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**SUMMARY:**

Jasper L. Cummings, Jr. and Robert P. Hanson, American Jobs Creation Act of 2004 -  
- A Selective Analysis. Warren Gorham & Lamont (2005). c. 324 pages. \$ 295.

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Enactment of the American Jobs Creation Act of 2004 (P.L. 108- 357) is an important event in the history of our tax system. Even though it began with a specific political problem, the Jobs Act speaks to a number of current problems in the income tax and larger economic policy concerns as well.

The Jobs Act had its origin in the geopolitical need to repeal the exemption for extraterritorial income (ETI) that the World Trade Organization had found objectionable. Congress believed it needed to spend the revenue that a repeal alone would have raised and spent this revenue mainly by adding a special deduction for domestic production activities, allowing one-shot repatriation of foreign income at reduced tax rates and reforming the foreign tax credit over a long phase-in period to make it more available (but certainly not simpler). The act also makes other reform-type changes to the system of deferral of tax on foreign income. Each of those changes (even the ETI repeal itself) is a highly complex piece of statutory machinery.

The act includes other important business tax changes too. Most notably, it expands the administrative rules to combat tax shelters. Those rules include disclosure requirements and penalties for anyone connected with anything shelter-like. The act has already changed how lawyers and accountants relate to their clients, with disclosures of transactions to the government, maintenance of

documentation on transactions in case the government wishes to see it and, of course, disclaimers lest a client rely on tax advice.

Aside from administrative attacks on shelters, the act adds a number of substantive rules to block particular shelter-like transactions, including transfers of tax benefits through leasing (such as sale-in, lease-out transactions (SILOs)), corporate expatriations (often referred to as inversions) to take expected future foreign income out of the U.S. tax jurisdiction, and use of the corporate tax rules to import built-in losses (both real losses incurred abroad, as in the General Electric case under section 482,/1/ and artificial losses like those dealt with in the Long Term Capital and Santa Monica/2/ cases) into the U.S. tax system and the "duplication" of a single economic loss to create more than one tax deduction.

All that adds up to major tax legislation from the perspective of business people and the economy, but for tax advisers in particular. The act affects day-to-day business transactions and accounting, as well as tax shelter exotica -- which brings us to the book reviewed here.

Jack Cummings and Rob Hanson both have the qualifications to analyze the Jobs Act in context. Cummings has served as IRS associate chief counsel (corporate), and Hanson has served on the Senate Finance Committee staff and later as tax legislative counsel at the Treasury Department. Both were in government while the ideas that led to the Jobs Act were being developed. Also, both of them have substantial experience in private practice (Hanson as my partner for a while, incidentally), and both have written and lectured extensively on business tax matters.

Their experience is reflected in this book. Time spent reading it will jump-start anyone's understanding of the Jobs Act itself and how it fits into business income tax as it stands in the early third millennium.

Assimilating new tax legislation into tax planning is always a struggle. We have to unlearn old habits, become familiar with new concepts, and incorporate them into transactions and business practices. We also have to be wary of misconceptions about the new rules -- usually the belief that legislation affects only situations at which it was supposed to be aimed. The transition is scary, and expensive mistakes become more likely than usual.

In the aftermath of new tax legislation, our resources are limited. Of course, we have the legislation itself and brief descriptions in the congressional committee reports. Occasionally we get an explanation (commonly known as a Bluebook) from the Joint Committee staff. In fact, the Joint Committee staff has published a Blue Book that includes the Jobs Act. Also, with astonishing speed, publishers (including Tax Analysts and the publisher of

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this book) compile the old and new legislative language, the corresponding committee report language, and brief descriptions of the new rules, with indexes and cross-references. Sometimes accounting firms and law firms (including my own firm) produce books or pamphlets with more description, but speed is usually the paramount concern, and the analysis is limited and uneven. Then comes the wait for official guidance and ultimately regulations. In the meantime, we have to be content with piecemeal articles, outlines, CLE-CPE programs, comments from bar associations and other professional groups, and speeches by IRS and Treasury folks.

For the Jobs Act, this book changes all that. The authors have given us more than the modest title suggests. The book does indeed include a "selective analysis" to help us untangle the fierce technicalities of the act. But the analysis is "selective" only in the sense that it covers only the corporate, international, and partnership provisions of the act (and not, for example, the subchapter S, investment company, and deferred compensation provisions). The authors have compiled detailed descriptions of the business-related provisions of the Jobs Act, but they have also dug deeper, with strong analysis of those provisions, including their ambiguities and their practical effects in many situations -- some of those effects intended and some probably not.

