

SULLIVAN & CROMWELL LLP

Lawyers



Donald L. Korb

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In 2009, former Chief Counsel for the Internal Revenue Service, Donald L. Korb joined Sullivan & Cromwell as a partner and the head of the Firm's Tax Controversy Practice. A practicing attorney for over 44 years, both in the public and private sectors, not only is Mr. Korb widely recognized as one of the country's foremost tax lawyers, his reputation extends outside the U.S. as well – for example, in October 2012, Mr. Korb was spotlighted in the U.K. Tax Journal in its "One minute with . . ." column, one of the very few U.S. tax lawyers ever profiled in that U.K. publication.

Importantly, Sullivan & Cromwell Tax Group's efficacy in resolving administrative challenges with the IRS has been enhanced by the presence and perspectives of Mr. Korb. Through his experience and knowledge of the IRS, the Firm is able to provide the crucial "inner working" understanding that allows it to anticipate crucial decisions, craft the best possible arguments and negotiate the best outcomes for its clients.

Public Sector Practice and Tenure with the Internal Revenue Service

As IRS Chief Counsel (2004-2008), Mr. Korb was the chief law officer for the IRS, supervising approximately 1,500 attorneys who were assigned to the IRS National Office and among the major operational divisions of the agency. He played a prominent role in increasing the effectiveness of the Chief Counsel's Office, and is best known for developing the litigation strategy that led to the stunning success by the government in litigating tax shelter cases during his almost five-year tenure.

Among the individual matters with which he was personally involved while Chief Counsel was serving as the lead negotiator in resolving a landmark transfer pricing dispute. As part of the settlement, the taxpayer made the largest single payment ever made to the IRS to resolve a tax dispute.

PRACTICES & CAPABILITIES

Tax

Tax Controversy

EDUCATION

1977, Georgetown University Law Center, LL.M.

1973, Case Western Reserve University School of Law, J.D.

1970, John Carroll University, B.A.

BAR ADMISSIONS

Ohio (inactive)

New York

District of Columbia

Prior to becoming the IRS Chief Counsel in 2004, Mr. Korb previously worked twice before in the public sector, having spent more than two years as an Assistant to the Commissioner of Internal Revenue in the mid-1980s (when he was the overall coordinator of the IRS's involvement in the legislative process that resulted in the enactment of the landmark Tax Reform Act of 1986) and, at the beginning of his career, four years as an attorney adviser in the IRS Chief Counsel's Office.

Private Sector Practice and Extensive Ongoing Tax Controversy Experience

In addition to his notable tenure in the public sector, Mr. Korb has over 33 years of private practice experience, the majority of it as a tax partner at Thompson Hine, including serving as chairman of that Firm's Tax Group, and the balance with Sullivan & Cromwell and Coopers & Lybrand. He was primarily responsible for developing Thompson Hine's national tax controversy practice but also advised clients on major transactions and obtained rulings and other technical guidance from the IRS National Office.

Most of Mr. Korb's private practice experience has consisted of tax controversy matters, including a significant number of tax fraud and tax penalty cases, all of which resulted in a significant reduction in the IRS's initial assessments and/or the elimination of the penalties. Some of the clients Mr. Korb has represented over the years include a rock star; a symphony orchestra; some of the world's largest financial institutions and brokerage firms; a major airline; national retailers; several of the nation's largest real estate developers; large multinational manufacturing, publishing, computer software, distribution, entertainment, water and construction corporations, some of which are headquartered outside of the U.S.; tax exempt entities; and closely held business entities in the fast food, automobile dealership, distribution and healthcare industries.

Additionally, Mr. Korb has been involved in the planning of many transactions, including financings, mergers, acquisitions and dispositions of assets and workouts of distressed companies. Over the years, he has formed numerous partnerships, joint ventures and limited liability companies. He also has assisted taxpayers in influencing the direction of tax policy at both the administrative and Congressional levels, including testifying before Congress. In addition, he has obtained many private letter rulings for clients, a number of which were obtained on a very expedited basis. Finally, he has helped candidates for senior Executive Branch appointments with the nomination/confirmation process, and in particular has advised them how to deal with tax issues that could conceivably derail their nomination.

