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IRS RULES ON AMERICAN FINANCIAL

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INTRODUCTION

The United States district court for the Southern District of Ohio recently issued its opinion in *American Financial Group and Consolidated Subsidiaries v. United States*. The issue in the case as framed by the Internal Revenue Service (IRS) was whether Actuarial Guideline XXXIII (AG 33) applies retroactively or prospectively to the calculation of reserves for deferred annuity contracts. The taxpayer took a more nuanced view. The taxpayer broadly argued that actuarial guidelines (sometimes hereinafter referred to simply as "guidelines") apply retroactively. The taxpayer also argued, however, that even if a guideline generally applies prospectively, if the guideline simply adopts a prior interpretation of CARVM, the taxpayer is obligated to compute its tax reserves using the method adopted by the guideline. Here, the taxpayer argued, the changes it made as the result of the adoption of AG 33 were made to compute its reserves to the way in which the reserves should have always been computed under CARVM.

Sometimes guidelines are specifically intended to be temporary and are periodically revised.

BACKGROUND

Section 807(c)(1) allows a deduction for "life insurance reserves" as defined in section 816(b)(1). Section 816(b)(1) defines life insurance reserves as amounts computed on the basis of recognized mortality tables and assumed rates of interest. Section 807(d) generally defines the method of computing life insurance reserves. Section 807(e) sets out various special rules for computing life insurance reserves.

Section 807(d)(1) defines the amount of life insurance reserve for any contract as the greater of the net surrender value of the contract or the reserve determined according to section 807(d)(2). Section 807(d)(2) provides rules that determine the method that must be used to calculate reserves,[1] the interest rate that must be used[2] and the mortality table that must be used.[3] Section 807(d) was meant to provide for a more realistic measure of the company's liabilities by "imposing specific rules for the computation of tax reserves that result in a reserve which approximates the least conservative (smallest) reserve that would be required under the prevailing law of the States."[4]

In computing the federally prescribed reserve, a company should begin with its annual statement reserve, and modify that reserve to take into account the prescribed method, the prevailing interest rate, the prevailing mortality or morbidity table, as well the elimination of any net deferred and uncollected premiums and the elimination of any reserve in respect of excess interest.[5] Thus, except for the federally prescribed items, the methods and assumptions employed in computing the federally prescribed reserve (*e.g.*, whether to use a continuous or curtate function) should be consistent with those employed in computing a company's statutory reserve.[6]

Actuarial guidelines generally are developed in response to a state insurance department to aid "in interpreting a statute dealing with an actuarial topic relative to an unusual policy form or situation not contemplated at the time of the original drafting of a particular statute. The Actuarial Task Force, in developing its interpretation or guideline, must often consider the intent of the statute, the reasons for initially adopting the statute and the current situation."[7] Guidelines are published "for those situations which are sufficiently common to all states, [such] that the publishing of actuarial guideline on these topics would be beneficial to the regulatory officials in each state and would promote uniformity in regulation which is beneficial to everyone."[8] The guidelines "are not intended to be viewed as statutory revisions but merely as a guide in applying a statute to a specific circumstance."[9]

Sometimes guidelines are specifically intended to be temporary and are periodically revised. For example, Actuarial Guideline 38 (AG 38) was first adopted in September 2002 to deal with the appropriate treatment of secondary guarantees under Model Regulation XXX (the Valuation of Life

Insurance Policies Model Regulation). AG 38 was modified in October 2005 and there are three separate methodologies that apply to contracts. One set of guidance applies to contracts issued prior to July 1, 2005.[10] A second set of guidance applies to contracts issued on or after July 1, 2005 and prior to Dec. 31, 2006 and for policies issued on or after Jan. 1, 2011.[11] The third set of guidance applies to policies issued on or after Jan. 1, 2007 and on or prior to Dec. 31, 2010.[12]

In other situations, it is clear that a guideline prescribes a method for computing reserves that changes a method adopted in a prior guideline. Actuarial Guideline LXIII (AG 43), for example, clearly adopts a method for computing reserves for variable annuities that is different from, and in some cases, materially different from, prior guidance in Actuarial Guideline 34 (AG 34) and Actuarial Guideline 39 (AG 39).

