
Second Helpings on Sandwiches

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In the December 2005 and January 2006 issues of the M&A TAX REPORT, we wrote about the Tax Court's voluminous opinion (at 135 pages, there must be a better word!) denying tax-free reorganization benefits to Times-Mirror. [See Wood and Morris, *Those Were the Days: Times-Mirror and How to Make a Sandwich (Part I of II)*, M&A TAX REPORT, Dec. 2005, at 1; Wood and Morris, *Those Were the Days: Times-Mirror and How to Make a Sandwich (Part II of II)*, M&A TAX REPORT, Jan. 2006, at 1.]

Leftovers?

Recently, the Tax Court issued another opinion in this continuing saga. [See *Tribune Company*, 91 TCM 678, Dec. 56,418(M), TC Memo. 2006-12.] As M&A TAX REPORT readers remember, Tribune purchased Times-Mirror in the interim between

Times-Mirror undertaking the supposedly tax-free Sandwich transactions and the Tax Court's initial decision last year denying tax benefits.

For those not wanting to review our prior article in full, a brief review of the sandwich transactions may be helpful. In 1998, Times-Mirror divested itself of its legal publishing unit, Matthew Bender. It consulted numerous professional advisors, choosing a PriceWaterhouseCoopers ("PwC")-developed structure called the "Domestic Sandwich." PwC claimed the Sandwich would allow Times-Mirror to divest itself of Matthew Bender in a tax-free transaction while simultaneously obtaining control of the cash proceeds, a whopping \$1.375 billion, which the purchaser contributed to the capital of one of the many companies layered within the Sandwich. (We'll call it the "Bender Sandwich".) Notably,

Times-Mirror first chose the Sandwich structure, then it found a willing buyer, conditioning the sale upon using the Sandwich.

The Bender Sandwich was a serpentine structure of joint ventures in which entities had multiple classes of stock outstanding and voting rights disproportionate to shares held. Cross ownership and inverted ownership were the commonplace. Furthermore, shareholders expressly declined their rights to the fiduciary duties owed to them by the underlying companies. In this manner, Times-Mirror effectively controlled the \$1.375 billion and the purchaser effectively controlled Bender. Indeed, the purchaser had no say over the cash and Times-Mirror had no remaining voice in Bender. Yet, the Times-Mirror and the purchaser agreed to be married to each other for 20 years through the interlocking ownerships of the Bender Sandwich.

Times-Mirror also had a scientific publishing unit called Mosby. It divested itself of Mosby at the same time to the same purchaser. Indeed, Mosby was divested in a virtually identical Sandwich transaction (the “Mosby Sandwich”.) The only difference between the Bender and Mosby Sandwiches was that immediately prior to the Mosby Sandwich, Mosby distributed certain assets to its shareholder, Times-Mirror.

On its 1998 return, Times-Mirror treated the divestitures of Bender and Mosby as tax-free reorganizations. It claimed that the two Sandwiches qualified for tax-free treatment as reverse triangular mergers or, alternatively, as “B” reorganizations. The IRS challenged this treatment, asserting that the transfers were taxable, and in December 2004, the Bender Sandwich was tried. On September 27, 2005, the Tax Court held that the Bender Sandwich did not qualify as a tax-

free reorganization, since it was neither a reverse triangular merger nor a B reorganization.

Since the issues involved in Mosby are virtually identical to those in Bender, Times-Mirror and the IRS agreed that a trial of Bender could obviate (or limit the scope of) a trial in Mosby. If the Bender Sandwich failed to qualify as a tax-free reorganization because it was neither a reverse triangular merger nor a B reorganization, then the Mosby Sandwich would also fail. Thus, the parties stipulated to identical facts and issues, and neither party asserted any additional arguments.

Times-Mirror and the IRS agreed that the Bender opinion governs the outcome of Mosby at the trial level. Indeed, Times-Mirror and the IRS stipulated that the Tax Court should find that the Mosby Sandwich does not qualify as a tax-free reorganization. They further agreed that any judicial determination affecting the Bender opinion on appeal or remand would also apply to Mosby.

You Get What You Ask for

Not to pass up such willing participants, the Tax Court fully abided by the parties wishes. [See *Tribune Company, supra.*] Of course, this agreement avoids the unnecessary time and cost of an additional trial, frees up IRS and judicial resources and facilitates early consideration of a consolidated Times-Mirror appeal. Given that the Bender opinion was a behemoth, and that the court took almost a year to issue it, stipulating everything was probably important for both parties. The full stipulation was akin to a fast-track appeal for Mosby. The Mosby Sandwich is now on the plate of the circuit court, and if the court is hungry, it can always have seconds.