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President Trump Freezes New Tax Regulations

President Donald J. Trump has instructed federal government agencies not to send new regulations to the Office of the Federal Register for publication until they have been approved by a person designated by the president, with certain exceptions for emergency situations. In addition, regulations that have been submitted to the Office of the Federal Register but not yet published have been withdrawn pending further review. Regulations that have been published but have not yet taken effect have been delayed 60 days from Jan. 20 to allow for further review.

This freeze on new regulations applies to all types of regulations – including tax regulations – issued by the federal agencies. Pending tax regulations affected by the freeze include proposed regulations issued under Internal Revenue Code Section 2704 seeking to limit valuation discounts for interests in family-controlled entities and recently proposed regulations regarding the new partnership tax audit rules scheduled to become effective next year.

Tax regulations are also subject to Executive Order 13771, which requires federal agencies to repeal two regulations for each new regulation enacted. This order does exempt regulations that are directed to be issued by a specific statute.

A number of important tax areas are in need of regulations to provide guidance for taxpayers and their advisors. It is not yet known when the normal regulatory flow will be resumed.

What About the Border Tax?

Following the failed attempt to repeal the Affordable Care Act – otherwise known as Obamacare – President Trump indicated that he plans to turn his attention next to tax reform. A considerable amount has been written regarding a proposed border tax, or “border

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adjustment tax." A lot confusion exists around the notion of a border tax because at various times President Trump has used the term in a manner different from what is intended by many in Congress. President Trump has used the term "border tax" to refer to what is commonly known as a tariff on imported goods. In order to penalize U.S. companies that outsource much of their supply chains outside the United States, the president has threatened to impose a 20 percent tax on all imported goods.

The border tax that is under consideration by many of the Republicans in Congress is a more complex concept that has never been tried. Under this version of the border tax, export sales made by U.S. companies would simply not be subject to taxation. On the other hand, if a company imports goods or parts to use in its finished product, the cost of those imported goods would no longer be allowed as a deduction as part of the company's cost of goods sold. The intent of this provision is to encourage multinational companies to manufacture their products within the United States, using U.S. goods and raw materials.

At the time of this writing, these provisions are still being drafted, and we will keep you apprised of further developments regarding the border tax and any other tax reform measures. It is far from clear whether Congress will be able to agree on a package of comprehensive tax reforms, but if it does, the changes to the tax law may be substantial and lasting.

Fate of the Federal Estate Tax Remains Unclear

Although speculation continues about whether the federal estate tax will be repealed or otherwise modified, and also about possible changes in the basis adjustment under IRC Section 1014, the Trump administration has yet to announce definitive proposals. We will continue to monitor these and other developments as tax reform takes center stage on the new administration's domestic agenda.

Guarantee of Loan Does Not Create Tax Basis

A recent Tax Court case serves as a reminder of one of the important differences between partnerships and S corporations. The income tax basis of the interest of a partner in a partnership is not only a function of the amount that the partner contributes to the partnership as a capital contribution, but also includes the partner's share of any of the indebtedness of the partnership. In the case of an S corporation, a shareholder obtains tax basis in his shares for the amounts he contributes to the corporation, but does not obtain tax basis in his shares from corporate-level indebtedness. The tax basis of a shareholder's or partner's interest in his shares or partnership interest is important for a number of reasons, not the least of which is that the amount of tax losses passed through from the entity that he is allowed to deduct is limited to the amount of his tax basis. In the case of an S corporation, a shareholder may deduct losses passed through from the corporation to the extent of the tax basis in his shares and the tax basis in any loans that he has made to the corporation.

Shareholders have attempted to augment their tax basis by guaranteeing loans made to the corporation by banks of other creditors and then arguing that the guarantee effectively means that the shareholder has loaned money to the corporation. The courts have generally not allowed a shareholder to increase his tax basis through a guarantee of corporate-level indebtedness because the lender is still looking primarily to the corporation to repay its loan.

