

Punishing the Innocent

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appearance of being illegal. In 2013, banks filed more than 700,000 such suspicious activity reports. Depositors caught up in structuring cases often cannot afford to fight the government, since the median seizure by the I.R.S. was \$34,000, while the cost of fighting to get that money back can exceed \$20,000.

There is nothing illegal about depositing less than \$10,000 cash unless it is done specifically to evade the reporting requirement. But a bank's 'suspicious activity' report has been held enough to justify the issuance of a seizure warrant. The Institute for Justice, which is seeking to reform civil forfeiture practices, analyzed structuring data from the I.R.S., which made 639 seizures in 2012, up from 114 in 2005. Only twenty percent were prosecuted as criminal structuring cases. The practice has swept up innocent small business owners and others with perfectly reasonable explanations for making deposits under \$10,000. For example, he said, a grocery store owner in Fraser, Mich., had an insurance policy that covered only up to \$10,000 cash on hand in the store.

In breaking news, the I.R.S. has just announced that it plans to cut back on the number of forfeitures it initiates and to investigate more thoroughly for evidence of criminal intent before seizing a bank account. The IRS's chief of Criminal Investigation on January 5, 2015 issued a press release stating, "This policy update will ensure that C.I. continues to focus our limited investigative resources on identifying and investigating violations within our jurisdiction that closely align with C.I.'s mission and key priorities."

What that statement shows is that the government has not admitted to doing anything wrong despite the havoc it has wreaked on the lives of citizens who were not been proved guilty of anything. Much worse is the fact that changes in the IRS's internal policies aren't reliable as to what the government may do in the future, since policies can change at any time, without any notice being given to the public. How safe does that make you feel?

Vano Haroutunian is a Senior Partner and the C.F.O. of BSBN. He can be reached at vharoutunian@ballonstoll.com.

Import Duties to Rise

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of the HTS 9822.05.10 reduced tariffs to finished garments in which all component fabrics have been wholly manufactured inside the U.S. This is completely new and effectively revokes CBP's earlier rulings which permitted the allowance even when any of a garment's secondary fabric components were not of U.S. origin.

CBP is accepting comments on this new proposal until January 23, 2015 and these deadlines are frequently extended. If clients desire assistance in registering comments on this potentially costly increase in customs costs, BSBN is ready to provide such assistance.

Richard Turyn is a BSBN Partner Emeritus and the Editor of BSBN Direct. He can be contacted at rturyn@ballonstoll.com.

Ponzi Schemes Pit Victim vs Victim in Recovery Battles

A Ponzi scheme is a financial fraud in which the criminal uses part of the money received from new 'investors' to make payments, either in the form of illusory profits or as repayments of amounts invested by earlier investors. This enables the criminal to maintain the appearances of normal operation, keeps earlier investors from suspecting that the operation is just an illusion in which the criminal simply takes the majority of the funds invested for himself, and continues to attract new victims with fresh funds.

The Madoff scandal has reawakened public awareness of Ponzi schemes. But in fact, the legal system has struggled with the unfairness caused by Ponzi schemes, and the inherent conflicts among the victims left in its wake, since at least 1924, when the Supreme Court dealt with the financial frauds masterminded by Charles Ponzi himself.

Although courts have resorted to various remedies in efforts to achieve fairness in recoveries between competing

victims, the very design of Ponzi schemes – in which new victims fund the fictitious profits that existing victims receive – has led some victims to think that some victors have received preferential treatment. Victims who have received fictitious profits (so-called 'winners') fight to keep what they received, while other victims (so-called 'losers') have not, and seek to obtain a share of the funds received by the winners.

Operating under the precept that equality is equity, courts have often employed various mechanisms in their efforts to fashion relief. These include the "net loss method"; "disgorgement" of any fictitious profits received, allowance of "good faith" defenses to claims for disgorgements, and in rare instances, allowing a victim to recover funds that can be traced to a particular repository.

Whichever methods a court has chosen to employ, some victims have always complained, and the legal fallout from Madoff and other such schemes will be felt for years to come. Ponzi schemes usually depend initially on investors who invest without really examining or understanding the business to which they are giving their funds. Don't be a victim. Don't invest until you can be satisfied that you are investing in a real business, and one you understand.

BSBN Update

BSBN Partner Marshall Bellovin has again been reappointed as an Adjunct Professor of Law at the Benjamin N. Cardozo School of Law, his sixteenth consecutive year of teaching Lawyering Skills and Legal Writing course there.

BSBN Welcomes five new associate attorneys to our professional staff: Evan E. Richards from Brooklyn Law School (Employment Practice and Litigation); Nadine Yavru-Sakuk, of Pace University School of Law (Commercial Litigation and Immigration); Courtney A. DeBlis, from St. Thomas University School of Law (Litigation); Gillian A. Bader, from Benjamin N. Cardozo School of Law (Commercial Litigation and Bankruptcy Matters); and Anna S. Badalian, of Western New England University School of Law (Trust and Estates/Estate Planning and Estate Litigation), whose admission to the New York Bar is pending,

BSBN DIRECT

Legal updates for clients and friends of Ballon Stoll Bader & Nadler, P.C.

