Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: Associate Area Counsel
(Small Business/Self Employed)
CC:SB:3:FTL
Attention: Ladd Brown

from: Chief, Branch 1
Office of the Associate Chief Counsel
(Income Tax & Accounting)
CC:ITA:1

subject:

This Chief Counsel Advice responds to your request for assistance dated December 23, 2003. This advice may not be used or cited as precedent.

While we agree with the conclusions reached in your memorandum, our analysis differs to some extent. Accordingly, we submit the following discussion for your consideration.

<u>LEGEND</u>

A =

Year 1 =

Year 2 =

Year 3 =

ISSUES

(1) Whether investors in a Ponzi scheme that takes the form of debt investments are entitled to amend their returns for an open year to reverse interest income received and reported.

(2) Whether "middle tier" investors are entitled to amend their returns for an open year to reverse commissions received and reported.

(3) Whether investors may claim a theft loss under § 165 for amounts received and reported as income, but reinvested in the scheme.

CONCLUSIONS

(1) Payments received by investors as interest are generally includible in income in the year or years they were actually or constructively received. As a return on an investment, these payments were income whether or not they technically constituted interest on a *bona fide* loan. Retroactive recharacterization of such payments as a return of capital under an "open transaction" theory, once the fraud was discovered, is not warranted; the appropriate form of cost recovery in such a situation is generally a bad debt or theft loss deduction. Assuming the deduction arises from theft, and if a net operating loss is created in the year the loss is sustained, an investor would be entitled to a three-year carryback of the loss under § 172.

(2) Commission income earned by "middle-tier" investors is ordinary income for services performed, taxable as such in the year or years received.

(3) It is possible that some of the loans were expected to be repaid; in such a case, an investor would take a nonbusiness bad debt deduction under § 166 for unpaid principal, including reinvested interest, in the year of worthlessness. Generally, however, investors would be entitled to a theft loss deduction under § 165(c)(3) for funds invested or reinvested and lost. However, no bad debt or loss deduction is allowable so long as there is a reasonable prospect of recovery, through the bankruptcy proceeding or otherwise. In addition, deductions under either § 166 or § 165 can be disallowed for participants who were aware of the fraudulent or illegal nature of the scheme, under the "frustration of public policy" doctrine.

FACTS

Generally, A's business began as a legitimate business buying and reselling surplus sundry items. However, after several unprofitable deals, A began soliciting loans from investors, promising a return of 5% in six weeks. After some period, the promoter’s business had disintegrated into a Ponzi scheme. A was no longer dealing in sundries, but rather directed his efforts toward soliciting new investors. Payments to investors were made with funds obtained from newer investors.

Some investors, described as “middle-tier” investors, received commissions for soliciting new investors, as well as interest payments. It is unclear whether these middle-tier investors were aware of the fraudulent nature of the scheme.

In Year 3 the scheme collapsed after A's bank contacted the FBI with respect to the volume of cash moving through A's account; the account was seized and A was forced into bankruptcy. The bankruptcy trustee has collected funds that will be distributed to investors, but the amount of the recovery is uncertain.

Many investors have filed refund claims for open years on the ground that the payments they received were not interest but a return of principal, excludable from income. Investors have also taken theft loss deductions in Years 1, 2, and 3.

For purposes of this discussion, we assume what seems likely on the facts, which is that A's operation of the scheme, at least in later years, constituted theft, as that term is interpreted for purposes of § 165(c)(3) and 165(e).

LAW AND ANALYSIS

(1) Were the interest payments received by investors income in the year received?

Section 61 of the Internal Revenue Code states that, except as otherwise provided, gross income means all income from whatever source derived. This definition covers any items that represent "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).

An item of income is includable in the gross income of a cash basis taxpayer in the tax year when it is actually or constructively received. Section § 1.451-1(a) of the Income Tax Regulations. Income is constructively received in the tax year in which it is credited to the taxpayer's account, set apart for him, or otherwise made available so that he may draw upon it at any time. Treas. Reg. § 1.451-2(a). When the payor lacks funds to make the payment, there can be no constructive receipt.