In the recent Tax Court case of *Tinsley (TC Summary Opinion 2017-9)*, Mr. Tinsley attempted to increase his basis in the shares of an S corporation first by guaranteeing a bank loan made to the corporation and then claiming, when the corporation was dissolved, that he had assumed the loan in his capacity as the guarantor. He argued that this amounted to a capital contribution to the corporation for which he should have tax basis.

Command Computers was an S corporation owned by Tinsley that sustained a tax loss in 2010 before liquidating in August of that year. Upon the liquidation, the loan was renewed by the bank but was done so in the name of Command Computers, even though the corporation had been liquidated. The Tax Court did not accept Mr. Tinsley's argument that he had effectively assumed the loan upon the liquidation of Command Computers, finding that the loan remained in the name of Command Computers as the borrower and that the bank was looking primarily to the assets of Command Computers rather than to Mr. Tinsley for repayment of the loan.

The best way for a shareholder to increase his tax basis by using borrowed funds is for the shareholder to borrow from the bank and then either reloan the funds to the corporation or use the borrowed funds to make a capital contribution to the corporation. Taxpayers have not been successful with guarantees of loans made to corporations.

Tax Court Does Not Recognize S Corporation as the Recipient of Personal Services Income

In the recent Tax Court case of *Fleischer (T.C. Memo 2016-238)*, the taxpayer attempted to utilize an S corporation to reduce his exposure to the self-employment tax. The taxpayer was a certified financial planner who entered into contracts to sell products offered by two different insurance companies. Both of the contracts were between Mr. Fleischer and the insurance company, and neither made any mention of his corporation, Fleischer Wealth Plan. FWP was an S corporation, and Mr. Fleischer reported the income he had received from the insurance companies as having been received by FWP. He paid himself a small salary out of FWP and treated the balance of its net income as simply being passed through to him as the S corporation's shareholder. A shareholder's share of the taxable income of an S corporation that is passed through to him on Form K-1 is not subject to self-employment tax, whereas any salary he pays to himself from the S corporation is subject to all the employment taxes.

Taxpayers have long uses S corporations to try to avoid self-employment taxes on what is essentially personal service income. The taxpayer arranges for the income from his services to be received by the corporation and pays himself a small salary, on which all the employment taxes are paid. Most of the net proceeds from the taxpayer's services are simply allowed to flow out on his K-1 as net income. This net income is not subject to employment taxes. The IRS long ago caught on to this scheme and prevailed in many court cases, resulting in the taxpayer having to pay employment taxes on most or all of the net earnings of the S corporation. The IRS has been successful in convincing courts that the small salary received is not reflective of the value of the taxpayer's services.

Mr. Fleischer, however, did not even get that far. The Tax Court determined that the amounts paid by the two insurance companies should have been reported directly by Mr. Fleischer on his own income tax return, rather than on the income tax return of FWP. The court pointed out that FWP was not a party to the contract with either of the insurance companies. In order for FWP to be the proper party to report this income, it needed to be a party to the contracts with the insurance companies and it also needed to be able to control the provision of Mr. Fleischer's services to the insurance companies. Under the court's holding, all the payments received by Mr. Fleischer from the insurance companies were considered net income from self-employment upon which he was required to pay self-employment tax.

Court of Appeals Affirms Taxpayer Victory in Swart Case Regarding Doing Business in California

We previously reported on the case of *Swart v. Franchise Tax Board (Vol. 10, No. 1, April 2015)*. Swart Enterprises Inc. was an Iowa corporation that owned a farm in Kansas. It had no physical presence

in California and did not sell any products or services in California. It was not registered with the Secretary of State to transact intrastate business within California. In 2007, Swart invested $50,000 in a limited liability company that was engaged in the business of equipment leasing, giving it a .2 percent interest in this company. The leasing company was formed under the laws of the state of California and was treated as a partnership for income tax purposes.

