President’s Message

by Jennifer A. Gellner

It is a new fiscal year for the Tax Section, and we recently had our first meeting with the new officers and committee chairs. We have a great group of attorneys on the Tax Council, and each of our committee chairs has excellent plans for our 2006/2007 year. The committee chairs have provided reports for this newsletter so our members can see the activities the different groups sponsor. We encourage our members to become involved in the committees and various activities.

This year, I would like to focus on membership benefits and renewal. The Tax Council is committed to bringing its members the following benefits this year:

• An updated website with working lists;
• A quarterly newsletter;
• Monthly or bimonthly committee meetings;
• Two or three quality CLE opportunities;
• Social activities, including the Tax Court Judge Reception in the winter; and
• Our annual tax luncheon in May or June.

One activity the Tax Section has sponsored for numerous years is the taping and showing of the Attorney/CPA Clinics in Eastern Washington. The live Seattle clinics are taped by permission of Richard Wood, and are currently shown at Moss Adams in Spokane. Additional information available in this newsletter.

In addition to the Attorney/CPA Clinics in Eastern Washington, we encourage attorneys from the other side of the state to participate in the committees and on the Tax Council. This is the first year in many years that we have not had an attorney from Eastern Washington coming to our bimonthly meetings. We are actively seeking attorneys from other parts of the state to participate. Please contact me directly if you are interested.

The section membership renewal forms were mailed to all WSBA attorneys at the beginning of October. Please renew your Tax Section membership as soon as possible to assist the section in its financial planning and activities. We have also included a renewal form in this newsletter for your convenience if you do not have your Bar renewal form.

Finally, this newsletter is for the benefit of our members, and I would appreciate any suggestions, feedback, ideas, articles, etc. Please contact me at jgellner@mhfmlaw.com or 206-621-9480 ext. 19. I am looking forward to a wonderful year of serving our members.

Handling Tax Shelter Audits

by John Colvin

While “tax shelters” have probably existed as long as there was a tax code, two developments have recently combined to bring cachet back to a term that, for many long time practitioners, conjures up the nonexistent cattle, fixed commodities trading, and overvalued stamps of the late 1970s and early 1980s:

First, during the 1990s, attorneys and accountants developed and marketed a wide array of arrangements that purportedly resulted in significant tax savings for their clients. Many of these arrangements were promoted by groups that the IRS had long believed to be pillars of tax compliance, i.e., large accounting firms and prominent law firms. The anecdotal evidence about how the culture at some of these institutions had changed in pursuit of the large fees associated with tax shelter promotion is overwhelming. The bulk of the tax products offered by these groups were marketed to corporations and individuals having significant taxable income, usually in the millions of dollars.

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Second, the internet exploded. The internet gave promoters the capability to reach large and fairly well-targeted audiences, at the same time as IRS enforcement efforts slowed. Tax protestors as well as the promoters of blunt-edged tax avoidance schemes, often involving the use of offshore bank accounts, were able to reach a far broader audience than ever before.

At the federal level, the potential tax loss from abusive tax shelters is estimated to be $129 billion. Tax Shelters: Services Provided by External Auditors (GAO-05-171, dated February 2005).

While the new tax shelters initially gained traction, the IRS and the Tax Division of the Department of Justice have reacted to each of these developments, often in ways that are creative and surprising, to make what initially was a low-risk enterprise into one fraught with peril, including the possibility of criminal prosecution. This outline discusses recent significant developments in the investigation of tax shelters and the special concerns that these developments raise for practitioners.

A. The Current “War on Tax Shelters”

The first of the technical tax shelters to come to the attention of the IRS involved large corporate transactions, the promoters of which were Big Four accounting firms and investment banks. These tax reduction techniques were often created in partnership form. For example, Merrill Lynch devised a “contingent installment sale,” or CINS transaction, which employed the discontinuity between the installment sale provisions and the partnership allocation rules to allocate income to a foreign partner in year one, then redeem out the foreign partner and allocate losses to the domestic partner in subsequent years. The IRS identified this transaction in Notice 90-56, 1990-2 C.B. 344.

The CINS transactions were sold to large corporations, like Colgate Palmolive, many of which subsequently litigated the merits of the transaction in the courts. See ACM Partnership v. Commissioner, T.C. Memo. 1997-115, aff’d in part, rev’d in part, 157 F.3d 231 (3d Cir. 1998). (IRS victory but partial reversal on appeal allowed taxpayer to take $6 million in actual economic losses); Boca Investerings Partnership v. United States, 314 F.3d 625 (D.C. Cir. 2003); rev’g 167 F. Supp.2d 298 (D.D.C. 2001); Andantech, LLC v. Commissioner, T.C. Memo. 2002-97, 331 F.3d 972 (D.C. Cir.).

During the 1990s, many other complicated corporate transactions were sold to large corporations. An excellent description of the climate can be found in the Joint Committee on Taxation’s Report on Enron’s tax shelters. Enron was involved in no less than eleven tax shelters, some of which involved fees in the millions of dollars to accounting and law firms. The Enron tax department attempted to become a “profit center,” and members of the department frequently traveled to New York City and Washington, D.C., to fight for tax shelter ideas.

Subsequent to the CINS transactions, in the mid and late 1990s, many other technical tax shelters came to the attention of the government. Often the information was discovered on audit. But sometimes, information about these shelters came from other sources. Sometimes, information was provided in plain brown envelopes to journalists. For example, in 1998, Janet Novak did an exposé regarding a Deloitte & Touche shelter entitled “X-Rated Tax Shelters” in Forbes magazine. On occasion, information came to the attention of Congressional staffers. In late 1999, the Senate Finance Committee queried a PriceWaterhouse Coopers employee/lobbyist on whether PwC authored tax shelter opinions. The PwC representative initially denied that his firm wrote tax shelter opinions, but was confronted with a copy of the BOSS opinion. After the embarrassment, PwC walked away from the BOSS shelter.

While the CINS-type corporate shelter would ordinarily be used only a handful of times, ultimately, the promoters determined that cookie cutter technical shelters could be developed for the wealthy seeking to shelter stock gains, or even ordinary income. The high-end tax shelter industry was brought into the public spotlight in November 2003, when the Senate Permanent Subcommittee on Investigations held two days’ worth of hearings on the industry, looking at tax shelters offered by the Big Four accounting firms (focusing primarily, but not exclusively, on the BLIPS shelter offered by KPMG), and the legal and financial industry that assisted in the creation of the relatively complex financial structures needed to accomplish the shelter’s goals. The hearings may still be viewed on the Subcommittee’s website. While many of the witnesses either defended their roles or apologized for their participation, one lawyer invoked his Fifth Amendment right to avoid self-incrimination.

Substantial internal documents were gathered by the Senate investigators, and a 100-plus page report was issued at the time of the hearings. Subsequently, most of the documents cited in that report were released (amounting to several hundred pages of documents, including many revealing emails), and, in August of 2004, more than 3,000 additional pages were released.

Even with the publicity associated with the Senate Hearings, it was still a surprise for many when, early in 2004, it became public that the U.S. Attorneys Office for the Southern District of New York was investigating KPMG and many of its partners who had been associated with the promotion of the BLIPS shelter. Many clients of the accounting firm and several KPMG partners (and former partners) have been interviewed as part of that investigation. Ultimately, an indictment was issued, naming several former KPMG partners, as well as members of a boutique financial firm that arranged the transactions, and a tax lawyer who gave opinions.

