

# Taxation Law



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## President's Message

by Robert V. Boeshaar

The WSBA Tax Section had a busy and productive year. A couple of highlights are that the Estate & Gift Tax Committee was instrumental in the passage of a new law to address the consequences of the temporary repeal of the federal estate and generation-skipping transfer taxes with respect to estates and taxable transfers occurring after December 31, 2009, and before January 1, 2011. Also, the new Pro Bono Committee has been active in providing services for low-income taxpayers who otherwise could not afford legal assistance.

The Tax Section hosted a number of events and CLEs this past year. The International Tax Committee hosted a number of brown bag lunch sessions on topics such as corporate expatriations and inversions. The Transactional Tax Committee hosted meetings in which they discussed case law concerning limited liability companies and recent changes to the net operating loss rules. The IRS Liaison Committee also hosted a reception at Lane Powell PC for Tax Court Judge Diane L. Kroupa during the trial session of the United States Tax Court in Seattle in February. In addition, the Tax Section again hosted the Tax Toolbox on business law in December.

Our annual WSBA Tax Section luncheon and election of officers will be held

this year at the Columbia Tower Club on Monday, June 7, 2010. The Tax Section's Nominating Committee is pleased to recommend the following slate of officers for members' consideration at the annual meeting:

**President: Benjamin Porter,**  
Porter, Kohli & LeMaster, P.S.

**Vice President/President Elect:**  
**Paige Davis,** Lane Powell PC

**Secretary: Darek Jarski,**  
LeSourd & Patten, P.S.

**Treasurer: Cori Flanders-Palmer,**  
Chicoine & Hallett

The Tax Section is also very pleased to be hosting Professor Martin J. McMahon as the keynote speaker at our annual luncheon on June 7. Professor McMahon is the Stephen C. O'Connell Professor of Law at the University of Florida Levin College of Law, Graduate Tax Program. Mr. McMahon is a prolific writer and is a frequent speaker for the American Bar Association. He will be speaking on "Living with (and Dying by?) the Codified Economic Substance Doctrine."

The Tax Section will also award its annual scholarship to a graduate of a Wash-

ington law school who is pursuing an LL.M. in taxation; present grants to support the important work of the low-income taxpayer clinics at Gonzaga University and the University of Washington Schools of Law; and present the Tax Section's Stouder Award to a practicing tax attorney in recognition of their excellence in their tax practice, their commitment to the community, and their high standards of professionalism.

A great way to get involved in the Tax Section is to join one of our many committees, which are listed on our new webpage on the WSBA's website at [www.wsba.org/lawyers/groups/taxsection2009.htm](http://www.wsba.org/lawyers/groups/taxsection2009.htm). Committee chairs are usually chosen from the most active committee members, and the incoming Treasurer of the Tax Council is usually selected from among those who have served as a committee chair for three years.

I have thoroughly enjoyed the privilege of serving the Tax Section and its members during my tenure as President. If you have any questions or suggestions about the Tax Section, please feel free to contact me at (206) 220-5951 or [robert.v.boeshaar@irs.counsel.treas.gov](mailto:robert.v.boeshaar@irs.counsel.treas.gov). You can also contact the incoming president, Ben Porter, at (206) 624-8890 or [bporter@porterkohli.com](mailto:bporter@porterkohli.com).

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# Codification of the Economic Substance Doctrine Offers Clarity and Questions

By Jeff Liang, Lane Powell P.C.

On March 30, 2010, the President signed into law the Health Care and Education Reconciliation Act of 2010 (the “Act”), which includes a provision to codify the Economic Substance Doctrine (“ESD”).<sup>1</sup> The Act adds section 7701(o) to the Internal Revenue Code of 1986, as amended<sup>2</sup> and imposes a strict liability penalty for a violation of section 7701(o). Codification of the ESD is expected to raise \$4.5 billion through 2019 and is effective for transactions which are entered into after March 30, 2010.

Section 7701(o) could affect common business transitions if the ESD is considered relevant to those transactions. In addition, a strict liability penalty of twenty or forty percent will affect tax planning for transactions that may be subject to section 7701(o). This article summarizes the provisions in the Act with respect to codification of the ESD, and highlights areas where the Department of Treasury (“Treasury”) or the Internal Revenue Service (“IRS”) could issue additional guidance.

