RECENT DEVELOPMENTS IN FEDERAL INCOME TAXATION

"Recent developments are just like ancient history, except they happened less long ago."

By

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Note: This outline was prepared jointly with Cassady V. ("Cass") Brewer, Associate Professor of Law, Georgia State University College of Law, Atlanta, GA, and James M. Delaney, Winston S. Howard Distinguished Professor of Law at the University of Wyoming College of Law.

I. ACCOUNTING

II. BUSINESS INCOME AND DEDUCTIONS

III. INVESTMENT GAIN AND INCOME

A. Gains and Losses

1. Taxpayer restores money-pit mansion to its former glory, but due to taxpayer's failure to rent or hold out for rental, gets "hammered" by capital loss. Keefe v. Commissioner, T.C. Memo 2018-28 (3/15/18). These married taxpayers, neither of whom was an architect or contractor, acquired and restored Wrentham House, a historic mansion in Newport, Rhode Island. From May of 2000 until May of 2008 the taxpayers spent approximately $10 million repairing and restoring the mansion with the goal of turning it into a luxury vacation rental property. Notwithstanding taxpayers' $10 million investment in the mansion, structural and other problems prevented the property from being marketable as a rental property until June of 2008. At that time, of course, the "Great Recession" was in full swing, and there was virtually no market and no prospect for luxury rentals. Consequently, the mansion was never rented or even seriously marketed for rental, and in August of 2009, the mansion was sold in a short sale for approximately $6 million. The taxpayers claimed that the mansion was § 1231 property used in a trade or business thereby entitling them to ordinary loss treatment. The Service contended that the mansion was not used in a trade or business but instead was a capital asset, so the loss on the short sale was a capital loss subject to the $3,000 per year limitation of § 1211(b). The Tax Court (Chief Judge Marvel) held for the Service. Citing *Gilford v. Commissioner*, 201 F.2d 735 (2d Cir. 1953) because the case would be appealable to the Second Circuit Court of Appeals, Judge Marvel explained that the taxpayers failed to show that their alleged rental activities were "sufficient, continuous, and substantial enough to constitute a trade or business with respect to rental of the property" (emphasis added). Instead, Judge Marvel ruled that the mansion was property "held for the production of income, but not used in a trade or business of the taxpayer." Reg. § 1.1221-1(b). Accordingly, § 1231 did not apply to the mansion, so the mansion was a capital asset subject to the capital loss limitation of § 1211(b). The court also upheld the Service's imposition of accuracy-related penalties.

a. And the Second Circuit agrees. Keefe v. Commissioner, 2020 WL 4032469 (2d Cir. 7/17/20), *aff'g* T.C. Memo 2018-28 (3/15/18). In a relatively brief opinion, the Second Circuit affirmed the decision of the Tax Court. Writing for the Second Circuit, Judge Walker agreed with Judge Marvel that the taxpayer's activities with respect to the mansion did not rise to the level of a trade or business. Therefore, the mansion was a capital asset, not a § 1231 asset, and the taxpayers thus suffered a capital loss, not an ordinary loss, upon the short sale of the mansion. Nevertheless, Judge Walker quibbled a bit with Judge Marvel's analysis. Specifically, Judge Walker wrote that the standard applied by Judge Marvel was more stringent than required by prior Second Circuit decisions. Specifically, to determine trade or business status with respect to real estate rental activities, Judge Marvel of the Tax Court examined whether the taxpayers' activities concerning the mansion were sufficiently "continuous, regular, and substantial." Judge Marvel's opinion stated, "The Court of Appeals for the Second Circuit requires that taxpayers be engaged in continuous, regular, and substantial activity in relation to the management of the property to support a conclusion that the property was used in a trade or business and was not a capital asset." *See* T.C. Memo 2018-28 at 16-17. In Judge Walker's view, however, Second Circuit precedent only requires a taxpayer's real estate rental activities to be "regular and continuous" to support a trade or business finding. Judge Walker explained that the Second Circuit has never expressly added the word "substantial" to the "continuous and regular" standard for testing trade or business status with respect to real estate rental activities. *See* 2020 WL 4032469 at footnote 22. Regardless, Judge Walker affirmed Judge Marvel's holding because the taxpayers' activities with respect to the mansion were not "regular and continuous" enough to justify a trade or business finding. Judge Walker also upheld Judge Marvel's decision to impose accuracy-related penalties.

B. Interest, Dividends, and Other Current Income

C. Profit-Seeking Individual Deductions

1. Say it isn't so! Miscellaneous itemized deductions are no longer deductible beginning in 2018. The 2017 Tax Cuts and Jobs Act, § 11045, amended Code § 67 by adding § 67(g), which disallows as deductions all miscellaneous itemized deductions for taxable years beginning after 2017 and before 2026. Miscellaneous itemized deductions are defined in § 67(b) and, prior to the Tax Cuts and Jobs Act, were deductible to the extent that, in the aggregate, they exceeded 2 percent of the taxpayer's adjusted gross income. The largest categories of miscellaneous itemized deductions are: (1) investment-related expenses such as fees paid for investment advice or for a safe deposit box used to store investment-related items, (2) unreimbursed employee business expenses, and (3) tax preparation fees.

a. But estates and non-grantor trusts can breathe a sigh of relief. Notice 2018-61, 2018-31 I.R.B. 278 (07/13/18). Under § 67(e), the adjusted gross income of an estate or trust generally is computed in the same manner as that of an individual. Furthermore, prior to the Tax Cut and Jobs Act, estates and non-grantor trusts were subject to the 2 percent floor on miscellaneous itemized deductions like individuals *unless* a cost paid or incurred by the estate or non-grantor trust "would not have been incurred if the property were not held in such estate or trust." Put differently, estates and non-grantor trusts avoided the 2 percent floor on miscellaneous itemized deductions if they paid or incurred a cost that "commonly or customarily" would not have been paid or incurred by a hypothetical individual holding the same property as the estate or non-grantor trust. For example, Reg. § 1.67-4(b)(3) provides as follows:

> Tax preparation fees. Costs relating to all estate and generation-skipping transfer tax returns, fiduciary income tax returns, and the decedent's final individual income tax returns are not subject to the 2-percent floor. The costs of preparing all other tax returns (for example, gift tax returns) are costs commonly and customarily incurred by individuals and thus are subject to the 2-percent floor.

