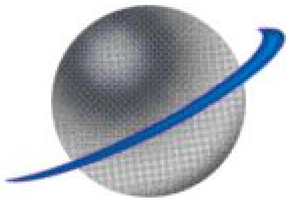

Duke Law Firm, P.C.–in the News

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Conferences

Richard Duke recently spoke at the Florida Bar Annual Wealth Protection Conference—Creating a Successful Wealth Protection Practice, May 13, 2005, Miami, Florida (J.W. Marriott Hotel). The topic of Mr. Duke's presentation was: "Foreign Asset Protection Trusts: What, Why, When, How and Where." The basis for the presentation was Denis Kleinfeld's 110 page chapter on the foregoing subject.

For information about ordering the tapes and materials for this conference, see:
http://www.assetlaw.com/events.htm

The Legalease conferences (The Bahamas and Cayman Islands, September 2005) information will be posted on the Legalease Web site in early June. Our next newsletter will include a link to the Web site, as well as information regarding the conferences.

Law Firms Face Sharp Rise in Malpractice Suits
Legal Times
It's getting more expensive for lawyers to defend themselves. A soon-to-be-released study by the American Bar Association shows a dramatic increase in suits with claims of $2 million or more against law firms. And although firms have faced high-stakes cases before, the recent suits are more complex and have expanded the legal theories that can be used against lawyers. The growing severity of claims stems partly from corporate scandals, which have opened law firms up to new liabilities:
http://www.law.com/jsp/article.jsp?id=1115642113700

Bastion Life Insurance SPC Limited
Donald A.K. Neal, one of the owners of Bastion Life Insurance SPC Limited, visited Birmingham May 7-8 in order to finalize several matters relating to the issuance of the variable life insurance policies by the Cayman Islands carrier. Mr. Neal (from Australia) resides in Grand Cayman with his wife (also from Australia).

Summary of Serious Impacts on Professionals Who Practice in the Financial Industries
Offshore professionals (bankers, trustees, service providers--the financial industry in general) are seriously impacted by: (i) the due diligence requirements, "Know Your Customer" rules, and the anti-money laundering rules of the USA Patriot Act and the Financial Action Task Force; (ii) Sarbanes-Oxley; (iii) the *John Doe Summonses cases* filed to obtain the names of Americans with offshore unreported accounts discharging debit and credit card liabilities issued by foreign banks; (iv) the dramatic impact on the way in which professionals must give tax advice after June 20, 2005, under Circular 230 (discussed below); (v) the IRS attack on tax shelter promoters and the upcoming indictments of some tax shelter promoters; (vi) the offshore tax amnesty program where the names of promoters, bankers and services providers were divulged to the IRS; and (vii) questions asked by the IRS of the audited persons at international tax audits [who were clients of promoters]. In one international tax audit, the IRS requested the audited person to provide the following: give us the names, addresses, telephone numbers (including home telephone numbers) and e-mail addresses of all persons who recommended and implemented the structure for you; give us the names of conferences on offshore matters that you have attended over the past five years; give us the names of organizations that discuss offshore matters that you belong to; give us the names, addresses, telephone numbers (including home telephone numbers) and e-mail addresses of the offshore bankers who managed the assets for the trust, entity, or structure.

In early 1997 (after the Small Business Job Protection Act of 1996) the IRS began creating and continues to create a database of names of promoters in the offshore industry. This database contains names (inside and outside the U.S.) of lawyers and other professionals, service providers, banks and bankers who are involved with offshore planning schemes that do not include filing required tax returns, especially the TD F 90-22.1. This database provides information allowing the IRS to focus on promoters and then subpoena their records to obtain their list of clients, whom the IRS can then audit. This subpoenaing of records of the promoter has occurred and continues to occur.

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The *Pasquantino Case*—Serious Potential Ramifications for the Private Banking and Wealth Management Industry

Pasquantino v. United States, 125 S. Ct. 1766 (2005) held that a "plot to defraud a foreign government of tax revenues" may constitute a wire fraud violation under the U.S. Criminal Code, a federal crime, where the requisite nexus to the U.S. exists. Wire fraud is a predicate offense (underlying crime that must be committed) under the Racketeer Influenced and Corrupt Organizations Act (RICO). Predicate offenses under the Money Laundering Control Act include criminal activities under RICO. Wire fraud charges can expose defendants to charges of money laundering, RICO crimes and, in some cases, to forfeiture, treble damages, liability for attorneys' fees and adverse parties' costs and severe criminal penalties and imprisonment.

