

January 2006

Tax Consequences of Shareholder Guarantees: There's Still Hay in Tulia Feedlot

Merle F. Wilberding

Follow this and additional works at: <https://scholarship.law.uwyo.edu/wlr>

Recommended Citation

Wilberding, Merle F. (2006) "Tax Consequences of Shareholder Guarantees: There's Still Hay in Tulia Feedlot," *Wyoming Law Review*. Vol. 6: No. 1, Article 6.

Available at: <https://scholarship.law.uwyo.edu/wlr/vol6/iss1/6>

This Article is brought to you for free and open access by the UW College of Law Reviews at Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

**TAX CONSEQUENCES OF
SHAREHOLDER GUARANTEES:
THERE'S STILL HAY IN *TULIA*
*FEEDLOT***

*Merle F. Wilberding**

Out in Swisher County in the Texas Panhandle lies a heavy concentration of feedlot operations, where the 45,000 head of feeder cattle in just one feedlot far outnumber the whole county's population of 8,378 people.¹ One of these feedlot operations is conducted by Tulia Feedlot, Inc.² This feedlot operation is located in the South Tule Draw of the Red River Basin,³ about five miles south of Tulia, the county seat of Swisher County. From that feedlot operation arose a tax case, *Tulia Feedlot, Incorporated v. United States* ("*Tulia I*"),⁴ which continues to provide a platform for the Internal Revenue Service to attack the structure and operation of shareholders' guaranteeing the obligations of privately-owned corporations.⁵ Yet, properly

* Member, Coolidge, Wall, Womsley & Lombard Co., LPA, Dayton, Ohio. B.A., St. Mary's University (Minnesota) 1966; J.D., University of Notre Dame, 1969; LL.M (Taxation), George Washington University, 1972; M.B.A., University of Dayton, 1975. Member, bars of Ohio, Iowa, and District of Columbia.

1. Total population of Swisher County, Texas, based on census for year 2000. U.S. Census Bureau, Fact Finder. <http://quickfacts.census.gov/qfd/states/48/48437.html> (last visited May 11, 2004).

2. The Tulia Feedlot operation spreads over 225 acres. Cattle are fed two or three times a day and will eat about twenty-two to twenty-eight pounds per day. Letter from John Van Pelt, Manager of Tulia Feedlot, Inc., to Merle F. Wilberding (April 4, 2004) (on file with the author).

3. Red River Authority of Texas, <http://www.rra.dst.tx.us/misc/aboutbasin.cfm> (last visited August 25, 2004). The Red River Basin has a total drainage area of 94,450 square miles, of which 24,463 square miles lie within Texas. *Id.* (The remaining drainage areas are in Oklahoma, New Mexico, Arkansas and Louisiana where it discharges into the Mississippi River.).

4. *Tulia Feedlot Inc. v. U.S.*, 513 F.2d 800 (5th Cir. 1975), *cert. denied*, 423 U.S. 947 (1975).

5. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 82-11-005 (Nov. 27, 1981); I.R.S. Priv. Ltr. Rul. 86-10-009 (Nov. 14, 1985); I.R.S. Priv. Ltr. Rul. 86-10-010 (Nov. 14, 1985).

implemented *Tulia I* and its progeny⁶ can provide taxpayers a structure and procedure for compensating shareholders for the risk they assume in guaranteeing corporate obligations.

For most privately-owned corporations, shareholder guarantees of corporate obligations are a way of life, and shareholder guarantees are often an integral part of the ability of many corporations to conduct business. More attention needs to be given to the corporate and tax aspects of shareholder guarantees to insure that shareholders are properly compensated for the risks they assume and to insure that corporations are properly entitled to deductions as ordinary and necessary business expenses under Section 162 of the Internal Revenue Code (the "Code").⁷

Tulia Feedlot, Inc. was incorporated in the State of Texas on March 29, 1963, with its business address in Tulia, Texas.⁸ Its purpose was to conduct cattle feeding operations which it established on land located about five miles south of the town of Tulia, Texas. In 1967, the Red River Authority of Texas created the Tulia Feedlot Reservoir by impounding the waters of the South Tule Draw with an earthen dam seventeen feet tall, with a crest length of 2,190 feet.⁹ Tulia Feedlot was one of many feedlot operations which were established in the 1950s and 1960s to take advantage of the abundant grain crops and other agricultural resources in that county.¹⁰ From its inception, the Tulia Feedlot operation grew rapidly and by 1970 it had reached its capacity of 28,000 head of cattle.¹¹

The nature of its operations was twofold. Primarily, it fed cattle owned by its customers.¹² To keep the feedlot running at maximum efficiency, it also purchased and fed cattle for its own account.¹³ Feeding cattle for its own account required large amounts of credit to carry the acquisition and feeding costs of this part of the operation.¹⁴ To satisfy the financial in-

6. See, e.g., *Tulia Feedlot, Inc. v. United States*, 231 Ct. Cl. 971 (1982); *Tulia Feedlot, Inc. v. United States*, 3 Cl. Ct. 364 (1983); *Olton Feed Yard, Inc. v. United States*, 592 F.2d 272 (5th Cir. 1979); *Stewart v. Comm'r*, 84 TCM (CCH) 175 (2002); *Seminole Thriftway, Inc. v. United States*, 42 Fed. Cl. 584 (1998); *Harris v. United States*, 902 F.2d 439 (5th Cir. 1990); *Sleiman v. Comm'r*, 187 F.3d 1352 (11th Cir. 1999); *Harrison and Sons, Inc. v. United States*, 86 TCM (CCH) 240 (2003).

7. I.R.C. § 162 (2005).

8. The articles of incorporation were filed on March 29, 1963. This information was found in the Public Records in the office of the Texas Secretary of State, available in LEXISNEXIS Library (last visited March 29, 2004).

9. Red River Authority of Texas, http://www.rra.dst.tx.us/survice_w/swisher/tulia_feedlot_reservoir.cfm (last visited March 27, 2004).

10. Red River Authority of Texas, http://www.rra.dst.tx.us/c_t/history/SWISHER/dfault1.cfm (last visited March 27, 2004).

11. *Tulia Feedlot Inc. v. United States*, 513 F.2d 800, 802 (5th Cir. 1975).

12. *Id.* at 803.

13. *Id.*

14. *Id.*

stitutions, the corporation pledged the real estate, the cattle, and the inventory feed as collateral. In addition to that collateral, the financial institution also required personal guarantees of its shareholders.¹⁵ Twelve principal shareholders of Tulia Feedlot, Inc. owned ninety-nine percent of the outstanding stock of the corporation.¹⁶ From the outset of the borrowings, the personal guarantees of the corporate obligations by the principal shareholders was in proportion to their stock holdings, with a specific ceiling to each of their guarantees.¹⁷ This ceiling was set initially at \$5,000 per principal shareholder, but gradually this amount increased to \$150,000 per principal shareholder.¹⁸

The guarantees were made without any monetary recognition of the risk attendant thereto. When the ceiling was raised from \$125,000 to \$150,000 per guarantor, the board of directors voted at a regular meeting on July 14, 1970, to compensate the shareholder-guarantors an "annual fee equal to three percent of the amount guaranteed by him."¹⁹ Each of the twelve shareholder-guarantors was also a director of the corporation and received \$2,400 per year as a director fee.²⁰ All together, the cumulative guarantee fees and director fees equaled \$82,200 for that tax year, generating a loss for the corporation for the fiscal year ending August 31, 1970, in the amount of \$6,309.07.²¹ The taxpayer deducted those guarantee fee payments, but the Commissioner disallowed the deductions, concluding that these payments constituted a distribution of property to its shareholders under section 316²² of the Code and that these payments were not an ordinary and necessary business expense under section 162 of the Code.²³

15. *Id.*

16. *Id.* at 802-803. Eleven of these shareholders owned 280 shares each. The twelfth shareholder owned his 280 shares with his son; however, for purposes of this discussion, the combined holdings of the father and son will be considered as one principal shareholder. The holdings of the twelve principal shareholders equaled 3,360. In addition, there were twenty-two shares owned by employees of the corporation. *Id.*

17. *Id.* at 803.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. I.R.C. § 316 (2005). Section 316 of the Code provides in relevant part that "the term 'dividend' means any distribution of property made by a corporation to its shareholders—(1) out of its earnings and profits accumulated after February 28, 1913, or (2) out of its earnings and profits of the taxable year . . . without regard to the amount of the earnings and profits at the time the distribution was made. *Id.* See also Daniel M. Schneider, *Characterization and Assignment of Corporate and Shareholder Income*, 14 N. ILL. L. REV. 133 (1994).

