High Net Worth Family

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Supreme Court Holds Defense of Marriage Act Unconstitutional

On June 27, 2013, in a landmark ruling, the United States Supreme Court held that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional. The case was *United States v. Windsor* and arose in connection with a New York statute that recognized same-sex marriages. On the same date, in *Holingsworth v. Perry*, the Supreme Court held that the proponents of California Proposition 8 did not have judicial standing to intervene in a case to argue in favor of the constitutionality of Proposition 8, which a United States District Court had previously declared unconstitutional. The *Hollingsworth* case effectively paved the way for California same-sex marriage.

The *Windsor* case arose from an attempt to claim an estate tax marital deduction in connection with the death of one member of a same-sex married couple. Edith Windsor and Thea Speyer were married in Canada, but their marriage was recognized under the laws of the state of New York, where they resided. Ms. Speyer died in 2009 and left her entire estate to Ms. Windsor. As Ms. Speyer's executor, Ms. Windsor filed an estate tax return and paid the estate tax due. She then filed a lawsuit claiming a refund of the tax on the basis that Ms. Speyer's estate was entitled to a marital deduction pursuant to IRC Section 2057.

The IRS denied the refund on the basis that under DOMA Ms. Windsor did not qualify as a surviving spouse. Section 3 of DOMA provides that for purposes of determining the meaning of any act of Congress, marriage means only a legal union between one man and one woman as husband and wife, and spouse refers only to a person of the opposite sex who is a husband or a wife. The import of this provision was that if a state permitted same-sex marriage, the federal government would not recognize it for purposes of any of its laws. The court held that the definition of marriage in Section 3 of DOMA violated the Due Process Clause of the Fifth Amendment to the United States Constitution as a deprivation of an essential part of the liberty protected under that amendment.

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These two cases may significantly impact your estate plan and may have important income tax consequences for you. Below is a partial list of some of the income tax and estate planning consequences of these cases. Further, many of these benefits may be retroactive.

- The availability of the marital deduction for both gift and estate taxes, including the ability to transmute separate property of one spouse to community property (or vice versa) without negative gift tax consequences.
- Retirement benefits, Social Security benefits and the availability of the spousal rollover IRA.
- The ability to file one joint income tax return and the attendant burden of the "marriage penalty."
- The availability of using both spouses' gift and estate tax exemptions, including the use of "split gifts" for gift tax purposes and the ability to make use at the second death of any estate tax exemption not applied to the deceased spouse's estate.
- Increased health care access and rights.
- Increased opportunities for international estate planning and citizenship.

The IRS has indicated that it intends to publish guidance on the effect of the *Windsor* case soon, and we will provide further information to you when such guidance becomes available.

California to Require Annual Reporting Following a Like-Kind Exchange for Out-of-State Property

California takes the position that when real property located in California is exchanged in an IRC Section 1031 like-kind exchange for property located outside California, the gain realized from the California property that is deferred under Section 1031 remains California-source gain when the second property is subsequently sold. For example, assume the taxpayer lives in Florida but owned an apartment building in California. The taxpayer exchanged the California apartment for an apartment building in Florida. Gain was realized but not recognized for income tax purposes due to Section 1031. The taxpayer then sold the apartment building in Florida three years later. Upon the sale of the Florida building for any amount equal to or greater than he received on the earlier sale of the California property, the taxpayer would owe tax to California on the amount of gain that was deferred when the California property was exchanged for the Florida property.

It was common that taxpayers either forgot that they owed tax to California or simply ignored their obligation to pay California tax. The Franchise Tax Board did not have any effective means of keeping track of the ownership of real property located outside California. To address this problem, in June the legislature added Section 18032 to the Revenue and Taxation Code. Beginning on January 1, 2014, each taxpayer who has exchanged California real property for real property outside California will have to file an annual report with the Franchise Tax Board on a form to be prescribed. This annual reporting obligation applies to both residents and nonresidents of California. The statute authorizes the Franchise Tax Board to determine what information will be required to be provided but presumably it will include confirmation that the taxpayer still owns the out-of-state property.

