

Hyperbolic Viewpoint on Attorney Fee Cases Proves Too Much

To the Editor:

I'm writing to comment on the article by Larry Stone and others entitled "High Court Should Deny 'Stealth' AMT Relief in Attorney Fee Cases," *Tax Notes*, June 14, 2004, p. 1407. I recently commented favorably on something Larry Stone wrote. Now I am compelled to disagree with much of what he (and his two co-authors) say. Stone and his colleagues are smart lawyers, and they make a strong case that this is a congressional issue, not one for the courts. But there is so much hyperbole in this article that it proves too much. I cite a few examples:

1. Mr. Stone (for convenience I'll refer to him as the sole author) opens by suggesting that the Supreme Court probably doesn't realize that the primary tax issue in *Banks* and *Banaitis* is the AMT. That strikes me as highly unlikely. Indeed, the Supreme Court denied certiorari on the attorney fee issue on several (I count five) prior occasions before *Banks* and *Banaitis* went up. Virtually all of these cases talk about the AMT and its effects. Judge Posner, whom Stone reverentially cites several times in his article, wrote one of the pithier cases on this subject, but I'll get to Judge Posner later.

2. Sure, Congress created the AMT. Sure, Congress should fix it. How many years now has that been discussed? How many years now has there been a bill to fix this part of the AMT, and even support for an entire repeal of the AMT? Perhaps Mr. Stone's repeated references to "stealth relief" (that *he* fears the Court might grant) is the result of watching too many war movies.

3. All of us are sensitive about tax shelters, abuses by accounting (and even law) firms, and government scrutiny regarding the same. But Mr. Stone (along with his graphic metaphors) seems to want to promote hysteria. Will the world really come to an end if the Supreme

Court does the right thing and grants relief in these attorney fee cases? He writes that the Supreme Court: “will upset well-settled, foundational tax law, inviting future uncertainty and innumerable tax shelter schemes, as millions of other taxpayers seek similar relief from the increasingly pervasive reach of the AMT.” *Id.* at 1407. This sounds like the trailer for the latest summer disaster movie.

4. Mr. Stone also criticizes the reasoning of the circuits that have come out against double-taxing attorney fees, noting that “some courts, sympathetic to the plight of these plaintiffs, have thrown caution (and the well-established assignment of income doctrine) to the wind. . . .” With all due respect, it simply isn’t necessary to view all of these cases as assignments of income, based on *Lucas v. Earl* and all the other hoary assignment of income cases that Mr. Stone cites so repetitively. Unless I’ve missed it, Stone does not discuss *Estate of Clarks*, the (to my mind) extremely well-reasoned Sixth Circuit case. We don’t need histrionics about violating the underpinnings of our federal income tax system, shaking Pennsylvania Avenue to its core, and so on. I like metaphors as much as anybody, but suggesting there will be a plethora of *other shelters* if the Supreme Court sides with the taxpayers in *Banks* and *Banaitis* seems overly fretful.

5. Mr. Stone cites in a footnote (without explanation) *Spina v. Forest Preserve District*, 207 F. Supp.2d 763 (N.D. Ill. 2002). I think he’s just saying that there are some cases in which there is a harsh result — a taxpayer ends up in the hole with a tax bill and no money to pay it despite a “successful” case. I guess Mr. Stone knows this is harsh. He fails to mention well-established tax doctrine here, and also fails to mention anything about fairness or equity.

6. Then I got to the income-splitting section. Maybe Mr. Stone is right that ad hoc relief is not as good as wholesale relief. In fact, Congress should repeal the AMT. But that is not the issue facing us right now. Stone suggests that if the Court “is prepared to tackle the AMT head-on” it will be doing some kind of clandestine rewriting of the income splitting rules. Here we get to the military metaphors again — he says the Court would be better off deciding these attorney fee cases “as simply another chapter in the long history of taxpayer attempts to avoid taxes through tactics such as income splitting and assignment of income.” *Id.* at 1408.

This is a talented argument, I guess, but tactics? Attempts to split income and assign income? I fear that Mr. Stone may not have the slightest idea of the reality of the current contingent fee arrangement, how these cases get hammered out between contingent fee lawyer and client, who is really in control, etc. Perhaps it is the class difference between life in the trenches (where I am) vs. the generals who are more worried about tactics. Contingent fee agreements can be modified or drafted from a perspective that takes tax issues into account. I certainly try to do that whenever I can, and to help others to do so. But ultimately, I just don’t see the enormous asteroid headed for Earth that Larry Stone does (oh, I forgot, that was *Armageddon*, a disaster movie from a few summers back).

7. Again referring to the horrible dangers of income splitting and assignment of income, citing the dusty

plethora of cases that go back to the ’20s, ’30s, and ’40s, Stone states flatly (but then there are a lot of flat statements in this article): “Long-standing income tax principles, such as the assignment of income doctrine, compel an IRS victory on this question.” *Id.* at 1408. He then starts giving lists of “numerous tax-avoidance ploys” throughout history. I’ll spare you his list, but I think they are all related-party transactions — husband to wife, father to child, corporation to shareholder, and so on. Just about every other sentence has some reference to the Supreme Court needing to “block these schemes.” *Id.* at 1408. Mr. Stone appears to be overly concerned with schemes, shelters, and tricks. What about equity and fairness?

