



# The National Conference of CPA Practitioners

Nassau/Suffolk Chapter

Volume 7, Issue 3

APRIL/MAY 2010

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#### Date Topic

### **Thursday, May 13, 2010** **HOW TO PREPARE FOR PEER REVIEW - UPDATE ON NYS CPE REQUIREMENTS**

#### Speakers

Frank Gallo, CPA of Gallo & Company CPA  
Robert L. Goldfarb, CPA  
of Schoenfeld Mendelsohn Goldfarb

#### Credits Location Time

**2 CPE/A&A**  
Holiday Inn @ Plainview  
Dinner/Networking: 5:30 - 7:00 PM  
Program: 7:00 - 9:00 PM

#### Cost Members Non- Members

On or before Friday, May 7 - \$50.00  
After Friday, May 7 - \$60.00  
On or before Friday, May 7 - \$75.00  
After Friday, May 7 - \$85.00

If you become a member of NCCPAP we will refund you \$25.00!

#### Course Description

How the new law affects registration of accounting firms, CPE credit requirements and competency issues. We also will discuss what peer reviewers are looking for, the different level of reviews, and what your firm quality review policies and procedures should look like.

#### Date Topic

### **Wednesday, May 26, 2010** **THE NEW HEALTH INSURANCE LAWS ... AND IMPLICATIONS FOR THE CPA PRACTITIONER**

#### Moderators

Michael Rubinstein, CPA  
of Topper, Scheer & Rubinstein CPAs LLP  
Gary Sanders, CPA  
of Raphael, Sanders, Goldberg, Nikpour & Cohen  
Glenn J. Franklin, Esq.  
of Franklin, Gringer & Cohen

#### Credits Location Time

**2 CPE/MAP**  
On Parade Diner, Woodbury  
Registration: 7:30 AM  
Program: 8:00 - 10:00 AM

#### Cost

On or before Friday, May 21 - \$20.00  
After Friday, May 21 - \$30.00

To register for any of our  
meetings, please visit

<http://www.ns-nccpap.org/index.php/Register-Online.html>



## **PRESIDENT'S MESSAGE**

As the President of N/S NCCPAP, I'm often asked by prospective members "Why should I become a member of NCCPAP?" Before I respond, my first thoughts are usually of why are many of us members of PBS and other non-profit organizations which are all terrific venues. Believe me that I'm not asking you to not contribute to those organizations. However, the answer is certainly not that simple. We often think that these organizations will continue and prosper without our contributions both monetarily and physically. We assume Channel Thirteen will always be around without our help. However, if you asked Channel Thirteen, I'm sure you'd get a different answer to that.

Our organization is different in many ways. I won't get into the ways we fight to protect the ability of the CPA practitioner to continue to prosper in this ever changing accounting marketplace. I know you all witnessed this last summer when more than a hundred of you came to our chapter meeting to gain understanding of the new NYS CPA Competency Rules. Not only did you come to learn the forthcoming regulations but you came to hear what NCCPAP was doing to make sure these regulations were fair and equitable. Just remember there is strength in numbers and the larger number means a louder voice in both the CPA community and in how we are regulated.

I'm always looking for feedback from other CPAs. When April 1st rolls around, my friends are always telling me "don't worry" "only 2 more weeks of tax season left" and my response is "that's what is making me worry". I need four more weeks to finish my workload. How many of you would like to see the tax deadline extended without moving to New Jersey and praying for rain. Extensions are fine with clients whose income stay relatively the same year to year, but for clients whose income's vary in large degrees figuring out how much to pay with the extensions is 95 percent of the work. You can't tell me that preparing taxes isn't more complicated than it was 30 years ago. I'm just curious to know how many of you feel this way. Send me an email with your thoughts.

I started this President's message with an answer to why one should join NCCPAP and why NCCPAP

needs you. On April 19, 2010, I had the privilege of taking part in a teleconference with Linda Henson; our IRS Senior Stakeholder Liaison. The purpose of the teleconference was to coordinate an IRS - Practitioner Summit that will take place in June 2010. The IRS is looking to resolve problem issues in the areas of Appeals, ETA, Collection, Exam, etc. We were one of only a few tax practitioner organizations asked to participate in this summit. I've asked our membership, via email, for their issues with the IRS departments listed above. I hope by the time you are reading this you would have sent me your responses which would then have been forwarded to the IRS to be discussed and hopefully resolved at the summit.