If a taxpayer neglects to file the form, the Franchise Tax Board can assess income tax on the original disposition of the California real property. This same provision was also added to the corporate franchise tax statutes in Section 24953 of the Revenue and Taxation Code.

Two Taxpayers Lose Income Tax Deductions for Spousal Support Payments

Two recent Tax Court cases serve as a reminder that the income tax deduction for the payment of spousal support is subject to some very specific rules. In *John D. Nye and Rose M. Nye* (July 15, 2013), John Nye was divorced from his first wife Alice Nye in 1990. An agreement between them that was incorporated by the judge in his order required John to pay Alice spousal support in the amount of $3,600 per month.

In 2006, Alice went back to court and sought an increase in the monthly spousal support payments. Subsequently, the parties agreed that John would pay Alice a single lump-sum payment of $350,000 in exchange for which Alice would waive her right to any further spousal support. John paid the $350,000 in 2008 and took an income tax deduction for spousal support, which the IRS disallowed upon audit. The Tax Court agreed with the IRS and upheld the denial of the deduction.

The fact that the alimony was settled through a lump sum payment was not the problem. The Internal

Revenue Code does contain rules prohibiting lump sum spousal support payments, but they only apply to the first three post-separation years. Since the Nyes were divorced in 1990, those rules were not applicable.

One of the requirements for spousal support payments to be deductible is that the payments must terminate upon the death of the payee spouse. In this case, it was possible that Alice could have died between the time the agreement was signed on December 7, 2007, and the time that John paid her on January 28, 2008. There was nothing in their agreement that would have cancelled the payment had Alice died, and the Tax Court determined there was also no provision of state law (Florida) that would have cancelled the payment. Therefore, the payment did not qualify as deductible spousal support.

The second spousal support case is *James J. Faylor* (June 5, 2013). In this case, another of the requirements for deductible spousal support payments was violated. While the attorneys for the taxpayer and his wife were negotiating a support and property settlement agreement, the taxpayer paid his spouse $20,000 in payments for temporary support. The agreement under negotiation was never finalized, but the court eventually issued an order dissolving the marriage and requiring prospective spousal support payments.

James claimed a deduction for the $20,000 he had paid as temporary support before the court order was issued. The IRS denied his deduction on the basis that deductible spousal support must be paid pursuant to "a divorce or separation instrument." The court's order did not cover the $20,000 paid as temporary support, and the agreement under which it was paid was never finalized and signed by the parties. Therefore the Tax Court agreed with the IRS that the payment had not been made pursuant to a divorce or separation instrument.

This case may serve as a reminder of the old saying "no good turn goes unpunished." In any event, it does, along with the *Nye* case, serve as a reminder that very specific rules must be followed in order for payments of spousal support to be tax deductible. The Tax Court showed in both cases that it requires strict compliance with these rules.

New Regulations Allow IRS to Require Taxpayers to Update Information Regarding Employer Identification Numbers

On May 3, 2013, the Treasury Department issued new regulations that require all taxpayers who have been issued an employer identification number (EIN) to provide additional information to the IRS in the time and manner prescribed by the IRS. Such reporting will not begin before January 1, 2014, in order to give the IRS time to prepare the appropriate form and instructions for such reporting.

The apparent impetus for these regulations is that many applications for EINs have been filed listing people who were only temporarily authorized to act on behalf of the entity applying for the EIN. The IRS wants to be able to identify a true responsible person to be associated with each EIN in order to be able to contact the correct person regarding tax matters related to the entity.

These regulations may create difficulties for organizations such as law, accounting and business management firms that keep track of legal entities for hundreds or even thousands of clients. We will report further on this when the IRS issues the applicable form.

