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Federal Tax Update

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Federal Tax Update
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I. Individuals

Public Law 110-343, the Emergency Economic Stabilization Act of 2008:

- Requires after 2008 that a qualifying child for purpose of the dependency exemption, the child tax credit, head-of-household status, the child care credit and the earned income credit be younger than the claimant and be unmarried and that, if a parent may claim a qualifying child, no other individual may claim the child unless no parent claims the child and the claimant has a higher adjusted gross income than either parent.

- Increased slightly the alternative minimum tax exemptions for 2008 to $46,200 for single individuals and $69,950 for married couples (one-half on a separate return) but left the phase-out thresholds unchanged, continuing to allow nonrefundable personal credits to offset AMT for 2008.

- Effective 2008, allows 50 percent of long-term unused minimum tax refundable credit to be claimed over a two-year period, eliminating the phaseout on the credit tied to the adjusted gross income phaseout on personal exemptions.

- Abated underpayments of tax, interest and penalty attributable to the Incentive Stock Option adjustment for pre-2008 years if outstanding on October 3, 2008 and treats 50 percent of interest and penalties paid in prior years as alterative minimum tax previously paid for credit purposes.

- Extended the exception to discharge from indebtedness income on most acquisition debt related to a principal residence through 2012.

- Extended through 2009 the optional sales tax deduction, the partial deduction of real property taxes by non-itemizers, the above-the-line deduction for higher education expenses, the above-the-line deduction for educators' out-of-pocket classroom-related expenses and the District of Columbia first-time homebuyer credit.

- Decreased for 2008 the threshold amount for calculating the refundable portion of the earned income credit from $12,050 to $8,500.

- Reinstated for 2009 with modifications the nonbusiness energy property credit which expired in 2007 [MODIFIED BY ARRA 2009].

- Extended through 2016 with modifications the residential energy property credit for qualified solar or fuel cell property, permitting the credit to be claimed against alternative minimum tax.

- Increased the floor for personal use property from $100 to $500 for 2008 casualties and thefts.

- For federally declared disasters in 2008 and 2009, removed the 10 percent floor on casualty losses, added the net disaster loss as a component part of the standard deduction (also permitting its use for alternative minimum tax purposes), permitted the disaster portion of a net operating loss to be carried back generally five years for regular and AMT purposes and allowed offset of 100 percent of alternative minimum taxable income by the AMT NOL.

- Requires information returns of brokers on dispositions of "covered securities" to show the customer's adjusted basis and holding periods of securities effective generally for post-2010 acquisitions where the security was purchased through that broker or a transferor broker; securities acquired by gift or inheritance are not covered securites.

- Requires information returns of brokers with basis information to be issued after 2010 in the case of a stock split or other organizational action affecting basis; a return is due by the earlier of 45 days from the action or the following January 15.

- Changed the date to February 15 by which brokers must provide information returns to customers effective with statements provided for 2008.

Public Law 111-5, the American Recovery and Reinvestment Act of 2009:

- Provides a one-time $250 "economic recovery payment" to be distributed by June 17, 2009 to residents of the United States eligible for social security, SSI (unless in a Medicaid institution), railroad retirement or veterans benefits in at least one month of the period November 2008-February 2009; the payment will reduce the "making work pay credit" for 2009.

- Creates a refundable "making work pay credit" for 2009 and 2010 except for nonresident aliens and those who are dependants on another's tax return equal to the lesser of 6.2 percent of earned income or $400 ($800 on a joint return) phased out between $75,000 and $95,000 of modified adjusted gross income ($150,000 and $190,000 on a joint return) and reduced by the payments of up to $250 for recipients of social security, SSI, railroad retirement, veterans benefits and government pensions; withholding tables are to reflect the reduced tax liability.

- Creates a refundable credit for 2009 of $250 ($500 on a joint return) for federal, state and local government pensioners not covered by FICA who do not receive an "economic recovery payment"; the payment will reduce the "making work pay credit" for 2009.

- Increases tax liability in the case of individuals with modified adjusted income over a phase-out range of $125,000-$145,000 ($250,000-$290,000 on a joint return) and who accepted the 65 percent federal subsidy for the first nine months of COBRA payments available for involuntary terminations after August 31, 2008 and before 2010; a new penalty is created for failure to notify the employer after becoming ineligible for the COBRA subsidy.

- Increases the alternative minimum tax exemptions in 2009 for cost of living but leaves the phase-out levels intact and continues to allow nonrefundable credits to offset AMT.

- Removes tax-exempt interest on private activity bonds issued in 2009 and 2010 (except bonds to refund prior bonds originally issued before 2004) as a preference item for alternative minimum tax (and adjusted current earnings (ACE) purposes in the case of a C corporation).

- Reduces the safe harbor for estimated taxes payable in 2009 to 90 percent of prior year liability for individuals with prior year adjusted gross income of less than $500,000 ($250,000 on a married filing separate return) if over 50 percent of gross income is from a small business of less than 500 employees.

- Excludes $2,400 of unemployment compensation from income in 2009.

- For March 2009 through December 2010, increases the monthly exclusion for employer-provided transit and vanpool benefits to the same level as employer-provided parking ($230 in 2009).