Selected Representations After Joining Sullivan & Cromwell

In 2013, Sullivan & Cromwell was honored by the International Tax Review as the North America Tax Disputes Firm of the Year. And two years later, in 2015, the same journal named S&C the U.S. Tax Court Firm of the Year as well as the Washington, D.C. Transfer Pricing Firm of the Year. The matters for which S&C received these awards (plus some additional matters in other years) are described below.

Mr. Korb believes that it is far better to approach tax controversies with a view toward resolving the matters at the earliest possible stage of the process and at the lowest possible cost to the client, both in terms of any payments to the IRS and the expense of achieving such results. The very successful outcomes described below were obtained by Mr. Korb (many working with colleagues at Sullivan & Cromwell), all without resorting to costly and time consuming litigation.

- The representation of a European company in an IRS examination involving a debt/equity issue with almost \$3 billion in potential tax, penalty and interest liability at stake. The IRS has been raising the debt/equity issue in a significant number of recent examinations where the non-U.S. parent, or another entity in the non-U.S. group, has made loans to a U.S. subsidiary. This case, which is a variation of those facts, represented, one of the largest potential adjustments that the IRS had proposed to date. In July 2012, after extensive presentations, discussions and negotiations with the IRS, the IRS examination team conceded 100% of the issue, saving the company almost \$3 billion.
- The representation of a U.S. company at the IRS appeals level where the IRS examination team had proposed an adjustment in excess of \$200 million based on the proposed disallowance of a trade/ business expense claiming that the payment was nondeductible under Section 162(f) of the Internal Revenue Code as the payment of a fine or penalty. S&C filed a written protest and then convinced the IRS appeals officer to make a 100% concession on the issue which resulted in a no-change to the tax return as filed.
- The representation of a European company in an IRS examination involving a dual consolidated loss issue which the IRS examination team raised at the "11th hour" of the examination. The IRS examination team was seeking an adjustment in excess of \$1 billion. Working less than two months on the issue, S&C was able to convince the LBI case manager and LBI territory manager that the losses were not in fact dual consolidated losses, and the issue was dropped.
- The representation of an individual at the IRS examination level where the IRS Global High Net Worth examination team had proposed a \$150 million adjustment claiming that the taxpayer, who had sold his shares of a publicly traded company which he formed, had to recognize additional gain on an adjustment to the purchase price of his stock to which he agreed in order to incentivize the acquirer of his shares to establish an additional nonqualified employee benefit plan. Eventually the case was referred to the National Office of the IRS Office of Chief Counsel where it was decided that the entire issue should be conceded by the IRS examination

team.

- The representation of a European bank at the IRS appeals level where a non-U.S. entity, an investment vehicle for non-U.S. citizens, had failed to file its IRS Forms 1120-F for multiple tax years. The IRS examination team had refused to grant a waiver of the 18-month filing requirement contained in Treas. Reg. § 1.882-4(a)(3) and to abate late filing and late payment penalties for the 8 tax years in issue. In this Swallows Holding, Ltd. type of case, the IRS was seeking over \$18 million, but the IRS appeals officer agreed to a settlement of \$1.2 million, a 92% concession.
- The representation of a U.S. Real Estate Holding Company in an IRS examination where the IRS examination team originally was seeking tax, interest and penalties of almost \$80 million. Numerous issues were involved, including constructive dividends and the use of a corporate plane; it is also highly likely that the examination was triggered by a whistleblower filing with the IRS. Eventually a potential \$46 million case went to IRS appeals and the IRS appeals office conceded 93% of the case (totaling \$43 million).
- The representation of a European Company's U.S. subsidiary in an IRS examination of a refund claim for the Extraterritorial Income Exclusion involving access to journal articles on an electronic database in countries other than the United States. The amount at issue was in excess of \$110 million in tax and, at the IRS appeals level, S&C, working with co-counsel, was successful in preserving all but \$400,000 of the refund claim, possibly the largest ETI refund to date.
- The representation of a non-U.S. North American bank at the IRS appeals level where the IRS Service Center had rejected a claim for refund based on the theory that the statute of limitations for filing the refund claim had expired. S&C filed a written protest and convinced the IRS appeals officer to allow the claim in full based on the theory that certain emails and oral conversations with the IRS examination team and another IRS appeals officer had resulted in an "informal claim" for refund being filed prior to the expiration of the statute of limitations. The amount of the refund (including interest) was approximately \$15 million.
- The representation of the U.S. subsidiary of a non-U.S. bank at the IRS appeals level where the IRS examination team set up a so-called Foreign Tax Credit Generator issue (value at about \$50 million). S&C filed a written protest and then convinced the IRS appeals officers to make an 85% concession on the issue; the Firm is not aware of any other taxpayer who received more than a 35% concession with respect to this issue.
- The representation of three siblings in a family which