The Franchise Tax Board took the position that Swart was required to file a California franchise tax return and pay the $800 minimum annual franchise tax as a result of its investment in the leasing company. The superior court determined that Swart was not doing business in California and therefore was not required to file a franchise tax return or pay the $800 minimum tax. The FTB appealed this decision to the court of appeal.

The FTB made a number of arguments before the court of appeal. It argued that because the leasing company was doing business in California and Swart was a member of the leasing company, it should be deemed to be doing business in California. The court of appeal did not accept this argument, finding that Swart bore more similarity to a shareholder receiving dividends — in other words, simply a passive investor. The FTB's next argument was that because the leasing company was treated as a partnership for tax purposes, Swart should be treated as a general partner. The FTB argued that each partner of a partnership is considered to be engaged in the business activities of the partnership, but the court also declined to accept this argument. Finally, the FTB argued that even though the leasing company was managed by a manager rather than by the members, the owners effectively controlled the management because they could remove the manager at any time. The court likewise rejected this argument, noting that as the holder of a .2 percent interest, Swart could not remove the manager without the concurrence of a number of other members, since a majority vote was required.

The fact that the FTB chose to appeal this case is an indication that it still takes a very aggressive view of what constitutes doing business in the state of California. Whether the FTB will now moderate its view in light of its loss at the Court of Appeal, or it will continue the fight by appealing to the California Supreme Court, remains to be seen.

Court Distinguishes Alimony From Property Settlement

In the recent case of *Leslie v. Commissioner (T.C. Memo, 2016-171)*, the Tax Court had an opportunity to review the different tax treatments that apply to payments for spousal support compared with a property settlement. In connection with their pending divorce, Maria Leslie and her husband, Byron Georgiou, entered into a marital separation agreement. Under the agreement, Ms. Leslie received a number of different payments. Her husband, an attorney, became involved in the Enron class action litigation and in their separation agreement agreed to pay Ms. Leslie an amount equal to 10 percent of whatever fee he might receive as a result. The agreement did not specifically stipulate that this contingent payment would terminate upon the death of Ms. Leslie; however, it did state that it was to be considered spousal support and intended to be deductible by Mr. Georgiou and includible in income by Ms. Leslie. He ultimately received $55 million in fees from the Enron litigation, to be paid during the period 2008 through 2010.

Payments of spousal support are typically deductible by the spouse making the payment and taxable to the spouse receiving the payment. Transfers pursuant to a settlement of the parties' property rights are generally not subject to tax. For payments to be considered spousal support: (i) the payments must be received by the payee spouse under a divorce or separation instrument; (ii) the payments must not be designated by the instrument as payments that are not includible in the recipient's income and not deductible by the payer; (iii) if the payee and payer are legally separated rather

than divorced, they cannot be members of the same household at the time the payments are made; and (iv) the payments must terminate on the death of the payee spouse.

Ms. Leslie received approximately $5 million out of the Enron fee and took the position that it was part of a nontaxable property settlement, rather than taxable spousal support as provided in the separation agreement. Her position was based on the fact that even though the separation agreement designated the Enron payment as spousal support, it failed to specify that the payment was terminable upon her death.

The Tax Court determined that even though the separation agreement did not specifically state the payment would terminate upon the death of Leslie, it was nevertheless properly treated as taxable spousal support because a provision of California law provided that the payment would terminate upon the death of Ms. Leslie. Section 4337 of the California Family Code provides "except as otherwise agreed by the parties in writing, the obligation of a party under an order for the support of the other party terminates upon the death of either party or the remarriage of the other party."

Fortunately for Mr. Georgiou (and unfortunately for Ms. Leslie), his tax deduction was salvaged by the California statute. The better practice for payments that the parties intend to be treated as spousal support is to provide in the agreement or court order that the payments will terminate upon the death of the recipient spouse.

New Due Date for FBARs

Beginning this year, the annual Report of Foreign Bank and Financial Accounts will be due on the same date as the individual income tax return. Normally, this would be April 15; however, for 2017 the due date is April 18 because the 15th is on Saturday and Monday the 17th is a holiday in the District of Columbia. For filers who miss this deadline, an automatic six-month extension is available. Previously, FBARs were required to be filed by June 30. Depending on your foreign holdings, you may also be required to file Form 8938 with your income tax return. You should discuss this with your tax preparer.