BLIPS were a variant of the “Son of Boss” transaction, listed by the IRS as an abusive transaction in Notice 2000-44. It is therefore perhaps not surprising that other firms that offered the transaction have also fallen under scrutiny. In May of 2004, the Wall Street Journal reported that there was a criminal probe of Ernst & Young, also apparently related to their firm’s offering of Notice 2000-44 transactions.

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It appears likely that similar criminal or quasi-criminal investigations involving high-profile tax specialists involved in the creation of tax shelters will not be uncommon in the future. In April of 2004, Tax Analysts reported that Nancy Jardini, the Chief of IRS Criminal Investigations ("CI"), conveyed that, while CI had historically worked largely with the Small Business/Self Employed Division (SBSE) and that Division’s fraud referral program, it had “really reinvigorated their relationship with the Large and Midsize Business Division (LMSB), particularly in our work in shelters. We’re doing a lot of what will ultimately prove to be high-profile work in tax shelters right now.” Thus, it appears that the KPMG and E&Y investigations will not be isolated incidents, but part of a larger group of tax fraud cases against highly respected tax advisors and their large corporate and individual clients.

B. Regulatory Response – Sunshine and Penalties

By 2000, there was significant anecdotal evidence which suggested that the IRS was not successful at discovering all of the tax shelter activity, certainly not in a timely manner. The IRS began to revise the rules governing when and how information was provided to it about tax shelters, substantially revising the tax shelter disclosure regulations.

1. Disclosure Rules

In 2000, the IRS began to revise the tax shelter disclosure rules, in an effort to better ensure that the agency discovers tax shelters whose undiscovered existence might cost the Treasury billions of dollars.

Between 2000 and 2003, the regulatory guidelines governing when taxpayers are required to disclose participation in certain transactions were revised several times. In March of 2000, the regulatory efforts commenced with the release of the first temporary disclosure regulation, Temp. Reg. § 1.6011-4T under T.D. 8877 (65 FR 11205, T.D. 8877). T.D. 8877 was later amended by T.D. 8896 and 8961 (65 FR 49909, T.D. 8896 and 66 FR 41133, T.D. 8961). In June 2002, a revised draft of the temporary disclosure regulation was issued under T.D. 9000 (67 FR 41324, T.D. 9000). T.D. 9000 was overhauled by T.D. 9017 (67 FR 64799, T.D. 9017) in October 2002. Finally, the final disclosure regulation, Treasury Regulation Section 1.6011-4, was issued in February 2003 under T.D. 9046 (68 FR 10161, T.D. 9046).

The various stages of the temporary disclosure regulation and the final disclosure regulation have different effective dates. For example, although the final disclosure regulation under T.D. 9046 applies in part to tax returns filed after February 28, 2000, the bulk of T.D. 9046 only applies to transactions entered into after January 1, 2003.

The approach taken in the various iterations of the temporary regulations, as well as the final disclosure regulations, is to require disclosure of certain categories of transactions. The categories of transactions subject to disclosure are often referred to as “filters.” If a transaction is subject to disclosure, it is ordinarily required to be reported on a Form 8886. If the applicability of one or more of the various filters is unclear, it is possible to make a protective disclosure. Treas.Reg. § 1.6011-4(f).

a) Listed Transactions

Included in the list of reportable transactions is the category of “listed transactions,” i.e., transactions identified as potentially abusive transactions by the IRS in a public notice. Treas.Reg. § 1.6011-4(b)(2). Generally, a taxpayer is required to disclose participation in a listed transaction.

Taxpayers are also required to disclose participation in transactions that are “substantially similar” to a listed transaction. Treas.Reg. § 1.6011-4(c)(4). The regulation contains two examples that illustrate the Treasury’s chosen a broad reading of the term “substantially similar.” After describing the transactions subject to Notice 2000-44 (Son of Boss), the regulation indicates that not only will transactions involving short sales, futures, derivatives, or other types of offsetting obligation to inflate a basis in a partnership, but also “use of inflated basis in the partnership interest to diminish gains that would otherwise be recognized on the transfer of a partnership asset” will be considered substantially similar. Treas.Reg. § 1.6011-4(c)(4) (Example 1). The second example discusses the so-called “intermediary tax shelter” described in Notice 2001-16. It explains that many transactions involving middlemen will be treated as “substantially similar” to the transaction described in Notice 2001-16, even if the status of the intermediary or the method used to shelter the asset sales from taxation differs from the transaction described in the Notice. Treas.Reg. § 1.6011-4(c)(4) (Example 2).

Disclosure is also required if participation in the listed transaction occurred in a prior year if the statute of limitations is still open with respect to the prior year return. Treas.Reg. § 1.6011-4(e)(2)(i). Under this circumstance, disclosure must be made on the first tax return filed after the date the transaction became a listed transaction. Treas.Reg. § 1.6011-4(e)(2)(i).

b) Confidential Transactions

This filter captures two groups of transactions. First, it encompasses any transaction that is claimed to be proprietary or exclusive. Second, it applies if the taxpayer’s disclosure of the tax structure or tax treatment is limited in any way by an express or implied understanding. It only applies if certain minimum fees are paid to advisors in connection with the transaction ($250,000 for corporations, $50,000 for other taxpayers). § 1.6011-4(b)(3)(ii). The disclosure obligation applies only to the taxpayer who is subject to the conditions of confidentiality. The examples in the regulations consider the case where a partnership and one of its three partners is subject to confidentiality restrictions. Even though the tax benefit claimed by the other two partners on the return relates to the transaction, only the partnership and the subject partner are subject to the reporting requirements. § 1.6011-4(c)(2)(i)(Example 2).

When this filter was first announced, practitioners complained that its scope was too broad and it would bring in innocuous transactions, which are subject to
confidentiality for reasons having nothing to do with federal tax. The confidentiality provisions of the tax shelter disclosure regulations were significantly revised by T.D. 9108, issued on December 30, 2003. The revisions effectively address many of the issues which tax practitioners found problematic. The revisions effectively carve out many everyday transactions that have little or no tax avoidance issues. Transactions that will generally no longer have to run the gamut of the confidentiality filter include:

- Stock, debt and other securities offerings;
- Loan transactions;
- M&A transactions;
- Litigation settlements; and
- Employment agreements

In practice, many if not most, tax advisors have abandoned confidentiality altogether, providing explicitly in governing documents that the tax treatment may be disclosed to third parties.

c) Transactions with Contractual Protections

This filter applies when fees contingent or partially contingent on a taxpayer’s realization of tax benefits are charged, or when the taxpayer is entitled to a refund of fees based on the ultimate consequences of a transaction. § 1.6011-4(b)(4) Interestingly, this only applies when the person charging the contingent fees (or being required to refund money) makes a statement regarding the potential tax benefits of the transaction. § 1.6011-4(b)(4)(ii). There is also an interesting exception, probably designed to protect M&A transactions, that removes from the contractual protection category transactions where one party has the right to terminate the transaction upon the occurrence of an event affecting the taxation of one or more parties to the transaction. § 1.6011-4(b)(4)(iii)(A).

d) Loss Transactions

Because many of the recent technical tax shelters involved the creation or allocation of § 165 losses, this filter is perhaps the widest. Section 1.6011-4(b)(5)(i) of the regulations requires reporting of loss transactions that exceed the following thresholds:

- Corporations: $10 million in one year or $20 million in any combination of years (including partnerships whose only partners are C corporations);
- Individuals, trusts, S corporations, and partnerships with any non-corporate partners: $2 million in one year or $4 million in any combination of years;
- Individuals and trusts (directly or through a flow through): $50,000 in any § 988 foreign currency transactions.

