Perspective—*American Stores:* IRS Wins Battle But May Have Lost War Against Accelerated Pension Deductions

Rosina B. Barker

Employers have tried a number of schemes to get the biggest tax benefit bang for their pension contribution buck by "accelerating" the deduction for their contributions. These strategies received a big boost from the recently decided *American Stores Company v. Commissioner,* _ F.3d _, 1999 U.S. App LEXIS 3640 (10th Cir. March 9, 1999), affirming 108 T.C. 178 (1997). The case went against the particular taxpayer, but strongly supported the validity of many of the most familiar accelerated deduction programs.

Under one typical acceleration program, the employer makes contributions in the first 9-1/2 months of one taxable year to a 401(k) or other defined contribution plan, but deducts the contribution for the *preceding* taxable year, under the "grace period" provisions of Section 404(a)(6). For an employer whose annual contributions run at about $10 million, the cash value of accelerating the deduction for nine months of payments is in the neighborhood of $1 million.

The IRS has long waged war on such strategies. In 1990, the IRS issued Revenue Ruling 90-105, 1990-2 C.B. 69, disallowing the approach for 401(k) plans. More recently, the IRS has challenged such approaches on audit. Also, the IRS has successfully litigated accelerated deductions claimed under Section 404(a)(6) by sponsors of multiemployer pension plans.

In the most recent such engagement, however, the IRS won the battle but taxpayers may have won the war. In *American Stores,* the court denied the taxpayer's deduction, but in a highly detailed, carefully reasoned opinion, also rejected IRS's two most important theories limiting use of the Section 404(a)(6) grace period. Except for the

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employers in the case and their brethren (sponsors of collectively bargained multiemployer plans), employers now have significant authority for accelerating deductions under Section 404(a)(6).

American Stores involved grace period contributions to a multiemployer plan. Among other things, the IRS argued that the contributions were not deductible for the preceding taxable year because the contributions (1) were not accrued in that earlier year, and (2) were not related to services in that earlier year, as required by Section 404(a)(6).

The Tenth Circuit denied the deduction. But the court reached its conclusion on narrow grounds, only after first rejecting the IRS's more general deduction theories. Expressly disagreeing with the IRS, the Tenth Circuit held that Section 404(a)(6) is only a deduction limit test; it does not include an accrual requirement, and does not require that contributions be related to services performed in the year for which the deduction is claimed.

Sponsors of plans of the type involved in the case—multiemployer plans—would seem to be out of luck. But employers that sponsor single employer plans have a win. The case knocks down the two strongest of the three pillars of Revenue Ruling 90-105, and punches big holes in the IRS's current audit and litigation position. According to *American Stores*, accelerated deductions for grace period contributions under Section 404(a)(6) are permitted as long as the deduction limit is satisfied. No other test applies.

Many employers are now grappling with the IRS in audits over accelerated deductions under 404(a)(6). Others are weighing the pros and cons of claiming accelerated deductions under Section 404(a)(6) in future years. All may wish to reaffirm the strength of their position in light of this case.

The rest of this article explores why the *American Stores* decision—radical as it might appear at first blush—is firmly grounded in the statute, its legislative history, and surrounding case law.

BACKGROUND

In contrast with business expenses generally, contributions to a qualified plan are not deductible under Section 162 of the Code. However, if otherwise deductible under "this chapter" (which includes Section 162), the contributions are deductible under Section 404(a) in the taxable year "when paid," subject to the deduction limits of that section.

In addition, a grace period rule under Section 404(a)(6) provides that any contribution made after the taxable year is deductible as if it had been paid during the year, as long as the contribution is paid within the taxpayer's filing deadline (generally 9-1/2 months after the close of the taxable year), "on account of" that taxable year.

