

The 6th Edition of B&E: Keeping Pace with the Code, Congress and the Courts

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Robert H. Wellen, a partner in the Washington, D.C., law firm of Ivins, Phillips & Barker, reviews the recently published Federal Taxation of Corporations and Shareholders, Sixth Edition, by Boris I. Bittker and James S. Eustice (Warren Gorham Lamont, 1994), \$185, supplemented three times per year. Mr. Wellen is former chair of the Corporate Tax Committee of the ABA Section of Taxation and is the supervising editor of the Tax Section Newsletter. As a law student, he worked as a research assistant on the third edition of B&E.

In a recent interview,¹ Professor Boris Bittker described the early history of what was to become the B&E treatise on corporate tax. During the 1950s, he began preparing a series of background papers for students in his corporate tax class at the Yale Law School. His idea was to develop a method of teaching taxation that relied less on case law and more on a careful reading of the Code and Regulations and on analysis of the structure of corporate transactions. The background papers were intended to provide an overall discussion of corporate tax rules and transactions, so that students would not become bogged down. Amazingly, when these papers were first published as a book in 1959 (again, mainly to aid students), Professor Bittker himself paid the publication costs.

In 1966, for a second edition, Professor Bittker enlisted the

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help of Professor James Eustice of the New York University School of Law, and B&E got its name. New editions of B&E have appeared at seven-to-eight-year intervals ever since. The sixth edition was published earlier this year.

Like the corporate tax law itself, successive editions of B&E have grown longer and more complex. For an increasing number of subjects, the footnotes have become longer than the text. Through all the time and changes, however, B&E has continued to appeal both to students looking for an overview and to practitioners looking for answers to particular questions. B&E is one of very few tax commentaries with authoritative stature—a citation to B&E is often at least as persuasive as a citation to a case or Revenue Ruling. Overall, many tax practitioners consider B&E to be the finest treatise available in any area of the tax law.

In the sixth edition, a new name appears on the title page for the first time since 1966. Jasper L. ("Jack") Cummings, Jr., the "collaborator" on the sixth edition, studied with Professor Bittker at Yale and then with Professor Eustice at NYU. Jack practices and teaches tax law in North Carolina, and he has published pieces on a variety of federal tax subjects, including corporate tax areas. Professors Bittker and Eustice, however, are still much in evidence. Their writing style and concept for this treatise are unmistakable. In other words, B&E is still B&E.

The sixth edition of B&E is about one-third longer than the fifth (excluding that edition's supplemental volume). The sixth edition incorporates changes in the law, while preserving the thorough treatment of fundamental concepts like "control immediately after" (under Sections 351 and 368(a)(1)(D)) and "continuity of proprietary interest" in corporate reorganizations. The sixth edition, however, is more than an update of earlier editions. Organization has been upgraded, and a good portion of the text has been rewritten with modern tax practice in mind. Even the format has been rethought.

Thus, the latest B&E is more user friendly than earlier editions have been. The binder is now expandable, and revisions can be added to the book itself. The package is an armful, but everything is in one place. Finding what you need is also simpler than in earlier editions. There is a complete table of contents, including subparagraphs. If that does not locate your subject, you can use the expanded subject matter index or the complete tables of authorities. (The tables would be even more useful if they indicated where the main discussion of each authority appears. A table of articles and other secondary sources also would be useful.) The sixth edition has twice as many footnotes as the fifth, largely because of more precise targeting of the footnotes. In the same vein, sections have been divided into a larger number of more specific subsections. Finally, in a surprisingly important improvement, each mention of an authority

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has a full citation. There are no more cross references to negotiate.

As with past editions, the sixth edition of B&E continues to be organized by subject matter. For example, Section 351 issues are discussed in Chapter 3, regardless of whether the transaction is an incorporation of a new business, a formation of a holding company, or a National Starch acquisition. There is no general attempt at the kind of transactional organization and analysis that we see in some other treatises.² Transactional analysis can provide a shortcut for practitioners, and it may also highlight new issues or tools. For example, a transaction-based discussion of corporate acquisitions would include the use of partnerships as acquisition vehicles, along with areas such as Section 338 and the reorganization provisions.

Subject matter analysis has advantages, however. It is more methodical, and it more readily accommodates historical discussion of how the law became the way it is. Consequently, subject matter analysis is the best way to provide an overview to those who do not work regularly with a subject. B&E always has been strong in the history department, and the sixth edition continues this strength. Sometimes the historical aspect can be overdone. For example, in the discussion of dividends in kind, three pages of text and ten footnotes on General Utilities appear before mention of the fundamental point that the General Utilities doctrine has been repealed. Still, once this point is made, the discussion proceeds with clarity and thoroughness.

