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BOARD OF EQUALIZATION

STATE OF CALIFORNIA

In the Matter of the Appeal of:	**HEARING SUMMARY**
	CORPORATION FRANCHISE TAX APPEAL
CAMINO MEDICAL GROUP, INC.	Case No. 719011

Year	Claim for Refund
2005	$1,028,094.13[1]

Representing the Parties:

For Appellants: Robert H. Wood, Wood LLP

For Franchise Tax Board (FTB): Daniel Biedler, Tax Counsel III

QUESTION: Whether appellant has demonstrated error in respondent's determination that appellant had constructive receipt of $10,179,648 in deferred compensation during the 2005 tax year.

HEARING SUMMARY

Section 40 Appeal

This is an appeal in which Revenue and Taxation Code section (Section) 40 applies.

[1] This amount consists of tax of $702,260.94 and interest of $325,833.19.

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Therefore, within 120 days of the date the Board renders its decision in this matter, a written opinion must be published on the Board's website. Please see Staff Comments for a discussion of Section 40.

Background

Appellant Camino Medical Group, Inc. (sometimes referred to as "CMG") is a California medical corporation. As discussed below, on the basis of a final federal determination from the Internal Revenue Service (IRS), respondent determined that appellant constructively received $10,179,648 of deferred income in 2005 from the Palo Alto Medical Foundation ("PAMF"), a California non-profit public benefit corporation.

Around May 2000, appellant entered into three affiliation agreements, effective June 1, 2000, with PAMF. The affiliation agreements consisted of an Agreement for Professional Services (referred to by appellant as the Professional Services Agreement or "PSA" and by respondent as the "APS"), an Affiliation Agreement that Sutter Health was also a party to, and a Deferred Compensation Agreement (DCA). Under the agreements, appellant's physicians would act as the medical staff for a division of PAMF, which was named the Camino Health Care Division (the "Camino Division"). (App. Op. Br., pp. 1, 4, Exhibits E, F, and G.)

The DCA stated that the Camino Division of PAMF will have insufficient receipts to pay appellant during the initial start-up period while appellant may have excess cash. It therefore provided that appellant would only currently be paid cash amounts necessary to meet current expenses. It further provided that "[a]ny difference between the amounts earned under the Agreement for Professional Services and the amount actually requested from and paid by [PAMF] shall be considered Deferred Compensation." It stated that the balance of the Deferred Compensation shall become due and payable on termination of the Agreement for Professional Services. (App. Op. Br., Exhibit F.)

The Affiliation Agreement set forth a plan for the integration of the Camino Division with the Palo Alto Division of PAMF (another division of PAMF), once certain criteria are met. One of the criteria for integration was that appellant must have forgiven PAMF's liability under the DCA. (App. Op. Br., Exhibit F, Article III, pp. 14 – 20.)

In 2000, on behalf of appellant, PAMF collected $10,179,648 of appellant's outstanding patient accounts receivable, and remitted the amounts collected to appellant in September 2000. These

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accounts receivable arose from services provided by appellant's physicians prior to the effective date of the affiliation agreements, and PAMF received a fee for the collection of these pre-affiliation accounts receivable. (App. Op. Br., p. 3; Resp. Op. Br., p. 4, fn. 5.)

On August 10, 2006, appellant filed a 2005 tax return reporting net income of $506,342 and a net operating loss ("NOL") carryover in the same amount, resulting in a self-assessed minimum tax of $1,600. On April 15, 2007, it filed an amended 2005 tax return which increased its net income to $671,569 but also increased its NOL carryover to this same amount, resulting in no change in tax. (Resp. Op. Br., p. 1, Exhibit C.)

Subsequently, the IRS conducted an audit and determined that the CEOs of PAMF and appellant orally agreed, in 2000, to withhold the payment to appellant of $10,179,648 of physician payments (i.e., an amount equal to the accounts receivable amount collected by PAMF for appellant). By late 2005, appellant had deferred approximately $34 million in physician payments, including $10,179,648 from the oral agreement. (The briefing and documentation sometimes rounds this $10,179,648 amount to $10 million.) The issue in this appeal is whether this $10,179,648 in deferred payment for services was constructively received by appellant in 2005. (App. Op. Br., p. 6 and Exhibit D, pp. 9, 16 [Form 886-A]; Resp. Op. Br., p. 4; App. Reply Br., pp. 3 – 4.)

Appellant and respondent agree there was an oral agreement to withhold this additional $10,179,648 of physician payments. However, the parties dispute whether the payment of this additional amount was subject to the restrictions on payment set forth in the affiliation agreements. Specifically, pursuant to the affiliation agreements, the other deferred amounts could not be paid except to the extent payment was needed for appellant to meet its operating expenses and would not be paid in 2005 if the planned integration occurred. In light of these restrictions on payment, the IRS concluded that the other deferred amounts were not constructively received. However, the IRS determined that the $10,179,648 payment that was deferred pursuant to the oral agreement was not subject to these restrictions and that appellant elected not to receive it. The IRS therefore determined that this amount was constructively received in 2005. The IRS included this $10,179,648 amount in appellant's gross income from the compensation for services pursuant to Internal Revenue Code (IRC) section 61(a)(1) and Treasury Regulation section 1.451-2. (App. Op. Br., p. 6 and Exhibit D, pp. 9, 16 [Form 886-A];

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Resp. Op. Br., p. 4; App. Reply Br., pp. 3 – 4.)

However, the IRS also allowed appellant to treat the $10,179,648 amount as a purchase of an intangible contract right associated with its contractual relationship with PAMF. Thus, the IRS determined that appellant constructively received the $10,179,648 amount but, by deciding not to take the payment, effectively purchased a contract right, and allowed appellant to amortize its cost to purchase that intangible contract right. The result was that $1,131,072 of the $10,179,648 was amortized as an expense in 2005 and $4,524,288 was amortized as an expense in both 2006 and 2007. Thus, the income recognized in 2005 was offset by the amortization amounts and the net result, due to NOL carrybacks and other adjustments, was that appellant owed a minimal additional amount of federal income tax in 2005 ($2,176) and was entitled to a refund in 2006 and 2007. (*Id.*)

The IRS Form 4549-A[2] states that the adjustments were "for federal income tax purposes only" and that "[n]othing in this report shall be deemed to limit [appellant's] ability to recharacterize the amount and nature of its income, expenses, and tax liability for state or local purposes . . . ."

On February 4, 2011, on the basis of the final federal determination, respondent issued a Notice of Proposed Action (NPA) for tax year 2005 finding $10,179,648 in additional income, reduced by an additional charitable contribution deduction of $904,857[3] and an amortization deduction of $1,131,072. On May 29, 2012, respondent issued a Notice of Action (NOA) affirming the NPA. The $1,131,072 amortization deduction reflected in the NPA and the NOA reflects the amortization deduction allowed by the IRS determination for 2005. (See also Resp. Op. Br., Exhibit H, p. 15 [respondent's April 24, 2012 position letter].) After respondent issued the NOA, appellant paid the additional tax ($702,260.94) and interest ($325,833.19) asserted in the NPA and filed a refund claim. The refund claim was denied, and appellant then filed this timely appeal. (App. Op. Br., p. 1 and Exhibit C; Resp. Op. Br., pp. 1 - 3.)

