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OPINION POINT

Tax Shelters: Up Off the Canvas?

By Steve R. Johnson*

Recently, taxpayers prevailed at trial in two federal tax shelter cases: *TIFD III-E Inc. v. United States*, 2009 WL 3208650 (D. Conn. Oct. 7, 2009) ("*Castle Harbour III*"), and *Consolidated Edison Co. v. United States*, 2009 WL 3418533 (Fed. Cl. Oct. 21, 2009) ("*Con Ed*"). Doing full justice to these cases would require detailed descriptions of their facts, the arguments presented and the rationales in the opinions. I leave this work to the inevitable parsing and spinning in briefs in tax shelter cases to come and to more lengthy commentary. *See, e.g.,* Lee A. Sheppard, *Con Ed's Night of the Living Dead*, TAX NOTES, Nov. 9, 2009, at 619.

Instead, this article addresses two larger themes. Part I places *Castle Harbour III* and *Con Ed* in the context of current tax shelter litigation. It notes that waves of taxpayer success and government success have alternated. The recent cases show that the Service has not yet landed a knock-out punch to end the tax shelter bout. Part II suggests that *Con Ed* and *Castle Harbour III* continue one theme evident in some tax shelter decisions: that, in some courts, shelters linked to ongoing, substantial business may be more likely to be validated than "freestanding" transactions.

The Tax Shelter Battles Aren't Over

The battle between the Service and tax shelter investors over the past two decades has been like Rocky Balboa against Apollo Creed. Supporters of each combatant are alternately exhilarated or distressed by the shifting fortunes of the fight.

For example, in 2004, the Service took three heavy punches in trial-level losses in *TIFD III-E Inc. v. United States*, 342 F. Supp. 2d 94 (D. Conn. 2004) ("*Castle Harbour I*"), *Black & Decker Corp. v. United States*, 340 F. Supp. 2d 621 (D. Md. 2004), and *Coltec Indus., Inc. v. United States*, 62 Fed. Cl. 716 (2004). These losses threw opponents of shelters into consternation. *E.g.*, Marvin A. Chirelstein & Lawrence A. Zelenak, *Tax Shelters and the Search for a Silver Bullet*, 105 COLUM. L. REV. 1939, 1962 (2005) (proposing new legislation because "the economic substance doctrine is simply too weak a barrier to protect the collection of income tax from assault by abusive shelter planners. Recent court decisions prove that proposition beyond a doubt.").

But the Government rallied strongly in the next round, including the reversal of all three taxpayer trial court victories. *TIFD III-E, Inc. v. United States*, 459 F.3d 220 (2d Cir. 2006) ("*Castle Harbour II*"); *Black & Decker Corp. v. United States*, 436 F.3d 431 (4th Cir. 2006); *Coltec Indus., Inc. v. United States*, 454 F.3d 1340 (Fed. Cir. 2006), *cert. denied*, 549 U.S. 1206 (2007).

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Stuart M. Lewis*

Of the many activities that the Section undertakes, its pro bono efforts have to be some of the most impressive and important. Over the last few months I have begun to appreciate these activities to a much greater extent. Members of the Section should seriously consider increasing their involvement in one or more of these programs.

VITA and Military VITA

Our Volunteer Income Tax Assistance programs offer the best opportunity for member involvement. VITA provides free assistance to low-income, elderly, disabled, and other individuals who, now more than ever, cannot afford the services of a paid tax return preparer. The program is an excellent pro bono opportunity for Tax Section members (practitioners and law students alike) who want to dedicate their time this filing season helping out in the local community.

In addition, through the efforts of the Section's Pro Bono Committee, the Section has undertaken a program whereby volunteers from the Section assist in the training of VITA volunteers who prepare returns on military bases. Last year the project was limited to the metropolitan Washington, D.C., area, but it has now expanded to include San Antonio, Texas. Tax Section members are not asked to prepare returns themselves, but instead are asked to train the preparers.

Participation in the military VITA training requires passing a test (I am sure Section members can pass) and receiving additional training by the IRS but this is a small sacrifice to support our military. Information about how to participate in the VITA programs is available on the Section's Pro Bono website (http://www.abanet.org/tax/probono/).

Public Service Fellowships

The Section devotes substantial resources to this program, which we began in 2008. Each year, we award up to two Fellowships for a two-year period to recent law school graduates or judicial clerks. Their employment must involve taxation or administration of tax law and must be with a public-interest, nonprofit section 501(c)(3) sponsoring organization.

This year we named two outstanding Fellows:

- Katie Tolliver from the University of Tennessee College of Law. After graduating, Katie will direct the Appalachian Community Partnership for Tax Advocacy, serving low-income taxpayers in Tennessee and surrounding regions.
- Douglas Smith, who will be working with the Community Action Program of Lancaster County, Pennsylvania, where he will develop a low-income taxpayer clinic to serve the population in southeast and central Pennsylvania.

Janet R. Spragens Pro Bono Award

Each year the Section awards one or two individuals the Janet R. Spragens Pro Bono Award for meritorious pro bono service in representing low-income taxpayers. This year's outstanding recipients are Caroline Ciraolo and Juan Vasquez, Jr. Both have provided exemplary pro bono services over many years.

Exempt Organization Assistance Program

At the Section's Midyear Meeting, members of the Exempt Organizations Committee provided consultation to local tax-exempt organizations and to nonprofit organizations that serve low-income individuals (as they did last year in New Orleans). The Exempt Organization Assistance Program was co-sponsored by the Pro Bono Committee. Due to the success of this program, we expect to continue this service at future meetings.

Celebrate Pro Bono Week Webinar

Last fall, the Tax Section joined the West LegalEdcenter to provide a free live CLE webcast, "Helping Charities via Pro Bono: How to 'Do It' Without Harm." Nearly 350 lawyers participated in the CLE, which was presented as part of the ABA's "Celebrate Pro Bono Week." The Section program recognizes that providing pro bono assistance to charitable organizations is an important service that many lawyers undertake and tries to help them avoid the most common mistakes that pro bono lawyers make when offering their assistance. If you missed the October 26 presentation, you may still listen to the program online at http:/westlegaledcenter.com/search/displaySearchResults.jsf.

The Section is always open to new initiatives in the pro bono area that can help it fulfill its mission of providing tax assistance to low-income and other deserving individuals in greatest need. Suggestions from members are welcome.

Midyear Meeting

As I write this, plans are well underway for the Section's 2010 Midyear Meeting on January 21-23 in San Antonio (http://meetings.abanet.org/meeting/tax/MID10). As the economy continues to challenge us, so too has it given our committees much to discuss, and our Midyear Meeting promises a full lineup of excellent CLE and networking opportunities. We are also very pleased that Bill Wilkins, IRS Chief Counsel, will present the Section Plenary address on Saturday. If you are unable to attend, the program materials will be available free of charge on our website at www.abanet.org/tax/taxiq. You may also purchase audio recordings of the programs at https://www.dcporder.com/abatx. ■

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Gilbert S. Rothenberg

By Jasper L. Cummings, Jr. and Alan J.J. Swirski*

Gilbert Rothenberg is the Chief of the Appellate Section of the United States Department of Justice's Tax Division. He is also currently serving as Acting Deputy Assistant Attorney General for Review and Appellate.

Q Can you describe how you came to be interested in tax litigation?

A It was a combination of two things. First, as I was growing up in Richmond, Virginia, one of my parent's closest friends happened to be a general practice lawyer, Seymour Horowitz, and his colorful descriptions of his cases really interested me. And, in my second year of law school, I was simply enthralled with my first tax course, which was taught by the late Professor Janet Spragens at the American University Law School, who went on to found the law school's Tax Clinic. Before joining the faculty there, she worked for the Appellate Section of the Department of Justice's Tax Division, and after I took some additional tax courses (and liked them, too) Professor Spragens said, "You know, you might like this, Gil, you might want to apply to the Tax Division at DOJ," and the rest is history.

Q Can you describe the work of the Appellate Section of the Tax Division?

A Our mission is to handle all civil tax appeals throughout the country. (There is a small, specialized unit that does the criminal tax appeals.) The civil tax appeals we handle encompass cases from the Tax Court, which is about half our docket, and the balance originate in the district courts, the Court of Federal Claims, and an occasional state court. Our basic mission is to write briefs, present the oral arguments, and prepare all kinds of motions and oppositions and internal memoranda that go along with that, so that we are speaking with one voice and we have a uniform position in all tax cases throughout the country.

Q Approximately how many people work in the Appellate Section?

A We have about 60 folks, about 45 of whom are attorneys, and the rest are support staff. The staff is broken down into about 35 line attorneys, who prepare the first drafts of briefs, motions, etc., and then we have a senior staff of people we call Reviewers, who look over the briefs, make any appropriate changes, etc., and then there is me as Chief of the Appellate Section and my two Assistant Chiefs. Everything that goes out of our office is thus the product of at least two (and sometimes three) people looking at it. We have found that this is the best way to ensure consistency and a good product because we have attorneys who are working here with various degrees of experience. We have found that having at least two people look at our work product provides a fresh approach and ensures that we end up with a very high quality product.

Q For those who would like to work for the Appellate Section someday, what is your advice to them?

A My advice to them is to be the best writer you can be. Tax law is very complicated, but the skill, especially at the appellate court level, is to be able to tell a story involving a very complex subject matter and explain it in such a way that lay judges can understand it. And that is a skill of a very good writer. And so, writing skills are paramount, with analytical skills being close behind that in importance. A tax background, of course, is a huge plus, but if I have my choice of hiring a brilliant tax lawyer or a brilliant writer, I will pick the brilliant writer because it is easier for me to teach tax law to a brilliant writer than it is for me to teach a brilliant tax lawyer how to write. Indeed, some of our best performers did not come into my office with lots of tax law experience. It is certainly very helpful, but it is not the only thing I look at when I'm trying to decide whether to hire someone.

Q For our young readers who might be interested in working for you some day, how many people every year or so do you hire into the Appellate Section?

A It depends on both workload and budget constraints. Our budget has been increasing in recent years because of various new initiatives we have implemented. And, of course, we are still fighting the tax shelter wars as well. But, in a typical year, we might hire one or two persons directly out of either law school or a clerkship under the Attorney General's Honors Program, and then we might also hire one or two laterals. Traditionally, one-half of our attorney staff arrived through the Honors Program, the other half coming on board as lateral hires. But, for the past ten years or so, we have hired more experienced attorneys than Honors Program applicants.

