Number 77 / April 2010

GOLDMAN ANTONETTI & CÓRDOVA, P.S.C.
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puerto rico
Business Law
Developments

New Legal Tax Lien on Property

ROBERTO MONTALVO
TAX DEPARTMENT

A new procedure has been created by Act No. 12 of January 20, 2010, which enables the Secretary of the Treasury to establish liens on taxpayers' properties to cover all debts arising under the Puerto Rico Internal Revenue Act of 1994, as amended (the "PRIRA"). These encompass debts for income, excise, sales and use, estate and gift, and alcoholic beverages tax, including penalties, interests, and surcharges.

The Secretary of the Treasury immediately sprang into action. During the month of February the Secretary filed 330 attachment certificates with the Registrar of the Property and announced that each month thereafter approximately 500 attachment certificates will be filed.

In the past, we all have seen how the Treasury has been regularly attaching taxpayers' bank accounts and salaries. This, because the law provides a simple procedure whereby the Secretary is authorized to require any person holding any property, credit, and money on any account, including salary, to withhold the amount that the Secretary notifies him for the purpose of covering tax debts. This is achieved following a simple internal administrative procedure within the Treasury Department. For the Treasury it is a simple task to require from all banks and from the debtor's employer, to withhold payment to debtor of any amount owed or payable to the debtor.

Although the Treasury was empowered prior to the enactment of Act No. 12 to attach taxpayer's real property to satisfy tax debts, no fast and efficient procedure was available to the Treasury to do so. Act No. 12 provides the Treasury with an additional and efficient tool to collect back taxes by establishing a simple mechanism to attach taxpayer's real property wherever located within Puerto Rico. The Treasury now can, without the need of identifying any specific property belonging to a taxpayer, file a Tax Lien Certificate and attach all the properties which may belong to a taxpayer located at the sections of the Registry where the certificate is filed.

Act No. 12 now enables the Secretary to file with the Registrar of the Property corresponding to the place

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Puerto Rico Business Law Developments is printed on 100% post-consumer recycled paper.

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Puerto Rico Business Law Developments
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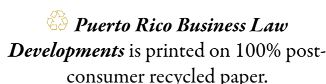

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of residence of the debtor, or corresponding to the place where debtor's property is located, a tax lien or attachment certificate. This certificate creates a lien and results in the attachment of all real property belonging to the debtor located in the section(s) of the Registry of the Property in which filed. Copy of the notification must be sent to the debtor by certified mail, return receipt requested, to his last known address. Act No. 12 does not provide a time period within which such notification must be made. Debtors may contest the attachment by filing an action with the Court of First Instance (Superior Court) within the time provided for such purposes in the notification. The Registrar of the Property shall maintain a Tax Lien Register in favor of the Commonwealth of Puerto Rico where all the tax lien certificates shall be registered. Such register will be part of the Registry of Real Estate Attachments in favor of the Commonwealth of Puerto Rico.

Should you have any question concerning the above, you may contact Attys. Angel D. Marrero at 787.759.4153 or amarrero@gaclaw.com; Roberto Montalvo at 787.759.4123 or rmontalvo@gaclaw.com; or José E. Villamarzo at 787.759.4120 or jvillamarzo@gaclaw.com. ✦

ALICIA LAMBOY
ENVIRONMENTAL PRACTICE GROUP

The law for reforming the permitting process in Puerto Rico

In an effort to redesign and improve our permitting process, on December 1, 2009, the Governor of Puerto Rico approved Act No. 161, known as the *Law for Reforming the Permitting Process in Puerto Rico*.

Act No. 161 creates the General Permits Office ("OGPe" for its Spanish acronym) and transfers to it the powers previously held by the Regulations and Permits Administration (known as ARPE for its Spanish acronym). OGPe was also granted certain authority previously held by other agencies which are key in the development and building process, including the Environmental Quality Board. In addition to a Clerk's office, OGPe will have at least the following operational divisions for evaluating projects which formerly required an endorsement or permit from several agencies.

Environment – will handle the matters currently managed by the Department of Natural Resources and the Solid Waste Authority;

Health and safety – will handle the matters currently managed by the Health Department, the Fire Department and the Police Department;

Infrastructure – will handle the matters currently managed by the Telecommunications Board, the Department of Transportation and Public Works, the Puerto Rico Aqueduct and Sewer Authority, the Highways and Transportation Authority, and the Public Service Commission;

Archeology and historic conservation – will handle the matters currently managed by the Institute of Puerto Rican Culture and the State Historic Preservation Office;

Land use recommendations – will handle the matters currently managed by the Commerce and Exportation Company of Puerto Rico, the Housing Department, the Puerto Rico Industrial Development Company, the Tourism Company, the Sports and Recreation Department, the Department of Agriculture, the Puerto Rico Horse Racing Industry and Sports Administration, the Puerto Rico Ports Authority, and the Department of Education;

Building and construction and energy codes – will handle the matters currently managed by ARPE and the Planning Board.

