IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL TRICARICHI, Appellant, v. PRICEWATERHOUSECOOPERS, LLP, Respondent.	Supreme Court No: 86317 87375 87835

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Appeal from the District Court of Clark County, Nevada

District Court Case No. A-16-735910-B

APPELLANT'S APPENDIX TO OPENING BRIEF

VOLUME 3 of 8

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Docket 86317 Document 2024-12345

CHRONOLOGICAL INDEX

Judgment and Motion to Strike Jury Demand			
Notice of Entry of Order Denying PwC's Motion for Summary Judgment and Motion to Limit Damages	4/14/2022	4	AA 993 – AA 1000
Notice of Entry of Order Granting PwC's Motion to Strike Jury Demand	4/29/2022	5	AA 1001 – AA 1012
Notice of Entry of Order Denying PwC's Renewed Motion for Partial Summary Judgment	6/16/2022	5	AA 1013 – AA 1022
Notice of Entry of Judgment	2/22/2023	5	AA 1023 – AA 1067
PwC's Appendix to Its Motion for Attorneys' Fees and Costs – Publicly Filed Version	3/15/2023	5	AA 1068 – AA 1207
PwC's Appendix to Its Motion for Attorneys' Fees and Costs – Intentionally Omitted Filed Under Seal	3/15/2023	n/a	AA 1208 – AA 1271
Notice of Appeal	3/23/2023	5	AA 1272 – AA 1274
Amended Notice of Appeal	3/24/2023	5	AA 1275 – AA 1277
Transcript of Hearing on PwC's Motion for Attorneys' Fees and Costs	5/30/2023	6	AA 1278 – AA 1357
Plaintiff's NRCP 60(b) Motion	8/21/2023	6	AA 1358 – AA 1473
Notice of Entry of Order on PwC's Motion for Attorneys' Fees and Costs	8/28/2023	6	AA 1474 – AA 1523
PwC's Opposition to Plaintiff's NRCP 60(b) Motion	9/20/2023	7	AA 1524 – AA 1634
Notice of Appeal	9/26/2023	7	AA 1635 – AA 1636
Plaintiff's Reply Supporting His NRCP 60(b) Motion	10/25/2023	7	AA 1637 – AA 1709

ALPHABETICAL INDEX

Amended Notice of Appeal	3/24/2023	5	AA 1275 – AA 1277
Answer to Amended Complaint	8/12/2019	4	AA 951 – AA 981
Answer to Complaint	1/17/2017	1	AA 51 – AA 73
Complaint	4/29/2016	1	AA 1 – AA 41
Exhibit 3 to Plaintiff's Appendix in Opposition to PwC's Renewed Motion for Partial Summary Judgment	05/19/2022	8	AA 1823 – AA 1826
Exhibit 4 to Plaintiff's Appendix in Opposition to PwC's Renewed Motion for Partial Summary Judgment	05/19/2022	8	AA 1827 – AA 1829
Exhibit 51 to Plaintiff's Appendix to Opposition to PwC's Renewed Motion for Partial Summary Judgment	05/19/2022	8	AA 1812 – AA 1822
Exhibit H to Opposition to PwC's Motion for Summary Judgment	04/17/2017	8	AA 1796 – AA 1797
Exhibits to Plaintiff's Opposition to PwC's Motion for Summary Judgment	8/1/2018	2-4	AA 367 – AA 863
Exhibits to PwC's Motion for Summary Judgment	6/14/2018	1-2	AA 84 – AA 366
Notice of Appeal	5/25/2017	1	AA 74 – AA 76
Notice of Appeal	3/23/2023	5	AA 1272 – AA 1274
Notice of Appeal	9/26/2023	7	AA 1635 – AA 1636
Notice of Appeal	12/22/2023	8	AA 1781 – AA 1783
Notice of Entry of Judgment	2/22/2023	5	AA 1023 – AA 1067
Notice of Entry of Order Denying in Part and Deferring in Part Plaintiff's	12/4/2023	8	AA 1773 – AA 1780

Motion for Stay of Execution Without Supersedeas Bond			
Notice of Entry of Order Denying Plaintiff's NRCP 60(b) Motion	11/28/2023	7	AA 1760 – AA 1772
Notice of Entry of Order Denying PwC's Motion for Summary Judgment and Motion to Strike Jury Demand	01/20/2021	4	AA 988 – AA 992
Notice of Entry of Order Denying PwC's Motion for Summary Judgment and Motion to Limit Damages	4/14/2022	4	AA 993 – AA 1000
Notice of Entry of Order Denying PwC's Motion to Dismiss	7/31/2019	4	AA 945 – AA 950
Notice of Entry of Order Denying PwC's Renewed Motion for Partial Summary Judgment	6/16/2022	5	AA 1013 – AA 1022
Notice of Entry of Order Denying: (1) Plaintiff's Motion for Stay of Execution Without Supersedeas Bond and (2) Plaintiff's Oral Motion to Stay Execution for Thirty Days	3/13/2024	8	AA 1784 – AA 1795
Notice of Entry of Order Granting Discovery Sanctions	12/08/2022	8	AA 1798 – AA 1811
Notice of Entry of Order Granting Motion for Leave to File Amended Complaint	3/27/2019	4	AA 892 – AA 897
Notice of Entry of Order Granting PwC's Motion for Summary Judgment	10/24/2018	4	AA 885 – AA 891
Notice of Entry of Order Granting PwC's Motion to Strike Jury Demand	4/29/2022	5	AA 1001 – AA 1012
Notice of Entry of Order on PwC's Motion for Attorneys' Fees and Costs	8/28/2023	6	AA 1474 – AA 1523
Notice of Entry of Order Regarding Motions in Limine	12/30/2020	4	AA 982 – AA 987

Notice of Entry of Order Regarding PwC's Motion for Summary Judgment	6/5/2017	1	AA 77 – AA 83
Notice of Entry of Order Regarding PwC's Motion to Dismiss	12/13/2016	1	AA 44 – AA 50
Plaintiff's NRCP 60(b) Motion	8/21/2023	6	AA 1358 – AA 1473
Plaintiff's Reply Supporting His NRCP 60(b) Motion	10/25/2023	7	AA 1637 – AA 1709
PwC's Appendix to Its Motion for Attorneys' Fees and Costs – Intentionally Omitted Filed Under Seal	3/15/2023	n/a	AA 1208 – AA 1271
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PwC's Opposition to Plaintiff's NRCP 60(b) Motion	9/20/2023	7	AA 1524 – AA 1634
Transcript of Hearing on Plaintiff's NRCP 60(b) Motion	11/2/2023	7	AA 1710 – AA 1759
Transcript of Hearing on PwC's Motion for Attorneys' Fees and Costs	5/30/2023	6	AA 1278 – AA 1357
Transcript of Hearing on PwC's Motion for Summary Judgment	9/24/2018	4	AA 864 – AA 884

CERTIFICATE OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on this 8th day of April, 2024, I caused service of a true and correct copy of the above and APPELLANT'S APPENDIX TO OPENING BRIEF pursuant to the Supreme Court Electronic Filing System to the following:

ALL COUNSEL ON SERVICE LIST

/s/ Kaylee Conradi
An employee of Hutchison & Steffen PLLC

Confidential Transactions

PRICEWATERHOUSECOOPERS

Confidential Transactions: Revised Final Regulations

- The confidentiality provisions of the final regulations issued on February 28, 2003 were determined to be overbroad
- Accordingly, the Service issued revised final regulations on December 29, 2003
- While the revised final regulations generally apply to all transactions entered into on or after December 29, 2003, taxpayers are permitted to apply these more reasonable provisions for all transactions entered into on or after January 1, 2003

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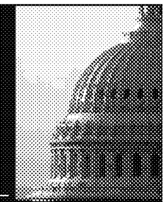
Under the revised final regulations, a confidential transaction is defined as "a transaction that is offered to a taxpayer under conditions of confidentiality and for which the taxpayer has paid an advisor a minimum fee."
Generally, the minimum fee is $250,000 for corporations and $50,000 for all other taxpayers. In the case of a pass-through entity in which all of the owners or beneficiaries are corporations, the minimum fee is $250,000.
A taxpayer is considered to participate in a confidential transaction if the tax return reflects a tax benefit from the transaction and the taxpayer is precluded from disclosing tax advice with respect to the tax structure or tax consequences

Confidential Transactions: Revised Final Regulations (Cont'd)



- Thus, disclosure generally will be required only in situations in which an advisor is paid a large fee and imposes a limitation on disclosure that protects the confidentiality of the advisor's tax strategies; i.e., unlike the February 28, 2003, these revised final regulations should not require disclosure of common business transactions
- Conforming changes delete the previously applicable exceptions and the rebuttable presumption/tax-carve-out mechanisms because such provisions should no longer be necessary

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Taxpayers that do not elect to apply the revised final regulations will be required to disclose any transaction offered to a taxpayer under conditions that the tax structure be held confidential.

Disclosure is required whether the confidentiality agreement is written, oral or evidenced by conduct and regardless of whether it is legally binding.

A taxpayer is considered to participate in a confidential transaction if the tax return reflects a tax benefit from the transaction and the taxpayer is precluded from disclosing tax advice with respect to the tax structure or tax consequences

Taxpayers are required to disclose any transaction involving a proprietary tax structure with respect to which an advisor requires confidentiality.

While focused on tax issues, this category potentially requires the taxpayer to "prove a negative" if non-tax confidentiality clauses are included in common business arrangements that have tax impact.

To minimize the burden of proof, many taxpayers will want to take advantage of a rebuttable presumption of nonconfidentiality by securing timely disclosure authorizations.

Transactions With Contractual Protection

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AA 000504

Transactions With Contractual Protection for Tax Advisor Fees

- A transaction with contractual protections is one where
  - The taxpayer, or a related party, has the right to a full or partial refund of fees if all or part of the intended tax consequences from the transaction are not sustained, or
  - The taxpayer has a fee arrangement contingent on realizing tax benefits
- A taxpayer is considered to participate in a transaction with contractual protection if the taxpayer's tax return reflects a tax benefit from the transaction and (i) the taxpayer has a right to a full or partial refund of fees or (ii) the fees are contingent

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Exception for Transactions With Contractual Protection

- A transaction is not considered to have contractual protection
  - Solely because a party to the transaction has the right to terminate the transaction upon the happening of an event affecting the taxation of one or more parties
  - If a person provides advice as to the potential tax consequences only after the taxpayer has entered into and reported the transaction on a filed tax return

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AA 000506

Loss Transactions

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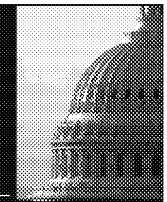
AA 000507

Section 165 Loss Transactions



Taxpayer	Single Year Loss Threshold	Combination of Years Losses Threshold
Corporations	$10 Million	$20 Million
Partnerships – Solely of Corporations	$10 Million	$20 Million
Others (Trusts, P/T of non-corporations, etc.)(except for certain 988 trans.)	$2 Million	$4 Million

- No netting of gains against losses
- Cumulative losses limited to current year plus 5 years

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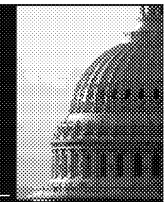
AA 000508

Loss Transactions (cont'd)



- A taxpayer participates in a loss transaction if the taxpayer's tax return reflects a 165 loss and the amount of the 165 loss equals or exceeds the threshold amount
- The tax return is deemed to reflect the full amount of the loss regardless of whether
  - the taxpayer can deduct the loss in the current year, or
  - the loss enters into the computation of an NOL or net capital loss that the taxpayer may carry over or carry back

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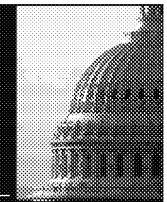
Loss Transactions (cont'd)



- A U. S. shareholder of a CFC (as defined in section 951(b)) that has a reportable 165 loss is treated as a participant and must report the CFC's transaction

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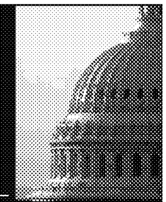
AA 000510

Exceptions to Loss Transactions



- Rev. Proc. 2003-24 describes certain losses not taken into account in determining whether a loss transaction is reportable
  - Losses from the sale or exchange of an asset with a qualifying basis (generally by reference to cash paid)
  - Losses that include casualty and involuntary conversion losses
  - Losses from properly designated hedging transactions described in section 1221(b)

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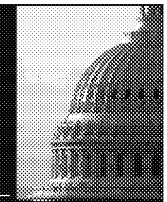
Exceptions to Loss Transactions (cont'd)



- Losses from marking to market under section 1256 or 475 property with qualifying basis
- Losses on abandonment of depreciable business property with qualifying basis

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Exceptions to Loss Transactions (cont'd)

- While the revenue procedure provides some exceptions, there are conditions that limit the effectiveness of those provisions, often creating traps for the unwary. Consider, for example
  - The limitations on the definition of qualifying basis
  - Limitations on the exception for common hedging transactions
  - The absence of any exceptions for losses arising from the disposition of any interest in a flow-through entity

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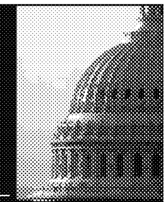
Many of these exceptions have surprising limits or traps for the unwary.
"Qualifying basis" may be difficult to establish and/or impossible to maintain. For example, taxpayers would not have qualifying basis in stock adjusted by reason of certain consolidated return, PTI or sub-part F adjustments .
Even if an asset has qualifying basis, disclosure is still required if the asset is an interest in a flow-through entity, certain straddles, etc.
The exemption for certain hedging transactions applies only if the hedges are properly designated; many are not.
In addition, Rev. Proc 2003-24 exempts from disclosure:
Losses that include casualty and involuntary conversion losses;
Losses from mark to market adjustments under sections 475 or 1256 with a qualifying basis;
Losses on abandonment of depreciable business property with qualifying basis, etc.
Certain bulk sales of inventory



Loss Transactions Requiring Disclosure

- A variety of common business transactions will trigger disclosure under this provision, especially because the loss must be determined on a gross basis, without any offsets. Consider, for example, losses arising under
  - Certain currency transactions
  - Asset sales
  - Notes with OID and/or acquired market discount
  - Certain abandonments

59

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Note: These dollar thresholds apply separately to each transaction. The cumulative losses are limited to losses claimed in the year that the transaction is entered into and five succeeding years.

Note: There is no netting of gains and losses

A taxpayer is considered to participate in a loss transaction if

The taxpayer's tax return reflects a section 165 loss that equals or exceeds the thresholds applicable to that taxpayer (as discussed below in Q&A); or

If a partner, sub-S shareholder or trust beneficiary, if the loss that flows through the entity to the partner, shareholder or beneficiary equals or exceeds the thresholds applicable to that taxpayer

Again, the Final Regulations significantly limited this category of reportable transaction by increasing the number of loss transactions exempt from reporting, which exceptions are bow defined by Rev. Proc. 2003-24.

US shareholders of CFCs must make required disclosures for the year in which the CFC enters into the transaction producing the loss and the five succeeding years (even if the loss has no impact on the Federal income tax return of the US shareholder).

Transactions With Significant Book-tax Difference

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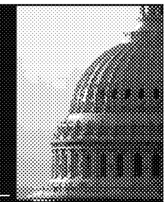
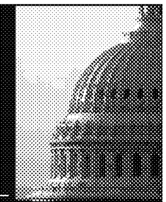
Transactions With a Significant Book-tax Difference



- $10 Million book-tax difference in single year
  - Gross Basis – no netting
  - Book Income determined under US GAAP unless US GAAP not used for any purpose
  - Of any non-exempted item or items of income, gain, expense or loss
- Applies to SEC reporting companies and companies with gross assets of $250 Million or more (based upon book values)

Transactions With a Significant Book-tax Difference (cont'd)



- Rev. Proc. 2003-25
  - Provides 30 categories of book-tax differences that are not taken into account when determining whether a significant book-tax difference exists

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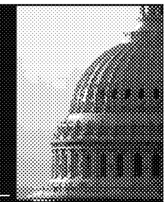
Transactions With a Significant Book-tax Difference (cont'd)



- Excluded Book-tax Differences include:
  1. Items to the extent a book loss or expense is reported before or without a loss or deduction for Federal income tax purposes
  2. Items to the extent income or gain for Federal income tax purposes is reported before or without book income or gain
  3. Depreciation, depletion under §612, and amortization relating solely to differences in methods, lives or conventions as well as differences resulting from the application of §§168(k), 1400I or 1400L(b)

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Transactions With a Significant Book-tax Difference (cont'd)

4. Percentage depletion under §613 or §613A, and intangible drilling costs deductible under §263(c)
5. Capitalization and amortization under §§195, 248 and 709
6. Bad debts or cancellation of indebtedness income
7. Federal, state, local and foreign taxes
8. Compensation of employees and independent contractors, including stock options and pensions
9. Charitable contributions of cash or tangible property

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AA 000519

Transactions With a Significant Book-tax Difference (cont'd)

10. Tax exempt interest, including municipal bond interest
11. Dividends as defined in §316 (including any dividends received deduction), amounts treated as dividends under §78, distributions of previously taxed income under §§959 and 1293, and income inclusions under §§551, 951, and 1293
12. Dividends paid deduction by a publicly traded REIT
13. Patronage refunds or dividends of cooperatives without a §267 relationship to the taxpayer
14. Items resulting from the application of §1033

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AA 000520

Transactions With a Significant Book-tax Difference (cont'd)

15. Items resulting from the application of §§354, 355, 361, 367, 368 or 1031, if the taxpayer fully complies with the filing and reporting requirements for these sections, including any requirement in the regulations or in forms
16. Items resulting from debt-for-debt exchanges
17. Items resulting solely from the treatment as a sale, purchase, or lease for book purposes and as a financing arrangement for tax purposes

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Transactions With a Significant Book-tax Difference (cont'd)

18. Treatment of a transaction as a sale for book purposes and as a nontaxable transaction under § 860F(b)(1)(A) for tax purposes, not including differences resulting from the application of different valuation methodologies to determine the relative value of REMIC interests for purposes of allocating tax basis among those interests

19. Items resulting from differences solely due to the use of hedge accounting for book purposes but not for tax purposes, the use of hedge accounting under §1.446-4 for tax purposes but not for book purposes, or the use of different hedge accounting methodologies for book and tax purposes

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AA 000522

Transactions With a Significant Book-tax Difference (cont'd)

20. Items resulting solely from (i) the use of a mark-to-market method of accounting for book purposes and not for tax purposes, (ii) the use of a mark-to-market method of accounting for tax purposes but not for book purposes, or (iii) in the case of a taxpayer who uses mark-to-market accounting for both book purposes and tax purposes, the use of different methodologies for book purposes and tax purposes
21. Items resulting from the application of §1286
22. Inside buildup, death benefits, or cash surrender value of life insurance or annuity contracts

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AA 000523

Transactions With a Significant Book-tax Difference (cont'd)

23. Life insurance reserves determined under §807 and non-life insurance reserves determined under §832(b)
24. Capitalization of policy acquisition expenses of insurance companies
25. Imputed interest income or deductions under §§483, 1274, 7872, or 1.1275-4
26. Gains and losses arising under §§986(c), 987, and 988
27. Items excluded under §883, §921, or an applicable treaty from a foreign corporation's income that would otherwise be subject to tax under §882

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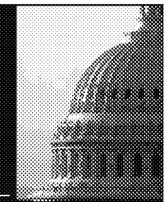
AA 000524

Transactions With a Significant Book-tax Difference (cont'd)

28. Section 481 adjustments
29. Inventory valuation differences whether attributable to differences in last-in, first-out (LIFO) computations or obsolescence reserves
30. Section 198 deductions for environmental remediation costs

Transactions With a Significant Book-tax Difference (cont'd)



- While the revenue procedure provides 30 exceptions, there are conditions that limit the effectiveness of those provisions, often creating traps for the unwary. Consider, for example –
  - The exception provided for depreciation
  - The conditional exception provided for certain Like-Kind Exchange Transactions
  - The limited scope of, and conditions precedent to relief for, certain reorganization transactions
  - The limited exception for charitable contributions

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One of the Service's primary concerns in the area of book-tax differences is that taxpayers report reduced income for purposes of tax calculations but then much higher income is reported to shareholders and investors. Accordingly the first two exceptions exempt from disclosure "unfavorable" book-tax differences – I.e., situations where (i) book expense is greater than (or recognized earlier than) tax deductions; or (ii) greater income is recognized for tax purposes than for book purposes (or recognized for tax earlier than for book).
Thus, for example,book-tax differences exceeding $10 million need not be disclosed if attributable to (I) a TP's decision to capitalize certain R&D expenses under section 59(e) while expensing such amounts for book purposes, (iii) certain creditable "orphan" drug costs; (iv) executive compensation in excess of section 162(m) or 280G thresholds, etc.

The depreciation exception does not apply to differences attributable to different depreciable bases (e.g., self-constructed assets). Query does this category of exemption establish a "cliff" or a "to the extent" standard?
As a practical matter, the most significant remaining issues include:
Depreciation differences attributable to depreciable bases e.g., in cases involving self-constructed assets;
Assets acquired in a transaction accounted for under the "pooling" rules, which may apply to combinations of entities under common control; or Assets that have been marked down for book purposes without corresponding adjustments to the tax basis.
Reorganization transactions for which no exemption applies (e.g., section 351 or 356 transactions, or eligible transactions with respect to which the taxpayer fails to comply with reporting requirements
Transaction costs
LKEs that are do not fully comply with reporting requirements

BEST PRACTICE: Note also that section 15 only exempts specified reorganization and LKE transactions if the taxpayer "fully complies" with all filing and reporting requirements. This may present a trap for the unwary: taxpayers should review compliance with these filing and reporting requirements to ensure that no disclosures will be required.

Transactions Involving A Brief Asset Holding Period

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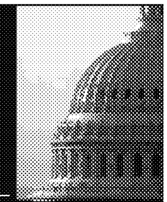
Transactions Involving a Brief Asset Holding Period



- An asset resulting in a tax credit of more than $250,000 (including a foreign tax credit) held for 45 days or less
  - See *Compaq* and *IES* cases
  - Exception provided where taxpayer is permitted to claim a foreign tax credit under Section 901(k)
- Taxpayer participates in a transaction involving a brief asset holding period when the taxpayer's tax return reflects items producing tax credits as described above, or when a CFC of a taxpayer enters into such a transaction

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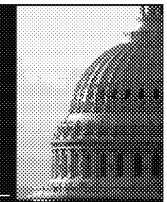
AA 000529



Reportable Transactions: Penalties Under Proposed Legislation

- S. 476 would impose penalties of up to $100,000 with respect to "Other Reportable Transactions"
- Unlike the penalties imposed with respect to Listed Transactions, under the SFC reported bill, the penalty for nondisclosure of an Other Reportable Transaction could be waived in exceptional circumstances and need not be reported to the SEC

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Reportable Transactions: Proposed Penalty Regime (cont'd)

- S. 476 would also impose accuracy-related penalties on certain "Reportable Avoidance Transactions"
- "Reportable Avoidance Transactions" are those "Other Reportable Transactions" that have a "significant tax avoidance purpose"
- For Reportable Avoidance Transactions, like Listed Transactions, the accuracy-related penalty would be
  - 20% of "understatement" if disclosed, and
  - 30% if not disclosed

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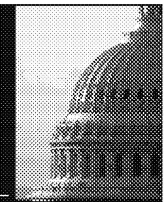
AA 000531

Reportable Transactions: Proposed Penalty Regime (cont'd)



- As with respect to Listed Transactions,
  - "Understatement" would be calculated without regard to other items on return applying highest marginal tax rate, and
  - SFC reported bill would require SEC disclosure of 30% penalty
- No deduction would be permitted for interest paid with respect to non-disclosed transactions

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AA 000532

Special Rules and Exceptions

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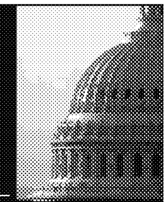
Application of Disclosure Regulations to U.S. Shareholders of Controlled Foreign Corporations



- In general, U.S. shareholders must disclose reportable transactions of their CFCs if the CFC would be considered to participate in the transaction if the CFC were a domestic corporation filing a US tax return for year of transaction
  - Regardless of whether there is a current U.S. tax effect
  - For year of transaction plus next 5 years
- Special rule for transactions with a significant book-tax difference – U.S. shareholders must disclose transactions of CFC only if the transaction reduces or eliminates an income inclusion under Subpart F

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AA 000534

Documentation Requirements

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Obligation to Retain Documentation

- Under the Final Regulations, taxpayers are required to retain "all documents and other records" relating to "transactions subject to disclosure" under the regulations until the statute of limitations has run.
- The scope of required record retention is far broader than that generally required under Section 6001

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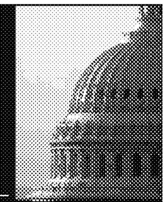
Obligation to Retain Documentation (cont'd)



- For Listed and Other Reportable Transactions, taxpayers are required to retain all documents and other records, including:
  - Marketing materials
  - Written analysis
  - Correspondence with advisors, other parties
  - Analysis of tax benefits
  - Documents relating to business purpose
  - Internal e-mails

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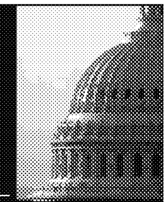
Obligation to Retain Documentation (cont'd)



- Taxpayer does not need to retain earlier drafts if the final document, or most recent draft, contains <u>all information in earlier drafts that is material to understanding the tax treatment.</u>

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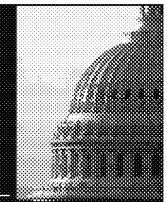
Obligation to Retain Documentation (cont'd)



- These tax-specific record retention requirements are in addition to, and not in lieu of, those imposed by Title 18 (including the recent amendments thereto made by the Sarbanes-Oxley Act of 2002)
- Given the potential criminal penalties imposed by Title 18, taxpayers should consult with counsel in finalizing record retention policies
- In many cases, existing systems, practices or processes do not capture the newly required information
- In most cases, existing record retention protocols do NOT satisfy the more stringent requirements set forth in the regulations.

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Proposed Penalty Legislation

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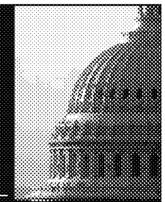
Senate Proposal To Require CEO Declaration



- Under pending legislation reported by the Senate Finance Committee, effective for returns filed after enactment, CEOs would be required to sign (under penalties of perjury) a declaration that
  - The return complies with the IRC
  - The CEO was provided “reasonable assurance of the accuracy of all material aspects of the return”
  - Processes and procedures have been implemented to ensure that the return complies with the IRC and all rules and regulations

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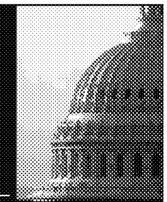
Again, this is a provision favored by the Senate, but not by the House. It is unclear which chamber will prevail and final results will not be determined until conference on the ETI bill later this year.

In its current form, however, the Senate proposal is particularly onerous, as reflected on this and the following slide.

Moreover, given that S. 1637 provides that the provision would take effect for returns filed after date of enactment, this provision, if enacted in its present form, could affect many 2003 returns, possibly with little or no notice. For example, should he provision be enacted just prior to Memorial Day, as some predict, corporate returns due on June 15, 2004 would be affected.



Senate Proposal To Require CEO Declaration (cont'd.)

- In addition, the CEO must certify that, to the best of the CEO's knowledge and belief,
  - The processes and procedures for ensuring that the corporation files a compliant tax return are effective;
  - The return is true, accurate and complete;
  - The officer signing the return did so under no compulsion to adopt a position with which that officer did not agree;
  - The CEO was briefed on all reportable transactions; and all required disclosures have been filed with the return

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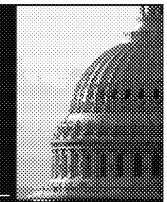
The Service Plans To Enforce Existing Sanctions



- Revised policies with respect to penalties require consideration of penalty issues (and more frequent assertion of penalties)
- Revised policies with respect to attorney-client privilege challenge assertion of privilege
- Office of Tax Shelter Analysis has been created by IRS and 25% of LMSB agent resources have been trained and will focus on Tax Shelter enforcement
- Number one IDR for corporate audits is the "tax shelter IDR"
- The IRS has developed and published an audit guide for agents to audit for reportable transactions

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The Service has redirected 25% of its audit resources to deal with tax shelter issues. Moreover, the Treasury and Service infrastructure has been modified to address these issues:

The Service established the Office of Tax Shelter Analysis (OTSA) to consolidate and accelerate review of troublesome transactions

CC created the office of tax shelter tsar to coordinate review

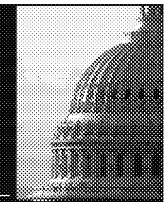
Commissioner Everson appointed

Commissioner Everson appointed Cono Namoratoas Director of the IRS's Office of Professional Responsibility, announcing a new effort focused on tax shelter promoters

Treasury proposed significant revisions to circular 230 standards for tax shelter provisions

These challenges are not theoretical, but very real, as evidenced by the increase in the number of listed transactions, the mandatory use of the "Super IDR" etc.

The Administration Will Propose New Tax Shelter Legislation in its 2005 Budget



- In addition to these pending legislative proposals, Treasury announced that the FY 05 budget will include another $45 billion of corporate tax shelter reforms
- Specifically, Treasury previewed proposals that would –
  - Target "abusive" sale-leaseback transactions with tax-indifferent parties, such as municipal transit authorities and foreign governments
  - Impose additional appraisal requirements for charitable deductions of property (including intellectual property and motor vehicles) and would limit, in the case of patents and certain other intellectual property, the amount that can be deducted "so that the charitable contribution deduction allowed matches the value of the donation"

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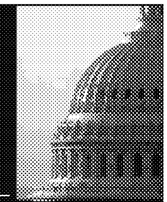
California Legislation also Requires Disclosure



- Effective for taxable years beginning on or after January 1, 2003, California taxpayers will be required to disclose participation in reportable transactions
- Penalties will apply for any failure to disclose ($30,000 in the case of a listed transaction and $15,000 in the case of other reportable transactions)
- Understatement penalty equal to 30% for non disclosed transactions and 20% for disclosed transactions
- In addition, retroactively effective for all open years, the Franchise Tax Board is authorized to impose a penalty of 20-40% for all transactions that lack economic substance

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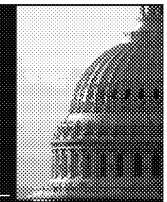
As we will discuss later in this presentation, the California rules are replete with ambiguities, creating significant uncertainty for taxpayers forced to comply with rules that were not well thought-out



California Legislation also Requires Disclosure (Cont'd)

- California has identified two California-only listed transactions:
  - Real Estate Investment Trust (REIT) Transactions
    - REIT takes a deduction for a consent dividend but the REIT owners do not report the consent dividend as income
  - Regulated Investment Company (RIC) Transactions
    - RICs claim dividend paid deductions under California provisions conforming to the federal RIC rules, while the parent eliminates the intercompany dividend received from the RIC relating to dividends between members of a California combined report

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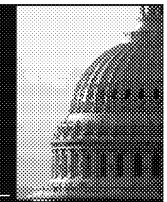
As we will discuss later in this presentation, the California rules are replete with ambiguities, creating significant uncertainty for taxpayers forced to comply with rules that were not well thought-out



Proposed New York Legislation also Requires Disclosure

- Effective for taxable years beginning on or after January 1, 2004, New York taxpayers will be required to disclose participation in reportable transactions
- Taxpayers filing a federal reportable transaction disclosure statement would be required to attach a duplicate to their New York tax return
- Retain all records related to the disclosure for six years
- Increase substantial understatement of tax penalty to 20% from 10%
- $10,000 penalty for failure to disclose each reportable transaction

91

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As we will discuss later in this presentation, the California rules are replete with ambiguities, creating significant uncertainty for taxpayers forced to comply with rules that were not well thought-out

Transactions Lacking Economic Substance

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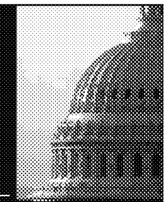
Transactions Lacking Economic Substance: Background



- Under present law, there is no <u>statutory</u> requirement that all transactions demonstrate economic substance
- The judicial standard for establishing economic substance varies among the circuits and is often considered in conjunction with another common law doctrine, the "business purpose" test

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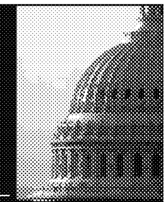
Transactions Lacking Economic Substance: Background (cont'd)



- Often the tests are defined as a two-prong test:
  - An objective "economic substance" test which requires a meaningful change in the taxpayer's economic position (other than that flowing from any reduction in taxes) and
  - A subjective "business purpose" test which attempts to determine whether the taxpayer intended the transaction to serve a useful non-tax purpose

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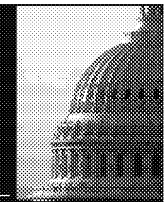
Noneconomic Substance Transactions: Penalties Under Proposed Legislation



- The Senate bill would impose accuracy-related penalties on understatements attributable to certain "Noneconomic Substance Transactions"
- "Noneconomic Substance Transactions" are those that
  - Result in no meaningful change in economic position and lack a substantial non-tax purpose, or
  - Fail to meet the requirements of any similar rule of law.
- The penalty would be 20% if the transaction were disclosed and 40% if not disclosed

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Noneconomic Substance Transactions: Penalties Under Proposed Legislation (cont'd)

- Understatements attributable to Noneconomic Substance Transactions subject to this penalty would not also be subject to the new accuracy related penalties added by this legislation for Listed and Other Reportable Transactions
- In addition, understatements attributable to Noneconomic Substance Transactions subject to this penalty would not be subject to current law understatement penalties, although such amounts would be included in determining whether any understatement was substantial under present law section 6662 (d)(1)

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Approaches to Compliance

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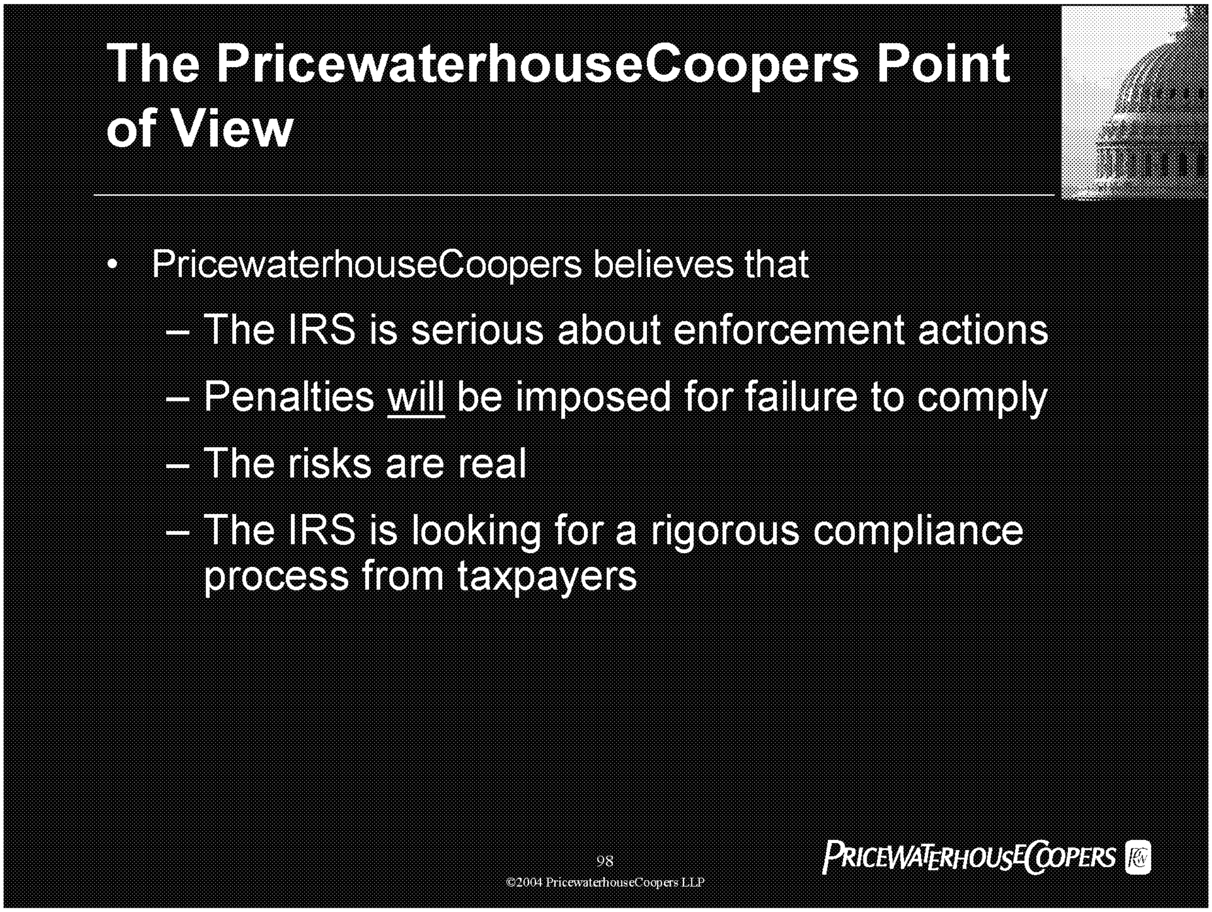

Compliance with the regulations can NOT be implemented only with Tax Department involvement;
Given the January 1, 2003 effective date, compliance will, in all events, include some level of forensic activity to identify and evaluate transactions beginning on or after that date;
Generally, existing tax compliance systems and corporate accounting systems do NOT capture required information; and
In most cases, existing record retention protocols do NOT satisfy the more stringent requirements set forth in the regulations.

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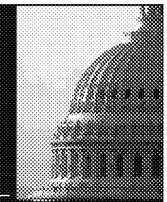
How Other Companies are Reacting



- In general companies are reacting in a variety of ways:
- Ignoring the regulations because they believe that:
  - They don't apply to the company or
  - They have not engaged in any listed transactions
- Taking a measured approach to the disclosure requirements and instituting some tax department control policies
- Completing comprehensive process development projects to manage the risk the new disclosure regulation create
- Companies with fiscal year-ends were the first to deal with the regulations

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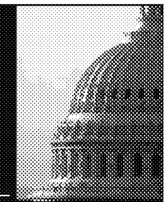
The PricewaterhouseCoopers Point of View



- We believe that the following objectives should guide any compliance plan:
  – Identify potentially reportable transactions
  – Analyze potentially reportable transactions to determine which must be disclosed
  – Properly disclose reportable transactions
  – Capture and retain documents required with respect to reportable transactions
  – Design process improvements for capturing future potentially reportable transactions on a contemporaneous basis

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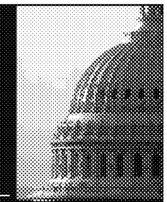

Dealing With The Compliance Burdens

- The present law sanctions and proposed legislative penalties are designed to give taxpayers an incentive to comply and the Service is expected to treat compliant taxpayers more favorably than those that ignore their compliance obligations
  - Taxpayers need to develop a process that permits them to properly disclose reportable transactions and capture and retain documents required with respect to reportable transactions
- Compliance necessarily requires a comprehensive review of Tax, Treasury, Legal, Business Unit and CFC operations
  - Taxpayers need to develop processes throughout the organization for avoiding, where possible, reportable transactions and for capturing future potentially reportable transactions on a contemporaneous basis

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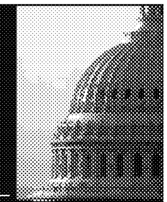

What Should I Do?