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Q And of those few spots in an average year, how many applications do you receive for them?

A Well, in the recruiting that I did this past spring, we received 85 applications and we ended up hiring only two persons.

Q What is the relationship between the Tax Division and the Solicitor General's Office with respect to appeals from cases in the Tax Court, district courts, and the U.S. Court of Federal Claims?

A The Solicitor General's office oversees all government appeals throughout the nation on any matter, including tax matters. Up until about seven or eight years ago, there was a tax assistant in the Solicitor General's office. But, after that individual left the government to go into private practice, the position was not filled, in large part because there was a reduction in the volume of tax matters requiring the Solicitor General's attention. The Solicitor General's office currently has four deputies, and one of them, Malcolm Stewart, has tax within his portfolio. Whenever the government loses a case in the district courts (or the Court of Federal Claims), we prepare a memo for the Solicitor General's office, and that office, armed with our recommendation and that of the Internal Revenue Service, then decides whether or not to authorize an appeal. That process works for any higher levels of review as well, such as rehearing en banc petitions or petitions for certiorari. Cases coming out of the Tax Court are handled in a slightly different manner. Generally, unless we have a keen interest in a case, the Internal Revenue Service makes the first call as to whether or not they would like to take an appeal from an adverse Tax Court decision. If so, we take a look, and then we prepare our own recommendation. Both recommendations then go up to the Solicitor General's office for decision. As you can imagine, I work very closely with the Solicitor General's office, and that relationship has worked very well over the years.

Q How often do the IRS and Tax Division disagree on whether to appeal an adverse decision by the Tax Court?

A That situation, while not common, is not uncommon either. In my current role as Acting Deputy Assistant Attorney General (in addition to being Chief of the Appellate Section), I chair internal conferences where we all sit around a table and discuss the pros and cons of taking an appeal in a case that the government lost at the trial level. I consider all the facts and circumstances surrounding the case, and all internal disagreements are fully aired; at the end of the process, the Solicitor General's office is presented with the views of all of the interested stakeholders so that an informed decision can be made.

Q What is the relationship between the Tax Division and the Chief Counsel's Office?

A I work very closely with the Chief Counsel, the Deputy Chief Counsel and the various Associate Chief Counsels because, whether we are proceeding administratively or in litigation, we need to be on the same page. So, for instance, if we are in litigation on a particular issue and the Internal Revenue Service says, "Look, we have 2,000 pending administrative claims that are on hold," we need to know that in developing our own litigating strategy. This may turn out to be a very important issue, and we have to assemble sufficient resources to take care of it. Also, if we have some disagreements as to what should be our primary argument, what should be our secondary argument, and so forth, we will often confer with the IRS to get that office's take on the situation. Indeed, we exchange draft briefs in important cases to make sure our position is consistent with the IRS's litigating position in the Tax Court. At the same time, if the IRS is proposing to issue a new notice about something that touches upon our litigation, we want to know about it. So we have frequent meetings at a very high level to discuss these various common interests.

Q So if I understand you correctly, the Appellate Section can be involved in litigation while it is still at the administrative or trial court level?

A If it is the same issue, yes. We may have one issue on appeal in a couple of cases, and in other cases we may still be at the trial level, and still other cases may be at the administrative level at IRS. So, we have to make sure everybody is acting in a consistent manner.

Q What if you had an issue affecting hundreds of taxpayers and it was not yet even at appellate—would there be an occasion where you would confer with counsel or with trial lawyers in the Tax Division to make sure what is being argued will be in your view appropriate if it comes up on appeal?

A Yes, that is one of our roles—a kind of coordination role. We have an appellate person who is assigned to each of our large tax shelter cases, and that appellate lawyer will sit in on some strategy sessions to make sure that the evidence is going to support whatever position we are going to take and that Appellate is on board with that. While that type of coordination is at a "macro" level as opposed to a "micro" level, it is nevertheless an important part of our job.

Q In your view, what are the most significant tax appeals in the last 10 years?

A That is a tough list. And I think it demonstrates the broad reach of the Tax Division's Appellate Section. In the tax area, the Supreme Court has decided a number of important cases, many of which deal with procedural matters. Among them are the *Brockamp* case [519 U.S. 347 (1997)] decided 12 years ago, dealing with equitable tolling. The Supreme Court upheld the government's position, and it prompted Congress to step in and create some exceptions to deal with unfortunate factual circumstances. Another procedural decision was *Clintwood Elkhorn* [128 S. Ct. 1511 (2008)], where the Supreme Court reaffirmed the proposition that if you have a statute of limitations in a tax case, and it says three years, it is three years. A third case I might mention is the *Craft* case [535 U.S. 274 (2002)], dealing with federal tax liens in tenancy-by-the-entireties property and reaffirming the proposition that while state law may determine whether a property interest exists, it is the Internal Revenue Code that determines whether that property interest can be reached by the federal tax collector.

In terms of Court of Appeals cases, I would say that probably some of the most important ones are the appellate victories in the abusive corporate tax shelter area that were first decided in 2006. There were about four reversals in the summer of 2006 after taxpayers had won some significant trial court victories in cases involving facts that may have met the letter of the tax law but lacked economic substance. Those cases were *Coltec*, *Black & Decker*, *Castle Harbour*, and *Dow Chemical*. Those four appellate decisions really turned the tide as to whether the government was going to be able to win the tax shelter war. Other cases I think were significant in the past ten years include the *Swallows Holding* case in the Third Circuit [515 F.3d 162 (2008)] involving deference to Treasury Regulations. I argued that case personally, and the decision there reaffirmed the stance that the Supreme Court has been taking in recent years as to the proper deference owed to administrative regulations—*to wit*, where there is an ambiguous statute, a reasonable administrative regulation deciding between two permissible interpretations is entitled to *Chevron* deference. Finally, I think the *Murphy II* decision out of the D.C. Circuit [493 F.3d 170 (2007)], which I also personally argued, was a very important one because it vacated the unprecedented initial panel opinion, which had declared a federal taxing statute unconstitutional. *Murphy I* received a great deal of publicity, and the panel's reversal of position in *Murphy II* made it unnecessary to take the matter to the Supreme Court.

Insofar as current cases go, the most significant is probably the *Textron* case [577 F.3d 21 (2009)], decided by the First Circuit, sitting en banc, in August 2009. That case involves the scope of attorney work product, and thus has importance even outside the confines of federal tax law. And, we have a series of cases involving medical residents and whether they are subject to FICA taxes. The IRS issued a new regulation in 2005 that clarified the law, and the government won the first appeal in a case governed by the 2005 regulation.

Q Did the second decision in *Murphy* get as much publicity as the first?

A Yes and no. The original panel decision generated a large volume of blog comments and law review articles because it was just a perfect case for law professors to examine in light of its bizarre conclusion. The second decision did not generate the same volume of written comments because it should have been decided that way in the first place.

Q I wonder how many law review articles were left in a near finished state when the second decision came out.

A Probably a lot. Virtually every tax lawyer in this country, whether in private practice or in the government, knew the decision in *Murphy I* was wrong. It was just a question about what was going to happen next. It was one of those unusual situations, somewhat similar to what I experienced about 25 years ago when I was handling the *Tufts* case [651 F.2d 1058 (1981)] in the Fifth Circuit. In that instance, too, almost every tax lawyer in the country knew that the panel decision was wrong and, as every tax lawyer and law student taking tax knows, the Supreme Court unanimously reversed the Court of Appeals' decision in *Tufts*.

Q At times the United States suffers adverse decisions in the circuit courts. What factors go into the decision for the United States to request en banc review of a circuit decision in favor of a taxpayer?

A The importance of the issue presented is paramount in this regard—*Murphy I* is a perfect example. The virtually unprecedented nature of that decision made it a fairly easy call for us to recommend to the Solicitor General that we file a petition for rehearing en banc. Whether or not a case might be destined for Supreme Court review is another major consideration in this respect. If the case is important enough for us to consider a certiorari petition, the road to that destination generally includes a rehearing en banc stopover. Although rehearing en banc petitions are rarely granted, we do not generally skip that step if we think a case might warrant Supreme Court review.

Q What factors go into the United States' decision whether to oppose or acquiesce in a taxpayer request for a certiorari review in the Supreme Court?

A Well, if there is a clear circuit split, I will not hesitate to recommend to the Solicitor General that we acquiesce in a certiorari petition, and the Supreme Court will generally agree to hear such a case. But, the conflict has to be a direct one. Sometimes you have cases in which there is some disagreement in approach, but unless the results in the cases are different, there may be insufficient grounds for asking the Supreme Court to step into the fray.

Q I think you may have answered this next question in part by describing some of the victories of the Tax Division in the circuits in 2006. What has the Appellate Section's role been in the development of the economic substance doctrine beyond that?

A In my experience, I think that district judges on occasion may simply lose sight of the forest for the trees. They may get so immersed in the machinations of the particular tax shelter and its facial compliance with the provisions of the Code that they are unable to see the big picture. Appellate judges are almost always attuned to the big picture, however, and that may explain why there have been a fair number of appellate reversals of taxpayer trial court victories, at least in the early going, and a lot of our success on appeal in this area is due to the incredible dedication and hard work of the attorneys in my office assigned to those cases. They are the real heroes in this regard, and I am incredibly proud of the role they have played in slaying (thus far) the tax shelter beast. ■

continued from page 1

For several years thereafter, the Service seemed to be winning. There were several taxpayer victories, to be sure. *E.g., Sala v. United States*, 552 F. Supp. 2d 1167 (D. Colo. 2008), *new trial denied*, 251 F.R.D. 614 (on appeal to 10th Cir.); *Countryside Ltd. P'ship v. Commissioner*, 95 T.C.M. (CCH) 1006 (2008). But the Government prevailed more often. With each victory, more tax officials and others forgot the lesson of experience: that a pendulum moves in one direction only for a space, after which it reverses its course. *See, e.g.*, Jeremiah Coder, *Practitioners, Government Officials Debate Codification of Economic Substance*, 2009 TNT 222-6 (Nov. 20, 2009) (citing Service attorney William Sabin Jr., speaking on his own behalf, to the effect that the Service's recent successes reflect "a large shift from just a few years ago when the [economic substance] doctrine was held in low esteem by many judges" and quoting him as saying that the doctrine has "proven very effective and very reliable.").

