Tax Section

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Bulletin

Vol. XXII, No. 1 THE FLORIDA BAR September 2003

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Coming up!

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CLE:
"Family Limited Partnerships – Transfer Tax Planning During Good, Bad, Ugly and Uncertain Times"

October 24, 2003
Tampa, Florida

See pages 29-30.

IRS Finalizes New FIRPTA Withholding Regulations

TINs Required After November 3; Mandatory Change In Non-Foreign Affidavits; Like-kind Exchanges Restricted

By Jonathan H. (Jason) Warner, Esq., Law Offices of Jonathan H. Warner, P.A., Miami, Florida

On August 4, 2003, the Internal Revenue Service issued final regulations requiring taxpayer identification numbers (TINs) from all parties at the time of filing any form, notice or election under Code Sections 897 or 1445. Effective for transfers after November 3, 2003, these new regulations may cause serious difficulty for real estate transactions involving a foreign seller, as even the IRS acknowledged that the current International Taxpayer Identification Number (ITIN) process needs improvement. The final regulations adopt the July 26, 2002 Proposed Regulations without material change.

Effective September 4, 2003, non-foreign certification forms for entities must include a statement that the entity is not a disregarded entity. A disregarded entity's owner, if eligible, must give the non-foreign certification. Practitioners will have to amend their forms to accommodate these new requirements.

The final regulations also provide that, effective September 4, 2003, the nonrecognition notice procedure can not be used in a deferred like-kind exchange, leaving the withholding certificate procedure as the only

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Chair's Report

By Richard B. Comiter, Esq., Comiter & Singer, LLP, Palm Beach Gardens, Florida

RICHARD B. COMITER

My term as Chair began with a roaring start at the Tax Section's July 4th Organizational Meeting at Amelia Island Plantation with over 350 attendees at the Chair's Welcome Reception Dinner. The record attendance at Amelia is another example of the continued overwhelming support and enthusiasm I have received from the membership in their desire to assist me in achieving my goals and aspirations for the upcoming fiscal year. I am certain the members who attended the Organization Meeting not only participated in CLE programs and workshops which added a tremendous amount of value to their practices, but also in a bonding social experience among family and friends. The social interaction and collegiality among the members of the Tax Section fosters a family-like atmosphere which makes attendance at our meetings a memorable experience. I was especially excited about the first-time attendance of so many young tax lawyers and the experienced tax practitioners who have rekindled their involvement in the Tax Section.

The key factor in why the Tax Section is such a successful and well-respected and recognized Section of the Florida Bar is the continued active involvement and participation of its Past-Chairs in Section activities and

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available mechanism for a foreign transferor to avoid withholding. Apparently, some practitioners have been utilizing the nonrecognition notice procedure for deferred like-kind exchanges even though this procedure left the transferee at risk of FIRPTA non-compliance because the transferee could not be certain at the time of the initial transfer that the deferred exchange would qualify as totally free of tax.

Background

Code Section 897 was enacted as the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA), for the first time generally imposing U.S. federal income tax on dispositions of U.S. real estate interests (USRPIs) by foreign persons. After Treasury was rebuffed in its attempts to enact a rigorous withholding system to enforce FIRPTA, the Florida Bar Tax Section proposed a moderate, rational withholding system that enabled real estate transactions to proceed relatively unimpeded. Enacted as Code Section 1445 by the Tax Reform Act of 1984, that proposal's innovative withholding procedures now are replicated in other federal tax withholding areas.

When a foreign person disposes of a USRPI, the transferee must withhold ten percent of the amount realized by the transferor at closing and remit the withheld amount to the IRS by the 20th day after the transfer. To avoid excess withholding when the required amount exceeds the tax actually due, the transferor may file an application for withholding certificate (Form 8288-B, generally) with the IRS prior to closing. If at closing the transferor provides the transferee a notice that the transferor has applied for a withholding certificate, the transferee retains the withheld amount (generally in an escrow arrangement with counsel) pending receipt of the IRS approval or denial of the application. The IRS is supposed to act on withholding certificate applications within 90 days of receipt, but that seems to have become a mere aspiration.

If the IRS approves a lesser amount of withholding, the transferee remits that lesser amount (if any) to the IRS with Form 8288 (including Form 8288-A) by the 20th day after receipt of the IRS response and refunds the balance of the withheld amount to the transferor. The IRS stamps a copy of Form 8288-A and mails it to the transferor for inclusion in the transferor's U.S. federal income tax return reporting the sale.

These forms and other notices and elections relevant to FIRPTA withholding already call for the TIN of the transferor and transferee. However, if the transferor or a foreign transferee did not already have a TIN, the prior regulations and forms accepted "Applied For" in lieu of the TIN and the transferor's TIN was not required to be provided until the transferor filed its U.S. federal income tax return reporting the disposition of the real property interest.

New Regulations Accelerate Requirement to Provide TINs

The regulations under Code Sections 6109, 1445 and 897 now are amended to require a foreign person to provide a TIN at the time of filing any return, statement or other document required by the regulations under Code Sections 897 or 1445 for a disposition of a USRPI occurring after November 3, 2003. If the transferor's TIN is not timely provided, the transferee must still report the withholding on Form 8288 and remit, but the transferor cannot obtain a credit or refund of tax on the basis of a Form 8288-A that does not include the transferor's identifying number. The Explanation of Revisions (the "Explanation") states that the IRS will consider as incomplete and will not process a withholding certificate application or any other notice or election under Code Sections 897 or 1445 that lacks either party's TIN. The amended regulations state that an application for withholding certificate *will be denied* if not complete, including TINs.

The IRS notes in the Explanation that it believes that the revised regulations do not impose a new obligation on a foreign person but rather accelerate the current requirement to provide a TIN in connection with the transferor's tax return reporting the disposition, or a transferee's withholding return in connection with the acquisition, of the USRPI. Accelerating the requirement for TINS better allows the IRS to identify foreign taxpayers and to more easily match applications, withholding tax returns, notices, and elections with the transferor's income tax return.

Potential Adverse Impact on Real Estate Closings

Foreign persons involved in buying or selling USRPIs often are unaware until immediately before closing of the FIRPTA withholding requirement or the requirement to provide a TIN. In this writer's experience, Florida real estate contract forms frequently do not provide a foreign party with adequate notice of these procedures and FIRPTA compliance rarely is considered at the time of contract. The current delays and difficulties in obtaining an ITIN for a foreigner will preclude filing a withholding certificate application for many foreign transferors unless initiated at the time of contract, and

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perhaps not even that lead-time is adequate based on recent anecdotal evidence. Unless the ITIN procedure is improved or alternative procedures developed, it may be necessary to advise foreign clients who own, or that want to own, U.S. real estate to obtain ITINS in advance even if not otherwise needed.

Absent a swift and sure procedure for foreign parties to obtain an ITIN, the new requirement may delay or disrupt real estate closings. Some foreign transferors may suffer excess withholding at closing, perhaps even having to put up additional cash when the net proceeds are less than ten percent of the purchase price. The transferor cannot utilize even the early refund application procedure until TINs are available for both transferor and transferee.

The new TIN requirement also applies to Code Section 1445(e) transactions. The requirement to furnish an ITIN should be less disruptive when only related parties are involved in these kinds of transactions, but time constraints might pose an occasional problem.

Difficulties in Acquiring TINs

In the Explanation, the IRS expressed its belief that in many cases, the foreign taxpayer already will have a TIN due to having filed a U.S. tax return. Other than for rental property, that belief seems somewhat dubious. The IRS also expressed the belief that foreign corporations can obtain employee identification numbers (EINs) without delay through existing procedures, but there remains a serious question whether Form SS-4 requires the principal officer of an applicant U.S. or foreign corporation to have a TIN. The reverse of Form SS-4 says the officer TIN requirement is optional for a foreign corporation seeking an EIN to comply with U.S. withholding requirements (perhaps limited to those currently listed on the Form, not including FIRPTA), but the instructions to Form SS-4 state that the officer TIN is mandatory. At least in the past, it has been difficult to get SS-4s processed by some Service Centers if the officer EIN was not stated.

The Explanation notes that the IRS is exploring options to address concerns about the time it takes nonresident aliens to obtain ITINs, and specifically is considering processing applications for withholding certificates in conjunction with TIN applications. The Instructions to Form W-7 suggests that it takes 4-6 weeks after filing to obtain an ITIN, but anecdotal evidence suggests that the process is slower and more difficult even when an "acceptance agent" is used rather than mailing the Form W-7 to the IRS or visiting a domestic IRS Taxpayer Assistance Center or a foreign IRS office (not all of which accept these forms). It would not be surprising if the November 3 effective date is delayed further to allow time to implement a better system.

Other Problem Areas with TINs

The amended regulations fail to provide a procedure for foreign persons to use to supply their TIN to the other party. It may be assumed, but should have been explicitly stated, that the TIN may be provided on Form W8-BEN.

The amended regulations also fail to provide any sanction or relief for circumstances where one party fails to provide its TIN timely. For example, if a transferee refuses to provide its TIN to the transferor in time to allow the transferor to file for a withholding certificate before closing, the transferor might suffer excess withholding and substantial delay in obtaining a refund, in some cases having to provide additional cash at closing if the net proceeds are less than the required withholding. One might imagine a transferee using excess withholding as leverage to force concessions from a transferor.

A transferee, of course, will need its TIN by the 20th day following closing to avoid Code Section 6651 penalties for late remittance of the withheld amount and late filing of Form 8288. If the transferor is unable or refuses to supply its TIN, the transferee should file these forms (including Form 8288-A) and remit the withheld amount without the transferor's TIN, even though the forms will not be processed. However, it is not clear that so filing exempts an innocent transferee from all penalties for not obtaining the transferor's TIN. The regulations should state explicitly that, if the transferee has requested the TIN but the transferor does not timely supply it, the transferee would not be subject to any penalties for filing Form 8288 without the transferor's TIN. This would be consistent with Reg. Section 1.6045-4(l)(2), concerning a settlement agent's request for TINs to be supplied on Form 1099. Potentially applicable penalties include those under Code Section 6721 for failure to file a correct information return; Section 6722 for failure to furnish a correct statement; Section 6723 for failure to comply with other information reporting requirements (including the requirement to furnish a TIN); and Section 7203 for willful failure to supply information (including a TIN).

continued...

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Important Address Changes

The amended regulations update a number of address specifications in the prior regulations. Most Code Section 897 filings previously directed to the Foreign Operations District in Washington, D.C. now go to the Small Business/Self Employed Division in Lanham, Maryland, or to the Philadelphia Service Center at the FIRPTA unit's address. For Code Section 1445 purposes, written communications to the Philadelphia Service Center now go to the address of the FIRPTA unit, and the address for filing Forms 8288 and 8288-A and remitting is changed from the Philadelphia Service Center to the address specified in Form 8288, currently the FIRPTA unit.

Disregarded Entities; Time to Revise Non-Foreign Affidavits for Entities

Effective September 4, 2003, a disregarded entity owning a USRPI will not be treated as the transferor under Code Section 1445. Consequently, a U.S. disregarded entity cannot provide a certificate of non-foreign status, and the entity's owner must give the non-foreign certificate if eligible to do so. Non-foreign certifications for entities will be required to state that the entity is not a disregarded entity. A revised sample statement is provided in the regulations.

A potential problem with the provision of the non-foreign certification by the owner of a disregarded entity is that the withholding agent might balk at accepting the certificate from a person who has no legal status in the transaction despite the regulatory requirement that the owner give the certificate. Unfortunately, the regulations did not include an affirmative statement entitling the withholding agent to rely on the owner's certification and TIN. Practitioners might revise their non-foreign certificate form to state that the person providing the certification is the owner of the disregarded entity, and that the notice is provided on behalf of the transferor pursuant to the amended regulations.

Another potential problem is that many disregarded entities have TINs different from that of the owner. Using the owner's TIN for FIRPTA purposes is inconsistent with the requirement of Form 1099-S under Reg. Section 1.6045-4 that the disregarded entity's TIN be used. The Service should address this inconsistency.

Deferred Section 1031 Exchanges Restricted after September 4

The final regulations adopt the IRS position that the expedited nonrecognition notice procedure of Reg. Section 1.1445-2(d)(2) does not apply to a deferred Code Section 1031 like-kind exchange because the transferee cannot be sure at the time of closing that the transaction eventually will qualify for nonrecognition treatment under Section 1031 (for example, if the 45-day identification time limit or the180-day transfer limit is not met) or that it will qualify as entirely tax-free (for example, if boot is received by the foreign transferor). Instead, to avoid putting up cash equal to ten percent of the amount realized and seeking a refund, the transferor can apply for a withholding certificate. Although not specifically addressed by Reg. Section 1.1445-3, the IRS long has accepted withholding certificate applications for deferred like-kind exchanges and this procedure now is incorporated into the regulations.

Apparently, the IRS has accepted nonrecognition notices in connection with deferred exchanges for years without objection. Proponents of this simpler mechanism for deferred exchanges argued that the IRS should adopt a notice of intent approach similar to that used under Temp. Reg. Section 1.1445-9T(b)(6) (prior to the repeal of Code Section 1034) for replacement of a principal residence.

In connection with formal adoption of the withholding certificate procedure for deferred like-kind exchanges, it is unclear how the IRS will apply the provisions of amended Reg. Section 1.1445-3(b)(2) if the requirement to identify "all the parties" to the transaction extends to the transferor of the replacement property. Often, the identity of such transferor is not established at the time of the initial transfer in a Code Section 1031 deferred exchange. Further Reg. Section 1.1445-3(b)(6) seems to contemplate only a cash escrow of the withholding tax. This is inconsistent with prior IRS practice in accepting withholding certificate applications for deferred Section 1031 exchange with alternative security such as an irrevocable letter of credit in accordance with Rev. Proc. 2000-35, section 6. Requiring a transferor to obtain and place in an extended escrow additional cash equal to ten percent of the exchange value is an unnecessary hardship. But, considering the Preamble to the Proposed Regulations, it seems likely that the IRS does not intend that these technical issues should hamper withholding certificate applications for deferred like-kind exchanges.

Code Section 121 Transactions

New Reg. Section 1.1445-3(b)(5) details how a withholding certificate may be sought if the nonresident alien occupied the property as his or her personal residence for the requisite time.

Chair-elect's Message:

The French Have a Word For It

By Bill Townsend, Esq., Steel Hector & Davis, LLP, Tallahassee, Florida

We need to recognize that our boy, Richie Comiter, and the tireless Donna Byrd put on a great set of meetings for us at Amelia. Perhaps I shall let Richie plan mine for 2004 as well….mmm. Moreover, the sportiest of sports, Mr. Mike Jorgenson, with his staff did a yeoman's work setting up and staffing the Hospitality Suite despite the fact that the cigar area was probably a few square feet less open that the law allows under that oppressive Ch. 396, Part II and the ill considered Constitutional amendment. Take the time to drop Mike and the guys a thank you by email…. impress them with your techno-suavity.

* * *

If you could have the time to sit and think about all you'd say in a column that didn't really have to have any kind of substance, and you had a mind sort of off kilter anyway, you can probably imagine the amount of editing that would have to be done before the column got sent to the *Bulletin*.

I've read some of the stuff my predecessors have written. . . and I am aware that there are those among them who shudder at what I might do to the gravitas of the office of Chair-Elect, let alone the sheer terror they harbor at the potential HAPPENINGS during 2004-2005. Ah, mes amis….*épatering le bourgeois* and shattering *l'esprit de notaire* are certainly two of the things I most enjoy, but I shall endeavor to keep as much of that under control as I possibly can… NOT!

In this regard, I direct your attention to the thoughts of a modern philosopher, Toby Keith….(up here in the hinterland, we listen to more than hip hop, klezmer and Latin music) ….

> I wanna talk about me Wanna talk about I Wanna talk about number one Oh my me my What I think, what I like, what I know, what I want, what I see I like talking about you, usually, but occasionally, I wanna talk about me! I wanna talk about me…

In addition to keeping you advised of the progress I'm making in developing my programs for the year after Richie, it will be my pleasure (it's all about me) to offer you my views on diverse non-controversial topics such as religion, politics, sex, drugs (including libation) and rock and roll as well as to keep you abreast of culture enhancing products and events to better enable you to cope with your tiny little lives.

But first a poll….. Some of you *gens de bien* remember when there were four Section meetings each year. Is there any interest in returning to the glorious days of yesteryear (hi ho Silver awaaaaaay!) and having a 4th meeting? If there is a ground swell of support for that (I noted with interest that the Reptile group trekked off to Sonoma for a meeting) we could therefore choose between making Donna figure out a cruise deal or having her figure out a trip/ meeting someplace like the Whiskey Trail in Scotland or the Recreational Powder Trail in Columbia or the "Duck!-- it's an RPG" Tour of Baghdad. This is a two part question, folks…. a) do you want a 4th meeting and, if you do, and/or, b) even if you don't, would you like one of our meetings to be extra-Florida?

There….. that serious note should allay some of the fear that I don't take this job seriously.

