

Reproduced with permission from Tax Management Weekly State Tax Report, Volume: 19 Issue: 7, 02/15/2013. Copyright © 2013 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Tax Policy

We are pleased to introduce a new Bloomberg BNA column. Each month or so, members of Crowell & Moring's state tax team sit down with a different state's Commissioner of Revenue or Chief Counsel for a candid conversation regarding current tax issues as well as his or her own career. The series will have a comprehensive nationwide scope. For this inaugural column, Walt Nagel, Don Griswold, and Jeremy Abrams (members of Crowell's state tax team) sat down in their own backyard with Alan Levine, Chief Counsel at the District of Columbia's Office of Tax and Revenue.

Crowell's Conversations: An Interview With Alan Levine, Chief Counsel With the District of Columbia's Office of Tax and Revenue

ALAN C. LEVINE, INTERVIEWED BY WALT NAGEL,
DON GRISWOLD, AND JEREMY ABRAMS

CROWELL: Glad you could join us today, Alan. We're always interested to hear about how our friends first got into tax. Not many of us grew up as children wanting to be tax professionals! What's your story?

LEVINE: At Vanderbilt Law School, I had a federal tax professor who was somewhat interesting, but I wasn't that turned on by tax at the time. As a young attorney, I came to Washington and worked for the Department of the Treasury in the Office of Revenue Sharing, and I decided to go get my LL.M. in tax at Georgetown Law because I could go at night . . . and I was a single guy. One professor, John Nolan, a former Assistant Secretary for Tax Policy, got up the first day of class – it was corporate reorganizations – and said: “The 1969 Tax Reform

Act, which I wrote.” That's when I started really loving tax.

CROWELL: And that love of tax turned into working for the Internal Revenue Service?

LEVINE: I transferred over to the IRS Chief Counsel's office and continued taking the LL.M. courses. While I was at IRS I worked in so many different areas, starting in the late 70s. In '81, while working in Exempt Organizations, I handled the *Bob Jones University* case that went to the U.S. Supreme Court. But I'm most proud of the case that I fully briefed for the U.S. Tax Court, *Ecclesiastical Order of the ISM of AM Inc.* It was the first case to deny an exemption under a “substantial purpose of tax avoidance” approach. It's cited in all the Court of Federal Claims cases now. I have a lot of litigated cases to my name.

I remember one case in particular that I litigated. I was a young attorney in the IRS's Washington District Counsel office. We had a settlement conference, and in walks this big law firm partner, Hal Heltzer, from Crowell & Moring – the firm you guys are with – he's still there today, right?

CROWELL: Yes, he's the head of our Tax Practice.

LEVINE: The case involved some kind of a tax credit, and Hal says, “when I wrote that section,” this is what it meant. I said, “with all due respect, Mr. Heltzer, that's not legislative history,” and we ended up settling the

Alan Levine is Chief Counsel at the District of Columbia's Office of Tax and Revenue. He can be reached at alan.levine@dc.gov. Messrs. Nagel, Griswold, and Abrams are attorneys with Crowell & Moring LLP, and can be reached at wnagel@crowell.com; dgriswold@crowell.com and jabrams@crowell.com, respectively.

case. But I was very impressed with Hal; we hit it off very well.

DC Tax on an Operational Level

CROWELL: So you have an illustrious career with the IRS for 35 years . . . and then you make this big move into state tax. What attracted you to the center of the universe!?

LEVINE: I did not have much of an inkling of what state and local tax was. You won't find sales tax, or franchise tax, or property tax in the Internal Revenue Code, so I had to learn it from scratch. But what attracted me to state and local was the opportunity to employ all the knowledge and experience that I had acquired in the IRS – not only operationally and organizationally, but also many of the IRC provisions that have applicability to the District code – and I think I have made a very good contribution by bringing over some of that knowledge and experience that I had at IRS.

Transfer-pricing audits will continue.

CROWELL: Let's stay with DC taxes. Could you tell us a little bit about what's happening in the transfer pricing area?

