did in writing the background materials was to convert, under some reasonable assumptions, what the energy value measured in British thermal units would be achieved from, for example, putting up a photovoltaic panel on the roof of your house as opposed to buying a Toyota Prius. There is a tax credit for a homeowner who puts up a PV system on their house, and there used to be a tax credit for somebody who bought a Prius, so an interesting economic comparison was the value of a million BTUs saved by the Prius compared to a million BTUs saved by the photoelectric cell and how much was Congress, through providing a credit, in effect paying per million BTUs saved. We provided that sort of analysis and background information for the members. So there are a lot of different types of economic analyses that our economists do.

FBA: You've been part of the Joint Committee Staff for a number of years; how has the Committee changed over the past 24 and a half years?

TB: We're still doing the same stuff, although I probably see it differently now that I'm older than when I was younger. I think the thing that has changed the most is congressional practice. In the late 1980s and the early 1990s, there was actually a seasonality to what we did. The President would put out his budget message in February, then from February through May the House Ways and Means Committee and the Senate Finance Committee would hold a series of hearings. There would always be an explicit hearing on a number of the President's proposals, sometimes members had particular initiatives, particular bills that they would introduce that would be subject to the hearings, and some other times it would just be a general topic area. For instance, the committee wants to explore the potential for enterprise zones; maybe there were no bills per se, but they wanted to talk about local economic development and tax incentives for local economic development. And so there would be a lot of activity in terms of preparing background information and preparing background hearing pamphlets that we write for the members. At the same time, elsewhere in Congress, not the tax writing committees per se, but the budget committees would be getting a budget resolution together. Budget resolutions often got in place by late spring, and that would give a directive to the tax writing committees and the other committees. For example, one jurisdiction could spend this much or should save this much because of deficit targets, or it needs X dollars to meet our budget targets, or we think it has room for a tax cut of Y dollars. So that would give general direction. Going on at the same time as hearings, information gathering, and the budget resolution process, the committee chairmen would be feeling out their members about what they think should be done and what changes should be considered. And then being mindful that there were targets in the budget resolution, the chairman would put together his markup, the proposal of what the committee should do. Often House Ways and Means and Senate Finance would hold a markup session in June or July. They would report the bills to the floors and the floors would act on them, and that often ran up against the August recess, so sometimes it didn't finish until after the August recess, and then there would be a conference. Most of the time we didn't finish it by the end of the fiscal year, and then in the early fall there would be a conference. At the conference they would come up with a conference agreement and then they would go back to each house and pass it. Generally they did pass it because they worked out all these compromises, and then it would go on to the President. So that was the seasonality; there was a hearing season, then a markup season, then a conference resolution season, and that often took us to the end of the year, and then we'd start up over again.

The thing I should emphasize about that is it usually meant that there was just one big tax bill per year. There was the Omnibus Budget Reconciliation Act of 1987, there was the Technical and Miscellaneous Revenue Act of 1988, there was the Omnibus Budget Reconciliation Act of 1990, there was the Omnibus Budget Reconciliation Act of 1993; there were just a few big bills and they would cover a lot of aspects of the Internal Revenue Code. In the mid-1990s, the mode of doing tax legislation changed; we broke it up more. It became, for lack of a

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better description, more thematic. Lets do tax legislation that affects the family. Lets do tax legislation that's about energy. There's a military bill; maybe we add a tax title to the military bill to provide some tax benefits to veterans or to active duty personnel. It has had the effect that we more often have tax legislation before the committees or before the House or Senate. So instead of hearing season building into legislative season, it is more concurrent. I also think if you go back and count, there is probably a relative decline in information hearings as opposed to markup sessions. And to emphasize again, a lot of it is going on at the same time. There is not the seasonality; it seems to be all happening at once.

FBA: What do you think is the most important function of the Joint Committee staff?

TB: Our most important function, this is not going to sound very glamorous, but it's to serve the members of Congress. I think it's important for us and our staff to remember—and I think we do a good job of it—that the members make the decisions. In serving members of Congress our most important function is to try to give them the best information possible to help them achieve in the best way possible their policy objectives. When a member's office comes to us and says, "I'd like to change this," we ask questions such as, "What are you trying to do?" or "Have you considered doing it this way or that way?" And they might say, "Well somebody came to me with this idea, and that sounds really attractive to me." Part of our role to help serve the members is to say, "Well, that would be really hard for [IRS Commissioner] Doug Schulman to administer. It might be easier if you did it this way." Or, "If you set up the system like this, there may be substantial compliance concerns; maybe it would be too easy to make fraudulent claims." We try to issue spot a lot of things for the members. A member can come up with a proposal and ask a staffer to work on a proposal, and the staffer might not agree with the proposal. But the idea is to set that aside do our best to help that member do that thing in the best way possible. So that's the most important thing, to provide good solid information and advice so the members can make as sound and as informed of a decision as possible to help them achieve the goals for which the American people ask them to represent them.

