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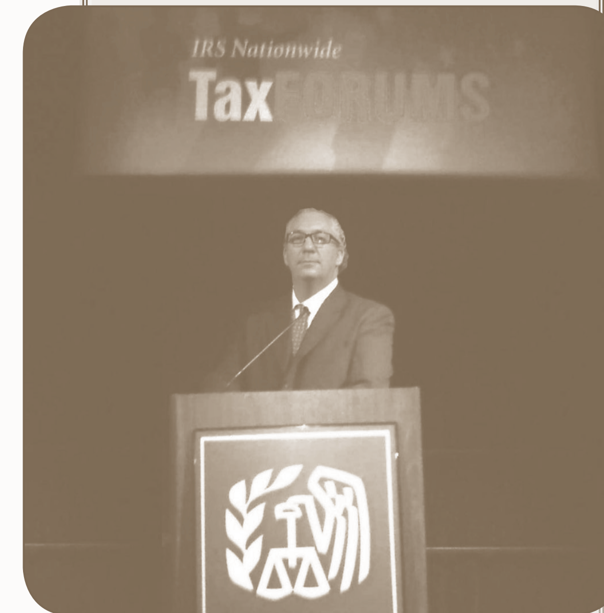
IRS Busts Swiss Secrecy Wide Open and Obtains an Additional 4,450 Names From UBS Switzerland as IRS Criminal "AMNESTY" Program Winds Down Closing on ~~September 23, 2009~~ October 15, 2009

By Josh O. Ungerman, J.D., CPA

The IRS requires taxpayers to disclose foreign accounts on tax returns even if the foreign account generates no income. If the amounts in the foreign accounts exceed $10,000 collectively, a U.S. taxpayer must also file a Form TD F 90-22.1 FBAR (Report of Foreign Bank and Financial Accounts) disclosing information on the foreign account. Many in North Texas have no knowledge of these requirements or have received erroneous advice from offshore bankers or others that these requirements do not apply to them.

The IRS for years has wanted to lift the veil of Swiss banking secrecy to determine if U.S. taxpayers with offshore accounts are IRS compliant. To entice self disclosure to the IRS, the IRS is allowing, until ~~September 23, 2009~~ October 15, 2009, U.S. taxpayers to approach the IRS and voluntarily disclose the existence of undisclosed foreign accounts and entities in exchange for no criminal prosecution and reduced civil taxes and penalties.

UBS (through the Swiss government) recently agreed to provide the IRS with 4,450 names of U.S. customers. Many in North Texas are expected to be on the list. The provision of these names is a tremendous blow to Swiss banking secrecy as it relates to IRS tax matters for U.S. taxpayers.



The new IRS Voluntary Disclosure Program expires ~~September 23, 2009~~ October 15, 2009 and is designed to bring as many U.S. taxpayers back into compliance with U.S. tax laws as possible. Generally, all back taxes on unreported income earned in these accounts must be paid along with an accuracy (20%) or delinquency penalty (.5% a month up to 25%). Fortunately, the IRS only requires taxpayers to go back 6 years, allowing earlier noncompliance to be forgiven completely, even if it is of a most egregious nature.

The IRS is also demanding 20% of the highest balance in the account in the last six years as a FBAR nondisclosure penalty in lieu of all other penalties which, in certain cases, could easily exceed 100% of the amount in the offshore account. This 20% of the highest balance in the account penalty may be inadvertently harsh in light of the recent overall reduction in investment account values for many North Texans.

The new IRS Voluntary Disclosure Program will not apply to accounts with income from illegal sources. Also excluded are U.S. taxpayers already under investigation. The challenging aspect of this method of exclusion is that the IRS is the holder of the list of taxpayers currently under investigation and will not tip their hand until after an initial disclosure under the new Voluntary Disclosure Program. Accordingly, all new

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Voluntary Disclosures must be handled with care by an experienced criminal tax attorney who has thoroughly prepared all information for the initial disclosure with the IRS. The decision of whether or not to participate in the new IRS Voluntary Disclosure Program must be addressed with great care.

The IRS has already secured four felony guilty pleas from U.S. taxpayers who banked with UBS and a felony guilty plea from one of the UBS bankers. The IRS has described its efforts to date as "the tip of the iceberg". The U.S. Department of Justice has admitted that it has opened up at least 150 investigations of UBS depositors. The Swiss government has agreed to allow the IRS to probe other Swiss banks, and the IRS is looking at banks in other countries for U.S. taxpayer noncompliance.