If a fee (such as a tax preparation fee) paid or incurred by an estate or non-grantor trust was bundled so that it included costs that were both subject to the 2 percent floor (e.g., gift tax return) and not subject to the 2 percent floor (e.g., fiduciary income tax return), then the estate or non-grantor trust must allocate the bundled fee appropriately.

The enactment of new § 67(g), which states that "no miscellaneous itemized deduction" is allowed until 2026, left many estates and trusts wondering whether their investment-related and tax-related expenses (e.g., return preparation fees, trustee fees, financial advisor fees, etc.) peculiar to the administration of an estate or trust remain deductible either in whole or in part. Notice 2018-61 announces that Treasury and the IRS do not read new § 67(g) to disallow all investment- and tax-related expenses of estates and non-grantor trusts. Thus, the Treasury Department and the IRS intend to issue regulations clarifying that estates and non-grantor trusts may continue to deduct investment- and tax-related expenses just as they could prior to the enactment of new § 67(g). Notice 2018-61 also announces that Treasury and the IRS are aware of concerns surrounding whether new § 67(g) impacts a beneficiary's ability to deduct investment- and tax-related expenses pursuant to § 642(h) (unused loss carryovers and excess deductions) upon termination of an estate or non-grantor trust. Treasury and the IRS intend to issue regulations addressing these concerns as well.

b. IRS issues proposed regulations clarifying that certain deductions allowed to an estate or non-grantor trust are not miscellaneous itemized deductions. REG-113295-18, Effect of Section 67(g) on Trusts and Estates, 85 F.R. 27693 (5/11/20). Based upon comments received pursuant to Notice 2018-61, the IRS has issued proposed regulations clarifying that deductions described in § 67(e)(1) and (2) are not miscellaneous itemized deductions. The proposed regulations would amend Reg. § 1.67-4 to clarify that § 67(g) does not deny deductions described under § 67(e)(1) and (2) for estates and nongrantor trusts. These deductions generally include administration expenses of the estate or trust which would not have been incurred if the property were not held in such trust or estate and the personal exemption deduction of an estate or non-grantor trust. Such deductions are allowable in arriving at adjusted gross income (AGI) and are not considered miscellaneous itemized deductions under § 67(b). The proposed regulations specifically do not address whether such deductions will continue to be deductible for purposes of the alternative minimum tax.

The proposed regulations also provide guidance under § 642(h) in relation to net operating loss and capital loss carryovers under subsection (h)(1) and the excess deduction under (h)(2). They implement a more specific method aimed at preserving the tax character of three categories of expenses. Thus, fiduciaries are required to separate deductions into at least the three following categories: (1) deductions allowed in arriving at adjusted gross income, (2) non-miscellaneous itemized deductions, and (3) miscellaneous itemized deductions. Under this regime, each deduction comprising the § 642(h)(2) excess deduction retains its separate character which passes through to beneficiaries on termination of the estate or trust. Separately stating these categories of expenses facilitates proper reporting by beneficiaries.

The proposed regulations adopt the principles used under Reg. § 1.652(b)-3 in allocating items of deduction among the classes of income in the final year of a trust or estate for purposes of determining the character and amount of the excess deductions under section 642(h)(2). In general, Reg. § 1.652(b)-3 provides that deductions attributable to a particular class of income retain their character. Any remaining deductions that are not directly attributable to a specific class of income are allocated to any item of income (including capital gains) with a portion allocated to any tax-exempt income. See Reg. § 1.652(b)-3(b), (d). The character and amount of each deduction remaining represents the excess deductions available to the beneficiaries. The proposed regulations provide a useful example for determining the character of excess deductions.

D. Section 121

E. Section 1031

F. Section 1033

G. Section 1035

H. Miscellaneous

IV. COMPENSATION ISSUES

A. Fringe Benefits

1. There are no adverse tax consequences for employees if they forgo their vacation, sick, or personal leave in exchange for the employer's contributions to charitable organizations providing disaster relief for those affected by the COVID-19 pandemic. Notice 2020-46, 2020-27 I.R.B. 7 (6/11/20). In this notice, the IRS has provided guidance on the tax treatment of cash payments that employers make pursuant to leave-based donation programs for the relief of victims of the COVID-19 pandemic in all 50 states, the District of Columbia, and certain U.S. territories (affected geograpic areas). Under leave-based donation programs, employees can elect to forgo vacation, sick, or personal leave in exchange for cash payments that the employer makes to charitable organizations described in § 170(c). The notices provide that the IRS will not assert that: (1) cash payments an employer makes before January 1, 2021, to charitable organizations described in § 170(c) for the relief of victims of the COVID-19 pandemic in affected geograpic areas in exchange for vacation, sick, or personal leave that its employees elect to forgo constitute gross income or wages of the employees; or (2) the opportunity to make such an election results in constructive receipt of gross income or wages for employees, Employers are permitted to deduct these cash payments either under the rules of § 170 as a charitable contribution or under the rules of § 162 as a business expense if the employer otherwise meets the requirements of either provision. Employees who make the election cannot claim a charitable contribution deduction under § 170 for the value of the forgone leave. The employer need not include cash payments made pursuant to the program in Box 1, 3 (if applicable), or 5 of the employee's Form W-2.

B. Qualified Deferred Compensation Plans

1. Congress has made access to retirement plan funds easier for those affected by COVID-19. The CARES Act, § 2202, provides special rules that apply to distributions from qualified employer plans and IRAs and to loans from qualified employer plans for those affected by the Coronavirus.

