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PROTECTING THE FISC

It's often been said that the only problem with the practice of law is the business of law. There is one practice area, however, where the need for securing and retaining clients does not apply—representing the federal government.

It is well known that "taxes are the lifeblood of government." There is a paramount need to collect them on an annual basis, but there is an equally paramount obligation to do so in a fair and just manner. Working as a tax lawyer for the government provides one with the opportunity to fulfill this obligation of fairness and justice on a daily basis.

Representing the interests of the United States as part of the finest federal tax litigation firm in the land—and against the best and brightest tax practitioners around the nation—offers young and experienced lawyers alike an unmatched

experience in the U.S. tax law landscape. While the job can be exhausting and is surely not going to maximize one's bi-weekly paycheck, it is one of the most rewarding jobs anywhere. We wouldn't trade places with anyone.

How To Get Started

The best place to start is where many readers may find themselves already—in law school. And the universal starting point is the introductory survey course in federal (individual) income tax.

If you are reading this because of your interest in tax law generally, you probably have already taken this course. That is where most of us became "hooked" on tax, with energetic professors such as the late Professor Janet Spragens, who taught her entire career at American University's Washington College of Law.¹

Tax law is a giant puzzle, and tax lawyers, generally speaking, like to solve that puzzle. If you are truly interested in practicing tax law and haven't yet finished law school, we recommend that you take a number of tax courses.² Also, if you are interested in a position in one of the civil or criminal trial sections of the Department of Justice's Tax Division, we suggest you take evidence and one or more trial practice courses. This will give you a taste of what it is like to practice tax law in a litigation setting, and it will telegraph that interest to potential employers like the IRS and the Justice Department's Tax Division, both of which hire entry-level lawyers directly out of law school.

Some Fundamental Characteristics of Government Tax Practice

Contrary to popular belief, the IRS is not all-powerful, and the government isn't always right. The beauty of working for either the IRS or the Justice Department's Tax Division—the government agencies that employ the most tax lawyers—is that you are in a position to do something about it.

That is a powerful elixir, and it is also a very satisfying one. Even at a relatively young age you are in a position to "shape" (to some degree at least) the future course of the tax law. It's also immensely satisfying to see first-hand that the nation's tax system "works." There are many—indeed, too many—tax scofflaws, and playing a constructive role in ensuring that they are brought to justice and the tax laws administered fairly and evenly is very satisfying.

If one wants to be a "tax trial lawyer" who appears regularly before district courts across the country, instead of a "litigator" who pushes paper from the confines of one's office, then there is no finer experience than working for the Department of Justice's Tax Division. Courtroom work is the *raison d'être* for the Division's very existence. Litigation at the Tax Division takes place throughout the nation in all federal district courts (and in the Court of Federal Claims),

¹ Indeed, one of the authors of this section (Gil Rothenberg) is currently an adjunct professor at that same law school, and has played a positive role (so he has been told) in creating new tax lawyers.

² The authors of this section loved every tax course they took, with the possible exception of corporate tax, which some of the authors merely liked.

in all of the federal circuit courts of appeals, and even in the Supreme Court (in conjunction with the Office of the Solicitor General).

On the civil side, most of the Tax Division's litigation is "playing defense"—that is, defending against tax refund suits and other taxpayer-generated litigation. But there is affirmative litigation as well, focusing for the most part on securing tax information via enforcing tax summonses, seeking an injunction against activities that threaten the integrity of the nation's tax laws, or suing to collect tax amounts owed. Tax Division attorneys become skilled not only in the conduct of litigation generally (at either the trial or appellate level, depending on the area of concentration), but also in the tax law itself, since that is the "glue" that binds the office's mission.

On the criminal side, the Tax Division's lawyers are in charge of approving any tax-related criminal charges anywhere in the nation. These tax lawyers analyze the evidence of criminality presented by Special Agents from the IRS's Criminal Investigation division, run grand jury investigations, interview witnesses, indict cases, try them to verdict, and then argue the government's position at sentencing. They work with Assistant United States Attorneys throughout the nation and provide expert tax advice throughout all phases of investigation and prosecution.

