Contra Costa Lawyer Online

June 2011

The Tax Issue

Contra Costa Lawyer Online

CC Lawyer

manufactured by

FEEDFABRIK

The original blog can be found at
http://cclawyer.cccba.org/

Manufactured by FEEDFABRIK on June 1, 2011

Contents

Inside: Guest Editor's Column

Wednesday, June 1, 2011

In this issue, we looked for the tax topics that we face every day in our respective practices. We explore the recapture of tax in the bankruptcy setting; ERISA issues for the business and estate tax attorney; gain exclusion for small business owners for the corporate attorney; the future of environmental taxes for the environmental attorney; domestic partnership update, income sharing and dependency exemptions for the family law lawyer; foreign bank account reporting for the international and tax attorney; income tax consequences as damages for the litigator; and use of the CDP appeal and recent changes in the Tax Court rules for the tax attorney. Interestingly, when you take out the tax issues associated with foreclosures and short sales and deferred taxation transactions under §1031, which has been covered at length in recent issues, we found no hot real property issues.

Mark Ericsson

I find history fascinating and with the rest of the column, I am going to take you on a whirlwind tour of the history of taxation in California. In California, we pay taxes to the Internal Revenue Service (Income and payroll taxes), Franchise Tax Board (income taxes), State Board of Equalization (sales and use taxes), and the Employment Development Department (income tax withholding and unemployment insurance).

As the Mexican War came to an end and California claimed statehood, the military continued to collect the customs tax and California appeared financially sound. This came to a quick end in 1849, when President Taylor seized the nearly $3,000,000 in revenues held in California, leaving California penniless. California reacted quickly, passing several taxes, chief among them the property tax which was to become the primary source of county and state funds for years to come.

While Californians were digging for gold, the seeds of the civil war were growing to the east. California voted to outlaw slavery and sided with the north. To finance the war, Congress passed an income tax in 1861. Having forgotten to create an agency to collect the tax, Congress created the Bureau of Taxation the following year and the first commissioner, George Boutwell, set about developing an infrastructure which has generally remained to this day. Districts were established following the Congressional districts and California was divided in five districts, four being in northern California. The first tax collectors were paid on commission to collect a three percent tax on incomes of $600 to $10,000 and five percent thereafter. The average income was about $300 per year and the tax probably produced less than one percent of the total tax revenue.

With the end of the civil war came a reduction in federal taxes. From 1868 through 1913, when the income tax was reinstated following passage of the sixteenth amendment, nearly 90% of the taxes federally collected were excise taxes on alcohol and tobacco. The current offer in compromise program originally addressed these taxes. Until 1951, the job of commissioner was a patronage job often going to the party loyal and charges of corruption were the news of the day throughout.

During the late nineteenth century, the railroads refused to pay the property taxes so vital to the state (they owned the collectors) and the mining interests were paying about one-fourth the rate of the farmers. The California constitution, passed in 1879 to ease difficulties with labor conditions, state taxes, monopolies, railroads and the treatment of the Chinese, created a board of equalization to insure that all property owners paid their proportionate share of the tax. Subsequent legislation provided that the state would keep the revenues from banks, railroads and utilities with the balance going to the counties.

With the great depression, the state found itself underfunded and property owners unable to pay their taxes. California was forced to look for new sources of revenue. In 1929, the legislature passed the bank and corporate franchise tax imposing a tax on corporate income. Most onlookers supposed the Board of Equalization (made up of representatives from four districts and the state controller) would administer the tax, but Ralph Riley, a popular and politically well connected controller persuaded the legislature to create a separate Franchise Tax Board headed by the controller, the director of finance and the chairman of the Board of Equalization. This was a blow to the Board of Equalization, although the Board was given appellate review over Franchise Board decisions. Several reports to the legislature during this time called for abolition of the Board of Equalization, but the legislature declined to act.

In 1932, the legislature established the Tax Research Bureau within the Board. Led by Board executive secretary Stewart Pierce, who held that position for 37 years, and counsel Roger Traynor, later to become famous in his position as Chief Justice of the California Supreme Court, the bureau recommended numerous changes to the Bank and Corporations tax and drafted bills for an income tax (administered by the Franchise Tax Board) and a sales and use tax (administered by the Board of Equalization). The sales tax was enacted at a two and one-half percent rate. At the height of the depression, the state relieved the counties of their responsibility to finance education, assuming a $40,000,000 annual burden which was about equal to the revenue generated by the sales tax.

The Second World War flooded the state treasury, while causing the federal government to widen its tax base to pay for the war. Tax rates quickly climbed. Withholding was instituted in 1943 and the number of taxpayers increased from eight million to fifty million. The IRS was hiring so fast that employees were not tested. With the victory tax, the wartime surtax, the income tax and the 1942 tax forgiveness provisions, the return was voluminous. In 1944, the IRS allowed people to send in their Withholding Receipt in lieu of a return.

Property values soared as people returned to the state after the war. The taxpayers revolted against soaring property taxes by passing proposition 13 in 1978, purportedly protecting the elderly, but also making local communities more dependent upon state funds and probably leading to a state educational system that has fallen from one of the country's finest to one of the worst. State revenue became more volatile as taxes from capital gains, taxed in California at ordinary income rates, flooded the treasury in good years and dried up during recession. Recent attempts to even out the boom and bust nature of California revenue have been rejected by the voters.

The IRS has also seen its problems. Senator Bob Kerry investigated the IRS during the mid-nineties and rumors abounded that the IRS would be abolished. The IRS responded with its "kinder and gentler" culture which resulted in declining revenues. Quite predictably, the pendulum has swung again and the IRS has now tightened the reins. Today, both the federal and state agencies are vast agencies working their way through a depression that is taxing the resources of the agencies themselves.

There is much talk today about revamping the tax system. It is generally agreed that the 34% corporate tax, about 10% higher than most of our competitors, needs to be brought into line to level the playing field. Many point out that the corporate tax impact is not equally distributed and preferential treatment to, say, the oil companies, should be abolished. With about 50% of individual taxpayers paying no tax, some feel that the franchise should be broadened. Others feel that those who can afford should carry a greater part of the burden. There is talk of discontinuing the estate tax in 2013. Some would tax consumption rather than income. It certainly appears that there will be significant changes over the next few years as the United States seeks to get its house in order.

Mr. Ericsson practices taxation, business and estate planning law as a partner in the Walnut Creek firm Youngman, Ericsson & Low, LLP, and was the 2006 Contra Costa Bar Association president.

The Dark Side of Debt Forgiveness

Wednesday, June 1, 2011

Generally, under Internal Revenue Code (IRC) § 61(a)(12) cancelation of debt (COD) is taxable as ordinary income. However, under certain circumstances such income can be excluded under IRC § 108 where, the COD occurs as a result of a discharge in a title 11 bankruptcy case (IRC § 108(a)(1)(A)), where the discharge occurs when the taxpayer is insolvent (IRC § 108(a)(1)(B)), where the indebtedness discharged is qualified farm indebtedness (IRC § 108(a)(1)(C)), where the indebtedness discharged is qualified real property business indebtedness (IRC § 108(a)(1)(D)), or where the indebtedness discharged is qualified principal residence indebtedness which is discharged before January 1, 2013 (IRC § 108(a)(1)(E), the “2007 Mortgage Relief Act”).

Elliot Abrams

There is no free lunch when it comes to exclusion of the COD. The "price" for exclusion occurs under IRC § 108(b) which requires that the taxpayer's tax attributes be reduced by the amount of the income excluded. In many cases, IRC § 108 only defers payment of the tax on the COD income. The method by which the tax attributes are reduced differs under each subsection of IRC §108(a)(1). Only the exclusion of COD income resulting from a bankruptcy discharge will be discussed.

In determining the amount of COD income, IRC § 108(e)(2) provides that "[n]o income shall be realized from the discharge of indebtedness to the extent that payment of the liability would have given rise to a deduction." For example where there is a foreclosure the amount of debt forgiveness does not include accrued but unpaid interest since the taxpayer could have deducted the interest if paid. Likewise where a landlord forgives unpaid rent owed by a business debtor, this discharge would not be COD income since the taxpayer could have deducted the rent as a business expense if paid.

Once the amount of COD income is determined, IRC § 108(b)(2) requires the taxpayer to reduce tax attributes in the following order:

(A) Net operating losses;

(B) General business tax credits (at 33 1/3% of the income excluded);

(C) Minimum tax credits (at 33 1/3% of the income excluded);

(D) Capital losses;

(E) Property basis;

(F) Passive activity loss and credits (at 33 1/3% of the income excluded for the credits); and

(G) Foreign tax credits (at 33 1/3% of the income excluded) .

The reduction in basis under IRC § 108(b)(2)(E) in a Title 11 case is governed under the provisions of IRC § 1017(b)(2) which limits the reduction to the excess of the "(A) aggregate of the bases of the property held by the taxpayer immediately after the discharge, over (B) the aggregate of the liabilities of the taxpayer immediately after the discharge." Treasury Regulation 1.1017-1(b)(3) provides that aggregate liabilities must be reduced by the amount of any cash on hand. Treasury regulation 1.1017-1(a) prescribes the order in which the bases in the taxpayer's property is reduced. Property where the tax attributes are reduced in the above order, is not limited to depreciable property but consists of all the property of the taxpayer.

Alternatively, the taxpayer can elect under IRC § 108(b)(5) to first apply any portion of the required reduction to the taxpayer's depreciable property before any other tax attributes are reduced. Under this election the reduction in basis is not limited to the excess of basis over liabilities but can reduce the basis to zero (IRC § 108(b)(5)(B)). Property under this election is limited to depreciable property of the taxpayer (IRC § 1017(b)(3)).

If the excluded COD income exceeds the sum of the taxpayer's tax attributes, the excess is permanently excluded from the taxpayer's gross income (Treasury Regulation 1.108-7(a)(2)).

The required adjustment to basis has future adverse consequences. Upon the later sale or taxable disposition at a gain of property whose basis has been reduced the portion of the gain attributable to the basis reduction is taxable as ordinary income (IRC § 1017(d)).

The reduction in tax attributes occurs following the determination of the tax for the taxable year of the discharge and any reduction in basis occurs on the first day of the first taxable year following the year in which the discharge takes place. This allows for planning opportunities especially in nonbankruptcy cases. Where the taxpayer is able to dispose of properties subject to the basis reduction in the same year as the discharge occurs, no basis reduction takes place with respect to those properties.

The reduction in tax attributes is reported on IRS Form 982 which is filed with the federal income tax return for the year in which the discharge of indebtedness occurs.

Finally, and most importantly, in bankruptcy cases only, where COD income is excluded from gross income, there is no basis reduction to any property which is claimed as exempt under Bankruptcy Code § 522 (IRC § 1017(c)(1)).

The following examples illustrate the operation in a bankruptcy context of IRC §§ 108 and 1017:

Dan files Chapter 7 bankruptcy on June 1, 2010 and has the following assets, liabilities and tax attributes:

1. Home worth $250,000 with a first mortgage of $300,000, a second mortgage of $200,000 and a basis of $400,000. Both mortgages are recourse. Client has lived in the home for the last 3 years.
2. Rental property worth $525,000 with a recourse first mortgage of $500,000 and a basis of $400,000.
3. Miscellaneous other assets all within the allowable bankruptcy exemptions.
4. No cash on hand.
5. Unsecured credit card debt of $100,000.
6. A NOL carryforward of $75,000 from a failed business.
7. A passive activity loss carryforward of $35,000 from the rental property.

Dan schedules as exempt on bankruptcy schedule C his home and the miscellaneous other assets. The Bankruptcy Trustee does not administer any assets. Although there is some equity in the rental property the Trustee decides not to administer it calculating that nothing would be available to pay creditors after payment of real estate commissions and costs of sale. Dan receives his bankruptcy discharge on October 1, 2010.

Dan realizes gross employment income for 2010 of $50,000. Assume that the rental property breaks even for 2010, that Dan has no other income and that he does not itemize deductions.

As a result of the bankruptcy Dan realizes $350,000 of discharge of indebtedness income for 2010 ($100,000 in credit cards COD plus the excess of debt over FMV of home). Dan first determines his tax for

2010 before reducing tax attributes (IRC § 108(b)(4)(A)). Dan will apply $50,000 of his NOL carryforward to offset his taxable income for 2010.

If Dan does not elect to first apply the discharge of indebtedness income against his depreciable property, the $350,000 of discharge of indebtedness income will first reduce his remaining NOL of $25,000 to zero. There will be no reduction in basis for Dan's home as it was claimed as an exempt asset in his bankruptcy schedules. There will be no reduction in basis for Dan's rental property as its liabilities exceed its basis. There will be no reduction in basis of Dan's other property (e.g. car, furniture, jewelry, etc.) as he has claimed those assets as exempt in schedule C. The discharge of indebtedness income will next reduce Dan's passive loss carryforward to zero and the remaining $290,000 will forever escape taxation.

If Dan were to elect to first apply some or a portion of the discharge of indebtedness against his depreciable property, he could reduce his basis in the rental by the full $350,000 of discharge of indebtedness income from $400,000 to $50,000 (there is no limitation under this election other than Dan can only reduce the basis of depreciable property and not below zero). In this case he would retain both this NOL carryforward and the passive activity loss carryforward. The $25,000 NOL remaining after netting against Dan's 2010 income would carryforward to future years, his passive loss carryforward would continue to be available, but he would face a much larger potential gain from a future sale of the rental with the first $350,000 taxable as ordinary income. Making this election would not seem to make sense unless Dan planned to hold the property for a very long time and calculated that the retention of the tax attributes outweighed the additional future tax, or Dan had a very short life expectancy and expected to die owning the property which would step up the basis to fair market value upon death.

If under the same facts, the basis of the rental property were instead in excess of its liabilities the basis would be reduced to the amount of the liabilities since the rental property was not claimed as an exempt asset on Schedule C. This result could be avoided by including the rental property on schedule C as an exempt asset and would have the additional benefit of protecting the rents generated from the rental property during the pendency of the bankruptcy.

There are other tax provisions that should be considered which may affect the amount of COD income including the possibility that the reduction in the liability may be a purchase price adjustment (IRC § 108(e)(5)) or that the tax benefit rule (IRC § 111) may apply.

Although the above discussion primarily applies to discharge of indebtedness in a bankruptcy case (IRC § 108(a)(1)(A)), the rules are very similar where the COD income is excluded as a result of insolvency (IRC § 108(a)(1)(B)) with one very significant difference: The exception that the basis of property claimed as exempt in bankruptcy is not reduced does not apply where the exclusion is based upon insolvency.

Furthermore, where the discharge is in connection with qualified principal residence indebtedness ((IRC § 108(a)(1)(E)), only the basis of the residence is reduced (IRC § 108(h)(1)) although the taxpayer can elect under IRC § 108(a)(2)(C) to instead have the tax attributes adjusted under the insolvency provisions. The reduction in basis effectively turns the COD income into capital gain which is eligible for the \$500,000/\$250,000 exclusion under IRC §121.

In most cases, however, the COD stems from foreclosure by the lender and no basis reduction occurs since the residence is not owned by the taxpayer on January 1 of the following year.

The adjustments mandated under IRC §§ 108 and 1017 are very complex and can have significant consequences which should be analyzed and understood before a petition for bankruptcy is filed. The bankruptcy practitioner needs to be aware of these issues and should advise the client of the options and consequences. If the attorney does not have the necessary expertise he or she should advise the client to seek guidance from a tax professional before filing the bankruptcy petition.

