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The Caterpillar Case: Effective Tax Planning or Scam?

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Caterpillar is the world's largest builder of bulldozers and other construction equipment. While principally known for manufacturing heavy machinery, Caterpillar is also in the business of selling replacement parts, commonly purchased from third-party suppliers. Because customers generally spend two or three time more on replacement parts relative the original machine purchase, the replacement parts segment of the business is a major driver of Caterpillar profits, and not an insignificant sideline.[1] Caterpillar is not unique in using this type of pricing model. A similar strategy has been used in other product lines, e.g., printers sold at a discount in anticipation of profitable ink sales, discounted razors with high priced replacement heads, etc. Caterpillar commonly bought parts from third-party suppliers. Before the reorganization (discussed below), Caterpillar would then sell these replacement parts to their Geneva office for overseas sales. For many years, Caterpillar's main operations were in Peoria, Illinois, with eighty-five percent of earnings allocated to the U.S. and fifteen percent allocated to their Geneva, Switzerland office. While Caterpillar paid an effective tax rate of nearly thirty percent on the U.S. earnings, it paid only four to six percent on the Swiss sales.

In 1999, Caterpillar commenced a reorganization that would shift billions of Caterpillar's profits to Geneva. Caterpillar tax manager Robin Beran led the reorganization, guided by PwC and the law firm of McDermott, Will and Emery, LLP. Beran had previously worked for PwC. In 1999, Caterpillar created CSARL, a swiss company headquartered in Geneva. Rather than purchasing from Caterpillar, CSARL purchased the replacement parts directly from suppliers. Consequently, Caterpillar's U.S. operations were cut out of the loop. Under this plan, Swiss CSARL became the global purchaser of replacement parts (instead of the U.S. parent), and CSARL would be credited with eighty-five percent of the income from the sales of the replacement parts. This plan shifted the taxation from the high U.S. rate (maximum of thirty-five percent at this time) to the much lower Swiss rate (as low as four percent). PwC in a planning document wrote that "we are effectively more than doubling the profit on parts." PwC reportedly received a fifty-five-million-dollar fee for their involvement.[2]

However, while Caterpillar was removed from the sale of the replacement parts on paper, Caterpillar's U.S. offices continued to be actively involved with the parts themselves. Caterpillar's reputation depended on their ability to quickly repair machinery. A slow repair could result in Caterpillar equipment being blamed for shutting down major construction projects, which would damage their reputation for quick support. Therefore, Caterpillar's U.S. operations continued to warehouse parts. Because most of the parts were designed, built, stored, and fulfilled in the U.S., most of the parts' executives and employees were in the U.S. CSARL had approximately 400 Geneva employees, with sixty-five working on parts. In contrast, approximately 5,000 employees worked on parts in the U.S.

In May 2004, an anonymous letter was received by Robin Beran, Caterpillar's Tax Director. In part, the letter stated the following:

> I do not believe Caterpillar's transfer pricing practices (past and present) meet the IRS' tests. The Officers and Board of Directors need to examine the transfer pricing issue before Caterpillar ends up in court and in the press…[T]he Tax Code does not permit transaction or an organizational structure that have no

[1] Bouchard, C.T., and J. Koch (2013) *The Caterpillar Way: Lessons in Leadership, Growth, and Shareholder Value*, McGraw-Hill publishers.
[2] https://www.forbes.com/sites/nathanvardi/2017/03/02/how-a-swiss-affiliate-led-to-thursdays-federal-raid-of-caterpillars-headquarters/#2a8bc5bf6832

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> substantial business purpose other than for tax avoidance purposes. The CSARL reorganization in my opinion, does not meet the test.…
>
> …I work in the Tax Department and I strongly disagree with how we have conducted our business over the past few years. I have not spoken out before, because of fear of retribution. I am speaking out now for the long term good of Caterpillar. An independent investigation (not PWC or our outside tax counsel) is needed. If there is no independent investigation or if there is any retribution, I will go [to] the IRS.[3]

Beran forwarded the letter to Caterpillar's CEO, [4] defending their tax policy stating, "CAT's transfer pricing policy is the result of detailed analysis of the functional activities of the various entities in strict accordance with Treasury Regulations" and supported by two independent accounting firms.[5]

Daniel Schlicksup was an accountant at Caterpillar. Schlicksup had once worked for the now defunct Arthur Anderson. He later accepted a position with PwC and moved to Peoria to work on the Caterpillar account. In 1992, he joined Caterpillar's tax department. From 1996 to 2000, Schlicksup worked oversees for Caterpillar, helping to establish Caterpillar's first overseas tax department.

By 2006, Schlicksup was back in the U.S. in the newly created position of Global Tax Strategy Manager. He reported to Beran, who reported to the Chief Financial Officer. Schlicksup was one of Caterpillar's 400 highest paid employees, earning an annual salary in excess of $200,000, plus incentive awards. Schlicksup was known for both his ability to handle difficult problems and for being difficult. He would send hectoring emails, griped about accounting issues (including an issue that dated back to the 1970s), and accused an executive of secretly taping meetings.

Schlicksup was adamant that the reorganization did not meet the tax laws and began e-mailing his concerns in 2007. In January 2007, he emailed Beran, expressing his concern that the CSARL strategy did not satisfy the economic substance tax doctrine. Throughout the year, Schlicksup repeated his concerns, emailing the legal department and Caterpillar's ethics officer.[6]

In April 2008, Schlicksup's e-mail to Beran included in part:

> "With all due respect, the business substance issue related to the CSARL Parts Distribution is the pink elephant issue worth a billion dollars on the balance sheet."[7]

On May 1, 2008 after a finance meeting, Schlicksup by-passed his superiors, and e-mailed two top executives at Caterpillar, using the subject line "Ethics issues important to you, the Board, and Cat Shareholders."[8] He again expressed his concern about the tax strategy and attached a fifteen-page memorandum, detailing what he claims to be the retaliatory treatment that he received from his superiors for expressing his concerns. The next day, he sent an additional 137-pages of documents showing how the company shifted billions in profits to Geneva to avoid two billion dollars of taxes.

In 2007 and 2008, Schlicksup had been given a performance rating of "two" (on a five-point scale with "one" being the highest) and an assessment of "L" (which indicates that a Lateral move would benefit the employee).[9]

Following the May e-mails, Schlicksup was transferred to the information technology department and given a seven percent raise.

On June 12, 2009, Daniel Schlicksup filed suit. He filed an IRS whistleblower complaint accusing Caterpillar of tax fraud, along with a complaint with the Occupational Safety and Health Administration. In 2012, his whistleblower lawsuit was settled for an undisclosed amount. However, Schlicksup legal action prompted an investigation by the IRS and the U.S. Senate.