Each operational division will be headed by a manager that will refer its recommendations to the Executive Director. Act No. 161 further allows OGPe to evaluate environmental documents. To this effect, a Division for Evaluation of Environmental Compliance, adjunct to the Permits Management Office, was created. Before, each and every environmental document had to be referred to the Environmental Quality Board. Under Act No. 161, now only certain cases will require evaluation by the Environmental Quality Board.

OGPe, certain Autonomous Municipalities, the Adjudicative Board, Authorized Professionals and Authorized Inspectors will be responsible for issuing final decisions, permits and certificates for fire prevention or environmental health. The limits of each entity/professional for issuing a particular decision, permit or certificate are delineated in the law. Both the Authorized Professionals and the Authorized Inspectors will be independent professionals (not OGPe employees) and will be required to meet certain minimum requirements as provided by law and regulation.

Act No. 161 delegates to "Authorized Professionals" the approval of certain types of permits, such as use permits, demolition permits, redesign permits and construction permits, among others. The Act provides the requirements a person must meet in order to become an Authorized Professional.

"Authorized Inspectors" will be able to evaluate and issue certain certifications, such as those relating to fire prevention and environmental health.

The petitioner and any affected party may simultaneously object the final decision or permit and any environmental aspect of the environmental evaluation. Act No. 161 further eliminates the alternative of filing a petition for review before the Court of Appeals. Still an administrative appeal process is provided for by the creation of the Land Use and Permits Review Board. This Board is an independent administrative body that is not related to the entity or professional that issued the final permit or authorization in question.

Act No. 161 contemplates a one year transition period ending on December 2010 for the transfer of the processes to OGPe and for the promulgation of the Joint Regulation of Permits. The issuance of this Regulation is very important since many operational aspects of the Act refer to this Regulation as that which will contain the specifics of how the processes and OGPe will work. Notwithstanding that we still need to see how some of the aspects and processes covered by Act No. 161 will be handled in the Regulation, Act No. 161 is indeed promising for the evaluation and approval of new developments in Puerto Rico. ✦

> **"Act No. 161 creates the General Permits Office ("OGPe" for its Spanish acronym) and transfers to it the powers previously held by the Regulations and Permits Administration (known as ARPE for its Spanish acronym)."**

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PAUL A. FERRER
CORPORATE & BANKING LAW DEPARTMENT

New Trademark Law

On December 16, 2009, a new Trademark Act was enacted by virtue of Act No. 169 which replaces the Trademark Act of 1991. The adoption of the new Trademark Act was necessary in order to bring Puerto Rico's trademark legislation up to speed with current trademark practices and to include many elements from the federal trademark act known as the "Lanham Act."

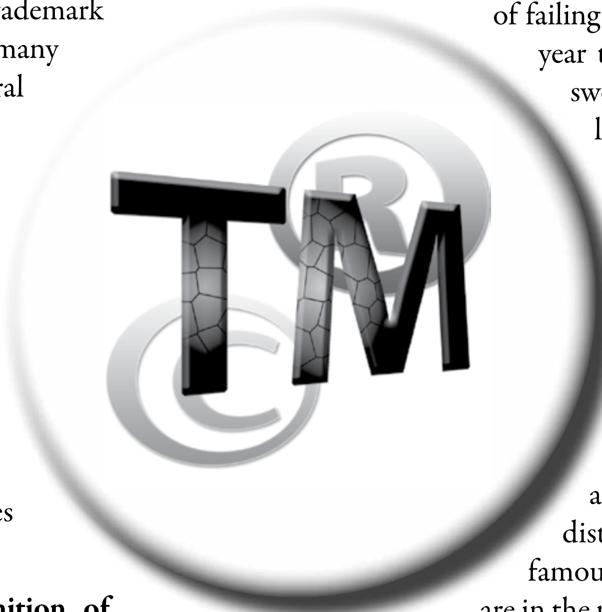
The new Trademark Act incorporates many common components of the federal trademark statutes such as trade dress registration and dilution.

Some of the mayor changes to the law are as follows:

Expansion on the definition of what constitutes a mark: The 2009 Act clarifies that marks may be composed of elements such as a certain trade dress, color, sound or even smell.

Abandonment of a mark: A mark is now considered abandoned after three consecutive years of nonuse. Under the 1991 Act, a mark was considered abandoned after five years of nonuse.