Coronavirus-related distributions. Section 2202(a) of the legislation provides four special rules for "coronavirus-related distributions." **First**, the legislation provides that coronavirus-related distributions up to an aggregate amount of $100,000 for each year are not subject to the normal 10-percent additional tax of § 72(t) that applies to distributions to a taxpayer who has not reached age 59-1/2. **Second**, the legislation provides that, unless the taxpayer elects otherwise, any income resulting from a coronavirus-related distribution is reported ratably over the three-year period beginning with the year of the distribution. **Third**, the legislation permits the recipient of a coronavirus-related distribution to contribute up to the amount of the distribution to a qualified employer plan or IRA that would be eligible to receive a rollover contribution of the distribution. The contribution need not be made to the same plan from which the distribution was received, and must be made during the three-year period beginning on the day after the date on which the distribution was received. If contributed within the required three-year period, the distribution and contribution are treated as made in a direct trustee-to-trustee transfer within 60 days of the distribution. The apparent intent of this rule is to permit the taxpayer to exclude the distribution from gross income to the extent it is recontributed within the required period. Because the recontribution might take place in a later tax year than the distribution, presumably a taxpayer would include the distribution in gross income in the year received and then file an amended return for the distribution year upon making the recontribution. **Fourth**, coronavirus-related distributions are not treated as eligible rollover distributions for purposes of the withholding rules, and therefore are not subject to the normal 20 percent withholding that applies to eligible rollover distributions under § 3405(c). A coronavirus-related distribution is defined as any distribution from an eligible retirement plan as defined in § 402(c)(8)(B) (which includes qualified employer plans and IRAs) that was made: (1) on or after January 1, 2020, and before December 31, 2020, (2) to an individual who is diagnosed (or whose spouse or dependent is diagnosed) with the virus under an approved test or

> who experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced due to such virus or disease, being unable to work due to lack of child care due to such virus or disease, closing or reducing hours of a business owned or operated by the individual due to such virus or disease,

or other factors as determined by the Secretary of the Treasury (or the Secretary's delegate).

Loans. For qualified individuals, section 2202(b) of the legislation increases the limit on loans from qualified employer plans and permits repayment over a longer period of time. Normally, under § 72(p), a loan from a qualified employer plan is treated as a distribution unless it meets certain requirements. One requirement is that the loan must not exceed the lesser of (1) $50,000 or (2) the greater of one-half of the present value of the employee's nonforfeitable accrued benefit or $10,000. A second requirement is that the loan must be repaid within five years. In the case of a loan made to a "qualified individual" during the period from March 27, 2020 (the date of enactment) through December 31, 2020), the legislation increases the limit on loans to the lesser of (1) $100,000 or (2) the greater of *all* of the present value of the employee's nonforfeitable accrued benefit or $10,000. The legislation also provides that, if a qualified individual has an outstanding plan loan on or after March 27, 2020 (the date of enactment) with a due date for any repayment occurring during the period beginning on March 27, 2020 (the date of enactment) and ending on December 31, 2020, then the due date is delayed for one year. If an individual takes advantage of this delay, then any subsequent repayments are adjusted to reflect the delay in payment and interest accruing during the delay. This appears to require reamortization of the loan. A *qualified individual* is defined as an individual who would be eligible for the distribution rules described above.

a. The IRS has provided guidance on the CARES Act provisions that facilitate access to retirement funds by those affected by COVID-19. Notice 2020-50, 2020-28 I.R.B. 35 (6/22/20). This notice provides guidance regarding the special rules enacted as part of the CARES Act, § 2202, that apply to distributions from qualified employer plans and IRAs and to loans from qualified employer plans for those affected by the Coronavirus.

Distributions qualifying as coronavirus-related distributions. Section 1 of the notice provides guidance in three areas relevant to determining whether a distribution is a "coronavirus-related distribution" as defined in § 2202(a)(4)(A) of the CARES Act. **First**, the notice provides guidance on individuals eligible to receive coronavirus-related distributions, whom the notice describes as "qualified individuals." Pursuant to the discretion granted by the statute, the notice expands the category of qualified individuals beyond the individuals expressly described in the statute. According to the notice, the category of qualified individuals includes those who experience adverse financial consequences as a result of the causes listed in the statute (such as being quarantined, furloughed or laid off or having work hours reduced due to the virus), and also those who experience adverse financial consequences as a result of (1) "the individual having a reduction in pay (or self-employment income) due to COVID-19 or having a job offer rescinded or start date for a job delayed due to COVID-19," (2) the individual's spouse or a member of the individual's household experiencing any of the same statutory or non-statutory situations (i.e., being furloughed, laid off, having a start date for a job delayed etc.), and (3) "closing or reducing hours of a business owned or operated by the individual's spouse or a member of the individual's household due to COVID-19." For this purpose, a member of the individual's household is someone who shares the individual's principal residence. **Second**, the notice provides guidance on the distributions that qualify as coronavirus-related distributions. According to the notice, there is no requirement that qualified individuals show that distributions were used for purposes related to COVID-19 in order to qualify as coronavirus-related distributions. Thus, "coronavirus-related distributions are permitted without regard to the qualified individual's need for funds, and the amount of the distribution is not required to correspond to the extent of the adverse financial consequences experienced by the qualified individual." The notice further provides that, with only limited exceptions (specified in the notice), a qualified individual can designate *any* distribution as a coronavirus-related distribution up to the statutory maximum of $100,000. The distributions that an individual can designate as coronavirus-related distributions therefore include any periodic payments, any amounts that would have been required minimum distributions (RMDs) in 2020 were it not for the suspension of RMDs by the CARES Act, any distributions received as a beneficiary, and any reduction or offset of a qualified individual's account balance in order to repay a plan loan. If designated as coronavirus-related distributions, all of these distributions can be included in income ratably over three years. (As described below, however, not all of these distributions are eligible for recontribution and treatment as a tax-free rollover.) The notice recognizes that “a qualified individual’s designation of a coronavirus-related distribution may be different from the employer retirement plan’s treatment of the distribution” for a variety of reasons, such as a distribution occurring before the effective date of a plan amendment providing for coronavirus-related distributions or the existence of multiple retirement accounts from which the individual withdraws more than $100,000 in the aggregate. **Third**, the notice provides guidance on which coronavirus-related distributions can be recontributed and treated as tax-free rollovers. According to the notice, “only a coronavirus-related distribution that is eligible for tax-free rollover treatment under § 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16) is permitted to be recontributed to an eligible retirement plan.” Such recontributions are treated as having been made in a trustee-to-trustee transfer to the eligible retirement plan. A coronavirus-related distribution paid to a qualified individual as a beneficiary of an employee or IRA owner (other than the surviving spouse of the employee or IRA owner) cannot be recontributed. Although distributions from an employer retirement plan made on account of hardship are not eligible for recontribution and treatment of tax-free rollovers, a distribution that meets the definition of a coronavirus-related distribution is not treated as made on account of hardship for purposes of the notice.