- Educate All Stakeholders
  - Compliance with the regulations is not a problem that can be isolated to the Tax Department
- Ensure Current Year Compliance
- Develop Procedures to Ensure Ongoing Compliance
- Consider Ruling Process
- Ensure Compliance with Record Retention Requirements
- Monitor Developments

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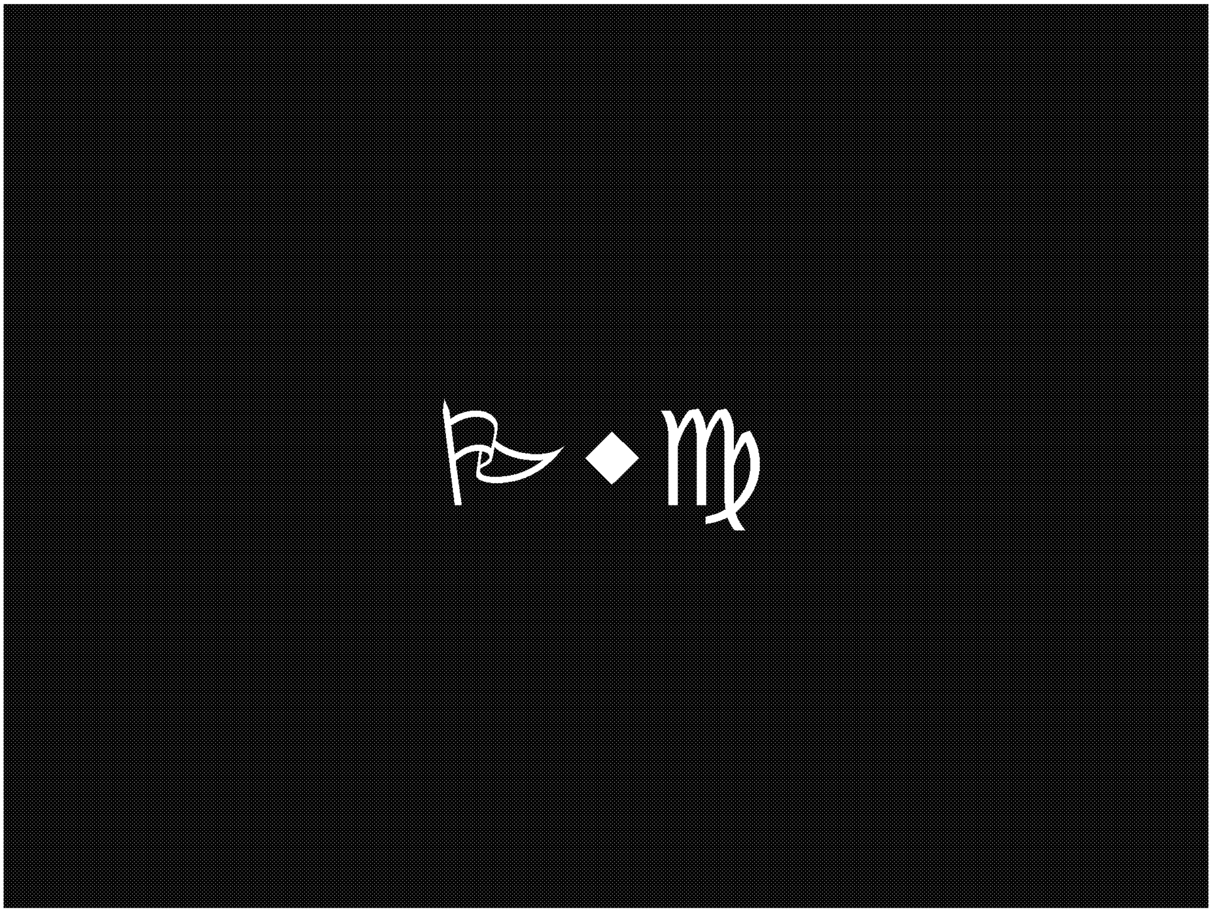

EXHIBIT 6

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- [HYPERLINK "http://www.irs.gov/individuals/index.html" \o "Information for Individuals, Employees, Farmers, International Taxpayers, Military, Parents, Self-Employed, Seniors & Retirees and Students"]
- [HYPERLINK "http://www.irs.gov/businesses/index.html" \o "Information for Businesses, Corporations, International Businesses, Partnerships and Small Business/Self-Employed"]
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Businesses Topics

- **[HYPERLINK "http://www.irs.gov/businesses/small/article/0,,id=98350,00.html"]**
- **[HYPERLINK "http://www.irs.gov/businesses/small/article/0,,id=99336,00.html"]**
- **[HYPERLINK "http://www.irs.gov/businesses/small/article/0,,id=99930,00.html"]**
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- **[HYPERLINK "http://www.irs.gov/businesses/small/content/0,,id=98942,00.html"]**
- **[HYPERLINK "http://www.irs.gov/businesses/topic/index.html"]**

IRS Resources

- **[HYPERLINK "http://www.irs.gov/compliance/index.html"]**
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Examination of Multiple Parties in Intermediary Transaction Tax Shelters as described in Notice 2001-16

January 12, 2006

MEMORANDUM FOR INDUSTRY DIRECTORS, LMSB DIRECTOR, FIELD SPECIALISTS, LMSB DIRECTOR, PREFILING AND TECHNICAL GUIDANCE, LMSB DIVISION COUNSEL, LMSB AREA DIRECTORS, SBSE

FROM: Barry B. Shott, /s/ Barry B. Shott
Acting Industry Director
Communications, Technology and Media, LMSB
Issue Champion for Notice 2001-16

SUBJECT: Examination of Multiple Parties in Intermediary Transaction Tax Shelters as described in Notice 2001-16, 2001-09 I.R.B. 730

To safeguard the Service's ability to assess deficiencies against one or more parties in intermediary transaction tax shelters, the Large and Mid-Size Business Division (LMSB) announces a directive emphasizing to examiners that the original shareholders of target corporations, the promoters that facilitate these transactions, the intermediaries, and the ultimate buyers of the assets must all be thoroughly considered for any tax liability, including, if case-specific facts call for it, transferee liability.

This Directive reflects a management decision to re-focus attention on the potential liability of parties other than just the intermediary entities, which will almost certainly be inadequate sources of collection. This Directive is not an official pronouncement of law, and cannot be used, cited, or relied upon as precedent.

BACKGROUND

Intermediary transaction tax shelters as described in Notice 2001-16 generally involve four parties: a seller (**X**), who desires to sell the stock of a target corporation (**T**), a promoter-controlled intermediary entity (**M**), and a buyer (**Y**) who desires to purchase the assets, but not the stock, of **T**. Pursuant to a pre-arranged plan, **X** purports to sell the stock of **T** to **M**. **M** has arranged financing for this sale through a bridge loan, which is secured by the assets of **T**. Contemporaneous with or shortly after the stock sale, **M** purports to sell **T**'s assets to **Y**. The bridge loan is then repaid from the proceeds and any excess proceeds are retained by **M**, effectively as a fee. **Y** claims a basis in the assets equal to **Y**'s purchase price. On occasion, the assets are sold before the stock, meaning that **M** then purchases the stock of a corporation consisting only of cash.

The primary tax motivation for **X** to engage in the transaction is the lesser gain recognized due to its high basis in the stock of **T**, as opposed to **T**'s low inside basis in the assets. The primary tax motivation for **Y** is larger depreciation and amortization deductions based on the fair market value of the assets, rather than on a carryover basis. Payment of the tax on the gain resulting from the asset sale is often avoided by **M** offsetting the gain with losses from the sale of inflated-basis assets.

COMPLIANCE MEASURE

Determining a Liability and Recasting the Transaction

A thorough examination of an intermediary transaction tax shelter requires scrutiny into each

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aspect of the transaction, including contacting each of the parties involved, to determine the true nature of the transaction. Based on the results of the examination, it may be appropriate to treat **M** as a mere conduit, thus enabling the Service to either (1) recast the transaction as an asset sale by **T** to **Y**, followed by a distribution of the sale proceeds to **X**, or (2) recast the transaction as a purchase by **Y** of **T**'s stock followed by a liquidation of **T** into **Y**. See the Intermediary [HYPERLINK "http://www.irs.gov/pub/irs-utl/intermediary_transaction.pdf"], December 19, 2002, for further recommendations as to case development.

Examiners should examine the return of the intermediary entity as part of any determination of the proper tax treatment of the overall transaction, as well as any determination of the correct tax liability of the target corporation as a result of the transaction. Examiners should bear in mind, however, that the intermediary itself is unlikely to serve as a source of collection for any tax liability. Experience with these transactions has shown that the intermediary usually has little or no collectible assets. The returns of the original shareholders of target corporations and the ultimate purchasers of the assets should also be thoroughly examined consistent with any recast of the transaction in each particular case.

Transferee Liability

After an intermediary transaction has been thoroughly examined, consistent with any appropriate recast of the transaction, and determinations of tax liability have been made, examiners should consider transferee liability if it appears that transferee liability may be the only possible way to obtain collection. Transferee liability is secondary liability for another's unpaid taxes. Transferee liability does not stand on its own because although an assessment against a transferor (who has primary liability) is not always necessary, transferee liability always requires that the Service have first determined the transferor's liability, including the amount. As a secondary collection tool, transferee liability should not be at the forefront of an examination of an intermediary transaction tax shelter. The potential for transferee liability, however, should not be ignored—ultimately transferee liability may be the only way for the Service to recover a determined tax liability that is otherwise uncollectible. Nevertheless, until the Service has determined the tax treatment of a transaction, including any recast, and determined that one or more transaction participants has a tax liability and has transferred assets to a transferee, a transferee examination is premature. When examiners reach that point and are considering transferee liability, they should be guided in a transferee liability examination by IRM 4.11.52, Transferee Liability Cases. See also IRM 5.17.14, **Fraudulent Conveyances and Transferee Liability**. Consistent with IRM 4.11.52.1, examiners should also coordinate their transferee liability examination with their Area Transferee Liability Coordinators and Area Counsel, as appropriate.

The elements of transferee liability are: (1) a transfer was made from a taxpayer to a transferee; (2) the taxpayer has a tax liability; (3) the transfer occurred during or after the taxable period in which the taxpayer's liability accrued; (4) the transferee is liable either at law or in equity for the taxpayer's unpaid liability; and (5) efforts to collect from the taxpayer have been exhausted or would be futile. As stated in IRM 4.11.52.5, the Service has the burden of proving these elements. Whether transferee liability is present will depend on all of the facts of an intermediary transaction, as well as the Service's treatment of the transaction, the taxability of gains from the transaction, and the allowance of claimed losses. "Transferee liability cases can be very complex in nature [and must be the product] of independent research predicated upon the facts of the specific case." IRM 4.11.52.1. For transferee liability, there must be both an underlying factual and legal basis (see the "Types of Transferee Liability" described in IRM 4.11.52.3 and the discussion of federal and state law in IRM 5.17.14).

As an example, assume that after examining an intermediary transaction, an examiner concludes that a sale of target stock to an intermediary was in substance a sale of the target corporation's assets to a third-party buyer, with the intermediary acting as an accommodation party. Moreover, the payment to the shareholders in the purported sale of the target stock was a disguised distribution (transfer) to the shareholders of the proceeds of the asset sale. Additionally, the examiner also determines that the target corporation incurred a tax liability on the re-characterized asset sale, and the target corporation and the intermediary are unlikely to have assets with which to pay the liability. The examiner should consider whether a basis exists for the liability of the shareholders as transferees of a fraudulent transfer under applicable state or federal law if the transaction was actually intended to be fraudulent or rendered the target corporation and/or intermediary insolvent and fair consideration was not exchanged for the transfer.

As the example demonstrates, at the point where transferee liability is a consideration in an examination, it is important to follow all transfers of the target corporation's assets (sometimes through the intermediary) to the other participants in the transaction in order to identify potential transferees. A party to the transaction that has received a transfer of cash or other property of the target corporation is potentially liable as a transferee. In intermediary transaction tax shelters, each of the central players may be a potential transferee: (1) the original shareholders of the target corporation who, when the transaction is recast as an asset sale, may be deemed to have received the bulk of the proceeds from the sale of the target corporation's assets; (2) the buyer (**Y**), to the extent, for example, **Y** has paid less than reasonably equivalent value for the target's assets, or in a stock sale recast if the target incurs a tax liability on its distribution of assets to **Y**; (3) the promoter to the extent that it has been paid a fee to set up the tax avoidance transaction; and (4) those persons or entities paid a fee for facilitating the transaction, such as consultants, accommodation parties, attorneys, and accountants, inasmuch as the fees paid to them were for non-existent services or were disproportionate to the generally accepted commercial rates for any services actually performed.

If the examiner develops a case which, on its face, supports the assertion of transferee liability against a party or participant, a decision to proceed with the assertion of transferee liability should be based on any preexisting position the Service has taken with regard to the transaction and the transferor's liability. As a result, the Service's characterization of the facts and their significance for purposes of transferee liability should be consistent with and not contrary to the Service's position on the primary liability, especially if the position has been advanced in a notice of deficiency or in litigation. If the position changes or is rejected in litigation, then any transferee liability case may have to be changed accordingly (such as when the Service position shifts to an alternative theory) or even abandoned. Examiners should always coordinate and consult with Counsel anytime the assertion of transferee liability is contemplated in connection with an intermediary transaction.

If you have any questions, please contact Vincent Papallo, Leasing Industry Technical Advisor, at (203) 792-3688 ([HYPERLINK "mailto:vincent.papallo@irs.gov"]).

EXHIBIT 7

Message

From: richard.p.stovsky@us.pwc.com [richard.p.stovsky@us.pwc.com]
Sent: 3/3/2008 10:05:50 PM
To: timothy.lohnes@us.pwc.com
Subject: Fw: IRS issues new Listed Transaction - Please read attached canvass
Attachments: _.png

Tim:

Please take a look at the message below. The California notice that you looked at last week had a similar transaction, but please take a look and confirm that this doesn't apply as well.

Thanks,

Rich

----- Forwarded by Richard P Stovsky/US/TLS/PwC on 03/03/2008 05:00 PM -----

Elizabeth Case/US/TLS/PwC 03/03/2008 04:40 PM "Reply to All" is Disabled	To	PwC US Tax Partners and Managing Directors
	cc	
	Subject	IRS issues new Listed Transaction - Please read attached canvass

Tax Quality & Risk Management Communication

Request for Information on a Listed Transaction

This is an **important request for information** on a Listed Transaction that was recently identified by the IRS entitled **"Distressed Asset Trust (DAT) Transaction"**

We must determine whether PwC was involved with any transaction that is the *same or substantially*similar to the Listed Transaction identified in **Notice 2008-34**, described below.

The Transaction: The Notice identifies certain transactions involving distressed assets with built in losses, trusts and a tax indifferent party as being listed transactions. The IRS calls these transactions Distressed Asset Trust Transactions or DATs.

According to Notice 2008-34, a DAT transaction generally occurs when a "tax-indifferent party" directly or indirectly contributes one or more distressed assets, such as debt instruments, with a high basis and low fair market value to a trust or series of trusts and sub-trusts, and a U.S. taxpayer investor then acquires an interest in the trust or sub-trusts for the purpose of shifting a built-in loss from the tax-indifferent party to a U.S. taxpayer that has not incurred the economic loss.

AA 000566

DAT transactions are similar to the partnership structures that were utilized to shift built-in-losses prior to the American Jobs Creation Act of 2004 (the "AJCA"). The changes under AJCA have prevented taxpayers from shifting a built-in loss to a U.S. taxpayer through the use of a partnerships but not trusts. The IRS believes that taxpayers are using DAT transactions described in the notice, which use a trust rather than a partnership, to get around the provisions of AJCA. Consequently, in Notice 2008-34, the IRS identifies the DAT transaction and transactions substantially similar to the DAT transaction as a listed transaction if they were entered into after **October 22, 2004**.

Notice 2008-34_doc.zip

If you have advised clients who have entered into this transaction after October 22, 2004, you should contact **Rochelle Hodes** (202-312-7589) or **Elaine Church** (202-414-1461) in Q&RM as soon as possible to determine whether registration and list maintenance is required. If you are unclear whether a client has entered a transaction that is substantially similar to this transaction contact **Trent Johnson** (202-414-1484). The due date for PwC to register the transaction is April 30, 2008. Taxpayers participating in this reportable transaction must disclose the transaction with their next filed return. Taxpayers must also file a copy of the disclosure with the Office of Tax Shelter Analysis. .

Thanks for your assistance in this matter

Betsy

This document was not intended or written to be used, and it cannot be used, for the purpose of avoiding U.S. federal, state or local tax penalties.

Part III - Administrative, Procedural, and Miscellaneous

Distressed Asset Trust (DAT) Transaction

Notice 2008-34

The Internal Revenue Service (Service) and the Treasury Department are aware of a type of transaction, described below, in which a tax indifferent party, directly or indirectly, contributes one or more distressed assets (for example, a creditor's interest in debt) with a high basis and low fair market value to a trust or series of trusts and sub-trusts, and a U.S. taxpayer acquires an interest in the trust (and/or series of trusts and/or sub-trusts) for the purpose of shifting a built-in loss from the tax indifferent party to the U.S. taxpayer that has not incurred the economic loss. This notice alerts taxpayers and their representatives that this transaction (referred to as a distressed asset trust or DAT transaction) is a tax avoidance transaction and identifies this transaction, and substantially similar transactions, as listed transactions for purposes of § 1.6011-4(b)(2) of the Income Tax Regulations and §§ 6111 and 6112 of the Internal Revenue Code. This notice also alerts persons involved with these transactions to certain responsibilities that may arise from their involvement with these transactions.

BACKGROUND

The Service and Treasury Department are aware that, prior to October 23, 2004, taxpayers used partnerships improperly to engage in variations of the distressed asset transaction described in this notice. The Coordinated Issue Paper, "Distressed Asset/Debt Coordinated Issue Paper," LMSB-04-0407-031 (Apr. 18, 2007) describes the variation of the distressed asset transaction involving partnerships (DAD). The American Jobs Creation Act of 2004, Public Law 108-357 (118 Stat. 1418) (AJCA), amended §§ 704, 734 and 743 effective after October 22, 2004, for contributions of built-in loss property to a partnership, for basis adjustment rules in the case of a distribution for which there is a substantial basis reduction, and for basis adjustment rules in the case of a transfer of a partnership interest for which there is a substantial built-in loss. The revisions to §§ 704, 734 and 743 generally (1) require that a built-in loss may be taken into account only by the contributing partner and not other partners, and (2) make the basis adjustment rules mandatory in cases with a substantial basis reduction or substantial built-in loss. Thus, the statutory changes to §§ 704, 734 and 743 under AJCA prevent taxpayers from shifting a built-in loss from a tax indifferent party to a U.S. taxpayer through the use of a partnership. The Service and Treasury Department have learned that a variation of the distressed asset transaction using a trust is being promoted in an attempt to avoid these revisions made by AJCA. Consequently, this notices identifies the DAT variation of the transaction as a listed transaction under § 1.6011-4(b)(2) for transactions that are entered into after October 22, 2004.

FACTS

In a DAT transaction, a tax indifferent party creates a trust (Main-Trust) with X as trustee. The tax indifferent party contributes distressed assets directly or indirectly (through a partnership or otherwise) to Main-Trust, and is described as the grantor and beneficiary of Main-Trust.

A U.S. taxpayer (Taxpayer) transfers cash or a note to Main-Trust in exchange for certificates evidencing units of beneficial interest in Main-Trust. The cash or note approximately equals the fair market value of the distressed assets. Under the terms of the Main-Trust agreement, Taxpayer thereby becomes a beneficiary of Main-Trust.

The parties contend that Main-Trust is a trust for tax purposes with the stated purpose of preserving and protecting assets. Thus, the parties contend that Main-Trust is to be taxed as a trust under the Internal Revenue Code, and not as a business entity described in § 301.7701-2 of the Procedure and Administration Regulations. As a result, the parties contend that under § 1015(b), Main-Trust's basis in the distressed assets is the same as the grantor's basis in the distressed assets (in this case, the tax indifferent party's basis).

Under the Main-Trust agreement, X, the trustee, is permitted to establish one or more sub-trusts of Main-Trust, each for a separate beneficiary of Main-Trust who will then be the sole beneficiary of that sub-trust. The Main-Trust agreement further provides that each sub-trust for a beneficiary constitutes a separate and distinct sub-trust of Main-Trust with beneficial interest certificates issued and separate records maintained for each sub-trust.

As permitted under the Main-Trust agreement, the trustee creates a separate sub-trust (Sub-Trust), transfers certificates evidencing units of beneficial interest in Sub-Trust (Sub-Trust Certificates) to Taxpayer, and allocates the distressed assets to Sub-Trust for the sole benefit of the beneficiary of the Sub-Trust. The Main-Trust agreement entitles the holder of Sub-Trust Certificates to various rights including the right to direct the trustee to vest the holder's ratable share of the corpus or the income of Sub-Trust in the holder. The Taxpayer contends that the existence of these rights causes the Taxpayer to be considered the owner of Sub-Trust under § 678, and that Sub-Trust is a grantor trust. As a result of being treated as the owner of Sub-Trust, the Taxpayer takes into account those items of income, deductions, and credits against tax, which are attributable to Sub-Trust, to the extent that such items would be taken into account in computing taxable income or credits against the tax of an individual. Section 671. The Taxpayer contends that Sub-Trust's basis in the distressed assets is the same as the grantor's basis in the distressed assets (in this case Main-Trust's basis). Section 1015(b). Within a short period of time, the distressed assets held by the Sub-Trust are written off as wholly worthless under § 166. Alternatively, the distressed assets are sold, and Taxpayer claims a deduction under § 165.

DISCUSSION

The transaction described in this notice attempts to shift built-in losses from a tax indifferent party to a U.S. taxpayer who has not incurred an economic loss so that the U.S. taxpayer may claim a deduction of the built-in losses from the distressed assets. The built-in loss purportedly transferred to Main-Trust and Sub-Trust and improperly shifted to the Taxpayer is not an allowable loss for the Taxpayer. The Service may assert one or more arguments that may include, but are not limited to, asserting that the Taxpayer's transfer of cash or a note to Main-Trust in exchange for certificates of beneficial interest is a transfer of the distressed assets under § 1001; asserting that Main-Trust does not meet the trust requirements of § 301.7701-4; asserting that Main-Trust is not a taxable trust; asserting that one or more of the entities is properly classified for Federal tax purposes as a partnership subject to §§ 704(c)(1)(C), 734(b) and 743; asserting that the claimed loss deduction under § 165 was not incurred in a transaction undertaken for profit; asserting the judicial doctrines, including substance over form, lack of economic substance, and step transaction; and asserting that, in the case of distressed debt, the distressed debt was worthless under § 166 at the time of contribution to Main-Trust and Sub-Trust.

Transactions that are the same as, or substantially similar to, the transaction described in this notice that are entered into after October 22, 2004, are identified as "listed transactions" for purposes of § 1.6011-4(b)(2) and §§ 6111 and 6112 effective February 27, 2008, the date this notice was released to the public. Independent of their classification as listed transactions, transactions that are the same as, or substantially similar to, the transaction described in this notice may already be subject to the requirements of § 6011, § 6111, § 6112, or the regulations thereunder. However, the variations of this transaction described in the Coordinated Issue Paper, "Distressed Asset/Debt Coordinated Issue Paper," LMSB-04-0407-031 (Apr. 18, 2007), that are subject to the AJCA changes to §§ 704, 734 and 743 are not being identified as "listed transactions" for purposes of this notice, § 1.6011-4(b)(2), § 6111 and § 6112.

Persons required to disclose these transactions under § 1.6011-4 who fail to do so may be subject to the penalty under § 6707A, which applies to returns and statements due after October 22, 2004. Persons required to disclose these transactions under § 1.6011-4 who fail to do so may be subject to an extended period of limitations under § 6501(c)(10). Persons required to disclose these transactions under § 6111 who fail to do so may be subject to the penalty under § 6707(a). Persons required to maintain lists of investors under § 6112 who fail to do so (or who fail to provide such lists when requested by the Service) may be subject to the penalty under § 6708(a). In addition, the Service may impose other penalties on persons involved in these transactions or substantially similar transactions, including the accuracy-related penalty under § 6662 or § 6662A.

A person that is a tax-exempt entity within the meaning of § 4965(c), or an entity manager within the meaning of § 4965(d), may be subject to excise tax, disclosure, filing or payment obligations under § 4965, § 6033(a)(2), § 6011, and § 6071. Some taxable entities may be subject to disclosure obligations under § 6011(g), that apply to "prohibited tax shelter transactions" as defined by § 4965(e) (including listed transactions).

The Service and Treasury recognize that some taxpayers may have filed tax returns taking the position that they were entitled to the purported tax benefits of the type of transaction described in this notice. These taxpayers should take appropriate corrective action and ensure that their transactions are disclosed properly.

DRAFTING INFORMATION

The principal author of this notice is Eric Ingala of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this notice, contact Mr. Ingala at (202) 622-3070 (not a toll-free call).

EXHIBIT 8

Message

From: timothy.lohnes@us.pwc.com [timothy.lohnes@us.pwc.com]
Sent: 3/3/2008 10:10:32 PM
To: richard.p.stovsky@us.pwc.com
Subject: Re: Fw: IRS issues new Listed Transaction - Please read attached canvass

Rich, I don't think this should apply to your client's fact pattern for several reasons. First, our individual transferor was not a tax indifferent party, second, there was no transfer of built in loss property, and third, there were no trusts used in the structure. Hope this helps.

Tim

* * * * * * * * * * * * * * * *
Timothy J. Lohnes
PricewaterhouseCoopers LLP
Washington National Tax Services - M&A Group
1301 K Street, NW, Suite 800W
Washington, D.C. 20005
phone: (202) 414-1686
fax: (813) 288-7825

Richard P Stovsky/US/TLS/PwC

Richard P Stovsky/US/TLS/PwC 03/03/2008 05:05 PM 216-875-3111 Cleveland US "Reply to All" is Disabled	To	Timothy Lohnes/US/TLS/PwC@Americas-US
	cc	
	Subject	Fw: IRS issues new Listed Transaction - Please read attached canvass

Tim:

Please take a look at the message below. The California notice that you looked at last week had a similar transaction, but please take a look and confirm that this doesn't apply as well.

Thanks,

Rich

----- Forwarded by Richard P Stovsky/US/TLS/PwC on 03/03/2008 05:00 PM -----

Elizabeth Case/US/TLS/PwC 03/03/2008 04:40 PM "Reply to All" is Disabled	To	PwC US Tax Partners and Managing Directors
	cc	
	Subject	IRS issues new Listed Transaction - Please read attached canvass

Tax Quality & Risk Management Communication

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[attachment "Notice 2008-34_doc.zip" deleted by Timothy Lohnes/US/TLS/PwC]

If you have advised clients who have entered into this transaction after October 22, 2004, you should contact **Rochelle Hodes** (202-312-7589) or **Elaine Church** (202-414-1461) in Q&RM as soon as possible to determine whether registration and list maintenance is required. If you are unclear whether a client has entered a transaction that is substantially similar to this transaction contact **Trent Johnson** (202-414-1484). The due date for PwC to register the transaction is April 30, 2008. Taxpayers participating in this reportable transaction must disclose the transaction with their next filed return. Taxpayers must also file a copy of the disclosure with the Office of Tax Shelter Analysis. .

Thanks for your assistance in this matter

Betsy

AA 000577

This document was not intended or written to be used, and it cannot be used, for the purpose of avoiding U.S. federal, state or local tax penalties.

EXHIBIT 9

Patrick G. Byrne, Esq.
Nevada Bar No. 7636
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Telephone: 702-784-5200
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Telephone: (213) 687-5000
Facsimile: (213) 687-5600

Attorneys for Defendant
PricewaterhouseCoopers LLP

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, an individual,

Plaintiff,

v.

PRICEWATERHOUSECOOPERS LLP, COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP, and GRAHAM R. TAYLOR,

Defendants.

Case No. A-16-735910-B

Dept. No. XV

PRICEWATERHOUSECOOPERS LLP'S AMENDED RESPONSE TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

Defendant PricewaterhouseCoopers LLP ("PwC") responds to Plaintiff Michael A. Tricarichi's First Set of Interrogatories (the "Interrogatories") as follows:

PRELIMINARY STATEMENT

1. PwC's Objections and Responses are solely for the purpose of this action.

2. PwC's Objections and Responses to the Interrogatories are set forth below. By asserting the specific responses and objections stated below, PwC does not waive its right to challenge the relevance, materiality, or admissibility of the Interrogatories and/or its responses

thereto, or the use of the Interrogatories and/or its responses thereto in any subsequent proceeding or trial in this action.

3. PwC's Objections and Responses are based upon the information and documents presently available to, and known by, PwC and disclose only those contentions, which are presently asserted based upon facts now known. It is anticipated that further investigation, legal research and analysis will supply additional facts, add meaning to known facts, and lead to new factual conclusions and legal contentions, all of which may result in substantial addition to, change in, and/or variations from these contentions and responses, and supplementation of them, where appropriate. PwC reserves the right to supplement or modify any of these Objections and Responses as additional facts are recalled or ascertained, analyses are rendered, legal research is completed and contentions are made.

GENERAL OBJECTIONS

The General Objections set forth herein apply to all Interrogatories made by Plaintiff, and all documents that PwC will produce in this litigation. The following General Objections are continuing in nature and are hereby incorporated into the specific Objections and Responses set forth below:

1. PwC objects to the general scope of the Interrogatories in that "any" or "all" information is requested, phrases which render the Interrogatories unduly burdensome, overbroad, unreasonable, and oppressive.

2. PwC objects to the Interrogatories to the extent they call for information outside the scope of the Court's May 30, 2017 Order ("May 30 Order") limiting Plaintiff's discovery to that "necessary to oppose PwC's summary judgment as set forth in Paragraph 10" of Plaintiff's April 7, 2017 Affidavit in opposition to PwC's Motion for Summary Judgment ("Tricarichi Affidavit") – which the Court noted was not "necessarily super clear."

3. PwC objects to the Interrogatories to the extent they call for information that is neither relevant to the subject matter of this action nor reasonably calculated to lead to the discovery of admissible evidence.

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Reno, Nevada 89501
775-785-5440

4. PwC objects to the Interrogatories to the extent they seek information or documents from a time period not relevant to the action and not reasonably calculated to lead to the discovery of admissible evidence, and/or beyond the scope of the May 30 Order.

5. PwC objects to the Interrogatories to the extent each Interrogatory is vague and ambiguous and fails to identify the requested information with sufficient particularity.

6. PwC objects to the Interrogatories insofar as they are redundant and overlapping and, therefore, are unduly burdensome.

7. PwC objects to the Interrogatories to the extent they seek to require PwC to comply with requirements beyond those imposed by the Nevada Rules of Civil Procedure, or exceed the permissible scope of discovery under the law.

8. PwC objects to the Interrogatories to the extent they seek information protected by the attorney-client privilege, the work product doctrine, the official information privilege, and/or other privileges recognized under the constitutional, statutory, and decisional law of the United States or the State of Nevada.

9. PwC objects to the Interrogatories to the extent they seek confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection, including, but not limited to, 26 U.S.C. §§ 6713 and 7216, and any other applicable accountant-client privilege, and/or AICPA professional standards.

10. PwC objects to the Interrogatories to the extent they seek information not known to PwC or not in PwC's possession, custody, or control.

11. PwC objects to the Interrogatories to the extent that the information sought is obtainable from other sources, including those that are publicly available, that are more convenient, less burdensome, or less expensive.

12. PwC objects to the Interrogatories to the extent they call for, or can be interpreted as calling for, legal conclusions.

13. No incidental or implied admissions are intended by the Objections and Responses herein. The fact that PwC has objected to any Interrogatory should not be taken as an admission

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that responsive information exists or that PwC accepts or admits the existence of any fact set forth or assumed by such Interrogatory, or that such objection constitutes admissible evidence.

14. Nothing contained in these Objections and Responses is intended as, nor shall in any way be deemed, a waiver of the attorney-client privilege, work product doctrine, official information privilege, the right of privacy, or any other applicable privilege or protection. Any production or disclosure of privileged information is inadvertent and shall not constitute a waiver of the privilege with respect to the subject matter addressed therein.

15. PwC is providing these Objections and Responses without waiving, or intending to waive, but on the contrary preserving, and intending to preserve: (i) the right to object, on the grounds of competency, privilege, relevance or materiality, or any other proper grounds, to the use of these Objections and Responses for any purpose, in whole or in part, in any subsequent stage or proceeding in this action; (ii) the right to object on any and all grounds, at any time, to other Interrogatories or other discovery procedures involving or relating to the subject matter of the Interrogatories to which PwC has responded herein; and (iii) the right at any time to revise, correct, add to, or clarify any of the Objections and Responses propounded herein.

16. The foregoing Preliminary Statement and General Objections are hereby expressly incorporated into each of the specific Objections and Responses below.

OBJECTIONS TO DEFINITIONS

1. PwC generally objects to the Definitions set forth in the Interrogatories to the extent they attempt to define words beyond their ordinary meaning.

2. PwC generally objects to the Definitions on the grounds and to the extent they cause the specific Interrogatories to be overbroad and unduly burdensome. PwC also objects to the Definitions to the extent they cause the Interrogatories to call for information that is privileged, not relevant to the subject matter involved in this action, not admissible in evidence, or not reasonably calculated to lead to the discovery of admissible evidence.

3. PwC generally objects to the Definitions to the extent they render any Interrogatory overbroad, unduly burdensome, or oppressive.

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Reno, Nevada 89501
775-785-5440

4. PwC generally objects to the Definitions to the extent they purport to place upon PwC obligations different from or greater than those imposed by Nevada statute, the Nevada Rules of Civil Procedure, and any other applicable law. Whenever the Definitions conflict with the Nevada Rules of Civil Procedure, PwC will comply with the Nevada Rules of Civil Procedure and not Plaintiff's Definitions.

5. PwC objects to Plaintiff's Definition of "You," "Your," and "PwC" to the extent Plaintiff defines these terms to include "Pricewaterhouse Coopers LLP and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf, including Richard Stovsky and Timothy Lohnes." Such a boilerplate definition calls for a legal conclusion; is overbroad; seeks documents from outside of PwC's possession, custody, or control; is vague and ambiguous; and is unduly burdensome. In addition, PwC objects to Plaintiff's Definition of "You," "Your," and "PwC" to the extent that it causes the Interrogatories to seek documents protected by the attorney-client and/or work product privilege.

6. PwC objects to Plaintiff's Definition of "Plaintiff" to the extent Plaintiff defines that term to include "Michael A. Tricarichi and each of his current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf." Such a boilerplate definition calls for a legal conclusion; is overbroad; is vague and ambiguous; and is unduly burdensome.

7. PwC objects to Plaintiff's Definition of "Seyfarth Shaw" to the extent Plaintiff defines that term to include "Seyfarth Shaw LLP and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf, including Graham R. Taylor and John E. Rogers." Such a boilerplate definition calls for a legal conclusion; is overbroad; seeks documents from outside of PwC's possession, custody, or control; is vague and ambiguous; and is unduly burdensome.

8. PwC objects to Plaintiff's Definition of "Rabobank" to the extent Plaintiff defines that term to include "Cooperatieve Rabobank U.A. and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting

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on its, his, her or their behalf." Such a boilerplate definition calls for a legal conclusion; is overbroad; seeks documents from outside of PwC's possession, custody, or control; is vague and ambiguous; and is unduly burdensome.

9. PwC objects to Plaintiff's Definition of "Utrecht" to the extent Plaintiff defines that term to include "Utrecht-America Finance Co. and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf." Such a boilerplate definition calls for a legal conclusion; is overbroad; seeks documents from outside of PwC's possession, custody, or control; is vague and ambiguous; and is unduly burdensome.

10. PwC objects to Plaintiff's Definition of "Taylor" to the extent Plaintiff defines that term to include "Graham R. Taylor and each of his current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf." Such a boilerplate definition calls for a legal conclusion; is overbroad; seeks documents from outside of PwC's possession, custody, or control; is vague and ambiguous; and is unduly burdensome.

11. PwC objects to Plaintiff's Definition of "Fortrend" to the extent Plaintiff defines that term to include "Fortrend International LLC and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf, including John P. McNabola and Timothy H. Vu (f/k/a Timothy H. Conn, a/k/a Timothy Conn Vu) ("Conn Vu")." Such a boilerplate definition calls for a legal conclusion; is overbroad; seeks documents from outside of PwC's possession, custody, or control; is vague and ambiguous; and is unduly burdensome.

12. PwC objects to Plaintiff's Definition of "Midcoast" to the extent Plaintiff defines that term to include "Midcoast Credit Corp. and each of its current and former employees, owners, and any predecessors, successors, or affiliates, and any other persons or attorneys acting on its, his, her or their behalf." Such a boilerplate definition calls for a legal conclusion; is overbroad; seeks documents from outside of PwC's possession, custody, or control; is vague and ambiguous; and is unduly burdensome.

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13. PwC objects to Plaintiff's Definition of "Midco" to the extent Plaintiff defines that term to include "the concept, strategy, or use of an intermediary entity to facilitate a business transaction and/or to reduce the tax implications of the transaction to the buyer and/or seller, by which an intermediary entity acquires stock from the selling party and subsequently transfers assets to the buying party." This Definition calls for a legal conclusion; is vague and ambiguous; is overbroad; seeks information not relevant to the subject matter of this litigation and/or is not reasonably calculated to lead to the discovery of admissible evidence to the extent it includes transactions not at issue in this action; seeks information beyond the scope of the Court's May 30 Order; seeks documents from outside of PwC's possession, custody, or control; and is unduly burdensome. In addition, PwC objects to Plaintiff's Definition of "Midco" to the extent it causes the Interrogatories to seek documents protected by the attorney-client and/or work product privilege. PwC further objects to Plaintiff's Definition of "Midco" to the extent it causes the Interrogatories to seek confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection.

14. PwC objects to Plaintiff's Definition of "Midco Transaction" to the extent Plaintiff defines that term to include "a transaction employing or consistent with the Midco concept or strategy, or consistent with or substantially similar to the transaction(s) described in IRS Notice 2001-16, IRS Notice 2008-20 or IRS Notice 2008-111." This Definition calls for a legal conclusion; is vague and ambiguous; is overbroad; seeks information not relevant to the subject matter of this litigation and/or is not reasonably calculated to lead to the discovery of admissible evidence to the extent it includes transactions not at issue in this action; seeks information beyond the scope of the Court's May 30 Order; seeks documents from outside of PwC's possession, custody, or control; and is unduly burdensome. In addition, PwC objects to Plaintiff's Definition of "Midco Transaction" to the extent it causes the Interrogatories to seek documents protected by the attorney-client and/or work product privilege. PwC further objects to Plaintiff's Definition of "Midco Transaction" to the extent it causes the Interrogatories to seek confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection.

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15. PwC objects to Plaintiff's Definition of "Fortrend Transaction" to the extent Plaintiff defines that term to include "a Midco Transaction or the transaction in which the Plaintiff participated, as described in Plaintiff's Complaint, which was found to be a Midco Transaction." This Definition calls for a legal conclusion; is vague and ambiguous; is overbroad; seeks information not relevant to the subject matter of this litigation and/or is not reasonably calculated to lead to the discovery of admissible evidence to the extent it includes transactions not at issue in this action; seeks information beyond the scope of the Court's May 30 Order; seeks documents from outside of PwC's possession, custody, or control; and is unduly burdensome. In addition, PwC objects to Plaintiff's Definition of "Fortrend Transaction" to the extent it causes the Interrogatories to seek documents protected by the attorney-client and/or work product privilege. PwC further objects to Plaintiff's Definition of "Fortrend Transaction" to the extent it causes the Interrogatories to seek confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection.

16. PwC objects to Plaintiff's Definition of "Listed Transaction" to the extent Plaintiff defines that term to include "a transaction that is the same as or substantially similar to one of the types of transactions previously or subsequently determined by the IRS to be a tax avoidance transaction by being identified as such by notice, regulation, or other form of published guidance." This Definition calls for a legal conclusion; is vague and ambiguous; is overbroad; seeks information not relevant to the subject matter of this litigation and/or is not reasonably calculated to lead to the discovery of admissible evidence to the extent it includes transactions not at issue in this action; seeks information beyond the scope of the Court's May 30 Order; seeks documents from outside of PwC's possession, custody, or control; and is unduly burdensome. In addition, PwC objects to Plaintiff's Definition of "Listed Transaction" to the extent it causes the Interrogatories to seek documents protected by the attorney-client and/or work product privilege. PwC further objects to Plaintiff's Definition of "Listed Transaction" to the extent it causes the Interrogatories to seek confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection.

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17. PwC objects to Plaintiff's Definition of "Document" to the extent it goes beyond the requirements of the Nevada Rules of Civil Procedure.

OBJECTIONS TO INSTRUCTIONS

1. PwC generally objects to the Instructions set forth in the Interrogatories to the extent they attempt to define words beyond their ordinary meaning.

2. PwC generally objects to the Instructions on the grounds and to the extent they cause the specific Interrogatories to be overbroad and unduly burdensome. PwC also objects to the Instructions to the extent they cause the Interrogatories to call for information that is privileged, not relevant to the subject matter involved in this action, not admissible in evidence, or not reasonably calculated to lead to the discovery of admissible evidence.

3. PwC generally objects to the Instructions to the extent they render any Interrogatory overbroad, unduly burdensome, or oppressive.

4. PwC generally objects to the Instructions to the extent they purport to place upon PwC obligations different from or greater than those imposed by Nevada statute, the Nevada Rules of Civil Procedure, and any other applicable law. Whenever the Instructions conflict with the Nevada Rules of Civil Procedure, PwC will comply with the Nevada Rules of Civil Procedure and not Plaintiff's Instructions.

5. PwC objects to the Instructions to the extent they cause the Interrogatories to seek information from a time period not relevant to the action and not reasonably calculated to lead to the discovery of admissible evidence, and/or beyond the scope of the May 30 Order.

OBJECTIONS AND RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1:

For the period between September 9, 2003, and the present, identify and describe all communications You have had with or regarding Plaintiff, or regarding the Fortrend Transaction, including communications with the IRS.

RESPONSE:

PwC incorporates by reference its General Objections and Objections to Definitions and Instructions as though fully set forth herein. PwC further objects to this Interrogatory on the

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following grounds: (i) the word "all" renders the Request overbroad, unduly burdensome, unreasonable, and oppressive; (ii) it is vague, ambiguous, and overbroad as to the phrase "with or regarding Plaintiff, or regarding the Fortrend Transaction, including communications with the IRS"; (iii) to the extent the Interrogatory contains multiple separate and distinct interrogatories; (iv) to the extent it seeks information beyond the scope of the May 30 Order; (v) it is overbroad, and unduly burdensome as to time; (vi) to the extent the Interrogatory seeks information protected by the attorney-client privilege, work product doctrine, and/or other privileges recognized under the constitutional, statutory, and decisional law of the United States or the State of Nevada; and (vii) to the extent the Interrogatory seeks confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection, including, but not limited to, 26 U.S.C. §§ 6713 and 7216, and any other applicable accountant-client privilege, and/or AICPA professional standards.

Subject to and without waiving any of its objections, without conceding it has an evidentiary burden that belongs to Plaintiff as a matter of law, and without waiving its right to supplement its responses, PwC responds with the following communications with Plaintiff or non-privileged communications regarding the Fortrend Transaction:

Internal PwC communications and communications with Jim Tricarichi in September and October 2003, regarding Plaintiff's Ohio personal income tax return. (*See* PwC-000277; PwC-001183; PwC-001184; PwC-001246.)