New IRS Reporting Requirements for Foreign-Owned U.S. Disregarded Entities

In December 2016, new regulations were issued that require any U.S. entity that is both (i) wholly owned (whether directly or indirectly) by a foreign person and (ii) treated as a disregarded entity for U.S. tax purposes to file Form 5472 whenever a "reportable transaction" occurs. The most common of these entities used by foreign persons is the single-member limited liability company, formed in Delaware or in another state, and often used to hold U.S. assets and investments, such as real property in the United States. Under the new regulations, for example, the funding of a limited liability company by its owner would be a "reportable transaction" triggering the filing requirement.

Form 5472 requires the entity to identify its beneficial owner. It also requires the entity to have a U.S. tax identification number, since such a number is needed to properly complete Form 5472. The regulations also require the entity to properly maintain books and records sufficient to establish the correctness of any U.S. tax filings, including any records relating to transactions with related parties.

These rules are effective for any tax years beginning Jan. 1, 2017. The due date for Form 5472 depends on whether the foreign owner has a U.S. tax return filing obligation. If so, the entity is deemed to have the same taxable year as its owner and the same filing date. If the foreign owner of the entity does not have a U.S. tax return filing obligation, then the entity is generally required to use the calendar year as its taxable year for this purpose.

California Supreme Court Clarifies Certain Statutes Regarding Trust Spendthrift Clauses

The California Supreme Court's recent opinion in *Carmack v. Reynolds* clarifies the effect of "spendthrift"

trust clauses, which are intended to prevent the trust's beneficiary from assigning away an interest in the trust, and protect the trust's assets from the beneficiary's creditors. Under the California Probate Code, spendthrift clauses are valid with respect to trust income and principal. However, they offer protection only while assets remain in trust. Once a distribution is made, it can be reached to satisfy a creditor's judgment just like any other asset the beneficiary owns. Conflicting provisions of the California Probate Code have long made it difficult to determine exactly what creditors can reach, and when.

In *Carmack v. Reynolds*, a trust instrument provided that the beneficiary was entitled to receive $100,000 of trust principal annually for 10 years, and then receive one-third of the remaining trust principal. The trust was governed by California law and contained a valid spendthrift clause. One day after the death of his last surviving parent, the beneficiary filed for bankruptcy under Chapter 7 of the Bankruptcy Code. The trustees of the trust sought a declaratory judgment as to the bankruptcy trustee's rights to the trust assets. The case was heard by the U.S. Bankruptcy Court and then appealed to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit was faced with three apparently contradictory California Probate Code statutes on the reach of creditors with respect to spendthrift trust assets that are going to be distributed to the beneficiary but are still in the trustee's hands. The Ninth Circuit therefore asked the California Supreme Court to clarify how these statutes should be reconciled.

Under Section 15301(b), when an amount of principal has become "due and payable" by the trust to the beneficiary, a creditor may apply for a court order directing the trustee to satisfy a judgment against the beneficiary by paying that principal amount to the creditor. In other words, the creditor can ask a court to apply up to 100 percent of a due and payable distribution to satisfy the debt. An exception under Section 15302 provides that if the trust instrument specifies a distribution is for the support or education of the beneficiary, the amount the beneficiary actually needs for those purposes may not be taken by the creditor.

Two other statutes governing a creditor's reach seem to conflict with Section 15301(b), however. Section 15306.5(b) also allows a creditor to obtain an order directing a trustee to satisfy his judgment out of trust payments to which the beneficiary is entitled, but limits the creditor's reach to 25 percent of any payments that are not needed for the support of the beneficiary and his or her dependents. Second, and most confusing, Section 15307 provides that, regardless of these other statutes, a creditor can obtain an order directing the trustee to satisfy a judgment from any amount to which the beneficiary is entitled, except for amounts needed for the beneficiary's support and education. This provision, if taken at face value, would abolish the restrictions placed on a creditor's reach by other statutes.

