

On Tax—Senior Judge James Halpern of the U.S. Tax Court

Len Teti: Welcome to On Tax—A Cravath Podcast. I'm Len Teti, a partner in the Tax Department of Cravath, Swaine & Moore, a premier U.S. law firm based in New York City. On each episode of On Tax, I talk to professionals in the Cravath network about their life and work in the world of tax. We focus on the human side of tax law, highlighting the people, connections and stories that make the space such a fascinating and dynamic area of practice. I hope you enjoy this episode.

On this episode, we're joined by Judge James Halpern, a Senior Judge on the U.S. Tax Court. Judge Halpern, welcome to the podcast and thanks for being with us.

Judge

James Halpern: You're welcome.

Len: You're the first member of the bench that we've had on the podcast, so we're looking forward to this conversation. Tell us how you found your way to the tax law.

Judge Halpern: Well, I got out of the army in 1969, and I was thinking about what to do. And my father said, "Why don't you go to law school?" And that sounded like a good idea. He was a lawyer.

Len: He was not a tax lawyer, was he?

Judge Halpern: No.

Len: So you went to law school, and at what point during or after law school did it sort of dawn on you that you might be gravitating towards a tax career?

Judge Halpern: During the Tax I course, which at Penn ran a whole year with two different professors. I found the tax law in the Tax I course to appear to be logical.

Len: Little did you know.

Judge Halpern: Little did I know, but it was enough for me to say, "Yeah, this looks like I could do it. I've always liked logical things." So I decided to take all the tax courses they had at Penn. After my second year, I went to Skadden Arps.

Len: And then after you graduated from law school, did you go back to Skadden or did you go to a different firm?

Judge Halpern: No, I went to what was known at that point as Mudge, Rose, Guthrie, Alexander & Mitchell, but after Mr. Mitchell got indicted, they changed the name.

They were interesting because Mudge Rose at that point had a very large municipal bond practice. And part of the municipal bond practice was pollution control, what we now call IDBs, industrial development bonds.

And I did a lot of work on pollution control facilities. And it was kind of interesting, because I did a lot of traveling. I went to a lot of power plants to look at smokestacks and sulfur scrubbers and other things so that we could write up, at that point, ruling requests to go to the IRS.

Len: And of course, you didn't stay in a law firm for very long, and we want to get to your career as a judge, but what kind of thinking did you do about staying at a law firm versus leaving and trying to do something else with your tax expertise? How was that thought process for you?

Judge Halpern: Well, I had very much enjoyed law school, and I thought being a law professor would be one of the—to use a term from the '60s—coolest things I could possibly do. And I also knew that being a tax law professor was probably an easy way to get into law teaching, because they

were always looking for tax law professors. If you want to do constitutional law or something else, it was harder.

What I did first is I decided that two years out of law school, I really didn't know a lot of tax law. So I decided to get an LLM at NYU. I quit Mudge Rose and started at NYU and got an LLM, found out that with a good law school and a good firm and an LLM, there were a lot of schools that were looking for me. I first started out at Washington and Lee University in Lexington, Virginia. And I was not at Washington and Lee a few weeks before the dean at St. John's law school called me and said, "We now have a tax opening."

Len: Wow.

Judge Halpern: So I said, "OK. I'll come back." My family was in New York—my parents. And I taught there for a while, and then I started teaching part-time at NYU and then got to visit full-time at NYU teaching tax law courses for a couple of years.

Len: You must have had experience with students getting turned on to the tax law and sort of pursuing careers in the tax law. What do you remember about helping them navigate the basic introductory tax and tax principles, the more advanced classes, and launching careers?

Judge Halpern: I remember that at that early stage in my career I told them that I thought the best thing they could do would be to start out in practice somewhere. Accounting firms weren't really on the horizon in the '70s at that point for tax lawyers, but I said that a firm or the office of chief counsel were great places to start.

Len: Chief counsel to the IRS.

Judge Halpern: Chief counsel to the IRS.

Len: Sort of IRS's internal law firm essentially.

Judge Halpern: Correct. But they do all the litigating in the Tax Court.

Len: Interesting. So tell us about the next step in your career.