Elliott Abrams[1] is a Walnut Creek attorney specializing in tax, estate planning and bankruptcy matters. He is a sole practitioner

[1] mailto:elliott@eabramslaw.com

and has been in practice in Contra Costa County for thirty years. www.eabramslaw.com

Gains from Investments in Small Business Stock Acquired During 2011 May Be Tax Free

Wednesday, June 1, 2011

In response to the economic crisis that occurred starting in late 2007, Congress has enacted a number of measures intended to spur investment and business activity. The purpose of this article is to explore one of those incentive provisions, which would allow an investor to effectively pay zero (0%) capital gains tax in connection with certain assets provided that the investment occurs during 2011. This is as a result of temporary changes in Section 1202[2] of the tax code enacted in December 2010. Section 1202[3] of the code relates to investment in "qualified small business stock" (QSBS). To qualify for this incentive the stock must not only be a "qualified small business", but the stock also has to be held for at least five years before being sold.

History of Section 1202 Section 1202[4] was originally enacted in 1993, but its benefits were quite limited until recently. Prior to 2009, 50% of the gain from the sale of QSBS could be excluded. However, the capital gains rate applicable to QSBS was 28%, not the 15% rate that has applied to most investment assets since 2003. This resulted in an effective rate of 14% compared to a 15% tax rate on corporate stock that was not QSBS. Thus, the QSBS exclusion provided little incentive to taxpayers in the years leading up to 2009. Under the American Recovery and Reinvestment Act of 2009[5] enacted early in the Obama administration, the exclusion was increased to 75% for stock acquired

[2] http://www.law.cornell.edu/uscode/26/usc_sec_26_00001202----000-.html

[3] http://www.law.cornell.edu/uscode/26/usc_sec_26_00001202----000-.html

[4] http://www.law.cornell.edu/uscode/26/usc_sec_26_00001202----000-.html

[5] http://www.recovery.gov/About/Pages/The_Act.aspx

after February 17, 2009 and before January 1, 2011, resulting in an effective federal tax rate of 7%. Then in September of 2010 with the enactment of the Small Business Jobs Act of 2010[6](”2010 SBJA”) the exclusion was increased to 100% for purchases of qualified small business stock after September 27, 2010 and on or before December 31, 2010. A 100% exclusion of gain equates to a 0% capital gains rate. The 2010 TRA prevented this provision from expiring on December 31, 2010 and extended it to purchases of QSBS occurring on or before December 31, 2011. In addition to providing a 0% capital gains rate, the 2010 TRA also provides that the excluded gain will not be treated as an item of tax preference for AMT purposes.

Definition of QSBS

Only stock in a “small business” is eligible for the exclusion. The corporation must not have more than $50 million in gross assets at the time stock was issued or any time on or after August 10, 1993 (that’s the date Section 1202 was first enacted) through the date of issuance. Generally, the amount of gross assets equals the amount of cash and aggregate adjusted tax basis of other property. This is significant as adjusted tax basis may be significantly below fair market value. In addition, the corporation must have been engaged in the active conduct of a *qualified* trade or business during substantially all of the taxpayer’s holding period for the stock. Generally, to qualify, a corporation must use at least 80% of its assets in the active conduct of one or more *qualified* businesses, which generally *excludes* investment companies, professional services and consulting, banking, insurance and other financial services, farming, oil & gas or mineral extraction, and the hotel, motel or restaurant business.

The following are some additional qualifications:

- The corporation must be a C corporation, i.e., it cannot be a corporation that has elected to be taxed as an S corporation.
- The corporation must be formed in the US and certain entities with special tax status are not eligible (e.g., REITs, REMIC, regulated investment companies and cooperatives).

[6] `http://finance.senate.gov/legislation/details/?id=da799068-5056-a032-5229-92cebbd2b7a0`

- The stock must be issued for money or other property (not including stock) or as compensation for services provided to the corporation (other than underwriter services).

Limitation on Gain Eligible for Reduced Taxation The amount of gain eligible for Section 1202[7] treatment is limited to the greater of $10 million (for married taxpayers filing jointly) reduced by gain on the same issuer's stock already excluded in prior tax years, or 10 times the taxpayer's basis in the stock disposed of during the taxable year. The exclusion is per issuer, so that a taxpayer can potentially hold investments in more than one company that qualifies as a "qualified small business" and exclude up to $10 million on each investment (or 10 times basis, if greater). It is important to understand the $10 million amount is the amount of gain eligible for Section 1202 treatment. For QSBS acquired in 2011 that means that $10,000,000 of gain can be effectively excluded from tax completely, but only $5,000,000 of gain can be excluded on QSBS acquired prior to the recent tax incentives. That is because previously a taxpayer with $10,000,000 of gain from QSBS was allowed to exclude 50% of the eligible gain, or $5,000,000.

Investors Who Can Benefit From Section 1202 The Section 1202[8] exclusion clearly applies to entrepreneurs setting up a new business venture, as well as existing C corporations that are in need of additional equity capital. In addition, stock acquired in connection with the conversion of an existing loan to a QSBS should also be eligible for Section 1202[9]treatment. Finally, owners of existing LLCs, partnerships and sole proprietorships can take advantage of Section 1202[10] and can benefit from the 0% capital gains rate by converting the LLC, partnership or sole proprietorship to a C corporation in 2011. Only the gain that accrues after conversion will be eligible for

[7] http://www.law.cornell.edu/uscode/26/usc_sec_26_00001202----000-.html ↩

[8] http://www.law.cornell.edu/uscode/26/usc_sec_26_00001202----000-.html ↩

[9] http://www.law.cornell.edu/uscode/26/usc_sec_26_00001202----000-.html ↩

[10] http://www.law.cornell.edu/uscode/26/usc_sec_26_00001202----000-.html ↩

the 0% capital gains rate. Stated differently, gain that already existed at the time of conversion is not eligible for the exclusion:

Example: the sole owner of a business contributes the assets of the business to a qualified small business corporation in exchange for QSBS. At the time of contribution the tax basis of the assets was $100,000 but the value was $1,000,000. Six years later the QSBS is sold for $5,000,000. The owner would be able to exclude the $4,000,000 in appreciation that occurred after the contribution, and would not be able to exclude the $900,000 in gain that existed at the time of contribution.

The benefits of Section 1202[11] can be claimed by individual investors, LLCs, partnerships, S corporations and certain other pass-through entities. However, the exclusion of gain underSection 1202[12] will only be achieved if the exit is a sale of stock. If the actual exit is an asset sale by the C corporation, then there will be tax at the corporate level on any gain resulting from the acquisition. This would result in a tax outcome that is no better than what could be achieved with an LLC or S corporation, and possibly a worse outcome.

Roll-over opportunity The gain from the sale of Section 1202[13] stock can also be rolled over (i.e., the tax can be deferred) under Section 1045 of the Code. To be eligible, the QSBS must have been held for at least six months and the taxpayer must reinvest the proceeds of sale in stock of another qualified small business corporation during a 60-day roll-over period. Note that it is not necessary to hold QSBS for 5 years in order to qualify for a roll-over.

California – Similar but Different Gain from the sale of QSBS may also be taxed at a reduced rate for California income tax purposes. Section 18152.5 of the Revenue & Taxation Code[14] provides for a 50% exclusion of gain for QSBS. California law generally provides

[11] http://www.law.cornell.edu/uscode/26/usc_sec_26_00001202----000-. ↩ html

[12] http://www.law.cornell.edu/uscode/26/usc_sec_26_00001202----000-. ↩ html

[13] http://www.law.cornell.edu/uscode/26/usc_sec_26_00001202----000-. ↩ html

[14] http://law.onecle.com/california/taxation/18152.5.html

for the taxation of capital gains at the same rate as ordinary income, so the effect of this provision is to provide for the taxation of gain on QSBS at 50% of the taxpayer's marginal rate. California's QSBS provision contains additional limitations designed to restrict eligibility to corporations whose business activities are heavily concentrated in California. This provision has existed for many years, and California has not taken any action to increase the exclusion percentage to conform to the changes in federal law.

Conversion Transactions It is very important that a conversion transaction be structured carefully with Section 1202[15] eligibility rules in mind. The incorporation of an existing LLC or partnership can be structured in several different ways, and not all of these structures will allow the owners to qualify for Section 1202[16] treatment. Of course, there are a number of factors other than Section 1202[17] to consider when deciding whether to form a C corporation for a new business or to convert an existing proprietorship, LLC or partnership to a C corporation. Also, care must also be taken to avoid triggering a tax event by incorporating. While the incorporation of an existing business is usually tax free under Section 351[18] of the tax code, there are circumstances where an incorporation transaction will be wholly or partially taxable.

Conclusion In the right circumstances Section 1202[19] might offer interesting opportunities for investors and business owners. The ability to achieve 0% capital gains tax for investments or conversions in 2011 may be attractive, especially to those who may, as a result of other planning considerations, already be contemplating additional capital contributions, debt conversions or the conversion of an existing LLC, partnership or sole proprietorship to C corporation status. Of

---

[15] http://www.law.cornell.edu/uscode/26/usc_sec_26_00001202----000-.html

[16] http://www.law.cornell.edu/uscode/26/usc_sec_26_00001202----000-.html

[17] http://www.law.cornell.edu/uscode/26/usc_sec_26_00001202----000-.html

[18] http://www.taxalmanac.org/index.php/Internal_Revenue_Code:Sec._351._Transfer_to_corporation_controlled_by_transferor

[19] http://www.law.cornell.edu/uscode/26/usc_sec_26_00001202----000-.html

course, taxpayers need to recognize that the benefits ofSection 1202[20] will not be realized unless the stock is held for five years and that the exit is a stock sale. The roll-over benefit under Section 1045 would be available for stock sales prior to the end of the five-year holding period, but again the exit from the QSBS would have to take the form of a stock sale. Anyone wishing to take advantage of the 0% capital gains rate under 2010 TRA needs to act promptly as this incentive expires at the end of 2011.

George S. Cabot is a tax attorney (State Bar certified specialist) in Walnut Creek, with a practice emphasizing entity level tax planning and general business matters. Contact him at 925-979-3312 orgcabot@mmblaw.com[21].

The Evolution of the Taxation of Air Pollution

Wednesday, June 1, 2011

> Any tax is a discouragement and therefore a regulation so far as it goes. ~Oliver Wendell Holmes, Jr.

Air pollution control laws date back to medieval times. King Edward I of England banned the burning of newly discovered coal by blacksmiths in 1273, because of its foul odor. An unfortunate smithy violated the ban in 1307 and was hanged, being perhaps a harbinger of environmental crimes to come.

[20] http://www.law.cornell.edu/uscode/26/usc_sec_26_00001202----000-.html
[21] mailto:gcabot@mmblaw.com

Rita Holder

Air pollution regulation is often characterized as having come from this harsh “command and control” milieu. Akin to King Edward’s decree, command and control regulations set unyielding standards, enforced by law, making excesses unlawful. For example, the 1977 amendments to the Clean Air Act[22] required new coal-burning plants to use flue gas desulfurization units to remove 90% of sulfur dioxide emissions from their smoke stacks. The law commanded what the limit was and controlled how it was to be achieved. The 1977 amendments were command and control regulations.

One nearly universal criticism of air pollution command and control regulations is that they don’t incentivize industry to invent new ways of producing cleaner energy. The drawback is that companies don’t need to figure out ways to reduce pollution so long as the minimum standard is met. More stringent regulations are needed to enforce higher levels of compliance.

Market-Based Controls Schemes to regulate air pollution have evolved into ”market-based” practices. Market based laws identify objectives and then give businesses the leeway to choose the most cost effective method to reduce emissions — without telling them specifically how

[22] http://www.epa.gov/air/caa/caa_history.html#caa77

to do it. A market-based regulation strategy is thought to encourage ingenuity by allowing companies to invent new technology to meet the emission goal. For example, the 1990 amendments to the Clean Air Act[23] embarked on regulation of SO2 emissions via a market-based approach. Companies were required to reduce their sulfur dioxide emissions by at least 90 percent but did not specifically require scrubbers or any other precise apparatus. The results were broadly heralded as SO2 emissions fell.

Cap-and-Trade A more complicated market-based regulation of air pollution is the phenomenon known as "cap-and-trade." A cap-and-trade (CAT) system is a type of market-based regulation used to control a specific pollutant that is spread over a discrete geographic area.

For example, the California Air Resources Board's Scoping Plan for AB32[24] identifies a cap-and-trade program as one of the weapons in the attack on greenhouse gas (GHG) emissions causing climate change. California's goal is to reduce GHG emissions to 1990 levels by the year 2020, with an 80% reduction from 1990 levels by 2050. The identified culprit here is carbon dioxide. (Other greenhouse gas sources, such as more harmful methane, are not included because carbon dioxide generates almost eighty-five percent of the over 7,000 million metric tons of greenhouse gases in the U. S.).

How will this market-based CAT system work? In short, a total GHG tonnage limit will be decreed for the air in various regions of California, based on an assortment of formulas. Focusing initially on emissions from the large industrial facilities and electricity generation sectors, each company that is emitting GHGs will be given or sold a set number of allowances. Each allowance will confer the right to give off one ton of specified GHGs for the year.

Companies will buy and sell emission allowance units to meet the ever shrinking "cap" on overall emissions. The compulsory 1990 cap imposed by the system will limit the number of allowances. If a company can reduce its emissions below its allowances, then it can

[23] http://www.epa.gov/air/caa/caa_history.html#caa90
[24] http://www.arb.ca.gov/cc/scopingplan/scopingplan.htm

either "bank" allowances and carry them forward to a future year, or put them up for sale on the established allowance market. Each business has the freedom to use better, or worse, emission control equipment so long as it has the number of allowances it needs to cover the year's needs. Companies that go over their limit must pay a fine — or jostle to buy more allowances before the annual deadline from a firm with extra allowances trading on the western states carbon market, .

Advocates of California's cap-and-trade scheme tout the following advantages:

- **It will be simple to run.** The program will be straightforward to design and operate.
  - Counterarguments:
    * Trading in allowances requires the drafting of voluminous regulations for set up and continuous market monitoring.
    * A new technology system needs to be devised to prevent the same allowance from being used twice and prevent the rigging of markets *a là* the Enron energy market-trading debacle.
- **Emissions are capped.** The program places an overall ceiling on specified emissions in a defined geographic area.
  - Counterarguments:
    * Who wants more bad air! We should be seeking to improve air pollution not encouraging polluters to make more.
    * Trading pollution credits across regions or even across state lines will result in more emissions being dumped in disadvantaged communities.
- **Accountability is ensured.** Emissions are quantifiable and, more importantly, there is a solid past estimate of how much pollution is already being emitted.

- Counterarguments:
  * Accountability is complicated. Cap-and-trade introduces collateral issues like the need for the Securities and Exchange Commission to police hedging and futures trading in allowances.
  * Penalties need to be established and enforced against polluters who exceed their allowances. Environmental regulation is already saturated in litigation. A carbon cap-and-trade system would make this worse.

Taxing Carbon A carbon tax is an environmental tax that is levied on the carbon content of fuels. Carbon atoms present in fossil fuels, are released as carbon dioxide (CO2) when they are burned. The way a carbon tax commonly works is that a tax is imposed on the oil, coal, and natural gas produced by or imported into a region, state or country. For example, a lower range tax of $10 per ton of carbon content in estimated 7000 million metric tons of greenhouse gases would pump $70 billion per year into the U. S. economy. A carbon tax can also be levied by taxing the burning of fossil fuels by manufacturers and consumers—e.g. coal, petroleum products such as gasoline, aviation fuel, natural gas and diesel—in proportion to their carbon content. England has imposed a fuel tax in this manner for some time.

Both cap-and-trade and carbon taxes give polluters a financial spur to reduce GHG emissions. Carbon taxes are said to provide "price certainty" on emissions, while a cap provides "quantity certainty" on emissions. The idea is that a pure tax fixes the price of carbon (but allows carbon emissions to fluctuate) while a cap-and-trade places a ceiling on carbon emissions (while the market price of carbon allowances fluctuates). A carbon tax is an indirect tax—a tax on a transaction—as opposed to a direct tax, which taxes income. In economic parlance a carbon tax is a "price instrument", since it sets a price for carbon dioxide emissions.

