2017

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Recommended Citation

Lawrence Zelenak, *The Uses and Abuses of Simplexity*, 66 Emory L. J. Online 2011 (2017).
Available at: https://scholarlycommons.law.emory.edu/elj-online/15

THE USES AND ABUSES OF SIMPLEXITY

Lawrence Zelenak[*]

INTRODUCTION

Although the importance of IRS publications in the administration of the federal income tax can hardly be overstated, before Joshua D. Blank's and Leigh Osofsky's comprehensive study of simplexity in IRS publications[1] scholars had given those publications almost no attention.[2] In their article, Blank and Osofksy make two important contributions to the scholarly literature on tax administration. The first (and more specific) contribution is the analysis of simplexity in IRS publications—their diagnosis of the problem of simplexity and their explanation of how it can be managed (not cured). The second (and more general) contribution is their opening up of the unexplored field of IRS publications to scholarly examination.

I agree with all their major conclusions—including, most significantly, that some simplexity is inevitable in carrying out the IRS's duty of explaining immensely complex tax laws to a general readership. I also agree that the primary response to that inevitability should be extensive "red-flagging" of publications to alert readers to particular instances of simplexity and to refer them to the regulations, rulings, and judicial opinions which the publications have simplexified. Given their focus on the virtues of plain writing, I should add that Blank's and Osofsky's article is a model of clarity and grace of expression, and a pleasure to read.

The remainder of this brief essay is devoted to a few points on which I disagree with the analysis of Blank and Osofksy (none of which affect my agreement with their major conclusions), and to a few thoughts—inspired by reading Blank and Osofksy—on a few non-simplexity aspects of IRS publications.

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[1] Joshua D. Blank & Leigh Osofsky, *Simplexity: Plain Language and the Tax Law*, 66 EMORY L.J. 189 (2016).

[2] A significant recent exception is Emily Cauble's analysis of the limited circumstances under which taxpayers should be entitled to rely on statements in IRS publications (and on other types of IRS guidance). Emily Cauble, *Detrimental Reliance on IRS Guidance*, 2015 WIS. L. REV. 421.

I. THE IRS WAS INTO SIMPLEXITY WHEN SIMPLEXITY WASN'T COOL

Although Blank and Osofsky do not explicitly assert a causal connection between the Plain Writing Act of 2010 and the prevalence of simplexity in IRS publications, a reader of their article might easily come away with the impression that the 2010 Act has been a major cause of simplexity in IRS publications.[3] However, as Blank and Osofksy themselves explain, long before 2010 the IRS acknowledged its responsibility to make the tax laws comprehensible to taxpayers and assigned publications a key role in its discharge of that duty.[4] According to the IRS's current mission statement, adopted in 1998 (more than a decade before the Plain Writing Act), the agency's mission is to "provide America's taxpayers top quality service *by helping them understand* and meet *their tax responsibilities* and by applying the tax law with integrity and fairness to all."[5] Similarly, even before the 2010 Act, the IRS's most important publication—Publication 17, "Your Federal Income Tax for Individuals"—described itself as "explain[ing] the tax law to make sure you pay only the tax you owe and no more."[6]

Thus, long before plain writing legislation was even a gleam in the congressional eye, the IRS was writing publications aimed at explaining the intricacies of the federal income tax in plain language to the average taxpayer. Of course, the IRS might have responded to the Plain Writing Act by redoubling its efforts to make its publications comprehensible. But did it? Consider the several examples of simplexity discussed in detail by Blank and Osofsky.[7] For each example, Blank and Osofsky cite to the most recent publication; they do not investigate whether the described simplexification arose before or after 2010. As it turns out, all but one of the nine examples predate the Plain Writing Act (in language identical to the current language).[8]

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[3] Blank & Osofsky, *supra* note 1, at 189, 198–99 (focusing on the Plain Writing Act in the second sentence of the abstract and describing the Act as "reinforc[ing] and expand[ing] the IRS's duty to explain the tax law to taxpayers").

[4] *Id.* at 197.