For more advanced readers, the B&E subject matter analysis is useful because it lends itself to a comprehensive treatment. For the past month or two, I have made it a point to use B&E to research issues that have come up in my practice. Even if my precise issue is not discussed, the critical citations are always where they belong, and the new format makes them easier than ever to find.

For subject matter analysis to work, the authors must have perspective and judgment, and they must be selective. Otherwise, readers end up with a lot of rules and citations and with little guidance as to what the important authorities are and what they mean. Perspective is especially crucial in a treatise intended for a wide audience that includes students, teachers, and both neophyte and advanced practitioners. Nothing beats B&E for perspective. The subject matter discussions are good on both theory and practical guidance. The treatment of dividend strip acquisitions is a good example of this-citing all the relevant authorities,³ but focusing attention on Waterman Steamship and, to a lesser extent, on Litton Industries, TSN Liquidating, and Basic, Inc. This emphasis is just right. Another good example is the discussion of mirror transactions and the infamous "loss disallowance rule" in the consolidated return Regulations.

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Although the loss disallowance rule itself is not discussed in detail, a reader of this section will understand why the rule is there and some of the planning problems it poses.

In all of Subchapter C, the hottest spot currently is Section 355. Spinoffs have always been difficult, and in recent years they have become increasingly important and even more difficult. Since the earliest editions, B&E has covered this area in a way that unravels the rules and makes their purposes, and the relationships among them, as clear as can be. In the sixth edition, the authors seem to have decided to stay with a conceptual approach to Section 355, and not to focus primary attention on the special Section 355 concerns that practitioners face in the 1990s. The discussion of "business purpose" is brief, and it does not make clear how difficult this requirement is to satisfy, at least in an advance ruling setting. All the relevant authorities are cited, however, as are a wide variety of secondary sources. An inquisitive reader will have no trouble studying "business purpose" in greater depth. Similarly, the authors make clear that, as now interpreted, Section 355 focuses more on the treatment of the distributing corporation and less on the shareholders, but the discussion of spinoffs to break up subsidiaries and of new Section 355(d) is more like a warning buoy than an exploratory voyage. For example, the difficult concept of "purchase" under Section 355(d) still needs rigorous analysis in the B&E style.

Along with hardcore Subchapter C material, B&E includes substantial discussions of related areas, such as consolidated returns, foreign corporations, S corporations, original issue discount, and Section 482. These subjects have full treatises on their own. As expected, the discussions of these subjects in B&E are useful as orientations into difficult and intricate parts of the tax law. Much expanded in the sixth edition, these discussions are surprisingly detailed, even though they are not so definitive as the Subchapter C discussions.⁴ The new section on "financially distressed S corporations" is a real contribution. In fact, the authors should consider consolidating and expanding all the discussions of corporate bankruptcy and workouts. An integrated treatment of the rules governing corporate workouts—such as Section 108, the G reorganization rules, and the Cottage Savings case—would be a great service (maybe the seventh edition will move that mountain). Another particularly useful section is the discussion of international aspects of Section 338. The current Regulations in this area are simpler than the earlier Temporary Regulations, but intricacies remain. B&E gets right to the planning aspects of these rules. The discussion in B&E is bound to improve the comfort level of practitioners structuring acquisitions that involve foreign subsidiaries.

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There isn't any doubt that you need the sixth edition of B&E. It is unique in its coverage, and there is no treatise that orients a reader to the relevant issues and policies in its area so comprehensively and successfully. In many situations, B&E will continue to be the only secondary source you will need. In many others it will get you started, even if it will not get you finished. Overall, it is indispensable for practitioners, and probably for students and teachers too.

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See Olchyk and Hanna, "Interview With Professor Boris I. Bittker,"

2

There are elements of transactional analysis, though. For example, the new Section 338 consistency Regulations are discussed as part of an overall discussion of mirror transactions. Even this analysis, however, is historical.

3

Uniroyal, Inc., TCMemo 1993-214 , RIA TC Memo 93214 , is too recent to be cited. This case may alter some of the conclusions in the text.

4

The chapter on foreign corporations is the second longest chapter in the book (197 pages, 785 footnotes). Still, it has limitations, and the authors note them clearly and sometimes colorfully. For example, the following disclaimer, at page 15-97, relates to the 1992 Temporary Regulations on passive foreign investment companies: "Coverage of this gargantuan corpus of regulatory hyperlexis will have to await the efforts of more relevant publications; they are so far beyond the scope of this work as to have achieved extraterrestrial orbit."

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