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INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR ASSOCIATE AREA COUNSEL (SB/SE)
MILWAUKEE, WISCONSIN CC:SB:4:MIL

FROM: Associate Chief Counsel CC:ITA

SUBJECT:

DISCLOSURE STATEMENT

This Chief Counsel Advice responds to your memorandum dated November 7, 2001, in which you asked the National Office for guidance regarding the federal income tax consequences of a transfer of stock from H to W incident to their divorce, followed by a cash distribution from C to W representing the complete redemption of W's interest in C. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

H =

W =

C =

Date 1 =

Date 2 =

Date 3 =

State =

$x =

$y =

$z =

ISSUE

Whether H's transfer of stock in C to W, incident to their divorce, followed by C's complete redemption of W's stock in C, is taxable to W under § 302(a) of the Internal Revenue Code, or a constructive distribution to H under § 301(a) with no taxable gain to W in accordance with the nonrecognition provisions of § 1041.

CONCLUSION

The intent of § 1041, and that of H and W, are best served by respecting the form of the redemption transaction. If the form of the transaction is respected, W's receipt of cash upon the redemption of the C stock should be treated as a complete termination of a shareholder's interest and taxed as a sale or exchange under § 302(b)(3). [redacted]

FACTS

On Date 1, the marriage of W and H was legally dissolved. Prior to the dissolution of the marriage, H owned 100% of the common stock of C, a State corporation. Pursuant to a Marital Settlement Agreement (Agreement) executed by H and W, H was obligated to transfer to W 16% of the common stock of C, which had an adjusted basis of $x. The Agreement also provided that C and W "shall enter into a stock redemption transaction" where W would transfer her stock to C in complete redemption of her interest. C is then to pay W $y in exchange for the C stock.

Under the Agreement, H is personally responsible for payment of the $y redemption amount if C fails in any manner to carry out the terms of the Agreement. The Agreement further provides that "[W] acknowledges that the stock redemption transaction referenced herein will require her to be solely responsible for any capital gain taxes related to the same said capital gain taxes projected to be approximately $z."

In accordance with the Agreement, W received 16% of the C common stock on Date 2. In Date 3, W received $y in redemption of her C stock.

LAW AND ANALYSIS

In general, under § 301, a corporation's distribution of property to its shareholders is taxable first as a dividend (as described in § 316) to the extent of the corporation's earnings and profits, and next as a return of basis to the extent of the shareholder's basis in the shares. Any amount received in excess of basis is taxed as gain or loss from a sale or exchange.

Section 302 provides for the treatment of shareholders receiving distributions upon the redemption of stock. When certain criteria are met, a distribution in redemption of a shareholder's stock in a corporation is taxed as a sale or exchange of the stock rather than as a § 301 distribution. However, if the redeeming shareholder does not satisfy any portion of the test outlined in § 302(b), the redemption is taxable as a distribution under § 301.

Under § 1041(a), no gain or loss is recognized on a transfer of property from an individual to (or in trust for the benefit of) (1) a spouse, or (2) a former spouse, but only if the transfer is incident to a divorce. Section 1041(b) provides that, in the case of any transfer of property described in section 1041(a), the property shall be treated as acquired by the transferee by gift for purposes of Subtitle A of the Code, and the transferee's adjusted basis in the property becomes the adjusted basis of the transferor.

Section 1041(c) states that, for purposes of § 1041(a)(2), a transfer of property is deemed to be incident to the divorce if such transfer (1) occurs within 1 year after the date on which the marriage ceases, or (2) is related to the cessation of the marriage.

Section 1.1041-1T(d), Q&A-10, provides that the transferor of property under § 1041 recognizes no gain or loss on the transfer even if the transfer was in exchange for the release of marital rights or other consideration. This rule applies regardless of whether the transfer is of property separately owned by the transferor or is a division (equal or unequal) of community property.

Arguments for taxing W

In the instant case, W received from H, in a transaction governed by § 1041, 16% of the stock of C. C then redeemed W's stock in a complete termination of her shareholder interest in C. Thus, under § 302, the redemption should be treated as a payment by C in exchange for W's stock in C. Upon the redemption, W should thus recognize gain under § 1001 on the difference between the $x she received in the redemption and her $y basis in the C stock.