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[3] http://www.green-tax.co.uk/wp-content/uploads/2014/04/Caterpillar-Case-Using-a-Swiss-Tax-Strategy-to-avoid-U.S.-Taxes.pdf
[4] https://www.foxbusiness.com/features/what-new-tax-law-caterpillar-fights-to-protect-2
[5] http://www.green-tax.co.uk/wp-content/uploads/2014/04/Caterpillar-Case-Using-a-Swiss-Tax-Strategy-to-avoid-U.S.-Taxes.pdf
[6] *Ibid.*
[7] *Ibid.*
[8] https://www.bloomberg.com/news/features/2017-06-01/the-whistleblower-behind-caterpillar-s-massive-tax-headache-could-make-600-million
[9] https://docs.justia.com/cases/federal/district-courts/illinois/ilcdce/1:2009cv01208/46749/42

By 2013, the IRS declared the reorganization scheme to be an abusive tax strategy and gave the company a bill for two billion dollars in back taxes and penalties. If the IRS wins and collects on this assessment, Schlicksup could receive a whistleblower award as high as $600 million. Further, the IRS is auditing more recent returns. A 2014 report on CSARL by the Senate Permanent Subcommittee on Investigations indicated that Caterpillar kept two separate sets of books. Their internal "accountable profits" account maintained operating income of the divisions which was used to calculate employee bonuses. Their public ledger account showed most of the parts profit allocated to Geneva with the lower corporate rates. The Senate committee said Caterpillar had avoided $2.4 billion of taxes on more than eight billion dollars in revenues over thirteen years.

On April 1, 2014, three Caterpillar executives (including Beran) and two PwC accountants testified before a Senate panel to defend CSARL and the reorganization. They argued that the restructure was necessary to compete on the world stage and that CSARL was running the parts business (regardless of where the parts were stored). Consequently, they argued that the plan satisfied the "economic substance" required. The Senate panel was not persuaded. The investigations continued. On March 2, 2017, various enforcement agencies raided three Peoria-area Caterpillar facilities to collect documents and electronic evidence.

On March 7, 2017, *The New York Times* reported on a damaging report prepared by Dr. Leslie A. Robinson, an accounting professor at Dartmouth College. Robinson was commissioned by the government to evaluate Caterpillar's tax practices. She reported that she "was provided with all documents available to the case agents assigned to the investigation" and spent approximately "200 hours reviewing the evidence and performing calculations."[10] In her eighty-five-page report leaked to the New York Times, she said that "Caterpillar did not comply with either U.S. tax laws or U.S. financial reporting rules." Robinson stated "that the company's noncompliance with these rules was deliberate and primarily with the intention of maintaining a higher share price. These actions were fraudulent rather than negligent."

Companies can defer taxes on profits produced offshore until they bring the income back to the U.S. When the company brings this profit back to the U.S. (a practice referred to as repatriation), taxes are owed to the IRS. Professor Robinson estimated that Caterpillar had brought back $7.9 billion to the U.S. structured as loans, thereby avoiding any additional income tax associated with repatriation. She asserted that the company failed to report these loans for accounting or tax purposes. However, short-term loans by foreign subsidiaries to the domestic parent are not repatriations and, consequently do not trigger U.S. corporate income tax. Robinson's report does not discuss this exception.

On March 8, 2017, Americans for Limited Government complained that the government was illegally outsourcing parts of the tax investigation to an outside source. The group argues that it is illegal for the federal government to outsource tax investigations to non-governmental personnel due to the highly confidential nature of tax records. Section 7701 (a) (11) (b) indicates that although the Secretary has broad powers to delegate authorities, any delegation is limited to an "officer, employee, or agency of the Treasury Department" unless Congress expressly grants broader authority.

The Tax Cuts and Jobs Act altered the U.S. approach to taxing corporations from the worldwide system to a territorial system after 2017. This shift to the territorial system aligns the U.S. approach to taxing international transactions with the territorial system used by most other countries. However, both the worldwide and territorial tax systems encourage companies to continue to shift their taxable income overseas. Under the worldwide system, prior to 2018, the U.S. taxed foreign income when repatriated to the U.S., less a credit for the foreign taxes paid on that foreign income. In this case, CSARL income is taxed by the U.S. when transferred its U.S. parent, Caterpillar. If already taxed at a rate of six percent in Switzerland, the repatriated income would be subject to a maximum rate of twenty-nine percent (thirty-five percent U.S. tax less six percent Swiss tax). Under the territorial system, the taxation of foreign income no longer depends on repatriation. Instead, foreign income is only subject to a partial U.S. tax if not subject to a minimum foreign tax, known as the BEAT (Base Erosion and Anti-abuse Tax) which effectively imposes a minimum level of tax on foreign income.[11] The BEAT is five percent for tax years beginning in 2018, ten percent for tax years beginning in 2019 through 2025, and 12.5% thereafter. In Caterpillar's case, CSARL's foreign income was subject to a foreign tax of six percent and would not be subject to

[10] https://www.nytimes.com/2017/03/07/business/caterpillar-tax-fraud.html

[11] Not all corporations are subject to the BEAT. The BEAT only applies to those corporations that satisfy certain criteria, including but not limited to a gross receipts test. Instructors wishing to delve deeper into tax issues could also discuss whether the new Global Intangible Low Tax Income (GILTI) provisions would apply to CSARL's foreign based income.

additional U.S. corporate income taxes in 2018 because the six percent Swiss tax is greater than the minimum five percent BEAT. However, CSARL's foreign income would be subject to a "pick-up" tax of four percent in 2019 through 2025 (ten percent Beat less six percent Swiss tax). Consequently, foreign income will never be subject to U.S. corporate income taxes, now set at a flat twenty-one percent. Corporations can continue to reduce their total tax expense by shifting their taxable earnings to those countries with a tax rate less than twenty-one percent, even if they have to pay a BEAT "pick-up" tax.

Because the territorial system eliminated the taxation of repatriated funds, the new territorial system no longer motivates firms to devise schemes to bring funds to the U.S. that are not classified as repatriations. Therefore, unlike the worldwide system, the territorial system does not motivate firms to devise the short-term financing arrangements that occurred between CSARL and Caterpillar. The residual tax companies face under the worldwide system is why the worldwide system has been criticized as promoting companies engaged in international tax planning to trap the cash from foreign subsidiaries in overseas operations.

The IRS is continuing its investigation and could bring civil or criminal charges against Caterpillar and their executives.