23. *Tulia*, 513 F.2d at 803-804. See *supra* note 7. Section 162 of the Code provides in relevant part that a taxpayer may deduct "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including – (1) a reasonable allowance for salaries or other compensation for personal services actually rendered." *Id.*

When the Commissioner asserted the deficiency, the taxpayer paid the assessment, immediately filed for a refund, and then brought suit in the United States District Court located in nearby Lubbock, Texas.²⁴ Since the Commissioner's disallowance of these claimed deductions carried with it the presumption of correctness²⁵ the taxpayer had the burden to prove not only that the Commissioner was wrong but also to establish the underlying facts supporting the deduction.²⁶ At trial there was evidence that the guarantee fee was approved before the taxpayer had determined its own profit or loss for the year.²⁷ More importantly, there was testimony that the bank would not have made the loan without the guarantees and that the guarantors would not make the guarantees without the payment of a fee.²⁸ Based on that testimony, the district court ruled the fee was properly deducted.²⁹ On appeal, the Fifth Circuit held that the district court's findings were "clearly erroneous"³⁰ because the taxpayer failed to introduce any evidence as to the "market price for guarantees for corporations of its type and size."³¹ Not content with setting that as a prerequisite for deductibility, the court went on to assert that the taxpayer failed to present any evidence "as to the possibility and likely cost of obtaining these guarantees in an arm's length transaction in the market."³² Setting that as the bar for deductibility enabled the Fifth Circuit

24. *Tulia Feedlot, Inc. v. United States*, 366 F. Supp. 1089 (N.D. Tex 1973), *rev'd*, 513 F.2d 800 (5th Cir. 1975), *cert. denied*, 423 U.S. 947 (1975).

25. *See, e.g.*, *Welch v. Helvering*, 290 U.S. 111 (1933).

26. *See, e.g.*, *Lenox Clothes Shops v. Comm'r*, 139 F.2d 56 (6th Cir. 1943).

27. The board of directors waited until eleven months of the tax year had passed before passing a resolution to pay a three percent fee on the entire credit line for the entire year. *Tulia Feedlot, Inc. v. United States*, 366 F. Supp. 1089 (N.D. Tex 1973), *rev'd*, 513 F.2d 800 (5th Cir. 1975), *cert. denied*, 423 U.S. 947 (1975). It appears that it was this hindsight declaration that may well have subjected the taxpayer to intense scrutiny by the Internal Revenue Service. Phrased another way, the silent suggestion is that if the corporation had been losing money after eleven months, it would not have paid any guarantee fee. So, the court may well have been influenced by this fact in concluding that this guarantee fee was a disguised dividend. *See also infra* note 76 and accompanying text.

28. *Id.* at 1092.

29. *Id.*

30. Under the "clearly erroneous" standard of review, "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Fed. R. Civ. P. 52(a). In turn, the term "standard of review" means the extent to which a reviewing court will measure the findings of fact or conclusions of law that a trial court makes during the initial hearing. Richard H. W. Maloy, "Standards of Review" - *Just a Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603, 604 (2000). In *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), the Supreme Court ruled that "a finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court, on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *See also Icicle Seafoods v. Worthington*, 475 U.S. 709 (1986).

31. *Tulia Feedlot Inc. v. United States*, 513 F.2d 800, 806 (5th Cir. 1975).

32. *Id.* It is perhaps this imposition that is the most far removed from the reality of the business world in terms of the practical aspects of what it takes to obtain a bank loan. In the real world, a bank which concludes that the corporate borrower does not have the financial statement to support the loan, will look for other financial support for the loan. If there is a corporate parent, it will request the parent corporation to guarantee the loan. But far more

to concluded tersely that the taxpayer failed to prove the essential elements of its case and that, therefore, the district court's findings were clearly erroneous.³³ The Supreme Court denied certiorari.³⁴

Tulia I was followed by another Texas cattle feedlot case, *Olton Feed Yard v. United States*.³⁵ In this case, the taxpayer was a corporation organized in 1969 and headquartered in Olton, Texas.³⁶ The stock was issued to approximately twenty individuals, five of whom were directors who owned about one-half of the outstanding stock.³⁷ To construct the feed yard facilities, the corporation set up a line of credit with the Production Credit Association of Plainview (the "PCA") that required each of the shareholders to sign a guarantee agreement in proportion to his stock ownership in the corporation.³⁸ When the feedlot expanded its operation to include the construction of grain elevators so that it could purchase and store large amounts of grain, the corporation went back to the PCA for a line of credit in the amount of \$3,300,000, the estimated cost for grain sufficient to fill the elevators to seventy-five percent of their capacity.³⁹ When this line of credit was set up, the management called a shareholders' meeting to seek approval and to tell them that "a reasonable fee, the amount of which would be determined at a later date, would be paid to them for their guarantees."⁴⁰ Based on that representation, all shareholders signed the guarantee agreements, although most (but not all) shareholders testified that they probably would have signed them without the promise of a fee in order to protect or enhance their investment in the corporation.⁴¹

The board of directors in *Olton Feed Yard* did not set the amount of the guarantee fee until August, 1974, almost one year after the guarantees were provided.⁴² The board, after checking with representatives of other feedlots, bankers, and lenders as to an appropriate guarantee fee, set the fee at 3 ¾ % of the entire line of credit (\$3,300,000), even though the outstanding loan balance never exceeded \$1,540,000.⁴³ Accordingly, the corporation paid out \$123,750 in guarantee fees and deducted the fees as ordinary

often, the bank looks to, expects, and requires that one or more of the shareholders guarantee the loan of the corporation.

33. *Id.*

34. *Tulia Feedlot Inc. v. United States*, 423 U.S. 947 (1975).

35. *Olton Feed Yard v. United States*, 592 F.2d 272 (5th Cir. 1979).

36. *Id.* at 274.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

and necessary expenses under section 162 of the Code.⁴⁴ The crucial question was whether these fees were “necessary” in light of the evidence that the shareholders signed the guarantees almost a year in advance of knowing the amount of the fee and the testimony from most shareholders that they would have personally guaranteed the loans without any fee in order to protect their investment. The jury found that these fees were paid *pro rata* based on each shareholder’s stockholdings and, therefore, the fees were, in effect, dividends, and not deductible by the corporation.⁴⁵

The taxpayer appealed to the Fifth Circuit, asserting that the evidence did not support the verdict. In reviewing the case, the appellate court noted that whether a corporate distribution is a dividend or not is generally a question of fact,⁴⁶ and noted that with particular emphasis that the Commissioner of Internal Revenue’s determination carries with it a presumption of correctness, forcing the taxpayer to show by a preponderance of the evidence that the Commissioner’s determination is wrong.⁴⁷ The Fifth Circuit favorably quoted *Tulia I*, although it did note that there were some differences between the evidence in these two feedlot cases.⁴⁸ It concluded that there was ample evidence for the jury to conclude that these payments were indeed dividends.⁴⁹

Even while the *Olton Feed Yard* case was being appealed, the taxpayer from *Tulia I* was back in litigation on this same issue. For fiscal years 1976 and 1977, the taxpayer in *Tulia I* deducted guarantor fees of \$26,140.50 and \$33,004.10, respectively, relating to a line of credit with the PCA.⁵⁰ The Internal Revenue Service again disallowed the deductions, determined that they constituted dividends, and issued statutory notices of deficiency.⁵¹ Again, the taxpayer paid the deficiency, and sought a refund.

44. See *supra* note 7. Section 162 of the Code provides in relevant part that a taxpayer may deduct “all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.”

45. *Olton*, 592 F.2d at 275.

46. *Hardin v. United States*, 461 F.2d 865, 872 (5th Cir. 1972).

47. *Helvering v. Taylor*, 293 U.S. 507 (1935); *Welch v. Helvering*, 290 U.S. 111 (1933).

48. In *Tulia I* there was no evidence that the amount of the fees were reasonable, while in *Olton Feed Yard* the government did not challenge the reasonableness of the payments as guarantor’s fees. *Olton*, 592 F.2d at 275. The court went on to note that in *Olton Feed Yard* it appeared that the decision to pay and the amount to pay was not determined until the eleventh month of the fiscal year, after the corporation realized that it had substantial taxable income. *Id.* at 276. In making the distinction, the court again favorably quoted *Tulia I* to the effect that the presence of reasonableness of the fee is *not* dispositive, although the absence of such evidence would be dispositive. *Id.*; *Tulia Feedlot v. United States*, 513 F.2d 800, 806 (5th Cir. 1975).

