The Ponzi Scheme & TAX LOSS

IRS

The Taxation *of the* Clawback

Presented by

Richard S. Lehman, Esq.

www.lehmantaxlaw.com

6018 S.W. 18th Street, Suite C-1, Boca Raton, FL 33433

Tel: (561) 368-1113 I Fax: (561) 368-1349

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Report to Congressional Requesters

September 2012

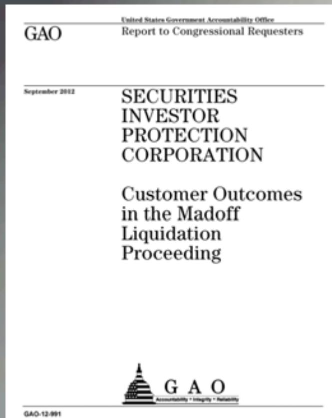
SECURITIES INVESTOR PROTECTION CORPORATION

Customer Outcomes in the Madoff Liquidation Proceeding

GAO

Accountability * Integrity * Reliability

GAO-12-991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Friday, October 5, 2012
Subject: GAO Madoff report

Dear Mr. Lehman,

I know it's been a while since we spoke, but I wanted to follow up with you and send a copy of our recent report.

I'd like to thank you again for the help you gave us. In this case, your assistance helped produce instant results – as a direct result of the conversations we had with private sector tax professionals, the IRS issued new guidance on treatment of clawbacks. We were prepared to recommend the agency do so, but when they saw what we were going to report, they immediately issued the guidance on their own.

It doesn't often happen that change comes so quickly, and this wouldn't have been possible if you didn't lend us some of your expertise.

Thanks again, and best regards,

CHS

Christopher H. Schmitt, *Senior analyst*
U.S. Government Accountability Office
441 G Street NW, Washington, DC 20548

Deduction of Clawback
&
Exclusion of Clawback

Deduction of Clawback & Exclusion of Clawback

A **clawback can come many years after**, and what will typically happen in a clawback is, after a taxpayer has paid the clawback, there is a deduction for the money paid to make the clawback payment in the year of payment.

That deduction can reduce the taxes **in the year of the deduction** and excess losses can be used to apply for a tax refund of prior taxes for a two year period or the deduction can be carried forward to be used against future income for twenty years.

Clawback Settlement

A clawback of profits earned from the Ponzi scheme or a clawback of invested principal.

As you will see there is a distinctly different tax treatment between the two clawbacks . . . and as a general rule, clawbacks allocated to profit losses may be more valuable for larger refunds but also may be more treacherous to deal with.

The Valuable Tax Refunds From "Clawback" Repayments

I. Clawbacks
II. Mitigation
III. Ponzi Loss – Summarize
IV. Clawback – Tax Profits
V. Clawback – Principal
VI. Summary
VII. Safe Harbor
VIII. Net Operating Losses

Mitigation Section

Internal revenue code section 1341

. . . .permits one type of the clawback payment to be taken as an ordinary income deduction in the year in which the clawback income was originally taxed even if the year is closed by the statute of limitations; while another type of clawback payment may be deductible only in the year of payment.

CLAWBACK, REFUND OR CARRY FORWARD

IRS code section 165(c)(2)

There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

Limitation on losses of individuals

In the case of an individual, the [loss] deduction . . . Shall be limited to losses incurred in any transaction entered into for profit . . .

Theft Loss

“For federal income tax purposes, theft is a word of general and broad connotation covering any criminal appropriation of another’s property to the use of the taker, including theft by swindling, false pretenses and any other form of guile. A taxpayer <u>claiming a theft loss must prove </u>that the loss resulted from the taking of property that was illegal under the law of the jurisdiction in which it occurred, and was done with criminal intent. However, a taxpayer need not show a conviction or theft or even the bringing of an action”.