Remember we are the only voice for the small CPA Practitioner!

To our members, I ask you this "If you were unable to continue your practice due to a health issue or any other reason, and you weren't able to assist in the continuance or sale of your practice, DOES YOUR SPOUSE, SIGNIFICANT OTHER, STAFF or GROWN CHILDREN KNOW SOMEONE TO CONTACT SO THAT ALL OF YOUR HARD WORK GROWING A PRACTICE, AND YOUR FAMILY'S FUTURE INCOME STREAM, doesn't disappear overnight? Although we do not have a formal continuity program, at least give them NCCPAP's number in case of emergency if you don't have something already set up with another practitioner.

*Bruce Berkowitz, CPA*

### **Disclaimer**

IRS Circular 230 Legend: Any advice contained herein was not intended or written to be used, and cannot be used, for the purpose of avoiding U.S. federal, state, or local tax penalties. Unless otherwise specifically indicated above, you should assume that any statement in this newsletter relating to any U.S. federal, state, or local tax matter was written in connection with the promotion or marketing by other parties of the transaction(s) or matter(s) addressed in this newsletter. Each taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor. Any opinion is solely that of the author and is not necessarily the opinion of NCCPAP.

### **CHAPTER POLICY**

THE FEES FOR REGISTRATIONS ARE:

\$50.00 WITH \*PRE-REGISTRATION AND \$60.00 REGULAR REGISTRATION, OR AT THE DOOR REGISTRATION.

\*PRE-REGISTRATION MEANS: A COMPLETED REGISTRATION FORM WITH PAYMENT AND POST MARKED, FAXED OR E-MAILED TO THE N/S CHAPTER OFFICE THE FRIDAY PROCEEDING THE CHAPTER MEETING WHICH YOU ARE PLANNING TO ATTEND.

A PRE-PAID REGISTRANT WHO CANNOT ATTEND THE CHAPTER MEETING WILL BE ISSUED A CREDIT TO BE USED BY THE REGISTRANT ONLY FOR A FUTURE MEETING (OF EQUAL VALUE) HELD WITHIN ONE YEAR OF THE MISSED MEETING. CANCELLATION NOTICE MUST BE GIVEN TO N/S NCCPAP CHAPTER OFFICE BY THE END OF THE CHAPTER MEETING DAY.

Refer to back cover for Cancellation and Refund Policy for ALL Chapter Meeting and Seminars.

## **MEETING SCHEDULE FOR 2010**

Holiday Inn @ Plainview  
215 Sunnyside Blvd  
Plainview, NY 11803

On Parade Diner  
7980 Jericho Turnpike  
Woodbury, NY 11797

June 3, 2010*	Workers' Compensation Updates	2 CPE/Tax	Holiday Inn
June 8, 2010	Education Planning Committee Meeting for 2010/2011 at 5:30 PM	RSVP Office	Mineola Office
June 24, 2010	Accounting & Auditing Updates (ALL DAY)	<b>8 CPE/A&amp;A</b>	Holiday Inn
June 30, 2010	How To Market and Manage Relationships Using The Internet	2 CPE/MAP	On Parade Diner
July 1, 2010*	Asset Protection	2 CPE/Tax	Holiday Inn
July 28, 2010	Work Flow Management for the CPA	2 CPE/MAP	On Parade Diner
July 29, 2010*	FIN 48 - Accounting for Uncertainty in Income Taxes	2 CPE/Tax	Holiday Inn
August 19, 2010	Ethics	4 CPE/ETHICS	Holiday Inn
August 25, 2010	How To Improve Profit Margins In Your Practice	2 CPE/MAP	On Parade Diner
September 2, 2010*	NYS Tax Update	2 CPE/Tax	Holiday Inn
September 29, 2010	Michael and Gary's Farewell Salute to MAP	2 CPE/MAP	On Parade Diner
October 7, 2010*	Compilation and Review	<b>2 CPE/A&amp;A</b>	Holiday Inn
October 27, 2010	MAP - TBD	2 CPE/MAP	On Parade Diner
November 17, 18 & 19, 2010	Long Island Tax Professionals Symposium	Crest Hollow Country Club	
December 2, 2010*	TBD	2 CPE/Tax	Holiday Inn
December 29, 2010	MAP - TBD	2 CPE/MAP	On Parade Diner
* Chapter Meeting                      All Meeting Subject to Change			