49. *Olton*, 592 F.2d at 276.

50. *Tulia Feedlot, Inc. v. United States*, 3 Cl. Ct. 364, 83-2 U.S.T.C. ¶ 9516 (US Cl. Ct. 1983).

51. Once the Internal Revenue Service issues its statutory notice of deficiency, the taxpayer has ninety days in which to submit a petition to the Tax Court or the assessment becomes fixed. I.R.C § 6213(a) (2005). The taxpayer’s alternative is to pay the tax, make a

However, instead of suing for a refund in the United States District Court,⁵² the taxpayer sued for a refund in the United States Court of Claims. The taxpayer was met with a motion for summary judgment by the Commissioner, based on a theory of collateral estoppel since, in the Commissioner's view, this case had been decided adversely to the taxpayer in *Tulia I*.⁵³ However, in an order ("*Tulia II*") dated September 10, 1982,⁵⁴ the Court of Claims found that there were significant and disputed facts in *Tulia II* that were different from the facts in *Tulia I*. Accordingly, the taxpayer deserved the opportunity to proceed with its case for refund.

Because of the statutory realignment of the judicial administration of claims against the United States,⁵⁵ the case known as *Tulia II* was transferred from the Court of Claims to the newly established Claims Court where the case became known as "*Tulia III*."⁵⁶ This time the taxpayer had different and better facts to support its argument. The Claims Court noted the following as significant differences in the facts present in *Tulia III* than the facts present in *Tulia I*:

claim for refund under Section 6511(a) of the Code within three years of the date of the tax return or within two years of the payment, whichever first expires. *Id.*

52. Once the taxpayer has made its claim for refund, it must wait at least six months to file a suit for refund, unless the Internal Revenue Service earlier rejects its claim, in which case it can immediately file. I.R.C. §§ 6532(a)(1), 7422(a) (2005). The taxpayer then has its choice as to whether to file its refund suit in the U.S. District Court pursuant to 28 U.S.C. 1346(a)(1) or to file in the U.S. Court of Federal Claims pursuant to 28 U.S.C. 1491(a)(1). *Id.*

53. As one author described this issue, "collateral estoppel should apply to as many issues as possible to eliminate repetitive litigation. On the other hand, the doctrine should be applied narrowly enough to ensure each party a fair hearing on all issues." Charles A. Heckman, *Collateral Estoppel as the Answer to Multiple Litigation Problems in Federal Tax Law: Another View of Sunnen and The Evergreens*, 19 CASE W. RES. L. REV. 230, 234 (1968). See also Commissioner v. Sunnen, 333 U.S. 591 (1948); *The Evergreens v. Nunan*, 141 F.2d 927 (2d Cir. 1944); *Tait v. Western Maryland Ry Co.*, 289 U.S. 620 (1933); *Limbach v. Hooven & Allison*, 466 U.S. 353 (1984); Note, *Collateral Estoppel: Loosening the Mutuality Rule in Tax Litigation*, 73 MICH. L. REV. 604 (1975).

54. *Tulia Feedlot, Inc. v. United States*, 231 Ct. Cl. 971 (1982).

55. Federal Courts Improvement Act of 1982, Pub. L. No. 96-164 at 403, 96 Stat. 25, 57-58. Under this statute, the Article III court known as the Court of Claims was abolished and much of its jurisdiction was transferred to the new United States Court of Appeals for the Federal Circuit. *Id.* Federal Judicial Center http://www.fjc.gov/history/home.nsf/page/coc_bdy (last visited May 12, 2004). That same statute created the "Claims Court" which was established as an Article I court. Federal Judicial Center, http://www.fjc.gov/history/home.nsf/page/cofc_bdy (last visited May 12, 2004). In 1992, the Claims Court was renamed the United States Court of Federal Claims. Federal Court Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992); WILSON COWEN, PHILIP NICHOLAS, JR., & MARION T. BENNETT, *THE UNITED STATES COURT OF CLAIMS – A HISTORY, PART II* (1978).

56. Because of that technicality, *Tulia II* was reduced to an order denying summary judgment. The order does not express new law, except for its express finding that the enforcement by the Internal Revenue Service of *Tulia I* would not be a matter of law, but indeed would be a case by case analysis of the facts to determine whether the guarantee fees paid out in any one case were ordinary and necessary business expenses or whether they were distributions to shareholders treated as dividends. 231 Ct. Cl. at 972-973. From time to time, *Tulia I*, *Tulia II*, and *Tulia III* will collectively be referred to as the "*Tulia Feedlot Cases*."

- The board of directors unsuccessfully sought loan sources that would not require individual guarantees, and were able to identify three banks in addition to the PCA.⁵⁷
- The board of directors unsuccessfully sought independent non-shareholder parties who would be willing and financially able to guarantee the corporation's loans from the PCA.⁵⁸
- The guarantor fees were based on the amounts of the guarantees and not on the amounts of stock owned by the guarantors.⁵⁹
- The guarantors were unwilling to provide the required guarantees unless they received guarantor fees of three percent and this was agreed to by the corporation.⁶⁰

On the basis of the evidence presented at trial in *Tulia III*, the Claims Court, although recognizing that transactions between a corporation and its shareholders are subject to special scrutiny,⁶¹ still concluded and found that the guarantor fees which the corporation paid to shareholders for fiscal years 1976 and 1977 were ordinary in the sense that they were of a known type and commonly made by persons in the type of business carried

57. All of these potential sources for loans informed the directors that no loan would be made to the corporation unless it was personally guaranteed in full by individuals having adequate financial resources to make good on the commitments (83-2 U.S.T.C. at 87,837).

58. The taxpayer did present evidence that it sought non-shareholders to act as guarantors. Clearly, this was an effort to address one complaint in *Tulia I* which seemed to suggest that taxpayers could find that type of person. *Tulia Feedlot Inc. v. United States*, 513 F.2d 800, 806 (5th Cir. 1975). See also *Jones v. Comm'r*, 19 TCM (CCH) 1561 (1960). This prescription by the Fifth Circuit in *Tulia I* is, in the author's view, a requirement that seems totally unrealistic in the corporate and financial world. Perhaps the biggest reason for the difficulty in finding such a person is, in the author's view, that the person would be subjected to potential liability for defaults when in all likelihood that person would not be in a position to control the actions of the borrower.

59. The eleven directors owned equal amounts of the corporation's stock. Eight of those directors guaranteed \$200,000 each. Two directors guaranteed only \$50,000, and the other director guaranteed \$150,000. 83-2 U.S.T.C. at 87838. Consequently, the court noted that the "guarantor fees were based on the amounts of the guarantees, and not on the amounts of stock owned by the guarantors. This discredits the defendant's argument that the guarantor fees were really dividends in disguise." *Id.*

60. There is little doubt that the taxpayer and its board of directors had approached this issue in 1976 and 1977 in a very different manner than it had during tax years 1970 and 1971 which were under review in *Tulia I*. Indeed, when the opinion in *Tulia I* was released by the Fifth Circuit on June 2, 1975, it certainly highlighted the evidentiary points that the taxpayer needed to address when it authorized new guarantor fees in August of 1976 and 1977, and seems like the corporation attempted to provide all of the evidence in 1976 and 1977 that the Fifth Circuit said was missing in *Tulia I*. 513 F. 2d at 805-806

61. See, e.g., *Dillin v. United States*, 433 F.2d 1097 (5th Cir. 1970).

on by the corporation, were necessary in the sense that they were appropriate to conduct its operations, and were reasonable in amount.⁶² Finally, the taxpayer had an acceptable structure for it to go forward with an on-going procedure for paying fees to guarantors of its corporate obligations.

