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The *Michigan Tax Lawyer* is a quarterly publication of the Taxation Section of the State Bar of Michigan that is designed to be a practical and useful resource for the tax practitioner. Features include concise reports in a uniform format from the Section's committees, practitioner articles with the "how to" approach, news of events and of other Section members, and "Short Subjects" providing helpful practice information.

Input from members of the Taxation Section is most welcome. Our publication is aimed toward involving you in Section activities and assisting you in your practice. If you have suggestions or an article you wish to have considered for publication, please contact Eric M. Nemeth, 2000 Town Center, Suite 2400, Southfield, Michigan 48075 (248) 263-3706.

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TAXATION SECTION

STATE BAR  OF MICHIGAN

November 15, 1999

Dear Taxation Section Members:

Thank you for giving me the opportunity to serve as your Chairperson as we enter the new millennium. Welcome to our new committee chairpersons (Business Entities - Tony Caputo, Employee Benefits - Larry Schiller, and Practice and Procedure - Trevor Wetherington) and new council members (Charles Lax who previously was chairperson of the Employee Benefits Committee, Aaron Sherbin who previously was chairperson of the Practice and Procedure Committee and Mark Larson who we are fortunate enough to have back on the Council).

I look forward to meeting as many of you as possible during the coming year at one of the following activities of the Taxation Section.

Summer Tax Conference. The Annual Summer Tax Conference has been scheduled for June 23 and 24, 2000 at Shanty Creek at Cedar River. In addition to outstanding golf, there are a number of family activities and children's activities available at Shanty Creek. Jay Kennedy is putting together an exciting program. Please call Jay at (313) 566-2500 for additional information.

After-Hours Tax Series. From October through May, there will be a presentation in the Detroit area and Grand Rapids area on topics of interest. Kaplin Jones is in charge of this educational series. If you have any questions or would like to be a speaker, please contact Kap at (616) 336-6000.

Tax Court Luncheon. The Tax Court Luncheons are an opportunity for tax practitioners to meet with the presiding Tax Court Judge and IRS District Counsel members when the Tax Court is in Detroit. The luncheons are announced in advance by correspondence to taxation section members and in this publication. Mark Larson is in charge of the luncheons this year and he can be reached at (313) 568-6790.

Commissioner Advisory Groups. Commissioner advisory groups have been established in order to give the Michigan Department of Treasury input on tax issues. Jim Novis and Joanne Faycurry are our representatives on the commissioner advisory group for business tax matters and Joanne Faycurry is our representative on the commissioner advisory group for individual tax matters.

Internet. The Taxation Section has a website. It can be accessed through the State Bar website, which is "www.michbar.org." Our website has limited information at this time. Mark Rizik is going to expand the information included on the website this year.

If you have any ideas or are willing to devote some time to this project, please contact Mark at (616) 831-1700.

Annual Dinner with Past Chairpersons. If you are a past chairperson of the Taxation Section, please mark May 4, 2000 on your calendar for the annual dinner at the University Club in East Lansing. This is a great opportunity to share your knowledge and experience with the current Council Members and Committee Chairpersons and to see old friends.

Committee Meetings. The Taxation Section continues to hold committee meetings during the year. Taxation Section members are notified about committee meetings via mailings. Hopefully, we will be able to notify committee members about meetings via the internet in the not too distant future. If you would like to be notified about committee meetings or would like to write an article for the *Michigan Tax Lawyer* in your area of specialty, please contact the appropriate committee chairperson:

BUSINESS ENTITIES - Tony Caputo (810) 573-8900
EMPLOYEE BENEFITS - Larry Schiller (313) 394-5101
PRACTICE AND PROCEDURE - Trevor Wetherington (313) 628-7439
STATE AND LOCAL - Joanne Faycurry (313) 496-7678
INTERNATIONAL - Alice Naski and Sherrill Wolford (313) 568-6849
ESTATES AND TRUSTS - Michael Love (248) 901-3979
PROGRAM FACILITATOR - Kelli Weiss (248) 683-0462

Annual Meeting. The annual meeting is scheduled for September 20, 21 or 22, 2000 in Detroit. Sherrill Siebert is putting together the program for the annual meeting. If you have any ideas, please contact Sherrill at (313) 465-7556.

As I begin my year as Chairperson, I want to thank my predecessor, Bob Stead, for his leadership of the Taxation Section. I also look forward to working with the new officers of the Section: Vice Chairperson - James H. Novis, Treasurer - Eric T. Weiss, and Secretary - Edward M. Deron. All of these individuals are knowledgeable tax professionals, have substantial experience working on Taxation Section matters and are my friends. All you have to do is show up at one of our activities. I look forward to meeting you soon.

Very truly yours,

JOSEPH A. BONVENTRE, Chairperson

Report of the Business Entities Committee

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1. Recent Activities.
The last meeting of the Business Entities Committee was held on November 11, 1999. Messrs. Jay Kennedy and Eric J. Girdler addressed the Committee on the subject of "ESOP owned 'S' Corporations."

2. Future Meetings.
Mr. Charles W. Roger will be addressing the Committee on the subject of Real Estate Investment Trusts on a date and location to be determined in early March of 2000.

Mr. George W. Gregory will be addressing the Committee on the "Unexpected Tax Impact and Model Language for Buy-Sell Provisions in Limited Liability Operating Agreements" on a date and location to be determined in July of 2000.

Report of the Employee Benefits Committee

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1. Recent Activities.
The most recent meeting of the Committee was on September 15, 1999 in conjunction with the State Bar meetings in Grand Rapids. Present were representatives of the Northeast Region of the IRS: Janna Skufca, Chief, EP Branch 2, Northeast Key District explained and outlined the new (again!) IRS reorganization, while Catherine M. Jones, Chief, EP Branch 1, Northeast Key District discussed IRS guidance regarding various correction methods for common plan errors under the Employee Plans Compliance Resolution Program (EPCRS). That meeting marked the final meeting of the two-year leadership cycle of Chuck Lax, whose innovations included a joint meeting with the Estates and Trusts Committee and a visit by an IRS representative of the Office of General Counsel. We all thank Chuck for his thoughtful and gracious leadership.

2. Future Meetings.
Following in the footsteps of Chuck Lax, we will sponsor a return visit from Alan Tawshunsky, Special Counsel from the IRS Office of General Counsel, on March 10, 2000. Mr. Tawshunsky will discuss current regulation and guidance projects, hopefully including IRS guidance on cash balance plans. There will be a joint meeting with the Estates and Trusts Committee on May 16, 2000, where members of each Committee will make presentations on topics of common interest. There also will be a January meeting, but the date and topic are as yet unscheduled.

Report of Estates and Trusts Committee

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1. Recent Activities.
A meeting of the Committee took place on September 15, 1999. This

meeting, held in Grand Rapids, was in conjunction with the State Bar of Michigan Annual Convention.

Mr. Robin Ferriby and Mr. George Gregory gave a presentation on Tax Aspects of the Estates and Protected Individuals Code for members attending the State Bar Annual Convention. Mr. Ferriby is one of the principal drafters of the Estates and Protected Individual Code. Mr. Gregory made substantial contributions to the drafting process in the area of taxation. They discussed several items of interest to tax practitioners and estate planners under the law which will take effect next year, including: Reduce to Zero rules of construction, tax apportionment, tax powers of trustees and personal representatives, charitable forms of gift and distributions, qualified family owned business interest deduction matters, Rev. Rul. 64-19 considerations pertaining to transfers to a surviving spouse, and other subjects under the Estates and Protected Individuals Code. Mr. Ferriby and Mr. Gregory recently wrote on these topics for the *Michigan Tax Lawyer*.

2. Future Meetings.
A Committee meeting is planned for December 7, 1999. At that meeting, Mr. Thomas Sweeney, a principal of Clark Hill, P.L.C., will discuss the use and taxation of family limited partnerships in estate plans. Mr. Sweeney will address the several aspects of such partnerships, including valuation issues, and the latest developments. This meeting will take place at the National City Center in Birmingham, Michigan from 3:30 p.m to 5:30 p.m.

A Committee meeting is planned for February 15, 2000. At the meeting, Mr. Robert Perry, a shareholder for Butzel Long, will discuss the "education IRA" made available under Section 529 of the IRC. The benefits of this provision, added by the 1997 Act, have only lately become clear. Mr. Perry will describe many aspects of this section, including how this vehicle may be used to make tax-favored gifts and how the grantor may affect the ultimate disposition of the property. This meeting will take place at the National City Center in Birmingham, Michigan from 3:30 p.m. to 5:30 p.m.

A joint Committee meeting is planned for May 16, 2000. At this meeting, Mr. Robert Ketchum, a principal of Miller, Canfield, Paddock and Stone, P.L.C., will address the interplay of income and transfer taxes on retirement plan benefits as used in lifetime and estate plans. Mr. Ketchum will identify some traps in this area, and will survey the latest developments. This will be a joint meeting with the Employee Benefits Committee. This meeting is planned for the MSU Management Education Center in Troy, Michigan.

Report of the International Tax Law Committee

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Sherrill D. Wolford, Co-Chairperson
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1. Recent Activities.
A meeting of the International Tax Committee was held in December at the Detroit offices of Dykema Gossett, 400 Renaissance Center. The topic of the meeting was Recent Mexico Tax Developments: Maquiladoras and Permanent Establishment Issues.

2. Future Meetings.
The next meeting of the Committee is scheduled for February. The featured speaker is David M. Gardner, C.P.A., C.A. of the law firm of Collins Barrow, of Windsor, Ontario, Canada who will speak on Cross Border Investment in Canada.

