Kennerly, Montgomery & Finley, P.C.

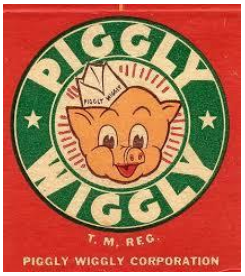
KM Newsletter

June 29, 2016

Articles in this edition:

Kennerly, Montgomery & Finley, P.C. Celebrates 100 Year Anniversary

What was new in 1916?



Supermarket - The concept of a "self-service" grocery store was invented by American entrepreneur Clarence Saunders and his Piggly Wiggly® stores, which first opened in Memphis, Tennessee.

U.S. President Woodrow Wilson signs legislation creating the National Park Service on August 25, 1916.

Lincoln Logs - Lincoln Logs® were invented in 1916 by John L. Wright, son of famous American architect Frank Lloyd Wright.

Jeannette Rankin was the first woman to be elected to the United States House of Representatives and the first female member of the Congress.

Kennerly Montgomery & Finley, P.C. Established

1916 KM 2016
100 YEARS

KENNERLY MONTGOMERY
Attorneys & Counselors Since 1916

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501(c)(3) Tax-Exempt Organizations and Lobbying

By Zack R. Gardner, Esq.

501(c)(3) tax-exempt organizations may engage in lobbying (i.e., attempts to influence *legislation*) so long as the lobbying does not make up a substantial part of its activities. Lobbying is distinct from political activities, which are entirely prohibited to 501(c)(3) tax-exempt organizations. Lobbying includes activities which, directly or indirectly, influence or attempt to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization.

Whether lobbying activities are "substantial" is determined under two alternative tests. Organizations may elect either test to determine whether lobbying is a "substantial" activity. First, the "Expenditure Test" determines whether the amount expended in relation to the organizations expenditures for exempt purposes is substantial. Internal Revenue Code section 4911 sets forth the applicable amounts in the following table:

If the amount of exempt purpose expenditures is:	Lobbying nontaxable amount is:
≤ $500,000	20% of the exempt purpose expenditures
>$500,00 but ≤ $1,000,000	$100,000 plus 15% of the excess of exempt purpose expenditures over $500,000
> $1,000,000 but ≤ $1,500,000	$175,000 plus 10% of the excess of exempt purpose expenditures over $1,000,000
>$1,500,000	$225,000 plus 5% of the exempt purpose expenditures over $1,500,000

Under no circumstances may lobbying expenditures exceed $1,000,000. Code Section 4911(c)(2). Example: If an 501(c)(3) tax-exempt organizations has about $400,000 in exempt purpose expenditures per year, the lobbying nontaxable amount would be $80,000. Therefore, that organization could spend up to $80,000 on lobbying activities

The second, alternative test is the "Substantial Part" test. This is a "facts and circumstances" type of test that considers several factors including time devoted to lobbying vs other activities (including time by paid and volunteer workers); expenditures devoted to activities; the amount of publicity the organization assigns to the activity; and whether the activity is continuous or intermittent in nature. G.C.M. 36148 (Jan. 28, 1975). There is no distinct amount of time/money expended that is considered *per se* "substantial" under this test (no statute or regulation set forth any parameters). However, courts have stated that devoting less than 5% of activities to lobbying is not substantial but spending between 16.6 and 20.5% is. *Seasongood v. Commissioner*, 226 F.2d 907 (1955); *Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1974). The factors are weighed by the IRS when it reviews an organization's Schedule C, Form 990.

If the Expenditures Test is met, it is clearly the easiest way to preserve tax-exemption. A form 5768 must be filed to elect to use the Expenditure Test. The election remains in effect for succeeding tax years unless it is revoked by the organization. Revocation of the election is effective beginning with the year following the year in which the revocation is filed.

Zack R. Gardner assists nonprofit and tax-exempt entities with forming their organizations, and obtaining and maintaining their nonprofit and tax-exempt statuses. If you have questions about nonprofit issues or for more information, please call Zack Gardner at (865)-546-7311 or email zgardner@kmfpc.com.

Dave & Busters under Fire for Cutting Hours to Avoid ACA Compliance

By Ashley N. Trotto, Esq., with assistance from Grant Davis, Law Clerk and University of Tennessee law student

In response to the ACA's employer mandate, many employers have used various strategies to avoid, or at least limit, the reach of the Affordable Care Act ("ACA"). However, ERISA § 510 makes it unlawful for any person to discriminate against a participant or beneficiary by interfering with the attainment of any right to which such participant may become entitled under the Plan or ERISA.

