

INTERVIEW WITH CHIEF COUNSEL DONALD L. KORB

December 19, 2008

1. **This is your third tour of service in the IRS. Can you talk a little about your prior IRS experiences and how the IRS has changed since the 1970s and 1980s?**

Prior IRS experiences. Following law school, I began my legal career in 1974 as an entry level attorney in the National Office of the Office of Chief Counsel. I spent four years in Washington and was in three different divisions (General Litigation, Disclosure, and Interpretive Divisions) over that four-year period. During that time, I was able to work on matters that my former law school classmates and future colleagues at the Thompson, Hine and Flory law firm in Cleveland could only dream of working on during the first four years of their legal careers. Just one example: I had the opportunity to work on projects which established rules in the area of partnership taxation which remain cornerstone principles of the tax law to this day.

But even better for me, I showed up at the IRS just at the time when President Nixon was embroiled in the Watergate Scandal. I was 25 years old and only in my first year as a lawyer, but I was able to work on some very interesting and quite historic Watergate related matters. Simply stated, I was in the right place at the right time and had a front row seat from which I could watch a part of our country's history unfold before my eyes.

But most important, the entry-level position that I held at the IRS in the mid-1970's resulted in me eventually being recruited from the private sector to serve at the IRS again, this time in a senior policy position during the mid-1980s. In 1984, then Commissioner Roscoe Egger asked me to become an Assistant to the Commissioner. My primary responsibility during that time was to lead the IRS's participation in the legislative process for what became the 1986 Tax Reform Act. I had responsibility for a great team at the IRS, which, by the time we were finished, numbered more than 350 people. At age 36, I was quite young to have such responsibility. So once again, I had a front row seat to watch history unfold before me—this time, tax history.

Changes at IRS since the 1970s and 1980s. The pace was clearly more leisurely back in the 1970s than it is today. Also, there was much more institutional knowledge among IRS personnel back in those days than there is today. One thing I always liked about working in the IRS National Office was when some obscure issue comes up, you could find somebody that knew more about that issue than anybody anywhere. That's still true today in the Office of Chief Counsel, which is good, but it is not quite as true in the IRS itself.

Probably the biggest change between these days and today is the non-geographic, taxpayer focused operational divisions (i.e., LMSB, SBSE, etc.) through which the agency's activities are now managed. As you know, prior to the reorganization of the IRS in 2000, the agency's various programs were managed by District Directors who in turn were supervised by Regional Commissioners, and each District Director was basically responsible for all functions in his/her geographic District. Now we have operational divisions like LMSB and SBSE which are focused on particular groups of taxpayers across the entire country. And except for W&I, which is headquartered in Atlanta, all of the other functions are headquartered in the Washington, D.C. metropolitan area. One very significant result of the new approach: I am absolutely convinced that we would not have been nearly as successful in the battle against tax shelters under the old geographic arrangement; I believe that the current centralized management model made all of the difference in the world in that effort.

Finally, another big change over the past 20 years is that the IRS has become less and less involved with the enactment of new tax legislation. I think we reached a high water mark during the period leading up to the 1986 Act. Just one example: in those days, we would prepare proposed forms overnight so that the members of Congress could see the impact of their proposals. In many cases, they decided not to make changes because of what the forms would look like. Also in those days, Chief Counsel lawyers participated directly in the drafting process. For a number of reasons, the Office of Chief Counsel did away with the Legislation and Regulation (L&R) division back in the 1980s. There used to be 60 lawyers in the L&R division who would help draft legislation, but not anymore. One consequence of these changes is that the IRS plays less of a role in new legislation. If you look carefully at Rob Portman's Report of the National Commission for the Restructuring of the IRS and the committee reports from the IRS Reform and Restructuring Act of 1998, both very clearly state that Congress wanted the IRS to be there "at the table" to talk about how it was going to administer any changes. Hopefully, that will become standard practice once again.

2. Can you talk about your private practice experience at Coopers & Lybrand and Thompson Hine?

After my first four years with the Chief Counsel's National Office, I returned to my hometown Cleveland and joined the law firm then called Thompson, Hine and Flory (note: I was recruited to the firm by Mal Bank who is UCLA tax professor Steven Bank's father—small world). Since by that time I already had four good years of tax experience under my belt, my focus as a young associate was more on the transactional/financing side of things. Working on a lot of transactions and financings over the first six years of private practice provided me with a strong business-oriented foundation both for the time I served as an Assistant to the Commissioner and later when I became the Chief Counsel.

