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High Net Worth Family
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Supreme Court Resolves Basis Overstatement Issue

The United States Supreme Court has resolved an issue that has been working its way through the circuit courts for several years. In *United States v. Home Concrete (April 25, 2012)*, the Court held that overstating the income tax basis of an asset does not cause an "omission from income" for purposes of making applicable the six-year rather than the three-year statute of limitations. Because the issue involves a substantial amount of tax dollars, the Internal Revenue Service fought this battle at every turn – until the Supreme Court finally put the issue to rest in late April.

The IRS normally has three years after a taxpayer files an income tax return to audit the return and propose additional tax liability. The agency has six years, however, if the taxpayer omits from the return an amount of gross income that is more than 25 percent of the amount of gross income reported on the return. The controversy centered on whether a taxpayer who overstated the tax basis of an asset, and thereby underreported the amount of tax gain that resulted from the sale of the asset, had omitted gross income from the return.

Many of the tax-advantaged transactions structured in the early part of the previous decade purported to increase the income tax basis of an asset. The IRS took some time to uncover many of these and consequently had to propose tax deficiencies more than three years after the filing of many returns. In order for its actions to be timely, the IRS had to take the position that the six-year statute of limitations applied.

By the time the issue reached the Supreme Court, six circuits of the United States Court of Appeals had addressed it. The battle had begun to swing in favor of the IRS after it promulgated its own self-help regulation in 2009. Four circuits – the District of Columbia, Federal, Seventh and Tenth Circuits – had held in favor of the IRS, and two circuits – the Fourth and Fifth Circuits had held in favor of the taxpayer. A split involving six different circuits presented a classic case for the Supreme Court to accept the certiorari petition of *Home Concrete*, the case from the Fourth Circuit, and resolve the issue.

The Court held that the six-year statute of limitations did not apply, based on its holding in *Colony Inc. v. Commissioner (1958)*. In *Colony*, the Court had interpreted identical statutory language in the Internal Revenue Code of 1939, and drew a distinction between understating gross income and omitting gross income. While the overstatement of basis clearly caused an understatement of the taxpayer's gross income, the understatement did not result from "omitting" anything from the return. The Court reasoned that "omit" means "to leave out or unmentioned; not to insert, include, or name." While the basis number on the tax return was admittedly not correct, nothing had been omitted from the return.

The Court also dismissed the IRS's attempt at self-help through the regulation it issued in 2009. In the Court's view, the statute was not ambiguous and the IRS could not issue a regulatory interpretation contrary to the clear meaning of the statute. In last summer's edition of our newsletter, we described the basis overstatement question as "the issue that will not go away" (See Vol. 6., No. 2, August 2011). The Supreme Court's decision in *Home Concrete* has finally banished it. For an in-depth analysis of the Court's decision in *Home Concrete*, see our May 2012 alert.

Supreme Court Finds No Equal Protection Violation for City's Forgiveness of Future Tax Obligations

The U.S. Supreme Court recently held that the city of Indianapolis did not violate the Equal Protection Clause of the United States Constitution when it forgave all future sewer tax obligations of those property owners who elected to pay their portion of the tax on an installment basis over 10, 20 or 30 years with interest, but did not issue refunds to those property owners who had previously paid their portion of the tax in a single lump sum.

An Indiana statute (the Barrett Law) permitted cities to assess benefitted property owners the cost of public improvements, including sewage projects, by requiring the owners to pay their portion of the project in a single lump sum or installment payments (with interest) over a period of years. The city of Indianapolis later replaced the Barrett Law with a less expensive assessment and payment method and forgave any remaining installment payments owed under the Barrett Law. In *Armour v. City of Indianapolis*, the plaintiffs, owners who had previously paid their portion of the sewer tax in a single lump sum, argued that the city's forgiveness of outstanding debts of those who elected to pay on an installment basis without issuing refunds to the plaintiffs discriminated against them in violation of the Equal Protection Clause.