It remains to be seen, of course, whether *Castle Harbour III* and *Con Ed* herald such a reversal. The Tenth Circuit is expected soon to issue its opinion in the *Sala* appeal; it is virtually certain that the government will appeal C*astle Harbour III*; and the Government may also appeal *Con Ed*. The results of these and other cases will tell the tale of the upcoming rounds. What can be said now, however, is that the Government has not yet achieved final victory in the tax shelter wars (if it ever will). The battle continues.

With each victory, more tax officials and others forgot the lesson of experience: that a pendulum moves in one direction only for a space, after which it reverses its course.

Shelters as Part of Ongoing Business

Some taxpayers have found courts more inclined to approve their claimed tax benefits if the scheme that produced them was part of ongoing, substantial business rather than an adventitious arrangement. For example, in the *UPS* case, the Eleventh Circuit reversed the Tax Court and upheld the claimed tax benefits. In part, the circuit court reasoned: "The transaction under challenge here simply altered the form of an existing, bona fide business . . . . [T]here was a real business that served the genuine need for customers to enjoy loss coverage and for UPS to lower its liability exposure." *United Parcel Serv. of America, Inc. v. Commissioner*, 254 F.3d 1014, 1020 (11th Cir. 2001).

The ongoing, substantial business aspect was present—actually or arguably—in the recent tax shelter decisions in *Castle Harbour III* and *Con Ed*. From the time of its first trip to district court, "[s]ome observers have suggested that *Castle Harbour* fits within a line of cases upholding tax-motivated transactions in which taxpayers have demonstrated a direct relationship between the structure chosen to provide tax benefits and the

Conceptually, though not yet empirically, the "connected to ongoing business" theme might appear to link more naturally to one of the multiple versions of the economic substance doctrine employed by the courts.

taxpayer's ordinary course of business." Karen C. Burke, *Castle Harbour: Economic Substance and the Overall-Tax-Effect Test,* Tax Notes, May 30, 2005, at 1163.

Con Ed concerned a leveraged lease, a "lease-in, lease-out" transaction as to a facility located in the Netherlands. This was not the taxpayer's core business, but the court viewed it as a reasonable extension of its business, stating that the taxpayer's purposes included "the ability to pursue new opportunities and alternatives in a deregulated market; the expectation of making a pretax profit . . . ; plaintiff's entry into Western European energy markets; . . . technical benefits to Con Ed of operating a state of the art plant in its own field of expertise; the ability to further develop and share Con Ed's own cutting edge technology; and environmental [and public relations] benefits." *Con Ed*, 2009 WL 3418533, at *88. The court also was impressed with the extensive nature of the taxpayer's engineering, accounting, financial, environmental, and legal analyses and documentation. *See id*. at *95.

The arrangements in question need not rise to the level of a "trade or business" as those terms are understood for purposes of section 162. For example, in *Sala*, the upheld arrangement involved foreign currency options transactions, which the court viewed as being part of a long-term investment strategy. *Sala*, 552 F. Supp. 2d at 1179. Not even this long-term investment is indispensable. Each shelter must be evaluated on its own terms, and some shelters not involving long-term arrangements have been upheld by the courts. *E.g., Compaq Computer Corp. v. Commissioner*, 277 F.3d 778 (5th Cir. 2001); *IES Indus., Inc. v. United States*, 253 F.3d 350 (8th Cir. 2001). Nonetheless, for some courts, the connection of the shelter to ongoing business is a plus factor, a connection that was actually or arguably present in *Castle Harbour III* and *Con Ed.*

Conceptually, though not yet empirically, the "connected to ongoing business" theme might appear to link more naturally to one of the multiple versions of the economic substance doctrine employed by the courts. The current, uncodified doctrine is applied in numerous inconsistent ways by the courts. One dimension of the inconsistency entails the relationship between the subjective business purpose component of the doctrine and the objective economic reality component.

There are at least four views of the relationship between these components. The disjunctive view holds that the taxpayer passes economic substance muster by winning either the subjective or the objective component. The conjunctive view requires the taxpayer to carry both components. The unitary test offers that the two components "do not constitute discrete prongs of a 'rigid two-step analysis,' but rather represent related factors both of which inform the analysis of whether the transaction had sufficient substance, apart from its tax consequences, to be respected for tax purposes." *ACM P'ship v. Commissioner*, 157 F.3d 231, 247 (3d Cir. 1998), *cert. denied*, 526 U.S. 1017 (1999). *Con Ed* followed a fourth view, under which both components are considered but "the lack of economic reality of the transaction itself is the primary consideration …." *Con Ed*, 2009 WL 3418533, at *41.

A connection to ongoing business arguably could relate to either the subjective component or the objective component. It seems to fit most comfortably, however, in the overall inquiry called for by the unitary test. Thus far, however, there does not appear to be a close correlation between the courts referring to the connection theme and the version of the economic substance doctrine generally followed by those courts.

Conclusion

Two swallows do not a Spring make. *Castle Harbour III* and *Con Ed* are not revolutionary cases, and only time will tell whether they survive appeal. Nonetheless, the cases remind us of the occasional theme of connection of the shelter with ongoing business. Most importantly perhaps, the cases remind us that the bell has not yet tolled the end of the final round of the tax shelter fight. If some had thought that shelters were down for the count, the recent cases show that at least some shelters have risen from the canvas. ■

Saving Private Ryan's Tax Refund: Poverty Relief for ALL Working Poor Military Families

By Francine J. Lipman*

Sergeant Horvath: This time the mission IS a man [and his/her family].
Saving Private Ryan (1998)

The lower ranks of the armed services are part of an exploding population of working poor in America. The U.S. Department of Defense estimates that thousands of military families live in poverty and that 40% of lower ranked soldiers face "substantial financial difficulties." Given the current economic crisis as well as unprecedented tours of duty per soldier in Iraq and Afghanistan (because of historically few soldiers, many soldiers are deployed five or six times with minimal downtime), thousands of soldiers and their families are suffering great financial hardship. Not surprisingly, many soldiers not able to make it to the next paycheck become victims of high priced short-term debt. Military towns have the highest concentration of payday lenders nationwide.

Private Reiben: I got a bad feeling about this one.
Captain Miller: When was the last time you felt good about anything?

As a long time resident of San Diego, I was shocked when a few years ago I first witnessed military families standing in line for public assistance. Sadly the situation is not new, but the public exposure of this problem is a recent phenomenon. Food bank pantry trucks were allowed onto bases across the country before September 11, 2001. Because of enhanced security rules, these trucks have been banned from all bases. As a result, military families must leave the base to receive free emergency groceries. Military families interviewed at Camp Pendleton Marine Corps Base in San Diego acknowledged that "For several days at the end of each paycheck period, they often have almost nothing to eat—sometimes absolutely nothing," reports Loretta Schwartz-Nobel in her book *Growing Up Empty (HarperCollins Publishers 2002).* "That's when they turn up desperate at food pantries, soup kitchens, bread lines, because they've literally run out." Some families, too embarrassed to ask for assistance, maintain their dignity, but go hungry.

For too many soldiers, poverty—often compounded by mental and physical problems—eventually does steal everything, including their dignity. One out of every three homeless men (or more than 260,000 fathers, sons, and brothers) sleeping on concrete sidewalks, in doorways or cardboard boxes has served in the armed forces. Women veterans are four times more likely to be homeless than their civilian counterparts. Most of these homeless veterans served America for three or more years.

Financial hardship can be destructive for any family. Military families face the additional stresses of separation from loved ones, hazardous jobs and in 2010 more than eight years of war. Family turmoil can compromise a soldier's career as well as put the safety and security of fellow soldiers and the entire country at risk. Soldiers' mission readiness, focus and effectiveness in protecting the United States depend upon the safety and financial security of families at home.

Captain Miller: Upham's talking about our duties as soldiers. We're given a mission and we follow orders and that supersedes everything, including our mothers.
Corporal Upham: Yes, sir. Thank you, sir.

Congress and the military have responded to this crisis with tax assistance and new programs designed to end veterans' homelessness; help military spouses find better jobs; provide subsistence grants, and teach families how to budget their

One out of every three homeless men sleeping on concrete sidewalks, in doorways or cardboard boxes has served in the armed forces.

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limited resources. In May 2008, with overwhelming bipartisan, bicameral support Congress passed and President Bush signed into law the Heroes Earnings Assistance and Relief Tax Act (the "HEART Act"). Among other benefits, the HEART Act exempts married military taxpayers filing a joint tax return from the Social Security number requirements for the 2008 recovery tax rebate. As Congressman Rangel stated during the debate in the House of Representatives, "This fix was necessary because in the zeal to impose anti-immigrant philosophy, language was added to the legislation for the stimulus rebate payments which now has a negative effect on some of our military and their families, even as they are off fighting a war." 154 Cong. Rec. H4171 (2008). As a result of this change more than 10,000 military families, previously barred from part of or their entire rebate because either spouse or their children did not have a Social Security number, received economic stimulus payments of up to $1,200, plus an additional $300 for each qualifying child.

> **We owe no greater duty than the one we owe to the members of the Armed Forces and their families.... Tens of thousands are immigrants.... Our duty to these brave men and women obligates us to ensure that their focus stays on their mission and on the safety and security of those they serve with. We must do all we can to reduce the stresses of war on the families of these brave men and women.**

Rep. Zoe Lofgren, Chairwoman of the House Subcommittee on Immigration, in *Immigration Needs of America's Fighting Men and Women, Hearing Before Subcomm. on Immigration of the House Comm. on the Judiciary,* 110th Cong., 2d Sess. (2008).

Since 1975, the EITC with bipartisan support has offset payroll taxes and subsidized low wages for working poor families. This tax benefit has lifted millions of hardworking families out of poverty every year and stimulated their deteriorating communities with billions of dollars spent for necessary goods and services.

Each year about 8,000 noncitizens join the United States armed forces. About 1.5% of the armed forces are noncitizens and 5% are foreign born. Countless soldiers have immigrant spouses. Under current immigration laws, unauthorized spouses and children of military personnel do not have an easy way to obtain Social Security numbers. Without valid Social Security numbers military spouses cannot work and the entire family is barred from receiving any earned income tax credit (the "EITC"). Unlike the 2008 recovery tax rebate, these families cannot file as married filing separately to receive a portion of this tax benefit. Married filing separately taxpayers are denied any EITC. The denial of EITC benefits in addition to an immigrant spouse's inability to work is a recipe for financial disaster.