When I returned to Thompson Hine in 1986 after my second tour of duty at the IRS, my practice became almost 100 percent tax controversy. Over the next 10 years, I represented many Fortune 500 companies in major controversies with the IRS. That's most of what I did, but I also worked some in other areas in the tax and employees benefit practice as well. For example, there was a period in the late 1980s through early 1990s when I had a lot of work-out and bankruptcy work. I also was involved in lobbying on the Hill and I would do one or maybe two projects each year. Consequently, in every tax bill from the time I left the IRS in 1986 until the mid-1990s, there's at least one provision in the Internal Revenue Code that I had worked on for a particular client. Also during that time, I became quite active in the ABA Tax Section. I moved up in the leadership hierarchy and eventually became Vice Chair for Committee Operations.

Finally, over the five years before I became Chief Counsel, I helped to develop a national tax controversy practice at Thompson Hine. We sought out the most difficult cases; they were few in number but they were very large dollar cases and very difficult cases. Of course, a lot of these cases involved cleaning up various tax shelters. For example, I had several COLI cases. This work gave me some great experience that was very useful to me when I became Chief Counsel.

Everyone is a product of his/her own experiences, so all of this prepared me well for the position of Chief Counsel.

3. What led to your appointment as Chief Counsel in 2004?

When I left the Office of Chief Counsel in 1977, I told many of my colleagues that I would be back as the Chief Counsel some day. I don't know if anyone took me seriously, but having a goal like that did in fact help to shape the next 27 years of my career. The private practice experience both with the law firm and a Big 6 accounting firm, the 27 months as Assistant to the Commissioner in the mid-1980s, the tax controversy work, and participation in the activities of the ABA Tax Section, including time as a Council Director and a Vice Chair, all gave me a very strong background for the Chief Counsel position.

In the mid-1990s, I became acquainted with a newly elected congressman from Cincinnati named Rob Portman, and as you know, became involved with you and others from the Cincinnati area—I was the only Clevelander—in serving on Rob's tax advisory group. At some point along the way, I expressed my interest to Rob that I would like to return to public service someday and after the 2000 election, Rob encouraged me to consider doing exactly that. Eventually, in August 2003, when the White House Office of Presidential Personnel called to see if I would be interested in becoming Chief Counsel, it took me about an hour to decide to do it. I was nominated by President Bush on December 9, 2003, was confirmed by the Senate on April 8, 2004, and was sworn in as Chief Counsel on April 14, 2004. It goes without saying that Rob played a large role in my return to Washington.

4. Tax academics are particularly interested in two aspects of your tenure as Chief Counsel: (i) your resurrection of the Professor-in-Residence Program (http://taxprof.typepad.com/taxprof_blog/2007/01/irs_names_calvi.html), and (ii) your efforts in making the Chief Counsel's Office "A Great Place to Start Your Career" (http://taxprof.typepad.com/taxprof_blog/2007/02/the_irs_office_.html). Can you comment on these?

Professor in Residence Program. I am quite pleased that I was able to restart the Professor in Residence Program. To me it was a "no brainer," and hopefully there will be enough interest by your colleagues to insure that it will be a vibrant program into the future. To me, having a tax professor work at the highest level of the Office of Chief Counsel for a full academic year is a "win-win-win" situation. It's a win for our lawyers who get the opportunity to interact with one of the country's top academic minds on a routine basis. It is a win for the tax professor because he/she can get a firsthand look at tax administration from the inside. Finally it is a win for the Office of Chief Counsel, since the professor returns to his/her school to serve as a talent scout for the Office and to steer prospective rising young law students with an interest in tax to our Honors hiring program.

A Great Place to Start. In the Summer of 2004, soon after I got here, we reviewed the composition of our workforce and determined that by the end of 2006, 28 percent of Chief Counsel's attorneys would be eligible for retirement. We also found that 42 percent of the managers and 67 percent of the executives would be eligible to retire at that time. To address these challenges, we decide we needed to reinvigorate our recruiting process. We decided that our recruiting effort would emphasize that there is no better place to begin a career in the tax law than the Office of Chief Counsel, and that we would try to emulate a private "law firm" form of recruiting program in order to compete with the law firms for our share of the best talent coming out of the law schools.