The U.S. Supreme Court found no Equal Protection violation because the city had a rational basis for distinguishing between property owners who had already paid the tax and property owners who had elected to pay on an installment basis. The Court accepted as a rational basis the city's administrative concerns, including maintaining a complex and expensive administrative system to process, collect and enforce the outstanding Barrett Law debts and process refunds. Moreover, the Court noted that the rationality of distinguishing between past payments and future obligations often comes up in the law, for example, in amnesty programs involving mortgage payments, taxes or parking tickets.

Taxpayer Increases Basis of S Corporation Stock by Using Receivables of Related Corporation

In *Maguire v. Commissioner (TC Memo 2012-160)*, the taxpayer held stock in two S corporations. One corporation, Auto Acceptance (AA), operated a car dealership and the other corporation, CNAC, purchased the retail installment notes generated by AA. CNAC was profitable and AA lost money. While shareholders of an S corporation can deduct the corporation's losses on their individual income tax returns, their deductions are limited to the amount of tax basis the shareholders have in their stock.

In the *Maguire* case, the taxpayer needed more basis in his AA shares to deduct the losses and, to increase his AA basis, he caused CNAC to distribute some of the auto finance receivables that it held. He then contributed these receivables to the capital of AA and claimed an increased tax basis in his AA shares. The IRS opposed this attempt to augment basis, arguing that the contribution of the receivables did not represent any new economic outlay on the part of the shareholder.

The court disagreed, finding that the receivables were real debts of AA owed to CNAC. The contribution of these receivables to AA had economic consequences because when a creditor contributes an obligation to the debtor, it can no longer collect the debt. The court also pointed out that while the taxpayer increased his basis in his AA shares, the distribution of the receivables by CNAC reduced the basis of his CNAC shares by an equivalent amount. The end result was that the shareholder was able to move basis from shares in which he did not need it to shares in which he did.

Tax Court Finds that Gift of Limited Partnership Interest Was Present Interest Eligible for Gift Tax Annual Exclusion

Section 2503(b) of the Internal Revenue Code ("IRC") allows an exclusion from gift tax for annual gifts up to a fixed amount per donee. The annual exclusion amount is inflation adjusted and, for 2012, is $13,000 per donee. In order to qualify for the exclusion, however, the gift must be of a "present interest" in the property transferred to the donee – a requirement that occasionally sparks a dispute between taxpayers and the IRS.

In *Wimmer v. Commissioner, T.C. Memo 2012-157 (June 4, 2012)*, the gift at issue was a limited partnership interest in the George H. Wimmer Family Partnership, L.P. The partnership contained a number of restrictions on the transfer of limited partnership interests, and while many of the restrictions were fairly typical, a couple were especially onerous. The transfer needed to be approved by all of the general partners and by limited partners holding 70 percent of the limited partnership interest. The transferee could only be admitted as a substituted limited partner upon the unanimous consent of all of the general and limited partners. Transfers to current partners and certain related parties were excepted from these restrictions. The gifts at issue in this case were made to related parties and not subject to the transfer restrictions. The IRS nevertheless took the position that, because of all of the transfer restrictions in the partnership agreement, the limited partnership interests were not present interests.

Based on prior case law, the Tax Court said that, in order to be a present interest, the gift must confer on the donee a substantial present economic benefit by reason of the right to use, possess or enjoy the property or income from the property. The court concluded that, because of the transfer restrictions, donees of interests did not receive unrestricted and non-contingent rights to the immediate use, possession or enjoyment of the interest. A limited partner did, however, possess the right to income from the interest. The court based this finding on the fact that the partnership regularly generated – and regularly distributed – income to the partners. If this partnership had held only non-income-producing property, the court likely would have concluded that a gift of a limited partnership interest was not a gift of a present interest in property.