Judge Halpern: Well, I paused, having taught for a couple of years and said, "Now I really see the advantage of practice in terms of learning." So I went to a small, very good tax boutique in New York, Roberts and Holland. I didn't do any M&A, but I did a lot of real estate and partnership tax work.

And I was sitting in my office one afternoon and I get a phone call from Harvey Dale, who was a professor at NYU. I've never had him in a class, but we were friendly. And he said, "How would you like to go to Washington?" And I said, "What are you talking about?" And he said, "Well, there's a new assistant commissioner technical at the IRS, and he is looking for an assistant, somebody who would be called the principal technical advisor. And given your academic bent and broad interests, I thought you'd be good for that job."

So I went down and interviewed and was successful in that interview. It didn't hurt that the commissioner at that time was Jerry Kurtz, who had been an adjunct professor at Penn and had taught me estate and gift taxation, which I think I did well.

Len: It's a small world now, but it must've been an even smaller world back then. That's amazing. You raised in a couple of different ways in that story a theme that we've seen, which is the theme of serendipity and unexpected things happening as your career is unfolding. I mean, you're just minding your business in private practice and you happen to get a phone call asking you to move and take a new job. It can't be something that you were planning at that particular point. Was it?

Judge Halpern: No, I planned to stay at Roberts and Holland for a while. When I got back from the interviews and I had the job offer in my pocket, I went to one of the partners at Roberts and Holland, Herb Alpert, and I said, "Herb, they want me to be the principal technical advisor. I will be responsible for being an expert on virtually every area of the code. How can I do that? I'm only 33."

And he said, "Jim, you're a good study. You'll have time. It's what I did when I was at Treasury. I think you'll

enjoy it immensely. And though we don't want to see you go, we wish you the best." So I did that—

Len: He encouraged it.

Judge Halpern: Without question.

Len: I'm sure that helped a lot make the decision.

Judge Halpern: Well, he gave me the confidence to be able to say yes. Give me something I don't know about and give me time to study it, I'll come to some answer.

Len: And how did you find the work at the IRS?

Judge Halpern: I thought it was a great job. I'm not sure whether being a judge is more fun, but being 35 and being in that position and meeting all the really, really good tax lawyers who came before the IRS to advocate for their clients. I met just a scad of people: Don Alexander, who had been the commissioner; Mort Caplin. I met them all, and it was fantastic. It was just a great job. Loved every minute of it.

Len: At what point did you decide that this has been a really interesting run, but you wanted a new challenge in the tax world?

Judge Halpern: Well, I had agreed to serve two years, and I served three because I liked it. At that point, I decided I wanted to stay in Washington. I basically looked for senior tax partners at firms who might be looking for somebody to come in and help them do a lot of the legwork. I went to a firm called BakerHostetler. I was a partner, but I worked for a guy named Norman Sugarman, who had been one of the generation who'd been instrumental in the '54 code and in the regulations thereafter.

His specialization turned out to be exempt organizations. By the time I left the firm seven years later, I did 20% exempt org practice. And I thought that was wonderful. The people you met in exempt organization work were very interesting, and a lot of the work gave you a good feeling to work on those matters.

Len: What was the nature of the tax issues? By definition, they're exempt from tax. And so the sorts of issues that I have to deal with on a daily basis are not the sort of issues that you would have been dealing with.

Judge Halpern: Well, the litigation—I guess, what we in the tax world call controversy issues—had to do with revocation of exemptions. I represented one religious organization which the IRS said was a cult. It wasn't.

I represented I think the largest Catholic publishing house, which published something called *Our Sunday Visitor*. So I was a Jewish tax lawyer with *Our Sunday Visitor* as a client, and I made them give me a subscription so I could read it every week. Their issues were UBIT, unreported business income tax, because, as I said, they had a large publishing house and they did a lot of publishing other than just *Our Sunday Visitor*. And issues came up as to what about the income from that.

And then one of my real fun clients was a foundation that was trying to help Appalachia in West Virginia, down the 81 corridor. And it was a large foundation. I was engaged to structure a series of tax-exempt organizations, charitable organizations, C4 organizations.

So I had very, very, very interesting palette of clients.