In theory, a carbon tax would make up for the so-called "social cost of carbon" (SCC). The SCC is estimated as the marginal cost of the harm upon society as the result of carbon dioxide emissions. As you might imagine estimates of SCC vary wildly. A carbon tax that compensates for the SCC also varies by fuel source. Many countries have already implemented a carbon tax including Denmark, Finland, Germany, Italy, the Netherlands, Norway, Slovenia, Sweden, Switzerland, and the UK.

But as with any proposed tax, the idea of carbon taxation is not an easy sell, especially in the bi-polar divide of U. S. politics. But there are indications it may be gaining common cause. On March 18, 2011, San Francisco Superior Court Judge Ernest Goldsmith ordered the California Air Resources Boar[25]d (CARB) to conduct an environmental review of other options, such as a carbon tax, and allow public comment. Judge Goldsmith admonished CARB that the "important alternative" of a carbon tax got a "scant two paragraphs" of discussion in its AB32 Scoping Plan[26].

Political fur is now flying. Influential green advocacy groups, like the Environmental Defense Fund[27], the Natural Resources Defense Council[28] and the Nature Conservancy[29] have always backed California's cap-and-trade approach. But on May 11, 2011, the Sierra Club[30] sent a letter to Governor Brown challenging him to reexamine Schwarzenegger's AB32 cap-and trade stand. This aligns the Sierra Club with environmental justice groups, such as the lawsuit's plaintiffs Association of Irritated Residents, Communities for a Better Environment and the Center on Race, Poverty and the Environment.

Upstream or Downstream? California could impose a carbon tax and a cap-and-trade system either "upstream", at the point of extraction or importation, or "downstream", at the point of manufacturing or consumer use. Each has its own cheerleaders and naysayers. An upstream carbon tax or cap-and-trade system is imposed on fossil fuel producers (oil, coal, and natural gas). An upstream approach has the maximum ability to ensure that all sources of carbon dioxide

[25] http://www.arb.ca.gov/homepage.htm
[26] http://www.arb.ca.gov/cc/scopingplan/scopingplan.htm
[27] http://www.edf.org/home.cfm
[28] http://www.nrdc.org/
[29] http://www.nature.org/
[30] http://www.sierraclub.org/

emissions are affected, because it focuses on carbon at the point that it enters the economy as a raw natural resource.

A downstream tax hits the energy users that are the major sources of carbon dioxide emissions such as energy generators, refineries and manufacturers, and even consumers. For example, Boulder, Colorado implemented the United States' first household tax on carbon emissions from electricity, on April 1, 2007, at a level of approximately $7 per ton of carbon. According to the City of Boulder, the tax is costing the average household about $1.75 per month, with households that use renewable energy receiving an offset. The challenge under a downstream approach is the vast number and types of facilities to monitor and how to cast the tax net over all forms of energy use, such as cars and electricity, which add appreciably to carbon dioxide emissions.

Pros and Cons of Carbon Taxation The main arguments favoring a carbon tax include:

- **A tax plan is simpler to initiate and operate than a cap-and-trade scheme.** A carbon tax is straightforward. The tax is imposed at a set rate on the carbon content of our main sources of greenhouse gases: coal, oil, and natural gas. The IRS with its existing staff, is already up and running. It has experience and expertise enforcing other excise taxes.
  - Counterarguments
    - The costs of administrating the tax are unknown. It is impossible to estimate the external costs of a new carbon tax. Furthermore, industry and consumers will complain that the tax rate (the social cost of carbon) is arbitrary.
    - A carbon tax will lead to tax evasion. Firms will begin to hide carbon emissions.
- **It will encourage use of alternative forms of energy.** Rather than pay the tax, companies and households will look

for ways to reduce their carbon footprint. Carbon taxes offer an easy-to-understand economic incentive to inventors and engineers to devise carbon-reduction technology.

  - Counterarguments
    * Knowing the ultimate cost of noncompliance, refiners, manufacturers and consumers will pay the tax rather than reduce emissions.
    * The tax will need to be very high to force changes in human behavior. It will be unpopular and, if repealed, will set our energy independence efforts back for years.

- **A carbon tax will generate real revenue. We can use this revenue to green our economy. The tax can be decreased in hard times.** The revenue raised from carbon tax could be used to subsidize green energy alternatives. Tax breaks can be added if the economy enters a recession.
  - Counterarguments
    * In theory, carbon taxes could be adjusted but politicians and policymakers would need a cooperative spirit, sophistication and experience they don't have now.
    * Political arm-twisting to define a carbon tax will result in exemptions and subsidies for upstream sectors such as drilling and mining, allowing higher emissions levels.
    * Production may shift to countries with no or lower carbon taxes. This will result in further unemployment and accompanying social problems.
    * Some argue that Big Oil will just pass an upstream tax along to consumers. Producers and importers will have no impetus to support clean energy technology.

Conclusion The regulation of air pollution using command and control and market-based initiatives has come a long way. The most effective and efficient cap-and-trade systems are said to have three key characteristics: placing an overall ceiling or cap on specified emissions in a defined geographic area; ensuring accountability in emissions; and being simple to run. Carbon taxation is seen as easy to implement and administer, generating revenue that can be used to subsidize alternative forms of energy, and encouraging a reduction in our collective carbon footprint.

The controversy between a carbon tax and cap-and-trade may be eventually resolved by a blend of the two. This is not impossible to imagine. We need to forge ahead in our efforts to reduce our dependence on non-renewable sources of energy. We may make mistakes as a state or a nation but that would not be the worst outcome. The worst outcome would be doing nothing at all, stymied by our failure to take the first hesitant steps.

Rita Holder is a solo tax attorney in Concord specializing in environmental law and ERISA (pension, 401(k) and HIPAA). She is also the legislative policy analyst for the Delta Vision Foundation. There she provides expertise on natural resource, infrastructure, land use and governance for a sustainable Delta. She is an environmental scientist as well as a tax lawyer. She has 4 kids and a wonderful husband, Rich.

New Tax World for Registered Domestic Partners

Wednesday, June 1, 2011

Articles on Taxes from the Family Law practice area perspective:

- New Tax World for Domestic Partners[31] by Don Read
- Help! I Think my Spouse Is Cheating (On His Taxes)[32] by Jonathon Watts

[31] http://cclawyer.cccba.org/2011/06/registered-domestic-partners-and-taxes/
[32] http://cclawyer.cccba.org/2011/06/help-i-think-my-spouse-is-cheating-on-his-taxes/

- Divorce, Children and Taxes[33] by Leslie Dawson, CPA

New Tax World for Registered Domestic Partners It took five years and a Presidential election to get the Internal Revenue Service ("IRS" or "Service"), through its Office of the Chief Counsel, to issue a ruling that, generally, community income of registered domestic partners ("RDP's") in California should be treated the same way as community income of heterosexual married couples. But the hard work was not over. The 2011 filing season (for 2010 returns) reaffirmed the old adage that the devil is in the details.

The PLR and the CCA PLR 201021048[34] (the "PLR") was issued on May 5, 2010, to a gay couple in Berkeley. Because its holding was directly applicable to all registered domestic partners ("RDP's") in California, the Internal Revenue Service issued a public version, CCA 201021050[35] (the "CCA"), on the main issue in the ruling.

Basically the PLR and the CCA recognize that RDPs in California have full community property rights. They hold, as a result, that when the RDP's file their individual tax returns – under the Defense of Marriage Act, 1 U. S. C §7 ("DOMA"), RDP's are not "spouses," so they cannot file joint federal income tax returns, at least until DOMA is ruled unconstitutional or Congress changes the law – they must equally split their community income and deductions. This income splitting rule, as applied to spouses, has been in the tax law since the United States Supreme Court decided *Poe v. Seaborn*, 282 U. S. 101 (1930) ("*Seaborn*").

[33] http://cclawyer.cccba.org/2011/06/divorce-children-and-taxes/
[34] http://www.irs.gov/pub/irs-wd/1021048.pdf
[35] http://www.irs.gov/pub/irs-wd/1021050.pdf

Pursuant to a request for a private ruling the Berkeley couple had filed in 2005, the Service issued Chief Counsel Advice 200608038[36] (the "2006 CCA") in February 2006 ruling that *Seaborn* applied only to spouses, and not to RDP's. The 2010 PLR, issued in response to a resubmission of the request in 2009, reversed that position, effective beginning in 2007.

Why the change? It certainly wasn't a reexamination of the rationale of the 2006 CCA. That CCA said that, in order for *Seaborn* to apply, the community property rights had to be an "incident of marriage by the inveterate policy of the State." *Seaborn* could not apply outside of a marriage of a husband and a wife. Thus, the 2006 ruling was about marital status. The 2010 PLR and CCA ignore marital status and implicitly justify the 2006 CCA by stating that it wasn't until 2007 that California RDP's had *full* community property rights. Once California RDP's had full community property rights, *Seaborn* applied. Thus the 2010 RDP and CCA are about federal taxation of state property rights, not about marital status.

The rationale for the implicit justification of the 2006 CCA is disingenuous. It is true that in 2005 and 2006, California did not treat earned income as community property for state income tax purposes. But that didn't mean that California RDP's did not have full community *property* rights. Federal tax law is supposed to follow state *property* law; state *tax* law should be irrelevant. No, the change occurred because the Bush White House dictated the holding of the 2006 CCA, and the Obama Administration has a nondiscrimination policy regarding same-sex couples. Interestingly, the 2006 CCA had so little support among the attorneys in the Office of Chief Counsel that no principal author was named – a departure from longstanding protocol.

Publication 555 The Internal Revenue Service has a booklet, Publication 555[37], entitled *Community Property* ("Pub 555"). Until this year it was used only in the relatively unusual case that a married couple in one of the nine community property states decided to file separate, rather than joint, tax returns. It answers questions like

[36] http://www.irs.gov/pub/irs-wd/0608038.pdf
[37] http://www.irs.gov/pub/irs-pdf/p555.pdf

whether the spouse in whose name an IRA has been maintained should report the deduction for a contribution of community property funds to, or report the income for a distribution from, the IRA, or whether each spouse should report half (answer: only the participant spouse). But this year it had to be used by all RDP's in California, Washington and Nevada, the only states granting RDP's community property rights, because the RDP's cannot file joint returns.

Learning all of these splitting rules significantly increased the work for tax return preparers; and the complications it introduced significantly increased the costs for RDP's who had their returns prepared by professionals. In the Bay Area, a group of wonderfully dedicated certified public accountants and enrolled agents worked to get ahead of the curve. This same group had met in 2004 and 2005 to think about how AB 205, the significant expansion of registered domestic partnership rights, would impact taxes when it became effective on January 1, 2005 (retroactive to the prior date of registration for existing domestic partnerships). Throughout the filing season they maintained a listserv for professionals to discuss the issues that arose. Things were even more difficult for RDP's not using professionals; TurboTax, for example, did not update its software to deal with RDP community income until after April 15.

The IRS also tried to get ahead of the curve. Early in 2011 it issued a revision of Pub 555[38] to take into account the community property rights of RDP's. The IRS had a legitimate problem: many provisions of the Internal Revenue Code ("IRC") that deal with community property use the word "spouse;" and under DOMA, a RDP is not a spouse. For example, IRC § 66 describes situations in which one spouse filing a separate return does not have to include community income earned by the other spouse. Because the word "spouse" is used, the Service stated in Pub 555[39] that these relief rules, akin to the "innocent spouse" rules for joint returns, do not apply to RDP's. Unfortunately, the IRS is probably right, and this will have to be fixed by Congress.

However, the IRS got some things quite wrong when it revised Pub

[38] http://www.irs.gov/pub/irs-pdf/p555.pdf
[39] http://www.irs.gov/pub/irs-pdf/p555.pdf

555[40]. Even though the Obama Administration believes that DOMA is unconstitutional and will not defend it in court, the Administration has stated that it will enforce DOMA, and the Service is adhering to that promise even where it is unnecessary. The example of this that proved most vexing during the filing season involved the self-employment tax ("SECA"). Social Security and Medicare taxes are paid one half by the employer and, through withholding, one half by the employee. Whether the employee lives in a community property state, is married, and files a separate return is irrelevant. Only the actual employee is taxed, and the taxes are credited only to the actual employee's Social Security and Medicare accounts. These employment taxes do not appear on the employee's income tax return. SECA is the Social Security and Medicare tax for the self-employed. It is reported on the self-employed person's income tax return, principally on schedule SE. To make SECA parallel, IRC § 1402(a) states, in part:

The term "net earnings from self-employment" means the . . . income derived by an individual from any trade or business *carried on by such individual*, . . . plus his distributive share . . . of income or loss . . . from any trade or business carried on by a partnership *of which he is a member . . .* [emphasis added]

Thus, the self-employment tax is imposed on the earnings of the person carrying on the business or who is the partner of the partnership business. Section 1402(a)(5) makes clear that *Seaborn* style income-splitting does not apply to SECA:

If

(A) any of the income derived from a trade or business . . . is community income under community property laws applicable to such income, the gross income and deductions attributable to such trade or business shall be treated as the gross income and deductions *of the spouse carrying on such trade or business* . . . ; and

(B) any portion of a partner's distributive share of the ordinary income or loss from a trade or business carried on by a partnership is community income or loss under the community property laws

[40] http://www.irs.gov/pub/irs-pdf/p555.pdf

applicable to such share, all of such distributive share shall be included in computing the net earnings from self-employment *of such partner, and no part of such share shall be taken into account in computing the net earnings from self-employment of the spouse of such partner*;

The Service concludes that since the word "spouse" is used in section 1402(a)(5)(A), that provision cannot apply to RDP's; and it then follows, despite the general language of section 1402(a), that the opposite rule applies and DRP's *must* split their income for SECA purposes. Arguments that the general rule should apply when the exception doesn't and that the IRS approach treats same-sex partners in community states as the *only* people taxed on self-employment income earned by another person fell on deaf ears at the Service.

The Infamous "J. Bell Letters" Recognizing that they were filing unfamiliar returns, preparers adopted the practice, recommended informally by the IRS National Office, of writing "FILED UNDER CCA 201021050" at the top of their RDP returns. Despite this legend, and despite the CCA having been issued almost a year before the returns were filed, a large number of RDP taxpayers received a letter from "J. Bell" of the Fresno Service Center rejecting the returns because they included income of another person to whom the taxpayer was not married. Even after the National Taxpayer Advocate's office declared that the problem was fixed, some J. Bell letters continued to arrive.

Conclusion A lot of work has yet to be done to smooth the tax return filing process for RDP's. The expense should go down, after this first season, but the cost of preparing joint (or married-filing-separately) state returns and individual federal returns will persist. Same-sex couples still do not have estate and gift tax marital deductions, nor are property divisions and spousal support on divorce treated as favorably as for heterosexual married couples. Not until Proposition 8 and DOMA are declared unconstitutional will same-sex couples have anything close to equality.

Don Read is an attorney and certified taxation law specialist practicing in Berkeley, Palo Alto, San Francisco and, occasionally, Bolinas. Learn more at www.dissotax.com. Together with Patricia Cain, now

the Inez Mabie Distinguished Professor of Law at Santa Clara, he filed the private ruling requests discussed in this article.

Don earned his J. D, *cum laude*, at Columbia University and his LL. M. (Tax) at NYU, where he was in the top 10% of his class. He has been a partner in law firms in Honolulu, San Diego and San Francisco and is currently tax counsel to Lakin-Spears in Palo Alto and Severson & Werson in San Francisco. He was an attorney-advisor in the US Treasury Department's Office of Tax Legislative Counsel and an adjunct professor at USF School of Law. He is currently chair of the Taxation Committee of the ABA Family Law Section and co-president of the East Bay Tax Club.

Disclosing Offshore Accounts – A Second Chance

Wednesday, June 1, 2011

Your client of many years, a successful second-generation winery owner, just confided that she has had bank accounts in France in her name for decades.

