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TAX TALK

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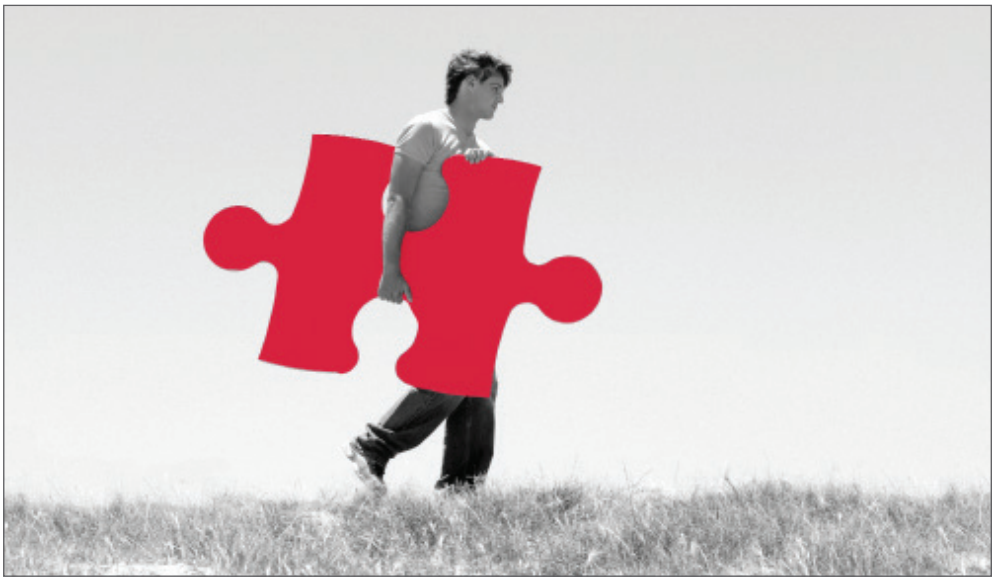

EDITOR'S NOTE

Q4 2015 saw one of the biggest tax bills to come along in some time. By all accounts, the "Protecting Americans from Tax Hikes," or PATH Act, was a rush job. That means it will take years to find the goodies (and what paid for them). One clear winner even now: foreign investors in U.S. real estate. Congress added some new provisions to the Foreign Investment in Real Property Tax Act ("FIRPTA"), which will make investment in U.S. real estate more attractive (taxwise, at least), particularly for publicly traded foreign funds in certain jurisdictions and for foreign pension funds. Much of this change will also encourage investment in U.S real estate investment trusts ("REITs"). Tax Talk explains it all.

Speaking of Subchapter M, right after the end of the quarter, the Internal Revenue Service ("IRS") provided some welcome relief for U.S. regulated investment companies ("RICs") that have received or will receive refunds of foreign dividend withholding taxes. In 2012, the European Court of Justice held that the imposition of withholding taxes on U.S. RICs violated the EU's nondiscrimination principles. Since then, RICs have been pursuing refunds from individual EU governmental tax authorities. The problem is that Internal Revenue Code ("IRC") section 905(c) requires an amended return when a foreign tax refund is received. This is impossible for a widely held RIC because its thousands of shareholders claimed the credit many years ago and there is no mechanism to pass through a refund, let alone to find the shareholders that were there at the time. The IRS guidance (which we discuss below) isn't perfect, but will help funds work through these problems.

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In other Q4 news, Tax Talk reports on the Sixth Circuit reversing the Tax Court on what can be a "foreign currency contract," the extension of the effective date of the dividend equivalent rules, a PLR on the effects of consent payments for contingent debt, the Supreme Court granting certiorari in a case deciding a REIT's "citizenship," and more. Finally, as we've done in prior election cycles, Tax Talk summarizes the tax plans of the various Republican and Democratic presidential candidates.

IRS PROVIDES RICS ALTERNATIVES TO ACCOUNT FOR FOREIGN TAX REFUNDS

Generally, when a U.S. taxpayer pays foreign tax, the U.S. taxpayer is entitled to take a credit (a "Foreign Tax Credit") against the taxpayer's U.S. tax liability. The purpose is to avoid double taxation. When a RIC pays foreign tax, it has two options: it can either claim the foreign tax credit itself to offset any tax liability, or under certain circumstances, it can make a "Section 853 Election" that allows the RIC to pass through the foreign tax credit to its shareholders. In other words, the RICs shareholders are entitled to claim the foreign tax credit directly on their tax returns. Under existing rules (the "Default Method"), a taxpayer that receives a refund of foreign taxes is required to notify the IRS, which redetermines the taxpayer's U.S. tax liability in the year in which the credit was taken. Due to a recent ruling by the EU Court of Justice, many RICs have received refunds of foreign taxes paid by the RIC in prior years. These refunds have caused RICs to question whether the existing rules regarding foreign tax credit refunds are administrable when applied to RICs that have made Section 853 Elections.

