PUBLICATION UPDATE

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Business Organizations with Tax Planning

Publication 165 Release 182 August 2016

HIGHLIGHTS

- Chapter 44, Real Estate Investment Trusts, has been thoroughly updated.
- Chapter 161, Review of Factors to Be Considered in Selecting Form of Acquisition, has been revised and brought current.
- Chapter 231, Protection Available to New Inventions and Ideas, has been updated.
- Chapter 231A, The History and Scope of United States Copyright Law, has been revised.

CHAPTER 44

Chapter 44 has been substantially updated in this release. The most important of the updates was to incorporate the amendments to the Internal Revenue Code dealing with REITs made in the Protecting Americans from Tax Hikes Act of 2015, a division of the Consolidated Appropriations Act, 2016, P.L. No. 114-113, Division Q, Title III, Subtitle B §§ 311–326, 129 Stat. 2242 (2015). The most important of these was the change prohibiting most REIT spinoffs, addressed in new § 44.05. Several recent cases and articles were also incorporated into the chapter, such as *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 550 n.58, 92 A.3d 400, 459 (2014), cited generally in § 44.01[1] for the proposition that the tax purpose of a REIT is that it is a pass through entity, with its income, loss, deductions and credits passed through to its shareholders, and Borden, "Reforming REIT Taxation (or Not)," 53 Hous. L. Rev. 1, 48–52 (2015), cited in §§ 44.01[1] (introduction and purpose of REITs); 44.03[2][b][iv][B] (taxable REIT subsidiaries); [3][a] (source of income test); [f] (foreclosure property); 44.05[2] (spinoffs) and 44.06[1][d] (structures of REITs such as UPREITs). A brief discussion was also added noting that Maryland is a preferred state of organization for many REITs. § 44.06[1][c]. Section 44.08 on the control test for REIT beneficiary liability has been expanded with new material and citations.

CHAPTER 161

Chapter 161 has been updated to reflect

changes in the mergers chapter of the Revised Model Business Corporation Act. The revision also incorporates recent case law on short-form mergers (Sec. 161.01[1]), contractual assumption of liabilities (Sec. 161.03[1]), the de facto merger doctrine (Sec. 161.03[6]), the "mere continuation exception" to the general rule of successor non-liability (Sec. 161.03[7]), products liability claims (Sec. 161.03[9]), employee covenants not to compete (Sec. 161.07), appraisal rights (Sec. 161.08), and preemptive rights (Sec. 161.09).

CHAPTER 231

Chapter 231, which covers the law of patents and of trade secrets, has been updated to reflect any statutory amendments and more recent case law. For example, the Supreme Court has added clarification to the concept of business method patents in *Bilski v. Kappos*, 561 U.S. 593, 130 S. Ct. 3218, 177 L. Ed. 2d 792 (2010). The term "process," as defined in the Patent Act, does not exclude business methods, but rather "a business method is one kind of 'method' that is, at least in some circumstances, eligible for patenting." In *Bilski*, however, the concept of hedging risk and the application of that concept in energy markets was not patent eligible since it was an attempt to patent an abstract idea. The *Bilski* opinion also addressed the so-called "machine-or-transformation test," which maintains that the sole test for determining the patentability of a "process" is whether the process is tied to a particular machine or apparatus, or if it transforms a particular article into a different state or thing. The Supreme Court rejected the idea that it was the "sole" test, but rather held that it is a "useful and important clue" and "an investigative tool" in determining whether some claimed inventions are processes under Section 101 of the Patent Act. *See* § 231.04[1].

CHAPTER 231A

Chapter 231A is the introductory chapter for coverage of U.S. copyright law and it has been updated to reflect more recent case law and statutory amendments. The Supreme Court decided the case of *Golan v. Holder*, 132 S. Ct. 873, 181 L. Ed. 2d 835 (2012), which addressed the constitutionality of 17 U.S.C. § 104A, allowing the restoration of copyright protection to certain foreign works after they had entered the public domain in the United States. Section 104A applies to works that lack copyright protection in the United States for any of these three reasons: the U.S. did not protect works from that country of origin at the time of the publication; the U.S. did not protect sound recordings fixed before 1972; or the author of the work had not complied with U.S. statutory formalities. Orchestra conductors, musicians, publishers and others who enjoyed free access to these foreign works, which were now removed from the public domain, argued that Congress had exceeded its authority under the Copyright Clause and violated the First Amendment in enacting the statute. The Supreme Court rejected those arguments and upheld Congress's authority to fully implement and comply with the Berne Convention and to ease the transition to an international copyright system. *See* § 231A.06[1].

Further, amendments to the Copyright Act have replaced the Copyright Royalty Tribunals with Copyright Royalty Judges, which are appointed by the Librarian of Congress and are charged with making determinations and adjustments of reasonable terms and rates of royalty payments, among other duties. There are three Copyright Royalty Judges, one of whom is appointed as Chief Copyright Royalty Judge. *See* § 231A.03[2][j]. Also, links have been provided to the Copyright Office

website for the various official forms and circulars needed for registration of each class of work. *See* §§ 231A.03[4][a], 231A.04[1].

SPECIAL ALERT

Please note that this release also features a Special Alert to the trade secret chapters outlining the Defend Trade Secrets Act of 2016. This new and important legislation will be thoroughly discussed in an update to those chapters in our next release.

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Publication 165, Release 182, August 2016

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Publication 165 Release 182 August 2016

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