Wolters Kluwer

The M&A Tax Report
JULY 2017 VOLUME 25, NUMBER 12
The Monthly Review of Taxes, Trends & Techniques

Court Holding and Commercially Reasonable Efforts for Tax Opinions

By Donald P. Board • Wood LLP

These days, few of us are shocked by public acrimony and dispute. In the M&A world, even the friendliest acquisition can become anything but friendly if it gets derailed. In fact, with our current news cycle, if two companies that were planning to spend their corporate lives together break up, it is almost surprising if they do *not* end up pointing fingers and suing each other.

In February 2017, for example, the Department of Justice won an antitrust injunction that blocked Anthem's $54 billion acquisition of Cigna. Anthem responded by seeking expedited review in the D.C. Circuit. Cigna responded by suing Anthem in Delaware to have the deal declared legally dead.

The fact that Anthem is on the hook for a $1.85 billion reverse termination fee may have had something to do with Cigna's race to the courthouse. But the disappointed target company has set its sights considerably higher than that. Under the acquisition agreement, the breakup fee is not an exclusive remedy.

Cigna is therefore taking the opportunity to demand an additional *$13 billion* in damages from Anthem. Predictably, Anthem filed its own suit in Delaware to *prevent* Cigna from backing out of this match made in heaven. The dueling complaints were under seal, but this did not stop Anthem from releasing a timeline detailing Cigna's "obvious efforts to sabotage the merger."

After the D.C. Circuit upheld the antitrust injunction, Anthem decided to let the deal go. But the company is refusing to pay that $1.85 billion termination fee, citing Cigna's alleged sabotage. Anthem also says it is planning to sue Cigna to recover its own "massive damages."

Energy Transfer Equity and Williams

Tax professionals almost always watch these train wrecks from a safe distance. The unraveling of Energy Transfer Equity's acquisition of The Williams Companies is a $33 billion exception. Fine points of tax law and tax opinion practice lay at the heart of the dispute between these two pipeline giants.

The deal looked plausible enough when ETE and Williams signed their acquisition agreement (September 2015). But then the bottom fell out of the oil and gas business, leaving ETE on the losing end of a very bad bargain. In June 2016, it announced that it was breaking off the engagement.

ETE did not claim that the unfavorable changes in the economics gave it the right to cancel the deal. Instead, the company pointed to its *tax counsel's* determination that it could not opine that a key step in the transaction "should" qualify as a tax-free exchange under Code Sec. 721.

Receipt of that "should" opinion was an express closing condition. ETE therefore concluded that it was free to abandon the deal. Williams said, we'll just see about that. It immediately sued in the Delaware Chancery Court to keep ETE from bailing out.

Under the acquisition agreement, ETE was required to make "commercially reasonable efforts" to obtain the tax opinion. Williams charged that ETE's supposed efforts had been anything but reasonable. As the party responsible for the failure of the closing condition, ETE should be enjoined from terminating the deal.

Vice Chancellor Sam Glasscock conducted a quick trial and ruled in favor of ETE. Based on testimony from a battery of big-firm tax lawyers and academic experts, the court found that ETE's tax counsel (Latham & Watkins) had reached its negative conclusion on the Code Sec. 721 issue in good faith. [*See The Williams Companies, Inc. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682 (Del. Ch. June 24, 2016).]

Williams promptly filed an appeal. In March 2017, the Delaware Supreme Court upheld the Chancery Court's decision. [*See* 2017 WL 1090912 (Del. Sup. Ct. March 23, 2017.] However, the Supreme Court *disagreed* with important aspects of the lower court's analysis. Specifically, it held that the Vice Chancellor had taken too narrow a view of ETE's obligation to obtain the tax opinion under the "commercially reasonable efforts" standard.

The Supreme Court nevertheless affirmed on the ground that any breach by ETE would not have contributed materially to the failure of the closing condition. This focus on causation points up the importance to the *Court Holding* doctrine if the case involves a tax opinion. *Court Holding* is not exactly a taxpayer favorite, but it appears to have saved ETE's bacon in its multi-billion-dollar battle with Williams.

Three Transactional Steps

ETE's planned acquisition of Williams involved a number of basically simultaneous events: a state-law merger, reciprocal contributions of assets, and the issuance of various securities. As conceived by the parties, these events were grouped into three distinct steps.