How did the Internal Revenue Service react? It reacted like any tax practitioner would expect it to react. It issued several technical advice memoranda⁶³ that it used to narrow the scope of *Tulia III* and reinforce the narrow scope of *Tulia I* and *Olton Feed Yard*. In 1982, the Service gave a limited approval for guarantees fees paid only to shareholders guaranteeing the debt when their ownership was thirty-one percent of the outstanding stock.⁶⁴ Even at that, the Service withheld any ruling or guidance on the amount of guarantee fee that would be acceptable to the Service, ruling "that the fair market value of the guarantees in question is a factual issue . . . to be determined by a consideration of all of the facts and circumstances involved."⁶⁵

The Service followed this up in 1986 with two adverse technical memoranda. In the first,⁶⁶ the taxpayer corporation paid guarantee fees to its shareholders in proportion to their shareholdings and the fees were based on the outstanding line of credit.⁶⁷ In analyzing the applicable law, the Service relied heavily on *Tulia I* and *Olton Feed Yard*, and tended to ignore *Tulia II* and *Tulia III*.⁶⁸ The Service emphasized its perspective that the use of shareholder guarantees would seemingly be the result of "choices made by the shareholders as to how to capitalize and finance their corporation"⁶⁹ which, in turn, suggested that any guarantee was really "a means of protecting and enhancing the shareholders' investment."⁷⁰ It is apparent that this part of the analysis by the Service was rooted in its belief that shareholders would be

62. 83-2 U.S.T.C. at 837, 838. This was a very hard fought victory for the taxpayer. In *Tulia I*, the taxpayer took its suit for refund through the district court, the court of appeals, and an appeal for certiorari to the United States Supreme Court. *Tulia Feedlot, Inc. v. United States*, 366 F. Supp 1089 (N.D. Tex 1973), *rev'd*, 513 F.2d 800 (5th Cir. 1975), *cert. denied*, 423 U.S. 947 (1975). In *Tulia III*, the taxpayer first filed suit in the Court of Claims and there survived a motion for summary judgment. *Tulia Feedlot, Inc. v. United States*, 231 Ct. Cl. 971 (1982). The case was then transferred to the Claims Court where the taxpayer tried the case and this time was vindicated in its position. *Tulia Feedlot, Inc. v. United States*, 3 Cl. Ct. 364, 83-2 U.S.T.C. ¶ 9516 (US Cl. Ct. 1983).

63. I.R.S. Priv. Ltr. Rul. 82-11-005 (Nov. 27, 1981); I.R.S. Priv. Ltr. Rul. 86-10-009 (Nov. 14, 1985); I.R.S. Priv. Ltr. Rul. 86-10-010 (Nov. 14, 1985). See also Eli Gerver & Richard G. Freidin, *Shareholder Fees*, *The National Law Journal* (May 5, 1986).

64. I.R.S. Priv. Ltr. Rul. 82-10-005 (Nov. 27, 1981)

65. *Id.*

66. I.R.S. Priv. Ltr. Rul. 86-10-009 (Nov. 14, 1985).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

making a conscious decision not to borrow funds personally and then to contribute them to the corporation in order to finance their company's expansion.⁷¹

The restrictive interpretations by the Internal Revenue Service in these private letter rulings imposed a high evidentiary standard that was, arguably, outside the practical banking and finance world. If upheld, the position of the Service would take away the vitality of the *Tulia Feedlot* Cases. In short, the Service seemingly wanted to eviscerate *Tulia III* and let the theory of a deductible guarantee fee die from administrative starvation – or, to coin a phrase, to remove the hay from the *Tulia Feedlot* Cases.

It is not unusual for the Internal Revenue Service to demand adherence to requirements that seem beyond the ordinary and necessary conditions of the marketplace.⁷² So, too, in this case. The imposition by the Internal Revenue Service of the shareholder-guarantor requirements suggests that it will demand facts that are more surreal than real. For example, in Private Letter Ruling 8610009 and in Private Letter Ruling 8610010 the preconditions for deductibility demanded by the Internal Revenue Service are simply conditions that are virtually non-existent in the market place:

- Proof that taxpayer sought guarantees from non-shareholders.
- Proof that guarantee fees are common practice in taxpayer's industry.

71. *Id.* While that observation may be present in some instances, it ignores the practical realities of the financial world—a world in which banks and credit institutions insist as a matter of policy that shareholders must guarantee corporate borrowing if there is any concern about the independent credit support of the corporation. Telephone interview with Thomas E. Winning, President and Chief Executive Officer of First National Bank of Germantown, in Ohio (May 3, 2004).

72. “The qualification requirements will make it impossible or impractical for many estates to take advantage of the Section 2033A exclusion,” David L. Delicath, Comment, *Estate Planning Ramifications of the Taxpayer Relief Act of 1997: Nobody Said Anything About Simplification*, 33 LAND & WATER L. REV. 697, 703 n.69 (1998); “The Service’s response, however, appears to ignore the realities of the banking industry,” Michael J. Young, Note, *Levying on Joint Bank Accounts: A Ticking Bomb for the Non-delinquent Joint Account Holder*, 70 MINN. L. REV. 1308, 1343 n.192 (1986); “[It makes little sense to allow the] IRS Commissioner to require substantiation of deductibility when taxpayer is not required to account to his employer,” Adam L. Pomerantz, Comment, *The Physical Contact Standard: An Over-Restrictive Interpretation of the Home Office Deduction “Meeting or Dealing” Provision*, 34 AM. L. REV. 1301, 1302 n.5 (1985); “The large number of such fuel transactions per year makes reporting them on tax returns administratively burdensome and for all practical purposes makes the reporting requirement impossible to enforce,” Amy C. Christian, *Designing a Carbon Tax: The Introduction of the Carbon-Burned Tax*, 10 U.C.L.A. J. ENV. L. & POL. 221, 246 (1992). *Cf.*, Laura Sager & Stephen Cohen, *How the Income Tax Undermines Civil Rights Law*, 73 S. CAL. L. REV. 1075, 1096 (2000).

- Proof that the guarantee rate reasonably approximates the accepted guarantee rate in the industry.⁷³

Yet, given the message in these technical memoranda, the taxpayer is pressured to generate evidence on each of these points if for nothing but to take away those arguments from the Internal Revenue Service. This forces the taxpayer to write letters to a number of lending institutions seeking loans without guarantees, then to write letters to unrelated corporations and individuals requesting them to guarantee the loans even though they have no interest in the borrowing entity, and finally, to find a witness who will be able to testify that a guarantee fee is appropriate in the taxpayer's industry, however that industry may be defined. Those demands by the Internal Revenue Service seem to be artificial barriers for taxpayers that do not reflect the lending practices in the commercial world. The technical memoranda issued by the Internal Revenue Service should continue to be challenged by taxpayers with arguments (and evidence if necessary) that those are the wrong standards to be applied. Indeed, in some instances, they seem to require the taxpayer to prove the negative, e.g., establishing that no other person or entity will guarantee this particular corporate loan. Instead of that sophistry, the more appropriate focus ought to be on the reasons why a shareholder guarantee is an "ordinary and necessary" part of many bank loans to small closely-held corporations.

When the *Tulia Feedlot* cases are re-examined, it becomes clear that there is still some hay to be made in those cases. They can be used to construct a plan for deductibility that is supported by case law and supported by experience in the market place. And this can be done within the limits of the Internal Revenue Service's legitimate concerns about looking closely at the deductibility of corporate payments to shareholders. Accepting the fact of life that the realities of life never fit the mold exactly, it still should be a goal which the taxpayer seeks to satisfy in any case in which the corporation is expected to pay a fee to a shareholder to compensate him for guaranteeing a corporate loan from an outside lender. These key planning concepts are as follows:

- Put the guarantee fee agreement in place before the loan is closed, *i.e.*, include it in the initial negotiations.
- Document that Bank will not loan without guarantee.

73. The Tax Court proclaimed similar barriers in *Harrison and Sons, Inc. v. Comm'r*, 86 T.C.M. (CCH) 246, (2003), Tax Ct. *cert. denied*, (2003) (citing *Olton Feed Yard, Inc. v. United States*, 592 F. 2d 272 (5th Cir. 1979), *Tulia Feedlot, Inc. v. United States*, 513 F. 2d 800 (5th Cir. 1975), *Fong v. Comm'r*, T.C.M., 1984-402, *aff'd* without published opinion, 816 F. 2d 684 (9th Cir. 1987), and *Seminole Thriftway, Inc. v. United States*, 42 Fed. Cl. 584 (1998)).

- Not all Shareholders should be guarantors.
- The amount of each shareholder guarantee should not be in proportion to the shareholdings of the corporation.
- Establish a reasonable fee for the guarantee, perhaps pricing it somewhat like the fees applicable to a standby letter of credit.