As part of the program, I visited many of our nation's law schools to teach classes/seminars and talk about the career opportunities with the Office of Chief Counsel. For example, the list of schools I visited last year included: Georgetown, Howard, New York University, Texas, the University of Southern California, Vanderbilt, Loyola, Emory, Hofstra, Villanova, Duke, UCLA, Chicago, Michigan, Florida, and Yale. In total, this Fall, we participated in on-campus interviews at over 150 law schools and diversity job fairs. In addition, last Spring we conducted on-campus interviews at close to 20 law schools and job fairs. Our recruiting video is on YouTube; our recruiting campaign has been written up in the Wall Street Journal and complemented in an Op Ed in the New York Times and an online posting on CPAWeb. We also started recruiting paralegals from some of our nation's best colleges and universities (focusing particularly on business schools).

All of this effort means that now we have a recruiting program virtually identical to the recruiting programs of the country's premier law firms. One way to measure the results we now achieve is that our summer classes of 2Ls in both of the last two summers (from which we now fill over 75 percent of our eventual Honors hiring slots) would be the envy of almost any law firm in the country. These efforts should have a positive impact on the Office of Chief Counsel and the tax system for years to come.

5. **We shared a panel at the January 2008 ABA Tax Section Meeting in Lake Las Vegas on how blogging has affected tax practice (http://taxprof.typepad.com/taxprof_blog/2008/01/the-role-of-tax.html). Can you share some thoughts on what you see as the impact of blogs on tax administration and tax practice?**

As I said when we did the panel in Las Vegas, the first thing I do every morning (even before I read the Daily Tax Report and Highlights & Documents—but don't tell BNA and Tax Analysts) is to turn to your blog. It gives me access to stuff—that's a technical tax term we use in Cleveland—that I wouldn't see anywhere else. In a sense, your blog along with the tax press as it exists today—which is quite different than it was when I was here before the mid-1970s and mid-1980s—have "democratized" the sharing of a lot of inside information about tax administration so those outside the Beltway can really know what is going on. Both have been a real plus for tax practice.

6. **What are you most proud of in your tenure as Chief Counsel? Your role in combating tax shelters?**

Strategic Litigation Effort. Perhaps the crowning achievement of my time as Chief Counsel is our strategic litigation effort. Lately, I have been referring to it in my public appearances as the "Three and Out Strategy." The idea is simple: use every tool at our disposal, such as designating certain key cases for litigation and doing our best to "order" the cases, so that within any particular group of like cases, the first cases to trial (which could be as few as 3 and as many as 20+) are those with the most favorable facts for the Government. Then after winning those cases, offer a global settlement initiative to taxpayers to bring in the overwhelming majority of the rest of the cases in that particular group.

Back in the late 1990s, I was on the other side of this type of strategy because I had several of the COLI cases where the Government won the first 3 cases to reach court and then settled all but a half dozen or so of the rest—and it was a good thing for the Government that it did, because it then proceeded to lost the next case in court (later to be reversed on appeal). In the mid-1980s when I was the Assistant to the Commissioner, I suggested to the then Chief Counsel Fred Goldberg that we do a similar thing with the tax shelters of that era but we never could quite get our act together to pull it off. Well, 20 years later, we pulled it off and the best most recent example is, of course, the LILO/SILO group of cases where after out three quick victories at the trial level plus affirmance of one case

on appeal, taxpayers representing over 80 percent of the dollars involved have elected to take advantage of the settlement initiative announced in August.

Our lawyers have also responded well to encouragement to “think outside the box” and be innovative in handling their cases. One example was the record settlement in the Glaxo case. I led the IRS negotiating team which resolved a landmark transfer pricing dispute with GlaxoSmithKline in September of 2006. As part of the settlement, Glaxo paid \$3.4 billion to the IRS, the largest single payment ever made to the IRS to resolve a tax dispute.

Use of Judicial Doctrines in Litigation. We played a major role in an extraordinary important group of cases decided by trial courts and appellate courts over the past four years. The overarching theme of these cases (Chicago Tribune in the Tax Court, Dow Chemical in the 6th Circuit, Black & Decker and BB&T in the 4th Circuit, Coltec Industries in the Federal Circuit, Castle Harbour in the 2nd Circuit, Jade Trading in the Court of Federal Claims, AWG and Fifth Third in District Courts in Ohio, and Klamath in District Court in Texas) is that the courts will look to the “real deal” and apply judicially developed doctrines such as substance over form and economic substance to see through transactions structured purely for tax motivated reasons where there is no business purposes.

In fact, I believe that someday we will look back on the past 48 months as a rather historic period where many courts overwhelmingly sustained the Service’s use of the various judicial doctrines (substance over form and economic substance) in a number of tax shelter cases.

