RECENT DEVELOPMENTS IN FEDERAL INCOME TAXATION

We apologize to our readers. If we had more time, this outline would be much shorter.

By

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I. ACCOUNTING

II. BUSINESS INCOME AND DEDUCTIONS

A. Income

B. Deductible Expenses versus Capitalization

C. Reasonable Compensation

D. Miscellaneous Deductions

1. Standard mileage rates for 2022. Notice 2022-3, 2022-2 I.R.B. 308 (12/17/21). The standard mileage rate for business miles in 2022 goes up to 58.5 cents per mile (from 56 cents in 2021) and the medical/moving rate goes up to 18 cents per mile (from 16 cents in 2021). The charitable mileage rate remains fixed by § 170(i) at 14 cents. The portion of the business standard mileage rate treated as depreciation is unchanged compared to 2021 and remains 26 cents per mile for 2022. The maximum standard automobile cost may not exceed $56,100 (up from $51,100 in 2021) for passenger automobiles (including trucks and vans) for purposes of computing the allowance under a fixed and variable rate (FAVR) plan.

- The notice reminds taxpayers that (1) the business standard mileage rate cannot be used to claim an itemized deduction for unreimbursed employee travel expenses because, in the 2017 Tax Cuts and Jobs Act, Congress disallowed miscellaneous itemized deductions for 2022, and (2) the standard mileage rate for moving has limited applicability for the use of an automobile as part of a move during 2022 because, in the 2017 Tax Cuts and Jobs Act, Congress disallowed the deduction of moving expenses for 2022 (except for members of the military on active duty who move pursuant to military orders incident to a permanent change of station, who can still use the standard mileage rate for moving).

a. Given the price at the pumps, it's no surprise the IRS has increased the standard mileage rate for 2022 effective July 1, 2022. Announcement 2022-13, 2022-26 I.R.B. 1185

(6/10/22). Because of recent increases in the price of fuel, the IRS has increased the standard mileage rates for 2022. The increased standard mileage rates apply to deductible transportation expenses paid or incurred for business, medical, or moving expense purposes on or after July 1, 2022, and to mileage allowances that are paid both (1) to an employee on or after July 1, 2022, and (2) for transportation expenses paid or incurred by the employee on or after July 1, 2022. Taking into account these increases, the standard mileage rates for 2022 are as follows:

Category	Jan. 1-Jun. 30, 2022	Jul. 1-Dec. 31, 2022
Business miles	58.5 cents	62.5 cents
Medical/moving	18 cents	22 cents
Charitable mileage	14 cents	14 cents

The announcement modifies Notice 2022-3, 2022-2 I.R.B. 308. Except as modified, all other provisions of Notice 2022-3 continue to apply.

E. Depreciation & Amortization

F. Credits

G. Natural Resources Deductions & Credits

H. Loss Transactions, Bad Debts, and NOLs

I. At-Risk and Passive Activity Losses

III. INVESTMENT GAIN AND INCOME

IV. COMPENSATION ISSUES

A. Fringe Benefits

1. Limits for contributions to health savings accounts for 2023. Rev. Proc. 2022-24, 2022-20 I.R.B. 1075 (4/29/22). The IRS has issued the inflation-adjusted figures for contributions to health savings accounts. For calendar year 2023, the annual limitation on deductions under § 223(b)(2)(A) for an individual with self-only coverage under a high deductible health plan is $3,850. For calendar year 2023, the annual limitation on deductions under § 223(b)(2)(B) for an individual with family coverage under a high deductible health plan is $7,750. For this purpose, for calendar year 2023, a "high deductible health plan" is defined under § 223(c)(2)(A) as a health plan with an annual deductible that is not less than $1,500 for self-only coverage or $3,000 for family coverage, and for which the annual out-of-pocket expenses (deductibles, co-payments, and other amounts, but not premiums) do not exceed $7,500 for self-only coverage or $15,000 for family coverage.

B. Qualified Deferred Compensation Plans

1. Proposed regulations on required minimum distributions. REG-105954-20, Required Minimum Distributions, 87 F.R. 10504 (2/24/22). Treasury and the IRS have issued proposed regulations that address required minimum distributions (RMDs) from qualified retirement plans and annuity contracts and related matters. The proposed regulations would update existing regulations to reflect a number of statutory changes. The most significant of these statutory changes were made by the SECURE Act, enacted on December 20, 2019, as Division O of the 2020 Further Consolidated Appropriations Act. Among other changes, the SECURE Act amended Code § 401(a)(9)(E) to modify the RMD rules for inherited retirement accounts (defined contribution plans and IRAs). The proposed regulations are lengthy and address these and a number of other issues. This outline will focus on only the guidance provided by the proposed regulations on the change made by the SECURE Act to RMDs for inherited retirement accounts. Readers should consult the proposed regulations for additional guidance.

