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Dodging the Boomerang Tax Problems of Intermediary Transactions

By Robert W. Wood • Wood LLP • San Francisco

The middle of the road may be safe political territory, safe in fashion and in pricing goods and services. The middle of the road may even be safe in the tax world if it avoids extreme tax positions on the fringe. But putting something or someone in the middle of something merits reflection.

In the world of acquisitions, parties create special-purpose vehicles all the time. They use them quite successfully in both taxable and tax-free acquisitions. There is thus nothing categorically wrong with the use of intermediaries. Of course, the question is *how* and *when* they are used, and to whom their ownership and tax attributes can be attributed.

Intermediary Transaction Tax Shelters, also known more colloquially as Midco transactions, are not middle of the road. They are also not safe. Everyone may know this today but there was a time when such transactions proliferated. And where there is once proliferation, there is later fallout.

Can't We All Just Get Along?

Classic Midco transactions have a simple and understandable goal. Selling shareholders of a C corporation almost invariably prefer to sell their stock rather than have the company sell its assets. The latter involves a corporate tax on the asset sale followed by shareholder-level tax on distributions. That double tax has been standard fare since the repeal of the *General Utilities* doctrine in 1986.

Buyers, on the other hand, normally want to purchase assets. They want to avoid corporate liabilities and want a stepped-up basis in the assets. Using a middleman is a logical way for buyers and sellers alike to get what they want.

Typically, the Midco entity buys the stock from the selling shareholders, sells assets to the buyer and covers the asset-level tax. But the devil is in the details. Indeed, the IRS may see the Midco entity as the devil, particularly if it has questionable ways of offsetting the tax due. If the IRS attacks that offset, it may find that the Midco entity has a paucity of assets.

This kind of arbitrage is not new. In fact, determining if selling shareholders sold the stock of a corporation or caused their corporation to sell its assets is a classic tax question. It seems nearly metaphysical in scope. Although the shareholders may be pulling the strings, the corporation is a separate taxpayer and is taxed on its own sales. [*See, e.g., J.T.S. Brown's & Son Co.*, 10 TC 840, Dec. 16,388 (1948).]

Midco Gauntlet

Despite the allure of interposing someone able to absorb the tax hit, it is hard to deny that the typical Midco transaction looks bad on its face. The IRS has made its position about such transactions clear. It immortalized their status over a decade ago in IRS Notice 2001-16, 2001-1 CB 730.

In its Notice, the IRS set out the archetypal fact pattern. The players are a seller who wants to sell stock, a buyer who wants to purchase assets and an intermediary. The seller sells the stock to the intermediary. The intermediary, in turn, sells the assets to the buyer.

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Generally, the intermediary has tax losses or tax credits. The target and the intermediary thereafter file a consolidated return to use the losses or credits against the corporate gain triggered on the sale. Theoretically, everyone goes away happy except the IRS. There are numerous variations on this theme with embellishments only limited by taxpayer and adviser creativity.

For example, the intermediary may be a tax-exempt entity. The target corporation may liquidate in a transaction that is not intended as a taxable liquidation. And there are numerous other possibilities.

Ultimately, regardless of the variation, Notice 2001-16 warns against Midco or intermediary shelters, including "substantially similar ones," which it labels as listed transactions. Exactly which types of Midco transactions were targeted by the IRS has been debated.

Shelter Profiling?

In Notice 2008-20, IRB 2008-6, 406, the IRS identified four necessary components of what it called an intermediary tax shelter:

- Built-in gain assets (in other words, a tax that would be triggered on an asset sale)
- Eighty-percent vote and value requirement (80 percent of the stock being sold within 12 months)
- Assets vs. stock (65 percent or more of the target's assets being disposed of within 12 months after the stock transaction)
- Tax avoidance (at least half the target's built-in gain ends up not being taxed)

These four components plus a "plan" mean the transaction is suspect. The "plan" requirement is broad. In fact, it is arguably present virtually any time a target is selling built-in gain assets where the sale of assets is related to a sale of stock designed to avoid tax.