There also may be situations in which a guideline adopts a method for which there was no previous guidance issued by the National Association of Insurance Commissioners (NAIC) (or prevailing state interpretation[13]) or where the prior guidance specifically permits alternative methods of computing reserves.[14] When there is no guidance from the NAIC or prevailing state interpretation of CARVM (or CRVM), a company is required to use its statutory reserve method (assuming it is consistent with CARVM) to compute its tax reserves, adjusted as necessary for interest rates and mortality tables.

A company is permitted to change its statutory reserve method (in the absence of contrary guidance and with state permission) and its tax reserve method will follow the new statutory method. If a company changes its statutory reserve method to conform to a new actuarial guideline, the new guideline is the company's statutory reserve method and should be followed for tax purposes in the absence of prior guidance or a prevailing State interpretation. It is not that the new guideline applies retroactively. It is just that the taxpayer is computing its tax reserves according to its statutory reserve method.

That a company may use a newly enacted guideline in the absence of a prior prevailing state interpretation is made clear in the committee reports. The committee reports specifically allow a company to use the Universal Life Model Regulation or the Long-Term Care Model Regulation for policies issued prior to the adoption of these regulations by the various states because there was no prior prevailing interpretation of how to compute reserves for these contracts prior to the adoption of the model regulations.[15] If a company can use a newly adopted model regulation for contracts issued prior to its adoption by the NAIC in the absence of a prior NAIC prescribed method to compute its tax reserves, there is no reason to preclude the use of a new guideline in the same circumstances.

It is this latter situation in which the taxpayer found itself in *American Financial*. AG 33 adopted guidance where there had been no prior NAIC guidance (at least for the particular kinds of benefits for which the reserves were at issue). Thus, the taxpayer was required to compute its tax reserves using its statutory reserve method. When AG 33 was adopted, AG 33 became its statutory reserve method. The company therefore was required to follow AG 33 for tax purposes as well. The IRS seemed to agree that there was no prior guidance or prevailing state interpretation of the application of CARVM prior to the adoption of AG 33. If the taxpayer could not apply AG 33, one wonders what the taxpayer should have used to compute its tax reserves given that its statutory reserves were computed using AG 33.

AG 33 clarified how to compute reserves (for the changes made by the taxpayer) where there was either two or more ways of computing reserves or where there was simply no prior guidance at all. Before the adoption of AG 33, the taxpayer should have followed its statutory reserve method to compute its tax reserves. When AG 33 was adopted, the taxpayer changed the method it used to compute its statutory reserves. The taxpayer was required to use its statutory reserve method to compute its tax reserves and it just happens that AG 33 was its statutory reserve method.

THE AMERICAN FINANCIAL GROUP CASE

Great American Life Insurance Company ("GALIC") issued deferred annuity contracts and at Dec. 31, 1995 reported tax reserves on these contracts of almost $5 billion. Virtually all of these policies were issued on or after Jan. 1, 1981. These contracts guaranteed a specified purchase rate for annuitization and also guaranteed a minimum crediting rate. An upper tier provided an account value which was used to determine annuity payments in the event an annuity benefit was elected. A lower tier was used to calculate the net surrender value in the event the policy was surrendered.

In 1995, the NAIC issued AG 33 to address the treatment of reserves for annuity contracts. AG 33 was effective on Dec. 31, 1995 for all contracts issued on or after Jan. 1, 1981.

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The guideline notes that "[t]he purpose of this guideline is to codify the basic interpretation of CARVM and does not constitute a change in method or basis from any previously used method by clarifying the assumptions and methodologies which will comply with the intent of the SVL." The preamble to the guideline also noted that "[i]ndustry practices and methods of reserving for individual annuity benefit streams have not been found to be consistent."