In summary, the IRS is already investigating over 150 U.S. taxpayers with offshore accounts and UBS is in the process of turning over another 4,450 names to the IRS. In the meantime, the IRS criminal "amnesty" program expires this month on ~~September 23, 2009~~ October 15, 2009. It is an interesting coincidence that UBS will not be finished notifying U.S. taxpayers if their name will be turned over to the IRS prior to the expiration of the new IRS Voluntary Disclosure program on ~~September 23, 2009~~ October 15, 2009. The gap will result in many more UBS clients stepping up to participate in the new IRS Voluntary Disclosure Program than may actually be disclosed to the IRS because of a fear of the unknown. There are alternative options for taxpayers with undisclosed offshore accounts which must be considered with great care in light of the potential consequences. After ~~September 23, 2009~~ October 15, 2009 the IRS has vowed to throw the book at nondisclosing foreign account holders, promising criminal investigations and a much harsher civil penalty regime.

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Recent Texas Case Creates Incentive in the Form of Attorneys' Fees for Proactive Taxpayers to Seek Declaratory Judgment on Controversial Tax Issues Before Payment of Tax is Due or an Assessment of Tax Occurs

By David E. Colmenero, J.D., LL.M., CPA

A recent decision by the Third Court of Appeals in Texas may create an incentive for taxpayers to be proactive in challenging a position by the Texas Comptroller of Public Accounts. The decision suggests that by bringing a lawsuit against the State even before payment is due or an assessment of tax occurs, a taxpayer may be able to recover attorneys' fees from the State in addition to overruling the State's position.

The case is *Comptroller v. Texas Entertainment Association, Inc.*, 287 S.W.3d 852 (Tex. Civ. App.—Austin, 2009). The threshold issue in *Texas Entertainment Association, Inc.* is whether legislation enacted in 2007 that imposed a tax on certain sexually oriented businesses is constitutional. The tax appeared in Chapter 47 of the Texas Business and Commerce Code and was imposed on a sexually oriented business at the rate of $5 per customer. *See* Tex. Bus. & Com. Code Ann. § 47.052(a). Texas Entertainment Association, Inc. and Karpod, Inc. (collectively, "Taxpayers") filed a lawsuit against the State seeking declaratory and injunctive relief under the Texas Uniform Declaratory Judgments Act (the "UDJA"). The district court granted Taxpayers' request, holding that the tax violated the First Amendment of the U.S. Constitution. The court permanently enjoined the Texas Comptroller from assessing or collecting the tax and also awarded attorneys' fees to Taxpayers. The State appealed.

The Third Court of Appeals in Austin, Texas upheld the lower court's holding. However, the significance of the

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Upcoming Speaking Engagements

(For complete speaking engagement information, please visit our firm website at www.meadowscollier.com. Click on the News & Events tab from the Home page of the website.)

SEPTEMBER 26, 2009 — JOSH O. UNGERMAN
American Bar Association Tax Section 2009 Joint Fall CLE Meeting
Chicago, IL

OCTOBER 01, 2009 — JOSH O. UNGERMAN
East Texas Estate Planning Council
Tyler, TX

OCTOBER 21, 2009 — JOEL N. CROUCH
Accounting Continuing Professional Education Network (ACPEN) Live Webcast
Dallas, TX

OCTOBER 21, 2009 — JOSH O. UNGERMAN
OCTOBER 22, 2009 — WILLIAM R. (TREY) COUSINS, III; TODD A. KRAFT
DFK/USA Multidiscipline Conference
Fort Worth, TX

OCTOBER 23, 2009 — WILLIAM R. (TREY) COUSINS,III
Houston Estate and Financial Forum
Houston, TX

OCTOBER 27, 2009 — ANNUAL CONFERENCE
11th Annual Meadows Collier Taxation Conference
"Ideas for Helping Your Clients and Improving Your Bottom Line"
Cityplace Conference Center, Dallas, TX
(Visit the firm website at www.meadowscollier.com to view the Program Agenda and the conference details. Click on the News & Events tab from the Home Page on the website.)

