August 2013

Tax Digest

A periodic newsletter highlighting developments of interest to today's companies on the move.

FEDERAL

Rescission doctrine—Alive and well

Rick Bailine, Principal, Washington National Tax

For at least 30 years, the IRS has agreed that in certain limited circumstances, taxpayers actually have the opportunity to get a second chance. That is, having done a transaction, taxpayers have the ability to undo it. This ability to undo a transaction is known as the rescission doctrine. About 18 months ago, the IRS National Office announced it would no longer issue private letter rulings on and were studying the application of the rescission doctrine, raising speculation that upon completion of this study this doctrine may be far more limited, if allowed to continue at all. The leader of the Corporate Tax Division at the IRS National Office recently announced the upcoming close of the study and indicated that taxpayers should anticipate no change to the existing IRS policy on the rescission doctrine. This is very good news because it means this doctrine is alive and well. Since not all transactions may be rescinded, taxpayers should consult with their tax advisors to determine the circumstances under which rescission may be possible.

Implications of debt guarantees on an LLC member's at-risk basis

Ed Decker, Director, Davenport, Iowa

A traditional advantage of the partnership tax structure relates to a partner's tax basis. A partner includes its share of partnership liabilities in its tax basis, which often makes it easier for the partner to take tax-free distributions and recognize losses from the entity. With respect to recognizing losses, however, the taxpayer must not only have tax basis, but must also have "at-risk" basis. The IRS recently released guidance outlining whether guarantors of LLC debt will be considered at-risk with respect to that debt. The guidance concludes that a guarantor of debt may be at-risk with respect to that debt even if the guarantor does not completely waive rights to subrogation and reimbursement from the LLC, provided that (1) the guarantee is bona fide and enforceable under local law, and (2) the guarantor is not otherwise protected against loss. With respect to the latter, the guidance indicates that co-guarantees by other parties would need to be analyzed to determine whether those co-guarantees limit the taxpayer's loss exposure. If they do, the taxpayer will not be at-risk with respect to those amounts. This ruling is significant because it explicitly acknowledges a departure from Prop. Reg. 1.465-6(d), which indicates that guarantees do not increase a taxpayer's amount at-risk. In explaining this departure, the IRS notes the specific application of this guidance to LLCs and the fact that LLC members that guarantee debt should be treated similarly to general partners. It goes on to note, however, that a limited partner (as opposed to an LLC member) would likely be subject to the guidance in Prop. Reg. 1.465-6(d) absent an explicit waiver of its rights to subrogation (see Prop. Reg. 1.465-24).

Employer notice of health insurance exchange required by Oct. 1, 2013

Steve Levin, Director, Washington National Tax
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The Patient Protection and Affordable Care Act require employers to provide by Oct. 1, 2013, a written notice to employees that discusses the new health insurance exchange. The notice must also be provided to any employee hired after Oct. 1, 2013, within 14 days of their

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start date. Regardless of employees' part-time or full-time status or enrollment in a health plan, employers must provide the notice to all employees. The notice informs employees about the health insurance exchange (also known as the health insurance marketplace) and explains that employees may be eligible for federal assistance toward the cost of health insurance purchased through the exchange. In addition, the notice states that an employee will lose the employer's contribution, if any, to the employer's health plan if the employee purchases health insurance through the exchange. The Department of Labor has issued two model notices – one for employers that offer a health plan to some or all employees and another for employers that do not offer a health plan. Since the notices include information about the employer and its plans, employers will need to customize the model notices prior to distribution.

Notices from the IRS should not be ignored

Bob Adams, Partner, Washington National Tax

The two most important things about a notice or letter from the IRS or a state are to know that you received the notice and to deal with it immediately in order to meet the response deadlines. Companies should install procedures, perhaps similar to those used to process inbound payment remittances, that ensure the immediate routing of such notices and letters to the person specifically charged with handling them. Instructions provided in the notice or letter should be followed precisely, and all written communications with the agency should be delivered by a means that provides proof of receipt by the agency. If the notice or letter is resolved on a phone call with the agency (expect long wait times), a letter including the name of the agency representative, minutes of the conversation, and the conclusion reached should be sent to the agency to avoid any misunderstandings about the conclusion reached or information rendered. Of course, the exact manner in which a notice or letter is handled depends on the nature and importance of the communication from the agency, as well as whether the notice requires a payment of additional tax, penalties or interest. For many taxpayers, having their tax advisor deal with such notices and letters is often the best solution.