Pressing on, as you know we cosponsor an annual State Tax Conference with the FICPA and the IPT each year. In the past few years there has been some *contretemps* with the bean counters regarding costs, splits, substance issues and other annoyances. We will again sponsor with them the 2004 Conference acceding yet once more to one of their requests – a change of venue. Should the Tampa location (Feb 5-6, 2003) not result in an increase in attendance from the folks in green eyeshades, we'll be back in Orlando in 2005 and likely WITHOUT the guys from down College Avenue. It has been suggested that the Section with IPT and a couple of the Final Four could do as good a job staffing and marketing this as the pencil noses have. We'll see. Film at 11. Louis Nizer once said "A graceful taunt is worth a thousand insults." Perhaps the beanies will read this column as a taunt, *ça va?*

For those of you who are not aware, the April meeting will include among other educational opportunities, a garage sale….er…display of new gadgets, gizmos and other whizbang gewgaws to enhance the way you practice whatever type of tax law you engage in. Richie has asked me to put this Tekkie Thingy together but if any of you have any specific devices you'd like to have demonstrated please let me know (although I anticipate a degree of prurience, Mr. Minton, please keep it at something less than a four word response.)

Because this is about ME….

I want you to be thinking about the amount of registration fees you're comfortable with for the meetings. Although some of our expenses are underwritten by the sponsors (and hasn't Nick La Roc done a HUGE job with that, Honey!!) some of the meal costs can be reduced by increasing registration fees. This is sort of like deducting state taxes from the federal return – exporting the burden type thing – since most firms pay the registration fee and individual lawyer travel expenses and meal costs, we could increase that amount, allow your firms to assist in feeding the wife and kiddies and thus reducing your personal costs for Amelia. Feel free to email me your thoughts.

Despite the fact that *chacun à son goût*, on any of the issues raised in this column, I am sure that the next two years will be an interesting and hopefully will leave the Section *hors concours*!!!

Finally…a thought for the day:

"I feel so miserable without you, it's almost like having you here." – *Stephen Bishop*

Y.O.S.
Bill
Bill.Townsend@steelhector.com

Bylaw Amendment to Be Presented at Fall Meeting for Final Vote

NOTICE: THE FOLLOWING AMENDMENT TO SECTION 3(a) OF ARTICLE III OF THE SECTION BYLAWS WILL BE PRESENTED FOR A FINAL VOTE DURING THE SECTION'S FALL MEETING ON OCTOBER 25, 2003 IN TAMPA, FLORIDA. **NO FLOOR AMENDMENTS TO THE PROPOSED AMENDMENT WILL BE ENTERTAINED AT THE FALL MEETING. ALL COMMENTS TO THE PROPOSED AMENDMENT SHOULD BE SUBMITTED BY E-MAIL PRIOR TO THE MEETING TO EACH OF:**

RICHIE COMITER, CHAIR
BILL TOWNSEND, CHAIR-ELECT
MITCH HOROWITZ, DIRECTOR, LONG RANGE PLANNING COMMITTEE
DONNA BYRD, SECTION ADMINISTRATOR

ALL COMMENTS RECEIVED PRIOR TO THE MEETING WILL BE READ TO THE SECTION MEMBERS PRESENT PRIOR TO CALLING THE AMENDMENT FOR A VOTE. YOU DO NOT NEED TO ATTEND THE MEETING IN ORDER TO PRESENT A COMMENT FOR READING.

Based on the discussion of the proposed amendment at the Section's Annual Meeting at the Portofino Hotel in April, the proposed amendment has been further revised as follows:

AS CURRENTLY APPEARS:

Section 3. Duties of Officers.

(a) *Chair*. The chair shall preside at all general meetings of the section, at all meetings of the executive council, and at all meetings of the directors' committee. The chair shall appoint and may discharge the officers(except the chair-elect), and all chairs of the section's committees and subcommittees, shall be responsible for the preparation of all reports to be submitted to The Florida Bar, and shall perform such other duties as customarily pertain to the office of the chair.

PROPOSED AMENDMENT (underlined is new language)::

(a) *Chair*. The chair shall preside at all general meetings of the section, at all meetings of the executive council, and at all meetings of the directors' committee. The chair shall appoint and may discharge the officers (except the chair-elect), and all chairs of the section's committees, subcommittees, and CLE programs, as the case may be; provided that any such appointees to certain committees, subcommittees, and CLE programs, pertaining specifically and exclusively to tax litigation and the practice of law (e.g., National Tax Moot Court, Unauthorized Practice, Bankruptcy, Tax Procedure (civil and criminal), and Tax Court Bar Relations/Tax Litigation) shall at the time of their appointment, and throughout their term, be actively engaged in the full time practice of law or shall be employed as a full time faculty member at an accredited school of law in Florida (any reasonable combination of legal practice and legal teaching as previously described shall be deemed to constitute the full time practice of law for purposes of this paragraph), or shall be an active member of the Florida or Federal judiciary, unless exempted from the aforementioned practice, teaching, or judicial participation requirements by a majority vote of the executive council. The chair shall be responsible for the preparation of all reports to be submitted to The Florida Bar, and shall perform such other duties as customarily pertain to the office of the chair.

Florida Tax Amnesty Update

By Tony Zarba, Esq., Miami, Florida

During the first special session of the 2003 legislative session, the Florida Legislature passed a tax amnesty program that will run from July 1, 2003 and end October 31, 2003. The amnesty program is Florida's first since 1988 and will apply to all taxes administered by the Department of Revenue, except unemployment tax. Tax liabilities incurred on or after July 1, 2003, are not eligible.

This program is an opportunity to voluntarily pay overdue taxes with no penalty and reduced interest. That is, there is a 50% reduction in interest if you report and pay a tax liability that the department was unaware of, and a 25% reduction in interest if you are responding to a department bill, audit, or other assessment. After October 31, 2003, you will owe 100% of the interest -- the interest rate will double from 4 percent to 8 percent -- and penalties will apply. Of particular note, taxpayers expressly waive all rights to protest, appeal, or receive refunds of taxes paid under amnesty. It is possible to file and pay online and the department has set up a web page that answers most questions at: *http://sun6.dms.state.fl.us/dor/amnesty*.

Tax Certification Committee Responds to Tax Section's Input

Guy E. Whitesman, Esq., Henderson Franklin Starnes & Holt, P.A., Ft. Myers, Florida
Chair, Tax Certification Committee 2003-2004

At the organizational meeting of the Tax Section Bar at Amelia Island, members of the Tax Certification Committee (a committee appointed by the Florida Bar to work with the Board of Legal Specialization and Education) and the Tax Section's Executive Council held a joint meeting. The purpose of the meeting was to discuss proposals to improve the tax certification process. The goal of both the Tax Certification Committee and Tax Section's task force was to (i) encourage and promote certification of Florida tax lawyers and (ii) devise an examination format which would fairly test the competency of members of the Florida Bar earning the title "Certified Tax Lawyer." The Tax Section has encouraged members to seek to become certified tax lawyers. The Tax Certification Committee reviewed the results of surveys regarding the tax certification process prepared and disseminated by the Tax Section as well as view of the Tax Section's task force on the format of the examination.

In response to suggestions made during this meeting, the Tax Certification Committee subsequently met via conference calls in order to review the examination format. As a result of the input from the Tax Section, the Tax Certification Committee agreed to modify the examination format. The format for the next exam is essentially as follows:

Part I (2 hours) is short answer. These will be a series of 10 questions from which the applicant must answer 7. The questions will be drawn from various areas of tax law, including, corporate, partnership, state and local, individual, foreign, procedure, transfer tax, etc.

Part II (2 hours), is a mandatory essay covering Choice of Entity.

Part III, (2 hours), is one essay question chosen from topics pre-selected by the applicants (usually in their area of concentration).

The Tax Certification Committee believes that this format is an improvement over prior years and is more reflective of the issues which tax lawyers in Florida may be called upon to advise clients on a daily basis.

The Tax Certification Committee appreciates the work, suggestions and cooperation of the Tax Section and those members of the Tax Section's Executive Council who took the time to assist in promoting and bettering the tax certification process.

Federal Tax Liens "Stick It" to Entireties

By Robert C. Meyer, Esq. Robert C. Meyer, P.A., Miami, Florida

The simplest concepts become convoluted when federal and state laws intertwine or conflict. Until the 2002 Supreme Court in *Craft* affirmatively responded to the question of whether a federal tax lien that arises by operation of federal law attaches to "all property and rights to property" of a delinquent taxpayer (26 U.S.C. § 6321), including the delinquent taxpayer's rights in property held as a tenant by the entirety,[1] there was confusion whether to apply federal tax laws on "property" as opposed to applying state laws of "property." *Craft* establishes that the collection rights of the taxing authorities clearly exceed the private creditor's collection rights in states which have a tenancy by the entirety property right. Florida residents are significantly affected as Florida's tenancy by the entirety, which clearly shielded assets from creditors for over a century,[2] cannot shield the entiretical property from a federal tax lien after the *Craft* ruling.

The Sixteenth Century English law devised entireties estates to serve numerous ends which no longer have merit: military organization in feudal states, male supremacy, and scriptural literalism. Florida had held the need to preserve entireties.[3] Since that time, democracy and liberation have abounded. The British abolished entirety estates in 1925.[4] Subsequently, some American jurisdictions abolished the same. Florida, unlike those other jurisdictions, continues to uphold tenancy by entirety ownership in real property and has expanded such ownership interest to personal property. At the same time, the Twentieth Century established title 26 of the United States Code (Tax Code) and created statutory language which the Supreme Court interpreted to overcome entireties concepts.

All tenancy by entirety properties are not equal.[5] Certain jurisdictions are referred to as "full bar states" and others are called "modified bar states."[6] In full bar states, creditors against one spouse cannot attach to the entireties property or interests.[7] In modified bar states, creditors can attach to entireties but subject to the right of the nondebtor spouse.[8] The full bar states were of greatest concern to the IRS as they imposed greater limitations on creditor rights and remedies. Florida – a full bar tenancy by entirety state – established tenancy by the entirety to be a creditor immunization which expansively protects real and personal property.[9]

When a federal tax lien against Mr. Craft could not attach to his entireties real property,[10] an appeal ensued. The appeal before the Supreme Court in *Craft* cited the reasons to reverse were: 1) a taxpayer who owns entireties property in states where creditors cannot attach such property for the debts of only one spouse is treated more favorably than a taxpayer who owns property in states where creditors are permitted by state law to attach such property; 2) the immunization of entireties property provides an avenue for easy avoidance of federal income tax laws; 3) significant opportunities for extraordinarily facile evasion of tax obligations exist with the entireties exemption; 4) because personal property as well as real property may be held in tenancy by the entirety, financial assets may be purchased with untaxed income and shielded from tax collection process through the simple artifice of placing ownership in the "marital unit" through a tenancy by the entirety; and 5) the amount of potential loss of revenue effected by the immunization of entireties property is extreme.[11] The Department of Justice argued the taxing authorities should attach to entireties properties for economically persuasive (avoid loss of revenue), permissibly punishing (harm those who use evasive strategies), and democratically derived (treats all taxpayers alike, regardless of resident state) reasons. The Department of Justice, in its brief, recognized that the true aim of this issue was to defeat the 14 states which created an "entireties bar" in what it described as "full bar states."[12]

The destruction of the entireties bar as to federal tax liens was not created by the *Craft* case alone. Before reviewing the *Craft* decision, one must look to its extremely important predecessor, *Drye v. United States*, 528 US 49, 120 S. Ct. 474, 145 L. Ed. 2d. 466 (1999). *Drye* commenced change to the concepts of property in regard to federal tax liens.[13] *Drye* clarified the conflicting federal court decisions on how to interpret state law and federal law when interpreting federal tax lien attachment cases.

Drye included grotesque facts which the taxing authority implored as evidence of abusive tax planning. Mr. Drye, who owed approximately $325,000.00 to the IRS, and was deemed to be insolvent because his only valuable assets were held as tenancy by the entirety, received an inheritance from his intestate mother. Mr. Drye was the sole heir of a $230,000.00 estate and was appointed administrator of the estate. Within six (6) months, he filed a Writ to Disclaim any interest in his mother's estate, clearly to avoid taxable events from the IRS lien attaching to that money. Two days later, he resigned as the administrator of that estate and was succeeded by his daughter. The daughter thereafter placed all the inheritance money into a spendthrift trust which named Mr. Drye, his wife, and daughter as the beneficiaries of the spendthrift trust. Under state law, these assets were clearly shielded from creditors as the beneficiaries of the trust. The IRS filed a tax lien notice against the trust and commenced a levy on the accounts. The trust responded with a § 7426 lawsuit[14] to which a counterclaim was filed by the IRS against the trustee and the beneficiaries as well as the trust. The Eighth Circuit, affirming the District Court, ruled for the IRS in *Drye*.[15]

Drye is not important under these facts. How *Drye* transcends its narrow issue is very important. The Supreme Court, once and for all, clarified the intertwined relationship between state law and federal tax lien law in regard to federal tax lien attachment on "property." "Property" for tax lien purposes was defined by *Drye* to be a "federal" issue.

Drye establishes that the analysis

of federal tax lien attachment is two-pronged. The jurisprudence of tax lien law had previously interpreted those two prongs in a different manner than the Supreme Court did in *Drye*. The initial prong involves describing the property interest and its existence. This analysis utilizes state law only. This was not a change. The second prong involves characterization of the property. *Drye* establishes this to be a question of federal law when a federal tax lien is at issue. This was a change. Before *Drye*, the second prong often was interpreted under state law. This change harmed the planners in *Drye* and *Craft*. "Property" under state law is vastly different than "property" under federal law. *Drye* describes numerous criteria for "property" and concludes that the definition is extremely expansive. "Property" under federal law includes: "every species of right or interest protected by law and having an exchangeable value."[16] The "property" of *Drye* includes:

- "A right to gain possession of an item, even if such possession does not include ownership;"[17]
- Assets or items available to the taxpayer "within his/her reach to enjoy;"[18]
- "Any beneficial interest as opposed to 'bare legal title' in the asset;"[19]
- "A valuable, transferable, legally protected right to the property at issue;"[20]
- "Rights or interests that have pecuniary value and are transferable;" and[21]
- "More than a mere expectancy of property and, even if valuable or transferable."[22]

The above-described criteria are intentionally extremely broad. In fact, the federal term "property" is a broadly construed and defined term[23] so as to enable the IRS collection parties to gather or grasp as many assets as possible.[24] Interestingly, *Drye* did not deliver an absolute definition of "property" and "rights of property," but referred to prior definitions through administrative analysis.[25] Those definitions of property rights basically encompass most tangible interests.

The Court further reviewed five (5) common elements to property. In order for an asset to be "property" or "right to property" under federal law, the IRS should show some of the five elements. The IRS does not need to show all five elements. Proof of a few would suffice. Amazingly, tenancy by the entirety (immune under state law) is clearly not immune under federal law as it holds *all* five elements, which are:

1) the debtor spouse's entireties interest is protected by law[26];
2) the debtor's spouse must "possess" or have "within his/her reach to enjoy" the asset[27]
3) the debtor spouse's entirety should be "exchangeable" and "transferable."[28]
4) the debtor spouse's entireties interest should be "valuable" at pecuniary value."[29]
5) the debtor spouse should have a beneficial interest in the property, not just bear legal title and not a mere expectancy.[30]

From *Drye* came *Craft*. In *Craft*, the Court recreated a metaphor of having property be more than just bricks and mortar or real estate, but characterized property as "sticks" in a bundle which cumulatively created "property." In *Craft*, the husband's "sticks" constituted a possessory interest of "property" within the meaning of 26 U.S.C. § 6321[31] as he had the following rights:

1) The right to use the property;
2) The right to exclude third parties from the property;
3) The right to a share of the income produced from the property;
4) The rights of ridership;
5) The right to become a tenant in common with equal shares upon divorce;
6) The right to sell the property with the respondent's consent and to receive half the proceeds from such a sale;
7) The right to place an incumbrance on the property with the respondent's consent; and
8) The right to block the respondent from selling or encumbering the property unilaterally.[32]

Those ownership interests comprise what the court calls "essential sticks in the bundle of rights that are commonly characterized as property."[33] Craft countered that state law prohibitions on tenancy by the entirety property – most importantly Craft's inability to unilaterally transfer the asset – proved that his property interest was not attachable as his alienable interest depended upon the termination of his marriage either by death or divorce – made his interest merely that of a conditional owner. The Court responded that,

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"this court has already stated that federal tax liens may attach to property that cannot be unilaterally alienated."[34] The U.S. Supreme Court's language can be neither stronger nor more blunt as it broadly defines property to be any property even when such property cannot be unilaterally alienated. Such language clearly was drafted to affect entireties property as an entireties' property interest is one of a few ownership interests that cannot be unilaterally alienated.[35]

Between those two decisions, *Drye* and *Craft*, tenancy by entirety property, under federal definitions of the terms "property" or "property rights,"is subject to the attack of the United States tax lien collectors, as opposed to private creditors; and, the U.S. tax collectors can now freely attach against almost all jointly held properties. In many critics' minds, this conclusion was inevitable. One critic has claimed that prohibiting the U.S. tax collectors from collecting against entireties property failed for three doctrinal reasons: (a) the IRS, not an ordinary or private creditor, has rights to collect against all properties but those which are exempted by the IRS rules or 26 U.S.C. §6334(a)[36]; (b) entireties property is an exemption to collection as opposed to a shield for taxpayers from federal tax liens; [37] and (c) state law on collection is irrelevant as one looks to state law only to ascertain ownership or "property" interests on the property sought to be attached by the tax lien.[38]