- For 2009 and 2010, modifies the child credit of $1,000 times each qualifying child under age 17 where the credit exceeds tax liability to permit a refund of up to 15 percent of earned income greater than $3,000 (down from the inflation-adjusted $12,550).

- For 2009 and 2010, for the earned income credit, increases the earned income percentage for families with three or more children from 40 to 45 percent of earnings up to $12,570, effectively raising the maximum credit by $628 for affected individuals and increases the phase-out levels for all married couples by $1,880 (to create a $5,000 difference from individual filers for 2009).

- Extends the first-time homebuyer credit through November 30, 2009 usable on 2008 or 2009 returns in the case of 2009 purchases and waiving recapture for 2009 purchases (irrespective of that election) retained as a principal residence for 36 months, increasing the maximum credit for 2009 to the lesser of 10 percent of the purchase price or $8,000 ($4,000 on a married filing separate return).

- Extends the portion of the nonbusiness energy tax credit scheduled to expire after 2009 for one year, raising the applicable percentage to 30 percent and creating a $1500 combined cap for 2009 and 2010 while eliminating the dollar limitations on individual items.

- Beginning in 2010, creates a credit for plug-in electric vehicles of $2,500 plus an add-on of $417 for each hour of capacity in excess of four with the credit not to exceed $7,500 to be phased out over four quarters beginning with the second quarter after 200,000 such vehicles have been sold; beginning February 18, 2009, creates a credit of $2,500 for low-speed vehicles with less than four wheels; and, for 2010 and 2011, creates a credit of the lesser 10 percent of the cost or $4,000 for converting any motor vehicles to a plug-in.

- For amounts paid in 2009 and 2010, modifies the Hope Credit (renamed the American Opportunity Tax Credit) by:

    - covering 100 percent of the first $2,000 of qualified tuition and related expenses (including course materials) and 25 percent on the next $2,000 for each of the first four years of post-secondary education;

    - increasing the modified adjusted gross income phaseout to $80,000-$90,000 ($160,000-$180,000 for married taxpayers filing jointly);

    - making 40 percent of the credit refundable except for children who can be claimed as someone else's dependant;

    - allowing the credit to be claimed against alternative minimum tax.

- Expands Section 529 plans for 2009 and 2010 to cover the purchase of computer equipment, technology, internet access, educational software, including related services, if the costs are for the benefit of a qualifying student or family member (no software primarily for sports, games and entertainment).

- Creates an additional standard deduction or itemized deduction for regular tax and alternative minimum tax purposes (except for itemizers electing the sales tax deduction who already include this component) for state and local sales and excise taxes on cars, light trucks and motorcycles, in each case new and under 8,500 pounds, as well as new motor homes acquired after February 16, 2009 and before 2010; the deduction is limited to the portion of the cost under $49,500 (one-half for married taxpayers filing separate) and is phased out for individuals with modified adjusted income between $125,000 and $135,000 ($250,000 to $260,000 on a joint return).

Public Law 111-32, the Supplemental Appropriations Act of 2009, giving vouchers of $3,500 or $4,500 as a cash incentive to trade in old fuel inefficient vehicles for new fuel efficient vehicles with a manufacturer's suggested retail price of $45,000 or less during July through October of 2009 or until the subsidy reaches $1 billion sets forth that the vouchers do not constitute income to the individual or business but are a reduction in the purchase price; Public Law 111-47, the CAR Save Program Supplemental Appropriations Act, provided an additional $2 billion for the "cash for clunkers" program and extended the outside date until September 30, 2010 or until the added funding was exhausted (as it was in August 2009).

In University of Chicago Hospitals v. United States, 102 AFTR2d 2008-6275 (Seventh Circuit Court of Appeals affirming an Illinois Federal District Court), in United States v. Detroit Medical Center (Ninth Circuit reversing a Michigan Federal District Court), and in United States v. Memorial Sloan-Kettering Cancer Center, 103 AFTR2d 2009-541 (Second Circuit reversing two New York Federal District Courts), three appeals courts agreed with an earlier Eleventh Circuit Court of Appeals decision that medical residents may qualify for the student exception from social security tax; in Mayo Foundation for Medical Education and Research v. United States, 103 AFTR2d 2009-2649, the Eighth Circuit Court of Appeals reversed a pair of Minnesota Federal District Court decisions and upheld IRS regulations to the contrary.

In Magdalin v. Commissioner, TC Memo 2008-293, the Tax Court determined that, despite the general rule that in vitro fertilization costs are deductible, a divorced physician who paid surrogates to bear children with eggs fertilized by him could not deduct the cost as there was no medical defect.

In Jones v. Commissioner, 103 AFTR2d 2009-687, the Tenth Circuit Court of Appeals concurred with the Tax Court that Timothy McVeigh's attorney had no basis in discovery documents and accordingly his donation of these papers to a charity did not give rise to a deduction; the Court ignored a second reason cited by the Tax Court for denying the deduction – that Jones did not own the property.