Questions

From the Internet and other sources, prepare answers for these questions:

1. What are the major steps in conducting a mock trial?
2. Explain the economic substance test. Did Caterpillar meet or fail this test? Find the appropriate Internal Revenue Code (IRC) sections.
3. Which alternative courts could Caterpillar select to fight the current two billion dollars in income tax and penalties that the IRS is seeking? What are the differences between civil vs. criminal charges?
4. How can accountants help attorneys? What are the various roles they can play in litigation services? What limitations, if any, apply to disclosure between accountants and attorneys?
5. What motion is used by the opposing attorney to eliminate an expert witness? Discuss *Daubert* and *Frye* challenges against expert witnesses. Can a cost or tax person be a forensic accountant?
6. Can the IRS outsource part of their tax investigation? Take a position.
7. Prepare a three-to-four paragraph opening statement for the prosecution (plaintiff) in a Caterpillar mock trial.
8. Prepare a three-to-four paragraph closing statement for the defense in a Caterpillar mock trial.
9. What does Leslie Robinson mean when she indicates that Caterpillar did not comply with "U.S. financial reporting rules?"
10. Was there a transfer pricing problem after Caterpillar's reorganization?
11. Are there any problems with the many short-term loans which Caterpillar received from the Swiss controlled entity? Be sure to look at I.R.C. Sections 951 and 956 and appropriate Regulations.
12. Pretend that you are Daniel Schlicksup's supervisor. Prepare an evaluation of his performance on May 15, 2008, including a minimum of three pros and three cons regarding his actions concerning the CSARL reorganization.
13. What are the benefits and costs of being a whistleblower? Would you have been a whistleblower had you been in Daniel Schlicksup's position? Why or why not?

Case Learning Objectives and Implementation Guidance

The Caterpillar case is an excellent teaching scenario. First, this case presents students with a complex set of facts, a complex set of characters, and several legal issues. While everyone may have a different opinion, there are legitimate legal and practical arguments that support both those attacking the reorganization and those supporting its use. Second, this case provides students with a peek into a real-world method of reducing firms' effective tax rates through international tax planning. Caterpillar is not the only U.S. firm to use foreign entities to shift taxable income to jurisdictions with lower tax rates. Third, this case does not only stay "big picture," but looks within Caterpillar to the human element. The actions of Schlicksup and the responses of his superiors enhance the case. Further, the case introduces students to some human resource legal concerns and to IRS whistleblower actions, which may bring lucrative payoffs.

Learning Objectives

This complex case helps develop students' critical thinking skills. The identification and evaluation of the many issues, and development of the arguments on both sides of the case will help improve students' research skills and understanding of the complex legal matters involved. Rather than seeing the use of foreign affiliates from a distance, this concrete real-world example helps students understand the purpose of international planning. Further, by having students develop arguments for both sides, this case more thoroughly develops students understanding of the issues involved.

This case will help increase student awareness of the role of ethics in all elements of business. A career in tax compliance and planning requires a thorough understanding of the law and a solid ethical compass. This holds true for substantive tax work (e.g., international tax planning), for employee relations (no one works in a vacuum), and in protecting the interests of the shareholders. While there is little mention of the shareholders or other employees in the case, their interests should not be forgotten. Shareholders may prefer that companies engage in tax planning to the extent that money saved is used to continue to maintain and grow future profits. However, shareholders may not want the company tax planning to be overly aggressive, to the extent that overly aggressive tax planning can result in legal action by the IRS and other regulatory agencies. Some shareholders may even prefer to invest in companies that pay their fair share of taxes, since taxes can be used by governments to provide social goods. This final two questions present an opportunity for students to consider the full consequences, both pros and cons, of Schlicksup's actions, and whether they would be a whistleblower if faced with similar circumstances as was Schlicksup.

The case will help develop students' communication skills. Whether you require a written report, a presentation, or implement a mock trial, having to organize and present (either oral or written) an analysis of a legal issue will help prepare students for a career in tax or accounting.

Implementation Guidance

Case Analysis

Because of the many issues involved, the Caterpillar Case provides an excellent opportunity to introduce active learning into the classroom. Also, the case is complex enough to be flexible. The case can be assigned individually, in which each student must prepare their own work, or assigned to groups. The students can be required to prepare written reports and/or present their findings to the group.

This case may serve as an excellent in-class activity, especially for a long night class. Students can read the case prior to class or at the beginning of the class. Due to the complexity of the issues involved, instructors should facilitate an in-class discussion aimed at helping students focus on the various issues. Following the discussion, the class can be divided into groups, and assigned the task of investigating different issues. Depending on your facilities, an equipped "smart" classroom, or a classroom which allows student connectivity on personal devices presents an ideal setting for this project. During their investigation time, faculty has the opportunity to visit the individual groups and provide further guidance as necessary. Instructors seeking to limit the time on this project can have groups discuss their findings with the whole class at the end of the class. Otherwise, instructors can have students continue to work on the project outside of class for a few days or weeks, in preparation for a debate or mock trial. Regardless of how the instructor chooses to implement this presentation, having each group present their findings is vitally important. Not only will this presentation help students improve their communication skills, but students will be able to hear various aspects regarding the case and be forced to evaluate their understanding of the issue they and others are presenting. Finally, instructors can require a written follow-up report detailing their findings.

Mock Trial

A valuable addition to a forensic accounting or fraud course is a mock trail near the end of the semester. The facts in the Caterpillar situation is an excellent topic for a mock trial. The dispute includes possible "cooking the books," new tax laws, outsourcing, economic substance test, whistleblowing, civil vs. criminal aspects, structured loans, fraud, negligence, IRS using expert consultants/witnesses, and much more.

Our students have engaged in mock trials on numerous occasions. We break the students into three or four-member teams, keeping the teams small enough to ensure that all members have a voice and do not shirk their responsibilities. Since each group of students will be assigned a different aspect of the case, and the mock trial environment induces a natural competition among groups, the project naturally encourages all groups to do their own research.

In general, each team needs one or two attorneys, at least one fact witness, and one expert witness. Since this is a mock trial, each student can play more than one part (e.g., a student can be both a fact witness and an expert witness). You may encourage students to get into character by wearing wigs, different hats, mustaches, etc. While two teams are engaged in a trial, the other students can be jurors, bailiff, investigative reporter, etc. A lawyer, other faculty, or community friends of the instructor can be brought in to be the judge. If you have access to a courtroom, such as on campus, you may wish to have students actually preform the mock trial in a courtroom. If not, you should find a classroom that could be configured with four separate areas, an area for the judge, one area for the plaintiff teams, one area for the defendant team, and one area for jurors. In a three-hour night class, students can get in at least two trials, and possibly have the other teams give their opening and closing arguments. If instructors do not have enough class time for all mock trials to be completed, then instructors can randomly select the trial topic minutes before the night class, so that all students have to prepare.

