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TAX LAW:
IMPORTANT TAX DEVELOPMENTS FROM THE FIRST QUARTER OF 2012

BY RONALD A. FEUERSTEIN, ESQUIRE

The following is a summary of the most important tax developments that have occurred in the first quarter of 2012 that may affect you, your family, your investments and your business.

Payroll tax cut extended for all of 2012. On February 22, 2012, President Obama signed the "Middle Class Tax Relief and Job Creation Act of 2012" into law. It extended the 2 percent payroll tax cut through the end of 2012. Earlier legislation had extended it for only the first two months of 2012. Thus, the 2 percent payroll tax reduction and the 2 percent reduction in the Old-Age, Survivors and Disability Insurance tax under the Self-Employment Contributions Act tax for the self-employed applies through December 31, 2012. As a result, for 2012, employees pay only 4.2 percent Social Security tax on wages up to $110,100 (wage base for 2012) and self-employed individuals pay only 10.4 percent Social Security self-employment taxes on self-employment income up to $110,100. The maximum savings for 2012 is $2,202 (2 percent of $110,100) per taxpayer. If both spouses earn at least as much as the wage base, the maximum savings is $4,404.

Some estates get more time to make estate tax portability election. The IRS issued Notice 2012-21 giving certain estates of married individuals who died during the first six months of 2011 an extension of the deadline to make the portability election to pass the decedent's unused estate and gift tax exclusion amount to the surviving spouse. The election is made on the Form 706 (estate tax return). Significantly, even if the estate is not required to file a Form 706 (e.g., because the value of the gross estate is less than the exclusion amount), Form 706 must be filed in order to make the election.

The extension is available to qualifying estates of decedents who are U.S. citizens or residents. A qualifying estate is an estate in which:

- The decedent is survived by a spouse;
- The decedent's date of death is after December 31, 2010, and before July 1, 2011; and
- The fair market value of the decedent's gross estate does not exceed $5,000,000.

The IRS will grant the executor of a qualifying estate a six-month extension of time until 15 months after the decedent's date of death to file Form 706 if the executor files an appropriately designated Form 4768 with the IRS no later than 15 months from the decedent's date of death.

Retirement security initiative. The U.S. Departments of the Treasury and Labor announced a sweeping initiative which is designed to broaden the availability of retirement plan options in order to provide greater certainty in retirement and minimize the risk of retirees outliving or underutilizing their retirement savings. It includes the following:

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- *Partial annuity options.* Proposed Treasury Regulations § 1.417(e)-1(d)(7) and (8) would change the rules to make it simpler for defined benefit pension plans to offer combinations of lifetime income and a single-sum cash payment. They would allow retirees to receive a steady stream of income for the duration of their lifetimes while keeping a portion of their savings invested in assets with the flexibility to respond to liquidity needs.

- *"Longevity" annuities.* Proposed Treasury Regulations § 1.401(a)(9)-6 would make it easier for retirees to use a limited portion of their savings to purchase guaranteed income for life starting at an advanced age. These annuities would provide an efficient way for 65 or 70-year-olds to address the risk of outliving their assets by purchasing a predictable income stream starting at age 80 or 85.

- *Spousal protection rules and deferred annuities.* In Revenue Ruling 2012-3, the IRS clarified that employers can offer their employees the option to use Code Sec. 401(k) savings to purchase deferred annuities and still satisfy spousal protection rules with minimal administrative burdens.

- *Purchase of annuities from defined benefit plan.* In Revenue Ruling 2012-4, the IRS explained how the rules apply when employees are given the option to use a single-sum Code § 401(k) payout to obtain a low-cost annuity from their employer's defined benefit pension plan.

- *Code § 401(k) fee disclosure.* Final Labor Department regulations under Employee Retirement Income Security Act of 1974 (ERISA) § 408(b)(2) require service providers to furnish information that will enable plan fiduciaries to determine both the reasonableness of compensation paid to the service providers and any conflicts of interest that may impact a service provider's performance under a service contract or arrangement.