In Kent v. Commissioner, TC Memo 2009-40, the Tax Court disallowed education deductions for a taxpayer with a bachelor's degree in health care management and a masters degree in counseling and psychology where her Ph.D. courses would have allowed her to become a consultant and/or a professor, holding that the courses qualified her for a new profession.

In Rice v. Commissioner, TC Memo 2009-142, the Tax Court determined, where a couple purchased a parcel of property containing a number of lots and they built on the most desirable lot and sold the others, that the sale of the excess lots gave rise to capital gain as they were held for investment purposes rather than for resale where the lot for the principal residence could not have been acquired separately.

In Revenue Ruling 2009-9 and in Revenue Procedure 2009-20, without mentioning the name "Madoff", IRS determined that victims of Ponzi schemes have investment theft losses rather than personal theft losses, that 2008 losses for taxpayers with average income of less than $15 million per year can be carried back for up to five years and that individuals not amending prior year returns to correct reported "phantom income" can take a deduction in the year of discovery of the theft of 95 percent of the net investment including previously reported income (75 percent in the case of taxpayers who are suing third party advisors) with adjustments to be made in subsequent years reflecting actual recovery vis-à-vis this "safe harbor" loss; the guidance left open whether a victim could amend prior years not yet closed with IRS hinting that "constructive receipt" could be a bar due to the right of withdrawal.

In Revenue Rulings 2009-13 and 2009-14, IRS explained the tax treatment of surrenders and sales of life insurance contracts and the tax consequences to investors who purchase such contracts.

In Notice 2009-12, IRS indicated that the credit for new home buyers may be allocated among unmarried joint purchasers in any reasonable manner such as comparative contributions or legal ownership but not based on who can and cannot utilize the credit because of income levels.

In News Release 2009-67, IRS formally declared that multiple vehicles may qualify for the new temporary sales tax deduction.

In Chief Counsel Advice 200836024, IRS accepted the use of a single piece of relinquished property to be used in the same forward and reverse like-kind exchange.

In Internal Legal Memorandum 200911007, IRS indicated that the $1 million limit on acquisition debt in the case of an individual property must be shared by co-owners.

In Letter Ruling 200912004, IRS determined that cars, light trucks, minivans, cargo vans, sport utility vehicles and similar vehicles are like-kind for tax free exchange purposes.

In Letter Ruling 200914018, IRS ruled that an employee is not in constructive receipt of income when the employee has the ability to waive retiree health benefits in favor of a higher rate of pay.

In Chief Counsel Advice 200923029, IRS determined that a fringe benefit of a discount for products made by the company's former parent (now a supplier) was not tax free to employees as it was unavailable to the public as a benefit on top of any discounts generally available.

In Chief Counsel Advice 200925041, IRS indicated that a divorce decree or separation agreement with a condition allowing a noncustodial parent to claim an exemption for a child does not pass the dependency allowance to the noncustodial parent where proof of the condition is provided; the release per IRS must be on Form 8332 or on a document conforming to the substance of that Form.

II. Retirement Plans

Public Law 110-343, the Emergency Economic Stabilization Act of 2008, extended by two years through 2009 the tax-free treatment of up to $100,000 annually in IRA distributions donated to a charity by individuals who have reached the required beginning date.

Public Law 110-458, the Worker, Retiree and Employer Recovery Act of 2008:

- Suspended the minimum distribution rule for distributions otherwise required in 2009.

- Requires qualified plans, 403(b) plans and 457 plans to honor requests by non-spousal beneficiaries to effectuate trustee-to-trustee rollovers effective 2009.

In Conopco v. United States, 104 AFTR2d 2009-5103, the Third Circuit Court of Appeals affirmed a New Jersey Federal District Court and in Ralston Purina Company v. Commissioner, 131 TC No. 4, the Tax Court also held that a corporation could not deduct payments to redeem stock held in its ESOP; the decision is consistent with subsequent IRS regulations taking the position that the reacquisition of stock is a redemption payment outside the rule permitting a deduction for the amount of certain dividends paid to an ESOP (the Eighth Circuit concurs and the Ninth Circuit disagrees).

In In Re: Willis, 104 AFTR2d 2009-5195, a Florida Bankruptcy Court found that an individual's IRAs were part of his bankruptcy estate because he had engaged personally in prohibited transactions with the IRA, causing it to lose its income tax exemption.

In Dollander v. Commissioner, TC Memo 2009-187, the Tax Court determined that an individual could not avoid the early distribution penalty when he alleged mental health difficulties including post-traumatic stress disorder and depression following the death of a patient in his care when he got a full time job with another employer upon leaving his prior position; the Court noted that a taxpayer is disabled only if is unable to engage in any substantial gainful activity.

In Benz v. Commissioner, 132 TC No. 15, the Tax Court determined that a distribution from an IRA for education was not a modification of a prior election to receive substantially equal periodic payments from the IRA commencing prior to age 59 ½.

In Kennedy v. Plan Administrator for Dupont Savings and Investment Plan, 497F.3d 426, the US Supreme Court unanimously ruled that a plan administrator properly distributed benefits under a qualified retirement plan to a decedent's former spouse as the designated beneficiary notwithstanding the waiver of interest in the divorce documents; the Court in affirming a decision by the Fifth Circuit Court of Appeals resolved a split among the Circuits by deciding that ERISA overrode anything to the contrary under state law.

