

AN ALERT FROM THE BDO COMPENSATION &amp; BENEFITS TAX PRACTICE

# BDO KNOWS: COMPENSATION & BENEFITS



## ► SUBJECT

## SECOND EXTENSION GRANTED TO GOVERNMENT BY THE SUPREME COURT TO FILE CERTIORARI PETITION IN "QUALITY STORES"

## ► SUMMARY

The United States Supreme Court granted the government another extension from May 3 to May 31 to file a petition for certiorari in *United States v. Quality Stores Inc.*, 693 F.3d 605 (6th Cir. 2012). The original deadline of April 4, 2013, had been previously extended to May 3, 2013.

While it is unclear whether the Court will decide to hear this case, the extensions obviously push back the timeline for final resolution of the issue. Based on the new timeline, the Court is not likely to decide whether to grant certiorari until the last quarter of 2013 and, if accepted, arguments would take place late in 2013 with a decision in mid-2014.

Employers that paid severance might be entitled to a refund if the decision in *Quality Stores* is upheld as long as the statute of limitations has not closed on the payroll tax returns that reported the severance payments. In order to hold open the employer's ability to file a claim for refund when the issues in the case are finally resolved, a protective claim on Form 941-X, Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund, should be filed just prior to the close of the statute of limitations. The statute of limitations will close on April 15, 2014, for 2010 payroll tax returns. Action should have already been taken in order to keep the statute open for years prior to 2010.

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If *Quality Stores* is resolved in favor of the taxpayer, the employer would perfect the protective claim (that is filled with minimal information) by furnishing the actual payroll data, including the amounts of severance paid, along with employee consents to have their FICA wages adjusted and taxes refunded.

## ▶ BACKGROUND

The Internal Revenue Service estimates that the issue affects more than \$1 billion in contested tax liability.

In *Quality Stores*, the United States Court of Appeals for the Sixth Circuit held that payments made by a company to employees as part of a severance program were not subject to Federal Insurance Contributions Act taxes.

The court's decision was in conflict with the decision of the United States Court of Appeals for the Federal Circuit in *CSX Corp. v. United States*, 518 F.3d 1328 (Fed. Cir. 2008), that the payments were dismissal pay subject to tax.

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