Fraudulent pyramid or "Ponzi" schemes may take a variety of forms. Generally the perpetrators promise the victims a significant return on capital, as interest, dividends, capital gains, sales proceeds, rentals, royalties, etc. In all cases the perpetrator's intent is to swindle the investors—funding payments of "income" using money invested by current and new investors—though many investors will receive some return, and some investors may make an overall profit from the scheme. The present scheme took the form of short term “loans” issued at interest rates in excess of 43% annually.

"Open transaction doctrine" in general

You state that a number of investors have filed amended returns for open years, recharacterizing the taxable interest they reported in those years as, in hindsight, a nontaxable return of principal. Presumably, the justification for this treatment is the "open transaction doctrine." The open transaction doctrine occasionally applies to permit an investor to recover capital prior to recognizing gain, where the receipt of deferred payments is speculative or contingent. The Supreme Court established the open transaction doctrine in Burnet v. Logan, 283 U.S. 404 (1931). In Logan, the taxpayer owned stock in a corporation which, along with several other corporations, held a leasehold interest in a mine. The taxpayer sold the stock for cash plus a royalty of 60 cents per ton on all ore apportioned to the corporation. There was no provision for a maximum or minimum tonnage. The contractual promise to pay the royalty was held to be too contingent and speculative to have any ascertainable value, and as a result, the transaction could not be regarded as closed.

The open transaction doctrine is sparingly applied. It originated and has most often been invoked in the context of sales of property and, even within that context, has only been applied in rare and extraordinary circumstances. See Treas. Reg. § 1.1001-1(a); McShain v. Commissioner, 71 T.C. 998, 1004 (1979); Estate of Wiggins v. Commissioner, 72 T.C. 701, 708 (1979); Estate of Meade v. Commissioner, 489 F.2d 161, 163 (5th Cir.), cert. denied, 419 U.S. 882 (1974).

In a line of older cases, the open transaction doctrine has also been applied to the treatment of discount income on a loan, on the ground that the instrument was speculative. See Underhill v. Commissioner, 45 T.C. 489, 495 (1966) (stated interest reportable as income, but discount income not reportable as interest until entire investment recovered); see also Liftin v. Commissioner, 36 T.C. 909 (1961); Phillips v. Frank, 295 F.2d 629, 633-34 (9th Cir. 1961).

With respect to notes issued in a fraudulent scheme, two cases have applied a version of open transaction treatment. In Greenberg v. Commissioner, T.C. Memo. 1996-281, the judge, citing Burnet v. Logan, permitted interest payments received by a passive investor in a Ponzi scheme to be treated as a recovery of principal. There was sufficient evidence to determine the amount of funds paid and received by the taxpayers. The opinion states that the payments the taxpayers received were not interest because they were not compensation for the use or forbearance of money. Instead, the payments were made to conceal the fraudulent misappropriation of the taxpayers' investment. And in Taylor v. United States, 81 AFTR 2d 98-1683, 98-1 USTC ¶ 50,354 (E.D. Tenn. 1998), an individual fraudulently claimed to be investing funds on behalf of a partnership; the court held that the partnership did not realize income in the year prior to the year the fraud was discovered, since the partnership did not receive more than it invested in that year.[1]

In contrast, most courts have been reluctant to apply the open transaction doctrine in this context. In Parrish v. Commissioner, 168 F.3d 1098 (10th Cir. 1999), aff'g T.C. Memo 1997-474, for example, the court found that payments of interest, dividends, and finders fees were taxable as current income. The court distinguished the "rather unique" Greenberg opinion, finding that the taxpayer had not established that the open

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[1] It is unclear from the Taylor opinion whether this issue was conceded by the government, whose primary argument was that the investment was made by the partners, not the partnership.