In Notice 2009-3, IRS extended the required updating of all 403(b) plans until December 31, 2009 with operational compliance required during this period.

In Letter Ruling 200846028, IRS ruled that there was no "designated beneficiary" of an IRA where the completed form indicated that the beneficiary was "as stated in wills."

In Letter Ruling 200925044, IRS found a violation of the "substantially equal periodic payment" rule where an individual starting IRA withdrawals before age 59 ½ transferred funds into another IRA by trustee to trustee transfer; however, in Letter Ruling 200929021, IRS permitted an entire transfer between IRAs but not a partial transfer under such circumstances.

III. Estates and Trusts

In Negron v. United States, 103 AFTR2d 2009-634, the Sixth Circuit Court of Appeals reversed an Ohio Federal District Court and agreed with the Fifth Circuit and two District Courts, disagreeing with the Second and Ninth Circuits, that IRS annuity tables must be utilized in valuing the future income stream from lottery payments for estate tax purposes; the taxpayer had sought an additional lack of marketability discount.

In Stone v. United States, 103 AFTR2d 2009-1379, the Ninth Circuit Court of Appeals agreed with a California Federal District Court that only a 5 percent fractional interest discount was appropriate in valuing a decedent's 50 percent interest in an art collection where the other 50 percent was owned by a testamentary trust of the decedent's spouse; the estate had sought a 51 percent discount.

In Estate of Hurford v. Commissioner, TC Memo 2008-278, the Tax Court ignored a purported family limited partnership where formalities were disregarded and funds were comingled, including the full value in a decedent's estate, but did not sustain a proposed negligence penalty as a result of reasonable reliance on the advisors despite their poor guidance.

In Estate of Jorgensen v. Commissioner, TC Memo 2009-66, the Tax Court included in a decedent's estate all amounts transferred into family limited partnerships where the decedent continued to write checks on the accounts and where there were no nontax reasons for the transfers; however, the estate taxes were reduced through "equitable recoupment" by the added income taxes paid in closed years as the result of using a carry over basis.

In Linton v. United States, 104 AFTR2d 2009-5176, a Washington Federal District Court disallowed discounting on gifts to a trust for children as they were pro rata shares of the underlying assets and not pro rata shares of LLC interests subject to a restrictive agreement at the time of the transfers.

In Pierre v. Commissioner, 133 TC No. 2, the Tax Court determined that the transfer of interests in a single owner LLC is the transfer of proportionate shares in the business and not in the underlying assets, effectively permitting discounting for lack of marketability and the lack of control.

In Barnett v. United States, 104 AFTR2d 2009-5047, a Pennsylvania Federal District Court increased a decedent's estate by $187,000, rejecting the estate's position that $11,000 was given under the annual exclusion to 17 family members prior to death; IRS successfully argued that the gifts were not authorized by the power of attorney used by the holder to make the gifts.

In Notice 2008-116, IRS indicated that it will not challenge "bundled" investment advisory costs with fiduciary fees for tax years beginning before January 1, 2009.

In Chief Counsel Advice 200836027, IRS determined that interest on estate tax accrued during the period of a hardship extension for paying tax is nondeductible personal interest.

IV. Business

Public Law 110-343, the Emergency Economic Stabilization Act of 2008:

- Prohibited deferral of most nonqualified deferred compensation for services performed after 2008 where there is no substantial risk of forfeiture and the payor's income is not substantially taxed in the United States or in a foreign country.

- Added "qualified bicycle commuting reimbursement" as a qualified transportation fringe benefit for post-2008 tax years by permitting reimbursement in a year of up to $20 multiplied by the number of months in which an employee regularly uses a bicycle for commuting and receives no other qualified transportation fringes.

- Extended for two years through 2009 the 15-year cost recovery period for qualified leasehold and restaurant property, the research credit (as modified), the above-basis deduction for donations to schools of qualified computer equipment and books by C corporations and the limitation of a shareholder's basis reduction in an S corporation upon donation of property to the applicable share of basis in the property.

- Created a five-year cost recovery period for most 2009 acquisitions of new farm machinery and equipment normally written off over seven years.

- For federally declared disasters after 2007, permitted the expensing of demolition and certain other costs otherwise capitalized.

- Modified the energy credit portion of the general business credit and permitted it to offset alternative minimum tax for tax years beginning after October 3, 2008.

- Extended through 2008 the business credit for contractors building energy efficient homes.

Public Law 111-5, the American Recovery and Reinvestment Act of 2009:

- For 2008 permits all business entities with average gross receipts of the loss year and two preceding years (if in business) of less than $15 million to elect by the extended due date of the return to carry back losses for any period up to five years.

- Retains through 2009 the $250,000 the Section 179 expensing along with the $800,000 phaseout level (with fiscal year taxpayers electing between years beginning or ending in those years).

- Extends through 2009 the additional 50 percent first year depreciation allowance for most types of nondepreciable personal property.

- Retains through 2009 the additional $8,000 first year depreciation allowance for new vehicles.