[5] I.R.S. News Release IR-98-59, New IRS Mission Statement Emphasizes Taxpayer Service (Sept. 24, 1998), https://www.irs.gov/pub/irs-news/ir-98-59.pdf (emphasis added); Blank & Osofksy, *supra* note 1, at 197–98.

[6] INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 17, YOUR FEDERAL INCOME TAX 5 (2009).

[7] As noted later, I question whether some of the examples actually involve simplexity. *See infra* text accompanying notes 20–29.

[8] *Compare* Blank & Osfofsky, *supra* note 1, at 207 (concerning the deductibility of ordinary and necessary business expenses), *with* INTERNAL REVENUE SERV., PUB. NO. 535, BUSINESS EXPENSES 2 (2010). *Compare* Blank & Osofsky, *supra* note 1, at 210–12 (concerning the deductibility of home mortgage refinancing points),

The sole exception—the only example discussed by Blank and Osofsky which did not appear verbatim in a publication predating the Plain Writing Act—is the language concerning the exclusion of gain from the sale of a principal residence.[9] Whereas the earlier publication language followed the regulations in referring to the taxpayer's financial ability to maintain a home becoming "materially" impaired and the suitability of the taxpayer's property as a home "materially" changing,[10] the current Publication 523 refers instead to "significant financial difficulty" and a "significantly less suitable main home."[11] It is possible that this one change was inspired by the Plain Writing Act; the IRS may have believed—and may have been right in believing—that some taxpayers would not have been familiar with the use of "material" in the sense of "significant." Even if that is so, however, consideration of the history of the simplexity examples offered by Blank and Osofksy strongly suggests that simplexity in IRS publications developed long before the Plain Writing Act of 2010, and that the Act has had at most a minor effect in encouraging further simplexification. This is not surprising, considering that—as Blank and Osofsky demonstrate—the IRS was committed long before 2010 to making the tax laws comprehensible to the average taxpayer.

II. DO THE PEOPLE WHO WRITE THE DIFFERENT IRS PUBLICATIONS EVER TALK TO ONE ANOTHER?

As Blank and Osofksy note, Publication 17, "Your Federal Income Tax for Individuals," is unique among IRS publications in featuring (on the bottom of its "Contents" page) a disclaimer.[12] The disclaimer makes two important points:

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with INTERNAL REVENUE SERV., PUB. NO. 936, HOME MORTGAGE INTEREST DEDUCTION 5 (2009). *Compare* Blank & Osofsky, *supra* note 1, at 212–14 (concerning tax characterization of leveraged leases), *with* INTERNAL REVENUE SERV., PUB. NO. 535, at 9. *Compare* Blank & Osofsky, *supra* note 1, at 214–17 (concerning capitalization of improvements), *with* INTERNAL REVENUE SERV., PUB. NO. 535, at 3. *Compare* Blank & Osofsky, *supra* note 1, at 219–21 (concerning IRA rollovers), *with* INTERNAL REVENUE SERV., PUB. NO. 590, INDIVIDUAL RETIREMENT ARRANGEMENTS (IRAS) 24 (2010). *Compare* Blank & Osofsky, *supra* note 1, at 221–24 (concerning bartering deductions), *with* INTERNAL REVENUE SERV., PUB. NO. 535, at 4. *Compare* Blank & Osofsky, *supra* note 1, at 224–26 (concerning early individual retirement account distributions), *with* INTERNAL REVENUE SERV., PUB. NO. 590, at 52–53. *Compare* Blank & Osofsky, *supra* note 1, at 226–28 (concerning characterization of an activity as profit-seeking), *with* INTERNAL REVENUE SERV., PUB. NO. 535, at 5. Only when Blank & Osofsky discuss IRA rollovers do they note the publication history of the language. *See* Blank & Osofsky, *supra* note 1, at 219–21.