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Punishing the Innocent – Government Civil Forfeiture

By Vano Haroutunian

It's another Friday and the weekend can't start soon enough. Everything has shipped on schedule for the week, employees have been paid and the weather looks to be holding up. All's as right with the world as it gets. Until you get the word that your company's checks are bouncing all over town.

A quick, in-person visit to your bank account officer explains why. Without warning, the United States Department of Justice, on behalf of the IRS, has seized all of your bank accounts. Your funds now belong to the Drug Enforcement Administration or whatever law enforcement agency that initiated the seizure. This is what's known as a civil forfeiture, and it's specifically authorized under the laws of the U.S...

How can this happen? Using a bank reporting law designed to catch drug traffickers, organized crime figures and international terrorists by tracing their cash transaction; the government has gone after ordinary business owners and wage earners. The government isn't even required to charge you with a crime before taking your money. Law enforcement agencies can seize the accounts and take the money without a money judgment or ever filing a criminal complaint, and the account owners are left to prove they are innocent. The owners have to hire lawyers (if they can find the funds to pay for counsel) and wait to learn whether they can get their money back.

"They're going after people who are really not criminals," said a former federal prosecutor who is now a forfeiture expert and lawyer quoted in the New York Times last year. "They're middle-class citizens who have never had any trouble with the law." The I.R.S. is one of several federal agencies that pursue such cases and then

refer them to the Justice Department. According to a Justice Department spokesman, the DOJ does not track the total number of cases pursued, the amount of money seized or how many of the cases were related to other crimes.

The basis for many of these cases is found in the federal Bank Secrecy Act, which require a bank to report cash transactions of \$10,000 or more. Under the Bank Secrecy Act, banks and other financial institutions must report cash deposits greater than \$10,000. This was designed to catch illegal activities which involve large amounts of otherwise untraceable cash. The reporting requirement was intended to bring to the government's attention

people who were regularly making large cash deposits, so that the government could investigate the source for all that cash. The criminal response has been to make bank deposits that never amount to \$10,000, instead divide large cash deposits into a series of under-\$10k deposits. That has become known as "structuring."

But banks are also required to report any 'suspicious activities' of their depositors such as frequent deposits that appear to be structured to avoid the \$10k reporting requirement and they are legally forbidden from telling customers that their deposit habits may have the

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U.S. Plans to Limit DR-CAFTA's Special Reduced Duty Apparel Rules

By Richard Turyn

In a notice in the Customs Bulletin of December 5, 2014, published on December 24, 2014, U.S. Customs and Border Protection ("CBP") has revealed that it plans to limit the situations in which apparel importers will be allowed to use the reduced duty treatment provided for in the U.S. Harmonized Tariff Schedules ("HTF") under the Dominican Republic-Central American Free Trade Agreement ("DR-CAFTA").

HTS 9822.05.10 provides reduced-duty treatment for garments that are cut (or knit to shape) and assembled in a nation covered under DR-CAFTA, but which are manufactured from U.S. – made fabric (regardless of where its yarns were made) when the sewing is performed with U.S.-formed sewing thread.

Under this provision, importers are

entitled to claim a credit against U.S. customs importing duties equal to the value of the U.S. fabric (or knit to shape components) and the value of any other U.S. origin materials used in the manufacturing process.

In seven CBP Ruling Letters between 2007 and last year, importers were permitted to claim the duty allowances where secondary fabric components (e.g., neckband tape fabric, ribbon hanger fabric, leg and waist elastic fabrics, sequined mesh fabric waistband overlay, etc.) were not of U.S. origin. CBP now says that it wants to substantially narrow the garments entitled to the DR-CAFTA duty allowances to

In its December, 2014 notice, CBP is proposing to strictly limit the applicability

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Considering the LLC for Your Business Needs

By Chris E. Wittstruck, Esq.

Among the myriad issues facing principals contemplating a new commercial venture, none is more straightforward than the question of which legal organization vehicle to use. While differences of opinion may abound regarding items such as selection of initial location, staffing and budgeting, the partners in any new venture are all hoping to achieve similar goals when it comes to selection of the formal business entity. Each venturer wants limitation of his or her respective personal liability, simplicity of organization, ease of operation and tax advantage. Given these criteria, the Limited Liability Company, or "LLC," should be given strong consideration.

Traditionally, the Business Corporation or "C-corp" was the vehicle of choice for most businesses. The entity is relatively easy to form; a mere filing of articles of incorporation with the secretary of state does the trick. All shareholders enjoy limitation of liability, meaning they cannot be personally sued for debts incurred by the corporation, and thus in a worst case cannot lose more than their financial contribution to the corporation. The problem with the C-corp is that it requires most actions to be taken via a board of directors that must operate through the strictures of formal and often cumbersome bylaws that prescribe firm notice and meeting requirements.