**Long Island Tax Professionals Symposium &  
our meetings together will be offering a total of  
28 Accounting and Auditing credits  
out of the 40 credits needed**

### **GOOD & WELFARE**

**Our get well wishes to**  
Anthony Finazzo, Past President of N/S NCCPAP

Our Good & Welfare Chairman is Stephen Sternlieb [ssternliebcpa@attg.net](mailto:ssternliebcpa@attg.net)



## **MAP CELEBRATES THE END OF TAX SEASON**



This article is being written on TAX DAY. We are just pressing those last buttons with our weary and tired fingers and by the time you read this, another season will be over, almost. In fact most of us will probably be reviewing that extension list!

As we stop, pause and take a deep sigh of relief, each of us, individually, might recall the events that unfolded in our personal and professional lives over these last few months and we may wonder how we somehow reached this side of April 15th.

As an organization, we also stop, pause and reflect on MAP and NCCPAP, and the role that this organization has in our personal and professional lives.

This morning there was a Starbucks commercial that, in their zeal to inform us of recycled cups, had a comment that was far more reaching to us at so many levels: **"If each of us contributes just a little, just a little more, then think of what we can do together."**

That is indeed what our committees, and our chapter is all about. Our roundtable meeting in March, was one of our best attended. Every attendee was able to participate in discussions on so many levels. More important than the discussions was the sharing of ideas and issues that has indeed made us part of an extended family.

As an extended family, we are able to e-mail each other with questions and facts relevant to our professional careers, and when we seek per diem help, we become a classified network. Indeed our chapter offers us a network that is unsurpassed. As an example, there was a unique question asked this year concerning oil shelters. Within hours of Etta posting it locally and Holly posting it nationally, the response of members offering to help from NY to Texas to the Midwest was overwhelming and heart-warming.

We are truly grateful to Etta, Holly, and Kathy for being the backbone of our local and national chapter day in and day out. In fact most members are unaware of their daily activities that not only facilitate our organization's operations, but also disseminate information to our membership as soon as it becomes available.

We are appreciative of Ross Kass's constant service as our IRS liaison, always eager to be sure that client correspondence and issues are dealt with efficiently at the IRS.

This May, in conferences with the IRS and with the tax committee of Congress, our local and national presidents and various members will once again represent the views and concerns of our membership in Washington DC,

Indeed, we are a family. Just as our own offices need to be part of an extended family working collectively towards our common goals, so too must we remain united and committed to working together.

As we plan for some wonderful spring and summer programs, we once again stress that our programs are only successful with the participation and spirit that brings us together to share ideas and simply to be a part of each other's lives.

Our schedule of meetings are listed on Page 3, We always meet for breakfast on the last Wednesday of the month, at the On Parade at Jericho Turnpike in Woodbury from 8AM to 10AM.

**Always** interesting, **Always** fun....**so register now!!**

*Michael Rubinstein, CPA + Gary Sanders, CPA*



## **THANK YOU**

**The MAP Committee is grateful to those who have participated as guest presenters during this past year.**

**We would like to give them one more public vote of thanks and urge our members to consult with these speakers regarding mutual relationships or questions they might have.**