We also refer interested instructors to the following sample trial: J.T. Reisch, "Brodnax Minerals Company: A Case Study for Auditors Responsibility," *Issues in Accounting Education*, Vol. 14, No. 4, November 1999, pp. 601–612. Instructors can provide a copy of the article to the class to use as a guide for structuring their case.

The mock trial format provides students with invaluable experiences, particularly as they relate to actual court room proceedings. These actual court room proceedings differ significantly from the unrealistic court room proceedings most students are familiar with, those portrayed on television shows. However, the mock trial format can be a bit time consuming. Additionally, it is our experience that students really enjoy conducting a mock trial. Instructors will have to trade off the unique learning environment that mock trials provide students with the class time constraints.

The Caterpillar Case: Good Planning or a Scam?

Instructor's Notes

1. The typical steps in a mock trial are as follows:
    a. Pre-trial preparation of information gathered from different sources by students.
    b. Courtroom participants: Judge, attorneys, witnesses, jurors, plaintiff (prosecution if a criminal case), defendant, and a bailiff.
    c. Beginning the trial, the bailiff announces:" All rise. The Court of the _____ is now in session; the Honorable Judge _____ is presiding." Everyone remains standing until the judge enters and takes the bench. The judge asks the bailiff to call the day's calendar, and the bailiff says, "Your Honor, today's case is _____ v. _____." The judge asks the attorneys for each side if they are ready to begin the trial.
    d. The Trial. Each attorney introduces him/herself: "May it please the court and members of the jury, my name is _____, counsel for _____ in this action."
    e. Attorneys for the plaintiff (first) and the defense (second) deliver their opening statements prepared from studying the facts of the dispute. Defense has the option to reserve its opening statement until after the plaintiff rests its case.
    f. Plaintiff calls each witness until finished calling witnesses and conducts direct examination for each one (direct examination).
    g. Defense may cross-examine the plaintiff's witnesses, before each witness steps down.
    h. The defense may call witnesses after the plaintiff rests the case (direct). The defense is under no obligation to present witnesses, because the burden rests on the plaintiff to demonstrate its case. Plaintiff's attorney may cross-examine the defense's witnesses before each witness steps down.
    i. Defense rests. Preparation of closing arguments.
    j. Closing arguments in a trial: Plaintiff's (or Prosecutor) attorney first, then defense.
    k. Jury instructions if a jury trial, but only in a District Court. Jury's verdict. This verdict must be unanimous in a criminal trial, but not in a civil trial.
    l. The sentence. The judge decides the punishment: jail, money, and/or time of volunteer service in a criminal trial.

2. The economic substance doctrine is defined in IRC § 7701(o)(5)(A) as the common-law doctrine that disallows tax benefits if the transaction lacks economic substance or a business purpose. Notice 2014-58 indicates that "a transaction has economic substance if: (1) the transaction changes in a meaningful (apart from federal income tax effects) the taxpayer's economic position; and (2) the taxpayer has a substantial purpose (apart from federal income tax effects) for entering into such transaction." The term transaction includes a series of transactions. Further, IRC § 6662 (b)(6) imposes a penalty on an underpayment attributable to tax benefits that are disallowed because of a lack of economic substance.

Whether the reorganization meets economic substance depends upon what action the IRS takes with respect to a lawsuit and the ultimate outcome of any lawsuit against Caterpillar.

The following is a partial list of relevant facts:

> In his deposition, Rodney Perkins, senior tax manager in Caterpillar's tax department was asked this question:
>
> Q: Was there any business advantage to Caterpillar, Inc., to have this arrangement put in place other than the avoidance or deferral of income taxation at higher rates?
>
> A: No, there was not.

Caterpillar counsel then said, "Let's take a break."[12]

More discussion of this question can be found in Senate Permanent Subcommittee on Investigations, Carl Levin, Chairman, Caterpillar's Offshore Tax Strategy, April 1, 2014 Hearing, pp. 69–73.

There are several sources detailing Daniel Schlicksup's assessment that the reorganization lacked economic substance, including his emails and legal action against Caterpillar.

Leslie Robertson's report reached the same conclusion.

3. Caterpillar would have three choices to fight the proposed IRS two-billion-dollar deficiency: U.S. Tax Court, U.S. District Court, or U.S. Court of Federal Claims. The Tax Court hears only tax cases; whereas the District Court and Court of Federal Claims hear nontax disputes. Apparently, the investigation is being undertaken by the U.S. Attorney's Office for the Central District of Illinois, the IRS, and the Inspector General of the FDIC.

The U.S. Tax Court normally has nineteen regular judges, but only one judge would hear the dispute. Only in the Tax Court does the two-billion-dollar deficiency not have to be paid before trial.

To have a jury trial, Caterpillar could file suit in the U.S. District Court, in the appropriate jurisdiction. However, Caterpillar could choose to file suit in a District Courts and still have the case decided by the presiding judge, i.e., a bench trial.

The third alternative is the Court of Federal Claims, which may be more favorable for issues having an equitable or pro-business orientation (and for those requiring extensive discovery of evidence). The Court of Federal Claims meets more often in Washington, D.C.

An appeal from Tax Court and District Court is to the U.S. Court of Appeals in the appropriate jurisdiction. An appeal from the Court of Federal Claims goes to the Court of Appeals for the Federal Circuit. For all federal tax cases, the ultimate authority for all appeals is the U.S. Supreme Court.

In a civil trial the dispute is over money, and a party needs only around fifty-one percent of the evidence to win (e.g., preponderance of the evidence). However, in a criminal trial about ninety-five percent of the evidence must prove the party is guilty (i.e., beyond a reasonable doubt). A criminal trial may result in a prison term.

If a special agent of the IRS recommends a criminal trial and if the Department of Justice Tax Division accepts the investigation for prosecution, the case is tried under IRC § 7201 (civil trial under § 6663). There is no statute of limitations for a civil tax fraud case, but for criminal tax fraud the statute of limitations is normally three years.

4. A quote from a Second Circuit Court of Appeals decision indicates why lawyers need both accounting consultants and expert witnesses. "Accounting concepts are a foreign language to some lawyers in most cases, and to almost all lawyers in some cases." Hal Rosenthal argues that "a lawsuit is like a parachute jump; you have to get it right the first time." The party who has command of the paper and electronic trails most often controls in the courtroom, and the accountants understand both the paper and electronic trails.

