OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE CHIEF COUNSEL ADVICE

MEMORANDUM FOR

FROM: Michael J. Roach, Chief, CC:TEGE:EB:QP1

SUBJECT:

This Chief Counsel Advice responds to your memorandum, dated October 27, 1999. Chief Counsel Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

Company A=
Plan X =

ISSUES:

1. For purposes of determining whether a plan is an "employee stock ownership plan" as defined in ERISA §407(d)(6), and exempt from the prohibited transaction provisions of I.R.C. §4975(c)(1)(A) pursuant to I.R.C. §4975(d)(13), is the term "qualifying employer securities" defined by I.R.C. §409(l) or by §407(d)(5) of ERISA?

2. Does the contribution of employer stock by an employer/plan sponsor to its stock bonus plan pursuant to a discretionary funding provision constitute the sale or exchange of property between the employer and the plan under I.R.C. §4975(c)(1)(A)?

3. What is the effect of the Service's issuance of a favorable determination letter to Plan X where the plan document had an incorrect definition of the term "qualifying employer security"?

4. Would a judgment in favor of the Department of Labor in an action under ERISA against the Plan's fiduciaries regarding violations of ERISA §§404 and 406 (which violations were, in part, grounded upon the definition of qualifying employer securities as found in I.R.C. §409(l)) constitute res judicata or collateral estoppel against Company A for its excise tax liability under I.R.C. §§4975(a) and (b)?

5. In light of the Supreme Court's decision in Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213 (1996), would a bankruptcy filing by Company A raise a substantial hazard that pre-petition, unassessed excise taxes under §§4975(a) and (b) will be classified as penalties, such that they are treated as unsecured claims under the Bankruptcy Code?

FACTS:

Company A adopted Plan X in 1990. Plan X is a combination stock bonus/money purchase pension plan and is intended to be an employee stock ownership plan (ESOP). Specifically, Section 1 of the Plan X plan document provides as follows:

> The first portion (The "Fixed Contribution Portion") is a money purchase pension plan under Section 401(a) of the Internal Revenue Code (the "Code"). The second portion (the "Variable Contribution Portion") is a stock bonus plan under Section 401(a) of the Code. The Plan is intended to be an employee stock ownership plan under Section 4975(e)(7) of the Code.

Plan X received favorable determination letters from the Internal Revenue Service, dated July 1994, as to both the fixed contribution portion and the variable contribution portion. The respective letters also state that "the plan meets the requirements of Internal Revenue Code Section 4975(e)(7) regarding Employee Stock Ownership Plans."

Company A is capitalized with three types of securities: (1) common stock with full voting rights; (2) Series A cumulative preferred stock; and (3) Series B variable rate cumulative preferred stock. None of these securities is publicly traded on an established securities market.

The Series B stock is callable, nonvoting stock that is not convertible into common stock. The Series B stock is senior in rank to all common stock but it is

junior to the Series A preferred stock. The Series B stock was initially issued with a dividend rate of 15.5% but, subsequent to April 1991, Company A could adjust this rate annually to maintain the initial value of the Series B stock at a constant $1,000 per share. The stock was issued solely for the purpose of funding Plan X through contributions made by Company A.

Company A made several contributions to Plan X in 1991 to 1993. The contributions consisted of Series B stock. Contributions in 1994 to 1996 were made with common stock. At no time during this period did the value of the common stock held by Plan X equal or exceed 50% of the total value of the Plan's assets.

Section 1 of the Plan X plan document, dated October 1994, provides that "the Plan is designed to invest primarily in Company Stock." The term "Company Stock" is defined in Section 2 of the plan document as "[s]hares of any class of capital stock issued by the Company."

Section 4(b) of Plan X states that employer contributions under the Variable Contribution Portion (i.e. the stock bonus portion) shall be paid to the trustee for each plan year in such amounts (or under such formula) as may be determined by the Board of Directors. During the years in question, the Board of Directors generally authorized contributions in an amount equal to 5% of compensation for both the fixed contribution and the variable contribution portions of the plan. The Board also authorized the contributions (with an estimated dollar amount) to be paid in Company Stock.