Relief for certain taxpayers. In IRS News Release 2012-40, the Service made available to certain wage earners and self-employed individuals a six-month grace period on failure-to-pay penalties. Form 1127-A, Application for Extension of Time for Payment of Income Tax for 2011 Due to Undue Hardship, had to be completed and postmarked on or before April 17, 2012 to seek the relief. The request for an extension will result in relief from the failure to pay penalty for tax year 2011 only if the tax, interest and any other penalties are fully paid by October 15, 2012. Subject to income and balance due limits, the penalty relief applied for these two categories of taxpayers:

- Wage earners unemployed at least 30 consecutive days during 2011 or in 2012 up to the April 17 deadline for filing a federal tax return this year.
- Self-employed individuals who experienced a 25 percent or greater reduction in business income in 2011 due to the economy.

A taxpayer's income could not exceed $100,000 if he or she filed as single or head of household ($200,000 for joint filers). The penalty relief was not available to taxpayers whose calendar year 2011 balance due exceeded $50,000.

In addition, in IRS News Release 2012-31, the IRS has raised the threshold for using an installment agreement without having to supply the IRS with a financial statement from $25,000 to $50,000.

Residence interest limits for unmarried co-owners. The Tax Court has held that limitations on deductions for qualified residence interest ($1 million of acquisition indebtedness and $100,000 of home equity indebtedness) are applied on a per-residence basis and not per-individual basis. Thus, unmarried co-owners were collectively limited to a deduction for interest paid on a maximum of $1.1 million, rather than $2.2 million, of acquisition and home equity indebtedness.

Luxury auto depreciation limits for 2012. Under special "luxury automobile" rules, a taxpayer's otherwise available depreciation deduction for business autos, light trucks and minivans is subject to additional limits, which operate to extend depreciation beyond its regular period. The IRS has released the inflation-adjusted depreciation limits for business autos, light trucks and vans (including minivans) placed in service in 2012—e.g., the first-year depreciation limit is $3,160 for autos and $3,360 for light trucks or vans first placed in service in 2012. However, for vehicles that qualify for bonus depreciation, the otherwise applicable first-year limit is increased by $8,000 to $11,160 for autos and $11,360 for light trucks or vans first placed in service in 2012.

S corporation underpaid employment taxes. A federal appeals court, in *Watson, P.C. v. Commissioner,* 668 F.3d 1008 (8th Cir. 2012), affirming a Federal district court in Iowa, held that an S corporation shareholder-employee's salary was unreasonably low. As a result, it allowed the IRS to reclassify as salary a substantial amount of dividend payments made to the officer during the years at issue. This resulted in the corporation owing employment taxes on the reclassified dividend payments.

FinCEN gives taxpayers more time to e-file FBARs. The Treasury's Financial Crimes Enforcement Network ("FinCEN") has announced in FinCEN Notice 2012-1 that electronic filing (e-filing) of TD F 90-22.1, Report of Foreign Bank and Foreign Accounts ("FBAR"), will not be required until June 30, 2013. Each U.S. person who has a financial interest in, signature or other authority over any foreign financial accounts, including bank, securities or other types of financial accounts in a foreign country, if the aggregate value of these financial accounts exceeds $10,000 at any time during the calendar year, must report that relationship each calendar year by filing TD F 90-

22.1, Report of FBAR with the Department of the Treasury on or before June 30, of the succeeding year. Although FinCEN reports generally must be e-filed from July 1, 2012, FinCEN has announced a general exemption from mandatory electronic filing of FBARs until July 1, 2013. The temporary e-filing exemption does not relieve any person of the obligation to file an FBAR and does not affect the required date by which any given FBAR must be received by Treasury.

Please contact Ronald A. Feuerstein for more information about any of these developments and what steps you should implement to take advantage of favorable developments and to minimize the impact of those that are unfavorable.