Her now-deceased parents opened the accounts for her when they inherited from the Loire-based side of the family. She discovered the accounts when she turned 25, and she has allowed the interest to accumulate. The accounts are held in a Loire regional bank and total the equivalent of approximately $2 million. Client has paid tax on the interest in France, but has not paid any U. S. tax related to the accounts. It did not occur to her that it was necessary.

Carolyn Lee

Client, a sponge for financial news, noticed in early 2009 that the Department of Justice had turned its laser-like attention to US citizens with bank accounts in the Swiss branches of UBS. For the first time, when Client reviewed her 2008 federal tax return, Part III, Foreign Accounts and Trusts, on Schedule B of the 1040 appeared in high relief. Cable news reporters began to pepper their stories with references to "'F' Bars." A little research told Client this FBAR was a Foreign Bank Account Report[41] (aka IRS Form TD F 90-22.1[42]). The IRS requires US taxpayers with an interest in offshore accounts to file an FBAR no later than June 30 for the prior tax year. And don't send the FBAR to Fresno. No. The IRS set up a special unit in Detroit to attend to the filings.

Client read enough to know her French accounts were potentially big trouble. The solution, as she understood it, was to participate in something called a voluntary disclosure program. Client found her

[41] http://www.irs.gov/businesses/small/article/0,,id=148849,00.html
[42] http://www.irs.gov/pub/irs-pdf/f90221.pdf

way to IRS.gov and devoured the forty-plus FAQs about the program with the same intense scrutiny she brought to her winery's marketing and distribution agreements.

The IRS's 2009 voluntary disclosure program looked to Client like les Champs Elysees to one sizeable check payable to the Government. Payments of back taxes, interest, and penalties on unreported income for the prior six years. An additional 20% penalty on the highest aggregate value of the undeclared foreign accounts and assets in that period. The extra penalty alone amounted to almost $400,000 for Client. The articles included threats of criminal investigation and prison time, though the IRS claimed it would not recommend criminal prosecution for taxpayers who voluntarily came forward. The program ran from February 2009 to October 15, 2009. Client, otherwise tax-compliant, considered that she wasn't on the UBS list and decided to play audit roulette.

Time passed with no ominous envelopes in the mail bearing an IRS return address. Nonetheless, the Loire accounts that once represented Client's retraite during her golden years in a chateau with modernized plumbing began to haunt her. When Client learned earlier this year that the IRS was opening a second offshore voluntary disclosure initiative (OVDI), she decided to reveal all to you. You invite Client into the office to review her options.

This Client is keen to understand her exposure. This is not saying Client is any more ready to write that sizeable check payable to the Government. Pas on votre life. She may yet choose not to act, but this time she will be informed. Client is accustomed to taking informed business risks and riding out the results. Thus you begin educating the steely-eyed executive sitting across your table.

Disclosure Facts on the Ground as Practitioners are Experiencing Them First, you expand Client's basic knowledge about the 2009 program. Participants filed amended federal returns and FBARs for tax years 2003 through 2008, and paid what the IRS calculated as due. Participants' fears that the program was the equivalent of presenting their wrists for the criminal prosecutors' handcuffs did not materialize. Of the approximately 15,000 taxpayers who disclosed unreported offshore income through the 2009 program, only forty-two were criminally prosecuted. Another 3,000 taxpayers submitted voluntary disclosures regarding their offshore accounts after the first program closed.

Partially to address those 3,000 late disclosing taxpayers, to sweep in more taxpayers such as Client, and possibly in anticipation of another UBS situation, on February 8, 2011, the IRS announced the sequel to the 2009 program, labeled OVDI[43]. Sure enough, in April the Government sought court authority for the IRS to request accountholder names from banks HSBC-India and Credit Lyonnais. OVDI[44]applies to all US taxpayers with offshore accounts greater than $10,000. Participants must file all required paperwork and submit full payment by August 31, 2011.

There is no reward for sitting out the 2009 disclosure program. Participants must file amended returns and FBARs for tax year 2003 through 2010; that is, eight years instead of six years under the 2009 initiative. The additional penalty is 25% of the highest aggregate value of the undeclared foreign accounts and assets in that period. While the program structure provides for lower penalties – for example, if the failure to report offshore income was not willful – to the IRS, these lower penalties exist on paper only. To date, the Service's position is that any failure to report offshore income is willful and the full 25% penalty applies. At least one Federal Court has ruled against the Service on the question, but the Service's position has not yet changed (*United States v. Williams* (2010) 2010 U. S. Dist. Lexis 90794; 2010-2 U. S. Tax. Cas. (CCH) P50,623; 106 A. F. T. R.2d (RIA) 6150.) Under OVDI[45], as under the 2009 program, the Service offers more lenient civil and criminal treatment to the OVDI participants than is available outside the program.

Are You In or Are You Out? You advise Client that her choices fall along a spectrum ranging from full disclosure and full payment to continued non-disclosure.

---

[43] `http://www.irs.gov/newsroom/article/0,,id=234900,00.html`
[44] `http://www.irs.gov/newsroom/article/0,,id=234900,00.html`
[45] `http://www.irs.gov/newsroom/article/0,,id=234900,00.html`

In completely on the Service's terms. Client can choose to enter the program, accepting the Service's terms. The IRS will calculate liability and penalties according to OVDI rules. Voluntary disclosure examiners do not have discretion to settle cases for less than what is due and owing under the program rules. If Client can prove a genuine inability to pay in full by August 31, 2011, Client must agree to payment arrangements acceptable to the IRS. Finally, Client must enter into a Closing Agreement on Final Determination. That is, Client will have no right to contest the tax liability and penalties. Here is a program quirk: Title 31 § 5314 of the U. S. Code requires disclosure of interest in foreign bank accounts, not Title 26. IRS collections procedures and taxpayer protections are governed by Title 26. Client will not have recourse to the Service's Appeals division, and the opportunity to achieve a negotiated settlement. Under this option, Client would write a predictable and large check. On the bright side, Client will have the peace of mind of being in tax compliance.

Disclose then opt out. If Client submits a full disclosure of amended returns and FBARs and disagrees with the application of the offshore penalty, Client may withdraw, or opt out, of the program. The withdrawal is irrevocable. Having opted out, the IRS is under no obligation to honor its offer of lenient criminal consideration. In addition, the IRS may conduct a complete examination of all relevant tax years and issues – not solely Client's failure to report her offshore income. This may not be a concern for Client, but it will involve no small amount of your billable time. Worst of all, the outcome will be uncertain, and the OVDI reduced penalty structure disappears. Client's additional civil penalty liability risk increases from 25% to 50% of the account values for each year, in combination with an array of other penalties waived by the Government in the OVDI. Client's potential assessment for the additional penalty alone, assuming for simplicity an average $1.5 million account balance each of the eight years, is an eye-watering $6 million. Failing to file an FBAR subjects a taxpayer to a prison term of up to ten years and criminal penalties of up to $500,000.

The bright side for this option? The door opens to Title 26 collections procedures and taxpayer protections, including access to Appeals officers, who have settlement authority. However, in Client's case, as a sophisticated business person who chose not to participate in the first offshore voluntary disclosure program and then continued non-compliance, it is unlikely there is sufficient upside to opting out to offset the risk of extreme penalties.

Come clean with a quiet disclosure. Some taxpayers are making quiet or silent disclosures. They file amended returns and their unfiled FBARs, and pay taxes, interest, and Title 26 penalties. The returns are submitted through the regular tax filing channels. A silent disclosure might slip by the Service for taxpayers whose foreign account income and associated tax liabilities are relatively small. Even this option is not for the faint of heart. Client would be reporting additional annual foreign income of more than $100,000, which is more likely to be noticed at Fresno, given the Service's heightened scrutiny in this area. You hand Client the Department of Justice's May 19, 2011 press release, crowing about the Government's plea bargain with a New Jersey taxpayer who attempted a quiet disclosure. The taxpayer filed amended returns and late FBARs for tax years 2003 through 2008 outside the 2009 program, belatedly admitting he owed an additional $40,624 in taxes. Having been detected, the taxpayer must pay a civil penalty of $76,283 and faces up to five years in prison followed by three years of supervised release and a $250,000 fine. You advise Client that quiet disclosure opens her to every possible penalty and criminal prosecution.

Out completely. Client has the option to continue nondisclosure. If caught, Client will be subject to criminal prosecution and civil penalties. There is no rational reason to remain out of compliance. The Service has made it clear there will be no reward for waiting to come forward.

Piling on – Client's California tax liability. Covering all bases, you advise Client she also has California tax liability on the unreported foreign income. Happily, in March 2011 Governor Brown signed a law establishing a tax amnesty program that applies to individual's and entities' offshore financial accounts. The program will be in effect from August 1 through October 31, 2011, dovetailing with the federal OVDI. Participants in the State's amnesty will avoid most penalties. More information is available at the FTB's website and from the FTB practitioners' hotline.

Only the Client Can Decide. And then you wait. After answering questions and offering to be available for follow-up, you remind Client that she should act quickly. If Client chooses to voluntarily disclose, Client, her CPA, and you must act without delay to assemble Client's OVDI submission and arrange full payment by August 31.

When ready to proceed, the first step is to contact the IRS Criminal Investigation Lead Development Center for clearance for Client to participate. Persons already under criminal review or IRS audit may not participate in the OVDI. The IRS has provided step-by-step OVDI instructions[46], including template disclosure communications, penalty calculation worksheets, and fifty-three FAQ's at www.irs.gov. Search on "voluntary disclosure initiative."

Carolyn M. Lee, LL. M. – Taxation, is an associate in the Taxation and Estate Planning, Probate, Trust Administration, and Trust Litigation practices at Archer Norris, PLC. Archer Norris attorneys represent business, commercial, and public sector clients wherever clients need strategic legal counsel throughout California and beyond. Contact Ms. Lee at cmlee@archernorris.com.

Substantiating the Tax Treatment of Settlement Payments

Wednesday, June 1, 2011

In order to assess the true economic value of a settlement proposal, a plaintiff must consider whether a settlement payment would constitute ordinary income, excludable (non-taxable) income, or proceeds from the disposition of a capital asset.

Non-tax practitioners generally understand that the tax treatment of settlements are determined by the origin of the claim test, *see United*

---

[46] `http://www.irs.gov/newsroom/article/0,,id=234900,00.html`

States v. Gilmore, 372 U. S. 39 (1963), and that if a settlement agreement expressly allocates the settlement payment to a specific claim, the courts generally respect that express allocation, see *Threlkeld v. Commissioner*, 87 T. C. 1294, 1306-1307 (1986), *affd.* 848 F.2d 81 (6th Cir. 1988).

In many or most cases, however, the settlement agreement does not contain an express allocation. Rather, there often is an exhaustive recitation of numerous claims that the plaintiff may or may not have raised along with language releasing the defendant from liability for all of those asserted and unasserted claims in consideration of the settlement payment. In such cases, application of the origin of the claim test becomes problematic.

A common formulation of the test is to ask the question: What claims did the defendant intend for the plaintiff to forego prosecuting in exchange for the settlement payment? Strictly speaking, in the case of a settlement agreement releasing claims both raised and not raised by the plaintiff, the defendant intends that the plaintiff forego prosecuting each one of those actual or theoretical claims. Therefore, literally applying the test would require an allocation of the settlement payment across all of these claims. Perhaps recognizing this practical problem, some courts have adjusted slightly the test. "The character of the settlement payment hinges ultimately on the *dominant* reason of the payor in making the payment." (Emphasis added.) *Longoria v. Commissioner*, T. C. Memo 2009-162 (2009).

Even with an adjusted version of the test, a plaintiff must establish and the court must determine the defendant's dominate purpose in making the settlement payment. The determination is a question of fact. *Bagley v. Commissioner*, 105 T. C. 396, 406 (1995), *affd.* 121 F.3d 393 (8th Cir. 1997). The court may consider all of the facts that reveal the payor's intent, such as the circumstances that led to the agreement, the allegations in the complaint, and the amount paid. *Robinson v. Commissioner*, 102 T. C. 116, 127 (1994), affd. in part, revd. in part and remanded on another issue 70 F.3d 34 (5th Cir. 1995). As one might expect, the outcomes in the reported decisions are very factually specific.

The allegations contained in the plaintiff's complaint are typically the first item of evidence examined. Thus, in *Parkinson v. Commissioner*, T. C. Memo 2010-142 (2010), to determine whether settlement payments were paid on account of physical injury and sickness, the United States Tax Court examined the plaintiff's state court complaint and found that it "did reflect, extensively, his assertions of physical injury and sickness. The complaint alleged that the actions of the medical center and its employees directly caused his second heart attack. Further, the complaint alleged that petitioner's complete disability and permanent damage to his cardiovascular system resulted directly from his heart attack."

In *Longoria v. Commissioner*, T. C. Memo 2009-162 (2009). though, the court looked "to Mr. Longoria's State court complaint to see whether it states more particular claims (i.e., 'physical injury or physical sickness')." The plaintiff's claims were for "discrimination, retaliation, and civil rights violations; and the damages Mr. Longoria claimed were: loss of income; loss of fringe benefits (including but not limited to medical benefits, dental benefits, and pension benefits); loss of seniority in higher positions; severe mental anguish; anxiety; stomach problems; sleep disorder; stress; diminution of the quality of his life and other hedonistic injury." Most of these injuries–loss of income, loss of fringe benefits (including but not limited to medical benefits, dental benefits, and pension benefits), and loss of seniority in higher positions–are non-physical." In the context of a settlement agreement, the nature of the claim underlying the plaintiff's damage award, as viewed by the defendant, rather than the actual validity of the plaintiff's claim, is determinative. *See United States v. Burke,* 504 U. S. 229 (1992). Thus, in holding against the plaintiff, the court reasoned that "although Mr. Longoria gave credible testimony at trial about other injuries that were plainly physical–e.g., bruised ribs, smoke inhalation, animal bite, and back injury–none of these injuries was alleged in Mr. Longoria's complaint, and we cannot find that the State of New Jersey agreed to settle because of them."

Nevertheless, the failure to plead in the complaint the claim to which the plaintiff allocates damages is not always fatal. In *Eisler v. Commissioner*, 59 T. C. 634 (1973), the court "did in fact find that a claim not pleaded in the complaint was nonetheless settled by an unallocated settlement agreement, because the claim was brought up between the respective parties' counsels during settlement negotiation. However, the Court reached that conclusion only because it was "satisfied by the testimony of a former officer of [the defendant in the State court lawsuit], petitioner himself, and counsel for the respective litigants that both the stock claim and the threatened negligence claim had real value in the minds of the litigants . . . when they executed the . . . Release."

Although few published cases discuss the content of written discovery responses, deposition testimony, and settlement correspondence, all of these would be relevant evidence.

Plaintiffs rarely have had success in allocating post-trial settlements differently than the judgment or verdict, notwithstanding the pendency of an appeal. "Where there has been a judgment in a trial court that preceded the settlement of the claims, the most persuasive evidence of the payor's intent in settling the case is the previous award of that court." *Francisco v. United States*, 267 F.3d 303, 320 (3rd Cir. 2001); *see also Robinson v. Commissioner*, 70 F.3d at 38 (the verdict provides "the best indication of the worth of the [taxpayer's] claims).

For example, in *Delaney v. Commissioner*, 99 F.3d 20 (1st Cir. 1996), the plaintiff obtained a trial court judgment which included prejudgment interest. The plaintiff and the defendant reached a post-trial settlement which did not allocate any portion of the settlement payment to interest. The court nevertheless found that a portion of the settlement payment constituted taxable interest income. The court of appeals held that the Tax Court reasonably considered, inter alia, the intent of the parties in context. The Tax Court's approach seems especially apt in these circumstances, where a relevant indicator extrinsic to the settlement documentation suggested that their choice of settlement language may have been driven by tax considerations. *Delaney v. Commissioner*, 99 F.3d at 24-25.