Len: Sounds like a varied practice and certainly very different than, for example, my practice, because exempt orgs have very different issues. So by 1990, you're appointed to the Tax Court. And I think we should probably pause here and just mention that the Tax Court in the U.S. is a special court created by Congress that has civil jurisdiction over tax matters, not criminal jurisdiction.

When the IRS is looking to make assessments against taxpayers and they disagree, the Tax Court is the forum for them to go and have their cases heard. And generally speaking, although you can certainly explain this, the judges in the Tax Court have particular expertise in the tax area, unlike necessarily judges in other federal courts that may hear tax cases from time to time. Is that right?

Judge Halpern: Yes. The judges on the court come mostly either from private practice or from government service, usually on

the Hill. Probably a third or so or more of the judges were previously, in addition perhaps to being in practice, on the staff of the Finance Committee, the Ways and Means Committee or the Joint Committee on Taxation.

Len: So in 1990, you would have been appointed by President Bush, right?

Judge Halpern: Bush One, yes.

Len: Can you tell me about that process?

Judge Halpern: Yeah, when I talk about this, I frame it as how do you apply for a job for which there is no application procedure?

Len: So how do you do it?

Judge Halpern: Well, in the serendipitous way you described. If you turn the clock back to 1980 to '83, when I was the principal technical advisor at the IRS, Ken Gideon was the chief counsel and Fred Goldberg was an assistant to the commissioner. Fast forward 10 years, Ken Gideon at that point was the assistant secretary for tax policy, and Fred Goldberg was the commissioner. And one of my classmates from NYU, Hap Shashy, was the chief counsel of the IRS.

Len: So you had friends in important places.

Judge Halpern: Yeah. Having been in practice for seven years and liking the law, but not so much the practice of law. I liked the issues. I liked getting problems. I liked writing memos. I liked writing advocacy pieces. Though, I must say before I became a judge, I'd only appeared in court once, and that was when I convinced the associate that we'd hired from the IRS that maybe I could interview one of the witnesses. That didn't go very well.

I decided that it might be fun and interesting to be a judge on the Tax Court. I called Fred Goldberg, who I'd known 10 years ago and said, "There are two or three open seats. Are you looking for anybody?" He said, "My God, yes. We were down to thinking that we might want to elevate one of the special trial judges, but if you're interested, wow, that'd be great." That process went very, very smoothly for me, not necessarily for other people, but for me it went very smoothly.

The Tax Court nominations go through not the Judiciary Committee but through the Senate Finance Committee. The politics that may be involved in a judiciary committee appointment generally don't intrude into a finance committee decision. So that was the good thing.

Len: I don't want to jump ahead of the story, but you were later nominated for another 15-year term in 2005 by President George W. Bush. So, tell me about your introduction to the Tax Court and to this different way of practicing in the tax field.

Judge Halpern: I had no problem with the technical tax issues. They were easy for me. But what was difficult was learning how to be a judge. So, the first thing I did is I called up a friend of mine who's a professor at GW University, Steve Saltzburg, who's an expert on evidence. And I said, "Steve, I would like to audit your evidence course for the semester." And Steve said, "Jim, you're welcome on one condition. I want to be able to ask you questions in class. That'll make you study." And I said, "I will do it, but I have one condition. I don't have to take the exam." Not because I didn't think I could do it, but who's got three days to prepare?"

So I sat through his course for a semester and it was wonderful. And then he called me the next fall and he said, "Jim, how would you like to be a section leader in my trial practice class?" And I said, "But Steve, you know I've only been a judge for two years." And he says, "There's no better way to learn than to teach."

So I was a breakout section leader for, I don't know, five years. And then I called Steve up and I said, "I've done it. I've learned everything I think I can learn here. It takes a lot of time. Get the next guy." That's how I learned evidence. I'd graduated law school before the federal rules of evidence. So, I really did need the course.

Len: Wow, fascinating. And do you remember, as you started to do the job as a judge, what surprised you about it?

Was it more tax than you expected or was it less?