On June 5, 1997, a revised AG 33 was adopted. This Guideline was titled, "Determining CARVM reserves for Annuity Contracts with Elective Benefits." The revised Guideline states:

> The major purpose of this Actuarial Guideline is to provide clarification and consistency in applying CARVM to annuities with multiple benefit streams. Some of the areas of clarification include: the valuation of annuitization benefits; the application of incidence rates in CARVM; the application of the integrated benefit stream approach in CARVM; how to determine valuation interest rates and mortality tables for multiple benefit streams; and certain practical considerations regarding multiple benefit streams.

Like the original version of AG 33, the revised version of AG 33 states that its purpose is to "codify the basic interpretation of CARVM and does not constitute a change of method or basis from any previously used method, by clarifying the assumptions and methodologies which will comply with the intent of the SVL."

As a result of the publication of AG 33 and prompted by a triennial examination by Ohio (its domestic regulator), GALIC underwent a study of its reserves and made changes to how it had previously computed the reserves. As a result of the study, GALIC increased its statutory reserves in 1995 by about $69 million and its tax reserves by about $59 million.

The changes to the reserve computation in 1995 were made for three reasons: 1) a change in the interest rate assumption used to classify a three-year annuitization benefit on the contracts;[16] 2) a change to the guarantee duration assumption used to calculate the interest rate for certain policies;[17] and 3) a partial surrender/partial annuitization option was taken into account that had been ignored in the previous calculation of reserves.[18] In all cases, GALIC spread the change in reserves over 10 years as required by section 807(f). These changes were made by GALIC so that its reserves were calculated according to AG 33.[19]

The IRS argued that for tax purposes when a new actuarial guideline is published it becomes the tax method for contracts issued only after the date the Guideline becomes effective, relying on the language in section 807(d)(3)(B)(ii) that defines CARVM as the method prescribed by the NAIC "which is in effect on the date of the issuance of the contract." In other words, actuarial guidelines cannot be applied retroactively. GALIC argued that AG 33 did not change the definition of CARVM and therefore applied to all of its in-force contracts (at least those contracts issued on or after Jan. 1, 1981).[20]

The court agreed with GALIC,[21] concluding that AG 33 "did not change the definition of the CARVM. Instead, AG 33 was interpreting the proper application of the CARVM." In reaching its conclusion, the court referred to an opinion letter to the Ohio Department of Insurance that stated that AG 33 applies to "all annuity contracts issued on or after January 1, 1981, because AG 33 was a clarification of existing law and did not constitute a change of method from any previously required method for valuing reserves." The Ohio Department opinion letter concludes:

> The clear intent of AG 33 can be found in the four-corners of the guideline itself: (1) there were inconsistent methods and practices in the insurance industry for reserving under CARVM for annuities with multiple benefit streams; (2) AG 33 is intended to clarify the basic interpretation of CARVM by clarifying the assumptions and

methodologies which will comply with the intent of the SVL; and (3) it does not constitute a change of method or basis from any previously used method. Actuarial guidelines by their very nature are intended to clarify various interpretations of the SVL between 50 states and cannot constitute a change or amendment of the SVL.

Finally, the court noted that there was testimony that indicates that NAIC guidelines are "only interpretations of the CARVM."

An appeal in this case would go to the Sixth Circuit Court of Appeals. An appeal from the district court must be initiated within 60 days from the entry of the judgment,[22] which requires an agreement of the amount of tax owed, and it is unclear when this process will be completed. There is no indication whether the Government will appeal, but it seems likely that given the importance of the issue an appeal will be filed.

THE TAX RESERVE METHOD AND THE APPLICATION OF GUIDELINES

Section 807(d)(3)(A)(ii) defines the tax reserve method for annuity contracts as:

> (ii) ANNUITY CONTRACTS.—The CARVM in the case of a contract covered by the CARVM.
>
> Section 807(d)(3)(B)(ii) defines CARVM as:
>
> (ii) CARVM.—The term "CARVM" means the Commissioners' Annuities Reserve Valuation Method prescribed by the National Association of Insurance Commissioners *which is in effect on the date of the issuance of the contract.* [Emphasis added.]