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[2] The Form 4549-A or RAR bears an examiner's name with a date of August 28, 2009, but based on the fax header appears to have been faxed prior to that date, on July 14, 2009. At the hearing, the parties may wish to confirm that the RAR in the record is the final RAR.

[3] The charitable contribution deduction was also reflected in the federal determination and does not appear to be an issue in this appeal. (See App. Op. Br., Exhibit D, p. 5 [p.3 of the IRS Form 4549-A].)

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Contentions

Appellant's Opening Brief

Appellant contends that it disagreed with the IRS determination but acquiesced because the IRS also allowed the offsetting amortization which eliminated any tax cost. Appellant argues that it expressly preserved its right to contest the matter at the state level by obtaining an agreement from the IRS to include the statement in the Form 886-A that the adjustments were only for federal purposes and did not limit appellant's ability to recharacterize the income for state purposes. (App. Op. Br., pp. 2 - 3.)

Appellant states that, in September of 2000, it received $10,179,648 in cash for receivables arising prior to its June 1, 2000 affiliation with PAMF. It states it used this cash to fund operating expenditures "and deferred $10,179,648 of compensation payable from PAMF." It further states that, after a testing period, it "deepened its affiliation with PAMF by forgiving all outstanding deferred compensation, including the $10,179,648 deferred in 2000." However, appellant states that it did not have the constructive receipt of this amount in 2005 because "in order to have been paid that sum in 2005, CMG [appellant] would have had to terminate its relationship with PAMF, which it did not do." (App. Op. Br., p. 3.)

Appellant argues that under the affiliation agreements it was require to, and did, use the $10,179,648 received from its accounts receivables to fund its current operating expenses. Appellant argues that, under the agreements, since it had enough cash to fund its operating expense, it had to defer this same amount of compensation and then in 2005 had to forgive all deferred compensation, including this amount, in order "to deepen its affiliation with PAMF." Appellant further argues that, even if it could be viewed as having the constructive receipt of the amount, which it does not concede, such receipt would have occurred in 2000, which respondent is barred from assessing due to the statute of limitations. (App. Op. Br., pp. 3 – 4.)

Appellant states that, under the Affiliation Agreement, the operating budget for the Camino Division would be jointly developed by appellant and PAMF. According to appellant, CMG was "ultimately responsible for the Camino Division operating expenses" and the compensation it

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received was reduced by such operating expenses (pointing to Section G.3 of the Affiliation Agreement[4]). Appellant states that, with respect to services performed by appellant's physicians after June 1, 2000, PAMF billed and collected patients. However, appellant asserts that only $23.04 million out of $42.4 million in billings was payable to appellant because PAMF retained the difference to cover the expenses of PAMF's Camino Division and because the compensation payable to appellant could not exceed certain market values.[5] (App. Op. Br., pp. 4 -5.)

Appellant asserts that, out of the $23.04 million that was payable to it for services provided in 2000, it only actually received approximately $12.5 million. Appellant explains that this was a result of Section 1 of the DCA, which provided that appellant was only required to request a cash payment to the extent necessary to fund its operations. Appellant argues that the remaining balance of $10.5 million (i.e., $23.04 million, less $12.5 million paid) was deferred because it was not needed by appellant to fund its operating expenses. Appellant argues that this $10.5 million deferred amount includes the $10,179,648 currently at issue. (App. Op. Br., p. 5.)

Appellant argues that, under the affiliation agreement, it could, after a testing period of up to five years, "deepen its affiliation agreement with PAMF by forgiving any compensation deferred . . . ." Appellant states that this forgiveness would cause the Camino Division balance sheets to merge with another division of PAMF (apparently referring to the Palo Alto division). However, if the affliation was not deepened, then the deferred compensation would have to be paid. Appellant states that the agreement was structured this way so that appellant would have funds to re-establish itself as a freestanding medical provider if the affiliation was not deepened. (App. Op. Br., p. 6.)

Appellant states that the $10,179,648 in prior accounts receivables (accrued prior to the affiliation date of June 1, 2000) that was collected by PAMF increased appellant's post-affiliation cash

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[4] Section G.3 of the Affiliation Agreement can be found on page two of Exhibit F of appellant's opening brief. It states that appellant will "[b]e accountable with respect to the budget of the Camino Division."

[5] Appellant points to Attachment B, Section 1.A, of the PSA, which can be found at page 41 of Exhibit E of appellant's opening brief. The provision states that compensation may not exceed the "Available Distributable Income" of the Camino Division and may not exceed the 90th percentile of an industry benchmark.

Attachment B also provides that compensation for appellant's professional services relates to the "net professional revenues" from operating the Camino Division. (See Attachment B, Section 1.A & 1.B.)

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balances. Therefore, appellant contends, since it had more cash to meet its operating expenses, it was able to defer approximately $10.5 million of compensation. (*Id.*)

Appellant argues that it accounted for all of the deferred compensation consistently, on an accrual basis. It states that the deferred compensation at the end of the testing period in 2005 was $34.2 million and consisted of: (i) a $34.2 million asset receivable (the total deferred compensation), (ii) a $21 million liability reserve accrued for the possibility that the deepened affiliation would require forgiveness, and (iii) $13.2 million of retained earnings/revenue accrued for "the remaining balance taken into income during the testing period for the possibility of not deepening affiliation with no forgiveness[.]" Appellant states that for the post-affiliation start-up period in 2000 it recorded the initial $10,179,648 of deferred compensation with journal entries of (i) debits to intercompany receivables in that amount and (ii) credits to an "Other Revenue" account. However, for the other deferred compensation, it recorded (i) debits of $24,020,352 to intercompany receivables, (ii) $3,020,352 in credits to a "PSA Revenue" account and (iii) $21 million in credits to an "Interco Liability" account. Appellant states that: "the first $10,179,648 of deferred compensation was credited to an Other Revenue account (not the PSA Revenue account) to track how such deferred amount was tied, dollar-for-dollar, to pre-affiliation periods . . . . However, both the Other Revenue account and the PSA Revenue account still represent revenue [for financial statement purposes]." Appellant states that no reserve was credited for the first $10,179,648 because, as a result of an earlier unsuccessful affiliation, it "had no reasonable expectation of any deepened affiliation with PAMF" at the end of 2000. (App. Op. Br., p. 7.)