The Service has proposed to impose excise taxes under §4975 upon Company A for its contributions to Plan X, alleging, in part, that the Series B stock is not "qualifying employer securities" under I.R.C. §409(l) and therefore the exemption provided in I.R.C. §4975(d)(13) and §408(e) of ERISA for contributions of qualifying employer securities to certain plans does not apply. Similarly, the Department of Labor has reviewed the case for possible ERISA fiduciary violations by the trustees of Plan X as well as some of the directors of Company A. The DOL investigation resulted in a formal non-compliance letter and is now pending with the DOL Solicitor's Office.

The Employee Plans agent assigned to the case has informed District Counsel that Company A has huge net operating losses and has never used the deductions available from its contributions to Plan X. Also, the agent has been advised by Company A's representatives that if the Service were to assert the §4975 excise taxes, Company A would seriously consider a bankruptcy filing.

LAW AND ANALYSIS:

ISSUE 1. For purposes of determining whether a plan is an "employee stock ownership plan" as defined in ERISA §407(d)(6), and exempt from the prohibited transaction provisions of I.R.C. §4975(c)(1)(A) pursuant to I.R.C. §4975(d)(13), is the term "qualifying employer securities" defined by I.R.C. §409(l) or by §407(d)(5) of ERISA?[1]

Section 4975(a) imposes a tax on each prohibited transaction at a rate of 15% of the amount involved. Section 4975(c)(1)(A) defines a prohibited transaction to include any direct or indirect sale or exchange of any property between a plan and a party in interest.

Section 4975(d)(13) exempts from the prohibitions of section 4975(c) any transaction which is exempt from §406 of Title I of ERISA by reason of §408(e) of Title I of ERISA (or which would be so exempt if §406 applied to such transaction).

Section 408(e) of ERISA provides, in part, that §406 will not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in §407(d)(5)) if: i) the acquisition, sale or lease is for adequate consideration; ii) if no commission is charged; and iii) if the plan is an eligible individual account plan as defined in §407(d)(3) of ERISA.

The term "individual account plan" is defined in §407(d)(3)(A) as i) a profit sharing, stock bonus, thrift or savings plan; ii) an employee stock ownership plan; iii) a money purchase plan that was in existence on September 2, 1974, and which on that date was primarily invested in employer securities.

Section 407(d)(6) of ERISA defines an "employee stock ownership plan" as an individual account plan: i) which is a stock bonus plan which is qualified, or a stock bonus and money purchase plan both of which are qualified under §401 of the Internal Revenue Code of 1986, ii) which is designed to invest primarily in qualifying employer securities, and iii) which meets such other requirements as the Secretary of the Treasury may prescribe by regulation.

Section 2550.407d-6(c) of the DOL regulations states that a plan constitutes an ESOP for a plan year only if it meets such other requirements as the Secretary of the Treasury may prescribe by regulation under §4975(e)(7) of the Code.

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[1]Under Reorganization Plan No. 4 of 1978, the authority of the Secretary of the Treasury to issue rulings under the prohibited transaction provisions of §4975 was transferred, with certain exceptions not relevant here, to the Secretary of Labor. Accordingly, we requested assistance from the Department of Labor with respect to Issue 1 and Issue 2 and our responses to those issues reflect the views of the Department.

Section 4975(e)(7) of the Internal Revenue Code defines an ESOP as a defined contribution plan which is a stock bonus plan or a stock bonus and money purchase plan both of which are qualified under §401(a) and which are designed to invest primarily in qualifying employer securities and which is otherwise defined in regulations prescribed by the secretary.

Section 4975(e)(8) of the Code provides that the term “qualifying employer security” means any employer security within the meaning of §409(l).

Treas. Reg. § 54.4975-11(b) provides that a plan constitutes an ESOP only if the plan specifically states that it is designed to invest primarily in qualifying employer securities. Section 54.4975-12 of the regulations, promulgated in 1977, contains a broad definition of employer securities under §4975(e)(8) which includes stock or equity securities. However, this regulation was superseded by section 101(a)(7)(C) of the Technical Corrections Act of 1979, P.L. 96-222, 96th Cong., 2d Sess. (1980), which amended §4975(e)(8) to conform to the §409(l) definition of employer securities.

