charge on amounts accumulated through non-U.S. trust structures owning PFICs.

Adoption of the ACTEC proposals would benefit Treasury's efforts to increase taxpayer compliance and reporting of offshore structures. U.S. beneficiaries are understandably reluctant to report "ownership" of PFIC shares through an FNT when the resulting tax consequences of that ownership remain unclear. Integrating the rules of subchapter J with the PFIC excess distribution regime as outlined by ACTEC would allow taxpayers to fulfill their reporting and tax obligations in a way that enhances the integrity of subchapter J and the PFIC regime. Integrating the two systems would eliminate much of the current uncertainty, which all too often leads to actual or apparent noncompliance.

Response to Jacobus on *G-I Holdings*

By Blake D. Rubin, Andrea Macintosh Whiteway, and Jon G. Finkelstein

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In this article, the authors respond to Richard G. Jacobus's criticism of their earlier article regarding the *G-I Holdings* case. In their earlier article, the authors wrote that the court's conclusion on the partnership disguised sale issue was dicta, in light of its holding that the government's claim was time barred. Jacobus argued that the court's partnership disguised sale conclusion was not dicta because it was a prerequisite to performing the computations required to determine whether the six-year statute of limitations applied. The authors explain that under no government-proposed disguised sale theory was the omission from gross income sufficient to trigger application of the six-year statute of limitations, and the court therefore did not need to decide the partnership disguised sale issue to conclude that the statute of limitations for the year at issue had expired.

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In his August 16 article entitled "Partnership Disguised Sales: *G-I Holdings* Is Not Dicta,"[1] Richard G. Jacobus criticizes our analysis of the district court's decision in *G-I Holdings*[2] and in particular, our view that the district court's decision on the disguised sale issue was dicta.[3] In an analysis that spanned more than 45 pages, the district court in *G-I Holdings* discussed the application of the partnership disguised sale rules to a transaction structured as a nontaxable contribution to a partnership. The district court ultimately decided that the six-year statute of limitations under section 6501(e)(1)(A) did not apply and that the government's claim was therefore time barred by the three-year statute of limitations. In our view, the district court's partnership disguised sale analysis

[1] *Tax Notes*, Aug. 16, 2010, p. 769, *Doc 2010-16075*, *2010 TNT 159-4*.

[2] *In re G-I Holdings Inc.*, 2009 WL 4911953 (D.N.J. 2009), *Doc 2009-25898*, *2009 TNT 225-18*.

[3] Blake D. Rubin, Andrea Macintosh Whiteway, and Jon G. Finkelstein, "Partnership Disguised Sales: *G-I Holdings* Misses the Mark," *Tax Notes*, May 3, 2010, p. 553, *Doc 2010-7727*, *2010 TNT 86-6*.

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was dicta because the analysis was not necessary to the ultimate disposition of the case.

Jacobus disagrees with our conclusion, writing that ''before the court could reach the statute of limitations issue, it had to determine whether the form of the 1990 transaction should be respected or recharacterized under substance-over-form principles.'' Also, Jacobus writes that we failed to recognize that ''the court could not perform the calculation prescribed by section 6501(e)(1)(A) without first determining the proper characterization of the 1990 transaction for federal tax purposes.'' Jacobus claims that our analysis of *G-I Holdings* was due to our ''evident inattention to the record'' and that ''by no stretch of the imagination is the court's disguised sale ruling in *G-I Holdings* dicta.''[4]

Based on the record, we believe it is quite clear that the district court did not need to analyze the application of the partnership disguised sale rules to reach its conclusion that the statute of limitations for the year at issue had expired. The six-year statute of limitations under section 6501(e)(1)(A) only applies if the taxpayer has omitted from gross income an amount properly includible therein and such amount is in excess of 25 percent of the amount of gross income stated in the taxpayer's return. The government's own filings set forth its computation of the amount of gain that the government alleged the taxpayer had failed to report, and it is clear from those filings that the taxpayer's omission from gross income did not meet the 25 percent threshold contained in section 6501(e)(1)(A) under any theory of the case proposed by the government.