FBA: Is it ever difficult to maintain that objectivity?

TB: I actually think the staff does a really good job. The thing that's difficult—in a way it's culture shock for some of our people who come from private practice and accounting firms or law firms—is that at a law firm if you have, to pick a name, General Electric as a client, you're probably not going to have Siemens, a direct competitor, as a client. Well, we serve democrats and republicans. And we serve the House and the Senate. And a lot of time, the House Democrats disagree with the Senate Democrats as much as they disagree with the House Republicans, so there can be four sides, and there can be factions within any of those sides. And we hire people and assign people to work on issues by issue area, so it's not like I ask one person to work with the Ways and Means Republicans on individual income tax issues, and go to another person and ask them to work with Ways and Means Democrats on individual income tax issues. We have our individual income tax team of people, and they work with the House Republicans, House Democrats, and the senators. You have to remember that a lot of times people are coming at the same issue from different perspectives. You have to make sure you don't tell someone something that's specific to the other person. So you have to keep a lot of firewalls in your head. That can be difficult, and could lead to perceptions that maybe we don't care about someone's stuff as much as someone else's, or that one person gets their answer faster than somebody else. Those kind of things come up, and part of my job as the top guy is to try to not let that happen too often, and to manage that. I try to make sure we have good information so that we have the things that need to be at the top of the priority list so those kinds of problems don't arise.

We try to treat everybody fairly, and when we do some quantitative analysis we don't necessarily like the outcome, but if there is a problem and a someone doesn't understand why their estimate looks like it does, we say, "Come on in, we'll talk through it." We're not trying to hide anything from any of the Members, so I think that helps a lot.

FBA: What's your favorite part of the job?

TB: There are a lot of fun different things to think about. As you know, the U.S. economy is huge; it has lots of different things going on. The federal government is close to 20 percent of it, and we try to fund close to 20 percent of it, so tax law is a big piece of the economy. And everything in the economy has a tax angle to a degree or not. There are people and organizations that don't pay any tax, but they are specifically exempt, and there are rules that say why you are on one side of the line or the other side of the line. I've worked on proposals that have related to how we treat the tailings from uranium mines. Another member once had a proposal related to childhood tooth decay—should we tax candy, things like that. There is a wide variety of issues, you get to learn a lot of different things, you get to meet a lot of interesting people, so I guess my favorite part intellectually is the wide variety. Professionally, my favorite part would be that I think we are doing a good job of serving the members, giving them good information so hopefully they will make good decisions.

FBA: The House Ways and Means Committee has started putting out discussion drafts for tax reform; does the Joint Committee staff have a role in that process?

TB: As I said, as a general matter, we work most closely with House Ways and Means and Senate Finance, so I don't think we're revealing any big secret to say that Chairman Camp's staff comes and talks to us about ideas, asking us, "What do you think about this, economically?" "Do you have comments on this draft?" "Here is what other countries are doing, how does that compare?" Chairman Camp has held a series of tax reform hearings, and we prepared background material on that. It's also been reported in the press that he has held some members-only bipartisan briefings on basic issues. Our staff has done some

walk-throughs for the members, so we participate. The discussion draft that has been put out, it's not anything we wrote, but we contributed in terms of general development just like with a lot of member bills; other members will draw on us for input. If they wanted to blame us all we'd take the blame too.

FBA: House Ways and Means recently put out a discussion draft on cross-border activity; what are some of the issues that might come up as Congress considers whether to move toward more of territorial system?

TB: You can see some of the issues highlighted in the background hearing pamphlets that we put together for the members. The key thing is, right now we start, in principle, from a worldwide system. Chairman Camp is proposing a territorial system. Of course, we don't have a pure worldwide system and he's not proposing a pure territorial system. One of the basic questions is, "How far are we moving things?" We know what some of the incentives are under present law, so what are some of the incentives under his proposed territorial system? One thing that has been mentioned by a number of people is that in 2010, the House Ways and Means Committee, under Chairman Levin, held a hearing on income-shifting, on whether income from intangible property is migrating offshore and whether ownership of intangible property is migrating offshore. We know that there are some indications that that it happens under present law. Under a territorial system, is that incentive greater or less? That's a big concern to a lot of members. If you read some foreign developments, the British, in moving from a worldwide system to a territorial system, are creating what people call a "patent box" to try and keep intellectual property from migrating from the UK. So that's an issue; under a territorial system, should it have a patent box or should it not. The administration's proposal wants to keep a worldwide system but do other things that may deal with the potential migration of intangible property. That's a big issue. Other issues are, is it simpler? Does it get rid of a lot of foreign tax credits? Do you still keep some parts of subpart F? How much simplification have you provided? An issue in a dividend exemption-type proposal is what do you do with branches? Do you want to treat them like CFCs? How do you do that? Does that create complication? Are you making it simpler in some cases but tougher in others? There are a lot of technical and administrative issues of what it says about the development tax base. Another big thing that's long been mentioned is, what do you do about allocation of expenses? Do you say that any expense incurred in the United States is offset against what is now just domestic-based tax income, since you might be perceived as effectively exempting all offshore earnings? Do we care, in a territorial system, if we start from the premise that part of the reason we have the foreign tax credit is that we're worried about double taxation? And double taxation is really that the tax rate is too high—most people wouldn't care if it was triple taxation if it was 1 percent at each level. But if you have our 35 percent and somebody else's 15 percent, that adds up into real money. And that is a rationale for a dividend exemption system. As a policy matter, do members want that rationale to hold for income from a zero or very low tax country? Which could in fact be, for lack of a better word, a "real country," not just a pure haven, a real country that just chooses a very low business tax rate. So there are a lot of questions for the members to think through, to try to determine what some of the effects are, weigh those against what some of the benefits are, consider what happens to our ability to administer the tax, and consider the ability of taxpayers to comply.

