



## Duke Law Firm, P.C.—in the News

400 Vestavia Parkway, Suite 100  
Birmingham, Alabama 35216-3750 USA

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### Seminars/Conferences

#### **Chartered Wealth Manager**

**Course:** Register for the Chartered Wealth Manager (CWM) and Chartered Trust and Estate Planner (CTEP) Designation Courses, May 2006, Wilmington, NC

<http://mfsfinancial.com/bsiiexecutiveeducation/>

#### **Circular 230—Update**

At the February 21, 2006, Cannon Financial Institute presentation, Roy M. Adams and Charles A. Redd discussed the topic "Circular 230: Pushing the Envelope." The presentation also included their materials on this subject.

Written advice is a covered opinion if it concerns one or more federal tax issues arising from: (i) a transaction that "is the same as or substantially similar to a transaction that, at the time the advice is rendered, the Internal Revenue Service has determined to be a tax avoidance transaction and identified by published guidance as a listed transaction under 26 C.F.R. 1.6011-4(b)(2)"—referred to as a "listed transaction"—31 C.F.R. Section 10.35(b)(2)(A); (ii) any partnership or entity, any investment plan or arrangement, or any other plan or arrangement, the principal purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code—**principal purpose arrangement**—31 C.F.R. Section 10.35(b)(2)(B); or (iii) any partnership or other entity, any investment plan or arrangement, or any

other plan or arrangement, a significant purpose of which is the avoidance or evasion of any tax imposed by the IRC if the written advice is: (a) a reliance opinion; (b) a marketed opinion; (c) subject to conditions of confidentiality; or (d) subject to contractual protection (a "**significant purpose**" opinion). 31 C.F.R. Section 10.35(b)(2)(C).

"A 'federal tax issue' includes a question concerning the federal tax treatment of an item of income, gain, loss, deduction, or credit, the existence or absence of a taxable transfer of property, or the value of property for Federal tax purposes." 31 C.F.R. Section 10.35(b)(3).

"[A] federal tax issue is significant if the Internal Revenue Service has a reasonable basis for a successful challenge and its resolution could have a significant impact, whether beneficial or adverse, and under any reasonably foreseeable circumstances, on the overall Federal tax treatment of the transaction(s) or matter(s) addressed in the opinion." 31 C.F.R. Section 10.35(b)(3).

A reliance opinion is one in which the professional "concludes at a confidence level of more likely than not (greater than 50%) that one or more significant federal tax issues would be resolved in the taxpayer's favor." 31 C.F.R. Section 10.35(b)(4)(i). A reliance opinion can be avoided by prominently disclosing in the written advice "that it was not intended or written by the practitioner to be used, and that it cannot be used by the taxpayer, for the purpose of avoiding penalties, that may be

imposed on the taxpayer." 31 C.F.R. Section 10.35(b)(4)(ii).

A marketed opinion is an opinion that "the practitioner knows or has reason to know that the written advice will be used or referred to by a person other than a practitioner (or a person who is member of, associated with, or employed by the practitioner's firm) in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement to one or more taxpayer(s)."

A marketed opinion requires that "the opinion must provide the practitioner's conclusion that the taxpayer will prevail on the merits at a confidence level of at least more likely than not with respect to each significant federal tax issue." The marketed opinion cannot be given if this requirement is not met (unless the disclosure requirements stated above for marketed opinions are prominently disclosed). 31 C.F.R. Section 10.35(c)(3).

A marketed opinion can only be avoided by a practitioner where the written advice discloses the following: (1) the advice was not intended or written by the practitioner to be used, and it cannot be used, by any taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer; (2) the advice was written to support the promotion or marketing of the transactions addressed by the written advice; and (3) the taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor. But, if a practitioner wrongfully

believes that his written advice is a marketed opinion when it is a principal purpose arrangement, the three foregoing disclosures will not avoid the requirements for a covered opinion.

The requirements for a covered opinion can be avoided by a practitioner through the use of a limited scope opinion, if the transaction or arrangement is not a listed transaction or a principal purpose arrangement, and if the advice is not given in the form of a marketed opinion. A limited scope opinion allows the practitioner to provide a written opinion that covers less than all the significant federal tax issues if the practitioner and the taxpayer agree that the scope of the opinion and the potential reliance by the taxpayer on the opinion for purposes of avoiding penalties that may be imposed on the taxpayer are limited to the federal tax issues addressed in the opinion. 31 C.F.R. Section 10.35(c)(3)(v)(A). The disclosures that are required with respect to a limited opinion are set forth at 31 C.F.R. Section 10.35(e)(3).