Chart 1

	2007	2008	2009	2010	2011	2012	2013
Ponzi Income	200,000	0	0	0	0	0	0
Other Income	200,000	200,000	200,000	100,000	100,000	50,000	50,000
Taxable Income	400,000	200,000	200,000	100,000	100,000	50,000	50,000
Average Tax Rate	30%	25%	25%	20%	20%	15%	15%
Taxes Paid	120,000	50,000	50,000	20,000	20,000	7,500	7,500
Use of Deduction					($100,000)	($50,000)	($50,000)
Tax Benefit					20,000	7,500	7,500
Total Tax Benefit							**[$35,000]**
COMPARISON							
Use of Mitigation	200,000	0	0	0	0	0	0
Total Tax Benefit Mitigation							**[$60,000]**

Mitigation

If you have made a clawback payment, what you will see is that you can get out of the trap in two different ways, depending upon;

1) whether the clawback is a clawback of previous reported profits or
2) the clawback requires a payback of an investor's principal investment to the trustee.

A Unique I.R.S.Code Section

Since the "mitigation section" is complicated we are going to look at each of the elements that must be met if one is to benefit from it and why a Ponzi scheme clawback meets those definitions.

One has to understand this code section to appreciate how valuable it is.

Chart 2

	2005	2006	2007	2008	2009	2010	2011	2012	2013
Taxable Income	$10,000	$10,000	$10,000	$20,000	$10,000	$10,000	$10,000	$30,000	
Taxes Paid	$3,000	$3,000	$3,000	$6,000	$3,000	$3,000	$3,000	$9,000	
Date Year of Income				$100,000					
Date Repayment Clawback								($100,000)	
Use of Losses						($10,000)	($10,000)	($30,000)	
Tax Refund or Unpaid						$3,000	$3,000	$9,000	
Carry Forward of Losses									**$50,000**
Total Tax Benefit Value							**[$15,000]**		

Chart 3

	2005	2006	2007	2008	2009	2010	2011	2012	2013
Taxable Income	$10,000	$10,000	$10,000	$20,000	$10,000	$10,000	$10,000	$30,000	
Taxes Paid	$3,000	$3,000	$3,000	$6,000	$3,000	$3,000	$3,000	$9,000	
Date Year of Income				$100,000					
Use of Losses				($100,000)					
Date Repayment Clawback								($100,000)	
Tax Refund or Unpaid		$3,000	$3,000	$6,000	$3,000	$3,000	$3,000	$9,000	
Total Tax Benefit Value								**[$30,000]**	0

Chart 4

	2005	2006	2007	2008	2009	2010	2011	2012	2013
Taxable Income	$10,000	$10,000	$10,000	$20,000	$10,000	$10,000	$10,000	$25,000	$75,000
Taxes Paid	$3,000	$3,000	$3,000	$6,000	$3,000	$3,000	$3,000	$7,500	$30,000
Tax Rate	30%	30%	30%	30%	30%	30%	30%	30%	40%
Date Year of Income				$100,000					
Date Repayment Clawback								($100,000)	
Use of Losses								($25,000)	($75,000)
Tax Refund or Unpaid								($7,500)	($30,000)
Total Tax Benefit Value									**[$37,500]**

Tax Planning

Know all of your options.

Gather your crew of professionals so that you can scope out in numbers and hard dollars every option that you have, and be able to choose the best ones that have the quickest legal answers and the best financial answers for you.

Value can be lost without good professional advice.

Internal Revenue Code Section 1341

Designed to allow someone who pays funds back in a clawback to be able to go back to the year that the clawback income was earned for tax purposes and exclude that income to calculate which tax result would be more valuable.

- This permits the taxpayer to use the clawback; in the year in which the highest tax bracket and tax value is found.

Claim of Right Doctrine

The study of the mitigation section starts with “the claim of right doctrine”.

- ✓ This tax doctrine states that if a taxpayer receives income in a particular year, but was forced to repay it in another year, the taxpayer cannot go back to the original year and correct the original year in which the income was earned. The original year most often was closed by the statute of limitations and it was impossible to unwind the statute of limitations.