Moreover, a broadly versed clause of 26 U.S.C. § 6334 states specifically that unless the property is listed in § 6334(a) as exempt, the property will not be deemed exempt.[39] The above-described doctrinal reasons no longer stand as the tax lien collectors' argument. The U.S. Supreme Court has determined that the "bundle of sticks" definition of property in a federal context will allow the IRS liens to attach to most tangible property, with the exception being only those exempt under § 6334(a).[40]

The recent metamorphosis of the tax lien attachment has been relatively quick. In fact, one could conceivably argue that the Department of Justice has very wisely and adeptly utilized the appropriate cases to reach its goal in an admirably quick fashion – in a matter of years it has allowed tax liens to attach to entireties property. The utilization of *Drye* to obtain a proclamation by the Supreme Court that federal law defines the terms "property" or "rights to property" under 26 U.S.C. § 6321 drastically inhibited other federal courts from utilizing state concepts of property to trump federal tax lien law and collection by the federal tax lien collector. No longer can the term "property" be reviewed under state law alone. Instead, as stated by the Supreme Court, the determination of whether "sticks" are "property" for the federal tax lien statute is a question exclusively of federal law.[41]

One open issue remains. The *Craft* court stated near the ending of its opinion that an expectancy to property may or may not be "property" as defined under 26 U.S.C. § 6321. The court admitted that, ". . .we suggested in *Drye* [that an expectancy] would not constitute 'property' for the purposes of federal tax lien."[42] The Supreme Court followed that, "[We do not mean to suggest] that an expectancy that has pecuniary value. . .would fall within § 6321 prior to the time it ripens into a present estate."[43] The court left open this question as it stated that, "*[D]rye* did not decide this question, however, nor do we need to do so here."[44] The court concluded, "it is therefore not necessary to decide whether the right to survivorship alone would qualify as 'property' or 'rights to property' under § 6321."[45]

The expectancy of property to be included as "property" which would then be subject to attachment would be the greatest victory for the tax lien collector. Expectancy of property was tangentially used as a defense to lien attachment. Mr. Craft argued that his ownership of the entireties property was an expectancy of property as his ownership would not become pronounced until he could alienate the property. Craft concluded that the power to alienate the property would only arise upon his marriage's termination by death or divorce. The Supreme Court countered that entireties property is property under the "sticks in a bundle" metaphor analysis as described above.[46] The court countered this matter quickly by reviewing the five (5) elements of ownership as described above [see footnotes 25 - 29].

Within the United States Supreme Court, the *Craft* ruling has its critics. Justices Scalia, Stevens and Thomas, some of the more published members of that court on codified law, wrote strong dissents. Justice Thomas wrote that the entire opinion was an, ". . . amorphus construct [which] ignores the primacy of state law in defining property interest, eviscerates the statutory distinction between 'property' and 'rights to property' drawn by § 6321, and conflicts with an unbroken line of authority from this Court, the lower courts, and the IRS."[47] Justice Thomas concluded, "I would affirm the Court of Appeals and hold that Mr. Craft did not have 'property' or 'rights to property' to which the federal tax lien could attach."[48]

Moreover, Justice Thomas astutely recognized the distinction between *Drye* and its progeny with *Craft*. The cases relied upon for the ruling of *Craft* were *Drye, supra.*, *United States v. Mitchell*, 403 U.S. 190 (1971) and *United States v. Irvine*, 511 U.S. 224 (1994). All those cases dealt with property belonging to a taxpayer who thereafter utilized state law to disclaim or exempt the property from the federal tax liability. For instance, in *Drye*, the debtor had no less than an inchoate ownership of the intestate estate of his mother, but attempted to utilize state law to divest himself of such interest, and create a spendthrift trust to prohibit or exempt the property from creditor attack. It is clear that at the time of the disinheritance,[49] Drye had some ownership interest in the property and the lien attached at the moment of Mr. Craft's mother's death. *Drye*, *Irvine*, and *Mitchell* were not concerned about the term "property" but were rather looking to state laws to exempt property after the federal tax liability and the property interest had been created.

Justice Thomas concludes that the federal law of "property . . . creates a new federal common law of property."[50] Much to Justice Thomas' discern, federal law on "property" will be a largely litigated issue of the future. Property will no longer be an exclusively state issue. In federal tax lien collection practice, the definition of "property" will be reviewed extensively by the federal courts with a new federal jurisprudence; and, federal common law will arise in defining what assets are "property" to which the lien can attach. The federal term "property" may eventually include "expectancy of property."[51]

Conclusion

In states like Florida, an "absolute bar state" for tenancy by the entirety property, it is clear that the federal tax lien issues are now of paramount concern. The practitioner must make every attempt to avoid a lien from arising. Once that lien has arisen, the *Craft* decision permits that lien to attach to almost any type of entireties property, and the war is almost over.[52] As stated by Professor Johnson, the tax collector is not an ordinary creditor with ordinary collection activity.[53] Instead, only those certain properties exempted under 26 U.S.C. § 6334(a)[54] are absolutely immune to tax attachment or collection *after* the lien has been created. That list is modest and leaves very little in value to the taxpayer. The revenue collection procedures of the Internal Revenue Service have been greatly enhanced by the *Craft* ruling and addressing those issues will be vitally important for the married debtor who jointly owns property in Florida with his or her spouse.[55]

Endnotes:

1 *United States v. Craft*, 535 U.S. 274, 122 S. Ct. 1414, 152 L. Ed. 2d. 437 (2002)

2 Having a tenancy by the entirety and proving it are different issues. Proof has been established to be derived from a review as follows:
A viable tenancy by the entirety , with regard to either realty or personalty, must possess always and at the same time the following characteristics of form: unity of possession (joint ownership and control); unity of interest (the interests must be the same); unity of title (the interests must originate in the same instrument); unity of time (the interests must commence simultaneously); and, the unity of marriage.
First Nat'l Bank of Leesburg v. Hector Supply Co., 254 So.2d 777, 781 (Fla. 1971)

3 *United States v. Gurley*, 415 F.2d. 144, 149 (5th Cir. 1969)

4 *Law of Property Act*, 1925, 15 and 16 Geo. 5, Ch. 20, § 37 (Eng).

5 Florida, not surprisingly, is endowed with the greatest debtor-protective entireties concept.

6 The full bar states include Delaware, District of Columbia, Florida, Hawaii, Indiana, Maryland, Michigan, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, Virgin Islands, and Wyoming. The modified bar states include Arkansas, Kentucky, Massachusetts, Montana, New Jersey, Oregon, and Tennessee.

7 For instance, a judgment against one spouse cannot attach to property clearly owned by husband and wife.

8 Perhaps the best written opinion regarding the contrasting rights of a party against tenancy by the entirety property is the Fourth Circuit's *Sumy v. Schlossberg*, 777 F.2d 921 (4th Cir. 1985)

9 See *Dzikowski v. Blais*, 220 B.R. 485, 490-491 (S D Fla. 1997) and *In re Planas*, 1998 US Dist. LEXIS 20524 (S.D.Fla. 1998)

10 By operation of Michigan law

11 Reasons cited in Department of Justice's Petition for Writ of Certoriari

12 See footnote 14 and 16 of Petition for a Writ Certiorari filed by the Department of Justice, in *United States v. Craft*, Case No.: 00-1831.

13 *Drye* and *Craft* overturn *U.S. v. Gurley*, 415 F.2d. 144 (5th Cir. 1969) and its progeny.

14 See 26 U.S.C. § 7246(a)(1)

15 *Drye Family 1995 Trust v. United States*, 152 F.3d 892 (8th Cir. 1998)

16 *Drye*, 120 S. Ct. at 480

17 *Drye*, 120 S. Ct. at 481

18 *Drye*, 120 S. Ct. at 482

19 *Drye*, 120 S. Ct. at 482

20 *Drye*, 120 S. Ct. at 482

21 *Drye*, 120 S. Ct. at 482

22 *Drye*, 120 S. Ct. at 482

23 *In Craft*, the court recited language that stated, "the statutory language authorized in the tax lien 'is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have.'" citing *United States v. National Bank of Commerce*, 472 U.S., 713, at 719-720 (1985). *Craft*, 122 S. Ct. at 1422.

24 *Craft*,122 S. Ct. at 1422.

25 *Drye*,120 S. Ct. at 481-482

26 *Drye*, 120 S. Ct. at 480

27 *Drye*, 120 S. Ct. at 482

28 *Drye*, 120 S. Ct. at 482

29 *Drye*, 120 S. Ct. at 482

30 *Drye*, 120 S. Ct. at 482

31 The Tax Code's definition of attachable property.

32 *Craft*, 122 S. Ct. at 1423.

33 *Craft*, 122 S. Ct. at 1423, citing *Kaiser Aetna v. United States*, 44 U.S. 164, 176 (1979); *Loretto v. Teleprompter $CATV Corp.*, 458 US 419, 435 (1982).

34 *Craft*, 122 S. Ct. at 1423, citing *United States v. Rogers*, 461 US 77 (1983)

35 The other somewhat inalienable ownership is community property, but community property is not entirely inalienable.

36 **Sec. 6334. - Property exempt from levy**
(a) Enumeration
There shall be exempt from levy -
(1) Wearing apparel and school books
Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;
(2) Fuel, provisions, furniture, and personal effects
So much of the fuel, provisions, furniture, and personal effects in the taxpayer's household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $6,250 in value;
(3) Books and tools of a trade, business, or profession
So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $3,125 in value.
(4) Unemployment benefits
Any amount payable to an individual with respect to his unemployment (including any portion thereof payable with respect to dependents) under an unemployment compensation law of the United States, of any State, or of the District of Columbia or of the Commonwealth of Puerto Rico.
(5) Undelivered mail

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Mail, addressed to any person, which has not been delivered to the addressee.

(6) Certain annuity and pension payments

Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 1562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code.

(7) Workmen's compensation

Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under a workmen's compensation law of the United States, any State, the District of Columbia, or the Commonwealth of Puerto Rico.

(8) Judgments for support of minor children

If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

(9) Minimum exemption for wages, salary, and other income

Any amount payable to or received by an individual as wages or salary for personal services, or as income derived from other sources, during any period, to the extent that the total of such amounts payable to or received by him during such period does not exceed the applicable exempt amount determined under subsection (d).

(10) Certain service-connected disability payments

Any amount payable to an individual as a service-connected (within the meaning of section 101(16) of title 38, United States Code) disability benefit under -

(A) subchapter II, III, IV, V,, [1] or VI of chapter 11 of such title 38, or

(B) chapter 13, 21, 23, 31, 32, 34, 35, 37, or 39 of such title 38.

(11) Certain public assistance payments

Any amount payable to an individual as a recipient of public assistance under -

(A) title IV or title XVI (relating to supplemental security income for the aged, blind, and disabled) of the Social Security Act, or

(B) State or local government public assistance or public welfare programs for which eligibility is determined by a needs or income test.

(12) Assistance under Job Training Partnership Act

Any amount payable to a participant under the Job Training Partnership Act (29 U.S.C. 1501 et seq.) from funds appropriated pursuant to such Act.

(13) Residences exempt in small deficiency cases and principal residences and certain business assets exempt in absence of certain approval or jeopardy

(A) Residences in small deficiency cases

If the amount of the levy does not exceed $5,000 -

(i) any real property used as a residence by the taxpayer; or

(ii) any real property of the taxpayer (other than real property which is rented)

used by any other individual as a residence.

(B) Principal residences and certain business assets

Except to the extent provided in subsection (e) -

(i) the principal residence of the taxpayer (within the meaning of section 121); and

(ii) tangible personal property or real property (other than real property which is rented) used in the trade or business of an individual taxpayer.

[37] *United States v. National Bank of Commerce*, 472 U.S. 713, 722-723 (1985)

[38] Johnson, *After Drye: Likely Attachment of the Federal Tax Lien to Tenancy by the Entireties Interest*, 75 Ind. L.J. 1163, 1172-1174 (2000)

[39] **Sec. 6334.(c) No other property exempt**

Notwithstanding any other law of the United States (including section 207 of the Social Security Act), no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

[40] The court wrote:

A common idiom describes property as a 'bundle of sticks' – a collection of individual rights which, in certain combinations, constitute property. State law determines only which sticks are in a person's bundle. Whether those sticks qualify as "property" for purposes of federal tax lien statute is a question of federal law.

Craft, 122 S. Ct. at 1420.

[41] *Craft*, 122 S. Ct. at 1420.

[42] *Drye*, footnote 7 of the opinion

[43] *Drye*, 120 S. Ct. at 482.

[44] *Craft*, 122 S. Ct. at 1424.

[45] *Craft*, 122 S. Ct. at 1424.

[46] Before *Craft*, all entireties properties were not subject to creditor or tax attack because of the fact that the unilateral alienation prohibition of such property demanded the death (or divorce) of one spouse to make the property become vested in the name of the taxpayer or debtor which would be deemed or arguably deemed an ownership interest only as a right of survivorship. That right of survivorship did inherit the whole of the estate is the argument of Craft that his ownership interest was merely an "expectancy which would not be property" under 26 U.S.C. § 6321.

[47] *Craft*, 122 S. Ct. at 1427.

[48] *Craft*, 122 S. Ct. at 1427.

[49] Note, this is not a transfer according to the Western District of Oklahoma Bankruptcy Court. *In re Faulk*, 281 B.R. 15 (Bankr. W.D. Ok. 2002)

[50] *Drye*, 122 S. Ct. at 1428.

[51] It is very likely that Justices Stevens, Thomas, and Scalia will absolutely rule against incorporating expectancy of property as collectable or attachable property for tax lien purposes. However, under the appropriate circumstances, the Department of Justice may want to bring the expectancy of property issue before the Supreme Court.

[52] Although the war may appear to be over to the nonbankruptcy practitioner, a Chapter 13 petition allows one less jab against the IRS. In the case of *In re Basher*, 291 B.R. 357(Bankr. E.D. Pa 2003), the bankruptcy court allowed the debtor to strip the lien of the IRS pursuant to an evaluation of the secured claim. The secured claim's value was "replacement value" as required under *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 138 L. Ed. 2d. 148, 117 S. Ct. 1879 (1997). The debtor can utilize 11 U.S.C. § 1325 (to strip the lien). Interestingly, the court's description of the equity in the home was not an absolute 50/50 split between the debtor husband and his non-debtor spouse. The court required that there be a review made under the formula of 50% modified by a percentage reflective of the debtor's survivorship interest as measured by applicable joint-life mortality tables. As woman – according to the actuarial tables reflect – outlive their spouses, their interest in the entireties property is adjusted by their longer lives. *Basher* at 367.

[53] *After Drye: Likely Attachment of the Federal Tax Lien to Tenancy by the Entireties Interest*, 75 Ind. L.J. 1163, 1172-1174 (2000)

[54] See footnote 34 above.

[55] The homestead, although not exempt, probably will not be subjected to execution. Homesteads are specifically exempt for small deficiency cases. 26 U.S.C. § 6334 (a)(13)(A).

Is Church Bingo Legal?

Thoughts on Avoiding Unrelated Business Income for Tax Exempt Organizations

By Adam S. Goldberg, Esq., Krause & Goldberg, Weston, Florida

Many people participate when churches, synagogues, fraternal orders, condominium associations and the like host bingo games, often on a weekly basis. Rough estimates are that ninety million dollars was spent on bingo last year. Bingo is so common that the Internal Revenue Service (hereinafter the "IRS") and the state of Florida statutorily defined "bingo" beginning in 1969 and 1992, respectively.

Before answering the question of whether or not a tax exempt organization can raise revenues through bingo, it is important to understand the definition of a tax exempt organization. There are over thirty-eight thousand organizations that are classified as tax exempt by the IRS. Exempt organizations were first established by the Tariff Act of 1894, which provided for a single category of exempt organizations. The Internal Revenue Code (hereinafter the "Code") currently exempts from federal income tax more than thirty types of organizations. The most prevalent of these organizations are "Section 501(c)(3) organizations" which derive their name from Section 501(c)(3) of the Code. Such organizations include, but are not limited to, religious, charitable, educational, and scientific organizations. Section 501(c)(3) organizations include both public charities and private foundations.

Rather than being organized to generate profits for owners or investors, a tax exempt organization generates resources to accomplish the purposes for which it is organized. The focus of a tax exempt organization's activity is outward, unselfish and directed at accomplishing a public purpose. These organizations are permitted to engage in income-producing activity, however, such income-producing activity cannot be conducted with the sole intention of producing a return on investment; it must also accomplish the exempt purpose of the organization. If the organization does not accomplish its exempt purpose, it may be taxed on any resulting income and/or have the tax-exempt status revoked, even retroactively.

