of lessening jury speculation over the value of a human life. Therefore, this testimony, as a useful tool, should be allowed to be used by the jury in its deliberations on the value of a human being.

JEROME M. KAPLAN

INCOME TAX—PROFESSIONAL SERVICE CORPORATIONS—KINTNER REGULATIONS

The plaintiff taxpayer was an employee of Drexler and Wald Professional Company, incorporated under the Colorado Supreme Court rules to engage in the practice of law.[1] The plaintiff brought this action for a tax refund on the ground that he was taxed as a partner of the law firm instead of as a corporate employee. The Treasury Department contended that the lawyer-client relationship prevented centralization of management required for tax purposes to achieve corporate status.[2] The district court found that the statutory definition of a partnership included only unincorporated organizations,[3] thereby excluding the plaintiff's employer, who was incorporated. The treasury regulations were inconsistent with the statuatory definition and its long standing judicial construction, unchanged by Congress, and were therefore invalid and unenforceable. Even if the regulations were valid, the court concluded that the organization more nearly resembled a corporation than a partnership, as determined by the regulations, and was therefore taxable as a corporation. The plaintiff was allowed recovery.[4]

A quick glance at any legal periodical index will reveal the growing interest of the legal profession in professional associations and corporations. Since 1960, thirty-five states have enacted laws providing for the incorporation of professional services to meet tax regulations.[5] Generally these acts permit the practice of a profession in corporate form. The licensed members had previously been, by law or ethics, forbidden to incorporate.[6]

The landmark case on associations is *Morrissey v. Commissioner*[7] and its companion cases,[8] which enumerated the attributes necessary for tax pur-

1. COLO. R. CIV. P. 265.
2. Treas. Reg. §301.7701-2 (a) (1960), *as amended*, T.D. 6797.
3. INT. REV. CODE of 1954, §7701 (a).
4. Empey v. United States, 20 Am. Fed. Tax R.2d 5403, (D. Col. 1967).
5. 5 P-H FED. TAX SERV. §41.608.
6. Sarner, *Associations Taxable as Corporations: A Review and a Look Ahead*, N.Y.U. 20th INST. ON FED. TAX 623 (1962).
7. 296 U.S. 344 (1935).
8. Swanson v. Commissioner, 296 U.S. 362 (1935); Helvering v. Coleman-Gilbert Associates, 296 U.S. 369 (1935); Helvering v. Combs, 296 U.S. 365 (1935).

poses.[9] It was there established, and is embodied in the present regulations, that an organization will be treated as an association if it more nearly resembles a corporation than a partnership.[10] *Pelton v. Commissioner,*[11] a case involving a medical association, held that the association would be taxed as a corporation even though a corporation could not practice medicine under the state law. The court relied on the resemblance test in *Morrissey* to determine if the necessary corporate characteristics were present.

Despite the double taxation imposed on corporations, it became obvious that in certain circumstances, there were tax benefits to be realized from operating as a corporation.[12] Therefore, taxpayers began to take advantage of the principle established in *Morrissey.* In *United States v. Kintner,*[13] the ninth circuit affirmed the Montana District Court in holding that an association of doctors had more of the criteria of a corporation than a partnership and should be taxed as a corporation. The court emphasized that it would destroy the uniformity essential to the federal tax system if state regulations were used to determine corporate status.[14] Similar problems were before the courts in *Galt v. United States*[15] and *Foreman v. United States*[16] and in both cases the *Kintner* decision was followed.

The Internal Revenue Service declared that it would not follow the *Kintner* decision[17] and in 1960 the "Kintner Regulations" were announced.[18] They retained the resemblance test in *Morrissey v. Commissioner,* but provided that:

> Although it is the Internal Revenue Service rather than local law which establishes the tests or standards which will be applied in determining the classification in which an organization belongs, local law governs in determining whether the formation of an organization is such that the standards are met.[19]

This emphasis on local law made compliance under the regulations almost impossible, and various professions provided the impetus for the necessary state legislation. In 1965 the Commissioner of Internal Revenue acted to nullify the effectiveness of these local laws through amendments to the