Appellant argues that, when it determined in 2005 to deepen the affiliation and therefore forgive the deferred compensation, the Board minutes identified receivables-related deferred compensation of $10,179,648 separately from the remainder of the deferred payments, which acknowledged how it tracked the $10,179,648 of deferred compensation. However, appellant states that it generally made no distinction between the types of deferred compensation on a cash basis and referred to all of the deferred compensation without distinction. Appellant argues that the general ledger in 2005 also shows no separation between the types of deferred compensation and shows a reversal of the detailed accounting entries to reflect the deepened affiliation. (App. Op. Br., p. 8 [referring to Board

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meeting minutes attached as Exhibit H and general ledger information attached as Exhibit I].)

Appellant notes that the doctrine of constructive receipt provides that "a taxpayer not deliberately turn his back upon income and thereby select the year in which he will report it." However, appellant further notes that income "is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions." (App. Op. Br., p. 9 [citing Rev. Rul. 60-31 and Treas. Reg. § 1.451-2(a)].)

Here, appellant argues that it "never" had constructive receipt of the $10,179,648 of deferred compensation "because [appellant's] ability to demand payment of the funds was substantially restricted." Referring to Section 1 of the DCA, appellant argues that there was a substantial restriction on payment because appellant could only be paid to the extent it needed the cash to pay its operating expenses. Appellant also argues that the forgiveness in 2005 did not trigger constructive (or actual) receipt of the income because the compensation was subject to the substantial restriction that it would not be paid unless the parties decided not to deepen the affiliation. Appellant characterizes PAMF's obligation to pay the deferred compensation as "no more than a conditional promise to pay funds subject to the restrictions discussed above [regarding whether appellant had enough cash to pay operating expenses and whether the affiliation was deepened in 2005]." (App. Op. Br., p. 10.)

As an alternative argument, appellant contends that if it had constructive receipt at any time – which it disputes – it would have constructively received the income in 2000, which is beyond the statute of limitations. Appellant argues that, if the affiliation agreements did not restrict its receipt of the income then any income, would have to be in the year of the deferral (2000). (App. Op. Br., p. 11.)

Responding to arguments the FTB made in a position letter dated April 24, 2012,[6] appellant contends that:

a) the fact that the $10,179,648 amount is not included in the DCA is irrelevant because no amounts are included in that agreement;

b) Board of Director discussions regarding what do do with the deferred compensation do not show that the income was constructively received, because the DCA required appellant to

[6] This FTB position letter is attached as Exhibit H of respondent's opening brief.

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determine its cash needs and only request payment if it was needed to meet operating obligations;

c) contrary to the FTB's argument that appellant had no obligation to forgive the payment, appellant had to forgive the payment as a condition to deepening its affiliation with PAMF;

d) the deferred income was deferred in accordance with the written agreements, not self-serving testimony;

e) the FTB's assertion that Board of Director authorization was needed for the deferral of the income is irrelevant because the deferred compensation was restricted by the affiliation agreements and, even if relevant (which appellant disputes), Dr. Slavin and Dr. Druker (who acted on behalf of appellant and PAMF, respectively) had adequate authorities as agents to enter into any related oral agreements;

f) even assuming that constructive receipt could have occurred at any time, it could only have occurred in 2000, not 2005; and

g) IRS Revenue Ruling 60-31[7] supports appellant's position because, as the boxer's income was deferred until he fought a match, the payment of appellant's deferred income was restricted by the affiliation agreements. (App. Op. Br., pp. 11 – 14.)

Respondent's Opening Brief

Respondent states that the Affiliation Agreement provided, among other things, that PAMF would collect $10,179,648 of appellant's accounts receivables that were pending when the agreement was signed, and notes that appellant reported this income on its 2000 tax return. Respondent further notes that the IRS determined that the CEOs of appellant and PAMF orally agreed to additional compensation of $10,179,648. (Resp. Op. Br., pp. 3 – 4.)

Respondent argues that appellant accounted for this additional payment differently from

[7] Staff notes that in the example cited by appellant, the boxer had negotiated a provision under which he would receive the proceeds over a period of years. The revenue ruling finds that the boxer had constructive receipt of the income when it was received by the club. In Revenue Ruling 70-435, in light of *Ray S. Robinson v. Comm'r* (1965) 44 T.C. 20, the IRS modified Revenue Ruling 60-31 to remove this example. In the later revenue ruling, the IRS stated that Revenue Ruling 60-31 was adverse to the taxpayer and was premised on a finding that the enterprise was a joint venture. Revenue Ruling 70-435 therefore replaced it with an example in which the parties are clearly engaged in a joint venture and therefore taxed as a partnership on income received by the joint venture.

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the compensation deferred under the DCA. Respondent contends that, unlike the DCA compensation, appellant did not record a corresponding liability for the compensation received pursuant to the oral agreement, and instead booked it to revenue. Respondent states that, by late 2005, appellant had accrued total deferred compensation of $34.2 million, consisting of approximately $24 million under the APS and DCA and $10,179,648 from the oral agreement. (Resp. Op. Br., p. 4.)

Respondent states that, on October 1, 2005, appellant entered into an amended PSA which, for the first time, did not contain a deferred compensation provision. Respondent notes that a Sutter Health memo regarding the amendment stated that: "The PSA specifies when the Group [appellant] shall be paid all compensation. Therefore, [appellant] needed to decide whether to be paid or forgive the amounts . . . ." Respondent then notes and quotes from appellant's Board meetings during September 2005, during which appellant's Board discussed: the need to reduce its deferred compensation balance, the possibility of creating a capital fund at the Palo Alto Medical Foundation, and the possibility of using deferred compensation to pay physicians in 2005 or increase the medical malpractice fund. (Resp. Op. Br., pp. 4 – 5.)

Respondent quotes from the minutes of appellant's November 8, 2005 Board meeting which note a $24 million "PSA deferral" and further state as follows: "[i]n addition the existing Camino Division of PAMF obligation to [appellant] of $10 million was reviewed. This was the amount of accounts receivable that was outstanding . . . in June of 2000." The minutes state that Dr. Slavin suggested that the Board:

1. Increase the Malpractice Risk Retention Fund by $5M
2. Forgive the PAMF obligation to pay CMG the $10M collected on its Accounts Receivable from June 2000
3. Forgive the PAMF obligation to pay [appellant] $18 million of its deferred PSA obligation.

(Resp. Op. Br., pp. 5 – 6.)

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Respondent states that appellant posted the following entries on its books to record the forgiveness:[8]

Posted November 30, 2005

Item	Debit	Credit
Interco Liab.	$21,000,000	
Other Revenue	$10,179,648	
PSA Revenue	$1,820,352	
Interco Receivable		$33,000,000

Posted December 31, 2005

Item	Debit	Credit
PSA Revenue	$1,200,000	
Interco Receivable		$1,200,000

Respondent further notes that, in 2007 and 2008, appellant merged with two other PAMF-affiliated entities to form the Palo Alto Foundation Medical Group, which has an ongoing relationship with PAMF. (Resp. Op. Br., p. 6.)