Notice 2016-10 (the "Notice"), released on January 15, 2016, by the IRS, gives RICs additional options when faced with refunds of foreign taxes paid in prior years. Generally, the Notice allows RICs to treat foreign tax credit refunds under two methods. The first method, the "Netting Method," applies to a RIC that, in the same year in which it receives a refund of foreign taxes (the "Refund Year"), also pays an amount of foreign taxes equal to or greater than the refund (including interest received from the foreign taxing jurisdiction). Essentially, the RIC is permitted to use the foreign tax refund received to offset the foreign tax paid in the Refund Year. As a result, the RIC is not required to separately include the tax refund in its gross income, and shareholders are able to take advantage of foreign taxes paid by the RIC that are not offset by the refund. The Netting Method is available to RICs if (1) the economic benefit of the refund inures to the RIC's Refund Year shareholders, (2) the RIC was not held predominantly by insurance companies or fund managers in connection with the creation or management of the RIC, (3) the RIC makes a Section 853 Election in the Refund Year, and (4) (as discussed above) foreign taxes paid by the RIC in the Refund Year equal or exceed the amount of the foreign tax refund (including interest received from the foreign taxing jurisdiction). If a RIC takes advantage of the Netting Method, the RIC is required to file an information statement with the IRS.

The second method under the Notice allows RICs that receive a refund of foreign tax to request a closing agreement with the IRS addressing the treatment of the refund, which the IRS will grant where such agreement is found to be in the interest of sound tax administration. According to the Notice, a closing agreement will generally be considered to be in the interest of sound tax administration where (1) the RIC demonstrates that it is precluded from applying either the Default Method or the Netting Method, and (2) the RIC provides information sufficient to establish a reasonable estimate of the aggregate adjustments that would be due under the Default Method.

The Notice also states that the IRS intends to promulgate regulations in the future that memorialize these rules. Until that time, RICs may rely on the Netting Method as described in the Notice to address refunds received in past tax years.

SIXTH CIRCUIT REVERSES TAX COURT: A FOREIGN CURRENCY OPTION CAN BE A "FOREIGN CURRENCY CONTRACT"

In *Wright v. Commissioner*,[1] taxpayers, the Wrights, challenged a Tax Court decision upholding an IRS deficiency claim. The Wrights had engaged in a major-minor transaction detailed as follows: (i) the Wrights were members in an investment company called Cyber Advice, LLC, which was treated as a partnership for federal income tax purposes; (ii) Cyber Advice paid premiums to purchase reciprocal offsetting put and call options (the purchased options) on a foreign currency in which positions are traded through regulated futures contracts (the "major currency"—here, the euro); (iii) Cyber Advice received premiums for writing reciprocal offsetting put and call options (the written options) on a different foreign currency in which positions are not traded through regulated

1 117 AFTR 2d 2016, (6th Cir. 2016).

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futures contracts (the "minor currency"—here, the Danish krone); (iv) the net premiums paid and received substantially offset one another and the values of the two currencies underlying the purchased and written options historically demonstrated a very high positive correlation with one another; (v) Cyber Advice assigned to a charity the purchased option that had a loss and the charity also assumed Cyber Advice's obligation under the offsetting written option that had a gain; and (vi) the Wrights, as members of Cyber Advice, took the position that the purchased option assigned to the charity is a contract subject to Section 1256 of the Code, marked the purchased option to market under Section 1256 of the Code, and claimed a loss.

This transaction is similar to the transaction in *Summitt v. Commissioner*,[2] a case discussed in an earlier edition of Tax Talk,[3] which held that foreign currency options are not foreign currency contracts within the meaning of Section 1256 of the Code; therefore, the *Summitt* taxpayers were not allowed to claim the losses resulting from their major-minor transaction. In following *Summitt*, the Tax Court also rejected the Wrights' argument that foreign currency options were foreign currency contracts within the meaning of Section 1256 because options are not contracts that "require delivery of, or the settlement of which depends on the value of, a foreign currency" as set forth in Section 1256(g)(2)(A)(i).

On appeal, the Sixth Circuit reversed and remanded. The Sixth Circuit held the Tax Court's ruling was incorrect because it ignored the plain language of the statue. Section 1256(g)(2) defines a foreign currency contract as:

(A) Foreign currency contract.—The term "foreign currency contract" means a contract—

(i) which requires delivery of, or the settlement of which depends on the value of, a foreign currency which is a currency in which positions are also traded through regulated futures contracts,

(ii) which is traded in the interbank market, and

(iii) which is entered into at arm's length at a price determined by reference to the price in the interbank market.

The Commissioner took the position that Section 1256(g)(2) is a unified provision that provides that a contract must mandate at maturity either a physical delivery of a foreign currency or a cash settlement based on the value of the currency; however, the Sixth Circuit disagreed with this interpretation of the statue. The Sixth Circuit explained that the use of the word "or" between the delivery and settlement phrases indicated that the phrases described two ways in which a contract may qualify as a foreign currency contract; either the contract (1) could require delivery of a foreign currency or (2) could be a contract the settlement of which depends on the value of a foreign currency. Accordingly, an option "could be" a foreign currency contract.

In reversing the Tax Court's decision, the Sixth Circuit recognized that tax policy did not appear to support allowance of the Wrights' claimed losses; however, this was not a reason sufficient to reform the statutory language. The Sixth Circuit stated that there were two alternatives more appropriate for dealing with the type of abuse observed in the transaction. First, it stated that Congress allows the secretary to prescribe regulations to exclude any type of contract from the foreign currency contract definition if the inclusion of the type of contract would be inconsistent with the purposes of Section 1256. Also, according to the Court, Congress allows the Commissioner to prevent taxpayers from claiming inappropriate tax losses by challenging specific transactions under the economic substance doctrine. Tax Talk will keep an eye on this case as it continues.

RULING ADDRESSES EFFECTS OF CONSENT PAYMENTS ON CONTINGENT DEBT

PLR 201546009 addresses the tax treatment of consent payments to holders of an outstanding issuance of contingent payment debt instruments.