Gil Rothenberg's Story

Each one of us has a favorite story, and mine involves my litigation of the now famous (but, for a time, infamous) *Tufts* case.³

The clock is set in the early 1980s, at which time I was a young Justice Department tax lawyer specializing in appellate work. When I was assigned the case then pending in the Fifth Circuit, it appeared to be a relatively straightforward appeal, involving a real estate developer's attempt to garner, after he lost his apartment complex through foreclosure proceedings, what the lower court had described as a "double deduction" for the same loss in value —once via depreciation deductions, and a second time via a reduction in the amount realized upon disposition of the property. A similar result had just been reached by the Third Circuit in another case,⁴ and my appellate brief relied on that decision (and others) in explaining why Mr. Tufts was not entitled to the deductions he claimed.

A few months after I had argued the case, a colleague stuck his head in my office and remarked that I had just lost the *Tufts* case. I laughed, assuming that the colleague was simply pulling my leg, because I did not believe that a court could possibly sanction a double deduction for a single economic loss. I then read the opinion, and my ashen face must have given away my true reaction, because the attorney with whom I shared an office at that time said that I actually looked shocked. And I was, indeed, shocked. The Fifth Circuit had relied upon what

³ Commissioner v. Tufts, 461 U.S. 300 (1983), reversing 651 F. 2d 1058 (5th Cir. 1981).

⁴ Millar v. Commissioner, 577 F. 2d 212 (3d Cir. 1978).

was deemed “the most famous footnote in tax history”⁵—Footnote 37 of the *Crane* case⁶—and had determined that the rationale the Supreme Court utilized in *Crane* could not be extended to the *Tufts* situation.

After conferring with my reviewer on the case and some other colleagues, my shock turned into anger—not so much for losing the appeal, but because it dawned on me that this loss meant that six additional projects had just been added to my “to do” list, beginning with some internal memos seeking permission from the Solicitor General to seek en banc rehearing and, if unsuccessful (which it was), certiorari, and ending with writing first drafts of the rehearing and certiorari petitions, as well as the opening and reply briefs in the Supreme Court on the merits. Not to mention reading every single law review article that had ever been written on the *Crane* case and its famous (infamous?) footnote.

It was all worthwhile in the end, of course, when (as most of you already know) the Supreme Court concluded—unanimously—that the Fifth Circuit had erred and that the government’s position was the correct one. The Supreme Court’s opinion in *Tufts* is included in virtually every law school income tax casebook, and my role in making that happen still brings a satisfying smile to my face despite the passage of time. I had made a difference, and the course of federal tax law was forever changed as a result.

John DiCicco’s Story

I started my professional career as a public accountant, but quickly realized I did not want to make it a career. Consequently, I went to law school, and then clerked for an appellate judge in Arizona.

After clerking, I joined the Tax Division, never intending to make government service a career. I was looking for an opportunity to engage in public service while I figured out what to do for the rest of my legal career. Before applying, I heard that the Division was a great place to learn how to litigate in a very collegial atmosphere. In addition, having lived most of my life in the Midwest, I liked the idea of living and working in a new, interesting city like Washington. I must confess, though, that I didn’t have an accurate idea of how the litigation process really worked.

What I’d heard about the Division was right on all counts. No sooner had I started than I was given a docket of cases “to call my own.” Having that kind of responsibility was exhilarating, if also a bit daunting. However, I quickly learned that there were a wealth of people with tremendous litigation experience and a desire to help me. It wasn’t just my excellent supervisors, but my fellow line attorneys who provided the help I needed. From all of them, and from actual hands-on experience, I learned the fundamentals of trying a case.

After a little over seven years, I thought I should see what life was like in private practice, so I accepted a position in a law firm in Phoenix. While I en-

⁵ Rice’s Toyota World v. Commissioner, 752 F. 2d 89, 94 n. 5 (1985).

⁶ Crane v. Commissioner, 331 U.S. 1, 14 n. 37 (1947).

joyed working at the firm, I didn't find it as fulfilling as Government service—the ability to always advance a correct interpretation of the law and to be on the cutting edge of the litigation process. Consequently, after about two and one-half years, I returned to the Tax Division. I was fortunate to try some very complex and important cases, such as *United States v. Campbell*, 704 F. Supp. 715 (N.D. Tex. 1988), aff'd, 879 F.2d 1990 (5th Cir. 1990), where I had the chance to do some foreign travel, and even to depose a witness in the U.S. Embassy in London.

My hands-on litigation responsibilities decreased as I became a supervisor in one of the civil trial sections. I then had influence over not just my own cases, but also those of the attorneys I supervised. Moreover, I had the privilege to mentor young lawyers. Looking to do something a little different, I then became Chief of the Office of Review—the Section that processes settlements in the largest and most important cases in the Division. In the Office of Review, I greatly expanded my knowledge of substantive tax law, and had the opportunity to work with very gifted senior lawyers.