3. Mailing List and *Tax Lawyer* Articles.
If you are interested in having your name added to the International Tax Committee mailing list or to either speak at an upcoming meeting or prepare an article for the *Michigan Tax Lawyer,* please contact Joy Donahue at (313) 568- 6709 or respond by e-mail to jdonahue@dykema.com.

Report of the Practice and Procedure Committee

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I am pleased to assume the duties of the Chairperson of the Practice and Procedure Committee. I look forward to chairing this Committee over the next two years and I have appreciated immediate past Chairperson Aaron Sherbin's assistance in assuming this position. I want to thank Aaron for all of his hard work over the past two years and for the wonderful job he has done as Chairperson.

1. Recent Activities.
The most recent meeting of the Practice and Procedure Committee was a joint meeting with the State and Local Committee held on September 15 at the State Bar Annual Meeting in Grand Rapids. The topic was "What's New in Michigan Taxes?" The speakers included June Summers Haas, Administrator, Legal & Hearings Division, Mike Martin, Audit Ombudsman, and Pat Snow, Hearing Referee. The event was fairly well attended and focused on recent developments in the Michigan Department of Treasury and the role various people play inside the agency.

2. Future Meetings.
The next meeting of the Practice and Procedure Committee is tentatively scheduled for mid-March. As has been the tradition, senior representatives from the IRS Michigan District will be in attendance. It is anticipated that the Director's office and the various IRS chiefs will be represented at the meeting. A separate announcement to all Committee members will be sent out after the first of the year with more specific information.

3. Recent Developments.
(A) *Ex Parte Communications - Appeals.* Section 1001(a)(4) of the 1998 IRS Restructuring and Reform Act requires that the IRS reorganization be structured to prohibit "ex parte communications" between Appeals Officers and other IRS employees. On October 4, 1999, the IRS issued a proposed revenue procedure, Notice 99-50 (IRB 1999-40, dated October 4, 1999) containing guidance on this subject in the form of questions and answers. The proposed guidance takes the position that while an Appeals Officer should not address the strength of issues and positions with examination agents, it is permissible for the Appeals Officer to seek clarification from the agent of a factual description or legal assertion in the file.

(B) *New IRS Compliance Initiatives.* On October 2, 1999, IRS Chief Operations Officer John Dalrymple told the Association of Former IRS Executives that the IRS is planning major new initiatives on trusts, non-filers and the earned income credit. Believing that the use of trusts is the fastest growing area of non-compliance, the IRS is training its staff to be more effective in enforcing the laws in this area. Second, the IRS is planning visits to the 1,500 return preparers (not attorneys or CPAs) who they have identified as having serious Earned Income Tax Credit compliance problems. Finally, while the IRS has had a non-filer initiative for some time, they have determined that the recidivism rate was over 30%. Consequently, they want to address this group of people again. See Tax Notes Today for October 4, 1999 for more detailed discussion of Dalrymple's remarks.

(C) *Global Interest Netting.* The IRS released Revenue Procedure 99- 43, modifying and superseding its global interest netting guidance contained in Revenue Procedure 99-19. Revenue Procedure 99-19 provided taxpayers with guidance on how to apply the new interest netting statute to interest for periods *prior* to July 22, 1998 (i.e., interest accruing before October 1, 1998), the general effective date of the law. The new revenue procedure was issued in response to comments from taxpayers and practitioners regarding what taxpayers should be required to submit to the Service by December 31, 1999, in accordance with Rev. Proc. 99-19, if final interest netting computations could not be provided by that date. The new revenue procedure provides that a taxpayer with overlapping overpayments and underpayments must file a claim *only* if the statute of limitations (SOL) for both the overpayment and underpayment will be closed on or before December 31, 1999. If one of the two statute of limitation periods (either the overpayment or underpayment) is still open on December 31, 1999, the taxpayer **does not have to file** until the date on which the last applicable period of limitation closes. Modifications to Rev. Proc. 99-19 include: (1) provision of a specific address for the filing of interest netting claims; (2) provision of a specific labeling of such claims; and, (3) requirement that the underpayment interest should generally be reduced to accomplish the equalization of the interest rate.

Report of the State and Local Tax Committee

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1. Recent Activities and Developments.

(A) The last meeting of the State and Local Tax Committee was held on September 15, 1999, at the annual State Bar Conference in Grand Rapids, Michigan. The meeting was held jointly with the Practice and Procedures Committee. The featured speakers were June Summers-Haas, former Director of Legal Hearings Division, Department of Treasury; Michael Martin, Supervisor, Audit Division of the Department of Treasury; Patricia Snow, Hearing Referee, Hearings Division of the Department of Treasury (Informal Conferences); and Norman D. Shinkle, former Chairperson of the Michigan Tax Tribunal. The speakers discussed audit and appeal procedures within the Department of Treasury, and hearings in the Court of Claims and Tax Tribunal. The meeting was well attended.

(B) The Sales and Use Tax Sub-Committee of the Commissioner Advisory Group ("CAG") is in the process of drafting new and amended Sales and Use Tax Rules. On December 6, 1999, a draft of the proposed Sales and Use Tax Rules will be distributed to all members of the State and Local Tax Committee for comment. A public hearing on the proposed Rules is scheduled for mid- to late-January, 2000. Accordingly, it is important that I receive all comments not later than January 7, 2000. Anyone who has not received a copy of the draft proposed Rules and is interested in receiving copies of same should contact Marie Fiocchi, secretary to Joanne Faycurry, Chairperson of the State and Local Tax Committee, at (313) 963-6420, Ext. 2443.

(C) Former Commissioner of Revenue B.D. Copping has retired. Ms. June Summers-Haas, former Director of Legal Hearings Division, has been appointed Acting Commissioner of Revenue.

2. Future Meetings.
To be announced at a later date.

3. Mailing List.
If you are not on the State and Local Tax mailing list and would like to be included, please contact Marie Fiocchi, secretary to Joanne Faycurry, Chairperson of the State and Local Tax Committee, at (313) 963-6420, Ext. 2443.

Recent Legislative Changes to the Michigan Sales and Use Taxes

By: Bradley E. Sladek and Joseph J. Tomczyk

In Public Acts 116 and 117 of 1999, the Michigan Legislature consolidated several changes to the Michigan sales and use taxes. Some of the provisions of these acts were in direct reaction to recent decisions of Michigan courts, while other provisions deal with long standing issues arising under the sales and use taxes.

The Industrial Processing Exemption

Michigan provides an exemption from sales and use tax for property used in manufacturing. Under the language of the Michigan exemption, industrial processors are allowed an exemption for property used in industrial processing. The new legislation expanded the statutory language of the exemption by codifying the provisions of the Department of Treasury's Rule 205.90.[1] Additionally, the Department has developed policies, procedures and rules of thumb to deal with issues arising under the industrial processing exemption. Many of these guiding principles drive the content of the changes to the industrial processing exemption.

Defining the Beginning and End of the Industrial Process

A facet of the industrial processing exemption rich in controversy involves defining the beginning and the end of the industrial process. Generally stated, the exemption only applies to productive activities. In the language of the statute, the exemption includes the activity of changing the form, composition, quality, combination or character of personal property. Manufacturers engage in activities falling outside of this area, including the receipt and handling of raw materials, as well as the handling of finished goods. These activities fall outside of the exemption, and any property used in such activities is subject to tax.

Prior to the new legislation, the industrial processing exemption lacked a definition of the point in an industrial process where the exemption begins to apply and subsequently ceases to apply. Treasury Rule 205.90 provided guidance as to the beginning and end of the industrial process. The Rule allowed the exemption to apply to the first step before of after activities that changed the form composition, quality, combination or character of tangible personal property. More specifically, the movement of raw materials from storage to the production process qualified as industrial processing, and fork lifts or other property used in this step was exempt. Similarly, the transportation of finished goods from the production process to storage qualified as industrial processing.

The new language continues the policy of the rule, defining the beginning and end of the industrial process by stating, "Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage." The focus of this definition is storage. The act of storing raw materials or finished goods defines the beginning and end of the industrial process. Experience will reveal how successful the codification of the rule is in reducing uncertainty in tax determinations involving property used at or close to the margin.

A facet of the industrial processing exemption rich in controversy involves defining the beginning and the end of the industrial process.

Third Party Service Providers

The new legislation allows third party service providers to take advantage of the industrial processing

exemption. Previously, the industrial processing exemption only applied to industrial processors.[2] A company that provided services for an industrial processor could not take advantage of the exemption, even if the services directly related to the industrial process, because such a company did not create a product for ultimate sale at retail. So, an engineering or research and development company would have to pay tax on equipment purchases that would be exempt to the industrial processor being served. The inherent inequity of this provision was especially apparent when an industrial processor separately incorporated its research and development function, as in the cases of *Nissan Research and Development* and *Isuzu*.[3] The new legislation specifically extends the exemption to include third parties performing industrial processing activities.[4]

A company that provided services for an industrial processor could not take advantage of the exemption, even if the services directly related to the industrial process.