We anticipate that W will argue she should not be taxed on the redemption transaction. For example, W may argue that, since she was compelled by the Agreement to have her stock redeemed soon after receiving the stock, H, not W, should be taxed on the redemption under the authority of Palmer v. Commissioner, 62 T.C. 684 (1974), aff'd on another issue, 523 F.2d 1308 (8th Cir. 1975), acq. 1978-1 C.B. 2; and Rev. Rul. 78-189, 1978-1 C.B. 83.

In Palmer v. Commissioner, supra, the taxpayer had voting control of both a corporation and a tax-exempt foundation. Pursuant to a plan, the taxpayer contributed stock of the corporation to the tax-exempt foundation and caused the corporation to redeem such stock. The Tax Court held that the transaction should be treated according to its form, i.e., a gift of the stock followed by a redemption from the tax-exempt foundation. In so holding, the court noted "the presence of an actual gift and the absence of an obligation to have the stock redeemed have been sufficient to give such gifts independent significance." Id. at 693, citing Carrington v. Commissioner, 467 F.2d 704 (5th Cir. 1973), DeWitt v. United States, 503 F.2d 1406 (Ct.C1. 1974), Sheppard v. United States, 361 F.2d 972 (Ct.C1. 1966).

In Rev. Rul. 78-197, the Internal Revenue Service stated that it will follow Palmer on this issue of who is taxed upon a gift of stock followed by a redemption. However, Rev. Rul. 78-197 further states that the Service will treat the proceeds of a redemption of stock under facts similar to those in Palmer as income to the donor if the donee is legally bound, or can be compelled by the corporation, to surrender the shares for redemption. Since, in the instant case, W was legally bound to redeem her stock, W may argue that H, not W, should be taxed on the redemption.

For a number of reasons, however, the principles addressed in Palmer and Rev. Rul. 78-197 should not control the facts in the instant case. First, the instant case involves a stock transfer between former spouses and is thus governed by § 1041. Under § 1041, Congress gave taxpayers a mechanism for determining which of the two spouses will pay the tax upon the ultimate disposition of the asset outside the marital unit. The spouses are thus free to negotiate between themselves whether the "owner" spouse will sell the asset, recognize the gain or loss, and then transfer to the transferee spouse the proceeds from that sale, or whether the owner spouse will first transfer the asset to the transferee spouse who will then recognize gain or loss upon its subsequent sale. Thus, in light of Congress' intent in enacting § 1041, more leeway should be given to the form of a transaction in a divorce context, notwithstanding that the form of a similar transaction would not be respected were it a non-divorce situation.

In addition, § 1.1041-1T(c), Q&A-9 (Q&A-9), of the regulations, and the reasons for its publication, must be examined. Q&A-9 addresses transfers to third parties on behalf of a spouse (or former spouse). Under Q&A-9, a transfer by Spouse 1 (or former Spouse 1) of property to a third party on behalf of Spouse 2 (or former Spouse 2) will qualify under § 1041, provided certain requirements are satisfied. If the requirements of Q&A-9 are satisfied, the transfer of property will be treated as having been made directly to the nontransferring spouse (Spouse 2) and the nontransferring spouse will be treated as immediately transferring the property to the third party. The deemed transfer from the nontransferring spouse to the third party is not a transaction that qualifies for nonrecognition of gain under section 1041.

Reliance upon Q&A-9 provides spouses and former spouses with the ability to shift between themselves the tax consequences of a sale of property outside the marital unit. For example, assume S1 and S2 divorce and, in an attempt to equitably divide the marital property, S1 proposes to transfer to S2 appreciated property owned by S1. S2, however, prefers a monetary settlement. S1 agrees to find a buyer for the appreciated property, sell the property, and give the proceeds to S2, provided S2 agrees to bear the tax consequences of the sale. S2 agrees to S1's proposal and an agreement is reached. Q&A-9 provides a mechanism for S1 and S2 to complete this arrangement. Without Q&A-9, to transfer the tax consequences of the sale to S2, S1 would first have to transfer the appreciated property to S2, who then would have to sell it to the third-party buyer. Q&A-9 allows the parties to eliminate that first step of transferring the property to S2 by giving the parties the option of having S1 transfer the property directly to the third party "on behalf of" S2. Under Q&A-9, there is a deemed transfer of the property from S1 to S2, which is a tax-free transfer under § 1041. S2 is then taxed on the transfer to the third party buyer as if S2 owned the property and S2 sold it to the buyer.