To me, the authors' discussions of the domestic production activities deduction, the dividend received deduction for repatriations of foreign earnings, the corporate tax rules on loss importation and loss duplication, and the corporate inversion rules are especially helpful. Those chapters will be mainly of interest to students of those parts of the tax law. Even for those people (and you know who you are), the analysis is dense and technical and so is best absorbed in small, therapeutic doses. Even the organization of the book reflects that density of analysis. Only in a book on the Jobs Act would the domestic production activities deduction be discussed in an international tax reform chapter (it is a substitute for the ETI exemption, after all), and would inversions be discussed in the chapter on tax shelters.

The chapter on the domestic production activities deduction discusses a number of the issues that arise whenever income from one type of activity is singled out for special treatment. The problems are compounded here because, to compute the deduction, income from the selected activities, related deductions, and related wages all have to be isolated. Apart from line-of-business accounting issues, there are special rules to deal with passthrough entities, related taxpayers and groups that are partially domestic and partially foreign, and the like. The authors march through those issues and predict, persuasively, that this deduction will be a huge administrative problem. Their discussion of the alleged double-dipping problem raised by contract manufacturing is a hint of issues to come. If ever one piece of legislation could perk up a troubled tax accounting profession, the Jobs Act is it. The only obvious omission in this chapter is the hot-button issue of when developing computer software is a qualifying activity.

Like the domestic production activities deduction, the one-time 85 percent deduction for repatriation dividends is supposed to promote investment in the U.S. instead of abroad. The authors point out that, while making the dividend is fairly simple, the rule to encourage investment of the dividend proceeds in the United States (the "dividend investment plan" rule) is a "toothless tiger." They explain why that is so in embarrassing detail.

The corporate loss importation and loss duplication rules are, of course, antishelter provisions. They will not affect day-to-day operations like the domestic production entities deduction. Nor are they as spectacular in immediate impact as the deduction for repatriated dividends. But the authors give them a thorough going-over, and rightly so. Both of those rules apply if the basis of property transferred in certain types of carryover-basis transactions is greater than its value. So appraisal becomes the order of the day -- especially because, as the authors point out, there can be a dramatic difference between \$ 1 of built-in gain and \$ 1 net of built-in loss, and the transfer itself can affect the value of the transferred property, as in Pope & Talbot v.

Commissioner, 104 T.C. 574, Doc 95-4591, 95 TNT 90-8 (1995) aff'd 162 F.3d 1236 Doc 1999-1823, 1999 TNT 8-4 (9th Cir. 1999).

The authors also explain that the inversion rules are aimed at U.S. companies with foreign operations that move abroad and place the U.S. operations in a brother-sister relationship (instead of a parent-subsidary relationship) with the foreign operations. The goal is to eliminate U.S. tax on future income from foreign operations by placing them in foreign entities that are not controlled foreign corporations. Rules to identify those transactions and prevent them from working proved to be very complex. Again, the authors give us a tour, which includes an explanation of the "60 percent rule," the "80 percent rule," how the rules are put together with the step transaction doctrine and the extensive regulation authority granted to Treasury. They also point out that the rules could apply to a simple outbound move by a U.S. subsidiary.

The chapter on the tax shelter disclosure and penalty rules is an excellent survey and should be read carefully by all tax advisers, both in-house and outside. A quick read through that material might be a good idea for corporate and other business lawyers, financial accountants, bankers, and financial advisers too. The four-page summary of penalties under the Jobs Act is especially helpful, if not sobering.

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But there is more. The book also provides the authors' thoughts on the historical and political context of the Jobs Act. Included are interesting and timely discussions of the prospects for fundamental tax reform (tactfully without quotation marks) and of the state of case law under the economic substance doctrine (not codified in the Act) and related tax shelter issues. The authors do not hesitate to tell us their views on how those areas of tax policy are likely to develop and how they should develop.

Of course, those discussions in the book are very much of their time. In a year or so, the authors may look either prophetic or misguided -- probably some of each. For now, though, those parts of the book raise the whole effort to a higher level than we generally see in discussions of new tax legislation. Even long after we have studied the new Jobs Act provisions and learned to apply them in practice, this book will still be of interest, if only as a time capsule and a snapshot of the income tax in its current state of evolution (where is intelligent design when we need it?).

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FOOTNOTES

/1/ General Electric Co. v. United States, 83-2 USTC para. 9532, 52 AFTR 2d para. 5744 (Ct. Cl. 1983). See also Nat'l Securities Corp. v. Commissioner, 137 F.2d 600, 43-2 USTC para. 456 (3d Cir. 1943).

/2/ Long Term Capital Holdings v. United States, 330 F. Supp.2d 122, Doc 2004-17390, 2004 TNT 169-15 (D. Conn. 2004); Santa Monica Pictures LLC v. Commissioner, T.C. Memo. 2005-104, Doc 2005-10308, 2005 TNT 91-12.