Taxpayer Fails in Attempt to Complete Like-Kind Exchange

In *VIP's Industries Inc.* (Tax Court, June 24, 2013), the taxpayer attempted to complete a tax-deferred like-kind exchange under IRC Section 1031 by exchanging a leasehold interest in real property on which the taxpayer had constructed and operated a motel. The lease of the real property had another 21 years and four months remaining on its term. The taxpayer exchanged this leasehold interest for fee interests in two parcels of real property, one of which was improved with a motel and the other with an office building.

The question before the court was whether a leasehold in real property with a 21-year-and-four-month term was like-kind to a fee interest in real property. The Tax Court held that the leasehold was not like-kind with the fee interest and denied the taxpayer Section 1031 exchange treatment. The regulations under IRC Section 1031 provide that a leasehold interest in real property with 30 years or more remaining on its term is like-kind with a fee interest in real property. The

question was whether this is an absolute minimum or merely a safe harbor.

It is surprising that the taxpayer attempted this exchange, at least if it obtained competent advice first. The Tax Court had previously held in *May Department Stores v. Commissioner* that a leasehold with 20 years remaining on its term was not like-kind with a fee interest. That case was decided in 1951, so its existence should not have come as a surprise. Perhaps the taxpayer thought that the extra one year and four months would make a difference?

The court did not say that a 30-years-remaining lease term is an absolute minimum. It left open the possibility that some remaining term less than 30 years might be like-kind with a fee interest. It will, however, take another adventurous taxpayer to find out what that term might be.

IRS Issues Helpful Chief Counsel Advice on Interest Expense Incurred by a Qualified Subchapter S Trust

Only limited types of trusts are permitted as shareholders of corporations that have elected to be treated as S corporations. One permitted type of trust that is in common use is called the "Qualified Subchapter S Trust," which is usually referred to as a "QSST." A QSST can have only one income beneficiary and is generally treated as a grantor trust as to the income beneficiary. If the QSST is a part of a larger trust that is not a grantor trust, it is treated as a separate trust whose only asset is the shares of the S corporation. All items of income, gain, deduction or loss that pass through the S corporation to the QSST are in turn passed through by the QSST to its income beneficiary, due to the grantor trust nature of the QSST.

There is one exception to the pass-through rule and that is for gain or loss arising from the sale or other disposition by the QSST of the shares of the S corporation. That gain is taxable to the QSST itself. The reason for this exception is that under the trust accounting principles in force in most states, gain from the sale of shares is usually allocated to trust principal rather than to income. This means that the income beneficiary is not entitled to have the gain amount distributed. It must remain in the trust for the remainder beneficiaries. It would seem unfair if the income beneficiary had to pay tax on the gain but at the same time was not entitled to have the gain amount distributed.

In *CCA 201327009* (May 1, 2013), the IRS addressed the tax treatment of interest expense incurred by a QSST to purchase the shares it holds in the S corporation. If the interest expense is treated as a deduction related to the S corporation, it should pass through to the QSST's income beneficiary under the grantor trust rules. On the other hand, if it is treated as a general trust expense, it would be treated for income tax purposes as a part of the rest of the trust and subject to the general rules of trust income taxation.

The IRS concluded that the interest expense was directly related to the shares of the S corporation so the expense should pass through to the beneficiary. The IRS reasoned that the interest expense must be paid out of distributions of income from the S corporation that would otherwise be distributed by the QSST to the income beneficiary. Since the beneficiary's distribution amount is reduced by the interest expense, the beneficiary should also receive the benefit of the income tax deduction for that interest expense.

IRS Issues Published Ruling on Mexican Land Trusts

We previously reported to you (Vol.8, No 1, January 2013) on a private letter ruling issued by the IRS on the income tax treatment of a popular real property title-holding trust used in Mexico. Under Mexican law, non-citizens of Mexico cannot own real property in certain restricted zones, which generally are the areas near the country's borders and the coastline. Mexico does, however, permit non-citizens to acquire such property in a form of trust known as a "fideicomiso." In this arrangement, legal title to the property is held by a Mexican bank for the benefit of its beneficiary, who is the person who wishes to own the property. The beneficiary is free to sell his interest in the trust, and the bank must allow the property to be encumbered by a loan upon the request of the beneficiary. The beneficiary has all rights of possession over the property, as well as all of the economic benefits and burdens of ownership.