In the instant case, we believe W should be taxed on the stock redemption for the same reasons that S2 bears the tax consequences of the transaction described above, namely that taxing W is equitable and consistent with the intent of the parties to the divorce. In the instant case, W ends up with the proceeds of the redemption, thus making it equitable that W pay the tax on such proceeds. Further, W, prior to receiving the C stock and the stock proceeds, agreed to accept the tax consequences of the redemption thus making W's taxation consistent with the intent of the parties. Finally, as in the case of the deemed owner bearing the tax consequences in Q&A-9, in the instant case, W was the owner of the C stock prior to its redemption by C and thus should bear the tax consequences of the redemption.

In addition, the Tax Court, has held, in a divorce situation, that a non-owning spouse can be taxed on a sale of property owned by his or her former spouse merely because a divorce instrument requires the non-owning spouse to receive a percentage of the proceeds of a sale of property greater than the non-owning spouse's ownership interest in such property. In Friscone v Commissioner, T.C. Memo 1996-193, Eugene Friscone owned a 50% interest in Maintenance Unlimited, Inc. (MUI) and a 45% interest in two car washes. The MUI stock owned by Eugene was subject to a buy-sell agreement between Eugene and Eugene's brother, who owned the remaining shares of MUI. Following a marital dissolution, the divorce court ordered Eugene to invoke the terms of the buy-sell agreement and awarded Eugene's former spouse, Linda, fifty-five percent of the proceeds derived from the sale of the MUI stock, as well as fifty-five percent of the proceeds derived from the sale of the two car washes. With respect to the tax consequences of the sales, the divorce court provided as follows:

> [I]n the event that the sale of [Eugene's] business interests as set forth hereinabove constitutes a taxable event, [Eugene and Linda] shall be liable and responsible for payment of any such taxes due in proportion to the share of the proceeds that each receives; and, accordingly, [Eugene] shall be responsible for payment of forty-five percent (45%) of any such tax so generated, and [Linda] shall be responsible for the payment of fifty-five percent (55%) of any such tax so generated.

Following the court's order, Eugene and MUI entered into an agreement under which MUI agreed to redeem the shares owned by Eugene. Eugene gave 55% of the proceeds of the redemption to Linda and, consequently, reported on his tax return only 45% of the proceeds of the MUI stock redemption.

The Tax Court agreed with Eugene's treatment of the sale proceeds, stating that, while the provisions of the divorce decree were cast in terms of a transfer of a percentage of the proceeds rather than a percentage of the stock, the divorce court, prevented from making an actual ownership stock transfer by the buy-sell agreement, in effect awarded Linda a 55% ownership interest in the stock. The Tax Court, in reaching its decision, was particularly persuaded by the divorce decree's provision as to the taxability of this division of marital property. The Tax Court stated as follows: "We recognize that although neither the parties nor the State court can authoritatively construe Federal tax law, the agreement as to Federal taxes may nevertheless throw strong light on what was intended in the agreement and decree with respect to the division of the marital property." Id. at 2839.

The result in Friscone is consistent with the position that, in the instant case, W should be taxed on the redemption of the C stock. In fact, the facts in the instant case are even more supportive of that result than the those in Friscone. In both cases, Friscone and the instant case, the spouse receiving the monetary proceeds agreed to bear the tax consequences of such proceeds, which as discussed above, was a very important factor in the Tax Court's decision in Friscone. Additionally, in the instant case, unlike in Friscone, W received an actual transfer of an interest in the C stock prior to its redemption and prior to W's receipt of the proceeds of the redemption.