- Barry Fox - Barry Fox Educational Planning - College Planning
- Betty Klein - Genworth Financial - Long Term Care Planning
- Stuart Schoenfeld - Capell Barnett Matalon & Schoenfeld - Elder Care Estate Planning
- Lisa DeRose - Virginia Belling Senior Placement Services - Medicaid Planning
- Bob Torella - Accountants World - Web Site Development
- Carolyn Dauphin - QuickBooks Certified Pro Advisor
- Glen Franklin, Esq.- Franklin, Gringer & Cohen PC - Workmen's Comp Issues
- Marla Seiden - Seiden Communications - Marketing Approaches
- Armando D'Accordo - CMIT Computer Solutions
- Ross Kass, CPA - Jablons Kass & Greenberg - How to Organize Your Office for Tax Season
- Robert Goldfarb, CPA - Schoenfeld, Mendelsohn, Goldfarb - New CPE Requirements
- Henry Krostich, CPA - Director of the Fuocco Group - Utilization of Engagement Letters
- Robert Markman, CPA - Sales Tax Issues and Nexus
- Mark Stone, CPA - Sales Tax Defense LLC - Sales Tax Issues and nexus
- Daniel N. Romanow, CFP - Bernstein and Company - ROTH IRA Conversions

In addition there are many speakers from our Chapter meetings that will receive special acknowledgement in the future.

**Finally...Thank you to so many of our chapter members that also presented at our meetings, and to those members that have served on panels over the past year.**

*Michael Rubinstein, CPA + Gary Sanders, CPA*

## **MESSAGE FROM THE EDUCATION CHAIR**



Now that tax season is over, it is once again time to focus on our upcoming calendar of events. When I reflect upon the quality and diversity of the programs, I am proud to see that they reflect the quality and integrity of our membership.

The Education Committee reaches out to find qualified and interesting speakers, and I am extremely pleased to report that after reviewing your evaluations, our speakers did indeed receive the highest accolades from you. I am made even prouder by the fact that many of our speakers are NCCPAP members and are recognized nationally as leaders in their field.

Many of our speakers have received both local and national recognition of their efforts. Carol Markman graciously assisted with both the Federal Tax Update and the Tax Roundtable discussions which received great acclaim from all in attendance. Bob Goldfarb has offered to assist in our upcoming chapter meeting on May 13, 2010, at the Holiday Inn. Bob, along with Frank Gallo, will discuss the new CPE requirements and will also discuss how to successfully navigate through peer review. This topic was requested by many of our members and I encourage everyone to register as early as possible, as it will likely be a sold out event.

Also back by popular demand is Steve Carbone, from the Workers' Compensation Board in Albany. Without overstatement, the last time Steve presented at one of our chapter meetings, our members would not let him go. His practical advice and knowledge will help with your client problems. Again, register early for this chapter meeting so that you are not left out. Also coming up, on June 24, 2010, Paul Sanchez will be presenting his accounting and auditing update. We all know Paul for his unique ability to bring humor and levity to an accounting and auditing update, which is no small feat; and yet Paul does it with simplicity and grace. There is also a MAP meeting on May 26, 2010, regarding the new health care law. The concentration will be directed toward what CPAs need to know regarding these new and broad sweeping provisions which will affect all of our practices as well as those of our clients.

I wish to close with an outreach to all our members. The success and strength of our educational presentations is a direct reflection of the efforts of our members and the help and suggestions by members of the Education Committee. We will be holding our annual Education Committee meeting on June 8, 2010, at 5:30 p.m. at the NCCPAP office. I encourage all of you to attend and help play a role in our upcoming meetings. It is my practice to schedule all programs for the upcoming year at that time. Come join the committee members and present your ideas and comments.

I look forward to seeing you.

*Robert Barnett, CPA, Esq.*

## **TIMELY DEPOSIT OF PLAN CONTRIBUTIONS**

### **401(k) Salary Deferrals**

A large percentage of retirement plans today are funded by employees' own contributions. In a 401(k) plan, participants can elect to defer a portion of their salary which is withheld from each paycheck. Deferrals can also be made from bonuses or other special compensation awards, if the plan allows.

The question arises as to how quickly the employer must transmit such deferrals to the plan once they have been withheld.

### **Existing Deferral Deposit Rules**

Until now, DOL regulations provided only that salary deferrals must be deposited as soon as they become plan assets and that occurs as of the earliest date such contributions can reasonably be segregated from the employer's general assets. The DOL did not provide any more specific instructions on how this date could be determined.

