

TAX TALK

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FROM THE CHAIR

By Bryan W. Young

The General Assembly has been active this year with legislation impacting the Tax Section. As a result, the Section has been very active as well. Once again, the General Assembly has introduced legislation commonly known as the “controlling interest transfer tax bill”, House Bill 475. The Section has again opposed the bill. Unlike previous years, there is a feeling that the legislation may have a good chance of passing. We will continue our efforts and keep you informed.

House Bill 988/Senate Bill 513, entitled “Maryland Tax Preparers Act”, would have established a state board of tax preparers which would license and regulate tax preparers. The Section had taken substantial action to voice our position on the bills. The interested parties, however, agreed the bill needed substantial modification. As a result, the Senate Bill was withdrawn February 27, 2007. There will be more meetings and discussions prior to next year’s session to come up with a more workable bill.

House Bill 448 seeks to impose the sales & use tax on a number of new services, including direct mail advertising, engineering services, dating/escort services, motor vehicle repair, and management/business consultants. Also included were tax preparation services. The bill does not include legal or accounting services (other than tax preparation). The sponsors of the bill appear to believe that leaving out attorneys and CPA’s gives the bills a better chance of passing. It also appears that if the bill does pass, some intend to go after attorneys and CPA’s in future sessions. We will be closely monitoring this.

There are rumblings that a special session may be called this year to create a commission on tax reform. Similar legislation was introduced last year. However, there appears to be a strong belief that this year’s legislation will be successful. The Section has taken action in an attempt to be represented on any such committee.

Besides legislation, the Section has been active in other areas. For example, the annual Tax Networking Night was held at the Candlelight Inn in Catonsville in November 2006. This attendance was excellent and it was a great night of socializing with colleagues and state officials. Catherine Rafferty deserves tremendous credit for organizing the event, procuring numerous door prizes, and obtaining several sponsors.

The Annual Irving Shulbank Dinner will be in May 2007. Announcements of the date and speaker will be coming out soon. The Tax Excellence Award and the J. Ronald Shiff Pro Bono Award will be presented at the dinner. Please take the time to nominate tax practitioners deserving of these awards. Announcements and nomination forms are in this edition of Tax Talk and will also be sent out on the listserv.

Finally, this year’s MSBA annual meeting in Ocean City (June 13-16, 2007) will be a joint bench/bar conference. When our program date and time has been set, we will send out announcements. Be on the look out.



Save The Date!

THE ANNUAL IRVING SHULBANK MEMORIAL DINNER

The Tax Section will host the Program on Thursday, May 3, 2007. We are honored to announce that Peter Franchot, the new Comptroller of the State of Maryland, will be our Distinguished Speaker. Please plan to join us to celebrate the recipients of The 2007 Tax Excellence Award and of The J. Ronald Shiff Memorial Pro Bono Award. Watch your email for more details!

Innocent Spouse Relief – Coming Full Circle (Almost....)

By Caroline D. Ciruolo, Esq., Rosenberg | Martin | Greenberg, LLP

There are benefits to married couples filing joint income tax returns. However, those benefits may be outweighed if the Internal Revenue Service or Comptroller of Maryland asserts a deficiency with respect to the return, or the return as filed reflects an amount due that remains unpaid. As a general rule, each spouse that signs a joint return is jointly and severally liable for any amount due arising from that return. A spouse may be relieved of joint liability if he or she qualifies for innocent spouse relief. Thanks to Senate Bill 3523 and The Tax Relief and Health Care Act of 2006, enacted on December 20, 2006, a spouse whose claim for relief from an underpayment on a joint return is denied by the Service has the right to judicial review in the U.S. Tax Court. This article discusses the background of that legislation.