The first step was Williams' merger into Energy Transfer Corp LP ("ET Corp"), a newly organized affiliate of ETE (the "Merger"). Although ET Corp was a limited partnership under state law, it had elected to be classified as a corporation for federal tax purposes. Consequently, the Merger could qualify as a reorganization under Code Sec. 368(a).

Under the terms of the Merger, the Williams shareholders were to receive 81 percent of the stock of ET Corp and $6.05 billion in cash boot.

The M&A Tax Report
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THE M&A TAX REPORT (ISSN 1085-3693) is published monthly by Wolters Kluwer, 2700 Lake Cook Road, Riverwoods, Illinois 60015. Subscription inquiries should be directed to 2700 Lake Cook Road, Riverwoods, IL 60015.
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Under Code Sec. 356, Williams' shareholders would have been taxable on their respective stock gains to the extent of any cash received. Under Code Sec. 361, however, there would have been no *corporate-level* tax when Williams transferred its assets to ET Corp.

The second step was ET Corp's post-Merger contribution of the Williams assets to ETE in exchange for ETE's issuance of new Class E Units (the "Asset Contribution"). The parties were counting on Code Sec. 721 to prevent ET Corp from recognizing gain when it transferred the assets to ETE.

The third step was ETE's contribution of $6.05 billion to ET Corp in exchange for newly issued shares representing a 19-percent stake (the "Stock Issuance"). ETE's acquisition of these ET Corp shares (the "Hook Stock") would have introduced an element of circular ownership. ETE would have owned an interest in ET Corp (the Hook Stock), and ET Corp would have owned an interest in ETE (the Class E Units).

The parties disagreed about the business purpose, if any, for creating this ownership loop. For now, it is enough to observe that the $6.05 billion that ETE paid to ET Corp in the Stock Issuance corresponded to the $6.05 billion that ET Corp was required to pay to the Williams shareholders in the Merger. Issuing the Hook Stock allowed the necessary cash to flow from ETE to the Williams shareholders.

ETE Has Second Thoughts

Williams and ETE signed the acquisition agreement in September 2015. While they were waiting for antitrust and regulatory clearances, troubles in the oil and gas industry caused a catastrophic decline in the value of Williams' pipeline assets.

ETE let it be known that it would like to renegotiate the price of the acquisition or maybe just call the whole thing off. But Williams was more than satisfied with the existing deal terms.

Meanwhile, ETE's head of tax was thinking about how the changed economics would affect the transaction. In March 2016, he began to wonder about the consequences of ETE's paying $6.05 billion to purchase the Hook Stock from ET Corp. If the Merger went through, the shares of ET Corp would be worth only about $2 billion, so ETE would be paying $4 billion for nothing.

Tax vs. Economics?

The head of tax became concerned that this $4 billion overpayment could raise questions about the three-step conceptualization of the acquisition. In September 2015, when the Hook Stock was still worth $6.05 billion, treating the Stock Issuance as a separate step seemed intuitively plausible. But now, with the gross disparity in values, would the IRS still respect the independence of the Stock Issuance?

The tax risk was that the IRS might collapse the reciprocal transfers in the Asset Contribution and the Stock Issuance into a *single step*. ET Corp would then be viewed as transferring one bundle of property (the Williams assets and the Hook Stock) to ETE in exchange for another (the Class E Units and $6.05 billion in cash).

This mash-up would raise an issue under Code Sec. 707(a). If a partner contributes assets to a partnership and there is a related transfer back to the partner, the transaction may be considered a *disguised sale* of the contributed assets. Under this analysis, ET Corp's transfer of the Williams assets to ETE, juxtaposed with ETE's transfer of $6.05 billion back to ET Corp, could be taxable as a sale of the Williams assets.

If the Asset Contribution and the Stock Issuance are kept separate, that effectively allocates ETE's entire $6.05 billion payment to the Hook Stock—and *away* from the appreciated Williams assets. This gambit might have seemed risky in the best of times. But now that the Hook Stock was worth only $2 billion, a transaction allocating the entire $6.05 billion to the shares would have had a conspicuously hollow ring to it.

