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Cases, Regulations, and Statutes

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liquidation of a corporation shall be treated *as in full payment in exchange for the stock*." [Emphasis added.] Note that the language does not refer to S corporation shareholders or C corporation shareholders, but to "a shareholder."[11] Moreover, I.R.C. § 331(b) specifically indicates that, except for certain liquidating distributions of personal holding companies, I.R.C. § 301 does not apply to liquidating distributions.[12] Section 301(c) is referred to in I.R.C. § 1368(a) as the subsection that would apply to S corporation distributions were it not for I.R.C. § 1368(a.

However, with I.R.C. § 331 trumping the S corporation *distribution* rules[13] as well as the C corporation *distribution* rules,[14] the provisions in Section 331(a) govern S corporation liquidations. That means that S corporation distributions *in complete liquidation* are treated as in full payment in exchange for the stock[15] which in turn means that the difference between the income tax basis in the stock and the fair market value of the liquidation is taxed as capital gain. Thus, the taxation of accumulated earnings and profits is governed by neither the layering rules of I.R.C. § 1368[16] nor the specific provisions of I.R.C. § 301[17] which provide that the portion of a distribution which is a dividend is to be included in gross income.

Keep in mind that a liquidation followed by a transfer to another corporation of all or part of the assets of the liquidating corporation may be treated as a dividend distribution or as a transaction in which no loss is recognized and gain is recognized only to the extent of "other property."[18]

In conclusion

Particularly where the outstanding S corporation stock has a relatively high income tax basis (such as from recent shareholder deaths), and the S corporation has sizeable earnings and profits from years it was a C corporation, the choice between a complete liquidation[19] and a series of distributions short of a complete liquidation[20] can be an important one.

All of this does not take into account the possibility of built-in gains tax[21] which applies to sales or exchanges of appreciated assets which are disposed of within 10-years after the corporation became an S corporation.[22]

ENDNOTES

[1] See Harl, "The Trap in Liquidating an S Corporation That Was Formerly a C Corporation," 19 *Agric. L. Dig. 81* (2008). See generally 7 Harl, *Agricultural Law* § 56.02[1][a] (2008); Harl, *Agricultural Law Manual* § 7.02[3][c][ii] (2008); 2 Harl, *Farm Income Tax Manual* § 7.04[1][a][ii]. [g] (2008 ed.).

[2] I.R.C. §§ 1368, 301, 331(a). I am indebted to Steven J. Roy, Nyemaster Law Firm, 700 Walnut Street, Suite 1600, Des Moines, Iowa 50309, for calling the matter to my attention.

[3] I.R.C. § 1368(e)(1).

[4] I.R.C. § 1368(e)(1)(A).

[5] I.R.C. § 1368(c)(2).

[6] I.R.C. § 1368(b).

[7] I.R.C. § 1368(c).

[8] Rev. Rul. 95-5, 1995-1 C.B. 100. See Ltr. Rul. 9501001, November 19, 1993 (S corporation with no accumulated earnings and profits).

[9] I.R.C. §§ 1361-1379.

[10] I.R.C. § 1371(a).

[11] I.R.C. § 331(a).

[12] I.R.C. § 331(b).

[13] I.R.C. § 1368(a).

[14] I.R.C. § 301(c).

[15] I.R.C. § 331(a).

[16] I.R.C. § 1368(c)(2).

[17] See I.R.C. § 301(c)(1).

[18] Treas. Reg. § 1.331-1(c).

[19] I.R.C. § 331(a).

[20] I.R.C. § 1368.

[21] I.R.C. § 1374(a).

[22] I.R.C. § 1374(d)(3).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

GENERAL

EXEMPTION

2008 STIMULUS PAYMENT. The debtor filed for Chapter 7 on April 21, 2008, after enactment of the Economic Stimulus Act of 2008. The debtor received a payment under the act in May 2008 and amended the bankruptcy schedules to include the payment and to exempt, under Idaho Code § 11-603(4), the payment as a public assistance payment. The court held that the payment was not exempt as public assistance because the payment did not have a public assistance purpose but was intended as an economic stimulus. The court also held that the entire payment was subject to bankruptcy estate administration because the payment was not an advance payment of a 2008 tax refund. ***In re* Wooldridge, 2008-2 U.S. Tax Cas. (CCH) ¶ 50,670 (Bankr. Idaho 2008)**.

FEDERAL AGRICULTURAL PROGRAMS

FARM LOANS. The FSA has adopted as final regulations for the direct and guaranteed farm operating loans and farm ownership loans, and the lease and disposal of inventory property, implementing changes required by the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill). The maximum loan amount authorized for direct farm ownership loans and direct farm operating loans is increased by the regulations. The existing Beginning Farmer Downpayment Loan Program is amended by the final regulations to include socially disadvantaged farmers and to reduce the size of the required down payment. The final regulations also amend the regulations governing lease and disposal of FSA's real estate inventory, which currently give priority to beginning farmers and are being amended to also give priority to socially disadvantaged farmers. **73 Fed. Reg. 74343 (Dec. 8, 2008)**.

MILK. The CCC has adopted as final regulations amending the regulations for the Milk Income Loss Contract (MILC) Program, as authorized by the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill), to extend the program from October 1, 2007, through September 30, 2012. The regulations also increase the percentage rate for the payment calculation after fiscal year 2008 and increase the payment quantity limitation of eligible pounds of milk per operation beginning in FY 2009. The regulations also provide for an adjustment to the MILC payment rate if feed costs increase above a specified level. The regulations also adjust the milk price support program regulations to specify that support purchases will only be made from manufacturers and not from third parties such as brokers. **73 Fed. Reg. 73764 (Dec. 4, 2008)**.

FEDERAL ESTATE AND GIFT TAXATION

GIFTS. The taxpayers, husband and wife, created an irrevocable trust for the benefit of their grandchildren, and the trust subsequently purchased two second-to-die life insurance policies on their lives. Under the agreement, the trustee was designated as the owner of the policies and could exercise all rights of ownership, except the right of the couple to be repaid the then cash surrender value of the policies upon the agreement's termination. While the couple was living, the trust was obligated to pay premiums for the cost of current life insurance protection on their joint lives based on the lesser of any relevant tables or pronouncements recognized by the IRS or the current published one-year term rates generally available for standard risks. Similarly, after the death of the first to die of the couple, the trust would pay that portion of the premiums equal to the lesser of the P.S. 58 (see *Rev. Rul. 55-747, 1955-2 C.B. 228*) table amount, or the current published one-year term rates generally available for standard risks. The couple was obligated to pay the balance. In addition, the trustee executed a collateral assignment, assigning the policies to the couple, but retaining all rights of ownership in the policies except the right of the couple or the estate of the survivor to receive the amount specified on termination of the agreement. The IRS ruled that the premium payments did not result in gifts by the taxpayers unless some of the cash surrender value was used to fund the trust's obligation. **Ltr. Rul. 200848002, Aug. 19, 2008**.

FEDERAL INCOME TAXATION

BUSINESS EXPENSES. The taxpayer was an independent contractor and claimed various business expense deductions, including car and truck expenses, labor expenses, supplies, office expenses, and travel expenses. The court held that the deduction for car mileage expenses was properly disallowed because the taxpayer provided only testimony of estimated miles driven, without any written documentation to support the testimony. The court held that the deduction for labor expenses was properly disallowed because the taxpayer provided only testimony of estimated wages paid, without any written documentation to support the testimony. The court held that a portion of the deduction for supply expenses was properly disallowed because the taxpayer provided written proof of the expenses but the proof did not identify the purchase date of the supplies. The court disallowed office expense and travel deductions because the taxpayer failed to provide any documentary evidence to support the nature, cost or date of the expenses. **Fay v. Comm'r, T.C. Summary Op. 2008-152**.

CASUALTY LOSSES. The taxpayers sustained damage as a result of hurricane Rita to their residence, a camp, and a wharf. The taxpayers claimed a casualty loss deduction for the damage to their residence by computing the decrease in fair market value of the residence by comparing the fair market value of the residence immediately before the casualty with the fair market value immediately after the casualty. The taxpayers did not obtain an appraisal to determine the decrease in value. The taxpayers filed an amended return that included as part of the casualty loss damage to the camp and wharf located on the property. The taxpayers re-computed the casualty loss on their amended return by using the tables 4 and 5 cost indexes safe harbor method provided in *Rev. Proc. 2006-32, 2006-2 C.B. 26* to determine the decrease in fair market value of the residence and the cost of repairs to the wharf. The casualty loss was limited to the taxpayers' basis in the residence, camp, and wharf. The taxpayers argued that the casualty loss should include both the damage to the residence (computed using the cost indexes safe harbor method) and the damage to the wharf (computed using the cost of repairs method). The taxpayers argued that the wharf did not constitute personal-use residential real property, as defined

in *Rev. Proc. 2006-32,* and thus the loss to the wharf should be calculated separately using the cost of repairs method and added to the loss calculated using the cost indexes safe harbor method. In a Chief Counsel Advice letter, the IRS ruled that the taxpayer could not use two different methods of calculating the loss for the residence and wharf because the wharf was included within the residence. **CCA Ltr. Rul 200849014, Aug. 20, 2008**.