## I. The Economic Substance Doctrine

The ESD is a judicial doctrine denying anticipated tax benefits from a transaction if the transaction does not change the taxpayer’s economic position other than providing a purported reduction in federal income tax.<sup>3</sup> Before the Act, courts did not uniformly apply the ESD. When determining whether a transaction was respected under the ESD, courts applied one of three approaches: a) the conjunctive test; b) the disjunctive test; or c) the unitary approach.

Under the conjunctive test, courts required a taxpayer to establish the objective economic substance (i.e., expected profit potential) and subjective business purpose (i.e., regulatory or business considerations) of a transaction to be respected under the ESD.<sup>4</sup> Alternatively, courts applying the disjunctive test held that either objective economic substance or subjective business purpose would be sufficient for the court to respect the transaction under the ESD.<sup>5</sup> Courts following the unitary approach

treated objective economic substance and subjective business purpose as factors to consider when determining whether a transaction had economic effect other than the creation of federal income tax benefits.<sup>6</sup>

Courts also lacked uniformity with regard to the types of non-federal income tax benefits a taxpayer must establish to satisfy the objective economic substance and subjective business purpose prongs of the ESD. Prior to the Act, courts denied federal tax benefits for transactions under the ESD when the transactions did not produce the intended business benefit, lacked a profit potential, or the expected profit potential was insignificant compared to the federal tax benefits.<sup>7</sup>

To provide uniform application of the ESD, section 7701(o) defines “economic substance doctrine” to mean the common law doctrine under which tax benefits under subtitle A (i.e., federal income taxes) are not allowed if the transaction does not have economic substance or lacks a business purpose.<sup>8</sup> In addition, section 7701(o) requires the application of the conjunctive test and provides rules to evaluate a transaction’s economic substance and substantial non-federal income tax purpose.

## II. Conjunctive Test

Section 7701(o) applies the conjunctive test when determining whether a transaction should be respected under the ESD. Under section 7701(o)(1), a transaction will be treated as having economic substance if: (i) it results in a meaningful change in the taxpayer’s economic position without regard to federal income tax effects; and (ii) it also has a substantial non-federal income tax purpose.

### A. Meaningful Change in Taxpayer’s Economic Position

Section 7701(o) does not provide guidance on the type of change courts will consider to be “meaningful.” Cases decided prior to the Act help clarify the definition of “meaningful.” Courts generally hold that objective economic substance requires

a net economic effect on the taxpayer’s economic position before and after the transaction.<sup>9</sup>

In *ACM Partnership*, a partnership acquired property and sold it in exchange for a large fixed payment plus small contingent payments. The partnership agreement allocated gain in the year of the sale to a foreign partner, while the losses for later years would be allocated to a U.S. partner, who could use the losses to offset taxable gains from the sale of the property. The transaction was designed to accelerate gain for the foreign partner and provide through the partnership agreement a distributive share of most of the losses to the U.S. partner in later tax years. The court held that the transactions lacked economic substance because they did not have a net effect on the partnership’s financial position.<sup>10</sup>

Courts comparing the taxpayer’s net economic effect have evaluated the economic benefits in the form of profit from the choice of an entity, profit from the incorporation of entity, and other economic benefits not specifically translated into profit.<sup>11</sup> The Treasury or IRS may issue guidance based on decided cases to determine when a transaction results in a meaningful change to a taxpayer’s economic position without regard to federal income tax benefits.

### B. Substantial Non-Federal Income Tax Purpose

The IRS could also issue guidance to determine when a non-federal income tax purpose is considered substantial under section 7701(o)(1)(B). Courts generally looked at the taxpayer’s subjective intent for engaging in a transaction, such as business and regulatory considerations.<sup>12</sup> In addition, courts weighed the following factors when making the subjective business purpose determination:

The presence or absence of arm’s length price negotiations;

The relationship between the asset’s selling price and its fair market value;

- The structure of the financing;
- The degree of adherence to contractual terms;
- The reasonableness of the income and residual value projections; and
- The insertion of other entities.<sup>13</sup>

Additional guidance should determine the type of non-federal income tax purpose that will satisfy section 7701(o) and how to evaluate if it has a substantial purpose, apart from federal income tax benefits.