To repeat, a principal purpose arrangement is one in which the "principal purpose of a partnership or other entity, investment plan or arrangement, or other plan or arrangement is the avoidance or evasion of any tax imposed by the Internal Revenue Code if that purpose exceeds any other purpose." 31 C.F.R. Section 10.35(d)(10). The "principal purposes of a partnership or other entity, investment plan or arrangement, or other plan or arrangement is not to avoid or evade federal tax if that partnership, entity, plan or arrangement has as its purpose the claiming of tax benefits in a manner consistent with the statute and Congressional purpose." 31 C.F.R. Section 10.35(b)(10). A principal purpose arrangement requires a covered opinion. And written advice with respect to a principal purpose arrangement need only relate to a federal tax issue that falls within the definition of a

principal purpose arrangement and is not required to relate to a significant federal tax issue. A practitioner providing written advice concerning a principal purpose arrangement cannot avoid covered opinion status by including covered language in the written advice prohibiting the recipient from relying on such advice to avoid penalties.

A subtopic discussed by Mr. Adams and Mr. Redd includes: "When written tax advice addressing estate planning techniques may have to be a covered opinion." Their handout material states as follows:

The estate planning technique that seems most likely to require a covered opinion under Circular 230, if written federal tax advice is to be given at all, is the creation of family limited partnerships ("FLPs") and limited liability companies ("LLCs"). Based on the numerous cases recently decided regarding these entities, it is easy to surmise that the IRS would view a[n] FLP or LLC as a principal purpose arrangement under Circular 230, which would require compliance with Section 10.35. Another popular estate planning technique that may require a covered opinion under Circular 230 (if written tax advice concerning it is to be rendered), is an installment sale to an intentionally defective grantor trust. No precedential road map exists for this technique, and the IRS has scrutinized it in the past ... One respected commentator [Howard Zaritsky] has suggested that practitioners could actually benefit from Circular 230 because clients will not pay for written tax advice concerning more aggres-

sive transactions (because such advice may have to be in the form of a covered opinion) and will therefore generally have to deal only with more familiar, less aggressive estate planning techniques.

31 C.F.R. Section 10.52 provides that a practitioner may be censured, suspended or disbarred from practice before the IRS for willfully violating any of the regulations under Circular 230 (other than Section 10.33). This penalty may also be imposed on a practitioner who recklessly or through gross incompetence violates Section 10.34 (establishes standards for advising with respect to tax return positions and for preparing and signing returns), 10.35, 10.36 or 10.37. Section 10.35 deals with the requirements for covered opinions; Section 10.36 requires practitioners who possess "principal authority and responsibility for overseeing a firm's practices of providing advice concerning federal tax issues" to take reasonable steps to ensure that all members, associates and employees comply with the requirements of Section 10.35; and Section 10.37 relates to requirements for any written advice that is not a covered opinion.

The IRS proposed new rules under Circular 230 on February 6, 2006. One of those rules is a change to Section 10.2(d), which defines practice before the IRS. As stated by Mr. Adams and Mr. Redd, practice before the IRS is modified to add that "rendering written advice with respect to any entity, transaction plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion," is considered practice before the IRS and is therefore subject to Circular 230. This appears to include trust officers and financial planners.

### **Circular 230 and Use of Offshore Mechanisms for Attempted Tax Deferrals**

Before reading the following, please read "Circular 230—Update" in this newsletter. It has been quite some time since Duke Law Firm has seen an offshore structure that provides legitimate income tax deferrals for U.S. citizens or legal residents. Most of these structures come in the form of boxes, circles, and arrows with numerous entities, trusts, etc., all with the attempt to provide income tax deferrals with respect to transfers of appreciated assets, sales of businesses, operations of businesses without income taxes, uses of foreign foundations where required tax returns are not filed and income taxes are not being paid, purchase of real estate outside the U.S. in corporations where tax returns are not filed and rental income is not being reported, etc. Those who are not licensed attorneys and recommend these structures most likely are engaged in the unlicensed practice of law. Practitioners, such as lawyers and certified public accountants who propose such structures with alleged tax deferrals, must determine the requirements they are subject to under Circular 230. In most instances, practitioners will find that Circular 230 will cause written advice to be a principal purpose arrangement, requiring a covered opinion.

If a covered opinion is required with respect to tax advice for obtaining valuation discounts for the underlying limited partnership interests in family limited partnerships and limited liability companies because the IRS views such techniques as a principal purpose arrangement under Circular 230, then offshore structuring certainly will be classified by the IRS as techniques with a principal purpose arrangement under Circular 230. A principal purpose arrangement under Circular 230 requires compliance with Section 10.35.