transaction doctrine or, if different, the rationale of Greenberg, applied. Similarly, in Premji v. Commissioner, T.C. Memo 1996-304, aff'd without published opinion, 139 F.3d 912 (10th Cir. 1998), the taxpayer received interest payments from an investment in a Ponzi scheme. Checks for the loan principal were also made available but the taxpayer chose to reinvest them. The taxpayer argued that an interest payment on one of the notes was not required to be included in income, under the open transaction doctrine. The Tax Court concluded that the payment was income in the year received, and not a recovery of principal, since the taxpayer could not establish that the recovery of the principal amount was sufficiently uncertain. See also Wright v. Commissioner, T.C. Memo. 1989-557, aff'd, 931 F.2d 61 (9th Cir. 1991); Murphy v. Commissioner, T.C. Memo. 1980-218, aff'd per curiam, 661 F.2d 299 (4th Cir. 1981).

In the present case, we conclude that amounts, if any, recovered with respect to an instrument *after* discovery of the fraud (that is, after the point at which, we assume, a typical investor would be aware that recovery of his or her principal was uncertain) are properly treated as a return of capital—not includable in income, in whole or in part, but instead reducing basis otherwise recoverable through a bad debt or loss deduction. For several reasons, however, we do not believe the open transaction doctrine applies for prior years.

This conclusion holds true whether or not a given obligation was, in fact, *bona fide* indebtedness, respected as such for federal income tax purposes—although the reasoning behind the conclusion differs to some extent.

Bona fide debt

A *bona fide* debt is a debt that arises from a debtor-creditor relationship based upon a valid and enforceable obligation to pay a fixed or determinable sum of money. § 1.166-1(c). Generally, whether a transaction for federal income tax purposes constitutes a *bona fide* loan is a factual question, and the courts have identified several factors to be used in the determination. However, a distinguishing characteristic of a loan is the knowledge of each party to the transaction that there is a loan, and the intention of each party that the money advanced be repaid. Commissioner v. Makransky, 321 F.2d 598, 600 (3d Cir. 1963), aff'g 36 T.C. 446 (1961); Moore v. United States, 412 F.2d 974, 978 (5th Cir. 1969); Litton Business Systems, Inc. v. Commissioner, 61 T.C. 367, 377 (1973), acq., 1974-2 C.B. 3; Leaf v. Commissioner, 33 T.C. 1093, 1096 (1960), aff'd per curiam 295 F.2d 503 (6th Cir. 1961). Courts have looked at whether there was an express or implied consensual recognition of the obligation to repay, and whether each party viewed the transaction as a loan. Collins v. Commissioner, 3 F.3d 625, 631 (2d Cir. 1993), aff'g T.C. Memo. 1992-478. The determination is made at the inception of the transaction.

On this basis, swindlers or embezzlers, who receive "loan proceeds" but do not recognize a consensual obligation to repay them, must include the proceeds in income, and cannot take a deduction under § 163 for payments that are not, in fact, interest (although they may be entitled to a § 162 deduction for such payments, as an ordinary and necessary expense of the fraudulent enterprise). See Collins; United States v.

Rosenthal, 470 F.2d 837, 842 (2d Cir. 1972); United States v. Rochelle, 384 F.2d 748 (5th Cir. 1967); Smith v. Commissioner, T.C. Memo. 1995-402.[2]

Although we have found no authority directly on point, presumably if an instrument is not true debt for the "borrower," it is not true debt for the "lender" either.

In the present case, we cannot reach blanket conclusions with respect to whether the purported loans were *bona fide* indebtedness. The fact that a business degenerates over time into a pyramid scheme does not rule out the possibility that some of its obligations were *bona fide* debts, and you may conclude that certain of the obligations in question were intended to be repaid and otherwise met the requirements for treatment as "indebtedness" under the Code. Accordingly, we will analyze both possibilities.