However, a critical element of Notice 2008-111 is that a person must "know" or have "reason to know" that a transaction is structured to effectuate the "plan" in order for the transaction to be a Midco transaction with respect to that person. One wonders how a buyer has reason to know that a target has previously engaged in a Midco transaction. What if a reasonable person would have discovered it through exercising due diligence?

Duty, Honor and Safe Harbors

It is appropriate to question whether there is any duty to inquire. Similarly, should a seller inquire into the buyer's future intentions for the target or seek (*via* representations, warranties or covenants) to prevent the buyer from making subsequent dispositions? In any case, safe harbors may take a transaction out of the soup.

Notice 2008-111 includes safe harbors that can take an otherwise bad transaction out of the pejorative category and into protected status. A transaction is not an intermediary transaction with respect to the following persons under the following circumstances:

- Any shareholder, if the target's stock the shareholder sells is traded on an established securities market, and before the disposition by the shareholder that person (and related persons) did not hold five percent or more by vote or a value of any class of the target stock that is disposed of by that shareholder
- Any shareholder or target if, after the acquisition of the target stock, the acquirer of the target stock is the issuer of stock or securities that are publicly traded on an established U.S. securities market, or is consolidated for financial reporting purposes with such an issuer
- Any buyer, if the target assets it acquires are either (1) securities that are traded on an established securities market and represent a less than five-percent interest in that class of security, or (2) assets that are not securities and do not include a trade or business as described in Reg. §1.1060-1(b)(2)

Victory in 2009

Although the IRS made its position on Midco transactions clear with the issuance of Notice 2001-16 and later guidance, it has also litigated cases. The IRS has had some success. Thus, in *Enbridge Energy Co.*, CA-5, 2009-2 USTC ¶50,737 (2009), the Fifth Circuit affirmed the district court's grant of summary judgment for the IRS. It was the first appellate court to strike down a Midco deal.

In *Enbridge Energy*, Langley sought to sell his stock but knew a direct asset sale would incur both corporate and individual taxes. MidCoast offered to buy the stock for $163 million, but Langley rejected the offer. MidCoast asked its tax advisor, PWC, for suggestions about improving its bid. PWC suggested that the parties use a third-party intermediary, Fortrend, for the transaction, as it had done in similar transactions.

MidCoast understood that Fortrend would buy Langley's stock, and that Fortrend would thereafter sell the Bishop assets to MidCoast. However, rather than buying the stock and selling the assets itself, Fortrend formed a special vehicle solely for this purpose: K-Pipe. K-Pipe existed solely to accomplish this transaction and did no substantive business before or after it.

Although K-Pipe obtained financing for the stock purchase, the financing was 100 percent secured by MidCoast's funds. It was technically a loan, but the district and appellate courts saw it as indistinguishable from purchasing stock with MidCoast's funds. Proximity in time was also suspect.

The transactions occurred within 24 hours of each other, further suggesting that K-Pipe was merely an intermediary with no *bona fide* role. Still, the only way MidCoast could acquire the Bishop assets at a price MidCoast was willing to pay was if a third party (K-Pipe) acquired Bishop's stock from Langley and then sold the assets to MidCoast. MidCoast claimed business reasons supported using the conduit and that K-Pipe had a profit motive.

MidCoast also claimed the transaction limited its exposure to litigation. Had MidCoast purchased the Bishop stock, the argument went, Midcoast would have been liable for claims against Bishop. By purchasing assets, MidCoast could avoid liability for known and unknown claims that might be asserted against the Bishop entity, it claimed.

Nevertheless, the court said this failed to explain why an intermediary was necessary in the first place. The parties could have achieved the same result if MidCoast had bought the assets directly without an intermediary. Of course, that would have produced some tax.

In the end, the Fifth Circuit didn't think this was a close case. It viewed the formalities as a sham. The district court ruled that the IRS was entitled to disregard the form of the transaction and treat it as a direct sale of stock. The Fifth Circuit agreed, finding that uncontroverted evidence supported the district court's conclusion. This was a sham conduit transaction.

Thus, the district court ruled that MidCoast was not entitled to claim a stepped-up basis for the assets it purchased. This transaction was designed solely to avoid taxes, and MidCoast offered no adequate nontax reason for using a conduit entity. Consequently, the court upheld the IRS's ability to disregard the form of the transaction.

