New York University School of Law

International Tax II

Professor Victor Zonana

General Information and Syllabus

REQUIRED MATERIALS


INTERNAL REVENUE CODE (latest edition)

INCOME TAX REGULATIONS (latest edition)

STRONGLY RECOMMENDED

Boris I. Bittker and Lawrence Lokken, FUNDAMENTALS OF INTERNATIONAL TAXATION (Student edition, Thomson Reuters, 2010-11)

OBJECTIVES

The aim of this course is to gain an understanding of some of the principal US tax rules that apply to investment and business activity of US persons outside the United States (so-called “outbound taxation”). It is the second of a trilogy of courses that focus on the US tax rules that apply to international activities. The first course (International Tax I) addresses “inbound taxation”, i.e., the rules that apply to foreign persons who conduct activities in the United States. The third course (International Tax III) focuses on the other principal US tax rules that apply to investment and business activity of US persons abroad, principally the controlled foreign corporations (“CFC”) rules and the dreaded passive foreign investment company (“PFIC”) rules. This course also delves into the issues that arise from cross-border corporate transactions including acquisitions and reorganizations.

We will review initially the basic legal and economic principles that are the foundation of the US international tax rules and focus briefly on possible approaches to structure the tax system to provide relief for potential double taxation and the policy implications of such approaches. We thus contrast a tax system such as ours, which provides for a limited tax credit for foreign taxes, with the approach of certain other countries, which provide for partial or total exemption of foreign earnings.

After this brief tour d’horizon, we will plunge into the principal part of the course – the foreign tax credit. We will begin with an overview of the foreign tax credit rules and recurring general principles that underlie the application of the rules and then turn our
attention to certain procedural and timing aspects. We then consider two critical issues – (1) who is eligible to claim a credit for foreign taxes and (2) what foreign taxes qualify as taxes that may be credited against a taxpayer’s US tax liability.

We will then address the limitations that are imposed on a taxpayer’s ability to use a foreign tax credit (the “section 904 limitations”). There is a general limitation and a complex regime designed to discourage cross-crediting of foreign taxes imposed on various categories of income (the “section 904 basket limitations”). Mercifully the basket limitations have been simplified going forward but we will spend a bit of time on the old rules that still have relevance today.

The limitations on the use of a credit for foreign taxes are a function of the taxpayer’s foreign source taxable income and its worldwide taxable income. The determination of taxable income obviously takes into account deductions. This requires us to apply a number of technical rules (principally reflected in lengthy regulations) to allocate deductible expenses among classes of income and to apportion those expenses between US and foreign source income. There are a number of specific rules that govern the allocation and apportionment of expenses. We will focus on but a few with the most important being the interest expense – an issue that is critical to most multinational enterprises.

We then return to the foreign tax credit rules with an analysis of the so-called “deemed-paid credit” – the ability of a parent corporation to claim a credit against its US tax liability on account of the foreign taxes paid by a foreign corporation from which it receives a distribution. We wrap up our consideration of the foreign tax credit with a close review of the issues arising in attempts by taxpayers to enhance their ability to claim foreign tax credits and the Government’s efforts to thwart what are deemed abusive transactions.

The next major part of the course is essentially a survey of the principal rules and recent cases that address the ability to shift income from a high tax jurisdiction to a low (or no tax) jurisdiction. We will concentrate on the issues that arise principally with regard to the development and exploitation of intangibles and consider specifically the Obama Administration proposals to tax currently “excess returns” associated with transfers of intangibles offshore and to limit the shifting of income through intangible property transfers.

Finally, to set the stage for the topics addressed in International Tax III, we will spend a bit of time on the classification of enterprises – the “check-the-box” regulations and consider the ways in which these rules have been used to benefit taxpayers.

**APPROACH**

The Syllabus (attached) sets out the assigned readings in the required materials. I have also set out the relevant sections in the Bittker & Lokken (“B&L”) treatise that you will find useful to supplement the materials in Steines. There will be additional required and suggested readings for each of the topics. Some of the additional readings will be focused on tax policy issues – it is important that you grasp early on the foundations of international taxation and the policies that underlie the rules that we will be studying.
Other readings will focus on recent legislative, regulatory and judicial developments. The readings will be posted on a weekly basis on Blackboard. You should be checking Blackboard regularly for additional messages, changes in the syllabus, and questions to consider for the following session of the class, etc.

Many students find it useful to refer to leading treatises or study aids to deepen their understanding of what at times will appear to be most complex statutory provisions. In addition to the strongly recommended Bittker and Lokken treatise, which can be purchased at the Bookstore, you may wish to consult the following (available in the Library):


We will follow the traditional problem-method approach for dissecting the relevant materials. It is important to have read and digested the assigned materials and to have prepared answers to the problems before coming to class. Your participation in the discussions is extremely important. I generally call on students in the class to initiate and move along the discussion of a problem. I will be looking for both rigorous technical analysis and demonstration that we have considered the relevant policy issues.

**EVALUATION**

There will be an open-book, three-hour final examination at the end of the semester. The class meets on Thursdays from 6:00 to 8:50 p.m. I will be posting office hours shortly and I will be available generally in my office (Room 615 Wilf Hall). I can be reached by e-mail at victor.zonana@nyu.edu and by telephone at (212) 998-6217 or at (917) 833-0035 (cell).
SYLLABUS
(as of August 17, 2010, subject to updating)

September 2  Introduction and Overview
Procedural and Timing Issues

Steines, II.A.1 and 2
Bittker & Lokken (“B&L”) 72.1, 72.2, 72.14, 72.15 and 72.16

Problem 12

September 9 and 16  Eligibility and Creditable Taxes

Steines, II.B.
B&L  72.3, 72.4 (but skim only 72.4.6A), 72.5 (omit 72.5.3)

Problem 13

September 23, 30
and October 7  Section 904 Limitations
General

Steines, II.C.1
B&L  72.6

Problem 14

Basket Limitations

Steines, II.C.2
B&L  72.7 and 72.8

Problem 15

October 14 and 21  Allocation of Expenses

Steines, III.
B&L  73.10

Problem (to be distributed)

October 28  Section 902 Deemed-Paid Credit

Steines, II.D.
B&L  72.9

Problem 16
November 4 and 11  Foreign Tax Credit Planning

Steines, II.E.
B&L  72.5.3

*Problem (to be distributed)*

November 18 and December 2  Transfer Pricing

Steines, IV.
B&L  79.1, 79.3, 79.8 (skim 79.8.6), 79.8, 79.8A, 79.9, 79.10, 79.15

*Problem (to be distributed)*

December 9  Entity Classification

Steines, V.
B&L  65.3 (skip 65.3.3 and .4)

*Problem (to be distributed)*