- Shortens to seven years the S corporation period for avoiding built-in gains from C corporation years if the seventh year occurs in or is preceded by 2009 or 2010.

- Allows taxable relief from indebtedness income on reacquisition by a business of its debt instruments in 2009 and 2010 to be reported ratably over five years beginning in 2014 (the exclusion on insolvency, qualified real property and qualified farm indebtedness must be waived for all years); acceleration applies on death and (for business taxpayers) liquidation or redemption of an interest.

- Increases the exclusion for most dispositions of "small business stock" issued by a C corporation from 50 percent to 75 percent, creating a 7 percent tax (.25 x .28 applicable capital gains rate) for stock acquired after February 17, 2009 and before 2011.

- For 2009 and 2010 expands the targeted groups for the work opportunity tax credit to include unemployed veterans (discharged in prior five years) and "disconnected youth" (aged 16-24, not in school, lacking sufficient skills and not really employed in last six months).

- Makes numerous changes to business energy credits including elimination of the credit cap on qualified solar hot water, geothermal and small wind energy property after 2008.

- Delays implementation of the 3 percent withholding by federal, state and local governments one year until 2012.

Proposed Regulations Under Code Section 409A explain how to calculate amounts includable in income as well as penalties when a nonqualified deferred compensation plan fails to comply with the law.

Proposed Regulations under Code Section 706 would require an actual closing of the books on a calendar day or a semi-monthly basis upon a change in percentage interest of a partner irrespective of reason unless the entity chooses proration on a calendar day basis in which case extraordinary items would still be allocated to the partners in proportion to their interests on a particular day; service partnerships would have liberal rules permitting allocations related to the provision of services based on any reasonable method and all partnerships would continue to have until the due date of a partnership return including extensions to make changes in allocations among contemporaneous partners.

In Woody v. Commissioner, TC Memo 2009-93, IRS determined that more than $20,000 paid for real estate training classes in "flipping" properties were costs incurred before the commencement of a business where the first investment property had not been acquired, causing disallowance of the training classes and related expenses for automobile, meals, etc.; however, the education expenses could not even be amortized as start-up expenses inasmuch as they were incurred to prepare for a new career.

In Agarwal v. Commissioner, TC Summary Opinion 2009-29, the Tax Court determined that a real estate agent is engaged in a real estate brokerage trade or business for purpose of the special rule for real estate professionals on material participation; IRS had argued that agents could not be considered as being in a real estate business.

In Muskat v. United States, 103 AFTR2d 2009-666, the First Circuit Court of Appeals agreed with a New Hampshire Federal District Court that a taxpayer seeking to set aside a written allocation to a covenant not to compete must demonstrate an actual meeting of the minds as to another allocation (in this case the desired allocation was personal goodwill).

In Wellpoint v. Commissioner, TC Memo 2008-236, the Tax Court determined that a company's payments to defend title to assets including the legal fees incurred were nondeductible capital expenditures.

In Electronic Picture Solutions v. Commissioner, TC Memo 2008-212, the Tax Court determined that a corporation was not entitled to a theft loss deduction for an investment in stock in a public corporation that became worthless in that California law, which determined whether a theft occurred, required a perpetrator to have made a false representation with the intent to defraud; however, in the case of publicly traded stock there is no privity between the investor and the underlying company and no false representation could be shown against the broker.

In Senulis v. Commissioner, TC Summary Opinion 2009-97, the Tax Court disallowed a deduction for cell phone use by a software designer temporarily away from his tax home due to inadequate records needed to collaborate the taxpayer's testimony as phones are "listed property."

In De Cacing v. Commissioner, TC Summary Opinion 2009-127, the Tax Court determined that mileage between a first and second work location is deductible even where the first location is 60 miles from his home and the second location is a mile away.

In Santa Fe Pacific Gold Company and Subsidiaries v. Commissioner, 132 TC No. 12, the Tax Court determined that a termination fee on a merger to permit a better merger is currently deductible.

In Menard, Inc. v. Commissioner, 103 AFTR2d 2009-609, the Seventh Circuit Court of Appeals reversed the Tax Court and determined that a bonus of more than $20 million based on a 5 percent of profits formula did not constitute a disguised dividend, noting that the bonus was high but not outlandish when compared with public competitors and that a percentage bonus does not "smell" like a dividend.

In Kerzner v. Commissioner, TC Memo 2009-76, the Tax Court refused to allow "circular loans" to constitute basis to S corporation shareholders when monies went from a partnership to its owners who were also shareholders in an S corporation who they transferred funds to that entity which paid rent to the partnership.

In Nathel v. Commissioner, 131 TC No. 17, the Tax Court determined that capital contributions by a shareholder to an S corporation do not restore lost basis in prior loans to the S corporation which were previously utilized to absorb losses.

In Minton v. Commissioner, 103 AFTR2d 2009-1311, the Fifth Circuit Court of Appeals agreed with the Tax Court that an S corporation shareholder was required to report her share of a corporation's profits in that the S election was not terminated by monthly distributions to certain shareholders in redemption of their stock in that this did not cause creation of an impermissible second class.