Application of open transaction doctrine

For those obligations that you conclude did constitute *bona fide* debt, we see no justification for retroactive recharacterization of interest, actually or constructively received, as a return of principal. Under Reg. § 1.446-2(e), a payment on a debt instrument is generally treated as a payment of interest to the extent of any accrued and unpaid interest. This includes original issue discount and any other amounts treated as interest, whether stated or unstated. § 1.446-2(a). [3] The treatment of market discount and contingent debt in such older cases as Underhill and Liftin has largely been superseded by subsequent developments in the law and it is questionable what, if any, precedential value they now have. See §§ 1276-78; § 1.1275-4; D. Garlock, Federal Income Taxation of Debt Instruments § 6.03[D][3] (4th Edition 2003). The fact that a lender on a *bona fide* debt obligation ultimately fails to recover all or part of the loan principal may result in a deduction under § 166; it does not, however, justify retroactive recharacterization of payments properly included in income in prior years.[4]

As to those transactions that you conclude did not constitute *bona fide* debt, even though a payment is not technically interest it is still a return on investment, taxable as such, and application of the open transaction doctrine is inappropriate. See Parrish; Premji.

As noted above, the open transaction doctrine—an exception to the general rule that each tax year stands on its own, see Burnet v. Sanford & Brooks, 282 U.S. 359

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[2] Courts have treated proceeds from fraudulent schemes as income even though the perpetrator may have had a vague hope of repaying investors eventually, and even though certain amounts were repaid to facilitate the scheme. See McSpadden v. Commissioner, 50 T.C. 478 (1968); see also Moore v. United States, 412 F.2d 974, 978 (5th Cir. 1969); Webb v. Internal Revenue Service, 823 F. Supp. 29 (D. Mass. 1993), aff'd, 15 F.3d 203 (1st Cir. 1994).

[3] A similar rule applies if the debt instrument has original issue discount, see § 1.1275-2(a), although, for purposes of this memorandum, we assume that the interest in question is not original issue discount.

[4] Note that this does not mean that all payments necessarily constituted interest. If a payment on an obligation exceeded the amount of accrued and unpaid interest on that obligation, the excess would properly have been treated as a return of principal under § 1.446-2(e).

(1931)—is only applied in rare and extraordinary circumstances, and even then primarily in the context in which Burnet v. Logan was decided, the sale of property. Generally, taxpayers are held to the form of their transactions, and cannot recharacterize them with the benefit of hindsight; this reasoning would apply, in particular, to "middle-tier" investors and others who benefited from a pyramid scheme, especially if they were aware of the nature of the scheme. See Parrish; Premji.[5] Apart from the Greenberg opinion, a memorandum decision of the Tax Court, the Taylor case, which is ambiguous on this point, and dicta in other opinions, we have found no authority for applying the open transaction doctrine when payments on an instrument are denominated as a return on investment and the recipient either receives the funds, or is in constructive receipt but chooses to reinvest them. Finally, in these situations it seems that the Code establishes a method whereby investors can recover their cost—through either a bad debt or loss deduction. Arguably, it is inconsistent with this statutory scheme (and perhaps unfair to those investors who received *no* return on their investment) for investors to avoid the restrictions of §§ 165 and 166 through the retroactive recharacterization of prior receipts, in advance of the year a debt becomes worthless or a theft loss is discovered, and when there may still be a reasonable prospect of recovery that would further postpone cost recovery.

We recognize that this treatment may appear unfair, especially as applied to "lower-tier" investors who were unaware of the true nature of the pyramid scheme at the time of the income payments, and especially if the amounts were only constructively received and reinvested. We note that whether constructive receipt applies is a factual determination, and you may conclude that amounts were not properly reported as income because, with respect to a particular "loan," the promoter was not in fact willing and able to pay.[6] See the discussion of constructive receipt in Premji. However, if a payment of income was, in fact, actually or constructively received, prior to the discovery of the fraud, we conclude that an investor may not recharacterize it retroactively as a return of capital under the open transaction doctrine. The remedy, in such a case, is a bad debt or theft loss deduction. Note that, as discussed below, the Code does contemplate the reduction of income received in years prior to the year a theft loss is sustained in certain circumstances, through the application of the net operating loss provision, § 172.