In the previous private letter ruling, the IRS ruled that such an arrangement did not constitute a trust because the bank did nothing more than hold bare legal title to the property. In *Rev. Rul. 2013-14* (June 6, 2013),

the IRS came to the same conclusion, holding that for United States income tax purposes, the beneficiary of the land trust would be treated as the direct owner of the real property. Because this is a published ruling, it can be relied on by all taxpayers. This ruling is beneficial because if the "trust" was treated as a trust for United States income tax purposes, a variety of annual reporting and compliance provisions would be applicable.

Court of Appeals Upholds Tax Court Finding that Pass-Through Income of Foreign Corporation Does Not Receive Favorable Dividend Tax Rate

In *Rodriguez v. Commissioner* (July 5, 2013), the United States Court of Appeals for the Fifth Circuit upheld a prior decision of the Tax Court denying the lower dividend tax rate to certain income passed through to a United States taxpayer from a foreign corporation. If more than 50% of the stock of a foreign corporation is owned by United States taxpayers, the foreign entity is referred to as a "controlled foreign corporation" or "CFC." Any United States shareholder who owns 10% or more of the stock is subjected to a pass-through income taxation regime on certain types of income generated by the CFC, including most forms of investment income.

The purpose of these rules is to prevent United States taxpayers from avoiding US tax liability by having their investments or foreign business interests held by foreign corporations formed in jurisdictions that do not have income taxes or have very low income tax rates. Under the applicable CFC rules, the United States shareholder must pay tax on his share of this income every year, whether or not it is distributed to him. The kinds of income that are subject to this pass-through taxation scheme are commonly referred to by tax practitioners as "Subpart F income." These United States shareholders are also taxed currently if the foreign corporation invests its earnings within the United States, even if the earnings came from the conduct of an active business and would not be considered Subpart F income. The policy behind this rule is that tax deferral should end if foreign earnings are effectively repatriated by the investment of those earnings in United States property.

In *Rodriguez*, the husband and wife taxpayers were Mexican citizens, but they were United States taxpayers because they were permanent residents of the United States. They owned all the stock of a Mexican corporation that had historically been in the business of publishing newspapers in Mexico. The earnings from publishing newspapers in Mexico were not Subpart F income or otherwise taxed to the United States shareholders on a pass-through basis. The corporation subsequently changed its business to the development of real property, and some of the property it acquired was located in the United States. The taxpayers reported the amount of earnings invested in the United States property as income on their Form 1040 but treated it as qualified dividend income, which at the time was taxed at a 15% rate rather the 35% rate that applied to other forms of ordinary income.

The IRS challenged this treatment, and the Tax Court agreed with the IRS. The taxpayers appealed to the Fifth Circuit. The Court of Appeals upheld the Tax Court's decision, ruling that income of a CFC that is taxed to a United States shareholder on a pass-through basis is not a "dividend" because a dividend requires an actual distribution or some economic benefit to pass from the corporation to the shareholder, whereas Subpart F income and foreign earnings invested in the United States are taxed to the shareholder whether or not those earnings are distributed.

This case resolves the issue of whether Subpart F income and other earnings of a foreign corporation that are taxed on a pass-through basis qualify for the more favorable tax rates applied to dividend income. A somewhat related issue is whether capital gain income that is Subpart F income passes through in kind to its shareholders and is subject to taxation at the lower capital gain tax rate. While no court has yet addressed this issue, it is widely believed that this is not the case and that capital income recognized by a CFC is nevertheless taxed at the higher ordinary income tax rate when passed through to the United States shareholder under Subpart F. The regulations do provide that tax-exempt interest received by a CFC loses its special character and becomes taxable when it passes through to a United States shareholder under Subpart F. It would seem likely that capital gain income also loses its special character under Subpart F.

