Tax Newsletter

October - December 1976

TAXATION SECTION

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Taxation Section
State Bar of Michigan
306 Townsend Street, Lansing, Mich. 48904

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SUMMARY MINUTES
OF
CENTRAL REGION
INTERNAL REVENUE SERVICE - BAR ASSOCIATION
LIAISON MEETING

The annual liaison meeting of the Central Region Internal Revenue Service and Bar Association representatives was held October 29, 1976 at Cincinnati, Ohio. Representatives of state and local bar associations in the IRS Central Region (Michigan, Ohio, Indiana, Kentucky, West Virginia) were in attendance. J. Lee Murphy, of Grand Rapids, Michigan attended as the representative of the State Bar of Michigan. It is hoped that the following summary minutes of matters discussed at the meeting will be of benefit to Taxation Section members.

ERISA - EMPLOYEE RETIREMENT INCOME SECURITY ACT

Edwin Kelleher, ARC-EP/EO, Central Region, opened this portion of the agenda with a brief introductory statement as follows:

ERISA has been in effect since September, 1974. It is probably one of the most complex acts ever passed and involves three agencies -- IRS, Labor Department and the Pension Benefit Guarantee Corporation. Congressional intent of the Act comes through loud and clear: protect the employee's rights to the retirement benefits promised. The provisions for funding, vesting, discrimination, fiduciary responsibilities, and prohibited transactions are all devised to protect employees' rights.

Much of the progress to date has been with the assistance of practitioner groups (their response to congressional hearings, local seminars, and cooperation with IRS specialists). IRS, on the other hand, has attempted to aid the practitioners in adopting and amending plans. We are presently assisting attorneys in the preparation of pattern plans. We feel that the pattern plans assist both the attorneys and IRS. IRS can process pattern plan adoptions with a minimum technical review, thereby resulting in expeditious treatment to the attorneys. We, therefore, encourage attorneys who wish to utilize the pattern plan procedure to contact our offices and we will work with them to the extent practicable. Our present volume of plan receipts enables us to offer such service. However, if attorneys wait until the final due dates, IRS will be inundated with plans and will be unable to provide this individualized assistance. General assistance will continue to be provided by our Taxpayer Service Division which is established specifically for this purpose.

A number of specific problem areas involving ERISA were then discussed as follows:

(1) With respect to the handling of ERISA matters in non-key districts, Mr. Kelleher and Mr. James reported that the

major portion of the work would be done in the key district office. However, some work will be handled outside the key district office by the local field offices but with the overall record keeping and files being maintained in the key district office.

(2) A question was raised as to whether determination letters were being issued in the Central Region with respect to ESOP's. Mr. Kelleher reported that ESOP's were being handled like other plans and in appropriate situations determination letters were being issued. Consequently, practitioners should treat an ESOP in the same manner as they treat other employee benefit plans in attempting to obtain appropriate determination letters from Internal Revenue.

(3) A question was raised as to the relationship with the Labor Department and the extent to which the Labor Department was becoming involved in the ERISA process. Mr. Kelleher reported that initially Internal Revenue and the Department of Labor had some difficulty in defining their respective roles with respect to prohibited transactions. However, this has now been resolved at the National Office level and there is a clear understanding between Internal Revenue and the Department of Labor as to the type of problems to be handled by each agency.

(4) Mr. Kelleher was questioned as to whether any employees have filed complaints with the Department of Labor under ERISA. Mr. Kelleher reported that he understands that complaints have been filed with the Department of Labor, but apparently all these complaints have been worked out by the Department of Labor and the various employers before being brought to the attention of Internal Revenue.

Because the time was running short, Mr. Kelleher suggested that any remaining questions be submitted in writing to be included with answers in the minutes of the meeting. The following written questions were submitted:

1. Q. Will there be a simplified procedure for obtaining determination letters for amendments to a plan previously qualified under ERISA? For example: If a profit sharing plan (qualified under ERISA) is amended, do I have to prepare another complete 5301 to secure a determination letter on the amendment?

   A. To receive a determination letter on an amendment, it is necessary to file all the required forms. The recently updated application Form 5301 (Rev. June, 1976) contains the information currently needed to obtain a determination letter for an amendment.

While, under the Special Reliance Procedure, initial applications are required to be submitted on Form 5301, in certain instances, amendments made as a result of issuance of the final regulations will not require submission of additional Forms 5301.

2. Q. Who does one contact in the Labor Department if there is a question regarding the labor sections of the Act?

A. Following is a listing of DOL area offices within this Region, their telephone numbers, and areas of jurisdiction. DOL does not have toll-free numbers.