### III. The Profit Potential Test

Section 7701(o) does not require a taxpayer to provide evidence of a transaction's pretax profit potential compared to the expected net tax benefits (also referred to as the "Profit Potential Test"). However, taxpayers using the Profit Potential Test must show that the present value of the reasonably expected pretax profit from the transaction is substantial in relation to the present value of the expected net tax benefits.<sup>14</sup>

In addition, the Profit Potential Test requires fees and transaction expenses (e.g., attorney's fees, banking fees, etc.) to be taken into account when computing the reasonably expected pretax profit.<sup>15</sup> Treasury or the IRS will be required to issue regulations regarding the treatment of foreign taxes as expenses in determining pretax profit.<sup>16</sup> Additional guidance could address the discount rate used to determine the present value of expected pretax profit and expected net tax benefits, and list the types of fees and transaction expenses used to determine reasonably expected pretax profit.

Treasury or the IRS could also issue guidance to determine how much expected pretax profit is needed for it to be substantial in relation to the present value of the expected net tax benefits.<sup>17</sup> In *Sheldon*, the Tax Court held the taxpayer's transactions lacked economic substance because there was minimal expected profit.<sup>18</sup> The taxpayer entered into a series of transactions involving the sale and repurchase of Treasury Bills (also referred to as "repo transactions"). The initial repo

transaction expected to generate a return of approximately 10.21%. A second offsetting repo transaction was based on a loan bearing interest at approximately 10.5%. The transaction produced profits to the taxpayer of \$18,000.

The taxpayer argued that any profit, even minimal, should suffice to show that the transaction had profit potential.<sup>19</sup> The Tax Court held that a minimal expected gain will not suffice.<sup>20</sup> Further, the Tax Court found that insignificant potential profit should be compared with the expected tax benefits when determining the validity of the transaction under the ESD. The Tax Court indicated that the losses on the related transactions absorbed the nominal profit the transactions generated. Thus, a transaction with profits of approximately \$18,000 would be nominal when compared to interest deductions of more than \$5,000,000 that would offset ordinary income.<sup>21</sup>

Additional guidance could clarify the mechanics of the Profit Potential Test and determine how taxpayers should evaluate the present value of expected pretax benefits to the present value of expected net tax benefits.

### IV. Non-federal Income Tax Effects and Accounting Benefits

Section 7701(o) contains additional rules applicable to the conjunctive test. Any state or local income tax effect which is related to a federal income tax effect is treated in the same manner as a federal income tax effect.<sup>22</sup> Thus, a state or local income tax effect related to a federal tax effect may not be used as evidence of a meaningful change in a taxpayer's economic position or as a substantial non-federal income tax purpose for entering into a transaction subject to section 7701(o).<sup>23</sup>

If the origin of a financial accounting benefit is a reduction in federal income tax, then the financial accounting benefit may not be taken into account when testing for whether a transaction has substantial non-federal income tax effects.<sup>24</sup> In *American Elec. Power, Inc.*, the court held that the use of a financial accounting benefit based on cash flows generated from a transaction

was irrelevant to the subjective business purpose prong.<sup>25</sup>

The taxpayer in *American Elec. Power, Inc.* purchased corporate owned life insurance ("COLI") and used loans to pay the premiums for the first three years, and dividends and partial withdrawals to pay premiums for the subsequent four years. The transactions resulted in a positive cash flow and earnings on an after-tax basis for every year of the plan. For purposes of the subjective business prong, the court held that the intended use of cash flows to defray expenses was not respected under the ESD.<sup>26</sup>

### V. Definition of a Transaction

Treasury or the IRS could also issue guidance determining the extent section 7701(o) applies to a series of transactions. Under section 7701(o)(5)(D), the term "transaction" is defined as including a series of transactions. However, there is ambiguity as to whether section 7701(o) applies to an integrated transaction consisting of many parts or an isolated part of a series of transactions providing federal income tax benefits.

The IRS indicated that it will evaluate on a case-by-case basis whether a series of transactions should be integrated as whole.<sup>27</sup> However, the IRS replaced Notice 98-5 with Notice 2004-19 and did not indicate that a series of transactions would be evaluated on a case-by-case basis.<sup>28</sup> Courts have varied on applying the integrated and bifurcated approaches.<sup>29</sup> Some courts applied an integrated approach under the ESD to evaluate the entire series of a transaction. Other courts applied a bifurcated approach to examine each component of a larger transaction.

If courts apply the bifurcated approach, then section 7701(o) will have a narrow application to a greater number of transactions because the focus will be on an isolated part of a series of transactions. Alternatively, the integrated approach could potentially limit the extent section 7701(o) applies to transactions because the entire transaction would be evaluated under the conjunctive test.