DEPRECIATION. CCH has published an article on the definition of truck for purposes of the "luxury car" depreciation limitations for trucks or vans, as provided in *Rev. Proc. 2003-75, 2003-2 C.B. 1018,* to include sports utility vehicles (SUVs) in the definition of truck if the SUV is built on a truck chassis. The article notes that, in *Rev. Proc. 2008-22, 2008-1 C.B. 658*, the IRS omitted the definition of SUV as a truck, if the SUV is built on a truck chassis. The omission could mean that the SUV no longer meets the definition as a truck and the CCH article suggests that the definition in I.R.C. § 4064 (using the definition in 49 C.F.R. § 523.5) may be applied. **Suelzer, "Unibody SUVs May Qualify for Exemption from Luxury Car Depreciation Caps," 2008TAXDAY, (Dec. 09, 2008), Item #I.1**.

EARNED INCOME CREDIT. The taxpayer filed as an unmarried head of household and was allowed dependency exemptions, child tax credit and additional child tax credit for two children of the taxpayer's half-sister. However, the taxpayer was denied eligibility for the earned income tax credit based on the two children because the taxpayer did not provide sufficient evidence that the taxpayer and half-sister shared a common father. **Redmond v. Comm'r, T.C. Memo. 2008-274**.

The unmarried taxpayer lived with a sister and helped care for the sister's minor children, providing more than one-half of their support. The taxpayer filed as head of household. The court allowed the taxpayer to claim the dependency exemption, child tax credit and earned income tax credit based on the taxpayer's relationship and support for the children. **Pavia v. Comm'r, T.C. Memo. 2008-270**.

GROSS INCOME. The taxpayer sold gift cards through various retail businesses. The proceeds of the sales were paid to the taxpayer who was obligated to reimburse the retailer for purchases made with the gift cards. The gift card purchasers could receive refunds for returned merchandise. In a technical advice memorandum, the IRS ruled that the proceeds of the sales of the gift cards were taxable income in the year received and were not excludible as advance payments under Treas. Reg. § 1.451-5(a) or *Rev. Proc. 2004-34, 2004-1 C.B. 991*. The IRS also ruled that the taxpayer could deduct the liability to the retail seller of the gift cards no earlier than the time in which the customer redeems an amount on the gift card. **T.A.M. 200849015, Aug. 22, 2008**.

INTEREST RATE. The IRS has announced that, for the period January 1, 2009 through March 31, 2009, the interest rate paid on tax overpayments decreases to 5 percent (4 percent in the case of a corporation) and for underpayments decreases to 5 percent. The interest rate for underpayments by large corporations decreases to 7 percent. The overpayment rate for the portion of a corporate overpayment exceeding $10,000 decreases to 2.5 percent. **Rev. Rul. 2008-54, I.R.B. 2008-52.**

LIMITED LIABILITY COMPANIES. In a Chief Counsel Advice letter, the IRS discussed the requirements for making assessments of employment taxes against a single-owner limited liability company which is a disregarded entity. The ruling states:

> "Although a single member limited liability company is allowed to separately calculate, report, and pay its employment tax obligations with respect to its employees under its own name and employer identification number, the owner of a single member limited liability company is the employer and the person subject to tax (i.e. , the taxpayer). See I.R.C. §§ 3401; 7701(a)(1), (14)."

Thus, the IRS ruled that an assessment made against the LLC was effective as an assessment against the single owner individual, whether or not the individual owner is named in the assessment and the assessment includes the individual's own employer identification number. The ruling recommends that any assessment include at least the EIN and name of the single owner individual. **CCA Ltr. Rul. 200848039, July 6, 2008**.

PENALTIES. The court held that the taxpayer was not subject to the accuracy-related penalty under I.R.C. § 6662 for tax errors resulting from the taxpayer's accountant's faulty bookkeeping. However, the taxpayer was subject to the penalty for improper claiming of the bonus depreciation deduction for an airplane where the deduction was based on a magazine article which was written before the bonus depreciation legislation was final. **January Transport, Inc. v. Comm'r, T.C. Memo. 2008-268**.