The SECURE Act changes to RMDs from inherited retirement accounts. A provision of the SECURE Act, Division O, Title IV, § 401 of the 2020 Further Consolidated Appropriations Act, amended Code § 401(a)(9)(E) to modify the required minimum distribution (RMD) rules for inherited retirement accounts (defined contribution plans and IRAs). The amendments require all funds to be distributed by the end of the 10th calendar year following the year of death (the "10-year rule"). The statute contains no requirement to withdraw any minimum amount before that date. Section 401(a)(9)(H)(i)(II), as also amended by the SECURE Act, provides that this rule applies whether or not RMDs to the employee or IRA owner have begun. The current rules, which permit taking RMDs over life expectancy, continue to apply to a designated beneficiary who is an "eligible designated beneficiary," which is any of the following: (1) a surviving spouse, (2) a child of the participant who has not reached the age of majority, (3) disabled within the meaning of § 72(m)(7), (4) a chronically ill individual within the meaning of § 7702B(c)(2) with some modifications, or (5) an individual not in any of the preceding categories who is not more than 10 years younger than the deceased individual. These changes generally apply to distributions with respect to those who die after December 31, 2019.

The proposed regulations' interpretation of the SECURE Act. The proposed regulations adopt an interpretation of the 10-year rule that appears to differ from the plain language of the statute and from the interpretation of the legislation of most advisors. The statute provides that, when the designated beneficiary is *not* an eligible designated beneficiary, all funds must be distributed by the end of the 10th calendar year following the year of death and that this rule applies whether or not RMDs to the employee or IRA owner have begun. There appears to be no requirement to withdraw any minimum amount before that date. The preamble to the proposed regulations, however, explains that the proposed regulations distinguish between situations in which the employee or IRA owner dies before the required beginning date for distributions, and situations in which death occurs after such date. When the employee or IRA owner dies *before* the required beginning date for distributions, the proposed regulations provide that that no distribution is required before the 10th calendar year following the year of death. However, in situations in which the employee or IRA owner dies *after* the required beginning date for distributions, the proposed regulations provide that a designated beneficiary who is *not* an eligible designated beneficiary must take RMDs before the 10th calendar year following the year of death:

> For example, if an employee died after the required beginning date with a designated beneficiary who is not an eligible designated beneficiary, then the designated beneficiary would continue to have required minimum distributions calculated using the beneficiary's life expectancy as under the existing regulations for up to nine calendar years after the employee's death. In the tenth year following the calendar year of the employee's death, a full distribution of the employee's remaining interest would be required.

87 F.R. 10514. This interpretation differs not only from the plain language of the statute and from the interpretation of the legislation of most advisors, but also from IRS Publication 590-B, which was issued for 2021. IRS Publication 590-B (page 11) provides:

> The 10-year rule requires the IRA beneficiaries who are not taking life expectancy payments to withdraw the entire balance of the IRA by December 31 of the year containing the 10th anniversary of the owner's death. For example, if the owner died in 2021, the beneficiary would have to fully distribute the IRA by December 31, 2031. The beneficiary is allowed, but not required, to take distributions prior to that date.
>
> The 10-year rule applies if (1) the beneficiary is an eligible designated beneficiary who elects the 10-year rule, if the owner died before reaching his or her required beginning date; or (2) the beneficiary is a designated beneficiary who is not an eligible designated beneficiary, regardless of whether the owner died before reaching his or herrequired beginning date.

Many of the comments on the proposed regulations urge the IRS to change its interpretation or at least to delay the effective date of the interpretation because many beneficiaries subject to the 10-year rule did not take distributions in 2021.