LEVINE: I see activity there, definitely. DC has its own transfer pricing statute, Section 47-1810.03, which is akin to Section 482 of the Internal Revenue Code. There are still many years out there that need to be audited, and that can be audited, and that we intend to audit, before 2011 when we adopted combined reporting. In terms of our audit methodology, *Microsoft* was the first case to deal with transfer pricing. We lost in the Office of Administrative Hearings (OAH) but we don't believe that the court's opinion was correct. The issue continues to be litigated in both the DC Superior Court and in other cases at OAH. We intend to be very active in this area. *Editor's Note: The DC Office of Tax and Revenue filed a motion to dismiss its appeal in the Microsoft case on Dec. 17, 2012, which was granted by the DC Court of Appeals on Jan. 2, 2013.*

CROWELL: You mentioned combined reporting. How did it come to be the law in DC and how is OTR going to administer combined reporting?

LEVINE: Well, it was a cloudy day in November of 2009, and Aaishah Hashmi, Assistant General Counsel, and I flew to West Virginia for the day to meet with the Commissioner of Tax for West Virginia, Craig Griffith, and a host of other people. That was our first toe in the water, beyond "the water's edge" as it were, with combined reporting.

Then about a year went by and nothing happened legislatively. Frankly we thought it was dead. And all of a sudden we got the word to come up with a statute. So we worked on it fast and furiously, and came up with proposed legislation. We are still working on changes to that statute and to the regulations to make sure that they are on all fours with each other.

One of the things we want to make sure of is that there is no double taxation. There's a unique tax in the District on certain unincorporated businesses – "UBs" – and that can create issues in combination when a UB is part of a combined group. We had an extensive com-

ment period to our regulations, received probably over 100 comments, many on this issue and others. We tried to listen to the affected corporations and we made many changes as a result of their comments.

I will say this: Recent revenue estimates for the corporate franchise tax based on estimated payments were something like \$45 million. The office is analyzing to see what part is attributable to combined reporting. In the Fiscal Impact Statement accompanying the legislation, we estimated that combined reporting would only bring in \$22 million during its first year, so that may turn out to be a conservative estimate once the analysis is concluded. If so, it will have been a bumper crop. Very nice.

Combined Reporting Regime

CROWELL: And how about administration of combined reporting?

LEVINE: We're very well prepared to take on audits and to assist taxpayers. We have a robust website now –otr.cfo.dc.gov – and there is a combined reporting section. We want to make it a living, vital, active, and friendly kind of website. Steve Cordi, who's the deputy CFO, is in the process of hiring new auditors in compliance. The agency is in the process of doing intensive training in combined reporting, and that's going to be a big boon in our process of accomplishing all these things.

CROWELL: You work closely with Steve Cordi, head of OTR, of course.

LEVINE: Yes. Having Steve Cordi, former head of taxes for the State of Maryland, has been a tremendous asset to the District. He's extremely knowledgeable – an expert in many different kinds of state and local taxes. He's well-known, a frequent public speaker. So having him there for leadership and guidance in OTR has been tremendous. He has also brought in people to streamline the procedures in OTR, and that includes improving the computer systems. OTR is making a tremendous investment in that area. At OTR, we want to be as modern, as "au courant," as up to snuff, as we possibly can. We're trying to be leaner, I don't want to say meaner, but we're trying to be a leaner and more effective outfit.

Achieving Fair Results

CROWELL: A "leaner but not meaner" OTR. Do you think the District is an attractive place for business?

LEVINE: I would think so. First of all, DC is a premier address. And the District Council has been working on legislation that would make more Qualified High Technology Companies eligible for certain tax benefits as well as legislation to spur investment in technology companies. Also, our tax rates are certainly comparable with Maryland and Virginia, for example. They're even better in some of the real property areas. So we think we're very competitive.

My philosophy – and I'm not the administrator, that's Steve Cordi – but as OTR's chief lawyer, my philosophy is that if we get a case in litigation we want to make sure that the fair and correct amount of tax is paid. We want to do the right thing. We want to be fair. We want to be equitable. So I see the District as a good place for business.

At the same time, the office of the District's CFO, Dr. Natwar Gandhi, has reported publicly that before this year two-thirds of the top 100 corporations in this city paid only the minimum tax of a hundred bucks. Well, we think that the changes in combined reporting with a new focus on transfer pricing will result in greater payments by the corporate taxpayers. We want to achieve fairness on that score, too. *Editor's Note: On Feb. 1, 2013, Gandhi announced his retirement, effective June 1, 2013.*

CROWELL: Sometimes it takes a judge to determine what the "fair" result really is. Can you comment on any important tax cases pending in the District's courts?