For the last two years or so I have been the Deputy Assistant Attorney General for Civil Trial Matters in the Tax Division. This is the highest career civil service position in the Tax Division. Supervising all of the Division's civil trial work, and managing 190 lawyers and attendant support staff, is far different from running a single office or trial section. In some ways, the basic challenge is the same: trying to ensure the best positions are taken in our most important cases. But I am very involved in budgetary and other processes—helping to get the funds the Division needs to do its job, overseeing the hiring of quality attorneys, and in general making sure that the Division functions as a twenty-first-century law firm. I also meet and work with high-level officials in the Department of Justice, the Office of Chief Counsel, Treasury, and elsewhere, to the end of improving tax enforcement.

Throughout my time in the Division I have made many lifelong friends among the lawyers I worked with. Those friendships have continued even after some of them have long since left the Division. In large part those friendships were made possible by the collegial atmosphere that exists in the Division. Competition is at a minimum, and sharing information and ideas is the norm—conditions not always found in other legal environments. All in all, a great place to work.

If I had to sum up my career, I would say it was one of meeting and overcoming challenges. I was given the opportunity to do a variety of interesting things—trying cases, managing lawyers, and preparing budgets, among other things. Each of these challenges allowed me to grow as a lawyer, as a person, and as a civil servant.

The ability to engage in public service and to play a small role in shaping tax administration has been immensely satisfying.

Nathan Hochman's Story

There is nothing greater and more humbling than announcing before a court your name and that you represent “the United States of America.”

I went to law school because I sought to develop a skill set that allowed me to do what I love most—analyze, write, and speak (though I unfortunately don’t always follow that order). The law in general, and tax law in particular, offered me the chance to enhance these skills in matters that define the American experience—from the social policy questions of promoting home ownership, incubating new industries, and promoting eleemosynary activities to the fine points of who pays which tax and for how long.

My career path following law school and prior to my position as Assistant Attorney General—judicial clerkship, Assistant United States Attorney (AUSA), private practitioner—is one I would advocate for anyone thinking of becoming a “tax trial attorney.” Working closely with a federal district judge as his or her clerk provides invaluable insights into how a judge evaluates arguments on a myriad of topics. One sees lawyers—terrific, good, bad, and awful—argue their positions, develop their cases, use the rules of evidence, and deal with the unexpected. A judicial clerkship also greatly helps translating the theoretical memos of law school to the real-world memos a judge will read to try to decide how to rule on a case.

As an AUSA for seven years, I had the opportunity at a relatively young age to develop my trial skills in the cauldron of the courtroom rather than in a training-room class or sitting in an office. During those years, I had over 20 jury trials and handled more than 20 Ninth Circuit appeals, as well as running complex grand jury investigations and spearheading task forces. I was the first chair, and in most of the cases the only chair, sitting at trial, and the success or failure of the case was squarely on my shoulders. While law firms spoke about providing “early responsibility” for cases, the U.S. Attorney’s Office went beyond words and spoke directly through its actions of handing you cases and telling you to run with them.

Practicing at a private civil and criminal tax firm for 11 years following my AUSA stint gave me a perspective on how the civil and criminal enforcement of the tax law truly affected the individuals and corporations it targeted. It also gave me an appreciation of the power of the government, both to do right but also to profoundly affect the lives of everyone it touches. The practice of tax law was life-changing for many I represented. Arguing how some IRS regulation did not apply so as to allow my client to keep most of his net worth, or contesting some subsection in the Sentencing Guidelines on “tax loss” that made the difference whether or not my client went to jail, infused the tax law with an importance that I hadn’t appreciated in law school or even during my early years as an AUSA.

In my just-vacated role as the Assistant Attorney General for the Tax Division, I was given the unique opportunity to wear the “white hat” again for a

brief time and to bring the lessons from my clerkship, my AUSA years, and my private practice experience to bear in trying to enhance the Justice Department's ability to fully and fairly enforce the nation's tax laws. I view the Tax Division as the finest tax law firm in the world, with a mission not only to advocate its positions, but also to be right and just in doing so.

Conclusion

As you can see, all three of us have had richly rewarding experiences working as tax lawyers for the government. Despite the occasional bureaucratic headache that is endemic to any governmental practice, we wouldn't have it any other way.