PENSION PLANS. For plans beginning in December 2008, for purposes of determining the full funding limitation under I.R.C. § 412(c)(7), the 30-year Treasury securities annual interest rate for this period is 4.00 percent, the corporate bond weighted average is 6.27 percent, and the 90 percent to 100 percent permissible range is 5.64 percent to 6.27 percent. **Notice 2008-112, I.R.B. 2008-51**.

In a Chief Counsel Advice letter, the IRS has ruled that contributions to thrift savings plans (TSA) are wages under I.R.C. § 3121(v)(1)(A) and subject to FICA taxes at the time of the contribution even though the contributions are not included in income. **Ltr. Rul. 200848054, July 24, 2008**.

QUALIFIED DEBT INSTRUMENTS. The IRS has announced the 2009 inflation adjusted amounts of debt instruments which qualify for the interest rate limitations under I.R.C. §§ 483 and 1274:

Year of Sale or Exchange	1274A(b) Amount	1274A(c)(2)(A) Amount
2009	$5,131,700	$3,665,500

The $5,131,700 figure is the dividing line for 2009 below which (in terms of seller financing) the minimum interest rate is the lesser of 9 percent or the Applicable Federal Rate. Where the amount of seller financing exceeds the $5,131,700 figure, the imputed rate is 100 percent of the AFR except in cases of sale-

leaseback transactions, where the imputed rate is 110 percent of AFR. If the amount of seller financing is $3,665,500 or less (for 2009), both parties may elect to account for the interest under the cash method of accounting. **Rev. Rul. 2008-52, I.R.B. 2008-49**.

S CORPORATIONS

ELECTION. In a Chief Counsel Advice letter, the IRS ruled that it had no authority to retroactively revoke an otherwise effective S corporation election. **CCA Ltr. Rul. 200848050, July 22, 2008**.

SAVER'S CREDIT. The IRS has published a reminder to low- and moderate-income workers to take steps now to save for retirement and qualify for the saver's credit (formerly known as the retirement savings contributions credit) in 2008 and future years. Elective deferrals must be made by year-end to a I.R.C. §§ 401(k), 403(b), 457, or Thrift Savings Plan for federal employees. However, taxpayers have until April 15, 2009, to set up new IRAs or add money to existing IRAs while still getting the credit for 2008. The saver's credit is available, in addition to other tax savings that apply, to help offset part of the first $2,000 voluntarily contributed to an IRA, I.R.C. § 401(k) plan, or similar workplace retirement program. Form 8880, Credit for Qualified Retirement Savings Contributions, is used to claim the credit. The form's instructions provide details on figuring the credit correctly. The credit amount is based on the taxpayer's filing status, adjusted gross income, tax liability and amount contributed to qualifying retirement programs, with a maximum credit amount of $1,000 ($2,000 for married couples). Certain retirement plan distributions reduce the contribution amount used to figure the credit. Also, those claimed as a dependent on another's return cannot claim the saver's credit. Eligible taxpayers must be at least 18 years of age and students cannot claim the credit. **IR-2008-134**.

SELF-EMPLOYMENT INCOME. The taxpayer was employed as a pipeline inspector and received income from the employment which was reported as non-employee compensation on Form 1099-MISC by the employer. The taxpayer listed the income on Schedules E and Form 1120S from an association and joint venture. The association and joint venture were found to have no separate business purpose or existence other than as a scheme to claim business deductions. The court held that, for purposes of self-employment taxes, the entities were disregarded and the business deductions disallowed except to the extent allowed by the IRS. The taxpayer's income from the employment was held to be subject to self-employment tax. **Pate v. Comm'r, T.C. Memo. 2008-272**.

The taxpayers, husband and wife, were lawyers who originally practiced through a professional corporation. The corporation was changed to a partnership with three trusts as partners. The taxpayers were trustees and beneficiaries of the trusts. Income from the law practice was paid to the trust partners and distributed to the taxpayers. The structure of the business was chosen as a means to eliminate employment taxes on the income earned by the taxpayers in their law practice. The court held that the trusts would be disregarded entities because they lacked economic substance since the taxpayers controlled the trusts. Therefore, the court held that the amounts distributed to the taxpayers was subject to self-employment tax just as if the amounts were distributed directly to the taxpayers as partners in the partnership. **Olsen v. Comm'r, T.C. Memo. 2008-275**.