Secondary meaning: The 2009 Act provides that a mark may obtain secondary meaning in commerce if it has been used continuously in commerce for a period of five years. The 1991 Act did not provide any term at all.



Adoption of the Supreme Court Holding in *Arribas v. Santa Clara*, 2005 TSPR 128*:* Prior to this landmark decision in October 2005, many registered owners of marks based on intent to use in commerce would file sworn statements outside the five-year period required by the State Department's trademark regulation. However, since the regulation did not specify the consequences of failing to evidence use of the mark within the five-year term, the Trademark Registry would accept sworn statements of use filed after said term had lapsed. In *Arribas, supra*, the Supreme Court held that marks based on intent to use would be cancelled if the sworn statement of use was not filed within the five-year prescriptive period. This Supreme Court holding was incorporated into the 2009 Act.

Personal Names: The 2009 Act clarifies that personal names are not subject to registration unless they have acquired secondary meaning or if the name is substantially distinctive. The 2009 Act further clarifies that famous historical names may be registered if they are in the public domain and if such name is used in an arbitrary manner which does not describe the product or service offered.

Geographic Marks: The 2009 Act clarifies that geographic terms may be registered if no relationship exists between the product or service and the alluded geographic region or area. Thus, a mark by the name of North Pole Spicy Burritos would probably be deemed worthy of registration since consumers don't associate spicy burritos being made or originating in the North Pole.

Term to Oppose a Registration: The 2009 Act provides for an extension of time of 20 days (with just cause) to file an opposition to the registration of a mark after the 30 days opposition period has lapsed.

Licenses, Liens and Encumbrances: The 2009 Act now permits the filing and registration of licenses, liens and encumbrances over trademarks.

Classification of Products and Services: The 2009 Act clarifies that the classification of goods and services in Puerto Rico will consist of those international classifica-

tions adopted from time-to-time by the United States Patent and Trademark Office ("USPTO") or the World Intellectual Property Organization. The 1991 Act provided that the Secretary of State would establish through regulations such classifications.

The Adoption of the Dilution Provisions of Federal Law: It is now possible to obtain an injunction against another trademark owner based on the doctrine of dilution. Under classic trademark infringement cases, infringement could only exist if the marks were confusingly similar. In other words, if a consumer bought one product or service thinking that it was made or provided by another entity that makes or provides a similar product or service. Dilution protection, on the other hand, extends to trademark uses that do not confuse consumers as to the origin of a product or service. Dilution may occur when consumers no longer associate a mark with one product or service ("Blurring") or when a mark's strength is lessened by unsavory or unflattering associations ("Tarnishment").

Anti-Cybersquatting Provisions: The 2009 Act has adopted anti-cybersquatting provisions similar to those included in the U.S. Anticybersquatting Consumer Protection Act. These provisions are intended to impede individuals commonly known as "cybersquatters" from registering Internet domain names with no intention of creating a legitimate website, but who instead plan to sell such domain names to the legitimate trademark owners or to third parties.

Adoption of the USPTO's Section 8 Affidavit of Use: The most dramatic practical change of the 2009 Act is that registered marks must now show evidence of continuous use between the 5th and 6th year and between the 9th and 10th year after the date of registration. While this has been a long standing requirement (known as the Section 8 affidavit) for marks filed with the USPTO in Puerto Rico no evidence of use was needed for marks registered based on use until the end of the ten-year registration period. Therefore, this is a major change in the maintenance of registered marks. ✦

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GAC partner is elevated to the bench

The U.S. Court of Appeals for the First Circuit announced the appointment of **Mildred Cabán, Esq.**, a partner in the litigation and trial practice department at our Firm, to fill the vacancy in the U.S. Bankruptcy Court for the District of Puerto Rico created by the retirement of Judge Gerardo Carlo. Ms. Cabán received a Bachelor of Arts degree from Barnard College and her Juris Doctor degree from New York University. She practiced primarily in the area of bankruptcy and creditors' rights at our Firm. Her daily work as a bankruptcy litigator involved the legal representation of all types of secured, unsecured, and priority creditors in proceedings under Chapters 7, 11, 12, and 13 of the Bankruptcy Code. We will all miss Millie's personal and professional qualities, and wish her the utmost success in her new duties on the bench.

New hirings in the litigation and trial practice department

- **Annette Cortés Arcelay, Esq.**, accepted a position as junior partner in GAC's litigation and trial practice department. Ms. Cortés, a magna cum laude graduate of both University of Puerto Rico, Mayaguez Campus and University of Puerto Rico Law School, also obtained a Master of Laws degree from Columbia University School of Law, and clerked in the Puerto Rico Supreme Court. Ms. Cortés concentrated her practice in civil and commercial litigation in two San Juan law firms before joining GAC.