Area Office	Jurisdiction
Chicago, Ill. 60604 230 S. Dearborn St. (312) 353-7264	Indiana
Cleveland, Ohio 44199 1240 E. 9th St. (216) 293-3855	Ohio
Detroit, Michigan 48226 234 State St. (313) 226-6200	Michigan
Nashville, Tenn. 37203 1808 West End Bldg. (615) 852-5906	Kentucky
Pittsburgh, Pa. 15222 1000 Liberty Ave. (412) 644-2925	West Virginia

Resident offices with a limited staff are located in the following cities:

Cincinnati, Ohio 45202 550 Main Street (513) 684-2700	Indianapolis, Ind. 46060 46 E. Ohio St. (317) 331-7976
Grand Rapids, Mich. 49502 110 Mich. Ave., N.W. (616) 372-2335	Louisville, Ky. 40202 600 Federal Pl. (502) 352-5160

3. Q. Shouldn't the Rev. Proc. 75-31 notice to interested parties requirement, calling for the calendar dates by which interested parties must

forward their comments, if any, be the number of days after the application filing date rather than a series of specific calendar dates?

A. Requiring specific calendar dates is considered to be more responsive in providing adequate notice to the interested parties, especially those unsophisticated in the ways of ERISA.

4. Q. I understand that after three amendments, the plan must be completely restated.

A. Yes, the instructions provided with the application forms require that after three amendments a plan must be completely restated.

5. Q. Can the Internal Revenue Service give any better guidelines or accumulate and formalize existing ones as to when "minor" amendments must be filed with IRS?

A. Determining when an amendment is a minor one is judgment area and must be considered on a case-by-case basis. If any doubt exists as to the efficacy of filing an amendment for approval, you should discuss it with our district office. We do not anticipate issuance of guidelines in this area.

DISCLOSURE - PRIVACY AND FREEDOM OF INFORMATION ACTS

Bernard Schlake, Regional Disclosure Officer, and Robert Venable, Regional Counsel's Disclosure Officer, covered this portion of the agenda. The items covered included the following:

(1) At the National Office level, a separate division has been established to handle matters arising under the Privacy Act and the Freedom of Information Act. A separate organization has not been established at the regional or district levels. However, each region, each service center and each district has appointed a disclosure officer and, in addition, Regional Counsel has appointed a disclosure officer.

(2) The purpose of the disclosure officers is to insure that Internal Revenue promptly discloses information that it is required to disclose under these Acts. Correspondingly, however, they are also to insure that Internal Revenue does not disclose information that it may not disclose under the Internal Revenue Code. Particularly important in this regard are the revisions to Section 6103 under the Tax Reform Act of 1976.

(3) In each office, the disclosure officer promptly answers requests for the disclosure of information under the Privacy and Freedom of Information Acts and, in addition, he monitors the information being disclosed pursuant to various requests. The disclosure program has been decentralized under those two Acts to ensure prompt responses and closer monitoring.

(4) Of tremendous significance as to disclosure are the revisions to Section 6103 under the Tax Reform Act of 1976. These revisions provide that there may be no disclosure by Internal Revenue of return or return information except in accordance with the provisions of Section 6103. The statute also defines return and return information. The statute sets forth provisions to be followed in connection with the exchange of information between Internal Revenue and other Federal agencies and state taxing authorities. Substantial restrictions are imposed upon the release of information in connection with non-tax criminal investigations. Also, these changes provide substantial record-keeping responsibilities upon Internal Revenue with respect to information disclosed.

(5) Concerning subpoenas served on Revenue Service employees, the disclosure officers told us that they will make every effort to comply promptly with appropriate requests for disclosure of information permitted under Section 6103. However, Internal Revenue is a vast organization and has a vast amount of information in its files. This information simply cannot be located overnight and, if we want timely information from Internal Revenue, make sure the subpoena is served early enough in order to give Internal Revenue time to evaluate the request and locate the requested materials. They suggested that any request be made a minimum of thirty (30) days prior to the time when the information is required for court.

(6) A lengthy discussion ensued as to Internal Revenue disclosures to other Federal agencies as to information uncovered by an agent in the course of an audit. The disclosure officers reported that the provisions under Section 6103 are not completely clear at this point, but it is apparent that more restrictions exist, limiting disclosures to other Federal agencies. This area will be clarified by the Regulations which Internal Revenue hopes to issue in tentative form no later than January, 1977.

(7) With respect to tax returns themselves, subpoenaed in litigation between private litigants, the disclosure officers reported that the returns can only be obtained by the taxpayer. Consequently, if another party in a civil action wants the tax returns of the other party, he cannot get the tax returns directly from Internal Revenue. Instead, the requesting party can undoubtedly require the other party to obtain a copy of his own tax return from Internal Revenue and then, once the tax return is in his hands, obtain the tax return from him.