FBA: Do you have any advice for anyone interested in working for the Joint Committee, or working on the Hill in general?

TB: Let me do Joint Committee first. We like Ph.D. economists that have a particular background in public finance, most of the time microeconomics, and empirical microeconomics for our quantitative staff. We also are looking for some macroeconomists to help us take a lot of the micro stuff that we have and build it into macroeconomic models. The members are interested in enacting pro-growth policies, and therefore are interested in how the macroeconomy is going to change. That's an important question and has been for a while. We take people with an academic background; for a lot of the economics work it's fine coming straight out of graduate school. For our legal staff, and our accounting staff, we like some experience out doing taxes and working with people. We hire some people from the IRS, but usually we like a minimum of 4 or 5 years of practice experience. For our accountants, a CPA.

We are interested in different areas and different experiences. We have to cover a lot of different topic areas so open-mindedness and willingness to tackle something with which you're not familiar is important. A number of people apply from the Washington, D.C., legal community. In most of the Washington, D.C., legal community, you're doing a lot of business tax stuff most of the time, but not that many people in the Washington, D.C., community have a background in agricultural co-ops for example. The Senate has a lot of members from farm states, so we actually get a lot of questions related to ag co-ops. We don't have to have someone who has ag co-op experience coming in, but we want someone who will say, "Yeah, I'll learn something new outside of the practice area I've working in for the past 4 or 5 years, throw that ag co-op stuff at me and I'll work through it." So experience in the field for our accountants and our attorneys; PhDs, quantitative skills, and a strong interest in micro questions for most of the economic positions, and like I said we're looking for a macroeconomist to work with a couple other of our macro guys on that macro modeling that we're doing now.

A lot of our staffers have some fun. They work really hard and there is a lot of technical work. There's a lot of interesting work, and there's stuff that you don't do anywhere else. But it's also sort of fun, because for us we hang out with people that professionally care about the same things. You have a group of over 40 people that care about how taxes work and how they affect things. It's kind of a neat work environment. What you don't see in private practice, that we get to see, is how are tradeoffs made, or why they make that tradeoff. I wrote a paper for an academic journal once, and as part of it I described something that Congress had enacted. The provi-

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Section on Taxation Recent Events

Section on Taxation Announces Winners of the 2012 Donald C. Alexander Writing Competition

by Graham Green and Zeb Kelley

A number of strong articles were submitted to the Section on Taxation's Donald C. Alexander Tax Law Writing Competition this year. The articles came from J.D. and LL.M. candidates at a wide number of law schools. The winning article, "The Challenges of Redefining Corporate Tax Residence in a Competitive Global Market," was written by Kara Baquizal, a J.D. candidate at Fordham Law School. Baquizal's article addresses U.S. tax reform and how corporate tax residency is determined for federal income tax purposes. The second place winner was Chris Davis of George Washington Law School, who explored the topic of tax treaties in his article "General Anti-Avoidance Regulations: An Acceptable Alternative to Limitation on Benefits Provisions?" The Section on Taxation also awarded an Honorable Mention to Robert Wynne of Georgetown University Law Center for his article addressing whether the United States should adopt a financial transactions tax.

A number of this year's articles involved two topical issues in the tax field: international tax enforcement and U.S. tax reform. Articles on international taxation considered a number of different issues, including tax havens, proposals to move the United States towards a more territorial system of taxation, and the need for a U.S.–Brazil tax treaty. The growing importance of U.S. economic relations with Brazil was reflected by the multiple articles received on this topic this year. U.S. tax reform was addressed by authors who wrote on the topics of corporate tax reform, the estate tax, and whether the United States should adopt a financial transactions tax. Authors also addressed the interaction of the federal income tax and social policy issues, including how gay and lesbian parents are affected by the Internal Revenue Code and current federal tax policy. One author also addressed the shared responsibility payment in the Patient Protection and Affordable Care Act of 2010 that will be charged to individuals who do not obtain healthcare insurance. The Supreme Court is due to consider the act in extensive oral arguments this March.