The term “combination of years” is defined to include the year that the taxpayer entered into the transaction and the five succeeding years. § 1.6011-4(b)(5)(ii). The Treasury has exercised its authority in Revenue Procedure 2003-24, 2003-11 I.R.B. 599, and Revenue Procedure 2004-66, 2004-50 IRB 966, and provided by regulation that many transactions are not subject to this filter, including the following:

- A loss from fire, storm, shipwreck, or other casualty, or from theft, as those terms are defined for purposes of § 165(c)(3);
- A loss from a compulsory or involuntary conversion as described in §§ 1231(a)(3)(A)(ii) and 1231(a)(4)(B);
- A loss to which § 475(a) or § 1256(a) applies;
- A loss arising from any mark-to-market treatment of an item under §§ 475(f), 1296(a), 1.446-4(e), 1.988-5(a)(6), or 1.1275-6(d)(2), and any loss from a sale or disposition of an item to which one of the foregoing provisions applied, provided that the taxpayer computes its loss by using a qualifying basis (as defined in section 4.02(2) of this revenue procedure) or a basis resulting from previously marking the item to market, or computes its loss by making appropriate adjustments for previously determined mark-to-market gain or loss;
- A loss arising from a hedging transaction described in § 1221(b), if the taxpayer properly identifies the transaction as a hedging transaction, or from a mixed straddle account under § 1.1092(b)-4T;
- A loss attributable to basis increases under § 860C(d)(1) during the period of the taxpayers ownership;
- A loss attributable to the abandonment of depreciable tangible property that was used by the taxpayer in a trade or business and that has a qualifying basis under section 4.02(2) of this revenue procedure;
- A loss arising from the bulk sale of inventory if the basis of the inventory is determined under § 263A;
- A loss that is equal to, and is determined solely by reference to, a payment of cash by the taxpayer (for example, a cash payment by a guarantor that results in a loss or a cash payment that is treated as a loss from the sale of a capital asset under § 1234A or § 1234B);
- A loss from the sale to a person other than a related party (within the meaning of § 267(b) or § 707(b)) of property described in § 1221(a)(4) in a factoring transaction in the ordinary course of business; or
- A loss arising from the disposition of an asset to the extent that the taxpayer’s basis in the asset is determined under § 338(b).

e) Transactions with Significant Book-Tax Differences

The regulations require the disclosure of transactions by entities which are “reporting entities” for purposes of the federal securities laws and entities with more than $250 million in gross assets (and their affiliates) where gain or loss for book purposes differs from the tax purposes by $10 million. However, on January 6, 2006, in Notice 2002-6, Treasury announced that it was exempting transactions captured by...
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this filter (after the date of the Notice) from the reporting requirement.

f) Transactions with Brief Asset Holding Periods

This filter is triggered where a taxpayer claims a tax credit of $250,000 (including a foreign tax credit) if the underlying asset is held by the taxpayer for a period of 45 days or less. It seems aimed at transactions like Merrill Lynch’s CINS transactions.

g) Penalties for Non-Disclosure.

The JOBS Act of 2004 added new section 6707A to the Code, imposing significant new penalties on taxpayers for failing to disclose a reportable transaction. This new legislation contains many provisions that will affect abusive tax shelter promoters, advisors, and investors. Among the many provisions of this Act, section 811 imposed a new, independent penalty on taxpayers who fail to disclose a reportable transaction, New Code Section 6707A. This new Code Section provides meaningful penalties for noncompliance that were previously lacking in the IRS’ initiative to discourage abusive tax shelters. Congress hoped that the imposition of this penalty would provide an additional incentive for taxpayers to comply with tax shelter disclosure provisions. H.R. Rep. No. 108-548, Part I

The penalties are $10,000 for natural persons, and $50,000 for other taxpayers. If the reportable transaction was a listed transaction, the penalties jump to $100,000 for a natural person and $200,000 for other taxpayers. The authority to rescind the penalty is given to the Commissioner, and the statute explicitly provides that there is to be no judicial review of any adverse decision on rescinding the penalty.

2. Disclosure Initiative in 2002

Aside from the new disclosure regulations, substantial information regarding the promotion of tax shelters was gathered in other ways. In December 2001, the IRS issued Announcement 2002-2, which set forth a disclosure initiative whereby the IRS agreed to waive the accuracy-related penalty for any underpayment of tax attributable to items disclosed by taxpayers within a 120-day period expiring April 23, 2002. The disclosure initiative resulted in excess of 1,600 separate disclosures from approximately 1,200 separate taxpayers, reflecting billions of dollars in taxes. While many taxpayers disclosed because they knew that the promoter of the transaction in which they were involved was under audit and information provided or compelled in that audit was likely to lead the IRS to the taxpayer’s door, there were several taxpayer disclosures that identified transactions the IRS had never previously encountered.

One requirement for participation in the Announcement 2002-2 disclosure initiative was that the taxpayer had to agree to provide information about the promoter and agree to provide marketing materials if requested. The number of promoters identified in the taxpayer responses to this initiative greatly exceeded IRS expectations, resulting in a significant increase in the number of promoter-related investigations. From this perspective, this Disclosure Initiative appears to have been very successful for the IRS.

3. Tax Shelter Registration and List Maintenance

While the tax shelter registration and list maintenance rules and the penalties associated with these provisions are beyond the scope of this outline, suffice to say that the enhanced penalties under the revised section 6707 and 6708 make it unlikely that promoters will resist registering tax shelters or providing lists.

4. Obtaining Information from Promoters

a) Privilege

When it discovered the technical tax shelters, the IRS attempted to obtain information from promoters using information document requests (“IDRs”). However, the IRS’s investigation of the technical tax shelters was initially met with less than enthusiastic cooperation on the part of the firms, which the IRS believed were promoting the shelters. The reluctance to provide information led to a series of summons enforcement actions, whose holdings have suggested that privileges in the tax shelter arena will be very narrowly construed.

In United States v. BDO Seidman, 337 F.3d 802 (7th Cir. 2003), the Seventh Circuit held, inter alia, that clients’ “participation in potentially abusive tax shelters is information ordinarily subject to full disclosure under the federal tax law.” 337 F.3d at 812:

Further, Congress has determined that tax shelters are subject to special scrutiny, and anyone who organizes or sells an interest in tax shelters is required, pursuant to I.R.C. § 6112, to maintain a list identifying each person to whom such an interest was sold. This list-keeping provision precludes the Does from establishing an expectation of confidentiality in their communications with BDO, an essential element of the attorney-client privilege and, by extension, the § 7525 privilege. At the time that the Does communicated their interest in participating in tax shelters that BDO organized or sold, the Does should have known that BDO was obligated to disclose the identity of clients engaging in such financial transactions. Because the Does cannot credibly argue that they expected that their participation in such transactions would not be disclosed, they cannot now establish that the documents responsive to the summonses, which do not contain any tax advice, reveal a confidential communication. Id. (internal citations omitted).