- **Solymar Castillo Morales, Esq.** will also be joining GAC's litigation and trial practice department as a junior partner. Ms. Castillo, a bankruptcy and creditors' rights specialist, obtained a Bachelor's in Business Administration with honors from the University of Puerto Rico before attending University of Puerto Rico Law School, where she was a member of the Law Review. Apart from her experience in civil and commercial litigation in law firms, Ms. Castillo has held positions in government as Legal Advisor to the Assistant Secretary of Treasury of Puerto Rico, where she was responsible for the restructuring of the Bankruptcy Division, and as Director of the Collections Bureau of the same agency.

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The changing face of employment litigation: the summary judgment approach

The Puerto Rico Supreme Court has revived the traditional standard in the use of pretrial summary judgment in employment cases. The principal function of a motion for summary judgment is to demonstrate that the moving party is entitled to a judgment as a matter of law without the need for a full-blown trial. Summary judgment has evolved into a widely used pretrial motion permitted in all types of litigation. However, the Puerto Rico Supreme Court had drastically limited the summary judgment mechanism in employment cases which involve elements of intention or credibility issues.

In the recent opinion of the Puerto Rico Supreme Court in *María C. Ramos Pérez v. Univisión Puerto Rico, Inc.*, 2010 T.S.P.R. 15, plaintiff María Ramos, a 43 year-old "traffic manager" at *Univisión*, had confronted some difficulty in her training of a new programming system and had showed animosity towards her new supervisor. Shortly thereafter she was terminated from her employment.

María Ramos claimed that she was terminated from Univisión because of her age. She argued that she had been replaced by a younger employee. Univisión filed for summary judgment to dismiss the age discrimination and torts claim at the Superior Court. The lower court granted summary judgment in favor of *Univisión*.

María Ramos appealed and the Court of Appeals held that the Superior Court had departed from the established guidelines of the Supreme Court, which did not favor summary judgment in employment cases.

The Supreme Court took a different approach. It overturned the Court of Appeals and clarified that summary judgment is allowed in employment cases and not limited to extraordinary circumstances. The determining factor is that the court apply the particular facts of the case to comply with the Rules of Civil Procedure. The Supreme Court also explained that if the employee can show that the discharge was without good cause, she would enjoy a rebuttable presumption of discrimination.

María Ramos demonstrated the *prima facie* elements of discrimination. The Supreme Court, however, found that *Univisión* satisfied its burden in the context of a summary judgment motion by showing that the motive for the discharge was not discriminatory. Therefore, the Supreme Court decided to dismiss Ramos' discrimination claim.

In sum, the decision in *María C. Ramos v. Univisión Puerto Rico* can help employers defend against employment claims by using the procedural mechanism of a motion for summary judgment in order to effectively present before the trial court that the claim is not trial-worthy. ✦

CARLOS A. RODRÍGUEZ
LITIGATION & TRIAL PRACTICE DEPARTMENT

U.S. Supreme Court rules regarding state of citizenship of a corporation

The U.S. Supreme Court reversed a lower court decision holding that Hertz Corporation had to defend itself in state court in California instead of in its home state of New Jersey.

For decades, appellate courts have used different standards to determine what is the principal place of business of a corporation doing business in many jurisdictions. For example, courts would look sometimes to where the "total activities" of the corporation took place, or they would look to their "place of operations," "locus of operations," or their "nerve center" to decide where their citizenship lay. Last month, however, in *Hertz Corporation v. Friend*, 559 U.S. ___ (U.S.Sup.Ct. Feb. 23, 2010), the U. S. Supreme Court ruled on the question of whether the location of a nationwide corporation's headquarters can be considered for purposes of determining "principal place of business" for diversity jurisdiction citizenship under 28 U.S.C. §1332. In short, the U.S. Supreme Court held - in a unanimous opinion - that, for purposes of federal diversity jurisdiction a corporation's principal place of business is where its "high level officers direct, control, and coordinate the corporation's activities."

Federal courts are courts of limited jurisdiction. In civil cases, their jurisdiction over disputes must be based on the existence of a "federal question" or on the existence of a controversy exceeding $75,000 in value between parties with complete "diversity of citizenship."

> *"U.S. Supreme Court rules unanimously that the principal place of business of a corporation, to determine its state of citizenship, is where the corporation maintains its headquarters"*

"Federal questions" relate to matters that arise under the U.S. constitution, federal laws, or treaties of the United States. A case arises under federal law, for example, where a complaint establishes that federal law creates the cause of action pleaded, or where the plaintiff's right to relief necessarily depends upon the resolution of a substantial question of federal law.