operated one of the largest privately held businesses in the New York metropolitan area in an IRS collection matter. The taxpayers had invested in a number of tax shelters (including two “son of boss” transactions) and had all of the losses generated by the tax shelters disallowed in a combination of proceedings, including a Tax Court case. The total amount owed by the three individuals for six tax years was in excess of \$158 million. S&C was engaged to negotiate with the IRS collection function and was able to reduce the combined payment by \$59 million through the use of the Offer in Compromise process. It is believed that the Offer in Compromise in this case represents the largest Offer in Compromise ever accepted by the IRS.

Selected Representations Prior to Becoming IRS Chief Counsel

- Obtaining a multi-million dollar refund for a non-U.S. bank in a case where the IRS argued that the claim for refund was untimely because the statute of limitations had expired.
- Obtaining a multi-million dollar refund for a telecommunications company with respect to 1986 Tax Reform Act transition investment tax credits on capital improvements.
- Obtaining a multi-million dollar refund for a national retailer for a specified liability loss deduction.
- Settled a multi-million dollar personal holding company issue for a large national shopping center developer at IRS Appeals.
- Handling an IRS appeals case for an Ohio property and casualty insurance company where the IRS conceded 100% of a complicated reserve issue.
- Negotiating a closing agreement resulting in the recovery of a multi-million dollar refund attributable to excessive payments to the IRS of deficiency interest by a large manufacturing company.
- Eliminating multi-million dollars in ERISA penalties asserted by the IRS against a major U.S. airline.
- Eliminating multi-million dollars in backup withholding penalties asserted by the IRS against several major financial institutions.
- Settling COLI interest deduction issues for five large multinational companies in the manufacturing, telecommunications and retail industries.
- Developing a novel legal theory that persuaded a U.S. Bankruptcy Court, in a case of first impression, to award a tax refund to a former subsidiary of a bankrupt parent corporation.
- Eliminating millions of dollars in proposed tax by the IRS

concerning the proper application of statistical sampling techniques to the calculation of LIFO pricing index.

Writing and Speaking Engagements

In addition, Mr. Korb writes and publishes articles regarding national and international tax controversy and dispute resolution issues. Recent notable articles include:

- “Is Treasury’s Policy Statement on the Regulatory Process Pro-Taxpayer?” in *Tax Notes* (April 22, 2019)
- “US Tax Reform: Outbound Investment” in *Tax Journal* (February 21, 2019)
- “US Tax Reform: Inbound Investment” in *Tax Journal* (February 14, 2019)
- “US Tax Reform: Examining the Tax Cuts and Jobs Act 2017” in *Tax Journal* (January 12, 2018)
- “US Tax Reform Nears its Conclusion” in *Tax Journal* (December 1, 2017)
- “US Tax Reform Effort Moves to Centre Stage” in *Tax Journal* (September 8, 2017)
- “Is the US Tax Reform Effort in Trouble?” in *Tax Journal* (May 5, 2017)
- “What Donald Trump’s Election Means for US Tax Policy” in *Tax Journal* (November 18, 2016)
- “BEPS: The US Perspective” in *Tax Journal* (July 25, 2014)
- “US Transfer Pricing Audit Roadmap Can Help Taxpayers” in *International Tax Review* (March 17, 2014)
- “Debt-equity litigation returns to US courts,” in *British Tax Review* (January 2014) (Co-author)
- “IRS Issues Directive Revising the Information Document Request Enforcement Process for LBI Examinations” in *Bloomberg BNA’s Daily Tax Report* (November 20, 2013)
- G-8 Declaration Latest in International Movement to increase Tax-Related Disclosures and to limit Cross-Border “Tax Arbitrage,” in *Practical Information Tax Strategies* (June 30, 2013)
- “One minute with . . .” interview, in U.K. *Tax Journal* (October 2012)
- “The Increasing Demands on US Tax Advisers,” in U.K. *Tax Journal* (July 2012)
- “Final Section 482 Cost Sharing Regulations: A Renewed Commitment to the Income Method,” in *BNA Tax Management Transfer Pricing Report* (January 2012)
- “Brazilian Legislation Proposes to Allow Administrative Settlement of Tax Disputes,” in both *Latin American Law & Business Report* and *Practical Latin American Tax Strategies* (February 2011)
- “Why Tax Authorities Need to Respect Client Privilege,” in

International Tax Review (December 2010/January 2011)

- “The IRS Uncertain Tax Position Initiative,” in *U.K. Tax Journal* (November 2010)
- “Comparing U.S. and U.K. anti-avoidance approaches,” in *Tax Journal* (August 2010) (Co-author)
- “Expert Q&A on the Codified Economic Substance Doctrine” (*Practical Law: The Journal*) (May 2010)
- “Brazilian Tax Settlements,” in *Latin American Law & Business Report* (November 2009) (Co-author)
- “The Four Rs Revisited: Regulations, Rulings, Reliance and Retroactivity in the 21st Century – A View From Within,” in *CCH’s Taxes – The Tax Magazine* (An August 2009 update of former IRS Chief Counsel Mitchell Rogovin’s important 1965 treatise)
- “Tax Information Exchange Program: View From America,” in *The Tax Journal* (July 2009) (Co-author)
- “IRS Alternatives to the Traditional Tax Controversy System,” in *Direito Tributário Internacional Aplicado* (Winter 2008)

Mr. Korb has also spoken on a variety of topics, including at events sponsored by the American Bar Association, Tax Executives Institute, Practising Law Institute, International Fiscal Association and many other organizations. Notably, while IRS Chief Counsel, Mr. Korb gave more than 250 speeches or public presentations. Recent presentations include:

- “International Assurance Programs. A New Phase of the Domestic Concept?” 2018 Co-operative Compliance and International Compliance Assurance Programs: Moving Forward the Debate; WU Global Tax Policy Center, Vienna University of Economics and Business (July 4, 2018) (Vienna, Austria)
- “Tax Cuts and Jobs Act of 2017,” 27th Annual Ohio Tax Conference (January 24, 2018) (Columbus, OH)
- “Review of Agency Rule-Making (APA, CRA, and Administrative Rescission),” 2017 Spring Tax Policy Conference & Annual TTC/TCPI Board Meetings (March 16, 2017) (Palm Beach, FL)
- “Recent Developments in Tax Litigation,” FBA Tax Law Conference (March 3, 2017) (Washington, DC)
- “Use of the Administrative Procedure Act to Challenge IRS Guidance and Other IRS Administrative Actions,” Conference, USA Branch, International Fiscal Association (February 22, 2017) (New York, NY)
- “A New World: BEPS and Section 385,” Tax Executives Institute, New York Chapter (December 14, 2016) (New York, NY)
- “Use of the Administrative Procedure Act in U.S. Tax Controversies,” Tax Executives Institute Cleveland Branch

(October 27, 2016) (Cleveland, OH)