The plaintiff in *Miller v. Commissioner*, T. C. Memo 1993-49 (1993), brought two actions against the defendants. In the first action, the jury "awarded petitioner $450,000 in punitive damages and $500,000 in compensatory damages." The parties then settled both actions for a total of $900,000. The court noted that it was "unable to predict with any certainty whether a similar award would have been made in the second action," and stated that it declined to "speculate what the $50,000 reduction represents." Nevertheless the court allocated the settlement payment pro rata the jury's verdict in the first action.

The plaintiffs were successful, however, in *McShane v. Commissioner*, 1987 T. C. Memo 151 (1987). In that case, the plaintiffs obtained a $ 1,275,000 jury award in a personal injury action under a state-law regime that entitled them to statutory prejudgment interest. The parties settled during the appeal for an amount greater than the jury award. In holding that no part of the settlement payment constituted taxable interest, the United States Tax Court scrutinized the details of the settlement discussions and found that at the insistence of the defendant "all of the settlement agreements provided that the lump sums were to be paid 'without costs and interest.' During the negotiations the tax consequences of the settlements without interest were never discussed or considered. The amounts were arrived at by each of the parties taking into consideration their risk or 'exposure' by a continuance of the appeal. The total of the settlements was equal to the total of the verdicts in the lower court plus statutory interest to an arbitrarily chosen date less a 5 percent discount."

Given the evidence that courts have considered persuasive in applying the origin of the claim test to settlement proceeds, attorneys representing plaintiffs should consider how the plaintiff will substantiate the tax treatment of settlement proceeds from the beginning of the case rather than during (or after) the final settlement negotiations.

Michael J. Low is a partner with Janssen Doyle llp. Mr. Low is a trial lawyer with a practice focused on civil tax controversies, criminal tax investigations, and litigation in state and federal courts involving trusts and estates, accounting, partnerships, executive compensation, and ERISA and non-ERISA plan benefits. Mr. Low is a graduate of U. C. Berkeley's Boalt Hall School of Law.

Is Courtroom Combat Past its Prime?

Wednesday, June 1, 2011

Mediation is the Emerging Tool to Bring Banks/Lenders and Shareholders to Certainty of Result in Uncertain Times. In this time of economic upheaval and heightened distrust of banks and lenders, shareholders do have a better alternative to courtroom combat in order to reach certainty of result along with monetary savings and fairness. Banks and lenders, at the same time, can satisfy their needs to maintain reputation, manage risk, and obtain party-directed results, leaving them more time to spend on developing money-generating business projects rather than putting out "fires" of hostile and costly shareholder meetings/demonstrations, instant news feeds, press conferences, or reporter inquiries, all at great expense to the corporate bottom line.

Linda DeBene

Research in the field, both on the ground and in written word, allows this author to posit that mediation, the alternative dispute resolution procedure juxtaposed to courtroom battlefields, can clearly provide more benefit to banking or lending entities with respect to disputes involving shareholders, than can costly litigation. At the same time mediation can bring more certain, interest-based, individualized resolutions without the attendant vagaries of appeal, instantaneous publicity surprises, and potential losses of long standing relationships.

In another article this author published the question was posed: "... why do lenders and borrowers, buyers and sellers, gravitate to litigation? No one is enamored about paying legal fees, not a soul appreciates the snail's pace of the judicial processes. But resolving disputes seems to draw out a need for public places (the courthouse), press coverage and finding justification (justice as it is often called). Things do not always run perfectly. And when they do not, the people involved develop a hard time talking about the issues with one another and, driven by self-protection, head off to adversarial ritual, rather than focusing on compromise, relationship protection and resolution."[1][47] This same query is quite relevant to claims involving shareholders and banks/lenders.

To highlight the benefits of mediation over litigation, one must first look at the needs of the parties. One expects both sides want frank, pragmatic discussions in a process that is basically without prejudice to their interests, one under the umbrella of mediation confidentiality. All mediators know, and most attorneys and parties understand that a mediated result is one reached by compromise. Without mediation, parties will rapidly be in litigation mode without the ability to speak in mediation sessions freely, while fearing anything said, or any concession made with the goal of compromise, will be used against them. This is the key basis supporting the inherent value of mediating bank/lender/shareholder disputes. Also, both sides typically share the desire for rapidity of resolution over lengthy litigation/appeal processes. In many instances banks/lenders seek resolution before a dispute escalates to full blown litigation or hits the press.

More directly, the bank/lender wants to focus on discussions about the commercial interests of the parties, not just legal issues. Managing relationships of bank/lender with its shareholders, its business

[47] #_ftn1

counterparts, its customers, and solving issues based upon workplace conflicts or other *intra*-company policy matters, maintaining the goodwill of the bank in the community, are top of mind to bank/lender parties.

In today's economy, investors (be they shareholders, lenders, or otherwise) are filing claims against failed banking institutions. These cases are likely to grow in numbers as investors seek to recoup losses from this banking crisis. Likely issues will take the form of assertions that top bank officials failed to disclose important information about the bank's condition before it "spiraled out of control", or misrepresented the bank's financial condition, failed to disclose to investors such things as losses in the bank's portfolio or censure by regulators[2][48]. Each claim raises concerns that could be mitigated by mediation versus litigation. Sensitive financial information which the bank and investors may not want to make available to competitors, such as insurance coverage issues, loss runs, or customer information regarding pull out of deposits, could be discussed and circulated under a mediation umbrella of confidentiality.

In the case of smaller local banks, many disputes are best served by resolution through mediation. Examples are departing shareholders where stock valuation or stock option issues are involved and confidentiality of internal discussions is critical, as well as a non-competition agreement if the shareholder were also an officer, director or employee. Others may involve trade secret non-disclosure or trademark infringement issues, necessary contract language to protect customer lists or confidential customer information, or the firing of a minority shareholder who works for the institution. It is quite likely that shareholders in a small lending corporation would not have planned in advance for the instance of a minority shareholder being forced to leave by the controlling shareholders, leaving employment, share valuation, insurance and many other issues irresolvable except by mediation or expensive litigation.

Similar confidentiality issues would be served in instances where minority shareholders, facing conversion of a lending entity into a bank, want to be bought out, raising issues over share value, customers,

[48] #_ftn2

expansion of products and services, competition, and buy out packages for shareholders who are officers of the entity. As in other "divorces," emotions can run high and the proper arena is not a public courtroom. The entity seeks to not pay dissenting minority shareholders more than what non-dissenter will get, and the dissenter may have not wanted a change in the first place. Arguments abound over whether the entity is more valuable than it now says it is, some holding out for what s/he thinks is due. A court may be bound by the jurisdiction's law on valuing a buyout, which the shareholders do not agree with, or have broad discretion in determining valuation in a binding judgment, drawing conclusions that none of the parties may find acceptable. Mediation allows the parties to conduct their own negotiations, taking into account their own needs and outlooks, reaching a value that all can accept rather than being forced to binding judgment and the potential of appeal.

In smaller bank settlings, where friends, relatives and close business associates are involved on a day to day basis, strategic decisions for the entity such as mergers or takeovers, dividend awarding, disparate salaries, voting rights, succession (in case of death or family dissolution), loans to or from corporate officers/directors, diversion of corporate opportunities, a squeeze out or other exclusion of minority shareholder officer/employees from management, or even embezzlement, create highly emotional circumstances all ripe for mediation, not public combat. Sensitive issues such as these are enhanced by burdens of proof in litigation settings resulting in unwanted (sometimes by all sides) judgments of a trial court or jury. Stakes rise higher when the end result has to be appealed at even more expense than anticipated. Mediation permits the parties to negotiate, eliminating high standards of proof and unwanted judgments, appeals, delay and expense.

Shareholders desire many of the same things as banks/lenders: certainty of result (including no delay from lengthy appeal processes), direct involvement in the process, reasonably timely resolution without having to wait for other shareholders or other banks who may be involved in a larger scale dispute. One large scale example: Enron Corporation's lenders/shareholders/investors failed after eight months of mediation to resolve claims of bank liability for the company's collapse. The investor lawyers then sought out individual settlements with some banks in lieu of a group agreement. The potential benefit to shareholders or banks is that settlement made early, when there may be more ability to pay, is better than waiting for all to be ready to settle[3][49]. Another example is Washington Mutual's (WMI) shareholder claims which are ongoing in WMI's bankruptcy proceeding. Class certification was granted leaving the shareholders to proceed to court-ordered mediation against four groups of defendants including some former WMI directors. The directors are indicating that an appeal is likely on the court's order approving lead counsel status[4][50]. Closure will be long in coming.

Mediated agreements, on the other hand, have an advantage over court judgments (or even arbitration awards) because they are the product of mutual understanding and consensual agreement of the parties. It is currently the case in most jurisdictions that if attorneys are not ethically bound by some state bar rule of conduct, or state or federal court rule or process, they are encouraged to advise clients that mediation or some form of alternative dispute resolution process[5][51] is preferred over litigation. Once in mediation, the parties' goal of fostering their future business interests, discussing what is most important to them, can, with the help of a skilled mediator, be framed and re-framed to lead them away from focusing on emotional and legal arguments to a position of potential cooperation for mutual gains. Needs of all parties can be pragmatically addressed, documented by an enforceable agreement which can be executed in a much shorter time than the years of litigation that comes with courtroom combat.

There are those who argue the non-binding nature of mediation is a disadvantage, and the possibility of enforcing a mediated settlement is harder than a court judgment or binding arbitration award would be. Watching the history of mediation over the last three decades as both litigator and alternative dispute resolution (ADR) professional, leads this author to conclude the argument cannot be substantiated in today's legal environment. Processes have been put on place either

[49] #_ftn3
[50] #_ftn4
[51] #_ftn5

by court rule or case law to provide for court intervention to uphold mediated settlement agreements where there may be recalcitrant parties[6][52]. Today, mediation (as well as other forms of ADR such as judicial reference or arbitration) is encouraged in all levels of court proceedings. Many courts, both state and federal, require parties to state in a written pleading they have advised their clients of the availability of ADR processes at or near the commencement of the action[7][53] and even offer court sponsored processes (often on some limited *pro bono* basis) for those purposes. Many federal courts have similar requirements that litigants engage in ADR at the outset of a case, in some instances through programs provided by the courts themselves[8][54]. Even at the appellate level, at least in California state and federal courts, litigants are now required to participate in mandatory mediation, sometimes before briefing[9][55]. While much of this is driven by fiscal constraints at various court levels, the substantial amount of dollars saved by using ADR processes, particularly mediation, is widely recognized and encouraged by courts in lieu of full blown litigation and appeal.

Others voice disadvantages of mediation due to cost. In bank/lender/shareholder cases, low-cost is not typically the driving factor when choosing mediation over litigation. Rather, the downsides of litigation far outweigh what may be a costly process in either venue. Yes, court processes are more "free" than not. But when one compares attorney time, full blown discovery, expensive expert workups, motion practice to limit issues or exclude evidence, and the length of the process and still comes to realize that litigation is not the place wherein one can craft one's own conclusion (as can be had in mediation), nor can litigation provide the certainty of a settlement agreement (instead of the lengthy appeal processes that follow an unexpected binding judgment), mediation is the better alternative. Studies have been done to compare actual expenses of litigation to actual expenses of mediation. However, if the desire of the parties is for certainty, confidentiality, mutuality and closure within a reasonably short period

[52]#_ftn6
[53]#_ftn7
[54]#_ftn8
[55]#_ftn9

of time, there can be no comparison as those attributes of mediation are absent in the courtroom context.

In theory, all sides to mediated settlement agreements desire enforceability. One would be remiss in not acknowledging such theory may fail in some cases. There are cases where clients claim they were threatened or coerced into signing a mediation settlement agreement. Such instances occur and are typically litigated through the appellate level. While no system is perfect, and there are appellate cases dealing with instances of coercion and dispute between lawyers and clients in a mediation context[10][56], the vast majority of mediated settlement agreements are complied with and the parties go on with their business having put extremely expensive litigations aside for a certainty, a mediated result in which they personally participated and can live with.

Alternative dispute resolution in the form of mediation (or other processes outside the scope of this article) has many attributes financial institutions, their shareholders, investors or customers can use as a business tool alternatively to (or even in conjunction with) litigation. ADR providers recognize that in many instances a lawsuit must be filed to preserve the *status quo* as in the case of injunctive relief, a stay of this or that, or to protect a statute of limitations or repose from running. Litigation in some states is required for mortgage foreclosures or certain particularized relief. However, use of mediation, in conjunction with those processes and to speed along the process of resolution, is appropriate and will bring more desired results than battlefield combat.

ADR has become highly recognized as an alternative, not a means to totally supplant the entirety of the processes of the court system in this country. The benefits of mediation, however, fit more needs of the parties in today's world in light of the delays of court processes due to economic constraints on the system as a whole. Time is money in the banking/lending/shareholder world. With shortages of judicial officers and courtrooms, with furloughs and budget cuts, the individualization of the process of settling disputes through mediation

[56] `#_ftn10`

better serves the banking industry than does battle and delay in the court system.

Linda DeBene is a mediator, arbitrator, referee and special master with JAMS – The Resolution Experts, specializing in business & commercial disputes, real estate, construction, and insurance related matters. She has been an ADR professional and court-appointed neutral since 1986, and a California legal professional since 1978. Linda is based in Walnut Creek, works throughout Northern California and Nevada, and can be reached at ldebene@jamsadr.com

---

[1] . "*Economic Downturn and Standard Contracts: Time for Another Look*", CCH Commercial Lending Review, March-April, 2009, pp.9-13

[2] . *Apropos* of a group of investors who have sued the parent of Georgian Bank in a Georgia state court. "*Georgian Bank Shareholders Sue Ex-CEO, Chairman*", The Atlanta Journal-Constitution, July 27, 2010

[3] . Bloomberg News Corp, *"Enron Mediation Talks Fail to Resolve Bank Dispute",* by Jef Feeley, March 22, 2004

[4] . Article by Allison Frankel, The Am Law Litigation Daily on AmericanLawyer.com, October 18, 2010

[5] . See, *e.g.*, the American Bar Association Model Rules of Professional Conduct, Comment [5] to Rule 2.1: "When a matter is likely to involve litigation, it may be necessary under Rule 1.4 [Communication with Client] to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." In 1993 the Colorado Supreme Court, in conjunction with the Colorado Bar Association, amended Colorado Rule of Professional Conduct 2.1 to add a requirement that a lawyer in an appropriate case has an obligation to discuss arbitration, mediation and negotiation. The text is similar to the ABA Model Rule 2.1. See Dauer & McNeill, *New Rules on ADR: Professional Ethics, Shotguns and Fish*, 21 Colo Law 1877 (1992)

Other states have adopted the ABA Model Rules; California has not. But on July 20, 2007 the State Bar of California adopted

California Attorney Guidelines of Civility and Professionalism (Civility Toolbox) which, at Section 13 discusses what a California attorney "should" do "as soon as possible" concerning discussions of ADR with the client and opposing counsel. See California State Bar website at http://ethics.calbar.ca.gov/LinkClick.aspx ↩ ? fileticket =mPBEL3nGaFs\%3d\&tabid=455

[6] . See, *e.g.*, California Code of Civil Procedure §664.6; California Evidence Code §1118, 1123, 1124

[7] . See, *e.g.*, California Judicial Council Mandatory Form CM-110 required in all California civil litigation proceedings.

[8] . See, *e.g.*, Federal Rule of Civil Procedure, Rule 16(a)(5), (c)(2)(I) and Form 52 4(f) & (g); U. S. District Court Northern District of California Local Rules 1-6-14.