In Rowden v. Commissioner, TC Memo 2009-41, the Tax Court found that a taxpayer's aircraft maintenance activity was a hobby in the case of an environmental engineer employed by the Government who was a pilot in a family of pilots; the Court noted that the taxpayer did not conduct the activity in a business-like manner, that the taxpayer could not expect in good faith to recoup his investment, that he had no history of profit, that he made a comfortable living from his regular employment and that he derived pleasure from working on airplanes.

In McWhorter v. Commissioner, TC Memo 2008-263, the Tax Court determined that the self-employment tax could not be imposed on a non-filing worker who was improperly classified as an independent contractor and should have been treated as an employee.

In Rosemann v. Commissioner, TC Memo 2009-185, the Tax Court indicated that a worker, in this case an outside salesman, cannot be a "statutory employee" permitted to file a Schedule C but subject to social security withholding unless at a minimum he is not a common law employee, necessitating application of the traditional multi-prong test.

In Peno Trucking v. Commissioner, 102 AFTR2d 2008-5360, the Sixth Circuit Court of Appeals reversed the Tax Court and determined that a trucking company was entitled to Section 530 relief in that the Company could rely on decisions of the Ohio Industrial Commission and a lower Ohio court that it previously ruled that two of its drivers were independent contractors despite failure to satisfy the federal common law test.

In Smith v. United States, 103 AFTR2d 2009-880, the Tenth Circuit Court of Appeals found that a Utah Federal District Court jury had sufficient grounds for determining that a general manager without ownership interests who had authority to write checks and who interacted with the owner could be a "responsible person" who "willfully" failed to turn over payroll taxes despite the fact that the owner had more control over creditor payments in that only "significant" control is all that is required.

In Jefferson v. United States, 102 AFTR2d 2008-6572, the Seventh Circuit Court of Appeals agreed with an Illinois Federal District Court that a state legislator serving on the board of directors of a nonprofit daycare center was personally liable for unpaid payroll taxes where he had significant involvement in the financial affairs although not on a day-to-day basis and had previously directed the payment of taxes under facts which indicated he received reports showing a steadily increasing tax liability; the exception to lack of liability for volunteer board members was determined not to be applicable because of signatory authority on checks and other financial involvement.

In Kandi v. United States, 102 AFTR2d 2008-5342, the Ninth Circuit Court of Appeals agreed with a Washington Federal District Court that under pre-2009 IRS regulations, determined reasonable, a sole owner of a limited liability company is automatically liable for unpaid payroll taxes.

In Revenue Procedure 2009-26, IRS set forth the procedure for electing a carryback of three, four or five years from 2008 losses, allowing either a statement with the timely filed 2008 return or the filing of the carryback or amended return with no statement required no later than six months from the original due date of the return.

In Revenue Procedure 2009-39, IRS modified the existing guidance on both automatic and nonautomatic changes in accounting method including the handling of supplies and repairs and maintenance.

In Notice 2008-113, IRS revised the procedures for seeking relief from the full application of the income exclusion and the additional taxes under the deferred compensation rules of Section 409A, repealing guidance from 2007, and in Notice 2008-115, IRS gave guidance on how to compute amounts to be included in income under 409A and the withholding required thereon.

In Notice 2009-48, IRS issued comprehensive guidance in question and answer form on split dollar insurance.

In Announcement 2009-4, IRS withdrew proposed regulations regarding the treatment of transactions between a partnership and its partners as disguised sales of partnership interests and will view each case on an individual basis.

In Fact Sheet 2008-25, IRS warned S corporations not to attempt to avoid employment taxes on shareholders who provide more than minor services to their corporation and set forth the following factors that courts have considered in determining reasonable compensation: training and experience; duties and responsibilities; time and effort devoted to the business; dividend history; payments to non-shareholder employees; timing and manner of paying bonuses to keep people; amounts paid by comparable businesses; compensation agreements; and use of a formula to determine compensation.

In Field Advice 2008-4301, IRS determined that a manufacturer's payment to several states to settle an antitrust claim was a nondeductible fine or penalty not withstanding that there was no admission of liability.

In Letter Ruling 200852013, IRS ruled that, upon the acquisition of a term interest in land and buildings, the land may be depreciated over the term but the buildings are depreciable over the standard MACRS lives.

In Chief Counsel Advice 200911006, IRS indicated that trademarks, trade names and similar intangibles that can be valued separate and apart from goodwill qualify as like kind property for purpose of tax free exchanges; this constitutes a reversal from two prior Letter Rulings where the IRS considered these items to be closely related to the goodwill.

In Letter Ruling 200927031, IRS ruled that net operating losses incurred in years of operation as a tax exempt entity with unrelated business income can be carried forward to years after a change to taxable status.

V. Procedure

Public Law 110-252, the Supplemental Appropriations Act of 2008, requires IRS to offset overpayments of federal tax by any amount owed to a state unemployment agency.

Public Law 110-343, the Emergency Economic Stabilization Act of 2008, except for "tax shelters" and "reportable transactions" where the standard remains "more likely than not", conformed the preparer penalty standard to the taxpayer standard of "substantial authority" retroactive for undisclosed positions on returns prepared after May 25, 2007; the standard for disclosed positions remains "reasonable basis."