In John Doe #1 v. Wachovia Corp., 268 F. Supp. 2d 627 (W.D.N.C. 2003), the court held that investor lists held by a bank regarding taxpayers it had assisted with such shelters were not privileged communications. The Wachovia case involved clients of a bank [First Union]“who used the bank to facilitate and implement tax advice concerning investment strategies. Legal advice on tax matters was provided by [a (continued on next page)
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law firm] and accounting advice was received from the accounting firm of KPMG, LLP." 268 F. Supp. 2d at 629. Critical to the court’s decision was the fact that the law firm to which the bank directed clients sold a package to investors that contained a description of a transaction and a memorandum as to potential tax consequences stemming from the transaction. This tenuous connection between the law firm and the clients of the bank, who used the bank to facilitate and implement tax advice concerning investment strategies, did not support the assertion of attorney-client privilege over investor lists held by the bank. See 268 F. Supp. 2d at 633–34. Further casting doubt on the application of the privilege in instances where a legal opinion is disseminated, the Wachovia court also held that if a legal opinion, which might have been privileged when it was given to clients, loses its privileged status when it is subsequently circulated to third parties, including investors. See 268 F. Supp. 2d at 636.

In John Doe No. 1 and John Doe No. 2 v. KPMG L.L.P., United States, Intervenor, 325 F. Supp. 2d 746 (N.D. Tex. 2004)), taxpayer-plaintiffs sought to enjoin KPMG from disclosing their identities to the IRS. The court rejected this argument, holding “[d]isclosing Plaintiffs’ identities to the IRS … only reveals Plaintiffs’ participation in these shelters; it does not reveal any confidential communication made regarding these tax shelters.” 325 F. Supp. 2d at 752-53 citing United States v. BDO Seidman, 337 F.3d 802, 812 (7th Cir. 2003). The court went on to find that:

Plaintiffs had no reasonable expectation of confidentiality as to their participation in the … tax shelter because of the provisions in I.R.C. §§ 6111 and 6112. Section 6111 requires the organizer of a tax shelter to register the tax shelter with the IRS, and § 6112 requires organizers and sellers of tax shelters to maintain lists of investors in tax shelters. … If Plaintiffs’ tax returns were audited, Plaintiffs would be required to explain how the losses resulted. Knowing that any information included on a tax return could be questioned during an audit, Plaintiffs could not have reasonably believed their participation in the tax shelter was confidential. … The Court, therefore, adopts the Seventh Circuit’s conclusion that §§ 6111 and 6112 destroy any reasonable expectation of confidentiality as to participation in a tax shelter. See BDO Seidman, 337 F.3d at 812.

325 F. Supp. 2d at 753.

In United States v. KPMG, LLP, 316 F. Supp. 2d 30, (D.D.C. May 4, 2004), the court ruled that communications between the accounting firm that offered certain tax strategies, and a law firm that provided concurring opinions for several of them, were not privileged:

Further evidence suggesting that Brown & Wood was not engaged in rendering true legal advice, but was rather a partner with KPMG in its tax shelter marketing strategy, is found in a 1997 e-mail exchange between Gregg Ritchie at KPMG Los Angeles and Randall A. Hamilton at KPMG Des Moines. In response to Hamilton’s question about whether his FLIP customer must pay a fee for the Brown & Wood legal opinion, even if the customer did not request that opinion, Ritchie states:

If we are found to be a promoter of a tax shelter, the client is not protected from [I.R.C. §] 6662 penalties by reliance on our opinion only. Also, our deal with Brown & Wood is that if their name is used in selling the strategy, they will get a fee. We have decided as a firm that B&W opinion should be given in all deals.

Third Halpert Decl. Ex. A (emphasis added).

This arrangement was carried on for years. For example, Documents 897, 898, and 899 are an exchange of e-mails in September 2000 and May 2001 which the Special Master characterized as relating to “a fee alleged to be due outside counsel by a client of both the outside counsel and KPMG.” Final Report and Recommendation at 62. Such a characterization understates the importance of these e-mails, however, for what they really are is additional evidence of the improper arrangement between KPMG and Brown & Wood to further KPMG’s tax shelter marketing strategy.

The improper use of privilege, especially as a shield to protect information from IRS scrutiny, is also one of the subjects of the pending indictment in New York related to the KPMG shelters. United States v. Stein et al, S.D.N.Y. 05-CR- 888, Indictment, ¶ 49(h).

In a March 30, 2005 opinion, the U.S. District Court for the Northern District of Illinois held that all but one of several hundred documents to which BDO clients have asserted the attorney-client privilege, the accountant-client privilege under § 7525, the “common interest” privilege, and the work product doctrine are protected. 2005 WL 742642 (N.D. Ill.), 95 A.F.T.R. 2d 2005-1725. For one e-mail, however, the court found that the government made a prima facie showing that the crime-fraud exception applies. In evaluating the crime-fraud exception, the court considered (among other things) eight indicators of potential fraud:

(1) the marketing of pre-packaged transactions by BDO;
(2) the communication by the Intervenors [clients] to BDO with the purpose of engaging in a pre-arranged transaction developed by BDO or third party with the sole purpose of reducing taxable income;
(3) BDO and/or the Intervenors attempting to conceal the true nature of the transaction;
(4) knowledge by BDO, or a situation where BDO should have known, that the Intervenors lacked a legitimate business pur-
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pose for entering into the transaction;

(5) vaguely worded consulting agreements;

(6) failure by BDO to provide services under the consulting agreement although payment was received;

(7) mention of the COBRA [a variant of Son of Boss] transaction; and


While privilege is often a very significant card for the practitioner to hold in a criminal tax investigation, the defense attorney should be aware that the recent case law may severely curtail his ability to claim privilege in the tax shelter setting, and the improper use of privilege claims by alleged shelter promoters may be viewed as criminal conduct.

b) John Doe Summonses

The IRS has issued John Doe summonses in connection with various technical tax shelters, to firms such as Jenkens & Gilchrist and Grant Thornton. While Jenkens resisted, the district court ultimately ruled it had to turn over information. Significantly, if there is no compliance with a John Doe summons within six months of service, the statute of limitations is suspended. § 7609(e)(1). Because of Jenkens’ resistance, it has recently been reported that the IRS has been adding 150 days (representing the time from the issuance of the summons to the receipt of information, minus six months) to statutes of limitations for Jenkens’ clients.

c) International Initiatives

The IRS announced in early 2004 that it had joined with the tax authorities of Australia, Canada, and the UK to form a joint international task force to increase collaboration and share information about abusive transactions that cross international borders. The taxing authorities expect to share expertise and information (to the extent allowed in the relevant treaties) in identifying and pursuing promoters.

Many of the more technical tax shelters also had a significant international component, often relying upon the services of large European banks (often the London branch offices) to act as counterparties. In fact, an employee of one large German bank (HVB), Domenick DeGiorgio pled guilty in connection with KPMG. Earlier this year, HVB entered into a deferred prosecution agreement with respect to transactions it entered into with KPMG as well as other parties.