- “IRS Administrative Issues Including Altera,” National Foreign Trade Council Tax Committee Meeting (October 20, 2016) (Washington, D.C.)
- “Criminalization of Tax Planning, including general audit in post-BEPS environments and practical strategies for minimizing exposure,” International Fiscal Association U.S. and Italy Branches Joint Meeting (September 23, 2016) (Barcelona, Spain)
- “Trends in Tax Exceptionalism and Tax Litigation,” *UK Journal of Tax Administration* and the Centre for Tax Law at Cambridge University (July 14, 2016) (London, U.K.)
- “Using the Administrative Procedure Act to Challenge IRS Guidance and Other IRS Administrative Actions,” New York University (February 4, 2016) (New York, NY)
- “Tax Policy Symposium: Reforming the IRS,” University of Minnesota Law School Forum on Taxation and Regulation (March 21, 2015) (Minneapolis, MN)
- “Exploring the Limits of the Evolving Economic Substance and Business Purpose Doctrines and Related Ethics Issues”, PLI Conference on Tax Strategies 2014 (December 5, 2014) (Los Angeles, CA)
- “Quote Me: How to Interact with the Tax Press,” 2014 Joint Fall CLE Meeting of the ABA Tax Section (September 19, 2014) (Denver, CO)
- “LB&I Update, Compliance and Resolution Tools,” 13th Annual IRS LB&I Financial Services Industry Conference (September 18, 2014) (New York, NY)
- “How Do You Put a Cross Border Debt/Equity Case Together?” At the International Fiscal Association (November, 2013, Washington) and at the Tax Executives Institute, New York Chapter 49th Annual Symposium (January 2014) (New York, NY)
- “Tax Reform in a Time of Crisis,” Symposium at the Pepperdine School of Law (January 2014) Malibu, CA)
- “Exploring the Limits of the Evolving Economic Substance, Business Purpose and Related Doctrines”, PLI Conference on Tax Planning 2013 (November 11, 2013) (Los Angeles, CA)
- “Nuts and Bolts of a Partnership Tax Controversy,” at Practising Law Institute’s Tax Planning for Domestic & Foreign Partnerships, LLCs, Joint Ventures and Other Strategic Alliances 2013 (May 2013) (New York, NY)
- “HMRC and the Taxpayer: Settlements and the Exercise of Discretion,” at the Institute for Fiscal Studies (September 2012) (Cambridge, U.K.)
- “Exploring the Limits of the Evolving Economic Substance, Business Purpose and Related Doctrines”, PLI Conference

on Tax Strategies 2012 (December 7, 2012) (Los Angeles, CA)

- “Tax Controversy and Hot Audit Topics,” at the Tax Executives Institute New York Chapter 48th Annual Symposium (December 2011) (New York, NY)
- “How to Deal with Legal, Corporate and Tax Challenges During Post -Merger Intergration”, China Outbound M&A Seminar (July 28, 2011) (Shanghai, China)
- “Introduction to U.S. Federal Tax System/U.S. Tax Controversy Pipeline/Role of U.S. Tax Advisors in the U.S. Tax System”, at the Chinese State Administration of Taxation Restructuring Training (July 27, 2011) (Shanghai, China)
- “Fight for Money: Civil War Income Tax Laws” (April 13, 2011) (Cleveland, OH)
- “Enforcement and Controversy”, ABA Section of International Law Transfer Pricing in Global Supply Chain – Current Issues (April 6, 2011) (Washington, D.C.)
- “The New ‘Codified’ Economic Substance Doctrine”, USC 2011 Tax Institute (January 24, 2011) (Los Angeles, CA)
- “The IRS and the Evolution of Taxpayer Transparency”, TEI New York Chapter 47th Annual Tax Symposium (December 8, 2010) (New York, NY)
- “Evolution of Transparency/UTP Industry Perspectives”, IRS LB*I/Houston TEI Tax Conference (December 2, 2010) (Houston, TX)
- “Hindsight Is 20/30: What the Tax Covenants SHOULD Have Said”, PLI Conference on Tax Strategies 2010 (October 22, 2010) (New York, NY)
- “Tax Strategies for Corporate Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations and Restructurings,” a Practising Law Institute seminar (October 2010) (New York, NY)
- “The Legal Privilege for Tax Advice,” at the 64th Annual Congress of the International Fiscal Association (September 2010) (Rome, Italy)
- Mattos Filho Seminar, at The Brazilian National Assembly (March 5, 2010) (Sao Paulo, Brazil)
- “Transparency, Compliance, and the Future of Tax-Decision Making”, Tax Executives Institute Midyear Conference (April 13, 2010) (Washington, D.C.)
- Keynote speaker, Tax Executives Institute’s Forty-Sixth Annual Tax Symposium (December 10, 2009) (New York)
- “Preserving Attorney-Client and Work Product Privilege After Textron”, International Fiscal Association (December 1, 2009) (New York, NY)
- “What to Expect from the IRS Enforcement Activities Over the Next Couple of Years,” and “Life After Textron and Other Issues Relating to Transparency in IRS Examinations” at the