Communication with Jim Tricarichi in November 2003 regarding outstanding invoices. (*See* PwC-001226.)

Internal PwC communications between Richard Stovsky and Tim Lohnes in November 2003 regarding IRS Notice 2003-76 and the Fortrend Transaction. (*See* PwC-000278; PwC-000715; PwC-000717.)

On January 29, 2008, PwC received a summons from the IRS seeking documents concerning the Fortrend Transaction. PwC responded to the IRS Summons and produced documents to the IRS on February 22, 2008, as produced in this action: PwC-000001 through PwC-001228. PwC provided a copy of the production to the IRS to Plaintiff on September 17,

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2009. On August 2, 2013, PwC produced supplemental documents to the IRS regarding the Fortrend Transaction, as produced in this action: PwC-001229 through PwC-001323.

Internal PwC communications in March 2008 between Richard Stovsky and Tim Lohnes concerning IRS Notice 2008-34, describing Distressed Asset Trust Transactions, in which Tim Lohnes stated IRS Notice 2008-34 should not apply to the Fortrend Transaction.

Internal PwC communications in December 2008 between Richard Stovsky and Tim Lohnes concerning IRS Notice 2008-111 clarifying IRS Notice 2001-16, in which Tim Lohnes and Richard Stovsky discussed that IRS Notice 2008-111 did not alter their prior analysis of the Fortrend Transaction.

Beginning in January 2011, PwC and Plaintiff negotiated a tolling agreement. The parties entered into a tolling agreement on February 2, 2011, that tolled the statute of limitations for any claims against PwC "arising from the services performed by PwC" relating to the Fortrend Transaction which were not already time-barred by January 19, 2011. The parties renewed the tolling agreement on January 24, 2012, October 11, 2012, January 20, 2014, September 16, 2015, and October 23, 2015.

After PwC's engagement with Plaintiff ended in 2003, Richard Stovsky, between 2008 and 2015, had conversations with Jim Tricarichi, Plaintiff's brother, that sometimes included a discussion of Plaintiff's IRS and Tax Court proceeding.

Prior to providing testimony in Plaintiff's Tax Court proceedings, PwC witnesses met with Plaintiff's counsel in August 2013, December 2013 and June 2014.

INTERROGATORY NO. 2:

Identify and describe any Midco Transaction regarding which you provided advice or otherwise participated, with respect to which a taxpayer was later determined, by the IRS or the Tax Court, to have transferee or other tax liability. Please include in Your response to the date(s) of the transaction(s) and of the determination(s) of liability; a description of Your role in the transaction(s); and the identity of the other participants in the transaction(s).

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<u>RESPONSE</u>:

PwC incorporates by reference its General Objections and Objections to Definitions and Instructions as though fully set forth herein. PwC further objects to this Interrogatory on the following grounds: (i) the word "any" renders the Request overbroad, unduly burdensome, unreasonable, and oppressive; (ii) it is vague, ambiguous, and overbroad as to the phrase "describe"; (iii) it is vague, ambiguous, and overbroad as to the phrase "provided advice or otherwise participated"; (iv) it is vague, ambiguous, and overbroad as to the phrase "transferee or other tax liability"; (v) it is vague, ambiguous, and overbroad as to "Your role in the transaction(s)"; (vi) it is vague, ambiguous, and overbroad as to "determination(s) of liability"; (vii) to the extent the Interrogatory contains multiple separate and distinct interrogatories; (viii) to the extent the defined term "Midco Transactions" calls for a legal conclusion and seeks information not relevant to the subject matter involved in this action and goes beyond the allegations in the Complaint and/or is not reasonably calculated to lead to the discovery of admissible evidence; (ix) to the extent it seeks information beyond the scope of the May 30 Order; (x) it is vague, ambiguous, overbroad, and unduly burdensome as to time; (xi) to the extent the Interrogatory seeks information protected by the attorney-client privilege, work product doctrine, and/or other privileges recognized under the constitutional, statutory, and decisional law of the United States or the State of Nevada; and (xii) to the extent the Interrogatory seeks confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection, including, but not limited to, 26 U.S.C. §§ 6713 and 7216, and any other applicable accountant-client privilege, and/or AICPA professional standards.

Subject to and without waiving any of its objections, without conceding it has an evidentiary burden that belongs to Plaintiff as a matter of law, and without waiving its right to supplement its responses, PwC responds as follows:

PwC provided tax advice in connection with the transaction at issue in <u>Enbridge Energy Co., Inc. v. U.S.</u>, Case No. H-06-0657 (S.D. Tex.) (the "Bishop Transaction"), which to PwC's knowledge did not involve issues of transferee liability. PwC advised the buyer Midcoast

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Energy Resources, Inc. in respect to the Bishop Transaction from roughly August 1999 to September 2001. PwC refers to the public court decisions for the determination of liability.

PwC provided tax advice in connection with the transaction at issue in Marshall et al. v. C.I.R., Nos. 27241-11 et al. (U.S. Tax Court) (the "Marshall Transaction") in 2003. PwC refers to the public Tax Court order for the determination of liability.

INTERROGATORY NO. 3:

Identify and describe any Midco Transactions regarding which you provided advice or otherwise participated, with respect to which a taxpayer was later investigated or audited by the IRS. Please include in Your response the date of the transaction(s) and of the investigation or audit; a description of Your role in the transaction(s); and the identity of the participants in the transaction(s).

RESPONSE:

PwC incorporates by reference its General Objections and Objections to Definitions and Instructions as though fully set forth herein. PwC further objects to this Interrogatory on the following grounds: (i) the word "any" renders the Request overbroad, unduly burdensome, unreasonable, and oppressive; it is vague, ambiguous, and overbroad as to the phrase "describe"; (iii) it is vague, ambiguous, and overbroad as to the phrase "provided advice or otherwise participated"; (iv) it is vague, ambiguous, and overbroad as to the word "investigated"; (v) it is vague, ambiguous, and overbroad as to "Your role in the transaction(s)"; (vi) to the extent the Interrogatory contains multiple separate and distinct interrogatories; (vii) to the extent the defined term "Midco Transactions" calls for a legal conclusion and seeks information not relevant to the subject matter involved in this action and goes beyond the allegations in the Complaint and/or is not reasonably calculated to lead to the discovery of admissible evidence; (viii) to the extent it seeks information beyond the scope of the May 30 Order; (ix) it is vague, ambiguous, overbroad, and unduly burdensome as to time; (x) to the extent the Interrogatory seeks information protected by the attorney-client privilege, work product doctrine, and/or other privileges recognized under the constitutional, statutory, and decisional law of the United States or the State of Nevada; and (xi) to the extent the Interrogatory seeks confidential, private, or

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sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection, including, but not limited to, 26 U.S.C. §§ 6713 and 7216, and any other applicable accountant-client privilege, and/or AICPA professional standards.

Subject to and without waiving any of its objections, without conceding it has an evidentiary burden that belongs to Plaintiff as a matter of law, and without waiving its right to supplement its responses, PwC responds as follows:

PwC provided tax advice in connection with the Bishop Transaction, which to PwC's knowledge, did not involve issues of transferee liability. PwC advised the buyer Midcoast Energy Resources, Inc. in respect to the Bishop Transaction, from roughly August 1999 to September 2001.

PwC provided tax advice in connection with the Marshall Transaction in 2003.

INTERROGATORY NO. 4:

Identify all PwC personnel who performed any work in connection with any Midco strategy or Midco transaction identified in response to Interrogatory No. 2 or No. 3 above, or in connection with the Bishop Midco Transaction or the Marshall Midco Transaction, and provide a brief description of their role(s) in connection with such transaction(s), when their work took place, and what transaction(s) their work was in connection with.

RESPONSE:

PwC incorporates by reference its General Objections and Objections to Definitions and Instructions as though fully set forth herein. PwC further objects to this Interrogatory on the following grounds: (i) the words "all" and "any" render the Interrogatory overbroad, unduly burdensome, unreasonable, and oppressive; (ii) it is vague, ambiguous, and overbroad as to the phrase "performed any work in connection with"; (iii) it is vague, ambiguous, and overbroad as to the phrase "brief description of their role(s)"; (iv) to the extent the Interrogatory contains multiple separate and distinct interrogatories; (v) to the extent the defined terms "Midco" and "Midco Transaction" call for a legal conclusion and seek information not relevant to the subject matter involved in this action and goes beyond the allegations in the Complaint and/or is not

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reasonably calculated to lead to the discovery of admissible evidence; (vi) to the extent the Interrogatory seeks information beyond the scope of the May 30 Order; (vii) it is vague, ambiguous, overbroad, and unduly burdensome as to time; (viii) to the extent the Interrogatory seeks information protected by the attorney-client privilege, work product doctrine, and/or other privileges recognized under the constitutional, statutory, and decisional law of the United States or the State of Nevada; and (ix) to the extent the Interrogatory seeks confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection, including, but not limited to, 26 U.S.C. §§ 6713 and 7216, and any other applicable accountant-client privilege, and/or AICPA professional standards.

Subject to and without waiving any of its objections, without conceding it has an evidentiary burden that belongs to Plaintiff as a matter of law, and without waiving its right to supplement its responses, PwC responds as follows:

PwC personnel provided tax advice to Midcoast in connection with the Bishop Transaction. The PwC personnel who performed work in connection with such advice included: Gary Wilcox, Co-Leader, Washington National Tax – M&A Practice; Bob Whitten, Partner; Dennis McErlean, Partner; and Thomas Palmisano, Senior Manager.

PwC personnel provided tax advice to the Marshalls in connection with the Marshall Transaction. The PwC personnel who performed work in connection with such advice included: Mike Weber, Partner; Patricia Pellervo, Partner, Washington National Tax; Dan Mendelson, Partner, Tax Quality and Risk Management; William Galanis, Partner Washington National Tax; and John Dempsey, Manager.

INTERROGATORY NO. 5:

Identify all current or former employees of PwC who have been interviewed or deposed or testified at trial, in a hearing, or before a grand jury, in which the Midco strategy or a Midco Transaction was mentioned, referred to, described, or inquired about. Please include the name of the witness, each date they testified, and the nature of such proceeding.

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<u>RESPONSE</u>:

PwC incorporates by reference its General Objections and Objections to Definitions and Instructions as though fully set forth herein. PwC further objects to this Interrogatory on the following grounds: (i) the word "all" renders the Interrogatory overbroad, unduly burdensome, unreasonable, and oppressive; (ii) it is vague, ambiguous, and overbroad as to the phrase "interviewed or deposed or testified at trial, in a hearing, or before a grand jury"; (iii) it is vague, ambiguous, and overbroad as to the phrase "in which the Midco strategy or a Midco Transaction was mentioned, referred to, described, or inquired about"; (iv) it is vague, ambiguous, and overbroad as to the phrase "nature of such proceeding"; (v) to the extent the Interrogatory contains multiple separate and distinct interrogatories; (vi) to the extent the defined terms "Midco" and "Midco Transaction" call for a legal conclusion and seek information not relevant to the subject matter involved in this action and goes beyond the allegations in the Complaint and/or is not reasonably calculated to lead to the discovery of admissible evidence; (vii) to the extent the Interrogatory seeks information beyond the scope of the May 30 Order; (viii) it is vague, ambiguous, overbroad, and unduly burdensome as to time; (ix) to the extent the Interrogatory seeks information protected by the attorney-client privilege, work product doctrine, and/or other privileges recognized under the constitutional, statutory, and decisional law of the United States or the State of Nevada; and (x) to the extent the Interrogatory seeks confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection, including, but not limited to, 26 U.S.C. §§ 6713 and 7216, and any other applicable accountant-client privilege, and/or AICPA professional standards.

Subject to and without waiving any of its objections, without conceding it has an evidentiary burden that belongs to Plaintiff as a matter of law, and without waiving its right to supplement its responses, PwC responds as follows:

- Patricia Pellervo was deposed in <u>Marshall et al. v. C.I.R.</u>, Nos. 27241-11 et al. (U.S. Tax Court) on March 4, 2014.
- John Dempsey was deposed in <u>Marshall et al. v. C.I.R.</u>, Nos. 27241-11 et al. (U.S.

Tax Court) on February 26, 2014 and March 13, 2014.

- John Dempsey testified at trial in Marshall et al. v. C.I.R., Nos. 27241-11 et al. (U.S. Tax Court) on April 9, 2014 and December 11, 2014.
- Mike Weber testified at trial in Marshall et al. v. C.I.R., Nos. 27241-11 et al. (U.S. Tax Court) on December 11, 2014.
- Dan Mendelson testified at trial in Marshall et al. v. C.I.R., Nos. 27241-11 et al. (U.S. Tax Court) on December 12, 2014.
- Gary Wilcox was interviewed by the IRS in In the matter of: K-Pipe Group Inc. and Subsidiaries, the IRS's examination of the Bishop Transaction, on April 29, 2004.
- Gary Wilcox was deposed in Enbridge Energy Co., Inc. v. U.S., Case No. H-06-0657 (S.D. Tex.) on February 19, 2007.
- Thomas Palmisano was deposed in Enbridge Energy Co., Inc. v. U.S., Case No. H-06-0657 (S.D. Tex.) on February 22, 2007.
- Richard Stovsky was deposed in Tricarichi v. C.I.R., No. 23630-12 (U.S. Tax Court) on August 6, 2013.
- Richard Stovsky testified at trial in Tricarichi v. C.I.R., No. 23630-12 (U.S. Tax Court) on June 11, 2014.
- Tim Lohnes was deposed in Tricarichi v. C.I.R., No. 23630-12 (U.S. Tax Court) on December 10, 2013.
- Tim Lohnes testified at trial in Tricarichi v. C.I.R., No. 23630-12 (U.S. Tax Court) on June 11, 2014.

INTERROGATORY NO. 6:

Identify all employees of PwC who personally participated in a Midco Transaction and who attempted to or in fact participated in an Internal Revenue Service amnesty program, such as that described in IRS Announcement 2002-2, or amended their returns to abandon the tax implications of the Midco Transaction on those returns.

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RESPONSE:

PwC incorporates by reference its General Objections and Objections to Definitions and Instructions as though fully set forth herein. PwC further objects to this Interrogatory on the following grounds: (i) the word "all" renders the Interrogatory overbroad, unduly burdensome, unreasonable, and oppressive; (ii) it is vague, ambiguous, and overbroad as to the phrase "personally participated in a Midco Transaction"; (iii) it is vague, ambiguous, and overbroad as to the phrase "who attempted to or in fact participated in an Internal Revenue Service amnesty program" (iv) it is vague, ambiguous, and overbroad as to the phrase "or amended their returns to abandon the tax implications of the Midco Transactions on those returns"; (v) to the extent the Interrogatory contains multiple separate and distinct interrogatories; (vi) to the extent it seeks information not relevant to the subject matter involved in this action and goes beyond the allegations in the Complaint and/or is not reasonably calculated to lead to the discovery of admissible evidence; (vii) to the extent the defined term "Midco Transaction" calls for a legal conclusion and seeks information not relevant to the subject matter involved in this action and goes beyond the allegations in the Complaint and/or is not reasonably calculated to lead to the discovery of admissible evidence; (viii) to the extent it seeks information beyond the scope of the May 30 Order; (ix) to the extent it assumes facts not in evidence; (x) it is vague, ambiguous, overbroad, and unduly burdensome as to time; (xi) to the extent the Interrogatory seeks information protected by the attorney-client privilege, work product doctrine, and/or other privileges recognized under the constitutional, statutory, and decisional law of the United States or the State of Nevada; and (xii) to the extent the Interrogatory seeks confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection, including, but not limited to, 26 U.S.C. §§ 6713 and 7216, and any other applicable accountant-client privilege, and/or AICPA professional standards.

Subject to and without waiving any of its objections, without conceding it has an evidentiary burden that belongs to Plaintiff as a matter of law, and without waiving its right to supplement its responses, PwC responds as follows: PwC does not possess information or knowledge responsive to this Interrogatory.

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INTERROGATORY NO. 7:

Identify all persons or entities (including governmental entities) to whom You have produced documents concerning the Midco concept or strategy, Midco Transaction(s) or the Fortrend Transaction, or to whom You otherwise responded to requests for information, summons, subpoenas, or regulatory inquiries concerning same.

RESPONSE:

PwC incorporates by reference its General Objections and Objections to Definitions and Instructions as though fully set forth herein. PwC further objects to this Interrogatory on the following grounds: (i) the word "all" renders the Interrogatory overbroad, unduly burdensome, unreasonable, and oppressive; (ii) it is vague, ambiguous, and overbroad as to the phrase "Midco concept or strategy"; (iii) it is vague, ambiguous, and overbroad as to the phrase "to whom You otherwise responded to requests for information, summons, subpoenas, or regulatory inquiries concerning same"; (iv) to the extent the Interrogatory contains multiple separate and distinct interrogatories; (v) to the extent the defined terms "Midco," "Midco Transactions," and "Fortrend Transaction" call for a legal conclusion and seek information not relevant to the subject matter involved in this action and goes beyond the allegations in the Complaint and/or is not reasonably calculated to lead to the discovery of admissible evidence; (vi) to the extent the Interrogatory seeks information beyond the scope of the May 30 Order; (vii) it is vague, ambiguous, overbroad, and unduly burdensome as to time; (viii) to the extent the Interrogatory seeks information protected by the attorney-client privilege, work product doctrine, and/or other privileges recognized under the constitutional, statutory, and decisional law of the United States or the State of Nevada; and (ix) to the extent the Interrogatory seeks confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection, including, but not limited to, 26 U.S.C. §§ 6713 and 7216, and any other applicable accountant-client privilege, and/or AICPA professional standards.

Subject to and without waiving any of its objections, without conceding it has an evidentiary burden that belongs to Plaintiff as a matter of law, and without waiving its right to

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supplement its responses, PwC responds as follows: PwC has produced documents concerning transactions that may be the same as, or substantially similar to, the transactions described in IRS Notice 2001-16 to government entities including the IRS, the California Franchise Tax Board ("CFTB"), the Illinois Department of Revenue, and the New York State Department of Taxation and Finance.

INTERROGATORY NO. 8:

Identify and describe any governmental investigation or inquiries of any kind into Your use of, promotion of, advice regarding, or role in any Midco Transaction.

RESPONSE:

PwC incorporates by reference its General Objections and Objections to Definitions and Instructions as though fully set forth herein. PwC further objects to this Interrogatory on the following grounds: (i) the word "any" renders the Interrogatory overbroad, unduly burdensome, unreasonable, and oppressive; (ii) it is vague, ambiguous, and overbroad as to the phrase "describe"; (iii) it is vague, ambiguous, and overbroad as to the phrase "governmental investigation or inquiries of any kind"; (iv) it is vague, ambiguous, and overbroad as to the phrase "use of, promotion of, advice regarding, or role in"; (v) to the extent the phrase "Midco Transaction" calls for a legal conclusion and seeks information not relevant to the subject matter involved in this action and goes beyond the allegations in the Complaint and/or is not reasonably calculated to lead to the discovery of admissible evidence; (vi) to the extent the Interrogatory seeks information beyond the scope of the May 30 Order; (vii) the phrase "use of, promotion of, advice regarding, or role in" assumes facts not in evidence; (viii) it is vague, ambiguous, overbroad, and unduly burdensome as to time; (ix) to the extent the Interrogatory seeks information protected by the attorney-client privilege, work product doctrine, and/or other privileges recognized under the constitutional, statutory, and decisional law of the United States or the State of Nevada; and (x) to the extent the Interrogatory seeks confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection, including, but not limited to, 26 U.S.C.

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§§ 6713 and 7216, and any other applicable accountant-client privilege, and/or AICPA professional standards.

Subject to and without waiving any of its objections, without conceding it has an evidentiary burden that belongs to Plaintiff as a matter of law, and without waiving its right to supplement its responses, PwC responds as follows:

From July 2002 to August 2002, PwC corresponded with the IRS regarding the IRS's request for information concerning transactions that are the same, or substantially similar, to those described in IRS Notice 2001-16. On October 8, 2002, PwC received a summons from the IRS seeking a list of investors in transactions that were the same as or substantially similar to those described in IRS Notice 2001-16 "in which PwC was an organizer, seller, advisor, or arranged for the client's/investor's participation." PwC responded to the summons on October 17, 2002 and March 4, 2004, providing the names of six transactions that may be the same as or substantially similar to those described in IRS Notice 2001-16, and the names, addresses and Taxpayer Identification Numbers ("TINs") of known participants in such transactions. None of the submissions to the IRS included the transaction at issue in this action.

Beginning in late 2006, the CFTB and PwC began corresponding and meeting regarding the production of information and documents by PwC to the CFTB regarding any listed transactions, including transactions described in IRS Notice 2001-16, that PwC previously registered with the IRS under Internal Revenue Code ("IRC") section 6112. PwC identified two transactions that PwC had previously registered with the IRS as transactions that may be the same as, or substantially similar to, the transactions described in Notice 2001-16, and provided documents concerning those transactions. This submission did not include the transaction at issue in this action. In May 2007, the CFTB subsequently issued a summons and a series of Information Document Requests ("IDRs") seeking documents concerning PwC's "actions and activities" in various listed transactions, including transactions that were the same as, or substantially similar to, the transactions described in IRS Notice 2001-16, whether or not PwC had previously registered those transactions with the IRS. On February 8, 2008, PwC provided a list of the names of six transactions that may be the same as or substantially similar to those described in IRS Notice 2001-16, and the names, addresses and TINs of known participants in

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such transactions. On September 17, 2008, October 6, 2008, and October 1, 2009, PwC produced documents concerning the transactions listed in the February 8, 2008 submission. None of the submissions to the CFTB included the transaction at issue in this action.

In December 2004, pursuant to section 35 ILCS 5/1405.6 of the Illinois Income Tax Act, PwC provided the Illinois Department of Revenue a list and description of listed transactions with an Illinois nexus, that PwC previously registered with the IRS under IRC section 6112. As part of this submission, PwC identified one transaction that may be the same as or substantially similar to transactions described in IRS Notice 2001-16, and provided documents concerning that transaction. None of the submissions to the Illinois Department of Revenue included the transaction at issue in this action.

In July 2006, pursuant to section 25(b) of the New York Consolidated Laws, Tax Laws, PwC provided the New York State Department of Taxation and Finance a list and description of listed transactions that PwC previously registered with the IRS under IRC section 6112. As part of this submission, PwC identified two transaction that may be the same as or substantially similar to transactions described in IRS Notice 2001-16, and provided documents concerning those transactions. None of the submissions to the New York State Department of Taxation and Finance included the transaction at issue in this action.

INTERROGATORY NO. 9:

Identify and describe any communications with the IRS or any other agency relating to Your use, promotion of, advice regarding, or role in any Midco Transaction.

RESPONSE:

PwC incorporates by reference its General Objections and Objections to Definitions and Instructions as though fully set forth herein. PwC further objects to this Interrogatory on the following grounds: (i) the word “any” renders the Interrogatory overbroad, unduly burdensome, unreasonable, and oppressive; (ii) it is vague, ambiguous, and overbroad as to the phrase “describe”; (iii) it is vague, ambiguous, and overbroad as to the phrase “other agency”; (iv) it is vague, ambiguous, and overbroad as to the phrase “use, promotion of, advice regarding, or role in”; (v) to the extent the phrase “Midco Transaction” calls for a legal conclusion and seeks

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information not relevant to the subject matter involved in this action and goes beyond the allegations in the Complaint and/or is not reasonably calculated to lead to the discovery of admissible evidence; (vi) to the extent the Interrogatory seeks information beyond the scope of the May 30 Order; (vii) the phrase "use, promotion of, advice regarding, or role in" assumes facts not in evidence; (viii) it is vague, ambiguous, overbroad, and unduly burdensome as to time; (ix) to the extent the Interrogatory seeks information protected by the attorney-client privilege, work product doctrine, and/or other privileges recognized under the constitutional, statutory, and decisional law of the United States or the State of Nevada; and (x) to the extent the Interrogatory seeks confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection, including, but not limited to, 26 U.S.C. §§ 6713 and 7216, and any other applicable accountant-client privilege, and/or AICPA professional standards.

Subject to and without waiving any of its objections, without conceding it has an evidentiary burden that belongs to Plaintiff as a matter of law, and without waiving its right to supplement its responses, PwC responds as follows:

From July 2002 to August 2002, PwC corresponded with the IRS regarding the IRS's request for information concerning transactions that are the same, or substantially similar, to those described in IRS Notice 2001-16. On October 8, 2002, PwC received a summons from the IRS seeking a list of investors in transactions that were the same as or substantially similar to those described in IRS Notice 2001-16 "in which PwC was an organizer, seller, advisor, or arranged for the client's/investor's participation." PwC responded to the summons on October 17, 2002 and March 4, 2004, providing the names of six transactions that may be the same as or substantially similar to those described in IRS Notice 2001-16, and the names, addresses and TINs of known participants in such transactions. None of the submissions to the IRS included the transaction at issue in this action.

Beginning in late 2006, the CFTB and PwC began corresponding and meeting regarding the production of information and documents by PwC to the CFTB regarding any listed transactions, including transactions described in IRS Notice 2001-16, that PwC previously registered with the IRS under IRC section 6112. PwC identified two transactions that PwC had

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previously registered with the IRS as transactions that may be the same as, or substantially similar to, the transactions described in Notice 2001-16, and provided documents concerning those transactions. This submission did not include the transaction at issue in this action. In May 2007, the CFTB subsequently issued a summons and a series of IDRs seeking documents concerning PwC's "actions and activities" in various listed transactions, including transactions that were the same as, or substantially similar to, the transactions described in IRS Notice 2001-16, whether or not PwC had previously registered those transactions with the IRS. On February 8, 2008, PwC provided a list of the names of six transactions that may be the same as or substantially similar to those described in IRS Notice 2001-16, and the names, addresses and TINs of known participants in such transactions. On September 17, 2008, October 6, 2008, and October 1, 2009, PwC produced documents concerning the transactions listed in the February 8, 2008 submission. None of the submissions to the CFTB included the transaction at issue in this action.

In December 2004, pursuant to section 35 ILCS 5/1405.6 of the Illinois Income Tax Act, PwC provided the Illinois Department of Revenue a list and description of listed transactions with an Illinois nexus, that PwC previously registered with the IRS under IRC section 6112. As part of this submission, PwC identified one transaction that may be the same as or substantially similar to transactions described in IRS Notice 2001-16, and provided documents concerning that transaction. None of the submissions to the Illinois Department of Revenue included the transaction at issue in this action.

In July 2006, pursuant to section 25(b) of the New York Consolidated Laws, Tax Laws, PwC provided the New York State Department of Taxation and Finance a list and description of listed transactions that PwC previously registered with the IRS under IRC section 6112. As part of this submission, PwC identified two transactions that may be the same as or substantially similar to transactions described in IRS Notice 2001-16, and provided documents concerning those transactions. None of the submissions to the New York State Department of Taxation and Finance included the transaction at issue in this action.

PwC also produced documents to the IRS in regards to the transactions at issue in <u>Marshall et al. v. CIR</u> Nos. 27241-11 et al. (U.S. Tax Court), <u>Enbridge Energy Co., Inc. v. U.S.</u>, Case No. H-06-0657 (S.D. Tex.), and Tricarichi v. C.I.R., No. 23630-12 (U.S. Tax Court), and former and current PwC individuals provided testimony as stated in Response to Interrogatory No. 6.

INTERROGATORY NO. 10:

Have you complied with AICPA Statement on Standards for Tax Services No. 6, with respect to the Fortrend Transaction? State the basis for Your answer.

RESPONSE:

PwC incorporates by reference its General Objections and Objections to Definitions and Instructions as though fully set forth herein. PwC further objects to this Interrogatory on the following grounds: (i) it is vague, ambiguous, and overbroad as to the phrase "complied"; (ii) to the extent it calls for a legal conclusion; (iv) to the extent it assumes facts not in evidence; (iii) to the extent it seeks information not relevant to the subject matter involved in this action and goes beyond the allegations in the Complaint and/or is not reasonably calculated to lead to the discovery of admissible evidence; (iv) to the extent it seeks information beyond the scope of the May 30 Order; (v) it is vague, ambiguous, overbroad, and unduly burdensome as to time; (vi) to the extent the Interrogatory seeks information protected by the attorney-client privilege, work product doctrine, and/or other privileges recognized under the constitutional, statutory, and decisional law of the United States or the State of Nevada; and (vii) to the extent the Interrogatory seeks confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection, including, but not limited to, 26 U.S.C. §§ 6713 and 7216, and any other applicable accountant-client privilege, and/or AICPA professional standards.

Subject to and without waiving any of its objections, without conceding it has an evidentiary burden that belongs to Plaintiff as a matter of law, and without waiving its right to supplement its responses, PwC responds as follows:

From April 2003, when Plaintiff first engaged PwC, through June 25, 2012, when the IRS issued a Notice of Liability for Plaintiff's role in the Fortrend Transaction, PwC at all times complied with AICPA Statement on Standards for Tax Services No. 6, with respect to the

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Fortrend Transaction.

INTERROGATORY NO. 11:

Have you complied with Section 10.21 of Treasury Circular No. 230, with respect to the Fortrend Transaction? State the basis for Your answer.

RESPONSE:

PwC incorporates by reference its General Objections and Objections to Definitions and Instructions as though fully set forth herein. PwC further objects to this Interrogatory on the following grounds: (i) it is vague, ambiguous, and overbroad as to the phrase "complied"; (ii) to the extent it calls for a legal conclusion; (iv) to the extent it assumes facts not in evidence; (iii) to the extent it seeks information not relevant to the subject matter involved in this action and goes beyond the allegations in the Complaint and/or is not reasonably calculated to lead to the discovery of admissible evidence; (iv) to the extent it seeks information beyond the scope of the May 30 Order; (v) it is vague, ambiguous, overbroad, and unduly burdensome as to time; (vi) to the extent the Interrogatory seeks information protected by the attorney-client privilege, work product doctrine, and/or other privileges recognized under the constitutional, statutory, and decisional law of the United States or the State of Nevada; and (vii) to the extent the Interrogatory seeks confidential, private, or sensitive information subject to PwC's and/or a third party's contractual, constitutional, statutory, or common law right of privacy or protection, including, but not limited to, 26 U.S.C. §§ 6713 and 7216, and any other applicable accountant-client privilege, and/or AICPA professional standards.

Subject to and without waiving any of its objections, without conceding it has an evidentiary burden that belongs to Plaintiff as a matter of law, and without waiving its right to supplement its responses, PwC responds as follows:

From April 2003, when Plaintiff first engaged PwC, through June 25, 2012, when the IRS issued a Notice of Liability for Plaintiff's role in the Fortrend Transaction, PwC at all times complied with Section 10.21 of Treasury Circular No. 230, with respect to the Fortrend Transaction.

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Dated: August 23, 2017

SNELL & WILMER L.L.P.

By: */s/ Patrick G. Byrne*
Patrick G. Byrne, Esq.
3883 Howard Hughes Pkwy. #1100
Las Vegas, NV 89169
Attorneys for Defendant PricewaterhouseCoopers LLP

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VERIFICATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

Corina M. Trainer, being first duly sworn upon other, deposes and says that she is a Managing Director, Tax Quality and Risk Management, of Defendant PricewaterhouseCoopers LLP and that she has read the foregoing **PRICEWATERHOUSECOOPERS LLP'S AMENDED RESPONSE TO PLAINTIFF'S FIRST SET OF INTERROGATORIES**, knows the contents thereof, and that the responses are, upon information and belief, and to the knowledge of Affiant, just and true.

Dated this 23rd day of August, 2017.

Corina M. Trainer
[Signature]

CORINA M. TRAINER
Corina M. Trainer, Managing Director, Tax Quality and Risk Management

SUBSCRIBED AND SWORN to before me this 23 day of August, 2017.

Arnita Berry
Notary Public in and for Said County and State

My Commission Expires January 14, 2019

My Commission Expires:

ARNITA BERRY NOTARY PUBLIC Expiration Jan 14, 2019 DISTRICT OF COLUMBIA

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing: **PRICEWATERHOUSECOOPERS LLP'S AMENDED RESPONSE TO PLAINTIFF'S FIRST SET OF INTERROGATORIES**, by the method indicated:

☐	i) **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
☐	ii) **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
☐	iii) **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
☐	iv) **BY PERSONAL DELIVERY:** by causing personal delivery by __________, a messenger service with which this firm maintains an account, of the document(s) listed above to the person(s) at the address(es) set forth below.
☐	v) **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.
X	vi) **BY EMAIL:** by emailing a PDF of the document listed above to the email addresses of the individual(s) listed below.

and addressed to the following:

Todd W. Prall, Esq.
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
tprall@hutchlegal.com

Scott F. Hessell, Esq.
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shessell@sperling-law.com
tbrooks@sperling-law.com
Attorneys for Plaintiff

Dated: August 23, 2017

*/s/ Winston P. Hsiao*________________
Winston P. Hsiao

EXHIBIT 10

Message

From: gary.cesnik@us.pwc.com [gary.cesnik@us.pwc.com]
Sent: 4/2/2008 1:08:13 PM
To: elaine.church@us.pwc.com
CC: tax core qrm
Subject: Re: US District Court concludes that Midco transaction on which we provided advice was a sham
Attachments: Untitled attachment 01137.gif

This is not a good situation. The court also held that there wasn't even substantial authority for the positions taken. Accordingly, I suspect that we will hear more from the losing plaintiffs in the near future.

Elaine Church/US/TLS/PwC

Elaine Church/US/TLS/PwC 04/02/2008 08:40 AM 202 414 1461; Right Fax (813) 281-6388 Washington DC US "Reply to All" is Disabled	To	Tax Core QRM
	cc	
	Subject	US District Court concludes that Midco transaction on which we provided a was a sham

FYI ......

Citations: Enbridge Energy Co. Inc. et al. v. United States; No. 4:06-cv-00657

Date: Mar. 31, 2008

Company Engaged in Sham Transaction; Refund Denied

A U.S. district court has held that a company is not entitled to a refund of taxes and the penalty it paid when the IRS disallowed depreciation and amortization deductions associated with the company's purchase of a pipeline business, finding that the purchase occurred through a sham intermediary tax shelter transaction.

Full Text Published by taxanalysts®

=============== **CASE NAME** ===============

ENBRIDGE ENERGY COMPANY, INC.
AND ENBRIDGE MIDCOAST ENERGY,
L.P. F/K/A ENBRIDGE MIDCOAST
ENERGY, INC. F/K/A MIDCOAST ENERGY
RESOURCES, INC.
Plaintiffs
v.
UNITED STATES OF AMERICA
Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AA 000610

OPINION AND ORDER

Pending before the court in this federal tax suit are cross motions for summary judgment filed by the Plaintiffs (Doc. 24) and the Defendant (Doc. 23). Having considered these motions, the responses and replies thereto, the complete record before the court, and all applicable legal standards, and for the reasons articulated below, the court DENIES Plaintiffs' motion for summary judgment; and GRANTS Defendant's motion for summary judgment.

I. Background and Relevant Facts

In November 1999, Dennis Langley ("Langley") allegedly sold all of the stock (the "Bishop Stock") of his solely-owned pipeline business, The Bishop Group, Ltd. ("Bishop"), to K-Pipe Merger Corporation ("K-Pipe"). With the sale of the Bishop Stock, Bishop simultaneously changed its name to K-Pipe Group, Inc. K-Pipe and K-Pipe Group, Inc. then merged, with K-Pipe Group, Inc. as the survivor ("K-Pipe Group"). The next day, the newly-merged K-Pipe Group allegedly sold substantially all of the assets of Bishop (the "Bishop Assets"), which consisted primarily of natural gas pipelines, to Midcoast Energy Resources, Inc. ("Midcoast"). Midcoast began taking depreciation and amortization deductions based on its acquisition of the Bishop Assets. The Government disallowed these deductions, as well as others, because it claimed that the overall transaction was a sham. The Government contends that, for federal tax purposes, K-Pipe's involvement should be disregarded and Midcoast should be treated as having acquired the Bishop Stock. Midcoast, having paid the taxes flowing from this characterization, as well as a twenty percent penalty, has brought the current suit to obtain a refund.

A. The Challenged Transaction(s)

The material facts of this case are undisputed. In mid-1999, Langley decided to sell Bishop. Based on his tax advisors' advice, Langley was interested in a stock, rather than asset, sale because an asset sale would generate greater taxes. Engaging the services of an investment banking firm, Chase Securities, Inc. ("Chase"), Langley initiated a modified auction process to gauge interest in and contact potential buyers of the Bishop Stock. After signing a confidentially agreement, interested buyers were provided with a Confidential Offering Memorandum and invited to submit "preliminary non-binding indications of interest." (Gov't Ex. 9, Doc. 23).

One potential buyer was Midcoast, a publically-traded company engaged in the business of constructing and operating natural gas pipelines. Midcoast was interested in owning the Bishop Assets, which included an interstate natural gas pipeline system located in Kansas, Oklahoma, and Missouri, because the assets "provided a stable cash flow from long-term transportation contracts and would nearly double Midcoast's existing pipeline asset base, providing Midcoast with the critical mass it sought to achieve." (Kaitson Aff. ¶ 3, Doc. 26). On July 21, 1999, Midcoast responded to Chase with a preliminary non-binding indication of interest stating that it would be prepared to pay $157 million in cash for the Bishop Stock. (Gov't Ex. 9.1, Doc. 23). On August 30, 1999, after conducting due diligence, Midcoast sent Langley a non-binding proposal to purchase the Bishop Stock for $184.2 million, subject to certain conditions. (Gov't Ex. 25, Doc. 23). The proposal also included "supplemental offers" by Midcoast to give Langley (i) half of any rate increase that might result following an application by Bishop with the Federal Energy Regulatory Commission ("FERC"); and (ii) an opportunity to negotiate and enter into "Project Development Agreements" ("PDAs") concerning, *inter alia*, certain future pipeline expansion projects and the use of certain pipeline rights-of-way. (*Id.*). Langley did not accept this offer, but the negotiations continued. Due to continued due diligence, Midcoast's offer to purchase the Bishop Stock dropped to $163 million by the end of the first week of September 1999. (Kaitson Aff. ¶ 4, Doc. 26). According to Midcoast, "[t]his resulted in a significant gap between the price Midcoast was willing to pay and the price Langley indicated he was willing to accept." (*Id.*).

To help "bridge this gap," Midcoast's tax advisor at the time, PricewaterhouseCoopers, L.L.P. ("PWC"), suggested Midcoast pursue a "Midco transaction," whereby Langley could sell the Bishop Stock to a third party who would, in turn, sell the Bishop Assets to Midcoast. This structure would provide the best of both tax worlds: Langley would only be taxed once on his capital gains, and Midcoast would receive the step-up in basis on the Bishop Assets. Thus, PWC approached Fortrend International LLC ("Fortrend")[1] about "facilitating" Midcoast's purchase of the Bishop Assets. (*See* Palmisano Dep., dated Feb. 22, 2007, at 48, Doc. 23).

In early September 1999, Fortrend began negotiating with Langley about acquiring the Bishop Stock. Langley provided Fortrend with the same auction material that he had given to other potential bidders. Although they had not participated in the negotiations between Langley and the other bidders, Midcoast and PWC participated in the negotiations between Langley and Fortrend. For example, Langley's representative faxed to Fortrend and PWC a draft Mutual Confidentiality Agreement and a draft letter of intent (Gov't Exs. 35 and 36, Doc. 23), and Langley's representatives emailed to PWC a draft Stock Purchase Agreement between Fortrend and Langley, which was a red-lined version of the agreement that had been drafted between Midcoast and Langley, with Fortrend substituted for Midcoast (Gov't Ex. 37, Doc. 23). On September 30, 1999, K-Pipe Holdings Partners, L.P., affiliated with Fortrend and the holding company of K-Pipe Merger

Corporation, submitted a non-binding letter of intent, offering to purchase the Bishop Stock for approximately $188 million. (Gov't Ex. 65, Doc. 23). The letter of intent also indicated that "other agreements" would be negotiated. (*Id.*).

On October 1, 1999, K-Pipe and Midcoast signed a non-binding letter of intent concerning the sale to Midcoast of the Bishop Assets. (Gov't Ex. 66, Doc. 23). In this letter of intent, Midcoast agreed to pay either $187,868,000 or $182,068,000 for the Bishop Assets, depending on certain variables. Additionally, the asset letter of intent provided that Midcoast could exercise its option to purchase the "Butcher Interest," a royalty interest that Bishop had acquired years earlier. Bishop had both an obligation to pay the royalty, as well as a right to receive payment; thus, no royalties were paid from 1989 to 1999.

The parties negotiated numerous issues in the lead up to the financing and execution of the final stock and asset purchase agreements (hereafter "Stock Purchase Agreement" and "Asset Purchase Agreement"). In general, Midcoast continued discussions with Langley regarding certain issues affecting the Bishop Assets. These issues included a PDA that Langley was causing Kansas Pipeline Company ("KPC"), a partnership included in the Bishop Assets, to enter with a Langley affiliate. (Kaitson Aff. ¶ 9, Doc. 26). Midcoast claims it became so concerned about a continuing relationship with Langley through the PDA that it indicated it would not buy the Bishop Assets unless there was a provision for terminating the PDA relationship. Langley, therefore, put in place an agreement giving KPC the option to terminate the PDA upon the payment of $10.75 million. K-Pipe agreed to pay Langley $3 million more for the Bishop Stock, and Midcoast agreed to pay K-Pipe a corresponding amount for the Bishop Assets.