Further Defining the Industrial Processing Exemption - Specific Inclusions and Exclusions

The new industrial processing exemption provides lists of specific inclusions and exclusions. These lists identify activities that are specifically included in or excluded from industrial processing. Also, the exemption specifically includes certain types of property in the exemption, while excluding other types. Under these provisions, industrial processing includes the following activities:

- production or assembly;
- research or experimental activities;
- engineering related to industrial processing;
- inspection, quality control or testing of production units within the production process;
- planning, scheduling, supervision or control of production or other exempt activities;
- design, construction or maintenance of production machinery;
- remanufacturing;
- removal of production scrap and waste from the production process;
- recycling of used materials for sale or reuse;
- production material handling; and
- storage of in-process materials.[5]

Industrial processing excludes the following activities:

- purchasing, receiving or storage of raw materials;
- sales, distribution, warehousing, shipping or advertising activities;
- administrative, accounting or personnel functions;
- design, engineering, construction or maintenance of real property and nonprocessing equipment; and
- plant security, fire prevention or medical services.[6]

Property eligible for the industrial processing exemption includes:

- an ingredient or component part of the finished product;
- machinery, equipment, tools, dies, patterns, machinery foundations or other processing equipment;
- property used to repair or maintain processing equipment;
- property that is consumed in an industrial processing activity;
- fuel or energy used in an industrial processing activity;
- material handling equipment used in the production process; and
- office equipment used for an industrial processing activity.[7]

Property not eligible for the industrial processing exemption includes:

- property permanently affixed to and a structural part of real estate, including heating, air conditioning, ventilating, plumbing, lighting and electrical distribution systems;

- office equipment used for other than industrial processing purposes;
- office furniture and supplies;
- finished goods converted to a taxable use by the industrial processor;
- property used in receiving and storage of materials, supplies, parts or components;
- licensed vehicles, with certain exclusions;
- property used on location to prepare food for sale at retail;
- property used to maintain a finished good placed in finished goods storage;
- returnable shipping containers; and
- property used to create custom software.[8]

A few of these provisions merit special attention, as they explicitly provide exemption in previously controversial situations. First, companies that produce canned software, software designed and sold to the general public, may claim exemption on equipment used in the production of the software. Second, quality control and research and development activities are now specifically included within the definition of industrial processing activities. This resolves the Department's speculation that these activities may have been taxable due to the prior language of the industrial processing exemption.

Apportionment

The new legislation provides for the apportionment of exemptions in the case of mixed-use assets. By specifically providing for apportionment, the legislation resolves a long standing issue of controversy between taxpayers and the Department of Treasury, which centered on the treatment of mixed-use assets. The Department has taken the position that an asset used both in a taxable manner and in an exempt manner should be partially exempt to the extent of the exempt use. Taxpayers have argued that since the statute failed to provide for apportionment, the Department lacked the authority to expand the taxes to include assets used partially in a taxable manner.

The issue of apportionment has arisen in the context of various exemptions from the sales and use taxes. However, the apportionment issue has arisen frequently in the context of industrial processors, who often use the same asset both within the industrial process and in taxable functions.[9]

The legislation overturned the recent Michigan Bell decision as it applied to dual use assets. In this case, *Michigan Bell* purchased telecommunication equipment that it used both in a taxable and exempt manner. The Court of Appeals, in *Michigan Bell*, held that the Department could not expand the sales and use taxes by applying an apportioned tax base to property that is used only partially in a taxable manner.[10] This case was consistent with the earlier holding in *Michigan Allied Dairy*, where the Michigan Supreme Court held that crates used both in an exempt manner and in a taxable manner were entirely exempt from taxation.[11]

The *Michigan Bell* opinion distinguished the Kress line of cases. Kress rented water softeners to residential and industrial users. In *Kress*, the Michigan Supreme Court found that the softeners rented to residential users were properly classified as taxable, while those rented to industrial users were exempt. The *Michigan Bell* opinion reasoned that the situation in *Kress* was distinguishable on the grounds that Kress used individual water softeners in either a taxable or an exempt manner.[12] Kress did not use a particular water softener in both a taxable and an exempt manner. By contrast, Michigan Bell and Michigan Allied Dairy

A few of these provisions merit special attention, as they explicitly provide exemption in previously controversial situations.

used particular units of property in both taxable and exempt manners.

The new legislation rejects the distinctions of Michigan Bell, and specifically grants the Department the authority to apportion exemptions.[13] In the case of telecommunications equipment, the apportionment provision applies to transactions occurring on or after April 1, 1999.[14] With all other types of property, the legislation allows apportionment for all transactions occurring on or after March 31, 1995.[15]

The Department of Treasury disallowed the bad debt deductions, arguing that the transactions were properly taxable under the Use Tax.

The apportionment provision grants the Department authority to approve methods for calculating exempt percentages. Specifically, the acts provide that exemptions are limited to the amount of exempt use relative to total use, based on a formula or method approved by the Department. The Department is currently working on a Revenue Administrative Bulletin to provide guidance in interpreting and applying these new provisions.

Use Tax Bad Debt Deduction

Prior to the new acts, the use tax did not explicitly provide a deduction for bad debts, while the sales tax did provide such an exemption. This lack of a deduction became an issue for both out of state vendors selling into Michigan, and for certain Michigan service providers. Out of state vendors may have sufficient contacts with the state of Michigan which would subject them to the collection obligation under the use tax. Also, Michigan taxes a few enumerated services under the use tax (e.g., telecommunications, hotels), and imposes a collection obligation on service providers. These parties eventually encounter delinquent payments from customers that they finally determine to be bad debts. In these situations, the out-of-state vendor or Michigan service provider naturally sought relief from the use tax payment obligation on transactions involving no receipt of money.

World Book, Inc. encountered the first scenario in its business of marketing encyclopedias and other educational material to residential customers in Michigan. In the process of this business, World Book occasionally encountered bad debts, when customers failed to pay for products World Book had delivered. World Book's practice was to take bad debt deductions on its tax returns. The Department of Treasury disallowed the bad debt deductions, arguing that the transactions were properly taxable under the Use Tax, which had no provision for such a deduction.

World Book challenged the Department in litigation, culminating in a decision of the Michigan Supreme Court.[16] The Supreme Court determined that World Book's sales were properly taxable under the use tax, rather than the sales tax.[17] In addition to the absence of a bad debt deduction, the use tax differs from the sales tax in that the primary liability for the use tax is imposed upon the purchaser, rather than the seller in the case of the sales tax. Further, the court found that while the use tax imposes a collection obligation on World Book, World Book was not liable for the uncollected use tax, because World Book was without fault in failing to collect the taxes from its customers.[18]

Michigan Bell Telephone Company encountered the second scenario. Michigan Bell provides taxable telecommunications services to Michigan customers. Occasionally, Michigan Bell, like World Book, encountered uncollectible accounts. Michigan Bell's practice was to reduce its monthly use tax return by these bad debts. The Department of Treasury refused to allow these reductions on audit. The Court of Appeals held that Michigan Bell was not liable to pay its customers' use taxes when Michigan Bell had exercised reasonable business care

in its collection attempts.[19]

The prior statutory structure allowed a bad debt deduction under the sales tax but not under the use tax, raising a potential Commerce Clause issue due to discrimination against interstate commerce. Both the *World Book* and *Michigan Bell* opinions acknowledged this issue, yet those opinions refrained from exploring the merits, as both cases were resolved under analysis of the use tax.[20] The provision of a bad debt deduction from use tax resolves this potential issue.

The recent legislation expands on the holdings in *World Book*, and *Michigan Bell* by explicitly providing a bad debt deduction from the use tax. The new use tax bad debt deduction is structured to parallel the sales tax bad debt deduction.[21] The act provides that the bad debt deduction applies beginning March 30, 1995.

Direct Pay

For over 30 years, the Department of Treasury has allowed certain taxpayers direct payment privileges. Under a direct pay agreement the Department allowed a taxpayer to forgo paying sales tax to the vendor at the time of purchase, and instead to pay the tax due in the form of use tax paid on periodic returns. Prior to the recent legislation, this administrative practice had no direct statutory basis.

In the right circumstances, direct payment is an efficient method of administering sales and use taxes. Several states recognize this efficiency and allow some form of direct payment. For example, some businesses make purchases that they can not accurately predict the taxability of until some later point in time. A direct payment procedure allows a taxpayer to make taxability determinations at some point in time after purchase, based on more complete information. Also, a direct payment procedure may afford a taxpayer compliance efficiencies when tax determinations are centralized.

Under a direct pay agreement with Michigan, the taxpayer typically issued an exemption certificate to vendors, claiming exemption based on a direct pay agreement with the Department. Typically, the Department would enter into direct pay agreements with manufacturers who often could not determine the taxability of property at the time of purchase. Direct pay agreements did not apply to construction contracts.

The recent legislation explicitly grants the Commissioner of the Department of Treasury the power to authorize a taxpayer to self accrue and remit use tax in lieu of paying sales tax at the time of purchase.[22] The Commissioner may identify items that are not eligible for a direct payment authorization.

A direct payment procedure may afford a taxpayer compliance efficiencies when tax determinations are centralized.

Mining and Extractive Operations

The recent acts codify Treasury Rule 49,[23] relating to extractive operators. The acts provide an exemption for producers of oil, gas, brine, or other natural resources from sales or use tax on equipment used in the extractive operations. The exemption does not include the transportation of the product from the place of extraction. Also, any self produced fuel or product consumed by an extractor is taxable at fair market value. Further, equipment used in exploring, prospecting or drilling for product is taxable.[24]

Rolling Stock Exemption - Sunset Repealed

The legislation expands the exemption from the sales tax for rolling stock. Previously, the sales tax included a partial exemption for qualified motor carrier trucks to the extent used in interstate commerce. This partial exemption had a sunset date of May 1, 1999. The new exemption provides a complete exemption for trucks used in interstate commerce.[25] So, interstate motor carriers

no longer need to track in state and out of state mileage. Rather, the entire purchase of a truck used in interstate commerce will be exempt.

Construction Contractors and Non-profit Hospitals

Construction contractors will find some significant changes under the new legislation. Generally, a construction contractor cannot take advantage of an exemption that applies to a customer. Exceptions arise when a contractor constructs real property for a non-profit hospital, certain non-profit housing entities, or certain religious sanctuaries. Prior to the new law, if any of the realty would be used in a taxable manner, such as providing doctor's office space to a non-employee, then the entire construction contract was disqualified. In such a situation, the contractor would owe tax on all tools and materials used the construction work. The new law allows the contractor to apportion the exemption, exempting the portion of materials consumed in constructing areas that house the essential hospital operations.[26]

These provisions should increase taxpayer certainty and concurrently reduce compliance burdens.