An accountant may be used in the courtroom as a fact witness to provide the court with relevant facts related to a dispute. No specialized training is necessary. The accountant or anyone can testify if he or she has information relevant to the case, and the testimony is not prejudicial or unnecessarily duplicative of evidence already presented. All documents referred by the fact witness must already be in evidence, and the accountant cannot testify about hearsay evidence. Their payment is a small, daily statutory fee. If called in a future trial, Daniel Schlicksup would probably be a fact witness.

An accountant may be hired as a consultant to help the attorney with accounting matters. If Leslie Robinson had been hired by the IRS as a consultant, her research report would not have been discoverable by Caterpillar as confidential workpapers (her research was leaked to the *New York Times*). However, if a consultant eventually turns into an expert witness, the her/his work would be discoverable by the other side.

If Dr. Robinson has been hired (or will be used) as an expert witness, she will help the court or trier-of-the-facts (jurors or judge in a bench trial) to understand technical issues. As a consultant or expert witness Dr. Robinson is entitled to a reasonable hourly rate, and an expert witness can testify about hearsay evidence if it is something normally relied upon by experts in that field (e.g., accounting). An expert witness can testify about documents that have not been entered into

[12] http://www.green-tax.co.uk/wp-content/uploads/2014/04/Caterpillar-Case-Using-a-Swiss-Tax-Strategy-to-avoid-U.S.-Taxes.pdf

evidence (if they are of the type normally relied on by experts in that field to form an opinion). The judge determines if the expert has the qualifications, and the testimony must be relevant and not unnecessarily duplicate or prejudicial.

Discovery rules are very liberal, particularly in criminal cases. Prosecutors must openly disclose all prosecution witnesses to the defense to allow ample opportunity to prepare a response. The prosecution is only allowed surprise witnesses in the case of rebuttal testimony, i.e., to directly contradict testimony given by a witness.

The court can appoint someone pre-trial, during trial, or post-trial to oversee certain aspects of the dispute. Often called special masters, appellate courts generally believe that special masters are reserved for special matters or unique circumstances, and they can be subject to *Daubert* challenges. Special masters have aided federal tax disputes for more than 90 years, especially in District Courts.

On occasions, a person may act as a summary witness to avoid wasting time calling multiple fact witnesses. They are used to efficiently and effectively present voluminous and complex data in the courtroom.

5. An attorney can make a motion of *limine* to exclude certain information before trial, such as an expert witness and his/her report. The judge will rule on the motion after a hearing. The hearing with the judge and lawyers can be simple or complex. A complex challenge can involve multiple days with live witnesses, both challenging experts and rebuttal experts.

In federal courts and many state courts there are *Daubert* challenges. To determine the admissibility of expert testimony, some state courts still follow the *Frye* rule.[13] However, most courts follow the rule laid down by the Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals, Inc*.[14] In *Daubert,* the Supreme Court established a gatekeeping rule for federal courts, such that trial judges have a special responsibility to ensure that scientific testimony is not only relevant, but also reliable. In *Kumho Tire Company, Ltd. v. Carmichael*,[15] the Supreme Court decided that a judge's "gatekeeping" obligation applies not only to scientific testimony, but to all expert testimony.

The Daubert five factors used to exclude expert witnesses are as follows:

1) Whether the theory or technique used by the expert can be, and has been, tested;
2) Whether the theory or technique has been subjected to peer review and publication;
3) The known or potential rate of error of the method used; and
4) The degree of the method's or conclusion's acceptance within the relevant community.
5) Are there standards controlling methodology and principles?

Experts may be excluded for other reasons such as:

1) The older, more liberal *Frye* challenge is used in a few state courts.
2) Does not qualify as an expert by skill, knowledge, experience, education, and training (SKEET).
3) Requires a valid connection to the pertinent inquiry as a precondition to admission.
4) Courts remain vigilant against the admission of legal conclusions.
5) Side-taking or result-oriented work (especially the U.S. Tax Court).
6) Conflict of interest.
7) Ghost-written report.
8) Spoliation.
9) Name not disclosed within time limit.
10) Improper expert witness designation.

Various types of accountants can be forensic accountants if there is an appropriate financial or accounting dispute. Forensic accounting is not limited to the narrow area of fraud, but includes many other areas such as valuations, damages, lost profits, malpractice, matrimonial disputes, bankruptcy, insurance claims, shareholder/partnership disputes and much more.

An AICPA litigation subcommittee indicates that a litigation practitioner can be a consultant, fact witness, special master, summary witness, or expert witness in these broad areas:

[13] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
[14] 509 U.S. 579 (1993).
[15] 526 U.S. 137 (1999).

- Computations.
- Consulting.
- Business valuations.
- Proactive and reactive fraud investigations.
- Pre- and post-bankruptcy restructuring, solvency analysis, and liquidation consulting.
- Special accountings, tracings, reconstructions, and cash flow analysis.
- Tax issues assessment and analysis.
- Marital dissolution's assessment and analysis.
- Contract costs and claims assessment and analysis.
- Antitrust and other business combinations assessments and analysis.
- Construction and environmental disputes assessment and analysis.
- Business interruption and other insurance claims assessment and analysis.

6. Once Dr. Leslie Robertson's eighty-five-page IRS report was leaked to the *New York Times*, Americans for Limited Government published a report by Natalia Casto indicating that critical taxpayer information and records should only be handled by the government agencies which are dedicated to the American people's trust. She points out that since May 2014, the IRS has hired outside firms to assist in income tax audits and investigations. The IRS paid the Quinn Emanuel law firm $2.2 million to perform duties that IRS normally handled privately (charging up to $1,000 an hour). Apparently, the law firm did not list taxes as one of its thirty-two practice areas.

Casto points to twenty-six U.S. Code 6103 which allows non-employees to handle paperwork only "to the extent necessary about the processing, storage, transmission, and reproduction of such returns and return information, the programming, maintenance repair, testing, and procurement of equipment, and the providing of other services, for purposes of tax administration." The IRS, according to Casto, manipulated a law about photocopying and issued Temporary Regulation § 301,7602-1T. This temporary regulation gives the IRS possibly illegal power to allow non-employees to "receive and examine books, papers, records, or other data produced in compliance with the summons and, in the presence and under the guidance of an IRS officer or employee, participate fully in the interview of the witness summoned by the IRS to provide testimony under oath." Likewise, IRC §6103 prohibits officers and employees of the IRS from disclosing taxpayer information, except in limited circumstances.

Senator Orrin Hatch sent a letter to the IRS Commissioner reminding him that the IRS has more than 36,000 employees, and the IRS will need an Act of Congress to hire private contractors. Further, he said:

> In a tax system based on voluntary compliance, the integrity of the tax administration process and protection of taxpayer rights is of paramount importance. To those ends, Congress put in place specific restrictions on government action in the examination process.