Our Office’s working relationship with the Department of Justice is quite strong particularly since John DiCicco took over as the Deputy Assistant AG (Civil Tax Litigation) and later when Nathan Hochman became Assistant Attorney General (Tax Division). DiCicco has said in an interview by the Federal Bar Association where he was asked how well the DOJ Tax Division and the IRS, particularly the IRS Office of Chief Counsel, are working together: “I think we work more closely now with them more than we have at any other time that I have been here We are all working toward the common end. And while that was true before, I do not remember this level of closeness that we have now.”

Recruiting. As discussed earlier, our Great Place to Start recruiting campaign has paid big dividends already, so it would have to be included on any list of accomplishments to be proud about.

Matrix Management. We made great strides toward making the Office of Chief Counsel more client-oriented by modifying its operations to resemble the operations of a private law firm. We accomplished this, in part, by employing a Matrix Management structure to our Field operations. Matrix Management retains the current functional management structure but adds a geographic management overlay to address certain specific matters. The goal of this

structure was to improve teamwork in each Field Office, as well as to provide a broader tax experience for our less experienced lawyers. The Matrix Management structure in the Field involved naming a Managing Counsel in each of our Field Offices and encouraging cross-assignments of lawyers between Divisions (primarily between LMSB and SBSE, but also involving lawyers from TEGE and CT). The basic idea was twofold: have one senior lawyer “in charge” of each Field Office and make better use of our talented lawyers by permitting both developmental and workload-balancing assignments.

Published Guidance. Beginning with the arrival of Clarissa Potter as the Deputy Chief Counsel (Technical) in August 2006, we reengineered the management of the published guidance program in order to try to increase our output. The changes we made have significantly improved our management of published guidance, and the results are evident through our increased output. This can be shown by the Published Guidance Program’s output in FY 2007, where 45 percent more guidance was issued over FY 2006 and the output in FY 2008, where we kept pace with the FY 2007 output.

We also have become more timely in publishing guidance soon after the Congress enacts new legislation. A good example was in FY 2005, we succeeded in getting four major comprehensive sets of rules out to the tax community within weeks of passage of the American Jobs Creation Act of 2004. The law took effect on October 22, 2004 and all of the guidance—dealing with a new domestic manufacturing deduction, a tax break on foreign earnings brought back to the United States, new restrictions on deferred compensation plans, and tighter rules for abusive corporate tax shelters—was issued by mid-January 2005, warp-speed for the IRS and Treasury for these types of projects.

7. Do you have any regrets – things you wish you had been able to accomplish as Chief Counsel?

No matter how long one serves in this position—in my case, 1,711 days, but hey whose counting—there will always be things that you would like to do accomplish but for whatever reason, you are unable to do so. In my case, the list is pretty short. For one, I wish we had done a better job on the Roxworthy-Textron-Regions group of cases dealing with access by the IRS to tax accrual workpapers. We will see how that comes out, but closer attention should have been paid by everyone involved in those three cases since the impact on the IRS could be quite significant. I also wish that we could write simpler and more user-friendly regulations. I know that Clarissa Potter is interested in this too so hopefully over time that can happen. One of the things Rob Portman “promised” me when I came down to take this job was that after the 2004 election, I would be in a great position to work on what would become the Tax Reform Act of 2006, the most significant rewrite of the tax code since 1986. Obviously, the President went in a different direction—social security reform—and it never happened. Finally, I had hoped that we could take a look at the so-called “ex parte rules” instituted after the 1998 Restructuring Act legislation now that we

have about 10 years of experience to improve them because inside the IRS, and frankly outside the IRS as well, the concept of ex parte has been misunderstood to the point where the Appeals Officers have by in large shut themselves off from seeking legal help from our lawyers. This is not good for the system.

8. What will your role be at Sullivan & Cromwell LLP?

I will become part of the team at Sullivan & Cromwell LLP which will, in the words of Joe Shenker, the firm's Vice Chairman, "position us as best-in-class in the tax controversy area." Basically, our goal is to work together to develop one of the preeminent, international tax controversy practices. Of course, it goes without saying that it is quite an exciting opportunity for me to join such a talented group of tax lawyers and litigators. I will be resident in the firm's Washington office but those who know me well, know that I am not a "desk bound" lawyer, so I will be spending a lot of time in New York, London and other cities where Sullivan & Cromwell has offices. I couldn't be more pleased with the next step in my career.