Moreover, the C-corp subjects shareholders to double taxation; meaning that the corporation is taxed on income, and the shareholders are then taxed on the distributed dividends occasioned by that income. While some small qualifying C-corps can make an election pursuant to Subchapter S of the Internal Revenue Code to escape the twofold taxation, the "Sub-S" election does nothing to alleviate the burdensome and often unwieldy process by which the decision makers must operate.

The General Partnership requires no formal organization and is "pass-through" entity for I.R.S. purposes, meaning that

only the partners and not the partnership are taxed. The problem is that relatively minor decisions will most likely involve a majority of partners and, more importantly, each partner is liable for the full amount of partnership indebtedness. While the term Limited Partnership invokes the thought of a limited liability

The LLC is neither a corporation nor a partnership, but rather enjoys the best aspects of both.

entity, the general partners, those with day-to-day, hands-on business responsibilities, remain personally liable.

In contrast to the above options, the Limited Liability Company ("LLC") is preferable on virtually all points. The LLC is neither a corporation nor a partnership,

but rather enjoys the best aspects of both. The entity is formed via the mere filing of articles of organization and the following of uncomplicated publication requirements. Unlike the corporation, the LLC is not encumbered with the burdens of formal meeting requirements. It acts through one or more managing members and, unlike a partnership, both the managing and non-managing members benefit from limited liability. In addition to insulation from liability, the LLC is also a tax pass-through and thus shields members from double taxation. Like a partnership, the entity merely reports the members' shares of profit or loss, thus reducing tax filing fees.

While specific and unique needs and circumstances must always be considered in making any decision, the LLC should prove to be the vehicle of choice for the overwhelming majority of small businesses.



Intellectual Property: Copyrights, Patents, and Trademarks

Today's economy demands that you maintain a competitive edge over the rest of the job market. As a result, it is crucial that you guard your intellectual property rights by taking advantage of the United States laws entitled to you for your ideas and inventions; such as copyrights, trademarks, and patents. Although there may be some similarities among these types of intellectual property protections, they are different and serve different purposes.

Copyrights

A copyright is a form of protection provided to the authors of "original works of authorship" including literary, dramatic, musical, artistic, and certain other intellectual works, both published and unpublished. The 1976 Copyright Act generally gives the owner of copyright the exclusive right to reproduce the copyrighted work, to prepare derivative works, to distribute copies or photo records of the copyrighted work, to perform the copyrighted work publicly, or to display the copyrighted work publicly.

The copyright protects the form of expression rather than the subject matter of the writing. For example, a description of a machine could be copyrighted, but this would only prevent others from copying the description; it would not prevent others from writing a description of their own or from making and using the machine.

Valuable creative components of a business or individual's work can be protected under U.S. Copyright Laws. Examples of creative components may include:

- Sales brochures
- Advertising
- Solicitation letters and emails
- Instruction manuals
- Architectural and engineering drawings
- Pictures
- Graphical images
- Web-site designs
- Computer software
- And music

Trademarks

A trademark is a word, name, symbol or any combination which is used for the trade of goods and services to indicate the source of the goods and services and to distinguish them from the goods of others. Marks are symbols of quality and goodwill that assure consumers that they will receive the same high-quality product or service this time as they did the last time. Trademark rights are typically used to prevent others from using a confusingly similar mark, but not to prevent others from making the same goods or from selling the same goods or services under a clearly different mark. Trademarks which are used in interstate or foreign commerce may be registered with the Patent and Trademark Office.

Patent

A patent for an invention is the grant of a property right to the inventor. The term of a new patent is typically 20 years from the date on which the application for the patent was filed in the United States. US patent grants are effective only within the US, US territories, and US possessions.

The right conferred by the patent grant

is, in the language of the statute and of the grant itself, "the right to exclude others from making, using, offering for sale, or selling" the invention in the United States or "importing" the invention into the United States. What is granted is not the right to make, use, offer for sale, sell or import, but the right to exclude others from making, using, offering for sale, selling or importing the invention. When looking at patents, it's important to remember that there are different types of patents available in the United States. They are: Utility Patents, Design Patents, and Plant Patents. A utility patent protects the function of an invention and will protect you for 20 years from the date you filed the patent. Design patents, on the other hand, only protect the overall appearance of an invention and have a term of 14 years from the date your patent was issued. A plant patent is one where an inventor has produced a plant "asexually", meaning without seeds. Plant patents will also provide you protection for 20 years from the date of filing.

Obtaining a Patent gives you the legal right to stop others from "borrowing" your idea unless they:

- Obtain your permission first
- Buy the patent from you
- Pay a yearly licensing fee or a royalty payment based on sales

By utilizing our nation's Patent Laws, you are documenting ownership of your idea and backing-it up with some of the strongest business protection laws in existence. Should you require one of these three protections, contact an experienced intellectual property attorney to ensure your legal rights are protected.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter