

Q&A With Morgan Lewis' Kenneth Kail

Law360, New York (December 17, 2013, 10:44 AM ET) -- Kenneth Kail is a partner in Morgan Lewis & Bockius LLP's New York office as part of the firm's tax practice. His practice involves transactional tax planning for federal and international tax matters.

Kail has a broad-based practice in corporate tax matters (including stock and asset acquisitions, reorganizations, spinoffs, venture acquisitions, incorporations, shareholder and intercorporate redemptions, liquidations and earnings and profits), investments, securities offerings, U.S. activities of foreign taxpayers (including branch tax, foreign investment in U.S. real property, earnings stripping, transfer pricing, withholding and treaties), foreign activities of U.S. taxpayers (including offshore joint ventures, controlled foreign corporations, foreign personal holding companies, passive foreign investment companies and foreign tax credits), executive compensation and employee share bonus arrangements (including stock options and stock purchase plans), corporation deductions, charitable organizations and controversy work.

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

A: Coming up with the most interesting or challenging tax problem over a 33-year career is not an easy task. Often a project is interesting and challenging because the client or corporate partner presents a structural problem and, after a bit of thought, an eloquent solution is determined.

I recall a complicated on-shoring of a complex foreign holding structure that raised the potential of foreign personal holding company ("FPHC") and controlled foreign corporate ("CFC") problems while an associate at a prior firm, where I orchestrated a team of about 10 other associates to research different aspects of the proposed solution, and then presented the proposal to the entire tax partnership at the firm. It was interesting and challenging because of the complexity and the risk involved.

During the past year, I worked on the combination of two large public companies, among about 60 other transactions. What made this transaction interesting and challenging was having to navigate a difficult, intertwined corporate structure while preserving one of the company's net operating losses so that they could be used to offset the operating income of the other company. What I enjoy most about being a tax lawyer is being presented with a challenging problem, and coming up with a great solution.

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

A: Client worries seem to be most focused on the foreign side of U.S. tax law. Thus, avoiding or minimizing the application of Foreign Investment in Real Property Tax Act ("FIRPTA") and passive foreign investment company ("PFIC") status, as well as minimizing the consequences of the CFC rules

seem to be a particular focus. There is no single answer to a particular problem, but there usually is a path to an improved result.

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

A: The biggest regulatory challenge is always one which is new, complex and not yet implemented to any great degree. Thus, the leading candidate is, the Foreign Account Tax Compliance Act rules. The focus has been on trying to understand, figure out how to implement and attempt to delay the inevitable as much as possible.

Q: Outside 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: This story goes back 25 to 30 years ago when I was a mid-level associate, but it stuck with me and guides how I practice tax law today. I was negotiating a stock sale agreement against Michael Schler, a tax partner at Cravath Swaine & Moore LLP, who remains a tax partner at Cravath. What impressed me in the negotiation was that he focused on the larger points, not worrying about the small or irrelevant, with the goal of reaching a reasonable result.

Interestingly, about 15 years ago we had sent a junior associate to negotiate the tax gross-up provisions in a credit agreement, prior to LSTA bringing some uniformity to the terms. Cravath was the lender's counsel and we expected that she would be negotiating with a junior associate. She reported back that she spent 90 minutes negotiating the tax gross-up provisions with Michael Schler who eventually conceded every point — no doubt because time is too short, and it wasn't worth the battle. I later asked him about it, and he said that he had to do it because they had no associates.

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