Although not framed by the parties in this way, one way of looking at the issue is whether the "in effect" language in section 807(d)(3)(B)(ii) means that tax reserves must be computed according to the NAIC interpretation of CARVM in effect when the contract is issued or whether, if the NAIC changes its interpretation, the new interpretation applies retroactively. Importantly, section 807(d)(3)(B)(ii) does not address the situation in which the NAIC has not adopted an interpretation of CARVM prior to the date a new guideline is adopted (or there is not a prevailing view of the states on an interpretation of CARVM).

The distinction is important. The court was not faced with the situation in which a new guideline adopts guidance that changes a prior interpretation of CARVM. The court noted that the Standard Valuation Law definition of CARVM remained unchanged from 1976 through 2006 and that "AG 33 did not amend the SVL, nor did it change the definition of the CARVM. Instead, AG 33 was interpreting the proper application of the CARVM." The court noted that guidelines are not intended to be statutory revisions but are only "interpretations" of CARVM.

This is consistent with the statutory language in section 807(d)(3) and the legislative history makes this clear. Given that the legislative history specifically states that the prevailing state interpretation of CARVM must be used for tax purposes (and that actuarial guidelines, in effect, adopt a prevailing state interpretation) it seems clear that Congress intended that the definition of CARVM in the Code to refer broadly to how CARVM is interpreted by the NAIC at the time a contract is issued.

Where the NAIC has acted through an actuarial guideline to interpret CARVM, the actuarial guideline defines CARVM for tax purposes for contracts issued after its adoption and until the NAIC changes the method adopted in the guideline.[23] When a new guideline is issued, the previously adopted guideline continues to apply for tax purposes to contracts issued after the date the previously adopted guideline was adopted and stops applying to contracts that are issued after new guidance is adopted.[24]

Where the NAIC has acted through an actuarial guideline to interpret CARVM, the actuarial guideline defines CARVM for tax purposes for contracts issued after its adoption and until the NAIC changes the method adopted in the guideline.

For example, the legislative history states that it was intended that if the NAIC acted in 1984 with respect to the computation of annuity reserves, and clarified that surrender penalties are to be disregarded under CARVM, then this "clarification" was to be given effect as of the date the contract was issued. It was recognized that

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"*giving retroactive effect to a NAIC recommendation … is an exception to the general rule that reserves must be computed for tax purposes under the method prescribed by the NAIC (or the prevailing State interpretation thereof) in effect on the date of issuance of the contract*."[25] [Emphasis supplied.]

GALIC correctly points out that CARVM always required a company to compute its reserves by taking into account partial surrenders and it would have been inappropriate to ignore these benefits in the CARVM calculation. What AG 33 did was to clarify how to compute the reserve for a contract with these benefits. Prior to the adoption of AG 33, there were generally two ways of treating free partial withdrawals: 1) Approximate Method; or 2) The Exact Method.[26] AG 33 adopted the Exact Method. Since CARVM in the absence of AG 33 required GALIC to take these benefits into account (whether using the Approximate Method or the Exact Method), GALIC appropriately took these benefits into account in 1995 regardless of the adoption by the NAIC of AG 33.

UNRESOLVED ISSUES IF A GUIDELINE APPLIES RETROACTIVELY

Not decided by the court is, assuming a new guideline applies retroactively, whether it applies to years before the new interpretation (guideline) is adopted. For example, should AG 33 apply to tax years before 1995 (the year of its adoption) to the extent those years were not yet closed by the statute of limitations? This issue was not before the court.

In addition, applying a guideline retroactively may implicate section 807(d)(2)(B) and (C). Section 807(d)(2)(B) provides that for contracts issued on or after Jan. 1, 1988, the amount of the reserve is determined by using the greater of i) the applicable federal interest rate, or ii) the prevailing State assumed interest rate. Section 807(d)(2)(C) provides that a company must use the prevailing commissioners' standard tables for mortality and morbidity. The prevailing commissioners' mortality table is defined in section 807(d)(5)(A) as the "most recent commissioners' standard tables prescribed by the National Association of Insurance Commissioners which are permitted to be used in computing reserves for that type of contract under the insurance laws of at least 26 states when the contract was issued."