Over the last four years, through the threat of sanctions, the Organization for Economic Cooperation and Development (“OECD”) has succeeded in convincing all but a handful of nations to agree to enter into tax treaties or tax information exchange agreements (TIEAs) with the developed world. The United States has already entered into many such agreements with many of the countries which were formerly considered black holes for obtaining financial information, such as the Channel Islands (Jersey and Guernsey), the Isle of Man, the Cayman Islands, Antigua and Barbuda, the Bahamas, Curaçao (Netherlands Antilles), and the British Virgin Islands. Many other jurisdictions have committed to entering into similar agreements.

The TIEAs that were recently signed typically had prospective effective dates, and the IRS has only recently been authorized to make requests. As many promoters advocated the use of offshore accounts, the opening up of a significant portion of the world’s hitherto inaccessible information will make uncovering these shelters and their participants much easier.

C. Conduct of the Audit

With the restructuring mandated by the 1998 Restructuring Act, the IRS was divided into various operating divisions, based upon the type of taxpayer. Because the Large and Midsize Business (LMSB) Division possessed significant expertise regarding financial transactions, it was the Division that figured out the complicated financial transactions involved in the latest crop of shelters. This was often done with the assistance of IRS Counsel. The Office of Tax Shelter Analysis (OTSA), the office that receives tax shelter disclosures, was an arm of LMSB.

Even though participants in the technical tax shelters were often individual taxpayers, rather than large corporations, LMSB took the laboring oar in identifying and auditing shelter participants. Often, after a shelter was identified, an executive from LMSB (referred to as a “Champion”) was placed in charge of the shelter and its resolution. The Small Business and Self-Employed (“SBSE”) Division has played a role also, particularly with the Son of Boss shelter (it shared control over this shelter with LMSB) and the widespread offshore employee leasing shelter identified in Notice 2003-22.

As a practical matter, the audit of a tax shelter is often formalized. While the point person on the audit is often the assigned Revenue Agent, there are many other individuals who may be playing some role in the audit:

• Counsel. In many cases, area counsel play a significant role in the development of shelter cases. Often, counsel will participate in the taking of summonses testimony. At some point, it is possible that counsel will release a Coordinated Issue Paper, setting out the IRS’s position with respect to the legal issues involved in the shelter. Counsel may also be looking for cases to “designate for litigation,” meaning that a specific case cannot be settled. This is rarely a desirable result for the taxpayer, and there is a process for appealing a designation.

• Technical Specialists. Often with the National Office, these are the individuals who have figured out the mechanics of the shelter. Sometimes, the IRS will issue a technical advice memorandum (TAM) regarding similar transactions. Technical specialists may be approached to determine if a transaction falls within a defined “listed transaction.”

• Appeals Personnel. Sometimes, while the merits of the shelter are being exam-
Handling Tax Shelter Audits... continued from previous page

ined, but before any cases have been sent to appeals on 30-day letters, appeals personnel become involved in reviewing the legal merits of the transactions. The IRS was criticized for not involving appeals personnel in the resolution of the Notice 2000-44 case, and it somewhat sensitive to the criticism that appeals has been kept out of the loop. Appeals personnel may draft an “Appeals Settlement Guideline,” to govern Appeals consideration of the matter. The appeals officer involved in the ASE process may well become the point person for any future appeals consideration, meaning that any settlement reached with an individual appeals officer must be approved by the ASE appeals officer.

- The Powers That Be. Any pattern resolution of a tax shelter program must be approved by the Commissioner who has a working committee reviewing proposed settlements.

- Department of Justice. In some situations, such as the Son of Boss cases, the Department of Justice has been consulted in connection the consideration of an appropriate settlement. In cases where a pattern settlement was not available (because a case was already filed or the taxpayer chose litigation), the DOJ Office of Review has sometimes insisted on settlement terms harsher than those proposed administratively by the IRS.

1. Unique Features of Tax Shelter Audits

The conduct of a tax shelter audit is much like any other audit. However, if your taxpayer is not the first investor through, there may be significant differences. Some of the most significant differences are set out as follows:

a) Listed Transaction IDR

In any tax shelter investigation, the IRS will almost always issue an IDR that asks whether the taxpayer has participated in any listed transactions. It is best to stay generally aware of what transactions are listed in order to assist the taxpayer in making the correct determination.

b) Counsel Drafted IDRs

In cases with significant counsel involvement, the IDRs issued will often look like interrogatory requests in complex litigation, with dozens or hundreds of very technical questions being propounded.

c) Summons for Testimony

The IRS treats many shelter cases like preludes to litigation. It will almost always attempt to obtain taxpayer testimony regarding the shelter. While agents in the field may not be enthusiastic about taking summons testimony in cases that are likely to settle if and when an initiative is announced, the IRS executives have generally wanted a large number of taxpayers “deposed” in order to determine the bona fides of the shelter, as well as to determine the appropriate cases to designate for litigation.

d) Summons on Third Parties

The IRS may summons third parties (such as promoters) in connection with other taxpayer audits, but not with respect to your case. This information may be highly relevant to the resolution of your case. However, because the IRS will take the position that the information obtained by this third party summons is not “tax return information” for your client for purposes of § 6103, the only way to obtain this testimony may be to work closely with other professionals defending the audit, or the professionals representing the third parties.

e) Requests for Audit Workpapers

Prior to the current wave of technical tax shelters, the IRS had a policy of not seeking audit workpapers from taxpayers. Despite having won the legal right to view such papers in the Supreme Court in United States v. Arthur Young & Co., 465 U.S. 805 (1984), the IRS had, as a political matter, determined not to seek workpapers in audits and had established IRM provisions to this effect.

Approximately four years ago, in Announcement 2002-63, the IRS announced that it would start seeking tax accrual workpapers from taxpayers who were involved in “listed transactions.” In 2004, IRM § 4.10.20 was substantially amended to reflect the new policy, which provided that if the taxpayer was involved in one listed transaction and disclosed that transaction, the IRS would seek tax accrual workpapers related to that transaction. However, if the taxpayer was involved in more than one listed transaction or did not disclose, the IRS would seek disclosure of all tax accrual workpapers.

In late April 2006, the DOJ filed a summons enforcement action in Rhode Island, seeking to compel a corporate taxpayer to respond to its summons for all tax accrual workpapers. United States v. Textron, Inc. & Subs, D.R.I. No. 06-198.

In 2001, Textron, Inc. had entered into four sets of Sale In Lease Out (“SILO”) transactions, involving nine separate investments, in the 2001 year, involving mobile telephone network equipment in the UK, France and New Zealand, and railway equipment in France. SILO became a “listed transaction” with the IRS publication of Notice 2005-13, 2005-9 IRB 630. Pursuant to the new policy, tax accrual workpapers for the entire year were requested. The taxpayer failed to comply with the summons, though it did offer to provide the tax accrual workpapers on the SILO transaction. The DOJ filed a summons enforcement action. Significantly, the summons enforcement action is not only supported by the traditional Revenue Agent declaration, but also by the declaration of the former Director of Professional Standards at PCAOB, explaining the role of tax accrual workpapers.

The DOJ anticipates that the taxpayer will raise the attorney-client privilege as a defense. The DOJ makes an interesting argument that, even if outside auditors were not shown the tax accrual workpapers themselves in connection with their review of the company’s tax reserves, the subject matter of the advice contained in the workpapers was likely discussed with auditors in the course of the auditors’ evaluation of the adequacy of the tax reserves. Because the subject matter had been discussed with third parties (the outside auditors), the DOJ argues that the taxpayer has
Handling Tax Shelter Audits... continued from previous page

waived privilege with respect to the subject matter. Given the short fuse on most summons enforcement actions, a determination in this case is likely within the next several months.