In Marin v. Dave & Buster's, the first case of its kind, a former employee brought a class action lawsuit against Dave & Busters ("D&B") under ERISA § 510 after D&B reduced her hours to avoid compliance with the ACA. The reduction resulted in the loss of her D&B health insurance benefits. At least one D&B manager specifically told employees, including the Plaintiff, that full-time employees' hours would be reduced to avoid approximately $2 million dollars in costs associated with ACA compliance. D&B tried to have the suit dismissed but the court allowed the litigation to continue finding that the Plaintiff had properly pled a violation of ERISA §510.

We will be closely monitoring this case to see where the court lands on this significant issue. Stay tuned!

Ashley N. Trotto practices in the areas of ERISA law, pension plans, and employee benefits. Ms. Trotto assists both private and governmental clients in the design, implementation, and maintenance of their employee benefit plans and specifically health and welfare benefit plans. Ms. Trotto focuses much of her time on assisting clients with issues related to compliance with the Patient Protection and Affordable Care Act. If you have questions or for more information, please call Ashley Trotto at (865)-546-7311 or email atrotto@kmfpc.com.

ABLE Accounts

By Michael R. Crowder, Esq.

The Achieving a Better Life Experience Act (ABLE Act) was enacted by Congress in December 2014, adding Section 529A to the Internal Revenue Code. Section 529A permits the states to establish a new type of tax-advantaged savings program for disabled individuals called ABLE Accounts. In May 2015, the Tennessee General Assembly passed its own version of the ABLE Act allowing the Tennessee Department of Treasury to offer ABLE Accounts through a program called ABLE TN. ABLE TN was made fully operational in Tennessee on June 13, 2016, and new applicants can now register by visiting www.abletn.gov.

Specifically, ABLE TN offers investment accounts that allow after-tax contributions to grow without being taxed on the investment earnings. Only those individuals whose disability occurred *prior* to age 26 and is already receiving SSI and/or SSDI or has been diagnosed by a qualified physician with a disability resulting in marked and severe functional limitations that is expected to last no less than 12 months will be eligible to establish an account. There is no state residency requirement; any eligible U.S. resident may participate in ABLE TN.

During the ABLE TN enrollment process, the individual will have the ability to select from 14 investment options. The individual will have the ability to change their investment selections each time they contribute, and reallocate funds twice (2) per calendar year. Earnings on contributions made to the account won't be taxed as long as any withdrawals from the account are only used for Qualified Disability Expenses. "Qualified Disability Expenses" may include any expenses related to the eligible individual's disability, such as education, housing, or transportation expenses; health and wellness expenses; financial management, administrative service, and legal fees; etc. In the event funds are used for non-qualified expenses, any earnings withdrawn will be taxed as income and subject to a ten percent (10%) federal tax penalty.

The aggregate of all contributions made to an account in one year may not exceed the annual gift tax exclusion ($14,000 in 2016).

Finally, as a general rule, the funds in the account and the disbursements from the account will be exempt as a resource for any means-tested government benefit (for example, SSI and Medicaid). However, SSI benefits (though not Medicaid benefits) will be suspended if an ABLE account contains more than $100,000.

In many instances, ABLE accounts will be useful tools for those individuals disabled prior to age 26 by replacing or supplementing Special Needs Trusts. They could become an excellent way for disabled individuals to deposit and invest excess income while remaining under the countable resource threshold for government benefits.

Michael Crowder works primarily in the firm's estate planning, and business & corporate law practices. If you have questions or for more information about Social Security Benefits, please call Michael R. Crowder at (865)-546-7311 or email mcrowder@kmfpc.com.

IRS Taxpayer Bill of Rights; Taxpayer Advocacy

By William E. Mason, Esq.

As the heart of thousands of pages of statutes, regulations and other guidance, every federal taxpayer has ten specific privileges when interacting with the IRS. The so-called "Taxpayer Bill of Rights" requires, among other things, that taxpayers: be informed; receive quality service; pay no more than the correct amount of tax; enjoy privacy and confidentiality; and be entitled to finality.

The Taxpayer Advocate Service (TAS) is an independent organization within the IRS that is intended to help eligible taxpayers with problems causing financial difficulty -- both individuals and business taxpayers.

A taxpayer may be eligible for TAS assistance if you have tried to resolve a tax problem through normal IRS channels and have gotten nowhere, or if you believe and IRS procedure isn't working as it should. In the state of Tennessee, the local Taxpayer Advocate, an IRS employee, is Terri Knuckles, Terri.Knuckles@irs.gov, 615-250-5206, located in Nashville.

The Local Taxpayer Advocate's role is to help eligible taxpayers with individual tax problems. The IRS also has a federal advisory committee made up of citizen volunteers, Taxpayer Advocacy Panel (TAP), which addresses big-picture, large-scale and system-wide issues that affect many taxpayers.

