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Q&A With Mayer Brown's Paul DiSangro

Law360, New York (February 13, 2014, 4:48 PM ET) -- Paul DiSangro is a tax adviser in Mayer Brown's Palo Alto, Calif., office. As a counselor and litigator, DiSangro regularly represents clients in the course of complex Internal Revenue Service audits and appeals and tax litigation. He also provides authoritative guidance concerning international tax issues and considerations relative to transfer pricing.

DiSangro also advises clients on a broad range of international, federal and state tax planning. He advises on cross-border issues including taxation under subpart F, transfer pricing and the movement and licensing of intangible property. He also regularly advises on mergers & acquisitions and outbound and inbound investment into the United States.

Q: What is the most interesting or challenging tax problem you've worked on to date?

A: My most interesting and challenging tax case was defending a company's tax treatment of a cross-border M&A transaction. The IRS did not like the highly beneficial tax treatment that a particular code provision bestowed in the context of this particular transaction. (It's worth noting that when the same code provision had worked against a taxpayer's interest under different circumstances, the IRS enforced it, even against hapless family farmers. Congress eventually rewrote the provision.)

During audit and in administrative appeals, the IRS stamped the transaction as a form of tax shelter, which made it virtually impossible to resolve administratively. In tax court, IRS counsel took a more surgical approach and asked the judge to disregard the parts of the transaction that were critical to the beneficial tax treatment as lacking in business purpose and economic substance. We were able to show through documents and witness testimony that there were substantial business purposes for and economic substance to each part of the transaction. The tax court rightly declined to stretch the judicial doctrines of economic substance and business purpose to undo legitimate tax planning in the context of a business acquisition. The IRS appealed the decision, but we successfully defended the tax court victory in the Ninth Circuit. (Flextronics America LLC v. Comm'r, T.C. Memo 2010-245, aff'd, 499 Fed. Appx. 725 (9th Cir. 2012).)

Q: Currently, what is a pressing tax concern for your clients, and how are you addressing it?

A: A pressing tax concern for our clients is defending the tax benefit that comes from producing in the United States. As part of the American Jobs Creation Act, Congress reduced the corporate tax rate by three percentage points on income from domestic production — the idea is to incentivize companies to keep and grow jobs in the United States. One would expect the IRS to audit the amount of the benefit, and I support that important examination process, but we are currently handling five matters in which the IRS is seeking a complete disallowance of the benefit.

The IRS's theories for denying the tax benefit vary depending on the industry, but the results sought by the IRS are clearly not what Congress intended. For example, in one of our cases, the taxpayer employs hundreds of software engineers in the U.S. that create a software product that many consumers enjoy. The IRS is bothered by the fact that a part of the software runs online and therefore questions whether it should be treated as licensed software that generates the benefit. But what software doesn't run at least in part online these days? These are among the most sophisticated software engineering jobs in the world, and we want to keep and grow them in the United States.

The fact is that our clients create tens of thousands of high-paying jobs in the United States, and are entitled to take this tax benefit. We are currently defending these matters vigorously both in audit and administrative appeals. We are also working cooperatively with the IRS national office on rulings that would bring more certainty to taxpayers on this issue.

Q: What do you anticipate being the biggest regulatory challenge in your practice in the coming year and why?

A: The corporate tax community is abuzz about the Organization for Economic Cooperation and Development's project to change the laws of international taxation among nations. The project's name is Base Erosion and Profit Shifting ("BEPS"). As the name suggests, the project arose out of concern by lawmakers in the U.S., U.K. and other nations that multinationals are shifting profits from higher-tax jurisdictions to low- or no-tax jurisdictions through such means as intellectual property migration, and that the rise of the digital economy is facilitating this practice. In July of 2013, the project proposed 15 major changes to international tax rules to be implemented by participating countries over the next three years.

I believe the corporate tax community accepts that changes to nations' international tax laws are inevitable as the world economy evolves. The concern, however, is whether the changes will result in more than one nation seeking to tax the same income (i.e., double taxation). For example, a nation with a large consumer market may take a different view about where value is created than a nation with a large, low-cost labor market. The challenge for us as tax advisers is to anticipate the likely changes, assess the impact on our clients, and plan for flexibility as the landscape changes in ways that are not entirely clear at this time.

Q: Outside of your own firm, who is an attorney in your practice area whom you admire, and what is the story of how s/he impressed you?

A: I have been extremely impressed with Amy Silverstein and Ed Antolin at the law firm of Silverstein & Pomerantz LLP. By building coalitions of clients, they have bravely challenged state tax laws that others have not touched like the validity of California's minimum tax on LLCs. More recently, they won a watershed victory in the Gillette case against the state of California.

California, along with approximately 20 other states, had been members of a multistate tax compact that provided a uniform way of allocating taxable income among member states. California had amended its tax laws over the years in ways that were inconsistent with the terms of the compact. Amy and Ed defended the taxpayers' rights to be taxed in accordance with the terms of the compact. This case has reverberated across other states and is being closely watched on appeal.

What impresses me about Amy and Ed is their ability to spot instances of governmental overreaching, apply highly sophisticated legal arguments that extend to analogous areas of state, federal and international law, and tenaciously pursue a remedy. They do this consistently, even when the amounts at issue on an individual basis have been too small to attract attention. It is rare to see such a successful melding of private practice and public watchdog roles, and I find their work commendable.

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