Transferee Attack

Most Midco attacks come as transferee liability cases. Plainly, a great difficulty the IRS has had with Midco transactions is who to pursue. In some ways, the most logical party to chase is the original seller of the stock.

Because that seller avoided two layers of tax, the seller got a higher price than he should have had the transaction not involved an intermediary. Yet procedurally, these cases can be a nightmare. On December 19, 2002, the IRS classified Midco transactions as a coordinated issue.

The IRS instructed auditors to use the economic-substance and step-transaction doctrines to disallow losses used to offset gains from the sale of the target's assets. The coordinated issue paper directs auditors to consider all facts and circumstances to determine if a transaction should be characterized as a stock sale or an asset sale. [IRS, Coordinated Issue Paper, *Intermediary Transaction Tax Shelters*, Dec. 19, 2002, *available at www.irs.gov/businesses/article/0,,id=182138,00.html*.]

According to the directive, auditors should focus on which party was responsible for involving the intermediary and paying its fees. However, it soon became painfully apparent that intermediaries would provide insufficient sources for collection. The IRS then directed auditors to focus on the potential liability of *other* parties involved in these transactions. [*See* IRS, Memorandum, *Examination of Multiple Parties in Intermediary Transaction Tax Shelters as Described in Notice 2001-16*, Jan. 12, 2006, *available at www.irs.gov/businesses/article/0,,id=153182,00.html*.]

One potential source: transferee liability under Code Sec. 6901 against the selling shareholders or buyers. However, transferee liability cases can be notoriously tough for the IRS. Nevertheless, in Notice 2008-111, IRB 2008-51, 1299 (Dec. 1, 2008), the IRS staked out its position that any person who participates in an Intermediary Transaction pursuant to a "plan" may be subject to transferee liability for the unpaid corporate-level tax of the target.

Avoiding the Spotlight

No one wants to be pursued as a transferee. A person engages in an Intermediary Transaction if the person knows or has reason to know that the transaction is structured to effectuate the Plan, even if the person does not know the actual mechanics of the transaction or the relationships between the parties.

To mount a transferee liability case, of course, the IRS must first determine the transferor's liability and its amount. As the liability is derivative, only then can it turn its collection efforts to the transferee. The burden of proof is on the IRS rather than the taxpayer to establish the technical requirements under Code Sec. 6901 for transferee liability.

For the determination of transferee liability, the IRS must resort to state law or the Federal Debt Collection Act. The IRS has generally fared poorly because of the high hurdles it must clear. [*See E.H. Vendig*, CA-2, 56-1 USTC ¶9208, 229 F2d 93 (1956).] For example, in California, the California Uniform Fraudulent Transfer Act sets forth the elements of a fraudulent transfer.

It is a transfer or obligation undertaken with an actual intent to hinder, delay or defraud any creditor of the debtor, and where reasonable equivalent value is not received in exchange for the transfer or obligation, if the debtor either:

1. was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
2. believed, or reasonably should have believed, he would incur debts beyond his ability to pay as they became due. [*See* Cal. Civ. Code §3439.04(a).]

Diehard Issue

In *D.R. Diebold*, 100 TCM 370, Dec. 58,374(M), TC Memo. 2010-238 (2010), the IRS attacked a Midco transaction in a transferee liability case.

The IRS issued a notice of transferee liability to Ms. Diebold. However, she did not own the stock of the corporation. Instead, the stock was owned by a marital trust formed under New York law, and the marital trust had received the sale proceeds.

There was no suggestion that this trust wasn't valid or legitimate. Nevertheless, the IRS argued that Ms. Diebold was either a direct transferee from the corporation or that she was a transferee of a transferee (through the trust). Essentially, the IRS argued that the trust was a mere conduit.

The Tax Court disagreed and refused to disregard the trust. The court noted that the IRS's assertion of transferee liability was governed by state law, in this case, New York. Under New York law, properly created marital trusts are independent legal entities.

The IRS argued that the trust should be disregarded because it acted as a mere conduit for transferring proceeds of the stock sale to Diebold. The trust's fiduciary tax returns listed her as the "grantor/owner." The IRS argued that she should therefore be treated as the owner of the marital trust assets for purposes of federal income tax and transferee liability.