ETE's head of tax testified that the disguised-sale problem did not occur to him until March 2016. He had always assumed that ET Corp was obligated to issue whatever amount of Hook Stock would be worth $6.05 billion at the time of the closing. It was only when he was reviewing some SEC filings that he realized that the number of shares was *fixed*. That's what created the $4 billion discrepancy when the Hook Stock crashed.

Calling for Backup

The head of tax's moment of insight must have been followed by a wave of vertigo as he imagined telling the CEO that the ETE's bad bargain could end up being taxable as well. On March 29, he reached out to Latham, which had advised ETE when the deal was being negotiated with Williams.

After confirming that the amount of Hook Stock was indeed fixed, the head of tax asked Latham whether this posed a tax issue under Code Sec. 707(a). If so, could it be fixed? Would it affect Latham's ability to deliver the required "should" opinion?

Latham spent a frantic two weeks evaluating the disguised-sale issue in light of the new economic conditions. Latham had previously indicated that it expected to issue the opinion, so it was not eager to reverse its position on the $33 billion transaction. Nevertheless, it informed ETE on April 11 that it would *not* be able to opine that ET Corp's contribution of the Williams assets "should" be tax-free under Code Sec. 721.

While Latham was still at work, ETE engaged William McKee (Morgan, Lewis & Bockius) to give the question a "fresh look." Mr. McKee, a noted partnership tax expert, reached the same conclusion. Morgan Lewis would not be able to provide a "should" opinion, either.

Controversy Erupts

Latham first raised the tax issue with Williams' tax counsel (Cravath, Swaine & Moore) on April 12. The matter quickly became contentious. A follow-up call with Mr. McKee on April 13 left Cravath unpersuaded.

In the heat of the moment, one Cravath lawyer claimed that the Code Sec. 721 issue was such a lock that his firm would be willing to provide a "will" opinion. Cravath later walked that back, but first it asked its co-counsel on the deal (Gibson, Dunn & Crutcher) for *its* tax assessment. Gibson's initial response was that it would be "tough to get to a should."

Ultimately, the firm said it could, if asked, render a "weak-should" opinion. It is fair to ask just what a "weak-should" opinion is anyway, but we have to leave such esoteric issues for another day. Weak or strong, in this context "should" meant should.

As the tax lawyers tussled, ETE filed with the SEC, warning investors that Latham's inability to opine might kill the transaction. On May 13, Williams sued ETE and ET Corp in the Chancery Court to force them to move ahead with the deal. The drop-dead date for the acquisition was June 28, so the case was put on the fast track.

Embracing Good Faith

No one disputed that ETE was extremely eager *not* to acquire Williams. It was also clear that Latham's refusal to opine was ETE's "get-out-of-deal-free" card. The fact that ETE was Latham's client made Williams suspect that the law firm's conclusion might have been something less than objective.

The Chancery Court recognized that giving Latham a veto posed certain risks. But Williams and ETE, both well versed in the ways of M&A, had agreed to make Latham's delivery of the "should" opinion a closing condition. They had also agreed to be governed by Delaware law, which the Vice Chancellor described as "strongly contractarian."

Williams might now regret its decision, but the Chancery Court declined to amend the parties' explicit agreement. Part of the vaunted "predictability" of Delaware law is that the parties can make a deal and count on it being enforced. That includes making Latham's opinion a condition to its client's duty to close.

Of course, that didn't give Latham *carte blanche*. The Chancery Court required Latham to make its tax call in good faith. After all, no one would claim that the parties intended to let Latham decide in *bad* faith.

The Chancery Court reviewed the record and found that Latham had determined in good faith that it could not render a "should" opinion. The court was particularly impressed with Latham's tax lawyers, who convincingly testified (1) that ETE had not pressured them to reach any particular conclusion, and (2) that they would not have succumbed to pressure from ETE in any event.

It is almost unheard of for a law firm to change its mind about the tax treatment of a public-company deal. From Williams' perspective, this rendered Latham's decision highly suspect.

The Chancery Court drew the opposite conclusion. Latham's extraordinary flip-flop was intensely embarrassing. The court simply could not believe that respected tax lawyers would tarnish their professional reputations to advance a client's interest in getting out of a bad bargain.

