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Recommended Reading in Taxation

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RECOMMENDED READING IN TAXATION*

1. Bittker, *Income From the Cancellation of Indebtedness: A Historical Footnote to the* Kirby Lumber Co. *Case*, 4 J. CORP. TAX. 124-29 (1977).

The name Bittker should be incentive enough to read this article; those needing more should find it while reading the student note on this important subject in this issue. Properly self-described as a footnote, this short article clarifies the factual circumstances in which the Supreme Court issued its opinion in *Kirby Lumber* and suggests that, in the cases that followed, the courts may have unduly restricted its scope on the mistaken assumption that the bonds in *Kirby Lumber* had been issued for cash when in fact they were issued in exchange for the taxpayer's preferred stock, on which there were dividend arrearages.

2. Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance*, 77 COLUM. L. REV. 161-247 (1977).

In this article, the author reaches the initially startling conclusion that the collection of substantial sums representing Federal estate and gift taxes can be attributed only to taxpayer indifference to avoidance opportunities or a lack of aggressiveness on the part of estate planners (albeit tempered by the observation that the utilization of known estate planning techniques is often dependent upon a variety of tax and non-tax factors). In doing so, important current planning techniques are examined in detail, with real and hypothetical examples of implementation, and proposals and suggestions for reform are advanced. It is a major contribution to estate planning literature and should be regarded as required reading by all those who deem themselves to be or have aspirations of becoming "estate planners."

3. Eustice, *The Tax Reform Act of 1976: Loss Carryovers and Other Corporate Changes*, 32 TAX L. REV. 113-60 (1977).

The Tax Reform Act of 1976 left intact the basic structure of the taxation of corporations and shareholders, but effected a major revision of the loss carryover rules of section 382. Although this article examines other provisions of the Act which impact directly or collaterally on Subchapter C, the major thrust of the article — as it is in the Act — is in the loss carryover area. Substantially tightened and highly complex, new section 382 focuses on continuity of shareholder proprietary interest (to the exclusion or relative prejudice of continuity of business, entity, tax avoidance and tax windfall) as prerequisite to preservation of a corporation's tax losses. In the absence of explanatory committee reports (the Senate Finance Committee version of section 382 was substantially rewritten in conference) and pending issuance of regulations (the stated purpose for the delayed effective date), this article looms large in rendering intelligible that which, at first blush, cannot be.

4. Lee, *Tax Shelters Under the Tax Reform Act of 1976*, 22 VILL. L. REV. 223-96 (1976-77).

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Surely no phrase more quickens the pulse of tax advisors and collectors alike than does the phrase "tax shelter" (loosely defined as a device producing artificial losses which are available as deductions to offset the taxpayer's regular sources of income). Tax shelter devices have been the object of continuous assault by the Internal Revenue Service (most recently evidenced by its widely-publicized series of late-1977 rulings) and periodic assault by Congress (a key feature of the Tax Reform Act of 1976). This article examines the current state of the law. The author paints with a broad brush, and the resulting landscape is decidedly impressionistic; nevertheless, it is a useful look into an important area and that is sufficient reason for a careful reading.

5. Link & Wahoske, *Taxation of Distributions from Accumulation Trusts: The Impact of the Tax Reform Act of 1976*, 52 NOTRE DAME LAW. 611-23 (1977).

Concededly directed to both a limited audience — those generally familiar with the nuances of Subchapter J — and a limited purpose — an examination of the new accumulation distribution "throwback" rules (which Congress claims to have "considerably simplified" in the Tax Reform Act of 1976) — this article generally succeeds in its effort to present the changes made by the Act in a manner useful to the practitioner. Coverage includes the repeal of the capital gains throwback rule and the enactment of section 644, its limited replacement (a simplification achieved at the expense of the conduit principle itself). To those within the limited audience who are interested in its purpose, a careful reading of this article is warranted.