Tax treatment of receiving and recontributing coronavirus-related distributions. Section 4 of the notice provides guidance on the tax treatment of a qualified individual receiving and recontributing coronavirus-related distributions. The notice provides that a qualified individual who designates a distribution as a coronavirus-related distribution includes the distribution in income ratably over a three-year period beginning in the year in which the distribution occurs unless the individual elects to include the entire amount of the taxable portion of the distribution in income in the year of the distribution. According to the notice, an individual cannot elect out of the three-year ratable income inclusion after having timely filed the individual’s federal income tax return for the year of the distribution. Thus, the election out cannot be made on an amended tax return. Further, an individual must treat all coronavirus-related distributions consistently by either including all of them in income ratably over three years or including all of them in income in the year in which the distributions occurred. An individual must report coronavirus-related distributions on the individual’s federal income tax return (if required to be filed) and on Form 8915-E, Qualified 2020 Disaster Retirement Plan Distributions and Repayments. On Form 8915-E, which is expected to be available before the end of 2020, an individual will indicate whether he or she elects out of the three-year ratable income inclusion rule. An individual also will report recontributions of coronavirus-related distributions on Form 8915-E. The notice provides several examples that illustrate how an individual should report recontributions of coronavirus-related distributions when the individual has reported income from the distributions both ratably over three years and in a single year (the year of distribution). Generally, if an individual includes a coronavirus-related distribution in income entirely in the year of distribution and recontributes some or all of the distribution within the three-year period beginning on the day after the distribution, the individual will file an amended tax return for the year of distribution to reduce the portion of the distribution included in income and also will file a revised Form 8915-E. If an individual instead reports the income from a coronavirus-related distribution ratably over three years, then the individual will reduce the income reported on the return for the year in which the recontribution is made. The notice permits an individual using the three-year ratable inclusion method who recontributes more than the amount reportable as income on the return for the year of recontribution to carry the excess recontribution back or forward to reduce income from the coronavirus-related distribution in other years; carrying such excess recontributions back would require filing an amended return. A qualified individual who dies before including the full taxable amount of the coronavirus-related distribution in gross income must include the remainder of the distribution in gross income for the taxable year that includes the individual’s death. If an individual is receiving substantially equal periodic payments from an eligible retirement plan and receives a coronavirus-related distribution, the receipt of the coronavirus-related distribution will not be treated as a change in substantially equal payments as described in § 72(t)(4).

Retirement plans and IRAs making or receiving recontributions of coronavirus-related distributions. Section 2 of the notice provides guidance for employer retirement plans making coronavirus-related distributions on topics such as the plan’s option to treat distributions as coronavirus-related distributions; the dates by which any plan amendments must be made; the fact that the normal requirements of offering a direct rollover, withholding 20 percent of the distribution, and providing a § 402(f) notice do not apply to coronavirus-related distributions; and the ability of plan administrators to rely on an individual's certification that the individual is a qualified individual in determining whether a distribution is a coronavirus-related distribution unless the administrator has actual knowledge to the contrary. Section 3 of the notice provides guidance for employer retirement plans and IRAs on the required tax reporting for coronavirus-related distributions and on accepting recontributions of such distributions. The notice provides that coronavirus-related distributions should be reported on Form 1099-R with either distribution code 2 (early distribution, exception applies) or distribution code 1 (early distribution, no known exception) in box 7 of Form 1099-R.

Plan loans. Section 5 of the notice provides guidance on the changes made by the CARES Act that affect loans from qualified employer plans, i.e., the legislation's increase in the limit on such loans and its extension of the period of repayment for certain outstanding loans. The notice makes clear that employer plans may, but are not required to, offer this permissible delay in loan repayment. The notice provides a safe harbor that qualified employer plans can use to satisfy the requirements of § 72(p) (i.e., to avoid having a plan loan treated as a distribution) and provides an example that illustrates the safe harbor and the reamortization of a plan loan for which repayment is delayed.

C. Nonqualified Deferred Compensation, Section 83, and Stock Options

D. Individual Retirement Accounts

V. PERSONAL INCOME AND DEDUCTIONS

A. Rates

B. Miscellaneous Income

C. Hobby Losses and § 280A Home Office and Vacation Homes

D. Deductions and Credits for Personal Expenses

1. Although the IRS treats Medicaid waiver payments as excludable from gross income, such payments are earned income for purposes of the earned income credit and the child tax credit, says the Tax Court. Feigh v. Commissioner, 152 T.C. 267 (5/15/19). Medicaid waiver payments are payments to individual care providers for the care of eligible individuals under a state Medicaid Home and Community-Based Services waiver program described in section 1915(c) of the Social Security Act. Generally, these payments are made by a state that has obtained a Medicaid waiver that allows the state to include in the state's Medicaid program the cost of home or community-based services (other than room and board) provided to individuals who otherwise would require care in a hospital, nursing facility, or intermediate care facility. In Notice 2014-7, 2014-4 I.R.B. 445, the IRS concluded that Medicaid waiver payments qualify as "difficulty of care payments" within the meaning of § 131(c) and therefore can be excluded from the recipient's gross income under § 131(a), which excludes amounts received by a foster care provider as qualified foster care payments. Generally, difficulty of care payments are compensation for providing additional care to a qualified foster individual that is required by reason of the individual's physical, mental, or emotional handicap and that is provided in the home of the foster care provider. In this case, the taxpayers, a married couple, received Medicaid waiver payments in 2015 in the amount of $7,353, which were reflected on Form W-2, for the care of their disabled adult children. The taxpayers reported this amount as wages on their 2015 return but excluded the payments from gross income. They received no other income during 2015 that would qualify as earned income. The taxpayers claimed an earned income credit of $3,319 and an additional child tax credit of $653. The IRS asserted that the Medicaid waiver payment was not earned income and therefore disallowed the taxpayers' earned income credit and child tax credit. The Tax Court (Judge Goeke) held that the Medicaid waiver payments in the amount of $7,353 did qualify as earned income for purposes of both the earned income credit and the additional child tax credit. For this purpose, section 32(c)(2)(A)(i) defines "earned income" as

> wages, salaries, tips, and other employee compensation, but only if such amounts are includible in gross income for the taxable year.