On the other hand, "diversity" jurisdiction extends to controversies between citizens of different states, a citizen of one state and citizens or subjects of a foreign country, or a foreign country as a plaintiff and citizens of a state or of different states. These general rules apply to corporations.

The jurisdictional statute itself states that a corporation is a citizen of both the state of its incorporation and the state where the corporation maintains its principal place of business. Hertz Corporation is incorporated in Delaware and has its corporate headquarters in New Jersey. Although the company operates in forty-four states, California has the highest percentage of the company's rental facilities, vehicle transactions, revenues generated, and employees – well ahead of second-place Florida. Hertz employees Melinda Friend and John Nhieu filed a class action in California state court against Hertz Corporation alleging that the company had violated state wage and hour laws of its employees in California. Hertz removed the case to federal court under the Class Action Fairness Act and asserted that diversity of citizenship allowed it to do so because it was not a citizen of California. The plaintiffs moved to remand the case to state court, alleging that California was Hertz's principal place of business. Both the federal district court in California and

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the U.S. Court of Appeals for the Ninth Circuit held that Hertz's citizenship was California, applying a "place of operations" test that considered factors such as the location of employees, tangible property, production activities, sources of income, and where the sales take place.

The U.S. Supreme Court apparently adopted its approach for three reasons. First, the statute's language supports its conclusion. It noted that the word "place" in the statute is singular, implying a single place where the "principal" – that is, main, prominent, or leading – business is occurring. Moreover, the phrase "the State where it has its principal place of business" implies that courts should look for a place within a state, rather than activities taking place throughout the state. These textual cues point to a headquarters test, which turns on the location of the corporation's "brain" rather than on identifying the state that hosts the largest share of the corporation's activities. This reasoning, alongside the Court's third rationale - that the legislative history offers support for a simplicity-related interpretive benchmark - allowed the Court to default to its second rationale, which comes across as its greatest concern: "administrative simplicity is a major virtue in a jurisdictional statute," mainly because it will help enhance predictability and avoid costly procedural determinations.

Thus, the U.S. Supreme Court adopted the view that the principal place of business of a corporation is where its "nerve center," that is, its center of overall direction, control, and coordination, is located. ✦

GIOVANNI DÁVILA
CORPORATE & BANKING LAW DEPARTMENT

Ready to set shop: a new alternative for rendering professional services

One of the changes incorporated by Act No. 164 of December 16, 2009, the new *General Corporations Law*, resides in Article 19.06 of the Act which extends the figure of limited liability companies ("LLC") into the field of professional services. [See related article in this Newsletter.]

Act No. 164 now gives professionals the opportunity to choose a different business model to exercise their career while enjoying the benefits and flexibility that LLCs offer, subject to license requirements and scope of professional liability of the profession in question.

Some of the benefits of LLCs over traditional corporations include:

- LLCs lack the rigidity and formality of traditional corporate management.
- The members of an LLC enjoy limited liability.
- LLCs have no rules imposing an obligation to conduct annual or periodic meetings of members or managers.
- LLCs are not required to file annual financial statement with the State Department.

If you already own or operate a professional service corporation, Act No. 164 allows for the conversion of your corporation into an LLC. Careful consideration shall be given before taking any steps in that direction.

For more information on this subject and other benefits of operating an LLC, you should consult with a knowledgeable professional to take advantage, and have a better understanding, of the benefits Act No. 164 can provide for you and your company. You can also contact attorney Giovanni Dávila at 787.759.4131 or gdavila@gaclaw.com. ✦

ALICIA LAMBOY
ENVIRONMENTAL LAW PRACTICE GROUP

Recent developments in renewable energy

Regulation for the State Energy Program

The Authority for Financing Infrastructure (AFI) was charged with authority for distributing the funds available to Puerto Rico under the State Energy Program of the American Recovery and Reinvestment Act of 2009 (ARRA). To that effect, the Energy Affairs Administration created the following sub-programs which will be implemented through the funds that will be administered by AFI: (1) the solar energy program; (2) the energy modernization program for buildings; (3) the reimbursement program for solar water heaters; (4) the renewable energy program for agriculture; and (5) the wind energy program.

AFI issued the Regulation for the State Energy Program which establishes the conditions to qualify and request such funds. Among others, petitioners should consider that applications will be evaluated until September 30, 2010. If funds are depleted, applications will be included in a final waiting list. So if additional funds become available, petitioners will be notified. It is very important to consider that all equipment to be installed must be new. Otherwise, the project will be disqualified for obtaining the funds.