> **Captain Miller:** Things have taken a turn for the surreal.

The EITC is one of the largest and most successful antipoverty programs for working poor families in America today. In 2008, 24 million families received $48 billion in refundable EITC benefits. For 2009, Congress has increased EITC benefits to up to $5,657. To qualify for EITC benefits both spouses and at least one of their children must have a valid Social Security number irrespective of whether or not one works. As a result many of the same military families who were barred pre-HEART Act from the 2008 economic stimulus rebate have been and will continue to be barred from critical EITC benefits every year.

> **Private Jackson:** Seems to me Cap'n this mission is a serious misallocation of valuable military resources.

Since 1975, the EITC with bipartisan support has offset payroll taxes and subsidized low wages for working poor families. This tax benefit has lifted millions of hardworking families out of poverty every year and stimulated their deteriorating communities with billions of dollars spent for necessary goods and services. Similar to the 2008 economic stimulus rebate (pre-HEART Act) certain military families are banned from this life-changing tax benefit.

Americans say we support the troops and their families. The tragic plight of thousands of military families and hundreds of thousands of veterans tells a different truth. Congress must fix this problem in the EITC immediately to ensure that every military family has a fighting chance in the war at home against poverty.

> **Private Jackson:** Be not that far from me, for trouble is near; haste Thee to help me. ■

Service Issues Guidance on Section 877A Exit Tax

By Michael A. Spielman*

In June 2008, a new expatriation provision, section 877A, was enacted by the Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART"). Section 877A applies to certain individuals who, on or after June 17, 2008, relinquish their U.S. citizenship or cease to be a lawful permanent resident of the United States. In addition to a brief background on section 877A, this article provides highlights of the 65 pages of written guidance on section 877A in Notice 2009-85, 2009-45 I.R.B. 598.

In addition to section 877A, HEART also introduced a new succession tax under section 2801 that imposes a tax on U.S. persons who receive a gift or bequest from an expatriate who was subject to the rules of section 877A. Generally, the rules under section 2801 require the recipient of the gift or bequest to pay tax on the fair market value of the property received at the highest gift or estate tax in effect on the date of receipt. Gifts or bequests to a qualified charity or U.S. spouse are exempt from the tax if made in a form that would be eligible for a deduction under the relevant estate or gift tax Code section. Although Notice 2009-85 does not provide guidance on section 2801, it indicates that future guidance on section 2801 will be issued separately.

Prior to the enactment of HEART, covered expatriates were subject to a 10-year alternative tax regime (1) on their U. S. source income and gain under section 877 and (2) a modified estate and gift tax regime under sections 2107 and 2501. In its most recent incarnation, as modified by the American Jobs Creation Act of 2004 ("AJCA"), section 877 became applicable solely on the basis of objective tests that measured an expatriating individual's net worth and net income tax liability, without regard to whether the individual had a tax avoidance purpose for expatriating. AJCA also added a third test, which caused expatriating individuals to become subject to the 10-year alternative tax regime if they failed to certify compliance with all U.S. federal tax obligations for the five preceding taxable years. In addition, AJCA added section 877(g), which caused covered expatriates to be treated as U.S. citizens for all federal tax purposes for any year during the 10-year period in which they spent 30 days or more in the U.S. This 30-day rule was not carried over to new section 877A.

Section 877A

Under new section 877A, Tax Responsibilities of Expatriation, covered expatriates (generally, U.S. citizens or long-term residents with a five-year average income tax liability exceeding $124,000 as indexed for inflation ($145,000 in 2009 and 2010) ("tax liability test") or net worth of $2 million or more ("net worth test"), are immediately taxed on the net unrealized gain in their property exceeding $600,000 ($626,000 in 2009 and $627,000 in 2010) as if they sold the property for fair market value the day before relinquishing U.S. citizenship or terminating their U.S. residency ("expatriating"). This mark-to-market tax regime applies to all property of the covered expatriate, other than deferred compensation items, specified tax deferred accounts, and interests in a nongrantor trust of which the covered expatriate was a beneficiary on the day before the expatriation date. Separate provisions apply with respect to these items.

Notice 2009-85

Individuals Covered. Notice 2009-85 clarifies that for purposes of determining whether a person is a covered expatriate under the tax liability and net worth tests, the guidance provided in Notice 97-19, 1997-1 C.B. 394, is applicable. Thus, for purposes of the tax liability test, joint filers must take into account the net income tax that is reflected on the joint income tax return. For purposes of the net worth test, an individual is considered to own any interest in property that would be taxable as a gift under Chapter 12 of Subtitle B of the Code if the individual were a citizen or resident of the United States who transferred the interest immediately prior to expatriation. The determination of whether a transfer by gift would be taxable is made without regard to sections 2503(b)-(g), 2513, 2522, 2523, and 2524.

Identification of a Covered Expatriate's Property. For purposes of applying the mark-to-market tax under section 877A(a), Notice 2009-85 treats a covered expatriate as owning any property interest that would be taxable as part of his or her gross estate for federal estate tax purposes if he or she had died on the day before the expatriation date as a citizen or resident of the United States. A covered expatriate is also deemed to own his her beneficial interest in each trust that would not be a part of the gross estate. A covered expatriate's beneficial interest in such a trust is to be determined by applying the rules set forth in Section III of Notice 97-19. For this purpose, the value of the beneficial interest is determined using a two-step process. First, all interests in property held by the trust are allocated to beneficiaries (or potential beneficiaries) based on all relevant facts and circumstances. Interests in property held by the trust that cannot be allocated based on the factors described in the previous sentence are allocated to the beneficiaries

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under the principles of intestate succession (determined by reference to the settlor's intestacy) as contained in the Uniform Probate Code, as amended. Second, interests in property held by a trust that are allocated to the expatriate are valued under the principles of section 2512 and the regulations thereunder without regard to any prohibitions or restrictions on such interests. Because section 877A(f)(3) includes special rules that apply to interests in nongrantor trusts in lieu of the general mark-to-market rules of section 877A(a), the rules of Notice 97-19 for interests in certain trusts should be limited to trusts that are not subject to section 877A(f)(3). Thus, the Notice 97-19 rules would apply when a trust is a grantor trust with respect to the covered expatriate for U.S. income tax purposes, but the assets of the trust are not includible in the covered expatriate's estate for U.S. estate tax purposes.

Determination of Fair Market Value. Notice 2009-85 provides helpful guidance on the determination of fair market value. In general, the notice applies estate tax valuation principles. It provides that the fair market value of each interest in property will be determined under section 2031 and the regulations, without regard to the alternate valuation provisions of sections 2032 and 2032A, as if the covered expatriate had died as a U.S. citizen or resident on the day before the expatriation. For property subject to the special valuation rules of sections 2701 through 2704 (Chapter 14), the notice provides that the provisions of Chapter 14 are to be applied as if the covered expatriate's interests were being transferred to family members. The notice also provides that in defining and valuing the gross estate under the estate tax valuation regime, the following may not be taken into account: (1) a covered expatriate's tax liability as a result of section 877A or another Code section and (2) amounts that would be subject to the charitable, marital, or family-owned business deductions under sections 2055 through 2057.

Calculation of Gain on Property Subject to Section 877A(a). For purposes of determining the mark-to-market tax, section 877A(a)(2) requires the calculation of net unrealized gain and loss to be individually determined for each item of property deemed owned by the covered expatriate on the day before the expatriation date, taking into account his or her worldwide holdings. The section 877A(a)(3) gain exclusion amount is then allocated among each item of built-in gain property. Net gains must be recognized to the extent that they exceed the $600,000 (increased by a cost-of-living adjustment factor for years after 2008 as noted above) gain exclusion provided in section 877A(a)(3). Recognized gains may be offset by recognized losses under the general provisions of Subtitle A of the Code.

As clarified by the notice, for each item of property subject to section 877A(a), basis is adjusted by the amount of gain or loss taken into account for each item of property under sections 877A(a)(2)(A) and (B), respectively, without regard to the exclusion amount provided in section 877A(a)(3). Thus, basis adjustments are available for the amount of built-in gain deemed realized with respect to an asset, even if such gain is not recognized due to the exclusion amount.

Under section 877A(h)(2), solely for purposes of determining the tax under section 877A(a), property held by a nonresident alien on the day that individual became a resident of the United States will be treated as having a basis of not less than the fair market value on such date. Notice 2009-85 indicates that the Service and Treasury intend to exercise their regulatory authority to exclude the basis step-up for U.S. real property interests or property used or held in conjunction with a U.S. trade or business.

Deferred Compensation. Deferred compensation items are not subject to the mark-to-market regime of section 877A(a). Instead, section 877A(d) applies a separate set of rules to these items: either a deemed distribution occurs or a special withholding regime is applied. Notice 2009-85 provides extensive guidance on the definition and treatment of eligible and ineligible deferred compensation items, and suggests that additional guidance may be issued. However, several important interpretative questions remain unanswered by the notice, including the relationship and application of section 871 to section 877A.

Interests in Nongrantor Trusts. Direct or indirect distributions of property to a covered expatriate who was a beneficiary on the day before the expatriation date are subject to withholding equal to 30% of the taxable portion of the distribution. Notice 2009-85 defines the term "beneficiary" and provides guidance on: (1) trust distributions of built-in-gain property; (2) conversions of nongrantor trusts into grantor trusts; and (3) the application of section 877A(f), which subjects a covered expatriate's nongrantor trust distributions to tax that is imposed under section 871, and section 877A(f)(1)(A), which subjects the payment to withholding. The notice also distinguishes between a trustee's obligation to deduct and withhold on distribution and a covered expatriate's obligation to inform the trustee of his covered status and report on his income tax return any tax not withheld. Under section 877A(f)(4)(B), covered expatriates who were nongrantor trust beneficiaries before expatriating waive their right to reduced withholding on those distributions under U.S. tax treaties unless they follow certain procedures. Until further guidance is issued, Notice 2009-85 outlines the procedures that covered expatriates must follow to preserve their treaty rights.

Deferral of Payment of Tax Under the Mark-to-Market Regime. Section 877A(b) allows a covered expatriate to make an irrevocable election for any property deemed sold by reason of section 877A(a)

to defer the payment of additional tax attributable to the property. The election is made on an asset-by-asset basis. To make the election, the covered expatriate must provide adequate security and must irrevocably waive on Form 8854 any right under any U.S. treaty that would preclude assessment or collection of tax imposed by section 877A.

