PRO BONO AWARD RECIPIENT: PETER LOWY

On Saturday, May 10, at the Section's 2003 May Meeting in Washington, DC, Peter Lowy became the second recipient of the Section's annual Pro Bono Award. The Section's Pro Bono Award is presented each year to an individual lawyer or law firm who has demonstrated outstanding and sustained commitment to *pro bono* legal services, particularly with respect to federal and state tax law. Peter Lowy, a senior tax attorney with the Shell Oil Company in Houston, received the award in recognition of his extensive *pro bono* work, including his assistance in establishing the first low-income taxpayer clinic in the Houston area. In addition to his work with the low-income taxpayer clinic, he has served as a mentor to other tax lawyers through the Houston Volunteer Lawyers Program and is developing a nonprofit website for low-income taxpayers (www.taxpayerrights.org). His commitment to *pro bono* services runs deep, as he also serves as co-chair of the Pro-bono Committee of the Houston chapter of the American Corporate Counsel Association. The Section is proud to have Peter Lowy as one of its members and to be able to honor his substantial *pro bono* work in this way. ■

PETER LOWY

POINTS

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In TAM 200244028 (July 21, 2002), the Service focused on an area that is ripe for the application of intermediate sanctions—executive compensation. The TAM involved compensation paid to a nonprofit health care organization's CEO and his wife under a post-employment consulting agreement. The Service first concluded that the CEO and his wife were both disqualified persons. The Service also held that the consulting agreement was a binding written contract and that an amended consulting agreement constituted a new contract.

This TAM also sheds light on the rebuttable presumption of reasonableness. The Service agreed that the first and third requirements of the rebuttable presumption were met—namely, that a disinterested authorized body approved the compensation package and adequately documented this. However, the Service concluded that the second requirement was not met. Although the authorized body—a personnel committee—did review comparability data provided by an executive compensation consultant that was hired by the organization to help in establishing that the couple's compensation was reasonable, this data came some nine months after the effective date of the consulting agreement. Moreover, the same data was used when the consulting agreement was amended some five years later.

In its most recent ruling, PLR 200247055 (November 22, 2002), the Service looked at whether a free bus service run by a hospital resulted in excess benefit transactions for the hospital's physicians. The hospital, serving several municipalities and rural communities, wanted to purchase a bus that it could use to pick up patients who needed transportation for rehabilitation and for other medical services, including transportation to doctors' offices. The free transportation would be on a first-come, first-served basis. Although several of the doctors served on the hospital's board of trustees, none would have a financial interest in the bus transportation system.

The Service ruled that because the bus service would be equally available to all patients of all physicians, the fact that disqualified persons—namely, the doctors on the board—might derive what the Service described as an incidental benefit from the operation of the bus service, did not mean that the bus service created an excess benefit for them.

INTERMEDIATE LESSONS

There are some important lessons to be learned from each of the cases and rulings discussed above. From *Caracci*, the lesson is that getting a valuation is not enough. The valuation should conform to appropriate industry standards. Also, it couldn't hurt to get a second or third appraisal. TAM 200244028 adds that valuations are not only crucial but also should be used contemporaneously with making a decision that the transaction is reasonable. TAM 200243057 points out that dealings should be arms length and all exempt organizations should adopt and abide by a conflict of interest policy. Since issuing this TAM, the Service has pointed out that the TAM highlights how these penalty taxes can stack up. The original amount of all of the excess benefits was $300,000. However, after stacking the intermediate sanctions penalty taxes, the total tax bill here could be well over $1 million. Finally, PLR 200247055 demonstrates that all benefits that disqualified persons derive are not created equal. Incidental benefits, those that don't rise to the level of excessive, will not be subject to the intermediate sanction rules.

Although these cases and rulings are helpful and show that the Service is taking these rules seriously, they only scratch the surface of the myriad places and ways that they might be applied. Everyone in a position of authority in an exempt organization needs to know about them, and we can look forward to further guidance from the Service on how the rules apply. ■