Intangibles Settlements: Clearing up the Pre-Section 197 Backlog

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Legislative history is normally used to interpret statutes, serving as a contemporaneous discussion of what the statute was intended to do, even if (and particularly, where) the words of the statute may not be clear. Occasionally, though, legislative history seeks to solve some controversy (or push others to resolve it), even though the statute is not explicitly applicable to the controversy. That was the case with the enactment of Code Section 197 by the Revenue Reconciliation Act of 1993.

The legislative history to that law—while noting that no inference is intended about the state of the law pre-Section 197—urges the IRS to settle its backlog of intangibles cases, and to do so by taking Section 197 into account. That is quite some admonition, considering just how impressive the volume and dollar value of that backlog is. According to a recent pronouncement by IRS spokesman David L. Jordan, Acting Chief Counsel, there are over 8,000 cases pending, involving a whopping $14.4 billion in proposed adjustments.

Even more shocking is the fact that most of these cases, and most of the dollars, are only at the examination level. That means it will be a long time indeed before this amoebic mass moves through the examination and appeals processes and into the courts. That is, of course, unless the IRS can expedite the resolution of these cases, as Congress apparently intended.

Diversity of Cases

Not all of the cases are customer-based intangibles cases like *Newark Morning Ledger*, S.Ct., 4/20/93. (See "Does *Newark Morning Ledger* Spell Relief?," 1 *M&A Tax Rep't* 11 (June 1993), p. 1.) Cases involving customer-based intangibles represent $5.6 billion in proposed adjustments, or more than one-third of the total dollar volume of pending intangibles cases.

In the wake of the Supreme Court's decision in *Newark*, the Service froze many amortization cases until there could be further guidance on the cases. However, many cases are not at all affected by the *Newark* authority (*e.g.*, cases involving covenants not to compete, patents, franchises, and other contract rights). (See, *e.g.*, "Covenants Not to Compete After Section 197," 2 *M&A Tax Rep't* 4 (November 1993), p. 1.) These cases can and should proceed.

Nonetheless, a blanket settlement policy is in the works. One possibility for that policy would be the

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application of Section 197, even though it is not retroactive by its terms. On the contrary, Section 197 provides for an election by which a taxpayer may apply it to all intangibles purchased after 7/25/91. ■