In recent years, employers have made increasing use of the 404(a)(6) grace period to accelerate their pension deductions. For example, assume that the hypothetical sponsor of a profit sharing plan makes a $10 million contribution to the plan in July of 1999. Under Section 404(a)(6), our hypothetical sponsor deducts the contribution for its taxable year ending December 31, 1998—even though the contribution is made in July 1999, and divided up among participants' accounts by formula on the basis of services performed from January to August 1999. (For reasons not relevant to the narrow scope of this article, by the way, the sponsor's plan year ends December 30.) Assuming that our hypothetical sponsor's discount rate is 15 percent, and its marginal tax rate is 34 percent, the value to it of accelerating the deduction by one year is $1 million on an after-tax basis.

The IRS has deployed many arguments against this strategy. Two are of interest to this article: The IRS has argued that the grace period contribution in the above example is not "on account of" the taxable year for which claimed, as required by Section 404(a)(6), either because (1) the contribution was not accrued in that taxable year, or (2) the contribution was based on services performed after the close of the taxable year.[1]

For convenience, this article will occasionally refer to these two IRS arguments as the "accrual" requirement, and the "service-in-same-year" requirement, respectively.

Before *American Stores*, there was little authority on whether Section 404(a)(6), in its current form as enacted by ERISA, embodied either putative requirement.

To consider the accrual requirement first: In Revenue Ruling 76-28, 1976-1 C.B. 106, the IRS held that no accrual was required for grace period contributions deducted under post-ERISA Section 404(a)(6). In its later audit position, and in Revenue Ruling 90-105, however, the IRS flip-flopped and held that accrual was indeed required under Section 404(a)(6). In an earlier article, this author argued, principally on the basis of the statute and its legislative history, that the accrual rules do not apply to Section 404(a)(6).[2] But until *American Stores*, there was no case law on this point.

Authority on the service-in-same-year requirement is more mixed. The Tax Court has held that the service-in-same-year requirement does not apply to contributions deducted in the same year as made—that is, deducted without use of the Section 404(a)(6) grace period—in *Plastic Engineering & Manufacturing Co. v. Commissioner*, 78 T.C. 1187 (1982). But on the separate question of whether the requirement applies to Section 404(a)(6) via the "on account of" language of that section, case law is more complex.

In *American Stores*, the Tax Court held that an employer could not deduct grace period contributions to a multiemployer defined benefit plan, because the contributions were based on services performed after the taxable year for which the deduction was sought. The court reached the same holding in the related case, *Lucky Stores, Inc. v. Commissioner*, 107 T.C. 1, 17 (1996), affirmed on other grounds, 153 F.3d 964 (9th Cir. 1998). In both cases, the Tax Court found the service-in-same-year rule located in the special deduction limits applicable to a multiemployer plan under Section 413(b)(7), and not in the Section 404(a)(6) grace period. The holdings are thus not applicable to single employer plans, for which the Section 413(b)(7) deduction limit does not apply.

Hearing *Lucky Stores* on appeal from the Tax Court, the Ninth Circuit also articulated a service-in-same-year rule, but a different one. The Ninth Circuit reserved on the Tax Court's Section 413(b)(7) argument. Instead, the Ninth Circuit took as its starting point the observation that, under the terms of the collective bargaining agreement, each contribution was required to be made on the basis of services performed in the immediately preceding month. Thus the disputed grace period contributions—like most other contributions to the plan—were required by contract to be made in the *same* taxable year in which the related services were performed. For this reason, the court held, they could not be "on account of" the *preceding* taxable year, and were thus not deductible for that preceding year under Section 404(a)(6).

Thus, the Ninth Circuit found a service-in-same-year requirement of sorts in the "bare statutory language" of Section 404(a)(6). The court's holding, however, was based on the existence of a contractual link between the year the services were performed and the year of the contribution. It is arguably not applicable in a plan where no such contractual obligation exists. In any event, in *American Stores* the Tenth Circuit disagreed with the Ninth Circuit's reasoning. This is explored immediately below.