2. Other Concerns in Tax Shelter Audits

a) Tax Shelters Entered Into For Non-Tax Purposes

With respect to public companies or entities that have ambitions of becoming public companies, the goal of the company’s participation in tax shelters may not have always been merely the simple reduction in taxes. In some cases, the primary goal of participation in the tax shelters may have been the financial statement benefits. For example, the Examiner’s report in Enron contained a discussion of the 11 tax shelters in which Enron had participated. The goal of most of these shelters appears to have been long term financial statement benefits. Indeed, unlike most tax shelters which provide the bulk of the benefits in the first year of participation (where participation may be as brief as 30 to 60 days), the majority of the tax benefits in the Enron shelters were projected to be received in future years.

The use of tax shelters to create financial statement benefits creates significant potential exposure under the securities laws, especially after the Sarbanes Oxley Act. Even if the case is not yet a criminal case, if the IRS discovers violations of securities laws, these violations may be reported to the SEC.

b) The Problem of the Investor’s “Factual Representations” in Opinion Letters

Most of the technical shelters are supported by very extensive legal opinions, which address many of the complicated technical legal issues supporting the accounting firm or law firm’s analysis. Unfortunately, legal opinions do not exist in a vacuum and must be applied to the facts of the transaction. Often critical facts regarding the business purpose of the transaction are included in the text of the opinion. These facts may differ substantially from the real purpose of the transaction, giving rise to liability on the part of both the opinion writer, who has a duty to investigate the facts and not make unreasonable assumptions, especially as to material matters, and on the part of the opinion recipient who, if he wishes to rely upon the opinion, should verify that the material facts stated therein are correct.

In the Enron Examiner’s Report on Enron’s Tax Transactions (Exhibit J to the Examiner’s Second Interim Report), one of Enron’s tax shelters (Cochise) was questioned on the grounds that the representations in the opinion about the non-tax purpose of the transaction appeared inaccurate:

Enron Representations and the Determination of Principal Purpose

The Cochise Tax Opinion relies heavily on Enron’s representation that obtaining the benefits of the Post-Acquisition Losses was more important to Enron than acquiring the benefits of the Pre-Acquisition Losses. In particular, Enron made the following representation:

While the Carryover Benefit is significant (and may be qualitatively somewhat superior to the Purchase Benefit in that it is presented for accounting purposes in an arguably more favorable light), it is materially less important than the Purchase Benefit, and thus Enron’s principal purpose for engaging in the Maliseet Transaction was to obtain the Purchase Benefit.

This discussion in the Cochise Tax Opinion emphasizes that the Post-Acquisition Losses are more valuable to Enron than the benefits from the carryover basis ...

The Examiner has concluded that there is significant factual uncertainty whether Enron’s representation that the Carryover Benefit was more important to it than the Purchase Benefit was accurate when made .... The desire to record benefits as “pre-tax” income may have been the more substantial purpose for Enron in the transaction.

... The Examiner has concluded that the validity of the Cochise Tax Opinion may be called into question by the issue of whether the factual representations and assumptions on which it is based were accurate when made.

The indictment of the nine individuals with respect to the KPMG shelters (United States v. Jeffrey Stein et al, SDNY No. 05-CR-888) also contains allegations that the recited representations in opinion letters regarding the clients’ factual circumstances were false and fraudulent. The use of inaccurate information in an opinion letter poses jeopardy (perhaps including criminal jeopardy) for both opinion drafter (who presumably knew of the disconnect) and the investor client (for not flagging and correcting the inaccurate representation).

Long Term Capital Holdings v. United States, 330 F. Supp. 2d 122 (D. Conn. 2004) is the most recent case discussing in depth whether a tax opinion can be relied upon to establish “reasonable cause” for purposes of avoiding the civil accuracy penalty. In an exhaustive opinion that may work far-reaching changes in the way law and accounting firms write tax opinions, the court rejected the taxpayer’s claim that it reasonably relied upon the opinion of the law firm. While a full discussion of the 40-plus page ruling on the penalties (following 160 pages on the merits of the transaction) is beyond the scope of this outline, the court essentially determined not to credit the testimony of Long Term personnel who claimed to have received oral advice (consistent with later written advice) prior to entering into the transaction. The court both criticized the legal discussion of the case law in the subsequently issued opinion, and, moreover, (continued on next page)
concluded that certain factual assumptions made in the opinion were clearly unreasonable:

The substance of the King & Spalding opinion does not provide a basis for concluding that the advice rendered to Long Term was based on all pertinent facts and circumstances or does not unreasonably rely on unreasonable factual assumptions. While the opinion states that it relies on assumptions and representations expressly made by Long Term, including that Long Term entered the OTC transaction for business purposes other than tax avoidance and reasonably expected to derive a material pre-tax profit from it and that there was no preexisting agreement on the part of OTC to sell its partnership interest to LTCM, it makes no effort to demonstrate, factually or analytically, why it was reasonable to rely on those assumptions and representations. Moreover, there is no evidence, such as internal King & Spalding memoranda, revealing King & Spalding’s analysis of the claimed non-existence of an agreement on the part of OTC to exercise its put option or any breakout of Long Term’s claimed expectation of profit or business purpose. As seen in the Court’s discussion above, particularly the existence of evidence clearly contrary to certain representations regarding the settlement payment to Turlington, see supra Part III.B.4.c., a reasonably diligent analysis of all facts and circumstances would have revealed at least some of those assumptions to be unreasonable and unsupportable.1

... In essence, the testimony and evidence offered by Long Term regarding the advice received from King & Spalding amounted to general superficial pronouncements asking the Court to “trust us; we looked into all pertinent facts; we were involved; we researched all applicable authorities; we made no unreasonable assumptions; Long Term gave us all information.” The Court’s role as fact finder is more searching and with specifics, analysis, and explanations in such short supply, the King & Spalding effort is insufficient to carry Long Term’s burden to demonstrate that the legal advice satisfies the threshold requirements of reasonable good faith reliance on advice of counsel. [Emphasis supplied]

There was other evidence in the record suggesting the absence of reasonable good-faith reliance on legal advice. Noe discussed the King & Spalding advice with other partners only to the extent of informing them that King & Spalding would render a “should” level opinion. There was no evidence that any partners other than Scholes have ever read the King & Spalding opinion, only that the principals specifically discussed that “should” level opinions would provide penalty protection. Merton was unaware of what assumptions, if any, were made by King & Spalding. Rosenfeld erroneously believed Long Term had a written opinion from King & Spalding at the time of the OTC transaction, apparently based on Scholes informing him that King & Spalding had issued a “should” level opinion.

While this case discussed whether the legal advice received from counsel would qualify for the “reasonable cause and good faith” exception to the imposition of the civil accuracy penalty, similar concerns should animate an analysis of the “reasonable reliance upon a professional” defense when considering complex tax shelters. Did the client actually rely on the opinion, or did he just consider it as a silver bullet for penalties or “get out of jail free” card? Are the factual representations regarding the business purposes of the transaction correct?