In its filings, the government asserted that the smallest possible gain that the taxpayer would have recognized from the disguised sale transaction was $369,986,956, but that the gain recognized by the taxpayer could be found to be as much as $416,357,084.[5] The district court determined that the amount of unreported gain from the disguised sale transaction was $369,986,956, and further determined that the taxpayer's omission from gross income amounted to only 17.68 percent of the gross income stated in the return.[6]

Our point is that, even if the district court had adopted the government's theory that resulted in the largest possible unreported gain alleged by the government of $416,357,084, the omission from gross income would only have been 21.67 percent.[7]

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[4]Jacobus seems to have a penchant for vitriolic attacks on private practitioners. In a June 30, 2010 blog posted by Jacobus on an article written by Jasper L. Cummings, Jr. (former Internal Revenue Service Associate Chief Counsel and now counsel at Alston & Bird LLP), Jacobus stated that:

> Anyone may consult the public record in the Fidelity case and recognize that Mr. Cummings distorts that record due to his failure to read it faithfully. In particular, Mr. Cummings has no business making observations about the DOJ Tax Division's conduct in relation to the Fidelity litigation that amount to thinly veiled ad hominem assaults on the integrity and motives of dedicated public servants. Given his ''familiarity with public law practice,'' Mr. Cummings surely knows that a Tax Division attorney is legally and ethically constrained from publishing a response to commentary by the private tax bar in the media or law journals. To so nakedly take advantage of that fact, for the mere sake of advancing a singularly uninformed, and therefore speculative, critique of a Tax Division lawyer's conduct of important tax litigation on behalf of all American citizens, is an unbelievably cheap and demeaning tactic on the part of Mr. Cummings.

See Jacobus's comments at http://taxprof.typepad.com/taxprof_blog/2010/06/cummings-making.html. Jacobus states in his article that he participated in the *G-I Holdings* case as a senior litigation counsel with the Tax Division of the Justice Department. Presumably, as a *former* Tax Division attorney, Jacobus has determined that he is no longer subject to the legal and ethical constraints he referenced in his blog posting.

[5]United States' Proposed Findings of Fact and Conclusions of Law, Nos. 313 and 314. In the transaction at issue, the taxpayer contributed assets with a fair market value of $480 million to the partnership. The partnership then distributed $450 million of debt proceeds to the taxpayer, which reduced the taxpayer's capital account to $30 million. The government argued that the taxpayer should have recognized $369,986,956 of gain in connection with the transaction if the $30 million interest in the partnership retained by the taxpayer was properly treated as received under a nontaxable $30 million asset contribution under section 721. Alternatively, the government argued that if the entire transaction was properly treated as a taxable transaction, the taxpayer recognized as much as $416,357,084 of gain. As noted below, the district court ultimately found that the transaction should be treated in part as a taxable sale and in part as a nontaxable contribution.

[6]*G-I Holdings*, 2009 WL 4911953, at 75. The district court stated that the total gross income reported on the taxpayer's 1990 tax return was $1,162,243,320, including $164,530,674 of gross income allocated to the taxpayer from the partnership that would not have been allocated to the taxpayer if the transaction were treated as a disguised sale of assets to the partnership rather than a nontaxable contribution. The district court found that the taxpayer should have reported gross income on its 1990 tax return equal to $1,162,243,320 (the gross income reported on the taxpayer's return), plus $369,986,956 (the gross income that the taxpayer recognized as a result of the disguised sale transaction), minus $164,530,674 (the gross income allocated to the taxpayer from the partnership that would not have been allocated to the taxpayer if the transaction were treated as a disguised sale of assets). Thus, the court found that the omission from gross income was $205,456,282 ($369,986,956 gross income that the taxpayer recognized as a result of the disguised sale transaction, minus $164,530,674 gross income allocated to the taxpayer from the partnership that would not have been allocated to the taxpayer if the transaction were treated as a disguised sale of assets), which equaled 17.68 percent of the gross income stated in the return ($205,456,282 omitted amount divided by $1,162,243,320 gross income reported on the return).

[7]Consistent with the court's method set forth above, if the unreported gain were the maximum alleged by the government of $416,357,084, the omission from gross income would be $251,826,410 ($416,357,084 282 gross income that the taxpayer

(Footnote continued on next page.)

