



November 7, 2014  
1:45 PM – 3:00 PM

### **Session 309: What Every Attorney Needs to Know about Tax: Top 10 Key Developments**

Law firm attorneys and in-house counsel, whether they practice in corporate, litigation, energy, real estate, tax or other legal disciplines, are keenly aware of the potential significant tax costs that may arise in any transaction. For example, an unexpected 30% withholding tax on transaction payments or a 39.6% income tax on litigation proceeds can significantly alter the economics of the deal. The purpose of the panel is to sensitize attendees to current tax issues that could have a major impact on your law firm or in-house practice. The tax climate is often in flux, and that is more so the case currently with the initiative by Congress to reform the Internal Revenue Code and by the states to fill budget deficits with through tax collections. In addition, the IRS is undertaking substantial efforts to ensure that income is taxed in the U.S. through its efforts to ensure reporting of foreign accounts held by U.S. persons and its efforts in regard to inversions by U.S. companies. The timing of the Convention – just after the mid-term elections – is ideal to assess or re-assess major tax law changes that might affect attendees, companies and clients. This program would provide a practical high-level overview of key administrative and legislative developments and their tax impact from federal, employee benefits/ERISA, and state and local tax perspectives on transactions and litigation issues that arise for all attorneys, regardless of area of practice.

**Program Chair & Moderator:**

Amish M. Shah, *Partner*, Sutherland Asbill & Brennan LLP

**Speakers:**

Michael Kam, *Senior Counsel*, Linklaters LLP

Chaya Kundra, *Partner*, Kundra & Associates P.C.

David W. K. Wong, *Partner*, Carlsmith Ball LLP

# **Tax Hot Topics That Every Attorney Needs to Know to Effectively Represent Their Clients**

2014 NAPABA Annual Convention

November 7, 2014

Session 309

# Permanent Establishment- Managing Your Employees' LinkedIn Accounts

- Factual question of whether your client has a permanent establishment in a foreign country.
- If so, may have an obligation to file and pay foreign taxes.
- Recent Indian case found permanent establishment based in part on an employee's description in his LinkedIn account profile.
- What do your clients need to consider about managing LinkedIn account profiles of employees?

# States Dash for Cash - Aggressive Pursuit of Out-of-State Taxpayers

- State Budget Shortfalls
- Need to Maintain and Attract In-State Businesses
- Solution - Increase Revenue from Out-of-State Taxpayers



# Virtual Presence, Real Taxes

- Clicks vs. Bricks
- Cloud Computing
- The Perils of Social Media



# Just Passing Through

- Is the entity truly disregarded?
- Upstream nexus
- Taxation of nonresident owners

# Employee Meals On Premises-

## Section 119

- The IRS announced its intention to review the rules regarding meals provided by employer to its employees on the employer's premises, which heretofore have been excluded from employees' compensation.
- Meals provided to employees at the workplace, whether for overtime services or to encourage employees to remain on the employer's premises during meal breaks, is a common practice in certain businesses, particularly professional service, software and other high tech employers.
- Query whether there are abuses in practice, e.g., is it an abuse if employees take home leftovers.
- Is increased employee productivity reason enough to dissuade the IRS from making any changes to limit this tax free benefit?

# Paying “Pennies on the Dollar” For your Taxes- Are Those Radio Ads Correct?

- There are numerous radio advertisements for companies that claim to be able to lower taxes for “pennies on the dollar.”
- What programs are available to reduce taxes and what is the reach of the IRS and can I really compromise my taxes? Federal resolution options include:
  - Offers in Compromise
  - Installment Agreements
  - Bankruptcy
  - Penalty Abatements
  - Currently not collectible
- What should your clients do to protect themselves if the IRS questions your clients’ tax returns?



# State Tax Procedure and Collections

- Statute of Limitations
- Penalties and Interest
- Denial of Deductions
- Personal Liability

# Inversions- Companies Leaving the U.S.

- Congress and the Administration are ranting about companies that engage “inversion” transactions to lower their U.S. Taxes, yet many companies have publicly announced their intention to invert.
- What is an inversion?
- Why are companies doing inversions?
- Given all of the negative press about inversions, what is Congress and the Administration doing about inversions?
- What do your clients need to know about inversions?



# FATCA-

## No more Swiss Bank Accounts

- FATCA (Foreign Account Tax Compliance Act) is intended for force foreign entities to disclose U.S. account owners – part of the effort to get rid of hidden offshore assets.
- What is FATCA?
- 30% of any payment to a non-compliant counterparty is required – your client is on the hook for paying that amount if your client fails to understand whether FATCA withholding is required.
- Your client also may be liable for your counterparty's 30% withholding if you fail to properly negotiate your agreements.