The court reasoned that, even though the taxpayers did not *include* in gross income the Medicaid waiver payments they received, the payments were *includible* in gross income. The court engaged in a lengthy analysis of Notice 2014-7, in which the IRS had concluded that such payments could be excluded from gross income under § 131(a) and determined that the notice was entitled to so-called *Skidmore* deference (*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)), under which a government agency's interpretation is accorded respect befitting "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those facts which give it the power to persuade, if lacking power to control." The Tax Court concluded that Notice 2014-7 was "entitled to little, if any, deference." In other words, the court concluded that the IRS got it wrong when it determined that the taxpayers' Medicaid waiver payments were excludable from gross income. Based on its analysis, the court accepted the taxpayers' argument that the IRS could not reach a result contrary to the Code by reclassifying the taxpayers' earned income as unearned for purposes of determining eligibility for the tax credits in question. The IRS argued that no statutory provision demonstrated that Congress intended to allow a double benefit, i.e., both an exclusion of the Medicaid waiver payment from gross income and eligibility for the earned income credit and child tax credit. The court responded: "Respondent's argument, however, misses that he, not Congress, has provided petitioners with a double tax benefit."

- The taxpayers were represented by the Low Income Taxpayer Clinic at the University of Minnesota Law School.

a. The IRS has acquiesced in the result in *Feigh* and will not argue that Medicaid waiver payments that are excluded from income under Notice 2014-7 but otherwise meet the definition of earned income are not earned income for determining eligibility for the earned income credit and additional child tax credit. A.O.D. 2020-2, 2020-14 I.R.B. 558 (3/30/20). In *Feigh v. Commissioner*, 152 T.C. 267 (5/15/19), the taxpayers, a married couple, received Medicaid waiver payments of $7,353, which were reflected on Form W-2, for care they provided to their disabled adult children. The taxpayers excluded the payments from their gross income pursuant to Notice 2014-7, 2014-4 I.R.B. 445, in which the IRS concluded that Medicaid waiver payments qualify as "difficulty of care payments" within the meaning of § 131(c) and therefore can be excluded from the recipient's gross income under § 131(a), which excludes amounts received by a foster care provider as qualified foster care payments. Nevertheless, the taxpayers claimed an earned income credit of $3,319 and an additional child tax credit of $653. The Tax Court rejected the IRS's argument that the payments, which were excluded from the taxpayer's income, did not meet the definition of earned income and that the taxpayers therefore were ineligible for the earned income credit and the additional child tax credit. The Tax Court reasoned that, even though the taxpayers did not *include* in gross income the Medicaid waiver payments they received, the payments were *includible* in gross income and therefore met the definition of earned income. In other words, the Tax Court disagreed with the IRS's conclusion in Notice 2014-7 that such payments are excluded from gross income. The IRS has acquiesced in the result in *Feigh*:

> Accordingly, in cases in which the Service permits taxpayers, pursuant to [Notice 2014-7], to treat qualified Medicaid waiver payments as difficulty of care payments excludable under § 131, the Service will not argue that payments that otherwise fall within the definition of earned income under § 32(c)(3) are not earned income for determining eligibility for the EIC and the ACTC merely because they are excludable under the Notice.

E. Divorce Tax Issues

F. Education

G. Alternative Minimum Tax

VI. CORPORATIONS

A. Entity and Formation

B. Distributions and Redemptions

C. Liquidations

D. S Corporations

E. Mergers, Acquisitions and Reorganizations

F. Corporate Divisions

G. Affiliated Corporations and Consolidated Returns

1. State law, not federal common law, must determine whether a refund with respect to a consolidated return belongs to the group's common parent or instead to the subsidiary member whose loss produced the refund, says the U.S. Supreme Court. Rodriguez v. FDIC, 140 S. Ct. 713 (2/24/20). United Western Bancorp, Inc. ("Holding Company") was the common parent of a consolidated group. One member of the consolidated group was a wholly-owned subsidiary, United Western Bank ("Bank"). The Holding Company received a refund of $4.8 million that was produced by carrying back a 2010 consolidated net operating loss (produced by the Bank's loss) to 2008, a year in which the consolidated group had paid tax on income of the Bank. Thus, the refund resulted from revenue generated by the Bank in 2008 and a loss incurred by the Bank in 2010. In the same year the 2010 consolidated return was filed, the Bank was placed into receivership with the FDIC as its receiver. Subsequently, the Holding Company became a debtor in a chapter 7 bankruptcy proceeding. The bankruptcy trustee asserted that the refund was an asset of the bankruptcy estate, and the FDIC asserted that the refund was an asset of the Bank.

The Tenth Circuit's Analysis. The U.S. Court of Appeals for the Tenth Circuit held that the Bank was entitled to the refund. The court noted that, in *Barnes v. Harris*, 783 F.3d 1185 (10th Cir. 2015), the Tenth Circuit, relying on *In re Bob Richards Chrysler-Plymouth Corp., Inc.*, 473 F.2d 262 (9th Cir. 1973), had held *as a matter of federal common law* that, in the absence of a contrary agreement, "a tax refund due from a joint return generally belongs to the company responsible for the losses that form the basis of the refund." In this case, however, the consolidated group members had entered into a tax allocation agreement. The Tenth Circuit ultimately framed the issue as whether, under the tax allocation agreement, the Holding Company was acting as the agent of the Bank or instead had a standard commercial relationship with the Bank. If the former, then the Holding Company was acting as a fiduciary of the Bank and the refund would belong to the Bank; if the latter, then the Bank was a creditor of the Holding Company and the refund would be an asset of the Holding Company's bankruptcy estate. The court concluded that the tax allocation agreement was ambiguous on this point, which triggered a provision in the agreement that required any ambiguity in the agreement to be resolved in favor of the Bank. Accordingly, the court concluded, under the tax allocation agreement the Holding Company was acting as the agent of the Bank and the agreement therefore did not unambiguously depart from the rule of *Barnes* and *Bob Richards*, which meant that the refund belonged to the Bank, the corporation whose losses had produced the refund. The refund therefore was not part of the Holding Company's bankruptcy estate.

The U.S. Supreme Court's Reversal and Remand. In a unanimous opinion by Justice Gorsuch, the U.S. Supreme Court reversed and remanded to the Tenth Circuit. The *Bob Richards* rule for determining ownership of a tax refund in the context of a consolidated return is a rule of federal common law. But the areas in which federal courts may apply federal common law, the Supreme Court observed, are limited and strict conditions must be satisfied before federal courts may do so. One of those conditions, according to the Court's prior decisions, is that, "[i]n the absence of congressional authorization, common lawmaking must be "'necessary to protect uniquely federal interests.'"" That condition, the Court held, is not satisfied in this case. The federal government has no unique interest in how a tax refund is allocated among consolidated group members. In other words, according to the Court, the rule of *Bob Richards* is not a legitimate exercise of federal common lawmaking. The Court held that the issue of ownership of a tax refund in the context of a consolidated corporate group is governed not by federal common law, but by state law, which "is well equipped to handle disputes involving corporate property rights." Because the Tenth Circuit had incorrectly applied federal common law rather than state law, the Court remanded to the Tenth Circuit for further consideration.