Conclusion

Public Acts 116 and 117 consolidate several significant changes to Michigan's sales and use taxes. Many of these changes represent the codification of administrative practice and judicial interpretations. Excluding the apportionment provisions, the changes found in the new legislation are positive developments for taxpayers. Viewed individually or as a whole, these provisions should increase taxpayer certainty and concurrently reduce compliance burdens.

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ENDNOTES

1. MAC Rule 205.90. 205.94w; MSA ___.
2. *Nissan Research & Development, Inc. v. Michigan Department of Treasury*, No. 96-16071-CM (1998), and *Isuzu Motors America v. Dept. of Treasury*, No. 97-16528-CM (1998).
3. *Id.*
4. MCL 205.54t(1)(c); MSA ___, and MCL 205.94o(1)(c); MSA ___.
5. MCL 205.54t(3); MSA ___, and MCL 205.94o(3); MSA ___.
6. MCL 205.54t(6); MSA ___, and MCL 205.94o(6); MSA ___.
7. MCL 205.54t(4); MSA ___, and MCL 205.94o(4); MSA ___.
8. MCL 205.54t(5); MSA ___, and MCL 205.94o(5); MSA ___.
9. See *Michigan Allied Dairy Ass'n v. State Bd. of Tax Administration*, 302 Mich 643; 5 NW2d 516 (1942), and *Kress v. Dep't of Treasury*, 322 Mich 590; 34 NW2d 501 (1948), cf. *Elias Bros Restaurants, Inc. v. Treasury Dep't*, 452 Mich 144; 549 NW2d 837 (1996) (restaurants), and *Michigan Bell Telephone Co. v. Dep't of Treasury*, 229 Mich App 200; 587 NW2d 770 (1998) (telecommunication services).
10. *Michigan Bell Telephone Co.*, supra.
11. *Michigan Allied Dairy Ass'n.*, supra.
12. *Michigan Bell Telephone Co.*, supra.
13. MCL 205.54t(2); MSA ___, and MCL 205.94o(2); MSA ___.
14. See MCL 205.54v(2); MSA ___, and MCL 205.94q(2); MSA ___.
15. See MCL 205.54s(1); MSA ___, and MCL 205.94r(1); MSA ___.
16. *World Book, Inc. v. Department of Treasury*, 459 Mich 403; 590 NW2d 293 (1999).
17. *Id.* at 412.
18. *Id.* at 417.
19. *Michigan Bell Telephone Co.*, supra at 217.
20. *World Book, Inc.*, supra at 413, and *Michigan Bell Telephone Co.*, supra at 217 n.12.
21. See MCL 205.99a; MSA ___, compare with MCL 205.54i; MSA ___.
22. MCL 205.98; MSA ___.
23. MAC Rule 205.49.
24. MCL 205.54u; MSA ___, and MCL 205.94p; MSA ___.
25. MCL 205.54r(1)(b); MSA ___.
26. MCL 205.54u; MSA ___, and MCL

Employee Benefit Plan Reporting: Changes and Challenges

By: Christopher J. Pardi

Over 800,000 Forms 5500 are filed annually by employee benefit plan sponsors.[1] The government has estimated that each year Form 5500 filers spend 35 million hours collecting data and preparing the returns. Accordingly, changes to the Form 5500 format draw much attention from plan sponsors and the employee benefits community.

Revising the format and content of the Form 5500 did not occur over night, or in a vacuum.

Employee benefit plans must contend with both Department of Labor ("DOL") and Internal Revenue Service ("IRS") requirements. The DOL is charged with protecting the interests of participants in employee benefit plans. The IRS ensures that these plans, which are granted preferential tax treatment, comply with the Internal Revenue Code guidelines for such tax-privileged status.

Form 5500 serves as the annual return/report of the financial condition and operating results for pension plans, welfare benefit plans and fringe benefit plans. The Form 5500 satisfies both the DOL's annual reporting requirements, as established by the Employee Retirement Income Act of 1974, as amended ("ERISA"), and the IRS' requirements. Form 5500 provides the information the IRS and the DOL need to carry out their administrative and enforcement responsibilities, and provides plan participants and beneficiaries access to information to which they are entitled under ERISA. Both ERISA and the Internal Revenue Code provide for the imposition of penalties for not submitting the required information when due.

With some exceptions, most pension plans must file a Form 5500 annually. Pension plans include both defined contribution plans, such as profit sharing or 401(k) plans, and defined benefit plans. Welfare benefit plans with over 100 participants must file a Form 5500, while welfare plans with under 100 participants may have to file depending on the method of funding. Welfare benefit plans provide benefits such as medical, dental, life insurance and short and long-term disability. Fringe benefit plans such as cafeteria plans, education assistance, and adoption assistance programs also must file a Form 5500 on an annual basis.

The Process of Change

A new Form 5500 designed to streamline information reported and improve government processing becomes effective for 1999 plan years. Accordingly, the first new Forms 5500 generally will be due in July, 2000.[2] These filings will be made under the newly developed ERISA Filing Acceptance System ("EFAST").

Revising the format and content of the Form 5500 did not occur over night, or in a vacuum. The review of the Form 5500 was a collaborative effort by the DOL's Pension and Welfare Benefit Administration ("PWBA"), IRS, and Pension Benefit Guaranty Corporation ("PBGC") (collectively referred to as "the agencies"). In September, 1997, the agencies published a notice of proposed revisions to the then existing Form 5500 in the Federal Register seeking public comment.[3] The revisions were to take effect for 1998 plan years. In November, 1997, the agencies held public hearings regarding the proposed revisions. The agencies heard testimony and received written comments from employer groups, employee representatives, financial institutions, service organizations and others.

In February, 1998, in response to the large volume of public comment, the DOL announced that the implementation of the new Form 5500 would be delayed until 1999 plan years. Additionally, a number of changes based on public comment were made to the Form 5500 as previously proposed, culminating in the release of the draft Form 5500 dated June, 1998.[4]

The New Form 5500

The new Form 5500 provides only overview information regarding the basic features of the plan and includes a checklist where plan sponsors can indicate which schedules will be attached to the return. These schedules provide the detailed information applicable to a particular plan. This represents a significant departure from the old Form 5500, which was six pages in length and included several pages that may or may not have been applicable to a particular plan. The new Form 5500 also includes a field for the preparer to provide his or her name and phone number. The field is optional and does not require the preparer to sign the Form 5500.

Much of the information that was previously included on the old Form 5500 is now reported on schedules to the new Form 5500. Many schedules from the old Form 5500 are carried over to the new Form 5500 reporting structure with only minor changes, while some new schedules are introduced. Some of the significant changes to the Form 5500 schedules include:

- Schedule C, which provides information related to service providers, now requires plan sponsors to disclose only the top 40 highest compensated plan service providers. Plan sponsors are no longer required to provide the name and address for all plan trustees. Additionally, information regarding the termination of service providers is required only for accountants and enrolled actuaries, and not for administrators, investment managers, insurance carriers, trustees or custodians.
- Information on participation in certain pooled investment/insurance arrangements is now reported on Schedule D, a new schedule to the Form 5500. The Schedule D will be required both for plans that participate in such investments and for "Direct Filing Entities." Direct Filing Entities, a term introduced in the new Form 5500 reporting structure, may include master trust investment accounts, common or collective trusts, pooled separate accounts, certain investment entities and group insurance arrangements. Plan sponsors whose plans have assets invested in master trust investment accounts are responsible for ensuring that a Form 5500 is filed for each master trust investment account in which the plan participated at any time during the plan year.
- Schedule G to the new Form 5500 provides information on transactions not exempt from prohibited transaction rules, loans, leases and fixed income obligations in default. The schedule of assets held for investment and the schedule of reportable transactions is no longer reported on Schedule G, but will continue to be a supplemental schedule to the audited financial statements for large plans.
- Financial information and information related to plan transactions during the plan year is reported on Schedules H and I for large and small plans, respectively. Plans with under 100 participants no longer file the

This represents a significant departure from the old Form 5500, which was six pages in length.

Form 5500-C/R, but rather use the new Form 5500 on an annual basis (with appropriate schedules).

- Pension plans have two new schedules to attach to the Form 5500. The new Schedule R is used to provide information on distributions, funding requirements and amendments, while the new Schedule T is used to report plan coverage information. The Schedule T is not required in plan years where the plan sponsor is relying on coverage testing information for a prior plan year.

The government's cost of receiving and processing the returns is over $20 million annually. ... Thus began the process of revamping the content of the Form 5500 in order to streamline the information reported.

The New Filing System: EFAST

In 1993, Vice President Al Gore's National Performance Review issued a report which included a recommendation that there be more automation and electronic filing of Forms 5500.[5] The IRS service centers have been processing Forms 5500 manually since 1976. The IRS' key entry approach to processing Forms 5500 was slow, prone to error, and expensive. The IRS processed the Forms 5500 and sent information to the DOL on a quarterly basis. The IRS would forward information to the DOL in regard to a particular plan only after the IRS had sent out correspondence to gather any additional information required or to clarify any ambiguity in the return. It has been estimated that the government's cost of receiving and processing the returns is over $20 million annually. Congress approved $9 million in funding for the IRS and the DOL to explore moving processing to a private contractor.[6]

Thus began the process of revamping the content of the Form 5500 in order to streamline the information reported. At the same time, work commenced on developing a processing system that would rely on computer scannable forms and electronic filing techniques to direct information to the appropriate government agencies more quickly and less expensively.