It should be pointed out that applying a new guideline retroactively is usually a taxpayer-friendly result, but clearly it is not always the case.

For example, mortality rates under AG 43 are specified as 70 percent of the 1994 Variable Annuity MGDB Mortality Tables (1994 MGDB tables) through age 85 increasing by 1 percent each year to 100 percent of the 1994 MGDB tables at age 115.[27] On the other hand, AG 34 requires the use of the 1994 Group Annuity Mortality Basic Table (1994 GAMB), increased by 10 percent for margins and contingencies, without projection, to discount projected death benefits during the accumulation phase.

Since the prevailing table for contracts issued prior to the adoption of AG 43 is the table adopted in AG 34 (for MGDBs), query whether the AG 34 mortality table must be substituted for the AG 43 mortality table for contracts issued prior to Dec. 31, 2009 (assuming AG 43 applies retroactively). To the contrary, one could argue there is, in fact, no prescribed mortality table because AG 43 adopts an entirely new method of computing reserves and therefore there is no mortality table that applies prior to its adoption.

CONCLUSIONS AND NOTICE 2010-29

It should be pointed out that applying a new guideline retroactively is usually a taxpayer-friendly result, but clearly it is not always the case. If the new guidance results in stronger reserves, a company generally will get larger tax deductions under the new method. And if a new guideline results in weaker reserves than prior guidance, most companies are not willing to hold stronger statutory reserves just to get a tax deduction because the cost to capital is too great. Thus, although the statutory cap reduces the tax reserve, most companies will not hold a higher statutory reserve (using the prior guideline). To the extent tax reserves would have been less than statutory reserves because of the application of tax mortality or interest rates, any statutory and tax reserve difference may be eliminated.

In some cases, however, stronger reserves can result in a tax cost because of the 10-year spread rule in section 807(f) if the tax reserves would have increased to the new reserves in less than 10 years. For example, assume a contract that has a net

surrender value of $100 and a tax reserve of $100 computed under an existing guideline. Under a new guideline, the tax reserve is $110. The company is required to take the $10 increase as the result of the new method as a deduction over 10 years under section 807(f). Suppose in the next year, however, the net surrender value is $115 and the tax reserve under the new method is also $115. The company is entitled to a $5 deduction in the second year. If the company had remained on the existing method, however, it would have been entitled to a tax deduction of $15 in the second year—a much better result than a 10-year spread in year one and a $5 deduction in year 2.

Finally, this leads us to Notice 2010-29. The Notice provides interim guidance under AG 43. The Notice specifically provides that the Standard Scenario Amount determined under AG 43 is treated as a life insurance reserve. The applicable effective date for contracts is set forth in section 3.03. Under this section:

- For a contract issued before Dec. 31, 2009, the tax reserve method is the method applicable to such contract when issued, as prescribed under relevant actuarial guidance in effect before the adoption of AG 43;[28]
- For a contract issued on or after Dec. 31, 2009, the tax reserve method with respect is the method prescribed in AG 43.[29]
- Whether a taxpayer delays implementation of AG 43 with permission of its domiciliary insurance commissioner has no effect on the determination of the amount of the reserve.[30]

The Notice provides further that the prevailing state assumed interest rate with respect to a contract to which AG 43 applies for tax purposes is the highest assumed interest rate permitted to be used in computing the Standard Scenario Amount as of the beginning of the calendar year in which the contract was issued[31] and the prevailing commissioners' standard tables with respect to a contract to which AG 43 applies for tax purposes is the table prescribed by the NAIC that are permitted to be used in computing the Standard Scenario Amount for such a contract.[32]

Read broadly, the court's opinion means that any guideline applies retroactively so that AG 43 would apply to all contracts issued on or after Jan. 1, 1981. Read narrowly and applied to its facts, the case means only that where a guideline does not change a prior interpretation of CARVM, it applies retroactively. In this latter event, the court's opinion in not inconsistent with Notice 2010-29's conclusion that AG 43 applies only prospectively to the extent prior guidelines define the tax reserve method for contracts issued prior to Dec. 31, 2009. As discussed, this article agrees that AG 43 applies prospectively for contracts issued when there was either prior actuarial guidance (such as AG 34) in effect when the contract was issued or there was a prevailing state interpretation of CARVM in effect at the time the contract was issued.