(1) Were commissions earned by "middle-tier" investors income in the year received?

Section 61(a)(1) states that gross income includes compensation for services, including fees, commissions, fringe benefits, and similar items.

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[5] Arguably, active participants in the scheme should be held to the form of their transaction even if they became aware of the nature of the scheme—and aware of the possibility that they might not recover their investments as the scheme unraveled—before innocent investors did.

[6] Note that the issue of constructive receipt is a threshold question. If you conclude that an investor did not constructively receive a payment that was "reinvested" in the scheme, you do not reach the income/capital characterization issue.

With respect to commissions earned by "middle-tier" investors as a result of their enrolling new investors in the scheme, there is no question of return-of-capital or open transaction treatment. It seems clear that these amounts represented compensation for services, includible in income when actually or constructively received, regardless of whether the taxpayer was aware of the fraudulent nature of the scheme.

(2) <u>May investors claim a theft loss under § 165 for amounts received and reported as income, but reinvested in the scheme?</u>

Bad debt or theft loss

Section 166(d) allows a noncorporate taxpayer a short-term capital loss deduction for any nonbusiness debt that becomes worthless within the tax year.

Section 165(a) allows a deduction for any uncompensated loss sustained during the tax year.

Section 166, not § 165, governs the deduction of worthless debts, <u>Spring City Foundry Co. v. Commissioner</u>, 292 U.S. 182 (1933), Rev. Rul. 69-458, 1969-2 C.B. 33, and this is true even if worthlessness was indirectly caused by fraud or theft. Rev. Rul 77-383, 1977-2 C.B. 66. However, a loss that is the *direct* result of fraud or theft is deductible under § 165, even though the transaction takes the form of a borrowing. Rev. Rul. 77-215, 1977-1 C.B. 51; Rev. Rul. 71-381, 1971-2 C.B. 126.

As discussed above, whether a purported debt instrument is respected as such for tax purposes depends primarily on whether the parties recognized it as a binding obligation, and you may conclude that some of the loan obligations issued in this scheme should be treated as *bona fide* debt. If so, then with respect to those instruments the investor would be entitled to a bad debt deduction under § 166 if it became worthless. As a nonbusiness bad debt, it would be a short-term capital loss, under § 166(d).

With respect to those instruments that were not *bona fide* debt (and assuming you conclude that the scheme met the definition of "theft" for purposes of § 165), investors are entitled to a theft loss deduction under § 165.

Frustration of public policy

With respect to certain investors who are found to have been active and knowing participants in the scheme, there may be a ground for disallowing a bad debt or theft loss deduction altogether.

The Supreme Court has held that a deduction is not allowable where to do so would severely and immediately frustrate a sharply defined national or state governmental declaration of policy. <u>See</u> <u>Commissioner v. Tellier</u>, 383 U.S. 687 (1966); <u>Tank Truck Rentals, Inc. v. Commissioner</u>, 356 U.S. 30 (1958). While this doctrine has been superseded by specific legislation for purposes of §§ 162 and 212, it still applies in the context of other Code provisions, such as § 165. See Rev. Rul. 77-126, 1977-1 C.B. 47; Wood v. Commissioner, 863 F.2d 417, 420-22 (5th Cir. 1989).

If a taxpayer's activities in connection with a claimed theft loss are contrary to public policy, that may be grounds for denying a theft loss deduction. See Richey v. Commissioner, 33 T.C. 272 (1959); Mazzei v. Commissioner, 61 T.C. 497 (1974). In Lincoln v. Commissioner, T.C. Memo. 1985-300, the taxpayer was swindled in connection with his participation in a scheme to buy stolen money at a discount. The court did not allow a theft loss deduction, stating that it is "as important to the policy of the state and nation to prevent attempts to buy stolen goods as it is to prevent an actual purchase [of stolen goods]." The same reasoning could apply to a claimed bad debt loss under § 166.[7]

Section 165(c)(2) or 165(c)(3)

Section 165(c) limits loss deductions for individuals to business losses, § 165(c)(1); losses incurred in a transaction entered into for profit, § 165(c)(2); and nonbusiness, noninvestment losses that arise from casualty or theft, § 165(c)(3). Section 165(h) imposes certain limits on deductions in the last category.