Taxpayer, a publicly traded corporation, issued a series of publicly traded debentures (the "Notes") treated as contingent payment debt instruments ("CPDIs"). As CPDIs, the Notes were treated under the noncontingent bond method whereby holders of the Notes ("the "Noteholders") would accrue original issue discount at the Taxpayer's "comparable yield," the rate at which Taxpayer would otherwise borrow on a similar noncontingent debt instrument. Likewise, Taxpayer was allowed to take deductions at the comparable yield. Additionally, a "projected payment schedule" is determined for the Notes that serves as a benchmark by which Noteholders recognize income on the Notes as contingencies resolve. If Noteholders receive an amount greater than the projected payment amount, this results in a "positive adjustment" that is generally treated as additional interest. If Noteholders receive less than the projected amount, this results in a "negative adjustment" that can be used to offset prior interest inclusions, subject to limitation.

2 134 T.C. 248 (2010).

3 For a more detailed analysis of *Summit v. Commissioner, please see our previous Tax Talk article at*: http://media.mofo.com/files/Uploads/Images/100716TaxTalk.pdf.

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Under the ruling, Taxpayer intended to achieve a spinoff whereby assets would be contributed to a newly formed corporation ("SpinCo") in exchange for SpinCo stock, followed by a distribution of SpinCo stock to Taxpayer's shareholders in redemption of such shareholders' stock in Taxpayer. Taxpayer had recently consummated a prior spinoff; however, a dispute arose as to whether the spinoff violated Taxpayer's financial covenants under outstanding debt. Although Taxpayer won the ensuing litigation, the process was costly and time-consuming.

In order to ensure a smoother spinoff this time around, Taxpayer sought to negotiate a payment with Noteholders to make a one-time payment in exchange for their consent to the spinoff (the "Consent Payment"). The Consent Payment would not otherwise affect the terms of the Notes. At issue in the PLR is whether the Consent Payments result in a deemed exchange of the Notes under Section 1001, which would cause Noteholders to realize any gain or loss in the Notes at the time the Consent Payment was made.

The regulations under Section 1001 provide that gain or loss is recognized on an exchange of property differing materially in kind or in extent. The regulations also provide that alterations to the terms of a debt instrument may result in a deemed exchange if (1) there is a modification to the debt instrument and (2) such modification is significant.

First, the IRS found that the Consent Payment resulted in a modification of the debt instrument under the Section 1001 regulations because the Noteholders were receiving a payment that they would not otherwise be entitled to. In other words, the Consent Payment altered the legal rights of the Noteholders, which gives rise to a modification under the regulations.

Generally, whether the modification of a CPDI is significant is based on the facts and circumstances. In the case of debt instruments other than CPDIs, the regulations provide a mechanical Yield Test that examines the change in the yield on the debt instrument as a result of the modification. The PLR finds that, under the facts of the PLR, it is appropriate to apply the yield test to the Notes, despite the fact that the Notes are CPDIs. The PLR appears to be the first piece of IRS guidance that examines the application of the Section 1001 regulations to CPDIs.

The Yield Test compares the original yield of the debt instruments (which, in this case, is the comparable yield, determined under §1.1275-4(b)(4) as of the issue date of each note) with the "go-forward yield" of the debt instruments. The "go-forward yield" is the yield on a hypothetical note that (1) is issued on the date of the modification, (2) has an issue price equal to the adjusted issue price of the Notes, reduced by the amount of the Consent Payment, and (3) a projected payment schedule consisting of the remaining projected payments on the Notes. If the "go-forward yield" does not exceed the original yield by the greater of (1) 25 basis points or (2) 5% of the original yield, the modification is not significant.

The PLR does not examine whether there is a significant modification of the Notes in question — the test outlined in the PLR would be run on the date of the Consent Payment. However, the PLR further finds that if the modification is not "significant" under the Yield Test, the Consent Payment would generally be treated as a "positive adjustment" under the CPDI rules and generally treated as additional interest to Noteholders.

EXTENSION OF DIVIDEND EQUIVALENT RULES

In September 2015, the IRS issued new final and temporary Treasury regulations under Internal Revenue Code Section 871(m) that cover dividend equivalent payments to nonresident aliens.[4] Generally, the rules treat "dividend equivalents" paid under certain notional principal contracts and equity-linked instruments as U.S. source dividends and therefore subject to U.S. withholding tax if paid to a non-U.S. person. The initial release of the rules had an effective date that was graduated over 2015, 2016, and 2017. Contracts entered into in 2015 were exempt from the rules, contracts issued in 2016 were only subject to the rules if the contracts made payments in 2018 or onwards, and all contracts issued in 2017 were captured. The concern among issuers of financial contracts was that the two and a half months between September and January 1, 2016 was not enough time to put in place the infrastructure to comply with the record-keeping, determination, and withholding requirements under the regulations. On December 7, 2015, the IRS issued an amendment to the new dividend equivalent regulations to change this effective date.[5] Now, the dividend equivalent regulations only apply to any payment made on or after January 1, 2017, for any transaction issued on or after January 1, 2017. Thanks to the extension, issuers will have the full 2016 calendar year to develop the architecture to meet the requirements of the new regime.

4 For a more detailed discussion of the new regulations, see our Client Alert, available at http://www.mofo.com/~/media/Files/ClientAlert/2015/09/150921DividendEquivalent.pdf.