The government gave contracts to both Wang Government Services and National Computer Systems, Inc. ("NCS") to develop a processing system and computer scannable versions of the new Form 5500.[7] After the introduction of the prototype forms, the agencies sought public comment from late June, 1999 through late July, 1999 on the computer scannable forms created by the competing firms.[8] Much of the comments received centered around the "bulkiness" of the new computer scannable forms. Whereas the June, 1998 version of the form and schedules consisted of 29 pages in a non-computer scannable version, the Wang version of the form and schedules was 72 pages long and the NCS version was 64 pages long.

The government awarded NCS the contract. The computer scannable Forms 5500 will be completed by plan sponsors and sent directly to NCS rather than the IRS. NCS will process the Forms 5500 and send the appropriate data to the DOL, IRS and PBGC. While it seems clear that EFAST will make processing Forms 5500 easier for the government, it remains to be seen if plan sponsors will find the form easier to use and understand.

Under EFAST, Form 5500 data will be simultaneously transmitted to the IRS and DOL, thereby eliminating the lag time for the DOL to receive the information from the IRS. This creates the potential for more notices as both the IRS and DOL will have an increased ability to do edit checks for inconsistent or incomplete returns. Additionally, the DOL's PWBA plans to hire 25 new auditors over the next three years to deal with an anticipated increase in returns flagged for further review.[9]

Conclusion

Form 5500, though changed, remains a vital part of a plan's overall ERISA and IRS compliance. The changes to the return require gathering certain information not needed in previous years. Also, a lack of familiarity with the new format may increase the time needed to prepare the return. Accordingly, all parties responsible for preparing or reviewing a Form 5500 for the 1999 plan year should take steps to ensure that they are familiar with the new format and filing procedures so that they will be ready to file their Forms 5500 on a timely basis for the 1999 plan year.

The 1999 plan year filings usher in a new era of Form 5500 compliance. While computer scannable forms are a step towards acknowledging the increasingly technology driven society in which pension plans operate, it is quite clear that the government's ultimate goal is electronic filing of Forms 5500. Currently, less than 1% of Forms 5500 are filed electronically. The DOL and IRS envision an era of true cost savings in terms of return processing if plan sponsors can be persuaded to file electronically. The significant changes to the 1999 return and movement to a computer scannable form are regarded as a critical step in this process.

The 1999 plan year filings usher in a new era of Form 5500 compliance.

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ENDNOTES

1. Proposed Revisions to Certain Regulations regarding Annual Reporting and Disclosure Requirements, 63 Fed. Reg. 68,369, 68,370 (1998) (to be codified at 29 C.F.R. § 2250)
2. Form 5500 is due seven months after the plan's year-end.
3. Proposed Revision of Annual Information Return/Reports Part II, 62 Fed. Reg. 46,556 (1997).
4. Department of Labor (DOL), Office of the Secretary of Labor, Pension Benefit Guaranty Corporation; submission for OMB Review; Request for Public Comment, 63 Fed. Reg. 34,493 (1998).
5. Interview by *CCH Online* with John Helms, Pension and Welfare Benefits Association Project Director for EFAST, (July 23, 1999).
6. Id.
7. *PWBA Selects NCS to Process 1999 Form 5500,* PWBA News Release, No. 99- 30, Sept. 7, 1999, (CCH Online, Sept. 11, 1999).
8. Computer Scannable Versions of 1999 Form 5500 Annual Return/Report of Employee Benefit Plan; Request for Public Comment, 64 Fed. Reg. 34,686 (1999).
9. *New 5500 System Could Lead to More Penalties for Plans,* Money Management Letter, May 31, 1999.

Recent Developments

The Michigan Department of Treasury held that a substantially disproportionate redemption of a corporation's stock is not income under the Michigan Intangibles Act.

Court of Claims Rules That Capital Acquisition Deduction is Unconstitutional

On November 24, 1999, the Michigan Court of Claims in *Jefferson Smurfit Corporation v. Department of Treasury* (Docket no. 98-17140-CM) held that Michigan's current capital acquisition deduction is unconstitutional. In its oral ruling, Judge Michael Harrison stated that the deduction, which in part provides a deduction for the cost of certain fixed assets located in Michigan, interfered with interstate commerce by discriminating against multi-state companies with out-of-state capital investments. The Department has indicated that it will appeal the decision.

Applying MagneTek Controls, Michigan Tax Tribunal Finds Sufficient Physical Presence, allowing Taxpayer to Apportion and to Avoid Throw Back of Out of State Sales

In *Gear Research Inc. v. Department of Treasury,* MTT Docket Nos. 227850 and 239890 (September 24, 1999), the Michigan Tax Tribunal found that a taxpayer had substantial nexus with certain states such that sales made to those states were not properly "thrown back" to Michigan for Single Business Tax ("SBT") purposes.

At issue were sales made by Gear Research Inc. ("Gear"), a Michigan based company that manufactures and sells industrial gears to customers throughout the United States. To solicit business for the tax years in question, Gear employed a Michigan sales representative who made sales visits to other states, as well as an independent sales representative who lived in New Jersey, maintained an office in New York and solicited sales in both New York and New Jersey. In calculating its SBT, Gear excluded from its sales factor numerator sales made to New York and New Jersey and to other states outside of Michigan where sales visits were made. The Michigan Department of Treasury contended that Gear did not have sufficient physical presence in the states in question and disallowed Gear's apportionment factor. It then allocated all sales to Michigan and reduced an overpayment credit carry forward for the 1989 and 1990 tax years.

On appeal, the Tribunal applied *MagneTek Controls, Inc. v. Department of Treasury,* 221 Mich App 400 (1997), and found that maintaining an independent representative who permanently resides in New Jersey with an office in New York created sufficient physical presence such that Gear's sales made to New York and New Jersey should not have been thrown back and included in the SBT sales factor numerator. In addition, the Tribunal held that sales visits made to other states in question represented a sufficient physical presence such that those sales should not have been thrown back for SBT purposes.

Michigan Tax Tribunal Holds that Proceeds from Redemption of Stock are Not Income Under the Intangibles Tax Act

In *Bihler v. Department of Treasury,* MTT Docket Nos. 247020 and 247021 (November 2, 1999), the Michigan Department of Treasury held that a substantially disproportionate redemption of a corporation's stock is not income under the Michigan Intangibles Act. At issue was a redemption of 99.6 percent stock of a company sold by petitioners. Relying on statutory language defining income as either (1) interest; or (2) dividends and other distributions to the extent that they represent the yield of intangible personal property, the Tribunal found that the redemption was an exchange/sale of stock for corporate assets, and not a yield of underlying property. Therefore,

application of the intangibles tax was inappropriate.

Michigan Tax Tribunal Rules that Payments to Network Affiliates are Royalties and Subject to Single Business Tax

On September 10, 1999, the Michigan Tax Tribunal in *Columbia Associates LP v. Department of Treasury,* Docket No. 242612, held in favor of the Department of Treasury and found that payments made by a cable television operator to network affiliates for programming are royalties and therefore subject to the Michigan SBT.

The petitioner, Columbia Associates LP, is a cable television operator. Its services include over-the-air broadcast television stations, public access channels and cable programming satellite services. Columbia Associates LP entered into agreements with networks in which the networks would provide programming services for distribution in return for a fee. Columbia Associates LP, arguing that the payments made were "fees" and not royalties, did not add back the payments in computing its SBT. The Department of Treasury determined that the payments were royalties that should have been added back, and assessed SBT for the years 1992 through 1994.

On appeal, the Tribunal followed the Michigan Court of Appeal's reasoning in *Field Enterprises*, 184 Mich. App. 151, 457 N.W.2d 113 (1990), and determined that the payments made by Columbia Associates LP were royalties. The Tribunal found that the payments in question represented a right to use a copyrighted property, and did not represent a service. This was so, the Tribunal reasoned, notwithstanding Columbia Associates LP's argument that a royalty requires the receipt of an exclusive right in property.

Michigan Court of Appeals Affirms Court of Claims Decision that Retaliatory Tax Provision Violates Constitution

In *TIG Insurance Company, Inc. v. Department of Treasury,* Docket No. 206999 (Aug. 17, 1999), the Michigan Court of Appeals affirmed a Court of Claims decision and ruled that 1988 revisions to the Michigan insurance code's retaliatory tax provisions were unconstitutional. The Court also upheld a statutory provision that requires a refund claim be filed within 90 days from the original filing date where the claim arises from a law struck down for constitutional reasons.

On appeal, the Court of Claims held that the retaliatory tax revisions were unconstitutional and violated equal protection.

The retaliatory tax is a tax imposed on out-of-state insurance companies writing insurance in Michigan, where the out-of-state insurer's home state imposes tax burdens on Michigan insurers that are greater than those imposed in Michigan. The out-of-state insurer generally pays an amount equal to the difference in the burdens. Under revisions to the retaliatory tax provisions, certain payments were excluded from a list of "burdens or special burdens" for purposes of computing the Michigan retaliatory tax liability. Plaintiffs, insurance companies domiciled in California and licensed to do business in Michigan, filed amended returns which included such burdens in their tax computations, and the Department of Treasury denied the refund requests. On appeal, the Court of Claims held that the retaliatory tax revisions were unconstitutional and violated equal protection.

Using the standard that a state may not discriminate against a foreign business unless the discrimination bears a rational relationship to a legitimate state purpose, the Court of Appeals examined the statute and the legislative history and found that the revised provisions were enacted only to generate more revenue, which

the Court stated was not a valid reason to discriminate against foreign insurance companies.

Distribution of Coupons to Retail Customers are Taxable Tangible Personal Property, Rules the Michigan Tax Tribunal

In *Catalina Marketing Corporation v. Department of Treasury,* MTT Docket Nos. 23198 and 23197 (August 9, 1999), the Michigan Tax Tribunal upheld a sales tax assessment against two corporations that distribute customer coupons.