[9] . See, *e.g.*, Ninth Circuit Court of Appeal Local Rule 33-1; California Court of Appeal First District, Local Rule 2; California Court of Appeal Third District, Local Rule 1

[10] . Two such cases are *Cassel v. Superior Court* (2011) 51 Cal.3rd 113, 119 Cal. Rptr.3d 437, and *Porter v. Wyner* (2010) 183 Cal. App.4th 949, 107 Cal. Rptr.3rd 653, where review was granted by the Supreme Court and then transferred back to the DCA for further findings in light of the Cassel decision. 2011 WL 1713378 (2011)

Getting Heard by a Real Person: the Collection Due Process Appeal

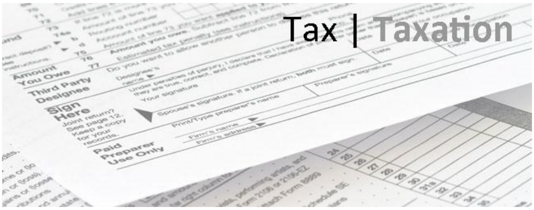
Wednesday, June 1, 2011

Articles on Taxes from the Tax Law practice area perspective:

- New U. S. Tax Court Rules Effective May 5, 2011[57] by Warren Peterson

[57] `http://cclawyer.cccba.org/2011/06/new-u-s-tax-court-rules-effective-may-5-2011/`

- Getting Heard by a Real Person: the Collections Due Process Appeal[58] by Mark Ericsson



Getting Heard by a Real Person: the Collections Due Process Appeal As long as there have been taxes, there have been delinquent taxpayers. Twenty years ago, the delinquent taxpayer could plan on a visit from a local tax collector. The experience depended upon the collector, but the resolution was face to face.

In the mid eighties, computers and the ACS (automated collection system) became the Service's contact point with the taxpayer. The ACS was the most cost effective collection group and used telephones and the mail to collect the tax. Taxpayers became frustrated because they could not get back to the same revenue officer (there is no transfer function at the service centers). As the Service became more dependent on computers, taxpayers received notices instead of calls.

In 1998, in response to congressional hearings featuring taxpayers testifying to heinous practices, Congress created an appeals process which allowed taxpayers to air grievances to the appeals groups about the collection procedures followed by the IRS. The process is called acollection due process appeal[59] (CDP appeal). The IRS appeals division provides an independent review of IRS actions. In enacting the legislation, Congress intended that where the IRS could not come to a payment arrangement with the taxpayer, the taxpayer could turn to the appeals group. This contemplates some failed negotiation between the taxpayer and the IRS.

[58] `http://cclawyer.cccba.org/2011/06/getting-heard-by-a-real-person-the-collection-due-process-appeal/`

[59] `http://www.irs.gov/individuals/article/0,,id=160739,00.html`

However, frequently, the taxpayer has received a series of four letters which the taxpayer, who probably has no means to pay, has ignored. Under the statute, the IRS is required to mail the taxpayer a notice of levy 30 days before taking levy action, which is the fifth letter received by the taxpayer. The taxpayer then has 30 days to appeal the action to IRS Appeals. The appeal may well be the first communication between the taxpayer and the IRS.

A revenue officer's mindset is generally to negotiate the most rapid pay-off agreement possible with the taxpayer to make it easier to sell the agreement to the group manager. The appeals officer's mindset is to resolve a dispute between the taxpayer and the Service. Obviously, the more appealing mindset from the taxpayer's perspective is that of the appeals officer. Therefore, it has become a strategy to wait out the notices from the IRS and appeal from the notice of intent to levy.

The appeals officer can look at any manner of resolution. Since both an offer in compromise and an installment agreement require the same financial information, one can make the case for an offer in compromise with the appeals officer and move on to an installment agreement if unsuccessful. The taxpayer has about ninety days before his hearing. Prior to the hearing, he must submit a completedForm 433-A[60] which resembles a loan application to a bank. The income/expense statement at page four of the form is controlling in most cases in determining the amount required to be offered or paid under an installment plan.

If the Form 433-A[61] is complete, the hearing usually consists of a telephone conference with the appeals officer seeking any clarification or additional verification as required. If a face to face hearing is required, the conference is informal. The appeals officer will usually tell the taxpayer or representative his decision at the hearing. Appeals officers appear to have a much wider latitude than revenue officers and the outcome is usually satisfactory.

Unfortunately, this is an inefficient use of the appeals process and is becoming more and more a burden on the office. The appeal is

[60] http://www.irs.gov/pub/irs-pdf/f433a.pdf
[61] http://www.irs.gov/pub/irs-pdf/f433a.pdf

initiated by filing a Form 12153[62] with the collection group that sent the notice of levy. In the case of notices issued by the ACS units, many units now have a group that will hold the appeal for 60 days while they attempt to arrive at a resolution. If the notice is issued by a local IRS revenue officer, the appeal will often cause the officer to review the case and look a little harder for a mutually agreeable resolution. Both are steps in the right direction, but frequently fruitless. The CDP appeal can move stalled negotiations and certainly is a valuable tool in the taxpayer's or practitioner's tool kit.

Mr. Ericsson practices taxation, business and estate planning law as a partner in the Walnut Creek firm Youngman, Ericsson & Low, LLP, and was the 2006 Contra Costa Bar Association president.

New U. S. Tax Court Rules Effective May 5, 2011

Wednesday, June 1, 2011

Articles on Taxes from the Tax Law practice area perspective:

- New U. S. Tax Court Rules Effective May 5, 2011[63] by Warren Peterson
- Getting Heard by a Real Person: the Collections Due Process Appeal[64] by Mark Ericsson

[62] http://www.irs.gov/pub/irs-pdf/f12153.pdf

[63] http://cclawyer.cccba.org/2011/06/new-u-s-tax-court-rules-effective-may-5-2011/

[64] http://cclawyer.cccba.org/2011/06/getting-heard-by-a-real-person-the-collection-due-process-appeal/

New U. S. Tax Court Rules Effective May 5, 2011 On May 5, 2011 the United States Tax Court announced the adoption of amendments to its Rules of Practice and Procedure. The Rules, as amended, are available on the Court's web site, www.ustaxcourt.gov. The proposed amendments were originally published on December 20, 2010 with an invitation for public comments. A number of comments were received by the March 7, 2011 deadline and the amendments as finalized reflect revisions prompted by the comments received. This article will briefly outline the principal changes made by the amendments and the explanations for the changes.

While many of the amendments are of a technical or clarifying nature, several address more substantive changes in the Court's Rules. Among these are amendments addressing the time periods for filing summary judgment motions, Rule 155 computations, motions regarding elections to proceed under the small tax case procedure. In addition, a new Rule 124 more clearly recognizes the role of voluntary nonbinding mediation as a form of alternative dispute resolution.

The amendments are generally effective as of May 5, 2011[65]. Certain amendments, however, are effective with respect to specific activities that are initiated after May 5, 2011.[1][66]

Deadline for Summary Judgment Motions The Rule 121(a)[67]amendment is designed to clarify the timing for the filing of summary judgment motions. The new rule provides that such motions may be made at any time beginning 30 days after the pleadings are closed, but no later than 60 days before the first day of the Court's session at which the case is calendared for trial. The 60-day limit is intended to allow the Court sufficient time to secure any additional information it deems necessary to decide the motion and to consider action on the motion before trial.

Deadlines for Rule 155 Computations The Court decided to amend

[65] `http://www.ustaxcourt.gov/rules/amended_050511.pdf`
[66] `#_ftn1`
[67] `http://www.ustaxcourt.gov/notice.htm`

Rule 155[68] due to its experience with "inordinate delay" [2][69] on the part of parties filing their computations for entry of decision in accordance with an opinion without the issuance of a court order. To alleviate the need for court orders, the amended Rule 155 now requires the parties to submit computations within 90 days after the service of the opinion unless otherwise directed by the Court.

Election of Small Tax Case Procedure The Court has deleted prior Rule 171 and replaced it with a new Rule 171[70]. The new Rule 171 is designed to replace former Rule 172(b) (and its predecessor Rule 36(c)) which were in effect from 1970 and 1983. These rules required the Commissioner to file any motion opposing a taxpayer request to elect a small tax case at the time the Commissioner filed an answer in the case.

In 1983 former Rule 172(b) was eliminated "apparently as a result of the Court's elimination of required answers in small tax cases in 1979." [3][71] The Court has decided that since the requirement of answers in small tax cases was reinstated in 2007, citing 130 T. C. 486-487, it is now appropriate to reinstate former Rule 172(b). Accordingly, new Rule 171(b) is substantially identical to former Rule 172(b).

Additional reasons for the new Rule 171 are the varied jurisdictional dollar limits for small tax case eligibility resulting from the Court's enlarged jurisdiction. The Court now has jurisdiction to decide appeals in lien and levy cases as well as requests for relief from joint liability. The varied jurisdictional dollar limits increase the difficulty for taxpayers in determining whether they may elect the small case procedures in lien and levy actions and actions for determination of relief from joint liability. The Court explains that the new Rule 171 helps alleviate the consequences of this increased difficulty since if "a taxpayer has incorrectly applied the jurisdictional limits in electing the small tax case procedures, early action on the error is in the interests of the Court and the parties and would assist in the management and

[68] http://www.ustaxcourt.gov/notice.htm
[69] #_ftn2
[70] http://www.ustaxcourt.gov/notice.htm
[71] #_ftn3

the calendaring of the case."[4][72]

The remaining changes incorporated in new Rule 171 are intended to clarify that a petitioner may elect to have the proceeding conducted as a small tax case at any time before trial, Rule 171(c) and that absent a Court order removing the small tax case designation, decision or dismissal prior to trial does not invalidate the petitioner's small tax case election, Rule 171(d).

Alternative Dispute Resolution The Court has replaced prior Rule 124 with new Rule 124[73]. New Rule 124 is designed to remove the prior focus on arbitration and elevate mediation as a form of dispute resolution. The Court noted that in the past twenty years only a few arbitrations were conducted, with substantially more mediations occurring over the same period.

New Rule 124 does not require a joint motion for mediation. Mediation issues are not limited to factual ones, as opposed to binding arbitration, and the mediation is nonbinding, thus requiring stipulations by the parties.

Warren R. Peterson, a Danville sole practitioner, has been practicing law in one form or another for longer than he cares to remember. He is presently concentrating his practice in the area of tax conflicts, defending taxpayers in disputes with federal and California state tax authorities.

---

[1] Amendments to Rule 121 are effective with respect to cases in which the Notices of Trial are issued after May 5, 2011; the amendments to Rule 155 are effective with respect to cases in which entry of decision is withheld pending the filing of computations pursuant to opinions filed or orders issued after May 5, 2011; and new Rule 171(b) is effective with respect to petitions filed after May 5, 2011.

[2] United States Tax Court, Press Release, May 5, 2011, (www.ustaxcourt.gov/press/050511.pdf) p. 14.

[3] Press Release, supra, p. 16.

[72] #_ftn4

[73] http://www.ustaxcourt.gov/notice.htm

[4] Press Release, supra, p. 17.

Help! I Think My Spouse Is Cheating (On His Taxes)

Wednesday, June 1, 2011

Articles on Taxes from the Family Law practice area perspective:

- New Tax World for Registered Domestic Partners[74] by Don Read
- Help! I Think my Spouse Is Cheating (On His Taxes)[75] by Jonathon Watts
- Divorce, Children and Taxes[76] by Leslie Dawson, CPA

Help! I Think my Spouse Is Cheating (On His Taxes) If you hear these words from a client, chances are that the story will be interesting.

By the time the client picks up the phone, he or she will have already: (1) Read the signals that something is amiss (anything from a questionable deduction to a bumper sticker proclaiming a spouse's allegiance to a tax protestor group); (2) tried talking about it (interesting conversation) or decided not to bother (even more interesting);

[74] http://cclawyer.cccba.org/2011/06/registered-domestic-partners-and-taxes/
[75] http://cclawyer.cccba.org/2011/06/help-i-think-my-spouse-is-cheating-on-his-taxes/
[76] http://cclawyer.cccba.org/2011/06/divorce-children-and-taxes/

(3) decided that knocking on wood and hoping for the best may not be the best strategy; and (4) decided to act.

In the spirit of "First, do no harm," a quick word on what not to do. If a client has reason to believe that his or her spouse is cheating on his taxes, the client should not, under virtually any circumstances, sign a joint return with the spouse.

The reason is simple: by signing a joint return, a married person becomes jointly and severally liable with his or her spouse for all of the taxes that the couple owes for the year. Unless he or she can qualify as an "innocent spouse," which will be difficult to do if he or she knew or had reason to know of the understatement (I. R. C. § 6015[77]), he or she will be jointly and severally liable for the entire tax bill. I. R. C. § 6013(d)[78]. Indeed, a person who knowingly signs an untrue joint return is guilty of a felony. I. R. C. § 7206[79].
The obvious (and indeed the only) alternative is to file as "married filing separately." While this can result in a greater total tax liability than married filing jointly, it at least avoids the trap of joint and several liability plus a potential criminal conviction. If the innocent spouse files separately, correctly reports her individual income, and pays the resulting tax, she will avoid the quagmire hubby created. Correct?

Not quite. Like an undetected cross-current, California's community property law may result in some unforeseen complications.

Because California is a community property state, absent a premaritial or post-nuptial agreement to the contrary, each spouse has an enforceable right to one-half of the total community income—i.e., the total income earned by both spouses. Therefore, your client cannot simply report his or her wages for the year and be done with it. Rather, he or she must report one-half of the total community income—client's earnings plus spouse's earnings—for the year. *Mischel v. Commissioner* (1997) T. C. Memo. 1997-350. This could be more

[77] `http://www.law.cornell.edu/uscode/26/usc_sec_26_00006015----000-.html`

[78] `http://www.law.cornell.edu/uscode/26/usc_sec_26_00006013----000-.html`

[79] `http://www.law.cornell.edu/uscode/26/usc_sec_26_00007206----000-.html`

or less than your client's individual wages, depending on which spouse earns the most. (Another interesting conversation, no doubt.)

In practice, this means that your client must determine the spouse's true income in order to file an accurate married-filing-separately return. If the spouse is a regular employee, your client may be able to sneak a peek at his or her Form W-2. Of course, the spouse is less likely to cheat if he or she knows that the employer will report his or her income to the IRS anyway. In the more likely event that the spouse is a self-employed contractor who takes cash under the table or overstates deductions, there may be no way your client can accurately determine the spouse's income. This leaves your client in a classic Catch-22: the spouse's failure to report income—the very reason your client needs to file separately—also makes it difficult for him or her to file an accurate return.

One potential solution is a marital property agreement under which the couple agrees that each spouse's earnings will be his or her separate property. This gives only prospective relief. A valid marital property agreement will generally be respected for tax purposes. *Helvering v. Hickman* (9th Cir. 1934) 70 F.2d 985. Once the agreement is in place, your client will have the right to receive—and be liable for the taxes on—only his or her own earnings. Another possibility is to seek a legal separation.

Of course, your client cannot enter into a valid marital property agreement unilaterally—the spouse has to agree too. If the spouse is not interested, your client's choices come down to: (1) end the marriage, in which case both spouses' future incomes will be their separate property, or (2) file separate returns that report one-half of the community income as accurately as possible.

There is statutory relief in the nature of innocent spouse for those filing as married filing separate under §66. A spouse will not be held responsible for one-half of the other spouse's income if the spouse did not have reason to know of the income or benefit from it.

While less than perfect, estimating community income as accurately as possible and filing a separate return may be the only real choice for someone who does not want to give up on a marriage to an uncooperative spouse. Your client could still be faced with an audit to determine the correct amount of community income, and may have to pay interest and accuracy penalties if he or she guesses wrong. But at least your client will have a fighting chance to minimize the cost of his or her spouse's wrongdoing, and will not commit a felony in the process.

Jonathan C. Watts recently opened his own law office in San Ramon. He assists his clients with business transactions, corporate law, estate planning, and tax issues, and looks forward to completing his LL. M. in Taxation from the University of Alabama School of Law this summer.