The ability of a covered expatriate to make a deferral election is subject to the Service's acceptance of a tax deferral agreement, including evaluation of the adequacy of the security to be provided. The notice provides that the deferred tax and interest will be due immediately if the Service determines that the security provided no longer qualifies as adequate security unless the covered expatriate corrects the failure within 30 days after the Service mails the notification of the failure. Because the Service's approval of a tax deferral agreement is discretionary and would not be made until after the expatriation, this procedure is unlikely to prove helpful to covered expatriates who are less affluent or have liquidity constraints.

Filing and Reporting Requirements. Notice 2009-85 imposes rules that covered expatriates must follow to report information until regulations are issued under section 877A. Most notably, the rules require covered expatriates to file Form 1040NR with Form 1040 attached for the year of expatriation and, in certain cases, Form 1040NR for subsequent years. Importantly, the notice clarifies that all U.S. citizens who relinquish their U.S. citizenship and all long-term residents who cease to be lawful permanent residents of the U.S. are required to file Form 8854 in order to certify that they have been in compliance with all federal tax laws during the five years preceding the year of expatriation. Individuals who fail to make such certification will be treated as covered expatriates within the meaning of section 877A(g), whether or not they also meet the tax liability test or the net worth test.

Conclusion

In comparison to the ten-year alternative tax regime under prior law, the section 877A exit tax regime has a far greater potential for adverse consequences. These consequences include higher net tax cost due to the imposition of the mark-to-market tax, the potential for U.S. taxation in perpetuity on distributions from nongrantor trusts and certain deferred compensation items, ongoing and onerous U.S. tax reporting requirements, and risks of double taxation. Thus, it should not be surprising that the new exit tax regime has caused many global executives, entrepreneurs, and other individuals with ties to other countries to rethink the benefits of acquiring or retaining U.S. citizenship or green cards. In addition, the prospect of increased tax rates, the increased emphasis on individual compliance and transparency and its implications for individuals with non-U.S. assets, and the current environment of depressed asset values across all markets are stimulating further interest in expatriation. ■

Employee Benefit Plans: Recent Developments

By David Pratt*

Retirement Plans

Temporary Waiver of Required Minimum Distribution Rules. Under the Worker, Retiree, and Employer Recovery Act of 2008 no required minimum distribution (RMD) was required *for calendar year 2009* from IRAs and employer-sponsored defined contribution plans, including governmental 457(b) plans. Act § 201(a); I.R.C. § 401(a)(9)(H). The next RMD would be for calendar year 2010.

In Notice 2009-82, 2009-41 I.R.B. 491, the Service issued guidance regarding the waiver. Individuals who receive a 2009 RMD have until the later of November 30, 2009, or 60 days after the date the distribution was received, to roll it over. The Notice provides sample plan amendments that plan sponsors may adopt or use in drafting individualized amendments. A plan amendment is generally required by the last day of the 2011 plan year (2012 for a governmental plan). The Notice also includes additional guidance for plan sponsors.

Amendments to Comply with the Pension Protection Act of 2006. In general, section 1107 of the PPA requires plans to be amended by the last day of the first plan year beginning on or after January 1, 2009, to effectuate the changes made by the Act. Governmental plans have until 2011. In some cases there is a delayed compliance date for collectively bargained plans. Defined benefit plans must be amended to provide for limitations on benefit payments and benefit accruals under section 436.

Announcement 2009-82, 2009-48 I. R.B. 720, gives sponsors of cash balance and other hybrid plans until the end of the 2010 plan year to comply with the PPA requirement that the plan's interest-crediting rate not exceed a "market rate of interest." The Service has also extended by one year the deadline for amending plans to comply with other requirements of PPA. The new deadline is the last day

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of the first plan year beginning on or after January 1, 2010. Notice 2009-97, 2009-52 I.R.B. (advance release on Service website Dec. 11, 2009).

Other Qualified Plan Amendments. Generally, a plan amendment that is not required by a change in the law or regulations (*e.g.*, adding a Roth contribution feature to a 401(k) plan) must be adopted by the last day of the plan year in which the amendment is effective. Neither a Qualified Automatic Contribution Arrangement nor an Eligible Automatic Contribution Arrangement may be adopted mid-year. Accordingly, to add a QACA or an EACA for a plan year, the sponsor must adopt an amendment before the beginning of the plan year.

All qualified plans must adopt 2009 interim amendments by the due date of the plan sponsor's 2009 tax return, including extensions.

Under the Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART Act"), plans must provide additional death benefits when a participant dies during active military duty, and differential wage payments must be treated as compensation. 401(k) plans must allow distributions of elective deferrals to certain participants who are on active military duty for a period of more than 30 days. Other changes are optional. Plan sponsors must adopt a conforming amendment by the end of the 2010 plan year.

Pension Funding. On October 15, 2009, the Service released final regulations under sections 430 and 436, providing guidance on measuring the value of plan assets and benefit liabilities used for determining the funding requirements in single-employer plans; using credit balances; and applying benefit restrictions to certain underfunded defined benefit pension plans. T.D. 9467, 74 Fed. Reg. 53004 (2009). The regulations are effective for plan years beginning on or after January 1, 2010; plan sponsors may rely on them earlier. It is possible that Congress will grant relief from the enhanced minimum funding rules enacted by PPA.

Qualified Plan Limits for 2010. The Service interpreted the Code to prohibit a decrease in the limits, so almost all of the 2010 limits are the same as the 2009 limits. For instance, the general limit on elective deferrals is still $16,500. IR-2009-94, 2009 WL 3303735 (Oct. 15, 2009); Notice 2009-94, 2009-50 I.R.B. 848. The following limits *did* increase:

- Some of the adjusted gross income limitations under section 25B(b)(1)(A) for determining the amount of the retirement savings contribution credit;
- The applicable dollar amount under section 219(g)(3)(B)(ii) for determining the deductible amount of an IRA contribution for certain taxpayers increased from $55,000 to $56,000. The applicable dollar amount under section 219(g)(7)(A), for a taxpayer who is not an active participant, but whose spouse is an active participant, increased from $166,000 to $167,000.
- The adjusted gross income limitation under section 408A(c)(3)(C)(ii)(I) for determining the maximum Roth IRA contribution for certain taxpayers increased from $166,000 to $167,000.

Posting of Actuarial Information. Section 104(b)(5) of ERISA, enacted by PPA, requires the sponsor of a defined benefit plan (including a multiemployer plan) to post actuarial information on any intranet website maintained by the sponsor, or by the plan administrator on behalf of the sponsor. This requirement is effective for the 2008 plan year. The Department of Labor has not yet issued regulations, so sponsors should make a good faith effort to comply with respect to information included in the 2008 Form 5500. According to Watson Wyatt, "Posting a scanned version of Schedule SB on an intranet Web site apparently satisfies the PPA requirement for the 2008 reporting year. The DOL has not issued regulations providing additional guidance with respect to the intranet display." *Intranet Posting of Schedule SB*, Watson Wyatt Insider, Nov. 2009, www.watsonwyatt.com/us/pubs/insider/showarticle.asp?ArticleID=22730.

ERISA 204(h) Notices. The Service has issued a final rule on the ERISA section 204(h) notice requirements for a pension plan amendment that is permitted to reduce benefits accrued before the amendment date. T.D. 9472, 74 Fed. Reg. 61270 (2009). The regulations also reflect certain amendments made to the requirements by PPA. Generally, a section 204(h) notice must be provided at least 45 days before the effective date of any section 204(h) amendment (15 days for small plans and multiemployer plans).

Section 1107 of PPA grants employers limited permission to reduce accrued benefits, which would otherwise violate Code section 411(d)(6). PPA contains specific notice requirements that conflict with the ERISA language. "'In general, the [final regs] confirm that if you comply with the specific notice rules, you are deemed to comply with section 204(h),' said Louis Mazawey of Groom Law Group. 'Unfortunately, they leave open the possibility that the 204(h) penalties could apply if you fail to meet the more specific PPA notice rule – which Congress may or may not have intended. '" Sam Young, *Opacity of Final Pension Plan Notice Regs Troubles Practitioners*, Tax Notes Today, 2009 TNT 224-2 (Nov. 24, 2009).

Other Notices. PPA requires single-employer defined benefit plan sponsors to provide participants with an annual notice of the plan's funding status within 120 days of the end of the plan year to which the notice relates. Plans with fewer than 100 participants need not provide the notice until the Form 5500 is due.

ERISA section 101(j) requires a plan administrator to provide a notice to participants if the plan is subject to a restriction on payment of benefits, *i.e.*, the plan's adjusted funding target attainment percentage is less than 80%.

PPA requires plan sponsors of defined benefit plans to notify the PBGC if the plan has a funding target attainment percentage of less than 80%.

PPA requires defined benefit plans to automatically provide benefit statements to

participants, generally at least once every three years, and expands the information that statements must include. The first benefit statement is generally due for the 2009 plan year, within 45 days after the end of that year.

PBGC Proposed Rule. PBGC has issued a proposed rule [74 Fed. Reg. 61248 (2009)] to conform its reportable events regulation (under ERISA section 4043) and other PBGC regulations to statutory changes made by PPA and to revisions of other PBGC regulations that implement the statutory changes. The rule would eliminate most of the automatic waivers and filing extensions currently provided. The rule would create two new reportable events, dealing with funding-based benefit limits and asset transfers to retiree health benefits accounts.

403(b) Plans. An employer that sponsors a 403(b) plan must adopt a plan document by December 31, 2009, if it has not already done so. Notice 2009-3, 2009-1 C.B. 250. Existing plans may need to be amended to reflect changes in the laws and regulations, including changes under PPA. Transition rules apply to collectively bargained plans and church plans. Plan sponsors must also enter into service agreements and information sharing agreements with vendors.

Effective for plan years beginning on or after January 1, 2009, section 403(b) plans covered by ERISA are subject to the normal Form 5500 filing requirements, including an audit for large plans. DOL granted some relief in Field Assistance Bulletin 2009-02, http://www.dol.gov/ebsa/regs/fab2009-2.html.