Public Law 110-428, the Inmate Tax Fraud Prevention Action of 2008, allows disclosure of taxpayer information to the Bureau of Prisons if IRS believes that any prisoner has filed or facilitated filing of a false return; the law expires after 2011 following a report to Congress of implementation due in 2010.

Public Law 110-458, the Worker, Retiree and Employer Recovery Act of 2008, increased the penalty for failure to file partnership and S corporation returns from $85 to $89 per partner/stockholder per month effective for returns required to be filed in 2009.

Proposed Regulations Under Code Section 7811 permit the issuance of Taxpayer Assistance Orders to any operating division or function of IRS except where a criminal investigation would be impeded; the taxpayer must be able to show significant hardship (met in the case of a delay of more than 30 days beyond the normal processing time) as well as facts coupled with the law to support relief.

In McHan v. Commissioner, 103 AFTR2d 2009-1076, the Fourth Circuit Court of Appeals agreed with the Tax Court that IRS was not barred in determining a taxpayer's income from the sale of marijuana by the lesser amount of unreported income which was the subject of a prior criminal conviction.

In United States v. Textron, Inc., 104 AFTR2d 2009-5208, the First Circuit Court of Appeals in a divided en banc decision, overruled a Rhode Island Federal District Court and the First Circuit panel and determined that tax accrual work papers are not protected by the work product privilege as they are not work done for litigation but are utilized in supporting financial filings; the Fifth Circuit is in accord.

In University of Chicago v. United States, 102 AFTR2d 2008-6835, the Seventh Circuit Court of Appeals agreed with an Illinois Federal District Court that there was not reasonable cause for abatement of penalties where the University failed to pay social security and medicare taxes on elective deferrals made by employees into retirement plans.

In Bakersfield Energy Partners v. Commissioner, 103 AFTR2d 2009-2712, the Ninth Circuit Court of Appeals agreed with the Tax Court that an overstatement of basis is not an omission of income for purpose of extending the normal three-year statute of limitations to six years; in Salman Ranch, Ltd. v. United States, 104 AFTR2d 2009-5190, the Federal Circuit reversed the Court of Federal Claims to reach a similar result.

In Estate of Brandon v. Commissioner, 133 TC No. 4, IRS determined that a notice of a tax lien filed after a taxpayer's death is valid; the estate argued that it could not be filed post-death as a deceased taxpayer could not receive the lien notice.

In Mission Primary Care Clinic, PLLC v. Internal Revenue Service, 103 AFTR2d 2009-594, a Mississippi Federal District Court determined that a levy on distributions by a limited liability company to a doctor-member is continuing in nature as would be the case of a levy on salary or wages.

In Medical Practice Solutions, LLC v. Commissioner, the Tax Court, agreeing with the Second and Sixth Circuit Courts of Appeal, allowed the IRS to come against individual assets of a single owner limited liability company owner following collection due process procedures based on Proposed Regulations in effect before 2009 (for payroll periods after 2008 a single owner LLC is a separate entity for payroll tax purposes).

In Frank Sawyer Trust of May 1992 v. Commissioner, 133 TC No. 3, the Tax Court determined that IRS could seek to collect from a trust which was the sole owner of several liquidated corporations for assessed income tax liability against the corporations as the result of an examination after distribution of assets to the sole stockholder.

In Hoyle v. Commissioner, 113 TC No. 13, the Tax Court modified a prior position which appeared to limit its review in CDP matters to topics raised at the appeals conference by holding that it could consider whether a notice of deficiency was properly mailed even where the issue had not been previously raised; the Court indicated that Appeals should have considered compliance with applicable law regardless of whether it was raised by the taxpayer at the CDP hearing.

In Commissioner v. Neal, 103 AFTR2d 2009-801, the Eleventh Circuit Court of Appeals agreed with the Tax Court that it had the right to go outside the administrative record when it conducted a trial on a taxpayer's claim for innocent spouse relief; IRS unsuccessfully contended that the Administrative Procedure Act confines appeals to the administrative record but the Tax Court had determined that its procedures preceded and were not modified by APA.

In Porter v. Commissioner, 132 TC No. 11, a divided Tax Court determined that the standard for review of the denial of equitable relief under Code Section 6015(f) is "de novo" as it is for other innocent spouse relief rather than on the record established with IRS Appeals.

In Sunleaf v. Commissioner, TC Memo 2009-52, the Tax Court gave equitable innocent spouse relief to a widow whose attorney husband died owing more to IRS than the gross value of his estate where the widow testified that she was unaware of the liability inasmuch as she was handed each return for signature a few minutes before the post office closed on the due date of the return and did not review the documents.

In Denton v. Commissioner, TC Summary Opinion 2009-87, the Tax Court gave equitable relief allowing innocent spouse status to a divorced spouse who knowingly signed an incorrect return but expected that her former husband would prepare and file an amended return reporting the omitted income.