Respondent notes that appellant has the burden of proof, citing the *Appeal of Frank J. and Barbara D. Burgett*, 83-SBE-127, decided June 21, 1983, and other decisions. Respondent contends that its adjustments follow the federal adjustments, to the extent permitted under California law, and appellant has not shown any error in the federal adjustments. (Resp. Op. Br., pp. 7 – 8.)

Respondent acknowledges that the IRS allowed appellant to treat the forgiven deferred income as the purchase of an intangible contract right which appellant could amortize over 27 months, resulting in federal deductions of $1,131,072 in 2005, with the remainder deducted in 2006 and 2007. Respondent notes that, under federal law, appellant was able to carry back to 2005 the amortized expense, which essentially eliminated the federal tax. However, respondent argues that, because

[8] Staff has excluded an Account Number column as it appears unnecessary to the analysis.

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California law does not permit operating loss carrybacks for 2005, "this appeal is before your [B]oard." (Resp. Op. Br., p. 9.)

With regard to the fact that the IRS Form 886-A stated that it would not limit appellant's ability to recharacterize the income for state purposes, respondent argues that appellant has the obligation to either concede the accuracy of the federal adjustment or prove that it is erroneous. Respondent states that its discussion is "sourced from the federal Form 886-A," which is attached as Exhibit D to appellant's opening brief, and it "incorporates by reference pages 5 through 9 of the federal Form 886-A."[9] (Resp. Op. Br., p. 10.)

Like appellant, respondent notes that Treasury Regulation section 1.451-2 provides that income is constructively received if it is made available or set aside for a taxpayer so that it could be withdrawn at the taxpayer's election. However, income is not constructively received if the taxpayer's control of the receipt of the income is subject to substantial restrictions. Respondent quotes Revenue Ruling 60-31, 1960-1 C.B. 174, as explaining that the purpose of the doctrine is to ensure that "a taxpayer may not deliberately turn his back upon income and thereby select the year for which he will report it." (Resp. Op. Br., pp. 10 – 11.)

Respondent then summarizes the IRS analysis as follows. The roughly $10 million related to the old accounts receivable (or "A/R") was subject only to the terms of the oral agreement. Therefore, unlike the deferred compensation subject to the DCA, the $10 million amount was not subject to a substantial restriction because appellant was not required to forgive the $10 million amount under the Affiliation Agreements. During four meetings late in 2005, appellant's Board considered how to dispose of the $10 million in deferred compensation and ultimately decided to forgive the amount. (Resp. Op. Br., pp. 11 – 12.)

Respondent states that the $24 million amount that was forgiven pursuant to the DCA is not at issue. It then provides a lengthy block quote from pages 7 to 8 of the Form 886-A (which correspond to pages 14 to 15 of Exhibit D of appellant's opening brief). The quoted language takes

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[9] Pages 5 through 9 of the Form 886-A correspond to pages 12 to 16 of appellant's Exhibit D. On these pages, the IRS finds, among other things, that the $10,179,648 payment was different from the other deferred compensation in that the $10,179,648 amount was not subject to the restrictions applicable to the other deferred compensation.

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issue with the taxpayer's position that the amounts withheld under the oral agreement were subject to the same restrictions as amounts deferred under the DCA. The Form 886-A portions that are quoted by the FTB respond to this argument as follows:

> . . . the actions of the Board and the booking of the transactions do not suggest that this was the case. The amounts were booked differently. One amount was recorded into revenue and one was not. A liability was accrued for one amount and not the other. One amount was put into a written contract; the other was deferred under an oral agreement. When the Board [votes] on the issue, they forgive each balance separately, not the $34.2 million as a whole. Further, even if the collection of the amount would be paid "upon termination of the PSA relationship" it does not violate the terms of the PSA they [sic] way collecting the $24 million would have. The idea that the $10,179,648 would be paid upon termination of the PSA simply fixes the date when the amount became collectible . . .
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> . . . [Appellant] also draws attention to Camino's Deferral Schedule on which it tracked the accumulating receivable from PAMF. In discussing the entire deferred compensation balance of $34.2 [million] accrued on the schedule, [appellant] states, "This deferred compensation amount accrued throughout the five years of the PSA under the terms of the [DCA] and the Oral Agreement. [Appellant] was not legally entitled to it, and it was not included in [appellant's] earnings." That statement is only partially correct, because except for the $21 million of the balance that was offset with a liability (a reserve for forgiveness) the amount *was* [emphasis in Form 886-A] included in Camino's book earnings. This is evidenced by the journal entries needed to forgive the amount due – reversing the receivables causes $13.2 million of debits (reductions) to revenue.

The Form 886-A portions quoted by respondent then state that for years 2000 through 2005 the taxpayer's situation may have been similar to the taxpayers in the ruling in that the taxpayer had only a promise to be paid. However, in late 2005, there was "more than a 'mere promise to pay,' there was the reality of income when the Board was tasked with deciding to collect or forgive." The Form 886-A states that this decision was appellant's and concludes that "[e]ntering into the oral agreement . . . was not the event that caused constructive receipt – it was having the right to make the decision to forgive the amount due." (Resp. Op. Br., pp. 12 – 14.)

Respondent argues that appellant's assertion that, "if it ever had constructive receipt of the amount at issue, it would have been in a year prior to 2005, runs afoul of its duty to consistently report items of income." In support, respondent cites and quotes extensively from *Hilda Ashman v. Comm'r* (*Ashman*) (9th Cir. 2000) 231 F.2d 541, 544, including the following language from that decision:

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> [t]he law should not be such an idiot [footnote in original] that it cannot prevent a taxpayer from changing historical facts from year to year in order to escape a fair share of the burdens of maintaining our government.

Respondent further cites and quotes from *Shanafelt v. United States*, 97-2 U.S. Tax Cas. (CCH) P50,098, 1997 U.S. Dist. LEXIS 17636, which provides in part that:

> The elements of the [duty of consistency] doctrine are 1) a representation or report by the taxpayer 2) on which the Commissioner has relied and 3) an attempt by the taxpayer after the statute of limitations has run to change the previous representation or to recharacterize the situation in such a way as to harm the Commissioner. [citations omitted] It is not necessary to show an intentional falsehood or wrongful misleading silence. [citation omitted]
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> When the requirements . . . are met, 'the Commissioner may act as if the previous representation, on which he relied, continued to be true, even if it is not. The taxpayer is estopped to assert the contrary. [citation omitted] [pages *9, *10]

Citing the above law, respondent argues that it is inconsistent for appellant to now argue that the income should have been reported on its 2000 tax return, when it did not do so and the statute of limitations is now closed. On this basis, respondent argues that appellant should be estopped from making this argument. (Resp. Op. Br., pp. 14 – 15.)