The Donald C. Alexander Tax Law Writing Competition is sponsored annually by the Section on Taxation. Submitted articles are evaluated based on the depth of research, originality of thought, quality of presentation, and relevance to current tax policy issues or events. This year's winners will be recognized at the FBA Tax Law Conference on March 2, 2012, in Washington, D.C. Please look out for this year's winning submissions in an upcoming edition of *The Federal Lawyer* or this newsletter.

Beyond The Beltway

by Brian Power

On Sept. 12, 2011, we held a kickoff event for the newly-created New York region of the Section on Taxation at New York University School of Law in conjunction with NYU's graduate tax program. The evening began with a discussion by Hon. David Gustafson of the U.S. Tax Court and was followed by a cocktail reception attended by both Judge Gustafson and Judge Robert A. Wherry, also of the Tax Court.

Judge Gustafson spoke to the assembled audience about his background and perspectives on the tax law before discussing issues to consider when choosing between deficiency and refund actions against the United States. The event was attended by about 100 people, including a mix of private practitioners, government attorneys, and NYU professors and students, and Judge Gustafson engaged in a brief question-and-answer session after concluding his remarks.

The event was a great success, as attendees thoroughly enjoyed Judge Gustafson's speech as well as the opportunity to meet and speak with both judges during the cocktail reception. We believe the interest and energy created by this event will carry over to the newly-created New York region, which will begin operating in early 2012.

Young Lawyer Events

by Alan Williams

We have sponsored three Young Tax Lawyers events this year. First, we sponsored a panel discussion entitled "The Tax Legislative Process: How a Bill Becomes a Tax." This event was covered by Tax Analysts, and panelists Kenneth Kies and Marc Gerson's were subsequently quoted in *Tax Notes* regarding tax reform. Second, we sponsored a Careers in Tax Law luncheon for summer law clerks. This event focused on career guidance and paths and included panelists from the public and private sectors. Finally, we sponsored a networking reception at the Georgetown Law Center. This event was an opportunity to introduce students to the section. These events were all very successful and we look forward to continued success in 2012.

Women in Tax Law Events

by Kari Larson

The FBA's Section on Taxation hosted a panel program and networking reception on Oct. 6, 2011, as part of its Women in Tax Law series, entitled Women in Tax Law: Networking at All Stages of Your Career. The panel was held at Arnold and Porter's D.C. office and featured a live panel discussion in Washington, D.C., and a video-streamed viewing of the panel discussion in New York. The panel focused on strategies to be successful in your organization, developing relationships with clients and networking among colleagues. Panelsits included Elizabeth Coffin, director of tax affairs, United Technologies Corporation; Susanne Sachsman Grooms, chief counsel, House Committee on Oversight and Government Reform; Karol V. Mason, deputy associate attorney general, U.S. Department of Justice; and Susan Seabrook, tax counsel, Skadden, Arps, Slate, Meagher & Flom LLP.

2011 Insurance Tax Seminar

by Lori Jones

The 23rd Annual FBA Insurance Tax Seminar was held on May 26–27, 2011, at the Marriot Wardman Park Hotel in Washington, D.C., and was chaired by Lori J. Jones and Nancy Vozar Knapp. The seminar featured luncheon speaker Alice Rivlin, who is a senior fellow in the Economic Studies Program at the Brookings Institution and a visiting professor at the Public Policy Institute of Georgetown University. The event had roughly 500 participants with 70 speakers on various topics, including a discussion of *Mayo Foundation* and Schedule UTP by a panel which included IRS Chief Counsel William Wilkins, a discussion of current investment tax and international insurance tax issues, an overview of possible tax reform legislation, and various updates on federal income tax issues arising in life, property/casualty and health insurance company audits. The 24th Annual FBA Tax Insurance Seminar is scheduled for May 31–June 1, 2012, at the J.W. Marriott in Washington, D.C.

Careers in Tax Law

by Christine Hooks

On July 28, 2011, the Federal Bar Association Section on Taxation and the Georgetown University Law Center hosted a luncheon program on Careers in Tax Law. Eight panelists were on hand to share career advice and their perspectives on the practice of federal tax law with law clerks, law students, and young lawyers. Bartholomew Cirenza of the Department of Justice Tax Division moderated the panel, which included Hon. Mark Holmes of the U.S. Tax Court, George Bostick, benefits tax counsel with the U.S. Department of Treasury, Linda Kroening with the Internal Revenue Service Office of Chief Counsel, Joe Sergi, senior litigation counsel, Department of Justice Tax Division, Lily Batchelder, tax counsel for the Senate Finance Committee (Majority), Jennifer Acuña, tax counsel for the House Ways and Means Oversight Subcommittee (Majority), David Blair of Miller and Chevalier Chartered, and Ellen McCarthy, managing director of government affairs for the Securities Industry and Financial Markets Association. Over 90 students and young lawyers attended the event.