H. Miscellaneous Corporate Issues

VII. PARTNERSHIPS

VIII. TAX SHELTERS

IX. EXEMPT ORGANIZATIONS AND CHARITABLE GIVING

X. TAX PROCEDURE

A. Interest, Penalties, and Prosecutions

B. Discovery: Summonses and FOIA

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H. Miscellaneous

1. Micro-captive insurance transactions are "transactions of interest" that might be on their way to being listed. Notice 2016-66, 2016-47 I.R.B. 745 (11/1/16). This notice identifies certain captive insurance arrangements, referred to as "micro-captive transactions," as transactions of interest for purposes of Reg. § 1.6011-4(b)(6) and §§ 6111 and 6112 of the Code. Generally, these arrangements involve a person who owns an insured business and that same person or a related person also owns an interest in the insurance company providing coverage. The insured business deducts the premiums paid to the insurance company, and the insurance company, by making the election under § 831(b) to be taxed only on taxable investment income, excludes the premiums from gross income. An insurance company making the § 831(b) election can receive up to $2.2 million in premiums annually (adjusted for inflation after 2015). The notice describes the coverage under these arrangements as having one or more of the following characteristics:

> (1) the coverage involves an implausible risk; (2) the coverage does not match a business need or risk of Insured; (3) the description of the scope of the coverage in the Contract is vague, ambiguous, or illusory; or (4) the coverage duplicates coverage provided to Insured by an unrelated, commercial insurance company, and the policy with the commercial insurer often has a far smaller premium.

The Treasury Department and the IRS believe these transactions have a potential for tax avoidance or evasion but lack enough information to determine whether the transactions should be identified specifically as a tax avoidance transaction. Transactions that are the same as, or substantially similar to, the transaction described in § 2.01 of the notice are identified as "transactions of interest" for purposes of Reg. § 1.6011-4(b)(6) and §§ 6111 and 6112 effective November 1, 2016. Persons entering into these transactions after November 1, 2006, must disclose the transaction as described in Reg. § 1.6011-4.

The Treasury Department and the IRS believe these transactions have a potential for tax avoidance or evasion but lack enough information to determine whether the transactions should be identified specifically as a tax avoidance transaction. Transactions that are the same as, or substantially similar to, the transaction described in § 2.01 of the notice are identified as "transactions of interest" for purposes of Reg. § 1.6011-4(b)(6) and §§ 6111 and 6112 effective November 1, 2016. Persons entering into these transactions after November 1, 2006, must disclose the transaction as described in Reg. § 1.6011-4.

a. Participants in micro-captive insurance transactions have until May 1, 2017, to disclose their participation in years for which returns were filed before November 1, 2016. Notice 2017-8, 2017-3 I.R.B. 423 (12/29/16). This notice extends the due date for participants to disclose their participation in the micro-captive insurance transactions described in Notice 2016-66, 2016-47 I.R.B. 745 (11/1/16). Generally, under Reg. § 1.6011-4(e)(2)(i), if a transaction becomes a transaction of interest or a listed transaction after a taxpayer has filed a return reflecting the taxpayer's participation in the transaction, then the taxpayer must disclose the transaction for any year for which the limitations period on assessment was open on the date the transaction was identified as a listed transaction or transaction of interest within 90 calendar days after the date on which the transaction was identified. This meant that, for open years for which returns already had been filed on November 1, 2016 (the date on which Notice 2016-66 was issued), disclosures were due on January 30, 2017. In this notice, the IRS has extended the due date from January 30 to May 1, 2017.

b. Sixth Circuit sides with the IRS against micro-captive advisor's attack on Notice 2016-66 and "reportable transactions." CIC Services, LLC v. Internal Revenue Service, 925 F.3d 247 (6th Cir. 5/22/19). In a 2-1 decision reflected in an opinion by Judge Clay, the U.S. Court of Appeals for the Sixth Circuit affirmed the U.S. District Court's dismissal of a lawsuit against the IRS challenging the IRS's categorization of certain micro-captive insurance arrangements as "reportable transactions" in Notice 2016-66, 2016-47 I.R.B. 745. The plaintiff, CIC Services, LLC, advises taxpayers with respect to micro-captive insurance arrangements. Generally, these arrangements involve a taxpayer who owns an insured business while that same taxpayer or a related person also owns an interest in an insurance company providing coverage to the business. The insured business deducts the premiums paid to the insurance company, and the insurance company, by making the election under § 831(b) to be taxed only on taxable investment income, excludes the premiums from gross income. In 2019, an insurance company making the § 831(b) election could receive up to $2.3 million in excludable premiums. Back in 2016, the IRS issued Notice 2016-66, 2016-47 I.R.B. 745, which identified certain of these micro-captive insurance arrangements as abusive and thus "transactions of interest" for purposes of the "reportable transaction" rules of Code §§ 6111 and 6112 and Reg. § 1.6011-4(b)(6). Significant penalties can be imposed upon taxpayers and their material advisers for failing to comply with the "reportable transaction" rules. The plaintiff took offense at the IRS's position regarding micro-captives and filed suit in the U.S. District Court for the Eastern District of Tennessee to enjoin enforcement of Notice 2016-66. The plaintiff alleged that the IRS had promulgated Notice 2016-66 in violation of the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* and the Congressional Review Act, 5 U.S.C. § 801 *et seq*. The IRS countered that the plaintiff's complaint was barred by the Anti-Injunction Act, 26 U.S.C. §7421(a), and the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201 (together, the "AIA"). Generally, the AIA bars lawsuits filed "for the purpose of restraining the assessment or collection of any tax" by the IRS. Responding to the IRS, the plaintiff characterized its suit as one relating to tax reporting requirements, not tax assessment and collection. Plaintiff therefore contended that its lawsuit was not barred by the AIA. The IRS, on the other hand, argued that the case ultimately was about tax assessment and collection because the penalties imposed under the "reportable transaction" regime are treated as taxes for federal income tax purposes. The plaintiff cited as support for its argument the U.S. Supreme Court's decision in *Direct Marketing Ass'n v. Brohl*, 575 U.S. ___, 135 S.Ct. 1124 (2015), which allowed a lawsuit to proceed against Colorado state tax authorities despite the Tax Injunction Act ("TIA"). The TIA, which protects state tax assessments and collections, is modeled on the AIA. The IRS, on the other hand, argued that the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Florida Bankers Ass'n v. U.S. Dep't of Treasury*, 799 F.3d 1065 (Fed. Cir. 2015), which distinguished *Direct Marketing*, reflected the proper analysis. The court in *Florida Bankers* held that the AIA applied to bar a suit seeking to enjoin the IRS's enforcement of certain penalties. The suit was barred by the AIA, according to the court in *Florida Marketing*, because the penalties at issue in that case were treated as federal income taxes for assessment and collection purposes, unlike the action challenged in *Direct Marketing*. Writing for the majority, Judge Clay rejected the plaintiff's *Direct Marketing* argument and agreed with the IRS's *Florida Bankers Ass'n* argument. Judge Clay reasoned that, like the penalties at issue in *Florida Bankers Ass'n*, the "reportable transaction" penalties are located in Chapter 68, Subchapter B of the Code and thus are treated as taxes for federal income tax purposes. Therefore, the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Florida Bankers Ass'n v. U.S. Dep't of Treasury* is directly on point. Judge Clay also ruled that the plaintiff's lawsuit did not fall within any of the exceptions to the AIA. Hence, the AIA barred the plaintiff's lawsuit because the plaintiff, by seeking to enjoin enforcement of Notice 2016-66, is indirectly attempting to thwart the IRS's assessment and collection of a tax.