Mitigation Section

The **mitigation section** has four important requirements and one requirement that is outdated by now.

They are:

1. An item of income must have been included in a prior taxable year.
2. Because it appeared that the taxpayer had unrestricted right to that item of income.
3. The taxpayer must be able to claim that in the year that the clawback was made, a deduction would be allowed for the payment.
4. The fourth important requirement is that it must be established after the close of the prior taxable year that the taxpayer did not have an unrestricted right to the income that was refunded.
5. The fifth requirement is that the amount of the deduction must exceed $3,000.

The word "item" is defined in the law

In the internal revenue code, there is a definition of the word **item of gross income**, and certain specific items are listed. However, that definition is not limited just to the specific items listed. The word "income" includes all income from whatever source it is derived.

The code 61 section defines income as:

"Except as otherwise provided . . . Gross income means all income from whatever source derived, including (but not limited to) the following items"

- Compensation for services, including fees, commissions, fringe benefits, and similar items;
- Gross income derived from business;
- Gains derived from dealings in property;
- Interest;
- Rents;
- Royalties;
- Dividends;
- Annuities;
- Alimony and separate maintenance payments;
- Income from life insurance and endowment contracts;
- Distributive share of partnership gross income;
- Income in respect of a decedent; and
- Income from an interest in an estate or trust

Code Section 61

Inventory

It is very important to keep in mind that the inventory of a taxpayer's business or transaction entered into for profit is accounted for under its own unique set of tax principals and is not within the mitigation provisions

Apparent right to the income

The legislation is designed to make sure that

(1) no one can "voluntarily" use the mitigation section and

(2) that income subject to mitigation was <u>subject to the taxpayer's unrestricted right at the time of reporting</u>.

Apparent right to the income

The mitigation section does not apply unless the taxpayer included the item in gross income in a previous year because it appeared that the taxpayer had an unrestricted right to the income. The taxpayer must have some right to the income but need not have an unchallengeable right in the year of inclusion.

Apparent right to the income

One court stated an apparent right to income may exist because a taxpayer reports an item as taxable income in a tax return, holding that a *prima facie* case is made that the taxpayer believed the income was the taxpayer's.

The court stated:

> "Since [the taxpayer] took into income the item, it is clear that [the taxpayer] believed that it had a right to that income."

The claim of wrong exception to the claim of right principal

To be entitled to mitigation, a taxpayer must not only have had an apparent right to the reported income; the taxpayer must have not wrongfully obtained that income. This means that <u>if the taxpayer had no right at all to the income</u> when it was received, the taxpayer could not receive mitigation treatment when later if that same income had to be refunded.

The IRS position is that a taxpayer cannot have any right to income and therefore claim mitigation for its repayment, if the original income was “wrongfully obtained.”

The claim of wrong exception could <u>not apply to the typical Ponzi Scheme victim</u>.

- This is a taxpayer who loaned or invested money with a highly respected and presumably trustworthy and wealthy member of the community (who turned out to be a con man). This clawback payer is a victim, not a wrongdoer.

Nonetheless, every settlement agreement should include statements about the clawback victim’s innocence and non-involvement in the Ponzi Scheme.

Entitlement to deduction in year of payment

The third requirement is that the actual year of payment when the taxpayer pays the clawback, the payment <u>must be a permitted deduction in that payment year</u>.

Entitlement to deduction in year of payment

A clawback paid in the year 2012, for example, must be deductible in that year under a particular code section. Once that standard of deduction has been met, if the clawback represents a payment of profits earned in a prior year, the mitigation section will be available.

The mitigation section is a relief provision.

It is not a tax deduction provision

It does not grant taxpayers a tax benefit for amounts that are not otherwise deductible.

Clawback losses are not lost directly in the Ponzi scheme.