Judge Halpern: Well, the thing that struck me the most was, though I'd known it statistically, I hadn't realized how much the Tax Court is really a small claims court. At that point, we had a huge docket, you know, 29-, 30,000 cases. And most of them settled, but when you get to a trial calendar for a week, you could have 20 cases and that'll whittle down to 12 for trial. Most of them will be an hour or two hours. And the majority of them will be self-represented taxpayers.

I had never thought about innocent spouse provisions. I never represented anybody in that kind of provision. But I learned an awful lot about that. And what you find out is, it's not the tax law that's the challenge. It's understanding the facts, and then understanding areas of law outside of the tax law—wills and trusts, for instance. So I found out that not only do we hear big billion-dollar cases, and I had one that went to the Supreme Court, but most of my cases were *pro se* taxpayers with rather run-of-the-mill questions.

Len: It's interesting the point you make about facts, because in law school, you are reading cases that are curated for you in a case book with the purpose of articulating and demonstrating pretty large legal principles, whether you're talking about constitutional law or torts or contracts, property, we're talking about cases that have been chosen from random state Supreme Courts to try and highlight a legal principle.

The facts of the case sometimes are quite important, but oftentimes the facts are sort of coincidental. They're beside the point. When you get to a practice like tax, which is already different because it's based on a statutory regime, a regulatory regime, administrative law, pronouncements like revenue rulings, and also has common law cases. You open up a Tax Court case and there's pages and pages and pages of facts.

And a lot of times in the tax cases, the facts are actually the critical things. And unless you spend time with the 20 pages of facts, you can't really understand what the court is trying to tell you about how to apply the law to those facts.

But, in my experience and I see this now with associates, it's really important to train yourself to focus on the facts because, of course, any large corporation is going to have slightly different facts or slightly different fact patterns. But the facts are the stubborn things and can make all the difference.

Judge Halpern: That's true. And in litigation, it's the litigant's lawyer's problem to put the facts before the court in a way that they make sense with respect to what the issues are and how you want the court to rule. And in our court, we rely heavily on the stipulation process of getting the taxpayer and the chief counsel to stipulate as many facts as possible.

The way it should work is that a trial is only to fill in the facts that could not be agreed to be stipulated. Now, when you're dealing with *pro se* taxpayers it's a little bit different because they don't really understand the stipulation process. The government will generally prepare the stipulation, and then the taxpayer will show up with a shoebox full of receipts. Those are facts that are difficult to address. But yes, you're right. If you're a lawyer litigating in the Tax Court, preparing the stipulation of facts is very important.

Len: What observations would you make about the extent to which taxpayers are disadvantaged as *pro se* parties in a Tax Court case? Have you given any thought as to whether there's a better way to do it, something like a public defender system for taxpayers? Is there a better way to create the mousetrap of taxpayers showing up in Tax Court?

Judge Halpern: There could be. But I think we've got a pretty good mouse trap now for a couple of reasons. One is we have the small case procedure for matters in dispute, I think it's, under \$50,000. But the rules of evidence aren't applied rigorously. Usually the judge goes out of his or her way to assist the taxpayer. Things are informal. But also since I got on the Tax Court, we've developed a very extensive network of clinics and bar associations that assist low-income taxpayers.

And we send out flyers, with the pretrial notices telling them about the clinics that are available. I announce at the beginning that anybody who's not represented and would like to talk to a volunteer lawyer and have the lawyers put their hands up: "Why don't you all go out in the corridor, and I'll delay calling your cases till the end?" And those lawyers are not obligated to represent anybody. They're basically there to assist in understanding the procedures. And sometimes they represent taxpayers and sometimes they won't. Clinic

sometimes will take a case and sometimes they won't. But unless you've got away from the adversary system of dispute resolution that we have, I don't see how you can do it much differently, and perhaps much better than the way we're doing it.

Len: So I imagine as a judge, you have a fair amount of autonomy in any standard workday. And you also get to hire staff for your work, clerks and so forth. I wonder if you might help explain how you get your work done and what kind of mentoring you're able to provide to the people who work in your chambers, and how that relates to other experiences you've had in the law firms and in faculties and, of course, in the government? What kinds of things are similar and what kinds of things are different?

Judge Halpern: As a regular Tax Court judge, I was entitled to two law clerks. As senior judge, I'm entitled to one. And in the early years, I had two law clerks right out of law school.