Satisfied that Latham had acted in good faith, the court did not rule on the merits of the firm's tax position. However, it did note that Mr. McKee and several academic experts had reached the same conclusion as Latham, although for somewhat different reasons. Latham's good-faith determination evidently had a reasonable basis, despite strong objections by Williams and its experts. [*See* Donald P. Board, *Hook Stock Torpedoes "Should" Opinion, Buyer Scuttles Mega-Merger*, THE M&A TAX REPORT (October 2016).]

What about ETE? The acquisition agreement required the company to exert "commercially reasonable efforts" to obtain the favorable tax opinion. The Court of Chancery treated this as a question of whether ETE had acted in good faith when it dealt with Latham. Had ETE made a good-faith effort to support Latham's impartial evaluation of the legal issue?

The court observed that ETE had authorized Latham to conduct an intensive and independent review of the Code Sec. 721 issue, including possible solutions if there was a problem. Latham then racked up 1,000 hours looking at the transaction from every angle. ETE also hired Mr. McKee, who seconded Latham's conclusion.

Whatever ETE was *hoping* the answer would be, its actions reflected a good faith effort to support Latham's independent review. As Vice Chancellor Glasscock memorably put it, "even a desperate man can be an honest winner of the lottery."

Raising the Bar

In its ruling on March 23, 2017, the Delaware Supreme Court held that the Court of Chancery had taken too narrow a view of ETE's obligations under the commercially-reasonable-efforts clause. ETE had more than a negative duty to avoid actions that might interfere with Latham's ability to evaluate the Code Sec. 721 issue. ETE had an affirmative duty to take *all* reasonable steps required to "solve problems and consummate the transaction."

The Supreme Court pointed to evidence in the record suggesting that ETE had not gone that extra mile. When it discovered there might be a tax problem, ETE did not immediately direct Latham to engage with Williams' counsel to consider the issue and what might be done about it. ETE never negotiated with Williams directly.

On the contrary, ETE lawyered up and communicated primarily by SEC filings. As the Chancery Court observed, ETE "generally did not act like an enthusiastic partner in pursuit of consummation of the [acquisition]." The Supreme Court held that the Vice Chancellor should have weighed all these facts before concluding that ETE had made commercially reasonable efforts to close the deal.

Consummate *Which* Transaction?

In Delaware, the parties to a commercial contract have an obligation to solve a wide range of problems in order to consummate the transaction. This can require them to work around express contractual terms. If the contract says the widgets must be delivered on September 1, which turns out to be Labor Day, delivery may have to be rescheduled for August 30 or September 2.

It is much less clear how this principle applies to big-ticket corporate transactions. Under the acquisition agreement, the Stock Issuance was defined as ETE's purchase of the Hook Stock for $6.05 billion. If Latham believed this might cause ET Corp's contribution of the Williams assets to be treated as a disguised sale, was ETE obliged to replace the Stock Issuance with a transaction that would reduce the tax risk to the Asset Contribution?

Williams' lawyers at Cravath actually proposed an alternative structure. Instead of paying the $6.05 billion to ET Corp, ETE would transfer the cash to a *new* entity. The new entity would pay the Williams shareholders the $6.05 billion they were owed in the Merger and then *dissolve*.

Formally, Cravath's proposal would have avoided having ET Corp contribute appreciated assets *to* ETE at the same time it was receiving billions in cash back *from* ETE. Latham, however, claimed that it was not required to evaluate Cravath's plan. ETE had a right to a "should" opinion on the Asset Contribution as defined in the acquisition agreement.

This argument seems less than compelling because Cravath's proposal could have been implemented without changing the terms of the Asset Contribution. Nevertheless, Latham might have objected that ETE's duty to "solve problems and consummate the transaction" imposed a duty to consummate the transaction actually set forth in the acquisition agreement. It is not a duty to consummate some *different* transaction.

Of course, it depends on how one defines "the transaction." Williams might have contended that what counts is the *end state*, not the steps taken to get there. As long as the economics of the acquisition are preserved, an "enthusiastic partner" must make whatever adjustments are necessary to get the deal done. Otherwise, the courts must step in.

One wonders how this argument would fly in the C-suites of the hundreds of public companies that call Delaware home. If corporations come to Dover for the state's "strongly contractarian" jurisprudence, their managers might question whether they were really in charge of their transactional fates. Viewing their prospects *ex ante*, most corporations prefer to take their chances with the agreements they have actually negotiated and signed.

