

**California (Los Angeles)**

James S. Rigby ABV, ASA  
213.362.9991

Erich Z. Sylvester JD., ASA  
213.362.9991

**California (Oakland)**

John J. Mayerhofer  
FACHE  
510.531.2943

**California (Silicon Valley)**

Robert T. Lanz  
408.777.2914

**Florida (Tampa)**

Michael J. Mard ABV, ASA  
813.985.2232

Steven Hyden ASA  
813.985.2232

**Florida (Ft. Lauderdale)**

Michael A. Crain ABV, ASA, CFE  
954.382.2201

**Georgia (Atlanta)**

James R. Hitchner ABV, ASA  
404.873.6633

**Illinois (Chicago)**

Michael J. Mattson  
773.769.3045

**Iowa (Des Moines)**

Terry J. Allen ABV, ASA  
515.953.4498

**Massachusetts (Boston)**

Stephen J. Bravo ABV, ASA  
508.872.6060

**Missouri (Kansas City)**

Terry J. Allen ABV, ASA  
816.373.3340

**Missouri (St. Louis)**

Ralph Ostermueller ABV, ASA  
314.965.5921

**Montana (Great Falls)**

John R. Gilbert ABV, ASA  
406.453.1800

Please contact us via email:

[info@fvginternational.com](mailto:info@fvginternational.com)

## Tax Valuation E-Flash

### Okerlund et al v. United States, United States Court of Appeals for the Federal Circuit, April 9, 2004

The Court of Appeals for the Federal Circuit has determined that the Court of Federal Claims properly dealt with subsequent events and risk associated with a stock redemption agreement in valuing shares gifted prior to death.

The Court of Federal Claims valued the non-voting stock of SSE gifted by Marvin Schwan at December 31, 1992. Mr. Schwan died unexpectedly on May 9, 1993 and in accordance with his

On appeal, the taxpayers contended that in the December 31, 1992, valuation the Court of Federal Claims failed to consider SSE's actual earnings results in 1993 and 1994.

estate plan, a charitable foundation received two-thirds of the outstanding SSE stock. SSE redeemed the foundation's shares pursuant to a February 4, 1993, redemption agreement.

On appeal, the taxpayers contended that in the December 31, 1992, valuation the Court of Federal Claims failed to consider SSE's actual earnings results in 1993 and 1994. They further contended that the potential triggering of the redemption agreement was not properly taken into account.

The 1992 valuation report of the taxpayers' expert discussed several risk factors for SSE, including, "(1) reliance on a home delivery route system; (2) thin management ranks; (3) reliance on a key management figure, Marvin Schwan; (4) the risk of food contamination; (5) the competitors' greater human resources; (6) SSE's inability to invest in a national advertising campaign, based on its lack of a nationally recognizable brand name and the demographics of its customer base; (7) less diversity in product offerings than the guideline companies; and (8) the relatively small size of SSE's Board of Directors."

[Click Here for Full Text of Cases](#)

## Services Offered:

- Corporate Transaction Services
- Tax Related Services
- International Valuations
- Employee Stock Ownership Plans
- Litigation Services
- Business Damage Analysis
- Financial Forensics
- Intellectual Property Services
- Financial Reporting (SFAS 141 & 142)
- SEC Review

For a complete listing of our services, please visit:

[www.fvginternational.com](http://www.fvginternational.com)



By the end of 1994, at least two of these risks had materialized: Marvin Schwan died and an outbreak of salmonella in October 1994 led to a product recall, a plant closure, and a class action lawsuit. The taxpayers argued that the actual occurrence of these events meant that the IRS

The taxpayers also challenged the IRS expert's assertion that considering actual 1993 and 1994 revenues when determining a 1992 valuation would have been "inappropriate appraisal practice."

appraiser, "...underestimated their *ex ante* probability in his 1992 valuation..." The taxpayers also challenged the IRS expert's assertion that considering actual 1993 and 1994 revenues when determining a 1992 valuation would have been "inappropriate appraisal practice."

As to the 1993 and 1994 events and the market approach, the Court concluded, "*Valuation must always be made as of the donative date relying primarily on ex ante information; ex post data should be used sparingly. As with all evidentiary submissions, however, the critical question is relevance. The closer the profile of the later-date company to that of the valuation-date company, the more likely ex post data are to be relevant (though even in some cases, they may not be). The greater the significance of exogenous or unforeseen events occurring between the valuation date and the date of the proffered evidence, the less likely ex post evidence is to be relevant--even as a sanity check on the assumptions underlying a valuation model.*"

As to the redemption agreement being triggered, the Court of Appeals agreed with the Court of Federal Claims conclusion that, "...in 1992 the estate plan provisions, although in place, had neither been triggered nor anticipated in the immediate future. In other words, they were prospective concerns rather than actual concerns as of the 1992 valuation date."