Divorce, Children and Taxes

Wednesday, June 1, 2011

Articles on Taxes from the Family Law practice area perspective:

- New Tax World for Registered Domestic Partners[80] by Don Read
- Help! I Think my Spouse Is Cheating (On His Taxes)[81] by Jonathon Watts
- Divorce, Children and Taxes[82] by Leslie Dawson, CPA

[80] http://cclawyer.cccba.org/2011/06/registered-domestic-partners-and-taxes/
[81] http://cclawyer.cccba.org/2011/06/help-i-think-my-spouse-is-cheating-on-his-taxes/
[82] http://cclawyer.cccba.org/2011/06/divorce-children-and-taxes/

Divorce, Children and Taxes One of the most misunderstood and seldom thought-out areas of family law are the requirements and interplay of claiming children as dependents, claiming head of household status, claiming child-related credits and the kiddie tax. The following is a general review of these areas. As is typical of income tax law, there are nuances and exceptions too numerous to discuss in this brief article. However, it is hoped that the following will raise the attorney and client's awareness of the tax consequences related to children and custody.

Dependency Deduction Before we dive into the specifics of divorcing or separating, let's take a look at the general requirements for claiming a dependency deduction for a child:

- The child cannot be claimed as a dependent of another.
- The child is a US citizen, US resident alien, US national or a Canada/Mexico resident for some part of the year.
- The child cannot claim the exemption on his or her own return
- The child is either a "Qualifying Child" or a "Qualifying Relative".

A Qualifying Child must be the taxpayer's son, daughter, stepchild, foster child, brother, sister, half brother or sister, stepbrother, stepsister or descendant of any. The child must not have provided more than half of his or her own support and cannot file a joint return for the year. Additional requirements:

- The child is either:

1. under 19 at the end of the year and younger than the taxpayer and spouse;

2. under 24 at the end of the year, a full time student and younger than the taxpayer and spouse;

3. permanently disabled (no age limit);

- The child *actually lived* with the taxpayer for more than half of the year.

Only one person can treat a child as a qualifying child. A parent will trump any other relationship. The parent with primary physical custody will trump the other. In the case of two parents with equal physical custody, the parent with the higher gross income will trump the other.

A Qualifying Relative is either an actual relative or an individual that lived with the taxpayer as a member of the household for the entire year. The relative's income must be less than $3,650 and the taxpayer must have provided more than half of the relative's support for the year. Finally, the relative cannot be the Qualifying Child of anyone else.

If multiple parties provide support for the child, each party must apply the above tests and follow the priority set forth.

If the child is in college, the parent to whom the child returns when not in school receives credit for the time in college for determining where the child "lives".

For 2011 the exemption amount is $3,700 and is no longer subject to phase outs. Thus, both parents can benefit from this deduction regardless of income level.

Dependency Exemption – Divorce Situations There is a special rule for children of divorced or separated parents under IRC §152(e)[83]. The custodial parent will be entitled to claim the child as a dependent if all of the following apply:

- The parents are divorced, separated or otherwise living apart for the last six month of the year.
- The parents together provide more than half of the child's support.
- The child is in the custody of one or both parents for more than half the year.

[83] `http://www.law.cornell.edu/uscode/26/usc_sec_26_00000152----000-.html` ↩

Custody is determined either:

- Legally – according to the written separation agreement or court order.
- Physically – based on which parent has the child for the greater number of nights during the year. If there is a tie, the parent with the greater adjusted gross income will be deemed the custodial parent. Fortunately, there are 365 days in most years so one parent should have at least one more night than the other.

The custodial parent may release the exemption to the non-custodial parent by completing and signing a Form 8332 "Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent"[84]. The non-custodial parent must attach this form to his or her return in order to claim the child as a dependent.

The IRS is very particular about using this form and has become more strict in recent years. Currently, a settlement agreement or court order will only replace this form if there is an *unconditional* assignment of the dependency exemption to the non-custodial parent and the agreement's only purpose is for this assignment. In other words, a provision in the overall divorce settlement will not work. Furthermore, any provision conditioning the assignment of the dependency exemption on the current payment of child support will also not be accepted. The IRS is not interested in getting involved in and making determinations regarding the status of child support payments between parents.

Form 8332[85] can be signed for a single year or for multiple years. If it is anticipated that obtaining the signature of the custodial parent is going to be a problem, then a form applying to all future years should be prepared and signed at the time of the judgment or settlement. On the other hand, if the custodial parent is concerned about receiving child support payments, he or she may want to sign a Form 8332[86] each year once the support has actually been received.

[84] http://www.irs.gov/pub/irs-pdf/f8332.pdf
[85] http://www.irs.gov/pub/irs-pdf/f8332.pdf
[86] http://www.irs.gov/pub/irs-pdf/f8332.pdf

An emancipated child is not considered in the custody of either parent and thus, these special rules do not apply. The child must qualify under the general dependency rules as outlined above. This situation typically occurs while the child is in college. When determining who paid the child's support, consideration should be given to the cost of the household to which the child returns as well as the costs of college, room and board.

Head of Household Filing Status Head of household filing status provides greater tax benefits in the form of lower tax rates and more beneficial thresholds. A taxpayer may claim head of household if they are unmarried or considered unmarried on the last day of the year. Additional requirements:

- The taxpayer paid more than half the cost of maintaining a home for the year.
- A "qualifying person" lives with the taxpayer for more than half the year. A child will be continued a "qualifying person" if they are:

1. Qualifying child – whether or not the child is claimed as a dependent by the taxpayer.

2. Other child that lives with and can be claimed as a dependent of the taxpayer.

Head of household is based on actual custody and cannot be negotiated between the parties. Thus, while a custodial parent can release the dependency exemption to the non-custodial parent (by signing a Form 8332[87]), he or she alone retains the ability to file as head of household.

Child Tax Credit Eligible taxpayers may claim a credit for each qualifying child under age 17 that can be claimed as a dependent. The maximum credit amount for 2010 and 2011 is $1,000. This credit is phased out for taxpayers with adjusted gross income (AGI) exceeding certain amounts. The credit is reduced by $50 for each $1,000 of AGI

[87] `http://www.irs.gov/pub/irs-pdf/f8332.pdf`

over \$110k for joint filers, \$75k for single/head of household taxpayers and \$55k for married filing separate taxpayers.

The credit is refundable to the extent of 1) 15% of the taxpayer's taxable earned income over \$3,000 or 2) if three of more children, the social security taxes paid in excess of the earned income credit. Earned income is required for the credit to be refundable, but no earned income is required to use the credit as an offset to the tax liability.

The parent who actually claims the dependency exemption will also claim the child tax credit. Thus, if the custodial parent releases the exemption to the non-custodial parent, he or she is also releasing the child tax credit.

Dependent Care Credit This credit is allowed for employment-related expenses incurred for the care of a child. Generally, only expenses for a child under that age of 13 who lives with the taxpayer for most of the year will qualify for the credit. As with most child-related benefits, there is an exception to the age requirement if the child is disabled/handicapped and incapable of self-care.

The maximum credit is 35% and the minimum credit is 20% of qualifying expenses. The phase-out begins at \$15k AGI and is reduced to 20% at \$43k AGI or more (regardless of filing status). The credit is limited to the tax liability and is non-refundable.

The maximum amount of expense that can be considered is \$3,000 for one child or \$6,000 for two or more children. Qualifying expenses include daycare, camp, nanny and any other expense that allows the taxpayer to be gainfully employed.

The custodial parent will be entitled to claim this credit since he or she will have has physical custody of the child for most of the year. Thus, if the custodial parent releases the exemption to the non-custodial parent, he or she retains the ability to take the dependent care credit.

Kiddie Tax One of the most overlooked areas when separated parents are evaluating the tax aspects of the children is the impact of the so-called "kiddie tax".

The kiddie tax first appeared in 1986 to discourage parents from shifting income to their children's returns in order to have it taxed at a lower rate. In general terms, the kiddie tax allows a child's *earned* income to be taxed at the child's tax rate, but requires that the child's *unearned* income in excess of the standard deduction for dependents (currently $950) be taxed at the parent's rate. Interest, dividends, royalties and trust income are frequent sources of *unearned* income.

The kiddie tax originally only applied to children under the age of 14. However, in 2006, the applicable age increased to 18. The kiddie tax was expanded again in 2008 and continues to apply as follows:

- Child 17 and Under - Child has excess unearned income.
- Child 18 – Child has 1) excess unearned income and 2) earned income of less than 50% of his or her support.
- Child 19-23 – Child has 1) excess unearned income, 2) earned income of less than 50% of his or her support and 3) is full time student.

In general, the kiddie tax will apply to children that can be claimed a dependent on a parent's return.

For unmarried taxpayers, the custodial parent's tax rate will be used to calculate the kiddie tax. For married taxpayers filing separately, the rate that will apply will come from the parent with the higher taxable income.

When calculating the proper rate to use, the income from all children subject to the kiddie tax is added to the parent's income. This calculated tax rate is then applied to the excess unearned income of all the children.

The kiddie tax is calculated and reported on a separate return filed for the child. However, the parent may elect to report the kiddie tax on his or her return if the following applies:

- Child only has interest and dividends

- Child's gross income is greater than half of the limited standard deduction
- Child's gross income is not greater than 10 times the limited standard deduction
- No estimates were made under the child's name or social security number
- No income taxes were withheld from the child's income

Electing to report the child's income may impact the parent's overall tax rate whereas filing separately will not.

As indicated, the tax impacts of children for divorcing or separated parents involve more than just negotiating the dependency exemption. More often than not, the ability to file as head of household will have a more significant impact than the benefit of a dependency deduction. Furthermore, the ability to claim a dependent care credit and the requirement to report kiddie tax will fall on the custodial parent regardless of whether the dependency exemption is released to the non-custodial parent.

Leslie O. Dawson is a partner with Glenn & Dawson, LLP in Walnut Creek. She is a Certified Public Accountant (CPA), a Certified Valuation Analyst (CVA), Certified in Financial Forensics (CFF) and Accredited in Business Valuations (ABV) by the American Institute of Public Accountants. She received her B. A degree in accounting, cum-laude, from Sonoma State University and her M. S. degree in taxation from Golden Gate University. Ms. Dawson has been providing family law forensic accounting services since 1991. She is a member of the California CPA Society family law section and serves as volunteer for the statewide family law conference, the coordinator of the East Bay "Tax Issues In Divorce" mini-conference and the coordinator of the East Bay pro-bono program. Ms. Dawson serves on the board of directors for Kids Turn, Ujima Family Recovery Services, Mount Diablo Interpretive Society and is the past chair of the Walnut Creek Chamber of Commerce. She has recently been appointed to the Community Blue Ribbon Task Force on Fiscal Health by the Walnut Creek City Council.

Sex with Clients

Wednesday, June 1, 2011

Dear Ethics Corner: I am a newly divorced lawyer who has a busy business litigation practice. I work long hours, especially during trial, and I don't have much of a chance of meeting single men outside of the office. I tried Match.com but found that many men post pictures that are dated (read: when they had hair to their shoulders and weighed forty pounds less) and lie about their age and jobs. The other day I was at my client's office – he is the VP for a large tech company - and he asked me out to lunch. It became more than a business lunch – we talked about our lives, our children and our favorite movies. He called the next day and asked me to dinner. Should I go out with him, or is this a bad idea?

Signed,

Legally Lustful in Concord

Dear Legally Lustful: Carol Langford

This is actually a tough question because you are a business litigator who would be dating someone that is a "sophisticated client". Under California Rule of Professional Conduct 3-120[88] an attorney can have sexual relations with a client. Coercion, intimidation and undue influence by the attorney are prohibited, but that is less likely with a client who is the VP of a large company. Many states like Minnesota, North Carolina and Wisconsin have complete bans on sexual relationships with clients, citing the fact that sex with a client can never be consensual because of the unequal relationship between the attorney and a vulnerable client. Other states ban it only in criminal law and family law practices. Each state has their own unique characteristics.

California was the first state to enact a Rule regarding attorney-client sexual relations. The Bar Board was concerned not so much with how attorneys conduct their private lives but with the loss of detachment and objectivity that can result when a lawyer manifests personal feelings for his client.

Lustful, I would recommend that if you intend on dating your client, you do it now before Rule 3-120[89] changes. The new proposed Rules of Professional Conduct are now before the California Supreme Court and could be passed any day. If so, the new Rule will place a complete ban on sexual relations with a client that don't predate the attorney-client relationship.

I testified at the Rule Commission hearings in favor of that ban, only because every time I have represented a lawyer in trouble for having sex with his client it ends up being a "he said, she said" battle over whether the sex was coerced, and the lawyer rarely wins. There was some concern at the hearings for the proposed Rule 3-120 about the constitutional right to privacy; our state Constitution has an explicit right to privacy and case law makes clear that sexual conduct is a private matter. The proposed Rule would have to pass strict scrutiny to be upheld because privacy is a fundamental right. The current

[88] http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule3120.aspx

[89] http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule3120.aspx

Rule, which allows sex with clients, is arguably more narrowly tailored to address any harm brought on by quid pro quo or coerced sex. So it is not abundantly clear to me that the proposed Rule, if challenged, would pass constitutional muster. States that have adopted the ABA Rule banning sex with clients have not encountered a challenge because those states don't have an explicit right to privacy.

We already have bans for doctors and psychotherapists, and those bans have been upheld. Think of the tough row to hoe to challenge the rule; a lawyer would probably have to be disciplined for having sex with a client, then the case would have to go all the way up to the California Supreme Court. The publicity that would ensue would be tough. I do think, however, that an ideal test case would be an in-house or business lawyer like you who becomes social friends with her corporate client and then falls in love.

But Lustful, you probably don't want to be the test case. Wait until the representation is over (she said joylessly). If the guy loves ya, he'll wait. Keep in mind that you risk civil liability on various theories that will surely dampen your ardor. Claims are based on civil battery, deceit, and intentional infliction of emotional distress. Legal malpractice is another avenue of recovery but can be hard to prove where the lawyer may have handled the case well but, for example, made the client angry by ending the sexual relationship.

There are a few civil cases out there where the lawyer went way too far but most cases settle before trial. Civil cases often arise out of an underlying domestic relations matter handled by the lawyer.

Lustful, try McCovey's in Walnut Creek on a game day. You'll do better there than in the office of your client.

Very Truly Yours,

The Ethics Corner

Carol M. Langford *is an attorney in Walnut Creek specializing in ethics and State Bar discipline matters. She is also a lecturer of professional responsibility at U. C. Berkeley Boalt Hall School of Law this semester.*

Scott Jenny: Court Tour Guide Extraordinaire

Wednesday, June 1, 2011

Interview with Scott Jenny *Can you tell us a little bit about your practice and practice areas? How long have you been practicing law in Martinez?* I have been practicing eminent domain law in Martinez since 1993 when I first passed the Bar. I was hired by Cox, Garrett, Nagle & Lally.

How did you get involved with the Court Tour program[90]? I have two boys who ran through the entire school system in Martinez, and in elementary school (fifth grade) each of them took the Court Tour, and I was a chaperone on both field trips. So when the opportunity came up for me to give the tours as the guide rather than a parent, I jumped at the chance.

[90] `http://www.cccba.org/attorney/build-your-practice/volunteer-court-docents.php`

Can you outline a typical court tour for us? A typical tour starts with the Deputy Sheriff/Ranger giving the kids a tour of the security system in the old courthouse. The kids get to see the x-ray machine and the video surveillance monitor and cameras. But the highlight is the box where they keep the confiscated weapons people have attempted to bring into the courthouse, including knives, knitting needles, brass knuckles, and a walking stick that turns into nun chucks.

Then we usually walk over to the jail garage and I explain to them how the double-locking garage doors prevent a mass escape from the jail buses. Then we go into the jail itself and (if the kids are lucky) get to see some inmates in their jumpsuits and irons. Their little faces light up then.

I give them quite a stern lecture about drugs, alcohol, and school while inside the jail, telling them how easy it is to get inside the jail: experiment with drugs and alcohol and drop out of school.