A tax exempt organization can save money for a new building, expand operations, protect itself with a reserve for lost or reduced financing or do any other activity for any valid reason that serves its exempt purposes. A tax exempt organization under Section 501(c)(3) must be organized and operated "exclusively" for a proper exempt purpose as described in the Code. The IRS interprets the term "exclusively" as meaning that the organization must operate primarily to further exempt purposes. Thus, "exclusively" does not mean one hundred percent and "primarily" could mean a little more than fifty percent. In each case where the IRS questions the activity of a Section 501(c)(3) organization, the IRS examines the facts and circumstances on a case by case basis. Thus, there are few firm guidelines that exist to provide guidance in this area.

A charitable contribution for purposes of Code Section 170 is a voluntary gift or transfer of money or property that is made with no expectation of procuring a financial benefit commensurate with the amount of the transfer. See H.R. Rep. No. 1337, 83rd Congress, 2d Sess. A44 (1954); S. Rep. No. 1622, 83rd Cong., 2nd Sess. 196 (1954).

Code Section 512(a)(1) defines unrelated business income as the gross income derived by any organization from any unrelated trade or business regularly carried on by the organization less the deductions which are directly connected with the carrying on of such trade or business. There are three requirements that must be met in order for an activity to constitute an unrelated trade or business, the income from which is taxable to a tax exempt organization:

1. The activity must constitute a trade or business.

The definition of "trade or business" under Code Section 513 coincides, practically word for word, with the definition under Code Section 162, which deals with trade or business expenses. The Supreme Court reviewed the definition of the term "trade or business" in *Commissioner vs. Groetzinger*, 480 U.S. 23 (1987). In *Groetzinger*, the court held that in order to constitute a trade or business under Code Section 162, the taxpayer must be involved in the activity "with continuity and regularity." The Supreme Court declined to formulate an all-purpose test for defining "trade or business" and limited its decision to the facts of the case. The Tax Court, however, quickly adopted the *Groetzinger* definition for purposes of unrelated business income. See also *National Well Association v. Commissioner*, 92 T.C. 75 (1989).

2. The trade or business must be regularly carried on.

In determining whether this element has been met, the IRS refers to the frequency and continuity with which the activity is conducted and the manner in which it is pursued. Pursuant to Treasury Regulation Section 1.513-1, if the activity manifests a frequency and continuity and is pursued in a manner generally similar to a comparable activity of a for-profit organization, the activity is regularly carried on.

3. The trade or business must not be substantially related to the organization's exempt purpose.

Code Section 513(a) defines unrelated business as any business the conduct of which is not substantially related to the exercise or performance by such organization of its charitable, educational or other purpose. Pursuant to Treasury Regulation Section 1.513-1(d)(2), an activity is not "substantially related" to the organizations's exempt purpose or purposes unless the activity "contributes importantly" to the accomplishment of its exempt purposes. Pursuant to *Sound Health Association v. Commissioner*, 71 T.C. 158, 190 (1978), acq., 1981-2 C.B. 2., because a

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Section 501(c)(3) organization serves a public rather than a private interest, the class of persons to be benefitted by the activity must be sufficiently large so that it can be truthfully said that the public is being served. As an example, Treasury Regulation Section 1.513-1(d)(4)(iv), Example 4, provides that the operation of a radio station by a tax exempt organization whose purpose is to promote public interest in classical music furthers the organization's exempt purpose, but the sale of advertising time and services to commercial advertisers in the same manner as an ordinary commercial radio station generates income from an unrelated business.

Under *U.S. v. America Bar Endowment*, 477 U.S. 105 (1986), the Supreme Court held that the undisputed purpose of the rules regarding unrelated business income is to prevent tax-exempt organizations from competing unfairly with business whose earnings were taxed.

Code Section 511 imposes a tax on the unrelated business taxable income of organizations exempt from tax under 501(c). This poses the question, can a tax-exempt organization raise revenues through the use of bingo games without paying taxes on the revenues raised? In order to answer this question, we must first define the term bingo.

Bingo is defined in Code Section 513(f)(2)(A) as any game where wagers are placed, the winners determined, and the prizes distributed, all in the presence of the persons playing the game. Section 513(f)(2)(A) also requires that the game may not be an activity ordinarily carried out on a commercial basis and that it must not violate any state or local law.

Florida Statute Section 849.0931 defines bingo as an activity where participants pay a sum of money for the use of cards. These cards are used, when the game commences, to be covered or marked as numbers (marked 1-75) are drawn by chance, one by one, and announced. The game ends when a player receives a given order of numbers in a pre-announced sequence. For a charitable organization to hold a bingo session, the following rules must be followed:

- The charity must be in existence and active for at least 3 years;
- The bingo jackpots can not exceed $250 in value;
- No more then three (3) jackpots on any one day of play are allowed, non jackpot games are limited to a prize of $50 per game;
- Bingo sessions may be held no more than twice a week;
- No one under the age of 18 may participate on be involved in the running of a bingo game;
- Bingo games must be held on the property of the organization, on the property that will receive the benefit of the bingo proceeds or on property leased to the organization for 1 year or more;
- Vocal announcement must be made of the numbers in the winning pattern; and
- Municipalities may add additional restraints.

Failure to abide by these rules can result in a first degree misdemeanor charge; a second offense is a 3rd degree felony.

In *Julius M. Israel Lodge of B'nai Brith No 2113 v. Commissioner*, 98 F.3d 190 (1996), the Fifth Circuit Court of Appeals affirmed the Tax Court's holding that an instant bingo activity was neither substantially related to the organizations exempt purposes nor was a bingo game under Code Section 513, even though Texas state law classified the game as bingo. In this case, the parties stipulated to the definition of "Instant Bingo:" a game of chance in which an individual places a wager by purchasing an Instant Bingo card that is preprinted with bingo card patterns and is covered with sealed pull tabs. To determine whether a prize is payable, the player pulls tabs from the front of the card and compares the preprinted patterns that have been revealed with those preprinted on the reverse. If the card is a winner, the player takes the card to a cashier or usher and collects his prize. The Fifth Circuit held that Instant Bingo was not any game of bingo since the winners were not determined in the presence of all persons placing wagers in such games.

Federal and Florida law allow for churches, synagogues, and the like to host bingo games. However, strict rules apply and every organization conducting bingo should make certain that the individuals running the bingo sessions are aware of the laws regulating such sessions Though the IRS will not consider revenues raised from bingo as unrelated business income, every tax-exempt organization should keep in mind the unrelated business income rules "B-4" embarking on any new revenue generating event.

What IRS Form 8082 Can Do For You (and to you!) Now That the IRS' K-1 Matching Program is Underway

By T. Scott Tufts, Esq., Lowndes, Drosdick, Doster, Kantor & Reed, P.A., Orlando, Florida

With the IRS' announcement earlier this year in IR 2003-27[1] that the IRS is resuming a program that will match information from Schedules K-1 (hereafter "K-1") filed by pass-through entities (partnerships, S corporations, and trusts) to what the partners, shareholders, and beneficiaries report on their own returns, tax practitioners advising closely-held general or limited partnerships, LLCs, LLPs, or LLLPs (hereafter "Pass-Thru Entity(ies)")[2] and/or their constituents need to remain on their toes.[3] By closely-held, reference is made to those Pass-Thru Entities consisting of 10 or fewer partners or members.[4] As if mastering Subchapter K were not enough of a daunting task, tax practitioners might not realize just how critical it is to have a strong working knowledge of the unified audit procedures under the Tax Equality and Fiscal Responsibility Act of 1982, as amended over the years and as codified as Subchapter C of Chapter 63 of the Internal Revenue Code ("Code"), Sections 6221 to 6234 (hereafter "TEFRA").

Indeed, tax practitioners who assist in the formation of any Pass-Thru Entity, even those closely-held, need to be familiar with all of the details of the federal partnership tax return ("Form 1065") and the accompanying K-1s, including sections that specifically address applicability of TEFRA's unified audit procedures. In particular, Questions 2 and 4 of Schedule B on the Form 1065 located on page 2 of the form direct the preparer to answer "yes" or "no" to the following questions:

2. Are any partners in this partnership also partnerships?

4. Is this partnership subject to the consolidated audit procedures of sections 6221 through 6233? If "Yes," see Designation of Tax Matters Partner below.

In Schedule B, the IRS ensures that it is only with respect to those Pass-Thru Entities in which the "yes" box is indicated on Question 4 of Schedule B that one is to proceed with the designation of a tax matters partner ("TMP"), by providing additional information at the bottom of the page in Schedule B, as follows:[5]

Designation of Tax Matters Partner (see page 21 of the instructions)

Enter below the general partner designated as the tax matters partner (TMP) for the tax year of this return:

Name of designated TMP:
Identifying number of TMP:
Address of designated TPP:

In recent years, this particular author has observed an alarming number of Form 1065s in which the "no" box has been checked on Questions 2 and 4 of Schedule B of the Form 1065 (page 2), even though K-1s have been issued to partnerships (including land trusts treated as such for federal tax purposes), trusts (even grantor trusts),[6] LLCs (even single-member LLCs),[7] and S corporations.[8] By this, one suspects that many tax return preparers have only a vague understanding of TEFRA, with little regard for the kind of complications that may arise when TEFRA's procedures are imposed upon the Pass-Thru Entity and all of its members or partners, including members or partners ultimately impacted in lower tier entities (called "indirect partners"). For example, when tax return preparers for these Pass-Thru Entities discover that errors have been made on the original Form 1065, a hasty, but erroneous assumption may be made just to file an amended Form 1065, accompanied by amended K-1s. However, if the Pass-Thru Entity in question is reasonably determined by the IRS to be an entity subject to TEFRA (hereafter "TEFRA Entity"), then this approach is not permitted.[9] Instead, in such circumstances, TEFRA mandates the filing of the Form 8082, Notice of Inconsistent Treatment or Administrative Adjustment Request (AAR). This form effectively serves as a written request by the TMP for permission from the IRS to amend the original Form 1065. Indeed, literal compliance with the Form 8082 filing requirements seems to be required,[10] as belated efforts to cure any defects may be invalid.

Section 6231(a)(1)(B): The Small Partnership Exemption & Rev. Rul. 2003-69

Tax advisors for many closely-held Pass-Thru Entities may just assume that the entity qualifies for the small partnership exemption from TEFRA under Code Section 6231(a)(1)(B) by having 10 or fewer partners. However, this exemption only applies with respect to partners who are individuals (other than a nonresident alien), a C corporation, or an estate of a deceased partner, with a husband and wife (and their estates) treated for these purposes as 1 partner. So, if a partner (i.e., member) in a Pass-Thru Entity is itself a partnership, LLC (taxed as a partnership, or alternatively, as a disregarded entity or affirmatively electing its way into S corporation status), or trust (even a revocable one), then the small partnership exemption will not apply and the Pass-Thru Entity will be subject to TEFRA.

Practitioners may be under the impression that TEFRA's unified audit procedures are intended for large tax-shelters. Nevertheless, when enacting the TEFRA audit procedures, Congress cast a larger net, excepting from its provisions only those Code Section 6031(a) partnerships meeting the specific requirements of the small partnership exemption. More particularly, Congress enacted the small partnership exemption to ensure that only "simple" partnerships would be excepted, and by simple,

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Congress meant those partnerships "whose members treat themselves as co-ownerships rather than partnerships in which each co-owner resolved his or her own tax responsibilities separately as an individual with the IRS."[11] Thus, Congress recognized the difficulties in having to deal with separate proceedings and how potentially inconsistent results can arise even within the context of very small partnerships. Congress perhaps understood that relatively few partnerships can truly be said to be "simple." For these reasons, a narrow construction of the small partnership exemption apparently is mandated.[12]

Practitioners trying to make the small partnership exception call can take some comfort in the recently issued Revenue Ruling 2003-69.[13] In this ruling, the IRS addressed the question as to whether the small partnership exception applied to a partnership having either a tax-exempt organization or a foreign corporation as one of its partners.[14] In looking to Treasury Regulation Section 301.6231(a)(1)-1 (effective for partnership tax years beginning on or after October 4, 2001), the IRS first examined Code Section 1361(a)(2) for the definition of a C corporation, by which a corporation was defined to mean all corporations which were not S corporations. By further reference to the definition set forth in Code Section 7701(a)(3) and the accompanying regulations under Regs. Section 301.7701-2(b), including Regs. Section 301.7701-3(c)(1)(v), the IRS then made it known in the ruling that if all of the named partners in the partnerships at issue are either individuals (other than a nonresident alien) or C corporations (whether domestic or foreign), or tax-exempt organizations under Section 501(a) of the Internal Revenue Code, such partnerships shall qualify for the small partnership exemption.

Section 6231(g) & the Reasonable Determination Standard

Prior to 1997, the IRS found it difficult to determine whether or not an entity treated for federal tax purposes as a partnership qualified for the small partnership exemption from TEFRA. While partnership tax returns may suggest that a closely-held Pass-Thru Entity exists (i.e., with fewer than 10 partners), the IRS often had no way of knowing whether or not any of the partners were nonresident aliens. If this led the IRS to apply the wrong procedures, this could jeopardize their assessment due to either the expiration of the applicable statute of limitations or a court's lack of jurisdiction over the item at issue.

With enactment of the Taxpayer Relief Act of 1997, and in particular, Code Section 6231(g), Congress empowered the IRS to make reasonable determinations governing the applicability of TEFRA, vis-à-vis the small partnership exemption. This provision permits the IRS to apply TEFRA's audit procedures if, based on the partnership's return for the year, the IRS reasonably determines that those procedures should apply. Similarly, the provision permits the IRS to apply the normal deficiency procedures if, based on the partnership's return, the IRS reasonably determines that those procedures should apply.

The IRS anticipates that the reasonable determination standard is likely to be a source of litigation in the future.[15] Thus, IRS personnel are advised that they must be reasonably assured that the information on the partnership tax return they review is correct. If the IRS knows that a partner in a given Pass-Thru Entity is a party ineligible for the small partnership exemption, then it will not be possible for the IRS to "reasonably rely" on the face of a partnership return suggesting potential application of the exemption.[16]

TEFRA Consistency Requirements & Form 8082

Consistency requirements under TEFRA are of critical importance for the "partners" in a closely-held Pass-Thru Entity that fall outside of the small partnership exemption. Under Code Section 6222(a), each partner in a TEFRA partnership <u>must</u> file an income tax return that is consistent with the partnership's Form 1065 with respect to the reporting of the partner's distributive share of partnership items (i.e., it must have the same amount, the same characterization, the same timing) unless the partner disagrees with the entity's reporting of the partner's distributive share of partnership items and takes affirmative, prompt action to either notify the IRS of his election to treat a partnership item inconsistently with the treatment on the Form 1065 or otherwise request an administrative adjustment of the partnership items in question. Once again, taxpayers comply with this duty by way of the filing of IRS Form 8082, checking the box marked "notice of inconsistent treatment" and complying with the instructions as to the completion of the form. Absent the taking of such affirmative action by the impacted "partner," the IRS may immediately assess a deficiency against any partner treating a partnership item inconsistently with the entity's treatment of those items, *and do so without notice*, as a computational adjustment.

If a partner desires to take a position on his or her return inconsistent with a position taken on the closely-held Pass-Thru Entity's Form 1065, he or she needs to use the correct form (i.e., Form 8082), as the mere filing of a Form 1040X is not sufficient for these purposes.[17] In addition, if a partner does nothing in response to the receipt of an erroneous K-1, this could prove fatal. For example, in *Blonien*,[18] the Tax Court noted that by failing to file a Form 8082 after receiving a K-1 from the law firm partnership, the taxpayer was deemed to have accepted the position stated on the K-1 he received (i.e., that Mr. Blonien was a "partner"). By doing nothing, the court found that the taxpayer deprived the IRS of the opportunity to address the issue before the expiration of the statute of limitations period, and thereby, waived the right to take an inconsistent position on their return. In these situations, the taxpayer will not have standing to assert that they have been deprived of due process. Assuming that the partner properly files a Form 8082 calling *sufficient* attention to the inconsistency, the IRS then has the option of: (1) converting all "partnership items" arising from the partnership into "nonpartnership items" and resolving them at the partner level by so notifying the partner under Section 6231(b)(1)(A); or (2) determining the items at the partnership level while allowing the inconsistent treatment, pending the conclusion of the partnership-level TEFRA proceedings.[19] Or, presumably, the IRS may do nothing and leave the partners in a state of quandary.[20]

A partner is protected from a computational adjustment only with respect to those partnership items the inconsistent treatment of which is reported. If a partner notifies the IRS with respect to one item but fails to report the inconsistent treatment of another item, the partner is subject to a computational adjustment with respect to that other item.[21]

The Regulations do not provide for a specific time period for filing the Form 8082. However, they do incorporate by reference the instructions which accompany the form.[22] In the Instructions for Form 8082, taxpayers are instructed to file the notice of inconsistent statement with their original return. For these reasons, a failure to file a Form 8082 on a timely basis (i.e., presumably with the filing of the taxpayer's original return or in response to an amended K-1) may render any belated filing of such notice ineffective for purposes of these consistency rules.[23]

For those taxpayers far removed from the Pass-Thru Entity, but qualifying as "indirect partners" vis-à-vis the source partnership, the consistency requirements are particularly onerous.[24] To qualify, the inconsistency that must be reported to the IRS is the inconsistency between the indirect partner's treatment of the item in question and the source partnership's treatment of that item.[25] The mere reporting of an inconsistency between the indirect partner's treatment of an item and the pass-thru entity's treatment of that item is inadequate to qualify under the rule, as only a notice of inconsistent treatment filed by the pass-thru entity which identifies the inconsistency of treatment with a partnership item coming from the source partnership will act to protect any such indirect partner otherwise reporting consistently with regard to the treatment of that item by the pass-thru entity through which the indirect partner holds his or her interest in the source partnership.[26]

Thus, for all partners (even indirect partners) acting in due regard to the consistency requirements under TEFRA, identification of "partnership items" is critical. In defining the

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term broadly, Congress refers to a tax item "more appropriately determined at the partnership level than at the partner level."[27] While *partnership items* are subject to TEFRA's centralized audit procedures located in Subchapter C of Chapter 63 of the Code, the tax treatment of *nonpartnership* items is to be determined at the level of the individual partner's return, pursuant to the normal notice of deficiency procedures of Subchapter B of Chapter 63, Sections 6211 to 6216.