LARGE CASE EXAMINATION - THE ELEVEN QUESTIONS

Jack Chivatero, ARC, Audit, Cincinnati Region, covered this portion of the agenda. The topics covered can generally be summarized as follows:

(1) This program was initiated in the National Office and the guidelines with respect thereto have been formulated in the National Office. The Internal Revenue job in the regions and districts is to carry out the program as developed in the National Office and to make the National Office aware of problems arising under the program in order that the National Office can consider the desirability of changes in the program.

(2) The eleven questions have resulted in disclosures of information affecting not only Internal Revenue audits but also the administration of other Federal agencies. Internal Revenue is not routinely turning over to the other agencies information it obtains in response to the eleven questions affecting the administration of these other agencies. New Section 6103, effective January 1, 1977, will place additional restrictions on disclosure of tax-related information. However, one of the principal questions that Internal Revenue is wrestling with at the present time is how much impact the responses to the eleven questions have and whether the amounts involved justify the time and effort being devoted to the program.

(3) Internal Revenue is concerned about complaints that there is an uneven administration of the eleven questions within Internal Revenue but every effort is being made to apply the eleven question program in a uniform manner. In this connection, all corporations with $250,000,000 in assets or more are being required to answer the eleven questions. It is up to the judgment of the agent and his supervisor as to whether smaller corporations are required to answer the questions and this is the area in which Internal Revenue is attempting to obtain more uniformity in the treatment of taxpayers. Initially, Internal Revenue found that there was an overreaction in some districts in that virtually every corporate taxpayer was being required to respond to the eleven questions. When Internal Revenue realized what was being done, it withdrew many of the requests. The agents and their supervisors have discretion as to whether the questions are asked of corporations with assets of less than $250,000,000 and Internal Revenue believes it is exercising discretion in determining the corporations to which the questions are put.

(4) There was a lengthy discussion as to rewording of the eleven questions by some agents. Mr. Chivatero replied that initially only the eleven questions are to be asked of any corporate taxpayer and the agent should not revise the eleven questions in any manner whatever. Should the agent do so, Mr. Chivatero suggested that the matter would be resolved immediately if brought

to the attention of the agent's group supervisor. However, once the eleven questions are answered, the agent may require answers to additional questions to fill in gaps in the information submitted.

(5) It was noted that in some situations the agent has refused to accept a qualification or explanation of an answer to a specific question. Where this occurs, it was suggested that the representative request a formal question and answer session at which the officers must answer the questions under oath but, in connection therewith, can qualify or explain their answers to the extent they deem appropriate.

(6) Mr. Chivatero noted that Internal Revenue is having problems with some of the accounting firms in connection with the eleven questions. The accounting firms are not being asked to answer the eleven questions themselves but rather to sign an attestation to the information submitted by the officers of the company. But, some CPA firms are contesting Internal Revenue's right to require this and presumably this matter will be resolved in court. Should an agent request the CPA firm for a client to answer the eleven questions themselves, this should be immediately taken up with the group supervisor and the request will be immediately withdrawn.

(7) Whether or not the eleven question program will produce substantial tax revenues has not been determined. Internal Revenue knows (and, in fact, we all know from the newspapers) that significant amounts of money are involved in matters relating to the eleven questions but only some of these have an actual tax impact depending on the corporate structure of the particular company involved and how the item was handled for tax purposes. Internal Revenue is attempting to work on only those cases where there appears to be a substantial tax impact arising out of the responses to the eleven questions.

(8) Mr. Chivatero reported that, in other regions, criminal fraud cases have arisen out of the responses to the eleven questions. In the Central Region, no cases have as yet been recommended for prosecution but there are several cases now under consideration.

(9) Internal Revenue personnel noted that, in some situations, they receive general complaints about agents being completely unreasonable in connection with examinations of taxpayers. They requested that, if and when situations like this arose, they be advised in order that they can take appropriate action to insure that such situations do not continue. The Bar representatives responded that doing so would put them and their clients in an extremely difficult situation in complaining about the treatment by an agent. Rather, in virtually every instance, the only way to handle such a situation would be to tell the agent to immediately

prepare his report and take the case to a higher level where the case could be considered on its merits without harassment by the examining agent. Internal Revenue personnel encouraged us not to bypass the Audit Division in this situation but, instead, bring the matter to the attention of the appropriate supervisor in order that the matter could be corrected. They recognize the problems created for us by doing so but believe that matters such as this can and will be handled in such a way that it would not adversely affect either the representative or his client.

REGIONAL COUNSEL MATTERS

David E. Mills, Regional Counsel, Cincinnati Region, handled this portion of the agenda which covered a number of different topics. Each of the agenda topics and the items discussed in connection with such topics are reported upon separately as follows:

(1) Standard of Prosecution - Criminal Cases

(a) Mr. Mills stated initially that for many years Regional Counsel has recommended cases for criminal prosecution only where they find evidence of guilt beyond a reasonable doubt and a reasonable probability of conviction. This has been the prevailing standard for many years and continues to be the standard today. Further, he reported his belief that the quality of the cases recommended for prosecution has not changed over the years and this is proved by the fact that the percentage conviction rate has remained relatively constant (in excess of 95%) over the years.