Subsequent Briefing

In its reply brief, appellant first argues that the FTB's argument rests on a "fundamental misunderstanding" of the business relationship between it and PAMF. Appellant states that, in the early 1990s, it became apparent to appellant that it needed to join with a larger healthcare organization. Appellant states that it had previously affiliated with a hospital foundation but the relationship deteriorated, requiring it to reestablish itself as an independent provider, at great expense. Appellant contends that, in light of this history, it was cautious and needed to have a "re-establishment fund" available in case it needed to re-establish itself as an independent provider. (App. Reply Br., pp. 2 – 3.)

In response, the FTB argues that, "[d]espite appellant's contention [that the FTB fundamentally misunderstands the context], respondent states clearly that appellant's present representation of its business purpose is misleading – appellant's sole purpose is to attempt to characterize the transaction as something other than a calculated bargain, the results of which speak for themselves." Respondent argues that appellant is bound by the form of the transaction it chose. (Resp.

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Reply Br., p. 2.)

Appellant states that its factual assertions are supported by the parties' conduct and their written agreements. In addition, appellant argues that its assertions are supported by the "undisputed" testimony of Dr. Richard Slavin. It provides a declaration under penalty of perjury from Dr. Richard Slavin, who was formerly the Chairman and CEO of appellant and is currently the CEO of PAMF. The declaration is dated February 10, 2012. (App. Reply Br., p. 3 and Exhibit 5.)[10]

Appellant summarizes the declaration as stating that, around the same time the affiliation agreements were signed, Dr. Slavin, as the CEO of appellant, and the CEO of PAMF, negotiated an oral agreement. Under the oral agreement, the parties agreed to the deferral of additional compensation equal to the accounts receivable earned prior to the June 1, 2000 effective date and subsequently collected by PAMF. The parties also agreed that the additional compensation would also be deferred and would be subject to the same restrictions as the other deferred compensation – that is, it would only be paid if a full integration did not occur. (App. Reply Br., pp. 3 – 4.)

On the issue of whether the receipt of the income was subject to restrictions, respondent asserts that "[d]espite appellant's contentions, no evidence has been provided to indicate that anyone other than appellant has had the ability to determine the disposition of the approximately $10 million." Respondent contends that "[s]imple reasoning demonstrates that appellant had sole control and determination of the deferred funds." (Resp. Reply Br., p. 1.)

In appellant's final brief, it argues that the FTB's reply brief "neglects to address a wealth of other evidence and legal authorities[,]" including "the course of conduct and history of dealing," the fact that appellant had suffered from a prior failed affiliation, and the "undisputed" testimony provided by Dr. Slavin. (App. Supp. Br., p. 1.)

Appellant contends that its 2005 Board meeting minutes reflect recommendations made in response to PAMF's request that an integration occur ahead of schedule to facilitate PAMF's planned bond financing. Appellant argues as follows: the FTB "fails to realize" that PAMF "was not asking that

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[10] The declaration is attached to appellant's reply brief. It is marked as Exhibit 5. There are no exhibits 1 – 4; it appears the exhibit previously may have been attached to a submission at protest or to the IRS. Although dated prior to the appeal, and considered in respondent's April 24, 2012 position letter during protest (which dismissed the testimony as "self-serving"), the declaration was first provided in this appeal with appellant's reply brief.

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the Board decide what to do with the funds. Rather, the Board was discussing how and to what extent they might *negotiate* with PAMF, even though they had no right to do so under the Affiliation Agreement, for certain committed uses of the deferred amounts. [emphasis provided by appellant]" Appellant argues that "the fact of negotiation does not change the underlying reality" that appellant had to forgive the deferred amounts prior to integration.[11] Appellant argues that the deferral of the $10 million was part of a "workable 'Plan B'" in the event that the affiliation did not work out. (App. Reply Br., pp. 4 – 5.)

Appellant argues that the IRS's determination is not entitled to a presumption of correctness because it expressly disclaimed any state tax effect. Appellant argues that the one court opinion cited by the FTB, *Todd v. McColgan* (1949) 89 Cal.App.2d 509, should be distinguished because it involved the determination of the California State Franchise Commissioner, rather than the IRS, and involved a state law matter. Appellant contends that "at best" the presumption of correctness attaches as to the character of income, but not as to its allocation, citing the *Appeal of Freemon and Dorothy Thorpe*, 87-SBE-027, decided May 3, 1987. Appellant contends that the other appeals cited by respondent should be distinguished because, unlike appellant, the taxpayers in those appeals provided no evidence or "merely provided vague allegations[,]" quoting the *Appeal of Aaron & Eloise Magidow*, 82-SBE-274, decided November 17, 1982. (App. Reply Br., pp. 5 – 6.)

In response to appellant's arguments about the limiting language of the IRS determination, the FTB argues as follows:

> Despite appellant's statements to the contrary, respondent is not limited or constrained by statements in the [IRS] findings. As stated in respondent's opening brief, respondent's finding[s] are entitled to a presumption of correctness when based upon [IRS] determinations. The language referred to by appellant has no legal effect and appellant must satisfy all legal requirements at the state level separate and apart from discussions at the federal level.
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> (Resp. Reply Br., p. 2.)

In response to appellant's argument that the presumption of correctness at best attaches

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[11] In support, in footnote 4 of its reply brief, appellant quotes PLR 9015046 that a "mere possibility" of a settlement does not cause constructive receipt. In appellant's final brief, appellant notes that the FTB fails to address the PLR in its brief and that this authority "fatally undermines Respondent's theory of the case." (App. Supp. Br., p. 1.)

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to the character of income, the FTB states that "[r]espondent offers no particular response other than to say that the effects of a particular determination are established by law, which respondent will observe or employ as required." (Resp. Reply Br., p. 3.)

Appellant reiterates that it "never" constructively received the $10 million and that the FTB is wrong to assume that it "simply 'gave away' this money to PAMF for no particular reason." Appellant asserts that it never had control of the funds because it could only request the payment of this amount if the payment was needed to fund its current expenses, which was not the case. (App. Reply Br., p. 7.)

Appellant contends that "neither the IRS nor the FTB has been able to [explain] *why* Camino [appellant] would simply 'give away' more than $10 million." Appellant notes that the Form 886-A states "[i]t is not clear what Camino [appellant] received in return for agreeing to the extra deferral." Appellant contends that the IRS first concluded that the forgiveness was a "non-deductible action" but then "later admitted" that appellant "was purchasing a contract right." Appellant contends that it does not make sense that appellant, a for profit entity, would forgive the amount "for no reason." Appellant argues that it is more consistent with the parties' behavior and agreements to find that appellant never had control over the amount. Alternatively, if appellant did have control of the funds, then the forgiveness would be viewed "either as a charitable contribution to a 501(c)(3) entity (which PAMF was), or as a deductible business expense[,]" which even the IRS ultimately recognized. Appellant states that the FTB "fails to rebut or even discuss these obvious alternatives . . . ." (App. Reply Br., p. 8.)

