



Robert W. Wood

THE TAX LAWYER

Jun. 15 2011 — 8:47 am

Will Tax Strategy Patents Be Outlawed?

Probably. That shouldn't prompt you to ask your tax or investment adviser for patented strategies before it's too late. In fact, if a tax or investment adviser tries to sell you a patented tax strategy, look closely. If the adviser has a stake such as a royalty or commission, get some outside advice.

Patented tax strategies have grown controversial. Bills are pending in Congress to eliminate them. The [America Invents Act](#) would prohibit them and has already passed the Senate 95 to 5. The House should resume its consideration of its own [bill](#) shortly. See [Bill Aims at Tax-Strategy Patent](#).

The heart of both bills is the rule that strategies to defer or reduce taxes can't be patented. Any strategy for reducing, avoiding, or deferring tax liability would not qualify. Tax preparation software is expressly not covered by the [House bill](#), so Intuit's [TurboTax](#) and other return preparation software will hardly go out of style or pass into the public domain. The [Senate bill](#) is not explicit on this point, though floor statements suggest the Senate bill will also exempt such software. See [Comparison of Key Provisions of S. 23 and H.R. 1249](#).

Why is there so much anxiety about allowing tax patents? There are several answers. One is that taxation is fundamentally about complying with the law.

The idea that someone could come up with a way to lower your taxes and then patent it—preventing others from doing it without paying homage to the inventor—seems bad public policy. Holders of the patents would reap windfalls and this would undermine a tax system based on voluntary compliance.

The second reason is less obvious. Many tax patents are likely to be in the realm of clever tax reduction strategies that may look, smell and feel like tax shelters. Shelters have a tarnished if not downright sleazy image. For that reason, a patented tax strategy makes most tax advisers queasy. See [Beware Patented Tax Strategies](#).

Of course, before you can steer clear of tax shelters you must identify them. Tax shelters are defined to include any plan or arrangement having a significant purpose of avoiding or evading federal income tax. See [Section 6662\(d\)\(2\)\(C\)\(ii\)](#). Beware of transactions that promise little economic gain other than tax benefits or that seemingly disparate parts cobbled together in a way that makes little economic sense.

If a transaction purports to be designed to make a profit but suggests you should sign a representation that you are investing with a profit motive, get nervous. This is especially true if the promoters promise multiple tax benefits for every dollar you invest.

For more, see:

[House Republicans Threaten Patent Bill](#)

[GOPers demand patent bill changes](#)

[Seeking Shelter In Tax Shelters?](#)

[Tax Shelters Not Über Alles](#)

[Know Tax Shelters When You See Them?](#)

*Robert W. Wood practices law with [Wood & Porter](#), in San Francisco. The author of more than 30 books, including *Taxation of Damage Awards & Settlement Payments* (4th Ed. 2009, [Tax Institute](#)), he can be reached at wood@woodporter.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.*