Theft-Loss Deduction Permitted for Indirect Investment in Ponzi Scheme

In *CCA 201213022*, the IRS permitted a theft-loss deduction for a taxpayer's investment in a Ponzi scheme even though the investment was not directly with the perpetrator of the scheme. In this case, the taxpayer invested in funds for which the perpetrator of the fraud served as an investment advisor. The taxpayer learned of the fund through a newsletter published by the perpetrator's associate, which discussed the perpetrator's skills as an investment manager.

In order to claim a theft-loss deduction, a taxpayer must show there is privity (a relationship) between himself and the perpetrator of the fraud. Privity is required because the fraudulent act must be a crime, and for it to be a crime the perpetrator must usually have a specific intent to deprive the victim of his property. The IRS concluded that the necessary privity existed because the perpetrator, although technically only an investment advisor to the fund in which the taxpayer invested, clearly controlled the investment activity of that fund and was able to use the assets of the fund in his criminal scheme.

The privity issue became very prominent after the Bernard Madoff Ponzi scheme came to light. Some investors had invested directly with Mr. Madoff, and the IRS provided safe harbor procedures for them to claim a theft-loss deduction. Other investors, however, invested indirectly with Mr. Madoff through feeder funds that invested with him. In many cases, investors in the feeder funds did not even know that the fund in which they had invested in turn invested with Mr. Madoff, until the losses surfaced. The IRS took the position that these feeder fund investors did not have the necessary privity with Mr. Madoff to claim a theft loss with respect to their investment in the feeder fund. Instead, the feeder fund would have to claim a theft loss and pass the loss through to its partners on Forms K-1.

CCA 201213022 does not go so far as to sanction a direct theft-loss deduction by a feeder fund investor. It permits a deduction only when the fund in which the taxpayer invested is effectively managed by the perpetrator of the fraud.

Taxpayer Finds New Way to Mess Up Family Limited Partnership

Many of the cases involving family limited partnerships on which we report have been cases where the taxpayer lost because it did not build a good factual foundation for the partnership. *Estate of Lockett, T.C. Memo 2012-123 (April 25, 2012)* is yet another example of such a taxpayer failure. The taxpayer, Mrs. Lockett, created a family partnership in which she, and a trust created for her at her husband's death, were the limited partners, and in which her two sons were the general partners. She and the trust contributed property to the partnership but the sons did not make any contribution. The trust was subsequently dissolved and Mrs. Lockett became the owner of the limited partnership interest previously held by the trust. Schedule A attached to the partnership agreement showed that the taxpayer had a 100 percent interest in the partnership and her two sons, although general partners, had a 0 percent interest, and partnership income tax returns allocated all items of income and deduction to Mrs. Lockett.

Following Mrs. Lockett's death, the estate tax return filed for her estate showed the taxpayer as the owner of 100 percent of the partnership, but claimed an approximate 40 percent valuation discount based on lack of control and marketability with respect to her partnership interest. The IRS took the position that no partnership existed and the taxpayer's estate should be treated as owning the partnership assets directly, in which case no discount would be applicable.

The court agreed with the IRS. While the sons were listed as general partners, the court found that they neither contributed capital nor rendered significant services to the partnership in order to obtain any interest. There was no evidence that Mrs. Lockett made any gifts of partnership interest to them, and both the partnership income tax returns and her estate tax return showed her as the 100 percent owner. The court said that while a partnership existed when Mrs. Lockett and the trust were partners, upon the dissolution of the trust, she became the sole owner and an entity seeking to be treated as a partnership under the tax law cannot have only one partner.

The case suggests poor planning on the part of the taxpayer and her family – although in her defense, Mrs. Lockett did die unexpectedly. She and her children may have had a plan for her to make gifts of partnership interest and that plan was interrupted by her unexpected death. While it is generally good planning to allow some time to elapse between the transfer of assets to a family partnership and subsequent gifts of partnership interests, this case certainly points out a risk that is inherent in waiting to make gifts.