Section 409(l)(1) provides that “employer securities” means common stock issued by the employer (or by a corporation which is a member of the same controlled group) which is readily tradable on an established securities market. Section 409(l)(2) provides rules for determining employer securities If there is no common stock which satisfies paragraph (1). Section 409(l)(3) provides that noncallable preferred stock can be treated as employer securities if the preferred stock is convertible at any time into stock which satisfies the requirements of §§409(l)(1) or (2), and if such conversion is at a price which (as of the date of the acquisition by the ESOP) is reasonable.

Since the definition of an ESOP under ERISA §407(d)(6) and §2550.407d-6(c) of the DOL regulations thereunder require an ESOP to satisfy the Code’s ESOP definition under §4975(e)(7) and hence the employer security definition in §409(l), we conclude that the §409(l) definition of employer securities is applicable for purposes of the definition of an ESOP under §407(d)(6) of ERISA.

We reach a different conclusion, however, with respect to §4975(d)(13). As appears from the foregoing, §4975(d)(13) cites §408(e) of ERISA for purposes of meeting the exemption for purchases of stock by an ESOP from a disqualified person. ERISA §408(e), in turn, cites the definition of qualifying employer securities in ERISA §407(d)(5). Based upon these provisions, the Department of Labor has concluded, and we concur, that for purposes of meeting the exemption under §4975(d)(13) the definition of “qualifying employer securities” in §407(d)(5) controls. See, Department of Labor Advisory Opinion 96-08A.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

As reflected above, ERISA §407(d)(6) does not specifically indicate which definition of "qualifying employer securities" is controlling for purposes of defining the term "employee stock ownership plan." Although it would be contrary to DOL regulation §2550.407d-6(c), we believe it can be reasonably argued, as it is argued by Jorgensen's representatives, that the definition of "qualifying employer securities" found in ERISA §407(d)(5) applies for purposes of determining whether a plan is an ESOP under ERISA §407(d)(6) rather than the definition found in I.R.C. §409(l). Since §407(d)(6) does not indicate which provision defines the term "employee stock ownership" it can be reasonably argued that the definition found in the immediately preceding provision should control.

Even assuming the broader definition of §407(d)(5) applies, however, the stock at issue in this case may not be qualifying employer securities. As defined by ERISA §4975(d)(5), qualifying employer securities include stock and marketable obligations. In its comments to us, the Department of Labor noted that the Series B stock may be debt rather than stock. Citing to DOL Advisory Opinion 91-24 and 81-33A, the Department noted that the Series B stock has at least two attributes of debt in that the "stock" is nonvoting and is not convertible into common stock. Further, we note that the stock is callable by Company A at a fixed price and that Company A may adjust the dividend rate to fix the value of the stock at a constant $1,000 per share. Each of these factors tends to indicate that the Series B stock is debt rather than stock under ERISA §407(d)(5).

If it is determined that the Series B stock is debt rather than stock, the Series B stock would then be required to meet the requirements for marketable obligations under ERISA §407(e) in order to be a qualifying employer security. Section 407(e) requires that independent parties hold at least 50 percent of the same securities and that a plan's investment in such securities does not exceed 25 percent of plan assets. It does not appear that the Series B stock can satisfy these requirements.

ISSUE 2. Does the contribution of employer stock by an employer/plan sponsor to its stock bonus plan pursuant to a discretionary funding provision constitute the sale or exchange of property between the employer and the plan under I.R.C. §4975(c)(1)(A)?

Section 4975(c)(1)(A) of the Code prohibits the sale or exchange of any property between a plan and a disqualified person. Similarly, §406(a)(1) of ERISA prohibits the sale or exchange of any property between a plan and a party in interest.

In Commissioner v. Keystone Consolidated Industries, Inc., 508 U.S. 152 (1993), the Supreme Court held that an employer's contribution of unencumbered property to a qualified defined benefit pension plan in satisfaction of the employer's

funding obligation to the plan constituted a “sale or exchange” within the meaning of §4975(c)(1), and thus a prohibited transaction subject to the excise taxes of §4975(a).

The Service has never addressed the application of the Keystone rationale to contributions of unencumbered property to a defined contribution plan. However, the Department of Labor has addressed this issue in Interpretative Bulletin 94-3, 29 CFR § 2509.94-3(c), in which the Department stated that an in-kind contribution to a defined contribution plan that reduces an obligation of a plan sponsor or employer to make a cash contribution to the plan would constitute a prohibited transaction under §4975(c)(1)(A) and ERISA §406(a)(1)(A).