The regulations also state that in no event shall the segregation date be later than the 15th business day of the month following the month the contribution was withheld. But the DOL has stated emphatically that this was not to be relied on as a safe harbor date and that most employers should be able to segregate the funds much sooner than the outside limit.

Upon audit, many employers were penalized for late deposits based on the enforcement of these regulations in a highly subjective manner. That's because the rules did not adequately provide objective standards that could be fairly applied to every situation. For many years there has been no definitive standard for determining if deferrals were being deposited on a timely basis in the opinion of the DOL.

When deferrals are not deposited on a timely basis, the employer is considered to be commingling plan funds with its own funds. The employer becomes liable for the payment of lost earnings to participants' accounts as well as prohibited transaction penalties. Trustees may also be liable for fiduciary breach penalties.

### **Safe Harbor for Small Plans**

On February 29, 2008 the DOL issued proposed regulations providing additional guidance on this issue. The existing standard of making deposits as soon as the money can be segregated from the employer's general assets remains in force. But a clear safe harbor time frame is established for small plans with fewer than 100 participants at the beginning of the plan year. The safe harbor deadline is the 7th business day after the day on which such amounts would have been payable to the participant in cash (in other words, withheld from paychecks).

The 100 participant cut-off for small plan status under the safe harbor deposit rule is not the same as small plan filing status of Form 5500. That is, a plan with a participant count between 100 and 120 may be able to file Form 5500 as a small plan but cannot utilize the 7-day safe harbor deposit rule. Plans with 100 or more participants at the beginning of the plan year are subject to the existing deposit rules.

### **Loan Repayments**

Loans to plan participants, secured by their vested benefits, are common in 401(k) plans. Repayments are often deducted from the employee's wages, similar to salary deferrals. The same 7-day safe harbor deposit rules apply to loan repayments.

### **Effective Date**

The safe harbor rule will become effective on the date of publication of final regulations in the Federal Register. But the DOL has clearly stated that employers can rely on the proposed safe harbor deadline until final regulations are issued. This provides immediate relief for many employers who now have at least 7 business days to make timely deposits without the uncertainty that previously existed.

Small employers who feel that they can't reasonably segregate withheld deferrals from their general assets within the 7-day period may want to rely on the existing deposit rules and ignore the safe harbor. But that may be a risky position to take now that a safe harbor has been established.

**Matching Contributions**

In order to encourage employees to participate in their 401(k) plans, employers will often provide a matching contribution. It is usually based on the employee's elective deferrals or a portion of such deferrals. Matching contributions are often deposited throughout the year along with deferral contributions.

The actual deadline for making matching contributions that are to be allocated for a particular year and included in the nondiscrimination test is the last day of the following plan year. But in order to be deducted on the employer's tax return for the year allocated, the contribution must be deposited by the tax return due date, including extensions. Different deduction rules apply where the employer's fiscal year is different than the plan year.

**Example:** ABC Company's fiscal and 401(k) plan year are both the calendar year. The company always deposits the entire matching contribution after the plan year end. For 2009, ABC filed for an extension (to September 15, 2010) to file its federal tax return. The matching contribution is made September 12, 2010. Since it was contributed before the federal tax return due date (including extension), it is deductible on the 2009 return.

**QNECs and QMACs**

Each year a separate nondiscrimination test must be performed for salary deferrals (ADP test) and matching and/or voluntary after-tax contributions (ACP test) under a 401(k) plan. One method of passing an otherwise failed test is for the employer to make a qualified nonelective contribution (QNEC) or a qualified matching contribution (QMAC) to some or all of the non-highly compensated employees.

In order to be utilized in the test for a particular plan year, these contributions must be made by the last day of the following plan year. The timing issues that apply to the deduction of matching contributions also apply to QNEC and QMAC contributions.

**Safe Harbor 401(k) Contributions**

A 401(k) plan will be treated as automatically passing the ADP test for any year that it satisfies the safe harbor contribution requirement and the notice requirement. The contribution requirement can be met by either a specified matching contribution rate or an employer nonelective contribution of 3% of eligible employees' compensation.