Clawback losses are a repayment that was paid as profits or it is a payment of principal that was previously repaid to the Ponzi scheme investor.

Using Mitigation Section

There must be a close relationship between the item of gross income that's originally recorded and the item of gross income that is being refunded and for which a deduction has been claimed.

One court's statement about this doctrine is helpful.

"The requirement that there be a nexus is inherent in the concept of "restoration" itself".

A doctor who benefitted from false insurance claims made by the professional corporation that paid the doctor's salary was not entitled to use the mitigation section

. . . the false claims had generated income for the professional corporation and not for the doctor, explaining that the item originally included in income was the doctor's salary, whereas the restitution payments derived from the fraudulent insurance claims were submitted by the corporation.

The Ponzi Scheme Clawback & "Same Circumstances"

Had it not been for the ponzi scheme investment, there would be no tax on, or reporting and payment of, the income that is returned in a clawback.

- The ponzi investment and the clawback are directly related to each other from the "same circumstances".
- The clawbacks repayment certainly seems to be a direct result of the same circumstances and the same Ponzi scheme that caused the clawback victim to report income in the first place.

The Ponzi Scheme Clawback & "Same Circumstances"

. . . As we will see the Internal Revenue Service does not believe the clawback of profits is deductible as a theft loss.

Instead, the service provides almost identical treatment to these clawbacks as ordinary loss deductions because they are "non-theft investment losses".

Repayment because lack of unrestricted right established

- If the taxpayer in the past should have never included the funds in income
- or if the taxpayer included the income under an absolute right and makes the repayment for reasons other than a determination that no right existed the mitigation section **will not** apply.

A judicial determination adverse to the taxpayer is not a prerequisite to a conclusion that the repayment is involuntary, but the repayment must arise out of a determination that any claim pursued against the taxpayer would be resolved adversely to the taxpayer.

One case states that the "established" requirement is met under the following circumstances:

The general rule is that a good faith, non collusive settlement agreement entered into to terminate litigation will "establish" a liability to return income, thereby establishing a lack of an unrestricted right to income for purposes of section 1341.

- In *Barrett Case,* the taxpayer had included profit from the sale of stock options in one year and then, in a later year, the securities and exchange commission brought administrative proceedings against the taxpayer on the basis of alleged insider trading.
- The taxpayer settled the case without admitting liability and claimed that the settlement payment deserved section 1341 treatment.
- *Barrett* held that a settlement that was made at arm’s length and in good faith could satisfy the “establishment” requirement of section 1341

- *The Pike case*; a taxpayer bought and sold corporate stock in one year, after which an investigator found that the profit from said stock should have gone in the corporation and not the taxpayer.

- The taxpayer then paid the money to the corporation, without admitting that the profits belonged to the corporation, and avoiding controversy so that he did not suffer harm to his professional career.

The *Pike* court stated that, although “a judicial determination of liability is not required . . . It is necessary under section 1341 for a taxpayer to demonstrate at least the probable validity of the adverse claim to the funds repaid.”

Summary
The Clawback of Profits

- The Ponzi Scheme clawback of profits passes all of the tests of the Mitigation Section.
- The perpetrators promise extraordinary returns in almost every one of the many types of listed income “items”.
- The taxpayer believes he or she has the right to take the item into income and does so, paying tax on the income.
- The year in which the taxpayer pays the clawback will be a year in which the taxpayer will receive a deduction for the repayment and the successful trustee in a clawback will have established there was no right to the income.

The Safe Harbor

There was also a **revenue procedure** that outlined an easy administrative process to claim refunds from **direct ponzi losses only**. This was called the Safe Harbor.

The Safe Harbor is very meaningful for direct Ponzi scheme victims but not for the Clawback.

The Law on Direct Ponzi Losses

THEFT LOSS DEDUCTIONS

- The revenue ruling defined the word "theft" for tax purposes and held that a Ponzi scheme loss <u>was a theft loss</u> that resulted from a <u>"transaction entered into for profit"</u>. It was <u>not</u> a capital loss.