Is Dr. Robinson a private contractor? What documents was she given? We do not have a copy of her eighty-five-page report. The authors believe the IRS has overstepped its powers.

7. "May it please the court and members of the jury, my name is _____, counsel for the Department of Justice in this action. Today's tax trial involves Caterpillar, Inc., the world's largest builder of bulldozers and other heavy equipment. Caterpillar's management felt that their thirty percent tax rate was too high. They saw Apple, Verizon, Pfizer, Merck, and other companies reducing their tax rates by transferring intellectual properties and other intangible assets to foreign tax havens. How could a builder of machinery use such a scheme?

So, Caterpillar hired a magician, PwC, for fifty-five million dollars to pull a rabbit out of a black top hat. The magician suggested moving the parts division to a Swiss subsidiary (with a four to six percent tax rate) so the income would be taxed at the much lower rate. Before the magic trick eighty-five percent of profits were taxed in the U.S. and fifteen percent in Switzerland. After the rabbit is pulled from the hat, the Swiss unit bought parts from the suppliers, but the purchases were only on paper. In reality, only sixty-five employees in Switzerland (out of 400) worked on parts, but 5,000 employees worked on parts in the U.S.

For the period 2000 to 2012, Caterpillar moved at least $7.9 billion in revenue to the Swiss subsidiary (a controlled unit) and reduced their federal taxes by at least $2.4 billion.

Caterpillar's bright yellow machines only can be maintained and repaired with Caterpillar parts, and these parts are manufactured mostly by companies in the U.S. and shipped around the world. Almost eighty percent of the R&D expenditures to design the machines and parts occurs in the U.S. The $525 million worth of parts are stored in the U.S., and few, if any, are stored in Switzerland.

As a juror, would you have paid PwC (the magician) fifty-five million dollars for this scheme? Probably not. But Caterpillar still had a problem, because much of the cash was in Switzerland. If Caterpillar brings the cash back to the U.S. (called repatriation), it will be taxed. So, PwC (magician) suggested to cover the obvious cash shortages in the U.S., have the Swiss office send thirty-day short-term loans to Caterpillar USA. Each of these many short-term loans are paid back from more and more short-term loans from Switzerland. Although, the company had economic use of these funds, they did not pay taxes on it. I ask you, if some foreign company gave you $7.9 billion of rolling, short-term loans, would that be worth something to you? Maybe invest it or buy a couple of Lamborghinis. Or buy a dozen bulldozers at wholesale and resale them. Our expert, Dr. Leslie Robinson, will testify that Caterpillar has brought back $7.9 billion to the U.S. as structured loans beyond the income already taxed overseas. She will testify that Caterpillar kept two sets of books. She will testify that Caterpillar's non-compliance with financial reporting rules was deliberate and primarily with the intention to maintain a high share price. I quote: "These actions were fraudulent rather than negligent."

Would the Swiss branch do the same for another company—say General Motors? Give G.M. $7.9 billion in loans, and during the next month loan more to G.M. so they could pay back the first loan. In other words, G.M. would always have $7.9 billion to use. Of course not. There would be no benefit of repatriating money to G.M.

By necessity we will talk about some tax terms, such as the economic substance doctrine. For the magician to pull the revenue (rabbit) out of the hat, an economic substance test must be met to keep it from being an abusive tax shelter. Mr. Daniel Schlicksup, as a tax employee, warned management that the new scheme did not meet the tax laws. He will tell you that the only reason for the new Swiss scheme to exist was to lower overall taxes—which is not a business reason for such a reorganization.

Another term is transfer pricing. Now transfer pricing is not illegal, but when dealing with a foreign subsidiary, a parent must use arms-length pricing (or uncontrolled pricing). Caterpillar does not use arms-length pricing when they transfer the parts, practical knowledge, and accounting to the Swiss unit. Our expert will show that a one percent increase in cross-border, intra-firm transfers leads to only 0.38 percent decrease in U.S. pretax income. Caterpillar is reducing its tax rate from thirty-four percent to four to six percent.

We will show that the magician, PwC, sold for fifty-five million dollars an abusive tax shelter to Caterpillar. Even some of Caterpillar's employees told management that the scheme did not meet the tax laws. An e-mail between two PwC partners shows that the slight-of-hand magic trick did not meet the transfer pricing tax rules. We will show that the massive short-term loans gave Caterpillar economic repatriation which should be taxable income to Caterpillar USA.

This subterfuge of Caterpillar and PwC brings to mind a tax adage. Pigs get fed; hogs get slaughtered.

Keep an open mind as you hear the evidence. Remember, when corporations do not pay their fair share of taxes, your tax bill is higher, and government benefits are reduced or eliminated.

Thank you"

8. "May it please the court and members of the jury, my is _____, counsel for Caterpillar Corporation. This dispute is simple. Did my client engage in legal tax planning or tax evasion? We have clearly shown that Caterpillar merely engaged in legal and effective tax planning, based on the tax code and solid tax principles—not fraud or evasion.

Most accounting and law students are familiar with the classic words of Judge Learned Hand in *Commissioner v. Newman* illustrating the value of tax avoidance:

> Over and over again courts have said there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor, and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced extractions, not voluntary contributions. To demand more in the name of morals is mere cant.

Tax avoidance is merely tax minimization through legal techniques allowable by the Internal Revenue Code. Tax avoidance is the proper objective of a large corporation or you. Remember you are not obligated to make voluntary contributions to federal, state, or local governments. I suspect that each of you and your accountant try to reduce your taxes by taking advantage of each of the available provisions in the tax laws.

The prosecution harps on this vague economic substance doctrine. Caterpillar's restructuring was necessary and appropriate because part sales grew globally, and the company had to invest in facilities and warehouses in many other countries. We have clearly shown that the Swiss unit was running the foreign business from Geneva regardless where the parts were made or stored. Obviously, this constitutes the required economic substance under the tax laws.

There is the argument about the short-term loans from Switzerland to Caterpillar USA. Have you ever been short of cash? Have you borrowed money from your parent, children, bank, or on your credit cards? If so, you do not have to show that as taxable income. Besides, there is a thirty-day short-term loan exception. The loans from Switzerland were short-term loans that were repaid.

With the high tax rates on corporations in the U.S. before 2018, Caterpillar had to continually adapt to the way their business was run, and that is what my client did. They did not invent an artificial tax structure. Do not punish my client for engaging in tax avoidance like most other corporations do in the U.S. and around the world. Caterpillar, based upon testimony from our witnesses, merely tried to minimize their taxes legally, and they do not evade taxes. These allegations against Caterpillar are gross misconceptions and misinterpretations of the complicated tax laws. Please note that the U.S. corporate tax rate after 2017 is significantly higher than the Swiss rate.