California State Board of Equalization Determines NBA Player Was a California Resident

In the recent case of *Appeal of Jerome James* (February 26, 2013), the California State Board of Equalization (SBE) determined that an NBA player was a resident of California for the years at issue. This issue has taken on greater importance since California raised its maximum income tax rate to 13.3%, which is one of the highest in the nation. Many high-income people have moved to other states and others are considering doing so.

The Franchise Tax Board (FTB) is well aware that some taxpayers take minimal steps to make it look like they have become "resident" in another state, while in reality they still live in California a significant amount of the time. As a result, the FTB has a very active program to audit the tax returns of those who claim to have moved from California to another state. The FTB is especially interested in cases in which taxpayers "move" very shortly before receiving a substantial amount of income or gain.

Jerome James was born and grew up in Florida. He attended college in Florida and after college spent the fall of 1998 playing basketball in Europe for the Harlem Globetrotters. In December 1998 he was signed by the Sacramento Kings. He rented a home in Sacramento and moved in. The season did not start until February 1999 due to an owner lockout over stalled negotiations on a new collective bargaining agreement with the NBA Players Association.

After the end of the season in May, Mr. James returned to Florida for a month and then went to Utah for the NBA summer league. He sustained a knee injury in July and, following surgery, remained in California for rehabilitation, living in a residence hotel. He purchased a home in Sacramento in December 1999. Although the knee injury prevented him from playing during the 1999-2000 season, he remained in Sacramento for rehabilitation of his knee.

The Kings released him in October 2000 just prior to the start of the season, and he played the 2000 – 2001 season in Yugoslavia. In September 2001, he signed with the Seattle Supersonics. He rented a furnished home in Seattle while retaining ownership of his Sacramento home. His son and the boy's mother lived with him in Seattle during that season. The boy's mother then moved with the boy to Los Angeles, and Mr. James returned to Sacramento for the summer of 2002.

He played for Seattle again during the 2002-2003 season, living in a rented house and again returning to Sacramento after the season in the summer of 2003. In May 2003, he purchased a second, larger home in Sacramento and furnished it, while retaining his original Sacramento home.

He returned to Seattle for the 2003-2004 season, once again living in a rented house. By this time he had reconciled with the mother of his son. They now also had a second son, and they all lived together in Seattle during that season. Upon audit, the FTB determined that Mr. James was still a California resident for the 2003 tax year and until March 23, 2004, after which time he entered into a lease of a Seattle home with an option to purchase it and sold his two Sacramento residences.

In its analysis, the SBE first determined that Mr. James had become domiciled in California. A person's domicile is his "permanent" home, the place to which he intends to return whenever he is temporarily absent. The significance of domicile here is that once a person becomes domiciled in California, he will remain a resident of California even when he is out of the state as long as his absence from the state is for a temporary or transitory purpose.

The SBE determined that Mr. James had become domiciled in California in August 1999 when he returned from Florida to rehabilitate his knee. He was living there with the woman who became the mother of his two sons, and he purchased a home in Sacramento before the end of the year.

The SBE then determined that his absences to play in Yugoslavia and subsequently in Seattle were temporary. He lived during the season in rented properties and returned to Sacramento each summer after the season ended. He filed California resident income tax returns through 2002 and registered several cars and a boat in California. He also used some California advisors. He had obtained a California driver's license and even renewed it in February 2003 while he was playing in Seattle. His bank and other financial accounts remained in California. As it often does, the FTB had obtained the taxpayer's credit card

bills as a means of establishing his physical presence at various times. This analysis confirmed his spending the entire off-seasons in California.

Based on all the facts, the SBE concluded that Mr. James retained his California tax residency until March 2004, when he acquired an option to purchase a home in Seattle and then sold his California residences. All these cases involve a weighing of factors that demonstrate a closer connection to either California or the other state in which the taxpayer claims he was resident. In order to establish residency outside California, one should do everything one can to sever California ties, including selling home and business interests that are located in California, buying a home in one's new location and attending to all the little details such as registering vehicles, updating estate planning documents to conform to the law of the new state, getting a driver's license, registering to vote, obtaining local advisors, moving bank and financial accounts, joining social clubs in the new location and minimizing the number of days spent in California. It is also important to keep accurate records of one's physical location each day and retain credit card and utility bills that will substantiate those records.

IRS Issues Regulations Permitting Some Stock Sales to Be Treated as Asset Sales

The Treasury and the IRS released final regulations under Section 336(e), which permits a domestic corporation or S corporation shareholders ("Seller") to make an irrevocable election to treat a sale, exchange or distribution of at least 80% (by vote and value) of a domestic target corporation's ("Target") stock to unrelated parties within a 12-month period as a sale of Target's assets (a "336(e) Election"). The benefit of a 336(e) Election is a step-up in the basis of Target's assets.

To make the 336(e) Election, the Seller (in the case of an S corporation Target, all of the S corporation shareholders, including any shareholders who do not dispose of stock in the transaction) and Target must enter into a written, binding agreement to make the 336(e) Election, attach a 336(e) Election statement to the applicable tax return and file the applicable asset allocation statement.

The 336(e) Election will expand the number of sales of stock of S corporations where asset sale treatment can be elected. Asset sale treatment has been available on the sale of the shares of an S corporation under Section 338(h)(10), but only where the buyer was a corporation. The Section 338(h)(10) election cannot be made if the buyer is an individual. The new 336(e) Election can be made even if the buyer is an individual. Where the company being sold is a C corporation, only a shareholder that is itself a domestic corporation can make the election. It cannot be made by a selling shareholder who is an individual.

A 336(e) Election only requires consent of Seller and Target. Seller and Target can potentially make the 336(e) Election without the knowledge or consent of the buyer(s). Buyers should be sure to deal with this issue contractually in transactions where a 336(e) Election could potentially be made.

New York's MTA Payroll Tax Ruled Constitutional

In 2009, New York enacted the Metropolitan Commuter Transportation Mobility Tax ("MTA payroll tax") in response to a large MTA budget shortfall. The MTA payroll tax is a quarterly tax on certain employers and self-employed individuals engaging in business within New York's metropolitan commuter transportation district (MCTD), which includes New York (Manhattan), Bronx, Kings (Brooklyn), Queens, Richmond (Staten Island), Rockland, Nassau, Suffolk, Orange, Putnam, Dutchess and Westchester counties.

In our January 2013 newsletter (Vol. 8, No. 1), we reported that a New York State Supreme Court justice declared the MTA payroll tax unconstitutional. However, the New York Supreme Court, Appellate Division, has since reversed this finding, holding the MTA payroll tax constitutional because it serves the substantial state interest of providing a "funding source for the preservation, operation, and improvement of essential transit and transportation services in the MCTD."

Co-ops and Condos Held in Trust Are Eligible for NYC's Primary Residence Property Tax Abatement

A new law, retroactive to June 1, 2012, clarifies that New York City's "primary residence" property tax abatement applies to co-ops and condominium units held in trust solely for the benefit of a person who would otherwise be eligible for an abatement if such person were the direct owner of such co-op or condominium.

New York City had previously taken the position that co-ops and condominiums were not eligible for the abatement if held in trust.

Affordable Care Act Compliance Extended for Employers and Insurers

The Department of the Treasury and the IRS announced that employers and insurers will now have until 2015 before employers are required to offer health care coverage to employees or face penalties under the Affordable Care Act (ACA) or employers and insurers are required to report information with respect thereto. This transition relief will provide more time for input from employers and insurers to simplify information reporting and to adapt their health coverage and reporting systems to comply with the ACA. IRS guidance has encouraged employers and insurers to voluntarily comply with the information reporting provisions for 2014 once such reporting rules are issued but has explained that there are no penalties for not doing so.

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