

Claude Simon

To: Darryl Vernon
Subject: RE: Update - Corporate or LP Ownership/NYC Income Tax

Darryl

My plan going in was to try to determine the strength of the double taxation argument so as to decide whether to accept, fight or negotiate NYS offer to drop the issue in exchange for settlement on a number of other issues.

I also had a notion that engaging a tax lawyer might increase negotiating position regardless of the facts and law. If that's the case, this isn't the lawyer. His approach is facts and law not intimidation. So I'm dropping this notion.

The most interesting point he raised in the meeting was not in his email. When I described the lp structure, he was all yes, yes, that's right, set up correctly for the time, definitely qualifies for pass through, done all the time, etc. When I mentioned the deed in the gp name, he stopped dead in his tracks and said I must be mistaken, that it was probably in the LP name. When I insisted, he said that that was so completely incorrect that would certainly, not maybe, constitute legal malpractice. He asked for the deed and said that he suspected that there must have been a change in the deed. I offered that we had had title work done (at the time of the Intervest loan) and that I would forward it to him.

Michael Meltzer was the lawyer at the time. He was Henry Traimen's lawyer. I do not recall using counsel for JMS and I other than Michael Meltzer who was Henry's lawyer and represented all the buyers. He was very knowledgeable and competent and fair throughout. I can't imagine him being as incompetent as Rick suggested without some other motivation. The motivation I suspect is Henry Traimen but I can't figure out why. Henry was an obstinate, intractable, suspicious, paranoid and self-certain individual. My father disliked him intensely and so did I. His premises were secured by an alarm system and bullet proof entrance with bullet proof glass despite the fact that he really had nothing of value there other than A/V equipment. If you recall, Henry had the right of first refusal to purchase 160 in his lease. We found that out after we had negotiated the deal with the seller and then had to include Henry and other tenants in the building. The transfer was actually a 2-step process from seller to Henry to 160. Why? Wouldn't a simple waiver of the right of first refusal been simpler? Did Henry insist on title in the GP Corp name and press Michael for same for some hidden agenda reason? Can you think of what that might be? Personal liability?

We need to look at the title work still. If there was some sleight of hand in the title work, would the title co not pick it up? If not, would they be liable?

Rick mentioned a 50-50 chance of prevailing on the double taxation issue at trial. I mentioned a couple of other factors which he acknowledged as "arguments" and jokingly asked if we got to 52%? 55%? Maybe we improved with his review of the lp docs.

I don't think that much matters in terms of our action. In my mind we have enough on the double taxation issue to "ask for" but not "insist on" some concessions from NYS based on good substantiation that we have. We are at 1.2m in additional capital gains tax between NYS and IRS and if we can get it down to 600-750k, between substantiation and penalty waiving that would have to work.

But the title thing bothers me. It is a piece of the puzzle that doesn't fit. I'm going to go through my fathers stuff again to see if I can find any of his notes. I'm also looking for the title work.

Regards,
Claude

From: Darryl Vernon [mailto:dvernon@vgllp.com]
Sent: Saturday, January 23, 2016 4:35 PMt

To: csimon@fairlane.biz

Subject: RE: Update - Corporate or LP Ownership/NYC Income Tax

Interesting. Wender and his firm seem to have a reasonable enough focus on tax. I think he begs the question on city tax since it seems the big issue is whether you have personal liability for city tax. But of course we don't want double city tax on the coop and you. I can't tell from his email if he thinks "a deed is a deed" is sufficiently overcome by the practice of the LP and historical treatment by the taxing authorities (he doesn't mention the historical treatment point – maybe because it doesn't matter?)

All in all, good news. Let's discuss when you want. This weekend is fine.

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From: Claude Simon [<mailto:csimon@fairlane.biz>]

Sent: Friday, January 22, 2016 12:42 PM

To: Darryl Vernon <dvernon@vgllp.com>

Subject: Fw: Update - Corporate or LP Ownership/NYC Income Tax

Darryl

See below from the meeting with the tax attorney yesterday.

Claude

Sent from my mobile.

From: Rick Wender <RickW@wenderlaw.com>

Date: Fri, 22 Jan 2016 12:29:30 -0500

To: <csimon@fairlane.biz>

Cc: <arthur@cpalanger.com>

Subject: Update - Corporate or LP Ownership/NYC Income Tax

Gentlemen,

I have followed up on the points you asked me to look at yesterday. Good news on all fronts.

Corporate or LP Ownership

Frankly, the partnership agreement could not have been more favorably written than had I written it today to suit our current needs.

Article I, para. 2 of the Agreement provides that *"the business of the partnership shall be carried on under the name of the General Partner, with such variations or changes therein as may be necessary in order to comply with the statutory*

requirements of the various states in which the partnership does business.” Effectively, the LP Agreement provides that the general corporate partner is the nominee of the limited partnership.

Based on the language above, one would expect that all commercial transactions in which the LP engaged would be engaged in the name of the GP only (leases, banking transactions, borrowings, etc.), which is exactly what I understand was done. However, the tax law provides that taxes be reported based upon the beneficial ownership of a business, not the nominal ownership of the business. Thus, the tax results should have been reported in the name of the LP, not the GP. This is exactly what you did.

The LP Agreement is also notarized, removing any doubt that the agreement could have been a post audit fabricated document. It is clearly a contemporaneously executed document put into effect at the time the building was acquired and the LP began to conduct its business.

Of course, this does not make it a “slam dunk” were the issue of corporate vs. LP ownership to go to court. There is still the argument that “the deed is the deed is the deed”. There is also a question of whether the LP was a legitimate LP in that (i) it was presumably not registered with NYS; and (ii) the general partner in fact had no equity or profit in the LP according to the LP Agreement, a requirement for a valid LP.

Bottom line: I think your position to find that ownership is held by the LP for tax purposes is as strong as it could be under this set of difficult circumstances. This accordingly can be used as leverage with the auditors who will be asking you to make concessions in their favor in exchange for them accepting the LP’s ownership. In reality, the fact that they concede LP ownership may not be as big a concession on their part as they may like to make it appear.

NYC Taxation of Non-Residents

The good news is that I was incorrect and an individual who is not residing in NYC and who sells NYC real estate is not subject to NYC income tax on the gain realized on the sale.

However, the bad news, and what I was remembering, is that a corporation which otherwise is not doing business in NYC but which has a capital gain arising from the sale of NYC real estate is indeed subject to NYC corporate tax.

Thus, this is one more reason that you want to go with a NY settlement that is predicated on the property being owned by the LP rather than 160 Madison Ave. Owners Corporation. In the former instance, there should be no NYC income tax. In the latter instance, there is NYC income tax. Thus, prevailing on the LP vs Corporation issue will not only save you substantial federal and NYS tax by eliminating the double taxation and reducing the federal rate of tax imposed, but it will also eliminate any NYC tax on the gain.

If you need anything else from me, do not hesitate to reach out.

Best regards.....



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