TAX SHELTERS. The taxpayers had invested $5,500 in a 2.857 percent partnership interest in a jojoba limited partnership. The taxpayers claimed over $12,000 in losses as their share of the partnership losses. The partnership was determined to be not entitled to the losses and the taxpayers were also denied the use of the losses. In this case, the taxpayers were found to have failed to use due care in making the investment in that the taxpayers failed to make any investigation into the propriety of the losses other than the information supplied by the partnership promoter. The court noted that the taxpayers were experienced investors and should have realized that the generous tax benefits were sufficiently suspicious to warrant further investigation more than the reliance on the advice of the partnership promoter. **Watson v. Comm'r, T.C. Memo. 2008-276**.

THEFT LOSSES. The taxpayer had made investments in several tax-related investment schemes. The promoters of the schemes were convicted of criminal fraud and other charges and ordered to pay restitution to victims of the schemes, including the taxpayer. The taxpayer claimed a theft loss deduction for the amounts invested in the schemes. The court held that the loss deductions were not allowed because the taxpayer failed to prove that the losses were not reasonably recoverable as of the end of the tax year in which the losses were claimed. **Vincentini v. Comm'r, T.C. Memo. 2008-271**.

TRAVEL EXPENSES. The taxpayer was employed as an airplane mechanic near the taxpayer's residence when the taxpayer was laid off. The taxpayer continued to work for the employer by accepting a job in another city where the taxpayer had seniority. The employer had subsequent layoffs and the taxpayer was forced to move several times to new locations where the taxpayer had seniority. The taxpayer maintained a residence in the original city in hopes of returning to a job there. The court held that the taxpayer was not entitled to deduct travel expenses from the residence to the temporary job locations because each job had an uncertain and indefinite duration. **Koepke v. Comm'r, T.C. Summary Op. 2008-151**.

TRUST. A trust was established by the taxpayer's parent who funded the trust with the parent's personal residence. The trust had a set term and allowed the parent to occupy the residence for the term of the trust. The taxpayer received the remainder upon expiration of the term. At the expiration of the term, the trust was to pass to the taxpayer. The parent reported the establishment of the trust as a taxable gift. At the end of the term, the trust was modified to allow the taxpayer to allow transfer of an interest by gift with the consent of all beneficiaries. The taxpayer transferred a deed to a trustee of a second trust and an interest to possess and occupy the residence to the parent. Both trusts were intended to qualify as personal residence trusts. The IRS ruled that, so long

as the trust was (1) substantially similar to the example in *Rev. Proc. 2003-42, 2003-1 C.B. 993 Sec. 4*, (2) the trust operated in a manner consistent with the terms of the trust instrument; and (3) the trust was valid under applicable local law, the zero-value rule generally applicable to retained interests under I.R.C. § 2702 was not applied to the taxpayer's trust. **Ltr. Rul. 200848003, Aug. 18, 2008**.

WITHHOLDING TAXES. The IRS has issued a notice which provides guidance to employers and payers on their reporting and wage withholding requirements for calendar year 2008 with respect to amounts includible in gross income under I.R.C. § 409A for non-qualified deferred compensation plans. The notice also provides guidance to employers and payers on their reporting requirements with respect to all deferrals of compensation under I.R.C. § 409A for 2008. This notice does not affect the application of I.R.C. § 3121(v)(2) or an employer's reporting obligations under Treas. Reg. § 31.3121(v)(2)-1. In addition, the notice provides guidance to service providers on their income tax reporting and tax payment requirements with respect to amounts includible in gross income under I.R.C. § 409A for 2008. Generally, these requirements for 2008 reflect an extension to 2008 tax years of the guidance provided in *Notice 2006-100, 2006-2 C.B. 1109* and *Notice 2007-89, 2007-2 C.B. 988* applicable to 2005, 2006 and 2007 tax years. The IRS stated that the guidance will continue to be effective for subsequent tax years until the IRS issues further guidance. **Notice 2008-115, I.R.B. 2008-52**.

The IRS has issued proposed regulations relating to withholding under I.R.C. § 3402(t) to reflect changes in the law made by the Tax Increase Prevention and Reconciliation Act of 2005 that require federal, state, and local government entities to withhold income tax when making payments to persons providing property or services. **73 Fed. Reg. 74082 (Dec. 5, 2008)**.

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