(b) Mr. Mills did report that many of the older, more experienced Special Agents had retired in recent years and, as a result, the Intelligence Division now has a younger and less experienced staff of Special Agents. This, in his view, has affected the manner in which the cases have been developed but has not resulted in any diminution in the quality of the cases referred for prosecution.

(c) Harold Holt, ARC-Intelligence, mentioned that there was recently a drive on Section 7215 trust fund cases and that these cases are now in process of being prosecuted. Because of this particular program, there is a possibility that some of the Section 7215 trust fund cases referred for prosecution would not be as clear cut criminal cases as many of the cases recommended for prosecution in the past. However, he too believes that the overall quality of cases recommended for prosecution represent as clear cut criminal cases as cases recommended for prosecution in prior years.

(d) Several practitioners expressed the belief that cases recommended for prosecution today would never have been considered as prosecution cases in the past. Mr. Mills agreed that

prosecution cases are not as easy to develop today and that the fraud involved is usually more sophisticated than in prior years. Evidence of fraud is not as clear cut and is more difficult to develop. But, the standard of prosecution has not changed -- rather, the type of cases being prosecuted has changed substantially.

(e) Voluntary disclosures as effecting criminal prosecution were discussed in considerable detail. Mr. Mills noted that many years ago Internal Revenue had a specific voluntary disclosure program under which a case would not be recommended for prosecution where there was a voluntary disclosure. As a result, many cases arose in which the principal question was whether or not there was a true voluntary disclosure. Because of the questions that arose as to what constituted a voluntary disclosure, Internal Revenue discontinued the voluntary disclosure program but, nevertheless, a true voluntary disclosure continues to be carefully considered by Internal Revenue in determining whether or not a case should be referred for prosecution.

(2) Update on Discovery Procedures in the Tax Court

This portion of the program was handled by Mr. Mills and Eugene M. Corbin, Assistant Regional Counsel-Tax Court, with the following points being made during the course of the discussion:

(a) In accordance with the Tax Court rules, Regional Counsel is not utilizing the discovery procedures except in situations where the parties have been unable to reach agreement as to a stipulation of facts. However, Counsel's Office is starting earlier with the stipulation procedures in an effort to insure that there is a full development of the facts long before a Tax Court case actually comes to trial. In this region, Counsel's Office has experienced very few problems with the stipulation process and, as a result, has not found it necessary to resort to the discovery procedures in most cases. Actually, Counsel's Office has found that in the vast majority of cases, there has been no great change in the manner in which they are handling their cases.

(b) After the discovery rules were first promulgated, most discovery motions emanated from the taxpayers. However, this trend is starting to reverse and it appears that more and more discovery proceedings are being instituted by Internal Revenue.

(c) Apparently in some regions discovery proceedings have been substantially more extensive than in the Central Region. As a result, the Tax Court has become concerned about the heavy burden being placed on it by discovery proceedings. It, therefore, appears likely that further consideration will be given by the Tax Court to a revision of the discovery rules in an effort to cut down on the burdens being placed on the Court by the discovery rules.

(3) Criminal Tax Violations by Attorneys

(a) In regard to this matter, Mr. Mills pointed out that there have been a number of recent criminal cases involving attorneys who failed to file returns for one or more years. He pointed out that attorneys should be aware of the fact that these cases are being prosecuted and, where the prosecution is successful, there is an extra severe penalty to the attorneys involved. Not only are they frequently sentenced to prison or a substantial fine is imposed but, in addition, in many states a tax conviction results in disbarment. Because of the disbarment aspect, Mr. Mills thought that all attorneys should be particularly aware of the consequences of a tax conviction.

(b) The states within the region were discussed with the conclusion that there is automatic disbarment in Ohio and Kentucky arising out of a conviction for tax evasion or failure to file with a possible disbarment in the states of Indiana, Michigan and West Virginia.

(c) Mr. Fuller pointed out that in 1972 there was a special Internal Revenue project to review filing by attorneys, accountants and enrolled agents (the ACE project). This program was discontinued in 1974 but has resulted in a substantial number of cases involving attorneys, accountants and enrolled agents.

(4) Attorneys as Witnesses in Tax Cases

(a) Many tax cases arise out of transactions planned by attorneys. Later, the tax consequences of this transaction is questioned by Internal Revenue and a tax case arises as a result thereof. Because of the attorney's familiarity with the transaction, he represents the taxpayer as the case proceeds through the administrative process of Internal Revenue and then as attorney of record when the case is docketed in the Tax Court. Internal Revenue and other government agencies have been concerned about the problems that arise when an attorney represents the taxpayer in a particular case and, in addition, proposes to appear as a witness in the case because of his involvement in the transaction.