Acquisition of Residence Qualifies as Section 1031 Exchange Despite Subsequent Occupancy by Taxpayer

In order to complete a tax-free exchange under IRC Section 1031, a taxpayer must exchange property that is either used in a trade or business, or held for investment for other property of a like-kind that is also either used in a trade or business, or held for investment. An exchange does not qualify for Section 1031 treatment if either the relinquished property or the replacement property is a personal-use asset.

In *Patrick A. Reesink, T.C. Memo 2012-118 (April 26, 2012)*, the taxpayer sold his interest in an apartment building and purchased a single-family home (Laurel Lane) as a replacement property. The purchase closed on November 4, 2005, and the taxpayer posted flyers locally, listing the home for rent. The taxpayer had listed the property as investment property on the application he completed in connection with the purchase. Potential renters looked at the property but none ever rented it. In May 2006, the petitioner sold the home he was then occupying as a residence because of mounting financial pressures. In June, he and his wife moved into Laurel Lane.

The IRS took the position that Laurel Lane was not held for investment by the taxpayer because he never actually rented it and occupied it as his residence within eight months after purchasing it. The court nevertheless found in favor of the taxpayer, pointing out that his intent at the time of the exchange is determinative. The court found that the taxpayer did enough to demonstrate his intent to rent the property by posting rental flyers and showing it to prospective tenants. The fact that he occupied the property as his residence fairly soon after its purchase was attributable to a change of circumstances and did not mean that the taxpayer did not intend for the home to be a rental property at the time of its purchase.

While the taxpayer's actions in this case do not translate into a paradigm of good, conservative tax planning, the case does point out that the bar is not very high to establish the taxpayer's intent that a property be considered "held for investment" following an exchange.

IRS Wins Case Involving the Sale of Residence but May Have Set Dangerous Precedent

Bennett v. Commissioner, T.C. Memo 2012-193 (July 12, 2012), also involved a personal residence. The taxpayers bought a residential property in the Bel-Air section of Los Angeles with the intent of constructing a residence they hoped to sell at a profit. After five years, the taxpayers had not completed the residence and sold it, at a loss, in its uncompleted state, to avoid further losses. On their 2002 income tax return, the taxpayers deducted an ordinary loss from the sale of the residence.

The IRS first disallowed the loss altogether, taking the position that the taxpayers intended to occupy the property as their residence, making it a personal-use asset, the loss on which is not deductible. The Tax Court held in favor of the taxpayers on this issue, finding that they had adequately demonstrated that they did not intend to occupy the property themselves. The IRS next argued that the loss, if allowed, should be treated as a capital loss. The taxpayers' position was that they were engaged in a trade or business of developing and selling property, and therefore this property was excluded from capital asset status under IRC Section 1221(a)(1). The IRS took the position that the taxpayers did not have a sufficient level of activity to be considered engaged in a trade or business. The Tax Court agreed with the IRS and determined that the taxpayers had sustained a capital loss. The court distinguished earlier cases involving the construction and sale of a single property, finding that, in all of the prior cases in which the construction and sale of a single property had been found to constitute a trade or business, the taxpayer had a pre-existing contract to sell the house before constructing it. That was not the case here.

One question this case raises is what would the IRS have done if the taxpayers had sold the house at a gain and reported the gain as a capital gain? Would the IRS then have argued that they were engaged in a trade or business? Future taxpayers who do have gains will no doubt cite this case as further precedent that the development of a single property yields capital gain as long as they have no pre-existing contract to sell the property before constructing it.

More Taxpayers Make Mistakes in Documenting Charitable Contributions

While we have written on this topic previously, two recent court cases remind us how often taxpayers fail to obtain the documentation required to sustain an income tax deduction for a charitable contribution that they have made. For all gifts of $250 or more, the taxpayer must obtain a contemporary written acknowledgement of his gift from the donee, by the earlier of the date he files his income tax return for the year of the gift, or the due date for filing the return, including extensions. The acknowledgement must state the amount of the cash contribution and a description of any property contributed. The acknowledgement must also state whether the donee provided any goods or services to the donor in consideration for the gift and if so, a description of those goods and services, and a good faith estimate of their value. If the gift is to a donee organized solely for religious purposes and the only services the donee provides consist entirely of intangible religious benefits, the acknowledgement must so state.