9 Blank & Osofsky, *supra* note 1, at 217–19.

10 INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 523, SELLING YOUR HOME 15 (2010).

11 INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 523, SELLING YOUR HOME 5 (2015).

12 INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 17, YOUR FEDERAL INCOME TAX (2015); Blank & Osofksy, *supra* note 1, at 239–40.

that "the information given does not cover every situation and is not intended to replace the law or change its meaning," and that "this publication will continue to present the interpretations by the IRS" despite the existence of a judicial interpretation (other than a Supreme Court opinion) more taxpayer-favorable than the IRS's view.[13] Blank and Osofsky consider disclaimers of this sort to be so inadequate as to be nearly worthless,[14] so they are not much troubled by the uniqueness of the Publication 17 disclaimer.

Although I agree with Blank and Osofsky that stand-alone disclaimers give taxpayers insufficient warning of lurking simplexity, in my view a well-written and prominent disclaimer (the Publication 17 disclaimer is well-written but could be considerably more prominent) could serve a valuable warning function if combined with the sort of red-flagging (or annotation) approach recommended by Blank and Osofsky.[15] What seems to me indefensible—and inexplicable, other than by some lost page of IRS history—is the IRS's practice of including a disclaimer in one publication but not in any other. The uniqueness of the Publication 17 disclaimer suggests a failure of communication and of quality control among the writers and editors responsible for the various publications. If a disclaimer is a good idea in the context of one publication—and I believe it is—it is inconceivable that it would not be a good idea for every other publication as well.

This is not the only puzzling inconsistency in the IRS's current tactics for dealing with simplexity issues in its various publications. In discussing their recommendation that IRS publications red flag (or at least annotate) instances of simplexity, Blank and Osofsky give no indication that the IRS currently makes any use of red flagging or annotations.[16] That is true, or nearly true, for many publications. Publication 17, for example, by my count has only nine annotations (all references to documents in the Internal Revenue Bulletin) in its 244 substantive pages.[17] Similarly, Publication 523, "Selling Your Home," has only one annotation in its eighteen substantive pages.[18]

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13 INTERNAL REVENUE SERV., *supra* note 12.

14 Blank & Osofksy, *supra* note 1, at 252.

15 *See id.* at 252–56 (proposing red-flagging or annotations).

16 As Blank and Osofsky use the term, "red flagging" involves explicitly noting IRS simplifications, explaining that they represent safe-harbor positions, and identifying other reasonable interpretations of the law. *Id.* at 252. By contrast, "annotation" only requires "hav[ing] the IRS simply annotate its Publications with links to all the sources of law that the IRS is relying upon." *Id.* at 256.

17 *See* INTERNAL REVENUE SERV., *supra* note 12.

18 *See* INTERNAL REVENUE SERV., *supra* note 11.

As with disclaimers, however, there is a striking exception to the norm. Publication 535, "Business Expenses," features about forty annotations in its forty-five substantive pages.[19] Most of these are just annotations, rather than the more informative red-flagging proposed by Blank and Osofsky. The annotations reference Internal Revenue Code provisions, Treasury regulations, and various types of Internal Revenue Bulletin (IRB) pronouncements (with hyperlinks in the case of IRB materials), but not judicial opinions. Although Blank and Osofsky would not view Publication 535 as fully implementing their recommendations—both because the annotations are not as informative as they would prefer and because of the failure to alert taxpayers to judicial interpretations differing from those of the IRS—the Publication 535 annotations are a major step in the direction of the Blank and Osofsky proposal.

Again, the puzzle is the inconsistency. Why would the IRS heavily annotate one publication (at the rate of almost one annotation per page), while providing minimal annotations in other publications (at the rate of one annotation for every twenty-seven pages, in the case of Publication 17)? Although the optimal density of annotations might differ from publication to publication—based on various considerations, including the complexity of the material covered and the level of tax sophistication of the typical readers of different publications—the likely explanation for annotation density differences of this magnitude is simple inconsistency. Apparently, there is no IRS-wide policy as to how heavily publications should be annotated, causing the writers and editors responsible for different publications to make very different choices.

If there were an IRS Publication featuring both a disclaimer in the style of Publication 17 and annotation density in the style of Publication 535, that publication would at least come close to adequately warning taxpayers of its simplexifications. The problem, of course, is that as of now there is no such publication.