No Material Contribution

Even if ETE had a duty to restructure the acquisition, that was not enough to overturn the decision below. The court affirmed based on the Vice Chancellor's determination that the record was "barren of any indication that the action or inaction of [ETE] … contributed materially to Latham's inability to issue the 721 Opinion."

Cravath had proposed inserting a new entity to receive the $6.05 billion from ETE, pay off the Williams shareholders, and dissolve. Latham reviewed the proposal, despite disclaiming any obligation to do so. It concluded that the new structure would still not support a "should" opinion. The Chancery Court found this credible, noting that one of Williams' own tax experts had testified that funneling cash through the transitory entity wouldn't solve the disguised-sale problem.

The upshot was that Latham would have refused to opine on the Asset Contribution *even if* the acquisition had been restructured as proposed. Hence, the Court of Chancery found no evidence that ETE's conduct had contributed materially to Latham's inability to opine on the Code Sec. 721 issue.

That was good enough for the Delaware Supreme Court. Even if ETE was in breach of a duty to restructure the acquisition, this did not *cause* Latham to withhold its opinion regarding the Asset Contribution. The Court of Chancery's decision was therefore affirmed.

Court Holding Revisited

But what if Cravath had found a structure that met all of Latham's disguised-sale objections? Would *that* have permitted Latham to opine?

Latham thought not, based on the U.S. Supreme Court's decision in *Court Holding Co.* [SCt, 45-1 USTC ¶9215, 324 US 331, 65 SCt 707]. The taxpayer in *Court Holding* was a corporation that wanted to sell its only asset, an apartment building. The corporation reached an oral agreement with the potential buyers, whose lawyers prepared a draft P & S.

When the corporation's lawyer reviewed the situation, however, he saw an opportunity to improve the tax result. Instead of selling the building, the corporation should distribute the property to its shareholders in complete liquidation. The *shareholders* could then sell the building to the purchasers on the same terms.

In those Edenic days before the enactment of current Code Sec. 336(a), this simple maneuver could eliminate most or even all of the corporate-level tax. [*See General Utilities & Operating Co.*, SCt, 36-1 USTC ¶9012, 296 US 200, 56 SCt 185.] The Bureau of Internal Revenue, however, contended that *General Utilities* did not apply on these facts.

Pointing to the history of the negotiations, the government argued that the *corporation* was the true seller of the building. The Supreme Court agreed. The corporation had negotiated the sale; the shareholders had functioned as nothing more than a conduit by which the corporation passed title to the buyers.

The implications of *Court Holding* for ETE and Williams are unsettling. Williams would be proposing a last-minute change to the agreed-upon flow of consideration in the deal. The undisputed purpose would be to change the potential tax consequences to ETE.

Structuring or even restructuring to avoid a disguised-sale problem may not be remarkable. But for ETE to have a "commercially reasonable" obligation to agree to Williams' proposal, the new plan would have to leave the economic terms of the deal essentially unchanged. A last-minute modification that changes the tax consequences of a transaction without changing the underlying economics bears a disturbing resemblance to *Court Holding*.

Even if the analogy is inexact, the question for Latham would be whether the Asset Contribution "should" qualify as a tax-free exchange. That would require a very high degree of confidence that the last-minute, non-economic restructuring would withstand scrutiny under *Court Holding*. So, Latham would probably have been unable to opine even if Cravath had found the perfect replacement structure.

No Equitable Estoppel

When it signed the acquisition agreement in September 2015, ETE represented that it did not know of "the existence of any fact that would reasonably be expected to prevent" the Asset Contribution from qualifying under Code Sec. 721. Williams contended that ETE had concealed its tax analysis indicating that a decline in the value of the Williams assets would create a disguised-sale problem under Code Sec. 707(a). ETE was therefore equitably estopped from relying on that tax analysis to justify its cancellation of the deal.

The Delaware Supreme Court offered several reasons for rejecting Williams' argument. First, ETE's legal analysis was not a "fact" requiring disclosure under the acquisition agreement. It was a *theory* about the application of Code Sec. 707(a) in the event of a major reduction in the value of Williams' assets.

Second, the theory concerned a contingency that would necessarily *follow* the execution of the acquisition agreement. When ETE made the representation, the critical events were still in the future, so they could hardly be described as "facts." It is also worth noting that ETE had no more reason to anticipate that they would occur than Williams did.