# FBAR/ OVDI – Stiff Criminal and Civil Penalties for Overseas Accounts

- Many individuals used Swiss and other foreign bank accounts to hide money offshore – the IRS is focused on stopping that practice.
- What is FBAR and what does it require of company executives and other individuals with signatory authority over foreign bank accounts?
- What are the stiff criminal and civil penalties for failure to comply?
- What are companies, company executives and other individuals doing to protect themselves?
- Using the OVDI program to settle offshore account tax issues and minimize the stiff penalties.

# FBAR / OVDI Options

- Standard OVDI = 27.5%; 50%; 8 years.
- Opt Out = 8 years; 3 years; 6 years.
- SDOP = streamlined domestic.
- SFOP = streamlined foreign
- Quiet Filings

# Expatriation – Individuals Leaving the U.S.

- Around each election, celebrities mightily swear that they will leave the country if one of the candidates is elected. Does that really happen?
- The Administration raised tax individual income tax rates including on ordinary income, capital gains and through the net investment income tax.
- Current expatriation activity.

# Employment Tax Issues- Dealing With and Avoiding Problems

- The employment tax obligations of our clients are an often overlooked tax.
- What happens when you have not been making federal tax deposits?
- When do employment taxes become personal and will bankruptcy help?
- Considering employment taxes in due diligence activities for the acquisition of a company.



# Personal Liability for Employment Taxes

- §6672 – Trust Fund Recovery Penalty
  - Willfulness
  - Knowledge

# Bitcoins-

## What does the IRS think of this?

- What are Bitcoins?
- Why are the IRS and states concerned about them?
- How might clients take advantage of the Bitcoin and other virtual activity, while limiting exposure?
- What guidance do we have from taxing authorities?



# Bitcoins-

## What does the IRS think of this? (Con't)

- IRS Regulation of Virtual Currency
  - Virtual currency is subject to third-party reporting requirements: Employment and income tax withholding. Virtual currency that is paid by an employer as compensation for services represents wages and therefore is subject to employment taxes and income tax withholding.
  - Given that virtual currency is used by many precisely because of its anonymity, compliance with the IRS's third-party reporting system may be uneven at best.
- Virtual currency is subject to third-party reporting requirements: Employment and income tax withholding. Virtual currency that is paid by an employer as compensation for services represents wages and therefore is subject to employment taxes and income tax withholding.

# Deferred Compensation: Section 409A

- The IRS announced its intention to begin auditing compliance with section 409A, which pertains to requirements applicable to deferred compensation.
- Section 409A has been around for many years now, having replaced custom and practices that seemingly included many opportunities for tax mischief.
- However, section 409A is a vexing and complicated set of “game-changing” rules, including the definition of “deferred compensation” with sometimes surprising and non-intuitive results.
- The Service is not yet comfortable issuing rulings on section 409A and hence increased enforcement arguably seems premature.
- Taxpayers are advised, if they haven’t done so already, to review their deferred compensation arrangements in anticipation of increased enforcement.

# Same-Sex Marriage- *Windsor* Tax Impacts

- Defense of Marriage Act struck down in a tax case – *Windsor*
- Post-*Windsor*, there are a number of required federal tax law changes
  - Obtaining refunds for prior year returns
  - Reporting future returns as married filers
  - Potential marriage penalty
- What do clients need to do to comply with the same-sex marriage decision in *Windsor*?

# Transportation and Lodging

- Does it stay in Vegas?
- Uber aggressive
- It's good to share . . .

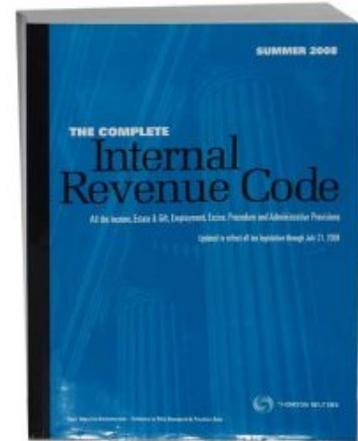
# Affordable Care Act/ ObamaCare- Continuing Fights and Compliance

- The Affordable Care Act, sometimes referred to as ObamaCare continues to be fought at every level.
- What are the current fights over?
- What costs are there to your client and are those costs appropriate?
- What does your client continue to need to do to comply?

## *Bobrow -*

# Can you Rely on your Tax Attorney?

- You've asked your tax counsel for advice, considered their source before
- Mr. Bobrow was a tax partner at a large firm.
- Mr. Bobrow relied on IRS publications for his tax position.
- Court determined that his reliance was unwarranted and held for the government.
- Your clients need to understand what actually comprises "tax law" when they rely on inside or outside tax counsel.
- Even with an opinion, reliance was be reasonable to avoid tax penalties.



# Questions?