III. WHAT IS, AND ISN'T, SIMPLEXITY

Blank and Osofksy identify a number of classic examples of simplexity in IRS publications, including the failure to mention judicial authority contrary to the IRS view of the deductibility of home mortgage refinancing points,[20] and the failure to fully describe the approved methods for avoiding the penalty tax on

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19 *See* INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 535, BUSINESS EXPENSES (2016).

20 Blank & Osofsky, *supra* note 1, at 210–12.

early individual retirement account distributions.[21] In two cases, however, I disagree with their characterizations of publication passages as examples of simplexity. In a third case, I agree with their characterization of a publication passage as an example of simplexity but think the problem uncovered by their example is even worse than they suggest.

Case One. For many years, the IRS had taken the position in Publication 590, "Individual Retirement Arrangements (IRAs)," that a statutory rule limiting taxpayers to one tax-free IRA rollover per year applied on a per-account basis, rather than a per-taxpayer basis, with the result that a taxpayer could make tax-free rollovers from two different IRAs in the same year.[22] The position taken by the IRS in Publication 590 was based on a proposed regulation issued in 1981, but never finalized.[23] In the widely-publicized *Bobrow v. Commissioner* case,[24] the Tax Court adopted (*sua sponte*, rather than at the urging of the IRS) a different interpretation of the IRA rollover provision of the Code,[25] holding that the one-rollover-per-year rule applied on a per-taxpayer basis.

Accepting, *arguendo*, the correctness of the Tax Court's interpretation of the Code, the position taken in Publication 590 was erroneous. But was it also a case of simplexity? According to Blank and Osofsky, it was.[26] I disagree. The Publication's position was based on a proposed regulation, and the proposed regulation was an *interpretation* of the statute (albeit an incorrect interpretation, according to the Tax Court), not a *simplification* of it.[27] A per-account version of the one-rollover-per-year rule is not simpler than a per-taxpayer version of the rule; it is just different. Not every inaccuracy in an IRS Publication is attributable to simplexity.

Case Two. In one instance, what Blank and Osofsky describe as an inaccuracy in an IRS Publication is not, in my view, erroneous at all. They take the IRS to task for its discussion in Publication 535 of the circumstances under which a leveraged lease will be treated as a true lease for tax purposes.[28] In particular, they criticize the publication for describing the requirements for

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21 *Id.* at 224–26.

22 *See, e.g.*, INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 590, INDIVIDUAL RETIREMENT ARRANGEMENTS (IRAS) 25 (2009).

23 Prop. Treas. Reg. § 1.408-4(b)(4)(ii), 46 Fed. Reg. 36,198, 36,206 (July 14, 1981).

24 No. 7022-11, T.C.M. 2014-21, at 14 (2014).

25 I.R.C. § 408(d)(3) (2012).

26 Blank & Osofsky, *supra* note 1, at 219–21.

27 *See supra* note 21.

28 Blank & Osofsky, *supra* note 1, at 212–14.

obtaining an advance ruling that a lease will be respected for tax purposes without also mentioning that some courts have reached taxpayer-favorable results on facts which would not have qualified for advance rulings. "While some savvy taxpayers may go on to research judicial alternatives," they write, "many others may simply accept the IRS's view."[29]

I see nothing wrong with the treatment of this topic in Publication 535. The publication advises, "[i]f you plan to take part in what appears to be a leveraged lease, you may want to get an advance ruling."[30] It lists the requirements for obtaining an advance ruling and states that those requirements apply "for advance ruling purposes only."[31] The Publication could not be any clearer on the crucial point that it is describing the IRS's advance ruling practices rather than the substantive law. Moreover, the topic is leveraged leases, and almost by definition any taxpayer involved in or contemplating a leveraged lease transaction is a sophisticated taxpayer or has ready access to sophisticated tax advice. The concern of Blank and Osofsky, that non-savvy taxpayers will be misled, seems misplaced; in the world of leveraged leases there are only savvy taxpayers.

