

## Perhaps We *Should* Sweat The Small Stuff

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**Date :** December 21, 2021

Leigh Osofsky and Kathleen DeLaney Thomas, [The Surprising Significance of De Minimis Tax Rules](#), 78 **Wash & Lee L. Rev.** 773 (2021).

“Don’t sweat the small stuff” was one of my father’s favorite sayings. It’s the thought that has always come to my mind whenever thinking about, and teaching, de minimis rules in the tax code. De minimis rules keep the IRS from seeming petty, for example by allowing an employer that provides free bagels in the break room from having to report the bagels as income to its employees. De minimis rules also allow taxpayers to avoid complexity and hassle when the dollar amounts at stake are small, for example by permitting taxpayers to immediately deduct many small capital expenditures, rather than having to amortize or depreciate them over several years. In short, I have always thought of de minimis rules as making a hugely complicated tax system just a little easier to navigate, and perhaps just a little kinder. At worst, de minimis rules have always seemed fairly harmless — “the equivalent of rounding errors in the design of the tax law.” Reading *The Surprising Significance of De Minimis Tax Rules* by Leigh Osofsky and Kathleen DeLaney Thomas has forced me to rethink these long-held intuitions.

Osofsky and Thomas begin their analysis of de minimis tax rules with an overview and a typology of sorts. Functionally, some de minimis tax rules indeed eliminate taxpayer burdens and protect unsophisticated taxpayers from finding themselves ensnared in complexity. The IRS also benefits in these instances, by avoiding enforcement and other administrative costs. Other de minimis tax rules, however, are simply the result of rent-seeking behavior and benefit only sophisticated taxpayers pursuing complicated transactions. While de minimis tax rules can protect taxpayers from complexity, they also create complexity. And sometimes, de minimis tax rules that seem small turn out not to be so small after all, whether due to unintended consequences or interpretative choices that expand their scope.

One particularly interesting categorical observation by Osofsky and Thomas: although some de minimis tax rules come from Congress, others are adopted by Treasury and the IRS in rules and regulations. At least in some instances, these nonstatutory de minimis tax rules are simply the equivalent of administrative nonenforcement policies, albeit with more transparency. Yet, Osofsky and Thomas question whether Treasury and the IRS possess the authority to craft their own de minimis tax rules. For example, Osofsky and Thomas cite non-tax cases rejecting agency authority to adopt de minimis rules that undermine benefits provided by statutes. Osofsky and Thomas acknowledge that the benefits provided by the tax laws often may be less obvious than in some other regulatory contexts. But Osofsky and Thomas suggest that raising revenue itself is a form of public benefit that Treasury and the IRS undermine when they adopt nonstatutory de minimis tax rules. Of course, all agency enforcement officials must make choices regarding which cases to pursue, and a less transparent administrative nonenforcement policy could have the same effect as a de minimis tax rule, without the benefit of certainty that an authoritative rule or regulation provides. Regardless, contemplating more carefully the authority of Treasury and the IRS to adopt de minimis tax rules is worthwhile, especially given how often Congress revisits the tax laws. Perhaps if Treasury and the IRS believe a de minimis tax rule is warranted, they ought to suggest as much to Congress rather than adopting the rule themselves.

Finally, Osofsky and Thomas offer several suggestions for designing de minimis tax rules. For example,

having explained why de minimis tax rules are not costless, Osofsky and Thomas suggest such rules “should be the product of a careful weighing of costs and benefits.” Osofsky and Thomas also contend that Treasury and the IRS should contemplate the downsides as well as the upsides of adopting such rules in regulatory form, rather than merely exercising nonenforcement discretion in cases involving small dollar amounts. Regulations benefit from the public participation process, but enforcement discretion offers more flexibility for distinguishing subsets of taxpayers or transactions. In particular, Osofsky and Thomas suggest that Congress and Treasury should scrutinize with particular care de minimis tax rules that benefit sophisticated parties and may be the product of political lobbying. Osofsky and Thomas also suggest indexing de minimis tax rules for inflation.

In summary, *The Surprising Significance of De Minimis Tax Rules* carefully examines, and calls into question, a practice that I suspect most tax professors and policymakers take for granted. Osofsky and Thomas do not argue that we should get rid of all de minimis tax rules. But Osofsky and Thomas demonstrate very effectively that we need to pay more attention to de minimis tax rules and not think of them merely as “the small stuff.”

Cite as: Kristin Hickman, *Perhaps We Should Sweat The Small Stuff*, JOTWELL (December 21, 2021) (reviewing Leigh Osofsky and Kathleen DeLaney Thomas, *The Surprising Significance of De Minimis Tax Rules*, 78 **Wash & Lee L. Rev.** 773 (2021)), <https://tax.jotwell.com/perhaps-we-should-sweat-the-small-stuff/>.