At the Careers in Tax Law event

2011 Tax Law Conference

by Christian Wood and James Kroger

The 35th Annual FBA Tax Law Conference was held in Washington, D.C., on Feb. 25, 2011. Some of the numerous highlights included remarks by William J. Wilkins, IRS chief counsel, discussing the IRS's approach to the economic substance doctrine; Manal S. Corwin, the Department of Treasury's international tax counsel, defending the international tax provisions in President Obama's budget; John A. DiCicco, the Department of Justice's acting assistant attorney general of the Tax Division, describing the division's current initiatives, such as combating offshore tax evasion; and Michael Mundaca, the Department of Treasury's assistant secretary for tax policy, speaking on the need for consensus on corporate tax reform. Attendees received an update on tax legislation from chief tax counsels from the Senate Finance and House Ways and Means Committees.

Concurrent sessions throughout the day included critical developments in employee benefits and executive compensation, domestic corporate tax, international tax, tax practice and procedure, partnerships and pass-throughs, tax accounting, and financial products.

Additionally, the 2011 Tax Law Conference launched the inaugural Donald C. Alexander Tax Law Writing Competition awards ceremony. The 2011 first place winner was Gail Eisenberg, St. Louis University School of Law, and the second place winner was Stephen Faivre, University of Georgia School of Law. The 2011 Tax Law Conference was chaired by James Kroger and Christian Wood.

At the conclusion of the Tax Law Conference on Feb. 25, 2011, the 2011 Kenneth H. Liles award was awarded to the late Martin D. Ginsburg. Ginsburg served as a professor of law at Georgetown University Law Center and was of counsel to Fried, Frank, Harris, Shriver & Jacobson. Accepting the award on behalf of her late husband was U.S. Supreme Court Justice Ruth Bader Ginsburg. Martin Ginsburg's former colleagues and friends, Alan S. Kaden of Fried, Frank, Harris, Shriver & Jacobson and N. Jerold Cohen of Sutherland, Asbill, and Brennan, provided remarks on his contribution to tax policy and administration, and to the legal profession in general.

The Kenneth H. Liles award is presented by the FBA Section on Taxation annually to recognize individuals for outstanding service and dedication to tax policy and administration, as well as their contributions to the bar and the legal profession. Liles founded the modern day section and helped to establish its high standards for service to the federal bar, as well as education and policy work. Past recipients of the award include present and former commissioners of the Internal Revenue Service, chief counsels for the Internal Revenue Service, assistant secretaries for tax policy at the Treasury, federal judges, chiefs of staff from the Congressional Joint Committee of Taxation, and officials from the Justice Department. ⌘

Supreme Court Preview: Department of Health and Human Services et al. v. State of Florida et al., *No. 11-398*

by George A. Hani

The U.S. Supreme Court is currently receiving briefs in the challenge to the Patient Protection and Affordable Care Act. One of the issues being briefed and argued is whether a tax statute, the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a) (AIA) prevents the Court from hearing the case. The Court's decision to consider the issue is unusual for several reasons. First, none of the parties in the suit maintain that the AIA applies. The Court specially ordered briefing on the issue and appointed counsel, Robert A. Long of Covington & Burling LLP, to argue as amicus curiae that the AIA applies and bars the suit. Second, while the AIA may be obscure to many, the government often relies upon it to dismiss suits brought by tax protestors as well as other legitimate, albeit arguably premature, grievances, and therefore is in the unusual position of arguing that the AIA does not apply. For those not familiar with the AIA, what follows is a summary of the reasons it became an issue in the healthcare cases, how it has been interpreted in the past, and some of the arguments that the parties and amicus may make.

Why did the Court Order Briefing and Appoint an Amicus?

Neither the plaintiffs nor the government assert on appeal that the AIA applies, so how did it end up as an issue in the case? In the district court, the government moved to dismiss the lawsuit on the ground that the AIA barred the suit. The district court rejected the argument, and the government did not raise the issue on appeal. The issue has also been raised by amici or sua sponte before the Courts of Appeal in three other challenges to the minimum coverage provision of the Affordable Care Act: *HHS v. Florida*, the plaintiffs in *Liberty Univ. Inc. v. Geithner* __ F.3d __, 2011 WL 3962915 (4th Cir. Sept. 8, 2011), *Thomas More Law Center v. Obama*, 651 F.3d 529 (6th Cir. 2011) and *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011).

The plaintiffs in these cases challenged the minimum coverage provision of the Affordable Care Act, or the mandate, as well as an accompanying penalty, as an unconstitutional exercise of Congress' power. The minimum coverage provision requires certain individuals to obtain minimum insurance coverage by enrolling in a private or government-sponsored insurance program. *See* 26 U.S.C. § 5000A(a).