With respect to the Stock Purchase Agreement, Langley requested that K-Pipe agree to pay a $15 million "break-up fee" if K-Pipe failed to close the Stock Purchase Agreement by November 15, 1999. (*See* Gov't Ex. 2-32, Doc. 23). K-Pipe also agreed not to liquidate Bishop for at least two years. (*Id.*). Finally, Fortrend agreed to guarantee K-Pipe's obligations under the Stock Purchase Agreement. (*See* Guaranty, Stern Aff. Ex. 30, Doc. 25).

With respect to the Asset Purchase Agreement, Midcoast agreed to pay K-Pipe $15 million if Midcoast failed to close the Asset Purchase Agreement by November 15, 1999. (*See* Gov't Ex. 1-5, Doc. 23).[2] Midcoast also agreed to be liable to any third-party donee or creditor beneficiaries of K-Pipe should the deal fall through. (*Id.*). Finally, Midcoast agreed to certain guarantees of K-Pipe's obligations under the Stock Purchase Agreement, including an obligation to indemnify Langley should he receive anything other than capital gain tax on the sale of the Bishop Stock to K-Pipe.[3]

Langley and K-Pipe executed the Stock Purchase Agreement on November 4, 1999, effective as of October 25, 1999. (*See* Stock Purchase Agreement, Gov't Ex. 2-34, Doc. 23). The following day, November 5, 1999, K-Pipe and Midcoast executed the definitive Asset Purchase Agreement. (*See* Asset Purchase Agreement, Gov't Ex. 1-4, Doc. 23).

K-Pipe financed its acquisition of the Bishop Stock with a loan from Rabobank Nederland ("Rabobank"). Although Fortrend had requested a 30-day secured term loan for an amount up to $195 million, the loan was expected to be repaid in a week. (Gov't Ex. 85, Doc. 23). As part of its protection regarding the loan, Rabobank required the following "pledges": (i) the membership interest of K-Pipe Holdings Partners, L.P.; (ii) an escrow account in the name Langley, established at Rabobank, into which the $195 million would be deposited and would be distributed upon the closing of the sale of the Bishop Stock; and (iii) a second escrow account held at Rabobank with account balances in excess of $200 million, which Midcoast would establish through its own secured financing with Bank of America. (*Id.* at 2). For reasons that are not entirely clear from the record, Fortrend requested that the loan amount be increased from $195 to $215 million. (Gov't Ex. 92, Doc. 23). Fortrend also requested that the pledge of the membership interests of K-Pipe Holdings, L.P. be removed. (*Id.*).

On November 4, 1999, but dated "as of November 8, 1999," K-Pipe executed a Promissory Note to pay Rabobank up to $195 million on November 28, 1999, plus interest, as well as a Security and Assignment Agreement. (Gov't Exs. 148 and 149, Doc. 23). The $195 million, to be deposited into K-Pipe's account at Rabobank on November 8, 1999, was conditioned on, *inter alia*, (i) K-Pipe executing and delivering the Security and Assignment Agreement; (ii) K-Pipe, Langley, Midcoast, and Rabobank entering into an escrow agreement (the "Escrow Agreement");[4] (iii) Rabobank, as escrow agent, receiving the escrow amount equal to at least the principal ($195 million) plus all interest to be due on the advance through maturity, plus $1 million (the "Escrow Amount"); (iv) Rabobank receiving an upfront fee of $750,000; and (v) K-Pipe using the proceeds to purchase the Bishop Stock. (Gov't Ex. 148, Doc. 23). Under the Security and Assignment Agreement, K-Pipe pledged as collateral (i) the Escrow Agreement and the Escrow Amount; (ii) all of its accounts with Rabobank; (iii) all other accounts; (iv) all personal property; and (v) any proceeds of any of the collateral. (Gov't Ex. 149, Doc. 23). The Escrow Agreement was entered into by K-Pipe, as the seller, Midcoast, as the buyer, Rabobank, as the escrow agent, and Bank of America, as the lender. (Gov't Ex. 1-6, Doc. 23). Under the Escrow Agreement, Bank of America agreed to fund $198.1 million into an escrow account set up with Rabobank ("Rabobank Escrow Account #18359"). (*Id.*). Thus, the $198.1 million loan acted as security for K-Pipe's loan from Rabobank for the purchase of the Bishop Stock.

On November 8, 1999, the stock purchase transaction closed. As noted above, Bishop changed its name to K-Pipe Group, Inc. and merged with K-Pipe Merger, with K-Pipe Group, Inc. as the surviving entity. K-Pipe Group requested, in writing, a drawdown of $123,345,000 under the Promissory Note to be credited into its Rabobank account ("K-Pipe Group Rabobank #18313") and authorized Rabobank to debit its up-front fee of $750,000 from the account. (Stern Aff. Ex. 35 at 1160, Doc. 25). K-Pipe Group then authorized the wire transfer of $122,594,852 to Langley under the Stock Purchase Agreement. (Gov't Ex. 1-5 at ENB 317, Doc. 23).

On November 9, 1999, the asset purchase transaction closed. As contemplated by the Escrow Agreement, the following amounts were wired from Rabobank Escrow Account #18359: (i) $112,695,895 to K-Pipe Group Rabobank #18313 in consideration for the Bishop Assets; (ii) approximately $79 million directly to Bishop's creditors; and (iii) $6.1 million to Bank of America "for the benefit of Butcher Interest Partnership." (*See* Gov't Exs. 1-6 and 117, Doc. 23). As noted above, the Butcher Interest was a royalty interest in which Bishop had both an obligation to pay and a right to receive payment. Nevertheless, in exchange for a partnership interest and a distribution of $6.225 million, K-Pipe Group transferred the Butcher Interest to a partnership, The Butcher Interest Partnership, owned 55% by K-Pipe Group and 45% by Midcoast. (Kaitson Aff. ¶ 12, Doc. 26). Midcoast retained the option to purchase K-Pipe Group's interest, and K-Pipe Group retained the option to sell its interest. (*Id.*). On November 9, Midcoast, on behalf of the Butcher Interest Partnership, transferred $6.225 to K-Pipe Group Rabobank #18313. Finally, K-Pipe Group received approximately $10 million from a cash reserve account held by a Bishop partnership that was released once Midcoast paid the related Bishop debt. In total, K-Pipe Group received $128,960,431 for the sale of the Bishop Assets. (*See* Gov't Ex. 116, Doc. 23). From these funds, K-Pipe Group repaid the Rabobank loan and approximately $2 million in fees to advisors involved in the transactions, including $299,750 to LeBoeuf, Lamb, Greene & MacRae, which allegedly acted as K-Pipe's counsel on the negotiations. (*See id.*). The price differential between the stock purchased and the assets sold totaled $6,364,579, which the Government contends was K-Pipe's "fee" for the transaction.

After the transactions, K-Pipe Group retained title to the Bishop Stock, the interest in the Butcher Interest Partnership, $10 million in cash reserves, and certain causes of action against third parties. Because K-Pipe Group had a substantial reportable gain from the sale of the Bishop Assets, K-Pipe Group's parent company, Signal Capital Associates, L.P., allegedly contributed high basis, low fair market value assets to K-Pipe Group in order to offset the gain on the assets.[5] K-Pipe Group filed tax returns for the years 2000, 2001, and 2002, but it engaged in virtually no business activity during that time. K-Pipe Group was ultimately sold to Baguette Holdings, LLC, an entity affiliated with Fortrend, in 2000.

Midcoast took a basis in the Bishop Assets of approximately $192 million, which represents the $122.7 million in cash and $79 million in assumed liabilities that it paid to K-Pipe Group. Midcoast began taking depreciation and amortization deductions in accordance with this basis in 1999.

On January 31, 2000, Midcoast, through KPC, allegedly terminated the Project Development Agreements and paid Langley $10.75 million. (Stern Aff. Ex. 38, Doc. 25). In its 2000 corporate tax return, Midcoast deducted this payment "because it was made to terminate a contractual obligation." (Jordan Aff. ¶ 5, Doc. 27).

On November 10, 2000, Midcoast paid K-Pipe Group $244,750 for K-Pipe Group's interest in the Butcher Interest Partnership. Midcoast, through a subsidiary, then terminated the Butcher Interest, effective January 1, 2001. (*See* Termination Agreement of the Butcher Interest, Kaitson Aff. Ex. 1, Doc.26). Midcoast claims that it had an adjusted basis in the Butcher Interest of $5,775,416. (Jordan Aff. ¶ 8, Doc. 27). In its 2001 corporate tax return, Midcoast deducted the alleged loss associated with the termination of the Butcher Interest Partnership in the amount of $5,775,416. (*See id.*).

Enbridge Energy Company, Inc. ("Enbridge"), the present taxpayer, acquired Midcoast in 2001.

B. The IRS Audit of Midcoast and the Notice of Deficiency

In February 2001, the IRS issued Notice 2001-16 designating certain intermediary transaction tax shelters as "listed transactions" that can be challenged by the Government. The notice describes the intermediary transaction as follows:

These transactions generally involve four parties: seller (X) who desires to sell stock of a corporation (T), an intermediary corporation (M), and buyer (Y) who desires to purchase the assets (and not the stock) of T. Pursuant to a plan, the parties undertake the following steps. X purports to sell the stock of T to M. T then purports to sell some or all of its assets to Y. Y claims a basis in the T assets equal to Y's purchase price. Under one version of this transaction, T is included as a member of the affiliated group that includes M, which files a consolidated return, and the group reports losses (or credits) to offset the gain (or tax) resulting from T's sale of assets. In another form of the transaction, M may be an entity that is not subject to tax, and M liquidates T (in a transaction that is not covered by § 337(b)(2) of the Internal Revenue Code or § 1.337(d)-4 of the Income Tax Regulations, resulting in no reported gain on M's sale of T's assets.

Depending on the facts of the particular case, the Service may challenge the purported tax results of these transactions on several grounds, including but not limited to one of the following: (1) M is an agent for X, and consequently for tax purposes T has sold assets while T is still owned by X, (2) M is an agent for Y, and consequently for tax purposes Y has purchased the stock of T from X, or (3) the transaction is otherwise properly recharacterized (e.g., to treat X as having sold assets or to treat T as having sold assets while T is still owned by X). Alternatively, the Service may examine M's

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consolidated group to determine whether it may properly offset losses (or credits) against the gain (or tax) from the sale of assets.

(*See* Notice 2001-16, 2001-1 C.B. 730). PWC brought the notice to Midcoast's attention, but advised that disclosure of the Bishop transaction was unnecessary because it was not the "same or substantially similar" to the transaction described in Notice 2001-16. (*See* Robert Aff. ¶ 3, Doc. 28). According to Midcoast, the IRS subsequently broadened the meaning of "substantially similar" such that it found it found it prudent to disclose the Bishop transaction. (*See* Jordan Aff. ¶ 2, Doc. 27). Enbridge, as the successor in interest to Midcoast, finally disclosed the transaction to the Office of Tax Shelter Analysis of the Internal Revenue Service on January 3, 2003. (*See* Disclosure Statement, Gov't Ex. 62, Doc. 23).

In November 2003, the IRS began its audit of the transaction and examined Midcoast's Forms 1120 for tax years ending December 31, 2000, and May 31, 2001. (*See* Jordan Aff. ¶ 2, Doc. 27). It examined Midcoast's Form 1120 for tax year ending December 31, 1999, to the extent any losses had been carried back from Midcoast's 2000 tax year. (*See id.*).

On September 14, 2004, the IRS issued its Notice of Deficiency to Midcoast, listing deficiencies of $573,470 for 1999 and $3,276,338 for 2000. (*See* Notice of Deficiency, Stern Aff. Ex. 13, Doc. 25). Additionally, the IRS assessed a twenty percent penalty on the 2000 deficiency in the amount of $655,267.60. The IRS explained that Midcoast's "returns had been adjusted to reflect the acquisition of stock in 1999 of The Bishop Group, Ltd., also known as (a/k/a) K-Pipe Group, Inc., rather than the assets of that entity." (*Id.*). The IRS also explained that it would not allow the deductions from the Butcher Interest Partnership because there was no evidence that the Butcher Interest had a basis in the hands of Bishop. Finally, the IRS explained that it would not allow the capitalization of terminating the PDA because the costs were included in the purchase price of the Bishop Stock. (*See id.*).

Midcoast paid the amounts set forth in the Notice of Deficiency under protest. (Stern Aff. Ex. 73, Doc. 25). Midcoast also paid under protest the interest associated with these amounts, $911,641. (Jordan Aff. ¶ 7, Doc. 27). Midcoast then filed a tax refund claim with the IRS. Midcoast claimed that, because it acquired assets, not stock, it was entitled to take total depreciation, alternative minimum tax ("AMT") depreciation, and amortization deductions in the amounts of $23,816,420, $22,686,331, and $1,749414, respectively, for the 2000 tax year. (*Id.* ¶ 5). Midcoast also claimed it was entitled to take total depreciation and amortization deductions on the assets in the amounts of $7,228,853 and $745,973, respectively, for the 2001 tax year. (*Id.* ¶ 8). Additionally, for the 2000 tax year, Midcoast claimed that it was entitled to a $10.75 million deduction for the cancelled PDA and a $182,138 deduction for losses from the Butcher Interest Partnership. (*Id.* ¶ 5). Finally, Midcoast stated in its refund claim that it was entitled to deduct the loss associated with the termination of the Butcher Interest Partnership in the amount of $5,775,416 for the 2001 tax year. (*Id.* ¶ 8).

The IRS denied, in relevant part, Midcoast's refund request for these amounts. (*See* Stern Aff. Ex. 17, Doc. 25).

C. The Current Case

On February 28, 2006, Midcoast[6] filed the current suit against the Government, seeking a refund of the total amount paid, plus interest. It claims that it purchased the Bishop Assets, not the Bishop Stock, and that the Government's characterization otherwise is erroneous.

The court has jurisdiction over this action pursuant to 28 U.S.C. 1346(a) (1) ("The district courts shall have original jurisdiction . . . [over] . . . [a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws[.]").

The parties have each moved for summary judgment. The key issue is whether the substance of the transaction matches its form. The cross motions for summary judgment are now ripe for ruling.

II. Summary Judgment Standard

A party moving for summary judgment must inform the court of the basis for the motion and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, that show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The substantive law governing the suit identifies the essential elements of the claims at issue and therefore indicates which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The initial burden falls on the movant to identify areas essential to the nonmovant's claim in which there is an "absence of a genuine issue of material fact." *Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 349 (5th Cir. 2005). If the moving party fails to meet its initial burden, the motion must be denied, regardless of the adequacy of any response. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). Moreover, if the party moving for summary judgment bears the burden of proof on an issue, either as a plaintiff or as a defendant asserting an affirmative defense, then that party must establish that no dispute of material fact exists regarding all of the essential elements of the claim or defense to warrant judgment in his favor. *Fontenot v. Upjohn*, 780 F.2d 1190, 1194 (5th Cir. 1986) (the movant with the burden of proof "must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor") (emphasis in original).

Once the movant meets its burden, the nonmovant must direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 323-24. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indust. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Instead, the non-moving party must produce evidence upon which a jury could reasonably base a verdict in its favor. *Anderson*, 477 U.S. at 248; *see also DIRECTV Inc. v. Robson*, 420 F.3d 532, 536 (5th Cir. 2005). To do so, the nonmovant must "go beyond the pleadings and by [its] own affidavits or by depositions, answers to interrogatories and admissions on file, designate specific facts that show there is a genuine issue for trial." *Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A.*, 139 F.3d 532, 536 (5th Cir.1998). Unsubstantiated and subjective beliefs and conclusory allegations and opinions of fact are not competent summary judgment evidence. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998); *Grimes v. Texas Dept. of Mental Health and Mental Retardation*, 102 F.3d 137, 139-40 (5th Cir. 1996); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994), *cert. denied*, 513 U.S. 871 (1994); *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992), *cert. denied*, 506 U.S. 825 (1992). Nor are pleadings summary judgment evidence. *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1046 (5th Cir. 1996) (citing *Little*, 37 F.3d at1075). The non-movant cannot discharge his burden by offering vague allegations and legal conclusions. *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889 (1990). Nor is the court required by Rule 56 to sift through the record in search of evidence to support a party's opposition to summary judgment. *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998) (citing *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5th Cir. 1992)).

Nevertheless, all reasonable inferences must be drawn in favor of the non-moving party. *Matsushita*, 475 U.S. at 587-88; *see also Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 412 (5th Cir. 2003). Furthermore, the party opposing a motion for summary judgment does not need to present additional evidence, but may identify genuine issues of fact extant in the summary judgment evidence produced by the moving party. *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 198-200 (5th Cir. 1988). The non-moving party may also identify evidentiary documents already in the record that establish specific facts showing the existence of a genuine issue. *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir. 1990). In reviewing evidence favorable to the party opposing a motion for summary judgment, a court should be more lenient in allowing evidence that is admissible, though it may not be in admissible form. *See Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 80 (5th Cir. 1988).

In a refund suit, the taxpayer has the burden of proving that the IRS's determination is incorrect. *Yoon v. Comm'r*, 135 F.3d 1007, 1012 (5th Cir. 1998).

III. Analysis

A. The Substance of the Transaction: Sale of Stock or Sale of Assets?

It is undisputed that Midcoast wanted to own the Bishop Assets. The Government contends that there were two "direct" routes in which Midcoast could have purchased the Bishop Assets: (1) a direct asset sale, or (2) a stock sale, followed by a liquidation of Bishop. In a direct asset sale, the purchaser (Midcoast) gets a cost basis in the assets, the corporation (Bishop) is liable for the tax on the gain, and the shareholders (Langley), who receive the asset proceeds, are liable for a gain on their shares. *See* I.R.C. §§ 1001, 331, and 1012. In the stock sale/liquidation scenario, the selling shareholders (Langley) are liable for the tax on any gain in their shares, and, while the liquidation of the target (Bishop) into its acquiring parent corporation (Midcoast) will be tax free, the assets will take their historic or "carryover" basis. *See* I.R.C. §§ 1001, 332, and 334. For situations in which a buyer cannot directly purchase the assets, like where a seller mandates a stock sale, the Code authorizes certain purchasers to elect to treat the price they paid for the stock as the asset basis. *See* I.R.C. § 338. However, the election effects a deemed sale of the assets, and the corporate level tax on the deemed sale must be paid by the newly acquired target corporation. A section 338 election would, therefore, have provided less value to Midcoast had it chosen that route. Thus, there were definite tax benefits to all the parties involved in using an intermediary to purchase the stock and sell the assets. In particular, Midcoast enjoyed a substantial step up in basis on the Bishop Assets.

A key principle in tax law is that the incidence of taxation depends upon the substance of a transaction rather than its form. *See Gregory v. Helvering*, 293 U.S. 465, 469 (1935); *see also Freytag v. Comm'r*, 904 F.2d 1011, 1015 (5th Cir. 1990) ("The fundamental premise underlying the Internal Revenue Code is that taxation is based upon a transaction's substance rather than its form. Thus sham transactions are not recognized for tax purposes . . ."). There are numerous iterations of the substance over form doctrine, which include, in relevant part, (1) the conduit theory; (2) the step transaction doctrine, and (3) the economic substance doctrine. Here, the Government contends that under any one of the substance over form doctrines, the participation of K-Pipe should be disregarded, and Midcoast should be deemed to have purchased the Bishop Stock and to have liquidated Bishop. The court finds that the conduit theory is the most analogous to the facts in this case and applies this substance over form doctrine to affirm the Government's recharacterization of the transaction as one of stock rather than assets.

In the conduit theory of the substance over form doctrine, the court may disregard an entity if it is a mere conduit for the real transaction at issue. As the Supreme Court stated in *Comm'r v. Court Holding Co.*, 324 U.S. 331 (1945),

The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant. A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title. To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.

Id. at 334 (internal citations omitted). The contours of the conduit theory are not well defined. Nevertheless, a close scrutiny of the precedent discussing conduits provides the court with guidance on when and how to apply this theory.

In *Court Holding*, an apartment house was the sole asset of a corporation. *Id.* at 332. The corporation wanted to sell this asset and had reached an oral agreement with a third party purchaser. *Id.* at 333. Before the agreement for the asset sale could be reduced to writing, the corporation's attorney informed the purchaser that the sale could not be consummated because it would result in a sizable income tax on the corporation. *Id.* Rather than consummate the sale, the corporation transferred the apartment house in the form of a liquidating dividend to the corporation's two shareholders. *Id.* The two shareholders, in turn, formally conveyed the asset to a purchaser who had originally negotiated for the purchase of the asset from the corporation. *Id.* The Supreme Court affirmed the Tax Court's conclusion that, under these facts of the entire transaction, the role of the intermediary should be disregarded and the corporation should be deemed as having sold the asset. *Id.* at 334.

The Supreme Court faced a similar situation in *United States v. Cumberland Pub. Serv. Co.*, 338 U.S. 451 (1950). In that case, the shareholders of a closely-held corporation offered to sell all the corporate stock to a local cooperative. *Id.* at 452. The cooperative refused to buy the stock, but countered with an offer to buy certain assets from the corporation. *Id.* The corporation refused, not wanting to pay the heavy capital gains tax from the asset sale transaction. *Id.* The shareholders agreed to acquire the assets as a liquidated dividend and then sell them to the cooperative. *Id.* at 452-53. The cooperative accepted, and the assets were transferred in this manner. *Id.* at 453. The corporations remaining assets were sold, and the corporation dissolved. *Id.* The Tax Court found that the sale was made by the shareholders and not the corporation, concluding that the liquidation and dissolution were genuine transactions and that at no time did the corporation plan to make the sale itself. *Id.* The Supreme Court accepted the Tax Court's finding of fact that the sale was made by the stockholders rather than the corporation. *Id.* at 455. As the Court noted, "[t]he Government's argument that the shareholders acted as a mere 'conduit' for a sale by respondent corporation must fall before this finding. *Id.*

These Supreme Court cases form the backdrop of the conduit analysis, but neither *Court Holding Co.* nor *Cumberland* deal with the same factual scenario as in this case, i.e., when a corporation sells its stock to an entity, which turns around and sells the assets to a third party. The parties have directed the court's attention to three 5th Circuit cases addressing more analogous factual scenarios: *Davant v. Comm'r*, 366 F.2d 874 (5th Cir. 1966); *Blueberry Land Co. v. Comm'r*, 361 F.2d 93 (5th Cir. 1966); and *Reef Corp. v. Comm'r*, 368 F.2d 125 (5th Cir. 1966). The court addresses each in turn.

In *Davant*, two corporations, Warehouse and Water, were owned by common owners, who wanted to sell the assets of Warehouse to Water and liquidate Warehouse. 366 F.2d at 877-88. The corporations' attorney, Bruce Sr., advised against the direct sale of assets because he believed that the IRS would take the position that the stockholders had received a dividend taxable at ordinary rather than capital rate. *Id.* at 878. Therefore, Bruce Sr. suggested that the stockholders make a sale of their stock to an unrelated third-party, who could, in turn, sell Warehouse's operating assets to Water and liquidate Warehouse without compromising the original stockholders' capital gain treatment. *Id.* The attorney's son, Bruce Jr., who was himself an attorney, agreed to purchase the stock and sell the assets. *Id.* Bruce Sr. contacted the bank holding the corporations' accounts and secured a loan for Bruce Jr. to purchase Warehouse. *Id.* The stock of Warehouse was the collateral for the loan, and it was understood that Water would then buy the assets Warehouse. *Id.* This money, plus part of the money that Warehouse had in its bank account, would then be used to repay the loan. *Id.* Bruce Jr. received $15,583.30 for his part in the transaction, and the Bank received one day's interest on the loan. *Id.* Bruce Jr. played almost no role in negotiating the transactions or the loan. *See id.* The taxpayers reported capital gain from the sale of the Warehouse stock; the Commissioner disregarded sale of stock to Bruce Jr., arguing that the substance of the transaction was a corporate reorganization with the taxpayers receiving dividends taxable as ordinary income to the extent of earnings and profits. *Id.* at 879. The Tax Court agreed with the Commissioner's characterization, and the Fifth Circuit affirmed. The Fifth Circuit examined and viewed the relevant portions of the Tax Code "as a functional whole" to determine that "[d]istributions of corporate funds to stockholders made with respect their stockholdings must be included in their gross income to the extent that those distributions are made out of the corporation's earnings and profits." *Id.* The 5th Circuit concluded that all the steps by the taxpayer were for the sole purpose of turning what otherwise would be a dividend taxed at the ordinary income rate into a capital gain. *Id.* at 880. It disregarded Bruce Jr.'s participation because "his presence served no legitimate nontax-avoidance business purpose." *Id.* at 881. He was, in the Tax Court's factual determination, "not a purchaser of the stock in any real sense but merely a conduct through which funds passed from Water to Warehouse and from Warehouse to [the stockholder petitioners]." *Id.* at 880.

In *Blueberry Land Co.*, the corporate taxpayers, involved in the real estate development business, owned certain mortgages and unpaid installment obligations (collectively, "Mortgages"), which they wanted to sell. 361 F.2d at 94-95. A prospective buyer for the assets was First Federal, and the parties began negotiating an asset purchase agreement. *Id.* at 95. First Federal and the taxpayers entered into such an agreement, but the agreement was later rescinded when the taxpayers' attorney advised against a direct asset sale due to the tax consequences. *Id.* at 96. Another attorney, familiar with the nature of the proposed transaction, came forward with an offer to purchase the taxpayer corporations' stock, liquidate the corporations, and sell the assets to First Federal. *Id.* at 97. The attorney formed a shell corporation, Pemrich, to complete the transaction. *Id.* According to plan, Pemrich purchased the stock, dissolved the corporations, and sold the Mortgages to First Federal. *Id.* Pemrich retained as an apparent profit $1,931.71 on the deal. *Id.* at 98. The taxpayer corporations and their stockholders "were not divorced from the transaction," as the stockholders were required to open certain savings accounts at First Federal as collateral for the transferred Mortgages. *Id.* These savings accounts represented 15% of the original sales price of the mortgaged properties. *Id.* In upholding the Tax Court's determination that Pemrich had been a mere conduit for the real obligation flowing between the taxpayer corporations and First Federal, the Fifth Circuit found that Pemrich was entirely dependent on the pre-existing negotiations between the taxpayers and First Federal and that the substance of the transaction was a sale by the taxpayers of their Mortgages, i.e., their assets. *Id.* 101-102. The Court was careful to note, however, that its opinion should not be construed as preventing or discouraging "a real and bona fide sale of stock by stockholders of one corporation to a second corporation, and liquidation of the first by the acquiring corporation to obtain its assets." *Id.* at 102. The key is the transaction must be substantively real and bona fide. The tension between legitimate and sham transactions is reflected in the Fifth Circuit's following comments in the case:

We have said many times, and we here reiterate, that one may not only lawfully yearn for tax savings, but he may utilize and exploit every available legitimate means of arranging his affairs to achieve this end. Thus Taxpayers and their stockholders were entitled to avail themselves of the sale of stock method of disposing of Taxpayers if they so chose. But the stumbling block here is that First Federal, which throughout this transaction was the only party actually interested in obtaining Taxpayers' mortgages, could not -- and hence would not -- itself purchase Taxpayers' stock from the stockholders, because of restrictions on the types of investments open to it. This made necessary the use of an intermediary, which would purchase all of Taxpayers' stock, liquidate Taxpayers into it and thereby obtain their assets (principally the mortgages), and then sell the mortgages to First Federal.

This plan certainly presents a legitimate method whereby the stockholders of one corporation can dispose of their stock to a second corporation, which in turn liquidates, and sells the assets of, the acquired corporation. If this actually takes place, a transaction conducted in this way would be upheld and given effect for Federal income tax purposes. But the question here is not whether a plan of this type is valid or invalid. The question rather is whether under the circumstances of this case, the plan was really what it purported to be. Stated another way, the issue is whether in substance the transaction was as formally cast by the parties; and if not, whether the form, or the substance, should control for tax purposes.

We must take guard against oversimplification, for a glib generalization that substance rather than form is determinative of tax consequences not only would be of little assistance in deciding troublesome tax cases, but also would be incorrect. The fact -- at least the tax world fact -- is that in numerous situations the form by which a transaction is effected does influence and may indeed decisively control the tax consequences. This generalization does, however, reflect the fact that courts will, and do, look beyond the superficial formalities of a transaction to determine the proper tax treatment.

Id. at 100-101.

Finally, in *Reef Corp.*, one of the issues to be determined was whether the taxpayer was entitled to a stepped-up basis in assets acquired in a transaction involving an intermediary. *See* 368 F.2d at 127-30. There, two shareholder groups owned the taxpayer corporation, Reef Fields Gasoline Corporation ("Reef Fields"). *Id.* at 128. One group, the Butler group, decided to buy out the other, the Favrot group. *Id.* One plan that was formulated involved the liquidation of Reef Fields, which would sell its operating assets to a new corporation to be formed in exchange for cash and notes. *Id.* The Favrot group would receive cash and notes while the Butler group would receive only notes. *Id.* The Butler group rejected this plan after learning it would have to pay taxes on the gain and would not be receiving the cash to pay the taxes. *Id.* Thus, the parties agreed to and executed a new plan. *Id.* The Butler group formed another corporation, Reef Corporation ("New Reef"), and received all of the common stock of New Reef in exchange for a portion of their stock in Reef Fields. *Id.* On the same day, Reef Fields contracted to sell its properties to New Reef, but before the sale of the properties, and in accordance with a pre-arranged plan, all of the stock of Reef Fields was sold to an intermediary, who was to carry out the sale of the assets of Reef Fields to New Reef with New Reef giving promissory notes to Reef Fields as consideration. *Id.* Reef Fields distributed the promissory notes to the intermediary, an attorney named George Strong ("Strong") with a business connection to the Favrot group, and Strong pledged the notes to Butler group, Favrot group, and New Reef for the stock they sold to him. *Id.* In affirming the Tax Court's decision to disregard the sale of Reef Fields to Strong, the Fifth Circuit stated as follows:

[Strong] was a mere conduit in a preconceived and prearranged unified plan to redeem the stock of the Favrot group in Reef Fields. His activity was but a step in the plan. He carried out a sales contract already entered into between the corporations. He assumed no risk, incurred no personal liability, paid no expenses and obtained only bare legal title to the stock. There was an insufficient shifting of economic interests to Strong. It is settled that under such circumstances substance must be given effect over form for federal tax purposes. The holding of the Tax Court in this regard was not clearly erroneous.

Id. at 130.

All of these cases turn on the trial court's particular findings of fact, which requires examining the transaction as a whole to determine whether it is bona fide. Several facts stand out as particularly relevant and include (1) whether there was an agreement between the principals to do a transaction before the intermediary participated; (2) whether the intermediary was an independent actor; (3) whether the intermediary assumed any risk; (4) whether the intermediary was brought into the transaction at the behest of the taxpayer; and (5) whether there was a nontax-avoidance business purpose to the intermediary's participation. Many of these facts are present in this case and weigh in favor of declaring K-Pipe a mere conduit in the transaction.

Although there was not a formal agreement between Langley and Midcoast regarding the stock sale, the evidence reflects that K-Pipe was able to facilitate that agreement by acting as an intermediary. Midcoast goes to great lengths to distance itself from Fortrend and K-Pipe in order to infuse legitimacy into the intermediary transaction. However, the undisputed facts reveal that it was Midcoast's tax advisors, PWC, who brought Fortrend into the picture and helped to structure the Midco transaction. Ultimately, Fortrend's participation was far less fortuitous than Midcoast intimates. Moreover, there is no objective evidence in the record that K-Pipe negotiated the stock sale at all. All of the communications involved Midcoast, and it was at the insistence of Midcoast's tax advisors that certain actions be undertaken, such as the agreement not to liquidate Bishop for two years and the formation of the Butcher Interest Partnership to add "good facts" to the transaction. Additionally, K-Pipe's obligations were almost entirely indemnified by Midcoast through various side agreements and under the Stock and Asset Purchase Agreements. It was Midcoast's loan that acted as security for the $195 million, which K-Pipe borrowed. K-Pipe, having been created for the purposes of this transaction, could not have provided any assets as security. After the transaction, K-Pipe engaged in virtually no business activity and was, in substance, a mere shell. Finally, K-Pipe's sole purpose in participating in the transaction was to allow Midcoast to step up the basis of the Bishop Assets. Under the facts of this case, the court finds that K-Pipe's role in the transaction should be disregarded.

Disregarding K-Pipe leaves the court with the question of what was the real substance of the transaction: a sale of stock or a sale of assets. In *Blueberry Land Co.*, the Fifth Circuit affirmed the Tax Court's determination that a similar transaction was, in substance, a sale of assets. Nevertheless, in that case, the parties had initially agreed to sell and purchase the assets. Here, by contrast, Langley would not entertain a direct asset sale. Thus, the only way in which Midcoast could have obtained the Bishop Assets was to purchase the Bishop Stock and liquidate. Indeed, it negotiated extensively with Langley for this very purpose. The fact that Midcoast and Langley did not ultimately reach a formal agreement as to the stock purchase is not dispositive. Without K-Pipe's participation, Midcoast must be treated as having purchased the Bishop Stock and liquidated. The Government's recharacterization of the sale as such for tax purposes was, therefore, appropriate.

B. The Butcher Interest

Midcoast makes two claims relevant to the Butcher Interest: first, Midcoast claims that it is entitled to an ordinary loss in the amount of $182,138 arising from its 45 percent share of the losses from the Butcher Interest Partnership in 2000; and, second, Midcoast claims that it is entitled to either a capital loss or an ordinary loss under IRC §§ 162 or 165 in the amount of $5,775,416 relating to the termination of the Butcher Interest Partnership in 2001. The Government argues that Midcoast cannot take any deductions related to the Butcher Interest Partnership because the partnership was a sham.

To determine whether the Butcher Interest Partnership was a sham, the court must examine whether entering into the partnership had economic substance. *See Merryman v. Comm'r*, 873 F.3d 879, 881 (5th Cir. 1989) ("transactions which have no economic purpose or substance other than the creation of income tax losses or credits are to be disregarded for tax purposes"). The court must examine the objective realities of the transaction in resolving whether economic substance is present. *See id.* "Where . . . there is a genuine multiple-party transaction with economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax independent considerations, and is not shaped solely by tax-avoidance features that have meaningless labels attached, the Government should honor the allocation." *Id.* (quoting *Frank Lyon Co. v. United States*, 435 U.S. 561, 583-84 (1978)). Here, the court finds that K-Pipe and Midcoast entered the Butcher Interest Partnership solely for the purpose of tax avoidance. The Butcher Interest Partnership was a part of a preconceived plan to provide "good facts" to K-Pipe's participation and disguise the true nature of the Midco

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transaction. The court is not persuaded that the Bishop Interest had any inherent value to Midcoast other than as a means to bolster its tax position. The court finds, therefore, that the Butcher Interest Partnership was a sham and that Midcoast is not entitled to any deductions relating thereto.

C. The PDA

Midcoast is claiming that it is entitled to deduct the entire $10.75 million relating to the terminated Project Development Agreement as an ordinary and necessary business expense under I.R.C § 162. The Government contends that the $10.75 million was, like the $3 million, additional consideration paid for the Bishop stock. The court finds that the facts support the Government's position and holds that Midcoast is not entitled to an additional deduction for this amount.

D. The I.R.C. § 6662 Penalty

The IRS may impose a twenty percent penalty for, *inter alia*, negligence or disregard of rules or regulations or a substantial understatement of income tax. I.R.C. § 6662(b).[7] Negligence "includes any failure to make a reasonable attempt to comply with the provisions of [the Internal Revenue Code]" or to exercise ordinary and reasonable care in preparing a tax return. *See* I.R.C. § 6662(c); Treas. Reg. § 1.6662-3(b)(1). According to the regulations, "[n]egligence is strongly indicated where . . . a taxpayer fails to make a reasonable attempt to ascertain the correctness of a deduction, credit or exclusion on a return which would seem to a reasonable and prudent person to be 'too good to be true' under the circumstances[.]" Treas. Reg. § 1.6662-3(b)(1)(ii). "Disregard of rules and regulations" includes any careless, reckless, or intentional disregard of the rules and regulations relating to the Internal Revenue Code. *See* I.R.C. § 6662(c); Treas. Reg. § 1.6662-3(b)(2). A "substantial understatement of income tax" occurs, in the context of a corporation taxpayer, if the amount of understatement exceeds greater of (i) 10 percent of the tax required to be shown on the return or (ii) $10,000. I.R.C. § 6662(d)(1)(B). Because it is undisputed that, having recharacterized the Bishop transaction as an acquisition of stock, Midcoast understated its income tax by 10 percent, the court shall begin by discussing the substantial understatement of income tax provision.

Meeting the mathematical element of the substantial understatement of income tax, standing alone, does not carry the day for the Government because certain statutory exceptions may be applicable. *See Klamath Strategic Inv. Fund, LLC v. United States*, 472 F. Supp. 2d 885, 900 (E.D. Tex. 2007). Under section 6662, the penalty for a substantial understatement of income tax may not be applicable if Midcoast (1) had "substantial authority" to support the deductions at issue or (2) adequately disclosed the relevant facts relating to the deductions and there is a reasonable basis for the tax treatment claimed. *See* I.R.C. § 6662(d)(2)(B). I.R.C. § 6664 provides an additional exception and states,

No penalty shall be imposed . . . with respect to any portion of an underpayment if it is shown that there was a reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion.

I.R.C § 6664(c)(1). There are, however, special rules in cases involving tax shelters, which are defined under the Code as "(I) a partnership or other entity, (II) any investment plan or arrangement, or (III) any other plan or arrangement, if a significant purpose of such partnership, entity, plan, or arrangement is the avoidance or evasion of Federal income tax." I.R.C. § 6662(d)(2)(C)(iii). If a tax shelter is involved in a case with a corporate taxpayer, neither the substantial authority or the adequate disclosure/reasonable basis exceptions under section 6662(d)(2)(B) applies. I.R.C. § 6662(d)(2)(C)(ii).[8] Even if a tax shelter is implicated, the corporate taxpayer may still rely on the reasonable cause/good faith exception in section 6664.

The court finds that the Midco transaction in this case meets the definition of a tax shelter under the Code. It is clear that Midcoast undertook the intermediary transaction with the sole purpose of inflating its basis in the Bishop Assets to increase deductions for depreciation and amortization. This qualifies as a plan whose significant purpose is the avoidance or evasion of Federal income tax. As such, the substantial authority or the adequate disclosure/reasonable basis exceptions are not applicable in this case.

Assuming, *arguendo*, that the transaction was not a tax shelter, Midcoast has still failed to show that substantial authority existed for its tax position or that it adequately disclosed the relevant facts of the transaction and had a reasonable basis for its tax position. "The substantial authority standard is an objective standard involving an analysis of the law and application of the law to relevant facts. The substantial authority standard is less stringent than the more likely than not standard (the standard that is met when there is a greater than 50-percent likelihood of the position being upheld), but more stringent than the reasonable basis standard." Treas. Reg. § 1.6662-4(d)(2). For substantial authority to exist, "the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment." Treas. Reg. § 1.6662-4(d)(3)(i); see also *Klamath*, 472 F. Supp. 2d at 900. Here, the weight of authorities does not support Midcoast's deductions at issue. Indeed, the weight of authorities counseled against the use of an intermediary in this manner. *See* Part III.A, *supra*. These authorities are more persuasive than those on which Midcoast purportedly relied. With respect to the adequate disclosure/reasonable basis exception, it is undisputed that Midcoast did not adequately disclose the relevant facts surrounding the deductions at issue. As such, neither exception under section 6662 applies to immunize Midcoast from the 20 percent penalty assessed by the Government.

Finally, the court finds that Midcoast cannot avail itself of the reasonable cause/good faith exception under section 6664. The evidence in the record reflects a knowing participation by Midcoast in a scheme to obfuscate the real transaction at issue. While reliance on the tax advice of professionals will typically satisfy the requirements of section 6664, the court finds that Midcoast's reliance on PWC under the facts of this case to be unreasonable.

IV. Conclusion

Accordingly, and for the reasons explained above, it is hereby

ORDERED that Defendant's motion for summary judgment (Doc. 23) is GRANTED; and, it is further

ORDERED that Plaintiffs' motion for summary judgment (Doc. 24) is DENIED.

SIGNED at Houston, Texas, this 31st day of March, 2008.

Melinda Harmon

United States District Judge

FOOTNOTES

[1] According to the promotional materials provided to Langley, Fortrend is an investment bank specializing "in structuring and managing economic transactions that accomplish specific tax or accounting objectives" by providing "unique" and "creative" planning techniques. (Gov't Ex. 26, Doc. 23).

[2] Although Midcoast agreed to pay $15 million, it escrowed only $14 million, which subjected K-Pipe to the $1 million risk should the closings be delayed. When asked about this discrepancy, Gary Wilson ("Wilson") from PWC testified that K-Pipe's contractual risk would be a "favorable fact" should the Government challenge K-Pipe's participation. (Wilcox Dep., dated Feb. 19, 2007, at 146-47, Doc. 23).

[3] Indeed, in November 2004, Langley filed suit against Fortrend, K-Pipe, Midcoast, and others in the United States District Court for the District of Kansas, *Langley v. Fortrend Int'l, L.L.C., et al.*, Cause No. 04-2546-JWL, after the Government challenged the Bishop Stock sale. (See Kaitson Aff. Ex. 2, Doc. 26).

[4] There is no evidence in the record that Langley entered into a separate escrow agreement.

[5] The IRS subsequently audited K-Pipe Group and disallowed these losses.