Section 402(f) Notices. Section 402(f) requires plan administrators to give recipients of "eligible rollover distributions" notice of their rollover rights. The Service has now issued two new model rollover notices that should be used as soon as possible. Notice 2009-68, 2009-39 I.R.B. 423. Use of the model notices is optional, and a plan sponsor may modify the notices and omit items that are not relevant to the plan.

Investment Advice. In November 2009, DOL withdrew its controversial final rules relating to the provision of investment advice to participants and beneficiaries in individual account plans, and beneficiaries of individual retirement accounts (and certain similar plans). 74 Fed. Reg. 60156, withdrawing the rules published at 74 Fed. Reg. 3822 (2009). DOL stated that it intends to propose a revised rule limited to the application of the statutory exemption relating to investment advice.

Deferred Compensation: Sections 409A and 162(m). Generally, all plans and arrangements were required to be amended to comply with section 409A by December 31, 2008. It may still be possible to bring an arrangement into compliance if the employee's rights have not yet vested.

The Service allows employers to correct "operational errors" in the administration of a deferred compensation arrangement. Normally, the error must be corrected by the end of the year after the year in which the error occurs. However, under a transition rule, errors that occurred in 2005 through 2009 may be corrected by December 31, 2009. Notice 2008-113, 2008-2 C.B. 1305.

Rev. Rul. 2008-13, 2008-1 C.B. 518, held that amounts could not be treated as performance-based compensation for purposes of the $1 million deduction limitation under section 162(m) if the agreement permits payment to an executive who terminates employment before attaining the specified goal. The Service provided transition relief for any performance period that began on or before January 1, 2009, and for compensation paid pursuant to an employment contract in effect on February 1, 2008. For most public companies operating on a calendar year basis, Rev. Rul. 2008-13 will apply to periods beginning on or after January 1, 2010.

Stock Plans. In November 2009, the Service issued final regulations relating to employee stock purchase plans under section 423 [T.D. 9471, 74 Fed. Reg. 59074] and final regulations on the section 6039 reporting requirements for corporations issuing statutory stock options. [T.D. 9470, 74 Fed. Reg. 59087]

Roth IRA Conversions. Beginning January 1, 2010, an individual will be able to roll over (convert) to a Roth IRA, regardless of income or filing status, an IRA or an eligible rollover distribution from an employer plan. Also, a non-spouse beneficiary of an employer plan can make a trust to trust transfer to a Roth IRA. For conversions and rollovers in 2010 only, the taxpayer can include 50% of the taxable portion of the rollover in gross income for 2011 and the other half for 2012. This provision is elective.

Health and Welfare Plans

Mental Health Parity. Congress enacted the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act (MHPAEA), Pub. L. No. 110-343, in 2008. The act does not apply to (1) small employers, generally those with 50 or fewer employees in the prior calendar year or (2) group health plans with fewer than two participants who are current employees on the first day of the plan year. The provisions take effect for plan years beginning after October 3, 2009. Collectively bargained plans have a delayed effective date.

Michelle's Law. H.R. 2851, enacted by Pub. L. No. 110-381, requires group health plans to continue coverage for dependent students with a "serious illness or injury" who take "medically necessary" leaves of absence for up to one year or, if earlier, until coverage would otherwise end under the plan (*e.g.*, attainment of age 24 or 25). It is not clear how these rules will interact with COBRA or how "medically necessary" and "serious illness or injury" will be defined. The law is effective for plan years beginning on or after October 10, 2009, and to leaves beginning during such years.

The Genetic Information Nondiscrimination Act of 2008. Title I of GINA prohibits group health plans and health insurance issuers from discriminating on the basis of genetic

information with respect to eligibility, premiums, and contributions and is effective for plan years beginning on or after May 21, 2009. Title II prohibits employers from discriminating on the basis of genetic information in employment decisions and acquiring genetic information except in limited circumstances (*e.g.*, wellness programs that meet certain requirements) and is effective on November 21, 2009. Genetic information is broadly defined to include information about the genetic tests of an employee and the employee's family members, as well as the employee's family medical history. "Family members" is also broadly defined. On October 7, 2009, the Departments of Labor, Treasury, and Health and Human Services jointly published interim final regulations [74 Fed. Reg. 51664] under Title I, effective for plan years beginning on or after December 7, 2009. These rules will have a significant impact on health risk assessments and other wellness programs.

Health Savings Accounts. In a November 5, 2009, report, the Congressional Research Service summarized the HSA rules for 2009, discussing eligibility, qualifying health insurance, contributions, and withdrawals. The report is reprinted in *Tax Notes Today*, 2009 TNT 218-88 (Nov. 26, 2009).

The Service has released final regulations on employer comparable contributions to HSAs, which apply to contributions made on or after January 1, 2010. T.D. 9457, 74 Fed. Reg. 45994 (2009).

Excise Taxes. Excise taxes are imposed for noncompliance with COBRA, HIPAA and the rules for Archer MSAs and HSAs. The HSA regulations require employers to report these excise taxes on Form 8928. For COBRA and HIPAA excise taxes, the return is generally due by the tax return due date (with no extension). For excise taxes related to Archer MSAs or HSAs, the return is due by April 15 of the year following the year the non-comparable contribution was made. The rules take effect for excise tax forms due on or after January 1, 2010.

HIPAA. The HIPAA privacy regulations took effect in 2003. The Health Information Technology for Economic and Clinical Health Act (HITECH), enacted as part of the American Recovery and Reinvestment Act of 2009, significantly increased penalties for noncompliance. DHHS has issued interim final regulations that implement the increased penalties. 74 Fed. Reg. 56123 (2009). The regulations apply to some violations occurring as early as February 18, 2009, and require a plan amendment by February 17, 2010.

FMLA. The National Defense Authorization Act for Fiscal Year 2010 permits family members to take 26 weeks of FMLA leave in a single 12-month period to care for a "covered service member" undergoing medical treatment, recuperation or therapy within five years after the individual separates from military service with respect to a serious service-related injury or illness incurred or aggravated while on active duty. The law also extends the availability of FMLA leave to employees with family members on active duty in a regular component of the Armed Forces during deployment to a foreign country.

On December 19, 2009, the President signed the Department of Defense Appropriations Act for Fiscal Year 2010, Pub. Law No. 111-118. The Act extends eligibility for the COBRA premium subsidy through February 28, 2010; extends the maximum period for receiving the subsidy from 9 months to 15 months; requires notification of these changes by February 17, 2010; and provides special transition rules.

Miscellaneous Issues

The Service issued proposed section 125 regulations in 2007. It has informally indicated that final regulations will not apply to plan years beginning before January 1, 2011.

The FTC has delayed enforcement of its identity theft red flags rule until June 2010. The FTC has clarified that a 401(k) plan loan program need not be included in a written identity theft prevention program, but clarification is still needed as to the rule's potential application to other benefits.

In November 2009, the 6th Circuit held that a plaintiff's attorney was liable to an ERISA plan for disbursed settlement funds. *Longaberger Co. v. Kolt*, 2009 FED App. 0399P, 2009 WL 3806079 (6th Cir. 2009). "Here, the Longaberger Plan required full reimbursement of benefits paid when a Plan participant received a judgment or settlement. The district court was correct to not deduct attorney fees from the amount of reimbursement due to Longaberger. Thus, we conclude that Kolt is obligated to reimburse the Plan from the funds he received from liable third parties. Kolt's decision to commingle these funds and not maintain them intact does not prevent enforcement of Longaberger's equitable lien by agreement under the terms of its ERISA plan." 2009 WL 3806079 at *11. ■

IRS Directive on Outer Continental Shelf Activity

By Heather M. Pesikoff and Dan Boeskin*

The Service's Large and Mid-Size Business division has issued a new directive regarding foreign taxpayers engaged in activities related to the exploration for, or exploitation of, natural resources on the Outer Continental Shelf in the Gulf of Mexico ("OCS"). LMSB-04-0909-037, Oct. 28, 2009, *Industry Director's Directive #1 – United States Outer Continental Shelf Activity*. There are three basic categories of foreign taxpayers that will undergo scrutiny:

- Contractors that perform services on the OCS,
- Vessel operators that transport supplies and personnel between United States ports and locations on the OCS, and
- Owners and/or operators of foreign-registered vessels that bareboat or time charter to persons that are engaged in activities related to the exploration for, or exploitation of, natural resources on the OCS.

The directive notes that in recent years, an increased number of foreign vessels have applied to enter and work in the OCS and that Service analysis indicates that a significant number of foreign vessels permitted to work in the area are not complying with United States filing requirements. In this regard, the Service's natural resources and construction industry group has established an issue management team to determine the extent of noncompliance. While a number of areas may be impacted, this article addresses employment tax compliance associated with foreign vessels and foreign crews.

Are Services Provided in the OCS Within the United States?

Federal employment taxes (*i.e.*, income tax withholding, the Federal Insurance Contributions Act (FICA), and the Federal Unemployment Tax Act (FUTA)) generally apply to services performed inside the United States. Section 638(1) provides that the OCS is geographically located within the United States. Thus, foreign employees that provide services in the OCS are considered to perform services in the United States.

The FICA Tax

FICA has two components: an Old-Age, Survivors, and Disability Insurance (*i.e.*, social security) tax and a Medicare tax. Pursuant to section 3121(b), FICA generally applies to payments of wages for services performed as an employee in the United States, regardless of the citizenship or residence of either the employee or the employer. Although there are exceptions to FICA for nonresident aliens working in the United States based on visa status, these exceptions generally do not apply to workers performing services on vessels in the OCS. However, there is a specific FICA exception under section 3121(b)(4) for vessels based on the location of work performed and locality of vessel registration. This exception requires intense factual development and can lead to unpredictable results. For example, wages paid to some workers on a particular vessel may be subject to FICA taxes, while wages paid to other workers on the same vessel may not be subject to FICA. Determining factors may include such facts as where the individual boarded and/or departed the vessel.

The question of whether services performed in the OCS are subject to FICA is further complicated by the existence of Totalization Agreements. In some cases, an employee will be subject to social taxes both in his home country and in a foreign location where the employee is working. The United States has entered into Totalization Agreements with 24 countries for the purpose of avoiding this dual taxation. These agreements must be considered when analyzing the applicability of FICA. While each Totalization Agreement is unique and should be reviewed for specific application, the basic rules are consistent. Under the general rule, an employee who would otherwise be subject to FICA tax and a foreign country's social tax remains subject exclusively to the social tax of the country in which the individual is working.