Individuals who fail to obtain minimum coverage must pay a "penalty", which, subject to a floor, is calculated as a percentage of the individual's income. *See* 26 U.S.C. § 5000A(b). Individuals report their liability for the penalty on their federal income tax returns. The penalty "shall be paid upon notice and demand by the Secretary [of the Treasury], and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." 26 U.S.C. § 5000A(g)(1). Assessable penalties, in turn, are assessed and collected in the same manner as taxes. 26 U.S.C. § 6671(a). However, the Affordable Care Act excepts the penalty from certain collection actions normally taken by the IRS, such as criminal prosecutions, the filing of Notices of Federal Tax Lien, and levying upon property of the taxpayer. 26 U.S.C. § 5000A(g)(2).

The Affordable Care Act's provisions go into effect in 2014. Accordingly, none of the plaintiffs in the various challenges to the Affordable Care Act have yet been required to obtain coverage or pay the penalty, which will not be due until April of 2015.

The AIA was enacted in 1867 and provides, with statutory exceptions that do not apply in these cases: "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). Generally this provision bars suits challenging tax laws on constitutional grounds, as well as suits by taxpayers challenging the amount of their tax liability, brought prior to payment of the tax. *See Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974).

On Sept. 8, 2011, the U.S. Court of Appeals for the Fourth Circuit held that the AIA barred Liberty University's constitutional challenge to the minimum coverage provision and accompanying penalty. *Liberty Univ., Inc. v. Geithner* __ F.3d __, 2011 WL 3962915 (4th Cir. Sept. 8, 2011). The Fourth Circuit held that the AIA's "any tax" language includes any exaction collected by the IRS, even if Congress calls it a penalty, and therefore includes the Affordable Care Act's penalty provision. *Id.* at *6. Two months later, on November 8, 2011, the U.S. Court of Appeals for the D.C. Circuit disagreed, holding that the AIA was not meant to apply to penalty provisions unrelated to tax liability. *Seven-Sky v. Holder* 661 F.3d 1 (D.C. Cir. 2011). The D.C. Circuit also noted as "critical" the fact that the plaintiffs in its case focused their challenge on the requirement to obtain insurance coverage rather than on the penalty itself. 661 F.3d at 9. The *Seven-Sky* decision is also notable since one judge (Judge Kavanaugh) who is generally thought of as conservative, dissented as to jurisdiction, arguing that the AIA applied, and therefore did not reach the merits of the constitutional claims.

The AIA has long been held to be a jurisdictional statute. Therefore where the AIA applies, it deprives the Court of jurisdiction over the case. *Bob Jones Univ.*, 416 U.S. at 749; *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962). And although the Supreme Court has once held that the AIA could be waived by the government, *Helvering v. Davis*, 301 U.S. 619 (1937), for many years the government has taken the position that the AIA's jurisdictional proscription could not be waived, and has not attempted to waive any defenses available to it under the AIA if the Court determines that it applies. Accordingly, one of the intriguing aspects of the current controversy over the AIA's application to the Affordable Care Act is that the government is in the unique posture (for it) in arguing that the AIA does not apply to the pending challenges to the act. If the government is successful, it will be interesting to see

if the Court's decision has broader ramifications enabling more suits to be brought by taxpayers.

Because any court has an independent duty to evaluate whether it has jurisdiction over a given case, the fact that the parties to a case agree that there is jurisdiction does not necessarily end the inquiry. *See, e.g., Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). Therefore, in light of the Court's duty to evaluate jurisdiction and the recent circuit split regarding the applicability of the AIA to the Affordable Care Act, on Nov. 14 and Nov. 18, 2001, the Supreme Court followed the government's suggestion and ordered briefing on the AIA and appointed counsel as amicus curiae to argue that the suit is barred by the AIA.

What Constitutes a Tax and a Suit to Restrain Under the AIA?

Although Congress characterized the exaction in the Affordable Care Act as a "penalty" rather than a "tax," that does not end the inquiry of whether the penalty is a tax for purposes of the AIA. *See, e.g., Helwig v. United States*, 188 U.S. 605, 613 (1903). In *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), the Supreme Court allowed the refund of a "tax" imposed under the Child Labor Tax Law based on the tax being a regulatory penalty and thus not properly within the Constitution's Taxing Power. On the same day, in the related case—*Bailey v. George*, 259 U.S. 16 (1922)—the Supreme Court also upheld the dismissal of a pre-enforcement challenge to the same "tax", raising the same Constitutional arguments, based on the AIA. The Fourth Circuit relied heavily on the twin *Bailey* cases in concluding that the AIA applies to the Affordable Care Act's penalty in *Liberty University*.

The Supreme Court has held that not only suits directly to enjoin the assessment or collection of a tax, but also suits to enjoin the IRS from taking actions that may lead to the imposition of tax, are barred by the AIA. In *Bob Jones*, a university sued to enjoin the IRS from revoking a Private Letter Ruling that the university was entitled to tax-exempt status. The IRS revoked the ruling due to the university's refusal to admit African-American students. The university argued that the AIA did not apply because the purpose of the suit was to maintain its current level of donations, not to obstruct the collection of tax. The Supreme Court rejected the argument, holding that the effect of the revocation would be to impose significant taxes on the university and its donors, and therefore the suit to enjoin the revocation would restrain the collection of these taxes. 416 U.S. at 739.