The Law on Direct Ponzi Losses

ORDINARY LOSS

- The revenue ruling clarified the benefits of a business oriented theft loss. The Ponzi scheme loss is an ordinary <u>deduction for losses incurred in a transaction entered into for profits.</u>

The Law on Direct Ponzi Losses

DEDUCTION IS NOT SUBJECT TO CERTAIN LIMITATIONS ON ITS USE

- As an ordinary loss, the ponzi theft loss is not subject to the limits on personal deductions or the limits on itemized deductions.

The Law on Direct Ponzi Losses

DEDUCTIBLE IN YEAR OF DISCOVERY

- The theft loss is deductible in the year the loss is discovered.

AMOUNT OF THEFT LOSS IN A PONZI SCHEME

Loss Carries Over & Carries Back

The last critically important IRS advice is that operating losses, arising from a theft loss, could be carried forward 20 year and carried back for 3 years. This is different from the typical loss carryback from a transaction entered into for profit or a business deduction, which is 2 years.

In arriving at this conclusion the IRS also ruled that the ponzi victim’s investment was like a sole “proprietorship” and was entitled to the loss carryback as such.

The I.R.S. FAQ

- **The FAQ considered** only the tax treatment of the clawback of Ponzi Scheme ("profits"), upon which taxes have been paid.

- **The FAQ does not consider** the treatment of the clawback of an investor's principal investment.

F.A.Q. Directly states that the F.A.Q. Is dealing with "repayments of amounts previously reported as income from a Ponzi Scheme*".*

According to the F.A.Q.

The profits returned in a clawback are deductible as ordinary losses incurred in a transaction entered into for profit, but **not as theft losses**.

The I.R.S. FAQ

- It is clear that though clawback repayments of amounts previously reported as income from a Ponzi Scheme **are not additional theft loss deductions.**

Instead, they are repayments of claim of right income that **result in either a deduction as a non-theft investment loss, or a credit, whichever results in lower tax.**

The treatment of Clawback of invested capital (principal) withdrawn from a Ponzi Scheme

The I.R.S. FAQ

- The F.A.Q does not deal directly with a Clawback payment that pays to the trustee any original principal paid in to the Ponzi Scheme and has been withdrawn from the scheme.
- This clawback payment represents the investor's principal investment that is lost at a later point in time than the discovery of the theft.

The I.R.S. FAQ

- The F.A.Q. directly relates only to the Clawback of Ponzi Scheme income. However, often a settlement may include a substantial portion of the Clawback that represents the loss of investor principal.
- The F.A.Q. did not publish any materials on the tax treatment of the Clawback of principal.

Settlement Agreement

Any settlement agreement that is being reached in a Ponzi Scheme should include . . .

1. Language to clarify the item being clawed back, the amount of the Clawback and other tax issues.
2. Tax counsel prior to finalization should review settlement agreements involving a Clawback.

Chief Counsel's office of IRS

- Advised that the IRS position was to treat Ponzi Scheme <u>principal losses that result from a Clawback, in the same manner as the principal losses suffered by original investors.</u>
  - (i.e., those victims who invested principal and lost their principal funds when the Ponzi scheme was bankrupted).

The IRS position is to permit the loss of principal in a Ponzi Scheme as a theft loss whether it is paid directly or as a result of a Clawback.

The I.R.S. FAQ

- The F.A.Q. ruled that the Clawback of **income** was entitled to be treated as a loss resulting from the transaction and the IRS has ruled that the loss of principal is unlike the loss of profits because there is no "repayment of income", such as we had in the Clawback of profits.

Ponzi losses of principal and profits are both treated as ordinary losses.

- Loss of principal, whether it be lost as part of the direct Ponzi Scheme loss or whether it be lost as a result of a clawback that forces the taxpayer to replace principal previously withdrawn, are both treated identically.
- Losses are both incurred directly as a result of investing in a Ponzi Scheme.