NOVEMBER 03, 2009 — JOSH O. UNGERMAN
2009 Austin CPA Chapter Annual Tax Conference
Austin, TX

NOVEMBER 06, 2009 — TODD A. KRAFT
Permian Basin Chapter/TSCPA CPE Expo
Odessa, TX

NOVEMBER 10, 2009 — TODD A. KRAFT; DAVID E. COLMENERO
The McLennan Community College Foundation Fifth Annual Tax Institute
Waco, TX

NOVEMBER 11, 2009 — WILLIAM R. (TREY) COUSINS, III
San Angelo Chapter/TSCPA
San Angelo, TX

NOVEMBER 12, 2009 — CHARLES M. (CHUCK) MEADOWS, JR.; WILLIAM R. (TREY) COUSINS, III; JOEL N. CROUCH
Wichita Falls Chapter/ TSCPA
Wichita Falls, TX

NOVEMBER 17, 2009 — DAVID E. COLMENERO
Dallas Practice Management Group
Dallas, TX

NOVEMBER 18, 2009 — CHARLES W. (CHARLIE) BLAU
Accounting Continuing Professional Education Network (ACPEN) Live Webcast
Dallas, TX

DECEMBER 2009 — JOEL N. CROUCH; CHARLES D. PULMAN
TSCPA CPE Expo
DECEMBER 1, 2009 - *Houston, TX*
DECEMBER 4, 2009 - *San Antonio,, TX*
DECEMBER 9, 2009 - *Arlington, TX*

DECEMBER 3, 2009 — CHARLES M. (CHUCK) MEADOWS, JR.
ABA Twenty-Sixth National Institute on Criminal Tax Fraud
San Francisco, CA

DECEMBER 9, 2009 — DAVID E. COLMENERO
San Angelo Chapter/TSCPA
San Angelo, TX

DECEMBER 10, 2009 — CHARLES M. (CHUCK) MEADOWS, JR.
UT 57th Annual Taxation Conference
Austin, TX

DECEMBER 11, 2009 — WILLIAM R. (TREY) COUSINS, III
2009 Stanley M. Johanson's Estate Planning Workshop sponsored by The University of Texas School of Law
Austin, TX

DECEMBER 14, 2009 — MICHAEL A. (MIKE) VILLA JR.
DECEMBER 15, 2009 — WILLIAM R. (TREY) COUSINS, III
Louisiana Tax Conference sponsored by the Louisiana Society of CPAs
New Orleans, LA

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Tax Issues in Divorce: Not as Simple as Most Think

will result in capital gains is more valuable to the party with the capital losses.

The division of exemptions can present a significant opportunity for negotiation and planning. The custodial parent is entitled to take the dependency exemption unless he or she releases the exemption to the non-custodial parent. If the custodial and non-custodial parents are in different tax brackets, the dependency exemption may be more valuable to the parent in the higher tax bracket. Likewise, the child tax credit and available educational credits may also provide opportunities for negotiation and planning.

Generally, the transfer of the interest in the marital home does not result in the recognition of gain or loss pursuant to Section 1041. Such a transfer becomes more complicated when Section 121 is considered. Pursuant to Section 121(a), gross income does not include gain from the sale or exchange of property if, during the five-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating two years or more. Pursuant to Section 121(d)(3), an individual shall be treated as using property as such individual's principal residence during any period of ownership while such individual's spouse or former spouse is granted use of the property under a divorce or separation instrument. The issue becomes much more complicated if, post divorce, the individual has purchased a new home which may be his or her principal residence for purposes of Section 121.

Of primary importance in any divorce matter are the innocent spouse provisions. Under Section 6015(b), an individual may be relieved of a tax liability, including penalties and interest if that individual can establish: 1) a joint return was filed; 2) there is an understatement of tax attributable to an erroneous item or items of the other individual; 3) the individual did not know or have reason to know of the understatement; and 4) it would be inequitable to hold that individual liable for any deficiency. Section 6015(c) allows a separated or divorced individual further protection by allowing him or her to limit their liability for any deficiency which is assessed with respect to the return to the portion which is properly allocable to that individual. Exceptions to Section 6015(c) relief include transfers made as part of a fraudulent scheme or transfers of property to avoid tax. Both Sections 6015(b) and (c) require assertion no more than two years after the IRS begins collection activity.

If neither Section 6015(b) nor 6015(c) is applicable, the IRS may relieve an individual of liability under Section 6015(f) if "taking into account all facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or any deficiency". A recent decision from the United States Tax Court held that such a taxpayer is not required to request 6015(f) relief within two years of the beginning of IRS collection activity. However, the IRS is continuing to assert the two-year period while the issue is pending further resolution.

These are but a few of the many tax issues that can arise in a divorce or separation matter. Because taxes can have an economic consequence, it is important that the clients obtain tax advice on any portion of any settlement.