These provisions are mutually exclusive, which poses considerable headaches for any practitioner trying to determine whether or not a particular item should be classified as a "partnership item."[28] In the past, courts have stated that the "hallmark of a partnership item is that it affects the distributive shares reported to other partners."[29] In other words, if a purported assessment arises from a determination that has no impact on the Pass-Thru Entity's aggregate income, gain, loss, deductions, or credits, or on the other partners' shares of the income, gain, loss, deductions, or credits of the entity, courts have viewed such items as nonpartnership or affected items, disengaged from a TEFRA proceeding.[30] However, this reasoning now appears to have been rejected by the 10th Circuit Court of Appeals in *Katz v. Commissioner*,[31] notwithstanding possibly sound policy reasons for not requiring a full-blown partnership-level TEFRA proceeding when an alleged error in one partner's return with respect to a partnership item affects only one other taxpayer, rather than all of the partners.

If identifying "partnership items" were not difficult enough of a task for the tax practitioner, Code Section 6230(a)(2)(A) of TEFRA authorizes the IRS to issue notices of deficiency with respect to "affected items which require partner level determinations" or for items which have become nonpartnership items (for e.g., through events of conversion or special enforcement considerations).[32] Two types of affected items can come into play, but only after the underlying partnership item(s) is finally determined: (1) computational affected items which follow from the result of a partnership level proceeding; and (2) affected items which may require factual development at the partner level.[33] Even if an item is identified as a "partnership item" (as opposed to an "affected item" or as a "nonpartnership item"), questions can then arise as to whether some action has occurred to convert the item to a "nonpartnership item," removing it from TEFRA consideration.[34]

Amending Partnership Items on Partnership Returns (Using Form 8082)

When the small partnership exemption does not apply, Pass-Thru Entities and their constituent members or partners will be surprised to find that TEFRA's procedures do <u>not</u> allow for the mere filing of an amended return below the IRS radar screen. Instead, the entity must request permission from the IRS to allow for it to adjust its return. This is done through the filing of an administrative adjustment request (AAR), using Form 8082, and the procedures set forth under Code Section 6227. The Form 8082 can be filed at any time before the expiration of the statute of limitations periods under Code Section 6229(a) (as extended by Code Section 6229(b)), but must be filed before the FPAA is mailed to the TMP for that year.[35] The AAR can be filed by the TMP on behalf of the Pass-Thru Entity, or alternatively, by any other partner (i.e., indirect partner) on his own behalf. If the TMP files this AAR on behalf of the entity, the TMP can request that the AAR be treated as a substituted return, usually done when the entity is reporting an increase in taxable income or is reporting an increase or decrease in taxable income resulting from a mathematical or clerical error.[36]

Alternatively, the TMP can file an AAR that is not treated as a substituted return on behalf of the partnership. This type of AAR is used to report a reduction in partnership income which generates a refund to the partners. Under Code Section 6227, the IRS has several options in determining how to respond to this type of AAR. The IRS can allow the credits or make refunds with respect to any or all of the changes requested (i.e., treat this AAR as a substituted return), conduct a partnership-level audit, or take no action.[37]

Finally, any partner may file an AAR on his or her own behalf. If filed, the IRS may process the request as if it were a claim for refund or credit based on a nonpartnership item, assess any additional tax resulting from the requested change, mail a notice to the partner that all partnership items for the year in question will thereafter be treated as nonpartnership items and resolved at the partner level, or conduct a partnership audit. If a partner files a Form 8082 AAR, it must be filed in duplicate, with the original filed with the partner's amended income tax return and the other copy filed with the IRS Service Center where the partnership return is filed.[38]

If the IRS disallows all or part of an AAR, the TMP or the other partner filing the AAR has limited recourse. Under the procedures for judicial review under Code Section 6228, if the AAR was filed by the TMP on behalf of the partnership, the TMP can file a petition for adjustment with the Tax Court, the federal district court, or the Claims Court. This petition must be filed within two years, but no earlier than six months after the filing of the AAR. If the IRS notifies the TMP or partner that all partnership items have been converted into nonpartnership items, then the AAR is treated as a claim for refund and the partner can bring a civil action for refund within 2 years after the mailing of the IRS notice. Absent such notification of conversion, the partner will have to sue for a refund in a civil action and once commenced, all partnership items are reclassified as nonpartnership items. Again, any such action can only be filed after the expiration of the six month period subsequent to the filing of the AAR, but it must be filed within two years of the filing date of the AAR.

Nominee Reporting Issues & the Unidentified Partner Rules

In practice, tax return preparers may wonder if they might not be able to bypass all of these TEFRA issues through the mere use of a qualifying individual's taxpayer identification number or by claiming later on that an individual or some other eligible person or entity is the de facto partner, under a nominee theory of reporting. A closer analysis raises significant doubts as to whether this will protect against falling outside of the small partnership exemption if an otherwise ineligible pass-thru entity is named as the "partner" on the K-1.

For starters, TEFRA defines "partner" broadly under Code Section 6231(a)(2), to include not only a partner in the partnership, but also any other person whose income tax liability is determined in whole or in part by taking into account directly or in-

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directly partnership items of the partnership, and the fact that one does not receive a K-1 does not mean that they are home free from "partner" status.[39] Second, use of nominee theory to claim some unidentified individual as the true, beneficial owner imposes affirmative reporting requirements on the person to whom the K-1 is delivered from the Pass-Thru Entity. According to the IRS Instructions to the Form 1065, any person who holds, directly or indirectly, an interest in a partnership as nominee for another person must furnish a written statement to the Pass-Thru Entity by the last day of the month following the end of the Pass-Thru Entity's tax year. This statement must include the name, address, and identifying number of the nominee and such other person, plus describe the partnership interest held as nominee for such person, and any other information required by the Regulations.[40] If the nominee fails to do so, then he or she must furnish to the person for whom the nominee holds the interest a copy of the K-1 and related information within 30 days of receipt.[41]

In addition, in light of *Katz* and *Blonien* and assuming the small partnership exemption does not otherwise apply, a Form 8082 may need to be filed out of risk (or fear) that by failing to do so, an admission of acceptance will be made as to the "real" status of the partner/nominee identified on the K-1. Furthermore, a special statute of limitations provision exists under TEFRA with regard to unidentified partners, making it difficult for a practitioner to advise any potentially unidentified partner (including, perhaps, any indirect partners) as to whether the statute has started to run. Under Code Section 6229(e), absent the filing of the Form 8082 (or other qualifying notification), the statute of limitations period for partnership items (or affected items) shall not expire with respect to the unidentified partner before the date which is one year after the date on which the name, address, and taxpayer identification number is furnished to the IRS.[42]

Practitioners wishing to make the most of the nominee K-1 game must be sensitive to the standards under Circular 230 for advising their clients with respect to tax return positions and for preparing and signing returns.[43] These practitioners must keep in mind that the reporting requirements reflected in the instructions incident to the preparation of the Form 1065 and K-1s (and Form 8082) are incorporated by reference into the TEFRA provisions.

Concluding Thoughts for Practitioners

Few practitioners dealing responsibly with closely-held Pass-Thru Entities can escape the potential application of TEFRA. For example, transactional lawyers who accede to the desires of individual or corporate principals to place their ownership interests in a Pass-Thru Entity in some kind of separate shell entity, whether a wholly-owned S corporation or LLC (or even in a family limited partnership, LLLP, or LLP), regardless of motivation, soon realize that by this restructuring of interests alone, TEFRA's provisions are back into play. In such cases, a failure to have anticipated TEFRA's applicability in the governing documents could prove to be a disaster. Similarly, estate planning lawyers must recognize that a simultaneous or subsequent estate planning transfer of membership or partnership interests to a grantor trust or single-member LLC brings TEFRA into play in the tax year of the change in ownership. For bankruptcy attorneys, potential TEFRA headaches abound, whether as a result of the filing by an individual partner of a Chapter 7 bankruptcy petition and the problems evidenced by the *Katz* decision, workout situations, or otherwise. For family law practitioners, TEFRA's provisions can arise when married couples fight it out over interests in a Pass-Thru Entity which itself holds interests in other Pass-Thru Entities, whether because of innocent spouse protections or otherwise. For the return preparer or CPA who might covet the work of the entity and all of its principal constituent members or partners, TEFRA's consistency requirements alone present many dilemmas.[44]

With the K-1 matching program underway[45] and the IRS empowered, via Code Section 6231(g), to reasonably rely on the face of the Pass-Thru Entity's Form 1065, and, in particular, the names appearing on the return and K-1, practitioners need to assist the Pass-Thru Entity and its constituents to make the proper TEFRA "small partnership" call on the front end, through proper due diligence that may need to carry through past the return preparation

Tax Section *Bulletin* 2003 - 2004 Publication Guidelines

The Tax Section *Bulletin* will be published three time during the 2003-2004 fiscal year, in the Fall, Winter and Spring. The *Bulletin* welcomes articles devoted to areas of professional interest to the Tax Section's members, including substantive and procedural law, activities of the Section and its committees, and tax policy. Topic proposals and articles should be submitted to the editor(s) of the *Bulletin*. Submissions must be made in electronic form, either on a 3 ½ " diskette or by e-mail. Deadlines for submissions to the editors are:

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Winter	December 5, 2003	December 19, 2003
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phase. Ideally, possible application of the TEFRA audit procedures should be addressed in the operating or partnership agreement, beginning with the entity's proper designation of an eligible tax matters partner.[46] Yet, even then, the ethical implications of TEFRA's provisions should not be overlooked, with TEFRA's consistency requirements bringing forth the potential for serious conflicts of interest to arise from the outset of an entity's formation.[47]

For those practitioners with clients that wish to game the system in the post-Enron era, scoffing perhaps at TEFRA, there is the friendly reminder of the tax return preparer penalties that can be imposed in these settings and the requirements under Circular 230.[48] For the rest of the practitioners with clients that desire to deal responsibly with the potential application of TEFRA's provisions, there is the scary realization that even mistakes made by the tax return preparer when filing the Pass-Thru Entity's federal income tax return (i.e., Form 1065, and accompanying Schedule K-1) may unknowingly subject one of their otherwise exempt client Pass-Thru Entities (and all of its members or partners) to TEFRA's unyielding procedures, especially the ever-dangerous consistency requirements.[49] Now, with decisions like *Katz* and *Blonien*, the message is clear. Practitioners merely having a vague appreciation for TEFRA and the small partnership exception under Section 6231(a)(1)(B) of the Internal Revenue Code will assume, at their peril,[50] that TEFRA's rules are limited to large tax shelters.

Endnotes:

[1] IR News Release 2003-27 (3/10/03) (reminding taxpayers and tax professionals of proper specific reporting and providing tips on how to avoid making errors related to K-1, which includes specific reference to the need to file IRS Form 8082 when the small partnership exemption does not apply) .

[2] For purposes of this article, the author refers to "closely-held" Pass-Thru Entities to mean limited liability entities with 10 or fewer members or partners *potentially* eligible for the small partnership exemption.

[3] Congressional leaders recently wrote to IRS Commissioner Mark Everson, expressing their views that the "success of the K-1 Matching Program depends on the IRS's ability to develop a program that identifies taxpayers who are not meeting their tax obligations while (at the same time) imposing the least inconvenience possible on compliant taxpayers and small business owners." "IRS K-1 Matching Program Must Not Burden Small Business, Snowe and Bond Tell Everson," BNA Daily Tax Report, No. 132 (7/10/03), at p.G-12 (further discussing GAO's Report, GAO-03-667, released on May 30, 2003, and entitled, "Tax Administration: Changes to IRS' Schedule K-1 Matching Program Burdened Compliant Taxpayers," and GAO's efforts to assess the matching program's effectiveness at detecting and deterring noncompliance); but see, Goldwyn, "IRS Researchers Using Schedule K-1 Data to Identify and Target Abusive Transactions," BNA Daily Tax Report, No. 113 (6/12/03), at p.G-3 (suggesting that IRS' study of abusive tax shelters and further analysis of K-1s are critical to uncover noncompliance, after Congress authorized the IRS to transcribe K-1s beginning with the 2000 tax year--something it had not done since tax year 1995).

[4] For an example of a two-partner limited partnership (consisting of an apparently affiliated general partner and one limited partner) governed by TEFRA, see *Mas One Limited Partnership v. United States*, 92 A.F.T.R.2d 2003-5516 (S.D.Ohio 7/10/03) (IRS issues NFPAA with respect to partnership's 1994 tax return in November of 2000; case resolved through summary judgment, in favor of the IRS).

[5] Quite often, tax return preparers go on to place the names of non-qualifying persons as the "TMP" at the bottom of page 2, which will be treated by the IRS as if no TMP has been appointed by the entity, further enabling the IRS to make their own designation of a TMP for the entity. Since only the IRS can appoint an indirect partner as a TMP (e.g., a non-member manager who is also an indirect partner), this designation power could come as quite a surprise to the unsuspecting designee, who must then worry about all of the practical and ethical problems that accompany such designation as a TMP. See, Mather, 624 T.M. (BNA), *Audit Procedures for Pass-Through Entities*, at A-16.

[6] See, FSA 199938016 (9/24/99) (discussing how IRS could not accommodate desires of grantor trust partners who wanted to have the IRS help them to elect out of TEFRA by intentionally issuing an untimely notice of final partnership administrative adjustment less than 120 days after issuing notice of beginning of administrative proceeding); see also, *Primco Management Co. v. Commissioner*, T.C.Memo 1997-332 (S corporation whose sole shareholders were 2 grantor trusts didn't qualify for "small S corp" exception to the then-in-effect unified S corporation audit and litigation procedures).

[7] For an example of a two-member LLC finding TEFRA applicable because of the presence of a single-member LLC, see CCA 200250012 (relying on fact that "Section 6231(a)(9) defines a 'pass thru' partner as 'a partnership, estate, trust, S corporation, nominee or *other similar person through whom other persons hold an interest in the partnership*,'" to show Congressional intent to make the TEFRA procedures apply whenever indirect partners exist whose identity will not be reflected on the face of the partnership return). Cf. Bailif, Unified Audit & Litigation Procedures for Pass-Through Entities, ¶ 2.01, n.8 (relying on *White v. Commissioner*, T.C.Memo 1991-552, author suggests that a prerequisite to classification as a pass-thru partner under TEFRA is the holding of legal title in the partnership interest, enabling intermediaries to hold an individual's interest without running afoul of the small partnership exemption).

[8] Under these circumstances, a reasonable determination made by the IRS under Section 6231(g) of the Code would appear to be that the small partnership exemption does

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not apply, mandating a TEFRA proceeding. The mere checking of the "no" box as to the applicability of TEFRA is not binding on the IRS. *Buchsbaum v. Commissioner*, T.C.Memo 2002-138.

[9] Treasury Regulations governing the application of TEFRA consist of those provisions applicable for partnership taxable years ending after October 4, 2001. For years beginning prior to then, see Temporary Regulations, as revised on April 1, 2001. See, for e.g., Regs. §301.6222(b)-1(a) (statement identifying inconsistency shall be filed by filing the form prescribed for that purpose in accordance with the instructions accompanying that form); Regs. §301.6227(c)-1 (AAR filed by TMP on behalf of partnership shall be filed on form prescribed by IRS for that purpose in accordance with that form's instructions); Regs. §301.6227(d)-1 (AAR filed on behalf of partner shall be filed on form prescribed by IRS for that purpose in accordance with form's instructions); Instructions to Form 8082.

[10] For e.g., *Phillips v. Commissioner*, 106 T.C. 176 (1996) (court rejects efforts by taxpayer to avoid recapture of investment tax credit claimed with respect to a disposition of partnership property, through the filing of an amended return, but without the Form 8082 attached; amended return held ineffective because it did not conform to the Section 6227 administrative adjustment request requirements); but see, *Wall v. United States*, 77 A.F.T.R.2d 96-2204 (9th Cir. 1996) (under peculiar facts of the case, court concludes that because taxpayer substantially complied with the procedures governing requests for administrative adjustment of partnership items under Section 6227(b), no purpose served by requiring taxpayer to have filed, in addition to his second Form 1040X, a partnership Form 8082 that would have reflected no additional information beyond what was already set out in the second Form 1040X and K-1); FSA 1999-746 (Vaughn #557) (In a 1992 field service advice, IRS concluded that an amended partnership return could be treated as a "substituted return if the TMP provides all the information required on a Form 8082, along with revised K-1s and further request is made that the treatment on the amended return be substituted for the treatment on the original return).