The general rule is the "territorial rule." Each agreement (except one, United States-Italy) includes an exception to the territorial rule designed to minimize disruptions in benefits coverage of the employee. Under this "detached worker rule" exception, an employee who is temporarily transferred to work for the same employer in another country remains covered only by the country from which he is sent. The detached worker rule applies to employees whose assignments are expected to last five years or less. Employees who are exempt from social taxes under an agreement must document their exemption by obtaining a certificate of coverage from the country that will continue to cover them. Accordingly, a particular individual working on a vessel in the OCS that is otherwise subject to FICA tax may be excepted from FICA depending on whether the individual is from a Totalization country and whether the individual has a certificate of coverage under the detached worker rule.

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The FUTA Tax

Section 3301 imposes an excise tax on every employer with respect to wages paid by the employer in the course of employment. FUTA is similar to FICA in that pursuant to section 3306, FUTA generally applies to payments of wages for services performed as an employee in the United States, regardless of the citizenship or residence of either the employee or the employer. As with FICA, there are exceptions to FUTA for nonresident aliens performing services in the United States based on visa status; however, these exceptions generally do not apply to workers performing services on vessels in the OCS. Again, similar to FICA, there is a specific FUTA exception under section 3306(c)(4) for vessels based on the location of work performed and locality of vessel registration. However, unlike FICA, Totalization Agreements do not apply to the FUTA tax.

Federal Income Tax Withholding

Pursuant to section 3402, every employer making a payment of "wages" is required to deduct and withhold income taxes unless a specific exception applies. Section 871(b)(1) provides that wages for personal services paid to nonresident alien employees are subject to graduated withholding in the same way as for United States citizens and residents if the wages are effectively connected with the conduct of a United States trade or business. Under section 864(b), the term "trade or business within the United States" includes the performance of personal services within the United States. However, section 864(b)(1) provides an exception for nonresident aliens performing services in the United States for a foreign corporation for a short period of time (less than 90 days) who earn less than $3,000. As with FICA and FUTA, there are exceptions to income tax withholding for nonresident aliens performing services in the United States based on visa status. However, these exceptions generally do not apply to workers performing services on vessels in the OCS. There are also income tax treaties that the United States has entered into with other nations that allow foreign workers to take a treaty position with respect to personal services performed in the United States. A properly documented treaty claim may alleviate the need for an employer to withhold income taxes from the pay of a nonresident alien's wages. It should be noted that dependent services articles under many treaties may not apply if the employer has a permanent establishment in the United States.

Depositing and Reporting

Foreign corporations operating in the OCS often are unaware they are paying United States source wages and therefore have deposit and reporting responsibilities. These obligations can be significant.

Regulations sections 31.6011(a)-1 and 31.6011(a)-4 prescribe the filing of Form 941, *Employer's Quarterly Federal Tax Return* for FICA and income tax withholding purposes. Similarly, for FUTA purposes, section 31.6011(a)-3 prescribes the filing of Form 940, *Employer's Annual Federal Unemployment Tax Return*. Section 31.6302-1 requires that the employer timely deposit employment taxes. Every employer engaged in a United States trade or business who pays remuneration for services performed by an employee must give that employee a written statement regarding the remuneration paid during the calendar year. I.R.C. § 6051(a). Regulations section 31.6051-1(a) provides that the statement is Form W-2, *Wage and Tax Statement.* Failure to meet these obligations may result in significant penalty exposure.

Guidance

The Service's industry directive provides guidance on foreign taxpayers engaged in activities related to the exploration for, or exploitation of, natural resources on the OCS. Foreign corporations are often unfamiliar with the complex rules that apply to the workers performing these services. As the Service focuses resources on foreign corporations conducting operations in the OCS, these foreign corporations must focus on achieving and maintaining employment tax compliance. Because of the uneven application of the FICA, FUTA and income tax withholding rules, this process can be a significant challenge for foreign corporations unfamiliar with these rules. ■

Deducting Mixed-Use Vacation Home Expenses: Uncertainty in the Taxpayer's Favor

By Vlad Frants*

Introduction

You have been consulted by a taxpayer, who owns a two-bedroom vacation home. The taxpayer rents it to tenants for 90 days during the year and receives $9,000 of rental income. The taxpayer uses the vacation home personally for 30 days during the year. The taxpayer pays property taxes of $3,200, mortgage interest of $4,000, and maintenance expenses of $2,000; depreciation is computed as $3,000. Not surprisingly, the taxpayer wants to know which expenses are deductible—and how much.

Relevant Statutes

Section 212(2) allows a deduction for all the ordinary and necessary expenses paid or incurred during the taxable year for the management, conservation, or maintenance of property held for the production of income, but section 262(a) provides that no deduction is permitted for personal, living, or family expenses. Taxpayer's mixed-use scenario has both income-producing and personal aspects. When property that the taxpayer uses as a residence is involved, section 280A provides deduction ordering rules for and limitations on the taxpayer's allowable deductions.

Under section 280A(e)(1), personal use of a dwelling unit on even a single day during the tax year requires an allocation of expenses based on days of personal use and days of rental of the property at its fair rental value. If the vacation home is rented for 15 or more days during the tax year and it is used by the taxpayer for personal purposes for the greater of (1) more than 14 days or (2) more than 10 percent of the number of days during the year for which the home is rented, the deductions attributable to the rental activity are limited. I.R.C. § 280A(d)(1).

Expenses allocated to rental days are deductible only to the extent of rental income. I.R.C. § 280A(c)(5). Because the taxpayer rented the vacation home for 90 days and personally used it for 30 days, there must be such an allocation of expenses. As discussed below, the Service and the courts disagree as to *how* the allocation of expenses must be made.

The Relevant Approaches

Taxpayer's expenses fall into two categories. Two items, the property taxes and mortgage interest, would be fully deductible even if the taxpayer used the property solely for personal purposes. I.R.C. §§ 163(h) (subject to the limits therein) & 164(a). Maintenance and depreciation expenses, on the other hand, are deductible only if there is a business or income-producing activity. Section 280A(e)(2) indicates that the limitations discussed below do not apply to the first category of expenses. But, as discussed below, the allocation of those expenses between personal and income-producing uses affects the limitations imposed on the second category.

The Service computes the expenses attributable to rental use as a percentage: the total days rented divided by the total days used. In the example posed, all expenses would be allocated 75% to the rental days and 25% to the personal days. In computing the limitation, the Service offsets the rental income by deductions in the following order: (1) mortgage interest and property taxes; (2) maintenance expenses; and (3) depreciation. I.R.C. § 280A(e)(1); Prop. Treas. Reg. §§ 1.280A-3(c)(4) & 1.280A-3(d)(3).

The Tax Court and two appellate courts have rejected the Service's formula. *Bolton v. Commissioner*, 77 T.C. 8 (1981), *affirmed*, 694 F.2d 556 (9th Cir. 1982); *McKinney v. Commissioner*, 41 T.C.M. (CCH) 1272 (1981), *modified by* 42 T.C.M. (CCH) 467, *affirmed*, 732 F.2d 414 (10th Cir. 1983). *See also Ruggiero v. Commissioner*, 74 T.C.M. (CCH) 662 (1997). In *Bolton*, the Tax Court agreed with the taxpayer that interest and taxes accrue on a daily basis regardless of use. In upholding the Tax Court's position, the Ninth Circuit noted that "'the number of days rented/total number of days used' fraction is not appropriate for allocating expenses such as interest and property taxes." 694 F.2d at 561. Although these courts employ a formula that computes the percentage limitation for interest and taxes by dividing the total days rented by the total days in the year, they limit other expenses using the Service's method (number of rental days/divided by number of days used).

Application to the Taxpayer

The table below reflects the facts set forth in the Introduction. The Service method would allocate 75% (90 days rented/120 days used) of all expenses to rental use. In contrast, the Tax Court would allocate only 25% of taxes and interest to rental use (90 days rented/365 days, ignoring rounding error); it would allocate 75% of other expenses (maintenance and depreciation) to rental use. In either case, allocable expenses in excess of rental income are carried forward to the next year.

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In addition to the $9,000 of deductions allowed using the Service method for allocating expenses under section 280A (or the $5,550 using the Tax Court method), the taxpayer can also deduct interest and taxes allocable to the non-rental use. Using the Service method, the taxpayer would have itemized deductions totaling $1,800; using the Tax Court method, the taxpayer would have itemized deductions totaling $5,400. The total deductions, combining both rental and personal use and ignoring any limitations under section 68, are $10,800 using the Service method and $10,950 using the Tax Court method. Because depreciation was limited using the Service method, the taxpayer's basis at the end of that year would be slightly higher than it would have been using the Tax Court method.

The Tax Court method gives better results in the example above. Will that always be the case? The Tax Court method uses 365 as its denominator for allocating interest and taxes, while the Service method (assuming the property is not used every day) uses a smaller denominator. Both methods use the same numerator. As a result, the Tax Court method will invariably allocate a smaller amount of the interest and taxes to the rental use. Thus, the Tax Court method potentially allows a larger deduction for maintenance and depreciation. When coupled with the itemized deductions available for the remaining interest and taxes, the Tax Court method is likely to provide larger total deductions. But a taxpayer who is more concerned with reducing adjusted gross income, or who is subject to the AMT, may attain better results using the Service method. Because taxpayers cannot change method from year to year, it is important to consider the taxpayer's overall results before selecting a method. ■

ITEM	SERVICE METHOD	TAX COURT METHOD
Rental Income	$ 9,000	$ 9,000
Mortgage Interest	-3,000	-1,000
Property Tax	-2,400	-800
Net Income Before Maintenance / Depreciation	$ 3,600	$ 7,200
Maintenance Expenses	-1,500	-1,500
Depreciation Expense	-2,100	-2,250
Rental Income After Deductions	$ 0	$ 3,450

Tax Bites in the 111th Congress

By Gail L. Richmond*

Many tax statutes include "Revenue Act" in their titles. It's an accurate descriptor, but oh so dull. Fortunately for our readers, many legislators understand the importance of creative naming. This Tax Bites presents an assortment of bills introduced in the early months of the current Congress. Readers can use the THOMAS website to follow their progress over the next year (and to decipher those represented by acronyms).