Appellant contends that to obtain the income it would have had to terminate its relationship with PAMF. Appellant argues that Revenue Ruling 60-31 "strongly supports" its position in that the conditions to the payment of the amount were never satisfied. Appellant argues that it had to defer payment off the $10 million because the payment "was not necessary to fund its current expenditures." Appellant further argues that forgiving an amount that is subject to significant restrictions does not constitute constructive receipt and that appellant was required to forgive the $10 million amount as a condition to full integration. In the alternative, appellant argues that, if it had unrestricted access to the funds in 2005, it must have similarly had unrestricted access in 2000. (App.

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Reply Br., p. 9.)

Appellant contends that there cannot be the constructive receipt of income "where one must surrender a valuable right in order to realize it." Appellant argues that to receive the income it would have had to give up the significant rights provided by the affiliation agreements, which included compensation for treating PAMF's patients. Furthermore, appellant contends that the forgiveness came with significant limitations, in that it required appellant to "become permanently affiliated with PAMF," including the "sale of its property and the transfer of its non-physician workforce to PAMF," and the merger of its financial statements with PAMF. (App. Reply Br., p. 10.)

Appellant further contends that respondent erroneously equates financial accounting with tax accounting. In support, appellant cites *PPL Corp. v. Comm'r* (2010) 135 T.C. 176, 191 and *PNC Bancorp, Inc. v. Commissioner* (3d Cir. 2000) 212 F.3d 822 (*PNC Bancorp*), among other cases. Appellant explains that, in *PNC Bancorp*, the court rejected the IRS argument that, because the taxpayer capitalized loan origination costs over the life of the loan for financial accounting purposes, it must also do the same for tax purposes. Appellant argues that "[e]ven the IRS eventually came to the conclusion that the financial accounting records were not controlling for tax purposes in this case when it allowed [appellant] to amortize and deduct costs associated with the $10 million." (App. Reply Br., p. 11.)

In response to this argument, the FTB argues that "[a]s with the *PNC* case, the facts of the case determine the result." The FTB asserts that "[h]ere, appellant had complete control of the determination of the disposition of the funds[,]" and decided to turn over the funds to PAMF. (Resp. Reply Br., p. 2.)

In its final brief, appellant argues that the FTB "fails to distinguish the present appeal from [*PNC Bancorp, Inc., supra*] . . . ." Appellant argues "there is no basis for distinction" and "financial accounting never dictates tax treatment . . . ." (App. Supp. Br., p. 1.)

Appellant contends that, in practice, its financial accounting for the $10 million "did not significantly diverge from its tax accounting." Appellant argues that its description of the $10 million shows "no material separation between the $10 million (pre-affiliation 'other revenue') and the other deferred compensation (post-affiliation 'inter-company liability' and post-affiliation 'PSA Revenue')." Pointing to the general ledger entries attached as Exhibit I of its opening brief, appellant argues that

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"each entry – including the reversal of the $10 million of deferred compensation per the Oral Agreement – was described in accordance with the Professional Services Agreement (the "PSA")[.]" and the overall transaction was described as "To forgive PSA Def Comp[.]" (App. Reply Br., p. 12.)

Appellant argues that the duty of consistency doctrine does not apply on the ground that the doctrine only applies where there is a "misstatement of fact *and not law*[,] quoting *Lockheed Sanders v. United States* (D. N.H. 1994) 862 F. Supp. 677, 683, with emphasis added by appellant. Appellant also provides the following quote from *Crosley Corp. v. United States* (*Crosley*) (6th Cir. 1956) 229 F.2d 376, 381:

> A mutual mistake of law on the part of the taxpayer and the Commissioner in treating it as a cost of manufacturing does not create an estoppel. This conclusion is *not affected* by the additional fact that an offsetting correction in a prior year is barred by a statute of limitations. [emphasis added by appellant]
>
> (App. Reply Br., p. 13.)

In response to appellant's duty of consistency arguments, the FTB argues as follows:

> To the extent that appellant argues that the income should have been recognized in 2000 (or later), the taxpayer did not do so. The taxpayer's actions of failing to report the income are inconsistent with a belief that the tax year 2000 (or later) was the appropriate year to report the income. It is only after the IRS found the income taxable in 2005 that appellant claims that the income should have been paid in 2000, a year that is now closed under the statute of limitations. Under the principle of the duty of consistency, appellant is estopped to claim that the income should have been reported in an earlier year.

(Resp. Reply Br., p. 3.)

Appellant's final brief notes that the FTB's reply repeats its prior duty of consistency arguments and does not address the authorities cited by appellant. Appellant reiterates that the duty of consistency "does not prohibit taxpayers from proposing alternative legal theories." (App. Supp. Br., p. 1.)

Appellant also argues that its agreement with respect to the $10 million was with the IRS, not the FTB, and that courts have held that closing agreements "are exclusive and are to be strictly construed[,]" citing *Klein v. Comm'r* (11th Cir. 1990) 899 F.2d 1149, 1152 and *Geringer v. Comm'r*, T.C. Memo 1991-31. Quoting *Philips v. Comm'r* (3d Cir. 1949) 178 F.2d 270, 271, appellant states the court declined to enforce a closing agreement where the plaintiffs were "strangers to [the] agreement,"

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and therefore could neither be "bound by it nor [could] they take advantage" of it. Appellant argues this is especially true here where the agreement with the IRS "expressly bracketed the state tax treatment." (App. Reply Br., p., 14.)

Appellant further argues that its federal "settlement is consistent with its position today[,]" because it "characterized the forgiveness of the $10 million at issue as a sale of contract rights." Appellant contends that this supports its position that the collection of the $10 million was contractually restricted, and that forgiving the loan required appellant to be permanently affiliated with PAMF. (App. Reply Br., pp. 14 – 15.)

Appellant also contends that the FTB received notice of its agreement with the IRS in September 2009 and that, in April 2011, appellant referenced its "*alternative* legal theory regarding 2000 as the appropriate year for constructive receipt." Appellant contends that at this time the statute of limitations under R&TC section 19059 was still open for the FTB to revise its notice of deficiency.[12] (App. Reply Br., p. 15.)

Appellant argues that it is respondent that is being inconsistent, because its theory would actually result in the constructive receipt in 2000. Moreover, appellant contends, respondent "conveniently" accepts the IRS analysis of constructive receipt but then ignores the IRS analysis allowing for the amortization of the $10 million amount as a purchase of a contract right. Thus, appellant argues, the FTB has "essentially cherry-picked only the income portion of the federal settlement." (App. Reply Br., pp. 15 – 16.)

Applicable Law

Burden of Proof

The FTB's determination is presumed correct, and an appellant has the burden of proving it to be wrong. (*Todd v. McColgan, supra*; *Appeal of James A. Alyn and Lisa E. Alyn*, 2009-SBE-001, May 27, 2009; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001; *Appeal of Sierra Pacific Industries*, 94-SBE-002, Jan. 5, 1994.)