6. Little & Thrailkill, *Fiduciaries Under ERISA: A Narrow Path to Tread*, 30 VAND. L. REV. 1-38 (1977).

The Employment Retirement Income Security Act of 1974 (ERISA) impacts importantly upon pension plan sponsors, participants, beneficiaries, and the entire private pension industry (those providing services, advice and counsel). The fiduciary responsibility rules of Titles I and II of ERISA create new responsibilities for and increase the liability of the fiduciary (broadly defined as anyone who exercises discretion in the management of assets, renders investment advice for a fee, or possesses discretionary authority with regard to plan administration). This article considers ERISA as it affects the fiduciary — by examining the fiduciary's duties (standards of conduct and transactions in which the fiduciary must not engage), the civil penalties and criminal sanctions for violations, and the inevitable problems inherent in any comprehensive new statute — and is worthy of a close reading by all who serve the industry.

7. Pedrick, *Grantor Powers and the Estate Tax: End of an Era?*, 71 Nw. U. L. REV. 704-32 (1977).

The controversial 1972 decision of the Supreme Court in *United States v. Byrum*, 408 U.S. 125, *reh. denied*, 409 U.S. 898 (1972) — simplistically, that retention of voting rights constitutes neither "enjoyment" of shares transferred in trust within the purview of section 2036(a)(1) nor the "right" to designate the persons to enjoy trust income within that of section 2036(a)(2) — occasioned a mild flood of editorial comment. The Tax Reform Act of 1976 evidenced the

congressional response – a new last sentence in section 2036 declaring that "the retention of voting rights in retained [presumably should read "transferred" – ed.] stock shall be considered to be a retention of the enjoyment of such stock." This article examines both *Byrum* and section 2036 in historical perspective and suggests that, although the new provision is narrow in scope, it should be viewed expansively in purpose; indeed, as requiring judicial reinterpretation of the "possession or enjoyment" language as developed in cases of the 1930's predating section 2036! Liberally sprinkled with policy notions, the argument is persuasively advanced that such reinterpretation, if made, can properly result only in a significant expansion of the reach of section 2036 to require inclusion of transferred property in the gross estate when substantial "managerial" powers are retained by the transferor.

8. Stolz & Purdy, *Federal Collection of State Individual Income Taxes,* 1977 DUKE L. J. 59-141.

Since the enactment of the Federal-State Tax Collection Act of 1972, Code sections 6361-65 have authorized the federal collection and administration of individual income taxes levied by states which have conformed their income tax laws (based on either federal taxable income or a percentage of federal tax liability) to the federal collection statute and elected to utilize the federal collection system. That the existence of a federal collection system is not widely known is explainable in part by the fact that regulations have not yet been published, a fact that has effectively thwarted implementation and was recognized as a "problem" during congressional consideration of the 1976 amendments to the Act. This article explores the background and mechanics of the federal collection system, weighs its advantages and disadvantages in the context of arguments which have been advanced for and against its concept and utility, and laments what the authors perceive as a "silent veto" of the system by bureaucratic refusal to publish regulations.

9. Surrey, *Reflections on the Tax Reform Act of 1976,* 25 CLEV. ST. L. REV. 303-30 (1976).

The substantive provisions of the Tax Reform Act of 1976 have been the object of exhaustive written scrutiny. While this article considers the Act's substantive "highlights," it does so only briefly; the principle focus is on the legislative process that produced those provisions, and that is its principle contribution. In both looking behind and beyond the 1976 "reforms" (which the author characterizes as almost solely a congressional effort virtually free from executive branch influence), the article provides valuable insight into the congressional approach to and conception of tax reform. Doubtless all tax persons should read everything penned by Surrey; failing that, or as a beginning, they should read this.

10. Weidner, *Partnership Allocations and Tax Reform,* 5 FLA. ST. L. REV. 1-65 (1977).

This article enters the murky world of partnership allocations before and after the Tax Reform Act of 1976 (in which the basic allocation provision,

section 704(b), was completely rewritten) and explores the boundaries of permissability in the principal context of the so-called "tax shelter" partnerships. The trail is both dark and twisting and on many important issues one must proceed without the customary judicial and administrative guides. The article is timely; and, as a comprehensive though general treatment of a complex issue, one that sheds worthwhile light. For another analysis of this subject, *see* Kamin, *Partnership Income and Loss Allocations Before and After the Tax Reform Act of 1976*, 30 TAX LAW. 667-99 (1977).

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Structuring a Workable Business Code of Ethics

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