At the Annual Florida Bar Wealth Protection Conference, May 13, 2005, a renowned Miami (domestic and international) tax controversies attorney who also represents defendants in money laundering cases briefly spoke about the *Pasquantino case*. One of the most serious comments made by this lawyer was that even if tax returns are filed, the *Pasquantino case* can still apply with respect to matters involving wire fraud, RICO and the 1986 Money Laundering Control Act.

The *Pasquantino case* impacts the private banking and wealth management industry. This case shows that any scheme to hide undeclared funds will always involve the use of checks, wired funds, telephones, faxes or other types of "wires" at some point in the process of the scheme. As a result of this case, the element of wire fraud will generally be easily satisfied (with respect to unreported foreign accounts that were established through some scheme).

In this case, the defendants ordered liquor by telephone calls made from New York to Maryland. The defendants obtained the liquor in Maryland and crossed the Canadian border with the liquor hidden in their vehicles. The defendants failed to declare the liquor to Canadian authorities, and hence failed to pay required Canadian excise taxes.

The U.S. Supreme Court ruled 5-4 that a scheme to defraud a foreign government of tax revenue violates the wire fraud statute, notwithstanding the "revenue" rule. The revenue rule is a common law rule generally disallowing courts to enforce the tax laws of foreign countries. Here, however, the U.S. Supreme Court focused on the activities of the defendants in the U.S. and held that these activities constituted wire fraud. 18 U.S.C. Section 1343 (the wire fraud statute) prohibits "any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises transmitted by means of wire, radio, or television communication in interstate or foreign commerce." The defendants used the telephone lines in executing a scheme to defraud the Canadian government of tax revenue and intentionally failed to declare the liquor on Canadian customs forms. The court determined that the right of Canada to uncollected taxes constituted "property" and this satisfied the wire fraud statute ("[a]ny scheme … for obtaining money or property …").

Bruce Zagaris, a renowned practicing lawyer involved in defense of transnational crimes (tax crimes, money laundering, extradition and other matters), discusses the *Pasquantino case* in his International Enforcement Law Reporter, Volume 21, Issue 6, June 2005, and writes the following: "The decision will give concern to U.S. professionals, especially accounttants, lawyers, bankers, real estate advisers, and security advisers who help advise on foreign laws, especially in countries that have significant tax crimes. Inevitably, they use the U.S. wires or mails in the advice. The decision is likely to cause the exercise of more care. For instance, in the Bank of New York case, Lucy Edwards and Peter Berlin were convicted of wire and mail fraud for helping persons in Russian evade Russian income taxes. The decision should encourage revenue authorities [to] pursue their revenue and tax criminals in the U.S."

Bruce Zagaris advised me that the *Pasquantino case* directly impacted two other cases: (i) Fountain v. United States, 357 F.3d 250 (Jan. 26, 2004), *cert. denied*, Fountain v. United States, 2005 U.S. LEXIS 3758 (U.S. May 2, 2005); and (ii) European Cmty. et al v. RJR Nabisco, Inc., et al, 355 F.3d 123 (Jan. 14, 2004), *vacated by, remanded by, writ of cert. granted* European Cmty. v. RJR Nabisco, Inc., 2005 U.S. LEXIS 3711 (U.S. May 2, 2005). Mr. Zagaris will discuss the above cases in his next International Enforcement Law Reporter, due to be published on June 7, 2005. I will discuss these two cases and how they were impacted in the *Pasquantino case* in the next issue of the Duke Law Firm newsletter.

Revised Circular 230

Revisions to Circular 230 provide standards of practice for written advice that reflect current best practices and are intended to restore and maintain public confidence in tax professionals effective after June 20, 2005. IRS News Release IR-2004-152, doc 2004-

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23935, 2004 TNT 244-13. Significant changes are made with respect to issuing "covered opinions" that include written advice, however delivered (letter, e-mail, fax), arising from: (i) a listed transaction; (ii) any plan or arrangement, the principal purpose of which is the avoidance or evasion of any tax; or (iii) any plan or arrangement, a significant purpose of which is the avoidance or evasion of tax 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. Clients of professionals who fail to meet the requirements of Revised Circular 230 cannot avoid penalties from the IRS with respect to certain types of tax planning arrangements, including tax shelters.

