

# “THE LARSEN LETTER”

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## **Owner of Single-Member LLC Couldn't Avoid Entity's Unpaid Employment Taxes**

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*Kandi, CA-9, September 25, 2008*

The Ninth Circuit Court of Appeals has rebuffed arguments by the owner of a disregarded single-member LLC that the IRS's check-the-box regs are unreasonable and invalid when fighting personal liability for the entity's unpaid employment tax liabilities. The court also rejected the owner's argument that new final regs that will require the LLC to file and pay employment taxes effectively lifted liability from this business owner's shoulders. The IRS's decision not to apply the final regs retroactively was not an abuse of discretion.

Final regs (T.D. 9356) treat a disregarded single-member LLC (and other eligible entities) as a separate entity for employment tax reporting purposes (and for certain excise taxes) with respect to wages paid on or after January 1, 2009. Owners are allowed to remain responsible for reporting them prior to January 1, 2009. However, these owners may switch without the IRS's consent and consider the wages to be paid by the disregarded entity. When applying the wage base, wages paid by the owner may be treated as paid by the disregarded entity; however, the owner remains ultimately liable for employment tax reporting responsibilities prior to January 1, 2009.

While the primary employment tax withholding, reporting and payment responsibilities shift to the LLC starting January 1, 2009, the owner may continue to be held liable as a responsible person. The disregarded entity also continues to be disregarded for other federal tax purposes. The IRS also had commented earlier that most states treat disregarded entities as the employer and that the regs would more

closely align federal and state treatment of employment taxes.

The taxpayer was the sole owner of an LLC, which incurred employment tax liabilities of more than \$100,000 and \$115,000 during two quarters of 2001. The IRS attempted to collect the unpaid employment tax liabilities from the taxpayer personally.

The taxpayer sought judicial review of the IRS's assessment, during which time the IRS issued T.D. 9356 (not effective until January 1, 2009) to treat a disregarded single-member LLC as separate from the owner for employment (and certain excise) tax purposes.

The district court rejected the taxpayer's argument that the IRS's refusal to apply the regs retroactively was an abuse of discretion. The court also found that the check-the-box regs properly applied not just for income tax purposes, but for employment tax purposes as well.

Under the IRS's [Code Sec. 7701](#) check-the-box regs, an eligible unincorporated business entity that has only one owner can choose to be treated for federal tax purposes as an association (and taxed as a corporation) or a sole proprietorship. If no election is made, a single-member LLC is disregarded as an entity separate from the owner and taxed as a sole proprietorship.

The Ninth Circuit found that the IRS's check-the-box regs "were a reasonable attempt by the IRS to fill in gaps left in the statute regarding the taxation of LLCs." The court also explained that the IRS's decision to adopt new regs regarding the tax of single-member LLCs does not apply to the taxpayer's unpaid 2001 employment taxes because the regs do not take effect until January 1, 2009.

Courts have consistently rejected arguments by owners of disregarded single-member LLCs that the IRS's check-the-box regs are unreasonable and invalid when fighting personal liability for the entity's unpaid employment tax liabilities.

## **Attorney Corner**

### ***IRS Provides Relief to Banks***

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*Notice 2008-83*

The IRS has provided relief from the net operating loss (NOL) limitations that would apply to a corporation acquiring a financially-strapped bank. The relief limits the treatment of the markdown of a bank's assets as a built-in loss and, as a result, allows the acquiring corporation a greater NOL deduction against its income.

The IRS relief provides that any deduction allowed to a bank after an ownership change for losses on loans or bad debts (including any deduction for a reasonable reserve for bad debts) will not be treated as a net unrealized built-in loss (NUBIL) or as a deduction that occurred before the ownership change. Thus, the losses are not limited by [Code Sec. 382](#).

Banks may rely on the IRS relief regarding built-in losses unless, and until, the IRS issues additional guidance. There is no effective date or expiration date for the guidance.

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**November Interest Rates** - Revenue Ruling 2008-50: Short-term, mid-term, and long-term applicable federal rates for November 2008, for purposes of the income and gift tax consequences arising from certain low-interest and interest-free loans under Code Sections 1274(d) and 7520:

|            | <u>Annual</u> | <u>Semi-Annual</u> | <u>Quarterly</u> | <u>Monthly</u> |
|------------|---------------|--------------------|------------------|----------------|
| Short-Term | 1.63%         | 1.62%              | 1.62%            | 1.61%          |
| Mid-Term   | 2.97%         | 2.95%              | 2.94%            | 2.93%          |
| Long-Term  | 4.248%        | 4.20%              | 4.18%            | 4.16%          |

AFR for November 2008, for determining the PV of an annuity, an interest for life or a term of years, or a remainder or reversionary interests 3.6 %.