Two other cases, however, Shur v. Commissioner, T.C. Memo 2001-28, and Urbauer v. Commissioner, T.C. Memo 1997-546, conclude that a former spouse is not required to bear a share of the tax consequences of a sale of property greater than the spouse's ownership interest in the property prior to its sale, notwithstanding the allocation of the sale proceeds. Both cases distinguish Friscone in concluding that the ownership interest of the taxpayer prior to the sale of property determines the tax consequences of the sale, not the amount of proceeds received by the taxpayer pursuant to a divorce instrument. It is important to note, however, that there are a number of important factual distinctions between those cases and the instant case. First, in the instant case, the Agreement actually provides for a transfer of the stock of C to W prior to the redemption of those shares. In neither Urbauer nor Suhr was there a transfer of the property to the non-owning spouse prior to its sale to a third party. Further, in neither Urbauer nor Suhr did the taxpayer spouse agree to accept the tax consequences relating to the sale proceeds received by that taxpayer. For example, in Urbauer, while agreeing to take on the administrative function of making the tax payment from the sale proceeds, the taxpayer did not agree to accept 75% of the tax liability even though she was to receive 75% of the net proceeds of the sale. In the instant case, the Agreement specifically provides that W will be solely responsible for any taxes related to the redemption. Accordingly, we do not view Urbauer and Suhr as inconsistent with the position that W should be taxed on the redemption of the C stock.

Thus, if the form of the redemption transaction is respected, W's receipt of cash upon the redemption will be treated as a complete termination of shareholder interest and taxed as a sale or exchange. W would therefore have a taxable gain to the extent the proceeds from the redemption exceed her adjusted basis in the C stock prior to the redemption.

Arguments against taxing W

Transactions similar to the one described in the instant case have been the source of much litigation, some of which is supportive of the position that, under Q&A-9, H, not W, should be taxed on the redemption. As discussed below, the cases have generated much confusion and uncertainty in the area of stock redemptions incident to a divorce.

Two cases with inconsistent results, Arnes v. United States, 981 F.2d 456 (9th Cir. 1992) (Arnes I), and Arnes v. Commissioner, 102 T.C. 522 (1994) (Arnes II), contribute to much of the uncertainty regarding the issue of who is taxed on a redemption incident to a divorce. The cases involved a corporate redemption that resulted from a divorce. Arnes I was a refund case in which the wife, Joann, was the litigant; Arnes II was a Tax Court case in which the husband, John, was the litigant. The marital property at issue was a McDonald's franchise that Joann and John jointly owned through a corporation. The franchisor did not allow divorced couples to jointly own and operate a franchise. To this end, Joann agreed to redeem her half interest in the corporation in return for cash, relief of debt, and installment payments.

In Arnes I, which resulted from the appeal of Joann's refund suit, the Ninth Circuit held that even though Joann transferred her stock directly to the corporation, the transfer was made on behalf of John within the meaning of Q&A-9. This was so, the court concluded, because John and not the corporation was obliged to buy Joann's stock and because John benefitted from the redemption in that he guaranteed the corporation's payments to Joann and was liable for the payments under state law. The court also noted the trial court's finding that the transfer benefitted John because it limited Joann's future community property claims against her former husband. Although John was not a party in Arnes I, the Ninth Circuit stated that Q&A-9 "suggests that the tax consequences of any gain or loss arising from the transaction would fall upon the nontransferring spouse [John] for whose benefit the transfer was made, rather than upon the transferring spouse [Joann]." Arnes I at 458.

John Arnes' tax liability from the transaction was addressed in a separate proceeding in the Tax Court. In Arnes II, the Service contended that John was liable for tax on the constructive dividend to him resulting from the corporation's redemption of Joann's stock. It also contended that the Tax Court was obliged to follow Arnes I under the principle of Golsen v. Commissioner, 54 T.C. 742 (1970), affd. 445 F.2d 985 (10th Cir. 1971). The Tax Court, however, disagreed, holding that John was not liable for tax on the transfer. The court concluded that Golsen did not apply, since Arnes I did not address the legal issue of whether there was a constructive dividend to John. The Tax Court's ruling was also based on its conclusion that John's guarantee of the corporation's liability to Joann did not create a "primary and unconditional obligation" under applicable state law. Under state law, the Tax Court noted, John's obligation to pay would only arise after the corporation failed to make payments to Joann. The Service did not appeal the Tax Court decision.

Thus, the results Arnes I and Arnes II were inconsistent, in that in Arnes I the Ninth Circuit held that Joann was not liable for the tax on the redemption and suggested that John received a constructive dividend from the same transaction, while in Arnes II the Tax Court held that no constructive dividend resulted. Accordingly, the inconsistent opinions created a whipsaw in which neither spouse paid the tax – a result clearly inconsistent with section 1041, its legislative history, and Q&A-9 of the regulations.