Asserting that the paper coupons constituted the sale of tangible personal property, the Michigan Department of Treasury assessed sales tax to the companies.

The companies in question, a parent corporation and its subsidiary, administer a "checkout coupon" program which involves targeting and identifying retail consumer purchases in checkout lanes of supermarkets. Under the program, a store computer tracks customer purchases and based on the information gathered, generates a paper coupon for future store purchases.

Asserting that the paper coupons constituted the sale of tangible personal property, the Michigan Department of Treasury assessed sales tax to the companies. On appeal, the Tax Tribunal disagreed with the petitioners' argument that the sale of coupons represented the sale of nontaxable services. The Tribunal applied the "real object test" and determined that the main objective of the program was the generation of a tangible end product and that sales tax was therefore properly assessed.

Michigan Department of Treasury Changes its Position Regarding Taxability of Downloaded Computer Software

The Michigan Department of Treasury has clarified its position regarding the taxability of downloaded computer software. On September 28, 1999, the Department issued Revenue Administrative Bulletin ("RAB") 1999-5, which replaced RAB 1988-41 and provides new guidance on the sales and use taxation of computer software.

RAB 1999-5 states that computer software is generally subject to Michigan sales or use tax, except for customized software which is exempt from taxation. This is so, whether software is purchased from a Michigan retailer, purchased from an out-of-state seller who pays Michigan use tax, or downloaded from the Internet. Michigan had previously taken the position that downloaded software was not generally subject to sales or use tax.

State Tax Commission Updates Property Tax Tables

On September 2, 1999, the State Tax Commission shortened the furniture and fixture property tax table to 15 years and the computer and peripheral equipment property tax table to 7 years. The Commission adopted two new tables: the consumer coin-operated equipment table and the consumer-utilized equipment table (to value video games and video tapes). Also, the machinery and equipment table was combined with the computer-controlled machinery and equipment table and was shortened to 15 years. Similarly, the office machines table was combined with the electronic/video/test equipment table and was shortened to 15 years. The new tables should provide a more reasonable lifespan of equipment as well as more accurately represent its value.

This Update was prepared by **Marjorie Bilyeu Gell** and **Jennifer Troyer** of KPMG LLP's Michigan State and Local Tax Practice in Detroit, Michigan.

Personal Income Tax filing Methods: A Potentially Taxing Experience!

By: Theodore E. Froum

In the world of business, the statement "the check is in the mail" is about as credible as a promise to sell the Brooklyn Bridge. Along these lines, it comes as no surprise that the Internal Revenue Service (the "Service" or "IRS") prefers not to rely on an individual taxpayer's promise with respect to whether he or she has sent in their income tax return in a timely fashion. In light of the fact that a taxpayer who misses his filing due date may be subject to substantial interest and penalties, Congress and the Service have promulgated a series of detailed rules and regulations on this subject.

The Service's general rule with respect to income tax returns received after a due date is that a return is deemed filed on the day it is mailed. Said another way, if the envelope containing the return has a valid and timely postmark, the postmarked date will be deemed the date that the return is filed.[1] This is known as the "timely filed presumption" or the "timely mailed is timely filed" rule. Under this rule, a taxpayer with a timely postmark will be deemed to have filed his return on time even though the return arrives at the IRS after the filing deadline. An example of how this rule is relied upon is seen every April 15th when taxpayers flood their local post offices in order to have a tax return postmarked before the stroke of midnight. Though their returns will arrive after April 15 has come and gone, the fact that they have succeeded in obtaining a proper and timely postmark means that they will not suffer the application of penalties and interest.

If the only delivery service in existence were the U.S. Postal Service, then this issue would be a simple one and this article over. However, the existence of numerous tax return delivery methods make for some complications; the different delivery methods that a taxpayer may use to send his return to the Service afford unequal degrees of protection for a taxpayer with respect to the timely filing presumption and the risk of loss. With some methods, for example, a taxpayer may be deemed never to have filed a return if it is lost on route or by the IRS, despite the fact that he can prove that it was sent before the deadline. This is true no matter what proof the taxpayer offers to show that he dropped the return off with a carrier.

What follows below is a brief discussion of the pros and cons of the different methods of delivery a taxpayer can use to file a return.

With some methods, for example, a taxpayer may be deemed never to have filed a return if it is lost on route or by the IRS, despite the fact that he can prove that it was sent before the deadline.

1. Regular U.S. Mail

Generally speaking, a document that is sent via non-certified or non-registered U.S. mail ("regular U.S. mail") falls within the timely-mailed-is-timely-filed rule. The rule applies when the postage is pre-paid, the envelope is properly addressed, the document mailed in the U.S., and the postmark is reflective of a date on or before the relevant deadline.[2]

Despite the foregoing general rule, reliance upon this form of mail carries some risk to a taxpayer. For example, a person who sends an income tax return assumes the risk that, despite the fact that he dropped it into the mail on or before April 15, the envelope will not be postmarked until after the due date.[3] Evidence that the taxpayer relied on incorrect pickup times displayed on a mailbox does not provide any relief.[4] The taxpayer bears the burden of proof of timely mailing if the postmark is illegible.[5] Further, proof of timely mailing does not save a taxpayer when it is estab-

lished that a return was not mailed with sufficient postage.[6] Finally, if the return is never actually delivered, the protection of the timely-mailed-is timely-filed rule will not apply.[7]

As a consequence of the above, sending one's tax return by regular U.S. mail may carry a risk to a taxpayer. Accordingly, taxpayers who are risk-averse may want to send their income tax returns to the IRS in a different way.

2. Registered and Certified U.S. Mail

Under the Internal Revenue Code, if a return is sent by U.S. registered mail the registration is considered prima facie evidence that the return was delivered to the Service.[8] The date of registration of the document is deemed to be the postmark date.[9] Accordingly, even if the government loses a tax return in transit or at a Service Center, if a taxpayer uses registered mail to send his return then the risk of loss falls upon Uncle Sam and the taxpayer escapes the application of penalties and interest.

If a return is sent by U.S. registered mail the registration is considered prima facie evidence that the return was delivered to the Service.

A similar rule applies to the use of U.S. certified mail; if a return is sent via certified mail and is postmarked by the postal employee to whom the document is presented, the date of the postmark on the certified mail receipt is treated as the date the document was sent.[10] Accordingly, the certified mail receipt is prima facie evidence that a document has been filed on time, thus eliminating the risk that the return will be lost by the postal service or the IRS.

As a consequence of the above facts, most practitioners would argue that the use of either registered or certified mail is preferable to ordinary mail when it comes to giving peace of mind to a taxpayer filing his income tax return. Generally speaking, as long as a taxpayer can produce a valid certified mail receipt, he will not suffer penalties or interest should the government misplace his return.

3. Private Delivery Services

If a taxpayer prefers not to the rely on ordinary U.S. mail, he or she may utilize one of several designated private delivery services in order to file a return. As of September 1, 1999, the list of designated non-governmental carriers is as follows:

a. Airborne Express ("Airborne")
b. DHL World Wide Express ("DHL"),
c. Federal Express ("FedEx"), and
d. United Parcel Service ("UPS").[11]

Assuming that certain enumerated classes of delivery are used, a taxpayer who chooses to utilize the services of one of the foregoing companies may rest secure in the knowledge that they will still qualify for the "timely-mailed-is-timely filed" rule of Code section 7502. Specifically, with respect to Airborne, the approved delivery methods are Overnight Air Express Service, Next Afternoon Service, and Second Day Service.[12] DHL's approved services are "Same Day" Service and DHL USA Overnight.[13] With respect to Federal Express, Fed-Ex Priority Overnight, Standard Overnight, and 2-Day Service may be relied upon.[14] Finally, UPS' approved services are Next Day Air, Next Day Air Saver, 2nd Day Air, and 2nd Day Air AM.[15]

While a taxpayer who uses any approved private delivery company will generally enjoy the same level of protection that he receives with ordinary U.S. mail, a lessening of the protection may apply depending upon whether the delivery company records the date the return was sent in its computer database or whether the date was simply stamped on the cover of the package itself.[16] Further, the protection of the timely-mailing presumption is weakened if the mailing slip on the cover of the privately sent package was generated out by the taxpayer instead of by the private delivery service. There are numerous rules and even more numerous exceptions relating to this

method of delivery. Consequently, a risk-averse taxpayer may choose to rely on another method of getting his or her tax return to the Internal Revenue Service. The myriad of rules relating to private delivery services may not offer the average taxpayer the level of comfort that he may otherwise desire.

4. E-Filing

The 1998 tax year filing season proved to be a watershed period for the Internal Revenue Service; for the first time, individual taxpayers were actively encouraged to file their income tax returns electronically. Deemed to be the wave of the future, the IRS and Congress have set a goal to reach 80% on-line filing by the year 2007. While the IRS has utilized certain forms of electronic refund and return transmission in the past, it has never undertaken a project of this scope; the massive amount of IRS-generated publicity on this matter, as well as the expansion of the program to include an increasing variety of different tax returns, attests to the government's commitment.