[11] *Dhillon v. Commissioner*, T.C.Memo 1999-214 (rejecting effort on the part of 50% partners to rely on TEFRA in general to file a petition more than 90 days after the IRS issued its notice of deficiency).

[12] *Harrell v. Commissioner*, 91 T.C. 242 (1988) (Hamblen, J., dissenting opinion); Federal Income Tax Project Subchapter K--Proposals on the Taxation of Partners, ALI 411 (adopted May 20, 1982, published 1984); Tax Compliance Act of 1982 and Related Legislation: Hearing on H.R. 6300 Before the House Comm. on Ways and Means, 97th Cong., 2d Sess. 256 Sess. 256 (1982); cf. *Z-Tron Computer Program v. Commissioner*, 91 T.C. 258 (1988) ("An exception for small partnerships, with few partners and few complexities, was deemed advisable.").

[13] 2003-26 IRB 1118 (6/27/03).

[14] In Chapter 13 of the MSSP Training Guide on TEFRA in the IRS' Internal Revenue Manual, the IRS states that a partnership containing less than 11 partners will qualify as a TEFRA partnership if it has as a partner any one of the following: (1) partnership; (2) LLC (which files a Form 1065); (3) Trust (any type, including grantor trusts, even if the Schedule K-1 contains the SSN of the grantor); (4) nominee; (5) nonresident alien individual; (6) S corporation; (7) C corporation (except for partnership taxable years ending after August 5, 1997). In this section, the Internal Revenue Manual states that the "current position is that all types of Form 1120 (except Form 1120S) are to be treated as the same and further, that all corporate entities (other than S corporations) are treated as C corporations for the purpose of the small partnership exception regardless of whether they are taxable under subchapter C." These materials go on to advise IRS agents that if a K-1 identifies the entity type of the partner as a corporation, without specifying whether it is a S corporation, the examining agent is to secure an IDRS print to settle the issue. The agents are also advised to look for the identification of a partner as a LLC on the K-1 and to further determine whether it has filed a Form 1120 or Form 1065. Id.

[15] Id.

[16] See FSA 199938016, at n.1, supra, fn.6.

[17] *Rothstein v. United States*, 81 A.F.T.R.2d 98-2132 (Ct.Fed.Cl. 1998) (dismissing limited partner's refund action because TEFRA did not authorize IRS to consider taxpayer's Form 1040X as a valid AAR when it was not accompanied by a Form 8082 which conformed to established regulations); Regs. §301.6227(c)-1 (AARs filed by TMP on behalf of partnership); Regs. §301.6227(d)-1(AARs filed on behalf of partners); Mather, supra, at pp.A-31-A-32 (discussing how partner may avoid a consistency assessment in one of two ways: (1) filing Form 8082; or (2) establishing that the partner reported consistently with a schedule received from the partnership, even though the K-1 is erroneous).

[18] *Blonien v. Commissioner*, 118 T.C. 541, 556 (2002).

[19] Id. at 556; Regs. §301.6222(b)-2(a).

[20] See, for e.g, in *Wolgin v. Kennington Ltd., Inc.*, 87 A.F.T.R.2d 2001-885 (3rd Cir. 2001), *aff'g*, 84 A.F.T.R.2d 99-6855 (E.D.Pa. 1999), infra, n.50.

[21] Regs. §301.6222(b)-2(b); see also, *Blonien*, at 556 (claiming that by not filing the Form 8082, the taxpayer led the IRS to believe that Mr. Blonien was a partner in Finley Kumble, and that had the taxpayer properly notified the IRS at the time the taxpayer filed the 1992 return of their position that he was not a partner, the IRS could have converted the item to a partner-level item or could have addressed the issue in a partnership-level proceeding within the statute of limitations period).

[22] Regs. §301.6222(b)-1(a).

[23] *Wolgin v. Kennington Ltd., Inc.*, 87 A.F.T.R.2d 2001-885 (3rd Cir. 2001), *aff'g*, 84 A.F.T.R.2d 99-6855 (E.D.Pa. 1999) (discussing partner's failure to file Form 8082 with amended return which violated court order; not acceptable to have filed mere disclaimer, or to have later filed Form 8082); *Blonien* (taxpayer's failure to file a Form 8082 in response to the taxpayer's receipt of a K-1 means that he or she will be deemed to have accepted the position stated on the K-1); cf. *In re Klemen*, 64 A.F.T.R.2d ¶ 89-5320 (Bankr. Ill. 1989) (in a pre-TEFRA case, suggesting that partner might not be bound by partnership return that didn't claim a bad debt loss).

[24] These consistency requirements extend to beneficiaries of any estate or trust, with similar provisions governing notification and the effect of a failure to notify the IRS. Code §6034A(c).

[25] Regs. §301.6222(a)-2(c)(1); Regs. §301.6222(a)-2(d), Example (2).

[26] Regs. §301.6222(a)-2(c)(3)(ii).

[27] Code §6231(a)(3); Regs. §301.6231(a)(3)-1(a) (partnership items include: (1) "the partnership aggregate and each partner's share of" a list of items, including income, gain, loss, deduction, or credit of the partnership, expenditures by the partnership not otherwise deductible, tax preference items, tax-exempt income, partnership liabilities, and other amounts determinable at the partnership level with respect to partnership assets, investments, transactions and operations; (2) guaranteed payments; (3) optional adjustments to basis under Section 754, and (4) certain items relating to contributions to the partnership, distributions from the partnership, and transactions governed by Section 707(a) and Section 707(c)); Regs. §301.6231(a)(3)-1(b) (also includes the accounting practices and the legal and factual determinations that underlie the determination of the amount, timing, and characterization of items of income, credit, gain, loss, deduction, etc.).

[28] See, for e.g., *Weiner v. United States*, 255 F.Supp.2d 624 (S.D.Tex. 2002), motion for reconsid. denied, 255 F.Supp.2d 663 (S.D.Tex. 2002) (in case involving an invalid return, signed by a non-partner treasurer, court constrained to hold that it has jurisdiction to reach a FPAA limitations issue, despite conflicting authorities like *Chimblo v. Commissioner*, 177 F.3d 119 (2d Cir. 1999) and *Slovacek v. United States*, 36 Fed.Cl. 250 (1996), disclaiming jurisdiction with regard to a partner's statute of limitations defense). See also, Weiner v. United States, 255 F.Supp.2d 673 (S.D.Tex. 2002) (taxpayer granted refund of tax-motivated interest due to presence of profit motive when investing in sham partnership).

[29] *Grigoraci v. Commissioner,* T.C.Memo 2002-202 (citing to *Blonien v. Commissioner*, 118 T.C. 541, 551-552 n.6 (2002); and relying heavily on the reasoning of the Tax Court's decision in *Katz v. Commissioner*, 116 T.C. 5 (2001)). The Tax Court's decision in *Katz* as now been reversed on appeal by the 10th Circuit Court of Appeals, 92 AFTR 2d 2003-5153 (10th Cir. 2003).

[30] See, for e.g., *Grigoraci*, T.C.Memo 2002-202 (determination of whether a partner is a corporation or an individual has no impact on partnership level issues and since there was no dispute about the amount of the allocations made to the partners, such items were not partnership items); *Hambrose Leasing v. Commissioner*, 99 T.C. 298, 308-309 (1992) (determination of partner's amount at risk was not a partnership item because it affected only the status of the partner and not the partnership); *Gustin v. Commissioner*, T.C.Memo 2002-64 (holding that a partner's basis in his partnership interest is not a partnership item); cf. *Blonien v. Commissioner*, 118 T.C. 541 (2002) (Tax Court held that a determination that an individual was a partner in a partnership was a partnership item because such determination affected the distributive shares of the other partners).

[31] In *Katz v. Commissioner*, Case No. 01-9009, BNA Daily Tax Reporter, No. 131, at p.K-5 (10th Cir. 7/7/03), the 10th Circuit reversed a lower Tax Court decision and held that the IRS may <u>not</u> challenge a taxpayer's allocation of partnership losses between himself and his bankruptcy estate *in a proceeding involving only the taxpayer-debtor.* Rather, the 10th Circuit held that the IRS must first bring a partnership-level proceeding under TEFRA. On a technical reading of the special enforcement bankruptcy regulation, Regs. §301.6231(c)-7T(a), the 10th Circuit rebuffed efforts on the part of the IRS to claim that they were entitled to use the normal statute of limitations procedures, viewing taxpayer debtor's filing of bankruptcy as having converted partnership losses into nonpartnership items. However, the 10th Circuit noted that the cited regulation only converts partnership items arising in any partnership tax year ending on or before the last day <u>of</u> *the latest taxable year of the partner with respect to which the United States could file a claim for income tax due* in the bankruptcy proceeding. In the case, the 10th Circuit found that 1989 (as opposed to 1990) was the latest tax year for the filing of the claim. The majority of the 10th Circuit further rejected the Tax Court's view that a partner in bankruptcy and his bankruptcy estate are properly treated as a single partner for purposes of TEFRA's procedures. In other words, the 10th Circuit has now rejected the notion that the subdivision of a partner's share of a partnership tax item between the partner as an individual and that partner's bankruptcy estate does not implicate TEFRA. Policy concerns raised by the IRS were unavailing ("it would require a gross distortion of the regulation's language to read the word "partner" to include the bankruptcy estate" and while "(t)here may be sound policy reasons for not requiring a full-blown partnership proceeding when an alleged error in one partner's return affects only one other taxpayer rather than all the partners" but "for now the law is otherwise.").

[32] The mere filing of a Form 8082 does not convert an affected item or nonpartnership item into a "partnership item." *Jenkins v. Commissioner,* 102 T.C. 550, at 554 (1994).

[33] *Jenkins,* at 554 (section 707(c) guaranteed payment is a partnership item; but receipt of the guaranteed payment as a lump-sum payment under section 104(a) might be an affected item which requires a factual determination at the partner level); *N.C.F. Energy Partners v. Commissioner*, 89 T.C. 741, 744-745 (1987).

[34] The presence of special enforcement considerations may empower the IRS to determine that if treating items as partnership items will interfere with the effective and efficient enforcement of the Code, then the IRS may convert partnership items to nonpartnership items, and exempt the same from the partnership-level proceedings. For examples of special enforcement considerations, see Regs. §§301.6231(c)-1 (carryback and refund adjustments based on partnership items); 301.6231(c)-2 (refund claims based on partnership items from abusive tax shelter partnerships); 301.6231(c)-4 (termination and jeopardy assessments); 301.6231(c)-5 (criminal investigations of partners); 301.6231(c)-6 (determinations of a partner's taxable income is being determined by an indirect method of proof); 301.6231(c)-7 (bankruptcy and receiverships); and 301.6231(c)-8 (with respect to a partner on whose behalf a request for prompt assessment of tax under Section 6501(d) is filed).

[35] Code §6227(a); §6227(b).

[36] See, PPC's 1065 Deskbook, 12th Ed. (2001), at 26-15 (Illustration 26-2) (indicating that "amended" Form 1065 is attached to completed Form 8082, but without entering any amounts on the return, but writing across top of this Form 1065, "See attached Form 8082 for AAR per IRC Sec. 6227(b)(1)"; plus filing K-1s for partners showing amended amounts for each partner).

[37] Id., at p.26-15, 26-16.

[38] Id., at p.26-16 (Example 26H-2).

[39] In *Oceanic Leasing v. Commissioner,* T.C.Memo 1996-458, the IRS refused to let the procedural difficulties of TEFRA reward a taxpayer for having invested in sham entities that did not file separate partnership tax returns for the years for which he claimed fictitious partnership losses. The taxpayer was held to have held an interest in sham equipment leasing partnership even though he wasn't listed on K-1s attached to various part-

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nership returns that all tied to the same taxpayer identification number.

[40] See Regs. §1.6031(c)-1T(a).

[41] Regs. §1.6031(c)-1T(h). According to the 2002 IRS Partner's Instructions for Schedule K-1 (Form 1065), a nominee who fails to furnish when due all the information required, or who furnishes incorrect information, is subject to a $50 penalty for each statement for which a failure occurs, with a maximum penalty of $100,000 for all such failures during a calendar year. If the nominee intentionally disregards the requirement to report correct information, then the per statement penalty increases to $100 or, if greater, 10% of the total amount of items required to be reported, and without any maximum penalty cap.

[42] See Mather, at A-24 (raising questions as to whether an undisclosed owner's distributive share of partnership items is itself a partnership item); *Blonien* (partner determination a "partnership item" under the facts and circumstances of the case); cf. *Hang v. Commissioner*, 95 T.C. 74 (1990) (in a case dealing with the old unified audit procedures applicable to S corporations, beneficial ownership issues to be determined at the shareholder level).

[43] Section 10.21 of Circular 230 (per final regulations released in July of 2002, modifying preexisting duty by requiring that, in addition to notifying the client of the fact of the noncompliance, error, or omission, the practitioner has to advise the client of the consequences as provided under the Code and regulations of the noncompliance, error, or omission).

[44] Section 10.29 of Circular 230 (requiring practitioners to obtain informed consent, confirmed in writing, to representation by a practitioner when the representation of one client will be directly adverse to another client or there is a significant risk that the representation of one or more clients will be materially limited by the practitioner's responsibilities to another client, a former client or a third person or by a personal interest of the practitioner).

[45] Supra, n.1 (after having abruptly ended an earlier matching program launched last June, the IRS says that the K-1 matching program will result in the issuances of notices to some taxpayers later this year which will request information about their 2001 tax returns. The IRS says that they have implemented sufficient filters to assist with the screening process to substantially reduce the number of notices issued. In addition, the IRS indicated that it now has plans to revise the Schedule K-1 and Schedule E, to make these forms and related instructions easier to understand. No time frame has been given for the redesign of such forms, however).

[46] As the IRS advises its field agents in Chapter 13 of the MSSP Training Guide found in its Internal Revenue Manual, "the proper designation of a qualified tax matters partner is critical" since "(a)n improper designation can invalidate a statute extension or the binding effect of settlement agreements on non-notice partners." The IRS warns that an invalid TMP is the equivalent of no TMP, and cautions that the TMP designation entered on a Form 1065 should not be accepted, automatically. The designated TMP must be qualified to serve. Agents are to determine if a terminating event has occurred from the time the partnership return was filed to the present and not to assume that the TMP for one year is the TMP for another year. Events which serve to terminate the TMP designation can be found in the regulations, Sections 301.6231(a)(7)-1(l) and 301.6231(c)-4 through (c)-8.

[47] Under Rule 4-1.13 of the Rules Regulating the Florida Bar, a lawyer employed or retained by a Pass-Thru Entity organization represents the organization acting through its duly authorized constituents (presumably, the managing members of a member-managed LLC, or the managers of a manager-managed LLC, or general partner of a LTD. or LLLP). In particular, Rule 4-1.13(d) mandates that when the lawyer deals with an organization's constituents, the lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing. Rule 4-1.13(e) makes it clear that a lawyer representing an organization may also represent any of its constituents, but subject to rules governing conflicts of interest. If consent is required to permit dual representation, then the organization is to provide such consent. Under Circular 230, tax practitioners authorized to appear before the IRS are obligated to identify their client and explain the ramifications of TEFRA's potential application.

[48] See, for e.g., *Goulding v. United States*, 957 F.2d 1420 (7th Cir. 1992) (tax return preparer penalty imposed on attorney who prepared partnership tax returns and K-1s for several limited partnerships when he included contingent debt in depreciation basis and sought to deduct start-up costs).

[49] One of the author's favorite examples of such a filing is a Form 1065 filed by a LLC which identifies only one "partner" member, issuing a single K-1 for the entire tax year. See I.R.C. § 6233 (if a partnership return is filed by an entity for a given taxable year, but the entity is later determined not to be a partnership or is determined not to exist, the UAL procedures still apply to such an entity and to all persons holding an interest in such entity for the tax year as to which the partnership tax return was filed); *Alhouse v. Commissioner*, T.C.Memo 1991-652 (participants in a triple net lease computer program, utilized in conjunction with comprehensive management agreements, created a shared economic interest in the profits and losses of the venture, and therefore, treated for federal tax purposes as a partnership requiring a TEFRA proceeding and permitting IRS to preclude taxpayer from contesting "partnership" items.).