Later in my career, I stumbled into some retired tax lawyers who wanted more to do. And my last law clerk retired five or six years ago, when he turned 78 and thought he needed a break. And my present attorney advisor is close to 60.

But with the younger people, I tell them, "Your experience here will be the only time in your career where you will have a senior tax lawyer whose time for you is virtually unlimited. And if you take advantage of it, you will get mentoring that you will not get in a firm." This is the golden time. And I used to hire clerks for two years and I would tell them, "The first year is for you. And the second year is for me." And I've had a lot of clerks over the years, and that's pretty much the way I work.

Len: Fascinating. Tell me about one or two cases or opinions that you've written that you really look back on as milestones in your judicial career, either for the creation of a new law or legal principle, or for just the nature of the issues and the litigants involved. Do you happen to have things that come to your mind?

Judge Halpern: Well, it isn't so much a particular case as I try in all of my cases to get things right and try to get it the way Congress intended it to be. And I'm fully conversant with the textualist-purposivist debate. If you asked me which I was, it would be which serves the case that I'm working on.

Len: You've done both.

Judge Halpern: I've done both. But it's to basically try to get things right. And I've got a couple of cases. One is called *Dorchester*, where I dealt with the stipulation, what it means and is it like a contract and such and so forth. I'm really proud of that. It gets cited by the Tax Court judges a lot. But I don't keep any track record of anything.

I was very pleased to be affirmed nine-zip in the Supreme Court. But, quite honestly, my clerks did all the heavy lifting there. I just read it over. In my chambers, I write a lot, and it's mine. But like in any law chambers with experienced clerks, the product is not necessarily one person's. And often when you have good assistance, you'd have to say honestly, "It's theirs." You know, "I edited it and we talked about it at every stage of the way. But it's ours."

I'm hesitant to talk to many particular cases, because I wouldn't claim exclusive authorship for anything that came out of my office. Everything is looked at by everybody, including my administrative assistant. I've had two in 30 years.

Len: One of the things I've been thinking about as you've been speaking is your experiences in the tax profession have been so varied just by virtue of the different places you've worked and the different responsibilities you've had in those places. My experiences in the tax law have also been varied, but only by reason of the different types of transactions I've worked on. You've had many different types of tax experiences. And I also get the sense talking to you that you've really enjoyed all of them.

In the little bit of time we have left, Judge, I wonder if you could just tell us about your interests outside of the tax world. What do you like to do in your spare time, and what keeps you busy when you're not working?

Judge Halpern: Well, as you get older, you do less skiing and less running. But we got a Peloton and we're great Pelotoners, if

that's an expression. And we got a COVID puppy. We had a brand new puppy. So that's taken a lot of our time.

Len: Have you had pets before or was this a first for you?

Judge Halpern: No, no. We had a dog that lived 17 and a half years.

Len: And do you have any other lawyers in your family? Any of your kids become lawyers or no?

Judge Halpern: Yes, if you take my two kids and my wife, three out of four.

Len: Amazing.

You told me before we started recording that you have senior status now on the Tax Courts, so you're a senior judge, you're clearly still hearing cases. What do you think the future for you holds in the tax world itself? Do you know?

Judge Halpern: Well, you sound like my wife who, when I took senior status, said, "What can we do new? Now let's go someplace."

Len: But you've already done half the things that you could do, so—

Judge Halpern: Well, you know what I want? I want, till I'm doddering, for them to give me a case file or to go to a trial and hear the testimony and get the briefs, and then sit in a nice quiet place and write up the case.

Len: It's not work to you.

Judge Halpern: It's not work. It's just joyful.

Len: That's great. Well, your joy has certainly shown through, and it's been a pleasure to get to meet you. We're talking to Senior Judge Jim Halpern on the U.S. Tax Court. It's been a pleasure to have you on the podcast, and thank you so much for joining us.

Judge Halpern: Thank you, Len.

Len: That's all for this episode of On Tax—A Cravath Podcast. You can find us online at cravath.com/podcast, and don't forget to subscribe on Apple Podcasts, Google Podcasts or Spotify. I'm your host, Len Teti. Thanks for listening.

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