Section 165(e) provides that any loss arising from theft is treated as sustained during the tax year in which the taxpayer discovers the loss.

Since the investors entered into the loan transactions with an expectation of profit, arguably their losses are deductible under § 165(c)(2), not § 165(c)(3)—although the timing of the loss would still be governed by § 165(e). See, for example, the government's apparent concession to this effect in Premji. However, the official position of the Service is that such a loss is deductible only under § 165(c)(3). See Rev. Rul. 71-381. As such, it is subject to the limitations in § 165(h).

Treatment of reinvested amounts

The amount of the deduction under both § 165 and § 166 is limited to the taxpayer's basis. §§ 165(b), 166(b).

In the present case, an investor's basis in an instrument—for purposes of § 165 or § 166, as the case may be—would include the investor's original investment, less any amounts reported as return of principal, plus amounts reinvested (including amounts actually or constructively received, reported as interest income, and reinvested). See the discussion in Premji.

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[7] Loss deductions are often disallowed altogether for taxpayers who participate in a "sham transaction." See, e.g., Viehweg v. Commissioner, 90 T.C. 1248 (1988); Marine v. Commissioner, 92 T.C. 958 (1989), aff'd, 921 F.2d 280 (9th Cir. 1991), cert. denied, 502 U.S. 819 (1991). The rationale is that the taxpayers suffered no economic loss, since they got what they bargained for: a tax shelter. Marine, 92 T.C. at 978; Rev. Rul. 70-333, 1970-1 C.B. 38. This rationale does not apply in the present case. Although the scheme may have been a sham, in that the promoter's misrepresentations masked its substance, it was not a tax shelter and the investors' potential losses are real.

Year of deduction

A short-term capital loss deduction for a nonbusiness debt is allowable in the year of total worthlessness. § 166(d)(1)(B); § 1.166-5(a)(2).

Generally, a loss is sustained in the taxable year in which the loss occurs as evidenced by a closed and completed transaction and as fixed by identifiable events. See § 1.165-1(d)(1). Section 165(e) and § 1.165-8 of the Income Tax Regulations provide that a loss arising from a theft shall be treated as sustained during the taxable year in which the taxpayer discovers the loss.

Section 1.165-8(a)(2) provides that if in the year the taxpayer discovers the loss arising from a theft there exists a claim for reimbursement with respect to which there is a reasonable prospect of recovery, no portion of the loss for which reimbursement may be received is sustained, for purposes of section 165, until the taxable year in which it can be ascertained with reasonable certainty whether or not such reimbursement will be received. See also § 1.165-1(d)(3). Therefore, a theft loss deduction will be barred to the extent that a reasonable prospect of reimbursement exists. If the theft loss exceeds the claim for recovery, the excess would be deductible in the year the theft is discovered. Ramsay Scarlett & Co. v. Commissioner, 61 T.C. 795 (1974), aff'd, 521 F.2d 786 (4th Cir. 1975).

Although the test for worthlessness of a debt, for purposes of § 166, is not necessarily identical to the test for when a loss is sustained, for § 165 purposes, a reasonable prospect of recovering on a nonbusiness debt will generally postpone a deduction under § 166(d), since the debt is not totally worthless. See §§ 1.166-2(a), 1.166-5(a)(2); Aston v. Commissioner, 109 T.C. 400, 415-16 (1997); Crown v. Commissioner, 77 T.C. 582, 598 (1981).

Whether the investors in the present situation had a reasonable prospect of recovery at a given point in time is a question of fact. However, substantial amounts were seized before the filing of the Chapter 7 bankruptcy proceeding, and although these amounts represented only a percentage of the creditors' claims the trustee could reasonably have been expected to recover additional amounts. We agree that these facts do not lead to an inference that the losses were deductible, as bad debts or theft losses, in the year the bankruptcy petition was filed.