In *Durden, T.C. Memo 2012-40 (May 17, 2012)*, the taxpayer failed to obtain the proper written acknowledgement of his gift from the donee organization. In 2007, the taxpayer gave his church a total of $25,171 in a series of gifts, all but five of which were more than $250. While the church provided the taxpayer with a letter, dated January 10, 2008, confirming the amount of the taxpayer's gifts, the letter did not state whether any goods and services had been provided by the church. When the IRS pointed this out to the taxpayer on audit, the taxpayer obtained a second letter from the church dated June 21, 2009, stating that it had provided no goods and services to the taxpayer.

The Tax Court strictly construed the requirements set forth in the Internal Revenue Code. Because the taxpayer had not obtained acknowledgements satisfying all of the requirements of the Internal Revenue Code before he filed his tax return for the year of the gifts, the court upheld the IRS's disallowance of his income tax deduction.

In *Mohamed, T.C. Memo 2012-152 (May 29, 2012)*, the taxpayer ran afoul of the appraisal requirements. A qualified appraisal must be obtained for all gifts of property for which a deduction of more than $5,000 is claimed. The taxpayers donated valuable real property to a charitable remainder unitrust in 2003 and 2004. Mr. Mohamed was a certified real estate appraiser and based the value of his gift on his own appraisal of the property. On audit, the IRS pointed out that the taxpayers did not have a qualified appraisal because one of the requirements of a qualified appraisal is that the donor cannot be the appraiser. The taxpayers then obtained an appraisal from an unrelated appraiser. The court pointed out that this appraisal was obtained after the taxpayers had filed their tax return – too late, as the appraisal must be obtained before the return is filed. The taxpayers made other errors as well, including failing to complete all of the information required on Form 8283.

The court acknowledged that the result was extremely harsh, noting that the evidence suggested that the property likely was actually worth more than the amount the taxpayer claimed as a deduction. Nevertheless, the court acknowledged that Congress had enacted very specific rules regarding contributions to counteract what it perceived to be a large problem with the incorrect valuation of gifts of property. The court did not feel that it should undermine Congress's rules to address one very sympathetic case.

These cases and others make it abundantly clear that no margin for error exists in documenting charitable contributions, even when a donor is giving to his own private foundation. The specific requirements will be strictly enforced by both the IRS and the courts, and taxpayers must follow the rules precisely.

Recent Case Points Out Even More Risks of Serving as Fiduciary

By now most people are aware that significant legal and economic exposure goes along with serving as a personal representative or trustee for a close friend or family member. The recent case of *U.S. v. MacIntyre (DC Tx, June 25, 2012)* highlights yet another of these risks. J. Howard Marshall made gifts to certain members of his family in 1995 and died shortly thereafter without having paid the gift tax that was due on the gifts. His estate also failed to pay the gift tax due, so liability for payment of the tax was shifted to the donees under IRC Section 6324(b). One of the donees, Eleanor Pierce Stevens, also died before the gift tax was paid. Her executor was E. Pierce Marshall, Jr., and the successor trustee of her living trust was Finley L. Hilliard. Following Ms. Stevens' death, the IRS informed Pierce Marshall, Jr., that it might assert liability against Stevens's estate for J. Howard Marshall's unpaid gift taxes.