- Judge Nalhandian dissented and would have held that the suit was not barred by the AIA. He reasoned that the suit involved a challenge to a tax reporting requirement, albeit one with a penalty attached for noncompliance, and that the AIA does not bar challenges to tax reporting requirements.

c. The IRS is making time-limited settlement offers to those with micro-captive insurance arrangements. IR-2019-157 (9/16/19). The IRS has announced that it has begun sending time-limited settlement offers to certain taxpayers with micro-captive insurance arrangements. The IRS has done so following three recent decisions of the U.S. Tax Court that disallowed the tax benefits associated with these arrangements. *See* Syzygy Ins. Co., Inc. v. Commissioner, T.C. Memo. 2019-34 (4/10/19); Reserve Mechanical Corp. v. Commissioner, T.C. Memo. 2018-86 (6/18/18); Avrahami v. Commissioner, 149 T.C. No. 7 (8/21/2017). The terms of the offer , which must be acepted within thirty days of the date of the letter making the offer, generally are as follows: (1) the IRS will deny 90 percent of any deductions claimed for captive insurance premiums; (2) the captive insurance company won't be required to recognize taxable income for received premiums; (3) the captive must already be liquidated, will be required to liquidate, or agree to a deemed liquidation that results in dividend income for the shareholders; (4) the captive will not be required to recognize taxable income for received premiums; (5) accuracy-related penalties are reduced to a rate of 10 percent and can be reduced to 5 percent or 0 percent if certain conditions are met; (6) if none of the parties to the micro-captive insurance transaction disclosed it as required by Notice 2016-66, a single penalty of $5,000 will be applied under § 6707A (Penalty for Failure to Include Rreportable Transaction Information with Return), and (7) additions to tax for failure to file or pay tax under § 6651 and failure to pay estimated income tax under §§ 6654 and 6655 may apply.

d. Approximately 80 percent of taxpayers receiving micro-captive insurance settlement offers accepted them. The IRS is establishing 12 new examination teams that are expected to open audits related to thousands of taxpayers. IR-2020-26 (1/31/20). The IRS previously announced that it had begun sending time-limited settlement offers to certain taxpayers with micro-captive insurance arrangements. The IRS has now announced that "[n]early 80% of taxpayers who received offer letters elected to accept the settlement terms." The announcement also informs taxpayers that "the IRS is establishing 12 new examination teams that are expected to open audits related to thousands of taxpayers in coming months." Finally, the announcement reminds taxpayers that Notice 2016-66 requires disclosure of micro-captive insurance transactions with the IRS Office of Tax Shelter Analysis and that failure to do so can result in significant penalties.

- The authors understand that, in March 2020, the IRS issued Letter 6336 to thousands of taxpayers seeking information about their participation in micro-captive insurance transactions. The letters initially asked for a response by May 4, 2020, which subsequently was extended to June 4, 2020.

e. The U.S. Supreme Court will consider a taxpayer's challenge to Notice 2016-66. CIC Services, LLC v. Internal Revenue Service, Docket No. 19-930 (U.S. 5/4/20). The U.S. Supreme Court has granted the taxpayer's petition for a writ of certiorari in this case, in which the U.S. Court of Appeals for the Sixth Circuit dismissed a lawsuit challenging the IRS's categorization of certain micro-captive insurance arrangements as "reportable transactions" in Notice 2016-66, 2016-47 I.R.B. 745. According to the Court's grant of the writ, the question presented is:

Whether the Anti-Injunction Act's bar on lawsuits for the purpose of restraining the assessment or collection of taxes also bars challenges to unlawful regulatory mandates issued by administrative agencies that are not taxes.