This company is proud to be a symbol of a lawful, legitimate business for almost a century. The government has failed to prove that my client did not follow the letter of the tax laws. It is absurd to believe that Caterpillar has done what the government claims. Consider the motives of their witnesses. One is a disgruntled employee who expects to receive a $600 million whistleblower award if the IRS wins. An expert was paid at least $250 an hour for 200 hours of work, or at least $50,000. How do you expect them to testify?

While the prosecutor is critical of Caterpillar's international tax planning and financing schemes, there is an important legal, alternate perspective. First, the Scholes and Wolfson's framework[1] suggests that companies' tax planning schemes are amoral. The paradigm that companies' tax planning schemes are amoral comes from the economic perspective that companies must take all actions necessary to remain viable in competitive operating environments. The globalization of competition highlights the importance of minimizing costs. There are any number of U.S. based manufacturing examples (e.g., televisions, steel, etc.) that have moved to other countries due to lower costs of production which highlight the importance of minimizing costs in competitive environments.

Second, do you want to pay more for the products you purchase? Economists frequently suggest that companies do not pay taxes, but instead pass these costs onto consumers, in the form of higher product prices, or onto employees, in the form of lower salaries. Many companies announced that they would pay employees bonuses or higher wages following the passage of the Tax Cuts and Jobs Act of 2017. These bonus payments and higher wage announcements support the economists' suggestion that companies pass the cost of taxes onto their employees in the form of lower salaries and consumers in the form of higher prices.

Finally, contemplate the real effects that the U.S. international tax system has on all corporate decisions. To minimize taxable income in the U.S., companies frequently try to move their valuable intellectual property overseas, before it has a significant value. By moving their valuable intellectual property overseas, profits can be shifted to foreign subsidiaries as these foreign subsidiaries charge their U.S. parent company for the use of these intellectual property rights. The question is whether the U.S. international tax system should promote companies to move these valuable assets to overseas subsidiaries, particularly since the U.S. is continuing to transition to a largely service based economy. The real effect is that, long-standing, profitable U.S. based companies who cannot shift profitable intellectual property rights, such as Caterpillar prior to the development of the Swiss CSARL strategy, were punished by the high U.S. tax system (before 2018) as they tried to compete against global competitors whose profit centers were in lower tax jurisdictions.

Another troubling real effect is that newer, growth companies, that could help the U.S. GDP continue to expand, were often motivated to shift their valuable assets, and thus profit growth, to foreign subsidiaries well before any profits were made from their operations. Another troubling trend that is motivated by the U.S. international tax system, is the trend

for large, long-standing profitable companies to engage in inversions, where a merger and acquisition transaction results in the newly formed company choosing to locate their parent company in a foreign jurisdiction that has lower tax rates. Should the U.S. international tax system promote these types of real effects on corporate decisions?

Read very carefully the jury instructions about fraud. Use common sense in your deliberations. Disagreement with the IRS is not a crime. Just because a taxpayer is audited is not a sign a taxpayer owes taxes. There are many grey areas in the tax laws, and experts can disagree about a word or phrase in the tax law.

Do not punish Caterpillar for merely engaging in tax avoidance, which is not tax evasion.

Thank you"

[1]Scholes, M.S. and M.A. Wolfson. 1992. *Taxes and Business Strategy: A Global Planning Approach*, Pearson.

9. The SEC also raised questions with respect to whether Caterpillar's financial reporting of taxes were appropriate. The SEC requested documents particularly with respect to Caterpillar's loans and product shipments between the U.S. parent and CSARL. While the SEC ultimately declined to pursue enforcement action,[2] we speculate on two financial reporting items that the SEC may be considering.

Financial reporting and tax rules require parity between inventory valuation methods. For example, a company must use LIFO for both financial reporting and tax reporting purposes. Given the transfer of parts from the U.S. parent to CSARL, the SEC may have been investigating whether Caterpillar's financial reporting of inventory on these transferred parts matched the tax reporting.

More importantly, companies must recognize deferred tax liabilities on their balance sheets for tax liabilities that they reasonably expect to incur at some point. Financial reporting rules, however, permit companies to avoid recognizing deferred tax liabilities for what are commonly referred to as permanently reinvested earnings.[3] Permanently reinvested earnings are foreign earnings earned by a foreign subsidiary that are not expected to be sent back to the U.S. parent. In the case of Caterpillar, the lending arrangement between CSARL and the U.S. parent may have violated the concept of permanently reinvested earnings, as the loans, were in effect, a return of the foreign earnings from CSARL to the U.S. parent. The SEC may have been evaluating whether Caterpillar recorded a deferred tax liability with respect to CSARL's profits. Had Caterpillar not recorded a deferred tax liability because they considered CSARL's profits to be permanently reinvested earnings, then the SEC likely would have investigated whether this lending arrangement between Swiss CSARL and the U.S. parent violated the permanently reinvested earnings concept.

If a company is caught cooking their books many bad things can happen, including:

- Collapse of the share-price (which affects stock options);
- Investigation by SEC;
- Indictment of top executives;
- Disgorgement of illegal gains;
- Claw back of prior compensation paid to executives;
- Temporary/permanent injunction from serving as an executive/officer;
- Civil/criminal penalties [might discuss Yates Memo here];
- Prison time;
- Bankruptcy of company (e.g., Enron, Arthur Andersen).

[2]Tangel, Andrew and Michael Rapoport. 2018. "What New Law? Caterpillar Fights to Protect Its Swiss Made Profits, Wall Street Journal, January. http://www.foxbusiness.com/features/2018/01/01/what-new-tax-law-caterpillar-fights-to-protect-2.html

[3]Edwards, Alexander, Todd Kravet, and Ryan Wilson. 2015. Trapped Cash and the Profitability of Foreign Acquisitions, *Contemporary Accounting Research,* Vol. 33, Issue 1, Spring, pp. 44–77.

10. Research shows that significant gains accrue to shareholders of firms that engage in cross-border, intra-firm transfers. "Estimation results show that a one percent increase in intra-company, inter-geographic area transfers leads to approximately 0.38 percent decrease in U.S. pretax income. Caterpillar's tax rate of around thirty-five percent of revenue went to four to six percent." See K.O. Olibe et al., "The Impact of Intra-firm Transfer Pricing on Firm Value,

Taxes, and Earnings: International Financial and Tax Fraud," *J. of Forensic & Investigative Accounting*, Vol. 9, Issue 1, Jan–June 2017.

PwC's webpage indicates that they have over 3,100 transfer pricing professionals in more than ninety countries. They indicated three major risks with transfer pricing arrangements.

