ATTORNEY PROFILE – GARY L. LONGMORE

Gary Longmore began his law practice over 14 years ago in his home state of Idaho, and practiced in Idaho for 5 years before joining Ray Quinney & Nebeker 9 years ago.

Gary is a member of Ray Quinney's Tax, Trusts and Estate Planning Section. Gary represents clients in a wide variety of matters, including estate planning and taxation, planning for closely held businesses, and probate and now serves as the Vice-Chair of the firm's Tax, Trusts and Estate Planning Section. A frequent speaker at continuing legal education seminars, Gary is a fellow of the American College of Trust and Estate Counsel (ACTEC), a designation which only 28 estate planning attorneys in Utah carry (six of whom practice at Ray Quinney).

Gary's estate planning practice includes the drafting of basic wills and revocable trusts, as well as the utilization of more sophisticated estate planning techniques such as family limited liability companies and partnerships, dynasty trusts, charitable trusts, irrevocable life insurance trusts, defective grantor trusts, and split-dollar agreements as well as estate administration, the probate of estates, and the preparation and filing of estate and gift tax returns. Gary's business planning practice includes formation, planning and taxation of various business entities.

Gary has an LL.M. in taxation from Denver University, is a CPA and is licensed to practice law in Utah and Idaho. Additionally, Gary has been voted by his peers throughout the state as one of Utah's "Legal Elite" in the category of Taxes/Estates/Trusts (as published in *Utah Business Magazine*) and maintains an "AV" rating with Martindale-Hubbell, which is the highest rating awarded to attorneys for professional competence and ethics.

Gary's knowledge, experience, and sound legal judgment, enable him to develop and implement dynamic solutions to his clients' complex business, probate, and tax matters. Gary enjoys spending time with his wife, Jana, and their five daughters and one son. Gary can be contacted at 801-323-3367 or glongmore@rqn.com. ❖

FIRM NEWS & NOTES

Thirty-Seven RQ&N Lawyers are *Best Lawyers in America*

Thirty-seven Ray Quinney & Nebeker attorneys, more than any other Utah firm, have been selected for the 2010 edition of *The Best Lawyers in America* for excellence in their respective practice areas. The list is based on an exhaustive and rigorous peer-review survey, developed and refined for nearly 25 years. Lawyers are not allowed to pay a fee to be included.

Bruce Olson Appointed as Chair of Tax Section

With the departure of Jerry Snow on an LDS Mission (see related article), Bruce L. Olson has been appointed as Chair of the firm's Tax, Trusts and Estate Planning Section. Bruce has been a leader in Utah in advising nonprofit organizations, handling taxpayer controversies before the IRS and State Tax Commission, and providing Federal and State tax planning advice to our clients.

Mark Cotter Appointed as Chair of Corporate Section

Mark A. Cotter has been appointed as Chair of the firm's Corporate Section. Mark has been with Ray Quinney since 1998 and practices business, corporate, securities, intellectual property and health care transactional law, with a particular focus on technology and life sciences businesses and health care providers and suppliers.

Farewell to Jerry Snow

After 37 years with the firm, Jerry Snow is taking a leave of absence to serve a mission with his wife in Italy for The Church of Jesus Christ of Latter-day Saints. We look forward to seeing Jerry back with the firm in the fall of 2011, when he can continue his estate planning, tax and business planning practice. Jerry served as the former chairman of the firm's Tax, Trusts and Estate Planning Section and has represented estates of all sizes. In addition, Jerry has developed a specialty in advising clients concerning all types of corporate transactions, partnerships and limited liability companies, and Section 1031 like-kind exchanges. Jerry is also a fellow of the American College of Trust and Estate Counsel (ACTEC). Jerry will be missed by his clients, fellow Utah practitioners and members of our firm. Asked if he would be willing to start up an office for the firm in Rome, Jerry stated, "Absolutamente!"

Tax & Business Newsletter

Christopher N. Nelson – Editor

Available online at: www.rqn.com/publications/

CHANGE OF ADDRESS?

If your address has changed, please contact Jennifer Norgate at Ray Quinney & Nebeker (801-323-3490) so that we can direct future mailings of the Tax & Business Newsletter to your current address.

Tax & Business Newsletter

RAY QUINNEY & NEBEKER

Fall 2009 Issue

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ALSO INSIDE THIS ISSUE

Deadline for Special Refund Claims

by Bruce L. Olson

Under the American Recovery and Reinvestment Act (ARRA), enacted in February, 2009, small businesses with expenses exceeding their income for 2008 can choose to carry the resulting loss back for up to five years, instead of the usual two years. Thus, a business with a net operating loss (NOL) in 2008 can carry the loss as far back as tax year 2003, rather than 2006. This could result in a larger refund because the loss is being spread over five years instead of two.