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## VI. Strict Liability Penalty

The Act adds section 6662(b)(6) to provide a twenty percent (20%) accuracy-related penalty for underpayments of tax resulting from transactions violating section 7701(o) or failing to meet the requirements of a similar rule of law.<sup>30</sup> The penalty is increased to forty percent (40%) if the relevant facts of the transactions are not adequately disclosed in a federal income tax return or a statement attached to a federal income tax return.<sup>31</sup> The Act also makes the penalty under section 6662(b)(6) a strict liability penalty, since it may not be avoided under the reasonable cause exception.

Guidance will be needed to address whether the penalty under section 6662(b)(6) applies at the time the court finds a transaction lacks economic substance under section 7701(o) or if the IRS can assess the penalty during an audit of a taxpayer. In addition, Treasury or the IRS could issue guidance permitting taxpayers to challenge assessment of the penalty, but taxpayers should consider the effect of the strict liability penalty on transactions where section 7701(o) is relevant.

## VII. Contemplated Tax Benefits and Excluded Transactions

The Joint Tax Committee's ("JCT") legislative explanation to the Act indicates that section 7701(o) is not intended to apply to tax benefits of a transaction if the realization of tax benefits is consistent with the congressional purpose or plan that Congress intended in the statute.<sup>32</sup> For example, section 7701(o) is not intended to apply to transactions where a taxpayer makes an investment or undertakes an activity related to the low-income housing tax credit (section 42), the production tax credit (section 45), the new markets tax credit (section 45D), the rehabilitation tax credit (section 47), or the energy tax credit (section 48).<sup>33</sup>

The JCT's explanation also includes a non-exclusive list of transactions that are not invalidated by application of section 7701(o). Specifically, these include the choice between debt and equity financing, the choice between using a domestic entity or a foreign entity, corporate organizations

or reorganizations, and related-party transactions that satisfy section 482.

Treasury or the IRS could also issue regulations or guidance explaining when contemplated tax benefits from a transaction fall outside the scope of section 7701(o), or create a list of specific transactions that are not invalidated by section 7701(o).

## VIII. Application of Section 7701(o)

Section 7701(o) could affect transactions that courts in the past have respected under the ESD.<sup>34</sup> In *United Parcel Service of Amer., Inc.*, the court held the transactions United Parcel Service ("UPS") entered into were respected under the ESD.<sup>35</sup> UPS engaged in transactions to avoid paying federal income taxes on premiums it received to insure packages. UPS provided insurance to customers on lost or damaged parcels. Customers paid \$0.25 per \$100 in declared value (the "Excess Value Charge"). UPS turned a large profit on the Excess Value Charge since it collected more than it paid on insurance claims. To avoid paying taxes on the Excess Value Charge, UPS restructured the insurance program by entering into the following transactions:

UPS formed an offshore subsidiary and distributed shares of the subsidiary as a taxable dividend to UPS shareholders;

UPS purchased an insurance policy naming UPS customers as beneficiaries;

The insurer assumed the risk of damage or loss to the parcels;

UPS administered the insurance program and paid premiums for the policy that consisted of the Excess Value Charge; and

The insurer entered into a reinsurance agreement with the offshore subsidiary where the subsidiary assumed the risk of damage or loss to the parcels in exchange for premiums equal to the Excess Value Charge less commissions, fees, and excise taxes.

In effect, UPS transferred the stream of income generated by the Excess Value Charge to the offshore subsidiary while still maintaining control and administration of

the insurance program. UPS did not report revenue from the Excess Value Charge and deducted the fees and commissions the insurer charged. In addition, no U.S. federal tax was collected on the Excess Value Charge until the offshore subsidiary distributed the profit as a dividend to its owners, the UPS shareholders.

The court respected the transactions under the ESD. Under the objective economic substance prong, the court found that there were genuine obligations enforceable by an unrelated party. There was a real insurance policy that gave the insurer the right to receive the Excess Value Charge in exchange for assuming the liability for damaged or lost parcels. Also, UPS lost a stream of income that it could have used for other purposes such as capital improvements, salaries, dividends, or investment. The court also held that UPS had a subjective business purpose to engage in the transactions because the transactions were bona fide, profit-seeking business activities.