2. You say "FBAR." We say "FUBAR." Although Treasury has failed to update relevant FBAR regulations, the penalty for willful violations is not capped at $100,000 per account, says the Federal Circuit. Norman v. United States, 942 F.3d 1111 (Fed. Cir. 11/8/19), *aff'g* 138 Fed. Cl. 189 (7/31/18). The issue in this case is whether substantial foreign bank account reporting ("FBAR") penalties assessed by the Service were reduced. Under 31 U.S.C. § 5321(a)(5)(A), the Secretary of the Treasury "may impose" a penalty for FBAR violations, and pursuant to administrative orders, the authority to impose FBAR penalties has been delegated by the Secretary to the Service. Further, under the *current* version of 31 U.S.C. § 5321(a)(5)(B)(i), the normal penalty for an FBAR violation is $10,000 per offending account; however, the penalty for a *willful* FBAR violation "shall be increased to the greater of" $100,000 or 50 percent of the balance in the offending account at the time of the violation. *See* 31 U.S.C. § 5321(a)(5)(C). These minimum and maximum penalties for willful FBAR violations were changed by the American Jobs Creation Act of 2004 ("AJCA"), Pub. L. No. 108-357, § 821, 118 Stat. 1418 (2004). The prior version of 31 U.S.C. § 5321(a)(5) provided that the penalty for *willful* FBAR violations was the greater of $25,000 or the balance of the unreported account up to $100,000. Treasury regulations issued under the pre-AJCA version of 31 U.S.C. § 5321(a)(5), reflecting the law at the time, capped the penalty for willful FBAR violations to $100,000 per account. *See* 31 C.F.R. § 1010.820(g). In this case, the government assessed a penalty of $803,500 for failure to file an FBAR in 2007 with respect to a Swiss Bank account. The taxpayer argued that the "may impose" language of the relevant statute, 31 U.S.C. § 5321(a)(5), provides the Secretary of the Treasury with discretion to determine the amount of assessable FBAR penalties and that, because the outdated Treasury regulations had not been amended to reflect the AJCA's increase in the minimum and maximum FBAR penalties, the Service's authority was limited to the amount prescribed by the existing regulations. The court reasoned that the amended statute, which provides that the amount of penalties for willful FBAR violations *shall be* increased to the greater of $100,000 or 50 percent of the account value, is mandatory and removed Treasury's discretion to provide for a smaller penalty by regulation. According to the court, the statute gives Treasury discretion *whether* to impose a penalty in particular cases, but not discretion to set a cap on the penalty that is different than the cap set forth in the statute.

- Several federal district courts and the U.S. Court of Federal Claims have considered this issue and reached different conclusions. For cases holding that the outdated FBAR regulations limit the penalty for willful FBAR violations to $100,000 per account, see *United States v. Wadhan*, 325 F. Supp. 3d 1136 (D. Colo. 7/18/18); *United States v. Colliot*, 121 A.F.T.R.2d 2018-1834 (W.D. Tex. 5/16/18). For cases holding that the outdated FBAR regulations do *not* limit the penalty for willful FBAR violations, see *United States v. Schoenfeld*, 396 F. Supp. 3d 1064 (M.D. Fla. 6/25/19); *United States v. Park*, 389 F. Supp. 3d 561 (N.D. Ill. 5/24/19); *United States v. Garrity*, 123 A.F.T.R.2d 2019-941 (D. Conn. 2/28/19); *United States v. Horowitz*, 361 F. Supp. 3d 511 (D. Md. 1/18/19); *Kimble v. United States*, 141 Fed. Cl. 373 (12/27/18).

a. And another BIG government victory in the FBAR-FUBAR war; however, an appeal to the 11th Circuit was filed almost before the ink was dry on the District Court's decision. United States v. Schwarzbaum, ___ F. Supp.3d ___, 2020 WL 1316232 (S.D. Fl. 3/20/20) (bench trial opinion); United States v. Schwarzbaum, ____ F. Supp.3d _____, 2020 WL 2526500 (5/18/20) (subsequent penalty determination opinion); United States v. Schwarzbaum, 2020 WL 2526500 (6/3/2020) (notice of appeal to the Eleventh Circuit). In this significant FBAR case, the United States District Court for the Southern District of Florida (Judge Bloom) upheld the Service's imposition of almost $13 million in penalties for willful FBAR violations across the years 2007-2009, although the court also ruled that no penalties should be imposed for 2006. The taxpayer, a German and U.S. citizen, owned multiple foreign bank accounts across the years in issue. The largest accounts were given to the taxpayer by his German father and were held in Switzerland. The taxpayer also had a smaller account that he had established at a bank in Costa Rica. The taxpayer credibly testified that for the years 2006-2009 he had been erroneously advised by his tax return preparers that he did not need to report foreign held bank accounts provided the accounts had no U.S. connection. For this reason, Judge Bloom found that the taxpayer's alleged FBAR violations for 2006 were not willful. In 2007, however, the taxpayer self-prepared an FBAR disclosure for his account in Costa Rica. The Costa Rican account had been funded with money accumulated by the taxpayer in the U.S. The taxpayer testified that he thus believed the Costa Rican account had a "U.S. connection" and, accordingly, was the only account subject to FBAR reporting obligations. The Service argued, though, that the 2007 instructions to the FBAR disclosure clearly state that *all foreign bank accounts* of taxpayers should be reported. The instructions do not condition a taxpayer's FBAR disclosure obligation on a "U.S. connection" to the account. Therefore, the Service argued, and Judge Bloom agreed, that despite the (erroneous) advice of his tax return preparers, the taxpayer's FBAR violations for the years 2007-2009 were willful. Judge Bloom reasoned that after 2006 the taxpayer either had constructive knowledge that his tax return preparer's advice was erroneous, or the taxpayer recklessly disregarded his FBAR obligations. In either case, Judge Bloom held that a willfulness finding was appropriate and that the Service's imposition of roughly $13 million (approximately) in FBAR penalties against the taxpayer for the years 2007-2009 was justified.

Contrary to the cases mentioned above, the taxpayer apparently did not argue that the Service's assessed FBAR penalties conflicted with Treasury's outdated regulations. Instead, the taxpayer argued that even if his FBAR violations for 2007-2009 were found to be willful, the $13 million (approximately) penalty assessment violated the Eighth Amendment to the U.S. Constitution. The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The taxpayer argued that the FBAR penalties imposed upon him by the Service were "fines" and were "excessive." In response to the taxpayer's Eighth Amendment argument, Judge Bloom ruled that the FBAR penalties, like most tax penalties, are remedial, not punitive, in nature. In other words, the FBAR penalties are designed to safeguard the revenue of the U.S. and to reimburse the Service and Treasury for the expense of investigating and uncovering the taxpayer's circumvention of U.S. tax laws. Therefore, Judge Bloom held, the FBAR penalties imposed upon the taxpayer are not "fines" subject to the Eighth Amendment. Because the court held that the FBAR penalties are not "fines," the court did not rule on whether the approximately $13 million in penalties imposed upon the taxpayer were "excessive." As noted above, the taxpayer has filed an appeal with the Eleventh Circuit.

XI. WITHHOLDING AND EXCISE TAXES

XII. TAX LEGISLATION

A. <u>Enacted</u>