TIME OF DISCOVERY

The Theft Loss & The Clawback of Principal

Time of Discovery

100% of the lost Principal is deductible.

The theft loss resulting from a Ponzi Scheme is permitted as an ordinary loss, the taxpayer is permitted to use the rules that permit deductions for net operating loss carry overs and carry backs to the year of the payment.

The Mitigation Section

A section of the internal revenue code that corrects an injustice in the tax law.

- This injustice occurs if the profits being returned in the clawback are deducted in a year when they were of little value because the tax rates were low in the year of payment; and yet the income that is paid back was earned in a year in which the taxes were high.

The Mitigation Section

The tax value of clawed back profits may be calculated as the higher of the tax value of the deduction in the year the Clawback is paid or the value of the deduction if one assumes that the profits that were repaid as a result of the Clawback; should never have been taxed in the year they were taxed in the first place.

Profits

- The Clawback of profits is not a theft loss. It is an ordinary loss from a transaction entered into for profit, and the losses of which can be carried back for two years and forward for twenty (20) years as a general rule.
- The value of this Clawback is entitled to be calculated under tax rules that maximize the Clawback's tax value whether (i) it was deductible in the year it was paid; or (ii) excluded as income in the year it was first considered as taxable income.

Principal

The Clawback of principal is deductible as a theft loss. It is an ordinary loss, deductible only in the year of discovery. It will have a three (3) year loss carryback and twenty (20) years carry forward.

The Safe Harbor & The Clawback

- The safe harbor has strict standards and requires taxpayers to waive certain rights. In those cases where a Ponzi scheme perpetrator does fit in the safe harbor, the loss from that particular Ponzi scheme may be deducted directly with little interference at the administrative level.
- In the first year of loss, the taxpayer agrees to deduct only 95% of the total loss.

The Safe Harbor & The Clawback

- The safe harbor has ruled that the safe harbor is <u>not</u> available for losses of either principal or profits resulting from claw backs. Since this is an administrative ruling the IRS can write the rules and one must comply exactly or the administrative grace of the safe harbor does not apply.

Seminar Outline

I. Review of Direct Ponzi Scheme Losses

A. Theft Definition

B. Privity

C. Character of Deduction

D. Carryback

E. Limitations

F. Amount of Deduction

(i) Basis

(ii) Year of Deduction

(iii) Amount Year 1 – Prospect of Recovery

Seminar Outline

II. Claw Backs

A. Comparative Chart

B. Profits *vs.* Principal

C. Carry Backs and Carry Overs

Seminar Outline

III. Mitigation

A. Claim of Right
B. Item of Income / Inventory
C. Right Claim of Wrong Exception
D. Entitlement to Deduction – Same Circumstances
E. “Established” No Unrestricted Right

Seminar Outline

IV. Ponzi Loss – Summarize

A. Not Claw Back Formula

V. Claw Back – Tax Profits

A. F.A.Q.

B. Not Theft Loss – “Not Theft”
“Trader Business” Type Deduction

C. 2 Year Loss

<u>Seminar Outline</u>

VII. Summary

VIII. Safe Harbor

VIII. Net Operating Losses

The Safe Harbor does not apply to Clawbacks

The Safe Harbor has ruled that . . .

The Safe Harbor is not available for losses of either PRINCIPAL or PROFITS resulting from Clawbacks.

Net Operating Loss Rules

To reap the most value from the Clawback;

- Know the tax situation of the Ponzi Clawback victim for many years in the past.
  - The Mitigation section allows the taxpayer to go back to the year the clawed back profits were earned and then carryback losses from that original year to previous years for purposes of a claim for refund.

If the Mitigation Section is applied . . . .

A deduction is not taken in the year of payment for any of the repaid funds; other than as a result of a loss carry forward resulting from the mitigation calculation.