A deduction may be available under § 165, however, to the extent the bankruptcy court has limited the amount it will attempt to recover. A taxpayer may deduct that portion of a loss that is not covered by a claim for reimbursement as to which there is a reasonable prospect of recovery. § 1.165-5(d)(ii). You have indicated that the bankruptcy court has reduced the total claim of at least some investors by amounts they previously received as interest. As discussed above under Issue (1), for tax purposes those payments are properly treated as income, rather than a return of capital; as such, the payments would not reduce the taxpayers' basis in their investment. Assuming that they do not have avenues of recovery other than the bankruptcy proceeding, therefore, investors in this situation would be able to deduct the excess of their basis over the amount of the bankruptcy claim; this partial loss deduction would not be postponed by the bankruptcy proceeding. Note that this treatment would not apply to any obligations that you determine were *bona fide* loans, since a deduction is not available under § 166(d) for the partial worthlessness of a nonbusiness debt.

Possible net operating loss carryback

Investors whose theft losses exceed their income in the year the losses are sustained may be able to carry back the losses against prior years' income as a net operating loss under § 172. Although § 172 is primarily concerned with business operating losses, a loss arising from casualty or theft is allowable in computing a net operating loss regardless of whether it arises in a business, investment, or personal context. § 172(d)(4)(C). In addition, although a net operating loss can generally be carried back two years and forward 20 years, the former three-year carryback has been retained for casualty and theft losses. § 172(b)(1)(F)(ii)(I).

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

[redacted]

It may be true that open transaction treatment has only been approved in Greenberg, a memorandum opinion of limited precedential value (and presumably in the district court's Taylor opinion; exact analysis of the facts of Taylor and the government's position in the case is difficult). However, subsequent opinions that did not follow Greenberg did so by distinguishing the case, or by relying on the taxpayers' failure to meet the burden of proof, not by rejecting Greenberg outright. In addition, courts may feel that the Underhill line of cases retains significant precedential value, even though the specific questions at issue in those cases—the treatment of market discount and contingent debt—have largely been superseded by subsequent legislative and regulatory developments.

Taxpayers bear the burden of proof on this issue, and the position that open transaction treatment does not apply may be sustainable with respect to "middle-tier" investors, similar to those in Parrish and Premji, who were active participants in the scheme, earned commissions for enrolling new participants, and who can reasonably be held to the form of their transactions. However, courts may be sympathetic to innocent "lower-tier" investor/victims—especially those who were persuaded to "reinvest" constructively-received earnings they paid tax on but never actually saw—whose deduction for their cumulative losses awaits the resolution of the bankruptcy proceeding. Even though investors may have believed, subjectively, that their investments were not excessively speculative, this belief was the result of deliberate fraud on the part of the promoter. Taking equitable factors into account, and drawing on the Underhill line of precedent, a court may find that under such circumstances the open transaction doctrine should apply, since the investment was, objectively, speculative, taking into account facts the investors did not know.

This memorandum has focused on taxpayers who, you indicate, are amending their returns to apply open transaction treatment for amounts received in years that are open under the refund statute of limitations. Arguably, open transaction treatment works to the disadvantage of taxpayers who reported actual payments as income in barred years, since recharacterizing such payments as a return of capital could reduce the amount of basis available to deduct as a bad debt or theft loss in an open year. However, it is not clear that this result would necessarily apply; analysis of this question would entail consideration of the mitigation provisions, equitable doctrines, and other procedural issues that are beyond the scope of the current memorandum.

We note that there is a potential, additional argument against retroactive open transaction treatment based on § 446(e), under which a change in a taxpayer's method of accounting generally requires Service consent and is made on a prospective basis. However, for present purposes we did not develop this argument, which would have further delayed our response.

[redacted]

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Please call (202) 622-5020 if you have any further questions.