H.R. 30: 401Kids Family Savings Act of 2009
H.R. 53: Bad Polluters Act of 2009
H.R. 87: Put Your Money Where Your Mouth Is Act of 2009
H.R. 386: CLASS Act of 2009
H.R. 424: Protecting Senior's Nest Egg Act of 2009
H.R. 433: REWARD Act of 2009
H.R. 550: Get America Moving Again Act of 2009
H.R. 705: National STEM Education Tax Incentive for Teachers Act of 2009
H.R. 779: Tax Free Tips Act of 2009
S. 100: Home School Opportunities Make Education Sound Act of 2009
S. 144: Modernize Our Bookkeeping In the Law for Employee's Cell Phone Act of 2009
S. 243: GIVE Act of 2009
S. 278: Incentive to Serve Tax Act
S. 304: Main Street Recovery Act
S. 493: ABLE Act of 2009
S. 744: Affordable Tutoring of Our Children Act
S. 857: SERVE Act of 2009
S. 864: Public Good IRA Rollover Act of 2009

* Nova Southeastern University Law Center, Davie, FL.

News Briefs

2009-2010 Nolan Fellows

The Tax Section congratulates the recipients of its 2009-2010 Nolan Fellows awards. The following six Nolan Fellows were recently honored at the Section's 2010 Midyear Meeting in San Antonio, TX.

- Kelley Cooper-Miller, Reed Smith LLP, Washington, DC
- Katherine E. David, Oppenheimer Blend Harrison & Tate Inc., San Antonio, TX
- Eric L. Green, Convicer & Percy LLP, Glastonbury, CT
- Kevin Morris Jacobs, Ropes & Gray LLP, Washington, DC
- Summer Ayers LePree, Holland & Knight LLP, Miami, FL
- Carlene Y. Miller, Snell & Wilmer LLP, Phoenix, AZ

Named for the late Jack Nolan, a dedicated and respected Tax Section member, the distinction is awarded to young lawyers who are actively involved in the Section and have demonstrated leadership qualities. Each one-year fellowship includes waived Section Meeting registration fees and assistance with travel to some Section Meetings.

19th Annual ABA/IPT Seminars – March 22-26, 2010, New Orleans

The ABA Section of Taxation and the Institute for Professionals in Taxation will present the annual Sales/Use Tax, Property Tax, and Income Tax Seminars this year at the Ritz-Carlton New Orleans in New Orleans, LA. The faculty will address issues common to income, sales, use and property tax cases in all jurisdictions with an emphasis on those issues that apply generally to state and local tax appeals throughout the country.

The early bird registration deadline is January 15, 2010. For program schedule and registration information, visit the Tax Section's website at: https://meetings.abanet.org/meeting/tax/IPT10/.

Members in San Antonio, Texas and Washington, DC, Train Volunteers for the Military VITA Program

Through the efforts of the Section's Pro Bono Committee, volunteers from the Tax Section received IRS training so that they could train VITA volunteers preparing returns for military service members and their families on military bases. In 2008, its first year, the project was limited to the metropolitan Washington, DC, area, and has expanded since that time to include San Antonio, Texas. Section members volunteered to train during the week of January 11, 2010 at Fort Belvoir and Andrews Air Force Base in Virginia and Lackland Security Hill in Texas. Last year the program helped train 63 volunteers who prepared 4236 income tax returns.

Implement Disability Diversity In Your Workplace!

A free conference report from the Second National Conference on the Employment of Lawyers with Disabilities is now available from the ABA Commission on Mental and Physical Disability Law. From this groundbreaking event—cosponsored by a number of ABA entities, including the Tax Section—came the 2009 Conference Report, which contains information relevant to both legal employers and lawyers/law students with disabilities. Download your copy today: http://www.abanet.org/disability/docs/09report.pdf.

The Report encourages legal employers make a *Pledge for Change*, and includes a one-page pledge for legal employers to sign. The Pledge affirms the signatory's commitment to diversity, specifically, disability diversity, and recognizes that diversity is in the best interest of the profession, those the profession serves, as well as the organization making the commitment. For details and instructions, visit: http://www.abanet.org/disability/pledge.

Exempt Organizations Assistance Program

At the Section's 2010 Midyear Meeting in San Antonio, members of the Exempt Organizations Committee volunteered to provide consultation time to local tax exempt organizations that hold 501(c)(3) status and to nonprofit organizations who serve low-income individuals. The participating Section attorneys are experienced with exempt organization qualification issues, filings, compliance rules and governance issues. The program, the Exempt Organizations Assistance Program, co-sponsored by the Pro Bono Committee and the Exempt Organizations Committee, was a success.

Section Meeting Materials & Recordings

As a benefit of membership, Tax Section members can search and download hundreds of papers and materials presented at the Section's Fall, Midyear, and May Meetings dating back ten years at: www.abanet.org/tax/taxiq. This service is made possible through Thomson Reuters Tax & Accounting and West, a Thomson Reuters business—a primary sponsor of the Section.

Audiotapes, CDs, and MP3s of programs from recent Section Meetings are available from Digital Conference Providers (DCP), the Section's audio service provider. Orders can be placed through the DCP website at https://www.dcporder.com/abatx/ or by calling 630-963-8311. ■

CLE Calendar

www.abanet.org/tax/calendar

DATE	PROGRAM	CONTACT INFO
January 27, 2010	**Last Wednesday CLE Teleconference** Current Developments in Individual, Corporate, Partnership, and Estate & Gift Taxation Organized by the Teaching Tax Committee	Tax Section www.abanet.org/tax 202.662.8670
March 12, 2010	**Tax CLE on the Road: The Tax Implications of Workouts and Bankruptcy** Country Springs Hotel – Waukesha, WI Cosponsored by the State Bar of Wisconsin	State Bar of Wisconsin www.wisbar.org 800.728.7788
March 22-23, 2010	**2010 ABA/IPT Advanced Income Tax Seminar** The Ritz-Carlton New Orleans – New Orleans, LA	Tax Section www.abanet.org/tax 202.662.8670
March 23-24, 2010	**2010 ABA/IPT Advanced Sales/Use Tax Seminar** The Ritz-Carlton New Orleans – New Orleans, LA	Tax Section www.abanet.org/tax 202.662.8670
March 25-26, 2010	**2010 ABA/IPT Advanced Property Tax Seminar** The Ritz-Carlton New Orleans – New Orleans, LA	Tax Section www.abanet.org/tax 202.662.8670
April 27, 2010	**Tax CLE on the Road: The Tax Implications of Workouts and Bankruptcy** Webcast Replay of March 12 program	State Bar of Wisconsin www.wisbar.org 800.728.7788
May 19-21, 2010	**3rd Annual U.S. – Latin American Tax Planning Strategies Conference** Mandarin Oriental – Miami, FL	Tax Section www.abanet.org/tax 202.662.8670
June 3-4, 2010	**10th Annual Tax Planning Strategies – U.S. and Europe Conference** Odd Fellow Palæet – Copenhagen, Denmark	Tax Section www.abanet.org/tax 202.662.8670
June 24-25, 2010	**How to Handle a Tax Controversy at the IRS and in Court: From Administrative Audit Through Litigation** Renaissance Stanford Court – San Francisco, CA	ALI-ABA www.ali-aba.org 800.CLE.NEWS
July 7-9, 2010	**Estate Planning for the Family Business Owner** Gleacher Center – Chicago, IL	ALI-ABA www.ali-aba.org 800.CLE.NEWS

Section Meeting Calendar – www.abanet.org/tax/calendar

January 21-23, 2010 May 6-8, 2010 September 23-25, 2010	**MIDYEAR MEETING** **MAY MEETING** **JOINT FALL CLE MEETING**	Grand Hyatt – San Antonio, TX Grand Hyatt – Washington, DC Sheraton – Toronto, ON
January 20-22, 2011 May 5-7, 2011 October 20-22, 2011	**MIDYEAR MEETING** **MAY MEETING** **JOINT FALL CLE MEETING**	Boca Raton Resort & Club – Boca Raton, FL Grand Hyatt – Washington, DC Hyatt Regency at Colorado Convention Center – Denver, CO
February 16-18, 2012 May 10-12, 2012 September 13-15, 2012	**MIDYEAR MEETING** **MAY MEETING** **JOINT FALL CLE MEETING**	Manchester Grand Hyatt – San Diego, CA Grand Hyatt – Washington, DC Westin Boston Waterfront – Boston, MA

ABA SECTION OF TAXATION PUBLICATIONS:

The Tax Lawyer (TAXL)

ABA CLEs (ABATAX-CLE)

ABA Section of Taxation Comments to the U.S. Congress, Federal Agencies and Tax Court (ABA-FTXCOM)

Guide to Nonprofit Corporate Governance in the Wake of Sarbanes-Oxley (ABA-NCORPGOV)

State and Local Tax Lawyer (SLTAXL)

The Property Tax Deskbook (ABA-PTD)

A Comprehensive Analysis of Current Consumption Tax Proposals (ABA-CONSTAX)

Value Added Tax: A Model Statute and Commentary (ABA-VALADTAX)

Sales and Use Tax Deskbook (ABA-SUTX)

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BOXSCORE

Since September 2009, the Section has coordinated the following government submissions, which can be viewed and downloaded free of charge from the Section's website at www.abanet.org/tax/pubpolicy.

Submissions and Comments on Government Regulations, Administrative Rulings, ABA Policy and Blanket Authorities*

TO	DATE	CODE SECTION	TITLE	COMMITTEE	CONTACT
Internal Revenue Service	1/6/2010		Comments Concerning Modification of the Qualified Small Issuer Exception Under Section 265(b)(3)	Committee on Tax Exempt Financing	Wendy Salinas
Senate Finance Committee, House Ways and Means Committee	12/3/2009	n/a	Comments on Foreign Account Tax Compliance Act of 2009, H.R. 3933 and S. 1934	n/a	Helen Hubbard
Internal Revenue Service	11/20/2009	1.148-6, 1.141-12, 1.148-1(b), 1.150-2, 149(b), 265(b), 6694	Comments on Build America Bonds	Committee on Tax Exempt Financing	Perry E. Israel
Internal Revenue Service	10/29/2009	1.1275-2(c), 54A(i)(1), 54A(f), 54AA(d)(2)(C), 1286	Comments Concerning Stripping Tax Credits	Committee on Tax Exempt Financing	George G. Wolf

* The technical comments listed in this index represent the views of the ABA Section of Taxation. They have not been approved by the ABA Board of Governors or the ABA House of Delegates and should not be construed as representing the policy of the ABA.