Adjustments to a liability of previous year

In recomposing the tax liability for the year in which the income item was included under the claim of right doctrine, the taxpayer must take into account any redeterminations, deficiencies, credits, and refunds attributable to that year, in addition to the tax liability shown on the return for that previous year.

Net Operating Loss arising in previous year of inclusion

- If reducing gross income for the previous year in which the income item was included under the claim of right doctrine generates a net operating loss for that year.
- The net operating loss for the previous year is carried back under the usual rules, and the decrease in tax is not only the decrease in tax for the previous year of inclusion but also for all the other previous years to which the resulting net operating loss is carried.
- Any remaining Net Operating Loss is carried forward under the usual rules.

Maximizing the Value of Deductions.

All of taxpayer's Clawback losses from the "Ponzi Scheme" must be accounted for. This includes . . .

1) all of the income or "profit" paid upon which the taxpayer has paid taxes (**the "profit"**) and
2) the principal invested for the year of the deduction in the ponzi scheme (**the "principal"**).

For purposes of filing the year. We will need to differentiate precisely between what is a loss of principal and what is a repayment of profits.

The I.R.S. Distinction

It is important to note that the IRS has made a distinction between. . .

a) losses of a Clawback that is considered to be a “repayment” of profits earned in a Ponzi Scheme; and
b) losses that result from invested principal that is lost as a result of a Ponzi Scheme Clawback.

Phantom Income

The typical victim in a Ponzi Scheme can have a loss of both principal and a loss of reported profits that were “reinvested” in the Ponzi Scheme and never distributed to the Ponzi victim, (“phantom income”).

The victim for tax purposes has reported this phantom income and taxes were paid.

Phantom Income

The direct loss in a Ponzi Scheme of "phantom income" and "invested principal" are both considered to be an ordinary income loss that resulted from the theft that had occurred in a transaction entered into for profit.

This results in an ordinary income deduction.

The Clawback Deduction

Clawbacks, that require a successful investor to pay back profits, upon which taxes have been paid, are not treated as theft loss deductions by the I.R.S. nevertheless these Clawbacks are treated as ordinary losses.

- – A Clawback of principal is considered a theft loss deduction from a transaction entered into for profit.

Not Considered Theft Losses

A Clawback of profits is treated as a "repayment" of funds that result in an ordinary loss because the Ponzi Scheme is a transaction entered into for profit.

An Ordinary Loss

The Clawback of profits is treated as an ordinary loss because of the fact that investing in a Ponzi Scheme means an investor has lost their profits in a “business like” investment suffered by a sole proprietor.

- Those losses are still treated as an ordinary loss but not considered to be theft losses.

Principal Investment

The amount of the principal investment in the Ponzi Scheme, that has been clawed-back, is not a “repayment of income”.

- A principal payment made in a Clawback is considered the same as a direct loss of the principal lost in a Ponzi Scheme.

Principal Investment

- The loss of principal in the Ponzi investment as a result of a Clawback receives the same theft loss treatment that is available to direct losses of principal in the Ponzi Scheme.
  - Either way, the Service seems to have come to the opinion that both types of Clawback losses are considered to be <u>ordinary losses.</u>

Loss Carry Back Rules

Rules differ between the two types of ordinary loss. The business loss has a two (2) year carry back period while the <u>theft loss</u> carry back period extends for three (3) years.

- In the event that there were significant taxable earnings in 2008 from the Ponzi Scheme, this may become important.

Proper Tax Planning

Because these Clawbacks are granted under two separate principals of law, the lost amount of profits and principal must be carefully defined and properly claimed as a deduction or confusion will reign with the IRS.

Value can be lost without good professional advice.

Richard S. Lehman, Esq.

TAX ATTORNEY AT LAW
6018 S.W. 18th Street, Suite C-1
Boca Raton, FL 33433
Tel: 561-368-1113 • **Fax:** 561-368-1349
www.LehmanTaxLaw.com