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June 25, 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's Rule 28(j) letter re: *Stobie Creek Investments LLC v. United States,* No. 2008-5190 (Fed. Cir. June 11, 2010).

Dear Ms. Shumaker:

The government's letter is another attempt to divert this Court's attention from the District Court's extensive and soundly supported findings of fact supporting its conclusion that all relevant transactions had economic substance and business purpose.

Stobie does not support the sweeping rule advocated by the government that in every case involving long and short options and application of the *Helmer* rule regarding the tax treatment of short options, the claimed losses are not allowable. Instead, *Stobie* illustrates that the economic substance and business purpose issues are intensely factual.[1]

Stobie concluded that the transactions did not have economic substance because they lacked: 1) "economic reality" and 2) business purpose. Economic reality was found lacking based upon the experts' opinions that there was no reasonable possibility of making a profit. Two of the experts, DeRosa and Kolb, were the same experts who testified in *Sala.* DeRosa and Kolb agreed that Sala's transaction had a profit potential of over $550,000 and made an actual profit of $90,000-$110,000. Aplt. App. 126-28.

[1] The trial court in *Stobie* carefully distinguished the transactions before it from those in *Sala* based upon actual profitability, profit potential, and a long term investment purpose. *Stobie Creek Inv., LLC v. United States,* 82 Fed. Cl. 636, 691-92 (2008).

Economic reality was also found lacking in *Stobie* because the court concluded the long and short option transactions should be treated as a "single unified transaction."[2] This conclusion was based upon the fact that the broker treated the options as a single investment. In *Sala,* the court found the long and short option contracts should be considered separate investments based upon the experts' testimony that each of the 24 option positions were purchased as a separate contract, were independently priced, and could be transferred or assigned independently. Aplt. App. 144-45.[3]

In contrast to the *Stobie* finding that there was no business purpose for the transactions involved, the *Sala* District Court made extensive findings of fact that there were legitimate business purposes behind Sala entering into the transactions, the use of an S corporation and partnership, the test period that included the transactions generating the tax loss, and the program in its entirety. Aplt. App. 128-136.

The government has not cited one case where there was a finding of profit potential and business purpose, but the claimed loss was disallowed. *Sala* is indeed unique.

Very truly yours,

CHICOINE & HALLETT, P.S.

John M. Colvin

JMC/ct
cc: Arthur Catterall, Esq.

[2] The government did not raise this issue on appeal in *Sala* and therefore it should not be considered.

[3] *Stobie's* conclusion that the short options should be netted against the long options and, therefore, the short and long options should not be separated for purposes of calculating basis ignored the holding in *Helmer* which dictates separate treatment and requires the short options to be disregarded entirely when computing basis. *Helmer v. Comm'r,* 34 T.C.M. 727 (1975). The trial courts in both *Stobie* and *Jade Trading* held that *Helmer* did require disregard of the short options in computing basis. *Stobie Creek,* 82 Fed. Cl. at 667; *Jade Trading, LLC v. United States,* 80 Fed. Cl. 11 (2007).