(b) Recently, the Commissioner's Advisory Committee issued a report dealing with this subject entitled "Chief Counsel's Advisory Committee on Rules of Professional Conduct." This report in its entirety can be found as follows: Federal Register, Volume 41, No. 184, dated 9/21/76, pp. 41,106-41,121. It is also contained in CCH Volume 9, ¶ 6906 and in PH Report Bulletin, ¶ 55,657, dated 10/28/76.

(c) The Department of Justice had adopted a policy under which it will automatically move to disqualify as counsel in a case an attorney who might be called as a witness in that case.

(d) In Tax Court cases, Counsel's Office tentatively intends to follow the following procedures:

(1) When the government has reason to believe the taxpayer's representative may be a witness, the government will bring it up with the representative with a view towards finding a mutually acceptable understanding.

(2) If a mutually acceptable understanding cannot be reached with counsel, the government will bring the matter to the attention of the Court in the presence of the taxpayer and his representative in order that the Court may determine the appropriate handling of the matter.

(3) Consideration of this matter should be taken up at the earliest possible time in order to eliminate any delay in the trial of the case.

(e) It was recognized that removal of counsel may result in a substantial hardship to the taxpayer because of counsel's familiarity with the transaction. Mr. Mills stated that the government will take this into account along with all other relevant circumstances in determining the position the government should take in a particular situation.

TEAM APPELLATE APPROACH

Claude Rogers, ARC-Appellate, Central Region, handled this portion of the program. The following points were covered:

(1) The name given to appellate conferees has been changed once again. From now on appellate conferees will carry the title "appeals officers."

(2) The team appellate approach is used only in extremely large and complex cases. It proves particularly valuable in corporate cases involving one or more specialized industries. For example, in a case where one of the corporations is an insurance company, it enables an insurance specialist to handle that portion of the appellate review.

(3) The cases are usually broken down by issues and enables each conferee to concentrate on the particular issues to which he is assigned. At one time there will never be more than two or three cases in any Appellate Office being handled under the team appellate approach. In each case, there is a team leader assigned to the case who has the ultimate responsibility for the settlement of the case. Such case, just as all other cases, is subject to the supervisor's approval.

(4) Mr. Rogers stated that, in the Central Region, there had been only limited utilization of the team appellate approach. However, he believed that, in these cases, the concept had worked well. One of the practitioners reported that he had handled one case of this kind and that he thought the procedure had worked well in that situation. Mr. Rogers stated that he expected that we will see more cases handled on a team appellate basis as time goes on and he would be interested in our comments as to our experiences in team appellate cases. Whether our experiences were favorable or unfavorable, he would like to have the benefit of our comments in connection with the process.

THE TAX REFORM ACT OF 1976

(1) The initial item discussed under the Tax Reform Act was with respect to the handling of mathematical and clerical errors under Section 1206 and Mr. John O. Hummel, Director, Cincinnati Service Center, responded to this item. He reported that, under the Tax Reform Act of 1976, mathematical and clerical errors will not be handled like any other deficiency proceeding with the usual appeal procedures being available to the taxpayers. He reported that penalties are not included within mathematical and clerical errors and, as a result, there will be no changes in the Service Center procedures with respect to assessment of penalties.

(2) Various Bar representatives commented on the continuing problem of corresponding with the Service Center as to billings, etc. Mr. Hummel stated that with data retrieval terminals available in district offices, the districts should be able to answer almost any question regarding a Service Center billing. He urged practitioners to contact the district office anytime they had a problem with a Service Center notice that could not be resolved by correspondence with the Service Center. The following list of telephone numbers were provided:

Indiana	
Evansville	424-6481
Fort Wayne	423-2331
Gary	938-0560
Hammond	938-0560
Indianapolis	635-2275
Muncie	288-4594
South Bend	232-3981
Terre Haute	232-9421
Elsewhere in Indiana	800-382-9740

Kentucky	
Lexington	255-2333
Louisville	584-1361
Northern Kentucky (Cincinnati local dialing area)	621-6281
Elsewhere in Kentucky	800-292-6570

Michigan

Ann Arbor	769-9850
Detroit	237-0800
Flint	767-8830
Grand Rapids	774-8300
Lansing	394-1550
Mount Clemens	469-4200
Muskegon	726-4971
Pontiac	858-2530
Elsewhere in area code 313, call	800-462-0830
Elsewhere in codes 517, 616, and 906, call	800-482-0670

Ohio

Akron	253-1141
Canton	455-6781
Cincinnati	621-6281
Cleveland	522-3000
Columbus	228-0520
Dayton	228-0557
Elyria	323-8090
Lima	228-6037
Lorain	933-9591
Mansfield	524-2095
Toledo	255-3730
Youngstown	746-1811
Elsewhere in Northern Ohio	800-362-9050
Elsewhere in Southern Ohio	800-582-1700

West Virginia

Parkersburg	485-1601
Elsewhere in West Virginia	800-642-1931

(3) Jack Chivatero commented on the changes in the estate and gift tax area and commented that the new changes will undoubtedly result in far fewer estate tax returns being filed and far fewer estate tax returns being audited. He reported that Internal Revenue will study the effects of the estate and gift tax changes in the light of the staffing of their estate and gift tax groups. He indicated the likelihood of a substantial reduction in the number of estate and gift tax examiners as a result of the changes in the law.