Section 10.35 requires that a practitioner providing a covered opinion must comply with the rules found in Section 10.35(c). The rules under Section 10.35(c) are too long to discuss in this newsletter. But it is imperative that each practitioner read, study, and learn all of Section 10.35, especially Section 10.35(c), to determine the requirements he is under, especially when tax advice may be subject to a covered opinion, with respect to planning that is used to defer income taxation.

The IRS has made it clear at seminars, conferences and other public forums that it is about to strike promoters and their clients with respect to various offshore structures used to provide alleged tax deferrals or other tax benefits. Thus, it is not difficult to understand that the IRS views most of the offshore structuring with income tax deferrals or other benefits to be a principal purpose arrangement under Circular 230, which requires compliance with Section 10.35 by practitioners when they give any written advice that touches upon taxation. Offshore structures that are principal purpose arrangements require compliance with Section 10.35 by practitioners, and the disclaimer language normally used in e-mail messages, letters, and faxes will not suffice to change this requirement.

For example, the IRS has stated for years at seminars, conferences, and other public forums that it will attack "promoters" who recommend private annuity arrangements with respect to otherwise valid offshore life insurance products. If the IRS is successful in its attack, the insurance policies will not be classified as insurance, the investment income (internal build up) of the policies will be taxable, and the investment proceeds cannot be excluded from the gross estate for federal estate tax purposes. On May 12, 2003, *The Wall Street Journal* included an article titled "IRS Warns Against

Tax Dodge Involving Insurance Companies" that set forth the structures that the IRS intends to attack, which are the same structures that the IRS states at seminars, conferences, and open forums. Some of the structures incident to offshore life insurance include:

- the use of a private annuity arrangement between a U.S. person, generally the insured, and one of the separate segregated accounts of an offshore variable life insurance policy;
- payment of premiums with property;
- transferring a business to a separate segregated account;
- transferring artwork to a separate segregated account; and
- transferring real estate or interest in real estate to a separate segregated account.

If the IRS views discount planning with family limited partnerships or sales to tax-defective trusts as principal purpose arrangements, it is not difficult to understand that the foregoing structures, plus all of the others that Duke Law Firm has seen, that are combined with otherwise valid offshore life insurance products, is a principal purpose arrangement. A principal purpose arrangement requires a covered opinion, and no disclaimer language can avoid that requirement.

Remember, when looking at structuring involving offshore matters (not just related to otherwise valid offshore life insurance products), that it is to be expected that the IRS will find such structuring to be a principal purpose arrangement. Second, the IRS has stated at seminars, conferences and open forums that it will attack specific

structures, including those listed above that are a part of otherwise valid insurance products. The IRS states that its attack on the use of private annuity arrangements, as a part of otherwise valid offshore life insurance, will be as follows:

(a) The economic substance of the transaction is a sham, and the transaction is a direct sale by the U.S. person under a private annuity agreement to a controlled foreign corporation or other foreign entity.

(b) The policy of insurance is not a life insurance contract because the insurer offsets its risk by acquiring a valuable property in exchange for an annuity contract with the debt of the policy extinguished at the death of the insured under the case of *Helvering v. Le Gierse*, 312 U.S. 531 (1941). The *Le Gierse* case states that where the insurer simultaneously issued a single-premium life insurance contract and a single-premium annuity contract, the risks offset each other. Thus, if the insured died prematurely, the insurer was compensated by a profitable annuity premium; and if the insured lived beyond his life expectancy, the insurer was compensated by profitable insurance premium. Thus, no shifting of risk to the insurer occurred, and the court held that there was no life insurance contract. See also, Rev. Rul. 89-61, 1989-1 C.B. 75.

(c) The transaction is a step-transaction. The U.S. person negotiated the entire deal.

(d) I.R.C. Section 367(f) applies to the transaction. The U.S. person is treated as transferring property to a foreign corporation as paid-in surplus or as a contribution to capital, and the transfer is treated as a sale or exchange for an amount equal to the fair-market value of the property transferred. The transfer results in recognition of gain equal to the amount of the fair-market value over the basis. No Treas. Regs. are issued with

respect to I.R.C. Section 367(f); however, the U.S. Treasury has agreed to make this a project.