Case Three. Blank and Osofsky rightly criticize the discussion in Publication 535 of the distinction between improvements (the cost of which must be capitalized) and repairs (the cost of which may be currently deducted).[32]

They note the striking fact that "nearly all of the specific examples of business expenses that IRS Publication 535 describes as improvements that must be capitalized are also presented in specific examples in the applicable regulations as repairs that may be deducted immediately."[33] They also note that, although the Publication 535 discussion leans heavily on the concept of "major expenditures," that terminology never appears in the very detailed regulations distinguishing improvements from repairs.[34] Finally, they mention that the governing regulations are quite recent, having been promulgated in 2013.[35] The regulations are highly detailed; as published in the IRB, they occupy about forty-five pages. Although the Treasury did not consider the regulations a radical

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29 *Id.* at 214.
30 INTERNAL REVENUE SERV., *supra* note 19, at 9.
31 *Id.*
32 Blank & Osofksy, *supra* note 1, at 214–17.
33 *Id.* at 17.
34 *Id.* at 215–16, 215 n.164.
35 *Id.* at 215 (citing T.D. 9636, 2013-43 IRB 331).

departure from previous law,[36] the regulations were decidedly more than a mere restatement of the existing tax law of improvements and repairs.

What Blank and Osofsky do not mention is the remarkable fact that the Publication 535 language on which they focus did not change at all in response to the issuance of the new regulations. The last version of Publication 535 published before the promulgation of the new regulations stated that improvements are "generally major expenditures," and that "[s]ome examples are: new electric wiring, a new roof, a new floor, new plumbing, bricking up windows to strengthen a wall, and lighting improvements."[37] Despite the intervening issuance of the new regulations, identical language appears in the current version of Publication 535.[38] Given that the IRS did not revise Publication 535 in response to the new regulations, it is not terribly surprising that—as Blank and Osofksy point out—the new regulations contradict "nearly all" of the examples of improvements offered by Publication 535. If the IRS Forms and Publications personnel are aware of the new regulations, there is no evidence in current Publication 535 of that awareness. The apparent failure of communication between the drafters of the regulations and the writers of Publication 535 is disconcerting.

To be fair to the IRS, both before and after the promulgation of the new regulations it would have been impossible to accurately describe the rules for distinguishing repairs from improvements in the space available in a publication covering the entire universe of business expense topics. But that impossibility drives home the crucial conclusion of Blank and Osofsky—because simplexity in IRS publications is inevitable in the case of many topics, the IRS should supplement its simplexifications with red flagging. In this instance, in addition to revising the examples of improvements, the writers of Publication 535 should have included (at a minimum) a warning that the discussion of the topic in Publication 535 was incomplete and a citation to the new regulations.

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[36] "The final regulations retain many of the provisions of the 2011 temporary and proposed regulations . . . which in many instances incorporated standards from case law and other existing authorities under sections 162 and 263(a)." T.D. 9636, 2013-43 IRB 331, 332.

[37] INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 535, BUSINESS EXPENSES 3 (2013). The same list of six examples of improvements goes back at least to 1994. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 535, BUSINESS EXPENSES 3 (1995) (for use in preparing 1994 returns). The description of improvements as "generally major expenditures" first appeared a decade later. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 535, BUSINESS EXPENSES 3 (2005) (for use in preparing 2004 returns). Thus, not only did the Publication not change in response to the 2013 final regulations, it also did not change in response to the temporary and proposed regulations issued in 2011. *See* Temp. Treas. Reg. § 263(a) (2011).

[38] INTERNAL REVENUE SERV., *supra* note 19, at 3.

IV. AS LONG AS WE'RE TALKING ABOUT IRS PUBLICATIONS . . .

Although the following few paragraphs are not directly responsive to anything in the Blank and Osofsky article, I cannot resist the opportunity to mention two striking instances of the IRS taking a position in a publication without taking the same position anywhere else. If the work of Blank and Osofsky inspires—as I hope it will—an increased scholarly interest in the uses and abuses of IRS publications, these two instances may serve as grist for the scholarly mill.