[6] Enbridge Midcoast Energy Inc., formerly known as Midcoast Energy Resources, Inc., filed the original complaint. (Pl.'s Compl., Doc. 1). On April 20, 2006, Enbridge Energy Company, Inc. and Enbridge Midcoast Energy, L.P., formerly known as Enbridge Midcoast Energy, Inc., formerly known as Midcoast Energy Resources, Inc., filed an amended complaint. (Pls.' Am. Compl., Doc. 10). Plaintiffs are collectively herein referred to as "Midcoast."

[7] This particular provision was substantively amended in 2004 and 2005. Unless otherwise noted, the court cites to the provision as it existed before the 2004 amendments, which covers the tax years at issue in this case.

[8] For non-corporate taxpayers, an understatement of taxes attributable to a tax shelter removes the adequate disclosure/reasonable basis exception, but the substantial authority exception remains applicable if the taxpayer can show that he reasonably believed that the tax treatment claimed was more likely than not the proper treatment. *See* I.R.C. 6662(d)(2)(C)(i)(II).

END OF FOOTNOTES

Tax Analysts Information

Code Section: Section 331 -- Gain or Loss in Liquidations; Section 338 -- Stock Purchase/Asset Purchase; Section 1001 -- Gain or Loss; Section 1012 -- Cost Basis; Section 6662 -- Accuracy-Related Penalty; Section 6664 -- Penalty Definitions and Special Rules

Jurisdiction: United States

Subject Area: Capital gains taxation
Corporate taxation
Penalties

Institutional Author: United States District Court for the Southern District of Texas

Author: Harmon, Melinda

Document Number: Doc 2008-7171 [PDF]

Tax Analysts Reference: 2008 TNT 64-9

EXHIBIT 11

Message

From: joe.t.realmuto@us.pwc.com [joe.t.realmuto@us.pwc.com]
Sent: 5/2/2008 2:37:21 PM
To: pat.pellervo@us.pwc.com
Subject: Re: Today's WSJ - Midco transactions

Worse than that, the findings say PWC suggested the midco transaction...

Joe Realmuto
PricewaterhouseCoopers LLP
125 High Street
Boston MA 02110
617-530-6496
813-207-3144 (Fax)
617-834-2682 (cell)

Pat Pellervo/US/TLS/PwC

Pat Pellervo/US/TLS/PwC 05/02/2008 10:08 AM "Reply to All" is Disabled	To	Joe Realmuto/US/TLS/PwC@Americas-US
	cc	
	Subject	Re: Today's WSJ - Midco transactions{doclink : document = '51B09EA52FAA66258525743D0049CCF6' view = '60E101E1B0C7344C85256A78006540D' = '85255C1600596C4B' }

The Houston case - Enbridge - was in Tax Notes a couple of weeks ago. It was a PwC client as you will see from the referenced depositions.

This document was not intended or written to be used, and it cannot be used, for the purpose of avoiding U.S. federal, state or local tax penalties.

Joe Realmuto

----- Original Message -----

From: Joe Realmuto

Sent: 05/02/2008 09:34 AM EDT

To: Derek Cain

Cc: Michelle Estrada; M&A TAX Directors; M&A TAX Managers; M&A Tax Managing Directors; M&A TAX Partners; Sam P. Starr

Subject: Re: Today's WSJ - Midco transactions

There is a front page article in today's WSJ: "Dutch Bank Funded US Tax Shelters". The story says "Just a month ago, a federal court in Houston ruled that the purpose of a midco transaction ... was...the evasion of Federal income tax and disallowed the tax benefits stemming from the deal. The IRS is currently challenging two other Rabonbank financed midcos in tax court in Boston and Chicago.".

Does anyone have details on the Houston, Boston and Chicago cases they can share?

Thanks

Joe

Joe Realmuto
PricewaterhouseCoopers LLP
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617-834-2682 (cell)

This document was not intended or written to be used, and it cannot be used, for the purpose of avoiding U.S. federal, state or local tax penalties.

EXHIBIT 12

Timothy Lohnes/US/TLS/PwC		To	Richard P Stovsky/US/TLS/PwC@Americas-US
12/02/2008 04:48 PM		cc	
		bcc	
202-414-1686 Washington D.C. US "Reply to All" is Disabled		Subject	notice

I read through the Notice and agree with your assessment that it shouldn't change any of our prior analysis.

Tim

Timothy J. Lohnes | WNTS Mergers & Acquisitions | PricewaterhouseCoopers | Telephone: +1 202 414 1686 | Mobile: +1 202 375 1662 | timothy.lohnes@us.pwc.com

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December 1, 2008

Guidance on Intermediary Transaction Tax Shelters (Notice 2008-111)

By Sean C Pheils

Rating: (U) Useful
LoS: Tax
Doc Type: Technical & Regulatory Guidance : WNTS Alert

Use Restriction: Internal use only -- U.S. Firm use only
IRC Section: 6011, 6111, 6112

Contact: Corina M Trainer, Rochelle L Hodes

Relevant Geography:
North America, USA

Short Description:
Guidance on Intermediary Transaction Tax Shelters (Notice 2008-111)

Overview

The IRS today issued **Notice 2008-111**, clarifying Notice 2001-16 regarding Intermediary Transaction Tax Shelters. The 2001 Notice identified and described such a transaction as a listed transaction under Reg. sec. 1.6011-4(b)(2). The IRS states that the new Notice defines an intermediary transaction in terms of its plan and of more objective components.

A transaction is treated as an intermediary transaction with respect to a particular person, and not with respect to another person, only if (1) that person engages in the transaction pursuant to the "plan," (2) the transaction contains four objective components indicative of an intermediary transaction, (3) and no safe harbor exception described in the guidance applies to that person. The Notice provides definitions of "plan" and describes the four objective components. The Notice does not affect the legal determination of whether a person's treatment of the transaction is proper or whether such person is liable, at law or in equity, as a transferee of property in respect of the unpaid tax obligation, which is defined in the Notice.

Notice 2008-111 supersedes Notice 2008-20.

Effective Date

The Notice is generally effective January 19, 2001. However, this Notice stats that it imposes no requirements with respect to any obligation under sections 6011, 6111, or 6112 due before December 1, 2008, not otherwise imposed by Notice 2001-16. Because this Notice supersedes Notice 2008-20, any disclosure filed pursuant to Notice 2008-20 will be treated as made pursuant to Notice 2001-16.

The IRS states that some taxpayers may have filed tax returns "taking the position that they were entitled to the purported tax benefits of the types of transactions described in Notice 2001-16," and that these taxpayers "should consult with a tax advisor to ensure that their transactions are disclosed properly and to take appropriate corrective action." The IRS seeks comments regarding the Notice 2008-111 definitions, components, and safe harbors "for the purpose of reflecting more accurately which transactions are the same as or substantially similar to an Intermediary Transaction and which parties are engaging in a transaction pursuant to the Plan."

For additional information, please contact Corina Trainer at 202.414.1328 or Rochelle Hodes at 202.312.7859.

Full text of Notice 2008-111:

WNTS 'Blue Sheet'

independent legal entity.

PricewaterhouseCoopers has taken all reasonable steps to ensure that information contained herein has been obtained from reliable sources and that this publication is accurate and authoritative in all respects. However, it is not intended to give legal, tax, accounting or other professional advice. If such advice or other expert assistance is required, the services of a competent professional should be sought.

Part III - Administrative, Procedural, and Miscellaneous

Intermediary Transaction Tax Shelters

Notice 2008-111

SECTION 1. PURPOSE AND BACKGROUND

This Notice clarifies Notice 2001-16, 2001-1 C.B. 730, and supersedes Notice 2008-20, 2008-6 I.R.B. 406, regarding Intermediary Transaction Tax Shelters. Notice 2001-16 identified the Intermediary Transaction Tax Shelter (hereafter, an "Intermediary Transaction") as a listed transaction under § 1.6011-4(b)(2) of the Income Tax Regulations. For purposes of this Notice, an Intermediary Transaction is defined in terms of its plan and in terms of more objective components. Under this Notice, a transaction is treated as an Intermediary Transaction with respect to a particular person only if that person engages in the transaction pursuant to the Plan (as defined in sections 2 and 4), the transaction contains the four objective components indicative of an Intermediary Transaction set forth in section 3, and no safe harbor exception in section 5 applies to that person. A transaction may be an Intermediary Transaction with respect to one person and not be an Intermediary Transaction with respect to another person. This Notice does not affect the legal determination of whether a person's treatment of the transaction is proper or whether such person is liable, at law or in equity, as a transferee of property in respect of the unpaid tax obligation described in section 3.

SECTION 2. DEFINITION OF THE PLAN

An Intermediary Transaction involves a corporation (T) that would have a Federal income tax obligation with respect to the disposition of assets the sale of which would result in taxable gain (Built-in Gain Assets) in a transaction that would afford the acquiror or acquirors (Y) a cost or fair market value basis in the assets. An Intermediary Transaction is structured to cause the tax obligation for the taxable disposition of the Built-in Gain Assets to arise, in connection with the disposition by shareholders of T (X) of all or a controlling interest in T's stock, under circumstances where the person or persons primarily liable for any Federal income tax obligation with respect to the disposition of the Built-in Gain Assets will not pay that tax (hereafter, the Plan). This plan can be effectuated regardless of the order in which T's stock or assets are disposed. A transaction is not an Intermediary Transaction for purposes of this Notice if there is neither any X nor any Y engaging in the transaction pursuant to the Plan (as defined in section 4).

SECTION 3. COMPONENTS OF AN INTERMEDIARY TRANSACTION

There are four components of an Intermediary Transaction, and a transaction must have all four components to be the same as or substantially similar to the listed transaction described in Notice 2001-16, even if the transaction is engaged in pursuant to the Plan. The four components are:

1. A corporation (T) directly or indirectly (e.g., through a pass-through entity or a member of a consolidated group of which T is a member) owns assets the sale of which would result in taxable gain (T's Built-in Gain Assets) and, as of the Stock Disposition Date (as defined in component two), T (or the consolidated group of which T is a member) has insufficient tax benefits to eliminate or offset such taxable gain (or the tax) in whole. The tax that would result from such sale is hereinafter referred to as T's Built-

in Tax. However, for purposes of this component, T will not be considered to have any Built-in Tax if, on the Stock Disposition Date, such amount is less than five percent of the value of the T stock disposed of in the Stock Disposition (as defined in component two). In determining whether T's (or the consolidated group's) tax benefits are insufficient for purposes of the first sentence, the following tax benefits shall be excluded: (i) any tax benefits attributable to a listed transaction under § 1.6011-4(b)(2), and (ii) any tax benefits attributable to built-in loss property acquired within 12 months before any Stock Disposition described in component two, to the extent such built-in losses exceed built-in gains in property acquired in the same transaction(s). All references to T in this notice include successors to T.

2. At least 80 percent of the T stock (by vote or value) is disposed of by T's shareholder(s) (X), other than in liquidation of T, in one or more related transactions within a 12 month period (Stock Disposition). The first date on which at least 80 percent of the T stock (by vote or value) has been disposed of by X in a Stock Disposition is the Stock Disposition Date.

3. Either within 12 months before, simultaneously, or within 12 months after the Stock Disposition Date, at least 65 percent (by value) of T's Built-in Gain Assets are disposed of (Sold T Assets) to one or more buyers (Y) in one or more transactions in which gain is recognized with respect to the Sold T Assets. For purposes of this component, transactions in which T disposes of all or part of its assets to either another member of the controlled group of corporations (as defined in § 1563) of which T is a member, or a partnership in which members of such controlled group satisfy the requirements of §1.368-1(d)(4)(iii)(B), will be disregarded provided there is no plan to

dispose of at least 65 percent (by value) of T's Built-in Gain Assets to one or more persons that are not members of such controlled group, or to partnerships not described herein.

4. At least half of T's Built-in Tax that would otherwise result from the disposition of the Sold T Assets is purportedly offset or avoided or not paid.

SECTION 4. ENGAGING IN THE TRANSACTION PURSUANT TO THE PLAN

A transaction that has all four components described in section 3 is only an Intermediary Transaction with respect to a person that engages in the transaction pursuant to the Plan. A person engages in the transaction pursuant to the Plan if the person knows or has reason to know the transaction is structured to effectuate the Plan. Additionally, any X that is at least a 5% shareholder of T (by vote or value), or any X that is an officer or director of T, engages in the transaction pursuant to the Plan if any of the following knows or has reason to know the transaction is structured to effectuate the Plan: (i) any officer or director of T; (ii) any of T's advisors engaged by T to advise T or X with respect to the transaction; or (iii) any advisor of that X engaged by that X to advise it with respect to the transaction. For purposes of this section, if T has more than five officers then the term "officer" shall be limited to the chief executive officer of T (or an individual acting in such capacity) and the four highest compensated officers for the taxable year (other than the chief executive officer or an individual acting in such capacity). A person can engage in the transaction pursuant to the Plan even if it does not understand the mechanics of how the tax liability purportedly might be offset or avoided, or the specific financial arrangements, or relationships of other parties or of T after the Stock Disposition.

A person will not be treated as engaging in the transaction pursuant to the Plan merely because it has been offered attractive pricing terms by the opposite party to a transaction.

Thus, a transaction may be an Intermediary Transaction with respect to X but not Y, or with respect to Y but not X, in situations where one party engages in the transaction pursuant to the Plan and the other does not. A transaction may also be an Intermediary Transaction with respect to some but not all Xs and/or some but not all Ys, depending on whether they engage in the transaction pursuant to the Plan. A transaction will not be an Intermediary Transaction with respect to any person that does not engage in the transaction pursuant to the Plan regardless of the amounts reported on any return.

SECTION 5. SAFE HARBOR EXCEPTIONS FOR CERTAIN PERSONS; PARTICIPATION GENERALLY

01. Safe Harbor Exceptions for Certain Persons

A transaction is not an Intermediary Transaction with respect to the following persons under the following circumstances:

- Any X, if the only T stock it disposes of is traded on an established securities market (within the meaning of § 1.453-3(d)(4)) and prior to the disposition X (including related persons described in section 267(b) or 707(b)) did not hold five percent (or more) by vote or value of any class of T stock disposed of by X.
- Any X, T, or M, if, after the acquisition of the T stock, the acquiror of the T stock is the issuer of stock or securities that are publicly traded on an established securities market in the United States, or is consolidated for financial reporting

purposes with such an issuer.

- Any Y, if the only Sold T Assets it acquires are either (i) securities (as defined in section 475(c)(2)) that are traded on an established securities market (within the meaning of § 1.453-3(d)(4)) and represent a less-than-five-percent interest in that class of security, or (ii) assets that are not securities and do not include a trade or business as described in § 1.1060-1(b)(2).

02. Participation

If one of the foregoing safe harbor exceptions does not apply to a person, that person engaged in a transaction pursuant to the Plan, and the transaction has all four components described in section 3, the determination of whether the person participated in an Intermediary Transaction for purposes of § 1.6011-4 in any given taxable year is made under the general rule in § 1.6011-4(c)(3)(i)(A).

SECTION 6. EFFECTIVE DATE; DISCLOSURE, LIST MAINTENANCE, AND REGISTRATION REQUIREMENTS; PENALTIES; OTHER CONSIDERATIONS

Transactions that are the same as, or substantially similar to, the transaction described in Notice 2001-16 were identified as "listed transactions" under § 1.6011-4(b)(2) effective January 19, 2001. Accordingly, this Notice is generally effective January 19, 2001. However, this Notice imposes no requirements with respect to any obligation under § 6011, § 6111, or § 6112 due before December 1, 2008, not otherwise imposed by Notice 2001-16. Because this Notice supersedes Notice 2008-20, any disclosure filed pursuant to Notice 2008-20 will be treated as made pursuant to Notice 2001-16. Independent of their classification as listed transactions, transactions that are the same as, or substantially similar to, the transaction described in Notice 2001-16 may already be subject to the requirements of § 6011, § 6111, or § 6112, or the regulations thereunder.

Persons required to disclose these transactions under § 1.6011-4 and who fail to do so may be subject to the penalty under § 6707A. Persons required to disclose or register these transactions under § 6111 who have failed to do so may be subject to the penalty under § 6707(a). Persons required to maintain lists of investors under § 6112 who fail to provide such lists when requested by the Service may be subject to the penalty under § 6708(a). A person that is a tax-exempt entity within the meaning of § 4965(c), or an entity manager within the meaning of § 4965(d), may be subject to excise tax, disclosure, filing or payment obligations under § 4965, § 6033(a)(2), § 6011, and § 6071. Some taxable parties may be subject to disclosure obligations under § 6011(g) that apply to "prohibited tax shelter transactions" as defined by § 4965(e) (including listed transactions).

In addition, the Service may impose other penalties on persons involved in this transaction or substantially similar transactions (including an accuracy-related penalty under § 6662 or 6662A) and, as applicable, on persons who participate in the promotion or reporting of this transaction or substantially similar transactions (including the return preparer penalty under § 6694, the promoter penalty under § 6700, and the aiding and abetting penalty under § 6701).

Further, under § 6501(c)(10), the period of limitations on assessment may be extended beyond the general three-year period of limitations for persons required to disclose transactions under § 1.6011-4 who fail to do so. See Rev. Proc. 2005-26, 2005-1 C.B. 965.

The Service and the Treasury Department recognize that some taxpayers may have filed tax returns taking the position that they were entitled to the purported tax benefits of the types of transactions described in Notice 2001-16. These taxpayers should consult with a tax advisor to ensure that their transactions are disclosed properly and to take appropriate corrective action.

SECTION 7. EFFECT ON OTHER DOCUMENTS

Notice 2001-16 is clarified. Notice 2008-20 is superseded.

SECTION 8. REQUEST FOR COMMENTS

The Service and the Treasury Department seek comments regarding the above definitions, components, and safe harbors for the purpose of reflecting more accurately which transactions are the same as or substantially similar to an Intermediary Transaction and which parties are engaging in a transaction pursuant to the Plan.

Comments should be submitted to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2008-111), Room 5203, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Alternatively, comments may be hand delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to: CC:PA:LPD:PR (Notice 2008-XX), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Comments may also be submitted electronically, via the following email address: Notice.Comments@irscounsel.treas.gov. Please include "Notice 2008-111" in the subject line of any electronic submissions. All comments received will be open to public inspection and copying.

DRAFTING INFORMATION

The principal author of this notice is Douglas C. Bates of the Office of Associate

Chief Counsel (Corporate). For further information regarding this notice contact Mr. Bates on (202) 622-7550 (not a toll free call).

EXHIBIT 13

Message

From: maury.i.passman@us.pwc.com [maury.i.passman@us.pwc.com]
Sent: 1/17/2008 5:07:52 PM
To: sf m&a
Subject: New IRS notice on intermediary transaction tax shelters
Attachments: _.png

A few years ago, the Service identified the "Intermediary Transaction Tax Shelter" as a listed transaction in Notice 2001-16. The vaguely worded Notice purported to describe certain transactions in which the assets of a corporation were sold following the purported sale of the corporation's stock to an intermediary.

The Service has now issued Notice 2008-20, which identifies the components of an Intermediary Transaction Tax Shelter, and is effective with respect to returns and statements due under sections 6011 or 6111 after today.

n 2008-20_pdf.zip

AA 000639

Part III - Administrative, Procedural, and Miscellaneous

Intermediary Transaction Tax Shelter

Notice 2008-20

SECTION 1. PURPOSE

Notice 2001-16, 2001-1 C.B. 730, identified the Intermediary Transaction Tax Shelter as a listed transaction under § 1.6011-4(b)(2) of the Income Tax Regulations. Since that notice was published, the Internal Revenue Service (Service) has received disclosure statements with respect to Notice 2001-16 transactions pursuant to § 1.6011-4 and other information pursuant to §§ 6111 and 6112 of the Internal Revenue Code and through promoter audits. After reviewing the disclosure statements and other information, the Service and Treasury Department have decided to identify the components of an Intermediary Transaction Tax Shelter. A transaction that does not have all of the components identified herein is not the same as or substantially similar to the listed transaction described in Notice 2001-16. The Service and Treasury Department also are identifying the persons who are treated as participants in an Intermediary Transaction Tax Shelter under § 1.6011-4(c)(3)(i)(A). This notice should not otherwise be construed as limiting the scope or application of Notice 2001-16 and should not otherwise create any inference as to whether or not a transaction was required to be disclosed or registered under § 6011 or § 6111 prior to January 17, 2008.

SECTION 2. BACKGROUND

An Intermediary Transaction Tax Shelter attempts to avoid the corporate income tax from a sale of assets. Generally it involves transactions in which shareholders of a corporation dispose of their shares of stock of the corporation, one or more persons purchase the corporation's assets in one or more taxable transactions, and all or a portion of the gain or tax that would otherwise result to the corporation from a sale of the assets is avoided.

SECTION 3. DISCUSSION

.01 Components of an Intermediary Transaction Tax Shelter

An Intermediary Transaction Tax Shelter involves the use of an intermediary (M) (which can be one or more persons) in facilitating the transaction. However, the Service has received information and comments from taxpayers suggesting that identifying the transaction based on the role of an entity that appears to be an intermediary may result in over-disclosure or under-disclosure of the transaction depending on the circumstances of the transaction. To address these concerns, this notice identifies the four necessary components in an Intermediary Transaction Tax Shelter from the perspective of the target corporation, its shareholders, and the purchasers of the target corporation's assets.

1. A corporation (T) directly or indirectly (e.g., through a pass-through entity or a member of a consolidated group of which T is a member) owns assets the sale of which would result in taxable gain and, as of the time of the stock disposition described in component two, T (or the consolidated group of which T is a member) has insufficient tax benefits to eliminate or offset such taxable gain (or the tax) in whole or in part. The tax that would result from such sale is hereinafter referred to as T's Built-in Tax. In

determining whether T's (or the consolidated group's) tax benefits are insufficient for purposes of the first sentence, the following tax benefits shall be excluded: (i) any tax benefits attributable to a listed transaction under § 1.6011-4(b)(2), and (ii) any tax benefits attributable to built-in loss property acquired within 12 months before the stock disposition described in component two, to the extent such built-in losses exceed built-in gains in property acquired in the same transaction(s). All references to T in this notice include successors to T.

2. At least 50 percent of the T stock (by vote or value) is disposed of by T's shareholder(s) (X), other than in liquidation of T, in one or more related transactions within a 12 month period.

3. Either within 12 months before, simultaneously, or within 12 months after the date on which X has disposed of at least 50 percent of the T stock (by vote or value) (excluding any time T is protected or hedged against price fluctuations), all or most of T's assets are disposed of (Sold T Assets) to one or more buyers (Y) in one or more transactions in which gain is recognized with respect to the Sold T Assets. Where a disposition of Sold T Assets is an intercompany transaction between members of a consolidated group, the disposition will not be a "transaction in which gain is recognized with respect to the Sold T Assets" for purposes of the preceding sentence until such gain must be taken into account under the rules of § 1.1502-13.

4. All or most of T's Built-in Tax described in component one that would otherwise result from the disposition of the Sold T Assets described in component three is purportedly offset or avoided or not paid.

.02 Participation in the Listed Transaction

A transaction must have all four of the components identified herein to be the same as or substantially similar to the listed transaction identified in Notice 2001-16 as the Intermediary Transaction Tax Shelter. In determining whether a person is a participant in a transaction identified in Notice 2001-16, the general rule in § 1.6011-4(c)(3)(i)(A) applies, except the following rules apply with respect to persons in the position of X or Y as described below:

- In no event will any X be treated as a participant under § 1.6011-4(c)(3)(i)(A) if the only T stock X disposes of is traded on an established securities market (within the meaning of § 1.453-3(d)(4)) and prior to the disposition X (including related persons described in section 267(b) or 707(b)) did not hold five percent (or more) by vote or value of any class of T stock disposed of by X.
- In no event will any Y be treated as a participant under § 1.6011-4(c)(3)(i)(A) if the only Sold T Assets acquired by Y are either (i) securities (as defined in section 475(c)(2)) that are traded on an established securities market (within the meaning of § 1.453-3(d)(4)) and represent a less-than-five-percent interest in that class of security, or (ii) assets that are not securities and do not include a trade or business as described in § 1.1060-1(b)(2).

.03 Disclosure, List Maintenance, and Registration Requirements; Penalties; Other Considerations

Independent of their classification as "listed transactions," transactions that are the same as, or substantially similar to, the transaction described in Notice 2001-16 may already be subject to the requirements of § 6011, § 6111, or § 6112, or the regulations thereunder.

Persons involved with these transactions are alerted to certain responsibilities that may arise from their involvement with these transactions. Persons required to disclose these transactions under § 1.6011-4 and who fail to do so may be subject to the penalty under § 6707A. Persons required to disclose or register these transactions under § 6111 who have failed to do so may be subject to the penalty under § 6707(a). Persons required to maintain lists of investors under § 6112 who fail to provide such lists when requested by the Service may be subject to the penalty under § 6708(a). A person that is a tax-exempt entity within the meaning of § 4965(c), or an entity manager within the meaning of § 4965(d), may be subject to excise tax, disclosure, filing or payment obligations under § 4965, § 6033(a)(2), § 6011, and § 6071. Some taxable entities may be subject to disclosure obligations under § 6011(g) that apply to "prohibited tax shelter transactions" as defined by § 4965(e) (including listed transactions).

In addition, the Service may impose other penalties on persons involved in this transaction or substantially similar transactions (including an accuracy-related penalty under § 6662 or 6662A) and, as applicable, on persons who participate in the promotion or reporting of this transaction or substantially similar transactions (including the return preparer penalty under § 6694, the promoter penalty under § 6700, and the aiding and abetting penalty under § 6701).

Further, under § 6501(c)(10), the period of limitations on assessment may be extended beyond the general three-year period of limitations for persons required to disclose transactions under § 1.6011-4 who fail to do so. See Rev. Proc. 2005-26, 2005-1 C.B. 965.

The Service and the Treasury Department recognize that some taxpayers may have filed tax returns taking the position that they were entitled to the purported tax benefits of the types of transactions described in Notice 2001-16. These taxpayers should consult with a tax advisor to ensure that their transactions are disclosed properly and to take appropriate corrective action.

SECTION 4. EFFECTIVE DATE

This notice is effective as of January 17, 2008. This notice is applicable to returns and statements due under § 6011 or § 6111 after January 17, 2008.

SECTION 5. EFFECT ON OTHER DOCUMENTS

Notice 2001-16 is modified with respect to the types of persons who may be treated as participants in an Intermediary Transaction Tax Shelter under § 1.6011-4(c)(3)(i)(A).

DRAFTING INFORMATION

The principal author of this notice is T. Ian Russell of the Office of Associate Chief Counsel (Corporate). For further information regarding this notice contact Mr. Russell at (202) 622-7550 (not a toll-free call).

EXHIBIT 14

Message

From: derek.cain@us.pwc.com [derek.cain@us.pwc.com]
Sent: 5/28/2008 1:08:53 AM
To: rochelle.hodes@us.pwc.com
Subject: Re: Fw: notice 2008-20 Info
Attachments: Untitled attachment 02669.gif; Untitled attachment 02672.gif; Untitled attachment 02675.gif; Untitled attachment 02678.gif; Untitled attachment 02681.gif

Rochelle,

The Notice and what the IRS has said about it are causing quite a stir. I was at the meeting and I can talk with you on Thursday afternoon. Please coordinate with Monica O'Sullivan so I don't mess up and double book my calendar. Thanks.

Derek

Rochelle L Hodes/US/TLS/PwC

Rochelle L Hodes/US/TLS/PwC 05/27/2008 06:28 PM 202-312-7859 Washington DC US "Reply to All" is Disabled	To	Derek Cain/US/TLS/PwC@Americas-US
	cc	
	Subject	Fw: notice 2008-20 Info

Derek--see the NY Bar comments and the write up from the May ABA meeting corp session below. Were you at this session? If so, can you bring me up to speed as to what the issue is? Betsy came out of a meeting and E&Y and Deloitte were very concerned about the reach of Notice 2008-20. Are they just worried that somehow in normal course you sell all your assets in a stock sale to multiple folks and then, not wired into the original deal and unbenownst to the seller, those buyers all sell parts of the assets and those parts total 50% of all the original assets?

Rochelle Hodes | PricewaterhouseCoopers LLP, Tax Quality & Risk Management

1301 K St. NW, Suite 800 West | Washington, DC 20005 | ☎: 202.312.7859 | : 813.990.2396 | : rochelle.hodes@us.pwc.com

----- Forwarded by Rochelle L Hodes/US/TLS/PwC on 05/27/2008 06:23 PM -----

Rochelle L Hodes/US/TLS/PwC 05/27/2008 03:18 PM 202-312-7859 Washington DC US "Reply to All" is Disabled	To	Elaine Church/US/TLS/PwC, Elizabeth Case/US/TLS/PwC
	cc	
	Subject	notice 2008-20 Info

Here's the 2 notices and the issues outlined in the comments below. As I said before, we are covered as far as an initial registration. But, for transactions where we became a material advisor after 1/17/08 we would have to include the taxpayers on our list and provide the taxpayers with our registration number.

AA 000647

[attachment "Notice 2008-20-Midco II_doc.zip" deleted by Derek Cain/US/TLS/PwC] [attachment "Notice 2001-16-Midco I_doc.zip" deleted by Derek Cain/US/TLS/PwC]

NYSBA Members Comment on Intermediary Transaction Tax Shelter Guidance

David Miller of the New York State Bar Association Tax Section has submitted members' comments on, and suggested changes to, guidance on identifying abusive intermediary transaction tax shelters as listed transactions.

Date: May 23, 2008

Full Text Published by taxanalysts®

May 23, 2008

The Honorable Eric Solomon
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

The Honorable Douglas Shulman
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Notice 2008-20 (Intermediary Tax Shelters)[1]

Dear Sirs:

In Notice 2001-16,[2] the Internal Revenue Service and the Treasury Department described an intermediary tax shelter transaction that was designed to avoid the corporate tax on a sale of the assets in a business, indicated the Service's intent to challenge the purported tax results, and identified the transaction and all "substantially similar" transactions as "listed transactions." In Notice 2008-20, the Internal Revenue Service and the Treasury Department identified four necessary components of the intermediary tax shelter described in Notice 2001-16, and provided additional guidance for determining whether a taxpayer may be treated as a participant in the transaction.[3]

As we have expressed in the past, the Tax Section supports your efforts to promote the disclosure of potentially abusive transactions, and recognizes the challenge of achieving an adequate level of disclosure without overburdening taxpayers, their advisors and the marketplace.

In the interest of promoting the goals of Notice 2008-20, we write to suggest certain changes to ensure that a taxpayer and its advisors are able to determine, at the time a transaction is entered into, whether the taxpayer will be considered to be a participant in the listed transaction described in the Notices and to ensure that potentially abusive transactions are included.[4] We also suggest other clarifications to Notice 2008-20.

AA 000648

Background

Notice 2001-16 describes a transaction involving a seller that desires to sell stock of a corporation, a buyer that desires to purchase the corporation's assets (but not its stock), and an intermediary corporation. The seller purports to sell the stock of the corporation to the intermediary and the intermediary purports to sell the assets to the buyer. In one version of the transaction, the intermediary has losses or credits, the corporation and the intermediary file a consolidated return, and the intermediary's losses or credits offset the gain (or tax) resulting from the sale of the assets. In another version of the transaction, the intermediary is an entity that is not subject to tax and the corporation liquidates in a transaction that is not described in section 337(b)(2) or Regulations section 1.337(d)-4.[5] (The transaction described in Notice 2001-16 is sometimes referred to as an intermediary transaction tax shelter or as a "midco" transaction.) In Notice 2001-16, the IRS indicated that it may challenge the tax results of this transaction on one or more of several grounds and/or may impose penalties on the participants, and identified the transaction and substantially similar transactions as "listed transactions."

Nevertheless, after Notice 2001-16 was published, tax shelters that produced similar results continued to be marketed. For example, in one transaction that was marketed after Notice 2001-16 was published, a third party would purchase stock in a closely held corporation after the corporation had sold its assets but prior to its liquidation *(i.e.,* at a time when the company's only remaining asset was its pre-liquidation cash) in order to achieve the same result as the transaction in Notice 2001-16 *(i.e.,* avoidance of the corporate tax on the sale of the corporation's assets). Promoters argued that the transaction was not substantially similar to the transaction in Notice 2001-16 because there was no "intermediary" between the asset buyer and seller: the asset sale ostensibly occurred independently and prior to the third party's involvement, and so the third party could claim that it was not an intermediary with respect to the asset buyer or the stock seller.

On the other hand, many buyers and sellers that were not engaged in abusive transactions, and their advisors, were nevertheless concerned that their transactions might be viewed as "substantially similar" to the one described in Notice 2001-16 and reported them under Sections 6011, 6111 and 6112 and the regulations thereunder.

Notice 2008-20 seeks to require taxpayers to disclose transactions that achieve the same result as that described in Notice 2001-16 by shifting the focus away from the "intermediary" toward four objectively measurable indicia of an intermediary transaction tax shelter, while exempting certain non-abusive transactions by providing safe harbors for a narrow set of buyers and sellers.

Under Notice 2008-20, a transaction will be considered the same or substantially similar to the listed intermediary tax shelter transaction described in Notice 2001-16 if four necessary components are present in the context of a transaction that "attempts to avoid the corporate income tax from a sale of assets." In addition to the existence of an intermediary "facilitating [(but not necessarily *intermediating)*] the transaction," the following four components are necessary:

1. The target corporation directly or indirectly owns assets, the sale of which would result in taxable gain and, at the time of the stock disposition described in component 2 below, the corporation (or the consolidated group of which the corporation is a member) has insufficient "tax benefits"[6] to eliminate or offset in whole or in part such taxable gain. Notice 2008-20 refers to the tax that would result from such sale as the "Built-in Tax."

AA 000649

2. At least fifty percent of the corporation's stock (by vote or value) is disposed of by one or more sellers, other than in liquidation of the corporation, in one or more related transactions within a 12-month period.

3. Within the 12-month period before, simultaneous with, or within the 12-month period after the date on which one or more sellers dispose of at least fifty percent of the corporation's stock (by vote or value), all or most of the corporation's assets are disposed of to one or more buyers in one or more transactions in which gain is recognized with respect to the assets. The 24-month period is extended for any time when "the corporation is protected or hedged against price fluctuations." An intercompany disposition of the corporation's assets that defers gain is taken into account only when the gain is taken into account.[7]

4. All or most of the Built-in Tax that would otherwise have resulted from the disposition(s) described in component 3 is purportedly offset or avoided or not paid.

In determining whether a person is a participant in the listed transaction identified in Notices 2001-16 and 2008-20, the general rule in Treasury Regulations section 1.6011-4(c)(3)(i)(A) applies,[8] except that Notice 2008-20 provides narrow safe harbors for certain stock sellers and buyers. Specifically, (1) a stock seller will not be treated as a participant in the listed transaction if the only stock of the target corporation disposed of is traded on an established securities market and, prior to the disposition(s), the seller was not a five-percent shareholder by vote or value and (2) an asset buyer will not be treated as a participant in the listed transaction if it purchases only (i) publicly-traded securities representing a less-than-five-percent interest in that class of security or (ii) assets that are not securities and that do not include a trade or business.

Summary of Recommendations

1. We recommend that a taxpayer be treated as a participant in an intermediary tax shelter transaction only if, at the time the taxpayer enters into a transaction, the taxpayer knows or has reason to know that the transaction is described in the Notices. This requirement will permit a taxpayer and its advisors to determine from the outset of a transaction whether the taxpayer might be treated as a participant in the listed transaction identified in the Notices.

2. We suggest an additional safe harbor for *de minimis* Built-in Taxes and suggest removal of the exclusion for sellers with *de minimis* tax benefits.

3. Finally, we request clarification of the phrase "all or most" in components 3 and 4, and guidance on the proper time for valuing assets in component 3.

Discussion

1. Introduce a "knowledge" requirement for participation

As currently drafted. Notice 2008-20 may implicate non-abusive transactions. Moreover, buyers and sellers who are not knowingly involved in a tax-avoidance plan will not be able to determine at the time they enter into the transaction whether they are about to participate in a listed transaction, and they will not be able to avoid participation through contract. For this reason, we recommend that a taxpayer be treated as a participant in an intermediary tax shelter transaction only if, at the time it enters into the transaction, the taxpayer knows or has reason to know that the transaction is described in the Notices.

Under Treasury Regulations section 1.6011-4(c)(3)(i)(A), a taxpayer is treated as a participant in a listed transaction if (1) its tax return reflects tax consequences or a tax strategy described in published guidance (here, the Notices) or (2) it knows or has reason to know that its tax benefits are derived directly or indirectly from the tax consequences or from the tax strategy described in published guidance. It appears that a stock seller's gain or loss on its stock disposition and an asset buyer's basis in its acquired assets in an intermediary tax shelter transaction would be treated as reflecting the tax consequences or strategy of the listed transaction, without regard to whether the seller or buyer knew or had reason to know that its transaction was part of such a tax strategy.

In most cases involving an intermediary tax shelter transaction, we believe that both the stock seller and the asset buyer will be aware of the existence of a tax-avoidance plan. For example, a selling shareholder may receive a price premium that is clearly attributable to the use of an intermediary tax shelter, or the taxpayer will be aware that its counter-party has engaged in intermediary tax shelters. Such were the facts *of Enbridge Energy Co. v. United States,* where a stock seller received a substantially increased purchase price for facilitating an asset buyer's purchase through an intermediary.[9] Notice 2008-20, however, appears to apply to a taxpayer even if it does not know or have reason to know of the existence of the components described in Notice 2008-20.

Stock sellers and asset buyers may not be in a position to know at the time of the relevant closing, or for that matter ever, whether they are participating in a listed transaction. Notice 2008-20 applies to transactions in which there are sufficient dispositions of assets by a corporation within a year of (before or after) a disposition of the corporation's stock. What's more, that two-year period is tolled indefinitely when the corporation "is protected or hedged against price fluctuations." A selling shareholder, however, may not know at the time it sells its shares (or ever) whether its buyer will dispose of corporate assets during the one-year (or possibly longer) period following the sale. Conversely, an asset buyer may not know at the time of its purchase (and may never know) that the shareholders of the corporation whose assets it purchases will dispose of a sufficiently large number of their shares in the year (or longer) following its purchase to cause Notice 2008-20 to apply.

Buyers and sellers should be able to determine reasonably whether they are participating in a listed transaction at the time they enter into a transaction. Although we understand that some advisors have begun to conduct due diligence and request representations and covenants in their agreements to the effect that their counter-parties will not take any action that will cause the transaction to be a listed transaction within the meaning of Notice 2008-20, this due diligence is atypical and these representations and covenants may be resisted for commercial reasons in non-abusive transactions. Moreover, contractual representations would not relieve a party of its disclosure responsibilities should its counterparty fail to comply, and may not be effectively enforceable.

In the face of this uncertainty, it has been suggested that a taxpayer should file a protective disclosure or request a ruling on the merits of its transaction. We do not believe that these approaches are in the interest of the government or taxpayers.

Instead, we recommend that a "knowledge" standard apply on a taxpayer-by-taxpayer basis in order for a taxpayer to be treated as a participant in the listed transaction described in the Notices. A stock seller or asset buyer should not be treated as a participant in the listed transaction if, at the time it enters into the transaction, it does not know about a plan to engage in the listed transaction and has no reason to know that its counterparty is or will be involved in a midco transaction.[10]

In implementing this recommendation, the government might consider identifying circumstances under which a taxpayer will be presumed to have reason to know of a midco strategy. We would expect these circumstances to include where an intermediary is inserted in a purchase and sale transaction after negotiations over substantial aspects of the transaction have taken place. The government might also consider identifying circumstances under which a taxpayer will be presumed not to have such reason to know, including where the asset seller or stock purchaser is a publicly traded company.

It has been suggested that a "knowledge" standard would continue to permit underreporting by those taxpayers who might falsely deny having a reason to know that they are participating in a tax-avoidance transaction. As mentioned above, we believe that in most cases both the stock seller and the asset buyer will know or have reason to know about the midco transaction. There will inevitably be taxpayers who do not comply with any disclosure regime; Notice 2008-20 will not transform liars into honest taxpayers. However, on balance we believe that concern about fraudulent underreporting does not justify the administrative and economic burden that Notice 2008-20 imposes on compliance-minded taxpayers (and their material advisors) who neither know nor have reason to know of a midco transaction.

We further note that the intermediary transaction tax shelter identified in Notice 2001-16 specified that the parties undertook the transaction "[p]ursuant to a plan." It is not clear that Notice 2008-20 retains this concept. The answer depends on the extent to which Notice 2008-20 must be read together with Notice 2001-16. If in fact it was intended that the "plan" concept be retained, guidance should clarify that a taxpayer must either be a party to the plan, or know or have reason to know of the plan, and in both cases whether the taxpayer's respective transaction must be undertaken "pursuant" to the plan, in order to be treated as a participant.

2. Add a *de minimis* built-in tax safe harbor

We recommend an additional safe harbor where the amount of Built-in Tax is *de minimis.* Under general principles, if only *de minimis* taxes are potentially avoided in a transaction, the transaction should not be considered a tax shelter.