MAPI/Manufacturers Alliance Tax Council Meeting

(November 17, 2009) (Annapolis, Maryland)

- "Bilateral and Multilateral Information Sharing – How They Are Gathering Information About You! And What You Should and Shouldn't Do About It," at the International Tax Institute (November 10, 2009) (New York, New York)
- "The U.S. Tax Controversy Pipeline – From A to Z," at the International Fiscal Association Congress (November 6, 2009) (Munich, Germany)
- "United States v. Textron Inc.: What Did It Decide and What Remains Unsettled About the Work Product Doctrine?" Practising Law Institute live audio webcast (October 19, 2009)
- "Trends in International Tax", Tax Journal: The Future of UK Tax (June 24, 2009) (London, U.K.)
- "Ethics and Professional Responsibility", ALI-ABA Corporate Taxation (April 3, 2009) (Washington, D.C.)
- "Alternatives to Trial", Tax Court Judicial Conference (April 2, 2009) (Galloway, N.J.)
- "Litigation with Multiple Tax Authorities", Tax Council Policy Institute (February 26, 2009) (Washington, D.C.)
- "Looking Back, Looking Forward: My Time as Chief Counsel", ABA Section of Taxation Administrative Practice/Court Procedure Committees Lunch (January 9, 2009) (New Orleans, LA)

Other Professional Activities

- American College of Tax Counsel – Fellow (1995-present); Regent (2001-2004)
- Section of Taxation, American Bar Association – Member (1978-present); Chair, Administrative Practice Committee (1992-1994); Council Director (1996-1999); Vice Chair, Committee Operations (2000-2002); LMSB Division Coordinator (2003-2004)
- Cleveland Tax Institute – Arrangements Committee Chair (1981); Program Chair (1993); Vice Chair (1994); Chair (1995)
- Ohio State Tax Commissioner's Advisory Council – Member (2000-2003)
- Ohio Secretary of State Operations Review Team – Member (1999)
- The National Commission on Economic Growth and Tax Reform (the "Kemp Commission") – Tax Adviser (1995)

Mr. Korb has also taught many individual tax law classes and seminars at law schools, including at the University of Cambridge, Université de Paris II Pantheon Assas (Sorbonne), California-Berkeley, Chicago, Columbia, Florida, Georgetown, Harvard, Michigan, NYU, Stanford, UCLA, USC, Vanderbilt, Virginia and Yale. He also taught a session on "An Introduction to the U.S. Federal Tax System" to the Chinese tax authority (State

Administration of Taxation (SAT)) in Shanghai, China in the summer of 2011.

Rankings and Recognitions

- *International Law Office* – received the Client Choice Award for Corporate Tax in 2017
- *Chambers USA* – ranked as a leading lawyer in Tax (Washington, D.C.) (2009-2017) and Tax Controversy (National) (2010-2014)
- *International Tax Review's Tax Disputes/Controversy Leaders Guide* – recognized in the inaugural and subsequent editions as a leading lawyer in the field of tax disputes and controversy (2011, 2013, 2015, 2016)
- *The Best Lawyers in America* – recognized as a leading lawyer for Tax for over 25 years (1989-2018)
- *The Legal 500 United States* – recommended lawyer for Tax Controversy (2010-2018)
- *Washington, DC Super Lawyers* - recognized for Tax (2004, 2012-2018)