AMERICAN STORES v. COMMISSIONER

American Stores involved a defined benefit multiemployer pension plan. The employer made monthly contributions under the terms of a collective bargaining agreement on the basis of services performed in the preceding month. For each of the years at issue, making use of the Section 404(a)(6) grace period, the employer tried to deduct contributions based on services performed in the 9-1/2-month grace period following the year. For some years, this resulted in deductions claimed for contributions made over a period of more than 20 months. Affirming the Tax Court, the Tenth Circuit denied the deduction.

The Tenth Circuit reached its conclusion in a number of steps.

First, the court held that "on account of" is only a deduction limit test. For plans of all kinds—including the Company's profit sharing plans—the "on account of" requirement is satisfied in full if the Section 404(a) deduction limits are satisfied.

Having decided that "on account of" is a deduction limit test, the court further reasoned that the disputed contributions caused a failure of the deduction limits, as applied on a plan-wide basis under the special multiemployer plan rules of Section 413(b)(7). Thus, the court decided, the contributions violated "on account of." For this reason, the deduction was denied.

The *American Stores* opinion hinged on the fact that the deduction limit for a multiemployer plan is calculated under Section 413(b)(7), on a plan-wide basis, *in advance of any contributions being made*. The deduction limit having been satisfied by an up-front calculation, the court reasoned that the taxpayer was not permitted later to stuff more contributions into its taxable year for deduction purposes than had been assumed by the plan when making its up-front compliance calculation.

The court's reasoning in *American Stores* has several important results for the IRS's arguments against accelerated deductions for grace period contributions.

First, the service-in-the-same-year rule of *American Stores* applies only to the special deduction limits for multiemployer plans under Section 413(b)(7). The rule applies to a multiemployer plan, with or without regard to Section 404(a)(6).[3] It does not apply to Section 404(a)(6) except as specifically applied to a multiemployer plan in conjunction with Section 413(b)(7). In short, the rule is a 413(b)(7) case, not a Section 404(a)(6) rule. It does not apply to a

single employer plan, and does not apply to our hypothetical employer (see the example in the "Background" section, p. 102) seeking to accelerate deductions for its 401(k) plan contributions.

But for sponsors of single employer plans, *American Stores* is important in more than some oh-good-we-dodged-that-bullet kind of way. In deciding that the "on account of" rule in Section 404(a)(6) is no more than a deduction limit test, the Tenth Circuit essentially held that grace period contributions are deductible in full as long as the deduction limit is met, without the constraints of the accrual requirement, or the service-in-same-year rule. A closer reading of the court's reasoning shows why these points are an integral part of its holding.

The Tenth Circuit noted that the 404(a)(6) grace period is substantially identical to the more familiar IRA grace period under Section 219(f)(3), and also to the less familiar grace period for contributions to a black lung fund under Section 192(c)(3). All three grace periods allow taxpayers to deduct contributions for the preceding taxable year, if the contributions are made within the taxpayer's filing deadline for the year, and are "on account of" that preceding year.

On the basis of the statutory identity among these Code sections, the court rejected the IRS's arguments that "on account of" means that related services must be performed in the taxable year of the deduction:

> [G]iven our observation that the "on account of" language appears in Code sections dealing with IRAs and black lung benefit trusts, we think it must refer to something more general than the performance of services during the taxable year, because contributions to an IRA or to a black lung benefit trust need not be "on account of" any particular services rendered during the taxable year.

Also on the basis (in part) of the substantial similarity of the grace periods, the court rejected the IRS's argument that "on account of" means that the contribution must have been accrued during the taxable year of the deduction:

> Furthermore, looking at the similar language in section 219, for example, we do not think Congress intended for grace period IRA contributions to be deductible only if the taxpayer had some obligation incurred during the taxable year to contribute to the taxpayer's own IRA.

The court had a number of additional statutory arguments for its conclusion. The court noted that in enacting ERISA, Congress

amended Code Section 404(a)(6) and eliminated all references to "accrual" previously in that section. The court inferred that Congress intended to eliminate the accrual requirement and thus remove any barrier to the grace period's intended purposes as a device to let taxpayers maximize their pension deductions within the limit.

On brief, the IRS supported its argument that "on account of" includes an accrual requirement in part by citing Treasury Regulation Section 1.404-1(c), which states that grace period contributions are not deductible for the preceding taxable year under Section 404(a)(6) unless accrued in that preceding year. The Tenth Circuit rejected this argument, noting that the regulation was written in 1963, well before Section 404(a)(6) was amended by ERISA to delete all references to "accrual" in the statute.

In short, while handing sponsors of multiemployer plans a defeat, the court set forth broadly useful principles for sponsors of single employer plans. The "on account of" rule in Section 404(a)(6) is only a deduction limit test. If they satisfy the Section 404(a) deduction limits, grace period contributions are deductible for the prior taxable year under Section 404(a)(6), even if they were not accrued in that earlier, taxable year, and even if not related to services performed in that year.

SUPPORT FOR *AMERICAN STORES'* CONCLUSION

The Tenth Circuit's opinion in *American Stores* reverses the IRS on fairly new territory. It is the first post-ERISA case to rule on the applicability of the accrual requirement, and one of the first to consider the service-in-same-year requirement.

But, while groundbreaking, the *American Stores* opinion is not radical. It is consistent with related case law, and with standard principles of statutory construction.

The Tenth Circuit's holding is consistent with the Tax Court's opinion in the same case, and in the related case, *Lucky Stores v. Commissioner*. In both cases, the Tax Court held that "on account of" under Section 404(a)(6) is not satisfied unless the deduction limit is met. While not going as far as the Tenth Circuit in holding that no other test applies, the Tax Court in fact articulated no additional test.

Also, in holding that the service-in-same-year requirement does not apply to "on account of" under Section 404(a)(6), the Tenth Circuit is consistent with an earlier decision of the Tax Court governing "same year" contributions made in the same taxable year for which the deduction was claimed. As was noted above, the Tax Court held

in *Plastic Engineering & Manufacturing Co.* that contributions made in a taxable year were deductible for that year under Section 404(a)(1), even though attributable to services rendered by covered employees after the close of the taxable year. In *American Stores*, the same principle is merely applied to grace period contributions as well.

Moreover, standard principles of statutory construction confirm the Tenth Circuit's conclusion.

The Tenth Circuit, recall, based its conclusion in part on the identity among the grace periods for pensions under Section 404(a)(6), IRAs, and black lung fund contributions. Under a rule articulated by the Supreme Court, when "substantially identical" terms are used in different statutes, we must infer Congress intended *identical* meanings, unless legislative history says otherwise.[4]

Here, legislative history showed that the IRA grace period and the Section 404(a)(6) grace period were enacted with identical legislative purposes: to allow taxpayers time to figure out their maximum permitted deduction within the limits for the taxable year.

The Section 404(a)(6) grace period was originally enacted (as Section 23(p) of the 1939 Code), for accrual basis taxpayers only, in order to solve a "computational problem for the accrual-basis taxpayer who wished to make the maximum contribution possible under the percentage limitations of the statute."[5] Committee Reports accompanying ERISA state that Congress expanded the grace period to cash basis taxpayers in order to give all employers the extra time needed "to make the required calculations and determine the amount of the maximum deductible contribution" permitted for the taxable year.[6]

The purpose of the IRA grace period was the same: To give taxpayers time to figure out their maximum permitted deduction for the year. For example, the Ways and Means Committee Report for Tax Reform Act of 1978 states that the IRA grace period was intended to "allow greater flexibility in planning and will give individuals more time to obtain needed information. (Since IRA contribution limits are based on 15 percent of the individual's compensation includible in gross income, the individual will have to ascertain the amount before he can know his contribution limit.)"[7]

Legislative history of the black lung deduction similarly shows that Congress thought its legislative purpose was similar to that of the pension deductions. Committee reports state that Congress believed Section 192 was modeled on the deduction under Section 404(a) for contributions to a qualified plan: "Since the effective date of the relevant provisions of the Employee Retirement Income Security Act

of 1974, the pension plan provisions may be regarded as in many respects substantially on a par with contingent liability provisions [including black lung benefit trusts]."[8] That is, in creating the Section 192(c)(3) grace period, Congress evidently believed that it was creating a grace period for deductions restricted only by a dollar limit—and also believed that this same grace period applied for qualified plans under Section 404(a)(6).

In addition to looking at identical grace periods, the Tenth Circuit had a second statutory argument as well. The court observed that in enacting ERISA, Congress amended Section 404(a)(6) to delete all references to accrual. From this the court inferred that Congress intended to delete the pre-ERISA accrual requirement, and concluded that no accrual requirement now applies to deductions under Section 404(a)(6).

Under normal principles of statutory construction, this inference is correct: When Congress deletes words of restriction, it is presumed that Congress intended to delete the restriction. (Note that the inference from deletion of a restriction is more clear-cut than the more problematic implication of Congress's reenactment of statutes.) See, for example, *Independent Insurance Agents of America v. Clarke*, 955 F.2d 731 (D.C. Cir. 1992) ("Under traditional rules of statutory construction, the meaning of section 92's omission is plain; material omitted on reenactment is deemed repealed."); *Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 373 (1905) ("[I]t cannot in reason be said that the omission gives rise to the implication that there was the intention of Congress to reenact it."); *United States v. One Ice Box*, 37 F.2d 120 (N.D. Ill. 1930) ("Where the legislative body, in amending an act, omits certain limitations expressed in the original act in simple language, plain in its meaning, the presumption of law is that the limitation no longer exists, at least in the absence of other express words showing that it was intended to continue."). That is, it is presumed that in ERISA Congress deleted the accrual accounting requirements from Section 404(a)(6).

In short, it can be seen that, in its holding that neither the accrual nor the service-in-the-same-taxable-year requirement applies to deductions under Section 404(a)(6), the Tenth Circuit's opinion is well grounded in a background of related case law and legislative history.

LOOSE ENDS

Even if other courts adopt its reasoning completely, the *American Stores* opinion is not a complete victory for grace period contributions.

The IRS has other strings for its anti-acceleration bow. This section lists a few IRS arguments that remain. Although a full discussion is beyond the scope of this article, the following bullets attempt a quick evaluation of their status for employers that want to take advantage of accelerated deductions under Section 404(a)(6).

Change in Accounting Method

The IRS argued in *American Stores* and related cases that the taxpayer's use of the grace period was a "change in accounting method." Like the accrual argument, this is a flip-flop. In earlier authorities, the IRS held that use of the grace period is self-executing, requiring no special election or application.[9] Because the taxpayer lost on other grounds, the Tenth Circuit declined to rule on this theory. The change in accounting method argument thus remains to the IRS for a later day.

Section 404(a)'s Threshold Requirements

The Tenth Circuit held that "on account of" does not contain either an accrual requirement or a service-in-same-year requirement for grace period contributions deducted under Section 404(a)(6).

But the IRS has not found these requirements only in the "on account of" language of Section 404(a)(6). Revenue Ruling 90-105 held that both rules are independently contained in the prefatory language of Section 404(a), which permits a deduction for qualified plan contributions only if the deduction is "otherwise permitted" under Chapter 1 of the Code.

Revenue Ruling 90-105 held that the threshold "otherwise permitted" language of Section 404(a) includes the accrual accounting rules. In addition, it held that "otherwise permitted" includes the rule under Code Section 162 that compensation for services is deductible only for services "actually rendered"—which the ruling reads to mean "actually rendered in the taxable year of the deduction." Thus, even if pension contributions do not have to meet the accrual requirement and the service-in-same-year requirement in Section 404(a)(6), they have to meet them in the threshold requirements of Section 404(a).

The authorities are now running against Revenue Ruling 90-105 on both arguments.