Under ARRA, eligible taxpayers can choose to carry back an NOL arising in a taxable year beginning or ending in 2008 for 3, 4 or 5 years instead of 2. The option is available for an eligible small business (ESB) that has no more than an average of $15 million in gross receipts over a three-year period ending with the tax year of the NOL. This choice may be made for only one tax year.

Most taxpayers still have time to choose this special carryback and get a refund. A calendar-year corporation that qualifies as an ESB must file a claim by September 15, 2009. For individuals, the deadline is October 15, 2009. This includes a sole proprietor that qualifies as an ESB, an individual partner in a partnership that qualifies as an ESB and a shareholder in an S corporation that qualifies as an ESB. Deadlines vary for fiscal-year taxpayers, depending upon when their fiscal year ends and whether they are making the choice for the tax year that ends or begins in 2008.

Individuals can accelerate a refund by filing Form 1045, *Application for Tentative Refund*. Similarly, corporations with NOLs may also accelerate a refund by using Form 1139, *Corporation Application for Tentative Refund*. According to the IRS, refunds normally are issued within 45 days. If you have any questions concerning the foregoing, please contact a member of our Tax, Trusts and Estate Planning Section.❖

Property Tax Appeal Deadline Looms

Property tax valuation appeals are due September 15th. If you think the County has improperly valued or assessed your property, do not let this deadline pass without filing your appeal. You will need to submit evidence with your appeal, so do not delay! Please contact a member of the Firm's Tax, Trusts and Estate Planning Section if you require any assistance with your appeal.❖

Increased IRS Attention to Employment Tax Issues: Focus on Businesses with Independent Contractors

by Samuel A. Lambert

Business owners need to be aware that due in part to federal budget shortfalls, the IRS is putting increasing emphasis on employment tax issues. One area of emphasis is on workers classified as independent contractors. The IRS is aggressively going after businesses that classify workers as independent contractors, and will often impose additional taxes going back 3 years, including penalties and interest.

Facts that increase audit risk:

- Independent contractor is terminated and seeks unemployment or social security benefits
- The business has a worker that receives both a 1099 and a W-2 in the same year
- The business has a large proportion of its workers classified as independent contractors
- The business has lengthy relationships with independent contractors

What steps should a business take to reduce its risks?

1. Take any related claim seriously. If an independent contractor files an unemployment benefits claim or asks the IRS to classify him as an employee (the IRS may send the business a Form SS-8 related to the worker), or if the State begins asking questions related to employee classification for any reason, the business must seriously address the matter. If not properly resolved, these situations can easily balloon into an audit by the IRS or the State.

2. Do not treat independent contractors like employees. The IRS applies a multi-factor test to determine whether a worker is an employee or an independent contractor. Generally, the more *control* the business can exert over the time, place, and manner in which the worker performs her job, the more likely the worker will be found to be an employee. The formalities in the business's contract with the independent contractor should be maintained over time, so the relationship does not drift to an employer-employee relationship.

3. Periodically review its practices. Businesses (and the legal climate which surrounds them) grow, develop, and change over time. A business should identify and resolve issues before the IRS becomes involved. A business should periodically review its method and procedure of employee classification, employee benefit and reimbursement plans, and billing and withholding deposit systems. These reviews are important not just for tax reasons. They can also help businesses implement best practices and reduce the risk of fraud or embezzlement.❖

Individuals Affected by Employee-Status Reclassification – What Next?

by Anjali Patel

The steps an individual needs to take upon reclassification as an "employee" instead of an "independent contractor" depend on how the income earned by the individual was originally reported. The following outlines how to handle reclassification in several common situations and assumes that the income earned by the individual was originally reported on Form 1099-MISC:

- Individual Has Not Yet Filed Federal Tax Return- The individual must file a Form 1040 for the affected tax year(s), reporting the Form 1099-MISC income as wages. Since no social security or Medicare tax ("FICA tax") was withheld from these wages, the individual must compute and pay the employee portion of these taxes with his return.

- Individual Has Filed Federal Tax Return, But Did Not Report the Form 1099-MISC Income - The individual must file a Form 1040X for the affected tax year(s). The individual must compute and pay his portion of FICA Tax as well as income tax on the income.

- Individual Has Filed Federal Tax Return And Reported The Income, But Did Not Calculate FICA Tax- The individual must file a Form 1040X for the affected tax year(s) to compute the FICA Tax due on his income.