In the present case, the plan language governing contributions to the variable contribution (stock bonus) portion of Plan X is discretionary but the Board of Trustees executed board resolutions which authorized contributions to the variable contribution portion of Plan X equal to five percent of employee compensation. The Board also authorized the contributions (with an estimated dollar amount) to be paid in Company Stock. In response to our request for assistance on this issue, DOL noted that the question of enforceability of board resolutions prior to the actual payment of the contributions may require application of state corporate or contract law to the specific facts presented. DOL further stated that whether a particular board resolution authorizing the contributions constitutes an enforceable obligation is an inherently factual matter upon which the Department will generally not opine.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

If we can successfully argue that the Keystone rationale applies to the stock bonus contributions in this case, it does not appear that these contributions will be covered by the exemption under §4975(d)(13). As noted above, (d)(13) exempts any transaction which is exempt under §406 of Title I by reason of §408(e) of Title I. Section 408(e) exempts the sale of qualifying employer securities (as defined by §407(d)(5) of Title I rather than as defined by the Code) to a plan if: i) the sale is for adequate consideration; (ii) if no commission is charged; and (iii) if the plan is an “eligible individual account plan.”

Section 407(a) of Title I defines an eligible individual account plan to include money purchase plans in existence on September 2, 1974, ESOPs, and stock bonus plans. We do not believe the Plan qualifies as an ESOP. As noted

previously, an ESOP under §4975(e)(7) must be designed to invest primarily in qualifying employer securities. As defined by §409(l), the term "qualifying employer securities" is generally limited to common stock and certain types of preferred stock. The Plan in this case, however, provides it is designed to invest primarily in "Company Stock" which is defined by the Plan to include shares of any class of capital stock of the Company. The Series B stock contributed to the Plan is not "qualifying employer securities" under §409(l). Accordingly, the Plan is not designed to invest primarily in qualifying employer securities.

It also appears that the Plan cannot otherwise qualify as an individual account plan. It is clear that the Plan is not a money purchase plan that was in existence on September 2, 1974, since it was not in existence at that time. Alternatively, it may be argued that the stock bonus portion of the plan could be treated as an individual account plan and thus qualify separately for the exemption, but DOL has rejected this argument. Rather, DOL has stated that if the Plan is not an ESOP, then the Plan cannot be an eligible individual account plan because the Plan consists in part of a money purchase pension plan that came into existence after 1974.

Also, although we do not have any direct information in this regard, it is our understanding that there may be a question as to whether the stock was acquired for adequate consideration. In other words, we understand that it is possible the value of the stock contributed was less than the amount required by the Board resolutions. In such a case, adequate consideration would not have been paid and the exemption would not apply.

Lastly, as pointed out above, there is a substantial question as to whether the Series B stock satisfies the requirements for a "qualifying employer security" under ERISA §407(d)(5).

ISSUE 3. What is the effect of the Service's issuance of a favorable determination letter to Plan X where the plan document had an incorrect definition of the term "qualifying employer security"?

LAW AND ANALYSIS:

In the instant case, the determination letter affects the plan's status as an ESOP and the possible prohibited transactions. Section 4975(e)(7) states that a plan shall not be treated as an ESOP unless it is intended "to invest primarily in employer securities." Section 409(l) defines qualifying employer security as certain common stock or noncallable preferred stock if such preferred stock is convertible at anytime into common stock and such conversion is at a reasonable conversion price. Section 54.4975-11(b) of the regulations states that a "plan

constitutes an ESOP only if the plan specifically states that it is designed to invest primarily in qualifying employer securities."

The preferred shares in this case are not convertible into common stock and, therefore, they are not qualifying employer securities. Thus, Plan X has not been invested primarily in qualifying employer securities. Moreover, because the plan document provides that Plan X is designed to invest primarily in Company Stock, rather than in qualifying employer securities, it fails to satisfy §54.4975-11(b). Accordingly, the plan is not an ESOP for purposes of §4975(e)(7), either in form or in operation.