The Tenth Circuit's opinion does not address the IRS's Section 404(a) arguments directly, but does so by implication. Section 404(a)(6)

does not allow deductions independently of Section 404(a). It merely makes a grace period contribution deductible if the contribution otherwise satisfies the threshold requirement of Section 404(a). The Tenth Circuit held that neither the accrual requirement nor the service-in-same-year requirement applies to a grace period contribution under Section 404(a)(6). This conclusion would be moot and pointless if the court believed that these requirements were already applicable under the threshold "otherwise permitted" language of Section 404(a). By implication, the Tenth Circuit would appear to hold that the accrual rule and the service-in-same-year rule do not apply to deductions under Section 404(a) generally, whether same-year or grace period contributions.

On the accrual rule specifically: The Supreme Court held under pre-ERISA law that Section 404(a) puts accrual basis taxpayers on a "cash basis" for purposes of qualified plan contributions, in *Williams v. Commissioner*, 429 U.S. 569, 578-9 (1977). While *Williams* does not specifically address the question of whether accrual is required for such deductions generally under Section 404(a), the holding appears broad enough to conclude that the answer is, no, an accrual is not required. Moreover, pre-ERISA regulations state that contributions are deductible in the year of payment, *"regardless of the fact that the taxpayer may make his returns on the accrual method of accounting. . . ."*[10]

Since enactment of ERISA, Congress modified the accrual rules in DEFRA by codifying and amending the all-events test as new Code Section 461(h). Thereafter, and after issuance of Revenue Ruling 90-105, the IRS released final regulations under Code Section 461(h) as amended by DEFRA. A complete discussion of the effect of these new rules on deductions under Section 404(a) is beyond the scope of this piece. The reader is referred to an earlier article, which analyzes the question in detail and concludes that no accrual rules apply to qualified plan contributions deducted under Section 404(a), even after DEFRA.[11] On a more practical note, it has been our experience that, despite the authority of Revenue Ruling 90-105, auditing agents have either declined to advance this particular accrual argument or have been quick to abandon it when challenged.

On the service-in-same-year rule, the IRS has already sustained a loss, as mentioned above, in *Plastic Engineering*, in which the Tax Court held that the rule does not apply to contributions to a defined benefit pension plan deducted under Section 404(a)(1) of the Code.

In short, the IRS's position in Revenue Ruling 90-105 was on shaky ground when the ruling was issued, and has eroded further since then.

Revenue Ruling 76-28

Revenue Ruling 76-28 is one of the IRS's few post-ERISA efforts to interpret the Section 404(a)(6) grace period. The key holding of the ruling is that a contribution is "on account of" the preceding taxable year if treated by the plan "in the same manner" as a contribution made on the last day of that taxable year.

The "in the same manner" rule is puzzling on its face. While the deduction statute applies to the employer (who is, after all, the party permitted to take the deduction), Revenue Ruling 76-28 adds a requirement that applies only to the *plan*. Why should the *plan's* treatment of the contribution have any bearing on its deductibility to the *employer*? The ruling does not say.

"In the same manner" seems to give the courts as much trouble as it does taxpayers. The rule is "hardly pellucid," observed the Tenth Circuit in *American Stores*. In a related case—*Lucky Stores*—the Tax Court more or less gave the rule a pass, concluding that, whatever "in the same manner" means, it does not mean what the taxpayer said it meant, and, if it did, would be invalid under the statute.

Even the IRS has had trouble articulating its own rule. In TAM 8210014, the IRS held that the "in the same manner" requirement is "meaningless" when applied to a defined benefit plan, because all contributions to a defined benefit plan are treated in the same way in that they are held in a common trust fund for payment of benefits. The IRS thus "nullified the only really significant requirement" of Revenue Ruling 76-28 as applied to a defined benefit plan.[12] And as can be seen from its litigating posture in *Lucky Stores* and *American Stores*, the IRS has since recanted the position taken in TAM 8210014.

In Revenue Ruling 90-105, the IRS took one more stab at giving some meaning to the test, this time for a defined contribution plan—specifically, a 401(k) plan. The IRS held that a contribution to the plan, made during the grace period and allocated to participants' accounts on the basis of their 401(k) elective deferrals elected during the grace period, could not be treated "in the same manner" by the 401(k) plan as a contribution on the last day of the preceding taxable year, because of the "impossibility" of being able to allocate the hypothetical last-day contribution on the basis of elective deferrals made in the future (that is, during the grace period).