Generally, the safe harbor contribution must be made by the last day of the following plan year. The timing issues that apply to the deduction of matching contributions also apply to safe harbor contributions.

Where the safe harbor matching contribution is being made on a per payroll basis instead of an annual compensation basis, the match must be deposited by the last day of the following plan quarter.

**Profit Sharing Plans**

Employer nonelective contributions to a profit sharing plan are generally credited in the year they are deposited. However, contributions made after the end of the employer's fiscal year but before the due date for filing its federal tax return (including extensions) may be considered to have been paid as of the last day of the fiscal year. If the employer's fiscal year is different than the plan year, other factors may have to be considered.

**Example:** The XYZ Corporation's fiscal year is the calendar year. XYZ's profit sharing plan also has a calendar plan year. For 2009, the due date of XYZ's federal tax return was extended to September 15, 2010. Any employer nonelective contributions deposited by that date can be considered deposited on December 31, 2009 and allocated under the plan as of that date. They would be deductible to the corporation for 2009.

**Money Purchase Pension Plans**

Unlike profit sharing plans, in which employer contributions are often discretionary, money purchase pension plans require a specific contribution formula. Failure to deposit the required contribution is a violation of the minimum funding standards. The contribution deadline for minimum funding purposes is 8½ months after the end of the plan year. If the deadline is not met, the employer is subject to a late funding penalty.

Where the employer's fiscal year is the same as the plan year, this date matches the day a corporation could extend the due date of its tax return. This allows the employer to deduct the payments necessary to fully fund the plan within the allowable funding period. However, the 8½-month funding period exists regardless of whether or not the corporation files for an extension.

Non-corporate entities such as partnerships and sole proprietors have different tax filing due dates which must be taken into consideration for deduction purposes.

### Top Heavy Contributions

If a plan is considered to be top heavy (i.e., at least 60% of the benefits belong to key employees), it must provide minimum contributions, usually 3% of compensation, to non-key employees. Though there is no clear deadline for top heavy contributions, it is advisable to make such contributions by the employer's deduction deadline.

### Defined Benefit Pension Plans

The funding requirements for defined benefit pension plans are based on actuarial calculations which spread out payments over the years to provide for specific benefits as they become due.

As with money purchase plans, defined benefit plans are also subject to the minimum funding rules which allow required contributions to be made up to 8½ months after the end of the plan year. Plans that do not contribute enough money to fully fund the current benefit liabilities must make deposits on a quarterly basis or else notify employees that quarterly deposits will not be made.

The timing issues that apply to the deduction of money purchase plan contributions also apply to defined benefit plan contributions.

### Conclusion

Earlier this year the DOL provided long-awaited relief from the vague and confusing salary deferral deposit rules for small employers. The 7-day safe harbor is a reasonable deadline that most small companies should be able to meet. If not, the existing guidelines are still available. Failure to make timely deposits could subject the plan to lost interest payments and penalties.

It is important that both employee and employer contributions be deposited by the required due dates to keep the plan properly funded and in compliance with qualification requirements.

**Alex Basseches** is a Pension Consultant at Economic Group Pension Services, Inc., an actuarial & employee benefits consulting firm. He specializes in the design and set-up of Defined Benefit and Defined Contribution Plans. For consultations Alex can be contacted at (212) 494-9024 or e-mail [abasseches@egps.com](mailto:abasseches@egps.com).

### **Bring a Fellow CPA to any Chapter Meeting and you receive a \$25 gas card FREE**

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you may have helped improve his/her practice.

The Chapter may gain a new member!!!!

Call in advance so that we can  
welcome your guest.  
Help us to grow our Chapter.

### **OFFICE SPACE IN CPA OFFICE**

Lake Success CPA firm  
has 1 or 2 offices/front desk  
available for rent in Class A office building on  
Marcus Avenue.

The available office(s)/front desk space are  
flexible depending on the tenant's needs. We  
can also make part of the file room available  
for your use, as well as phone/internet lines  
if requested. Our current lease runs through  
August 2012 and the rent will be dependent on  
the space/services requested by the tenant.