LEVINE: There's an interesting one called *Sunbelt*, dealing with the statute of limitations for filing a return under DC's tax on unincorporated businesses. A taxpayer filed a partnership return, and expected that as a result of that alone, OTR was supposed to be able to figure out the tax in the District of Columbia. Well, the partnership return provided no apportionment factors at all, so OTR wanted someone to file the proper return so that we could see the apportionment factors. The petitioner argued that the statute of limitations on assessment had run because the partnership return was filed more than three years ago, which is the normal statute of limitations, so they had filed their return and that was enough for us to figure it out. And we said no, you did not. We relied on U.S. Supreme Court precedents to argue that, both at the federal level and the District level, if you've never filed the correct tax return (in this case, a UB return), the statute of limitations has not begun to run. The case was argued before the DC Court of Appeals last year (the taxpayer won at OAH), and we are awaiting a decision.

We lost in OAH in the QHTC (qualified high technology corporation) area, in a case called *BAE*, that's the international defense contractor. There the issue was whether BAE was "maintaining an office" in the District of Columbia. I saw Hal Heltzer at the DC Court of Appeals hearing when your firm was making the appellate argument for the taxpayer. *Editor's Note: The case was decided last month by the DC Court of Appeals; the taxpayer was victorious.*

And we have many, and I won't get into the details, many appeals for real estate matters that mostly deal with the tax sale. The tax sale is a mechanism that we use to collect the taxes for real property tax.

CROWELL: Let's focus back on you, Alan, and on your function as OTR's Chief Counsel. Tell us a bit more about your day-to-day responsibilities.

LEVINE: I have a penchant for litigation. Having litigated at IRS for many years, as well as supervised the weekly Wednesday motion sessions of the U.S. Tax Court in the collection due process area, I have lots of expertise there, so I get very closely involved with OTR's senior litigation counsel, and do some of the litigating myself. I had the opportunity, for example, to make oral argument in the *Microsoft* case, and I also won a Motion for Summary Judgment over what was

called the arena fee, which was the predecessor to the ballpark fee.

We also work very closely with the OAG (Office of Attorney General) to provide any support that they need. And they also come back to us to make sure – because OTR is their client – that the arguments that they make in the Superior Court, or in the Court of Appeals, are consistent with the way we see the arguments. The Solicitor General works very closely with us to make sure that there is agreement in the arguments and so forth.

So you have a whole litigation side, and I work closely with the litigation attorneys there. And we have so much litigation that we have now advertised a position for another litigating attorney that will help in the handling of this case load.

So that's one area. Another thing that we do is give advice to our client, OTR. We may have the Compliance Division, which consists of both Audit and Collection, asking us what should we do? What do you advise? We get questions from other divisions including Real Property Tax Administration. And we either give written comment or oral comment or e-mail comment as to what we think they should do. The phone doesn't stop ringing all day.

We also get taxpayers who are writing in as well, who want to know what they should do with their tax filings. If the request is specific enough, we will consider it to be a private letter ruling. And we'll try to get those out as fast as we can. Now we just started a new practice, and we enacted a regulation for what's called a Declaratory Order. And there, if an entity is considering whether to move into the District, like a QHTC, but they need more comfort regarding the tax consequences, they can write in to us and we will try to give them an opinion, assuming they give us enough facts. We do have the discretion as to whether to answer, for example, if the issue is in litigation or some other factor controls our decision.

So, as you can see, I keep my finger in every pot.

CROWELL: Did you ever think about doing a stint in industry or private practice?

LEVINE: Well, I thought about it at one time or another, but I decided the grass isn't always greener. One of the things that I say when I speak to the incoming LL.M. tax classes at Georgetown – where I teach like you guys, Don and Walt, as an adjunct professor – is that when you work for the government, "you are where the rubber meets the road." So, whether you work at IRS or you work in our office at OTR, you are on the other side of very big issues. I'm not sure you always get that as a beginning associate in a firm. You may or may not. But you are really an indispensable part of the legal argument that's going on in a case.

As a personal matter, I really love the job. It's great. I find it exciting and invigorating every day. Which, after working in government for 42 years, is a lot to say!

CROWELL: We couldn't end this inaugural interview on a better note. Thanks very much, Alan. It's been a real pleasure to help our readers get to know you.

LEVINE: My pleasure.