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[12] Appellant refers here to the extended statute of limitations applicable when the FTB receives notice of a final federal determination with respect to a tax year. Staff questions whether the IRS determination constituted a final federal determination for the 2000 tax year since it only appears to include the 2005 – 2007 tax years.

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In *Dicon Fiberoptics, Inc. v. Franchise Tax Board* (2012) 53 Cal.4th 1227, 1236, the California Supreme Court noted:

> In a suit for refund of tax, the burden of proof is on the taxpayer. [Citation.] The taxpayer must not only prove that the tax assessment is incorrect, but also he must produce evidence to establish the proper amount of the tax. [Citations.] In an action for refund, 'the taxpayer has the burden of proof to show that he is entitled to his claim. He cannot assert error and thus shift to the state the burden to justify the tax ... .' " (*Honeywell, Inc. v. State Bd. of Equalization* (1982) 128 Cal. App. 3d 739, 744 [180 Cal. Rptr. 479]; see *Apple, Inc. v. Franchise Tax Bd*. (2011) 199 Cal.App.4th 1, 22 [132 Cal. Rptr. 3d 401].)

Federal Assessment

R&TC section 18622, subdivision (a), provides that taxpayers shall either concede the accuracy of a federal determination or state wherein it is erroneous. "It is well settled that a determination with respect to federal income tax liability will generally be followed when determining California tax liability where the applicable federal and state provisions are identical and where there is no compelling reason for departure from the federal interpretation." (*Appeal of Sierra Pacific Industries, supra*; see also *Appeal of Sheldon I. and Helen E. Brockett*, 86-SBE-109, June 18, 1986; *Todd v. McColgan, supra*.) This presumption is rebuttable, and respondent is not required to follow an IRS determination. (See *Appeal of Sierra Pacific Industries, supra*; *Appeal of Der Wienerschnitzel Inernational, Inc.*, 79-SBE-063, Apr. 10, 1979.)

Constructive Receipt

IRC section 451(a), to which California conforms, provides generally that the amount of any item of gross income shall be included in gross income in the taxable year in which received by the taxpayer.

Treasury Regulation 1.451-1(a) provides, in pertinent part, that gains, profits, and income are to be included in gross income for the taxable year in which they are actually or constructively received by the taxpayer. Treasury Regulation 1.451-2(a) states, in pertinent part, that income not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he could draw upon it at any time, unless the taxpayer's control of its receipt is subject to substantial

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limitations or restrictions.

Duty of Consistency

In *Ashman, supra,* the Ninth Circuit held that the duty of consistency has the following elements:

> (1) A representation or report by the taxpayer; (2) on which the Commissioner has relied; and (3) an attempt by the taxpayer after the statute of limitations has run to change the previous representation or to recharacterize the situation in such a way as to harm the Commissioner. If this test is met, the Commissioner may act as if the previous representation, on which he relied, continued to be true, even if it is not. The taxpayer is estopped to assert the contrary.

(*Id.* at p. 545 [citations omitted].)

STAFF COMMENTS

The IRS determined that the $10,179,648 amount at issue was constructively received during 2005 because payment of the amount was not subject to restrictions and appellant forgave the payment of that amount. The IRS also found that, by forgiving the payment of the amount, appellant effectively purchased an intangible contract right to continue its affiliation with PAMF. On this basis, the IRS allowed appellant to deduct and amortize the $10,179,648 amount over a 27-month period, with $1,131,072 being deducted in the 2005 tax year and $4,524,288 being deducted in 2006 and 2007.

Respondent's NPA and NOA followed the IRS determination on this issue, as well as on the constructive receipt issue, and allowed an amortization deduction of $1,131,072 for the 2005 tax year. In addition, respondent's NPA and NOA followed the IRS determination by allowing an additional charitable deduction of $904,857 for the 2005 tax year. In light of the foregoing, appellant should be prepared at the hearing to explain further its contention that the FTB "essentially cherry-picked only the income portion of the federal settlement." (See App. Reply Br., p. 16.)

Respondent notes that California law during the period at issue did not permit the carryback to 2005 of net operating losses from 2006 and 2007 and states that this explains the reason for the appeal. To the extent appellant objects to the restrictions imposed on net operating loss carrybacks under California law, such an objection is better directed to the California Legislature, which has the authority to change the law, then to the Board of Equalization, which must apply the law as written. (See, e.g., *Appeal of Thomas C. and Donna G. Albertson*, 84-SBE-002, Jan. 17, 1984; *Appeal of Samuel*

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R. and Eleanor Walker, 73-SBE-020, Mar. 27, 1973.)

It appears to staff that the resolution of the constructive receipt issue will turn on the following factual issue: was the $10,179,648 deferred payment subject to the same restrictions as the the other deferred payments? That is, could appellant have required payment of the $10,179,648 amount in 2005 even if the funds were not needed for its current operating expenses and the planned integration was going forward? Based on its review of appellant's Board meeting minutes and financial accounting records, the IRS found that the $10,179,648 payment deferred pursuant to the oral agreement was not subject to the restrictions set forth in the affiliation agreements. The IRS therefore found that, unlike the forgiveness of the other deferred compensation, the $10,179,648 payment was constructively received and generated taxable income. Appellant argues, and provides a declaration from Dr. Slavin, appellant's CEO at the time, attesting under penalty of perjury that the parties orally agreed that the $10 million deferred payment would be subject to the same restrictions as the other deferred payments. Staff notes that the declaration was made after the IRS determination became final, so the IRS did not have the declaration when the IRS made its findings. At the hearing, respondent should be prepared to address whether the declaration should impact the Board's analysis of the evidence. Both parties should be prepared to address whether there were business reasons for subjecting all deferred amounts to the same restrictions on payment, or, conversely, whether there were business reasons why appellant and PAMF might have determined *not* to subject the deferred amount at issue to the same restrictions on payment as the other deferred amounts.

With regard to the Board meeting minutes, respondent notes that the September 6, 2005 minutes include a discussion about "the need to reduce deferred CMG compensation by at least $20 million[,]" and "possible ways of using the CMG deferred compensation."[13] Staff observes that the discussion does not on its face identify the $10,179,648 payment at issue or distinguish it from other deferred compensation and that the "at least $20 million" which needed to be deferred exceeds the amount of the $10,179,648 deferred payment at issue in this appeal. The November 8, 2005 Board meeting minutes discuss both the "$24 million PSA deferral payable to CMG" and the "$10 million"

[13] The minutes are attached as Exhibit H to appellant's opening brief. This portion of the minutes is found on page 1 of the exhibit and November 8, 2005 minutes are on page 4.