(e) The transfers to the foreign trust are required to be reported under one or more of the provisions of I.R.C. Sections 6038, 6038A, 6038B, 6046, 6046A, or 6048. Under the provisions of I.R.C. 6501(c)(8), the time for assessment of any tax imposed shall not expire before three years after the date that the required tax return is filed with the Internal Revenue Service (IRS). In addition, the filings with respect to Schedule B, Part III, of Form 1040 or 1120 may be: (i) suspended by petition to quash summons; (ii) opened due to fraud; (iii) extended by filing an amended return; or (iv) extended for failure to correctly file certain information returns.

(f) The transfer of appreciated property to the entity under the policy is treated as a transfer of appreciated property to a foreign trust and may be subject to immediate gain under Treas. Reg. Section 1.684-1(a). Such a transfer includes a direct, indirect or constructive transfer. Therefore, Treas. Reg. Section 1.684-2 applies with respect to the transfer of appreciated property pursuant to the private annuity agreement.

Now, in addition to the foregoing, the IRS has its strongest weapon of attack: Circular 230.

If the insurance fails as a U.S. compliant product under the Internal Revenue Code, the internal build up is taxable and the death benefits cannot be removed from the gross estate for federal estate tax purposes. Remember, written advice with respect to a principal purpose arrangement need only relate to a federal tax issue that falls within the definition of a principal purpose arrangement and it is not required to relate to a significant federal tax issue. The issue is whether a covered opinion is required, not whether the tax issue is significant. Also, if a covered

opinion is not required, then it is a marketed opinion unless the written advice prominently discloses the three disclaimers stated above.

I have a question for the readers of this newsletter: Have any of you seen a single offshore structure that alleges to provide tax deferrals or tax avoidance that has met the conditions of: (i) a covered opinion; (ii) a reliance opinion; (iii) a marketed opinion; (iv) included the three disclaimers necessary to avoid the status of a marketed opinion; or (v) an agreement between the practitioner and client with respect to a limited scope opinion, which opinion contained the three required disclosures? Duke Law Firm has not seen a single offshore structure with attempted tax deferrals or tax avoidance that complies with, attempts to comply with, or even pretends to comply with any of the foregoing requirements under Circular 230. This means that the lawyers and others who are promoting these structures are not complying with Circular 230.

If a covered opinion is not required for offshore structuring involving one or more federal tax issues, such advice will most likely require a marketed opinion or the three disclosures to avoid a marketed opinion.

### **Unnecessary Due Diligence Requirement from Some Swiss Banks**

Some Swiss banks may require a legal opinion before opening an international trust account. Recently, Duke Law Firm experienced the trustees of foreign asset protection trusts from different jurisdictions going through the due diligence requirements to open trust accounts at the private banking department of a particular Swiss bank. The private banking department of a branch bank of this Zurich, Switzerland bank required a legal opinion with respect to the offshore asset protection trust before it would open an ac-

count. Subsequently, the private banking department of the Zurich (headquarters) bank also required a legal opinion with respect to the foreign asset protection trust.

Legal opinions cost from US \$1,200 to \$2,000, depending on the amount of work involved. This is the first time that Duke Law Firm has seen a legal opinion as a part of the due diligence requirements for a private banking account to be opened.

The trustees of several foreign asset protection trusts, all opening accounts at this Zurich private banking department, and Duke Law Firm see no reason for the requirement of a legal opinion. It appears that someone at the bank merely required the legal opinion and the box to be checked for receiving the legal opinion before an account is authorized to be opened. We recommend determining whether the private banking department of a bank requires a legal opinion before it will open a trust account for a foreign asset protection trust. If it does, it may be desirable to recommend another private banking department to avoid this unnecessary expense.

### **Tax Savings with Nevada Corporation**

#### ***The Jacobs Report***

*by Vernon K. Jacobs, CPA  
February 7, 2006*

COMMENT: A friend told me about a way to avoid corporate state income taxes by incorporating in Nevada and then transferring [the business operations in a state other than Nevada] to the Nevada corporation. An office for the Nevada corporation is provided by the people who set up the corporation and take care of the annual registration process. Now with the new structure, no taxes are paid in [the original state where the shareholders resided and did business] and none [are paid] in Nevada because Nevada has no state taxes. I thought you might

like to pass this idea on to your subscribers.

REPLY: I hate to be the messenger with bad news, but you might want to take another look at whether this concept will survive a state tax audit. Apparently you and your friend are not familiar with the Multi-State Tax Compact that was set up in 1967 to deal with the problem of multi-state taxation problems.

