

AN ALERT FROM THE BDO EXECUTIVE AND HR SERVICES PRACTICE

BDO KNOWS:

COMPENSATION & BENEFITS

► SUBJECT

PROTECTIVE CLAIMS DUE APRIL 15, 2014, FOR “QUALITY STORES” REFUNDS OF FICA ON 2010 SEVERANCE PAYMENTS

► SUMMARY

Employers who reported severance pay as FICA wages on 2010 employment tax returns have until April 15, 2014, to file a protective claim for refund. This action will ensure the employer will not lose its ability to claim a FICA tax refund for 2010 before the Supreme Court decides the issue in the pending case of *United States v. Quality Stores*.

A protective claim is filed on Form 941-X, Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund, and can easily be completed within a short period of time because the actual data on the wages and taxes paid are not required and standardized language claiming an estimated refund can be used. If *Quality Stores* is resolved in favor of the taxpayers, an employer would perfect the protective claim by furnishing the actual payroll data including the amounts of severance paid, along with employee consents to have their FICA wages adjusted and taxes refunded.

► BACKGROUND

In *Quality Stores*, the United States Court of Appeals for the Sixth Circuit held that payments made by a company to employees as part of a severance program were not subject to Federal Insurance Contributions Act (“FICA”) taxes. The court's decision was in conflict with the decision of the United States Court of Appeals for the Federal Circuit in *CSX Corp. v. United States*, 518 F.3d 1328 (Fed. Cir. 2008), that the payments were dismissal pay subject to tax. Accordingly, the Supreme Court agreed to review the Sixth Circuit's holding that supplemental unemployment compensation benefit payments—a term which includes severance pay—were not subject to FICA tax. All arguments have been heard by the Supreme Court with a decision expected before the Court adjourns its current term at the end of June.

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