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March 29, 2010

Elisabeth Shumaker, Esq.
Clerk, U.S. Court of Appeals
for the Tenth Circuit
Byron White United States Courthouse
1823 Stout Street
Denver, CO 80257

Re: *Sala v. United States*, Appeals Court Docket No. 08-1333
Response to Government Citation to Supplemental Authorities: *Jade Trading, LLC v. United States*, No. 2008-5045 (Fed. Cir. March 23, 2010).

Dear Ms. Shumaker:

This case has been fully briefed and oral argument was held on November 16, 2010. In a Rule 28(j) letter, the government has called the Court's attention to the Federal Circuit's recently issued opinion in *Jade Trading, LLC v. United States*, affirming a decision issued by the Court of Federal Claims. This letter is Appellees' response to the government's Rule 28(j) letter.

The Federal Circuit opinion did not broadly hold that all cases involving what the government calls "offsetting option shelters" lack economic substance. It did not even discuss *Sala* or the other two decided cases cited by the government. Rather, it affirmed the specific factual findings and legal conclusions reached by the Court of Federal Claims in the case before it. The lower court's opinion in *Jade Trading* and the significant differences between the "economic substance" of that transaction and the Deerhurst transaction were discussed by the parties in their briefing. Aplee Br. at pages 13-15. This new opinion does not alter in any way any of the substantive issues discussed in the previously filed briefs.

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Like the lower court, the Federal Circuit was persuaded that the *Jade Trading* transaction lacked economic substance because it was guaranteed to be unprofitable: “[E]ach Ervin LLC spent at least \$834,100 for the chance to make a profit of \$140,000. No reasonable investor would engage in such a transaction to earn a profit.” Slip.Op. at 8-9. The district court in *Sala* found that the Deerhurst GP transactions which generated the tax benefit cost \$728,000 and had a profit potential of \$550,000. There were no upfront fees.

The Federal Circuit stated in passing that “the transaction to be analyzed is the one that gave rise to the alleged tax benefit.” Slip. Op. at 7. However, there was no long-term investment program in *Jade Trading*, just a quick “in and out” involving two offsetting options. In contrast, the district court found the transactions directly generating the tax benefit in *Sala* were an integral part of a five year investment program, and therefore the district court considered the entire program to be relevant to its evaluation of economic substance. Moreover, the issue is a red herring in *Sala*; the district court made very specific findings with respect to the economic substance of the Deerhurst GP partnership and its hundreds of executed transactions, holding that - even viewed in isolation - Deerhurst GP had economic substance. 552 F. Supp. at 1185-90; Aplee Br. at 19-22, 26-30.

We are forwarding a copy of this letter to counsel for the appellant. We would request that you distribute this letter to the members of the panel assigned to this case.

Very truly yours,

CHICOINE & HALLETT, P.S.

A handwritten signature in black ink, appearing to read "John M. Colvin". The signature is written in a cursive, slightly slanted style.

John M. Colvin

JMC/ct

cc: Arthur Catterall, Esq.