The California Supreme Court had to reconcile statutes that together seem to provide that (i) a creditor can reach up to 100 percent of the amount "due and payable" to the beneficiary, except any amount the trust provides that is for the beneficiary's support or education and that is needed for those purposes (Section 15301(b)); (ii) a creditor can reach up to 25 percent of any amount the beneficiary is entitled to receive, except any amount needed to support the beneficiary and dependents (Section 15306.5(b)); and (iii) a creditor can reach up to 100 percent of any amount the beneficiary is entitled to receive, except any amount needed for the beneficiary's support or education (Section 15307).

The court determined that Section 15307 must reflect a legislative drafting error, or else the more restrictive and specific provisions of Section 15306.5(b) would not have been enacted. Concluding that the legislature actually intended to limit creditors' reach to 25 percent of distributions to which the beneficiary was entitled (aside from amounts needed to support the beneficiary and dependents), the court set aside Section 15307 to the extent it conflicted with that intent.

The court then turned to reconciling the 25 percent limitation of Section 15306.5(b) with Section 15301(b), which contains no limitation. Looking closely at the language of each statute, the court determined that the key issue was the timing of the distributions each statute described.

Section 15301(b) applies to amounts “due and payable,” that is, distributions that are currently payable to the beneficiary but not yet actually distributed. These amounts are practically in the beneficiary’s hands, though they have not yet been transferred. This is a narrower class of distributions than those described in Section 15306.5(b), which applies to any future distributions to which the beneficiary is entitled. This would include, for example, payments required to be made to the beneficiary in future years under the trust instrument. Since these assets will continue in the trust for some period of time and are not practically in the beneficiary’s hands, they are entitled to the greater protection of the 25 percent cap.

Having reconciled these statutes, the court created a much clearer set of rules. A creditor can reach up to 100 percent of any amount that has become due and payable (but is still in the trustee’s hands), reduced by amounts that the trust instrument specifies are for the beneficiary’s support or education and are needed for those purposes (Section 15301(b)). In addition, a creditor can reach up to 25 percent of any *anticipated* payments to be made to the beneficiary, reduced by amounts needed to support the beneficiary and dependents (or already obtained by other creditors).

The opinion illustrates these rules with the example of a beneficiary who is entitled to receive $10,000 from a spendthrift trust each March 1 for the next 10 years. The trust does not specify the distributions are for his support or education. On March 1 of the first year, a creditor who has a $50,000 judgment against the beneficiary could petition for an order directing the trustee to distribute to the creditor (i) the entire $10,000 distribution for that year and (ii) $2.500 from each of the nine expected distributions as they are paid out in future years. And if the balance of the judgment were not satisfied, then each year the creditor could seek a new order to collect from the trustee the remaining $7,500 of that year’s distribution. The creditor’s recovery would be limited only to the extent distributions were required for support of the beneficiary and dependents. Although the court does not highlight the fact, the creditor would have been in a less advantageous position if this trust provided that distributions were to be made only for the beneficiary’s support or education. Such provisions are not appropriate for every spendthrift trust, but they do maximize creditor protection.

Although not relevant to this case, some trusts do not provide for mandatory distributions and instead give the trustee total discretion over the timing and amount of distributions. With respect to these “discretionary” trusts, Section 15306.5 allows a creditor to reach assets only when the trustee has decided to make a distribution to the beneficiary. If the beneficiary of a discretionary trust has a judgment against him or her, the trustee can protect the trust assets by deciding not to distribute them. The trustee can make this decision only if he is not required under the trust instrument to make distributions as required for the beneficiary’s support, however.