If section 7701(o) had been in effect at the time UPS entered into the transactions, it is unclear whether the court would have reached the same conclusions. Under section 7701(o), the court would have to resolve the following issues:

Whether the integrated or bifurcated approach applies to UPS's transactions.

Whether it is relevant for purposes of the conjunctive test that the transactions UPS entered into are consistent with commercial practices.<sup>36</sup>

Whether losing a stream of income from the Excess Value Charge resulted in a meaningful change to UPS's economic position without regard to federal income tax benefits.

Whether engaging in a bona fide, profit-making business activity, such as forming an offshore entity to transfer the stream of income, is a substantial non-federal income tax purpose.

## IX. Conclusion

The impact of section 7701(o) on tax planning will develop over many years. Any guidance issued to clarify the meaning of terms such as "meaningful change," "substantial," and "significant" might expand  
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The Taxation Law Section newsletter invites its readers to submit articles, items of interest, and announcements for publication in upcoming issues. Share your expertise, your knowledge, and your insights for the benefit of your colleagues.

So you have an idea you would like to flesh out, or a finished article ready to go?

Please contact the Newsletter Editor, Jennifer Gellner, by sending an e-mail to [jennifer@gellnertaxlaw.com](mailto:jennifer@gellnertaxlaw.com).

We would like to read what you have to say.

## CLE Committee Report

by Amber Quintal

Mark your calendars and plan to join us on Friday, December 17, 2010 for an update on federal and state estate tax! Our distinguished speakers will talk about recent changes to Washington's estate tax and the current state of the federal estate and generation-skipping transfer tax. Don't miss it!

The CLE Committee is recruiting new Committee members and CLE speakers. If you'd like to get involved or have an idea for a CLE, please contact Amber Quintal at [aquintal@omwlaw.com](mailto:aquintal@omwlaw.com).

## Estate and Gift Tax Committee Report

by Alan Macpherson

We have met about every six weeks at the offices of Gordon Thomas Honeywell in Seattle. Our last meeting of the school-like year is tentatively set for June 11; contact our Chair Alan Macpherson (info below) to confirm.

We are working on the following issues:

- State estate tax apportionment. We have approved proposed legislation drafted by Ben Porter and his subcommittee to remove estate tax allocation from limited amounts of specific gifts of tangible personal property and cash. We will try to work this proposal through the Bar legislative process.
- SSB 6831. A group of practitioners succeeded in getting state legislation passed this year, on tax-formula Wills and Living Trusts. In short, the presumption is that any reference to the exempt amount for federal estate tax purposes, intends to incorporate the law as of December 31, 2009. Luke Thomas has written an article for the RPPT newsletter on this.
- SB 6352. A subcommittee of ours, led by Claudia Gowan, was unable this year to get changes to RCW 6.15 passed in the legislature. We are revisiting this for the coming year.
- Contribution of retirement plans to estate tax payment. Watson Blair and Gair Petrie are reviewing the law on this.
- State estate tax return where no federal return. A subcommittee led by Tom Keller has worked with the Department of Revenue on improvements to the State form.
- CLE December 17, 2010. Our Committee will be doing a WSBA seminar on this date. Kate Szurek and Amber Quintal are leading the effort.

Want to join, or have questions? Please e-mail Committee Chair Alan Macpherson: [amacpherson@gth-law.com](mailto:amacpherson@gth-law.com). Thanks.

### Codification of the Economic Substance Doctrine Offers Clarity and Questions *continued from previous page*

or narrow the reach of section 7701(o). Courts could rely on cases decided prior to the Act to provide clarity to taxpayers entering into transactions where section 7701(o) is relevant.