1) Large local tax reassessments—with significant penalties and interest on overdue tax—and double taxation on income when relief under tax treaties is not available.
2) Uncertainty about worldwide tax burden, and expensive, time-consuming conflicts with regulatory authorities.
3) Damage to reputation and corporate brand if seen as a bad corporate citizen.

As a juror, would you have paid PwC fifty-five million dollars for the tax schemes?

After the reorganization, there was a transfer miss-pricing problem. An e-mail exchange[16] between two PwC transfer pricing partners recognized this problem and the solution:

> Steven Williams (PwC Managing Director): "Just curious—say they [Caterpillar] decide PMs [product managers]…stay in U.S. How do we retain CSARL parts profits if those 'U.S. entrepreneurs' claim both machine AND parts profit?"
>
> Thomas Quinn (PwC Tax Partner, designer of CSARL scheme): "PMs in U.S. will put some pressure on the parts profit model. These guys are really bought into the [idea that] PM is king concept. We are going to have to create a story that will put some distance between them [product managers] and parts [e.g., all the parts that are non-current] to retain the benefit. Get ready to do some dancing."
>
> Steven Williams replied: "What the heck. We'll all be retired when this audit comes up for audit. [Edward] Bodnam and [C]hris Dunn will have to solve it. Baby boomers have their fun and leave it to the kids to pay for it."

U.S. corporate income tax rates were the highest (before 2018) among Organization for Economic Cooperation and Development countries, which drove U.S. multinationals to use transfer pricing to reduce their overall taxes. Switching income from a thirty-five percent regime to a four to six percent country was obviously beneficial. We suspect some corporations will continue to look for low tax countries after 2017.

In general, transfers of tangible goods, intangible property, and services must be done under an arm's length standard (as if Caterpillar is dealing with an uncontrolled party). Reg. §1.482-1(b)(1) indicates that a transaction is consistent with the results that would have been realized if uncontrolled taxpayers had engaged in the same transaction under the same circumstances.

If a taxpayer fails to prepare and maintain contemporaneous documentations, there can be twenty or forty percent tax adjustments. There are various transfer pricing methods for tangible goods, intangible property, and services, such as resale price, cost plus, comparable uncontrolled price, and others. There is not enough information to know which method Caterpillar used. However, with only sixty-five parts employees out of 400 in Switzerland and 5,000 in the USA, the impression is Caterpillar did not meet the transfer pricing rules.

> 11. The IRA LB&I International Practice Service Transaction Unit discusses this technique by some companies that use short-term loans (thirty days) from the foreign entity to obtain economic repatriation of the foreign earnings. In general, under IRC Sections 951 and 956, Caterpillar, as a shareholder, must include in income an average amount of U.S. property held by the Swiss entity (Controlled Foreign Corporation). There is a short-term loan limited exception that can be used to avoid taxation, but the IRS looks at a situation where a series of short-term loans is being used to circumvent taxation under IRC Section 951. To meet the exception, the substance of the obligation must match its form, and the obligation must not be one step in a series of related steps in a united transaction. If so, multiple obligations may be collapsed into a single obligation.
>
> 12. Note concerning employee evaluations: Quality reviews are to provide focus. While some items may be discussed in general terms, performance evaluations, identified weakness and suggested future actions should be as specific as

[16] https://www.gpo.gov/fdsys/pkg/CHRG-113shrg89523/html/CHRG-113shrg89523.htm; and http://www.green-tax.co.uk/wp-content/uploads/2014/04/Caterpillar-Case-Using-a-Swiss-Tax-Strategy-to-avoid-U.S.-Taxes.pdf

possible. Only with clarity are supervisors able to provide employees guidance and to document when performance falls short of expectations.

RE: Review of Daniel Schlicksup, Global Tax Strategy Manager

Discussion of Positive Performance and Value Added to the Company

Daniel has long demonstrated excellent technical tax and accounting skills. Daniel was an important member of Caterpillar's international tax team during the 1999 reorganization. His service abroad during this important transitional period lead to his promotion to the newly created position of Global Tax Strategy Manager. He has the reputation of being a "go to" leader and solver of tough problems.

Evaluation of Areas Needing Improvement

Daniel's behavior has occasionally interfered with the efficiency of the department and made fellow employees uncomfortable. First, there have been multiple occasions where Daniel has refused to accept departmental decisions. While the department encourages open discussions and debates during planning stages, the department expects all of the in-house tax team members to accept the planning and operational decisions of the leadership team, who are advised by the finest accounting and legal firms. Second, Daniel has repeated reviewed past accounting decisions, some dating back to the 1970s, which are far outside of his authority. Third, Daniel has sent numerous unprofessional, antagonistic emails to fellow employees, accusing one of secretly recording meetings.

13. The final question is designed to help students consider the challenges faced by "whistleblowers." It is easy for students in a sterile environment, such as a classroom, to suggest that they would not engage in questionable behavior. Additionally, students may believe that, thanks to whistleblower protections offered in the United States, that the decision to become a whistleblower is easy. We refer interested readers to https://www.whistleblowers.gov/ for more information.

Although there are substantial whistleblower protections in the United States, including the right to avoid retaliation by the employer during the investigation, Schlicksup's case provides the realistic perspective that there may be substantial time between the retaliatory actions of employers and actual protections being provided, in the form of financial relief judgments against former employers. Schlicksup's whistleblower case remained unsettled for nearly a decade, as of the writing of this case. Further complicating this perspective, is whether it can be proven that the employer will be held responsible under the whistleblower act. In Schlicksup's case, he was granted a lateral move with a raise and the employer suggested that Schlicksup was a troublesome employee. Either of these actions could be used by the company to provide support for a claim that the employee did not suffer retaliatory action, thus reducing or eliminating the possibility that the employee will be granted any financial relief judgements.

Additionally, some forms of retaliation can lead to an employee choosing to leave a company but are difficult to prove since an employee may not be able to adequately document these retaliatory actions. If an employee chooses to leave the company or their position to limit their exposure to retaliatory actions, the employee may suffer lost or reduced compensation and potentially face challenges in finding new positions. Thus, whistleblowing likely results in financial hardships to the individual who elects to engage in whistleblowing. Since whistleblowing claims can take a long time to adjudicate, and ultimately may not result in a financial judgement favoring the plaintiff, whistleblowers are often faced with the reality that they must be financially secure enough to endure the entire process.

In a worse-case scenario for Peoria, Caterpillar could ultimately close some of its U.S. facilities to expand its foreign operations. If Schlicksup's friends and neighbors blame him should they lose their jobs and be forced to move, the financial reward may do little to make up for the impact on his life.

Student responses to this question should reflect a deeper understanding of the challenges in being a whistleblower.