Revised Circular 230 also covers written advice other than covered opinions in section 10.37:

> **(a) Requirements**. A practitioner must not give written advice (including electronic Communications) concerning one or more Federal tax issues if the practitioner bases the written advice on unreasonable factual or legal assumptions (including assumptions as to future events), unreasonably relies upon representations, statements, findings or agreements of the taxpayer or any other person, does not consider all relevant facts that the practitioner knows or should know, or, in evaluating a Federal tax issue, takes into account the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be resolved through settlement if raised. All facts and circumstances, including the scope of the engagement and the type and specificity of the advice sought by the client will be considered in determining whether a practitioner has failed to comply with this section. In the case of an opinion the practitioner knows or has reason to know will be used or referred to by a person other than the practitioner (or a person who is a member of, associated with, or employed by the practitioner's firm) in promoting, marketing or recommending to one or more taxpayers a partnership or other entity, investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code, the determination of whether a practitioner has failed to comply with this section will be made on the basis of a heightened standard of care because of the greater risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances.
>
> **(b) Effective date**. This section applies to written advice that is rendered after June 20, 2004 [sic June 20, 2005].

Vern Jacobs, CPA, Web site regarding Circular 230:
http://www.rpifs.com/circular_230.htm

Vern Jacobs, CPA--Tax Advisors vs. Taxpayers:
http://www.offshorepress.com/vkjcpa/disclosurerules.htm

Comments on the Final Circular 230 Regulations--Tax Section of the American Bar Association:
http://www.abanet.org/tax/pubpolicy/2005/050511c230.pdf

Comments by the Real Property, Probate and Trust Law Section of the American Bar Association:
http://www.abanet.org/rppt/section_info/circ230comments.pdf

WashingtonCPA On-line Tax Corner, CPAs be aware:
https://www.wscpa.org/wscpa/WashCPA/JanFeb05/JanFeb05_technicaltax.htm

It is recommended that professsionals read and study the writings included in each of the foregoing Web sites. We especially recommend that you go to Vern Jacobs' Web site regarding Circular 230 and review the comprehensive article by Jonathan Blattmachr and Michael L. Graham, titled "The Application of Circular 230 to Estate Planners."

IRS Revises Rules For Advisers In Shelter Crackdown
The Wall Street Journal
May 25, 2005
The Wall Street Journal reports that "The IRS is turning up the heat in its campaign to deter tax professionals from helping to promote bogus tax shelters." Circular 230 governs the conduct of lawyers, accountants and others practicing before the IRS.

The Journal states that "Officials also say they are investigating numerous lawyers, accountants and other professionals for possible misconduct in connection with promoting shelters and other issues."

Officials at the IRS believe the new standards under Revised Circular 230 will ensure that tax professionals will no longer issue "inadequate advice" in writing to clients in response to a wide variety of tax issues. The IRS is especially focused on "canned opinion letters" written by tax professionals to clients persuading

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investors that a proposed tax-avoidance idea is valid.

The Journal article also states:

> Lawyers at an American Bar Association tax-section conference last week peppered government officials with questions about the mechanics, with many arguing that the new rules are too broad and vague, and will cause confusion among clients. Lawrence M. Hill of the law firm Dewey Ballantine LLP in New York City compared the new rules to using "a harpoon to kill a goldfish."

The increased complexity and burdens to tax practitioners under Revised Circular 230 will require additional work by practitioners and additional fees to be paid by clients:

> In many cases, the new rules will require professsionals to spend "considerable time performing the requisite due diligence work, thereby increasing the costs to the client," says Sharyn M. Fisk, a lawyer at Hochman, Salkin, Rettig, Toscher & Perez in Beverly Hills, Calif. For example, certain types of written opinions must include "extensive factual due diligence, detailed analysis in applying the law to the facts," an evaluation of "all significant federal tax issues," in addition to a conclusion on the tax issues and the reasons, she says.
>
> What if clients don't want to pay for all that work and just want a short email reply? In that case, the opinion typically must include a prominently disclosed disclaimer saying it wasn't written to be used, and can't be used, to avoid penalties. Ms. Fisk says: "Clients will be asking themselves 'Why should I pay for tax advice if I can't rely on it?' and asking their tax professionals, 'Why do I have to pay you more for advice I can rely on!' "

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