The determination letters to Plan X should be revoked to the extent they provide that Plan X is an ESOP under §4975(e)(7). Also, to qualify prospectively as an ESOP, Plan X must be modified to provide that it is designed to invest primarily in qualifying employer securities and it must invest in employer securities that satisfy the requirements of §409(l) in order to be an ESOP. This means the Plan must reinvest in common stock that meets the requirements of §409(l)(1) or (2), or preferred stock that satisfies §409(l)(3).

The retroactive revocation of the letters may be limited, however, because Company A and Plan X may be entitled to relief under I.R.C. §7805(b). Section 7805(b)(8) of the Code provides that the Secretary may prescribe the extent, if any, to which any ruling relating to the internal revenue laws shall be applied without retroactive effect. Section 601.201(l)(5) of the regulations states:

> Except in rare and unusual circumstances, the revocation or modification of a ruling will not be applied retroactively with respect to the taxpayer to whom the ruling was originally issued or to a taxpayer whose tax liability was directly involved in such ruling if (i) there has been no misstatement or omission of material fact, (ii) the facts subsequently developed are not materially different from the facts on which the ruling was based, (iii) there has been no change in the applicable law, (iv) the ruling was originally issued with respect to a prospective or proposed transaction, and (v) the taxpayer directly involved in the ruling acted in good faith reliance upon the ruling and the retroactive revocation would be to his detriment.

With respect to determination letters, section 601.201(m) of the regulations states that a determination letter "will be given the same effect upon examination of the return of the taxpayer to whom the determination letter was issued as is described in paragraph (l) of this section, in the case of a ruling issued to a taxpayer...." Section 21.03 of Rev. Proc. 2000-6, 2000-1 I.R.B. 187, 221 (Jan. 3, 2000), the determination letter Revenue Procedure, provides language similar to

§601.201(m). Section 13.05 of Rev. Proc. 2000-4, 2000-1 I.R.B. 115, 146, the ruling letter Revenue Procedure, provides language similar to §601.201(l).

Section 6.15 of Rev. Proc. 2000-6, 2000-1 I.R.B. 187, 199, provides that the Service may determine, based upon the application form, the extent of review of the plan document. A failure to disclose a material fact or misrepresentation of a material fact on the application may adversely affect the reliance which would otherwise be obtained through issuance by the Service of a favorable determination letter.[2]

Section 7805(b) relief applies without limitation to ruling letters concerning tax liability. Therefore, §7805(b) relief is available to limit the retroactive revocation of a ruling letter concerning the imposition of the prohibited transaction tax. Section 7805(b) relief applies to determination letters in the same manner as it applies to ruling letters. Accordingly , we conclude that §7805(b) relief, if granted with respect to the revocation of the determination letter, could also limit the imposition of the excise tax under §4975 to the period before the determination letter was issued.

As to whether 7805(b) relief should be granted in this case, a determination letter was issued to Plan X stating that it meets the requirements of §4975(e)(7) regarding ESOPs notwithstanding the fact that the plan language did not state that it was designed to invest primarily in qualifying employer securities, but rather primarily in Company Stock (which did not meet the requirements of qualifying employer securities). Accordingly, relief may be granted from the §4975 excise taxes for the period after Company A was issued the determination letter, if, among other things, Company A made no misstatement or misrepresentation of material fact in its application for the letter.

We note, however, that the discretionary authority to grant relief under §7805(b) with respect to the revocation of determination letters issued by the Employee Plans Division is exercised by the Commissioner, Tax Exempt and Government Entities. Rev. Proc. 2000-4, 2000-12 I.R.B. 115, Section 13.09. Accordingly, the decision as to whether such relief is to be granted, including whether there was a misrepresentation of material fact in the application, must be made by the Commissioner.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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[2]Similar language appears in prior determination letter revenue procedures. See, e.g., Rev. Proc. 94-6, 1994-1 C.B. 510, 517.