These key planning elements can and should be incorporated into the corporate thinking of any closely-held corporation which anticipates that its lender will require personal guarantees of one or more of its shareholders. The important point is that these concepts must be adopted before the loan is closed and before the personal guarantees are made. When these planning concepts are analyzed in the context of their occurrence in the commercial banking world, and when these planning concepts are compared to other facets of the commercial banking world, it will become clear that shareholder guarantees of corporate banking loans are ordinary and necessary elements to bank loans in today's commercial banking world.

Even when the courts and Service accept the argument that a shareholder guarantee is appropriate in the industry and necessary to secure the loan, there is recurring discussion about the amount of the guarantee.⁷⁴ In *Tulia III*⁷⁵ a shareholder guarantee fee of three percent of the average outstanding balance was accepted, while in *Tulia I*⁷⁶ a shareholder guarantee fee of three percent was rejected.⁷⁷ The second part of that discussion centers on whether the shareholder guarantee fee should be based on the full amount of the approved line of credit, or on only that amount of the line of credit which is actually disbursed and outstanding during the tax year in question.

In *Tulia I*, the Fifth Circuit observed that in the 1970 tax year, the taxpayer corporation paid "to each of the shareholder-guarantors an annual

74. See, e.g., Steven B. Fabrizio, *Shareholder-Guarantor Fees: Deductible Business Expenses or Dividends*, 40 TAX LAW. 905, 913-914 (1987); David S. Miller, *Federal Income Tax Consequences of Guarantees: A Comprehensive Framework for Analysis*, 48 TAX LAW. 103 (1994).

75. While it can be noted that the rate of pay in both *Tulia I* and *Tulia III* was three percent, and that in *Tulia I* that rate was based on the entire credit line while in *Tulia III* that rate was based on the average outstanding line, it does not necessarily follow that those distinctions are critical to the decision. A reading of both cases in their entirety suggests that in both cases it was a totality of the circumstances that lead to their respective differing conclusions. Compare 75-2 U.S.T.C. at 87, 533, with 83-2 U.S.T.C. at 87,837.

76. In *Olton Feed Yard, Inc. v. Comm'r*, 592 F.2d 272, 274 (5th Cir.1979), the guarantor fee was 3 ¼% of the entire credit line. It is important to note that this rate was higher than any other rate in the guarantor fee cases.

77. See *supra* note 27 and accompanying text; see also *supra* notes 24 through 33 and accompanying text.

fee equal to 3 percent of the amount guaranteed by him.”⁷⁸ The court went on to note that the amounts actually guaranteed by the shareholders were considerably less.⁷⁹ When Tulia Feedlot litigated that same shareholder guarantee fee issue in *Tulia III* for the 1976 and 1977 tax years, the Claims Court observed that the taxpayer corporation paid “3 percent of the average annual outstanding indebtedness of the corporation to the [lender]”⁸⁰ Since the taxpayer lost the issue in *Tulia I*, but won the issue in *Tulia III*, some commentators have observed that the key to success is to make sure that the measure of the guarantor fee must be tied to the actual outstanding loan balance and not the total line of credit.⁸¹ This conclusion is premised on a theory that:

[A] loan guarantor is never exposed to a risk of loss that exceeds the outstanding balance owed to the lender. [Consequently,] while it would be reasonable to base the fee payment amount on the outstanding balance, it would not be reasonable to base the fee amount on the total line of credit extended.⁸²

In comparing *Tulia I* with *Tulia III* it has been suggested that this theory of “basing the fee payment on the total line of credit will usually lead to an unreasonably high fee payment amount.”⁸³ Certainly those factual differences between *Tulia I* and *Tulia III* existed. But, it does not necessarily follow that those factual differences did or should control differences in outcome. More importantly, those factual differences *should not* control the differences in outcome. This concept of fair compensation for level of risk needs to be examined because it is an important element in the determination of whether the guarantee fee payment is reasonable.⁸⁴

78. *Tulia Feedlot Inc. v. United States*, 513 F.2d 800, 803 (5th Cir. 1975).

79. *Id.*

80. *Tulia Feedlot, Inc. v. United States*, 3 Cl. Ct. at 367.

81. Mark W. Degler, Note, *Fee Payments for Shareholder Debt Guarantees in the Close Corporation Setting: Has the Internal Revenue Service Improperly Departed from Established Statutory and Judicial Doctrine?* 7 VA. TAX L. REV. 157, 160 (1987).

82. *Id.*

83. *Id.* at n.24.

84. In *Elliotts, Inc. v. Comm’r*, 716 F.2d 1241, 1247 (9th Cir. 1983), the Ninth Circuit posited that “reasonableness” depended on whether this type of payment would be acceptable to an “independent investor.” In *Elliotts*, the question was whether compensation paid to a chief executive who was also the sole shareholder was reasonable compensation and therefore deductible or whether it was unreasonable and therefore non-taxable dividends:

In such a situation . . . it is appropriate to evaluate the compensation payments from the perspective of a hypothetical independent shareholder. If the bulk of the corporation’s earnings are being paid out in the form of compensation, so that the corporate profits, after payment of the compensation, do not represent a reasonable return on the shareholder’s equity in

It is important to remember that if a shareholder agrees to guarantee a \$100,000 corporate line of credit, he has assumed a \$100,000 risk, and it should matter little that at the point in time that the Internal Revenue Service audits the transaction there is only \$50,000 outstanding on the line of credit. That snapshot in time ignores that these types of borrowings may go from zero to the full line throughout the life of the line of credit. Equally important is the recognition that the shareholder-guarantor has used up \$100,000 of his personal credit capacity, and he should be compensated for that.

Because of those factors, the better argument is that the level of risk is better measured by the full amount of the credit line than it is by the actual outstanding balance during the year. The reasons for making this conclusion are twofold: First, from the guarantor's standpoint, he is giving up a certain amount of his creditworthiness and the amount he is giving up is the full amount of his guarantee—not the amount that happens to be outstanding at any one time. Once the guarantor has committed to the full amount, he has signed away that much credit and the actual amount drawn down will no longer be under his control. This is further illustrated by the following example: If a guarantor has guaranteed a \$ 1,000,000 line of credit with only \$300,000 of that line outstanding, other financial institutions will look at his credit as being burdened with a \$1,000,000 contingent liability, not a \$300,000 contingent liability. Therefore, the guarantor's fee should be based on the outstanding line, *i.e.*, the full amount of the standby letter of credit – not the actual amount outstanding—should be the measure of the fee.

The second reason for using the full amount of the guarantee as the proper measure comes from the other side of the same transaction. From the corporation's standpoint, it is buying a source of credit. From the corporation's standpoint, a guarantee as a source of credit is very similar to the purchase of a standby letter of credit.⁸⁵ Consequently the commitment fee and the guarantee fee should have the same legal structure. Once that analogy is accepted, it follows that a guarantor's fee (that has the same structure as a commitment fee for a standby letter of credit) should be accepted by the reviewing courts as a reasonable ordinary and necessary expense.

the corporation, then an independent shareholder would probably not approve of the compensation arrangement.

Id. In many ways the appearance of this "reasonable man" standard in tax cases harkens back to the "reasonable man" standard typically used in tort litigation. But, it does permit the reviewing courts to use their common sense in evaluating what is often very subjective testimony by the interested parties.

85. For an excellent discussion of the similarities of a standby letter of credit and a loan guarantee, see Egon Guttman, *U.C.C. Article 5 Symposium: Bank Guarantees and Standby Letters of Credit: Moving Toward a Uniform Approach*, 56 BROOK L. REV. 167 (1990). See also Gerald T. McLaughlin, *Symposium: The Restatement of Suretyship: Standby Letters of Credit and Guarantees: An Exercise in Cartography*, 34 WM. & MARY L. REV. 1139 (1993).

From the perspective of the guaranteeing shareholder, an analysis of the true effect a personal guarantee has on the ability of the guarantor to obtain other sources of credit will help understand the nature and effect a personal guarantee has on the guarantor's credit status. There are few persons in our country who have sufficient assets and or income to support unlimited credit. The rest of the population has a limited amount of credit that he (or she) can support. This discussion will assume only that portion of the population. Every use of credit consumes some credit. Despite the prevailing doctrine that "shareholder guarantees of corporate loans are costless transactions"⁸⁶ until the guarantor makes an out-of-pocket payment, that gossamer theory does not hold together.⁸⁷ Not only does it not hold together, it is economic fiction.⁸⁸ When a person guarantees the loan of another person (such as a corporation owned in part by that same person), he is using up a portion of his personal credit. It follows that if a person is allocating the use of his creditworthiness to a corporation he is giving up a portion of his ability to borrow for his own direct purposes.⁸⁹ That is the nature of what he is giving up and for which he should be compensated. This may well be called the "opportunity cost"⁹⁰ incurred by personally guaranteeing a corporate loan. The guarantor is giving up the ability to use that credit for another opportunity.

Any banker or other lender can readily appreciate this. When a lender decides to extend credit, it must take into account how many other extensions of credit the applicant already has consumed.⁹¹ To the extent that the applicant is already over extended with outstanding liabilities or with contingent liabilities (such as loans that have been personally guaranteed), the applicant becomes a weaker credit because the applicant may not have the financial resources to satisfy all of his liabilities (real or contingent) in the event they actualize and come due.⁹² Certainly, there is a judgment factor in deciding whether to extend credit, but to the extent that the lender

86. Babette B. Barton, *Economic Fables/Tax-Related Foibles: On the "Cost" of Promissory Notes, Guarantees, Contingent Liabilities and Non-Recourse Loans*, 45 TAX L. REV. 471, 519 (1990).

87. *Id.*

88. *Id.* at 521.

89. "It is fallacious to adhere to the economic fiction that guarantees are costless to their makers." *Id.*

90. *Id.* at 520.

91. Telephone interview with Thomas E. Winning, President and Chief Executive Officer of First National Bank of Germantown, in Ohio (May 3, 2004).

92. A weak credit may be enhanced by a guarantee of the debt by a third party. Robert D. Aicher, Deborah L. Cotton & TK Kahn, *Credit Enhancement: Letters of Credit, Guaranties, Insurance and Swaps (The Clash of Cultures)*, 59 BUS LAW. 897, 912-913 (2004). Bankers rarely use a simple guarantee because of the defenses that would otherwise be available to the guarantor in the event that the bank demanded payment from the guarantor. The banks generally protect themselves against these types of defenses by exacting at the time the loan is made a signed waiver of one or more defenses. *Id.* at 914-915. Alternatively, the banks may simply require the "guarantor" to co-sign the loan.

must take into account the nature and amount of the contingent liabilities of the applicant, it will take into account the amount of the full credit line, not just the amount of the outstanding balance at the time of the credit decision.⁹³

From the perspective of the borrowing corporation, an analysis of the nature of what the corporation is acquiring by the guarantee will help explain the nature and effect of its agreement to pay a fee to a guarantor (shareholder or otherwise) for helping provide credit to the corporation. In some ways, the payment of a guarantee fee by a borrowing corporation is a payment for the acquisition of credit in the market place. Without the personal guarantee of the shareholder, the corporation cannot acquire credit in the market place. But, if the corporation pays a fee to a guarantor, that corporation has credit at its disposal, which it can use if the case arises. That is a very critical point in justifying the deductibility of that payment for federal income tax purposes.

Another way to illustrate why a guarantee fee is deductible is to compare how it functions with a letter of credit.⁹⁴ Letters of credit, of course, have been a part of banking and commerce for hundreds of years.⁹⁵ Letters of credit were originally premised on the commercial fact of life that reputable banks did provide financial credibility and assurance to those sellers who were unfamiliar with distant buyers and wanted to look to a bank to assure themselves of getting paid.⁹⁶ Banks developed a financial instrument that enabled the banks to rely on a pre-approved draft if it was accompanied by a requisite document such as a bill of lading.⁹⁷ Moreover, it provided a

93. *Id.*

94. One good discussion provided this description and definition of a letter of credit:

A "letter of credit" is, essentially, a promise by a bank or other issuer of the letter of credit (the "issuer") to pay money to a stated beneficiary (the "beneficiary") on behalf of a third party (the "applicant") upon satisfaction of the condition or conditions specified in the letter of credit. In order to draw upon the letter of credit (i.e., to receive payment from the issuer), a beneficiary is generally required to present the letter of credit to the issuer, together with such documents as the terms of the letter of credit require. The issuer will then either honor such draw request (i.e., make payment to the beneficiary) or dishonor such draw request (i.e., not make payment to the beneficiary.)

Robert D. Aicher, Deborah L. Cotton & TK Kahn, *Credit Enhancement: Letters of Credit, Guaranties, Insurance and Swaps (The Clash of Cultures)*, 59 BUS. LAW. 897, 899 (2004). A "letter of credit" is statutorily defined in the Uniform Commercial Code at Section 5-103(1)(a), as set forth *infra* in notes 105 and 106 and accompanying text.

95. See, e.g., Robert D. Aicher, Deborah L. Cotton & TK Kahn, *Credit Enhancement: Letters of Credit, Guaranties, Insurance and Swaps (The Clash of Cultures)*, 59 BUS. LAW. 897, 900 (2004).

96. *Id.*

97. *Id.*

mechanism for the banks to exact commitment fees and thereby add a source of income.

Letters of credit continue to provide the major source of funds transfer in trade, especially international trade.⁹⁸ Over time, the structure of letters of credit has expanded into a number of variations of providing a means of funds transfer. The biggest variation in the development of letters of credit became the “standby letter of credit” which was developed in the capital bond markets to provide assurance to the bondholders that the issuer would make the payments.⁹⁹ This credit enhancing technique has been extended to any situation in which the selling party wants an assured payment in the event that the primary obligor defaults or otherwise fails to timely pay in accordance with the contract.¹⁰⁰

Letters of credit and shareholder guarantees both provide credit enhancement to the borrower.¹⁰¹ Indeed, when a guarantee is recognized as a collateral promise by the guarantor to pay the debt or obligation of the underlying obligor for the benefit of the lender,¹⁰² the guarantee becomes remarkably similar to a letter of credit.¹⁰³ The standby letter of credit is strikingly similar to the individual guarantee of a corporate loan.¹⁰⁴ Both the guarantee and the standby letter of credit provide a source of credit in the event that the primary obligor fails to pay.¹⁰⁵

In some ways, the functional structure of a standby letter of credit is remarkably similar to the functional structure of a shareholder’s guarantee of a corporate loan. In each instance, an obligor is acquiring credit in the marketplace, either through an individual guarantee or by acquiring a standby letter of credit.¹⁰⁶ Functionally, both the individual guarantee and the

98. *Id.*

99. *Id.* at 902.

100. Christopher Leon, *Letters of Credit: A Primer*, 45 MD. L. REV. 432, 442 (1986).

101. Robert D. Aicher, Deborah L. Cotton & TK Kahn, *Credit Enhancement: Letters of Credit, Guaranties, Insurance and Swaps (The Clash of Cultures)*, 59 BUS. LAW. 897, 911 (2004).

102. *Id.*; *FDIC v. University Anclote*, 764 F.2d 804, 806 (11th Cir. 1985).

103. Robert D. Aicher, Deborah L. Cotton & TK Kahn, *Credit Enhancement: Letters of Credit, Guaranties, Insurance and Swaps (The Clash of Cultures)*, 59 BUS. LAW. 897, 911 (2004).

104. From an enforcement standpoint, there are certainly more defenses available to a guarantee than to a letter of credit. There are no defenses available to a letter of credit except the following: “(i) a non-conforming demand for payment; (ii) forgery; and (iii) material fraud.” *Id.* at 918.

105. Christopher Leon, *Letters of Credit: A Primer*, 45 MD. L. REV. 432, 442 (1986).

106. Section 5-103(1)(a) of the Uniform Commercial Code defines a letter of credit as “an engagement by a bank or other person made at the request of a customer . . . that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit.” U.C.C. §5-103(1)(a). If the letter of credit is conditioned upon a default in the performance of a separate obligation to the beneficiary of the letter of credit, it is com-

standby letter of credit support the perceived weakness in the credit of the third party obligor.¹⁰⁷

In evaluating their function, letters of credit and shareholder-guaranteed loans both can be reduced to a triangle outline. Both of these credit sources are composed of three separate legal relationships. In the letter of credit triangle, the first is the contractual relationship comprising the basic transaction—the contract between a buyer and seller for the sale of a product, usually commercial goods.¹⁰⁸ The second contractual relationship is the inducement of the bank by the buyer to issue a standby letter of credit in order to assure the seller that it will be paid.¹⁰⁹ The standby letter of credit itself serves as a document by which the bank legally assures the seller that it will be paid if the buyer defaults in its obligation to pay for the product.¹¹⁰ In this instance, the original seller is the beneficiary of the standby letter of credit. This triangular relationship can be illustrated by Chart I below.