The Supreme Court has created two exceptions to the AIA, but they are narrow and are rarely invoked. Under *Williams Packing*, a pre-enforcement injunction against the assessment or collection of a tax may be granted if (1) it is clear that under no circumstances could the government ultimately prevail and (2) equity jurisdiction otherwise exists, *i.e.*, the plaintiff will be irreparably harmed. 370 U.S. at 6-7. Under *South Carolina v. Regan*, the AIA does not bar an action where Congress has not provided the plaintiff with an alternative mechanism to challenge the validity of the tax. 465 U.S. at 373. Such exception can apply where the plaintiff cannot pay the tax and claim a refund. In *Regan*, the state of South Carolina sued to challenge the imposition of tax on its bondholders, not on itself. *Id.* at 379-380. This limited exception does not obviate the requirement that a party have standing under Article III of the Constitution, and the states might not have standing, given that they do not, themselves, pay the penalty here.

What Arguments Might Be Made?

According to the Supreme Court, the language of the AIA "could scarcely be more explicit." *Bob Jones*, 416 U.S. at 736. Taking a "plain meaning" approach to the Affordable Care Act's penalty provision and the AIA, one might conclude that the AIA applies to bar the present challenges to the law. *See, e.g.*, *Gitlitz* v. *United States*, 531 U.S. 206 (2001). However, as with many issues that arise under the Internal Revenue Code, context and history can complicate the matter. The amicus brief, filed on Jan. 6, 2012, makes two arguments that the AIA applies to the Affordable Care Act's penalty. First, it argues that the Affordable Care Act explicitly provides that the penalty shall be "assessed and collected in the same manner" as assessable penalties that are assessed and collected in the same manner as taxes, *see* 26 U.S.C. § 6671(a). In so doing, Congress invoked the AIA, which by its terms applies to the assessment and collection of taxes. Second, the term "tax" in the AIA is broad enough to include the Affordable Care Act's penalty, particularly in light of statutory provisions that define taxes to include "assessable penalties" for purposes of assessment and collection. There is no dispute that the term "tax" in the AIA applies to "assessable penalties"; the Affordable Care Act's penalty, the amicus argues, is an assessable penalty, and therefore it is encompassed by the term "tax" in the statute. The amicus also argues that the plaintiffs cannot avoid the AIA by arguing that they seek to challenge the mandate, not the penalty, calling such arguments "circular."

There are several rejoinders that the government and the respondents may offer to these arguments when they file their responding briefs (on Feb. 6, 2012, after preparation of this article). First, as the D.C. Circuit noted in *Seven-Sky*, it may be "critical" that the plaintiffs challenge not only the penalty, but the mandate itself. To the extent the AIA bars challenges to both, the individual plaintiffs may be able to argue that *South Carolina v. Regan* applies to except the challenge to the mandate. Unlike the penalty, funds expended to purchase insurance coverage will not be paid to the government and cannot be returned through the Internal Revenue Code's refund procedures. It would seem the individual plaintiffs would have no other remedy to this portion of the law than an injunction and declaration that they are not required to purchase health insurance.

Second, there is no indication from the text of the Affordable Care Act or its legislative history that Congress intended to invoke the AIA by providing that the penalty would be assessed and collected in the same manner as assessable penalties; indeed, given the lengths to which Congress went to characterize the penalty as a "penalty" rather than a "tax", it could be inferred that Congress would not intentionally invoke a statute that refers only to any "tax" and not any "penalty."

Third, the terms "assessment and collection" are terms of art that refer to the particular procedures provided by the Internal

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Revenue Code. "Assessment" is merely the means by which the IRS notes a tax liability for bookkeeping purposes and imposes the liability upon a taxpayer. *See Seven-Sky*, 661 F.3d at 11. Notably, statutory language that a penalty is to be assessed and collected "in the same manner" as tax does not typically require that the same statute of limitations apply to each, which suggests that the language does not incorporate all statutory provisions nominally related to collection of taxes. *Id.*

Fourth, although Congress did provide that the Affordable Care Act penalty would be assessed and collected in the same manner as "assessable penalties" under Chapter 68, subchapter B of the Internal Revenue Code, it did not provide that the penalty *is* an "assessable penalty" under the code and it did not codify the penalty in Chapter 68, subchapter B. This is arguably significant because only actual "assessable penalties" under subchapter B of Chapter 68 of the code are treated as "taxes" for all purposes under the code, including the AIA. 26 U.S.C. § 6671(a); *Seven-Sky*, at 11-12. *See also* 26 U.S.C. § 6665(a) (providing similar language for penalties codified in subchapter A of Chapter 68). The government and the respondents may argue that the failure to include the penalty in subchapter B necessarily renders the AIA inapplicable.