3. Remove the apparent *de minimis* tax benefits exemption

The first requirement of Notice 2008-20 is that the corporation "has insufficient tax benefits to eliminate or offset such taxable gain (or the tax) *in whole or in part"* (emphasis added). Read literally, this requirement would not be satisfied if, at the time of the stock disposition(s) described in the second component, the corporation has *any* tax benefit that would offset even a small part of the taxable gain (or the tax). We believe this implication was unintended. A transaction should be treated as substantially similar to the transaction described in the Notices even if some of the potential gain would be offset by a tax benefit so long as the amount of Built-in Tax is more than *de minimis.*

4. Define "all or most"

In order for an intermediary transaction tax shelter to be substantially similar to the transaction in Notice 2001-16, "all or most" of the corporation's assets must be sold within the time frame given in the third component, *and* "all or most" of the Built-in Tax purport to be offset or avoided or not paid. This is a critical feature of the Notices because a taxpayer may well try to avoid the Notices by engaging in a transaction in which the corporation disposes of just less than "all or most" of its assets, or alternatively by avoiding just less than "all or most" of the Built-in Tax. However, "all or most" is not a commonly understood term of art in the tax law. Therefore, clearer guidance on the meaning of the term would be helpful. In particular, if this test is intended to be interpreted more expansively than "all or substantially all," the Notices should be clarified to say so.

In addition, the first prong of the test in Notice 2008-20 could literally be avoided if assets having all or most of the taxable gain were sold, but those assets did not represent all or most of the assets of the corporation. The Notice would be under-inclusive if its aim is to include all transactions in which all or most of the taxable gain is avoided. On the other hand, a corporation might dispose of a portion of its assets in non-abusive circumstances, and its retention of a substantial amount of assets might be viewed as evidence that the transaction is not abusive. If, however, the Notice's intention is not to provide a safe harbor for transactions that involve only a minority disposition of assets, the Notice should be clarified to reflect its intent.

In providing clarification of the Notice, it might also be helpful to specify when the baseline value of the assets should be measured in order to determine whether "most" of the assets have been disposed of. Should valuation occur at the outset of the period described in component 3, in the middle, or at the end? In the case of assets with fluctuating or, worse even, declining values, the timing of this measurement could determine whether a transaction is described in the Notices.

We appreciate your consideration of our recommendations and comments. Please let us know if you would like to discuss this letter or if we can otherwise further assist you.

Respectfully,

David S. Miller
New York State Bar Association
Albany, NY

cc:
William Alexander
Associate Chief Counsel (Corporate)
Internal Revenue Service

T. Ian Russell
Senior Counsel
Internal Revenue Service

Lon B. Smith
National Counsel to the Chief
Counsel for Special Projects
Internal Revenue Service

Karen Gilbreath Sowell
Deputy Assistant Secretary for Tax Policy
Department of the Treasury

FOOTNOTES

[1] The principal drafters of this letter are Kathleen Ferrell and Michael Bretholz. Helpful comments were received from Kimberly Blanchard, Peter Blessing, Michael Farber, Edward Gonzalez, David Miller, Michael Schler, Jodi Schwartz, Linda Swartz, and Diana Wollman.

[2] 2001-1 C.B. 730.

[3] 2008-6 I.R.B. 406.

[4] "Notices" refers to Notices 2001-16 and 2008-20, taken together.

[5] All "Section" references are to the Internal Revenue Code of 1986, as amended, and all references to the regulations are to the Treasury Regulations promulgated thereunder.

[6] Tax benefits for this purpose exclude benefits attributable to a listed transaction or to property with a built-in loss acquired within 12 months before the stock disposition described in component 2 below, to the extent that such built-in losses exceed built-in gains in property acquired in the same transaction(s).

[7] It is not clear whether the 12-month periods before and after the stock disposition are tolled for periods when the corporation is hedged or protected against fluctuations in the price of its assets or some other price fluctuation.

[8] Regulations section 1.6011-4(c)(3)(i)(A) provides, in general, that a taxpayer has participated in a listed transaction if the taxpayer's tax return reflects tax consequences or a tax strategy described in the published guidance that lists the transaction. A taxpayer also has participated in a listed transaction if the taxpayer knows or has reason to know that the taxpayer's tax benefits arc derived directly or indirectly from tax consequences or a tax strategy described in published guidance that lists the transaction.

[9] 101 AFTR 2d 2008-1733 (Mar. 31, 2008)

[10] Regardless of whether a given taxpayer knows or has reasons to know of a midco transaction, the transaction will nonetheless remain a listed transaction with respect to the intermediary and the other party (*i.e.,* the stock seller or asset purchaser, as the case may be) who have actual knowledge of the midco transaction and who are its true participants.

END OF FOOTNOTES

Tax Analysts Information

Code Section: Section 6011 -- Return Filing Requirement; Section 6111 -- Tax Shelter Registration; Section 6112 -- Tax Shelter List Requirement; Section 6707 -- Tax Shelter Info. Penalty; Section 6707A -- Reportable Transactions Information Penalty; Section 6708 -- Tax Shelter Investor List
Jurisdiction: United States
Subject Area: Compliance
Corporate taxation
Information disclosure
Information reporting
Penalties
Author: Miller, David S.
Institutional Author: New York State Bar Association Tax Section
Tax Analysts Document Number: Doc 2008-11600 [PDF]
Tax Analysts Electronic Citation: 2008 TNT 102-67

Cross Reference: For Notice 2008-20, 2008-6 IRB 406, see *Doc 2008-1029* [**PDF**] or *2008 TNT 13-5* {2008 TNT 13-5: Internal Revenue Bulletin}.
For Notice 2001-16, 2001-1 C.B. 730, see *Doc 2001-2019* [**PDF**] or *2001 TNT 13-3*

Listed Transaction Guidance May Complicate Some Stock Transactions

by David D. Stewart

The intermediary transaction tax shelter guidance issued in January 2008 may require the stock seller to either receive a covenant from the purchaser or file a protective listed transaction notice, according to officials.

Date: May 13, 2008

The intermediary transaction tax shelter guidance issued in January 2008 may require the stock seller to either receive a covenant from the purchaser or file a protective listed transaction notice, according to officials.

Notice 2008-20, issued January 17, updates Notice 2001-16, which identified the intermediary transaction tax shelter as a listed transaction. (For Notice 2008-20, 2008-6 IRB 406, see *Doc 2008-1029* [**PDF**] or *2008 TNT 13-5* {2008 TNT 13-5: Internal Revenue Bulletin}.)

The structure of the shelter involves avoiding corporate tax on the sale of assets through a stock sale to an intermediary.

In the notice, the government identifies the transaction and requires any taxpayer whose return reflects tax consequences or the described tax strategy to file a listed transaction notice. It was the lack of a knowledge requirement that received the most attention at a May 10 Corporate Tax session of the American Bar Association Section of Taxation meeting in Washington.

Panelists questioned government officials on the application of the notice and the language used to describe the transaction. Michael Schler of Cravath Swaine & Moore LLP questioned the use of the term "all or most" in the notice's description of the transaction rather than more commonly used language.

Mark Schneider, who had until recently been with the IRS but is now with Deloitte Tax LLP, explained that the notice was written because the first notice had stopped most, but not all, of these transactions.

Marc Countryman, an attorney-adviser at Treasury, added that the notice "took a very long time and was very difficult to write." He explained that the notice was written to catch abusive transactions, but not real business deals. That is why the notice avoids bright-line rules, according to Countryman. He added that the government was open to comments on how the notice could be improved.

Schler then turned to the question of who is required to file a listed transaction notice on the intermediary transaction tax shelter. Schler described a scenario in which a corporation sells a subsidiary to another party but does not know that the listed transaction will occur. He asked Stephen Fattman, special counsel to the IRS associate chief counsel (corporate), if a seller could be engaged in a listed transaction if the purchaser refused to say if it intended to take the actions described in the notice.

Fattman said that in such a case the seller would not have engaged in enough diligence to avoid the listed transaction requirements. The panel discussed the possibility for sellers to seek a covenant from purchasers through which the parties would agree not to engage in the listed transaction.

Schler asked whether that meant that every stock sale agreement would require a covenant since the buyer won't do something that gets the seller in the notice, which Fattman answered affirmatively.

Schler responded by calling the government position a "revolutionary concept."

"How else could you assure yourself that you will not be within the notice?" asked Fattman.

He said the government's position is based on the failure of the previous notice to shut down the transaction and reiterated that the government is open to suggestion on the notice.

Schler pointed out that asset buyers will also be affected by the notice since the future actions of the seller could make the purchase a listed transaction, calling the situation a "disaster from everybody's point of view."

Comment on this story

Tax Analysts Information

Code Section: Section 6111 -- Tax Shelter Registration; Section 6112 -- Tax Shelter List Requirement; Section 6707 -- Tax Shelter Info. Penalty; Section 6707A -- Reportable Transactions Information Penalty; Section 6011 -- Return Filing Requirement
Jurisdiction: United States
Subject Area: Compliance
Corporate taxation
Information reporting
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Author: Stewart, David D.
Institutional Author: Tax Analysts
Tax Analysts Document Number: Doc 2008-10415
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This document was not intended or written to be used, and it cannot be used, for the purpose of avoiding U.S. federal, state or local tax penalties.

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EXHIBIT 15

Message

From: rochelle.hodes@us.pwc.com [rochelle.hodes@us.pwc.com]
Sent: 5/29/2008 11:58:37 PM
To: gary.cesnik@us.pwc.com; carl.duyck@us.pwc.com; elizabeth.case@us.pwc.com
CC: david.andres@us.pwc.com; elaine.church@us.pwc.com
Subject: MIdco-- notice 2008-20 --Independence Implications
Attachments: _.png; _.png; Untitled attachment 01746.gif; Untitled attachment 01749.gif; Untitled attachment 01752.gif; Untitled attachment 01755.gif; Untitled attachment 01758.gif

Importance: High

This is to alert you that the IRS midco modification (Notice 2008-20 modified the original Notice 2001-16, both below) issued in January 2008 is so broad as to make almost every deal to sell stock of a company (short of a complete liquidation) a potential listed transaction. The actual listed transaction would be triggered if the buyer turns around and sells 50% or more of the stock within a 12 month period after the purchase. When a representative from office of chief counsel was asked about this at the May ABA meeting, the response was that the sellers should put language in their agreements to ensure the buyer does not later trigger the listed transaction (I believe this is not commercially practical, nor is it a surefire cure) and if worried, the parties should do a protective listed disclosure. This is an ok (not ideal) answer for lawyers because they will just do one registration for the midco (which we already have), but for us this resolution is not acceptable because we have the PCAOB Rule 3522 to worry about. NY Bar suggests including a knowledge requirement to have the listed transaction trigger. It is unclear whether some other sham or substance test could be applied. See coverage and NYBar letter below for more details.

I spoke with Derek Cain and David Andres and David said he was going to reach out to Betsy and you, Gary. They were also going to loop in Jon and Mark Boyer (the SMS for midco). Derek said E&Y and D&T corporate guys were looking to get an accounting firm group to go in and talk to Chief Counsel (Corporate)--the office that made this mess. I also reached out to my contact at Treasury who said this is primarily a corporate issue and the Treasury and Chief Counsel officials who deal with corporate issues would handle this--not the 6011 procedural person. My contact suggested that meeting with these government corporate officials was a good idea. She also said that it was unlikely that govt would pull the notice back, as they did with notice 98-5 because of the current IRS litigating position on midcos (both LMSB and Chief Counsel (Corporate) would be unwilling to show any weakness).

Regardless of the fix (which one has to hope will come), we need to do something in the meantime. Gary/Carl you guys probably want to think about informing Kevin. There is also the issue about what to do with Global.

I'm not sure what the normal canvass we usually do with listed transactions will get us (but we can certainly do one). I think this is better if M&A develops a message and sends it to their people. However, other than alerting the practice to the issue, which already exists when you apply substantially similar to the original midco notice, what do we tell the practice to do?

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----- Forwarded by Rochelle L Hodes/US/TLS/PwC on 05/29/2008 07:32 PM -----

Rochelle L Hodes/US/TLS/PwC 05/27/2008 03:18 PM 202-312-7859 Washington DC US "Reply to All" is Disabled	

To	Elaine Church/US/TLS/PwC, Elizabeth Case/US/TLS/PwC
cc	
Subject	notice 2008-20 Info

Here's the 2 notices and the issues outlined in the comments below. As I said before, we are covered as far as an initial registration. But, for transactions where we became a material advisor after 1/17/08 we would have to include the taxpayers on our list and provide the taxpayers with our registration number.

Notice 2008-20-Midco II_doc.zip Notice 2001-16-Midco I_doc.zip

NYSBA Members Comment on Intermediary Transaction Tax Shelter Guidance

David Miller of the New York State Bar Association Tax Section has submitted members' comments on, and suggested changes to, guidance on identifying abusive intermediary transaction tax shelters as listed transactions.

Date: May 23, 2008

Full Text Published by taxanalysts®

May 23, 2008

The Honorable Eric Solomon
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

The Honorable Douglas Shulman
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Notice 2008-20 (Intermediary Tax Shelters)[1]

Dear Sirs:

In Notice 2001-16,[2] the Internal Revenue Service and the Treasury Department described an intermediary tax shelter transaction that was designed to avoid the corporate tax on a sale of the assets in a business, indicated the Service's intent to challenge the purported tax results, and identified the transaction and all "substantially similar" transactions as "listed transactions." In Notice

AA 000660

2008-20, the Internal Revenue Service and the Treasury Department identified four necessary components of the intermediary tax shelter described in Notice 2001-16, and provided additional guidance for determining whether a taxpayer may be treated as a participant in the transaction.[3]

As we have expressed in the past, the Tax Section supports your efforts to promote the disclosure of potentially abusive transactions, and recognizes the challenge of achieving an adequate level of disclosure without overburdening taxpayers, their advisors and the marketplace.

In the interest of promoting the goals of Notice 2008-20, we write to suggest certain changes to ensure that a taxpayer and its advisors are able to determine, at the time a transaction is entered into, whether the taxpayer will be considered to be a participant in the listed transaction described in the Notices and to ensure that potentially abusive transactions are included.[4] We also suggest other clarifications to Notice 2008-20.

Background

Notice 2001-16 describes a transaction involving a seller that desires to sell stock of a corporation, a buyer that desires to purchase the corporation's assets (but not its stock), and an intermediary corporation. The seller purports to sell the stock of the corporation to the intermediary and the intermediary purports to sell the assets to the buyer. In one version of the transaction, the intermediary has losses or credits, the corporation and the intermediary file a consolidated return, and the intermediary's losses or credits offset the gain (or tax) resulting from the sale of the assets. In another version of the transaction, the intermediary is an entity that is not subject to tax and the corporation liquidates in a transaction that is not described in section 337(b)(2) or Regulations section 1.337(d)-4.[5] (The transaction described in Notice 2001-16 is sometimes referred to as an intermediary transaction tax shelter or as a "midco" transaction.) In Notice 2001-16, the IRS indicated that it may challenge the tax results of this transaction on one or more of several grounds and/or may impose penalties on the participants, and identified the transaction and substantially similar transactions as "listed transactions."

Nevertheless, after Notice 2001-16 was published, tax shelters that produced similar results continued to be marketed. For example, in one transaction that was marketed after Notice 2001-16 was published, a third party would purchase stock in a closely held corporation after the corporation had sold its assets but prior to its liquidation *(i.e.,* at a time when the company's only remaining asset was its pre-liquidation cash) in order to achieve the same result as the transaction in Notice 2001-16 *(i.e.,* avoidance of the corporate tax on the sale of the corporation's assets). Promoters argued that the transaction was not substantially similar to the transaction in Notice 2001-16 because there was no "intermediary" between the asset buyer and seller: the asset sale ostensibly occurred independently and prior to the third party's involvement, and so the third party could claim that it was not an intermediary with respect to the asset buyer or the stock seller.

On the other hand, many buyers and sellers that were not engaged in abusive transactions, and their advisors, were nevertheless concerned that their transactions might be viewed as "substantially similar" to the one described in Notice 2001-16 and reported them under Sections 6011, 6111 and 6112 and the regulations thereunder.

Notice 2008-20 seeks to require taxpayers to disclose transactions that achieve the same result as that described in Notice 2001-16 by shifting the focus away from the "intermediary" toward four objectively measurable indicia of an intermediary transaction tax shelter, while exempting certain non-abusive transactions by providing safe harbors for a narrow set of buyers and sellers.

Under Notice 2008-20, a transaction will be considered the same or substantially similar to the listed intermediary tax shelter transaction described in Notice 2001-16 if four necessary components are present in the context of a transaction that "attempts to avoid the corporate income tax from a sale of assets." In addition to the existence of an intermediary "facilitating [(but not necessarily *intermediating)*] the transaction," the following four components are necessary:

1. The target corporation directly or indirectly owns assets, the sale of which would result in taxable gain and, at the time of the stock disposition described in component 2 below, the corporation (or the consolidated group of which the corporation is a member) has insufficient "tax benefits"[6] to eliminate or offset in whole or in part such taxable gain. Notice 2008-20 refers to the tax that would result from such sale as the "Built-in Tax."

2. At least fifty percent of the corporation's stock (by vote or value) is disposed of by one or more sellers, other than in liquidation of the corporation, in one or more related transactions within a 12-month period.

3. Within the 12-month period before, simultaneous with, or within the 12-month period after the date on which one or more sellers dispose of at least fifty percent of the corporation's stock (by vote or value), all or most of the corporation's assets are disposed of to one or more buyers in one or more transactions in which gain is recognized with respect to the assets. The 24-month period is extended for any time when "the corporation is protected or hedged against price fluctuations." An intercompany disposition of the corporation's assets that defers gain is taken into account only when the gain is taken into account.[7]

4. All or most of the Built-in Tax that would otherwise have resulted from the disposition(s) described in component 3 is purportedly offset or avoided or not paid.

In determining whether a person is a participant in the listed transaction identified in Notices 2001-16 and 2008-20, the general rule in Treasury Regulations section 1.6011-4(c)(3)(i)(A) applies,[8] except that Notice 2008-20 provides narrow safe harbors for certain stock sellers and buyers. Specifically, (1) a stock seller will not be treated as a participant in the listed transaction if the only stock of the target corporation disposed of is traded on an established securities market and, prior to the disposition(s), the seller was not a five-percent shareholder by vote or value and (2) an asset buyer will not be treated as a participant in the listed transaction if it purchases only (i) publicly-traded securities representing a less-than-five-percent interest in that class of security or (ii) assets that are not securities and that do not include a trade or business.

Summary of Recommendations

1. We recommend that a taxpayer be treated as a participant in an intermediary tax shelter transaction only if, at the time the taxpayer enters into a transaction, the taxpayer knows or has reason to know that the transaction is described in the Notices. This requirement will permit a taxpayer and its advisors to determine from the outset of a transaction whether the taxpayer might be treated as a participant in the listed transaction identified in the Notices.

2. We suggest an additional safe harbor for *de minimis* Built-in Taxes and suggest removal of the exclusion for sellers with *de minimis* tax benefits.

3. Finally, we request clarification of the phrase "all or most" in components 3 and 4, and guidance on the proper time for valuing assets in component 3.

Discussion

1. Introduce a "knowledge" requirement for participation

As currently drafted. Notice 2008-20 may implicate non-abusive transactions. Moreover, buyers and sellers who are not knowingly involved in a tax-avoidance plan will not be able to determine at the time they enter into the transaction whether they are about to participate in a listed transaction, and they will not be able to avoid participation through contract. For this reason, we recommend that a taxpayer be treated as a participant in an intermediary tax shelter transaction only if, at the time it enters into the transaction, the taxpayer knows or has reason to know that the transaction is described in the Notices.

Under Treasury Regulations section 1.6011-4(c)(3)(i)(A), a taxpayer is treated as a participant in a listed transaction if (1) its tax return reflects tax consequences or a tax strategy described in published guidance (here, the Notices) or (2) it knows or has reason to know that its tax benefits are derived directly or indirectly from the tax consequences or from the tax strategy described in published guidance. It appears that a stock seller's gain or loss on its stock disposition and an asset buyer's basis in its acquired assets in an intermediary tax shelter transaction would be treated as reflecting the tax consequences or strategy of the listed transaction, without regard to whether the seller or buyer knew or had reason to know that its transaction was part of such a tax strategy.

In most cases involving an intermediary tax shelter transaction, we believe that both the stock seller and the asset buyer will be aware of the existence of a tax-avoidance plan. For example, a selling shareholder may receive a price premium that is clearly attributable to the use of an intermediary tax shelter, or the taxpayer will be aware that its counter-party has engaged in intermediary tax shelters. Such were the facts *of Enbridge Energy Co. v. United States,* where a stock seller received a substantially increased purchase price for facilitating an asset buyer's purchase through an intermediary.[9] Notice 2008-20, however, appears to apply to a taxpayer even if it does not know or have reason to know of the existence of the components described in Notice 2008-20.

Stock sellers and asset buyers may not be in a position to know at the time of the relevant closing, or for that matter ever, whether they are participating in a listed transaction. Notice 2008-20 applies to transactions in which there are sufficient dispositions of assets by a corporation within a year of (before or after) a disposition of the corporation's stock. What's more, that two-year period is tolled indefinitely when the corporation "is protected or hedged against price fluctuations." A selling shareholder, however, may not know at the time it sells its shares (or ever) whether its buyer will dispose of corporate assets during the one-year (or possibly longer) period following the sale. Conversely, an asset buyer may not know at the time of its purchase (and may never know) that the shareholders of the corporation whose assets it purchases will dispose of a sufficiently large number of their shares in the year (or longer) following its purchase to cause Notice 2008-20 to apply.

Buyers and sellers should be able to determine reasonably whether they are participating in a listed transaction at the time they enter into a transaction. Although we understand that some advisors have begun to conduct due diligence and request representations and covenants in their agreements to the effect that their counter-parties will not take any action that will cause the transaction to be a listed transaction within the meaning of Notice 2008-20, this due diligence is atypical and these representations and covenants may be resisted for commercial reasons in non-abusive transactions.

Moreover, contractual representations would not relieve a party of its disclosure responsibilities should its counterparty fail to comply, and may not be effectively enforceable.

In the face of this uncertainty, it has been suggested that a taxpayer should file a protective disclosure or request a ruling on the merits of its transaction. We do not believe that these approaches are in the interest of the government or taxpayers.

Instead, we recommend that a "knowledge" standard apply on a taxpayer-by-taxpayer basis in order for a taxpayer to be treated as a participant in the listed transaction described in the Notices. A stock seller or asset buyer should not be treated as a participant in the listed transaction if, at the time it enters into the transaction, it does not know about a plan to engage in the listed transaction and has no reason to know that its counterparty is or will be involved in a midco transaction.[10]

In implementing this recommendation, the government might consider identifying circumstances under which a taxpayer will be presumed to have reason to know of a midco strategy. We would expect these circumstances to include where an intermediary is inserted in a purchase and sale transaction after negotiations over substantial aspects of the transaction have taken place. The government might also consider identifying circumstances under which a taxpayer will be presumed not to have such reason to know, including where the asset seller or stock purchaser is a publicly traded company.

It has been suggested that a "knowledge" standard would continue to permit underreporting by those taxpayers who might falsely deny having a reason to know that they are participating in a tax-avoidance transaction. As mentioned above, we believe that in most cases both the stock seller and the asset buyer will know or have reason to know about the midco transaction. There will inevitably be taxpayers who do not comply with any disclosure regime; Notice 2008-20 will not transform liars into honest taxpayers. However, on balance we believe that concern about fraudulent underreporting does not justify the administrative and economic burden that Notice 2008-20 imposes on compliance-minded taxpayers (and their material advisors) who neither know nor have reason to know of a midco transaction.

We further note that the intermediary transaction tax shelter identified in Notice 2001-16 specified that the parties undertook the transaction "[p]ursuant to a plan." It is not clear that Notice 2008-20 retains this concept. The answer depends on the extent to which Notice 2008-20 must be read together with Notice 2001-16. If in fact it was intended that the "plan" concept be retained, guidance should clarify that a taxpayer must either be a party to the plan, or know or have reason to know of the plan, and in both cases whether the taxpayer's respective transaction must be undertaken "pursuant" to the plan, in order to be treated as a participant.

2. Add a *de minimis* built-in tax safe harbor

We recommend an additional safe harbor where the amount of Built-in Tax is *de minimis*. Under general principles, if only *de minimis* taxes are potentially avoided in a transaction, the transaction should not be considered a tax shelter.

3. Remove the apparent *de minimis* tax benefits exemption

The first requirement of Notice 2008-20 is that the corporation "has insufficient tax benefits to eliminate or offset such taxable gain (or the tax) *in whole or in part"* (emphasis added). Read literally, this requirement would not be satisfied if, at the time of the stock disposition(s) described in the second component, the corporation has *any* tax benefit that would offset even a small part of the taxable gain (or the tax). We believe this implication was unintended. A transaction should be treated as substantially similar to the transaction described in the Notices even if some of the potential gain would be offset by a tax benefit so long as the amount of Built-in Tax is more than *de minimis*.

4. Define "all or most"

In order for an intermediary transaction tax shelter to be substantially similar to the transaction in Notice 2001-16, "all or most" of the corporation's assets must be sold within the time frame given in the third component, *and* "all or most" of the Built-in Tax purport to be offset or avoided or not paid. This is a critical feature of the Notices because a taxpayer may well try to avoid the Notices by engaging in a transaction in which the corporation disposes of just less than "all or most" of its assets, or alternatively by avoiding just less than "all or most" of the Built-in Tax. However, "all or most" is not a commonly understood term of art in the tax law. Therefore, clearer guidance on the meaning of the term would be helpful. In particular, if this test is intended to be interpreted more expansively than "all or substantially all," the Notices should be clarified to say so.

In addition, the first prong of the test in Notice 2008-20 could literally be avoided if assets having all or most of the taxable gain were sold, but those assets did not represent all or most of the assets of the corporation. The Notice would be under-inclusive if its aim is to include all transactions in which all or most of the taxable gain is avoided. On the other hand, a corporation might dispose of a portion of its assets in non-abusive circumstances, and its retention of a substantial amount of assets might be viewed as evidence that the transaction is not abusive. If, however, the Notice's intention is not to provide a safe harbor for transactions that involve only a minority disposition of assets, the Notice should be clarified to reflect its intent.

In providing clarification of the Notice, it might also be helpful to specify when the baseline value of the assets should be measured in order to determine whether "most" of the assets have been disposed of. Should valuation occur at the outset of the period described in component 3, in the middle, or at the end? In the case of assets with fluctuating or, worse even, declining values, the timing of this measurement could determine whether a transaction is described in the Notices.

We appreciate your consideration of our recommendations and comments. Please let us know if you would like to discuss this letter or if we can otherwise further assist you.

Respectfully,

David S. Miller
New York State Bar Association
Albany, NY

cc:
William Alexander
Associate Chief Counsel (Corporate)
Internal Revenue Service

T. Ian Russell
Senior Counsel
Internal Revenue Service

Lon B. Smith
National Counsel to the Chief

Counsel for Special Projects
Internal Revenue Service

Karen Gilbreath Sowell
Deputy Assistant Secretary for Tax Policy
Department of the Treasury

FOOTNOTES

[1] The principal drafters of this letter are Kathleen Ferrell and Michael Bretholz. Helpful comments were received from Kimberly Blanchard, Peter Blessing, Michael Farber, Edward Gonzalez, David Miller, Michael Schler, Jodi Schwartz, Linda Swartz, and Diana Wollman.

[2] 2001-1 C.B. 730.

[3] 2008-6 I.R.B. 406.

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[9] 101 AFTR 2d 2008-1733 (Mar. 31, 2008)

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Schler then turned to the question of who is required to file a listed transaction notice on the intermediary transaction tax shelter. Schler described a scenario in which a corporation sells a subsidiary to another party but does not know that the listed transaction will occur. He asked Stephen Fattman, special counsel to the IRS associate chief counsel (corporate), if a seller could be engaged in a listed transaction if the purchaser refused to say if it intended to take the actions described in the notice.

Fattman said that in such a case the seller would not have engaged in enough diligence to avoid the listed transaction requirements. The panel discussed the possibility for sellers to seek a covenant from purchasers through which the parties would agree not to engage in the listed transaction.

Schler asked whether that meant that every stock sale agreement would require a covenant since the buyer won't do something that gets the seller in the notice, which Fattman answered affirmatively.

Schler responded by calling the government position a "revolutionary concept."

"How else could you assure yourself that you will not be within the notice?" asked Fattman.

He said the government's position is based on the failure of the previous notice to shut down the transaction and reiterated that the government is open to suggestion on the notice.

Schler pointed out that asset buyers will also be affected by the notice since the future actions of the seller could make the purchase a listed transaction, calling the situation a "disaster from everybody's point of view."

Tax Analysts Information

Code Section: Section 6111 -- Tax Shelter Registration; Section 6112 -- Tax Shelter List Requirement; Section 6707 -- Tax Shelter Info. Penalty; Section 6707A -- Reportable Transactions Information Penalty; Section 6011 -- Return Filing Requirement
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EXHIBIT 16

Exhibit 88-J toward the end of your binder there and tell us if you recognize that document.
A Yeah. 88-J is the check that Cellnet wrote -- Westside wrote to the IRS on November 18th, of 2003 --
Q So that's --
A -- for $3.1 million.
Q -- the second payment you wrote?
A The second time we paid it. It's the same payment, but we stopped payment on the first check and sent them this one.
Q Fair enough. Okay.
A Okay.
Q And I'll come back with a couple of questions on that. But let me just go back and still talk about kind of housekeeping at Westside as you're getting ready for the stock sale.
Did Westside have any receivables on its balance sheet during this kind of summer of '03 time period?
A It did have receivables, yes.
Q What happened to those?
A Well, initially Fortrend was interested in buying the receivables as well as the company as well as the stock. And at some point, they decided that

they really didn't want to pay us anything for the receivables, anything, you know, substantial for the receivables.
So we decided when we formed LXV -- decided to put the receivables into LXV.
Q And what was -- what were they offering to pay you? Why didn't you want to take that?
A Nothing. Like a penny, a penny a dollar or something like that, or half a penny a dollar or something like that.
Q And you thought they were worth more than that?
A Oh, yeah. We actually collected a lot more than that.
Q We being?
A We being LXV.
Q Okay. But there were discussions with Fortrend about that issue?
A Yeah. That's when we first started with that.
Q And did those discussions tell you or inform you in any way about Fortrend and its business?
A No. I mean, other than they were in the business of buying receivables cheap. That -- that

didn't tell me anything else.
Q Okay. So you had some understanding they knew what they were talking about when they were talking to you about buying --
A Oh, yeah. Absolutely.
MR. DESMOND: How are we doing on time, Your Honor? I'm fine to keep going through.
THE COURT: I thought we might break for lunch maybe 12:30, quarter of 1. Whenever would be a good breaking point for you.
MR. DESMOND: Okay. I may even be done with Mr. Tricarichi by then so.
THE COURT: Ms. Lampert, would it be okay to --
MS. LAMPERT: Yes, Your Honor.
THE COURT: -- run a little bit late and then try to finish up before lunch?
MS. LAMPERT: To finish up his direct and then --
THE COURT: Yeah.
MS. LAMPERT: -- do cross after lunch, Your Honor?
THE COURT: Yeah.
MS. LAMPERT: That would work for us.
THE COURT: Okay. Well, let's shoot for

that.
MR. DESMOND: Okay.
BY MR. DESMOND:
Q Going back, then, to the Fortrend offer, Mr. Tricarichi, we've talked about the $65 million and the tax consequences surrounding that consideration between PWC.
Did you have any understanding as to what was going to happen to the taxes, whatever that amount might be, that Westside might owe?
A Fortrend was going to make sure that the taxes got satisfied.
Q Do you know how they were going to make sure the taxes got satisfied?
A No. That was why I hired the outside experts.
Q Okay. Did your advisers look into that for you?
A I believe they did. To some -- to some degree I think PWC did.
Q Okay. And you mentioned earlier this -- well, let me come back to that in just a second. But were the specific terms in Exhibit 1-J, the stock purchase agreement, that addressed the taxes that you recall?

AA 000671

173

your understanding that Fortrend was going to pay Westside's corporate income tax liability; is that correct?
A That's correct. That's contractual in the purchase agreement.
Q But according to the various sales calculations spreadsheets that we've been looking at, the one in Exhibit J (sic), page 42, and the one on Exhibit 23-J, the Fortrend premium, the amount of cash that Fortrend received was approximately $5.3 million, correct?
A The amount of cash they received was approximately $40 million. If you're trying to net that out, I don't -- I'm not following you.
Q They received -- okay. So there was $40 million is what you're saying and then they paid back Rabobank, correct, for 29 --
A I can't speak to that. I don't -- I'm not privy to whether they paid back Rabobank or not. I think they did, but that wasn't my respon- -- I was out of the -- I was out of the deal by the time that that happened.
Q How did you think was -- how did you think Fortrend was going to pay for the taxes of Westside?
A Well, my understanding was they had some

174

tax reduction process that they were going to do.
Q A tax reduction process?
A Yeah. They were -- that was their thing. They were going to reduce the tax to the point where they would pay it.
Q That was -- when you say that was their thing, what do you --
A It was never my understanding that they were going to pay $16 million in tax. It was my understanding that they were going to pay some number between $5 million or less in tax.
But how they got to that point, I had no understanding of how they were getting to that point. Their business was bad debt. And my understanding was that they were going to somehow use bad debt to lower the tax obligation. And that's the extent of my knowledge as to how they did whatever they did.
That's why I hired Hahn Loesure and that's why I hired PWC was to figure that out, to look into that and figure it out.
Q Okay. And did you talk to Hahn Loesure and PWC, the advisers that you had at Hahn Loesure and PWC, about what they thought about the plan that Fortrend had to minimize the tax?
A Yes.

175

Q And what did they say?
A Well, part of it was proprietary. They weren't telling us what they were going to do as far as minimizing the tax goes. They had a couple of options. I think -- I think PWC looked at one of them.
But we had nothing in the purchase agreement that spoke to a specific thing that they were going to do after they purchased the company. There was nothing -- all -- the only thing we had in the agreement was they were going to satisfy the tax obligation of Westside.
Q Okay.
A Okay. They didn't say how they were going to do it. They just said they were going to do it. And we had a lot of reps and warrants to that effect.
Q Thank you. Can you turn to Exhibit 26-J, please?
A 26-J, got it.
Q This is the letter of intent from Nob Hill Holdings to you.
A Yes.
Q And Nob Hill Holdings is the acquisition company that Fortrend used; is that correct?
A That's my understanding.

176

Q And if you'll turn to -- let's first turn to page 3 of that exhibit, please.
A Okay.
Q And if you'll look down at Paragraph 5, it says: Purchaser will have secured financing for the stock purchase price.
What was your understanding of that condition precedent?
A They were borrowing money.
Q And when you say they were borrowing money, who are you referring to?
A Well, whoever the purchaser was. If it was Fortrend or if was Nob Hill --
Q Okay.
A -- whoever it was was borrowing the money, securing the financing to be able to pay me the money for my stock.
Q Okay. So Fortrend was securing the money for financing?
A That's what Paragraph 5 says, yeah.
Q Okay. And can you turn to page 4 of the letter of intent where it says Indemnifications?
A Yeah.
Q This paragraph talks about different indemnifications that will be given, but it

AA 000672

193

me. It referred to some section of the IRS Code, but other than that I don't know.

THE COURT: You mean before having that struck out you didn't ask?

THE WITNESS: What I asked -- the question I asked Folkman was what -- what's a reportable transaction?

And he said there are certain types of transactions that have to be reported to the Government when you file your tax return. He said this isn't one of them.

And I said, Okay. Fine. And then when I saw this on the PWC engagement letter, basically, what I said to PWC is, I want you to make that determination as to whether this is a reportable transaction. But they did as well and they said it wasn't a reportable transaction, too. So I don't think anybody has yet said that it was a reportable transaction, even them.

THE COURT: Okay. I believe that at some point, and I guess this is -- is it true that at some point a fee of a million dollars was paid to Midcoast even though you turned down their offer?

THE WITNESS: Yeah. We found that out -- I don't know if Ms. McCaskill told us that or Candace

194

over there told us that. But when they interviewed me in November of 2007, I was told that Fortrend -- we were always wondering why Midcoast dropped out.

And I was told that Fortrend claimed a million dollar deduction on one of their tax returns. And after they investigated it, they determined that the million dollars was paid to Midcoast to get out of the deal.

THE COURT: Oh, I see. So nobody from your side paid Midcoast?

THE WITNESS: Oh, no, no, no, no, no, no. Fortrend paid Midcoast to back away from the deal. Matter of fact --

THE COURT: And you learned that relatively recently?

THE WITNESS: I learned that in 2000- -- well, I learned that, yeah, way after the transaction was done. If I would have known that, you know, could a, would a, should a.

THE COURT: Okay. And just a couple questions about the purchase price for Westside. As I understand it at the point the stock sale closed, Westside had no assets except about $40.5 million of cash and it had tax liabilities?

THE WITNESS: Correct.

195

THE COURT: And they were computed to be about 16.8 million?

THE WITNESS: Well, that's what our guys computed --

THE COURT: Right.

THE COURT: -- them to be.

THE COURT: So that would mean that it had a shareholder equity of 23.7 million, give or take?

THE WITNESS: If -- assuming that there were no other deductions or setoffs or anything else.

THE COURT: Well, I think they had to be taken into account. I think our guys had plugged in a small bad debt deduction and other stuff and they determined that your liability -- Westside's liability would have been 16.8 million.

THE WITNESS: Yeah. If we would have -- if we would --

THE COURT: If you had, right.

THE WITNESS: -- if we would have done it, yes, it would have been that.

THE COURT: Now, why did you think that Fortrend was willing to pay you 34.6 million, which is 11 million more than the value of the company?

THE WITNESS: Because we believed that they had some type of strategy for reducing the $16

196

million down to some lower number. And we were told that they were in the debt collection business. And I know a little bit about bad debt. You know, I collected a lot of bad debt in my time and I got stuck with a lot of bad debt, too. So I know that on many occasions, bad debt is deductible.

So, you know, and that's -- again, that's the reason why I hired PWC and why I hired Hahn Loesure was to basically figure that out. Tell me what -- make sure that this is okay, you know what I mean?

THE COURT: You know, a lot of times companies will pay premiums to buy ongoing companies with good technology. But why would a company pay an $11 million premium to buy a company whose only asset was cash?

THE WITNESS: Well, I know that if, for example -- and I'll give you an example. If I had a lot of loss trapped somewhere and I wanted to cash out my loss, that would be a way to do it.

THE COURT: So you'd buy a tax liability, you're saying?

THE WITNESS: Basically. I don't know how that would work technically to be able to make it work. But that would -- that would certainly allow

AA 000673

you to do that.

THE COURT: And why did Fortrend tell you that they wanted to buy your company?

THE WITNESS: Why -- they never told me why they wanted to buy it. They just came to me and said we want to buy your company. My guess was that they were looking for a way to cash out losses.

THE COURT: And I think you said your understanding was that Nob Hill, the acquisition vehicle, was going -- initially you thought was going to borrow all the money to acquire Westside.

THE WITNESS: That was my understanding originally, yeah. I didn't find out about the 5 million until this case.

THE COURT: But Westside's only asset was cash. Why would somebody want to borrow $34 million in cash to acquire cash?

THE WITNESS: Well, they were getting more cash than they were borrowing. They were getting 5-some million dollars more --

THE COURT: And they had a --

THE WITNESS: -- than they were borrowing.

THE COURT: -- $16 million tax liability --

THE WITNESS: I understand. But if they could have reduced the $16 million tax liability to

4, they would have been a million ahead and they would have cashed out a million dollars' worth of losses.

So it's not for me to explain. I mean, I'll try the best I can. But I don't know what was behind the door there. I do know that people have propriety strategies for dealing with hazardous waste, for dealing asbestos removal. And there are a lot of situations where people buy companies that have, for example, large obligations and will pay more than what the obligation is because they have a technology for reducing the obligation.

THE COURT: Companies sometimes will write off assets if I owned a company. But writing up a liability seems very unusual why you would -- you would voluntarily incur a liability of $16 million.

THE WITNESS: That's a question --

THE COURT: If you only get $5 million for it.

THE WITNESS: That's a question that if they were in this courtroom today, that would be a question that you could ask them.

THE COURT: But you're a sophisticated guy. Didn't any of this seem fishy to you?

THE WITNESS: That's why I -- that's why I

hired one of the largest accounting firms in the country. That's why I hired an accounting -- or a law firm that I had been with for 20 years was to look at this. That's exactly why I did it.

Otherwise, I would have just -- if it didn't seem fishy to me, I would have just done the deal and I wouldn't have spent what I spent in terms of analyzing the deal.

So, you know, you scratch your head and you look and you say could a, would a, should a. What -- what more could I have done to vet this deal?

I go to the largest -- one of the largest accounting firms in the country, Big 4. I go to my lawyer for 20 years. They both tell me it's a good deal. There's nothing wrong with it. We don't see any problem with it.

I'm not a tax guy. Tax law is like Chinese to me. So when I go -- if I don't understand something, I hire somebody that does. And I did. And not only did I hire one person, but I hired two and I got the same response from both of them.

THE COURT: Well, didn't PWC tell you that the apparent plan by Nob Hill or Fortrend involved a very aggressive tax strategy that's vulnerable to IRS challenge?

THE WITNESS: They didn't tell me that.

(Whereupon, page 202 and continuing are attached under separate cover.)

PROCEEDINGS

(9:00 a.m.)

THE COURT: Good morning. Please be seated.

THE CLERK: Resuming Docket Number 23630-12, Michael A. Tricarichi, Transferee.

MS. LAMPERT: Good morning, Your Honor. Heather Lampert for Respondent. Your Honor, this morning we would like to call Richard Stovsky to the stand.