5 The published amendment also makes some immaterial edits in other places in the rules.

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RULING DESCRIBES HOW TO ACCOUNT FOR NOTICE 2015-73 AND NOTICE 2015-74 BASKET OPTION CONTRACTS

On October 21, 2015, the IRS issued Notice 2015-73 and Notice 2015-74, which revoked Notice 2015-47 and Notice 2015-48, respectively, and replaced them with new guidance.[6] In addition to releasing the revised notices, in November, the IRS released CCA 201547004, which elucidates the IRS's view on how basket option contracts that fit within the notices should be treated for federal income tax purposes. There, the taxpayer purchased two options on a basket of hedge fund limited partnership interests from a bank, which the taxpayer's designee could and did change over the life of the options. Consistent with the basket notices, the IRS concluded that the contracts did not constitute options because they did not function or have the economic characteristics of options. Since the contracts were not options, the IRS explained two different treatments for them. First, to the extent the bank held the referenced assets on the taxpayer's behalf (including as a hedge for the options), the option contracts transferred ownership of the referenced assets to the taxpayer for tax purposes. Second, if the taxpayer could not be considered the owner of the referenced assets for tax purposes (for example, if the bank did not hold the limited partnership interests as a hedge) and the referenced asset was a passthrough entity, then the taxpayer would be subject to the constructive ownership provisions of Code Sec. 1260 with respect to the referenced asset of the referenced asset under Code Sec. 1260. Additionally, the IRS stated that where the taxpayer has discretion to change a basket and exercises that discretion, changes in the reference basket could constitute a fundamental change in the option and result in a taxable deemed exchange for the taxpayer of the old options for new options. If taxpayers choose to file amended returns pursuant to the New Notices for basket option contracts they have already entered into, CCA 201547004 provides a roadmap on how to treat those transactions.

PATH ACT MAKES CHANGES TO FIRPTA

The PATH Act (the "Act") makes changes to FIRPTA, which generally imposes a tax on a foreign person's gain or loss on the sale of a U.S. real property interest ("USRPI"). These changes exempt some investors (basically foreign pension funds) from FIRPTA's provisions and expand the FIRPTA exemption for stock in publicly traded REITs. A summary of each new provision follows.

Increase in Threshold of "Publicly Traded" Exception to FIRPTA

The Act makes two investor-friendly changes that narrow FIRPTA's reach. The first change increases the ownership threshold for the "publicly traded" exception to FIRPTA. Previously, shares of a publicly traded class of stock (including REIT stock) constituted a USRPI only in the hands of a person who owned more than 5% of that class. As a result, when it came to publicly traded stock, only shareholders with a stake greater than 5% could be subject to FIRPTA on dispositions of the stock itself. Similarly, shareholders owning 5% or less of the publicly traded stock of a REIT were exempt from FIRPTA on capital gain distributions. The Act increases this threshold to 10% in both cases. This change applies only to REIT distributions made during taxable years that end after the Act's enactment. The Act also provides a number of technical changes to the attribution rules applicable to direct and indirect holders of REIT stock; these changes are effective immediately.

Exemption From FIRPTA for Qualified Pension Funds

The Act adds a FIRPTA exemption for "qualified pension funds" and their wholly owned subsidiaries. Generally, qualified pension funds are non-U.S. retirement or pension funds that do not have a single participant or beneficiary with a right to 5% or more of the fund's assets or income, are subject to governmental regulation, and (in their country of establishment or operation) receive preferential tax treatment on either contributions to the fund or on investment income. This new exception covers both directly and indirectly held USRPIs, as well as REIT distributions. It applies to dispositions and distributions that occur after the Act's enactment. This is expected to significantly increase the amount of foreign capital invested in U.S. real estate by removing the most significant barrier for non-U.S. pension plan investors.

Increased FIRPTA Withholding Rate

The Act increases the amount of withholding tax on dispositions of USRPIs by a foreign person from 10% to 15%. If a property is acquired by the buyer to be used as the buyer's residence, and the price paid for the property does not exceed $1,000,000, the 10% withholding rate under prior law would still apply. The new withholding rate is effective starting 60 days after the enactment of the Act.

6 For a more detailed discussion of the Notice 2015-73 and Notice 2015-74, see our last issue, available at http://www.mofo.com/~/media/Files/Newsletter/2015/11/151103TaxTalk.pdf.

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Liquidating Distributions of REITs and RICs Taxable Under FIRPTA

Prior to enactment of the Act, under Code section 897(c), the definition of a USRPI excluded an interest in a corporation if, as of the date of disposition of that interest, the corporation did not hold any USRPIs, and all USRPIs held by the corporation at any time during the preceding five years were disposed of in transactions in which all gain was recognized. The Act adds another requirement: Neither the corporation nor its predecessor has been a REIT or a RIC during the preceding five years.

TAX COURT DISALLOWS NETTING OF BLOCKS OF STOCK IN REORGANIZATION

In *Michael Tseytin and Ella Tseytin v. Commissioner*, T.C. Memo 2015-247, the Tax Court ruled in favor of the IRS regarding the calculation of gain on two blocks of stock the taxpayer held prior to a merger. The taxpayer owned 75% of a corporation's stock ("Block 1") and an unrelated party owned the remaining 25% ("Block 2"). Before the corporation merged into another corporation in a tax-free reorganization, the taxpayer purchased Block 2 from the unrelated stockholder for $14 million. The taxpayer then exchanged Blocks 1 and 2 for $23 million cash, and stock of the new corporation worth $31 million.