9. The most important characteristics are (1) continuity of life, (2) centralization of management, (3) free transferability of interests, and (4) limited liability. *See* Treas. Reg. §301.7701-2 (b) -2 (e).
10. Treas. Reg. §301.7701-2 (a) (1960), *as amended,* T.D. 6797.
11. 82 F.2d 473 (7th Cir. 1936).
12. A discussion of these benefits is beyond the scope of this text. *See generally* Bluestein, *Tax Considerations of Professional Associations,* 17 S.C. L. REV. 219-229 (1965); Pesin, *Professional Associations Doing Business as Corporations,* N.Y.U. 21ST INST. ON FED. TAX 573-580 (1963); Thrower & Cohen, *Professional Associations Under the Georgia Act—Some Tax Aspects and Considerations of Legal Ethics,* 26 GA. B.J. 168-172 (1961).
13. 216 F.2d 418 (9th Cir. 1954).
14. *Id.* at 424.
15. 175 F. Supp. 360 (N.D. Tex. 1959).
16. 232 F. Supp. 134 (S.D. Fla. 1964).
17. REV. RUL. 131, 1956-1 CUM. BULL. 598.
18. T.D. 6503, 1960-2 CUM. BULL. 409.
19. *Id.* at 413.

Kintner Regulations. Under these amendments, the label applied by local law was to be given no importance. A professional service corporation would not be taxed as a corporation just because so labeled by local law; it must still have the requisite corporate characteristics.[20] Example one under Reg. section 301.7701 2 (e) (2) (g) was deleted. This example was similar to the facts in *Galt v. United States,* which many states had followed in drafting their professional association and corporation acts.

In the principal case, *Empey v. United States,* these regulations were declared invalid. Regulations are the most authoritative interpretations issued by the Treasury Department, and since the courts do not usually exercise their judgment on matters covered by such administrative regulations, they may have the force of law. However, the need is strong for protection from administrative change of long standing rules, re-enacted by Congress and consistently followed by the courts. If a court does not agree with the change, it will not be bound by the administrative interpretation.[21] Therefore, the result in any case similar to *Empey* could be predicted.[22] The regulations are not consistent with section 7701 of the 1954 Internal Revenue Code, nor with its long standing judicial interpretation. They attempted to classify an incorporated association as a partnership, contrary to its accepted definition.

The Georgia Professional Association Act,[23] like those of most states, was challenged on ethical grounds and questioned as to its effectiveness to satisfy the Treasury requirements.[24] There is a Georgia case pending in the District Court involving a Georgia Professional Association.[25] This decision may answer those critics who contend that a Georgia Professional Association cannot withstand an attack under the regulations, if they are even to be followed in this district. However, if the Georgia district court follows *Empey* in declaring the regulations invalid, as it should, the soundness of the Georgia act under the regulations may not be decided. The court in *Empey* is on firm ground in holding the regulations invalid. Its determination from the agreed facts conclusively shows that Drexler and Wald also has the necessary corporate characteristics under the regulations. An appeal of *Empey* is almost certain, although it is doubtful that the regulations will be upheld. However, it would still be expedient for the district court in Georgia to examine the professional association involved, in relation to the Georgia act and the Kintner Regulatons.

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20. Treas. Reg. §301.7701-1 (c) (1965); Treas. Reg. §301.7701-2 (h) (1965).
21. K. DAVIS, ADMINISTRATIVE LAW TREATISE, §5 (1958).
22. Bluestein, *supra* note 12, at 230; Sarner, *supra* note 6, at 662; Scallen, *Federal Income Taxation of Professional Associations and Corporations,* 49 MINN. L. REV. 653 (1965).
23. GA. CODE ANN. §84-43 (1965 Rev.).
24. Bittaker, *Professional Associations and Federal Income Taxation—Some Questions and Comments,* 17 TAX L. REV. 1 (1961); Thrower & Cohen, *supra* note 12, at 163; *Williams &.* Cowart, *Federal Income Tax Advantages for Professionals—The Georgia Professional Association Act,* 12 MER. L. REV. 388 (1961).
25. 6 P-H FED. TAX SERV. §41.608.