- 1 Section 1409 of the Act. see Joint Committee on Taxation ("JCT") Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as Amended, in Combination with the "Patient Protection and Affordable Health Care Act."
- 2 Unless otherwise provided, all section references are to the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.
- 3 *ACM Partnership v. Comr.*, 73 T.C. Memo 1997-115, at 107-08 (1997).
- 4 *Pasternack v. Comr.*, 990 F.2d 893, 898 (6th Cir. 1993).
- 5 *Rice's Toyota World v. Comr.*, 752 F.2d 89, 91-92 (4th Cir. 1985).
- 6 *Zmuda v. Comr.*, 731 F.2d 1417, 1420 (9th Cir. 1984); *James v. Commissioner*, 899 F.2d 905, 908 (10th Cir. 1995).
- 7 *Coltec Industries, Inc. v. U.S.*, 62 Fed. Cl. 716 (2004) (transaction to create a subsidiary did not afford liability protection from veil-piercing claims by third parties); *Goldstein v. Comr.*, 364 F.2d 734, 740 (2d Cir. 1966) (transactions were entered into without any realistic expectation of economic profit and solely to secure a large interest deduction); *Sheldon v. Comr.*, 94 T.C. 738, 768 (1990) (the potential for gain is nominal and insignificant when compared to the claimed tax deductions).
- 8 Section 7701(o)(5)(A).
- 9 *ACM Partnership*, 157 F.3d at 249.
- 10 *Id.*
- 11 *Northern Indiana Public Serv. Comp. v. Comr.*, 105 T.C. 341, 348 (1995) (corporation engaged in substantive business is not disregarded for federal tax purposes); *TIFD III-E Inc. v. U.S.*, 342 F. Supp.2d 94 (D. Conn. 2004) (taxpayer claimed that it was motivated to raise capital and to demonstrate to investors, rating agencies, and its senior management, that it could raise capital).
- 12 *United Parcel Service of Amer., Inc. v. Comr.*, 254 F.3d 1014, 1019 (11th Cir. 2001) (a transaction has a business purpose

when a going concern figures in a bona fide, profit-seeking business); *Packard v. Comr.*, 85 T.C. 397, 417 (1985) (taxpayers subjective business purpose was based on an intent to invest funds from the sale of their business).

- 13 *Andantech L.L.C. v. Comr.*, T.C. Memo 2002-97, 37 (2002).
- 14 Section 7701(o)(2)(A).
- 15 Section 7701(o)(2)(B).
- 16 *Id.*
- 17 *Sheldon v. Comr.*, 94 T.C. 738, 768 (1990).
- 18 *Id.*
- 19 *Id.* at 767.
- 20 *Id.* at 769.
- 21 *Id.* at 768.
- 22 Section 7701(o)(3).
- 23 Section 7701(o) is silent as the treatment of federal estate and gift taxes or foreign taxes under the conjunctive test. Treasury or the IRS could issue guidance indicating whether these taxes would constitute a benefit under the conjunctive test.
- 24 Section 7701(o)(4); see *American Elec. Power, Inc. v. U.S.*, 136 F.Supp.2d 762, 791-92 (S.D. Ohio 2001).
- 25 *American Elec. Power, Inc.*, 136 F.Supp.2d at 791-92.
- 26 *Id.*
- 27 IRS Notice 98-5, 1998-1 C.B. 334.
- 28 IRS Notice 2004-19, 2004-1 C.B. 606.
- 29 *Coltec Industries, Inc.*, 454 F.3d at 1356 (the transaction to be analyzed for purposes of the ESD is the one that gave rise to the alleged tax benefit); *Salina Partnership, v. Comr.*, T.C. Memo 2000-352, \*13 (2000) (the economic substance of a transaction turns on a review of the entire transaction, rather than portions of it).
- 30 Footnote 359 to the JCT's Technical Explanation to the Act indicates that the penalty is intended to apply to a transaction where tax benefits are disallowed as a result of the application of similar factors and analysis required under the ESD, even if a different term is used to describe the doctrine.
- 31 Section 6662(b)(6)(i).
- 32 See Footnote 344 to JCT Technical Explanation to the Act.
- 33 *Id.*
- 34 See *United Parcel Service of Amer., Inc.*, 254 F.3d at 1014.
- 35 *Id.* at 1020.
- 36 See *ACM Partnership v. Comr.*, 73 T.C.M. 2189 (1987).

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## Pro Bono Committee Report

by John Clynch

The Federal Tax Clinic just conducted the first of two CLE training sessions for Pro Bono Attorneys. John Ridge, Partner at Stoel Rives, hosted the CLE. Speakers included Professor Scott Schumacher, Director of the Federal Tax Clinic, Cory Flanders, Associate at Chicoine and Hallett, and Darek Jarski, Associate at LeSourd and Patten. The session covered an overview of the IRS, Audit Reconsideration, Automatic Substitute for Return, Automatic Underreporter and Offer in Compromise.

The April 23 and May 7 sessions, held at Stoel Rives, were for current volunteers at the Federal Tax Clinic. The May 7 session covered Dependency, Earned Income Tax Credit, Installment Agreements, Currently Not Collectible, Innocent Spouse, Injured Spouse, Bankruptcy, Penalties and Penalty Abatement. Speakers were Robert Kane, Partner at LeSourd and Patten, Adria Vondra, Partner at Ortiz and Vondra, and John Clynch, Staff Attorney at the Federal Tax Clinic.