The taxpayer calculated a short-term capital loss on Block 2, which he used to partially offset a long-term capital gain on Block 1. The IRS contended that the loss on Block 2 should be disallowed pursuant to Section 356(c). The taxpayer argued (i) that it acted only as an agent regarding Block 2 and did not actually own that stock, and (ii) in the alternative, that he should be able to net the two blocks of stock. The Tax Court determined that the taxpayer was the owner of Block 2 because he was bound by the form of the transaction, which was a purchase of stock. Furthermore, the Tax Court ruled that the taxpayer could not net the two blocks of stock. The Tax Court favorably cited to Fifth and Sixth Circuit cases that held that where separate blocks of stock are sold together in the same transaction, the IRS may disallow the netting of gains and losses. In addition to the deficiency, the taxpayer was liable for an accuracyrelated penalty under Section 6662(a).

SUPREME COURT GRANTS CERTIORARI IN REIT CITIZENSHIP CASE

In *Conagra Foods, Inc. v. Americold Logistics, LLC*,[7] the U.S. Tenth Circuit Court of Appeals held that the citizenship of a Maryland Title 8 Trust REIT must be determined by the citizenship of its shareholders for the purposes of determining whether a federal court has diversityofcitizenship jurisdiction rather than its jurisdiction of organization or its principal place of business/headquarters, as with corporations.[8] The petition to the Supreme Court (and a supporting brief by the National Association of Real Estate Investment Trusts) argued that the citizenship of a Maryland Trust REIT should be determined by the jurisdictions of its formation and headquarters like other Maryland corporations, since a Maryland Trust REIT has particular characteristics that make it materially identical to a corporation. The characteristics include being an entity created by statute and not derived from common law, owning property in its own name, and suing and being sued in its own name rather than in the name of its trustees. If the Tenth Circuit's view is followed, a widely held Maryland Trust REIT could potentially be a citizen of all 50 states for the purposes of testing federal court diversity of citizenship jurisdictional issues. The Supreme Court granted certiorari in the case, and it was argued January 19, 2016.

TAX COURT RULES "MONOGAMY PAYMENT" IS INCOME

In *Blagaich v. Commissioner*, the Tax Court held that "monogamy payments" to a taxpayer constituted income to the taxpayer, despite a state court ruling that the taxpayer was required to return the amounts.

In 2010, taxpayer and "significant other" entered into a "written agreement intended in part to confirm their commitment to each other and to provide financial accommodation for [taxpayer]." Under the agreement, significant other paid taxpayer $400,000. Not long after the agreement was executed, the relationship began to sour and significant other sent taxpayer a notice terminating the agreement and the relationship.

After the breakup, significant other brought a suit in state court in an attempt to recover the $400,000 as well as other property totaling $343,819 transferred to taxpayer during the course of the relationship. Significant other also filed a Form 1099-MISC, reporting the amounts transferred to taxpayer to the IRS. The IRS subsequently asserted a deficiency claim against taxpayer for failing to report the monogamy payment and other property as income in the year received.

7 776 F.3d 1175 (10th Cir.), *as amended (Jan. 27, 2015), cert. granted*, 136 S. Ct. 27, 192 L. Ed. 2d 997 (2015).

8 Under the Federal Rules of Civil Procedure, a U.S. district court has the power to hear a civil case where the persons that are parties are "diverse" in citizenship, which generally means that they are citizens of different states or non-U.S. citizens.

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In the state court action, the court found that taxpayer had fraudulently induced significant other to enter into the agreement and ordered taxpayer to return the $400,000 to significant other. However, the court found that other property transferred to taxpayer were "clearly gifts" that did not have to be returned.

In the Tax Court proceeding, taxpayer attempted to assert that the portion of the deficiency attributable to the $400,000 monogamy agreement payment should be disregarded by the IRS under the equitable rescission doctrine. The rescission doctrine allows taxpayers to "undo" transactions as long as the transaction and rescission occur in the same taxable year. The Tax Court ruled that taxpayer failed to rescind the monogamy agreement in the same year in which it was entered into, and therefore, the rescission doctrine was not applicable.

Additionally, taxpayer attempted to argue that the state court proceeding collaterally estopped the IRS from asserting that the $343,819 in property were not gifts. Here, the Tax Court found that the IRS was not estopped from arguing that the $343,819 were gifts because the IRS was not represented in the state court proceeding.

PRESIDENTIAL CANDIDATES' TAX POSITIONS

With the non-stop press coverage of the presidential candidates, we figured a summary of the candidates' tax positions would be helpful to our readers. Most of the Republican candidates would lower taxes across the board, while the Democratic candidates would all raise taxes for at least some individuals. The following chart takes a look at the candidates' proposed individual income, corporate, and capital gains tax positions.

(*See Chart on page 8*)