This past tax season, many technology-savvy taxpayers found themselves tempted to take advantage of the simplicity and ease of on-line filing when it came time to complete and remit their 1998 tax returns. For a nominal fee, a Form 1040 could be completed on a personal computer and whisked off to the IRS from the comfort of a taxpayer's own home. If it turned out that the taxpayer was due a refund, he could get it deposited directly into his bank account in under three weeks. If he owed money, payment could be made via direct debit from a bank account or with a credit card.[17] Yet another positive attribute to e-filing is that some states (including Michigan) "piggy-back" their e-filing; in a single transmission, a taxpayer could file his state and federal income tax returns electronically.[18]

The process of e-filing is a relatively novel process to a majority of the taxpaying public. The basic mechanics of it are not particularly difficult to understand. The initial step involves the completion of an income tax return on commercial tax preparation software that has been produced by an IRS-approved private software company (an "authorized electronic return transmitter") who participates in the IRS' electronic filing program. Once finished, the taxpayer pays a small fee via credit card and transmits the return to the IRS with the click of a mouse button. Subsequently, an "electronic postmark" is issued to the taxpayer. Under the Treasury Regulations, the term "electronic postmark" means a record of the date and time that an authorized electronic return transmitter received the transmission of the taxpayer's electronically filed document on its host system.[19] Once at the IRS, the return is automatically added to the government's database; the process of manual data entry by an IRS clerk is avoided. Also avoided is the approximately 20% error rate that arise as a result of the hand-typed speed entry by the human clerk.[20]

Attuned to this growing trend in tax return preparation and filing, many tax practitioners raised questions as to the level of proof of timely filing that applies with respect to e-filing. Much to the relief of America's ever-growing technophile population, brand new Temporary and Proposed Regulations provide some guidance.

Under the new regulations, the electronic postmark will allow the electronically filed income tax return to fall under the general timely-mailed-is-timely-filed rule; the day noted on the electronic postmark will be considered the filing date if the return was sent on or before the due date of the return. Accordingly, even if received after April 15, an electronically transmitted income tax return

Deemed to be the wave of the future, the IRS and Congress have set a goal to reach 80% on-line filing by the year 2007.

will be considered timely.[21] This level of protection is akin to that given to the U.S. postal service's ordinary mail.

It is beyond dispute that e-filing wins in a contest of convenience; a taxpayer can fill out and submit his return to the government without ever leaving his living room. No other method of filing an income tax return is as accommodating. When it comes to the level of protection from loss or late delivery provided, however, e-filing loses some luster.

When it comes to the level of protection from loss or late delivery provided, however, e-filing loses some luster.

Neither the Internal Revenue Code nor the temporary and proposed regulations provide much detail with respect to how comfortable a taxpayer may be that his return will be deemed filed in a timely manner. While the issues of illegible postmarks, slow postal clerks, and late mailbox pick-ups are not relevant, e-filing carries its own distinctive problems. For example, what happens if power outages or technical glitches keep an authorized electronic return transmitter from noting the receipt of a return or issuing an electronic postmark? Alternately, what if these "gremlins" keep the return from being forwarded on to the government? What if data is corrupted as it is transmitted? What if a computer virus infects either the taxpayer's or the receiving computer's hard drive such that a false electronic postmark is sent or received, or such that data is never sent at all despite indications to the contrary?

Though IRS personnel may state in informal conversation that e-filing carries the same timely-filing presumption as certified/registered mail, until case law and further IRS administrative materials develop, this issue will remain cloudy and the level of protection offered upon late delivery or loss will remain unknown. Accordingly, a taxpayer may be trading security for convenience if he or she chooses e-filing instead of certified/registered mail this tax season.

Conclusion

As discussed above, the numerous methods of transmitting a tax return to the Internal Revenue Service offer drastically different levels of protection with respect to risk of untimely delivery or loss. In some cases, a taxpayer is out of luck should his tax return be delivered extremely late or lost en route to the Service. In other instances, the taxpayer enjoys a presumption that the tax return was filed even if it never reaches the Service.

For those uncomfortable with the thought of transmitting tax data electronically, certified mail or registered mail is the best method available. For those taxpayers who prefer to utilize their computers to help complete and remit their tax returns, e-filing may be preferable. A techno-taxpayer should be aware, however, that until a more substantial body of law develops and provides definitive guidance, the level of protection offered by e-filing does not seem to reach that of certified and/or registered U.S. mail.

Theodore E. Froum, an associate at the Southfield, Michigan law firm of Raymond & Prokop, P.C., practices in fields of the tax, estate planning and corporate law. Mr. Froum earned a Bachelor of Arts from Brandeis University, a Juris Doctorate from the Benjamin N. Cardozo School of Law of Yeshiva University, and an L.L.M. in Taxation from New York University. He is presently admitted to practice law in Illinois, Michigan and Florida.

ENDNOTES

1. Code Sec. 7502(a)(1), (2).
2. Reg. § 301.7502-1(c); Prop. Reg. § 301.7502-1(c).
3. Id. See also *Feldman v. Commissioner,* 47 T.C. 329 (1966).
4. *Hamilton v. Commissioner,* 43 T.C.M. 1087, *affd* 10th Cir. Oct 22, (1982)
5. Id.
6. *Wedemeyer v. Commissioner,* 59 T.C.M. 1022 (1990).
7. Reg. § 301.7501-1(e)(1).
8. Reg. § 301.7502-1(c)(2).
9. *Id.*
10. *Id.*
11. Notice 99-41.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. Rev. Proc. 97-19, 1997-1 C.B. 644.
17. Presently, taxes may be paid with MasterCard, Discover and American Express. Imagine the potential to earn frequent flier miles that this opportunity presents!
18. In such an instance, both returns are transmitted to the federal government, which then retransmits the state return on to the respective state taxing authority. Some states run their own e-filing program and require a separate transmission. A list of the states that piggy-back may be found (at the time of the authoring of this article) on the IRS website at: http://www.irs.gov/elec_svs/fed_state.html.
19. Prop. Reg. § 301.7502-1(d)(3)(ii).
20. This figure was provided in a speech by Theresa Leszcz, Electronic Tax Administration Coordinator, Internal Revenue Service, on November 8, 1999, at the Washtenaw County Bar Association's Tax Section Meeting. Ms. Leszcz stated that the error rate on e-filed returns was under 1%.
21. If the taxpayer and the authorized electronic return transmitter are in different time zones, however, it is the taxpayer's time zone that controls the timeliness of the return: Prop. Reg. § 301.7502-1(c)(3)(ii).

Why I Attend ABA Tax Section Meetings

By: Walter J. Russell

I have been active in the Section of Taxation of the American Bar Association for more than 30 years. I am often asked the question of many of my tax practitioner friends, "Why do you go to the time and expense to attend ABA Tax Section Meetings?" The short answer is that it is the best CLE that you can obtain anyplace in the country. And secondly, it is probably the cheapest, at least that is my impression from looking at many of the brochures coming forth from various tax institutes around the country. Third, the Tax Section CLE is a "Cafeteria" of CLE. So often we go to CLE programs that are simply on one topic, and it is designed for all levels of practitioners.

The breadth of programs at the Tax Section are such that one can pick and choose those areas where he has the most interest.

To the contrary, the breadth of programs at the Tax Section are such that one can pick and choose those areas where he has the most interest, and the most thirst for updating. There are nearly 50 committees putting on substantive programs on various fields of tax law, and most of these are multi-programs – that is two to four programs per session. The areas range from trial practice to all forms of tax planning, utility regulations, etc. as well as several examples of what I am talking about. The substantive committee meetings are open to all attendees. These are usually small groups with sufficient opportunity to question the presenters of the programs and to participate with one's own views. For instance, the Committee on Income Tax Problems of Fiduciaries and other committees have been conducting extensive programs on one of the hottest topics in estate planning – Total Return Unitrusts. Consider the Committee on Employee Benefits. This Committee had programs which were a primer on employee benefits for those not familiar with this field, all the way up to such specialized and esoteric subjects as the ESOP fiduciary responsibility, litigation and prohibited transactions area. The Committee on Administrative matters had meetings on the reorganization of the Internal Revenue Service and how it is going to affect our practice. These sessions were attended not only by Tax Section members, but Assistant Commissioners of the Internal Revenue Service, and it was a give-and-take session to answer questions. Sessions on Electronic Federal Payment System on Employee Taxes and What it Means to You and Your Clients; Current Tax Employment Issues From the Perspective of the Internal Revenue Service, which included top people from the Chief Counsel's Office and Thomas Berger, Director of Employment Tax Administration; Tax Shelters: a Hot Legislative Topic was discussed by some of the leading experts in the field. The Committee on Insurance Companies had programs on legislative matters of interest to insurance companies. Natural Resources had programs on current developments, and a government panel discussing taxation and the current thinking of the Internal Revenue Service on tax programs. There were programs conducted on partnership, state and local taxes, estate planning, fiduciary tax problems, low income taxes, management of tax practice, closely held business, including tax considerations in buying and selling a business and the tax issues involved therein. Corporate tax, a program on guidance and handling of Section 355 of the Internal Revenue Code. Environmental tax issues, limited liability companies and others. In short, there is something of interest to all practitioners, regardless of concentration; and all of this bargain is less than $300.

In fact, the Tax Section has a policy that all first time attendees' tuition is waived. Now you really can't beat that!

Here is a session with leading experts of the bar, together with the government's policy makers on taxation. You will leave the meeting with up-to-date knowledge and much enriched not only by the programs, but with the materials. Each committee has outline presentations or reports. The material that I brought home from the committees was almost a foot thick. In addition, at a very low cost you can obtain tapes of most of the committee meetings. One of the cheapest and greatest reference sources you can have in your libraries for those problems that don't come up often.

Another value is that you get an opportunity, on an informal basis, to talk about your tax problems and other peoples' tax problems and how they solve them. Consider the San Diego meeting of the Tax Section in January. The programs will be as extensive. When the announcement comes to you, please read it. I think you will be pleasantly pleased with the depth and breadth of the subject matter. And as I stated above, first time attendees pay no fees. How can you beat it? I hope to see you in San Diego.

Here is a session with leading experts of the bar, together with the government's policy makers on taxation. ... Consider the San Diego meeting of the Tax Section in January.

Walter J. Russell is a long-standing member of the Tax Section of the American Bar Association, a former Regent of the American College of Tax Counsel, has served on many committees of the ABA Tax Section and has been a speaker on many Tax Section Committees. He is currently the Vice Chairman of the Liaison Committee. He recently made a presentation to lawyers and accountants on Multi Disciplinary Practice.