However, the Tax Court found no case law (in New York or elsewhere) that would place transferee liability on the grantor on the basis of the trust being a grantor trust. In any event, the marital trust was not a grantor trust. The IRS also argued that Diebold was the beneficial owner of the trust's assets because she exercised full control over them. Indeed, claimed the IRS, approval of the trust's co-trustees was a mere formality. In any case, the Tax Court found that Diebold did not exercise sole authority and that the co-trustees were notified of her reasonable disbursal requests in writing.

The IRS even claimed that the trust should be disregarded because it participated in a fraudulent transfer of assets with a *de facto* liquidation plan in place. Yet even if there was as a plan of liquidation, the Tax Court said, the IRS did not prove that Diebold had engaged in a fraudulent conveyance of the stock. Unless the marital trust could be disregarded under New York law (which the IRS failed to show) the Tax court had to respect its separate legal existence.

The Tax Court held that the trust should not be disregarded for purposes of transferee liability and that Diebold was not a transferee. The Tax Court noted that the burden was on the IRS to prove that Diebold was a transferee of the trust. Moreover, the IRS must prove that the distributions caused the trust to become insolvent when the distributions were made, and that the distributions should be treated as fraudulent under New York law. These are high standards and the IRS simply didn't make its case.

Other Transferees

Despite the difficulty the IRS has with transferee liability cases, some taxpayers in this position may give up. For example, in *MDC Credit Corp., F.K.A Midcoast Credit Corp., Midcoast Mortgage Corporation, Transferee v. Commissioner of Internal Revenue,* U.S. Tax Court, Docket No. 26922-08, Midcoast stipulated to a liability of $672,000 plus interest. Prior to the sale of SBP Michigan, the alleged transferees owned a company with a value of approximately $1.8 million and a potential tax liability of approximately $1.1 million.

With penalties and interest, the total was $2.1 million. The IRS was doing its best to collect. The alleged transferees ended up with approximately $1.1 million in cash, thus saving approximately half of the tax liability. Because this case was decided by stipulation ($672,000 plus interest), it does not reveal whether the selling shareholders knew of MidCoast's plan to avoid paying tax.

Fourth Circuit in *Starnes*

The most recent Midco litigation vehicle was *A.J. Starnes,* CA-4, 2012-1 USTC ¶60,380, 680 F3d 417 (2012). Tarcon Corporation had $3.1 million in cash and about $880,000 in liabilities (mainly the expected corporate tax on its gain from selling its warehouse). That gave it a net worth of approximately $2.2 million.

As intermediary, MidCoast paid Albert Starnes and three other shareholders ("the Tarcon Shareholders") $2.6 million for their stock. At the time, the Tarcon Shareholders thought MidCoast would continue operating Tarcon as a going concern. In fact, the Tarcon Shareholders testified that they did not understand what MidCoast planned to do or what the "asset recovery business" was.

Still, they made no inquiries and seemed happy enough to get the deal closed. One even testified he didn't *want* to understand. MidCoast could do as it desired, it seemed.

Of course, you guessed it: Rather than operating Tarcon, 11 days after closing, MidCoast sold its Tarcon stock to Sequoia Capital (a Bermuda company) for $2,861,465.96.

Two days later, all of the funds in Tarcon's SunTrust account were transferred to an account with Deutsche Bank under Tarcon's name. Then, $2.96 million was transferred from Deutsche Bank to an account in the Cook Islands in the name of Delta Trading Partners, and $126,822 was transferred to a MidCoast bank account. Thereafter, Tarcon never had more than $132,320 in any account.

Tarcon filed its 2003 federal tax return in July 2004, reporting capital gain of $1,009,483 and ordinary income of $1,557,315, principally from the sale of the warehouse and the related grounds. Tarcon reported a short-term capital loss of $1.01 million from a December 2003 interest rate swap option. It reported an ordinary loss of $1.95 million from a transaction involving an asset denominated "DKK/USD BINA," which was purportedly acquired on December 29, 2003, and purportedly sold on December 31, 2003.