Case One. The Internal Revenue Code provision governing the home mortgage interest deduction is ambiguous about whether a taxpayer borrowing \$1.1 million to finance the purchase of a residence can deduct the interest on the entire \$1.1 million debt, or only the interest on \$1 million of the debt.[39] The statute permits a taxpayer to deduct interest on \$1 million of "acquisition indebtedness" and interest on \$100,000 of "home equity indebtedness," but it provides no clear answer to the question of whether the last \$100,000 of a \$1.1 million purchase money mortgage can qualify as home equity indebtedness. In *Pau v. Commissioner*,[40] decided in 1997, the Tax Court agreed with the IRS's litigating position that a taxpayer in this situation could deduct the interest on only \$1 million of principal.

As it happened, in Publication 936, "Home Mortgage Interest Deduction," the IRS had made a taxpayer-favorable change in its position on this issue well before the Tax Court's 1997 decision in *Pau*. Consistent with the IRS's litigating position in *Pau*, the 1994 version of Publication 936 stated, "[i]f you take out a loan *for reasons other than to buy, build, or substantially improve your home*, it may qualify as home equity debt."[41] The 1995 version of Publication 936, however, did an about-face on this issue, adding the following after the sentence quoted above: "In addition, debt you incurred to buy . . . your home, to the extent it is more than the home acquisition debt limit, may qualify as home equity debt."[42] Substantially the same language has appeared in all subsequent versions of Publication 936.

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39 *See* I.R.C. § 163(h)(3)(B)(ii), (C)(ii) (2012).

40 No. 20475-94, 73 T.C.M. 1819, 1819 (1997).

41 INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 936, HOME MORTGAGE INTEREST DEDUCTION 9 (1995) (for use in preparing 1994 returns) (emphasis added).

42 INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 936, HOME MORTGAGE INTEREST DEDUCTION 8 (1996) (for use in preparing 1995 returns).

Thus, at the time of the *Pau* litigation, the IRS's litigating position was directly contrary to the IRS's position in Publication 936. To state the obvious, the IRS should either have revised Publication 936 to bring it in line with the IRS's victory in *Pau* or announced that it had reconsidered the issue and was abandoning its Tax Court triumph. For well over a decade, however, the IRS took neither step. During that period, taxpayers conscientious enough to consult Publication 936, but not tax-sophisticated (or compulsive) enough to research judicial opinions and other actual sources of tax law, would have blithely claimed interest deductions on $1.1 million of home mortgage principal. At the same time, better-informed taxpayers would have struggled with whether to accept or challenge the *Pau* interpretation. Finally, in 2010, the IRS resolved the discrepancy—not, as one might have expected, by revising Publication 936—but by issuing a revenue ruling rejecting *Pau*.[43]

What should one make of this strange saga? It has nothing to do with simplexity; neither interpretation of the statute is simpler than the other. But the story does, of course, involve a discrepancy between the IRS's actual position on the issue and the position set forth in a publication. It is remarkable that such a discrepancy—on a fairly high-profile issue involving a non-trivial number of taxpayers—could have persisted for well over a decade. If one were making a list of indications that the quality control for IRS publications is not all it might be, the saga of the interest deduction on a $1.1 million home mortgage would belong on the list.

Case Two. The second story shows the IRS in a better light.[44] In 1997, Congress enacted I.R.C. §121, introducing a new set of rules for the exclusion of gain on the sale of a principal residence.[45] Although the rules generally permitted exclusion only if the taxpayer had owned and lived in the residence for at least two years, an exception allowed an exclusion if the failure to satisfy the two-year requirement was due to a change in place of employment, health, or other unforeseen circumstances to be specified by regulation.[46] In that case, however, the exclusion rules were less generous than for taxpayers satisfying the two-year requirement. According to the statute as enacted in 1997, if, for example, a taxpayer sold her home after only six months because of a change in place of employment, and realized a gain of $40,000 on the sale, she could

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[43] Rev. Rul. 2010-25, 2010-44 I.R.B. 571–72.

[44] The following discussion is based in part on RICHARD SCHMALBECK, LAWRENCE ZELENAK & SARAH B. LAWSKY, FEDERAL INCOME TAXATION 342–44 (4th ed. 2015).

[45] Taxpayer Relief Act of 1997, Pub. L. 105-34, § 312, 111 Stat. 788, 836 (1997).