Making the IRS an Offer It Can't Refuse

By: Maurice A. Rose

With the decline of asset seizures and other enforced collection techniques, the Internal Revenue Service has begun to emphasize the Offer-in-Compromise as a valuable tool in the overall resolution of significant tax liabilities. As mandated by the IRS Restructuring and Reform Act of 1998, the Service has recently introduced new Temporary Regulations applicable to the Offer program. While many of the guidelines describe provisions which had previously been limited to the more voluminous Internal Revenue Manual, completely new Offer materials were also released. This article will explain these new materials within the context of the existing Offer framework.

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An Offer-in-Compromise negotiation is the federal tax equivalent of a civil litigation settlement conference in that a successful Offer constitutes a win-win result for both the government and the taxpayer. In other words, the taxpayer rids himself of a significant tax liability at a fraction of its original size, and the government receives more than it feels it could have otherwise collected. The taxpayer avoids the need for bankruptcy or extremely long-term installment agreement payment plans, and the government is able to close another case and utilize its collection resources elsewhere.

Prior to the Temporary Regulations, there had only been two grounds on which to propose a settlement. Namely, a taxpayer could submit a Form 656 (Offer-in-Compromise) based on a doubt regarding the underlying liability or based on a doubt regarding the collectibility. A doubt as to liability exists "where there is a genuine dispute as to the existence or amount of the correct tax liability under the law."[1]

On the other hand, valid grounds as to a doubt as to collectibility exists "in any case where the taxpayer's assets and income are less than the full amount of the assessed liability."[2] In short, a "liability" based Offer focuses on the validity of the underlying debt, whereas a "collectibility" based Offer focuses on a practical analysis of the given taxpayer's reasonable collection potential.

These two types of Offers can and do allow a delinquent taxpayer to experience significant savings from the balance of his current assessed liability. Nevertheless, the Service has recently advanced a third basis for a potential Offer settlement. According to the new Regulations, a taxpayer who fails to qualify under either of the two existing grounds for an Offer may still qualify for a compromise to "promote effective tax administration."[3] (A taxpayer who challenges the underlying liability or who lacks the wherewithal to pay is ineligible for this type of Offer and must attempt either of the other two varieties.)

The Regulations provide three general guidelines as to the description of this particular type of Offer. First, an Offer promotes effective tax administration when collection of the full liability will impose an "economic hardship" on the taxpayer.[4] This type of financial analysis parallels the analysis required to obtain a release of levy, and exists if full collection of the liability will cause an individual taxpayer "to be unable to pay his or her reasonable basic living expenses."[5]

The final two guidelines must exist jointly in order to "promote effective tax administration." In short, despite the apparent ability to pay, "exceptional circumstances exist such that collection of the full liability will be detrimental to voluntary compliance by taxpayers, and compromise of the liability will not undermine compli-

ance by taxpayers with the tax laws."[6] At first glance, it appears that conditions such as "economic hardship" and "exceptional circumstances" are different versions of the traditional "collectibility" based Offer. However, the Regulations provide factors supporting (but not conclusive of) these kinds of conditions. Bear in mind that a true inability to pay would force the taxpayer to a "collectibility" Offer and away from an "effective tax administration" variety of resolution.

Consequently, for purposes of this type of Offer the "economic hardship" taxpayer must be currently collectible for the short term, but who is experiencing a decline in financial condition. For example, a disabled taxpayer who must liquidate assets to be able to pay future basic living expenses would qualify for this type of Offer as would a taxpayer who is unable to borrow against his existing assets.[7] Similarly, an "exceptional circumstances" candidate for an Offer should be able to establish factors such as a history of compliance with tax laws and a lack of deliberate actions to avoid payment.[8] Every variety of Offer (i.e., liability, collectibility, or tax administration) requires the taxpayer to promise to stay in full compliance with the tax laws for five years or risk the reopening of the closed agreement.

If a taxpayer qualifies for this new breed of Offer, a Form 656-A must be submitted with the standard Offer materials. This new form (which was released on the internet in mid-September) is a simple one-page document which allows the taxpayer to explain the facts and circumstances unique to his case. Presumably, verification of these conditions as well as any ultimate acceptance will parallel those required for any other type of Offer.

A second major change in the Offer program relates to the terms for payment. Under previous Offer protocol, the Offer had to have been paid within the ninety (90) days following its official acceptance. But relatively new changes in the Offer program have allowed for alternative time frames for payment. Interest will still accrue until the negotiated Offer amount has been paid. (A longer plan for payment of the Offer will allow the IRS to analyze a longer time frame of collectibility and will generally result in a higher underlying Offer amount.)

Under new guidelines, a taxpayer has two alternatives to extend payment beyond this 90 day parameter. First, a taxpayer can agree to a Short Term Deferred Payment Offer in which the Offer will be paid in more than 90 days but in less than two years. This results in a sort of "mini-mortgage" whereby the taxpayer pays off the Offer amount with its corresponding interest in a relatively short time frame.

Alternatively, the taxpayer could agree to a Deferred Payment Offer whereby the Offer amount is paid off over the remaining life of the collection statute of limitations. While the ordinary collection statute is 10 years, events such as bankruptcy, taxpayer waivers, or a previous Offer-in-Compromise would act to extend the statute. On one hand, this option gives the taxpayer the most flexibility to pay the Offer amount in the longest possible time frame. But on the other hand, the cost for this flexibility is increased interest payments as well as a probably higher Offer amount.

Offers are a very valuable tool for delinquent taxpayer as well as for the new "kinder and gentler" IRS. They may only be one component of an overall IRS collection case, but they may represent the one best chance to effectively resolve a lingering tax liability at the lowest overall price.

Maurice A. Rose is the managing partner of Abraham & Rose, P.L.C. and specializes in the representation of delinquent taxpayers. He is an adjunct professor of law at Wayne State University Law School, and teaches Federal Tax Practice as well as Accounting for Lawyers: Financial Statement Analysis. He has a J.D. and M.B.A. from the University of Michigan, and has lectured in other professional settings.

ENDNOTES

1. Treas. Reg. § 301.7122-1T(b)(2).
2. Treas. Reg. § 301.7122-1(T)(b)(3)(i).
3. Treas. Reg. § 301.7122-1(T)(b)(4).
4. Treas. Reg. § 301.7122-1(T)(b)(4)(i).
5. Treas. Reg. § 301.6343-1(b)(4)(i).
6. Treas. Reg. §§ 301.7122-1(T)(b)(4)(ii),(iii).
7. Treas. Reg. § 301.7122-1(T)(b)(4)(iv)(B).
8. Treas. Reg. § 301.7122-1(T)(b)(4)(iv)(C).

Notes from the Editor

By: Eric M. Nemeth, Editor

This is my second edition as Editor of the *Michigan Tax Lawyer*. I want to thank the many contributing authors for their submissions. I especially want to thank my assistant, Heather Morley, for her tremendous assistance in this endeavor.

The *Michigan Tax Lawyer* is published four times per year and distributed to nearly two-thousand practitioners throughout the State of Michigan. Our publication has been recognized as the premier State Bar Tax Publication. I was recently contacted by the Texas Bar Association requesting additional copies of our publication. They are looking to use our magazine as their model.

I urge you to get involved in our various Committees. We are always looking for articles to publish. If you are interested, please contact your Committee Chairperson or me directly.

Updates

Telephone Update. Please update your Tax Directory which you received earlier this year. IRS – District Counsel has new telephone numbers and some new faces. The new numbers are as follows:

Michigan District Counsel

New Telephone System Numbers – Effective November 19, 1999

Main Office Number
(313) 237-6400
Fax (313) 237-6445

Management Staff

Nearing, Phoebe L.,
District Counsel
(313) 237-6400
Fax (313) 237-6405

Heitmeyer, Robert D.,
Ass't District Counsel
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Attorneys

Begun, A. Gary
(313) 237-6416

Bloink, Robert S.
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Gabriel, Grant E.,
Special Litigation Assistant
(313) 237-6424

Hammoud, Meso T.
(313) 237-6432

Knox, Steven L.
(313) 237-6435

Lueck, Micheal E.
(313) 237-6437

Murphy, Timothy S.
(313) 237-6413

Nicholaides, Alexandra E.
(313) 237-6415

Skinner, Eric R.
(313) 237-6426

Sladek, Bryan E.
(313) 237-6421

Stevens, John W.
(313) 237-6419

Webb, Kimberly J.
(313) 237-6427

Paralegals

Jones, Carolyn D.
(313) 237-6411

Rudick, Roberta L.
(313) 237-6431

** Congratulations to Grant Gabriel and Robert Heitmeyer on their recent promotions. Also, congratulations to Roberta Hamm-Amos on her retirement as Assistant District Counsel and the opening of her new law office in Southfield, Michigan. **

Tax Court Luncheon. At the recent Tax Court Luncheon we had approximately 35 attendees. Judge Joel Gerber gave both an interesting and amusing speech about some of his more colorful experiences on the bench. These luncheons are a wonderful opportunity to meet your colleagues in both the private and public tax tiers as well as the judiciary.

Amendments. Last Quarter's feature article entitled *"Section 367(d): Pitfalls of Forming Foreign Entities with Intangible Assets Developed in the United States"* was inadvertently credited to the wrong individual. The article was written by Patrick D. Lee. Mr. Lee received his B.B.A. from the University of Michigan and J.D., Case Western Reserve, cum laude. Mr. Lee was admitted to the Michigan Bar in 1999. Mr. Lee's practice focuses on general corporate and international tax matters. He is a member of the State Bar of Michigan. Prior to joining Dykema Gossett, Mr. Lee was a certified public accountant with an accounting firm.