Future trainings will welcome those who would like to volunteer. The CLEs are free, and those attending will earn 2 credits for attending plus up to 4 additional credits for pro bono work performed after attending the training.

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## Scholarship Committee Report

by Cory L. Johnson and Cori Flanders

We are currently seeking donations for the Tax Section's Annual Scholarship, which is awarded to a graduating law student with plans to attend a tax LL.M. program. The Tax Section is hoping to raise \$5,000 for the scholarship this year, and if additional funds are raised the Section will contribute to the low-income taxpayer clinics at the University of Washington and Gonzaga Law Schools. We have raised \$2,250 to date, and we ask our members to consider contributing to help us reach our goal. Any

contribution is appreciated, and contributors will be recognized at the Tax Section's annual luncheon and on the Tax Section's website. Contributions can be mailed to the WSBA, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101, Attn: Tax Section Scholarship.

The Tax Section Scholarship has been successful in assisting students with the financial burden of obtaining an LL.M. degree. Many recipients have become valuable members of the Tax Section—one recipient served as President. With the rising costs of an LL.M. education, and the increased need of our low-income taxpayer community, your contribution is extremely important.

The scholarship application deadline has been extended to May 14, 2010. Scholarship application information is available on the WSBA Tax Section website.

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## Transactional Tax Committee Report

by Chris Brown

The Transactional Tax Committee has held a number of meetings in the past year to focus on recent and pending tax law changes. Thus, in August 2009, we discussed the recent taxpayer victory in *Thompson v. U.S.*, 87 Fed. Cl. 728 (2009), which held that an LLC member was not subject to the restrictive passive activity loss rules in the same manner as a limited partner. This victory and others like it may pave the way for LLC members to claim more favorable treatment in the area of flow-through losses. In October 2009, we discussed Washington state tax issues in business transactions. In December, we focused on the interesting tax issues that arise when private equity and venture capital funds make direct investments in LLC operating companies. Most recently, in February, we reviewed the new rules governing net operating loss carrybacks and debated the pros and cons of claiming the new 4-year and 5-year carryback loss benefit.

In the coming months, we will continue to review federal and state tax issues that are relevant to business transactions. If

you have any ideas on topics, or would like to help to present an issue, please contact Chris Brown at Summit Law Group, PLLC. If you are a WSBA Tax Section member, send an e-mail to Chris Brown to ensure that you are included in future e-mail announcements. Also look for upcoming meeting announcements on the WSBA website, listed under the "Transactional Tax Committee" of the Tax Section.

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## Website Committee Report

by Adam Blake

The Website Committee is pleased to report that the transition to the new website and list serve, maintained by the WSBA, has been successful. However, the www.wsba.org website will be going through a complete redesign and build over the coming years. In order to ensure the success of this project, the WSBA brought in representatives from each section, including Taxation, to provide feedback and ideas on the project. As a result, in the next year, the Taxation Section website will again be undergoing a makeover, and should be better set up to service the needs of our members. All throughout this transition, though, the Taxation Section website will still be accessible by clicking on the "Taxation Law" link on the WSBA Practice Sections webpage ([www.wsba.org/lawyers/groups/sections.htm](http://www.wsba.org/lawyers/groups/sections.htm)).

If you have any questions about the new website or the section list serve, or if you would like to be involved in the Website Committee, please contact Adam Blake at (206) 829-2500 or [ajblake@merriamandassociates.com](mailto:ajblake@merriamandassociates.com).

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## Young Lawyers Committee Report

by Kevin Sullivan

On February 25, 2010, the Young Lawyers Committee organized a happy hour social event in Seattle. The event was attended by the faithful followers of the young lawyers, as well as a few individuals newer to the Bar and the Tax Section. These events provide a wonderful opportunity to meet your fellow tax practitioners in an informal setting and discuss issues related (or unrelated) to the practice. The young lawyers intend to continue organizing these social events as

often as its members would like to get together. Since the young lawyers was formed a year ago, the Tax Section has seen a large increase in membership and participation by attorneys newer to the practice. Thank you to all whose efforts have made this possible. Lastly, preparations for the Young Lawyers annual event this fall are underway. More details about this event will be made available at a later date.

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