The Upside of Investigating Taxpayers' Approaches to the Downside Risks of Tax Law Change

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Heather M. Field, Tax MACs: A Study of M&A Termination Rights Triggered by Material Adverse Changes in Law, 73 **The Tax Lawyer** 823 (2020).

Heather M. Field's *Tax MACs: A Study of M&A Termination Rights Triggered by Material Adverse Changes in Law* presents information and insights about tax-specific material adverse change provisions in publicly filed mergers and acquisitions (M&A) agreements from May 2014–May 2019. Field identified and primarily focused on 13 agreements with "Tax MAC Out" provisions, meaning that these agreements provided an exit right that could be exercised unilaterally because of adverse tax law changes. Field also located 6 agreements that contained express Tax MAC provisions but that did not provide a unilateral ability to exit; most in this group were in the form of requiring the parties to work to address the tax change through restructuring, with termination expressly *not* following from an inability to complete such restructuring.

The article highlights the bespoke nature of Tax MAC provisions; while Field found that some boilerplate language recurred, there were also substantial differences among the agreements, and the article suggests explanations for the variability, tied to specific instances of difference. As Field notes, the heterogeneity suggests ample "opportunities for nuanced bargaining and value-added lawyering."

The small number of agreements (dictated by the realities of public filings) means that the article's qualitative analysis is heavily dependent on the particular transactions and parties (and their legal counsel). But this does not make the article overly narrow; rather, the agreements provide a foundation from which Field is able to reach several audiences, and those audiences will be able to use Field's information and analysis to engage productively and creatively within their respective areas of tax interest. This reach makes the article much more than a wonderfully clear description (which it also is) of what Field uncovered in this group of M&A agreements.

First, the article will undoubtedly be instructive to taxpayers and their counsel, and this is the primary audience identified by Field: "[T]his Article provides insights into both strategies for empowering taxpayers to proceed with desirable transactions that might otherwise by stymied by uncertainty about possible future tax reforms and deal-making practices when tax laws may change." At a practical level, taxpayers could use the article to develop tax-change risk-assessment procedures, including checklists for assessing the completeness of proposed agreement terms.

For example, Field highlights how the agreements vary in how they define "tax law," from those that are highly detailed—containing some evidence of discussion and thought about how to handle IRS notices, proposed regulations, and similar early stage or informal "law"—to those that contain no specific definition, thereby requiring reliance on a general, potentially inadequate, definition of "law." The agreements also were highly varied with respect to identifying whether a particular confidence level about the effects of a tax law change would be required to trigger the Tax MAC Out. This is particularly surprising, as Field notes, given the availability of a framework (albeit one subject to critique) for expressing levels of confidence (e.g., substantial authority, more likely than not) in tax opinion letters. Further, some of the agreements contained both a Tax MAC Out and a requirement for a tax opinion letter as a condition to closing. These and other examples highlighted by Field suggest areas where attorneys in advising taxpayers may need to take additional care in ensuring the tax provisions of the agreement function as intended when taking into account the entirety of the deal agreement and the larger context of tax practice.

Second, the article could be used not only to assist taxpayers and their counsel but also could be used in the classroom to facilitate the type of excellent, research-based tax teaching that Field has championed elsewhere (e.g., Heather M. Field, *A Tax Professor's Guide to Formative Assessment*, 22 **Fla. Tax Rev.** 363 (2019), available at SSRN). While tax LL.M. programs, including the one at which I teach, rely on a cadre of practitioners to provide practical, cutting-edge tools and examples for students who need to learn how to think like a *tax* lawyer, it is also critical that the courses taught by those of us many years out from practice draw on real-world, current examples that are accessible to students—and professors.

For those teaching classes on business entity tax (especially tax aspects of M&A) or on tax planning more generally, Field's article and the agreements listed in its appendices could be used as the backbone of a module to facilitate student learning about the different types of tax authorities, the impact of mid-deal changes in these authorities, the inherent difficulties in handling tax uncertainty and tax risk, and the intersection of tax uncertainty and tax risk with other types of deal uncertainties and risks—and then how to weigh all of that in advising clients.

Third, this article could be used to inform and suggest new avenues of tax scholarship. Field has, for example, used the Tax MAC research to inform portions of a second, companion article about the use of private contracts to manage tax transition risk (Heather M. Field, *Allocating Tax Transition Risk*, 73 **Tax L. Rev.** __ (forthcoming 2020), available at SSRN). The agreements gathered by Field might also provide insight into how taxpayers and their attorneys weigh the differences among proposed, temporary, and final (but unpopular) regulations, which could inform theorizing about administrative guidance.

The tax changes that worry taxpayers, as evidenced by these agreements, could suggest new approaches to anti-tax avoidance policies, standards, or rules (which also suggests a fourth audience: government actors charged with issuing guidance and enforcing tax law, a possibility Field touches on in her companion article). The variance among the agreements could prove useful in considering whether there is equitable access to understanding (and exploiting) the complexity inherent in the tax system.

Field's method provides a useful roadmap for advancing tax research grounded in taxpayers' revealed preferences. To be sure, Field is not the first to consult public filings in tax scholarship, but it is a reminder that there is a considerable opportunity to advance tax scholarship by using this approach.

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