C. <u>Nonqualified Deferred Compensation, Section 83, and Stock Options</u>

D. <u>Individual Retirement Accounts</u>

V. PERSONAL INCOME AND DEDUCTIONS

A. <u>Rates</u>

B. <u>Miscellaneous Income</u>

1. The taxpayer's attorneys might have committed malpractice, but the settlement she received from the law firm was not on account of her physical injuries and therefore was not excludable from her gross income. Blum v. Commissioner, 129 A.F.T.R.2d 2022-1170 (9th Cir. 6/2/22), *aff'g*, *Blum v. Commissioner*, T.C. Memo. 2021-18 (2/18/21). The taxpayer allegedly fell to the floor when she attempted to sit in a broken wheelchair while in the hospital for knee replacement surgery. She brought legal action against the hospital for personal injuries. The trial court in that action granted summary judgment for the hospital and the trial court's decision was affirmed on appeal. The taxpayer then brought a malpractice suit against the attorneys who had represented her. The law firm settled the malpractice action by paying the taxpayer $125,000. According to the court, the settlement agreement provided:

> "Blum maintains, and … [her former attorneys] do not dispute, that Blum did not sustain any physical injuries as a result of the alleged negligence of either ... [of her former attorneys]" and that "Blum's physical injuries are ... alleged to have resulted from the … [hospital] incident, which did not occur as a result of any fault or negligence by … [her former attorneys]."

The taxpayer excluded the $125,000 from gross income under § 104(a)(2) as damages received on account of personal physical injury or physical sickness. She argued that, but for the alleged negligence of her attorneys, she would have received damages from the hospital that would have been excluded from her income under § 104(a)(2). In a memorandum opinion, the U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the U.S. Tax Court and held that the settlement proceeds the taxpayer received were not excludable from gross income under § 104(a)(2). In its prior decision in *Rivera v. Baker W., Inc.*, 430 F.3d 1253 (9th Cir. 2005), the Ninth Circuit had held that damages are received on account of a personal, physical injury within the meaning of § 104(a)(2) only if there is a direct causal link between the damages and the personal injury sustained. In this case, the court concluded, the settlement agreement pursuant to which the taxpayer received the settlement proceeds stated that the settlement was to settle a malpractice claim and that she had not suffered any physical injuries as a result of the alleged negligence of her attorneys. Accordingly, the court held, the taxpayer could not exclude the settlement proceeds from gross income under § 104(a)(2).

C. <u>Hobby Losses and § 280A Home Office and Vacation Homes</u>

D. <u>Deductions and Credits for Personal Expenses</u>

E. <u>Divorce Tax Issues</u>

F. <u>Education</u>

G. <u>Alternative Minimum Tax</u>

VI. CORPORATIONS

VII. PARTNERSHIPS

VIII. TAX SHELTERS

IX. EXEMPT ORGANIZATIONS AND CHARITABLE GIVING

A. **Exempt Organizations**

B. **Charitable Giving**

X. TAX PROCEDURE

A. **Interest, Penalties, and Prosecutions**

B. **Discovery: Summonses and FOIA**

C. **Litigation Costs**

D. **Statutory Notice of Deficiency**

E. **Statute of Limitations**

F. **Liens and Collections**

1. When a taxpayer seeks review in the Tax Court of an IRS determination to uphold proposed collection action, the Tax Court does not have jurisdiction to consider the taxpayer's refund claim if the proposed collection action becomes moot. McLane v. Commissioner, 24 F.4th 316 (4th Cir. 1/25/22), *aff'g* T.C. Memo. 2018-149. The issue in this case was whether the Tax Court had jurisdiction to consider the taxpayer's claim for a refund. After the taxpayer filed his 2008 return, the IRS disallowed his claimed business deductions on Schedule C and determined that he had underreported his tax liability by $23,615. The IRS issued a notice of deficiency, but the taxpayer and the IRS agreed that the taxpayer never received it. After assessing the tax allegedly due, the IRS issued a notice of federal tax lien. In response, the taxpayer requested a collection due process (CDP) hearing. In a CDP hearing, § 6330(c)(2)(B) permits a taxpayer to challenge the existence or amount of the taxpayer's underlying tax liability only "if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." Because the taxpayer had not received the notice of deficiency, the IRS Settlement Officer allowed the taxpayer to present evidence to substantiate his business deductions and allowed approximately one-half of the deductions, which reduced the amount of tax allegedly due. Following the CDP hearing, the IRS issued a notice of determination sustaining the notice of federal tax lien and the taxpayer filed a petition in the Tax Court. In the Tax Court, the taxpayer presented evidence of his claimed deductions and the IRS ultimately conceded that (1) the taxpayer was entitled to deductions that exceeded those he initially claimed, (2) there was no tax due, and (3) the taxpayer was entitled to abatement of his tax liability for 2008 and release of the lien. The taxpayer's petition to the Tax Court did not claim that he was entitled to a refund. Following these concessions, in a conference call with the court, the taxpayer asserted for the first time that he was entitled to a refund of tax paid for 2008. The Tax Court (Judge Halpern) concluded that it did not have jurisdiction to consider the taxpayer's refund claim. In an opinion by Judge Motz, the U.S. Court of Appeals for the Fourth Circuit affirmed the Tax Court's decision. According to the Fourth Circuit, the question was whether § 6330(c)(2)(B) (which applies in CDP hearings held to review a notice of federal tax lien pursuant to § 6320(c)) gives the Tax Court jurisdiction to hear a claim for refund. Section 6330(c)(2)(B) provides:

> The person may also raise at the [CDP] hearing challenges to the existence or amount of the *underlying tax liability* for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

(Emphasis added.) Further, § 6330(d)(1) provides that the Tax Court has jurisdiction to review the IRS's determination following the CDP hearing. The Fourth Circuit reasoned that "the phrase 'underlying tax liability' does not provide the Tax Court jurisdiction over independent overpayment claims when the collection action no longer exists." Here, the court explained:

> When as here, the Commissioner has already conceded that a taxpayer has no tax liability and that the lien should be removed, any appeal to the Tax Court of the Appeals

> Office's determination as to the collection action is moot. No collection action remains, for which there is underlying tax liability, to appeal.

Accordingly, the Fourth Circuit affirmed the Tax Court's decision that the Tax Court did not have jurisdiction to consider the taxpayer's refund claim.

- The analysis required to conclude that the Tax Court did not have jurisdiction to consider the taxpayer's refund claim is far more nuanced than the Fourth Circuit's opinion suggests. The Tax Court's opinion in this case engages in an extensive analysis of the relevant statutory provisions and of the Tax Court's prior decision in *Greene-Thapedi v. Commissioner*, 126 T.C. 1 (2006). In *Greene-Thapedi*, the taxpayer filed a petition in the Tax Court seeking review of the IRS's determination in a CDP hearing to uphold a proposed levy, but the proposed levy became moot because the IRS applied the taxpayer's refund from a later year to the year in question, which reduced her tax liability to zero. The taxpayer sought a refund of accrued interest on the liability. The Tax Court concluded that, in enacting § 6330, Congress did not intend to provide for the allowance of tax refunds. In this case, the Tax Court declined to reconsider its holding in *Greene-Thapedi* and rejected the taxpayer's arguments that *Greene-Thapedi* was distinguishable. The Fourth Circuit's opinion in this case discusses *Greene-Thapedi* in a footnote and concludes that it is unnecessary to consider whether § 6330 *ever* allows a taxpayer to claim a refund because the limited holding in this case is that § 6330 does not permit a claim for refund when the IRS's proposed collection action that provides the basis for the Tax Court's jurisdiction becomes moot.

G. <u>Innocent Spouse</u>

H. <u>Miscellaneous</u>

1. In Notice 2007-83, the IRS concluded that certain trust arrangements involving cash value life insurance policies are listed transactions. According to the Sixth Circuit, the IRS failed to comply with the Administrative Procedure Act in issuing Notice 2007-83 and the notice therefore is invalid. <u>Mann Construction, Inc. v. United States</u>, 27 F.4th 1138 (6th Cir. 3/3/22). In an opinion by Chief Judge Sutton, the U.S. Court of Appeals for the Sixth Circuit has held that the IRS failed to comply with the Administrative Procedure Act (APA) in issuing Notice 2007-83, 2007-2 C.B. 960, and that the notice therefore is invalid.

Notice 2007-83. In Notice 2007-83, the IRS examined certain trust arrangements being promoted to business owners. In these arrangements, a taxable or tax-exempt trust is established to provide certain benefits, such as death benefits, to owners of the business and to employees. The business makes contributions to the trust, which the trustees use to purchase cash value life insurance policies on the lives of the owners and term insurance on the lives of non-owner employees. The arrangements are structured so that, upon termination of the plan, the owners of the business receive all or a substantial portion of the assets of the trust. According to the notice, those promoting the arrangements take the position that the business can deduct contributions to the trust and that the owners have no income as a result of the contributions or the benefits provided by the trust. The notice identifies these transactions as listed transactions that must be disclosed to the IRS. Accordingly, those who fail to disclose these transactions are subject to significant penalties pursuant to § 6707A.

