

TAX ANALYSTS EXCLUSIVE

Conversations: Robin L. Greenhouse

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Robin L. Greenhouse is a tax controversy partner in the Washington office of McDermott Will & Emery LLP and a recognized authority on privilege issues. Before entering private practice, Greenhouse was a trial attorney with the Justice Department's Tax Division.

Tax Analysts: Without focusing on *Textron*, where do you see the future of work product, attorney-client, and other privileges headed in tax litigation?

Robin L. Greenhouse: I expect that for the next several years, the federal courts will continue to address the scope and applicability of the work product protection for documents that reflect the taxpayer's litigation risk analysis. Indeed, the legal standard for "anticipation of litigation" may reach the U.S. Supreme Court. Moreover, I expect that a body of law on work product protection will also develop in state courts as the result of the increased pressure on the state taxing authorities to aggressively pursue transactions that result in state tax savings.

TA: Administratively, what areas most need resolution by the IRS?

Greenhouse: Adjustments need to be made to the IRS tier issue program. Based on the feedback from taxpayers and the IRS Exam team, the identification of a tier issue results in delays in resolving the audit, frustration on the part of the taxpayers and the IRS Exam team, and increases the likelihood that the case will be closed as unagreed.

TA: The IRS has been making a big push on alternative dispute resolution [ADR] mechanisms, at least with regard to business taxpayers, the past few years. Is ADR helpful for taxpayers?

Greenhouse: The IRS has developed and expanded alternative dispute resolution techniques. These ADR techniques offer the IRS and taxpayers the opportunity to resolve controversies at the earliest stage — prefiling, during exam, and at IRS

Appeals. Taxpayers can use one or more of these techniques at the same time and should not be reluctant to ask the IRS case team leader about trying them. For example, I am currently involved in a case where the taxpayer requested a prefiling agreement [PFA] with respect to a section 165(g)(3) worthless stock issue. The IRS agreed to accept the PFA request provided that the taxpayer also ask for a private letter ruling to address a legal question that needs to be resolved in connection with the PFA. I have successfully used the fast-track settlement procedures to resolve one or more unagreed issues. Fast-track settlement is a quick and relatively inexpensive way for Exam and the taxpayer to sit down at the table and attempt to reach a settlement based on hazards of litigation, without the imposition of hot interest. Even when a settlement is not obtained, taxpayers leave the process with a better understanding of the strengths and weaknesses of their cases. I have also been involved in several post-Appeals mediations. This is the taxpayer's last opportunity to resolve an issue short of litigation. I recommend having a neutral mediator in addition to the IRS Appeals mediator, since the old adage is true — two heads are better than one.

TA: What threat does the U.S. tax system most need to address?

Greenhouse: Complexity and global competitiveness. As the tax code continues to expand, there is a certain malaise that has developed for individuals and small businesses. At some point, people may persuasively argue that "ignorance of the tax law" should be an acceptable defense. With respect to global competitiveness, our tax policy should be neutral. U.S. tax policy should not discourage U.S. multinationals from expanding into the global market.

TA: There has been a big focus on practitioner penalties lately. What's your take?

Greenhouse: The focus on practitioner penalties seems to be a response to the aggressive tax planning transactions that were suggested or blessed by tax advisers. If the standard is clear and fair, it should not be cause for concern, but I worry about its implementation.

TA: What has been the greatest change or shift in tax controversy during your years of practice?

Greenhouse: The tax practice has become more adversarial in the last 10 years. IRS attorneys are routinely involved throughout the examination, crafting information document requests to specifically request legal opinions and interviewing witnesses. In response, the taxpayers involve their lawyers at earlier stages. While this may be good for tax controversy lawyers, it tends to lead to more disputes over privilege claims.

TA: Where will the tax system be in five years?

Greenhouse: I continue to hear discussion about imposing a VAT or consumption tax as a funding mechanism for healthcare reform. Whether this will be workable will depend on the details.

TA: Do you have any interest in future government service?

Greenhouse: I look back fondly at my four years as a trial attorney with the Department of Justice Tax Division. I don't know what the future holds, but not much comes close to standing up in federal

court and introducing yourself as the legal representative for the United States. I encourage all law school and LLM students to consider government service.

TA: What would you be doing now if you hadn't chosen a career in law?

Greenhouse: Tough question. My first choice was an astronaut, but my fear of heights ruled out that option. I enjoy the practice of law too much to second-guess. ■