Corporations doing business in a compact state basically allocate their net income based on a three factor formula consisting of (1) gross sales, (2) payroll, (3) fixed assets. Thus if a business in [Alabama, for example] was owned by a holding company in Nevada, the company would owe taxes to [Alabama] on 100% of its net income (adjusted for state tax purposes) to [Alabama] because all of its sales, payroll and assets are in [Alabama].

For further details see:

<http://www.mtc.gov/ABOUTMTC/compact.htm>

For information about The Jacobs Report, see:

<http://www.offshorepress.com/jacobsreport/>

Send email comments to:

[Jacobs@offshorepress.com](mailto:Jacobs@offshorepress.com)

### **Constitutionality of Sarbanes-Oxley at Issue**

*The Wall Street Journal* reported that the Free Enterprise Fund filed a federal lawsuit in Washington, D.C., challenging a key portion of the 2002 "Sarbanes-Oxley" law.

The suit argues that the Public Company Accounting Oversight Board, the quasi-private agency that Sarbanes-Oxley established to oversee the auditing of public companies, violates the Appointments Clause of the U.S. Constitution. It's a compelling argument and one that, with any luck, may finally spur Congress to revisit a law that has

arguably done more economic harm than the scandals that inspired it.

See: *Peekaboo Powers, The Wall Street Journal Online, February 8, 2006; Page A16*

### **Australian Bill Targets Promoters of Tax Avoidance Schemes**

*Published by Tax AnalystsTM*

The Australian government has introduced a bill in the House of Representatives designed to crack down on those who promote or implement tax avoidance schemes.

The draft bill would establish a new civil penalty regime applicable to entities that promote exploitative schemes "on the basis of a taxation product ruling in a materially different way to that described in the product ruling," according to a Treasury statement.

The proposed legislation is intended to close a loophole in Australian tax law that has allowed tax officials to penalize tax scheme participants, but not promoters.

The draft bill also provides a new five-year write-off for business capital expenditure not recognized elsewhere in Australian tax law and enhances the foreign income tax exemption for temporary residents. Treasurer Peter Costello said the moves will give Australia one of the most competitive expatriate tax regimes in the world.

*Document: (Doc 2006-3171)*

*Electronic Citation: See 2006 WTD 33-1*

### **IRS Offering Targeted Settlement to Handful of Shelter Promoters**

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The IRS is extending a new settlement offer "by invitation" to a select group of shelter promoters,

the IRS press office confirmed on February 14. "It's a pretty specific offer where we identify the recipient," an IRS spokesman told Tax Analysts.

In exchange for turning over to the IRS all promotional materials, tax opinions, and investor lists, promoters entering into settlement would avoid criminal prosecution, some penalties, and public disclosure, according to a template offer letter provided to Tax Analysts by the IRS. (See Doc 2006-3002.) "This is not amnesty," an IRS spokesman told Tax Analysts.

Letters offering the deal have been sent to certain promoter firms that the IRS claims failed to comply before October 22, 2004, with sections 6111 and 6112, which require that "material advisors" report certain transactions and keep a list of investors it counseled on the reportable transactions.

Under the offer, the firms would have to pay 100 percent of applicable penalties under section 6707 for failing to report reportable transactions under section 6111. The IRS would waive penalties under section 6708, the penalty for failing to keep a list of advisees under section 6112. Firms that provided tax advice for shelters subject to Circular 230 would also have to provide a list of anyone who helped prepare the advice or opinion, the letter said.

The offers have been sent to about 30 accounting firms, law firms, and banks that the IRS contends have been involved in criminal tax shelters, the IRS spokesman said, with about 70 more still to go. "It should be wrapped up in the next month," he said.

Once contacted, the firms have 30 days to accept the offer to avoid prosecution in which the IRS claims it "would likely prevail." Neither the settlement nor its terms would be made public, but while the firms would avoid prosecution, the IRS would reserve the right to

prosecute firm employees, partners, and shareholders.

The settlement offer is novel for the IRS both because it is narrowly targeted and because it focuses on promoters rather than taxpayers. It comes on the heels of a more sweeping settlement initiative last year for taxpayers involved in 21 separate transactions. (Announcement 2005-80, 2005-46 IRB 967; Doc 2005- 21864 or 2005 TNT 208-11.) Taxpayers had until January 23, 2006, to enter into settlement under that offer, but the IRS has not yet released the results of the initiative.

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**Duke Law Firm, P.C.**  
**(205) 823-3900**  
**Facsimile: (205) 823-2630**  
**400 Vestavia Parkway, Suite 100**  
**Birmingham, AL 35216 USA**  
<http://www.assetlaw.com>