

## Book Review:

### *Taxation of Intangible Assets*

by Robert W. Wood • San Francisco

It is perhaps a testament to the increasing complexity of the tax law that books on quite specialized topics now seem to proliferate. Indeed, it almost seems that a book on a general topic such as corporate taxation can hardly be detailed at all. Anyone practicing in the merger and acquisition field could likewise state that a book on the taxation of acquisition transactions might be over-general. Whether or not willingly, most of us therefore turn to resources that are increasingly specialized.

Mark Muntean's new book, *Taxation of Intangible Assets* (Shepard's/McGraw-Hill 1995), fills an important void in the tax literature. The tax treatment of intangibles has been complicated and controversial. Indeed, following a whole raft of court cases, it was only a few years ago that Congress enacted Section 197 of the Internal Revenue Code.

With one stroke of the pen, Congress transmuted the word "intangible" from almost a dreaded concept in the acquisition field to one that was far less pejorative. Section 197 now imports 15-year amortization to most intangibles. Yet, as readers of this newsletter know, some intangibles (particularly covenants not to compete) suddenly became less favored by virtue of Section 197.

Happily for all of us, Mark Muntean's new book takes the old and new of intangibles treatment and dissects it all in a thorough and incisive volume. I am particularly sympathetic to Muntean's plight in dealing with the amorphous (I can't resist the temptation to call the topic "intangible") subject at a time when Section 197 was being written and passed. The book was many years in the making.

#### Contents

The book begins with Section 197, covering this Code provision and its regulations and other interpretations in one chapter. It then covers the general principles of intangible treatment, including such topics as valuation, and giving a good deal of pre-Section 197 history. Chapter 3 deals with the alternative minimum tax and intangibles, including such thorny areas as mining, exploration and development expenditures, percentage depletion, intangible drilling costs, circulation expenditures, incentive stock options, etc. Chapter 4 treats like-kind exchanges of intangible assets, giving extensive citations and planning thoughts regarding these specialized transactions.

Beginning with Chapter 5, the book takes a decidedly intellectual turn, with five chapters (5-9) devoted to research and development expenditures. Chapter 5 deals with the background and historical changes to the research and development tax credit. Chapter 6 covers the basic research credit. Chapter 7 explains pre-1987 qualified research expenses. Chapter 8 deals with post-1986 research and development expenses. Then, Chapter 9 ties this all together with the aggregation concepts for controlled groups, pass-through rules, etc.

Chapters 10 through 13 deal with other topics of a specialized nature that are sure to be important in the high-tech fields. Chapters 10 through 13 deal, respectively, with patents (Chapter 10); franchises, trademarks and trade names (Chapter 11); computer software (Chapter 12); and copyrights (Chapter 13).

Chapters 14 through 17 move on to additional important concepts. Chapter 14 contains a fascinating look at intangibles related to real property, including easements and rights-of-way, air and development rights, mineral interests and water rights, etc. However, it is in Chapters 15 and 16

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that the author treats some of the most vehemently litigated intangibles. Chapter 15 explores covenants not to compete; Chapter 16 covers customer-based intangibles and contract rights.

The last two chapters deal with Section 482 and the application of this overarching Code provision to intangibles (Chapter 17); and the state taxation of intangible assets (Chapter 18).

**Covenants and Conundrums**

After this mere review of chapter topics, prospective readers will doubtless see the myriad avenues in which treatment of intangibles is pursued. The chapters on covenants not to compete and customer-based intangibles are likely to be the most well-thumbed parts of my copy of the book, along, of course, with Chapter 1 on Section 197. Yet, there is a wealth of other information here. It is easy to see how years could be consumed in the book's writing because the level of citations is superlative.

At the same time, since the citations and many of the case descriptions appear in footnotes, readers looking for a discussion of a topic are not overburdened with material that might only be needed in brief writing. Citations and many extra details that might break up the discussion if included in the text are helpfully included in the footnotes to every page. Virtually a third to a half of each page seems to be devoted to footnotes.

So far, my favorite chapter in the book concerns covenants not to compete. The author begins with a discussion of the varying circumstances in which covenants arise, and then launches into an exhaustive treatment of the different types of valuation methods that the courts and the Revenue Service have applied. He examines effects to both buyers and sellers, and then looks at the progression in the law leading up to the enactment of Section 197 in August of 1993. He then examines allocations of dollar amounts to covenants, and conversely, how one can avoid allocating an amount to a covenant.

All in all, it is the most thorough—and at the same time straightforward and understandable—discussion of covenants not to compete I have seen. While obviously its focus is on the tax law, I could well

imagine corporate acquisitions lawyers benefiting enormously from reading this material. Maybe if they did, corporate lawyers would not be as likely to misunderstand the dynamics of covenants not to compete in consummating deals.

**Conclusion**

*Taxation of Intangible Assets* will be a valuable tool for most readers of this newsletter. Mark Muntean has done an admirable job of assembling and tirelessly documenting the subject in far more ways than I would have thought possible. Of course, for such a tool to be helpful in the long-term it must be updated. Shepard's/McGraw-Hill obviously plans to provide updates, since the compression binder in which the book appears has a supplement tab and ample space that will doubtless be filled in the coming years.

I know I will use the book, particularly as regards covenants not to compete and customer-based intangibles frequently. Given what one of the marketing flyers on the book mentions—that intangible assets in U.S. business are estimated to be worth \$1 trillion, or one-third of the U.S. gross domestic product—the tax treatment of intangibles is surely a topic that merits this book-length treatment. It is available from Shepard's/McGraw-Hill for \$125 plus tax and \$6.75 shipping and handling (1-800-525-2474). ■

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