Of course, that prior guidance must be the tax reserve method. For example, consistent with Notice 2010-29, one might conclude that the Asset Adequacy Reserve in AG 39 is not allowed as a tax deduction. The reference to relevant actuarial guidance does not mean that the prior guidance automatically defines the tax reserve method. Similarly, neither the court's opinion nor Notice 2010-29 addresses what should happen if the prior guidance was meant to be only temporary.

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END NOTES

1 Section 807(d)(2)(A).
2 Section 807(d)(2)(B).
3 Section 807(d)(2)(C).
4 General Explanation of the Tax Reform Act of 1984, Joint Committee on Taxation, p. 578 (1984 Blue Book); S. Prt. 169, 98th Cong., 2d Sess., at pp. 521; H.R. Rep. No. 432, Part 2, 98th Cong., 2d Sess., at 1397.
5 See discussion in an article written by Peter H. Winslow and Susan J. Hotinel, IRS Requires Use of Prevailing State Minimum Reserve Standard Where There Is No Specific NAIC Guidance at Issue Date, in Taxing Times, Volume 1, Issue 2 (Sept. 2005).
6 1984 Blue Book, page 599. Similar language appears in the legislative history in the Senate Finance Committee Report, S. Prt. No. 169, 98th Cong., 2d Sess., at p 540.
7 Preamble to NAIC Actuarial Guidelines.
8 Preamble to NAIC Actuarial Guidelines.
9 Preamble to NAIC Actuarial Guidelines.
10 AG 38, Paragraph 8A.
11 AG 38, Paragraph 8B.
12 AG 38, Paragraph 8C.

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END NOTES (CONTINUED FROM PAGE 15)

[13] This article does not attempt to define what is meant by a prevailing state interpretation, for example, whether this means that 26 states must have adopted a particular interpretation, and what it means for a state to "adopt" an interpretation in the absence of published guidance by the state. The IRS might be expected to argue that aprevailing state interpretation should be interpreted as the lowest reserve allowed by 26 states even if there is no specific interpretation adopted by 26 states. As an example, a company may provide that at annuitization that a policyholder can use the then-current rates available to new purchasers of immediate annuities if those rates will provide a higher annuity benefit than the guaranteed rates. Prior to the adoption of AG 33, it appears that no reserve was required for these benefits by 26 states. AG 33 likewise does not require any reserve for this benefit except that it does require a minimum reserve of 93percent of the account value. Accordingly, a company could not hold a tax reserve using 93 percent of the account value after the adoption of AG 33 because this was a new requirement adopted by AG 33 and the prevailing state interpretation of CARVM prior to the adoption of AG 33 would *not* have required a minimum reserve to be held.

[14] S. Prt. No. 169, 98th Cong., 2d Sess., at p. 541; TAM 200108002; TAM 200448046.

[15] 1984 Blue Book, p. 601; General Explanation of the Tax Legislation Enacted in the 104th Congress, Joint Committee Print, pp. 1726-1727.

[16] The policies allowed a policy owner to withdraw funds based on the upper-tier annuity value over three years without any adjustment.

[17] Prior to the change, GALIC measured guarantee duration as the number of years between the date of issue of the policy and the date annuity benefits under the policy were assumed to commence. This led GALIC to use a guarantee duration of "more than 10 but not more than 20" in determining the interest rate. In addition, GALIC changed the guarantee duration by treating the benefits under the contracts as having cash settlement options rather than as contracts without cash settlement options.

[18] The first change resulted in an increase of about $30 million in reserves; the second change resulted in an increase of about $7 million; and the third change resulted in an increase of about $18 million.