[50] See, for e.g, in *Wolgin v. Kennington Ltd., Inc.*, 87 A.F.T.R.2d 2001-885 (3rd Cir. 2001), *aff'g*, 84 A.F.T.R.2d 99-6855 (E.D.Pa. 1999), a dispute arose over the allocation of certain tax losses incurred by a partnership known as Green Island Associates ("GIA") by and between its two partners, the Wolgins and a corporation known as Kennington Ltd., Inc. ("Kennington"). A panel of arbitrators concluded that the tax losses had not been properly allocated, and entered an award ordering Kennington to either file amended partnership tax returns for GIA for the 1994, 1995, and 1996 years or allow the Wolgins to designate an accounting firm to prepare and sign the returns. When GIA's accountant conferred with the Wolgins' accountant, he gave indications that the amended returns would reflect substantial losses of approximately $4 million being assigned to Kennington, with relatively minimal losses of approximately $250 thousand assigned to the Wolgins. The 1994 GIA amended returns were required to be filed by August 30, 1998, but GIA's accountant did not file the 1994, 1995, and 1996 amended partnership tax returns until September 11, 1999. In addition, and unlike the estimates made known to Wolgins' accountant based on a strict interpretation of the partnership agreement, on the amended returns, GIA's accountant assigned approximately $1 million of losses to Kennington and $3.1 million of losses to the Wolgins. Rather than attach a Form 8082 with the amended return, GIA's accountant attached a disclaimer that stated that the amended returns may not be in compliance with Treasury Regulations, even though prepared pursuant to court order. GIA's accountant later filed the Form 8082; nevertheless, the taxpayer was still held in civil contempt for violating the court order. The court noted further that it didn't yet know whether the failure to attach Form 8082 voided the amended returns, rendering the amended returns invalid and perhaps, foreclosing acceptance by the IRS.

The Dark Side of the Proposed Tax Shelter Transparency Act

By John J. Koresko, V, Esq., CPA. Koresko & Associates, P. C., Bridgeport, Pennsylvania

Editor's Note: Mr. Koresko presented his strong concerns at the organizational meeting of the Tax Section at Amelia Island regarding the potential adverse impact on tax practice of legislation working its way through Congress, the Tax Shelter Transparency Act ("TSTA"). Mr. Koresko was asked to provide the Tax Section with an article regarding the TSTA for the Tax Bulletin. The views expressed herein are Mr. Koresko's and not positions of the Tax Section of the Florida Bar.

History of TSTA

On April 8, 2003, the Senate passed the Charity Aid Recovery and Empowerment (CARE) Act (S. 476). CARE was designed to create new tax incentives for charity. Senators Max Baucus (D-MT) and Charles Grassley (R-IA) of the Senate Finance Committee attached the TSTA to CARE as a revenue off-setting mechanism. Little was said about TSTA when CARE was reported out of the Finance Committee.

The speed with which TSTA emerged and was attached to CARE left very little time for consideration by interested parties. TSTA appears to allow the Internal Revenue Service broad powers to implement its intent. CARE's sponsor, Sen. Rick Santorum (R-Pa), expressed reservations about TSTA in a letter to Messrs. Baucus and Grassley prior to the bill's advancement to the Senate floor.

Although CARE has not been enacted by the House as a stand-alone bill, the TSTA provisions were scored as a revenue raiser by the JCT. Consequently, Representatives Bill Thomas (R-Ca) and Charles Rangel (D-NY) have now decided to use the positive revenue score of TSTA to pay for other legislation introduced by them in the House. According to sources at the Ways & Means Committee, Chairman Thomas may reintroduce TSTA to pay for new foreign tax legislation that is intended to replace the Foreign Sales Corporation provisions.

Treasury's Strategy

"One thing I have become convinced of since joining Treasury is the importance of acting even without a legislative mandate. We don't always need laws to tell us the difference between right and wrong or to tell us what we ought to do."

Statements of Asst. Treas. Sec. Pamela Olson, Univ. So. Cal. Tax Inst., Jan. 27, 2003. [http://www.treas.gov/press/releases/kd3804.htm]

While TSTA was pending on Capitol Hill, the Treasury Department was pursuing a parallel strategy to issue tax shelter disclosure regulations under sections 6011, 6111 and 6112 (the "Disclosure Regulations"). These regulations, predominantly sec. 1.6011-4, introduced the new terms "listed transactions" and "reportable transactions" that also appear in the TSTA. Basically, Treasury now requires that INDIVIDUAL taxpayers [not just corporations] disclose their participation in "potentially abusive transactions" that the IRS periodically "lists" in Notices. Disclosure must occur twice -- on income tax returns and a special notice to the IRS Office of Tax Shelter Analysis ("OTSA"). The Regulations also require promoters to keep lists of participants. These lists are meant to simplify the IRS' ability to acquire taxpayer identity information for the purposes of examination.

The part of the regulations that deals with the sec. 7525 privilege and the common law attorney-client privilege seems to be flawed. According to the regulations, if a taxpayer or its advisor intends to claim a privilege from disclosure, he or she would have to inform the OTSA. The issue arises as to whether such a communication would act as a waiver of privilege.

Because the Disclosure Regulations contained no new penalties, they were not met with the greatest opposition by either the ABA or AICPA. It was not problematic for these organizations to agree that there should be more "transparent" disclosure, especially if failure to disclose implicated nothing but the existing hierarchy of penalties.

While professional groups were paying lip service to these initiatives by Treasury, they overlooked the possible impact of the proposed penalties of TSTA. More disturbingly, professional groups gave little attention to the deviation of the 1.6011-4 and 1.6012 regulations from the express language of the law. Section 6111 requires that taxpayers register and disclose participation in "tax shelters." Section 6111 defines "tax shelter" specifically as an investment in an arrangement that produces $2 or more of tax reduction for each $1 of investment AND which is subject to securities laws or requires a substantial investment. "Substantial investment" is an aggregate investment of $250,000 in the arrangement expected to be made by 5 or more investors. In 1997, the definition of tax shelter was expanded to include corporate arrangements having a significant tax avoidance purpose, made under conditions of confidentiality, and generating over $100,000 of fees to promoters. Section 6112 requires organizers maintain lists of investors with respect to "potentially abusive [corporate] tax shelters." Section 6112(b) defines "potentially abusive tax shelter" as transactions for which registration is required under section 6111, and "any entity, investment plan or arrangement, or other plan or arrangement which is of a type which the Secretary determines by regulations as having a potential for tax avoidance or evasion."

Congress envisioned disclosure and registration for transactions designed to deliver far more tax reduction than investment. Since a dollar of deduction only gets someone 40 cents of tax reduction, it appears that Congress was not concerned with disputes over whether a particular item or business expense was deductible. More importantly, Congress extended list maintenance requirements only to those significant transactions described in section 6111 and

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POTENTIAL TAX AVOIDANCE ("PTA") arrangements determined by REGULATIONS. It does not appear that Congress intended the Treasury to unilaterally extend section 6111 reporting to include section 6112 PTA arrangements. There is no evidence that Congress contemplated that Treasury could avoid the regulatory process by creating Listed Transactions by Notice, thus amending the Disclosure Regulations without complying with the Administrative Procedure Act, the Regulatory Flexibility Act, or the Small Business Regulatory Enforcement Fairness Act. This leads to the argument that the Disclosure Regulations may be void both as to their intended effect on individuals and their potential for inappropriate amendment.

Provisions of the TSTA of Note

The broad language in TSTA delegating considerable authority to the IRS to define "listed transactions" and tax shelters in general is a concern. The TSTA does not define listed transaction in the way the Code specifies the definition of the term "tax shelter" in sections 6111 or 6662. Consequently, the IRS, under TSTA would appear to end up with excessive authority to extend penalties to unlimited types of transactions and arrangements.

TSTA imposes no identifiable legal standard on Treasury as to what constitutes a listed or reportable transaction. All the transaction need be is one the Commissioner identifies as "potentially abusive." Given that virtually any tax deduction can be utilized by a taxpayer in a potentially abusive manner, TSTA needs to be changed to include a definition that is consistent with sections 6111 and 6112 of the Code.

Section 706 of TSTA would broaden the exceptions to the statutory privilege currently found under section 7525. Section 7525(b) would drop the references to "corporations," thus making communications with individuals about "tax shelters" subject to disclosure.

The TSTA does more than simply permit IRS to define the activities subject to penalties. Section 702 and 708 of TSTA add new Code section 6707A, and new penalties in the new section and amendments to section 6707. The penalties are assessable against taxpayers and their material advisors. The penalties are large: $50,000 for a reportable transaction; $100,000 for a "listed transaction." They get worse for large taxpayers. The penalties double when net worth passes a certain level: $2 million for individuals, $10 million for corporations.

Section 709 adds a $10,000 per day penalty for failure to make a section 6112 tax shelter list available to the Secretary. This penalty could be abated for reasonable cause in the discretion of the Service.

Although there is an internal administrative appeal procedure for TSTA penalties, the legislation does not allow taxpayers and others any right of appeal to a court of law.

TSTA also provides that anyone involved with a listed transaction would be denied the section 7525(b) communication privilege as to that transaction. How far in either direction of the taxpayer's action will the IRS deem the listed transaction? Does privilege end when the client merely mentions the listed transaction? Does it end when he participates or when he takes the tax return position? Does privilege ever re-attach if the lawyer or tax advisor consults the client on other matters concerning a tax return that has been affected by a listed transaction? In other words, it appears that there is no firm point at which an attorney or other advisor can know that privilege has disappeared.

To recap, under the current pending version of TSTA, the IRS would be allowed to (1) define the transactions subject to penalties with complete discretion; (2) propose the assessment of the penalties; (3) decide the outcome of any appeal; and (4) collect the penalties.

The Attempt to Defend TSTA

Treasury has defended TSTA as simply a disclosure provision that nobody should worry about except the bad guys. TSTA is not a pure disclosure provision. *It is meant to pinpoint the IRS examination resources and consequently increase tax receipts [which explain why it has been scored as a revenue raiser].*

The TSTA model basically creates two classes of taxpayers. For the GMs, Fords, IBM's, Microsoft, etc., TSTA will be of little consequence. They have sufficient resources to defend their tax positions, even if they must disclose their positions. On the other hand, small businesses will not place huge examination spotlights on themselves, regardless of the soundness of their positions.

The Eternal Dilemma – What is a tax shelter, and when is it "abusive?"

Lawyers must be diligent when

persuasive factions attempt to influence legislation by substituting catchy labels for good law. The word "tax shelter" evokes such emotion these days, and we have to ask ourselves, "Why?" Under the classic definition, a tax shelter is nothing more than a transaction or method of investing that results in less taxes than others. This definition is simple enough and should not immediately signal alarms among us. None of us disagrees that a taxpayer has the legitimate right to minimize his taxes by arranging his affairs in a certain way, yet who among us really knows for sure when good tax planning "crosses the line." That becomes a subjective test, changing from IRS agent to IRS agent, and administration to administration. These are matters best left for an objective observer, like a judge, or perhaps a legislator, but certainly not a tax collector.

TSTA Operates To Overrule Presumptions and Doctrines Favorable To Taxpayers

Supporters of TSTA and the Disclosure Regulations argue that increased disclosure obligations do nothing more than highlight transactions the IRS might not otherwise discover in the standard examination selection process. This argument assumes that the "reportable transactions" are "abusive" in the first place and are worthy of special disclosure. It also assumes that the IRS process of determining reportable transactions is fair and objective. The threat of litigation, which disclosure spawns when the IRS does not like something, is the functional equivalent of an act of Congress to repeal a tax benefit.

TSTA contemplates that privacy interests of individuals will be compromised on the basis of terms like "potentially abusive." No one can yet define "abusive" with any reasonable particularity. Yet, the Senate, at the behest of Treasury, would increase the vagueness by adding the term "potentially." Clearly, every provision in the Internal Revenue Code is "potentially" subject to execution by a taxpayer in a fashion not consistent with Treasury's interpretation. There is no limitation, therefore, on the power of the IRS to effectively eradicate taxpayer-friendly interpretations of the Code, even when the IRS has no legislative or judicial authority in support of their views.

Please Act Now

Congressmen Clay Shaw and Mark Foley of Florida are influential members of the Ways & Means Committee. Elizabeth Nicolson of Mr. Foley's staff is especially interested in gathering comments from Florida constituents. [Her web address is Elizabeth.Nicolson@mail.house.gov.] Senator Bob Graham has his own base of power as a member of the Senate Finance Committee. Staff for Ways and Means Committee Vice-Chairman, Phil Crane (R-Il), [manny.rossman@mail.house.gov] is not sold on TSTA and recognize the problems illuminated in this article. Tax Counsel for the House Small Business Committee is also interested in views of professionals who represent small businesses. [jim.clark@mail.house.gov.] If you agree that TSTA is a proposed law that should not be passed, please share your thoughts with Treasury and your representatives.

 The author is a shareholder in the suburban Philadelphia law firm of Koresko & Associates, PC. He is Co-Chairman of the Civil Tax Procedure Committee of the Florida Bar Tax Section.

Tax Certification Review Course to Start in 2005

By Mitchell I. Horowitz, Esq., Fowler White Boggs Banker P.A., Tampa, Florida

Shortly after the organizational meeting at Amelia Island, the Tax Certification Task Force (Mark Holcomb, David Pratt, and Mitch Horowitz), together with Section Chair Richie Comiter, had a conference call to determine how best to proceed with changing the existing Annual Review of Income Tax into a Tax Certification Review Course. The Annual Review has been a two-day program in February which has been taught for over 20 years by Elliott Manning and Jerry Hesch, both of the University of Miami. Because the Annual Review has been such a high quality program for so long, the Task Force did not want to switch to a certification review course without assuring ourselves that we would maintain the first class status of the program.

Given the timing for starting the certification review course for this year, it was the considered opinion of the Task Force that it would be better to wait until 2005 to make the change. In this way, the re-vamping of the course materials could be done in such a way as to ensure that this would be the very best program that could be put together. We also look forward to the participation of as many former chairs of the Section as are available to speak at the first certification review course. This, we believe, will help to realize the goals of the Task Force to make the certification exam, which is administered by the Bar's Tax Certification Committee, more approachable for attorney eligible to sit for the Exam.

The Task Force would also like to thank the Tax Certification Committee for its fair consideration of the Survey results, which suggested that non-certified tax lawyers would be interested in sitting for a fair and broad ranging Exam. The Committee is considering a change in the format of the Exam, which will hopefully be im-plemented with the 2005 administration of the Exam.

We look forward to keeping Section members informed of our progress over the next year.

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Important Dates

1st Cycle Filing Period:
July 1 - August 31
of each year

2nd Cycle Filing Period:
September 1 - October 31
of each year

THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and the Tax Section present

Family Limited Partnerships – Transfer Tax Planning During Good, Bad, Ugly and Uncertain Times

COURSE CLASSIFICATION: ADVANCED LEVEL

One Location: October 24, 2003 • Hyatt Regency Westshore
6200 Courtney Campbell Causeway • Tampa, Florida • 813-874-1234

Course No. 5414R

10:30 a.m. – 11:00 a.m.
Late Registration

11:00 a.m. – 12:15 p.m. (lunch provided)
Family Limited Partnerships: The Continuing Saga Plus a Panel Discussion by Practitioners, an Appraiser and the IRS on Recent Trends and Valuation Techniques
E. Jackson Boggs, Esq., Tampa
Donald R. Tescher, Esq., Boca Raton
Mary Lou Edelstein, Esq., National Appeals Family Limited Partnership Coordinator for the IRS, Miami
Martin E. Basson, Esq. Supervisory Attorney, Estate & Gift Taxes, South Florida Territory of the IRS, Plantation
Timothy K. Bronza, ASA, CPA, Management Planning, Inc., Orlando

12:15 p.m. – 12:30 p.m.
Break

12:30 p.m. – 12:55 p.m.
Transfer of Family Limited Partnership Interests to Charitable Lead Trusts: A Lifetime and Testamentary Planning Technique that Must Be Considered by High Net Worth Families
Barry A. Nelson, Esq., North Miami Beach

12:55 p.m. – 1:20 p.m.
Using Family Limited Partnerships as an Asset Protection Technique
Barry A. Nelson, Esq., North Miami Beach

1:20 p.m. – 2:00 p.m
Bad Facts are Making Bad Law: Putting Your Clients in a Defensive Posture in Order to Avoid a Successful IRS Attack Under IRC Section 2036
David Pratt, Esq., Boca Raton

2:00 p.m. – 2:15 p.m.
Break

2:15 p.m. – 3:05 p.m.
Utilizing Sophisticated Planning Techniques in an Uncertain Tax and Interest Rate Environment
Robert H. Waltuch, Esq., Tampa

3:05 p.m. – 3:55 p.m.
Family Limited Partnerships and Nimcruts
Paul S. Lee, Esq., Director of the Wealth Management Group, Bernstein Investment Research and Management, New York, NY

3:55 p.m. – 4:45 p.m.
How Should General Partners and Trustees Invest Assets in Order to Achieve Cash Flow Objectives Associated with Sophisticated Transfer Tax Planning Strategies and to Satisfy the Fiduciary Standards Imposed on Them?
Paul S. Lee, Esq., New York, NY
John J. Pankauski, Esq., Associate Fiduciary Counsel, Bessemer Trust, Palm Beach
Sandy Spitz, Managing Executive, Financial Planning Group, Wachovia Wealth Management, Charlotte, NC

4:45 p.m. – 5:15 p.m.
Questions and Answers

5:15 p.m. – 6:00 p.m.
Reception (included in registration fee)

TAX SECTION

Richard B. Comiter, Palm Beach Gardens — Chair
William D. Townsend, Tallahassee — Chair-elect
David Pratt, Boca Raton — CLE Co-Chair
William R. Lane, Tampa — CLE Co-Chair

CLE CREDITS

CLER PROGRAM

(Max. Credit: 7.0 hours)

General: 7.0 hours
Ethics: 0.0 hours

CERTIFICATION PROGRAM

(Max. Credit: 7.0hours)

Tax Law: 7.0 hours
Wills, Trusts & Estates: 7.0 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News) you will be sent a Reporting Affidavit or a Notice of Compliance. The Reporting Affidavit must be returned by your CLER reporting date. The Notice of Compliance confirms your completion of the requirement according to Bar records and therefore does not need to be returned. You are encouraged to maintain records of your CLE hours.