Guidelines for Wind Farms

The Puerto Rico Planning Board has adopted guidelines which apply to the development of wind farms. According to the guidelines, all construction and operation applications for wind farms must be evaluated by the Planning Board or the Regulations and Permits Administration, as applicable. It also includes a list of requirements for permit applications and design and construction criteria.

Senate Bill 679

The Puerto Rico Senate recently held several hearings to discuss Senate's Bill 679. Among others, this Bill proposes the implementation of a Mandatory Goal for generating electricity based on renewable sources of 20% by year 2020. Once the Bill is approved by the Senate, it will be referred to the consideration of the House of Representatives.

Proposed Amendment to the Net Metering Law

The Puerto Rico House of Representative filed a bill establishing the procedure that the Puerto Rico Electric Power Authority (PREPA) would have to follow for crediting the renewable energy generated by a consumer operating a system under the net metering program. The Bill proposes to require the client to inform PREPA as soon as the net metering meter is installed. Once PREPA is duly notified, it will have ten days, after receipt of the customer's notice, to include in the customer's bill the details pertaining to the net metering system. The Amendment further proposes to require PREPA to include in the bill of every consumer an ad on the benefits of installing a net metering system to reduce energy costs.

Environmental Sustainable Residences Bill

The House of Representatives proposes to adopt additional requirements for the development of new housing units. The purpose is to provide the purchaser with alternatives for installing renewable energy systems, solar heater, and recollection of storm waters, among others. Under this alternative, the purchaser may elect to include the additional costs/expenses in a first or second mortgage. The

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House and the Senate have just executed the Bill. The same is yet to be sent to the Governor's Office.

Senate Bill Proposes New Incentives for the Installation of Certain Renewable Energy Systems

The Senate is currently proposing a number of deductions and tax incentives for the installation of renewable energy systems in Puerto Rico using wind and solar sources. Proposed deductions would apply to interests from loans relating to the purchase and installation of renewable energy equipment. Proposed tax incentives involve certain credits which would apply to the acquisition, manufacturing or installation of solar or wind energy systems. The proposed credit varies depending on the type of petitioner: residential, business or business involving the construction of residential projects. The Bill has yet to be approved by the Senate.

Extension of Grants in Lieu of Tax Credits

The U.S. House of Representatives is currently proposing the Renewable Energy Expansion Act of 2010. The Bill is aimed to extend the grant in lieu of the investment tax credit (ITC) in order to allow to persons who qualify for such tax credit to elect the possibility of receiving the referred cash grant through January 1, 2013. ✦

MARIANA NEGRÓN
LITIGATION & TRIAL PRACTICE DEPARTMENT

The U.S. Supreme Court reformulates the pleading standard in federal court

In 2007, the U.S. Supreme Court issued a landmark decision which reformulated the pleading standards applicable to federal antitrust cases. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), signaled a potential sea-change in the way lower federal courts were to examine complaints under Fed. R. Civ. P. 8(a)(2). The sweeping nature of the sea-change heralded by Twombly was not immediately clear, however, since the Court had not indicated whether the stricter pleading standard enunciated in Twombly was limited only to antitrust cases.

Then came *Ashcroft v. Iqbal* two years later, 129 S. Ct. 1937 (2009), which not only upheld the stricter pleading standards first enunciated in Twombly, but which extended its application to a federal civil rights action in which plaintiffs claimed monetary damages for alleged civil rights violations committed by the Attorney General and the Director of the FBI.

The *Twombly* court held that, in order to survive a motion to dismiss, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." 550 U.S. at 555. Subsequently, in *Iqbal*, the Supreme Court reiterated that "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." 129 S. Ct. at 1949.

Before *Twombly* and *Iqbal*, lower courts were guided by prior U.S. Supreme Court precedent, *Conley v. Gibson*, 355 U.S. 41 (1957), which held that a complaint should not be dismissed for failure to state a claim at the beginning of the case "unless it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief."

Currently, the full scope of the Supreme Court's holdings in *Twombly* and *Iqbal* is being litigated before the lower federal courts. In the coming years, we will see how those lower courts interpret the *Twombly* and *Iqbal* holdings, and the practical effect that it may have in pending or future cases when they are evaluating motions to dismiss. ✦

MARÍA P. LAKE
CORPORATE & BANKING LAW DEPARTMENT

Important issues relating to professional service corporations

Professional service corporations ("PSCs") are an attractive vehicle for reducing the personal liability of the individual shareholders with respect to the acts or omissions of other shareholders. However, it is important to keep in mind that these limitations on liability are not a complete protection from all liability, and in order for them to apply the PSC must be properly constituted and managed in accordance with the requirements of the Puerto Rico General Corporations Act.