(4) Mr. Mills reported that the new summons rules involve substantial procedural changes. Chief Counsel's Office anticipates a great deal of litigation in this area until the new legislation is judicially clarified. A preliminary survey indicates that many additional attorneys will be needed just to handle the Internal Revenue summons problems arising under the Tax Reform Act of 1976.

TAX MANAGEMENT—U.S. INCOME

Current Portfolio Classification Guide

ACCOUNTING AND RETURNS

Accounting Methods--Adoption and Changes (303)
Accounting Methods--Definitions. Permissibility (46-3rd)
Accounting Periods (56-2nd)
Allocations (Sec. 482) -- General Coverage (327)
Allocations (Sec. 482) -- Specific Transactions (230-2nd)
Consolidated Returns -- Computation of Consolidated Items (204)
Consolidated Returns -- Computation of Separate Taxable Income (200)
Consolidated Returns -- Elections and Filing (21-2nd)
Consolidated Returns -- Special Concepts in Computation of Separate Taxable Income (203)
Estimated Tax -- Corporate (1-3rd)
Income Averaging (100-3rd)
Installment Sales (48-4th)
Inventories Other Than LIFO -- Gen'l. Principles (146)
LIFO: Fundamentals, Pooling & Computations (69-3rd)
LIFO: Technical Requirements, Method Changes and Transfers (74-3rd)
Preparation and Use of Schedule M (31-3rd)
Tax Accounting Problems of Contractors (75-3rd)

CORPORATE DISTRIBUTIONS & ADJUSTMENTS

Boot Distributions (81-2nd)
Collapsible Corporations -- General Coverage (29-3rd)
Collapsible Corporations -- Section 341(e) (226)
Collapsible Corporations -- Section 341(f) (49-2nd)
Corporate Acquisition Debt -- Interest Deduction--Sec. 279 (287)
Corporate Acquisitions--(A) Reorganizations (77-3rd)
Corporate Acquisitions--(B) Reorganizations (78-2nd)
Corporate Acquisitions--(C) Reorganizations (79-2nd)
Corporate Acquisitions--Special Problems (14-3rd)
Corporate Liquidations--§331 and Related Problems (73-3rd)
Corporate Liquidations Under Section 333 (58-5th)
Corporate Liquidations Under Section 337 (18-5th)
Corporate Recapitalizations (52-2nd)
Corporate Reorganizations--Deferred Stock Distributions (166-2nd)
Corporate Separations--Active Business Requirement (224-2nd)
Corporate Separations--Gen'l Requirements (223-2nd)
Corporate Stock Redemptions--Basic Rules (17-5th)
Corporate Stock Redemptions--Special Problems (266-2nd)
Corporations--Assumption of Liabilities (233-2nd)

Dividends--Cash and Property (40-3rd)
Earnings and Profits--Effect of Distributions and Exchanges (189-2nd)

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★ Indicates new Portfolio
# Indicates revised Portfolio

CORPORATE DISTRIBUTIONS & ADJUSTMENTS—Contd.

Earnings and Profits--General Principles and Treatment of Specific Items (175-2nd)
Life Insurance--Corporate Business Use (34-3rd)
Liquidation of Subsidiaries--Basis--§334(b)(2) (16-4th)
Liquidation of Corporate Subsidiaries--Gen'l. (238-2nd)
Liquidation--Reincorporation (335)
Net Operating Losses--Computations (9-3rd)
Net Operating Losses--§§381, 382, 269 (27-3rd)
SEC Aspects of Corporate Acquisitions (276-2nd)
Section 306 Stock (85-2nd)
Stock Dividends and Stock Rights (94-4th)
Stock Sales Subject to Section 304 (83-3rd)
Transfers to Controlled Corporations (54-3rd)

EXECUTIVE COMPENSATION

Deferred Compensation Arrangements (20-4th)
(ERISA)--Fiduciary Responsibilities and Prohibited Transactions (308)
(ERISA)--H.R. 10 Plans--Qualification (311)
(ERISA)--Pension Plans--Qualification (309)
(ERISA)--Plan Terminations; Corporate Acquisitions (312)
(ERISA)--Profit-sharing Plans--Qualification (310)
(ERISA)--Qualified Plans--Deductions, Contributions and Funding (313)