For further information, contact  
Jay Haberman at (516) 775-0175,  
extension 101 or [jay@nhcpa.us](mailto:jay@nhcpa.us)



## **LLC VS. LP AND PASSIVE ACTIVITY LOSSES.** **THE IRS ACQUIESCES IN THOMPSON**

There has been a recent flurry of cases regarding the application of the passive activity loss rule to LLC membership interests. IRC§469 limits the utilization of passive activity losses (PAL's) and restricts their ability to offset non-passive activity income (such as wages, dividends and business profits). Rental activities and activities in which a taxpayer does not materially participate are regarded as passive. Material participation requires regular, continuous and substantial involvement in an activity. There are seven alternative tests in (Treas. Reg. § 1.469-5T(a)).

A limited partner's interest under the statute is presumed passive (IRC§469(h)(2)). A partnership interest is treated as a limited partnership interest if the interest is designated a limited partnership interest in the limited partnership agreement or the certificate of limited partnership, or if the liability of the partner is limited under the law of the state in which the partnership is organized. However, a limited partner may meet the requirements of material participation by meeting one of three alternative tests (Treas. Reg. § 1.469-5T(e)(3)(i)). This is a more stringent requirement than the seven tests referenced above. The statute in question is silent with respect to LLC's. The recent case of *Thompson v. Commissioner*, was a case of first impression regarding whether a LLC member should be treated as a limited partner or as a general partner (*Thompson v. US*, 103 AFTR 2d ¶ 2009-5124). If treated as a limited partner the PAL's would be presumed passive.

LLC's have both corporate and partnership characteristics and this hybrid status at times does not fit perfectly into a mold. In addition, state limited partnership statutes vary greatly and limited partners who are active in the business and have authority to act for and bind the partnership may be regarded as general partners under both state partnership liability laws and IRS regulations. In contrast, LLC members are statutorily allowed to participate in management, without sacrificing limited liability. This is a tangled web and the IRS said that if a LLC member lacks liability under state law then the LLC member should be taxed as a limited partner under the passive activity rules.

The IRS has recently acquiesced (in result only) in *Thompson* (AOD IRB 2010-14 (April 5, 2010)). This means that the IRS has accepted the holding of the Court, that the Taxpayer's LLC interest was not that of a limited partner. The IRS will also apply this conclusion in similar factual situations, and therefore, entity losses will not automatically be presumed to be passive.

If your client does not have similar factual participation by the LLC members, perhaps the losses are passive. The taxpayer, in *Thompson*, was the manager of the LLC which engaged in an airplane charter business. The parties stipulated that if the LLC interest was not characterized (under IRC§ 469) as a limited partnership interest, he could then establish material participation under any of the seven tests. Although, the IRS has helped to relieve some of the uncertainty surrounding the classification of LLC losses, great care still must be taken to ensure that taxpayer's meet one of the seven tests of material participation.

Article submitted by Robert S. Barnett Esq. CPA (MS Taxation) of Capell Barnett Matalon & Schoenfeld LLP. He can be reached at 516-931-8100

### **GOT AN OPINION?**

Do you have an opinion, criticism, gripe or praise that you'd like to share about NCCPAP or the accounting profession? Think something's not being covered in the newsletter, MAP or chapter meetings and you think we all would benefit? Let us know! Think our focus is misguided or on track? Let us know! Have a great idea for what we need to do, but figure we'll think of it on our own? LET US KNOW! We can't fix it if no one tells us it's broken. We can't address it if we don't know you need it. We'd like to know.

We want to be the organization that you WANT to belong to and participate in and we need to hear it!

We're starting a "Members' Feedback" column and it obviously needs you and your ideas.

Please submit by email to [egelbein@ns-nccpap.org](mailto:egelbein@ns-nccpap.org).

Keep it short, keep it professional.

Every attempt will be made to keep all submissions intact, subject to space limitations.

Please state if you wish to remain anonymous.

## **NASSAU/SUFFOLK CHAPTER CONTACT INFORMATION**

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