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deferred amount at issue in this appeal, and then note that Dr. Slavin recommended that appellant increase a malpractice risk fund by $5 million, and forgive both the $10 million obligation and $18 million of the "deferred PSA obligation." At the hearing, respondent may wish to discuss further how these Board of Director discussions support its argument that the $10,179,648 amount was not subject to the same restrictions as the other deferred compensation such that appellant had constructive receipt of the amount at issue.

Although it is not entirely clear, it appears to staff that the November 8, 2005 meeting minutes suggest that, while Dr. Slavin recommended that the deferred payment at issue in this appeal be completely forgiven, he recommended that $5 million of the $24 million in other outstanding deferred payments be used to fund a malpractice risk fund.[14] It may be helpful if the parties could address at the hearing if this is correct and, if so, whether it sheds light on the contractual restrictions on payment and the circumstances in which the deferred compensation was forgiven. If the $5 million amount was used by or for the benefit of appellant, does it suggest that forgiveness of the deferred compensation amounts was subject to negotiation, as appellant argues on pages 4 to 5 of its reply brief? Was the $5 million subject to tax?

With regard to appellant's financial reporting records, respondent should be prepared to address appellant's contention that financial accounting should not control tax reporting and the general ledger entries provided as Exhibit I of appellant's opening brief. Appellant should be prepared to discuss further why, if all deferred amounts were subject to the same restrictions, some financial accounting entries treated the deferred amount at issue differently from other deferred amounts.

Appellant's alternative argument is that, if the $10,179,648 payment was not subject to the restrictions set forth in the affiliation agreements, then the payment should have been taken into income in 2000. Staff notes that this alternative argument is only relevant if the Board determines that

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[14] The minutes discuss a $24 million deferred payment amount and the $10 million deferred payment amount at issue in this appeal, which total approximately $34 million. This is approximately equal to the sum of the $18 million amount which Dr. Slavin recommended forgiving, the $10 million amount he recommended forgiving and the $5 million he recommended putting into the malpractice risk fund, which total $33 million (the difference may be attributable to rounding). Thus, based on the minutes of the Board discussion, it appears that the $34 million of deferred compensation was divided into three portions: the $10 million at issue in this appeal which was forgiven, an additional $18 million which was forgiven, and $5 million which was put into a malpractice risk fund.

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the $10,179,648 payment was not subject to the restrictions set forth in the affiliation agreements. If the Board finds that the payment was subject to the same restrictions as the other deferred payments, then the alternative argument is moot.

Respondent contends that appellant's alternative argument is barred by the duty of consistency as the 2000 year is now closed by the statute of limitations. Appellant responds that its alternative argument is a legal argument, and that the duty of consistency cannot bar legal arguments, citing *Crosley, supra*. However, appellant's alternative argument appears to staff to be a factual argument. As noted above, Dr. Slavin's declaration states that during 2000 he and his counterpart at PAMF negotiated an oral agreement and that as part of this oral agreement the parties agreed that the additional $10,179,648 amount would be deferred on the same terms as the other deferred payments. Appellant's alternative argument takes the position that, if the $10,179,648 payment was *not* subject to the restrictions set forth in the affiliation agreements (and therefore Dr. Slavin's description of the oral agreement is incorrect), then appellant should have been taxed in 2000, a year closed by the statute of limitations. Appellant's alternative argument raises a factual issue because it requires a weighing of Dr. Slavin's declaration, the Board minutes, and appellant's financial accounting entries. By contrast, in *Crosley*, *supra*: it was undisputed that the payment in the prior year had actually been made, the prior year was audited, and the court found that the taxpayer and the IRS made a "mutual mistake of law."

In *Ashman*, *supra*, 231 F.3d 541, 546, the Ninth Circuit Court of Appeals rejected a duty of consistency argument that appears similar to appellant's argument. Ashman reported a tax-deferred roll-over of pension plan proceeds on a 1990 tax return, but then on her 1993 tax return argued that the roll-over was taxable in 1990 and therefore not subject to tax in 1993. She argued that the IRS should have audited the prior year and further argued that she had not changed her representations. Instead, she contended, she made an incorrect "legal statement" on her prior tax return and was now, on the later tax return, merely correcting that error. The court rejected that argument, finding that Ashman had changed a representation of fact.

Section 40

R&TC section 40 provides that the Board will publish on its website a written opinion for each decision rendered by the Board in which the amount in controversy is $500,000 or more.

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Section 40 does not apply to consent calendar actions. The amount in controversy in this appeal is over $500,000, and it is not a consent item; therefore, Section 40 will apply to the Board's decision in this appeal. Section 40 requires that the Board publish on its website a Summary Decision or Formal Opinion containing findings of fact, analysis and other required content within 120 days of the date the Board's decision is rendered.

In 2013, following public hearings and comment, the Board revised its regulations to implement Section 40. The revised regulations became effective on April 1, 2014, and therefore will apply to the Board's decision in this appeal.

Under the revised regulations, following the conclusion of the hearing, if the Board votes to determine the appeal, but does not specify whether a Summary Decision or a Formal Opinion should be prepared or direct the preparation of a Formal Opinion, staff will prepare a Summary Decision (which would not be precedential) and submit it to the Board for review and adoption at a later public meeting. (Rule 5551, subd. (b)(2).) Unless the Board directs otherwise, its vote to determine the appeal will become final 30 days following the date of the vote, unless a petition for rehearing is filed within that period. (Rule 5460, subd. (a).) Thus, in the absence of other Board direction, the default rule is that the resolution of the appeal is not delayed while staff is drafting, and the Board is reviewing, the written opinion required by Section 40.

If a petition for rehearing is filed, the Board's determination will not become final, and no written opinion under Section 40 will be proposed or adopted until after the petition for rehearing is resolved. If a petition for rehearing is not filed, staff will submit a proposed Summary Decision for adoption and publication at least 60 days prior to the expiration of the 120-day deadline imposed by Section 40 for the publication of a Summary Decision. (Rule 5451, subd. (b).) Under Rule 5551, subdivision (b)(5), unless the Board directs otherwise, the proposed Summary Decision would not be confidential pending its consideration by the Board; accordingly, it would be posted on the Public Agenda Notice for the meeting at which the Board will consider and vote on the Summary Decision.

An appellant may request that the Board hold in abeyance its vote to determine the appeal so that the appellant may review the Board's written findings and analysis prior to the expiration of the 30-day period for the filing of a petition for rehearing. If the vote is held in abeyance, the Board's

determination would become final 30 days following the date it adopts the Summary Decision, if a petition for rehearing is not filed. (Rule 5460, subd. (a).) Also, if the vote is held in abeyance, unless otherwise directed, the proposed Summary Decision will be confidential until it was adopted by the Board. (Rule 5551, subd. (b)(5).) Any request that the Board's vote be held in abeyance should be made in writing to the Board Proceedings Division prior to the hearing or as part of the taxpayer's oral argument at the hearing. Any such request would then be considered by the Board during its deliberations on the appeal.

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