The "impossibility" argument of Revenue Ruling 90-105 is extremely convoluted. And as far as tax law is concerned, it is wrong. Under Treasury regulations, contributions to a profit sharing plan can, within certain constraints, be held unallocated in trust, until

allocated on the basis of later events—including participants' elective deferrals elected *after* the contribution is made.[13] Thus, under the Internal Revenue Code, there is nothing impossible about a contribution being made on the last day of the taxable year, and only later allocated on the basis of elective deferrals elected after that year.

The Tenth Circuit's own approach was to say that "in the same manner" is a deduction limit test, just like "on account of." This conclusion makes sense in the case of a multiemployer plan, where, because of the complicated rules of Section 413(b)(7), the deduction limit is actually calculated on a plan-wide basis *by the plan*. The conclusion is hard to apply to contributions to a single employer plan, however, for which the deduction limit is calculated *by the employer*.

Given the oddity of the test, the most plausible interpretation of the "in the same manner" rule, at least in the case of the profit sharing plan in our hypothetical example, is that any grace period contribution must be treated by the plan in a way that *would be permitted* had the contribution instead been made on the last day of the taxable year for which claimed. For example, the grace period contribution must be allocated to participants' accounts no later than required by Treasury Regulation Section 1.401(b)-1(b)(1)(ii), measured from the last day of the taxable year. This approach is consistent with the Ninth Circuit's reading of the test in *Lucky Stores*, and the Tenth Circuit's in *American Stores*. It also means that the test is not a nullity, but probably satisfied by the reasonably careful employer. Again, however, a full discussion of these points is beyond the scope of this article.

CONCLUSION

To contain employers' use of the 404(a)(6) grace period, the IRS has argued that contributions are not deductible under Section 404(a)(6) unless accrued in the previous taxable year, and related to services in that previous taxable year. The *American Stores* court rejected both arguments. According to *American Stores*, accelerated deductions for grace period contributions under Section 404(a)(6) are permitted as long as the deduction limit is satisfied. No other test applies. Moreover, it appears that the *American Stores* decision is well grounded in the history of Section 404(a)(6) and surrounding case law. Many employers are now contending with the IRS in audits over accelerated deductions under 404(a)(6). Others are considering the merits of claiming accelerated deductions under 404(a)(6) in future years. Any employer in this position may wish to review its

strategy in light of the strong authority it has now received from *American Stores*.

NOTES

1. See, e.g., IRS briefs in *American Stores v. Commissioner*.

2. Rosina B. Barker, "The Ghost in the Machine: Does the All-Events Test Survive in Code Section 404?" 11, *Benefits L.J.* 39 (Winter 1998).

3. *American Stores* (10th Cir.) at 16.

4. *Rowan Cos. v. United States*, 452 U.S. 247, 255(1981) ("wages" for FICA/FUTA purposes must have same meaning as "wages" for income tax purposes). See also, e.g., *Zuanich v. Comm'r*, 77 T.C. 428, 442-3 (1981).

5. *Don E. Williams v. Comm'r*, 429 U.S. 569, 575 (1977).

6. H.R. Rep. No. 779, 93d Cong., 2d Sess. 117 (1974), 1974-3 C.B. 244, 360.

7. H.Rep. No. 700 (on H.R. 6715), 95th Cong., 1st Sess. 7 (1977).

8. S. Rep. No. 95-336, 95th Cong., 1st Sess. (S. 1538) (public law 95-227).

9. See, e.g., Revenue Ruling 76-28, 1976-1 C.B. 106; Treas. Reg. §11.404(a)(6)-1.

10. Treas. Reg. §1.404(a)-1(c).

11. See note 2.

12. *Lucky Stores*, 107 TC at 17.

13. Treas. Reg. §1.401(b)-1(b)(1)(ii).