8. In all fairness, Mr. Stone does recognize (although I think all of us do), that the AMT produces wildly inequitable results. Commendably, he cites the *Spina* case a second time, *not* in a footnote this time, and the well-known testimony of National Taxpayer Advocate Nina Olson back in 2002 that this problem *had* to be fixed. He even mentions a few bills. He may even have a better feeling than I do about how likely some of this long-tortured and oft-introduced legislation may fare. He uses a repetitive “Congress will fix it” mantra, even waxing poetically that: “Congress seems to have heard the rising chorus of anti-AMT sentiment.” *Id.* at 1409.

9. Mr. Stone then turns to the “well-established” argument again. The Supreme Court, he says, will “open a can of tax-avoidance worms” (now *there’s* a metaphor) by “loosening the well-established and time-honored precedents that prevent taxpayers from dodging their lawful tax liabilities by denying income or shifting it to another — here, from the plaintiff to his attorney.” *Id.* at 1409.

I find it a little silly that Mr. Stone drops a footnote at the end of this diatribe saying that the attorney will obviously have income in any event and will have to pay tax on it. There is no double taxation here, he says, because the plaintiff is given a deduction for the attorney fees (albeit a largely valueless one because of the rules of section 212 and more importantly the AMT). Then, Stone steps on his own feet by pointing out that after all, “taxpayers often pay their income to others and receive no deduction — for example, on the purchase of the services of a plumber in one’s personal home.” *Id.* at 1409.

Isn’t a plumber in one’s personal home a *personal* expense and therefore a rather ridiculous example? Isn’t section 212 about the production of income? Maybe some lawsuits even rise to the level of a trade or business.

10. I have already mentioned Judge Posner. I have no personal animosity towards Judge Posner (although he wasn’t especially well-liked as a law professor when I was in law school at the University of Chicago before going on the bench). But Larry Stone evidently likes him, at least in the *Kenseth* case. *Kenseth* was a terribly important Tax Court case, with a panoply of concurring and dissenting opinions by a deeply divided Tax Court. Judge Posner wrote what I’ve always considered a very poor Seventh Circuit opinion, giving short (more like dwarf-ish) shrift to virtually every argument, and basically saying “tough luck” if the plaintiff ends up paying tax and getting no deduction for the attorney fees.

At the end of his underscoring of Judge Posner's edict, Mr. Stone then goes back into the assignment of income doctrine, back into "well-established" principles and so on. I don't think I saw the term "floodgates" used anywhere in this article, but it certainly smacks of a whole host of floodgate arguments. Maybe the word floodgates just isn't "well-established" enough.

Mr. Stone refers with some degree of reverence to the "early days of the income tax" where the Supreme Court "carefully erected barriers to tax avoidance that still hold firm today." Then he starts talking (again) about how granting relief in the attorneys' fee cases would — actually, he doesn't say *could* or *might* — "revive all of the income splitting and assignment of income schemes of the past." Oh fabled walls of Jericho, come tumbling down! I had to stop and mop my brow here.

11. I got a little lost with references to *INDOPCO*, *Frank Lyon Co.*, and various other decisions that Mr. Stone didn't think were good. I also got a little lost where he talks about his hope that the Supreme Court will not surrender "to a moment of passion" that "would cause endless years of regret." *Id.* at 1410. Sexual metaphors too? Then he gets back on the tax shelter and newspaper bandwagon (using "scheme" and "sham" and other naughty words), saying "In a period in which abusive tax shelters have proliferated, bringing disrepute on our tax system and causing serious tax losses, the Supreme Court does not need to encourage shams." *Id.* at 1410. Shams? What on earth is he talking about?

12. Judge Posner gets quoted again. I rest my case about the *Kenseth* decision and the very difficult time that many of the Tax Court judges had with this case. It was a good case in the Tax Court. Posner decided it badly. Stone cites Posner badly. A moment of passion?

13. Hourly fees? Stone tries to use this as yet another argument why he is right. The hourly fee dichotomy is something worthy of note, but it ignores the reality that the vast bulk of disparate recovery vs. fee cases are contingent fee cases. These are the ones in which there

are problems. Because cases typically go on for years, even hourly cases don't contain the bunching problems that you see in the contingent fee ones. The hourly subject is really beyond the scope of this article.

14. Mr. Stone goes on to talk about how the Court would be encouraging the formation of "unnatural" legal relationships between an attorney and a client. As if debate about gay marriage was not already occupying the press. Now we have unnatural fears about unnatural relationships between lawyer and client. Who really runs the contingent fee case? I just don't get it.

15. Oh, then there's the "unfair tax cases will flood the Court" argument (moment of passion of floodgates?). He makes it sound like the Supreme Court would be solely handling tax cases. Then he starts talking about all the cases that would be brought before the Supreme Court involving bribes, penalties, political contributions, and kickbacks. Say what?

16. Toward the very end of his article (but there are a bunch more "well-settled" and "stealth" words here and there), he starts talking about lien laws, how lawyers will lobby to fix all this, to make Oregon-like lien laws. Anyway, don't worry, Congress will grant some relief from the AMT. And Mr. Stone says — one more time, just in case you missed it the other 25 times — that the Court should not "undermine settled principles of tax law to grant stealth AMT relief to the few plaintiffs whose cases have made it before the court." Indeed, one should, he says, uphold the august *Helvering v. Horst* and *Lucas v. Earl* authorities and their progeny. Respectfully, I disagree.

Very truly yours,

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