Consequently, the 2003 return stated that Tarcon's only asset was $132,320 in cash. Thus, the return reported an overall loss and no tax due. In 2005, Tarcon filed its 2004 federal tax return, marked as its final return, reporting no tax due and no assets. When the IRS disagreed with Tarcon's return but found no one to pursue, the Tarcon Shareholders who had sold their stock to MidCoast were logical suspects.

Follow the Money

The IRS pursued them under a transferee liability theory. The court asked whether the Tarcon Shareholders had *actual* knowledge of facts that would have led a reasonable person concerned about Tarcon's solvency to inquire further into MidCoast's post-closing plans. This standard is ultimately a factual inquiry.

Would an inquiry undertaken by a reasonably diligent, similarly-situated person have revealed MidCoast's plan to leave Tarcon unable to pay its 2003 taxes? Asking the question in this way suggests that the standard to trigger inquiry notice is not terribly high. However, the court answered these points in favor of the Tarcon Shareholders, holding that they were not liable. The Fourth Circuit agreed.

Although there is a bevy of other transferee liability cases in the offing, so far the cases have not gone to the IRS's liking. Perhaps for that reason, the cases reveal some experimentation in legal arguments. In *Diebold*, the IRS pursued the initial seller (although the Tax Court ultimately ruled that Diebold was not the seller).

The Usual Suspects

In *LR Development*, 100 TCM 231, Dec. 58,334(M), TC Memo. 2010-203 (2010), the IRS attacked the transaction from the perspective of the purchaser who ultimately bought the seller's assets. When the sole shareholder of a company died, his estate wanted to sell the stock. The ultimate buyer, LR Development Company, introduced Fortrend as an intermediary.

Fortrend offered to purchase the stock and then sell the assets to the buyer. Fortrend was to pay any taxes resulting from the asset sale, and that obligation was assumed by the buyer. Fortrend represented that it had ways to minimize the tax liabilities from the asset sale.

The buyer made an escrow payment into an account controlled by Fortrend and those funds were applied against a loan Fortrend received to buy the target's stock. The target reported no tax liability for the year because gain from the asset sale was offset by a $17.2 million loss from currency arbitrage, which the IRS later disallowed. The Tax Court held that the buyer was not a transferee. For one thing, Illinois law had a strong presumption against finding third-party beneficiaries to contracts.

Moreover, to show that the parties had contemplated insolvency, the IRS would have to show that the target had reason to believe it would incur debts beyond its ability to pay. The IRS did not present *any* evidence of that here. Interestingly, the buyer apparently had knowledge of the intermediary's plan to avoid paying the taxes and therefore negotiated a lower purchase price. Nevertheless, the IRS failed to collect.

Diligent Diligence?

In *D.R. Griffin*, 101 TCM 1274, Dec. 58,571(M), TC Memo 2011-61 (Mar. 15, 2011), Douglas

Griffin owned HydroTemp Manufacturing Company. Pentair Corporation, its largest customer, wanted HydroTemp's assets and bought them for $8.3 million. HydroTemp's expected tax bill from the sale was $2.6 million.

HydroTemp kept unrelated equipment, inventory and accounts receivable, and kept five to 10 employees on its payroll. The corporation agreed to change its name following the sale but encountered delays. In the meantime, Griffin was approached by MidCoast, which, according to its representatives, was engaged in an asset recovery business. MidCoast proposed purchasing the stock of HydroTemp for its cash, minus 52 percent of its estimated tax liability, plus $25,000 for reimbursement of expenses.

Griffin conducted extensive due diligence, including visiting the offices of MidCoast, examining its books, and getting advice from a lawyer. After the sale to MidCoast, Griffin had no further involvement with HydroTemp until he found the IRS pursuing him. MidCoast had committed to cause HydroTemp to pay its tax liability and agreed to indemnify HydroTemp for the $2.4 million of accrued taxes.

Griffin reported his gain from the sale of his HydroTemp stock and paid the tax shown on his return. HydroTemp's return showed no tax liability because of a $7 million short-term capital loss, which the IRS later disallowed. The IRS was unable to collect from HydroTemp so asserted transferee liability against Griffin.