TAP is composed of 75 demographically and geographically diverse citizens who are not IRS employees, who listen to taxpayers, identify taxpayers' issues, and make suggestions to the IRS for improvements.

Some of the systemic issues that TAP has addressed include consideration of IRS user fees, virtually automatic 501(c)3 tax exempt recognition, and IRS guidance on levy of retirement accounts. TAP has also considered the tax administration burden associated with the Affordable Care Act.

I am the Tennessee member of TAP for the next three years. I would like to hear from you or your organization on big-picture issues affecting taxpayer rights to a fair, just IRS tax program. I cannot help on individual issues that might be referred to the Local Taxpayer Advocate. TAP has no jurisdiction on issues requiring congressional action.

For additional information or questions, feel free to contact me at wemason@kmfpc.com or (865) 546-7311.

Bill Mason has practiced law for more than 40 years. He worked for the Tennessee Valley Authority from 1974-1986, Wagner Myers & Sanger PC, from 1986-1988, and William E. Mason PC, from 1988-2009. He joined Kennerly Montgomery in 2009. He is a Certified Employee Benefit Specialist, 1993, and Fellow, by examination, 1994 and 1995. He is a frequent speaker at regional professional meetings and writes on pension and employee benefits topics. Mr. Mason serves on the Board of Directors for the Legacy Park Foundation and the Education Subcommittee for the United Way of Greater Knoxville. He is the past Chair of the Hillcrest Healthcare Board of Directors. In 2016, Mr. Mason was appointed by the US Treasury Department to a three-year term as the IRS Taxpayer Advocacy Panel (TAP) representative for Tennessee.

What a Difference Attorneys' Fees Make!

By Briton S. Collins, Esq.

A recent Tennessee Court of Appeals opinion highlights the dramatic difference that an award of attorneys' fees can make in litigation. The case, Troy L. Boswell v. RFP-TV The Theater, LLC, involved a breach of contract claim by banjo player "Leroy Troy" against a theater in Branson, Missouri. Leroy Troy had a written contract with the theater to perform a series of shows between March and December of 2007. In exchange, Leroy Troy was supposed to be paid $165,000. Midway through the season, the theater cancelled the show and refused to pay Leroy Troy the rest of his money (about $70,000). Leroy Troy sued for the unpaid amount, as well as prejudgment interest and attorneys' fees. His attorneys' fee claim was based on what looked like a solid attorneys' fee provision in his contract, which I'm certain his attorney assured him was valid when he convinced Leroy Troy to file the suit ("You have nothing to lose!").

Seven years later, Leroy Troy won his case at trial. The trial court gave him everything he wanted, including $70,744 for the breach of contract, $59,864.18 in prejudgment interest, and $90,000 in attorneys' fees, for a total judgment of just over $222,000. Not bad. Unfortunately for Leroy Troy, the contract also contained a choice of law provision stating that the contract was governed by Nebraska – not Tennessee – law. More unfortunately, Nebraska law does not enforce contractual attorneys' fee provisions, nor does it allow for prejudgment interest when a claim is subject to reasonable controversy. For some reason, the trial court (and apparently Leroy Troy's attorney) missed these points. The theater didn't miss them, however, and appealed the case.

On appeal, the court applied Nebraska law and vacated the awards of prejudgment interest and attorneys' fees, leaving Leroy Troy with a judgment for only $70,744. Since Leroy Troy had probably already paid his attorneys their $90,000 in fees over the 7 years of litigation, it is very likely that Leroy Troy ultimately ended up losing $20,000 despite winning his case. What a change of events!

The ability to win (or lose) attorneys' fees can have a dramatic effect on litigation. Often, it determines whether a case is even worth pursuing. Having a valid attorneys' fee provision in your contracts is imperative to ensuring that the litigation juice is worth the squeeze. Don't end up like Leroy Troy; make sure your attorneys' fee provisions are valid.

Briton S. Collins focuses his practice on civil litigation and appeals, construction law, and representing local governmental agencies. If you have questions or for more information, please call Briton S. Collins at (865)-546-7311 or email bcollins@kmfpc.com.

Kennerly Montgomery is a general practice law firm providing diverse professional services for 100 years both inside and outside the courtroom to a wide variety of individual, corporate and governmental clients. Our attorneys practice in all state and federal trial and appellate courts, as well as before administrative boards and panels and alternative dispute tribunals. We provide assistance in a variety of areas, including business and corporate law, governmental affairs and public utilities, employment law, worker's compensation, construction law and litigation, employee benefits, civil litigation and appeals, insurance defense and coverage litigation, taxation, wills and estate management, real property, healthcare, insurance defense and governance for churches and church-associated entities, technology transfer, and intellectual property.