The standby letter of credit charted below in Chart I has a very similar functional structure as the typical shareholder-guaranteed corporate borrowing outlined below in Chart II. In the shareholder-guarantor situation, the lending bank serves as the “seller” in that it is selling the use of money to the corporate borrower that is functioning as the “buyer.” The guaranteeing shareholder serves in the same function as the bank which issues the standby letter of credit, but in this case, the guaranteeing shareholder is issuing his “guarantee” that the lender will be paid if the “buyer” defaults in its obligation to pay for the loan product. And, of course, the lending bank is the “beneficiary” of this guarantee. Chart II below illustrates that same functional triangle.

monly called a “standby letter” or even a “guarantee letter.” RONALD A. ANDERSON, UNIFORM COMMERCIAL CODE § 5-102:15, 249-250 (3d ed. 1993); *Easton Tire v. Farmers & Merchants Bank*, 642 S.W.2d 396 (Mo. App. 1982); *Pastor v. Nat'l Republic Bank*, 390 N.E.2d 894 (1979).

107. Jim L. Banks, Comment, *The Standby Letter of Credit: What it is and How to Use it*, 45 MONT. L. REV. 71 (1984); Christopher Leon, *Letters of Credit: A Primer*, 45 MD. L. REV. 432 (1986); Martin S. Hall, *Standby Letters of Credit: Tactical Transactional Tools*, 80 ILL. B.J. 356 (1992); Henry Harfield, *Guaranties, Standby Letters of Credit, and Ugly Ducklings*, 26 UCC L.J. 195 (1994).

108. Jim L. Banks, Comment, *The Standby Letter of Credit: What it is and How to Use it*, 45 MONT. L. REV. 71 (1984).

109. *Id.* at 72.

110. *Id.*

CHART I – STANDBY LETTER OF CREDIT TRIANGLE

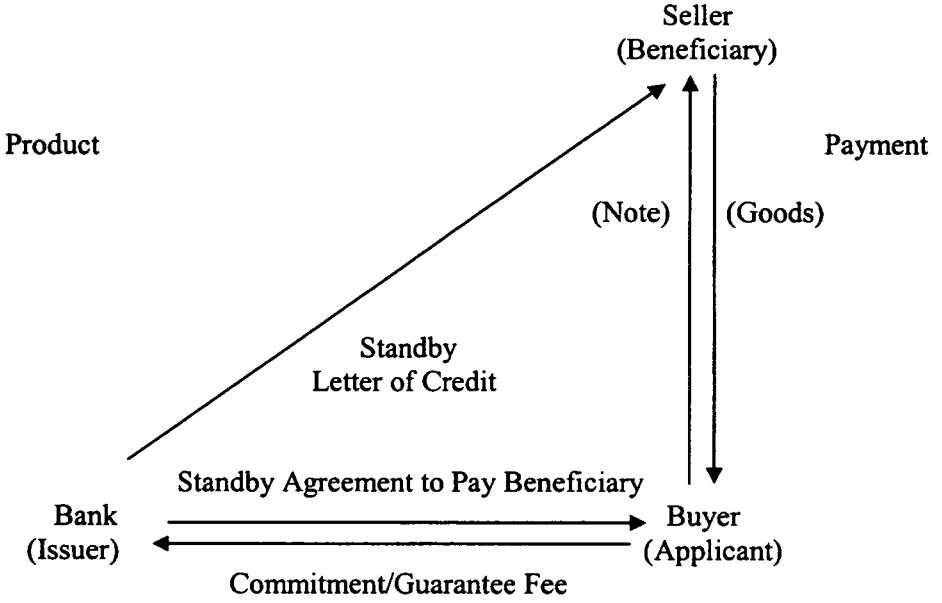
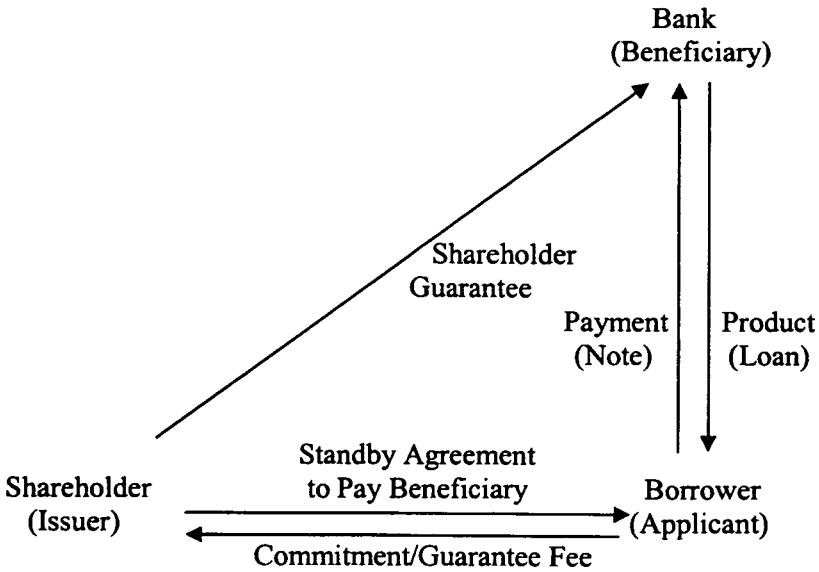


CHART II – SHAREHOLDER GUARANTEE TRIANGLE



When the relationships are reduced to this simple triangle, it becomes readily apparent that the shareholder guarantee of a corporate loan is conceptually similar to a corporation buying credit in the marketplace by acquiring a standby letter of credit.¹¹¹ Both the individual guarantee of the corporate obligation and the standby letter of credit give rise to a secondary liability¹¹² which actualizes only upon the default of the primary obligor.¹¹³

While those two triangles illustrate the similarities between the standby letter of credit and the shareholder guarantee of a corporate loan, they also illustrate the weakness that the Internal Revenue Service has been targeting in its attacks on shareholder guarantee fees. While the functional relationship between the borrower and the guaranteeing shareholder is the same as the functional relationship between the buyer and the bank in the standby letter of credit situation, there is all too often no documentation reflecting the implicit agreement between the borrowing corporation and its guaranteeing shareholder.

Under a standby letter of credit, a borrowing corporation pays a fee—usually in the range 0.75% to 1.25%¹¹⁴—to a lender for the issuance of the standby letter. This enables the borrowing corporation to have that amount of credit at its disposal if and when the need for credit materializes.¹¹⁵ The key point in the letter of credit analogy is that the commitment fee is paid whether or not the line of credit is ever drawn upon.¹¹⁶ Indeed, when the bank is issuing the standby letter of credit, in effect the bank is providing “standby credit” and it typically imposes two charges: a standby fee for making the credit available and, if necessary, a draw down fee for actually disbursing the credit.

Banks impose two charges on issuers for letters of credit: commitment fees and draw-down fees. The commitment fee, a one-time payment at

111. See, e.g., Boris Kozolchyk, *The Emerging Law of Standby Letters of Credit and Bank Guarantees*, 24 AZ. L. REV. 319 (1982); Christopher Leon, *Letters of Credit: A Primer*, 45 MD. L. REV. 432 (1986). See also Reade H. Ryan, Jr., *Letters of Credit Supporting Debt for Borrowed Money: The Standby as Backup*, 100 BANKING L.J. 404 (1983).

112. RONALD A. ANDERSON, *UNIFORM COMMERCIAL CODE* §5-102: 25, 258 (3d ed. 1993); *New York Life Ins. Co. v Hartford Nat'l Bank & Trust*, 378 A.2d 562 (Conn. 1977); *Dubuque Packing, Co. v. Fitzgibbon*, 599 P.2d 440 (Okla. 1979).

113. See, e.g., *Stringer Constr., Co. v. Am. Ins., Co.*, 430 N.E.2d 1 (Ill. App. 1981).

114. Telephone interview with Tom Winning, President and Chief Executive Officer, First National Bank of Germantown, in Ohio (May 3, 2004).

115. Letters of credit typically are one of two types: commercial letters of credit used to make payment in commercial transactions, especially international transactions, and standby letters of credit used to assure payment in the event the primary obligor fails to pay. “While both types of letters of credit can resemble guarantees because credit support is provided for a principal obligor, . . . standby letters of credit almost always involve credit support [in the same way as a personal guarantee]” David S. Miller, *Federal Income Tax Consequences of Guarantees: A Comprehensive Framework for Analysis*, 48 TAX LAW. 103, 108 (1994).