Court upholds IRS refusal to allow modified purchase price allocations based on cost segregation studies

Natalie Tucker, Director, Washington National Tax
Kevin Johnson, Director, Minneapolis, Minn.
Nick Gruidl, Partner, Washington National Tax

The Court of Appeals for the Eleventh Circuit has upheld the Tax Court's ruling in *Peco v. Commissioner*, disallowing a taxpayer from modifying binding purchase price allocations. In this case, the taxpayer entered into detailed purchase agreements, subsequently had cost segregation studies performed, and filed Forms 3115 to change to more favorable depreciation methods for the assets purchased. Taxpayers entering into asset acquisitions governed by section 1060 are not required to agree to purchase price allocations, and as the decision in *Peco* reaffirms, such taxpayers should conduct cost segregation studies prior to agreeing to any purchase price allocations, as such allocations will be binding. Because *Peco* dealt specifically with an asset acquisition under section 1060, a typical real estate transaction that does not constitute the acquisition of a trade or business should not be affected by *Peco*, and the ability to perform a cost segregation study should not be impacted by *Peco*. Cost segregation studies remain a beneficial means of determining the most favorable depreciation methods for real and personal property.

INTERNATIONAL

IRS extends key FATCA deadlines and provides additional guidance

Ramon Camacho, Principal, Washington National Tax

The IRS recently issued a notice extending several key deadlines under the Foreign Account Tax Compliance Act (FATCA), including extending the date by which U.S. withholding agents are required to begin withholding to July 1, 2014. In the notice, the IRS also extended the deadline for taxpayers to conduct due diligence,

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the period in which obligations may be treated as grandfathered, and the time to establish new account opening procedures. The final FATCA regulations will be amended to incorporate the changes contained in the notice, but taxpayers may rely on the notice until the regulations are amended. Significantly, a jurisdiction that has signed an Intergovernmental Agreement (IGA) but has not yet brought such agreement into force will generally be treated by Treasury as having an IGA in effect. In addition, the online FATCA registration portal did not open by July 15, 2013, but will instead open on Aug. 19, 2013. The notice also contains many other key provisions that will affect taxpayers required to comply with FATCA, including U.S. withholding agents and foreign payees.

Significant Poland tax planning opportunity expires this year

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Ramon Camacho, Principal, Washington National Tax
Mario De Castro, Director, Vienna, Va.

Under a recent amendment to Polish tax law, taxpayers that have any depreciable real or amortizable personal property with a fair market value in excess of tax cost may revalue such property for tax purposes at fair market value without incurring additional Polish tax by completing certain steps before Dec. 31, 2013. Through this planning, the taxpayer may obtain higher amortizable or depreciable basis in its property for Polish tax purposes, and may use the higher basis to compute gain or loss on any sale of the property or upon a termination of operations in Poland, as well as to create current deductions. Taxpayers with operations in Poland that have depreciable real property or amortizable personal property (including intangible property such as trademarks, intellectual property, software, etc.) are excellent candidates for this planning opportunity. Because it expires on Dec. 31, 2013, interested taxpayers should consult with their tax advisors now to evaluate its potential benefits.

STATE & LOCAL

Louisiana enacts amnesty program

Mike Williams, Partner, Dallas, Texas

On June 21, 2013, Louisiana Governor Bobby Jindal signed HB 456, the "Louisiana Tax Delinquency Amnesty Act of 2013." The act requires the Louisiana Department of Revenue (Department) to implement a two-month tax amnesty program during the remainder of 2013, a one-month amnesty program in the second half of 2014 and a one-month amnesty program in the second half of 2015. The amnesty programs apply to all taxes administered by the Department, except for motor fuel taxes, that were either (1) due before Jan. 1, 2013, and for which the Department issued an individual or a business proposed assessment, notice of assessment, bill, notice, or demand for payment not later than May 31, 2013, (2) owed for tax periods that began before Jan. 1, 2013, or (3) owed for a tax year covered by an agreement to suspend the running or the statute of limitations on assessment until Dec. 31, 2013. Taxpayers that properly apply for and comply with the amnesty requirements will be eligible for a waiver of penalties and 50 percent waiver of interest in 2013, 15 percent waiver of penalties in 2014, and 10 percent waiver of penalties in 2015.

Massachusetts delays implementation of FAS 109 deduction

Girard Brisbois, Principal, Boston, Mass.

On July 12, 2013, Massachusetts Governor Deval Patrick signed HB 3538, the state's fiscal year 2014 appropriations bill. Pursuant to the bill, the implementation of the corporation income tax FAS 109 deduction will be delayed until tax year 2015. The FAS 109 deduction is a seven-year deduction from income intended to make corporations whole for any increase to a combined group's net deferred tax liability as a result of the adoption of combined reporting. The deduction was originally scheduled to take effect in 2012, but has been postponed annually.

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