[46] The current version of the less-than-two-years exception is codified at I.R.C. §121(c)(2)(B) (2012).

exclude only that fraction of her gain equal to the fraction of two years that she had owned and lived in the home.[47] Thus, $10,000 of her gain would be excluded and the other $30,000 would be taxable.

Oddly enough—but such is life in the sausage factory of tax legislation—the Ways and Means Committee Report on the 1997 legislation described a very different treatment of a taxpayer qualifying for an exception to the two-year requirement. According to the Report, the usual ceiling on the amount of excludable gain ($250,000, in the case of a single taxpayer) was to be multiplied by the fraction of two years that the taxpayer had owned and lived in the home.[48] For our hypothetical taxpayer, this rule would mean a $62,500 ceiling on excludable gain, resulting in the exclusion of all of her $40,000 gain—obviously a much more favorable result than under the statutory formula.

Legislators noticed the discrepancy between the statute and the Ways and Means description shortly after the August 5, 1997, date of enactment. By October 1997 the Ways and Means Committee had approved a package of technical corrections—described by its Chair, Bill Archer, as "noncontroversial"[49]—including revising the statutory less-than-two-year exclusion formula to conform with the House Report, to be effective retroactively as if included in the original legislation.[50] Although it was clear that Congress would, sooner or later, retroactively change the statutory formula, it was far from clear when Congress would bestir itself to do so. In the end, it took the better part of a year; the revision was included in the IRS Restructuring and Reform Act of 1998, enacted in July 1998.[51]

During the months in which the eventual enactment of a retroactive revision of the exclusion formula was a virtual certainty, the IRS had the tricky task of deciding how to administer the new exclusion regime. If it proceeded by way of an official pronouncement in the IRB, it had only unattractive options. It could hardly announce in a revenue ruling that, because it had a crystal ball, it was interpreting the statute as if Congress had already enacted the anticipated retroactive revision. On the other hand, it also made no sense for the IRS to

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[47] Taxpayer Relief Act of 1997, Pub. L. 105-34, § 312, 111 Stat. at 836–37 (formerly codified at I.R.C. §121(c)(1)).

[48] H.R. REP. NO. 105-148, at 348 (1997).

[49] Heidi Glenn, *W & M Approves Corrections Bill, Expanded Education IRAs*, 77 TAX NOTES 135 (1997).

[50] JOINT COMM. ON TAXATION, JCX-56-97, DESCRIPTION OF CHAIRMAN'S MARK OF THE "TAX TECHNICAL CORRECTIONS ACT OF 1997" 17–18 (1997).

[51] Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, § 6005(e)(2), 114 Stat. 685, 805–06 (1998).

announce its insistence on the letter of the current law when it was overwhelmingly likely that Congress would sooner or later make that aspect of current law a nullity. What was a tax administrator to do?

Because the 1997 tax return season fell within the limbo period, the IRS had to address—one way or another—the less-than-two-year exclusion formula in its Publication 523, "Selling Your Home," for use in preparing 1997 returns.[52] Without alerting taxpayers to the vagaries of the tax legislative process, the 1997 version of Publication 523 simply described the formula in the technical corrections bill without mentioning that it had not yet been enacted.[53] This was a brilliant solution; it enabled the IRS to describe to taxpayers what it knew would ultimately be the governing rule, without having to state in a document with status as legal precedent (such as a revenue ruling) that it was administering the law based on its legislative predictions. Although this was unquestionably a peculiar IRS use of a publication, it seems to me to have been the least bad of the available options.

CONCLUSION

To end where I began, Blank and Osofsky have made a major contribution in their article, both in their analysis of the etiology and treatment (not cure) of simplexity in IRS publications, and in their insistence that IRS publications are worthy of scholarly attention. If there is a thread running through many of the points I have raised in this response, it is that a fuller understanding of the uses and abuses of IRS publications might be achieved by supplementing the approach of Blank and Osofsky—which is, for the most part, based on a snapshot view of publications in their current versions—with an examination of how the various publications have evolved, or have failed to evolve, over recent decades.

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52 INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 523, SELLING YOUR HOME 30 (1998) (for use in preparing 1997 returns).

53 *Id.*