116. Cf., Christopher Leon, *Letters of Credit: A Primer*, 45 MD. L. REV. 432 (1986).

the time of the issue, usually ranges from ¼ % to 1 % of the amount of debt. The draw-down rate is the interest rate the bank charges in the future if the letter of credit is actually drawn on. Banks usually charge their prime rate plus one percent on loans drawn under the letter of credit.¹¹⁷

Standby letters of credit, and the commitment fees and draw-down fees associated with them, are a routine part of trade and commerce in the world of corporate financing.¹¹⁸ There is no doubt but that these fees are accepted without question as ordinary and necessary expenses by the paying corporations, and that the Internal Revenue Service accepts them as routine payments, fully deductible to the paying corporation. This analysis supports a recommendation that a corporation considering shareholder guarantees should establish as part of its fact gathering process the cost of standby letters of credit in its community. Then, the corporation can use those fee structures to construct its own guarantee fee plan and present it to the target guarantors.

From a tax perspective, corporations seeking guarantees from their shareholders need to adopt the triangle offense and prepare their play book to implement the standby letter of credit as a model and then document that relationship in the same way that letters of credit are documented. That documentation will reflect a contractual relationship that had previously been unstated and, to the Internal Revenue Service, had previously been unsupported. The deductibility of commitment fees for letters of credit has long been accepted as a routine "ordinary and necessary" business expense.¹¹⁹ In order to appropriately document these claimed deductions,¹²⁰

117. Letter of Credit, Regional Data Information Center, Southwest Minnesota University <http://www.southwest.msus.edu/RDIC/ch2.5.html> (last visited Oct. 3, 2005). See also Kerry Lynn Macintosh, *Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules be Based on Business Practices*, 38 WM. MARY L. REV. 1465, 1510 n.203 (1997); Henry D. Gabriel, *Standby Letters of Credit: Does the Risk Outweigh the Benefits?* 1988 COL. BUS. L. REV. 705, 710 (1988).

118. Perhaps letters of credit are not as common in trade and commerce as guarantees, particularly in the lending area, but they are an integral part of many major commercial financings. For a related discussion of guarantees generally used in the marketplace, see David S. Miller, *Federal Income Tax Consequences of Guarantees: A Comprehensive Framework for Analysis*, 48 TAX LAW. 103 (1994). As was noted by David S. Miller in this article:

Guarantees are among the most prevalent financial arrangements in the marketplace. Not only are they common in major commercial financings, but parents also often guarantee the debts of their children, shareholders and partners routinely guarantee the debts of their corporations and partnerships, and governmental entities guarantee the indebtedness of individuals, corporations, and other sovereigns.

Id.

119. Rev. Rul. 54-43, 1954-1 C.B. 119. In issuing that ruling, the Internal Revenue Service made clear that the commitment fee did not constitute "interest" and therefore was not deductible under Section 163 of the Internal Revenue Code, but was deductible under Section

both taxpayers and tax practitioners should adopt a practice of insuring that the following legal elements are in place before any shareholder guarantees are signed.

- Pass a corporate resolution of the board of directors approving the payment of a guarantee fee and the reasons it is approving the guarantee fee.¹²¹
- Execute a guarantee fee commission agreement between the corporation and the guarantor before the loan is closed and funds disbursed.¹²²
- Establish a guarantee fee that recognizes the purchase of credit in the same way that paying a commitment fee purchases a standby letter of credit.

162 as an ordinary and necessary business expense as long as it was related to the taxpayer's business. The limitation imposed was that the commitment fees paid had to be deducted ratably over the term of the loan period. See also Rev. Rul. 81-160, 1981 C.B. 312; Rev. Rul. 69-455, 1969-2 C.B. 9; John Harllee, Jr., "Interest Expense Deductions," 536-2nd TAX MGMT. PORTFOLIO A-21 (2003).

120. In *Republic Petroleum Corp. v. United States*, 397 F. Supp. 900, 924, (D. La. 1975), *aff'd*, 613 F.2d 518 (5th Cir. 1980), the district court disallowed as deductible payments made to three individuals "allegedly for guaranteeing certain unspecified loans made to finance the purchase of the stock." *Id.* at 924. These claimed deductions were disallowed because of the "taxpayer's failure to introduce any evidence pertaining to the details of the alleged loan guarantees." *Id.* at 925. That absence left the court in the dark "as to how much each individual undertook to guarantee or under what terms or why guarantees were necessary." *Id.*

121. A corporate resolution by a board of directors might include the following language:

WHEREAS, the Corporation desires credit from XYZ Bank to conduct its operations;

WHEREAS, the Corporation cannot obtain credit from XYZ Bank without a guarantor; and

WHEREAS, John Doe is willing to guarantee a non-pro rata portion of the Corporation's bank loan if he is compensated for the risks incurred and for the personal credit consumed,

NOW, THEREFORE, BE IT RESOLVED, That to induce John Doe to sign a personal guarantee of a \$100,000 portion (the "Guaranteed Portion") of the Corporation's \$500,00 line of credit ("Line of Credit") from XYZ Bank, the Corporation shall pay to John Doe the annual sum of one percent of the Guaranteed Portion, said fee to be paid as long as the Line of Credit is available to the Corporation.

122. A guarantor fee agreement might include the following representations by the corporation.

- Establish an initial commitment fee based on full line of credit.¹²³
 - Establish an annual fee based on full line of credit.
 - Establish a “draw down” fee in the event the guarantor has to fund his guarantee.¹²⁴
- Document that the lender will not make the loan without the guarantee.
 - If possible, structure guarantees to be not in proportion to shareholdings.
 - If reasonably available, document efforts to find alternate sources of guarantee.

The issues embodied in the *Tulia Feedlot Cases* are issues that are common among closely-held businesses in today’s world.¹²⁵ Shareholders who permanently guarantee corporate loans should be compensated for the use of their credit and financial strength. Corporations who pay shareholder

1. The Corporation is seeking a \$500,000 line of credit (“Line of Credit”) from XYZ Bank, said Line of Credit intended to be used to fund continuing operations.
2. The Corporation does not have sufficient assets to secure the loan without a guarantor.
3. The Corporation has made an investigation as to the availability of credit and the costs of credit, and has concluded that the Corporation cannot find a person who is not affiliated with the Corporation to guarantee the Line of Credit being extended by the Bank.

123. For at least one bank, the posted initial commitment fee, based on the full line of credit, is two percent. *International Banking Services*, US Bank (Effective Date: January 1, 2003). See also Kerry Lynn Macintosh, *Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules be Based on Business Practices*, 38 WM. MARY L. REV. 1465, 1510 n.203 (1997); Henry D. Gabriel, *Standby Letters of Credit: Does the Risk Outweigh the Benefits?* 1988 COL. BUS. L. REV. 705, 710 (1988).

124. A typical letter of credit imposes on the customer a “drawing fee for each payment under a letter of credit.” BROOKE WUNNICKE, DIANE B. WUNNICKE & PAUL S. TURNER, *STANDBY & COMMERCIAL LETTERS OF CREDIT* 28 (2nd ed. 2004). To the same effect is this sample provision which imposes a draw down fee on the customer: “We also agree to pay you, on demand, a commission at the rate of . . . per cent on such part of the credit as may be used, and, in any event, a minimum amount of . . . per cent of the amount of credit.” HERMAN N. FINKELSTEIN, *LEGAL ASPECTS OF COMMERCIAL LETTERS OF CREDIT* 322 (1930). See generally, Avery Wiener Katz, *An Economic Analysis of the Guaranty Contract*, 66 U. CHI. L. REV. 47, 55 (1999).

125. See generally, David S. Miller, *Federal Income Tax Consequences of Guarantees: A Comprehensive Framework for Analysis*, 48 TAX LAW. 103 (1994).

guarantee fees should be entitled to deduct those expenses as ordinary and necessary expenses that are essential to the conduct of their business affairs. The theories behind the routine acceptability of fees paid for standby letters of credit are the same theories that underlie the deductibility of fees paid for shareholder guarantees of loans. Examined in the prism light of the practices and expectations of commercial credit in today's world, the shareholder-guarantee is an ordinary and necessary element to shore up the credit of many closely-held corporations. Those theories should be reinforced with the routine adoption of the appropriate corporate resolution and guarantee fee agreements. When those practices are interlaced with the theories underlying the deductibility of fees paid for standby letters of credit, it should be clear that there is still hay left in the *Tulia Feedlot Cases* and that is certainly fodder for thought.