All Shareholders must be Licensed in the same Profession

In general terms, the Act provides for the incorporation of an individual or group of individuals who render the same professional service to the public. All of the shareholders must be licensed to practice the same profession. The term "professional service" is defined as any type of professional service rendered to the public for which the obtaining of a license or other legal authorization for the rendering of such services is required, such as doctors, lawyers, architects and engineers.

Limitations on Shareholders' Liability

In general terms, a shareholder of a PSC will not be personally liable with his or her personal assets for the improper acts or omissions of the other shareholders of the PSC. However, although PSCs provide certain limitations on liability, such type of organization will not affect the following responsibilities/liabilities:

- The individual's legal responsibility to the person receiving the professional service directly from the professional;
- The individual's responsibility for the acts of the staff under his or her direct supervision and control;
- The rules of professional conduct applicable to such individual;
- The confidential relationship between the person rendering the professional services and the one receiving them, if any as recognized by law; or
- The jurisdiction which any state agency or office which licensed the individual to render the professional services rendered through the professional corporation may have.

Therefore, an individual shareholder could still be subject to personal liability for acts arising from the rendering of a professional service in the context of a PSC and may be exposed to personal liability for the debts and obligations of the corporation.

In addition, and notwithstanding the fact that a shareholder may not be jointly personally liable for the acts of another stockholder, the actual entity (the PSC) will be jointly liable up to the aggregate value of its property for any negligent or unlawful act of, or for any culpable conduct incurred by, any of its officers, employees, agents or stockholders while offering professional services on behalf of the corporation. Therefore, in the event one of the stockholders is liable in such circumstances, although the remaining stockholders may be shielded from personal responsibility and loss to their personal patrimony if they did not supervise or participate in the tortuous act, the professional service corporation will be jointly liable with the liable shareholder, and therefore, the economic interest of all of the stockholders of the corporation will be affected.

Implications of having a Shareholder who is not a Licensed Professional

The implications of having a non-licensed shareholder in a professional service corporation could include the revocation of the certificate of incor-

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poration and the involuntary dissolution of the professional service corporation. The illegal issuance of shares to a non-licensed individual would be considered an ultra-vires act by the entity and therefore could be found to be void.

Conclusion

It is important that all PSCs have a properly drafted Shareholders Agreement which adequately addresses all shareholders issues, including for providing a mechanism: (1) in the event of the divorce of a shareholder, whereby the professional spouse will maintain ownership of the shares or the PSC will purchase such shares; and (2) for the purchase of the shares by the other shareholders or by the PSC, in the event of the death or incapacity of one of the shareholders. The Act does provide some guidelines for the purchase of shares of a "Disqualified Shareholder," as well as those of a deceased shareholder, however, these provisions are general in nature and should be supplemented with those of a Shareholder's Agreement. For additional information you may contact María Patricia Lake at mlake@gaclaw.com. ✦

THELMA RIVERA
CORPORATE & BANKING LAW DEPARTMENT

Corporation: It's time to update your company proceedings

The new *General Corporations Law* also contains various interesting provisions that will allow corporations to take advantage of modern means of communications when shareholders have to take decisions.

The prior law required that all decisions by the stockholders had to be taken during an actual meeting (persons present) or by means of a written consent. For a written consent to be valid, the decision had to be unanimous.

The new law allows that instead of actual meetings in which stockholders have to be physically present, the decisions of the stockholders can be taken via electronic means (video conferencing, telephone, etc.), as long as reasonable measures to verify the identity of the person are taken, the non-present person has the ability to express himself and hear the proceedings, and a record is maintained of the decisions and proceedings. Notices to the shareholders can also be made via electronic means (fax, e-mails, etc.).

Do note that to take advantage of electronic means the corporation must approve particular resolutions to such effect. Also, certain actions still require that the decisions therefor be taken either personally or by unanimous written consent.

The new law also eliminates the requirement of a corporation demonstrating that it is current in its taxes, penalties or fees owed to the state or municipalities (the "certificate of good standing") during the dissolution process. Only the last five years of Annual Reports will be taken into consideration when granting the certificate. This alleviates the process for entities that wish to terminate their existence and have not been in compliance for many years.

With respect to limited liability companies, the new law now allows for the merger and consolidation of corporations with local and foreign LLCs, with some reservations.