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Thus, the district court did not have to determine whether there was a disguised sale resulting in a gain of $369,986,956, or a disguised sale resulting in a gain of $416,357,084, or whether there was no disguised sale at all and no gain. In all cases, the omission from gross income was insufficient to trigger the six-year statute of limitations. Accordingly, the district court did not need to analyze the application of the partnership disguised sale rules to conclude that the statute of limitations with respect to the taxpayer's 1990 tax year had expired.

We will address the other points made by Jacobus only briefly. He argues that the disguised sale conclusion also is not dicta because it is relevant "to the extent that GAF [Corp.] had net operating loss or tax credit carryovers originating in or passing through the 1990 tax year." He concedes that the impact, if any, on such carryovers was not before the court (although it may come before the court in a separate proceeding). In our view, the fact that the disguised sale conclusion was not relevant to the controversy currently before the court makes it dicta. The fact that it might be relevant to another controversy that may or may not ever be decided by the court reinforces, rather than detracts from, that conclusion, and suggests that the disguised sale issue should not have been decided unless and until the other controversy comes before the court.

Jacobus also criticizes what he characterizes as "our attempt to marginalize the *G-I Holdings* disguised sale ruling because of its unpublished nature." Jacobus points out that in 2007, the Federal Rules of Appellate Procedure were amended to provide that a court may not prohibit or restrict the citation of unpublished decisions.[8] Jacobus neglects to point out that the rule allowing citation has no effect on the status of unpublished opinions as nonprecedential. Indeed, when advising on the drafting and adoption of the 2007 amendment, the Advisory Committee noted that "Rule 32.1 is extremely limited. . . . It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court."[9] As noted in our article, any appeal in *G-I Holdings* will be to the Third Circuit, which recently stated that "unpublished District Court opinions are not a source of law."[10]

Finally, Jacobus writes that we are "off base in suggesting that *Plantation Patterns Inc. v. Commissioner,* 462 F.2d 712 (5th Cir. 1972), implies a flaw in the *G-I Holdings* court's recharacterization of the Credit Suisse loan as an indebtedness of [Rhone Poulenc], not GAF." Jacobus writes that "the evidence at trial established that the comprehensive financial assurances provided by [Rhone Poulenc] were indispensable to the extension of credit." We find this assertion simply not credible, given that GAF used the proceeds of the Credit Suisse loan to repay other debt. The existence of the other debt strongly suggests that an unrelated party would have advanced a comparable sum without the "credit enhancement" provided by the elaborate partnership arrangements — the other lender had done so already. The fact that absent the "credit enhancement" GAF may have obtained less favorable loan terms, including a requirement for recourse liability, is beside the point. In any case, the court never made a finding that absent the partnership "credit enhancement" an unrelated third party would not have advanced a comparable sum of money, as required by *Plantation Patterns*. Indeed, the court never even cited the case, which is widely regarded as the seminal case involving the determination of the true debtor for federal income tax purposes.

We continue to believe that the district court's analysis in *G-I Holdings* is seriously flawed. Because the court's opinion is unpublished and dicta, however, its conclusion on the disguised sale issue should be accorded little precedential weight.

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recognized as a result of the disguised sale transaction, minus $164,530,674 gross income allocated to the taxpayer from the partnership that would not have been allocated to the taxpayer if the transaction were treated as a disguised sale of assets), which equals 21.67 percent of the gross income stated in the return ($251,826,410 omitted amount divided by $1,162,243,320 gross income reported on the return).

[8]Fed. R. App. P. 32.1(a).

[9]Advisory Committee on the Federal Rules of Appellate Procedure, Committee Note to Fed. R. App. P. 32.1. *See generally* Patrick J. Schiltz, "The Citation of Unpublished Opinions in the Federal Courts of Appeals," 74 *Fordham L. Rev*. 23, 30 (2005). Prof. Schiltz was the reporter for the Advisory Committee on the Federal Rules of Appellate Procedure during the drafting, comment, and recommendation period of new Fed. R. App. P. 32.1.

[10]*Pinho v. Gonzales*, 432 F.3d 193, 213 n. 26 (3d Cir. 2005). Although the case was decided before the adoption of Fed. R. App. P. 32.1(a), it continues to be good law.

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