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appellate court's decision -- at least for purposes of this article -- has less to do with the constitutionality of a sexually oriented business tax and much to do with the court's holding on the award of attorneys' fees. Those attorneys' fees were awarded under the UDJA. The State argued that Karpod was not entitled to attorneys' fees under the UDJA because the UDJA claim was redundant to the legal remedy provided by the tax protest provisions of the Tax Code (i.e., Chapter 112 of the Tax Code). The Comptroller argued that Karpod had "improperly brought its UDJA claim solely as a vehicle to obtain attorneys' fees."

The court disagreed with the Comptroller. The court noted that, while Chapter 112 of the Tax Code provides Taxpayers with the statutory right to seek a return of taxes paid under protest and injunctive relief prohibiting the assessment or collection of tax, "if a party requests a declaration under the UDJA that goes beyond its request pursuant to the Tax Code, the UDJA claim is not considered a redundant remedy." Moreover, the issues to be determined in a "tax protest suit" filed under Chapter 112 are limited to those set forth in a written protest as originally filed. The court noted that, at the time of trial, Karpod had not paid the tax under protest or filed a written protest because the first tax payments were not yet due. Thus, when Karpod's UDJA claim was filed, the constitutionality of the tax was not yet a "reason expressed in the written protest" that could be raised in a tax-protest suit.

The court also noted that the "Texas Supreme Court has held that taxpayers have a constitutional right to obtain judicial review of a tax liability by means of a prepayment declaratory action." Thus, at the time Karpod filed its UDJA claim in this case, "it had a constitutional right to a declaratory judgment regarding its tax liability, and such declaration was not redundant to any remedy available under the Texas Tax Code." The court therefore held that the district court had not abused its discretion in awarding attorneys' fees under the UDJA.

While the parameters of this case and its applicability to other factual scenarios will have to be established through the course of future case law, the Court's holding in *Texas Entertainment* suggests that there may be an incentive for proactive taxpayers to file a lawsuit against the State of Texas on controversial tax issues even before payment is due or an assessment of tax is made by the State. The incentive is in the form of attorneys' fees, which a taxpayer may seek under the UDJA. This may be particularly relevant today with the advent of the revised Texas Franchise ("Margin") Tax, which raises many issues that will eventually become the source of dispute between taxpayers and the State of Texas.

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Texas Supreme Court Changes the Rules for Survivorship Accounts

By Eric D. Marchand, J.D., LL.M.

Estate planning attorneys often draft a complex set of documents wherein the majority of a decedent's assets are designed to pass through a will and into a living trust structure to achieve various tax and nontax planning objectives. Texas law permits the ownership of assets by a husband and wife (and other individuals) such that the surviving individual will automatically become the owner of such assets upon the death of the other. These types of accounts are typically referred to as "with rights of survivorship" accounts.

In many cases, a married couple will

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own various bank and brokerage accounts "with rights of survivorship". At a spouse's death, therefore, the surviving spouse automatically becomes the sole owner of these accounts, irrespective of the estate planning documents. In other words, the surviving spouse's ownership of the account did not occur because of the terms of the decedent's estate plan, but merely because of such spouse's surviving the predeceasing spouse.

Because the planning objective is usually for the operative provisions of a couple's estate plan to control the ownership of assets after a spouse's death, it is generally recommended that assets be owned without rights of survivorship. Successful planning requires the estate planning attorney to coordinate the ownership of accounts with the estate plan.

Pursuant to Section 452 of the Texas Probate Code, a married couple may create a right of survivorship in community property by executing a written agreement signed by both spouses. The agreement will be deemed to be sufficient to create a right of survivorship in the described property if it includes any of the following phrases:

(1) "with right of survivorship";

(2) "will become the property of the survivor";

(3) "will vest in and belong to the surviving spouse"; or

(4) "shall pass to the surviving spouse."

Most estate planning attorneys in Texas have long practiced under the notion that a "joint tenancy" or "joint" designation on a community property account, without some other survivorship language, was insufficient to create rights of survivorship under Section 452.