Facts of this case. In this case, from 2013 to 2017, a corporation, Mann Construction, Inc., established an employee-benefit trust that paid the premiums on a cash-value life insurance policy benefitting the corporation's two shareholders. The corporation deducted these payments and the shareholders reported as income part of the insurance policy's value. Neither the individuals nor the company reported this arrangement to the IRS as a listed transaction. In 2019, the IRS concluded that this transaction fell within Notice 2007-83 and imposed a $10,000 penalty on the corporation and on both of its shareholders ($8,642 and $7,794) for failing to disclose their participation in the transaction. The corporation and the shareholders paid the penalties for the 2013 tax year, sought administrative refunds on the ground that the IRS lacked authority to penalize them, and ultimately brought legal action seeking a refund in a U.S. District Court. The District Court upheld the validity of Notice 2007-83 and held in favor of the government.

Sixth Circuit's analysis. The U.S. Court of Appeals for the Sixth Circuit reversed the District Court's holding and concluded that the IRS had failed to comply with the APA in issuing Notice 2007-

83. The APA generally prescribes a three-step process for notice-and-comment rulemaking. First, the agency must issue a general notice of proposed rulemaking. Second, assuming notice is required, the agency must consider and respond to significant comments received during the period for public comment. Third, in issuing final rules, the agency must include a concise general statement of the rule's basis and purpose. *See, e.g.*, *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015). The IRS did not comply with the first requirement in issuing Notice 2007-83 because it did not issue a notice of proposed rulemaking. The government made two principal arguments as to why it was not required to comply with the APA's notice-and-comment requirements. *First*, the government argued that Notice 2007-83 is an interpretive rule that is not subject to the APA's notice-and-comment procedures rather than a legislative rule that is subject to such procedures. The Sixth Circuit rejected this argument and concluded that Notice 2007-83 is a legislative rule. According to the court, the notice imposes new duties on taxpayers by requiring them to report certain transactions and imposes penalties for failure to do so. The notice also carries out an express delegation of authority from Congress, the court reasoned, because § 6011(a) provides that the Secretary of the Treasury is to determine by regulations when and how taxpayers must file returns and statements and § 6707A(c) delegates to the Secretary of the Treasury the authority to identify which transactions have the potential for tax avoidance or evasion and which transactions are substantially similar to such transactions. Because Notice 2007-83 imposes new duties and penalties on taxpayers and carries out an express delegation of congressional authority, the court concluded, the notice is a legislative rule that is subject to the APA's notice-and-comment procedures. *Second*, the government argued that, even if Notice 2007-83 is a legislative rule, Congress had exempted it from the APA's notice-and-comment procedures. The Sixth Circuit rejected this argument as well. According to the court, nothing in the language of the relevant statutory provisions or their legislative history indicated a congressional intent to exempt the IRS from the APA's notice-and-comment procedures when the IRS identifies transactions that have the potential for tax avoidance or evasion and substantially similar transactions. Because the IRS was required to comply with the APA's notice-and-comment procedures in issuing Notice 2007-83 and failed to do so, the court concluded, the notice is invalid. Accordingly, the taxpayers are entitled to a refund of the penalties they paid for failing to disclose the transaction.

Broader implications. The effect of the Sixth Circuit's decision is to preclude the IRS from imposing penalties under § 6707A for failing to disclose a transaction that the IRS identifies in a notice issued without complying with the APA's notice-and-comment requirements. Because the IRS normally does not comply with the APA's requirements in issuing notices, the broader implication of the court's decision is that taxpayers, at least those whose appeals will be heard by the Sixth Circuit, can challenge penalties imposed pursuant to similar notices that identify transactions as listed or reportable transactions. These include Notice 2016-66, 2016-47 I.R.B. 745, which 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, and Notice 2017-10, 2017-4 I.R.B. 544, which identifies certain syndicated conservation easement transactions entered into after 2009 as listed transactions.