The executor and trustee made various payments from and distributions of Ms. Stevens's estate and trust assets, but did not pay the gift tax on the gift to Stevens from J. Howard Marshall. The United States asserted liability against both the executor and trustee for failing to pay the J. Howard Marshall gift tax liability, on the grounds that 31 U.S.C. Section 3713, commonly referred to as the "Federal Priority Statute," provides that a debt owing to the United States shall be paid first when the estate of a deceased debtor, in the custody of an executor or administrator, is not sufficient to pay all debts of the debtor. The statute also provides that if a representative of the estate pays any debt of the estate before paying the government, the representative is liable to the extent of the payment for the unpaid claims of the government. The Tax Court has previously interpreted this statute to require, as a prerequisite for liability, that the representative: (1) is a fiduciary; (2) distributed the estate's assets before paying a claim of the United States; and (3) knew or should have known of the United States' claim.

While IRC Section 6324(b) makes the donee liable for the donor's gift taxes, that section does not extend that liability to the donee's executor or trustee. The court held that 31 U.S.C. Section 3713 can apply to make the executor and trustee liable for the payment of Mr. Marshall's unpaid gift tax to the extent of the distributions and payments they made from Ms. Stevens's estate and trust while leaving the gift tax obligation unpaid. The court had no trouble finding that both the executor and trustee were fiduciaries. It also found that Ms. Stevens owed money to the

United States as the result of her liability as donee for Mr. Marshall's gift tax under IRC Section 6324(b) and that the executor and trustee had notice of the United States' claim.

Most individuals who become a personal representative or trustee are aware or are told by their counsel that they are personally liable for the payment of the decedent's estate taxes to the extent of the decedent's assets within their control. This liability arises under IRC Section 6324(a)(2). The *MacIntyre* case points out that a fiduciary's potential exposure is not limited to the decedent's own estate taxes, and that a fiduciary can be liable under 31 U.S.C. Section 3713 for any amount the decedent owes to the United States, whether for taxes or something else.

IRS Issues Guidance on 2012 Offshore Voluntary Disclosure Program (2012 OVDP) and Announces New Procedures for U.S. Taxpayers Residing Abroad to Come into Compliance

The IRS released a new set of Frequently Asked Questions (FAQs) June 26, 2012, for the 2012 Offshore Voluntary Disclosure Program that it announced in January of this year. The terms of the 2012 OVDP are very similar to the 2011 program described in our prior newsletter issued April 5, 2011 (Vol. 6, No. 1). Two notable differences are that the offshore penalty has been raised to 27.5 percent (up from 25 percent for the 2011 program) and the IRS has set no deadline for participating in the 2012 program. The offshore penalty rates of 12.5 percent and 5 percent under the 2011 program still apply in limited circumstances.

The IRS has added a FAQ that addresses taxpayers with certain Canadian retirement plans who failed to elect under the U.S.-Canada Treaty to defer income earned by the plan, as well as a FAQ that addresses the eligibility of taxpayers who challenged a foreign government's disclosure of tax information through the foreign country's judicial system and failed to notify the U.S. Justice Department of the appeal. The IRS has cautioned that it could change the terms of the program at any time, including the amount of the offshore penalty and who qualifies for the program. It also announced that the first two offshore disclosure programs, in 2009 and 2011, resulted in the collection of more than $5 billion in back taxes, interest and penalties from 33,000 voluntary disclosures. The IRS has received an additional 1,500 disclosures so far under the 2012 OVDP since it announced the program in January.

The IRS also announced, the same day, its plans to help U.S. citizens residing abroad get current with their U.S. tax-filing obligations. For certain U.S. taxpayers living abroad who have failed to timely file U.S. federal income tax returns or Reports of Foreign Bank and Financial Accounts (FBARs) and who owe little or no back taxes ($1,500 or less) for any of the covered years, the IRS is offering to forego penalties and additional enforcement action if the taxpayers file all delinquent tax returns along with appropriate related-information returns for the past three years and the delinquent FBARs for the past six years. The new procedures will also allow resolution of certain issues related to certain foreign retirement plans. These new procedures do not come into effect until September 1, 2012, and we expect that the IRS will provide additional guidance prior to that date.

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