How to register	MAIL the completed form w/check.	FAX: Completed form to **850/561-5816**	PHONE: **850/561-5831** M-F 8:00 - 5:30	NEW! ON-LINE: **www.FLABAR.org**

REFUND POLICY: Requests for refund or credit toward the purchase of the course book/tapes of this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A $15 service fee applies to refund requests. Registrants that do not notify The Florida Bar by 5:00 p.m., October 13, 2003 that they will be unable to attend the seminar, will have an additional $30 retained. Persons attending under the policy of fee waivers will be required to pay $30.

HOTEL RESERVATIONS: A block of rooms has been reserved at the Hyatt Regency Westshore Hotel, at the rate of $169 single occupancy and double occupancy. To make reservations, call the Hyatt Regency Westshore direct at (813) 874-1234. Reservations must be made by 10/03/03 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

Register me for the "*Family Limited Partnerships - Transfer Tax Planning During Good, Bad, Ugly and Uncertain Times*" Seminar

ONE LOCATION: (112) HYATT REGENCY WESTSHORE, TAMPA (OCTOBER 24, 2003)

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Name ______________________________ Florida Bar # ____________________

Address ____

City/State/Zip ______________________________ Phone # ____________________

DLB: Course No.5414R

REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Tax Section: $155
- ❑ Non-section member: $170
- ❑ Full-time law college faculty or full-time law student: $100
- ❑ Persons attending under the policy of fee waivers: $30
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METHOD OF PAYMENT (CHECK ONE):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Advance registration only. Fax to 850/561-5816.) ❑ MASTERCARD ❑ VISA

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❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

COURSE BOOK — AUDIOTAPES

Private taping of this program is not permitted.

Delivery time is 4 to 6 weeks after October 24, 2003. TO ORDER AUDIOTAPES OR COURSE BOOKS, fill out the order form above, including a street address for delivery. **Please add sales tax to the price of tapes or books.**

Tax exempt entities must pay the non-section member price.

______ COURSE BOOK ONLY: Cost $30 plus tax TOTAL $ _______

______ AUDIOTAPES (includes course book)
Cost: $155 plus tax (section member), $170 plus tax (non-section member) TOTAL $ _______

Certification/CLER credit is not awarded for the purchase of the course book only.

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Tax Section Featured Sponsors

September 2003

The Tax Section is pleased to introduce you to two of the many fine sponsors who have generously participated in the sponsor program for 2003-2004. Take a moment and familiarize yourself with Bernstein and Poole Carbone Eckbert. Please be sure to visit the sponsor recognition page in future issues of the Bulletin *for additional features.*

BERNSTEIN was established in 1967 to manage investments for private families and individuals. Its mission soon grew to include investment research and institutional asset management, but private clients have remained a central focus. Today, as a unit of Alliance Capital Management L.P., Bernstein Investment Research and Management oversees some $44 billion in private capital for a clientele that includes some of the nation's most prominent families and individuals. Each of our clients' portfolios is tailored to meet client-specific needs, yet all share the goal of maximizing long-term return at a controlled risk level. We advocate the construction of diversified portfolios among low-correlated asset classes around the world's capital markets, and manage each with a disciplined approach. Tax considerations are carefully integrated into our decision-making process where appropriate to meet our clients' best interests. Our proprietary planning tools rank among the most sophisticated in the wealth-management industry and are designed to help our clients make better-informed decisions about the issues that concern them most whether retirement planning, complex asset-allocation strategies, annual budgeting, single-stock strategies, multigenerational invest- ment planning or philanthropic giving. We are proud of our long history of creating and preserving wealth for our clients and are gratified by the trust and confidence we've earned from our clients for over 35 years.

POOLE CARBONE ECKBERT. The family of PCE companies provides a variety of corporate financial services through its subsidiaries: PCE Investment Bankers, formerly Poole Carbone Eckbert, (*www.pccap. com*), Stratus Valuations (*www.stratus valuations.com*) and PCE Advisory. **PCE Investment Bankers.** PCE Investment Bankers, formerly known as Poole Carbone Eckbert, provides merger, acquisition and growth capital services to Florida-based companies with revenues from $5 -$100 million. In addition, its principals – with extensive experience in owning and operating businesses – provide advisory services to owners for business planning through PCE Advisory. The PCE partners founded the firm with a commitment to serving Florida's small and mid-sized businesses that often are neglected or ignored by large, institutional investment banks. At PCE, Florida companies have immediate access to a team of local, seasoned professionals who will help them overcome the financial obstacles to strengthening the value of their enterprise. Our principals and advisors understand the challenges of entrepreneurship and the commitment required to sustain the growth of a company. Our personal experiences as business owners, institutional bankers, analysts and investors enable us to effectively communicate and negotiate for business owners to execute mergers, acquisitions and growth capital transactions. The principals of PCE have been involved in the execution of over $3.25 billion in corporate finance, merger and acquisition transactions for large and middle market enterprises. And, through our advisory service engagements, we help business owners assess opportunities and risks, establish objectives, appraise alternatives and negotiate terms and conditions leading to a transaction event. **Stratus Valuations.** Stratus Valuations is Florida's premier full-service valuation firm providing market-driven, customized valuation products for business owners and their advisors. The company delivers a full array of high, quality customized business and estate/gift valuations with an emphasis on Florida-based companies and affiliates. As a business owner, you will seek business valuations for a variety of reasons throughout the life cycle of your company. Stratus Valuations helps Florida business owners understand and evaluate the present and future value of their businesses in any scenario. Born out of an investment banking environment, Stratus Valuations delivers market-relevant valuations that go beyond an academic valuation approach. Further, our principals have worked in Florida for two decades with the influential players who drive tax and accounting policies and laws. Our team of valuation professionals includes analysts, a valuation-accredited CPA, investment bankers and seasoned valuation experts with business, legal and tax expertise that translates into more credible, supportable valuations. Based in Winter Park, Florida, Stratus Valuations is in close proximity to its Florida clients and representatives, providing for a high level of personalized service and advantageous local perspectives. **PCE Advisory.** PCE Advisory provides business owners with advisory services and strategies that lead to creating shareholder value, succession planning and liquidity events. Strengthened by its day to day association with PCE's investment bank, PCE Advisory offers strategic guidance in a variety of areas, including day-to-day operations: cash and asset management; liquidity options, shareholder administration, personnel and estate planning.

CHAIR'S REPORT
from page 1

programming. Past Chairs, Joel Bronstein (1996-1997), Jason Warner (1992-1993) and Marvin Gutter (2000-2001) were discussion leaders for a Breakfast Workshop on "What Young Tax Lawyers Should Know About the Practice of Tax Law and How to Solve Office Problems." Their practice tips, suggestions and recommendations will aid all of the attendees in their tax practice and make them better tax lawyers. Sam Ullman (1977-1978) once again organized the "Ullman Year of Review", a three-hour program in which experienced Florida tax practitioners discussed recent changes and developments in the their area of tax law and how such recent events have impacted their practices. Past Chairs who participated in the CLE program included Bob Panoff (1994-1995) on Civil Tax Procedure, Lauren Detzel (1997-1998) and Don Tescher (1984-1985) on Estate and Gift Tax, Larry Gragg (1991-1992) on Partnership Tax, Hank Rattaama (1983-1984) on Tax Exempt Organizations, Lou Conti (2001-2002) on Limited Liability Companies and Sam Ullman (1977-1978) on C Corporations. (Chair-Elect Bill Townsend in an attempt to groom himself for being a Past Chair also made a presentation on State Tax Law Developments.) I must also mention Past Chair Rick Josepher (2002-2003), who spent countless hours during the past year preparing me for my year as Chair. The heart and soul of the Tax Section is the continuing leadership and guidance provided by Past Chairs who take time out of their business practices to assist in Tax Section activities and programming. They are our spirit and inspiration of the Tax Section. They energize the Tax Section and serve as mentors to its younger members. This is the reason why the Tax Section is such a special Section of The Florida Bar.

The Organizational Meeting also included a workshop on RE-RULPA in which Greg Marks, the Chair of the RE-RULPA Task Force, updated Section members on the status of this Tax Section led project to draft a revised Revised Uniform Limited Partnership Act ("RE-RULPA") for the State of Florida based upon the recently passed model act adopted by The National Conference of Commissioners on Uniform State Laws. One of my goals as Chair is for the Tax Section, in conjunction with the support and assistance of the Business Law and Real Property & Probate Sections of the Florida Bar, to have a RE-RULPA statute drafted for submission to the Florida legislature. In conjunction with the RE-RULPA Task Force, Guy Whitesman, the Co-Director of the Federal Tax Division of the Tax Section, has assumed the role as chair of the drafting committee. His charging order is to work with other members of the Tax Section to develop a prototype Family Limited Partnership Agreement based upon RE-RULPA along with memoranda and other practice tool aids to assist tax practitioners in drafting family limited partnership agreements under RE-RULPA when the revised statute is adopted.

The Organizational Meeting also included a State Tax Law Forum organized by Rex Ware and Tony Zarba, the Co-Directors of the State Tax Division. Kevin O'Donnell, Chief Tax Counsel, Florida Department of Revenue, spoke on the Amnesty Program recently instituted by the Florida Department of Revenue. Alan Johansen, Staff Director, Florida Senate Finance and Tax Committee, predicted there would not be any significant new state taxes enacted during the 2003-2004 legislative session. Jeff Kielbasa, the Deputy Executive Director, Florida Department of Revenue, talked about the great working relationship between the Florida Department of Revenue and The Florida Bar Tax Section.

The Organization Meeting also included a Workshop organized by Sam Ullman and Bill Townsend on "What All Tax Lawyers Should Know About Sarbanes/Oxley and New SEC Tax Audit Rule Representation Restrictions on Auditors". Bill's insightful slide show was the hit of the program. Thank you to Bernie McCarthy, Gerald Wiele and Kevin Herzberg for their thorough presentations of the issues created by the new legislation and Sam Ullman and Bill Townsend for their eloquent and somewhat passionate analysis of Sarbenes/Oxley from a tax lawyer's perspective.

All and all I believe my "Back to Basics" theme is off to a flying start. As I have always said, the best tax lawyers are those who know more about the tax law, communicate with their clients and do the "right thing". I cannot express how lucky a chair I am to have tax lawyers of such a high caliber agreeing to serve as members of the Executive Council and Board of Directors during my term. I would like to personally thank each of you in advance for your time, effort and commitment to the Tax Section. I know that the success of my administration will depend upon how successful you are in implementing my goals and aspirations. Let's keep the momentum going.

I would also like to thank the Tax Section Sponsors whose names are referenced throughout the Bulletin. Tax Section members have commented to me not only about the friendliness and professionalism of our sponsors, but also of the knowledge and high level of expertise they have for assisting members in their practices. I cannot thank Nick Lioce enough for his herculean effort in formalizing and developing a well-organized sponsorship program, and Ken Hackett, of Ken Hackett & Associates, Inc., for his efforts in connection with organizing the Tax Section's sponsors into a cohesive group. My goal of creating a mutually beneficial partnership-type relationship with the Tax Section's sponsors is in the process of being achieved to a level beyond my greatest expectations. There is still a lot of work to do and with Nick as our Sponsorship Chair and Ken as the sponsor coordinator, I know Bill Townsend will be in good hands. Please assist Nick in obtaining other quality sponsors consistent with my objective of a mutually beneficial relationship. Without the support of the sponsors, the high caliber of events and quality of food and entertainment at Tax Section meetings would not be attainable.

I very much look forward to visiting with all of the members of the Executive Council at the Tax Section's Fall Meeting at the Grand Hyatt Tampa Bay on Friday, October 24th and Saturday, October 25th. The weekend will start with an excellent CLE Program put together by the Co-Directors of the Education Division, David Pratt and Bill Lane, along with

Assistant Director Hunter Brownlee. The CLE Program is titled "Family Limited Partnerships - Transfer Tax Planning During Good, Bad, Ugly and Uncertain Times", and will focus on the latest developments pertaining to family partnerships after Strangi III. A Past Chair, David Bowers (1999-2000), will lead a Breakfast Forum titled "A Long Range Planning View for the Florida Bar Tax Section". David was the discussion leader at the highly successful Tax Section Long Range Planning Retreat a few years ago. I believe this Fall Meeting will be a good time to have an open forum in which the members of the Tax Section can express to Bill Townsend (Chair-Elect) and Mitch Horowitz (Chair-Elect Designee) their views pertaining to where they believe the Section should be heading in light of continual changes in the federal and state tax and business laws and the enactment of Sarbenes/Oxley. Is the current direction of the Tax Section consistent with the goals developed at the Long Range Planning Retreat? Should it be? I can't think of a more appropriate section leader than David Bowers to lead this Breakfast Forum. Members should make every effort to attend this Breakfast Forum. Michael Poole, a member of the Board of Directors of the Federal Reserve, our keynote speaker, will address the members at the beginning of the Section Luncheon on Saturday. Christin Conley and Kevin Nelson, Co-Chairs of the Fall Meeting, will once again make sure that the Hospitality Room is up to Tax Section standards.

I am super excited about the Annual Meeting being held at the PGA Resort in Palm Beach Gardens, Florida. As a result of the efforts of Nick Lioce, the PGA Resort has made extremely favorable weekend room rates available to our membership, making attendance at the Annual Meeting a difficult offer to refuse. The Annual Meeting will be a weekend affair starting out Thursday night April 22nd with a Board of Directors Meeting. The Education Institute on April 23rd will be on "Income and Estate Planning Through the Life Cycle of a Closely Held Business". In addition to the normal Division Meetings, Section Meeting, Luncheons, Dinner and Tax Lawyer of the Year Presentation, the CLE Workshops will focus on tax practice management and the latest technology available to assist tax lawyers in their practices. The Annual Meeting will include a sponsor sponsored golf tournament, spa packages at the new spa at the Resort, live entertainment throughout the weekend and the Hospitality Suite. Nick Lioce, the Chair of the Annual Meeting, with his Co-Chairs Barbara Shore and Marc Wisniewski, promise to make this a very special weekend.

A special thank you needs to be given to Mike Jorgensen, the Chair of the Organizational Meeting at Amelia Island. What a great job Mike and Co-Chair Ian White did with stocking the Hospitality Suite throughout the weekend. Mike, your time and effort does not go unnoticed and is greatly appreciated. The July 4th weekend would not have been the same without you. You are the type of person that makes the Tax Section a family of friends rather than just a group of tax lawyers.

It is not too late to become involved in Section activities. Please call me if you want to become more involved in the Tax Section. "My door is open, my e-mail is always up and my phone is never too busy for new blood." I look forward to visiting with the members of the Executive Council on Friday night, October 24.

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Revised May 2003

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5118R	*Mergers, Acquisitions and Conversions BL = 6.0 TX = 6.0	**8.0**	**0**	10/26/2003	**S = $160.00** **N = $175.00**	N/A
5121R	*The Power of Asset Protection – Annual Wealth Protection Conference CA = 0.5 CR = 0.5 EP = 4.5 TX = 7.0	**7.0**	**1. 0**	11/10/2003	**S = $145.00** **N = $160.00**	N/A
5315R	*UPIA– It's Not Short for Utopia EP = 3.0 TX = 3.0	**4.0**	**0**	04/18/2004	**S = $120.00** **N = $135.00**	N/A
5248R	*21st Annual International Tax Conference BL = 13.0 CT = 13.0 HL = 3.0 IM = 2.0 IL = 17.0 TX = 17.0	**17.0**	**0**	07/23/2004	**S = $320.00** **N = $335.00**	N/A
2081-2	*Insurance 2003 – The New Universe TL = 5.0 WT = 5.0	**6.5**	**2.5**	10/11/2004	**S = $200.00** **N = $225.00**	N/A
5250R	* Annual Wealth Protection "The Need for Asset Protection Grows Every Day" BL = 4.5 IL = 4.5 TX = 9.0 WTE = 4.5	**9.0**	**0**	11/09/2004	**S = $185.00** **N = $200.00**	N/A

Board Certified in Tax Law

The Tax Law Certification Committee would like to congratulate these applicants who became board certified in tax law, effective June 1, 2003:

Michael W. Fisher	***Jacksonville***
Brian Kirk Jordan	***Vero Beach***
Kevin Alan Kyle	***Ft. Myers***
John J. Lancaster	***Lakeland***
Michael J. Silva	***Miami***

If you are interested in obtaining an application for Board Certification, please complete the form below and return it to The Florida Bar, or contact Michele Lamar-Acuff at 850/561-5690, or lacuff@flabar.org for more information.

APPLICATION REQUEST FOR TAX LAW CERTIFICATION

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