Finally, the Chancery Court credited the testimony of ETE's head of tax that the theory did not occur to him until the spring of 2016. Hence, even if ETE's legal analysis of future events were considered some species of fact, it would not be one that ETE could have disclosed to Williams when the deal was signed in September 2015.

Chief Justice Strine Dissents

The Delaware Supreme Court affirmed by a 4-to-1 vote. The lone dissenter was Chief Justice Leo Strine, who joined the court in 2014. Prior to that, he had spent 15 years on the Court of Chancery. During his tenure, he took a leading role in the development of Delaware's corporate jurisprudence.

Never one to pull punches, the Chief Justice viewed the proceeding below with obvious skepticism. Instead of deferring to Vice Chancellor Glasscock's evaluation of the testimony at trial, the Chief Justice suggested that the lower court may have given Latham a pass because of "an understandable reluctance" to question its veracity.

But the Chief Justice thought Latham's good faith was a red herring in any event. Even if Latham was sincere, what mattered was ETE's conduct. Had ETE made "commercially reasonable efforts" to get the required opinion?

Like the majority, the Chief Justice thought ETE had the burden of proof on this point. Unlike the majority, however, he did not think the issue had been settled by the Chancery Court's finding that there was no evidence that ETE's conduct contributed materially to Latham's inability to render the opinion.

Chief Justice Strine thought that ETE had taken several actions that arguably prevented Latham from either rendering the "should" opinion or working with Cravath to find a solution to the alleged tax problem. Several of them involved questionable timing.

ETE's head of tax first got in touch with Latham about the disguised-sale issue on March 29, 2016. Latham researched the matter and gave ETE the thumbs down on April 11. Latham communicated its position to Cravath on April 12.

ETE may have believed that it was acting with all deliberate speed. To the Chief Justice, however, it appeared that ETE and Latham had kept Williams "in the dark for a commercially unreasonable and thus highly suspect period of time." After all, a "full two weeks" had passed between ETE's contacting Latham and Latham's raising the disguised-sale issue with Cravath.

Cravath sent Latham its restructuring proposals on April 14. It did not take Latham long to conclude that the proposals were insufficient for the reasons described above. Latham notified ETE almost immediately.

But Latham did not get back to Cravath until April 29. Meanwhile, ETE amended its SEC Form S-4 on April 18 to inform Williams and the world that Latham would *not* be able to provide the Code Sec. 721 opinion, at least as things stood on that date. ETE said the parties had the matter under discussion but warned that there was a "substantial risk" that the transaction would not be completed.

Chief Justice Strine took a dim view of "ETE's rush to file the good news." Like Williams, he suspected that this was really "another tactic … to pin [Latham] down." Putting Latham's views on the public record would make it harder for the firm to reconsider its position.

At the same time, the Chief Justice did not see any "urgent" reason for ETE to file anything with the SEC. This is surprising because the news about Latham was obviously material to investors. And given that ETE was not planning to close without Latham's "should" opinion, the company was sitting on deal dynamite.

The Chief Justice may have had a point about ETE's motives. But could ETE really have left investors in the dark much longer to avoid boxing Latham in? ETE may have been delighted to go public with the bad news, not least because of the possible effect on Latham. But if the acquisition was teetering on the brink, did ETE really have a choice?

Conclusion

Going forward, lawyers who draft acquisition agreements may want to consider more elaborate provisions to govern the tax-opinion process. When Latham and Cravath found themselves at loggerheads, for example, it would have been useful to have a mechanism for referring the disputed tax issue to one or more firms that did not have a horse in the race.

Sometimes, a tax problem can be solved by making non-economic changes to the form of the deal. That sounds promising. But even the most disinterested third party will want to consider whether the last-minute fiddle creates a *Court Holding* problem.

In a public company deal, last-minute changes will certainly get the IRS's attention. Whether the IRS is likely to notice—or care about—such changes when the taxpayers are privately held is another matter. Private-company deals are also much more likely to require only a "more-likely-than-not" opinion.

Given the specter of *Court Holding*, getting to "should" may be asking a bit much. What about getting to "MLTN"? Naturally, tax professionals will vary in their assessments. But it could be a definite maybe.

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