MOFO IN THE NEWS; AWARDS

- Morrison & Foerster is one of five law firms shortlisted for Equity Derivatives Law Firm of the Year by EQDerivatives for their 2016 Global Derivatives Awards. In 2015, MoFo was named Americas Firm of the Year at GlobalCapital's Americas Derivatives Awards. GlobalCapital also shortlisted us for Global Firm of the Year and European Firm of the Year at the 2015 Global Derivatives Awards. myCorporateResource.com awarded MoFo with the 2015 Client Content Law Firm of the Year Award in recognition of law firms that produce worldbeating, client-facing content.
- On January 14, 2016, Of Counsel Julian Hammar and Of Counsel James Schwartz reviewed the latest developments in derivatives regulation and discussed expectations for 2016 during a teleconference entitled "Derivatives Regulation Update: Latest Developments and What to Expect in 2016." Topics included: the final margin rules for uncleared swaps of the CFTC and the prudential regulators; the SEC's proposed rules for investment companies' use of derivatives; the ISDA 2015 Universal Resolution Stay Protocol and related matters; the CFTC's proposed rules for automated trading on U.S. designated contract markets; and the CFTC's preliminary report relating to potential changes in the current de minimis swap dealing threshold for the swap dealer registration requirement.
- On January 6, 2016, Partner James Tanenbaum and Partner Anna Pinedo hosted a PLI webcast entitled "Financings in Close Proximity to Acquisitions." The presentation addressed: materiality of acquisitions; assessing probability of an acquisition; when should an effective shelf registration become subject to black out; conducting a private offering and wall-crossing investors; Nasdaq shareholder vote issues; effecting a 144A-qualifying offering to QIBs; and, confidentially marketed public offerings.
- On December 17, 2015, Partner Oliver Ireland and Partner Anna Pinedo hosted an IFLR webinar entitled "TLAC, the Long-Term Debt Requirement, and the Clean Holding Company Proposal." Topics included: the FSB's final TLAC principles; the FRB's proposed requirements; the principal differences between the FSB's and the FRB's approach; the planning required of G-SIBs in order to prepare to comply; potential effects for foreign banks subject to both regimes; and anticipated effect on how banks will fund going forward.
- On December 17, 2015, Partner Anna Pinedo spoke on the "Securities Act Exemptions/ Private Placements" panel on day one of the PLI "Understanding the Securities Laws Fall 2015" seminar. Topics included: exempt securities versus exempt transactions; Regulation D and Regulation A offerings and changes resulting from the JOBS Act; "crowd funding"; stock option grants and related issues; Rule 144A high yield and other offerings; and Regulation S offerings to "non-U.S. persons."
- On December 16, 2015, Partner David Lynn and Partner Anna Pinedo led a PLI webcast entitled "FAST Act Securities Law Provisions." The presentation addressed the recently adopted FAST Act, which amends certain provisions of the JOBS Act, the Securities Act, and the Exchange Act. Topics included: the changes to the JOBS Act, including the new 15day public filing requirement, the financial statement requirement, the EGC grace period, and

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PRESIDENTIAL CANDIDATES' TAX POSITIONS (CONTINUED)

CANDIDATE	INDIVIDUAL INCOME TAX	CAPITAL GAINS TAX	CORPORATE TAX
Hillary Clinton (D)[9]	4% surcharge for income above $5 million	For individuals in the top tax bracket, capital gains tax rate of 39.6% for investments held for less than two years, with rates gradually decreasing to 20% for investments held for more than six years	Not specified
Martin O'Malley (D)[10]	Top tax bracket of 45% for income above $1 million	Tax capital gains at ordinary income rates	Not specified
Bernie Sanders (D)[11]	Top bracket with a tax rate over 50%	Tax capital gains at ordinary income rates	Not specified
Jeb Bush (R)[12]	Three brackets with tax rates of 10%, 25%, and 28%	Capital gains tax rate of 20%; tax carried interest at ordinary income tax rates	Top rate of 20%
Ben Carson (R)[13]	Flat tax of 14.9%	Eliminate capital gains tax	Flat tax of 14.9%
Chris Christie (R)[14]	Three brackets with bottom tax rate as a single digit and top tax rate of 28%	Not specified	Top rate of 25%
Ted Cruz (R)[15]	Flat tax rate of 10%	Capital gains tax rate of 10%	Flat tax rate of 16% on all capital income and labor payments
Carly Fiorina (R)[16]	Flat tax	Not specified	Flat tax
Jim Gilmore (R)[17]	Three brackets with tax rates of 10%, 15%, and 25%	Eliminate capital gains tax	Top rate of 15%
Mike Huckabee (R)[18]	Eliminate income tax and enact national sales tax	Eliminate capital gains tax and enact national sales tax	Eliminate corporate tax and enact national sales tax
John Kasich (R)[19]	Top rate of 28%	Capital gains tax rate of 15%	Top rate of 25%
Rand Paul (R)[20]	Flat tax rate of 14.5%	Flat tax rate of 14.5%	Flat tax rate of 14.5% on capital income and labor payments
Marco Rubio (R)[21]	Two brackets with rates of 15% and 35%	Eliminate capital gains tax	25%; owners of pass through entities and sole proprietorships pay a maximum of 25%
Rick Santorum (R)[22]	Flat tax rate of 20%	Flat tax rate of 20%	Flat tax rate of 20%
Donald Trump (R)[23]	Four brackets with tax rates of 0%, 10%, 20%, and 25%	Three brackets with tax rates of 0%, 15%, and 20%	Flat tax rate of 15%

the 12(g) threshold equalization for savings and loan holding companies; practical considerations for ongoing or planned EGC IPOs, the Regulation S-K study, and the SEC's ongoing disclosure review initiative, forward incorporation in Form S-1 registration statements, the new resale exemption under Section 4(a)(7) and its relationship to the "Section 4(a)(1-1/2) exemption;" application of the new exemption for block trades, private secondary transactions for pre-IPO issuers; and other legislative initiatives related to capital formation that are on the horizon.