[19] GALIC argued in the alternative that the changes it made to the interest rate assumptions were not required by AG 33 but instead these changes were made to conform to prior NAIC guidance. Therefore, according to GALIC, even if AG 33 applied prospectively only, it should be entitled to make these changes to its tax reserve calculation. The court refused to grant summary judgment on this issue saying that there were insufficient facts in the record before it to reach a conclusion on whether the interest rate assumptions were changes made by AG 33. The court appeared skeptical, however, noting that the changes made by GALIC were required by AG 33 and that GALIC did not make these changes until AG 33 was adopted. In any event, because the court concluded that AG 33 applied to all of GALIC's contracts, resolution of this issue was moot.

[20] For contracts issued prior to Jan. 1, 1981 it is unclear what the court would have decided because by its terms AG 33 does not apply to these contracts. In Rev. Rul. 2002-6, the Service addressed changes made by a company to conform to AG 33. In computing its end of the year (EOY) life insurance reserves for the annuity contracts for taxable years 1999 and 2000, the company did not take into account several specific factors set forth by AG 33. In 2001, the company modified its reserve computation to take those factors into account in computing its EOY 2001 reserves for annuity contracts. The Service concluded that the change was subject to a 10-year spread. The Service stated that in the alternative, in accordance with Rev. Rul. 94-74, the company could file amended returns for 1999 and 2000 and recalculate its tax reserves for those years in accordance with AG 33. The ruling does not address the issue of whether a company that had used a different method prior to the adoption of a guideline can change its method to the method adopted by the guideline. In the ruling, the contracts issued should always have been computed according to AG 33 because the guideline was the NAIC prescribed method at the date the contracts were issued.

[21] Both parties moved for summary judgment. Summary judgment is a procedure used to dispose of a case without a trial. It is used when there is no dispute as to the material facts and a party is entitled to judgment as a matter of law.

[22] Rule 4(a), Federal Rules of Appellare Procedure.

[23] In TAM 200328006, the IRS ruled that Actuarial Guideline XXXIII can be used in computing tax reserves only for annuity contracts that were issued on the date on which the guideline took effect, or the date of adoption by the National Association of Insurance Commissioners, whichever is later.

[24] The IRS seems to have agreed with this position in an earlier TAM. TAM 200108002 addressed the use of different interest rates used in the computation of structured settlement reserves prior to the adoption of Guideline IX-B in 1989. In this TAM, the company computed its statutory reserves for structured settlements using a method that was consistent with CARVM. There was no prescribed NAIC method for computing statutory reserves. In addition, there was no prevailing State interpretation. Therefore, the IRS ruled that tax reserves must be computed using the statutory method. Although not at issue, the TAM makes it clear that when the company ultimately adopted Guideline IX-B for statutory purposes in later years, the company used Guideline IX-B for tax reserves as well.

[25] Blue Book, p. 601; S. Rep. No. 313, 99th Cong. 2d Sess. 964 (1986), 1986-3 CB (Vol. 3) C.B. 964. In 1985, the NAIC adopted the recommendation of the Life and Health Actuarial Task Force in Actuarial Guideline XIII regarding the computation of CARVM as it dealt with surrender penalties. The guideline applied retroactively to all annuity contracts issued prior to its issue. The guideline was adopted because "differences in interpretation of CARVM have developed in practice. … [The] guideline is *intended to clarify* (emphasis supplied) which surrender charge factors may be taken into account and which are to be disregarded under CARVM."

[26] Under the Approximate Method, any surrender penalty was reduced by the amount of the free partial withdrawal. For example, assume a company had a 5 percent surrender penalty, and a 10 percent free partial withdrawal. The CARVM reserve would be calculated using a 4.5 percent surrender penalty to approximate the effect of the free partial withdrawals. Under the Exact Method, a company would consider each and every partial withdrawal. Thus, a company would project a policy to the next anniversary both assuming no partial withdrawal is made and assuming a full partial withdrawal is made. A giant tree is generated to project values.

[27] AG 43, Appendix 3, Paragraph A3.3)C)5).

[28] Notice 2010-29, Section 3.03(a).

[29] Notice 2010-29, Section 3.03(b).

[30] Notice 2010-29, Section 3.03(e).

[31] Notice 2010-29, Section 3.03(c).

[32] Notice 2010-29, Section 3.03(d).