THE COURT: Please proceed.

WHEREUPON,

RICHARD STOVSKY

called as a witness, and having been first duly sworn, was examined and testified as follows:

THE WITNESS: Yes.

THE CLERK: Please state your name and address.

THE WITNESS: Richard P. Stovsky. My business address is 200 Public Square, Cleveland, Ohio 44194.

THE COURT: Okay. Before we get to you, Mr. Stovsky, I'd like to remind you that you're not allowed to discuss your testimony with anybody else, any other witness in the case, until the case is

completely complete. Okay?

THE WITNESS: Yes.

MS. LAMPERT: And, Your Honor, before we get started today, if I may. Can I have Mr. Stovsky's representatives that are here with him today stand up and identify themselves so that we're all clear on who is in the courtroom today?

THE COURT: Yes.

MS. LAMPERT: Thank you.

MR. MARKUS: May it please the Court, Your Honor, my name is Stephen Markus. I'm a partner with the Cleveland law firm of Ulmer and Berne.

MR. DEMARCO: I'm Richard DeMarco from the office of general counsel at PricewaterhouseCoopers.

THE COURT: Thank you.

MS. LAMPERT: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. LAMPERT:

Q Mr. Stovsky, if it's okay with you, I'm going to sit down while we do our examination today. Can you hear me all right?

A Yes.

Q Okay. Could you give me a brief description of your educational background?

A Sure. Starting with college?

Q Yes, please.

A I went to Ohio State University and majored in accounting, and my degree was a bachelor of science in business administration.

From there I went to Cleveland Marshall College of Law, which is a law school at Cleveland State University. Received a law degree from Cleveland State.

Q Okay. And do you have any professional licenses?

A Yes. I'm a certified public accountant, a member of the Ohio bar.

Q Okay. Any other licenses?

A Other than associations, no.

Q Okay. And can you give me a brief history of your work experience since you finished law school?

A Sure. I graduated from law school in 1983, and immediately after the bar started with Coopers and Lybrand, which was the predecessor firm to PricewaterhouseCoopers, one of the two firms.

I was admitted to the partnership in 1992. I've always been in the tax area at PricewatershouseCoopers. I've been a tax partner since 1992.

I've had various additional roles in the firm. In addition to client service, I was the market -- the Cleveland market leader for private companies, the little market practice. I was also the Midwest region leader for middle market for PwC. I was the office managing partner in Cleveland. And my current role is that I'm the United States private company services leader for PricewaterhouseCoopers.

So my practice includes all -- services to most of our private companies in the U.S., all services to those companies. And I'm also a member of our firm's executive -- excuse me, extended leadership team, which is one of the bodies that governs the firm.

Q I'm having a little problem hearing you.

A Oh, I'm sorry.

Q Do you think that you could speak into the microphone?

A Sure. Is that better?

THE COURT: That's better, yes.

THE WITNESS: I'm sorry.

BY MS. LAMPERT:

Q That's perfect. Thank you. I want to make sure that I hear everything that you say.

And in 2003, what were your

595

THE WITNESS: Correct. The reason why there's two pages, when we produced the file, we produced every --
THE COURT: Correct.
THE WITNESS: -- piece of paper in the file. And there were two pieces, so I produced both. But these -- but that's exactly right.
THE COURT: And what's page 5? Was that -- I suppose that was an internal note you made to yourself --
THE WITNESS: Yes.
THE COURT: -- in the file?
THE WITNESS: It was -- it was attached to the page -- it was attached to -- I believe it was attached to page -- this page 2 in the file.
THE COURT: And so did -- and that means that the way the opinion -- this was initially issued was as we see on the first page --
THE WITNESS: Correct.
THE COURT: -- without the strikeout?
THE WITNESS: Right.
THE COURT: Thank you.
BY MS. LAMPERT:
Q Can you please turn to Exhibit 25? Can you look through this exhibit for me, please, and when

596

you're done, let me know.
A (Brief pause.) Okay.
Q Do you recognize this document?
A I do.
Q And can you identify this document for us?
A Right. This is my internal memo to the file that I drafted throughout the transaction.
Q And there is some handwriting on the first five --
A Right.
Q -- pages of this exhibit. Pages 1 through 5 there's handwriting. Do you recognize this handwriting?
A I do.
Q And whose handwriting is this?
A It's mine.
Q It's yours. So these notes are your notes?
A They are.
Q And it appears that there might be two different writing utensils that were used for some of these notes.
A Right.
Q Does that -- is that indicative of anything?
A Well, if you refer to page 1, it says up in

597

the top left: "red comments," and then the second note says: "pencil comments." So I wrote in red and pencil to identify different meetings that the notes related to.
Q And you said this was an internal memorandum?
A Yes.
Q Was this memo given to anyone outside of PwC?
A Not to my knowledge, no.
Q And did you draft all parts of this memo?
A Yes.
Q Did you draft all parts of this mem- -- did you have any input from anybody else when you were writing this memo?
A Yes. The entire -- anybody who worked on the project. I was collecting -- I was coordinating the project and collecting information as we went through the project.
Q Okay. Can you talk to me about who else was on the project at PwC?
A Sure. The project had two main components: a federal tax component and a state tax component. The federal side, Tim Lohnes of our Washington National Tax practice led the efforts relative to any

598

federal tax questions that we were addressing.
Tim is a subject-matter expert in our Washington National Tax Practice and specializes in other corporate tax provisions. In addition, Tim relied upon others with the National Tax. But the one that appears in this memo is Don Rooken (phonetic).
Don was -- actually, Don had a career with the Internal Revenue Service. He was deputy chief counsel with assistant commissioning. When he went -- when he left the service after years, he joined our firm, and he also had input into this memo.
On the state and local side, Ray Turk, who's a partner at PwC, is a state and local tax partner. And he and David Cook, who is a director at our practice, and others, handled the state and local side.
So there was input from numerous people because our practice is to go to our experts. Whenever we're doing really any project, we rely on our experts. And in this case, we relied on our National Tax experts, as well as our state and local experts.
Q And you might have said this, but I missed what you said. On Don Rooken --

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627

was ordinary income issues, Section 269 issues, and transferee liability issues, correct?
A Correct.
Q And I'd like to confirm that those are the conclusions that were more-likely-than-not qualifications, correct?
A My -- my belief based on the file is that all the conclusions that we drew were at the more-likely-than-not level.
Q So you drew a more-likely-than-not conclusion regarding the deduction that the corporation was taking for the write-off of the high basis/low valued property that was to be contributed to Westside?
A Well, we didn't -- I don't believe we looked at that issue -- we didn't look at that issue as it relates to the buyer.
Q Okay.
A We were looking at it from Mr. Tricarichi's perspective.
Q Okay. So your conclusion, then, is, with respect to the fact that it's more likely than not, that it was not Mr. Tricarichi's concern about the result of that deduction because it would be a corporate-level tax. Is that the conclusion that

628

we're speaking about?
A I believe so.
Q Okay. I just wanted to clarify that. You've identified several documents today that have been stipulated to by the parties as documents that were contained in the PwC client file.
A Uh-huh.
Q Were there any documents that you looked at in preparation for today's testimony that were not turned over to the IRS?
A From the PwC file?
Q From either the PwC file or from another source.
A My understanding is anything -- any document that we had was turned over. I can't -- I don't know about any other documents. But anything that we had in our file, I believe was turned over --
Q Okay.
A -- to the best of our ability, yes.
Q Is there any document that you looked at that was not contained in that PwC client file?
A In preparation for today, not that I can recall, no.
Q Have you looked at any documents that were not turned over since this case -- since you became

629

aware that this particular case started?
A You mean other documents that are part of the --
Q No. I think we've established that you've looked at all of the documents in the PwC file and that you've turned those over to the IRS.
I'm just wondering have you been provided by any other parties other documents that you've looked at?
A The one document I can recall, in my deposition, I was given a brochure that I had -- that actually my attorney had shown me prior to the deposition that I hadn't seen before, and then at the deposition it was provided to me again.
Q Okay.
A I can't recall any other documents -- and there were some letters as well that accompanied that brochure that I hadn't seen prior to that timeframe. But I can't recall other documents that I've seen that relate to the file -- that are related to the matter at all.
Q Okay.
MS. LAMPERT: May I have one moment, Your Honor?
THE COURT: You may.

630

MS. LAMPERT: Your Honor, at this time we have no further questions for this witness.
MR. BELL: Cross?
THE COURT: You may proceed.
MR. BELL: Thank you, Your Honor. Your Honor, in light of what we've been doing in the past, we prepared a binder of selected exhibits that are already in the record of the case that are maybe a little easier to handle than the one binder. May I approach and hand that to --
THE COURT: You may.
MR. BELL: Thank you.
CROSS-EXAMINATION
BY MR. BELL:
Q Good morning, Mr. Stovsky. My name is Craig Bell and I'm one of the counsel for Mr. Michael Tricarichi.
Before we get into some of the specific documents that you've been questioned about today, I want to talk a little bit more about your practical work experience, not the formal education. But when you got to PricewaterhouseCoopers after graduating law school, did you have the opportunity to work on mergers and acquisitions (indiscernible)?
A Yes. Throughout my career.

AA 000677

Q And the same with Sections 453 and 453A?
A Right. Those relate to installment sale.
Q Right.
A And the amount of installment sale that you could defer for federal income tax purposes (indiscernible) charge. If my memory is correct, I don't believe they -- I don't believe they entered into an installment sale, but it was something that might have been talked about earlier.
Q Okay. When you were getting this memorandum more into a finalized state as you're progressing, collecting facts, you're reaching out to your subject-matter experts at National Office and updating and refining this letter, or this memorandum, did you have occasion, it would appear from your handwritten notes, to then talk about some of these issues with Mr. Folkman, who I believe is a partner at Hahn Loesure in the tax area?
A Right. I don't -- you know, I don't recall specific discussions, but I -- based on the file and based on my overall memory, we had -- we did have discussions with Mr. Folkman.
Q Okay. And I do see certain -- if I were just looking down, for example, on pages 4 where you have in the left margin: Folkman concurs, Folkman

concurs, did Folkman assist you in answering questions, or are the caps and answers based on PwC's analysis and conclusions?
A The caps answers are based on PwC's conclusions. So we didn't -- we didn't work with Mr. Folkman in looking at these questions and answers, but I believe he was looking at them as well, and we would talk about them.
Q And you were not involved in negotiating the stock purchase agreement with the other --
A No.
Q -- buyer's counsel?
A No. We were not.
Q Okay. And if you'd go back to page 1 on Exhibit 25-J. I'm going to draw your attention, because you've had questions from the Court as well as counsel for Respondent the note: "All conclusions discussed with Tricarichi and Jim Tricarichi were qualified -- were clearly qualified as more likely than not. Further, no written answers were provided to Mr. Tricarichi."
If I understand your testimony, is it correct, then, that each of those answers to those issues that we just went through you reached that standard of conclusion or above?

A I'm sorry. Can you repeat the question?
Q Did you reach the more-likely-than-not standard with respect to each of the issues that we've just gone through in that memo?
A Yes.
Q Okay. And then, again, if I understand that this is an internal memo, this was not provided to Mr. Tricarichi, either Michael or Jim?
A That's my recollection, correct.
Q And if I recall from your testimony, you knew Jim Tricarichi before you were engaged in this transaction?
A Yes.
Q And how did you know Mr. Jim Tricarichi?
A He -- initially I met Jim because he was the CFO of one our clients at PwC, so he was effectively a client, and then we had an ongoing relationship from there.
Q Okay. And your -- if I -- again, just to make sure the record is absolutely clear, with respect to whether this transaction, in your eyes, was a reportable transaction or listed transaction or not, it was PwC's analysis that it was not; is that correct?
A That's right.

MR. BELL: May I have a moment, Your Honor?
THE COURT: Yes, you may.
MR. BELL: No further cross, Your Honor.
THE COURT: Thank you.
Ms. Lampert, do you want any redirect?
MS. LAMPERT: Your Honor, I do have a few follow-up questions.
THE COURT: Yes.
REDIRECT EXAMINATION
BY MS. LAMPERT:
Q Mr. Stovsky, you just had a question from Mr. Tricarichi's counsel about the type of due diligence that you would do in a transaction where the seller received stock. Correct?
A Potentially, if we were asked to do it, sure.
Q And you might have covered this, but my notes are little bit fuzzy. Could you go over with me what type of due diligence the seller would need to do if the seller was receiving cash?
A Due diligence on the buyer?
Q Yes.
A Typically, we wouldn't perform any due diligence on the buyer if we were selling our stock for cash.

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A In the course of being asked to represent a seller to ensure that their transaction is a taxable sale of shares, I was generally looking at whether or not there were provisions that could apply to cause a recharacterization, either a de facto liquidation, as I referenced earlier, of the company being sold or if there was another characterization, if there was some other transaction going on that could adversely impact the form of the transaction.
Q Do you recall what those provision were that you looked at?
A I believe it was primarily around de facto liquidation risk.
Q And what was your analysis with respect to that issue?
A I don't recall specifically.
Q Were you asked to look at -- there's been some testimony that the purchaser of the stock would engage in a transaction to minimize the tax liability of the corporation. Were you asked to consider that scenario, the reduction of the tax liability, in your analysis?
A I don't recall that specifically. At the time, my engagement was around representing the seller of shares. So I wanted to ensure that there

was nothing happening on the purchaser side on the closing date, or that otherwise would impact the characterization of the share disposition.
Q I'd like to refer you to page 3 of the Exhibit 25 that you're currently in.
A Yes.
Q There's a paragraph that is in all caps at the bottom half of the page. Could you read that paragraph to yourself, and when you're done, let me know, please.
A And, I'm sorry. I may have lost pages. It's page 3 of the -- of Tab 25?
Q Yes.
A Okay. This -- the all-caps paragraph at the bottom?
Q Yes.
A Read it to myself?
Q Please read it to yourself; see if this refreshes your recollection with respect to the question that I just asked you.
A (Brief pause.) Okay. Can you repeat the question?
Q My question is, were you asked by Mr. Stovsky, or anyone else, for that matter, to look at the transaction that the purchaser was thinking

about entering into to minimize the tax liability of Westside?
A I was not asked to evaluate the purchaser's transaction in what they were doing. I instead was asked to ensure there wasn't anything that the purchaser was doing that would have impacted the characterization of the transaction as a stock sale.
Q So when it says in this paragraph: "Lohnes also stated that the deduction the corporation was taking for the write-up of the high basis/low value property contributed to Westside and, paren, (to offset the tax income in Westside relative to the legal verdict), end paren, was subject to IRS challenge."
Is that something that -- is that an issue that you looked at?
A When you say looked at, can you be more specific as far as what -- what you mean by that?
Q First, were you aware that the purchaser was planning on trying to deduct a high basis/low value property that was contributed to Westside after they purchased the stock from Mr. Tricarichi?
A My recollection was that I was aware that there was going to be some level of business that was conducted in the inter- -- in the corporation on a

go-forward basis and that that business would generate or could generate deductions.
Q That that business could generate deductions?
A Yeah.
Q And how would that business generate deductions?
A I don't -- I don't recall, other than this note seems to indicate it was through distressed debt.
Q And did you look to see whether that would be a legitimate deduction?
A No.
Q Okay. So did you look at it with -- if you continue on after the paren, it says: "Was subject to IRS challenge."
Then there's another parenthetical: "The IRS could push the deduction to the time period when it was in the hands of the contributing shareholder."
Did you look at this, at whether or not the high basis/low value property contribution to Westside, did you look at that -- I'm trying to figure out the light with which you looked at that.
Did you look at it as to whether or not the IRS would challenge it, or did you look at it with

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respect to whether it was a legitimate deduction?
A Really, really neither. I was -- I was looking at the facts that were provided to ensure that they weren't going to cause a recharacterization of Mr. Tricarichi's sale as anything other than a stock sale.
And in the context of reviewing the facts, I observed that the IRS could challenge certain things that the buyer was planning to do based upon the facts that were provided.
Q And were you concerned that that would cause a recharacterization of the sale -- of the stock sale transaction to Mr. Tricarichi?
A I believe we thought -- I thought no, that it would not cause a recharacterization of Mr. Tricarichi's stock sale.
Q And why did you think that it would not cause a recharacterziation of the stock sale?
A I -- yeah. I didn't believe the activities that the purchaser was taking within the corporation that the purchase would invoke any principles to cause a change in the characterization of the transaction as that of a stock sale.
Q And which principles are you referring to?
A Perhaps if the company was liquidated on a

de facto liquidation is the primary purpose or concern that comes to my mind.
Q And just so that I'm clear, when you say de facto liquidation, can you explain what you mean by that?
A Sure. De facto liquidation's a principle or a term that's used in tax to refer to a situation where a company is viewed as actually being liquidated for tax purposes even though it legally still exists.
Q And so what would -- strike that.
So look in the same paragraph that we were just talking about, and two sentences later, the sentence starting: "However, this is not Tricarichi's concern."
A Yes.
Q This sentence is referring to successor and transferee liability for Westside taxes, correct?
A Yes.
Q Did you -- was it your determination that Mr. -- it was -- that this issue was not Mr. Tricarichi's concern?
A No, it wasn't. Successor -- excuse me. Successor and transferee liability is -- is outside of my personal area of expertise.

Q Do you know who would have come to this conclusion?
A I don't know the full universe of people that were involved in reaching that conclusion. But I did consult with another partner within my practice, or within the National Tax Office of PwC, Don Rooken, on this particular issue.
Q So Mr. Rooken came to that conclusion?
A Yes.
Q Did you concur with Mr. Rooken's conclusion?
A I deferred to Mr. Rooken's conclusion in that regard.
Q Can you turn to page 4 of this memo? Paragraph 2, will you read that to yourself?
A (Brief pause.) Okay.
Q It says: "Lohnes concluded that a position can be taken that this is not a reportable transaction." Is that your conclusion?
A Yes.
Q Okay. And was -- and can you explain to me how you came to the conclusion that this was not a reportable transaction?
A I don't recall how I came to that conclusion.

Q Do you recall if you were concerned whether or not this transaction was substantially similar to a reportable transaction or a listed transaction?
A Yes. I believe we considered whether or not it was similar to the notice 2001-16 listed transaction, which would be a reportable transaction.
Q And how did you -- what -- can you walk me through what your analysis was on that, how you can look at the facts and compare them to notice 2001-16?
A I really don't recall.
Q Did you use the facts that are stated in this memo?
A I believe I stated earlier I'm not sure I saw this memo at the time. There's another memo that has my writing on it.
Q Can you turn to the memo that has your writing on it, at page 10?
A Okay.
Q Did you rely upon these facts that are listed in this memo in making your conclusion about the -- whether or not this was a listed or reportable transaction?
A At least in part, yes.
Q Do you recall what other facts you might have relied on?

Petitioner?

MR. DESMOND: We have no cross on the questions you did ask regarding his work experience and formal education.

THE COURT: Mr. Klink, you are dismissed.

THE WITNESS: Thank you, Your Honor.

MS. WILLIAMS: Your Honor, Respondent requests --

THE COURT: Yes, before we -- I think, as I mentioned before, I'm not going to rule on the relevancy objections now. But they have been preserved, and I will address them if necessary in the opinion. What I would propose is that if Respondent, I think we're going to have simultaneous opening briefs in this case, we'll talk about that later, but I would request that any use Respondent proposes to make of Mr. Klink's testimony be made in your opening brief. And if you do make use of it, Petitioner can respond to it in their response brief and I will address it in the opinion. If you do not use any of his testimony in your opening brief, I will decide and will deem you not to have -- that it won't be necessary to address that question. Because I don't want to have to rule on it if I don't have to rule on it. So in other words, if you don't feel

like you need it in your opening brief, then we'll just deem the issue to have been gone away.

MS. WILLIAMS: Thank you, Your Honor.

THE COURT: Very good.

MS. WILLIAMS: Your Honor, Respondent requests a 15-minute break.

THE COURT: Okay. And what's next?

MS. LAMPERT: Your Honor, that's what we're going to discuss.

THE COURT: Good luck.

MS. LAMPERT: Thank you.

(Court in recess at 10:43 a.m.)

(Court resumes at 11:16 a.m.)

MS. LAMPERT: Your Honor, I'd like to make a few representations for the record, so that you can understand why we didn't call some of the witnesses today, and then we'll rest our case. We attempted to call Alice Dill-Wendland to the stand for her testimony. And we believe she's located in Bali. We contacted our foreign tax attachthat covers Bali and have been unable to locate her to serve her with a subpoena to appear. We have also attempted to call John McNabola to the stand. I believe that we've also heard testimony that we believe he's in Ireland. We contacted our foreign tax attachthat covers

Ireland, and we were unable to serve him. We have also attempted to call Graham Taylor, who was with C. Farkland Shaw I believe, and we have contacted his attorney. And it is our understanding from the last time that we talked to his attorney that he is out of the country in Australia, so we have been unable to serve him as well. Those are my representations for the record. We are ready to rest our case, Your Honor.

THE COURT: Okay. And Petitioner, you may put on what is left of your case.

MR. RIDLEHOOVER: Thank you, Your Honor. I don't think it'll take too long. At this time we call James Tricarichi to the stand.

WHEREUPON,

JAMES TRICARICHI

Called as a witness, and having been first duly sworn, was examined and testified as follows:

THE COURT: And he is the last witness?

MR. RIDLEHOOVER: We have our (INAUDIBLE)

THE COURT: They don't have to give any exclusion advise?

MR. RIDLEHOOVER: No. There are no more fact witnesses, Your Honor.

THE COURT: All right. Very good.

THE CLERK: State your name and address.

THE WITNESS: Jim Tricarichi. 17558 Merry Oaks Trial, Scranton Falls, Ohio 44023.

DIRECT EXAMINATION OF JAMES TRICARICHI

BY MR. RIDLEHOOVER:

Q Good morning, Mr. Tricarichi. Thank you for being here. My name is Brad Ridlehoover. I'm an attorney for the Petitioner. I think we can establish that you do know the Petitioner.

A Yes, I do.

Q How do you know the Petitioner?

A He's my brother.

Q Thank you. Mr. Tricarichi, where are you originally from?

A Cleveland. Suburbs of Cleveland.

Q And did you go to high school in Cleveland?

A Yes, Bedford Heights High School.

Q And where did you take college?

A College, I attended John Carroll for two years until my father passed away, and then I graduated from Kent State.

Q And after finishing college, can you please describe to the Court your general work experience?

A First job out of college I started entry level. I was working for a company called Dana

proposal with anyone in particular?
A There was, you know, like I said, it was all new to me, the process and everything. And I knew the guy that I played golf with, he had a CPA firm. And I don't remember what the circumstances were that I talked to him about this meeting. And he said before you do anything with them, I have another firm you need to talk to. And that was Fortrend.
Q And who's the individual you were talking about?
A Don Jesco.
Q Don Jesco is what type of professional you said?
A He has his own CPA practice the east side of Cleveland.
Q And at some point, did Mr. Jesco put someone in touch with Fortrend?
A He had some other guy, Gary Zwick, I believe his name is. I don't know if they did dealings; I can't recall. But they're the ones that introduced Fortrend to me. Which I in turn passed the information onto Mike and whoever else.
Q So you had no prior experience with Fortrend before this?
A No.

Q Or Midcoast?
A No.
Q Did you have any general understanding of what Fortrend was planning to do or offer to do?
A I think it was very similar. But again, I don't recall the details of, you know, or nor really understood what they were proposing.
Q And you conveyed this introduction or someone introduced it to your brother?
A Yes.
Q And after this introduction to Fortrend, did they make any type of proposal that you know of?
A Yes, there was some kind of proposal that was based on some kind of formula that they had. And I think at that time, they were all estimates. But I can't recall the detail.
Q Were they offering to also purchase the stock like Midcoast?
A I think they were similar, but I'm not sure; I don't remember.
Q All right. As far as once these two proposals came in, did you make any recommendations to your brother about these proposals?
A Yes, I recommended that he engage PWC to get a second opinion on the transaction.

Q And you say second opinion. Who was giving --
A Well, Hahn Loeser.
Q Hahn Loeser. And that's law firm?
A That he was using, yes.
Q Did you know the law firm?
A I knew one of the partners in the law firm, that was it.
Q Which partner?
A Randy Hart.
Q And who at PWC did you ask your brother or suggest your brother speak to?
A Rich Stovsky.
Q And who is Mr. Stovsky?
A Rich is, now he's the director of their national for their private clients. But at that time I think he was just a regular partner. But he was a tax partner originally.
Q And you had some dealings or experience with him?
A Yes. I hired him in 1990 when he was with Coopers to do our audit and tax book. The company I was working for.
Q Oh, the company you worked for. Let's turn in your exhibit binder there 103. Let me know when

you get it.
A First page?
Q Yes, first page.
A Okay.
Q Can you identify this document for the Court?
A It looks like an email I sent to Rich telling him that we needed to add on the debts and document.
Q And what's the date on this email?
A 4-8-2003.
Q Let's just turn to page 2, which I believe we've agreed to a tax shield that came out. Can I give you this document?
A Yes. Yes. You've got statements of account.
Q Sorry. Do you recognize this document?
A Yes.
Q All right. And what is the purpose of this document?
A This is the points that I thought were relevant, again, that he should have looked at, the two deals, one from each company. Because there were basically two offers. The second one, I'm not going in order, because it's hard for me to see.

EXHIBIT 17

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Title: * Tip 454: AICPA Statements on Standards for Tax Services - Statement No. 6, Knowledge of Error: Return Preparation and Administrative Proceedings

Summary:

Short Description: * This SSTS sets forth the applicable standards for a member who becomes aware of an error, as described below.

Attachment/Body:

This is the ninth in a series of Q&RM Tips regarding the AICPA Statements on Standards for Tax Services (SSTSs). This tip focuses on SSTS No.6, *Knowledge of Error: Return Preparation and Administrative Proceedings* .

This SSTS sets forth the applicable standards for a member who becomes aware of (a) an error in a taxpayer's previously filed tax return; (b) an error in a return that is the subject of an administrative proceeding, such as an examination by a taxing authority or an appeals conference; or (c) a taxpayer's failure to file a required tax return. The term "error" includes any position, omission, or method of accounting that, at the time the return is filed, fails to meet the standards set out in AICPA SSTS No. 1, *Tax Return Positions* (click here). The term error also includes a position taken on a prior year's return that no longer meets these standards due to legislation, judicial decisions, or administrative pronouncements having retroactive effect. The term does not include an item that has an insignificant effect on the taxpayer's tax liability. The term administrative proceeding does not include a criminal proceeding (Paragraph 1). SSTS No. 6 applies whether or not the member prepared or signed the return that contains the error (Paragraph 2) and special considerations may apply when a member has been engaged by legal counsel to provide assistance in a matter relating to the counsel's client (Paragraph 3).

If a member becomes aware of an error in a previously filed return, the member should promptly advise the taxpayer of the error, the potential consequences, and recommend the measures to be taken(Paragraph4). Although it is ultimately the taxpayer's responsibility to decide whether to correct the error (Paragraph 8), if appropriate action to correct an error is not taken, the member should consider whether to withdraw from the engagement and whether to continue the relationship with the taxpayer. If the member is not engaged to perform tax return preparation, the member is only responsible for informing the taxpayer of the error and recommend that the taxpayer discuss the error with the taxpayer's tax return preparer (Paragraph 14).

Similarly, when representing the taxpayer before a taxing authority in an administrative proceeding with respect to a tax return containing an error the member is aware of, the member should advise the taxpayer to disclose the error to the taxing authority and of the potential consequences of not disclosing the error (Paragraph 6). However, the member is not allowed to inform the taxing authority without the taxpayer's permission, except when required by law (Paragraph 4). A member should consider consulting with his or her own legal counsel before deciding on recommendations to the taxpayer if there is a conflict between the taxpayer's interest and the member's, for example, with respect to potentially violating the Code of Professional Conduct Rule 301, *Confidential Client Information* (Paragraph 10). Once the member has obtained the taxpayer's consent to disclose an error in an administrative proceeding, the disclosure should not be delayed to a degree where the taxpayer or member might be considered to have failed to act in good faith (Paragraph 9). If, however, a member believes that a taxpayer may face exposure to allegations of fraud or other criminal misconduct, the member should advise the taxpayer to consult with an attorney before taking any action (Paragraph 11).

The next tip of this series will summarize the AICPA SSTS No. 7, "*Form and Content of Advice to Taxpayers.*" For the prior Tips in this series, click here.

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EXHIBIT 18

Author:	Paolo Clemente/US/TLS/PwC	**Topic:**	From Tax Q&RM: AICPA Statement on Standards for Tax Services (SSTS) No. 6, Knowledge of Error: Return Preparation
Staff Level:	4 - Manager	**Industry:**	Non-Industry Specific
Home Office:	New York (300 Madison Avenue)	**Code Section:**	none
Practice Unit:	Q&RM	**Content Type:**	Practice Aids/Tools

Abstract:

AICPA Statement on Standards for Tax Services (SSTS) No. 6, Knowledge of Error: Return Preparation

Content:

AICPA Statement on Standards for Tax Services (SSTS) No. 6, Knowledge of Error: Return Preparation

Consider the following scenario: We become aware of an omission in a client's previously filed tax return during a consulting engagement; we are neither preparers nor reviewers of the client's tax return. What are our responsibilities in this situation?

The answer to this and related questions can be found in the AICPA's Statement on Standards for Tax Services (SSTS) No. 6, Knowledge of Error: Return Preparation. In the above scenario, we should inform the client of the omission and recommend that the error be discussed with the client's tax return preparer or, if the client has prepared its own return, recommend corrective action.

SSTS No. 6, Knowledge of Error: Return Preparation

Statement No. 6 sets forth our obligation to a) notify clients of any ***error**** identified in a previously filed tax return (e.g., under-reported taxes) or of failure to file a required return and b) recommend the corrective measure to be taken. Our recommendation may be given to the client orally, but should always be documented in our client files.

Partner and staff responsibility if PwC is the preparer of the tax return. It is the client's responsibility to decide whether to correct the error. However, if we are the preparer of the client's current year tax return and the client has not taken appropriate action to correct an error in a prior year's return, we should consider whether to withdraw from preparing the return and whether to continue our professional relationship with the client

If, after reassessing our relationship with the client, we decide to continue our relationship and prepare the current year's tax return, reasonable steps should be taken to ensure the error is not repeated.

If we are engaged to be the preparer of an amended return or refund claim for the year which includes the error, the error must be corrected if we are to prepare the amended return or refund claim.

Partner and staff responsibility if PwC is not the preparer of the tax return. If we become aware of the error while performing services for a client that do not involve tax return preparation, we should inform the client of the error and recommend that the error be discussed with the client's tax return preparer. If the client prepared its own return, which includes the error, we must recommend corrective action. If the client declines to correct the error, we should consider whether to withdraw from the engagement and whether to continue our professional relationship with the client. Again, our recommendation may be given orally, but should be documented in our client files.

Complying with SSTSs

The AICPA's SSTS Nos. 1 through 8, and Interpretations No. 1-1 and No. 1-2 reflect the AICPA's standards of tax practice and describe members' responsibilities to taxpayers, the public, the government and the profession. ***Every PwC partner and staff member must comply with AICPA ethical standards,*** regardless of individual affiliation with the AICPA or status as a CPA.

Notes

* The term ***error*** includes any position, omission, or method of accounting that, a the time the return is filed, fails to meet the standards set out in SSTS No. 1. The term ***error*** also includes a position taken on a prior year's return that no longer meets these standards due to legislation, judicial decision, or administrative pronouncements having retroactive effect. However, an ***error*** does not include an item that has an insignificant effect on the taxpayer's tax liability. (SSTS No. 6, paragraph 1)

Contacts: For questions about this tip, contact a member of the US Tax Q&RM team.

Attachment(s):

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Line of Service:	Tax Services		
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EXHIBIT 19

GUIDANCE TO PRACTITIONERS REGARDING PROFESSIONAL OBLIGATIONS UNDER TREASURY CIRCULAR NO. 230

Who is Subject to Treasury Circular No. 230[1]

The provisions of Treasury Circular No. 230 apply to:

- Attorneys
- Certified Public Accountants
- Enrolled Agents
- Enrolled Actuaries
- Enrolled Retirement Plan Agents
- Appraisers
    - Individuals representing others pursuant to limited practice regulations
    - Individuals giving written advice with respect to any entity, transaction plan or arrangement, or other plan or arrangement, which is of a type the IRS determines to have a potential for tax avoidance or evasion.

The IRS' Office of Professional Responsibility (OPR) may propose the censure, suspension, or disbarment of any practitioner, and the disqualification of any appraiser, from practice before the Internal Revenue Service if the individual is shown to be incompetent or disreputable, fails to comply with any regulation in Circular 230, or with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client. The OPR may also propose a monetary penalty for an individual, and/or the employer of any individual subject to Treasury Circular No. 230, for violations of Circular 230 if (i) the violations occurred in connection with the individual's activities on behalf of the employer and (ii) the employer knew or reasonably should have known of the individual's conduct. *Treasury Circular No. 230 §10.3, §10.7, §10.8, §10.50. 31 U.S.C. 330(b)*.

Selected Obligations Under Treasury Circular No. 230

The following is a summary description of certain obligations under Treasury Circular No. 230. This summary does not address all provisions of the Regulations. You should read the Circular/Regulations for a more complete understanding of the duties and obligations of someone practicing before the IRS.

Due Diligence. You must exercise due diligence in preparing and filing tax returns and other documents/submissions, and in determining the correctness of representations made by you to your client or to the IRS. You can rely on the work product of another person if you use reasonable care in engaging, supervising, training, and evaluating that person, taking into account the nature of the relationship between you and that person. You generally may rely in good faith and

[1] All references to the publication called Treasury Circular No. 230 are to the June, 2014 version found at http://www.irs.gov/pub/irs-pdf/pcir230.pdf. The corresponding Regulations are available at 31 CFR Subtitle A, Part 10.

without verification on information furnished by your client, but you cannot ignore other information that has been furnished to you or which is actually known by you. You must make reasonable inquiries if any information furnished to you appears to be incorrect, incomplete or inconsistent with other facts or assumptions. *Treasury Circular No. 230 §10.22, §10.34(d)*.

Competence. You must have the necessary knowledge, skill, thoroughness, and preparation for the matter for which you have been engaged. You may be able to provide competent representation by researching and educating yourself on the issue or by consulting with another tax professional who you know or believe has established competence in the field in question, but in doing so you must consider the requirements of Internal Revenue Code §7216. *Treasury Circular No. 230 §10.35*.

Conflicts of Interest. A conflict of interest exists if representing one of your clients will be directly adverse to another client. A conflict of interest also exists if there is a significant risk that representing a client will be materially limited by your responsibilities to another client, a former client or a third person, or by your personal interests. When a conflict of interest exists, you may not represent a client in an IRS matter unless (i) you reasonably believe that you can provide competent and diligent representation to all affected clients, (ii) your representation is not prohibited by law, and (iii) all affected clients give informed, written consent to your representation. You must retain these consents for 36 months following the termination of the engagement and make them available to the IRS/OPR upon request. *Treasury Circular No. 230 §10.29*.

Tax Return Positions. You cannot sign a tax return or refund claim or advise a client to take a position on a tax return or refund claim that you know or should know contains a position (i) for which there is no reasonable basis; (ii) which is an unreasonable position as defined in Internal Revenue Code §6694(a)(2); or, (iii) which is a willful attempt to understate tax liability, or a reckless or intentional disregard of rules or regulations. An unreasonable position is one which lacks substantial authority as defined in IRC §6662 but has a reasonable basis, and is disclosed. For purposes of Circular 230 disclosure, if you advised the client regarding the position, or you prepared or signed the tax return, you must inform a client of any penalties that are reasonably likely to apply to the client with respect to the tax return position and how to avoid the penalties through disclosure (or, by not taking the position). *Treasury Circular No. 230 §10.34*.

Written Tax Advice. In providing written advice concerning any Federal tax matter, you must (i) base your advice on reasonable assumptions, (ii) reasonably consider all relevant facts that you know or should know, and (iii) use reasonable efforts to identify and ascertain the relevant facts. You cannot rely upon representations, statements, findings, or agreements that are unreasonable or that you know to be incorrect, inconsistent, or incomplete. You must not take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit in evaluating a Federal tax matter (audit lottery). In providing your written advice, you may rely in good faith on the advice of another practitioner only if that advice is reasonable considering all facts and circumstances. You cannot rely on the advice of a person whom you know or should know is not competent to provide the advice or who has an unresolved conflict of interest as defined in §10.29. *Treasury Circular No. 230 §10.37.*

Errors and Omissions. If you know that a client has not complied with the U.S. revenue laws or has made an error in, or omission from, any return, affidavit, or other document which the client submitted or executed under U.S. revenue laws, you must promptly inform the client of that noncompliance, error, or omission and advise the client regarding the consequences under the Code and regulations of that noncompliance, error, or omission. Depending on the particular facts and circumstances, the consequences of an error or omission could include (among other things) additional tax liability, civil penalties, interest, criminal penalties, and an extension of the statute of limitations. *Treasury Circular No. 230 §10.21*.

Furnishing Information to the IRS/OPR. If you receive a proper and lawful request for records or information from the IRS/OPR, you must promptly submit the requested information unless in good faith you reasonably believe that it is privileged. If the requested information is not in your or your client's possession, you must promptly inform the requesting IRS personnel of that fact. In the case of requests from the IRS, you must also provide any information you may have regarding who is in possession of the requested information, but you are not required (i) to make inquiries of anyone other than your client or (ii) to verify information provided by your client regarding the person(s) in possession of the requested information. You must not interfere with any lawful attempt by the IRS to obtain information unless in good faith you reasonably believe that the information is privileged. You cannot advise a client to submit any document to the IRS that is frivolous or that contains or omits information in a manner demonstrating an intentional disregard of a rule or regulation unless you also advise the client to submit a document that evidences a good faith challenge to the rule or regulation. *Treasury Circular No. 230 §10.20, §10.34(b)*.

Handling Matters Promptly. You cannot unreasonably delay the prompt disposition of any matter before the Internal Revenue Service. This applies with respect to responding to your client as well as to IRS personnel. You cannot advise a client to submit any document to the IRS for the purpose of delaying or impeding the administration of the Federal tax laws. *Treasury Circular No. 230 §10.23, §10.34(b)*.

Client Records. On request of a client, you must promptly return any client records necessary for the client to comply with his or her Federal tax obligations, even if there is a dispute over fees. You may keep copies of these records. If state law allows you to retain a client's records in the case of a fee dispute, you need only return the records that must be attached to the client's return but you must provide the client with reasonable access to review and copy any additional client records retained by you that are necessary for the client to comply with his or her Federal tax obligations. The term "client records" includes all written or electronic materials provided to you by the client or a third party. "Client records" also include any tax return or other document that you prepared and previously delivered to the client, if that return or document is necessary for the client to comply with his or her current Federal tax obligations. You are not required to provide a client with of your work product- i.e., any return, refund claim, or other document that you have prepared but not yet delivered to the client if (i) you are withholding the document pending the client's payment of fees related to the document and (ii) your contract with the client requires the payment of those fees prior to delivery. *Treasury Circular No. 230 §10.28*.

Solicitation. With respect to any Internal Revenue Service matter, you may not use any form of public communication or private solicitation containing a false, fraudulent, or coercive statement or claim; or a misleading or deceptive statement or claim. You also may not assist, or accept assistance from, any person or entity who obtains clients or otherwise practices in violation of the solicitation provisions. *Treasury Circular No. 230 §10.30.*

Negotiating Checks. You may not endorse, negotiate, electronically transfer, or direct the deposit of any government check relating to a Federal tax liability issued to a client. This prohibits any person subject to Treasury Circular No. 230 from directing or accepting payment from the government to the taxpayer into an account owned or controlled by that person. This provision does not apply to whistleblower payments. *Treasury Circular No. 230 §10.31*.

Supervisory Responsibilities. If you have or share principal authority and responsibility for overseeing your firm's tax practice, you must take reasonable steps to ensure that your firm has adequate procedures in place to raise awareness and to promote compliance with Circular 230 by your firm's members, associates, and employees and that all such employees are complying with the regulations governing practice before the IRS. *Treasury Circular No. 230 §10.36*.

Personal Tax Compliance Responsibilities. You are responsible for insuring the timely filing and payment of your personal income tax returns and the tax returns for any entity over which you have, or share, control. Failing to file 4 of the last 5 years income tax returns, or 5 of the last 7 quarters of employment/excise tax returns is per se disreputable and incompetent conduct for which a practitioner may be summarily suspended, indefinitely. The willful evasion of the assessment or payment of tax is also conduct which violates Circular 230. *Treasury Circular No. 230 §10.51(a)(6)*.

Best Practices. In addition to the rules with which persons must comply, Treasury Circular No. 230, §10.33 includes aspirational best practices for those who provide advice and/or assistance in preparing submissions to the IRS. These best practices include:

- Communicating clearly with the client regarding the terms of the engagement.
- Establishing facts, determining which facts are relevant, evaluating the reasonableness of any assumptions or representations, relating applicable law (including potentially applicable judicial doctrines) to the relevant facts, and arriving at conclusions supported by the law and the facts.
- Advising clients regarding the meaning of any conclusions reached by the person subject to Circular 230.
- Advising clients whether they may avoid accuracy-related penalties if the client acts in reliance on that person's advice.
- Acting fairly and with integrity in practice before the Internal Revenue Service.

Frequently Asked Questions

Following a disagreement between us, my client called and demanded his records back and is refusing to pay me for my time. What are my obligations?