If significant statements regarding the economics and subjective purpose of the transaction are inaccurate, the opinion may not protect the taxpayer involved in the tax shelter from the assertion of penalties. However, if material representations are intentionally incorrect or misleading, there is potential criminal exposure on the part of both the opinion writer and the tax shelter investor.

c) Settlement Initiatives

The IRS has made many public settlement initiatives to settle tax shelter transactions, including the corporate owned life insurance (COLI), the contingent liability shelter, the basis shifting shelter (FLIP and OPIS), the Son of Boss shelter, and, most recently, more than a dozen transactions described in Notice 2005-80. The IRS has also offered private settlements to participants in other tax shelters, usually in cases where the IRS believes that it has identified all of the participants.

While earlier shelter settlements may provide some insight into how current transactions might be settled, prior settlements may not be very good guides, as the process appears to be very fluid, motivated by concern on the part of the government to take a very hard line in any publicly announced settlement.

The public initiatives have usually required an initial election to participate, followed by the full disclosure of information about the transaction on the part of the taxpayer, and concluding with a closing agreement. Recent closing agreements have included provisions that explicitly provide that no criminal liability is being compromised, as well as provisions requiring taxpayers to waive most, if not all, rights in the collection process.

d) The TEFRA Rules

While the TEFRA partnership audit and litigation rules (§ 6221 et seq.) are beyond the scope of this outline, the practitioner should remain cognizant of the many procedural rules unique to TEFRA partnerships. If the matter proceeds to litigation, the rules governing jurisdictional deposits may allow taxpayers access to the district courts or Court of Federal Claims (as opposed to the Tax Court), even if all partners do not wish to fully pay the proposed tax liability.

(continued on next page)
Handling Tax Shelter Audits… continued from previous page

With the IRS having only identified certain tax shelter transactions late in the audit cycle, the statute of limitations has become a matter of contention. In AD Global Fund, LLC ex rel., North Hills v. United States, 67 Fed. Cl. 657 (2005), the taxpayer argued that the IRS’s issuance of an FPAA for plaintiff’s 1999 tax return was untimely because it was outside the three-year statute of limitations period prescribed by § 6229(a) (2000). The Department of Justice countered that § 6229(a) was not a statute of limitations period for the issuance of an FPAA, but, instead, operates as an extension of the general three-year time period provided in § 6501(a) (2000). The court ruled in favor of the government, but certified the issue for the Court of Appeals for the Federal Circuit, as the resolution could affect a number of taxpayers in pending cases.

As many tax shelters involved basis issues, the issue of whether the partner’s basis in his partnership interest is an affected item and properly addressed in TEFRA partnership proceedings, or an individual item, is an issue that must be considered. Presumably, if the IRS challenges the matter at the wrong level, the taxpayer may be able to obtain a procedural advantage. The Tax Court has recently considered the argument that basis computations in a Notice 2000-44 case were not an affected item, and should not be addressed in TEFRA proceedings, and refused to dismiss a TEFRA Notice on jurisdictional grounds. RJT Investments X, LLC et al. v. Commissioner; Docket No. 11769-05, Order issued April 18, 2006.

c) Statutes of Limitation

Over the last year or so, the IRS has been taking the position that the six-year statute of limitations, applicable to substantial omissions of income (more than 25% of gross income), are applicable to certain tax shelters which involved overstated basis. A taxpayer can avoid the longer statute of limitations if there was adequate disclosure on the return, or a related return. See Colony, Inc. v. Commissioner, 357 U.S. 28 (1958). The IRS and taxpayers are litigating this position in two cases, Bay Way Holdings v. Commissioner, Tax Court, Docket No. 5534-05, and Grapevine Imports v. United States, Court of Federal Claims, Docket No. 05-296T.

1 The emphasis is supplied.

CLE Credits for Pro Bono Work?

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For further information contact Sharlene Steele, WSBA Access to Justice Liaison, at 206-727-8262 or sharlene@wsba.org.

Reminder – Upcoming CLE

The Tax Section is co-sponsoring the 12th Annual Working Together Symposium. This CLE is on November 8, 2006 from 8:00 am to 4:30 pm at the Seattle Center Rainier Room. The cost is only $50.00 for the approximate 7 hours of CLE credits (pending approval). You can register online at wscpca.org with credit card information or the Tax Section web site has the registration form available by link on the front page of the site at http://wsbatax.tripod.com.
CLE Committee Report

by Stephanie D. Anderson

I'm pleased to introduce myself as the Chair of the CLE Committee for the coming year. I am very excited for the opportunity to expand and enhance the Tax Section's CLE program. One of my goals will be to offer a greater variety of high-level sessions on a wide array of tax-law topics. I will work with the committee to bring in the best speakers available and offer timely and strategic programs on issues of interest to our members. I welcome your suggestions on how to make our CLE series as interesting and effective as it can be.

I practice tax law with Preston Gates & Ellis LLP in Seattle, with a particular focus on sales and use taxes, Washington Business and Occupation tax, credits and incentives, audit defense and other state tax issues. Prior to joining Preston Gates, I worked six years in a “Big 4” public accounting firm in Seattle. I hold an LL.M. in Taxation from the University of Washington School of Law, a J.D. from the University of Arizona College of Law and a B.A. from the University of Houston. You can contact me at 206-370-6615 or stephaniea@prestongates.com.

Estate and Gift Tax … cont’d

Wells addressed the committee about a variety of topics relating to Washington's current system of estate taxation being administered by the Department of Revenue, including the newly updated estate tax return form and certain anticipated changes to the Department of Revenue's position on the effects of the state's marital deduction.

The committee's next meeting will be held on November 10, 2006. Invited speaker Gair Petrie of Paine Hamblen Coffin Brooke & Miller, LLP will be addressing the committee on recent changes in the law affecting estate planning with retirement plans and IRAs. The outcome of Initiative 920 seeking to repeal Washington's estate tax will also be discussed at this upcoming meeting.

Additional meetings of the committee have been scheduled for December 15, January 26, March 16, April 27, and June 15. Agendas for each of these meetings will be published via email to the Estate and Gift Tax Committee list serve. To join this list serve, please send a request to the committee chair, Luke Thomas, at lthomas@prestongates.com.

International Tax … cont’d

that are common in the international area, including those involving transfer pricing, tax deferral structures, foreign permanent establishment issues and foreign tax credit planning. This is a timely issue for many SEC registered companies and their advisors. Starting in the first quarter of 2007, public companies will need to begin reporting uncertain tax positions in their financial statements and SEC reports.

For the remainder of 2006 and 2007, the International Tax Roundtable plans to host a number of lunch seminars on emerging topics. One idea is to hold a discussion regarding international tax audits, including a review of the kinds of issues that commonly arise on audit and some perspectives on managing an audit that involves a review from an international tax examiner. We are also interested in individual tax issues, including cross-border estate tax and income tax planning, including expatriation. Another topic of interest relates to tax issues involving foreign partners and foreign partnerships. Of course, this is a huge topic, so we will likely focus on specific issues – such as the withholding rules for foreign partners, or the new partnership service regulations. The common theme is to focus on how changes in U.S. tax law impact cross-border transactions and foreign persons. Thus, we will try to organize programs that focus on changes to the laws and new and emerging trends.