Finally, the government and respondents may argue, the "assessable penalties" in Chapter 68 of the code are all related to tax liabilities and enforcement, while the Affordable Care Act penalty is indisputably not. "Assessable penalties" include penalties for failure to file a tax return, 26 U.S.C. § 6651(a)(1), failure to pay tax, 26 U.S.C. § 6651(a)(2), and failure to pay over withheld employment and income taxes, 26 U.S.C. § 6672, among others. All of these penalties relate to the enforcement of other tax liabilities, and are designed to ensure compliance with the internal revenue laws. The Affordable Care Act penalty, in contrast, is related to enforcement of the minimum coverage provision, not the payment of a tax. If the Supreme Court finds that the AIA applies, it will be the first time in history that the statute is applied to a non-tax-related penalty.

What Happens If the Supreme Court Finds That the AIA Applies?

There are strong arguments on both sides, and it is conceivable that the Supreme Court will find that the AIA bars the respondents' challenge to the Affordable Care Act until the first penalty is imposed in 2015. If that happens there may still be an option to seek review of the Affordable Care Act before it goes into effect. Congress may amend the AIA to expressly exclude challenges to the Affordable Care Act. In December 2011, U.S. Rep. Leonard Lance (R-N.J.) introduced the "Americans Need a Health Care Ruling Act," H.R. 3558, which would amend the AIA to exclude the Affordable Care Act's penalty from its prohibition on suits to restrain the assessment or collection of tax. As of January 2012, the bill had been referred to the House Committee on Ways and Means but had not yet been reported out of committee. However, even if the bill is enacted it may not have an effect on the case currently pending before the Supreme Court. Jurisdiction is generally determined at the time the suit is filed, not at the time of decision, although the Supreme Court has in some instances applied intervening statutes conferring or ousting jurisdiction. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 576 (2006). ⌘

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sion at the time provided that a particular tax rate was going to increase in fixed increments over the next five years. I had as a footnote that one could view that increase as a proxy for an inflation adjustment. It was an academic journal, so you have blind referees who comment. One referee said in his comments, "This is clearly stupid, because if Congress had intended that this was an offset for future inflation, they would have chosen indexing." Well, that's easy in academics to say, but actually the Congressman who was the lead sponsor of the legislation hated indexing. He was okay with the policy that the rate ought to go up because prices are going to be higher, but he didn't like automatic indexing. So they asked me and our staff to determine the current projections of inflation. Then the congressman said, "Average it out over five years and we'll put that in my bill." So I knew that was essentially indexing, but a person on the outside thought that obviously Congress didn't mean for this to be anything like indexing or they would have done indexing. You see a lot of little things that are sort of quirky that lead to odd results. You know some things get done at the last minute. A law professor was writing an article on a provision, and she knew that I had worked on this provision when it was passed, so she asked me, "Why did this come out that way?" And I just said offhand, "Well, it was the best we could come up with in an hour's time at 2 in the morning," which was true. There are a lot of little stories like that, and that's something that most of your readers don't see. They might see something and ask why they did it that way, and sometimes it's a political compromise, sometimes it's the best way to do it with 60 minutes of thought and writing time.

For the Hill in general, the different member offices and committee staffs look for people with a lot of different backgrounds; there are defense committees, there are environmental committees, there are a lot of different skill areas that our members and the committees look for. I'd say the main thing that they look for is the energy and the talent that people can bring. What I do find on committees of jurisdiction, you will see people that specialize. In fact I think currently, all of the legislative aides on the Senate Finance Committee were assigned for tax issues; they all have some tax law experience, they're almost all attorneys, some of them are CPAs. The specialized experience can help. The Senate Banking Committee obviously would like familiarity with banking law or securities law, but there are a lot of opportunities just because of the breadth of areas that Congress has to oversee. ⌘

Taxation Interview Program (TIP)

Georgetown University Law Center is again partnering with New York University School of Law to sponsor this year's Taxation Interview Program (TIP). TIP enables private and public sector employers to interview, on one day—March 2, 2012—and in one place—Embassy Suites Hotel, Washington, D.C.—current LL.M. in Taxation students from Georgetown Law and NYU Law. Since 2001, TIP has been the nation's flagship program for the recruitment of graduate tax students, featuring employer schedules representing law firms, government agencies, corporations and the major accounting firms from around the country. Employers can prescreen candidates for interviews and participate in TIP through a resume collection option.

Georgetown Law cordially invites you and your organization to participate in TIP 2012. If you are not involved in hiring at your organization, please feel free to pass this message along. For further information about TIP, please visit the TIP website at www.law.georgetown.edu/graduate/TIP.html. *Because TIP convenes on the same day as the Section on Taxation's 36th Annual Tax Law Conference, registered TIP recruiters will be able to purchase $40 half-day admission to the Conference (a 10-minute walk from TIP).*

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