Generally, upon demand, you must return all documents necessary for the client to fulfill his tax obligations. In the case of a dispute over fees for services rendered, state law controls whether you may be entitled to withhold some records, but otherwise, all documents obtained from the client or a third party must be returned. *Treasury Circular No. 230 §10.28.*

I think my business partner is advising his clients to take credits for which they do not qualify. We have never had policies involving supervision or training since we are both licensed and neither of us "manages" the other. Can I be sanctioned for his negligent or reckless actions?

Yes. The IRS may designate one or more individuals to be responsible for the firm's compliance with Circular 230. If you know or should have known of others within your firm who are engaged in a pattern or practice in violation of Circular 230, you could be held accountable for failure to correct the noncompliance, even if it involves individuals who you do not supervise. *Treasury Circular No. 230 §10.36.*

I joined a tax resolution marketing service that refers representation clients to me for a fee. Is this type of solicitation allowed?

Yes, but you must be cautious about the referral service's solicitation practices and advertising claims. You may not assist or accept assistance from any person or entity who obtains clients using false, fraudulent, or coercive claims or otherwise uses misleading or deceptive advertising. *Treasury Circular No. 230 §10.30(d).*

EXHIBIT 20

Gain Knowledge*

Circular 230 Insights and Update Webcast

September 20, 2007

Presenters :
Betsy Case – Tax Q&RM Leader
Paul Eldridge – Tax Q&RM
Greg Fowler – Tax Q&RM

*connectedthinking

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Asking Questions – Online Expert

You can submit questions online at anytime during the program by clicking on the “Online Expert” button

We will either answer your question live or respond back to you via the tools

The **Online Experts InBox** button will illuminate when you receive a response. Click on this button to view the answer to your question

Resources

In addition to the PowerPoint slides you are viewing, there are additional materials included in the Resources section

Resources

Buffering Issues

What can I do about buffering?

- Reduce the number of programs you are using on your computer
- Click the SPEED button under the media player and select a lower stream rate

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Technical Help

If you are experiencing any technical problems, please contact a US-IT Support Specialist at 1-877-PwC-HELP, select *Web Applications (2) and Webcast Support (4)*

Administrative Items

- This program is being recorded and the archived version will be made available
- This webcast will take approximately 1 hour
- WBS Code – 8.0013631.001

CPE and Evaluation

- In order to receive CPE credit for this program, you must stay on for the entire program
- You must respond to ALL multiple choice questions–you will not be graded on these
- A link to the course evaluation will be included at the end of the program
- Today's program will be worth approximately 1 CPE credit

Course Objectives

- To review the key obligations imposed on PwC and you by Circular 230
- To update you on recent developments
- To address leading Circular 230 issues in our practice
- To discuss how levels of confidence converge under various statutory and regulatory rules
- To assist you in locating PwC policies and Q&RM resources for Circular 230

Betsy: Welcome to…

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Introduction

Why the emphasis on Circular 230 and this webcast?

- Provides basic rules regarding federal tax practice
- Directly affects essential parts of our practice – providing written tax advice, tax return preparation and advice
- Violations may result in public or private sanctions, including monetary penalties against individuals and PwC
- Part of larger framework of ethical and professional guidance that governs our practice
- Share insight on practical applications and update for new developments

Preparer penalty audits
Implications of sanctions and penalties

Ethical and professional guidance that governs our practice
- AICPA Rules of Professional Conduct, and SSTSs
- PCAOB rules
- PwC Q&RM and Independence policies
Other applicable codes of conduct, laws and regulations

PwC has CBT courses on Tax Advisor Penalties and Taxpayer Penalties to give you a more detailed understanding of the penalty rules.

Circular 230 – Key Provisions

- Section 10.21 – Knowledge of Client's Omission
- Section 10.22 – Due Diligence Requirements
- Section 10.29 – Conflicting Interests
- Section 10.33 – Best Practices
- Section 10.34 – Advising on Tax Return Positions and Preparing or Signing Returns
- Section 10.35 – Covered Opinions
- Section 10.36 – Procedures to Ensure Compliance
- Section 10.37 – Other Written Advice
- Section 10.52 – Sanctions

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Circular 230 has broader application and does not only deal with written tax advice. For example, Section 10.21 sets out our obligations where we know that the client has not complied with tax laws, and is similar to the AICPAs SSTS. Section 10.29 provides guidance for situations involving potential conflicts of interest. Section 10.33 sets out best practices for tax advisors, which we have adopted by incorporation in our Q&RM policies.

This webcast will focus primarily on Sections 10.22, 10.33, 10.34, 10.35, and 10.37.

Section 10.34 defines the standards applicable to the preparation or signing of tax returns and advising on tax return positions. It defines the minimum standards for signing a tax return without disclosure, and the minimum standards for signing a tax return with disclosure. Same standard applies for advising on tax return positions.

Section 10.35 defines the requirements applicable to covered opinions. In practice, this section defines the requirements with respect to limited scope opinions and full scope opinions.

Section 10.37 defines the standards applicable to all written advice that is not a covered opinion. Even though we may be giving other written advice that may not be relied upon for penalty purposes, there are standards that we need to satisfy.

Section 10.35 and 10.37 applies to written advice with respect to tax planning and structuring. Later in this webcast, we will discuss how Section 10.34 may overlap with sections 10.35 and 10.37.

Section 10.22 defines the due diligence that must be exercised by the practitioner in preparing tax returns, giving advice to clients (whether written or oral), and representations before the Service.

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Circular 230 – Written Tax Advice

- Applies to all manner of written tax advice --

Including	Excluding
• Opinion letters	• Oral advice
• Technical memoranda	• Tax return preparation
• Presentations	• Certain negative advice
• Certain studies	• Certain post-filing advice
• Faxes	• PwC Internal written advice
• E-mail	
• Instant messaging	
• Any other written advice	

Circular 230 applies to all or our written tax advice, regardless of the form or formality of the advice. Later, we'll cover aspects of Circular 230, such as Section 10.34, that also apply to oral advice.

Regardless of the form or medium of communication used (e-mail, fax, memo or "formal opinion"), all written tax advice rendered to a client is an opinion.

Other Written Advice may be given by e-mail otherwise, thus increasing the risk of inadvertent non-compliance with Circular 230 due to this informal nature.

Circular 230 – The PwC Approach

- Applies to all PwC professionals providing written tax advice to clients
- You should generally assume that written advice involves “a significant purpose” of tax avoidance
- Written tax advice includes federal, state and local, foreign and human resource services, etc.
- Act fairly and with integrity in advising clients and in practice before the IRS.
- PwC Tax Leadership is committed to having our procedures, training and practice be consistent with Circular 230 and other applicable rules and standards.

Circular 230’s written tax advice provisions apply only to Federal advice, but PwC applies them to all written tax advice.

Question 1

PwC US policy generally requires Circular 230 compliance with respect to any written tax advice including, foreign, state or local taxes.

True or False

Question 1

Answer: True. Circular 230's written tax advice provisions apply only to Federal advice, but PwC applies them to all written tax advice.

Circular 230 – Written Tax Advice

- Covered Opinions (10.35)
  - Advice concerning a listed or substantially similar transaction
  - Advice concerning a transaction the principal purpose of which is tax avoidance
  - Advice concerning a transaction a significant purpose of which is tax avoidance if the advice is
    - a reliance opinion (i.e., concludes at MLTN)
    - a marketed opinion
    - subject to conditions of confidentiality
    - subject to contractual protection
- Other Written Advice (10.37)

Explain significance of the two types of written tax advice:
Penalty protection can only be obtained with a Covered Opinion and we conclude at MLTN
No penalty protection can be obtained from other written advice

If you are dealing with listed and substantially similar transactions or the principal purpose transactions, consult with Q&RM. A principal purpose transaction is where the purpose of avoiding or evading tax exceeds any other purpose of importance.

Most of our written tax advice falls into the third category – a significant purpose, which is a very low threshold.

Advice is subject to contractual protection where the taxpayer has a right to a full or partial refund of our fees if the intended tax consequences from the written advice are not sustained.

Advice is subject to conditions of confidentiality if the tax advisor imposes a limitation on the disclosure of the tax treatment of the structure.

During this webcast, we will discuss in more detail the marketed opinion, reliance opinion and other written advice.

Covered Opinions - Requirements

- A tax advisor providing a covered opinion must comply with the following requirements:
  - Establish / evaluate relevant facts
  - Relate law to the facts
  - Evaluate significant Federal tax issues
  - Overall conclusion supported by the law and facts
  - Determine which, if any, disclosures may be required

Section 10.35 sets out the requirements of a covered opinion……this is what you have to do if you are issuing a covered opinion.

We should use reasonable efforts and due diligence to identify/ascertain relevant facts and (in separate sections) factual assumptions and representations.
No unreasonable legal assumptions, legal representations, or legal conclusions.
We should evaluate and conclude separately on each significant Federal tax issue. We may not assume issue resolution or consider audit lottery/settlement.
Conclude overall
Key disclosures are:
Marketed Opinions
Limited Scope Opinions
Less than MLTN opinions
Relationships between advisor and promoters (persons other than the client) regarding fee arrangements and referral agreements.
(See our toolkit for the above disclosures)

Circular 230 – Written Tax Advice

	Full Scope Opinion	Limited Scope Opinion	Other Written Advice
Listed or substantially similar transaction	✓	✗	✗
Principal purpose of tax avoidance transaction	✓	✗	✗
Reliance Opinion (advice concludes at MLTN)	✓	✓	✓
Marketed Opinion	✓	✗	✓
Contractual protection	✓	✓	✗
Confidential transaction	✓	✓	✗

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Choices are sometimes available.

In a "a significant purpose" transaction or matter that does not involve a marketed opinion, contractual protection advice or a confidential transaction, the taxpayer and PwC may agree that we will provide (i) a full covered opinion, (ii) a limited scope opinion, or (iii) other written advice.

However, with a full or limited scope opinion, the taxpayer can rely for penalty protection only on the issues where PwC reaches a MLTN (or higher) conclusion.

The differences between the types of opinions require attention to their uses, the scope of work involved, and whether a particular type of opinion is required or permitted.

Discussions with Clients are Important

- Early discussions regarding a client's anticipated use of our advice, potential application of taxpayer penalties and the scope and contents of our advice are consistent with PwC policy, Circular 230 Best Practices, and the AICPA's SSTSs.
- There is a tendency to opt out to Other Written Advice without focused discussions regarding client expectations.
- These discussions are vital when the potential for listed and principal purpose transactions, marketed opinions or positions at less than MLTN is present.
- Advice issues may raise independence concerns with C1 clients and targets.

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In determining whether PwC can accept an engagement, or the type or level of advice we can or should provide and whether, or to what extent, our clients may be entitled to rely on our advice to avoid the imposition of penalties, we must evaluate all of the rules and guidance discussed earlier.

Remember: we are required by Circular 230 and the AICPA's SSTSs to discuss penalty implications with our clients.

Limited Scope Opinions

- Our written advice may consider less than all of the significant Federal tax issues involved in a matter if:
  - PwC and the client agree that the opinion's scope and the client's reliance thereon for penalty purposes are limited to the issues addressed,
  - The opinion does not relate to a listed, principal purpose or marketed transaction, and
  - The opinion includes the appropriate disclosure.
- Clients want limited scope opinions in many instances.

Scoping the issues to be covered is a key part of the overall engagement scoping exercise.

Depending on the client and situation involved, our advice is often sought on discrete issues – those that are novel, complex or that have significant tax exposures. Clients typically want our advice to focus on these weightier matters and not on issues that are routine or have low risk. Thus, limited scope opinions are appropriate for many engagements.

A full scope opinion must cover all significant federal tax issues that exist in the plan or arrangement. Consider a corporate reorganization – a full scope opinion would not only cover whether it qualifies as a reorganization, gain or loss, basis and holding periods, items typically covered in a limited scope opinion -- but would have to consider issues involving tax attributes, accounting methods, options, warrants, pension plans, preliminary restructurings or post-merger integrations, effects on special categories of shareholders, etc.

Emphasize here that to be a reliance opinion that provides penalty protection, we have to conclude at a MLTN confidence level.

AA 000718

Marketed Opinions - Definition

When do I have a Marketed Opinion?

- We know or have reason to know that our advice will be used or referred to in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement to a taxpayer.
- A "third party opinion" is one example of a marketed opinion.
- Sometimes difficult to identify and aided by having discussions with client about their anticipated use of our advice.

Broad definition. Consult with Q&RM on whether your engagement may involve a marketed opinion.

Third party opinions - Must discuss this with Q&RM before accepting client or engagement. Most third party opinions are also Marketed Opinions.

Partnership examples

Examples – Memo covering flow thru of ordinary partnership income / expenses is not marketed; but written advice on a partnership merger where the partners will take actions based in part on our advice, likely is a marketed opinion.

Marketed Opinions - Options are Limited

Required form of written advice for a Marketed Opinion:

- Full scope Covered Opinion at MLTN (or higher); or
- Other Written Advice.

Limited scope is <u>not</u> an option.

PricewaterhouseCoopers 21

As you will recall from the earlier table illustrating the various types of opinions we can issue, these are the options we have when dealing with a marketed opinion.

Limited vs. full scope is main issue here, as there is no option to do a limited scope opinion

There is a special opt-out disclaimer for marketed opinions – more detailed than regular opt-out disclaimer.

After opting out – if a third party opinion, PwC's policy is all conclusions must have a confidence level of MLTN or higher.

A full scope opinion is one that considers all the significant Federal tax issues, whereas a limited scope opinion is one that considers less than all of the significant Federal tax issues.

Question 2 – Illustration 1

A PwC E&P study will be placed in the data room of Client that is up for sale. Our study and other company tax and financial information will be available for potential buyers to review. Client assures PwC that the study will be used only for this purpose. Is the study a marketed opinion?

Yes

No

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Question 2 – Illustration 1

Answer

No. Merely placing the study in the data room so that it is available for review (along with other standard information) by potential buyers should not make this a Marketed Opinion. The only known purpose is to reflect historical data.

People can differ on this answer. It is based on the facts and circumstances.

Marketed Opinions – Illustration 2

Same as Illustration 1, except that I know that the Client and its advisors anticipate that the results of the study will be used, in part, to structure the acquisition of the Client through distributions. Is the study a Marketed Opinion?

Yes. The anticipated use goes beyond mere reflection of historical data. The study will be used to structure the acquisition. PwC must provide a full scope opinion or opt-out of the Marketed Opinion (i.e., issue Other Written Advice).

Here, the advice is understood to be used to recommend a plan or arrangement via the structuring.

Other Written Advice

- Section 10.37 requires a practitioner to prepare Other Written Advice that:
  - is not based on unreasonable factual or legal assumptions (including assumptions as to future events);
  - does not unreasonably rely on representations, statements, findings or agreements of the taxpayer or any other person;
  - considers all relevant facts that the practitioner knows or should know; and
  - does not take into account the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be resolved through settlement if raised.

As a recap from the earlier slides, other written advice is the form of advice for the following scenarios:
We opt-out from reliance or marketed opinion
Less than MLTN conclusion
Catch all (Not available for listed, principal purpose, conditions of confidentiality or contractual protection transactions)

Usually bears disclosure regarding no penalty protection.

While Other Written Advice does not have all of the substantive and procedural requirements for full or limited scope opinions under section 10.35, it nevertheless shares the important hallmarks of reasonable due diligence in considering and evaluating relevant facts, representations and assumptions, and cannot rely on the audit lottery.

Other relevant rules, regulations and policies still apply when providing Other Written Advice – e.g., PCAOB Rule 3522, Section 6694, advising on taxpayer penalties, using appropriate caveats and limitations to protect PwC, and so on.

Due Diligence Requirements

- Under Sec. 10.22 we must exercise due diligence with respect to providing tax services and in representations to clients and the IRS.
- Applies to all federal advice whether oral or written and tax return preparation
- The factors that should be considered to satisfy our this requirement depend on the facts and circumstances of each engagement.
- ITS, M&A and Q&RM developed a set of due diligence recommendations to consider when advising on debt vs. equity issues related to debt refinancing or restructuring.

Due diligence requirements cuts across all of our practices, e.g., consulting, planning, compliance, oral or written advice.
Debt vs. Equity guidance - This document is located on the Q&RM Domain on Knowledge Gateway – search on "debt/equity".

AA 000725

Question 3

We are engaged to advise a client whether a payment is subject to withholding tax. A key factor relevant to this analysis is the debt/equity characterization of the instrument to which the payment relates. Can we rely on a representation alone regarding the debt/equity character of the instrument?

Yes
No

AA 000726

Question 3

Answer

No. Although we have not been engaged to opine on the debt/equity character of the instrument, we need to perform reasonable due diligence to get comfortable with the client's representation in order for us to opine on the withholding tax question.

This is an example of a limited scope opinion, and shows we must be mindful of issues that are technically "out of scope" but are integrally related to the issue to be specifically addressed.

AA 000727

Tax Planning / Tax Return Preparation

- Tax return preparer defined in Reg. §301.7701-15
- Advice with respect to events which have not yet occurred does not make a practitioner a preparer.
- For advice dealing with events which have occurred, factors such as whether the opinion is directly relevant to an entry on a return and overall purpose of the advice should be considered to determine if you are engaged in tax preparation or tax planning.

As explained earlier, the key provisions of Circular 230 are:
Section 10.34 – return preparation and advice on return positions, both oral and written
Section 10.35 – Covered opinions
Section 10.37 – Other written advice

We need to discuss using the 6694 approach in 10.34. Practitioner vs. preparer. 10.34 applies to both.

In providing planning advice on transactions not yet consummated:
Section 6694 does not apply (unless we know we ultimately will prepare the return containing the issue)
Section 10.34 of Circ 230 does not apply. The Covered Opinion or Other Written Advice rules apply

In return preparation and written advice furnished to clients with respect to transactions that were consummated:

Section 6694 applies
Section 10.34 of Circ 230 applies
Although Section 10.34 is the primary operative section, there is a potential for overlap with section 10.35 (covered opinion) and section 10.37 (other written advice).

Tax Return Positions and Preparation

- Sec. 10.34 states that a practitioner may not sign a return, or advise taking a return position, unless the RPOS confidence level is reached, or unless there is adequate disclosure and the position is not frivolous.
- When advising on a position or preparing a return, the practitioner must inform the client of the taxpayer penalties reasonably likely to apply and the disclosure steps that may be taken to avoid them.
- A practitioner generally may rely in good faith and without verification on information provided by the client but must use reasonable due diligence.
- Sec. 10.34 uses the RPOS / not frivolous standards and is not in sync with recent changes to section 6694.
- Proposed regulations updating Sec. 10.34 were issued on September 24, 2007.

All returns, not just income tax returns, are covered. Realistic possibility of success is 1 in 3 likelihood of prevailing on the merits.

Re due diligence – particularly be alert for incorrect, inconsistent or incomplete information. Be alert for code or regulation specific due diligence requirements.

The standards are likely to be changed to conform with new section 6694 so that a practitioner may not advise on a position or prepare a return unless the MLTN level of confidence is reached, unless there is adequate disclosure and the position is has a reasonable basis.

The SSTSs likely will be revised to reflect the changes to the preparer penalty, and may require RPOS or, if higher, the applicable preparer standard, or adequate disclosure and reasonable basis.

Mention that we have the CBT on Tax Advisor and Taxpayer penalties.

Convergence – More Likely than Not Standard

- Beyond Circular 230, consider other applicable rules and regulations.
- MLTN – a greater than 50% level of confidence that the position will be resolved in the taxpayer's favor. Applies to:
  - Circular 230 written advice – prerequisite for penalty protection
  - Sec. 6662 — threshold for taxpayers to avoid penalties for tax shelter items
  - Sec. 6694 – minimum standard beginning in 2008 to avoid preparer penalties for non disclosure
  - FIN 48 – threshold for book recognition of tax positions
  - PCAOB Rule 3522 – prerequisite for an auditor of SEC restricted entity for initially recommending planning or marketing services or issuing an opinion in favor of a transaction

Convergence – Example 1

Both PCAOB and Circular 230 rules would permit PwC to write a MLTN opinion for an audit client on an aggressive transaction that is not listed.

- If the client were a SEC registrant or affiliate, however our opinion would be required to reach a MLTN conclusion with respect to the entire transaction, even if (i) Circular 230 permitted issuance of Other Written Advice, or (ii) we were unable to reach a MLTN opinion with respect to one or more significant Federal tax issues.
- If we are also engaged to prepare the client's tax return for filing in 2008, we will need to reach a MLTN conclusion to avoid penalties for non-disclosure.

Convergence - Example 2

Our SEC registered audit client consummated a transaction that we did not recommend. They want to engage us to perform a TCA study to support the deductibility of costs in their 2007 tax return. We will not be signing their return. We anticipate that we will be unable to reach a MLTN conclusion for all the positions in the TCA study.

Since we did not recommend the transaction to the client, PCAOB Rule 3522 does not apply. Depending on the facts, we could be treated as a non-signing preparer. Under section 6694, we are required to recommend disclosure since we cannot meet MLTN. For Circular 230 purposes, the TCA study report may be issued in the form of other written advice.

Emphasize when we want people to undertake this type of analysis and discussions with our clients – earlier as opposed to later!

The minimum standard or disclosure was raised from not-frivolous to Reasonable Basis.

Under FIN 48, a tax benefit may be reflected in the financial statements only if it is “more likely than not” that the company will be able to sustain the tax return position, based on its technical merits. With respect to those positions that do not meet the MLTN standard, no benefit may be recognized. For those positions that meet the MLTN recognition threshold, the next step is measuring the amount of tax benefit that can be recorded in the financial statements.

Question 4

True or False

Whenever permitted, PwC will provide clients with Other Written Advice, as it is too risky to provide a Covered Opinion.

AA 000733

Question 4

Answer: False. PwC and the client should agree as to the type of advice PwC will provide, given the subject matter and client's needs.

AA 000734

Circular 230 - Anticipated Future Developments

- In Feb. 2006 IRS proposed amendments to various sections, including contingent fees and conflicts of interest. Final rules have not been issued.*
- Treasury is considering changing Sec. 10.35 to a "principles" rather than "rules" approach.

* Subsequent to the webcast, Treasury issued final regulations amending various sections. Further guidance will follow soon.

Treasury comments/concerns

Fees/conflicts : final rules are expected "soon"

Section 10.35 : Concerns expressed included heavy use of opt-out, the burdens of compliance, growing dissatisfaction with the legalistic/formalistic approach in place as well as ongoing criticisms from bar associations.

Discussions suggested possible proposed revisions, but no commitment. To date, no revisions have been published.

Circular 230 – Monetary Penalties Update

- AJCA 2004 added monetary penalties to sanctions IRS may impose for prohibited conduct under Circular 230.
- The monetary penalty shall not exceed the gross income derived (or to be derived) from the conduct giving rise to the penalty.
- Monetary penalty may be in addition to, or in lieu of, any suspension, disbarment, or censure of the representative.
- IRS issued Notice 2007-39 announcing standards relating to monetary penalties and requesting public comment.
- Separate penalties against the practitioner and against the firm may be imposed.
- Final regulations amending Sec. 10.50 were issued on September 25, 2007

In order to avoid the imposition of sanctions and/or monetary penalties against you or the firm, it is important that you comply with the requirements of Circular 230.

The IRS asked for comments on Notice 2007-39, and hopefully some of the recommendations made by the AICPA will be heeded.

Key points in AICPA comments:
Potential for double penalties (e.g., monetary penalties under Circ 230 and section 6694)
Factors to consider when determining whether a monetary penalty is appropriate, and the amount thereof.
Clarification regarding meaning of larger engagements and computation of penalties for larger engagements
Practical difficulties in determining a practitioner's gross income

AA 000736

Question 5

True or False

A practitioner can only be subject to suspension for prohibited conduct.

Question 5

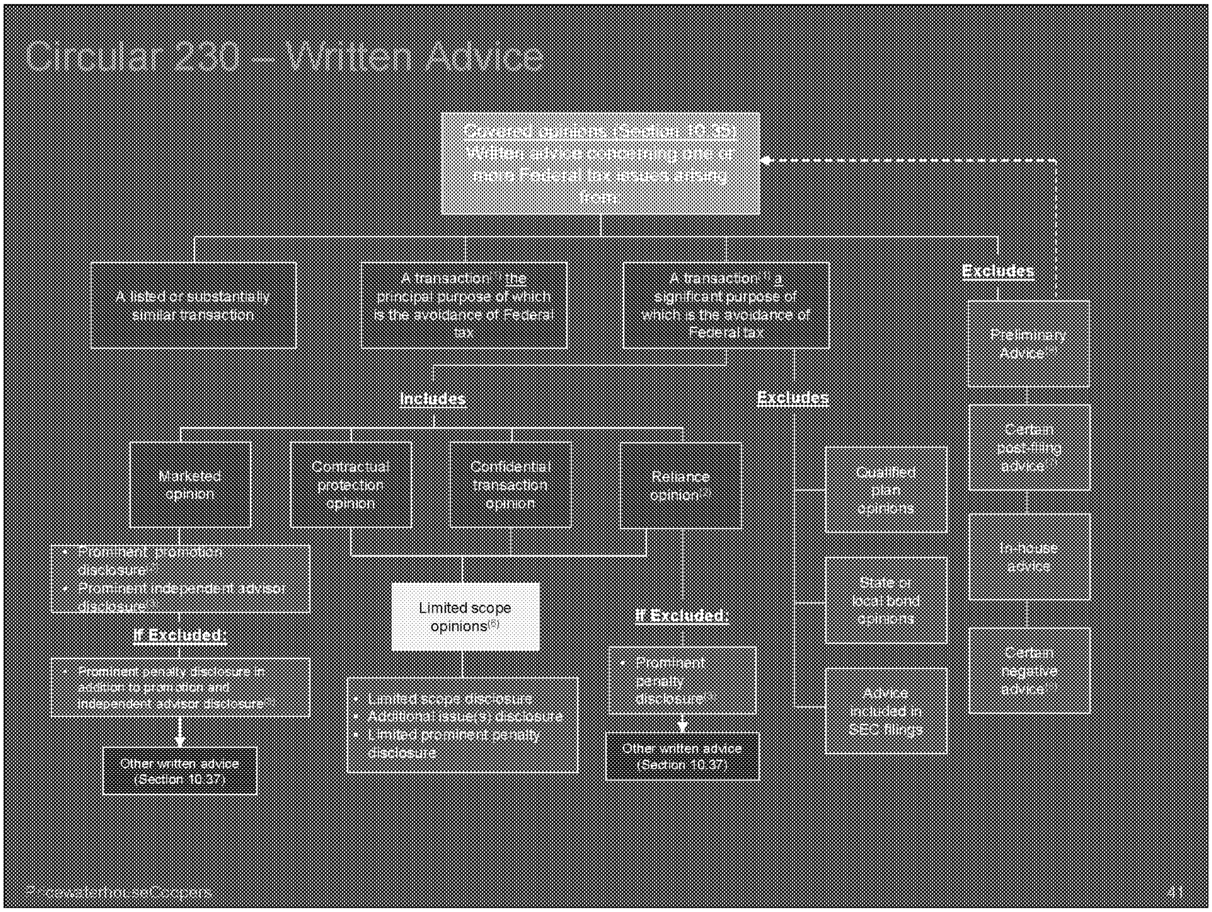
Answer:

False. The American Jobs Creation Act added monetary penalties to sanctions the IRS may impose for prohibited conduct under Circular 230. These monetary penalties are in addition to, or in lieu of, any suspension, disbarment, or censure.

Q&RM Tools & Resources

- Circular 230 Toolkit
- Section 6694 Toolkit
- National, Regional & Markets Tax Q&RM
- CBTs
  - Circular 230
  - Tax Advisor Penalties
  - Taxpayer Penalties
- Section 6694 webcast (coming soon)

Betsy to provide overall conclusion


Circular 230 – Written Advice
Covered opinions (Section 10.35)
Written advice concerning one or more Federal tax issues arising from:
A listed or substantially similar transaction
A transaction[1] the principal purpose of which is the avoidance of Federal tax
A transaction[1] a significant purpose of which is the avoidance of Federal tax
Excludes
Preliminary Advice
Certain post-filing advice
In-house advice
Certain negative advice
Includes
Marketed opinion
Contractual protection opinion
Confidential transaction opinion
Reliance opinion[2]
Excludes
Qualified plan opinions
State or local bond opinions
Advice included in SEC filings
• Prominent promotion disclosure
• Prominent independent advisor disclosure
If Excluded:
• Prominent penalty disclosure in addition to promotion and independent advisor disclosure
Other written advice (Section 10.37)
Limited scope opinions[6]
• Limited scope disclosure
• Additional issue(s) disclosure
• Limited prominent penalty disclosure
If Excluded:
• Prominent penalty disclosure
Other written advice (Section 10.37)
PricewaterhouseCoopers
41

AA 000740

Circular 230 – Written Advice

Requirements for Covered Opinions (Section 10.35)

Any practitioner who has principal authority and responsibility for overseeing a firm's practice of providing advice concerning Federal tax issues must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates and employees for purposes of complying with Section 10.35 (Section 10.36)

Facts

- Must use reasonable efforts to identify and ascertain the facts, and determine which facts are relevant.
- Opinion may not be based on any unreasonable factual assumptions.
- Opinion may not be based on any unreasonable factual representations, statements, or findings.

Relate Law to Facts

- Can not assume favorable resolution of any significant Federal tax issue (except generally for the resolution based on the opinion of another practitioner or in a limited scope context), or otherwise base an opinion on any unreasonable legal assumptions, representations, or conclusions.
- Must not contain internally inconsistent legal analyses or conclusions.

Evaluate Significant Federal Tax Issues

- Conclusion on likelihood of prevailing on each significant Federal tax issue.
- Any issue at less than more likely than not must have appropriate disclosure (see Disclosure).
- Can not consider "audit lottery".
- Marketed opinion must be at more likely than not on all significant Federal tax issues.
- Limited scope opinions permitted sometimes.

Overall Conclusion

- Practitioner must be knowledgeable in all aspects of relevant federal law
- Must include overall conclusion on likelihood that Federal tax treatment is proper treatment and supportive reasoning for such conclusion.
- Marketed opinion must be more likely than not.

Disclosure

- Marketed opinion:
  - Written to support promotion marketing, taxpayer should seek independent advice
- Limited scope:
  - Opinion is limited scope
  - Additional issues may exist
  - Significant issues outside of scope – no penalty protection
- Less than more likely than not (MLTN) opinions.

AA 000741

L&E Learning and Education
Learning and Education
Learning and Education

PRICEWATERHOUSECOOPERS

NOTICE

EXHIBIT 21

Message

From:	rochelle.hodes@us.pwc.com [rochelle.hodes@us.pwc.com]
Sent:	5/6/2008 9:52:03 PM
To:	Wilson, Pete [pete.wilson@rsmi.com]
Subject:	Re: ABA Panel Materials
Attachments:	_.png; _.png; _.png

Does your material address ABA op 314, model rule 1.6, 4.1, and 8.4?

Rochelle Hodes | PricewaterhouseCoopers LLP, Tax Quality & Risk Management

1301 K St. NW, Suite 800 West | Washington, DC 20005 | ☎: 202.312.7859 | : 813.990.2396 | ✉: rochelle.hodes@us.pwc.com

"Wilson, Pete" <Pete.Wilson@rsmi.com>

"Wilson, Pete" <Pete.Wilson@rsmi.com> 05/06/2008 04:00 PM "Reply to All" is Disabled	To	Rochelle L Hodes/US/TLS/PwC@Americas-US
	cc	
	Subject	ABA Panel Materials

As discussed, attached are the following for the panel on Saturday:

- PowerPoint slides with notes.
- Excerpts from applicable professional standards referenced in the PowerPoint.
- April 2008 Tax Adviser article.

Please let me know whether you or someone else from PwC will be able to sit on the panel.

Thanks.

PLEASE NOTE MY NEW PHONE AND FAX NUMBERS BELOW

Pete Wilson

Managing Director

Tax Quality and Risk Management

RSM McGladrey, Inc.

(202) 683-4131 Direct

(202) 448-9662 Fax

pete.wilson@rsmi.com

Circular 230 Disclosure: Any advice contained in this email (including any attachments unless expressly stated otherwise) is not intended or written to be used, and cannot be used, for purposes of avoiding tax penalties that may be imposed on any taxpayer. Notes for 10-21 ABA Panel.pdf Slide Notes for 10-21 ABA Panel.pdf Wilson Clinic item.pdf

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Circular 230

§10.21 Knowledge of client's omission

A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.

§10.51 Incompetence and disreputable conduct

(a) Incompetence and disreputable conduct.--Incompetence and disreputable conduct for which a practitioner may be sanctioned under §10.50 includes, but is not limited to--

(1) Conviction of any criminal offense under the Federal tax laws.

(2) Conviction of any criminal offense involving dishonesty or breach of trust.

(3) Conviction of any felony under Federal or State law for which the conduct involved renders the practitioner unfit to practice before the Internal Revenue Service.

(4) Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing the information to be false or misleading. **Facts or other matters contained in** testimony, **Federal tax returns**, financial statements, applications for enrollment, affidavits, declarations, and any other document or statement, written or oral, **are included in the term "information"**

(5) Solicitation of employment as prohibited under §10.30, the use of false or misleading representations with intent to deceive a client or prospective client in order to procure employment, or intimating that the practitioner is able improperly to obtain special consideration or action from the Internal Revenue Service or any officer or employee thereof.

(6) Willfully failing to make a Federal tax return in violation of the Federal tax laws, or willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax.

(7) Willfully assisting, counseling, encouraging a client or prospective client in violating, or suggesting to a client or prospective client to violate, any Federal tax law, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof.

(8) Misappropriation of, or failure properly or promptly to remit, funds received from a client for the purpose of payment of taxes or other obligations due the United States.

(9) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the Internal Revenue Service by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of an advantage, or by the bestowing of any gift, favor or thing of value.

(10) Disbarment or suspension from practice as an attorney, certified public accountant, public accountant or actuary by any duly constituted authority of any State, territory, or possession of the United States, including a Commonwealth, or the District of Columbia, any Federal court of record or any Federal agency, body or board.

(11) Knowingly aiding and abetting another person to practice before the Internal Revenue Service during a period of suspension, disbarment or ineligibility of such other person.

(12) Contemptuous conduct in connection with practice before the Internal Revenue Service, including the use of abusive language, making false accusations or statements, knowing them to be false or circulating or publishing malicious or libelous matter.

(13) Giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or **engaging in a pattern of providing incompetent opinions on questions arising under the Federal tax laws**. False opinions described in this paragraph (a)(13) include those which reflect or result from a knowing misstatement of fact or law, from an assertion of a position known to be unwarranted under existing law, from counseling or assisting in conduct known to be illegal or fraudulent, from **concealing**

matters required by law to be revealed, or from consciously disregarding information indicating that material facts expressed in the opinion or offering material are false or misleading. For purposes of this paragraph (a)(13), reckless conduct is a highly unreasonable omission or misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner should observe under the circumstances. A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted knowingly, recklessly, or through gross incompetence. Gross incompetence includes conduct that reflects gross indifference, preparation which is grossly inadequate under the circumstances, and a **consistent failure to perform obligations to the client**.

(14) Willfully failing to sign a tax return prepared by the practitioner when the practitioner's signature is required by the Federal tax laws unless the failure is due to reasonable cause and not due to willful neglect.

(15) Willfully disclosing or otherwise using a tax return or tax return information in a manner not authorized by the Internal Revenue Code, contrary to the order of a court of competent jurisdiction, or contrary to the order of an administrative law judge in a proceeding instituted under §10.60.

(b) Effective/applicability date.--This section is applicable to conduct occurring on or after September 26, 2007.

§10.52 Violation of regulations.

(a) A practitioner may be sanctioned under §10.50 if the practitioner--

(1) Willfully violates any of the regulations (other than §10.33) contained in this part; or

(2) Recklessly or through gross incompetence (within the meaning of §10.51(a)(13)) violates §§10.34, 10.35, 10.36 or 10.37.

(b) Effective/applicability date.--This section is applicable to conduct occurring on or after September 26, 2007.

ABA Model Rules of Professional Conduct

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4 - Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.9 Duties To Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.18 Duties To Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) **Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.**

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Rule 2.1 - Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment

...

[5] In general, a lawyer is not expected to give advice until asked by the client. **However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation.** Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Rule 2.3 Evaluation For Use By Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Treasury Regulations

§1.6662-4. Substantial understatement of income tax

...

(f) <u>Method of making adequate disclosure</u>

(1) <u>Disclosure statement</u>. --Disclosure is adequate with respect to an item (or group of similar items, such as amounts paid or incurred for supplies by a taxpayer engaged in business) or a position on a return if the disclosure is made on a properly completed form attached to the return **or to a qualified amended return (as defined in §1.6664-2(c)(3))** for the taxable year. In the case of an item or position other than one that is contrary to a regulation, disclosure must be made on Form 8275 (Disclosure Statement); in the case of a position contrary to a regulation, disclosure must be made on Form 8275-R (Regulation Disclosure Statement).

§1.6694-1. Section 6694 penalties applicable to income tax return preparer

(d) <u>Abatement of penalty where taxpayer's liability not understated</u>. --If a penalty under section 6694(a) or section 6694(b) concerning a return or claim for refund has been assessed against one or more preparers, and **if it is established at any time in a final administrative determination or a final judicial decision that there was no understatement** of liability relating to the return or claim for refund, then --

(1) The assessment must be abated; and

(2) If any amount of the penalty was paid, that amount must be refunded to the person or persons who so paid, as if the payment were an overpayment of tax, without consideration of any period of limitations.

§1.6694-2. Penalty for understatement due to an unrealistic position

...

(c) <u>Exception for adequate disclosure of nonfrivolous positions</u>

...

(3) Adequate disclosure

(i) <u>Signing preparers</u>. --In the case of a signing preparer, disclosure of a position that does not satisfy the realistic possibility standard is adequate only if the disclosure is made in accordance with §1.6662-4(f) (which permits disclosure on a properly completed and filed Form 8275 or 8275-R, as appropriate, or on the return in accordance with an annual revenue procedure).

(ii) Nonsigning preparers. --In the case of a nonsigning preparer, disclosure of a position that does not satisfy the realistic possibility standard is adequate if the position is disclosed in accordance with §1.6662-4(f) (which permits disclosure on a properly completed and filed Form 8275 or 8275-R, as appropriate, or on the return in accordance with an annual revenue procedure). In addition, disclosure of a position is adequate in the case of a nonsigning preparer if, with respect to that position, the preparer complies with the provisions of paragraph (c)(3)(ii) (A) or (B) of this section, whichever is applicable.

(A) Advice to taxpayers. --If a nonsigning preparer provides advice to the taxpayer with respect to a position that does not satisfy the realistic possibility standard, disclosure of that position is adequate if the advice includes a statement that the position lacks substantial authority and, therefore, may be subject to penalty under section 6662(d) unless **adequately disclosed in the manner provided in §1.6662-4(f)** (or in the case of a tax shelter item, that the position lacks substantial authority and, therefore, may be subject to penalty under section 6662(d) regardless of disclosure). If the advice with respect to the position is in writing, the statement concerning disclosure (or the statement regarding possible penalty under section 6662(d)) also must be in writing. If the advice with respect to the position is oral, advice to the taxpayer concerning the need to disclose (or the advice regarding possible penalty under section 6662(d)) also may be oral. The determination as to whether oral advice as to disclosure (or the oral advice regarding possible penalty under section 6662(d)) was in fact given is based on all facts and circumstances. Contemporaneously prepared documentation of the oral advice regarding disclosure (or the oral advice regarding possible penalty under section 6662(d)) generally is sufficient to establish that the advice was given to the taxpayer.

(B) Advice to another preparer. --If a nonsigning preparer provides advice to another preparer with respect to a position that does not satisfy the realistic possibility standard, disclosure of that position is adequate if the advice includes a statement that disclosure under section 6694(a) is required. If the advice with respect to the position is in writing, the statement concerning disclosure also must be in writing. If the advice with respect to the position is oral, advice to the preparer concerning the need to disclose also may be oral. The determination as to whether oral advice as to disclosure was in fact given is based on all facts and circumstances. Contemporaneously prepared documentation of the oral advice regarding disclosure generally is sufficient to establish that the advice regarding disclosure was given to the other preparer.

§301.7216-2. Permissible disclosures or uses without consent of the taxpayer

...

(e) Disclosure or use of information in the case of related taxpayers

(1) In preparing a tax return of a second taxpayer, a tax return preparer may use, and may disclose to the second taxpayer in the form in which it appears on the return, any tax return information that the tax return preparer obtained from a first taxpayer if --

(i) The second taxpayer is related to the first taxpayer within the meaning of paragraph (e)(2) of this section;

(ii) The first taxpayer's tax interest in the information is not adverse to the second taxpayer's tax interest in the information; and

(iii) The first taxpayer has not expressly prohibited the disclosure or use.

(2) For purposes of paragraph (e)(1)(i) of this section, a taxpayer is related to another taxpayer if they have any one of the following relationships: husband and wife, child and parent, grandchild and grandparent, partner and partnership, trust or estate and beneficiary, trust or estate and fiduciary, corporation and shareholder, or members of a controlled group of corporations as defined in section 1563.

(3) See §301.7216-3 for disclosure or use of tax return information of the taxpayer in preparing the tax return of a second taxpayer when the requirements of this paragraph are not satisfied.

Other

Restatement of the Law Governing Lawyers, §20

Comment

...

c. Informing and consulting with a client. … If the lawyer's conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client. …