In response to our request for assistance, EP has indicated that they believe that there would be a "material misrepresentation of fact" if Company A "incorrectly" answered question 6a of Form 5309, Application for Determination of Employee Stock Ownership Plan. This question asks the applicant to indicate the page and section number where the plan document indicates that it is designed to invest primarily in employer securities. We have reviewed the Form 5309 submitted by Company A and believe a court might reasonably conclude that the Company did not make a "misrepresentation of material fact" by stating that a particular provision could be found in a specified section of the plan when in fact the provision did not satisfy the legal requirements of the Code. it could be reasonably argued that the Service has a legitimate interest to require applicants to correctly state where particular provisions are to be found in a plan and that reliance may be limited where the statement proves incorrect. Therefore, section 6.15 of Rev. Proc. 2000-6 may be construed to require that the applicant must correctly interpret the legal requirements of the Code before asserting that a particular plan provision satisfies those requirements.

ISSUE 4. Would a judgment in favor of the Department of Labor in an action under ERISA against Plan X's fiduciaries regarding violations of ERISA §§404 an d406 (which violations were, in part, grounded upon the definition of qualifying employer securities as found in I.R.C. §409(l) constitute res judicata or collateral estoppel against Company A for its excise tax liability under I.R.C. §§4975(a) and (b)?

In the absence of a final judgment in favor of the Department of Labor we do not believe there are sufficient facts to determine whether such a judgment might constitute res judicata or collateral estoppel against Company A.

ISSUE 5. In light of the Supreme Court's decision in Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 2131 (1996), would a bankruptcy filing by Company A raise a substantial hazard that pre-petition, unassessed excise taxes under §§4975(a) and (b) will be classified as penalties, such that they are treated as unsecured claims under the Bankruptcy Code?

LAW AND ANALYSIS

We requested the views of Collection, Bankruptcy & Summonses as to this last issue. They stated that it is their opinion that pre-petition excise taxes imposed under sections 4975(a) and/or (b) fall within the scope of the Supreme Court's decision in CF&I, such that they would be a general unsecured claim under the Bankruptcy Code.

The issue in CF&I was whether I.R.C. § 4971 liability was entitled to priority as an excise "tax" under B.C. § 507(a)(8)(e) or whether it was a penalty entitled only to the status of a general, unsecured claim. The Court held that the characterization by the I.R.C. of the liability as a "tax" was not dispositive. Instead, relying on the legislative history of section 4971, the Court found that the purpose of this excise tax was to punish a pension plan sponsor for failing to fund a pension plan as required by ERISA. 518 U.S. at 225-26. The Court, thus, concluded that the section 4971 liability was a penalty not entitled to priority.

Although the Supreme Court in CF&I addressed section 4971 rather than section 4975, Collection, Bankruptcy & Summonses believes the taxes imposed by section 4975 serve the same general punitive purpose as the taxes imposed by section 4971. Both impose "excise taxes" as punishment for an unlawful act or omission. Both are designed, by imposing a flat rate of up to 100% of the amount of the wrongful act or omission, to curb prohibited conduct rather than repay pecuniary loss.

Section 4975(a) provides that a tax equal to 15% of the amount of each prohibited transaction will be imposed, to be paid by the disqualified person. The tax is thus imposed only when the disqualified person enters into a prohibited transaction, and so acts to discourage such transactions. Also, like section 4971(b), section 4975(b) imposes an additional tax equal to 100% of the amount involved if the prohibited transaction is not corrected within the taxable period. General Litigation believes a court would find section 4975 to be punitive in nature and, therefore, considered a penalty under the Bankruptcy Code. See, e.g., In re MMR Holding Corp., 1998 Bankr. LEXIS 1132 (Bankr. M.D. La. 1998) (for purposes of I.R.C. § 6601, section 4975(a) is a penalty because its aim is to punish wrongful conduct). Consequently, pre-petition excise taxes imposed under section 4975 would be treated as general unsecured claims under the Bankruptcy Code.

Collection, Bankruptcy & Summonses notes that Latterman v. United States, 872 F.2d 564 (3d Cir. 1989), found section 4975(a) to be a tax rather than a penalty. However, Latterman looked at section 4975 in connection with the imposition of interest under section 6601, not as a bankruptcy claim. Collection, Bankruptcy & Summonses thus finds Latterman ultimately unpersuasive on this issue. Cf. MMR Holding, 1998 Bankr. LEXIS at *11-*17 (declined to follow Latterman).

If you have any questions regarding this memorandum, please call me at (202) 622-6090.