2. The shared responsibility payment imposed by § 5000A for failure to maintain health insurance is a tax for bankruptcy purposes and is entitled to priority. Internal Revenue Service v. Juntoff, 636 B.R. 868 (B.A.P. 6th Cir. 3/21/22). Section 5000A of the Code, enacted as part of the Affordable Care Act, requires individuals to maintain health insurance that provides minimum essential coverage. Prior to tax-year 2019, the statute imposed a penalty, referred to as a shared responsibility payment, on individuals who did not maintain minimum essential coverage. The taxpayers in these two consolidated cases filed Chapter 13 bankruptcy petitions. The IRS filed a proof of claim in each proceeding for a shared responsibility payment based on their failure to maintain minimum essential coverage in 2017 and 2018. The proof of claim characterized the shared responsibility payment as an "excise/income tax." The taxpayers argued that the shared responsibility payment was a penalty and not a tax, and therefore was not entitled to priority in bankruptcy. In *NFIB v. Sebelius*, 567 U.S. 519 (2012), the U.S. Supreme Court held that the shared responsibility payment is a tax for constitutional purposes but is not a tax for purposes of the Anti-Injunction Act. In an opinion by Judge Stout, the court concluded that the penalty is a tax for bankruptcy purposes. The court also concluded that it is a tax described in § 507(a)(8) of the Bankruptcy Code and therefore entitled to priority in bankruptcy.

Dissenting opinion of Chief Judge Dales. In a dissenting opinion, Chief Judge Dales argued that the shared responsibility payment is not a tax. He argued that the general approach of courts to be sparing in permitting priority treatment and the text of the statute (§ 5000A), which consistently refers to the shared responsibility payment as a penalty, suggest that the shared responsibility payment is a penalty rather than a tax. Judge Dales also relied on prior decisions of the Sixth Circuit, which provide guidance on determining when a payment to a governmental entity is a tax:

> Where a State "compel[s] the payment" of "involuntary exactions, regardless of name," and where such payment is universally applicable to similarly situated persons or firms, these payments are taxes for bankruptcy purposes.

Yoder v. Ohio Bur. of Workers' Comp. (In re Suburban Motor Freight, Inc.), 998 F.2d 338, 342 (6th Cir. 1993). The shared responsibility payment, he argued, is not universally applicable to similarly situated persons because it is triggered only by default, i.e., by virtue of an individual's failure to maintain minimum essential coverage. Because the shared responsibility payment is not a tax, he concluded, it is not entitled to priority in bankruptcy.

a. The Third Circuit has agreed: the shared responsibility payment imposed by § 5000A for failure to maintain health insurance is a tax for bankruptcy purposes and is entitled to priority. In re Szczyporski, 34 F.4th 179 (3d Cir. 5/11/22). The taxpayers in this case, a married couple, filed a Chapter 13 bankruptcy petition. The IRS filed a proof of claim for a shared responsibility payment based on their failure to maintain minimum essential coverage in 2018. The proof of claim characterized the shared responsibility payment as an excise tax. The taxpayers argued that the shared responsibility payment was a penalty and not a tax, and therefore was not entitled to priority in bankruptcy. The U.S. Court of Appeals for the Third Circuit concluded that the penalty is a tax for bankruptcy purposes. The court also concluded that it is a tax described in § 507(a)(8) of the Bankruptcy Code and therefore entitled to priority in bankruptcy.

XI. WITHHOLDING AND EXCISE TAXES

A. Employment Taxes

B. Self-employment Taxes

C. Excise Taxes

1. The tax imposed by § 4611 on oil exported from the United States is a tax on exports in violation of Article I, § 9 of the U.S. Constitution and therefore is unconstitutional. Trafigura Trading, LLC v. United States, 29 F.4th 286 (5th Cir. 3/24/22), *aff'g* 485 F.Supp.3d 822 (S.D. Tex. 2020). The taxpayer, a commodity trading company, purchased and exported from the United States approximately 50 million barrels of crude oil between 2014 and 2017. Section 4611(b) of the Code imposes a tax on "any domestic crude oil [that] is used in or exported from the United States." The taxpayer paid over $4 million to the IRS based on the oil it exported and filed an administrative claim for a refund of the tax. When the IRS denied the claim, the taxpayer brought legal action seeking a refund in a federal district court. In the U.S. District Court for the Southern District of Texas, the taxpayer argued that the tax imposed on exported oil by § 4611(b) violates the Export Clause of the U.S. Constitution (Art. I, § 9, cl. 5), which provides: "No Tax or Duty shall be laid on Articles exported from any State." The U.S. District Court (Judge Hanen) granted summary judgment in favor of the taxpayer and the government appealed. In an opinion by Judge Ho, the U.S. Court of Appeals for the Fifth Circuit affirmed the District Court's decision. The Fifth Circuit observed that, according to the U.S. Supreme Court's decisions in *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998), and *Pace v. Burgess*, 92 U.S. 372 (1876), the label Congress uses to describe an impost (e.g., as a tax) is not controlling and the Export clause does not bar a charge or user fee that lacks the attributes of a generally applicable tax and instead is "designed as compensation for Government-supplied services, facilities, or benefits." Thus, according to the Fifth Circuit, the question is whether § 4611(b) imposes an impermissible tax or instead a permissible user fee. According to § 9509(b)(1), proceeds from § 4611(b) go to the Oil Spill Liability Trust Fund. The Oil Spill Liability Trust Fund is used for several purposes, including reimbursing those held liable for the cleanup costs of an oil spill, covering costs incurred by federal, state, and Indian tribe trustees for natural resource damage assessment and restoration, and supporting certain environmental research and testing. The "tax" imposed by § 4611(b) therefore might be characterized as a user fee that provides a source of funds for these initiatives. After analyzing relevant precedent from the U.S. Supreme Court, Judge Ho summarized the guiding principles regarding whether an impost is a tax or instead a user fee as follows:

> First, we must consider whether the charge under § 4611(b) is based on the quantity or value of the exported oil—if so, then it is more likely a tax. Second, we must consider the connection between the Fund's services to exporters, if any, and what exporters pay for those services under § 4611(b). That connection need not be a perfect fit. See *Pace*, 92 U.S. at 375–76. But a user fee must "fairly match" or "correlate reliably with" exporters' use of government services. *U.S. Shoe*, 523 U.S. at 369–70. Finally, we apply "heightened scrutiny," *Matter of Buffets, LLC*, 979 F.3d 366, 380 (5th Cir. 2020), and strictly enforce the Export Clause's ban on taxes by "guard[ing] against . . . the imposition of a [tax] under the pretext of fixing a fee," *U.S. Shoe*, 523 U.S. at 370 (quotations omitted).

With respect to the first issue, the Judge Ho concluded that the charge imposed by § 4611(b) is based on the volume of oil transported and therefore is based on the quantity or value of the exported oil, which makes it more likely that the charge is a tax. With respect to the second issue, Judge Ho concluded that there is not a sufficient connection between exporters' payment of the charge imposed by § 4611(b) and their use if government services. He reasoned that "[a] user fee is a charge for a specific service provided to, and used by, the payor," and that the charge imposed by § 4611(b) does not meet this criterion. Section 4611(b) requires oil exporters to pay for several things that cannot be regarded as services provided to the oil exporters, such as reimbursements to federal, state, and Indian tribe trustees for assessing natural resource damage; research and development for oil pollution technology; studies into the effects of oil pollution; marine simulation research; and research grants to universities. Although oil exporters benefit indirectly from these initiatives, they do not receive a specific service in return for the amounts they pay. Society as a whole benefits from these initiatives. By analogy, Judge Ho reasoned, [t]he fact that people pay taxes to fund police and fire protection does not somehow turn those taxes into user fees." Accordingly, the court held that the charge imposed by § 4611(b) is a tax rather than a user fee, and because it is a tax on exports, it violates the Export clause and is unconstitutional.

Concurrence of Judge Wiener. Judge Wiener concurred in the judgment of the court.

Dissenting opinion of Judge Graves. In a dissenting opinion, Judge Graves concluded that there are genuine issues of material fact as to whether § 4611(b) imposes a user fee and that it was therefore inappropriate for the District Court to grant summary judgment in favor of the taxpayer. Judge Graves disagreed with Judge Ho's conclusion that the charge imposed by § 4611(b) is based on the quantity or value of the exported oil. In his view, the charge is a per-barrel fee that does not depend on the value of the exported oil. He also disagreed with Judge Ho's analysis regarding exporters' payment of the charge and their receipt of services:

> it is implausible to suggest that random taxpayers or random members of society are the primary beneficiaries of exporters simply being responsible for their own actions and business practices. There would be no oil spills, resulting damage, or need for research and development regarding oil pollution if oil was not exported. The oil was not exported by random taxpayers or random members of society, and they are neither responsible for any subsequent pollution/damage of precious natural resources nor the beneficiaries of any cap on liability. The oil is exported by exporters, who are not forced to share any resulting profit with random taxpayers or random members of society. To borrow from the plurality, exporters pay and exporters benefit.

XII. TAX LEGISLATION

A. **Enacted**