Tax Court Resolves Dispute Over the Valuation of Old Master Artworks

The Tax Court frequently becomes involved in the resolution of disputes between a taxpayer and the IRS over the value of an asset. Most often these disputes arise in connection with the imposition of the estate tax or the gift tax. The recent case of *Estate of Kollsman (T.C. Memo 2017-40)* is interesting because the dispute centered on the value for estate tax purposes of two old master paintings owned by Eva Franzen Kollsman. At the time of her death in 2005, she owned Village Kermesse, Dance Around the Maypole by Pieter Brueghel the Younger and Orpheus Charming the Animals by Jan Brueghel the Elder or Jan Brueghel the Younger. There was a dispute over which of the Brueghels had painted Orpheus. Both Maypole and Orpheus were painted in the 17th century, and the medium for both was oil paint on wood panels.

After the decedent's death, the co-chairman of Sotheby's Old Master Paintings Worldwide looked at the paintings and wrote a letter to the executor of the decedent's estate expressing the view that Maypole would sell at auction for $600,000 to $800,000 and Orpheus would sell for $100,000 to $150,000. Shortly thereafter, Sotheby's sent the executor a letter expressing its opinion that Maypole was worth $500,000 and Orpheus was worth $100,000, which values were used on the decedent's federal estate tax return.

The executor conferred with an art restoration expert and, based on that expert's advice, decided that both paintings should be cleaned. The cleaning was highly successful.

In January 2009, Maypole was sold at auction by Sotheby's for a hammer price of $2,100,000 and a total price to the buyer of $2,434,500, after the buyer's premium was added. The sale occurred before the audit of the decedent's estate tax return by the IRS had been completed. The IRS initially adjusted the estate tax value of the paintings to $1,750,000 for Maypole and $300,000 for Orpheus. In the ensuing Tax Court proceeding, it further increased the values to $2,100,000 for Maypole and $500,000 for Orpheus. At the time of the trial in the Tax Court, Orpheus had not been sold.

The decedent's estate used the expert from Sotheby's as its expert witness. He defended his prior valuation on two grounds. He believed that the paintings' value at the time of the decedent's death was depressed because the paintings were soiled and the dirt obscured the true condition of the paintings. He was also of the opinion that the cleaning process entailed significant risk and might damage the paintings or reveal significant flaws that might render them unsalable. His other rationale was that the art market had risen substantially since the date of the decedent's death, principally due to wealthy Russian buyers trying to acquire Old Master paintings.

The court largely disregarded the taxpayer's expert. In part, the court thought he was conflicted in that at the time he first gave the executor his view of the value of the paintings, he knew that the executor wanted a low value for estate tax purposes and was hoping to curry favor in order to obtain the right to auction the paintings at a later date, which ultimately happened. The court also found that art sales statistics did not reflect the substantial increase in prices after the decedent's death that had been asserted by the Sotheby's expert. Much of the increase in auction sale prices had actually occurred prior to the decedent's death. Finally, the court did not believe that the soiled condition of the paintings had as great an impact on their value as the taxpayer's expert asserted. The IRS also submitted expert testimony that the cleaning of the paintings was well-advised and not a high-risk endeavor.

The IRS used an art historian and appraiser as its expert. He valued Maypole at $2,100,000 and Orpheus at $500,000. His expert witness report identified certain sales of other paintings that he believed were comparable, in a value sense, to the paintings in question. The court largely accepted the valuation of the IRS expert, adjusting down the value of Maypole by 5 percent to reflect the soiled condition of the painting. The court adjusted down the value of Orpheus by 5 percent to reflect its soiled condition and down 10 percent because evidence in the record showed some bowing of the wood panel.

The court's opinion is not clear on the extent to which the court was influenced by the posthumous sale of the Maypole painting, although it clearly took the sale price into consideration. If there are morals in this story, they are: (1) where possible, a significant asset over which there could be a valuation dispute should not be sold until the audit of the decedent's estate tax return has been completed, at least where the sale price could be significantly higher than the value reported on the estate tax return; and (2) a well-done market value appraisal by a qualified independent appraiser is essential to support the value reported in the return, because the court will take the subsequent sale into account in its determination.

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