In addition, Arnes II suggests that the primary-and-unconditional-obligation standard of corporate redemption/constructive dividend law is the appropriate standard to apply in determining whether, for purposes of Q&A-9, a transfer by a retiring shareholder/spouse of her stock to the corporation was "on behalf of" the nontransferring continuing shareholder/spouse.

That the Tax Court refused to apply Arnes I to the petitioner in Arnes II was not surprising, in that the court had previously and specifically refused to follow Arnes I in another case, Blatt v. Commissioner, 102 T.C. 77 (1994). In Blatt, a corporation was owned jointly by Gloria and Frank Blatt. Pursuant to a divorce decree, the corporation redeemed all of Gloria's stock. Before the Tax Court, Gloria relied on Arnes I for her argument that the redemption was on behalf of Frank and therefore was nontaxable under section 1041 and Q&A-9. The Tax Court, however, stated that it did not agree with Arnes I and "respectfully refuse[d] to follow it." Blatt at 82. The court also noted that a transfer "on behalf of" a person must satisfy an obligation or liability of that person, and concluded that the redemption did not satisfy any liability of Frank since he did not personally guarantee the corporation's obligation to redeem the stock.

Furthermore, the court concluded that any benefit to Frank, such as relief from possible claims under marital property distribution laws, did not mandate a finding that Gloria's transfer of her shares to the corporation was on Frank's behalf. The court also noted factual differences between Arnes and Blatt, among them (1) in Arnes, the franchisor, McDonald's, required complete ownership of a franchise by an owner-operator after a divorce (there was no such requirement regarding the corporation in Blatt), (2) unlike Frank Blatt, John Arnes guaranteed the corporation's obligation to his former spouse, and (3) the Arnes' were divorced in a community property state, while the Blatts were not. Thus, the Tax Court's ruling in Blatt was based on its disagreement with Arnes I, as well as factual differences between the two cases.

The most recent Tax Court case involving section 1041 and a corporate redemption is Read v. Commissioner, 114 T.C. 14 (2000). In Read, the Tax Court apparently resolved many of the perceived differences between Blatt, Arnes I, and Arnes II. The taxpayers, Mr. and Ms. Read, owned almost all of the stock of Mulberry Motor Part, Inc. (MMP). Under their divorce judgment, Ms. Read was to sell her stock to Mr. Read, or, at his election, to MMP or MMP's ESOP. In consideration for the stock, Mr. Read, or at his election, the MMP or its ESOP, was to pay Ms. Read a certain amount of cash and give her an interest-bearing promissory note. At Mr. Read's election, Ms. Read sold her stock to MMP. MMP paid the cash amount to Ms. Read and issued the promissory note to Ms. Read. Mr. Read also guaranteed the note in his individual capacity.

The Tax Court held that MMP's redemption of the wife's stock was a transfer to a third party on behalf of Mr. Read, as contemplated by Q&A-9. The court concluded that no gain was recognized by Ms. Read on the transfer and that Mr. Read had a taxable constructive dividend as the result of the redemption. In reaching its conclusion, the Tax Court stated that its prior cases, including Arnes II and Blatt, have been misconstrued as holding that the "on-behalf-of standard" of Q&A-9 may be satisfied only if the nontransferring spouse has "a primary and unconditional obligation" to purchase the transferring spouse's stock, as set out in constructive dividend cases such as Sullivan v. United States, 363 F.2d 724 (8th Cir. 1966), and Smith v. Commissioner, 70 T.C. 651 (1978).

Eschewing the "primary-and-unconditional" standard, the Tax Court in Read looked solely to the "on-behalf-of" standard of Q&A-9 and whether the wife's transfer of her stock to the company was a transfer on behalf of her husband within the meaning of Q&A-9. Citing Blatt, the court held that "the common, ordinary meaning of the phrase 'on behalf of' in Q&A-9 is "in the interest of" or "as a representative of." The court then made the following conclusion:

> [W]e find that Ms. Read was acting as Mr. Read's representative in transferring her MMP stock to MMP, and Ms. Read was acting in the interest of Mr. Read in making that transfer to MMP, [footnote omitted] in that she was following and implementing Mr. Read's direction as reflected in his election under the divorce judgment that she transfer her MMP stock to MMP. Absent Mr. Reid's election, Ms. Read was obligated under that judgment to transfer that stock to Mr. Reid. We hold that Ms. Read's transfer to MMP of her MMP stock was a transfer of property by Ms. Read to a third party on behalf of Mr. Read within the meaning of Q&A-9.