Recently, however, in *Holmes v. Beatty*, 52 Tex. Sup. Ct. J. 967 (2009) the Supreme Court of Texas ruled the opposite. At issue in *Holmes* were several community property brokerage accounts amassed by Thomas and Kathryn Holmes over the course of their 27 year marriage. The accounts had a combined fair market value in excess of $10,000,000. Both Thomas and Kathryn had children

from previous marriages. Kathryn died in 1999 leaving a will that left nothing to Thomas's children from his prior marriage. Thomas died approximately nine months later leaving a will that left nothing to Kathryn's children from her prior marriage. The accounts at issue had various designations, including "JT TEN" and "Joint (WROS)". If the account designations were sufficient to establish a right of survivorship, then as the surviving spouse, Thomas would receive 100% of the accounts on Kathryn's death, and upon his death, the assets would have passed pursuant to the terms of his will, leaving nothing to Kathryn's children from a prior marriage. If, however, those designations were insufficient to create survivorship interests, then only 50% would have passed to Thomas as community property, with the remaining 50% passing pursuant to the terms of Kathryn's will, which would have left nothing to Thomas's children from a prior marriage.

The Court rejected the argument that "parties may own property as joint tenants without being subject to a right of survivorship" and held that as a matter of law a "joint tenancy carries rights of survivorship". In other words, a joint tenancy account, that otherwise meets the requirements of Section 452, automatically carries rights of survivorship without including any survivorship language. The Court further held that one of the accounts designated "Joint (WROS)" meant a "joint tenancy with rights of survivorship".

Thus, what are estate planners to do with accounts designated as "joint tenants without rights of survivorship" or "joint (without rights of survivorship)"? Presumably such designations would be sufficient to clearly state the intent of the parties that such accounts are not intended to be held with rights of survivorship. Post *Holmes*, however, it is unclear whether a joint tenancy or joint account may ever be held without rights of survivorship. As such, it is now more important than ever for estate planners and their clients to do a thorough review of all account designations. In the event the client's objective is to pass assets through his or her estate plan, all accounts should be owned as tenants in common. It seems a designation as tenants in common is the only way to be absolutely sure that there are no unintended rights of survivorship.

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As a result of the Court's ruling, Kathryn's children from her prior marriage received none of the accounts. It is hard to believe the couple intended for the predeceasing spouse's children from a prior marriage to receive none of the $10,000,000 of securities the couple amassed over their 27 year marriage. Interestingly, the court concludes by noting that if the Holmeses had "wished an alternate devise, they could have made appropriate provisions in their respective wills." Because the Court's ruling effectively attributed "rights of survivorship" to every single joint account at issue, removing such accounts from disposition under the terms of Kathryn's will, one finds this logic both confusing and suspect.

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Tax Issues in Divorce: Not as Simple as Most Think

By Joel N. Crouch, J.D.

In many divorce matters, there are significant tax issues that must be addressed. On one hand, tax benefits can be powerful negotiating tools. At the same time, each party may be facing significant tax issues related or unrelated to the divorce or separation. It is important that family law attorneys and tax professionals assist their clients in reducing the clients' tax liability and exposure to additional taxes.

In general, no gain or loss is recognized on the transfer of property between spouses. Likewise, no gain or loss is recognized on the transfer of property from an individual to a former spouse, but only if the transfer is incident to a divorce. Incident to divorce means it is related to the cessation of the marriage or occurs within one year of the date of the divorce. Payments or transfers to third parties on behalf of a former spouse may also qualify for non-recognition. There are exceptions to the general rules, such as when one of the spouses is a non-resident alien.

Although there is no recognition of gain or loss on transfers between spouses or former spouses, certain property transfers can raise related issues. For example, assume that the only asset of issue in the divorce is a partnership interest. Also assume the wife, but not the husband, is a partner in the partnership. As part of the divorce, wife agrees to transfer to husband one half of her interest in the partnership. Pursuant to Section 1041, this is a transfer related to the cessation of the marriage and thus there is no recognition of gain or loss on the transfer. However, there may be other issues. For example, does the partnership agreement address whether a partner can transfer her interest without the permission of the other partners? Is husband automatically a partner in the partnership? Does the transfer cause dissolution of the partnership? Is there a right of first refusal in the partnership agreement? These types of issues can make this simple transfer incident to divorce much more complicated.

Non-recognition under Section 1041 can be a planning and negotiation point in any divorce matter. Section 1041 can be used to accomplish net tax savings where the spouses are in different tax brackets. In deciding how to divide their assets, the parties should consider allocating to the lower-tax-bracket spouse assets with the greater built-in gain and allocating to the higher-tax-bracket spouse assets that have appreciated little or have declined in value. Even if the parties are in the same tax bracket, there are planning opportunities. For example, one party may have capital losses they would like to use. Property, the sale of which

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