

From the desk of Jeanne M. Kerkstra, Esq., CPA

**Viewpoint
Challenging You to a Throwdown**

Tax strategies are always a hot commodity. Of course, the hotter they are, the more closely they're followed by the IRS. So, it is interesting to note that the U.S. Patent and Trademark Office ("USPTO") has since 1998 issued about 40 tax patents with 60 more pending. I find this a potentially troubling situation.

In his testimony before the House Subcommittee¹, IRS Commissioner Everson noted how it is working with the USPTO in the USPTO's effort to issue patents on tax strategies. The problem as I see it is how are we as tax practitioners to stay on top of patented strategies. Everyone knows that ignorance of the law is no excuse and, more importantly, does not offer legal protection. Will I have to regularly check with the USPTO to determine what more has been added to patented tax strategies. Right now I do not know what are the 40 patented tax strategies and what are the 60 that are pending. From my little knowledge of patent law, it is my understanding that patent holders may make more money from infringement due to treble damages than to the actual use of their patents. Currently, I have to closely scrutinize tax shelter developments, including what constitutes a "listed transaction", a "reportable transaction", and now a "transaction of interest". Will I have to have as one of my "favorites" on my computer a direct link to the USPTO? What steps would my malpractice insurance carrier seek to implement to make sure that my exposure was kept to a minimum? Do the benefits outweigh the costs for allowing tax strategies to be patented?

The ability to patent tax strategies was confirmed in 1998 with *State Street v. Signature Financial*, 149 F.3d 1368, 47 U.S.P.Q.2d 1596. I am curious as to why now patenting tax strategies is getting attention. On average, five tax strategies have been patented annually over the last eight years. This does not seem to be a significant amount. The full text of the Subcommittee's hearing can be found at House Subcommittee hearing. There are bound to be future developments. Stay tuned.

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