Individual Retirement Arrangements (315)
Life Insurance--Corporate Business Use (34-3rd)
Maximum Tax on Earned Income (300)
Nonstatutory Stock Options (87-3rd)
Plan Selection--Pension, Profit-sharing Plans and ESOPs (314)
Reasonable Compensation (202-3rd)
Restricted Property--Sec. 83 (262)
Sickness and Disability Benefits (4-4th)
Stock Options (Statutory)--Qualifications (7-4th)
Stock Options (Statutory)--Taxation (183-2nd)

INCOME, DEDUCTIONS, AND CREDITS

Amortization of Intangibles--General Rules (209)
Amortization of Intangibles--Specific Industries and Types of Property (218)
Amortization of Pollution Control Facilities--§169 (254)
Antitrust Payments and Recoveries (121-2nd)
Bad Debts (19-5th)
Bonds and Other Evidences of Indebtedness--§1232 (333)
Cancellation of Indebtedness (88-3rd)
Depreciation: ADR System--Post-1970 Property (255-2nd)
Depreciation--Basis, Useful Life, Salvage (62-4th)
Depreciation: Class Life System for Pre-1971 Property (295)
Depreciation--Group Accounts (76-3rd)
Depreciation--Guideline Lives and Reserve Ratios (6-4th)
Depreciation--Item Accounts (63-2nd)
Depreciation of Real Estate (71-3rd)
Depreciation Recapture--Corporate Transactions (268)
Depreciation Recapture--Partnership Transactions (289)
Depreciation Recapture--§1245--General (129-2nd)

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Current Portfolio Classification Guide—Contd.

INCOME, DEDUCTIONS, AND CREDITS—Contd.

Depreciation Recapture--Sec. 1250--General (148-2nd)
Depreciation Recapture--§§1245 & 1250--Multiple Properties; Items; Elements (157-2nd)
Depreciation Recapture--Transfers by Gift, Death, and Taxfree Rollover (169-2nd)
Dividends--Cash and Property (40-3rd)
Educational and Professional Expenses--§162 (267-2nd)
Equipment Leasing (12-4th)
Income Averaging (100-3rd)
Interest Deduction--General (Sec. 163(a)) (279)
Interest on Deferred Payments--Sec. 483 (155-2nd)
Investment Credit--Application; Suspension; Termination (192-2nd)

Investment Interest (Sec. 163(d)) (297)
Losses--Casualty (274)
Losses--General Requirements (96-2nd)
Losses--Theft, Wagering, War, Confiscation (278)
Minimum Tax--Computation and Application (288)
Minimum Tax--Items of Tax Preference (269)
Moving Expenses (3-4th)
Net Operating Losses--§§381, 382, 269 (27-3rd)
Political Expenditures (231)
Related Taxpayers--Losses, Expenses, Interest (102)
Research and Development Expenses (42-2nd)
Scholarships and Fellowship Grants (177)
State, Local, and Federal Taxes (24-3rd)
Taxfree Exchanges Under Section 1031 (61-3rd)
Travel and Entertainment Expenses (26-5th)
Travel and Entertainment Expenses--Recording and Reporting (180-2nd)
Unrelated Debt-financed Income (257)

LIFE INSURANCE COMPANIES

Life Insurance Companies--Definition & Accounting (245)
Life Insurance Companies--Special Problems; Separate Accounts (247)
Life Insurance Companies--Taxable Income (246)

NATURAL RESOURCES

Mineral Interests--Nonoperating (151)
Mineral Properties--Exploration, Acquisition, Development and Disposition (15-4th)
Mineral Properties Other Than Gas and Oil--Operation (90-5th)

PARTNERSHIPS

Dispositions of Partnership Interests--Gifts, Incorporations, Etc. (286)
Dispositions of Partnership Interests--Sales and Exchanges (237)
Partnership Basis and Basis Adjustments (277)
Partnerships--Distributive Shares--Disallowance of Special Allocations (283)
Partnership Transactions--§751 Property (258)
Partnerships--Statutory Outline and Definition (161-2nd)
Partnerships--Taxable Income & Distributive Shares (282)
Transfers to Partnerships (293)

PROCEDURE AND ADMINISTRATION

Claim of Right Doctrine and Statutory Exceptions (142-2nd)
Criminal Tax Procedure--Part I (162)
Criminal Tax Procedure--Part II (163)
Equitable Remedies Against Commissioner: Estoppel, Abuse of Discretion, Discrimination (171)
IRS National Office Procedures--Rulings, Closing Agreements (104-4th)
IRS Procedures--Production of Documents (123-2nd)
Practice Before the IRS (147-3rd)
Statute of Limitations--Interest on Underpayments and Overpayments of Tax (28-2nd)
Statute of Limitations--Mitigation (110)
Tax Court--Forum; Pleadings (152-3rd)
Tax Court--Trial of Case (153-3rd)
Transferee Liability (158-2nd)