- On December 15, 2015, Partner James Tanenbaum and Partner Anna Pinedo hosted a seminar in Tel Aviv, Israel, entitled "Finding the Right Capital Raising Tool." The presentation addressed: early stage private financings; venture and institutional financings; late stage or pre-IPO financings; and follow-on financings for already public companies, whether U.S. listed or TASE-listed.
- On December 8, 2015, Partner James Tanenbaum and Partner Anna Pinedo led a seminar entitled "Financing the Acquisition." The presenters discussed various considerations for SEC reporting companies considering a capital raise to finance a proposed acquisition, including the following: assessing probability and materiality of a proposed acquisition; other disclosure considerations; pro forma financial statement requirements; financing pursuant to an effective shelf registration statement; using a PIPE transaction and Nasdaq concerns; and effecting a 144A-qualifying offering to QIBs.
- On December 2, 2015, Partner Ze'-ev Eiger and Senior Of Counsel Jerry Marlatt hosted a teleconference entitled "Commercial Paper Programs." The presentation addressed the considerations relating to the establishment and operation of commercial paper programs as a financing tool. Topics included: the legal framework for commercial paper programs; market practice and documentation that is used; and practical advice for broker-dealers and personnel who handle issuances from these programs.
- On December 2, 2015, Partner Jeremy Jennings-Mares, Partner Peter Green, and Partner Vlad Maly introduced keynote speaker, Rick Grove (Rutter Associates) at a seminar titled "Avoidable Mistakes in Derivatives Transactions." Rick Grove presented on lessons learned, including avoidable mistakes, from his many years of derivatives experience. Topics included: documentation problems and errors; issues arising from the early termination of derivatives transactions; valuation issues in derivatives disputes; and potential preventive measures in trade execution and collateral practice.
- On December 2, 2015, Partner Anna Pinedo served as a panelist on the session "Social and CCOs: The Latest in Tackling a Thorny Issue" at the Compliance Reporter's December Breakfast Briefing. The event was centered on offering the latest practical advice for chief compliance officers at broker/dealers and investment managers on avoiding the pitfalls and keeping a firm safe.
- On November 19, 2015, Senior Counselor Akihiro Wani, Of Counsel Julian Hammar, and Of Counsel James Schwartz hosted a teleconference titled "Derivatives: Latest U.S. Regulatory Developments." The presentation provided an overview of the CFTC's crossborder and substituted compliance regime for derivatives, and addressed a number of recent developments involving derivatives regulation in the United States. Further topics included: the margin rules for uncleared swaps and their cross-border application; the ISDA Resolution Stay Protocol; and status of the SEC's rules for security-based swaps.
- On November 18, 2015, Of Counsel Bradley Berman led a teleconference titled "Section 3(a)(2) Bank Note Programs." The presentation addressed Section 3(a)(2) of the Securities Act, which provides an exemption from registration for securities issued by banks. This program covered the requirements of the exemption, offering structures for non-U.S. banks, requirements for banks and branches regulated by the Office of the Comptroller of the Currency, offering documentation, and process tips for launching a bank note program. Further topics included: What is a "Bank"?; non-U.S. Banks; the OCC Securities Offering Regulations; Rule 144A Offering Alternative for non-U.S. banks; FINRA matters; offering documentation; launching a bank note program; and liabilities.
- On November 17, 2015, Partner James Tanenbaum and Partner Anna Pinedo led a seminar entitled "A Prerequisite: Pre-IPO Private Placements." The presentation addressed pre-IPO private placements, including the structuring and other considerations for issuers contemplating such a financing. Topics included: timing and process; diligence, projections and other information sharing; "cleaning up" the cap table and providing liquidity to existing securityholders through a secondary component; terms of the security, such as liquidation preference; IPO and acquisition protection; governance issues; valuation issues; the placement agent's role; and planning for the IPO in your negotiations.
- On November 16, 2015, Partner David Lynn and Partner Anna Pinedo hosted a teleconference titled "Too Many Exempt Offering Choices?" The session addressed the final Regulation Crowdfunding and

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all of the new offering formats contemplated by the JOBS Act that will be available to issuers, in addition to traditional private placements. Topics included: an overview of Regulation Crowdfunding; choosing between Regulation A, crowdfunding, and a Rule 506(c) offering; tier 2 of Regulation A compared to an IPO; life after the offering and ongoing reporting; good-old 4(a)(2) and Rule 506(b); and offerings in close proximity to one another.