The IRS Restructuring Act of 1998 expanded spousal relief for taxpayers who file joint returns by enacting Internal Revenue Code (“IRC”) § 6015, which provides three types of relief. See IRS Publication 971. The relief available depends upon the current marital status of the parties, and whether the liability at issue arose as a deficiency, or was reported on the joint return but not paid (“underpayments”). Under IRC § 6015(f), a spouse may file a claim for equitable relief from joint liability for an underpayment.

In *Butler v. Commissioner*, 114 T.C. 276 (2000) and *Fernandez v. Commissioner*, 114 T.C. 324 (2000), the Tax Court held that it has jurisdiction to review for an abuse of discretion the Service’s denial of a claim for equitable relief filed pursuant to IRC § 6015(f). *Butler* involved a taxpayer’s claim raised as an affirmative defense in a petition for redetermination of a deficiency filed pursuant to IRC § 6213(a). *Fernandez* involved a petition filed pursuant to IRC § 6015(e) in response to the Service’s denial of an administrative claim for relief (“a stand alone claim”). On June 5, 2000, the Service issued an Action on Decision, acquiescing to *Fernandez*. See 2000-23 I.R.B. 2, 2000 WL 33910968 (IRS ACQ). Both *Butler* and *Fernandez* involved tax deficiencies, not underpayments.

In *Ewing v. Commissioner*, 118 T.C. 494, 498-507 (2002) (“*Ewing I*”), the Tax Court *sua sponte* considered whether it had jurisdiction to review the Service’s denial of stand alone claims for equitable relief from underpayments under IRC § 6015(f). After noting the legislative history of IRC § 6015, the court considered whether its jurisdiction over claims for equitable relief was limited by Congress when it amended IRC § 6015(e), effective December 21, 2000. See Consolidated Appropriations Act, 2001 (Consolidated Appropriations Act, 2001), Pub. L. 106-554, app. G, § 313, 114 Stat. 2763, 2763A-641-643. The court noted that both the petitioner and the Service agreed that “the absence of a deficiency is no impediment to our jurisdiction [.]” *Ewing I*, 118 T.C. at 506. The court then

held, “[a]fter examining section 6015 as originally enacted, the subsequent amendment by the Consolidated Appropriations Act, 2001, the legislative history and relevant caselaw, we agree with the parties and hold that the absence of an asserted deficiency does not deprive us of jurisdiction over petitioner’s claim for equitable relief pursuant to section 6015(f).” *Id.* at 507. Since issuing its opinion in *Ewing I*, the court repeatedly exercised its jurisdiction over underpayment claims.

The Tax Court later held that its determination with regard to a claim for equitable relief is made pursuant to a trial *de novo* and is not limited to evidence in the administrative record. *Ewing v. Commissioner*, 122 T.C. 32, 39 (2004) (“*Ewing II*”). The Service appealed *Ewing II* and, on February 28, 2006, the Ninth Circuit reversed, holding that the Tax Court does not have jurisdiction under IRC § 6015(e) to review denials of claims for equitable relief from underpayments under IRC § 6015(f). *Commissioner v. Ewing*, 439 F.3d 1009, 2006 WL 463788 (9th Cir. 2006), *reversing and vacating*, 118 T.C. 494 (2002) and 122 T.C. 32 (2004). The Eighth Circuit followed suit in *Bartman v. Commissioner*, 446 F.3d 785, 787 (8th Cir. 2006).

In *Billings v. Commissioner*, 127 T.C. 7 (July 25, 2006), the Tax Court revisited whether it had jurisdiction to review a denial of relief under IRC § 6015(f) where there is an underpayment, but no deficiency. Under its renewed analysis, the court reversed its earlier position that the amendment to IRC § 6015(e), which added the phrase “against whom a deficiency has been asserted,” created an ambiguity that required consideration of legislative history. Instead, the court held “that the phrase establishes a condition precedent: A petitioner in this Court who seeks judicial review of a denial of relief must show that the Commissioner asserts that he owes more in tax than reported on this return.” *Id.* at 16. While lamenting that this result was not what Congress likely intended when it amended the statute, the court overruled its prior holding in *Ewing I* and dismissed *Billings*’ petition for lack of jurisdiction. *Id.* at 17-18.

On August 25, 2006, the Service’s Office of Chief Counsel issued Chief Counsel Notice CC-2006-020, directing its attorneys to move to dismiss all cases involving stand-alone IRC § 6015(f) cases in which no deficiency had been determined. Based on its decision in *Billings*, the Court dismissed numerous nondeficiency stand-alone petitions for lack of jurisdiction.¹

On June 15, 2006, in anticipation of the *Billings* decision, Senators Feinstein and Kyl introduced Senate Bill 3523, proposing the amendment of IRC § 6015(e)(1) to grant the Tax Court jurisdiction to review denials of relief under IRC § 6015 in any case where an individual requested relief under IRC § 6015(f). On December 20, 2006, Senate Bill 3523 passed as part

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SECTION OF TAXATION SEEKS NOMINATIONS FOR THE J. RONALD SHIFF MEMORIAL PRO BONO AWARD

The Maryland State Bar Association's Section of Taxation established an annual pro bono award in memory of J. Ronald Shiff, Esquire, a past Chair of the Section and a distinguished tax attorney with the firm of Gordon Feinblatt. This annual award recognizes the efforts and dedication of one or more individuals or law firms who have provided meritorious pro bono services in the field of taxation, with special consideration given to those who have represented either low income taxpayers or organizations who serve low-income taxpayers.

The Pro Bono Award Committee is now seeking nominations for candidates for the 2007 J. Ronald Shiff Memorial Pro Bono Award. Nominations must be submitted by March 23, 2007.

For further information, please contact James W. Dawson, Jr., Esquire, Chair of the Pro Bono Award Committee, at (301) 838-3227 or by email at jdawson@steinsperling.com.

ELIGIBILITY AND CRITERIA FOR SELECTION FOR THE J. RONALD SHIFF MEMORIAL PRO BONO AWARD

Eligibility

- ◆ Eligible candidates include individual attorneys or law firms who render legal services to individuals or organizations in Maryland. Individuals who are members of the Tax Section Council or its committees (including those Past Chairs who remain on the Section Council for a period of time as outlined in the Section By-laws) are not eligible for nomination or consideration.
- ◆ Candidates must have performed a level of pro bono service that is measurable and within the parameters discussed in the criteria for selection section below. Bar association activities or other activities of a pro bono nature that benefit the profession or the practice of law will not be considered for purposes of this award.

Criteria for consideration and selection

Evaluation of pro bono services rendered include those provided over an extended period of time (not limited to the current year), as well as activities with intensive involvement over a limited time with significant impact:

- ◆ Handling a significant number of tax controversies for low-income taxpayers on a pro bono basis
- ◆ Voluntarily forming, operating or participating in organizations, such as low-income taxpayer clinics (LITCs) devoted to representation of low-income taxpayers, particularly if such participation is over an extended period

- ◆ Formation, supervision and participation in programs to assist taxpayers in the resolution of their tax controversies, including "attorney of the day" programs for the Tax Court
- ◆ Mentoring and teaching law students and other individuals who work for LITCs
- ◆ Preparation of resource materials for LITCs and other low-income programs
- ◆ Providing pro bono legal assistance to IRC section 501(c)(3) tax-exempt organizations, especially those formed to help low-income individuals. Special consideration should be given to those candidates who provide advice on tax matters to such organizations on a pro bono basis
- ◆ Providing legal services to individuals affected in periods of national crisis or natural disasters (such as victims or families of victims of terrorist attacks, floods, earthquakes, or hurricanes) or to individuals or family members of those who serve in the armed forces of the United States during war times, with special emphasis on assistance in providing advice on tax matters
- ◆ Providing education on tax matters to members of the general public (such as through speaker's forums, etc.), especially to groups consisting of low-income individuals

NOMINATION FORM

J. RONALD SHIFF MEMORIAL PRO BONO AWARD

SECTION OF TAXATION, MARYLAND STATE BAR ASSOCIATION

I/We have considered the eligibility/selection criteria for the above award and wish to nominate:

Name (individual or law firm) _____

If an individual, please also include name of firm; if nominating a law firm please include names of lawyers in firm who worked on the matter/matters giving rise to the nomination.

