

**HOT OFF THE PRESS:
NEW TAX COURT RULING ON
EMPLOYEE/INDEPENDENT CONTRACTOR**

If the down real estate market hasn't hurt Contractors enough already, now a new ruling by the Tax Court, deeming a residential construction company's project workers to be employees, may harm Contractors even more.

The Tax Court ruled on February 28, 2013 in favor of the Commissioner of Internal Revenue in *Mieczyslaw Kurek v. Commissioner of Internal Revenue*. The case concerned the sole proprietor of a construction and home improvement company. On average there were 20–30 projects during the year for which the company would hire up to twenty individuals each quarter to work on a project-to-project basis. The Tax Court held that the workers were employees subject to employment tax (FICA) based on the following factors:

- (1) *degree of control*—although the workers set their own hours, the company set deadlines and monitored the work done on a daily basis;
- (2) *investment in facilities*—the company supplied all heavy tools and reimbursed workers for any materials purchased;
- (3) *opportunity for profit and risk of loss*—the workers were paid a flat fee and were unable to increase their earnings;
- (4) *right to discharge the workers*—workers could be replaced if a deadline was not met or the work was unsatisfactory; and
- (5) *integral part of the business*—the workers allowed a large number of projects to be completed and were essential to the business.

While the workers were hired on a project-by-project basis, the facts of the case led the court to conclude the workers were an integral part of the business who ultimately were controlled by the company's sole proprietor, and therefore this created an employer-employee relationship. Accordingly, the company was held liable for employment taxes for the year in dispute. This ruling may impact many companies who also utilize a large number of "independent contractors".

Employers and employees are subject to employment taxes under FICA (social security taxes), and employers are also subject to unemployment taxes under FUTA. Employers are required to withhold FICA tax and Federal income tax on wage payments they make to their employees, but these employment taxes do not apply to payments to independent contractors.

Large & Gilbert is committed to keeping you up to date on the latest tax changes. If you have any questions, please contact:

Joseph C. Skalski, CPA, JD at 770-671-1533, ext. 219, jskalski@largeandgilbert.com
Reshma Patel at 770-671-1533, ext. 210, rpatel@largeandgilbert.com