REAL ESTATE

Depreciation of Real Estate (71-3rd)
Real Estate Investment Trusts (107-3rd)
Real Estate Leases and Improvements (47-2nd)
Real Estate--Mortgages (66-2nd)
Sale or Exchange of Residence (179-2nd)

SPECIAL CORPORATE PROBLEMS

Accumulated Earnings Tax (35-5th)
Charitable Contributions by Corporations (290)
Constructive Ownership Rules Under Sec. 318 (72-3rd)
Multiple Corporations (55-4th)
Multiple Corporations--Section 1551 (70-3rd)
Net Operating Losses--§§381, 382, 269 (27-3rd)
Personal Holding Companies (Domestic)--Taxation and Relief (114-2nd)
Small Business Stock (98-2nd)
Subchapter S--Elections (178-3rd)
Subchapter S--Operations (60-5th)

MISCELLANEOUS

Arbitrage Bonds (271)
Divorce and Separation (95-3rd)
Farm and Ranch Expenses and Credits (208-2nd)
Farm and Ranch Losses (241-2nd)
Farm and Ranch Losses--Recapture (236-2nd)
Industrial Development Bonds (216-3rd)
Involuntary Conversions (33-5th)
Patent Transfers--Section 1235 (228)
Private Foundations--Excess Business Holdings (249)
Professional Corporations--Organization and Operation (334)
Professional Organizations--General Coverage (227)
Securities Trading--Options, Short Sales, Wash Sales (184-2nd)
Taxation of Agricultural Cooperatives (229)
Tax Crimes--Evasion of Another's Tax and Defenses (285)
Tax Crimes: False Statements Under §§7206 and 7207 (193)
Tax Crimes--False Statements Under U.S. Criminal Code (Part I) (243)
Tax Crimes--False Statements Under U.S. Criminal Code (Part II) (244)
Tax Evasion--Elements of the Offense (284)
Tax Evasion--Methods of Proof (330)
Trade Associations (331)

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TAX MANAGEMENT

ESTATES, GIFTS, AND TRUSTS

CURRENT PORTFOLIO LISTING

CHARITABLE CONTRIBUTIONS

Charitable Contributions--General Rules (281)
Charitable Contributions--Percentage Limitations (292)

COMMUNITY PROPERTY

Community Property: General Considerations (212-2nd)
Community Property: The Migrant Client (252)

ESTATE PLANNING/SMALL BUSINESS

After-death Tax Planning--Payments and Distributions (302)
After-death Tax Planning--Tax Options (301)
Corporate Buy-out Agreements (106-3rd)
Estate Planning--General (11-6th)
Estate Planning and Subchapter S (305)
Estate Planning for the Corporate Executive (225)
Personal Life Insurance Trusts (210)
Private Annuities (195-2nd)

ESTATE TAX

Aliens--Estate and Gift Taxation (201)
Annuities (134-2nd)
Estate Administration Expenses--Sec. 2053 (234)
Estate Tax Charitable Deduction (261)
Estate Tax Credit for Gift Tax (159)
Estate Tax Credit for Tax on Prior Transfers (130)
Estate Tax Marital Deduction (239)
Estate Tax Payments and Liabilities (219-2nd)

Life Insurance (111-3rd)
Lifetime Transfers with Retained Powers (50-2nd)
Powers of Appointment--Estate Tax (265)
Retained Life Interests (133-2nd)
Transfers Taking Effect at Death (Sec. 2037) (256)

GIFTS

Aliens--Estate and Gift Taxation (201)
Gifts (154-2nd)
Gifts--Determination of Tax (176-2nd)
Gifts in Contemplation of Death (182)

INCOME TAX ASPECTS

Administrative Powers (326)
Corporate Stock Redemption--Section 303 (91-3rd)
Death of a Partner (213)
Disposition of Interests in Closely Held Corporations (242)
Income in Respect of a Decedent--Computations (185-2nd)
Income in Respect of a Decedent--General (32)
Lifetime Transfers with Retained Powers (50-2nd)
Subchapter J--Throwback Rules (170-2nd)
★ Unrelated Debt-Financed Income (339)

PRIVATE FOUNDATIONS

Exempt Organizations--Exemption and Filing-Requirements (337)
Private Foundations--Definition (Sec. 509) (296)
Private Foundations--Sec. 4940 and Sec. 4944 (338)
Private Foundations--Special Rules (Sec. 508) (275)
Private Foundations--Taxable Expenditures (Sec. 4945) (298)
Private Foundations--Termination (272)

VALUATION

Blockage (248)
Valuation of Assets (132)
Valuation of Real Estate (299)
Valuation of Shares of Closely Held Corporations (221)

★ Indicates new Portfolio.
# Indicates revised Portfolio.

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