In Stolkin v. Commissioner, TC Memo 2008-211, the Tax Court denied equitable innocent spouse relief to a woman aware of her husband's financial irresponsibility at the time of signing the tax returns who owed $55,000 and had $80,000 of equity in a townhouse and was making $600 per month lease payments on a BMW while receiving income of $66,000 per year (mostly in alimony).

In Lantz v. Commissioner, 132 TC No. 8, a divided Tax Court determined that the law requiring innocent spouse status to be requested within two years from the first targeted collection activity is invalid as outside the statute to the extent applied to equitable relief under Code Section 6015(f); the Court interpreted the two-year rule as applying only to the other two types of innocent spouse relief under Section 6015; in Chief Counsel Notice 2009-12, IRS expressed its disagreement.

In Bennett v. Commissioner, TC Memo 2008-251, the Tax Court held that IRS did not abuse its discretion when it refused to accept an Offer in Compromise in the minimum processable amount, indicating that IRS has the discretion of considering such factors as potential increases in income and past noncompliance.

In In Re: Guillet, 102 AFTR2d 2008-6972, a Texas Bankruptcy Court rejected an IRS argument that a bankruptcy should be denied in the case of a physician involved in a fraudulent transaction who put up more than $1.3 million to provide advance funding for a bogus Nigerian business which turned out to be an "advance fee fraud" under which the taxpayer's share (never received) was supposed to be $31 million; the Court determined that the doctor was a victim rather than a perpetrator in the fraud.

In Ciccotelli v. United States, 10 AFTR2d 2009-1647, a Pennsylvania Federal District Court agreed that a payment to the Internal Revenue Service was a deposit and not an estimated tax payment and, accordingly, was not subject to the statute of limitations period on refunds of payments where the amount of the check had no correlation to the estimated tax liability, was much larger than estimated payments and was not accompanied by a payment voucher.

In Estate of Wilshire v. United States, 102 AFTR2d 2008-6946, an Ohio Federal District Court determined that oral and written communications between a Personal Representative and IRS regarding calculation of the estate tax constituted a claim for refund within the statute of limitations notwithstanding the informality prior to the deadline which was followed by a Form 843 subsequent to the deadline.

In Notice 989, IRS indicated that an individual who received a 1099 rather than a W-2 must show the applicable income as wages and pay the employee portion of social security with an original or amended return following a determination by IRS that the worker is an employee.

In Announcement 2008-111, IRS announced a two-year test period for both mediation and arbitration in Offer in Compromise and Trust Fund Recovery Penalty cases, starting with Appeals in Atlanta, Chicago, Cincinnati, Houston, Indianapolis, Louisville, Phoenix and San Francisco.

In News Release 2009-2, in light of economic conditions, IRS announced that its employees will have greater authority to suspend collection action and to be more flexible with taxpayers who have missed an installment payment or who cannot come up with a periodic payment due under an Offer in Compromise.

In News Release 2009-19, IRS indicated that it would not renew the contracts of the two private collection agencies.

In News Release 2009-37, IRS determined that credit or debit card "convenience fees" charged by the issuer for paying income taxes are deductible as miscellaneous itemized deductions.

In News Release 2009-75, IRS announced that it had negotiated an agreement with Switzerland under which the Swiss Bank UBS will provide IRS with the names of 4,450 account holders.

In Action on Decision 2009-1, IRS announced its nonacquiescence with a 2008 decision of the Tenth Circuit Court of Appeals in Cox v. Commissioner which reversed the Tax Court in 2008 and held that an IRS appeals officer was disqualified to serve in a collection due process hearing because he previously handled a CDP hearing involving the same individual.

In EMISC 20090326, IRS indicated a six month "amnesty" commencing March 23, 2009 in which a tax payer with unreported offshore income can file back tax returns for six years and pay principal, interest and certain civil penalties in order to avoid criminal prosecution.

In Chief Council Notice 2009-21, IRS indicated its disagreement with the 2008 case of Porter v. Commissioner in which the Tax Court determined that it will make its own determination as to the applicability of equitable innocent spouse relief without being limited to evidence in the administrative record; IRS indicated it will continue to argue that a decision must be based upon whether or not there was an "abuse of discretion" as set forth in the administrative record.

In Chief Counsel Advice 200835030 and Chief Counsel Advice 200836002, IRS indicated that a single owner limited liability company must honor a continuous levy on consideration payable to its owner.

In Chief Counsel Advice 200847001, IRS indicated that, where a corporation following an IRS levy discontinues operations and transfers its contracts to a newly created corporation formed by the spouse with the same employees, fixed assets and customers, the new entity is a successor in interest rather than an "alter ego" and, as such, there is no need to make an additional assessment against the new entity nor does it have any right to collection due process.

In Legal Memorandum 20092102F, IRS determined that a transferable personal seat license (PSL) allowing annual renewals of season tickets to a sporting team may be levied upon by IRS; however, a nontransferable right of renewal may not be the subject of levy.

In Chief Counsel Advice 200926001, IRS concluded that it could levy on both nonqualified and incentive stock options which are nontransferable in most cases under the law.

In Chief Council Advice 200927019, IRS determined that a health savings account is subject to a federal tax levy, causing generally a ten percent excise tax on the distribution if the taxpayer has not reached normal retirement age or has become disabled.