- Individual Has Filed Federal Tax Return, But Reported Income as Self-Employment Income and not Wages - The individual must file a Form 1040X for the affected tax year(s). Because the individual does not owe self-employment tax, he may be able to obtain a refund for the difference between the self-employment tax paid and his portion of the FICA Tax due.❖

Reminder of RQN Fall Seminar

Please be reminded that the Firm's Annual Tax & Business Seminar is scheduled to be held on Thursday, November 12, 2009, from 2:00 to 5:00 p.m. at the Little America Hotel, 500 South Main Street, Salt Lake City, Utah. Please contact our receptionist at 801-532-1500 to register for the Seminar. You may also register at the door.

Reminder of Recovery Act Benefits

by Bruce L. Olson

In the American Recovery and Reinvestment Act (ARRA), Congress provided a number of tax breaks and incentives. Many of these benefits have expiration dates, so you should take advantage of them while you can.

First-Time Home Buyer Credit. Taxpayers who did not own a principal residence during the past three years can purchase a home before December 1, 2009 and receive a credit of up to $8,000 on either an original or amended 2008 tax return or a 2009 return. The purchase must close before December 1, 2009, and an eligible taxpayer cannot claim the credit until after the closing date. This credit phases out at higher income levels, and different rules apply to home purchases made in 2008.

New Vehicle Purchase Incentive. Qualifying taxpayers can deduct state and local taxes and excise taxes paid on the purchase of new cars, light trucks, motor homes and motorcycles purchased after February 16, 2009 and before January 1, 2010. There is no limit on the number of vehicles that may be purchased. The deduction per vehicle is limited to the tax on up to $49,500 of the purchase price of each qualifying vehicle and phases out for taxpayers at higher income levels. This deduction is available whether or not you itemize deductions on Schedule A.

Energy-Efficient Home Improvements. ARRA also increased the credit for non-business energy property for homeowners who make qualifying energy-efficient improvements to existing homes. The law increases the rate to 30 percent of the cost of all qualifying improvements and raises the maximum credit limit to a total of $1,500 for improvements placed in service in 2009 and 2010. Qualifying improvements include the addition of insulation, energy-efficient exterior windows and energy-efficient heating and air conditioning systems.

Tax Credit for First Four Years of College. The new American Opportunity Credit modifies the existing Hope credit for tax years 2009 and 2010, making it available to a broader range of taxpayers. Tuition, related fees, books and other required course materials generally qualify. Many of those eligible will qualify for the maximum annual credit of $2,500 per student.

Certain Computer Technology Purchases. ARRA adds computer technology to the list of college expenses (tuition, books, etc.) that can be paid for by a qualified tuition plan (QTP), commonly referred to as a 529 plan. For 2009 and 2010, the law expands the definition of qualified higher education expenses to include expenses for computer technology and equipment or internet access and related services to be used by the designated beneficiary of the QTP while enrolled at an eligible educational institution.

Making Work Pay and Withholding. The Making Work Pay Credit lowered tax withholding rates this year for many American households. However, taxpayers who fall into any of the following groups should review their tax withholding rates to ensure enough tax is withheld, including multiple job holders, families in which both spouses work, workers who can be claimed as dependents by other taxpayers and pensioners. Failure to adjust withholding could result in potentially smaller refunds or in some instances cause taxpayers to owe tax rather than receive a refund next year. The IRS states that thus far in 2009, the average refund amount is $2,675, and 79 percent of all returns receive a refund.❖

AVOIDING INDIRECT GIFTS OF FLLC INTERESTS

by Bryan K. Bassett

The IRS has a number of weapons in its growing arsenal of arguments used to attack gifting of interests in family limited partnerships and family limited liability companies (together "**FLLC**"). Prior articles have discussed arguments under Internal Revenue Code Section 2036(a) termed as "retained rights." In at least two recent cases the IRS won based on "indirect gift" and "step transaction" arguments.

In David E. Heckerman et ux. v. United States (July 2009), the court held that entity level discounts did not apply to gifts of member interests in an FLLC because the transfers constituted indirect gifts or alternatively a step transaction. An indirect gift occurs when the gift is determined to be a transfer of the underlying assets of the entity rather than a transfer of member interest(s) in the entity. A step transaction occurs when, even though a proper sequence of events (funding of assets, crediting accounts, and transferring FLLC interests) may have been followed, the steps are collapsed because they are part of an integrated whole.

To avoid IRS "indirect gift" and "step transaction" arguments when gifting interests in an FLLC, at a minimum the following should occur: (1) clearly document each step and execute the associated documents at the time each step occurs; (2) make certain that the value of contributed assets is credited only to the capital account(s) of the contributing member(s); and (3) allow sufficient time between funding and gifting so that the members bear material risk that the capital accounts at the time of the gifts may be different from the capital accounts at the earlier time of funding.

If you require assistance regarding your FLLC gifting transfers, please contact a member of the Firm's Tax, Trusts and Estate Planning Section.❖