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ALERT FOR TRADEMARK OWNERS: TRADEMARK MONITORING AND REGISTRATION SCAMS

BY ASHLEY R. DOBBS, ESQUIRE, WITH JASON MALASHEVICH, LAW CLERK

THE PROBLEM—USPTO'S IMPOSTERS

If you or your client has received a U.S. trademark registration, you need to be vigilant against infringers and others who try to take advantage of your mark's goodwill by passing themselves off as you or using a mark confusingly similar to your own. However, there's a new category of "bad guys" to watch out for. Unscrupulous companies are trying to pass themselves off as the U.S. Patent and Trademark Office ("USPTO") or another official-sounding trademark service in order to elicit money from your company.

The scammers use publicly-available information to target trademark owners with offers for mostly meaningless services in exchange for large fees. They disguise solicitations to look like correspondence from the USPTO or an affiliated entity. They appear to offer services such as trademark monitoring, recording trademarks with U.S. Customs and Border Protection, registering trademarks in a private registry, or maintaining registrations and renewals. The USPTO's website has sample scam letters.

The catch is that the services are largely bogus or unnecessary and the fees range from hundreds to thousands of dollars. The letters usually contain language such as "urgent" or "immediate response needed," intending to dupe a trademark owner into believing that the owner will lose its trademark rights if it fails to respond (though some also include an inconspicuous disclaimer). Unsuspecting trademark owners who don't notice the flaws in the solicitation or its disclaimer may be tricked into paying a great deal of money for nothing or, worse, possibly losing a mark.

For example, the "Register of International Patent and Trademarks" offers to include your mark in their "international service and trademark directory" for almost $3,000. Even if such a registry exists, it is a private registration unrelated to the official World Intellectual Property Organization (WIPO) and does not confer any legal trademark rights or protections on the trademark owner who pays the fee. International trademark rights are far more complex than this, depending in which country and economic zone you are seeking protection. Simply publishing a mark in a private registry does not confer any trademark rights upon its owner. In other solicitations, the trademark owner is offered "monitoring" services or renewal services at fees which mimic the USPTO's filing fees, yet never materialize.

The USPTO recognizes the confusion these "deceptive" and "misleading" solicitations cause and recently issued a warning to trademark owners. The warning provides its official email domain and mailing address to help trademark owners distinguish between legitimate and unofficial correspondence. The USPTO also encourages trademark owners who receive unofficial solicitations to file complaints with the Federal Trade Commission or to contact the USPTO directly, particularly where trademark owners have mistakenly paid fees believing a solicitation was official government communication.

THE IMMEDIATE SOLUTION—BE SKEPTICAL

If you receive an unsolicited notice regarding your trademark application or registration that is not from your attorney, be skeptical. To be safe, follow these guidelines:

1. **<u>Read the correspondence very closely.</u>**

   - <u>Check company name and address.</u> Any official correspondence from USPTO will be from the "United States Patent and Trademark Office" in Alexandria, Virginia or from the domain "@uspto.gov."

   - <u>Check for a seal.</u> While some companies use logos similar to the USPTO's, it would be unusual for them to copy it exactly. This is the seal of the USPTO:

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- Check the content. The USPTO does NOT send reminders to trademark owners of filing deadlines and will not send you a bill for any renewal or additional payment to publish your mark.

- Read the fine print. Some notices contain inconspicuous disclaimers admitting their informality and solicitous nature.

2. **Contact your attorney.** Always make your attorney aware of any request for payment before acting on it. If you have someone listed as an attorney of record, you should not be receiving any correspondence from the USPTO. The scam artists avoid contacting those listed as attorneys of record.

3. **Alert your financial department.** Make sure the rest of your organization knows about these scams and knows the tips for spotting fraudulent trademark schemes.

IV. CONCLUSION

Whenever you receive anything in the mail regarding your trademarks that is not from your attorney, be very skeptical. It's likely that even if these particular entities are stopped, there will be others that pop up in their place. Time has shown that those behind these scams know how to be creative, so the old adage remains true: *Caveat Emptor*.

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