We certainly welcome your attendance and involvement. If you have a particular interest in a topic, or would like to serve as a presenter, or would like to host a lunch event at your workplace, please contact Chris Brown at 206-816-1480, or csbrown@gsblaw.com.

The International Tax Roundtable is a joint forum sponsored by the International Tax Committee of the WSBA Tax Section and the International Section of the Washington Society of CPAs. The two co-chairs are John Forrest of Sweeney Conrad and Chris Brown of Garvey Schubert Barer.

International Tax Committee Report

by Christopher Brown

The International Tax Roundtable held its most recent lunch seminar on October 3rd at Clark Nuber, P.S. The topic was “FIN 48,” which refers to the new pronouncement from the Financial Accounting Standards Board regarding the financial reporting standards for uncertain tax positions. David Cordova, an international tax partner at Deloitte, and Rick Burkhardt, the tax director of Starbucks, led a lively discussion on how the new FIN 48 guidance will impact both financial reporting and international tax planning. The group discussed how companies can approach the task of identifying their tax positions and testing for uncertainty. There was a particular emphasis on tax uncertainties
Bob Boeshaar of IRS Counsel and Darek Jarski of LeSourd & Patten, P.S. are currently serving as co-chairs of the IRS Liaison Committee. The committee intends to conduct regular meetings to discuss various topics pertinent to practice before the Internal Revenue Service. The first meeting will be on November 2, 2006 at noon in the Eagle Room in the Jackson Federal Building Cafeteria on the second floor of the Jackson Federal Building in Seattle. The meeting will feature Cathy Campbell of IRS Counsel and Pat Hannifin, a revenue officer with SB/SE. The topic discussed will be the challenges posed by the current laws affecting LLCs disregarded from their owners for Federal tax purposes, and the expected upcoming changes in the law.

In addition, future meetings will include the following topics: fraud and criminal investigations, issues surrounding reasonable compensation, and injunctions of promoters of abusive tax schemes. The committee is also planning a reception for a United States Tax Court Judge in early 2007.

Finally, on September 26, 2006, the co-chairs attended a practitioner liaison meeting that featured Revenue Agent George Nunziata, the fraud coordinator for the five-state region including Washington. Mr. Nunziata discussed examples of, and challenges facing, preparer investigations. According to Mr. Nunziata the scope of fraudulent behavior in this regard can reach millions of dollars per offender. The committee hopes to secure Mr. Nunziata as a guest speaker in the future.

The WSBA Tax Section is pleased to announce its sixth annual tax scholarship. The Tax Section is hoping to raise $5,000 for the scholarship this year. We are currently taking donations. Anyone who contributes to the scholarship fund will be acknowledged at the Tax Section’s annual luncheon and on the Tax Section Web site.

An eligible individual is any student currently attending a Washington law school with plans to attend an LL.M. tax program in 2007-2008. The scholarship will be awarded to an individual who can demonstrate that he/she has: (a) a strong academic record; (b) a financial need for the scholarship; and (c) the intent to become an active member of the WSBA Tax section upon completion of his/her LL.M. tax education. Most prior recipients of the scholarship have graduated from LL.M. programs and have become practicing members of the Washington State Bar Association. Scholarship information will be posted at all Washington law schools and on our Tax Section Web site.

The initial fall 2006 meeting of the Transactional Tax Committee will occur at 12:00 noon on Tuesday, October 24, 2006, at the offices of Preston Gates & Ellis, LLP in Seattle. An e-mail setting out the discussion topic and additional details regarding the meeting will be sent to those included in the Transactional Tax Committee’s most recent list of participants. If you do not receive a copy of the e-mail providing details of the October 25, 2006 meeting, please contact Lance W. Behnke, Chair of the Transactional Tax Committee, at lbehnke@prestongates.com or by phone at 206-370-8380, and your contact information can be added to the e-mail list. The format of the October 25th meeting will be an informal round table discussion by the attendees addressing the focus topic, with the opportunity for participants to raise current developments they are encountering in their practice. We will also discuss possible focus topics for upcoming meetings. The WSBA web page for the Transactional Tax Committee is found at http://wsbatax.tripod.com/transactional/transactional.htm and will be updated for the October 24, 2006 meeting during the week of October 9th.

Jaret Coles and Marlyn Chu of Merriam and Isaacson, P.S. are currently serving as co-chairs of the Website Committee. The committee is in the process of significantly revamping the current website located at www.wsbatax.org, as it was created more than three years ago. Future updates will include better alternative browser capabilities, as well as an easier way to track committee meetings and important tax section events. If you have any suggestions regarding to the type of content that you would like to see on the section’s website, please e-mail both of the chairs at the following addresses: jrcoles@merriamisaacson.com and mchu@merriamisaacson.com.

When you have finished reading this newsletter, please pass it on to someone else in your firm.
Attorney/CPA Tax Clinic in Spokane

This coming year, Attorney-CPA Tax Clinic sessions will again be repeated via videotape at the Spokane office of Moss Adams LLP (18th floor of the Bank of America Financial Center – 601 West Riverside Avenue).

Sessions will be viewed on selected Thursday mornings at 7:15 a.m. as well as selected Wednesday afternoons at 4:00 p.m. Topics and dates will be announced via email to registrants as the videotapes are received from the WSBA Taxation Section.

For those needing to drive into downtown Spokane for the sessions, parking will be validated at the Bank of America Financial Center garage, entrance off Howard between Sprague and First.

To express interest in signing up for the Spokane presentations, please send an email to Karen Shea at Moss Adams (karen.shea@mossadams.com) or call her at 509-777-0133.

Please Donate to the Tax Section Scholarship Fund

We will soon begin soliciting contributions to the Sixth Annual Tax Section Scholarship Fund. Through the generosity of the Tax Section members, the section has been able to assist five LL.M. students with their program tuition. Please remember the Tax Section Scholarship Fund as you prepare your 2007 budgets.

Information for Your Clients

Did you know that easy-to-understand pamphlets on a wide variety of legal topics are available from the WSBA? For a very low cost, you can provide your clients with helpful information. Pamphlets cover a wide range of topics:

- Alternatives to Court
- Bankruptcy
- Communicating with Your Lawyer
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- Criminal Law
- Dissolution of Marriage (Divorce)
- Elder Law
- Landlord/Tenant
- Lawyers’ Fund for Client Protection
- Legal Fees
- Marriage
- The Parenting Act
- Probate
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- Signing Documents
- Trusts
- Wills

Each topic is sold separately. Pamphlets are $9 for 25, $15 for 50, $20 for 75, and $25 for 100. Pricing for larger quantities is available on request.

To place your order or for more information, please contact the WSBA Service Center at 800-945-WSBA or 206-443-WSBA. Sales tax is applicable to all in-state orders.

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Call us Monday through Friday, from 8:00 a.m. to 5:00 p.m., or e-mail us at questions@wsba.org.

Assistance is only a phone call or an e-mail away.
The Taxation Law 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 Officers of the Tax Section by sending an e-mail from the Taxation Section web site at the following link: http://wsbatax.tripod.com/officers/roster.htm.

We would like to read what you have to say.
Taxation Law Section Membership Form

Section membership dues cover October 1, 2006 to September 30, 2007.

☐ Please enroll me as an active member of the Taxation Law Section. My $30 annual dues are enclosed.

☐ I am not a member of the Washington State Bar, but I want to receive your Newsletter. My $30 is enclosed.

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