Address of nominee _____

Description of pro bono services provided and what such services accomplished or why they were valuable — please include, where known, the hours of representation provided, the duration of the representation (such as over an extended period of time or intensive involvement over a limited period of time), the type of legal work or activities undertaken by the nominee and, in particular whether the services were provided to an individual low-income taxpayer or an organization that serves low –income individuals), and the significance or impact of such services.

Use additional paper if necessary.

Reasons why the individual or law firm should be selected to received the Pro Bono Award—(narrative of specific details or achievements are encouraged):

Submitted by:

Name: _____
Organization or firm name (where applicable)

Address: _____

phone: _____

e-mail: _____

May we contact you to discuss this nomination? _____

Please submit this nomination form by March 23, 2007 to:

James W. Dawson, Jr., Esq.
Chair, Pro Bono Award Committee
MSBA Section of Taxation
Maryland Bar Center
520 West Fayette Street
Baltimore, MD 21201

Or via e-mail to: jdawson@steinsperling.com

Note: if using e-mail please fill out the form and convert it to a PDF document or contact the above via e-mail and a Word document will be e-mailed to you for you to use.

CALLING FOR NOMINATIONS FOR THE TAX EXCELLENCE AWARD

The Maryland State Bar Association's Section of Taxation is seeking nominations for the 2007 Tax Excellence Award. The Tax Excellence Award is presented annually to an attorney, law school professor, public official or member of the judiciary who exemplifies professional, academic or public service excellence, integrity, compassion and commitment in the areas of practicing, teaching or developing tax law or tax policy.

If you know an individual who should be considered, please email your nomination to James W. Dawson, Jr., Esquire, Chair of the Tax Excellence Award Committee, at jdawson@steinsperling.com. You must include a brief statement as to why you feel the nominee is worthy of consideration. Nominations must be submitted by March 23, 2007.



INNOCENT SPOUSE RELIEF...

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of The Tax Relief and Health Care Act of 2006, div. C, sec. 408(a), Pub. L. 109-432, 120 Stat. 922, _____. The amendment applies "with respect to liability for taxes arising or remaining unpaid on or after the date of the enactment of this Act."

PRACTICE TIP: For cases that were dismissed for lack of jurisdiction after *Billings*, petitioner were advised to file motions to vacate pursuant to Tax Court Rule 162, if no more than 30 days had passed since the case was dismissed. In cases where more than 30 days have passed since the order of dismissal, petitioners may move for leave to file a motion to vacate, citing the new legislation. If the liability at issue has been paid, the Tax Court lacks jurisdiction.

Footnotes

¹ *McCausland v. Commissioner*, T.C. Memo. 2006-246; *Schlachter v. Commissioner*, T.C. Memo. 2006-244; *Banderas v. Commissioner*, T.C. Memo. 2006-228; *Hunter v. Commissioner*, T.C. Memo. 2006-227; *Starbuck v. Commissioner*, T.C. Memo. 2006-210; *Meade v. Commissioner*, T.C. Memo. 2006-209; *Alioto v. Commissioner*, T.C. Memo. 2006-199; *Toppi v. Commissioner*, T.C. Memo. 2006-182; *Stroud v. Commissioner*, T.C. Memo. 2006-175.



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Comments, contributions, and suggestions are greatly appreciated. Please direct them to the Editor.

Items contained in Tax Talk reflect the views of the individuals who prepared them and do not necessarily reflect the opinions of the MSBA Tax Section.