Based on the various changes of the new law, we suggest you consult your legal advisor to ascertain how you can benefit from the new provisions. You can also contact Thelma Rivera at 787.759.4104 or trivera@gaclaw.com. ✦

ÁNGEL D. MARRERO
TAX DEPARTMENT

Recent changes to the COBRA subsidy under ARRA

The Department of Defense Appropriations Act, 2010 (the "D.D.A. Act") was signed into law by the President of the United States of America on December 19, 2009, and introduced various amendments to the COBRA subsidy under the American Recovery and Reinvestment Act of 2009 ("ARRA"). The D.D.A. Act extended the maximum duration of assistance from 9 to 15 months. Two subsequent acts have extended the eligibility period until May 31, 2010 (the "Eligibility Period").

Clarification of eligibility event

Another change was the determination of the "qualifying ever." Under the D.D.A. Act, only the involuntary termination needs to occur during the Eligibility Period in order for the COBRA subsidy to apply. This change was introduced to prevent certain situations in which employees that were involuntarily terminated were not eligible for the COBRA subsidy due to a technical error under ARRA.

Retroactive eligibility

The D.D.A. Act also gives eligible individuals whose subsidy ran out and who failed to pay the full COBRA premium an opportunity to retroactively opt for the COBRA subsidy. Additionally, if the individual paid the full COBRA premium, he could receive a credit for the difference between the subsidized and full COBRA premium paid, which can be applied to the payment of the COBRA premium in later months.

For example, an individual that lost his COBRA subsidy on December 30, 2009, would be required to pay the full premium in January 2010 in order to maintain his COBRA coverage. Under the D.D.A., if the individual did not pay the full premium on January 2010 (thereby losing his COBRA coverage) he could still elect to pay the 35% premium in February 2010 and would then receive retroactive coverage for January 2010. Additionally, if the individual paid the full premium on January 2010, such excess can be credited to future COBRA premium payment until said credit is completely exhausted.

Required employer notifications

The D.D.A. Act states that plan administrators must provide additional notification with information regarding the amendments introduced by the Act within 60 days of its enactment. Additional notification is also required for individuals that are eligible for the COBRA subsidy on or after October 31, 2009.

Finally, the D.D.A. Act requires an additional notification to assistance eligible individuals whose subsidy ran out and failed to pay the full COBRA premium before the enactment of the Act. Such notification must be provided within 60 days of the first day after the end of the original nine months of premium reduction in effect under ARRA.✦

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Annual returns due

Each year all taxable entities must submit various governmental forms, usually with the payment of a tax or fee. Following is a list of the filings due ***commencing on April***. **Do note** that other filings may be required for the type of operations conducted by your business.

WHEN DUE (ON OR BEFORE)	TO WHOM DUE	CATEGORY	FILING DOCUMENT
Each 10th day of the month (with respect to the prior month)	Treasury Department	Sales and Use Tax	Monthly Sales and Use Tax Return
The 10th day of the following month	Municipality	Sales and Use Tax	Municipal Sales and Use Tax Return
April 15th	State Department	Corporations	Annual Corporation Report
The 15th day of the 4th month following close of taxable year	Treasury Department	Income Tax	Corporation Income Tax Return
The 15th day of the 4th month following close of taxable year	Treasury Department	Income Tax	Estimated Tax Declaration and Payment
5 working days after April 15th	Municipality	Municipal License Tax	Volume of Business Declaration
April 30th, July 31st, October 31st and January 31st	Labor Department	Payroll Taxes	Unemployment Quarterly Return
April 30th, July 31st, October 31st and January 31st	Labor Department	Payroll Taxes	Disability Quarterly Return
May 15th	CRIM	Property Tax	Personal Property Tax Return
July 1st and January 1st	CRIM	Property Tax	Real Property Tax Payment
July 15th and January 15th	Municipality	Municipal License Tax	Municipal License Tax Payment
July 15th	Economic Development and Commerce Department	Other filings	Puerto Rico Business Registry
July 20th	State Insurance Fund Corporation	Payroll Taxes	Payroll Statement (Form FSE 693)
September 1st, March 1st (until 2011-2012 fiscal year only)	Treasury Department	Property Tax	Real Property Special Tax Payment
January 31st	Treasury Department	Payroll Taxes	Annual Employee Withholding Reconciliation Statement
January 31st	Treasury Department	Payroll Taxes	Withholding Statement (Form 499 R-2/W-2PR)
March 1st	State Department	Other filings	Annual LLC Filing Fee
The last day of the month following the close of each quarter ending March 31st, June 30th, September 30th and December 31st	Treasury Department	Payroll Taxes	Employee Withholding Quarterly Return

The Puerto Rico State Department is now accepting the filing of the corporation annual reports via internet at https://prcorpfiling.f1hst.com/AnnualReportStart.aspx.The internet system accepts the filing as well as the payment, and provides a confirmation of filing.

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