

TAX SECTION



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April 23, 2007

The Honorable Norm Coleman
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The Honorable Carl Levin
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The Honorable Barack Obama
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RE: Patentability of Tax Advice and Senate Bill 681

Dear Sirs:

On behalf of the Tax Section of the Florida Bar, we join the voices of opposition to the patentability of tax advice. We strongly support the comments on this issue by (i) the Colorado Bar Association and the Taxation Law Section of the Colorado Bar Association in their March 5, 2007 letter, (ii) the Tax Section of the New York State Bar Association in its August 17, 2006 letter, and (iii) the American Institute of Certified Public Accountants (“AICPA”) in its February 28, 2007 letter (all such comments, collectively, the “Previous Comments”). In addition, we strongly support the resolution passed on January 26, 2007 by the Section of Taxation of the State Bar of Texas and the Board of Directors of the entire State Bar of Texas recommending the amendment of 35 U.S.C. Section 287 to limit the enforceability of tax patents (the “Texas Resolution”). Lastly, we strongly support Section 303 of Senate Bill 681 (the Stop Tax Haven Abuse Act), as introduced by you in the Senate on February 17, 2007, which would amend 35 U.S.C. Section 102 (the “Amendment”).

The Amendment

Section 102 of Title 35 of the U.S.C. provides certain instances when a person will not be entitled to a patent. The Amendment would add that a person is not entitled to a patent if “the invention is designed to minimize, avoid, defer, or otherwise affect the liability of Federal, State, local, or foreign tax” and would be effective on the date of enactment and apply to any application for a patent that has not been granted by that date.

For the reasons set forth below, we strongly support the Amendment to modify 35 U.S.C Section 102 to prevent the issuance of patents for tax advice.

Texas Resolution

The State Bar of Texas recommends modifying 35 U.S.C Section 287 to protect persons who infringe a tax patent. Currently, Section 287 of Title 35 U.S.C. provides certain limitations on damages for patent infringement. For example, Section 287(c) of Title 35 U.S.C provides that with respect to a medical practitioner's performance of a medical activity that would constitute a patent infringement, no patent infringement damages will be imposed on the medical practitioner or against a related health care entity with respect to such medical activity. The Texas Resolution would add a new provision to 35 U.S.C Section 287 that would provide similar protection to taxpayers and tax practitioners. Specifically, the Texas Resolution would provide that "[w]ith respect to a taxpayer's and/or tax practitioner's utilization of a tax planning method that constitutes a [patent infringement], the [damage provisions] of this title shall not apply against the taxpayer, the tax practitioner, or any related professional organization with respect to such tax planning method."

For the reasons set forth below, we strongly support the Texas Resolution that would modify 35 U.S.C Section 287 to protect taxpayers and tax practitioners against tax patent infringement.

Previous Comments

Since the early 1990s, the U.S. Patent and Trademark Office has issued 52 tax patents and numerous other applications are pending.¹ On January 6, 2006, Wealth Transfer Group L.L.C., a Florida limited liability company, filed a complaint in the United States District Court for Connecticut against Dr. John W. Rowe, former chief executive of Aetna Inc., alleging that he infringed its "SOGRAT patent" for establishing and managing grantor retained annuity trusts funded with nonqualified stock options.² Grantor retained annuity trusts are permitted by the tax laws and tax practitioners were surprised that a patent could be granted for a variation of such a common transfer tax planning technique. The filing of the patent infringement lawsuit has highlighted the tax patent issue and has caused many tax practitioners to become aware for the first time that patents can be issued with respect to tax advice.

The Previous Comments provide comprehensive, detailed and thorough explanations as to why patenting tax advice is contrary to the public's interest. In addition to the Previous Comments, the Staff of the Joint Committee on Taxation set forth issues related to tax patents in its pamphlet titled "Background and Issues Relating to the Patenting of Tax Advice" (July 12, 2006, JCX-31-06). Rather than repeat in full the points raised in the Previous Comments and the issues raised by the Staff of the Joint Committee on Taxation, we briefly summarize a few of the points and issues and add our own comments below.

¹ Tom Herman, *Patents on Tax-Related Ideas Stir Worry*, WALL STREET JOURNAL, Mar. 14, 2007, at D3.

² On the top of its internet home page, the Wealth Transfer Group has in red, bold, underlined and italicized type, "If you own NON-QUALIFIED STOCK OPTIONS, we have a patented technique to help you increase the value your family will receive." See <http://www.wealth-transfer.com>.

(a) Equal Access. Taxpayers should have full and complete access to interpretations of all laws, including tax laws. A tax patent in effect grants the patent holder a property right in the Internal Revenue Code itself. Exclusivity on interpreting the law is not sound policy because all taxpayers should have the same opportunities to apply all provisions the law.

(b) Toll Charge. Taxpayers should not be required to pay a toll charge, in the form of a royalty, to use the tax laws that Congress intended to be applied to all taxpayers equally.

(c) Increased Cost. Tax patents complicate the provision of tax advice by tax practitioners, thereby increasing the cost of providing tax advice in general.

(d) Increased Burden. Tax patents significantly increase the compliance burden for taxpayers.

(e) Prohibit Use. Tax patent may prevent tax practitioners and taxpayers from using otherwise legally permissible tax planning techniques.

(f) Limit Free Flow of Ideas. Tax patents limit the exchange of ideas within the tax community. For example, one patent holder obtained a list of attendees at a meeting in the area of law related to his patent and sent all the attendees a letter suggesting that they might be infringing his patent.³

(g) Ethical Concerns. Tax patents create significant ethical concerns for tax practitioners under the Florida Rules of Professional Conduct and under the attorney-client privilege. It is unclear to us how a tax practitioner or firm can zealously represent two similarly situated taxpayers when one of them may be entitled to patent the idea and preclude the second taxpayer from utilizing the same idea.

(h) Mislead Taxpayers. Tax patents mislead taxpayers into believing that a patented strategy is valid under tax law.

(i) Other Practices of Law. Patents on the interpretation of tax laws may lead to patents on the interpretation of other areas of the law.

(j) Jurisdiction. Congress should have complete control over tax policy, not the U.S. Patent and Trademark Office (the "Patent Office"). The SOGRAT illustrates how a patent may have been issued with regard to a tax planning idea that was not properly patentable. It is questionable whether the Patent Office has the ability to efficiently make the requisite determinations of patentability of tax ideas.

(k) Innovation. Unlike other areas of innovation, patents are not needed to encourage the creation of new tax strategies.

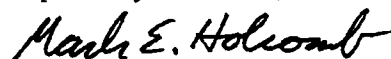
For the reasons set forth above, we strongly support the Previous Comments and add our voice of opposition to the issuance of patents for tax advice.

³ See AICPA letter.

Conclusion

In conclusion, we strongly encourage the revision of 35 U.S.C Section 102 as provided in the Amendment and we would encourage the revision of 35 U.S.C. Section 287 as recommended by the Texas Resolution. Issuing patents for tax advice is not in the public's interest and should be stopped. We applaud your efforts in addressing this issue and proposing a legislative solution that would eliminate the issuance of patents for tax advice.

Respectfully submitted,



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