Read at 36-37. Thus, under Q&A-9, no gain was recognized on the transfer by Ms. Read.

The Read decision was followed in Craven v. United States, 215 F.3d 1201 (11th Cir. 2000), an appeal of a refund case. In Craven, a husband and wife owned a closely-held corporation. Pursuant to their divorce decree, the wife (the transferring spouse) agreed to sell all of her stock to the corporation in exchange for a note. Relying on Read, the Eleventh Circuit held that the corporation's redemption of the transferring spouse's stock was "on behalf of" the nontransferring spouse because (1) the transferring spouse was redeeming her stock pursuant to the divorce settlement, (2) the nontransferring spouse guaranteed the corporation's note to the transferring spouse, and (3) in the note the nontransferring spouse acknowledged that it's terms were of direct interest, benefit and advantage to him.

The facts in the instant case are quite similar to the facts in Read, Craven, and Arnes I. As in the instant case, those cases all involve former spouses transferring their stock to a corporation in complete redemption of the former spouse's stock interest in the corporation. Another similarity with the instant case is that the redemption transactions in the cases were called for by a divorce instrument. Finally, as in Read, Craven, and Arnes I, H in the instant case guaranteed the cash payment from C upon C's redemption of W's stock.

An important fact, however, that distinguishes the instant case from Read, Craven, and Arnes I is that W, in the instant case, agreed, prior to the transaction, to accept the tax consequences of the redemption. Very possibly, the aforementioned cases would have reached a contrary result if, as in the instant case, the spouse ending up with the redemption proceeds expressly agreed to accept the tax consequences of the redemption. Furthermore, the fact that W accepted the tax consequences of the redemption makes the instant case very much like Friscone, supra, where a taxpayer who had no ownership interest in stock prior to its sale by her former spouse was nevertheless taxed on 55% of the proceeds she received mainly because the divorce decree provided that she would accept the tax consequences of the sale. In deciding the issue, the Tax Court stated as follows: “We recognize that although neither the parties nor the State court can authoritatively construe Federal tax law, the agreement as to Federal taxes may nevertheless throw strong light on what was intended in the agreement and decree with respect to the division of the marital property.” Id. at 2839.

In conclusion, in the instant case, the intent of § 1041 and the intent of the parties to the divorce are best served by respecting the form of the redemption transaction. In that case, W’s receipt of cash upon the redemption of the C stock is treated as a complete termination of a shareholder interest and taxed as a sale or exchange under § 302(b)(3). We recognize, however, that transactions similar to the one described in the instant case have been the source of much litigation, some of which is supportive of the position that H, not W, should be taxed on the redemption. If, in accordance with those cases, the redemption transaction is determined to be "on behalf of" H, then the transaction would be treated as a distribution of cash to H, which would be taxable to H under § 301, followed by a § 1041 non-taxable transfer of that cash to W.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

[redacted] In the past, to support a position that a transaction was "on behalf of" the non-transferring spouse, significant weight has been given to the fact that the non-transferring spouse has guaranteed that the transferring spouse would receive the cash that is owed to them. Craven v. U.S., supra; Arnes v. U.S., supra; cf. Blatt v. Comm’r, supra (1994) (holding that mere "putative benefit" to the non-transferring spouse upon the transfer of property to a third party, is not "on behalf of" and therefore does not qualify the transferring spouse for § 1041 treatment; but also noting that the non-transferring spouse did not guarantee the corporation’s obligation to redeem the transferring spouses shares). In the instant case, H personally guaranteed C’s payment to W, which suggests that the transaction may have been "on behalf of" H. However, in the Marital Settlement Agreement, W expressly accepted any tax burden associated with the redemption transaction. [redacted]

[redacted]

If you have any further questions, please call 202-622-4940.