Griffin then sued MidCoast in Florida District Court, obtaining a judgment that MidCoast was liable for HydroTemp's tax liability. However, the IRS argued that the asset sale to Pentair and the subsequent stock sale to MidCoast, were part of an integrated plan entered into by Griffin solely to reduce his tax liability. The IRS argued that the court should collapse the two transactions based on substance over form.

However, the Tax Court rejected the IRS's arguments. The court found that the asset sale and the stock sale had independent legal significance and were not part of a preconceived plan. Griffin had no knowledge that MidCoast would avoid paying HydroTemp's tax liability. The court also found that neither transaction was a fraudulent conveyance under Florida law.

Interestingly, the Tax Court considered the IRS's position in pursuing Griffin despite his lack of knowledge of Midcoast's tax-avoidance scheme deserved an award of litigation costs. The Tax Court granted Griffin's motion, awarding him $183,019.42 in litigation costs. The case is on appeal to the Eleventh Circuit.

Pressure Points

Despite the IRS defeats, the IRS has occasionally succeeded in its quest to collect. For example, in *CHC Industries,* 101 TCM 1148, Dec. 59,964(M), TC Memo. 2011-33, the IRS asserted transferee liability not against the buyer or seller, but against the promoter that introduced the buyer to MidCoast. The allegedly fraudulent transfer was the payment of a finder's fee of approximately $275,000.

CHC Industries had introduced Fortrend to MidCoast. Fortrend acquired the stock of the Town and Checker taxi company, which then acquired a holding company (St. Augustine), which held only cash ($5,255,258) following the redemption of its interest in another venture. When the cash from St. Augustine was distributed to various entities (including CHC), it left St. Augustine insolvent and unable to pay its taxes.

Because CHC was paid by St. Augustine instead of MidCoast or Fortrend, the Tax Court determined that the payment was a fraudulent transfer. The Tax Court treated CHC as having constructive knowledge of the tax-avoidance scheme given the source of its payment and its close relationship with Fortrend.

Innocent Bystander?

The taxpayer in *Frank Sawyer Trust of May 1992,* 102 TCM 623, Dec. 58,845(M), TC Memo 2011-298, fared much better. What's more, this was the same transaction. The patriarch, Frank Sawyer, died in 1992 at age 97. His wife Mildred died in 2000. Included in her estate was the Frank Sawyer Trust of 1992. The taxable estate was $138,480,721 and there were C corporations with highly appreciated assets.

Midcoast Credit Corp and Fortrend International LLC offered to do a Midco transaction, make the Sawyer family happy and handle the taxes as usual. When the transaction proceeded apace and the attempted tax offset was unwound, the IRS started looking for other suspects from whom it could collect. In a connected transaction, the IRS was able to get the $275,000 finder's fee from CHC Industries.

But there were far larger dollars at stake against the Sawyer Trust. The problem the IRS had was that the Sawyer Trust did not receive corporate distributions. In fact, Fortrend had borrowed from a bank to pay the Sawyer Trust. The loan was transitory, but the Trust appeared not to know.

With arguments similar to those in *Diebold*, the IRS wanted to collapse everything together. Yet under the Uniform Fraudulent Transfer Act, though, the burden was on the IRS to prove that the trustee knew Fortrend's schemes were illegitimate. The court didn't find that the trust had actual knowledge.

In fact, the IRS had stipulated that at the time of the stock sales the trust representatives didn't know about the post-closing merger or the contribution of inflated-basis stock contemplated by Fortrend. Maybe they should have figured it all out, but there was no suggestion that they had. Once again, the IRS was out of luck.

Better Planning?

It is hard to read Midco cases without periodically scratching your head. A timely S election could usually have avoided the underlying fact patterns and thus also have avoided the Midco deal too. Plainly, if you have appreciated assets in a closely held C corporation, you should consider whether you might liquidate in the future and take affirmative steps sooner rather than later.

But these obvious platitudes aren't the issue. Beyond these historical ruminations, there is the more immediate post-transaction malaise. Surely few today would consider a transaction even remotely similar to a Midco transaction. But if after the fact you find yourself in the Midco soup, you might find slight comfort in the case law. For all the warts of the Midco transaction, the IRS has had a hard time collecting from Midco participants.

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