Next we go into the Bray Courthouse and watch about 20 minutes of an actual jury trial, hopefully something of a mid-level offense (burglary, drugs, etc.) and hopefully there will be some good physical evidence in the courtroom.

Then we end up by holding a mock trial where the kids themselves take on the roles of judge, DA, PD, bailiff, court reporter, clerk, defendant, witnesses and jury. The trial is scripted and the kids really get into it, especially when it is verdict time (usually a popularity contest).

If there is time I show the kids the bullet hole in the Bray building from the family court shootout, on the basement level. They all want to stick their finger in the hole, and do.

What's your favorite part? I get the biggest kick when we are standing on the steps of the old Taylor Courthouse. I have them look at the block walls on the exterior of the courthouse, then up under the eaves of the roof overhang, and I tell them that it is a little known fact that the entire courthouse is built out of giant concrete Legos.

Take a look, you'll see what I mean. My hope is that they teach their own children that "fact."

In your experience, which part do the kids like best? The kids like the predictable stuff like the weapons box at security, the bullet hole, seeing an inmate in custody, and seeing the defendant in the jury trial.

What is surprising is how many of them are completely fascinated by the court reporter's job, including the reporting machine and the transcription tape. I'll get thank-you notes saying how they loved the weapons and the court reporting machine.

Do you have a favorite court tour story or memory you would like to share with us? Once during the mock trial, the student playing the judge would use the word "executed" instead of "excused."

So after a witness was done testifying, the judge would say "the witness may be executed." I did not correct him because I have a strange sense of humor and enjoyed it from a trial attorney perspective.

What are your interests or projects outside the practice of law? Are you involved in any volunteer projects other than the court tour program? I also have been helping coach the Martinez Alhambra High School Mock Trial team. The Mock Trial program is a wonderful program that always needs attorneys to help coach the kids and to act as scorers during the competition. Those kids, especially the pre-trialers (they argue constitutional pretrial motions), scare me sometimes, they are so well prepared.

Finally, out of curiosity, what's the story behind the red jacket? I enjoy a good, loud sportcoat (and shoes) and got a pretty good price on the red jacket from Jos. A. Banks several years ago. It was intended as a holiday coat only, but I soon remembered that the docents wore red jackets when my boys took the tours. So I am now able to wear the red jacket much more often during the year, a big plus on the red jacket amortization account.

I usually wear my Darth Vader tie with the jacket, except Christmas when it is the Grinch.


COSTA COUNTY COURT HOUSE

Elder Court honored for its innovation and success, wins 2011 KLEPS award

Wednesday, June 1, 2011

On April 29, 2011, the Judicial Council of California announced the recipients of the 2010–2011 Ralph N. Kleps Awards for Improvement in Administration of the Courts[91]—and our Elder Court was one of the winners!

The Elder Court ensures swift protections for the victim's physical and financial safety, while also addressing the victim's mental, physical or emotional frailty, as well as their need or desire to maintain a relationship with abusers who may be the victims' children, grandchildren or caregivers.

The program consists of:

- **Weekly calendars** in the central part of the county before the Hon. Joyce Cram. The docket includes small claims, criminal, landlord tenant, and general civil matters. To minimize transportation issues, documents and emergency elder abuse cases can be handled by the branch courts in the eastern and western parts of the county.
- **Senior Peer Counselors**. Volunteer Counselors are available during every Elder Court session to assist petitioners in coping with emotional stress, and work closely with the District Attorney's Victim's Assistance Program.
- **Senior Self Help Center** is staffed by experienced attorneys and is open from 9 am until 1:30 pm on Elder Court days (Tuesdays). It offers free legal assistance and referrals regarding restraining orders, small claims forms, consumer credit, unlawful detainer, and foreclosure actions, as well as preparing for hearings.

[91] `http://www.courts.ca.gov/nr12-11.pdf`

- **Free Spanish Translation and Interpretation** services at the Senior Self Help Center are available from a court interpreter training program.
- **Mediators** assist elders to reconcile with family members and negotiate their differences. “Kitchen Top” mediations at home are available for those with mobility issues.
- **Outreach, Education and Prevention.** Judge Cram and representatives of the Elder Court partner agencies frequently speak at service club meetings and community events.

According to the Judicial Council[92], the KLEPS award honors outstanding programs from nominations that “must be innovative and transferable to other courts and have demonstrated results.” The Elder Court Program was chosen in part because of its emphasis on collaboration, bringing “together community partners with services that assist the elderly, giving them immediate access to support services, including volunteer senior peer counselors, a senior self-help clinic, mediation, and volunteer interpreters to assist before and after court”.

Congratulations to our Elder Court, Judge Joyce Cram, the Senior Peer Counselors, the Senior Self-Help Center staff and everyone involved in making the Elder Court a successful and remarkable program!

Three Students’ View of the Contra Costa County High School Mock Trial Program

Wednesday, June 1, 2011

While most teenagers do their best to avoid the courtroom, the 19 members of the California High School Mock Trial team looked forward to their every opportunity to stand before a judge.

[92] `http://www.courts.ca.gov/nr12-11.pdf`

After winning the Contra Costa County Mock Trial Competition[93] with an undefeated record, **the Cal High team placed sixth in the statewide championship[94]** in March to top off its most successful year in more than a decade.

But this success did not come easily. We spent more than six months preparing, with countless hours practicing objections, studying case law and memorizing witness statements all with the knowledge we would need perfection in courtroom.

Mock Trial County Finals 2011

This year, teams competing in the Mock Trial Program, sponsored by the Constitutional Rights Foundation[95], argued the fictitious case of *People v. Woodson*[96], in which the defendant was charged with committing assault and violating an anti-bullying statute.

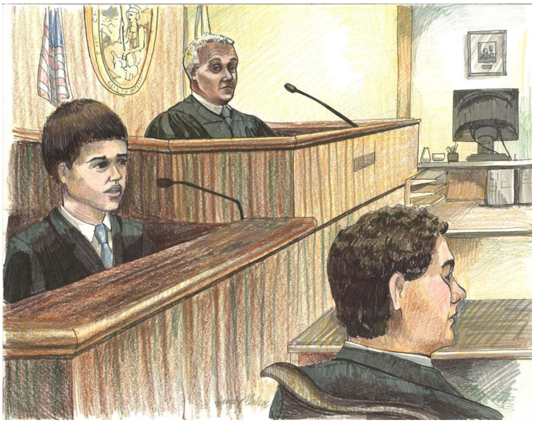
Each team had both a prosecution and a defense, with students playing the roles of attorneys, witnesses, clerks, and bailiffs, which would compete against another team in front of real attorneys and judges.

[93] http://www.cccoe.k12.ca.us/supe/events/mocktrial.htm
[94] http://sanramon.patch.com/articles/cal-high-mock-trial-places-sixth-in-state
[95] http://www.crf-usa.org/mock-trial-program/
[96] http://www.cccoe.k12.ca.us/supe/events/tforms/casebrief11.pdf

It is this added component of being scored by professionals in the field of law that makes mock trial a learning experience rather than simply a competition.

The judges and attorneys have heard authentic testimonies, questioned actual witnesses, and ruled on real cases, so their benchmarks of judgment are their real-life experiences. This adds to the pressure we feel while competing, but it also provides us a source of practical advice which helps us to improve.

The scorers did more than just give us tips on how to approach the facts of the case. They also provided general advice on presentation skills applicable outside the courtroom.



Mock Trial drawing by the County winning courtroom artist, Emily Neilson

For the first two rounds of actual competition, the scorers held onto the same mantra: speak clearly and speak slowly. They stressed that even in real court cases with jurors, the way the facts are presented is often just as, if not more, important than the facts themselves.

Our team's three speaking awards from the county for outstanding opening and closing arguments speak for themselves, literally, as to the adjustments we made to fit the scorers' advice.

Though attorneys in mock trial receive much of the glory for the oral arguments and questioning, the witnesses, from the police officer first on-scene to the close friend of the victim, are equally important.

Witnesses bring another skill set to the courtroom entirely. Being up on the stand tests their ability to reason and react to cleverly worded questions, while ensuring that they do not hurt their credibility or the team's case.

Since we try our case in front of real judges and attorneys, it becomes imperative, especially in the case of witnesses, to be as realistic as possible in our presentation.

It was the realistic nature with which we conducted ourselves that won us numerous individual awards, proving that our hard work and the numerous hours spent working with our attorney-coaches, Ellen Rosenbluth and Catherine Woodward, and teacher-coach, Brian Barr, had paid off.

> The verdict is in, and there is no reasonable doubt that the Cal High mock trial team has proven itself guilty of greatness.

But these individual awards and the county first place trophy are not as valuable as the skills and knowledge we are taking away from this year of mock trial.

At the state competition, our third trial in a single day lasted almost four torturous hours because of a stubborn judge. Afterwards, the judge told us that if we could go through that trial, we could do anything. We don't entirely disagree.

Mock Trial Group 2011

Granted, performing in a mock trial does not require extreme physical exertion. But heatedly arguing objections, testifying on the stand, and scrambling to improvise leaves participants—and the emotionally-involved spectators known as our parents—mentally and physically exhausted.

No two trials, even for the same case of *People v. Woodson*, are ever the same. Every team prepares a different case theme, every witness and attorney has individual strengths and weaknesses, and every judge makes unique rulings on objections. Walking into the courtroom you must be prepared for anything.

In the end, however, despite the stress of competition and the free time lost to studying the case or performing, the excitement and satisfaction of trying a case in a courthouse before a real judge outweighs the negatives.

Mock trial, with its emphasis on learning from experience in the courtroom and developing skills at the assistance of practicing law professionals, has been a cherished activity that we will miss after high school.

The verdict is in, and there is no reasonable doubt that the Cal High mock trial team has proven itself guilty of greatness.

We'll gladly face our sentence.

2011 Food From The Bar – Walk-A-Thon

Wednesday, June 1, 2011

This article was first published in the Food Bank of Contra Costa and Solano blog.[97]

On Friday, May 13th, the 2011 Food from the Bar Drive culminated in a flurry of fun activities organized by the Walnut Creek law firm Archer Norris[98]. Kicking off the day in downtown Walnut Creek, dozens of walkers in matching blue shirts completed a 3-mile Walk-A-Thon, co-sponsored by Archer Norris[99], the Law Offices of Hinton Alfert, Sumner & Kaufmann[100]; Shapiro, Buchman, Provine, Brothers, Smith LLP[101]; Timken, Johnson, Hwang LLP[102]; McNamara, Ney, Beatty, Slattery, Borges & Brothers LLP[103], andSports Basement[104].

[97]http://www.foodbankccs.org/wordpress/category/events-2/
[98]http://www.archernorris.com/
[99]http://www.archernorris.com/
[100]http://www.hinton-law.com/
[101]http://www.sbllp.com/
[102]http://www.timkenlawgroup.com/
[103]http://www.mcnamaralaw.com/
[104]http://www.sportsbasement.com/

Family members, friends and vendors joined the law firms in their efforts to raise much-needed funds for the Food Bank of Contra Costa and Solano. "My family gets together to volunteer at least one day every month," one walker shared, adding "Next month, we'll go to the Food Bank to help sort food supplies."

After the walk, a casual dress fundraiser, raffle, wine auction, and potluck lunch at the Archer Norris office rounded out the day. The day's events marked the conclusion of the two-week long annual food drive which has raised more than $800,000 and 54 tons of food for the Food Bank of Contra Costa and Solano since its inception 16 years ago.

Did Contra Costa law firms reach their 2011 goal of collecting $100,000 and 10,000 pounds of food? The tallying begins...

Emily Newton of Archer Norris with her mom

Wine Auction Item

Karin Wiborn, Archer Norris Executive Director; Tim Sweeney of One Risk Group, and Praggay Chaturvedi of Archer Norris

Walkers in front of the Archer Norris Walnut Creek office

Read more about 2011 Food from the Bar activities:

- 2011 Res Ipsa Jokuitor – Comedy Night Review[105]
- 2011 Food from the Bar Press Release[106]

Tea Party. Discuss.

Wednesday, June 1, 2011

The Tea Party, although they would never so admit, is an incredibly racist organization. They want us to return to an America of yesteryear. Which America would that be? Perhaps we should re-intern the Japanese, or "separate but equal" was a great policy. Maybe we can have return to the Civil Rights movement and have attack dogs brought out to deal with African Americans in the south. And, let's not forget lynching. I mean, do we really need to discuss the Tea Party?

Algera M. Tucker, Tucker Family Law Practice, P. C.

---

[105] http://cclawyer.cccba.org/2011/05/2011-food-from-the-bar-comedy-night-kick-off/

[106] http://www.cccba.org/attorney/news/press-20110420.php

A proper British tea party at a reasonable price is exceptionally difficult to find in the Bay Area. Almost all the places with which I am acquainted are overpriced or not very good, or both. The only place I can recommend is the Bloomsbury Tea Room in Capitola. Of course, the best way to enjoy a tea party is to travel to England. I am especially fond of the "cream teas" (scones and clotted cream served with tea) found in Devonshire and Cornwall in southwest England.

David Roth, REAL ESTATE LAW OFFICES OF DAVID L. ROTH

Who'd want to?

Merritt L. Weisinger, CFLS – Walnut Creek Family Law Center, Inc.

It's great and it's about time. Neither of the "mainstream" political parties, and very few media outlets are willing to address and solve the serious issues facing America–out of control deficit, high taxes, too many hand-out programs–The Tea Party movement, though certainly not perfect, at least keeps its focus on the relevant issues.

Patrick R. Anderson, Construction Law Attorney

A bunch of loud obnoxious people who think if they scream loud enough and stomp their feet, they'll get everything they want. In my house, that's known as being a teenager.

Jordan J. "Jody" Yudien, Yudien Law Firm

"I prefer to serve a wide variety of teas from around the world at my tea parties. My favorites are Earl Grey, and my own blend of Rooibos and Peppermint."

Gary Vadim Dubrovsky, **Dubrovsky Law**

Quotes: Tax quotes selected by our guest editor

Wednesday, June 1, 2011

- **Ronald Reagan:** "A taxpayer is someone who works for the federal government but who doesn't have to take a civil services examination."
- **Revenue Auditor:** "The trick is to stop thinking of it as 'your' money."
- **George Bernard Shaw:** "The Government that robs Peter to pay Paul can always depend upon the support of Paul."
- **Adam Smith:** "There is no art which one government sooner learns from another than that of draining money from the pockets of the people."
- **Dave Barry** (US columnist): "Your federal government needs your money so that it can perform vital services for you that you would not think up yourself in a million years."

June Classifieds

Wednesday, June 1, 2011

Pedder Law Firm, Lafayette. Office Space Available. Brand new/ updated creekside office space for rent. Includes large window view, library, free parking, reception, referrals, etc.

Please call Janelle at (925) 283-6816 for more details or to view.

Law office near downtown Pleasanton Office in suite with 2 other attorneys. Office only or with a secretarial space. Office is on 2d floor, but there is an elevator. There is also a shared library conference room. Office only $450, office with secretarial space $500.

Contact: Jim Tomcik 925-462-0665 jrtatty@sbcglobal.net[107]

[107] mailto:jrtatty@sbcglobal.net

Probate Paralegal to Attorneys Joanne C. McCarthy. 2204 Concord Blvd. Concord, CA 94520. Call 925.689.9244.

Conference Rooms for Rent Conference rooms for rent at the Contra Costa County Bar Association:

- Standard Conference Room, with small adjacent waiting area and exit, seats 10-12: $150/ full day, $75/ half day
- Full Mobile Room seats 20-30: $200/ full day, $100/ half day
- Subdivided Mobile Room seats 10: $75/ full day, $40/ half day
- Package Deal – Both Rooms: $250/ full day, $150/ half day
- Hourly Rate $20

For more information, call Theresa Hurley at 925.370.2548