- On November 11, 2015, Partner Peter Green, Partner Jeremy Jennings-Mares, and Senior Of Counsel Jerry Marlatt led a teleconference entitled "Treatment of Securitizations under LCR/NSFR." The presentation addressed Liquidity Coverage Ratio ("LCR"), which requires banks to hold sufficient high-quality liquid assets to survive a 30-day stress period, and the Net Stable Funding Ratio ("NSFR"), which provides a framework for a longer-term liquidity model. This seminar focused, in particular, on how this new liquidity framework is likely to impact structured finance and securitization transactions globally.
- On November 10, 2015, Partner Anna Pinedo and Of Counsel Bradley Berman led a two hour in-depth session entitled "Choosing among Capital-Raising and Funding Alternatives." The presentation focused on the securities law, banking law, and other regulatory considerations that may affect an issuer's choice as among reliance on MJDS regime and SEC registration; registered offerings and exempt offering alternatives, such as the Section 4(a)(2) exemption, Regulation D, Rule 144A, and Section 3(a)(2) (for banks); continuous issuance programs, such as bank note, medium-term note, and commercial paper programs; and bank products, such as certificates of deposit, market-linked CDs, and Yankee CDs. The program also included a discussion of the liquidity coverage ratio, leverage ratio, and TLAC in the context of funding choices.
- On November 6, 2015, Partner Oliver Ireland, Partner Jay Baris, Partner Anna Pinedo, Partner Obrea Poindexter, Partner Remmelt Reigersman, Of Counsel Sean Ruff, Of Counsel James Schwartz, and Of Counsel Julian Hammar hosted a seminar entitled "Financial Services Regulatory and Enforcement Current Issues." Sessions included: Living with the Volcker Rule; Money market fund regulation: Will a third shoe drop, and when; Liquidity and capital developments: the LCR, NSFR, and TLAC; Alternative (or "virtual") currencies: developing trends; Regulatory developments affecting nonbanks, including nonbank servicers and nonbank lenders; The ABCs of BDCs; Liquid alternative investments: what to expect from the SEC; and Cross-border derivatives issues, the ISDA stay protocol margin, and related matters.
- On November 5, 2015, Partner Lloyd Harmetz moderated the opening panel entitled "Disclosures, pricing, new products and emerging issues" and a panel titled "Navigating the currents: How product manufacturers are addressing today's challenges" at the Structured Products Washington 2015 Conference. Partner Oliver Ireland made a presentation on "Bank regulatory issues affecting structured notes issuers." Partner Remmelt Reigersman moderated a panel titled "Tax developments in the structured products market." Partner Anna Pinedo and Of Counsel Julian Hammar co-led a panel titled "Derivatives and structured products." Of Counsel Bradley Berman co-led a panel titled "Suitability, KYD and other compliance issues and preparing for a FINRA or OCIE exam compliance basics."
- On November 4, 2015, Partner Brian Bates delivered the conference chair's opening remarks and spoke on a panel entitled "What Drives the Decision to Issue through the Private Placement market?" at the "Private Placements Global Forum – Europe 2015." Topics included: accessing the global private placement market for European companies; outlining the reasons for issuance; which companies are private placements for; and what alternatives are considered alongside a private placement.
- On November 2, 2015, Partner Oliver Ireland led a teleconference entitled "Total LossAbsorbing Capacity." The presentation addressed the important issues in regards to the Financial Stability Board's final total loss-absorbing capacity, or TLAC, requirement for banks that are G-SIFIs. Topics included: the FSB's TLAC requirement; the Federal Reserve Board's proposed TLAC requirement; potential differences between the FSB and the Fed standard; and the anticipated effect on various financial products.
- On November 2, 2015, Partner Anna Pinedo spoke on a panel entitled "Oversight of Technology and Social Media in Your Firm" at the "2015 NSCP National Conference." Topics of the panel included: overview of applicable regulations; practical guidance regarding policy design and implementation; integration with other systems and due diligence; compliance oversight of thirdparty vendors; and hands-on case studies covering reallife scenarios.

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- On October 26, 2015, Partner Anna Pinedo spoke on the "Welcome and Introduction to Private Placements and Hybrid Financings" panel on day one of the PLI "Private Placements and Hybrid Securities Offerings 2015" seminar. Ms. Pinedo served as chair for this conference and also spoke on the "Welcome and Introduction to Conducting Hybrid Offerings" panel on October 27, 2015. Partner James Tanenbaum spoke on panels titled "Regulation A+" and "PIPE Transactions, Change of Control Transactions" on October 27, 2015.

9 See http://www.wsj.com/articles/hillary-clinton-proposes-4-income-tax-surcharge-for-wealthy-americans-1452552083?cb=logged0.5793573611746292; http://www.wsj.com/articles/clinton-to-propose-rise-in-capital-gains-taxes-on-short-term-investments-1437747732.

10 See http://taxfoundation.org/blog/modeling-martin-o-malley-s-idea-tax-increases.

11 See http://www.bloomberg.com/politics/articles/2015-06-11/bernie-sanders-eyes-top-tax-rate-of-more-than-50-percent; http://www.nytimes.com/2016/01/22/upshot/sanders-makes-a-rare-pitch-more-taxes-for-more-government.html.

12 See https://jeb2016.com/backgrounder-jeb-bushs-tax-reform-plan/?lang=en; http://www.npr.org/sections/itsallpolitics/2015/09/09/438873030/everything-you-wanted-to-know-about-jeb-bushs-tax-plan.

13 See https://www.bencarson.com/issues/tax-reform.

14 See http://www.wsj.com/articles/my-plan-to-raise-growth-and-incomes-1431387102.

15 See http://www.wsj.com/articles/a-simple-flat-tax-for-economic-growth-1446076134.

16 See http://money.cnn.com/2015/11/11/pf/taxes/carly-fiorina-tax-code-three-page/.

17 See http://www.gilmoreforamerica.com/tax-reform/.

18 See http://www.mikehuckabee.com/_cache/files/11ce70c7-bee1-4fc0-b428-65ccdad4e7d1/B3BBF8906D52C920712799CAB662DB1F.fairtax-faq.pdf.

19 See http://www.wsj.com/articles/kasich-tax-plan-aims-to-balance-u-s-budget-in-8-years-1444937757.

20 See https://www.randpaul.com/issue/taxes.

21 See https://marcorubio.com/issues-2/rubio-tax-plan/.

22 See http://taxfoundation.org/article/details-and-analysis-senator-rick-santorum-s-tax-plan.

23 See https://www.donaldjtrump.com/positions/tax-reform.

ANNOUNCING OUR *STRUCTURED THOUGHTS* LINKEDIN GROUP

Morrison & Foerster has created a LinkedIn group, StructuredThoughts. The group will serve as a central resource for all things Structured Thoughts. We have posted back issues of the newsletter and, from time to time, will be disseminating news updates through the group.

To join our LinkedIn group, please click here and request to join or simply e-mail Carlos Juarez at cjuarez@mofo.com.

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