

No. _____

IN THE SUPREME COURT OF THE STATE OF NEVADA

PRICEWATERHOUSECOOPERS LLP,
Petitioner,

Electronically Filed
Jan 25 2021 10:33 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

v.

THE EIGHTH JUDICIAL DISTRICT COURT, IN AND FOR THE COUNTY OF CLARK,
STATE OF NEVADA, AND THE HONORABLE ELIZABETH GONZALEZ,

Respondents,

and

MICHAEL A. TRICARICHI,

Real party in interest.

From the Eighth Judicial District Court, County of Clark, Dept. XI
Dist. Court Case No. A-16-735910-B

APPENDIX TO PETITION FOR WRIT OF MANDAMUS
VOLUME V

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DATED: January 22, 2021

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove
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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On January 22, 2021, I caused to be served a true and correct copy of the foregoing **APPENDIX TO PETITION FOR WRIT OF MANDAMUS VOLUME V** by the method indicated:

- ☒ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

Honorable Elizabeth Gonzalez
Regional Justice Center
200 Lewis Ave.
Las Vegas, Nevada 89101

- ☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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Todd W. Prall
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Attorneys for Real Party in Interest

/s/Maricris Williams

An Employee of Snell & Wilmer L.L.P.

purposes with such an issuer.

- Any Y, if the only Sold T Assets it acquires are either (i) securities (as defined in section 475(c)(2)) that are traded on an established securities market (within the meaning of § 1.453-3(d)(4)) and represent a less-than-five-percent interest in that class of security, or (ii) assets that are not securities and do not include a trade or business as described in § 1.1060-1(b)(2).

02. Participation

If one of the foregoing safe harbor exceptions does not apply to a person, that person engaged in a transaction pursuant to the Plan, and the transaction has all four components described in section 3, the determination of whether the person participated in an Intermediary Transaction for purposes of § 1.6011-4 in any given taxable year is made under the general rule in § 1.6011-4(c)(3)(i)(A).

SECTION 6. EFFECTIVE DATE; DISCLOSURE, LIST MAINTENANCE, AND REGISTRATION REQUIREMENTS; PENALTIES; OTHER CONSIDERATIONS

Transactions that are the same as, or substantially similar to, the transaction described in Notice 2001-16 were identified as "listed transactions" under § 1.6011-4(b)(2) effective January 19, 2001. Accordingly, this Notice is generally effective January 19, 2001. However, this Notice imposes no requirements with respect to any obligation under § 6011, § 6111, or § 6112 due before December 1, 2008, not otherwise imposed by Notice 2001-16. Because this Notice supersedes Notice 2008-20, any disclosure filed pursuant to Notice 2008-20 will be treated as made pursuant to Notice 2001-16. Independent of their classification as listed transactions, transactions that are the same as, or substantially similar to, the transaction described in Notice 2001-16 may

already be subject to the requirements of § 6011, § 6111, or § 6112, or the regulations thereunder.

Persons required to disclose these transactions under § 1.6011-4 and who fail to do so may be subject to the penalty under § 6707A. Persons required to disclose or register these transactions under § 6111 who have failed to do so may be subject to the penalty under § 6707(a). Persons required to maintain lists of investors under § 6112 who fail to provide such lists when requested by the Service may be subject to the penalty under § 6708(a). A person that is a tax-exempt entity within the meaning of § 4965(c), or an entity manager within the meaning of § 4965(d), may be subject to excise tax, disclosure, filing or payment obligations under § 4965, § 6033(a)(2), § 6011, and § 6071. Some taxable parties may be subject to disclosure obligations under § 6011(g) that apply to "prohibited tax shelter transactions" as defined by § 4965(e) (including listed transactions).

In addition, the Service may impose other penalties on persons involved in this transaction or substantially similar transactions (including an accuracy-related penalty under § 6662 or 6662A) and, as applicable, on persons who participate in the promotion or reporting of this transaction or substantially similar transactions (including the return preparer penalty under § 6694, the promoter penalty under § 6700, and the aiding and abetting penalty under § 6701).

Further, under § 6501(c)(10), the period of limitations on assessment may be extended beyond the general three-year period of limitations for persons required to disclose transactions under § 1.6011-4 who fail to do so. See Rev. Proc. 2005-26, 2005-1 C.B. 965.

The Service and the Treasury Department recognize that some taxpayers may have filed tax returns taking the position that they were entitled to the purported tax benefits of the types of transactions described in Notice 2001-16. These taxpayers should consult with a tax advisor to ensure that their transactions are disclosed properly and to take appropriate corrective action.

SECTION 7. EFFECT ON OTHER DOCUMENTS

Notice 2001-16 is clarified. Notice 2008-20 is superseded.

SECTION 8. REQUEST FOR COMMENTS

The Service and the Treasury Department seek comments regarding the above definitions, components, and safe harbors for the purpose of reflecting more accurately which transactions are the same as or substantially similar to an Intermediary Transaction and which parties are engaging in a transaction pursuant to the Plan.

Comments should be submitted to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2008-111), Room 5203, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Alternatively, comments may be hand delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to: CC:PA:LPD:PR (Notice 2008-XX), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Comments may also be submitted electronically, via the following email address: Notice.Comments@irs.counsel.treas.gov. Please include "Notice 2008-111" in the subject line of any electronic submissions. All comments received will be open to public inspection and copying.

DRAFTING INFORMATION

The principal author of this notice is Douglas C. Bates of the Office of Associate

Chief Counsel (Corporate). For further information regarding this notice contact Mr.
Bates on (202) 622-7550 (not a toll free call).

ADMIN_TRI01818

TRICAR-NV0026644
APP0798

Exhibit 19

CERTIFIED MAIL

7011 1570 0001 9806 4644

Internal Revenue Service
1100 COMMERCE STREET
Stop 4019 DAL
Dallas, TX 75242

Department of the Treasury

Date: JUN 25 2012

Form Number:

Transferee liability with regard to Form 1120 West Side Cellular, Inc.

For Estate Tax - Date of Death:

Person to Contact:
Notices Clerk

Employee Identification Number:

Contact Telephone Number:
214-413-5162

Last Day to File a Petition With the
United States Tax Court: SEP 24 2012

Michael Tricarichi, Transferee
20 Hawk Ridge Dr.
Las Vegas, NV 89135

RECEIVED
JUN 25 2012

CERTIFIED MAIL

Dear Michael Tricarichi, Transferee:

NOTICE OF LIABILITY

The determination of the income tax liability of West Side Cellular, Inc., 1155 W. Fourth St. #225-18, Reno, NV 89503, for the taxable year ended December 31, 2003, discloses a deficiency in the amount of \$15,186,570.00 in income tax and penalties of \$6,012,777.00, as shown in the attached statement. The amount of the deficiency plus interest as provided by law, constitutes your liability as transferee of assets of West Side Cellular, Inc., and will be assessed against you.

If you want to contest this determination in court before making any payment, you have 90 days from the date of this letter (150 days if addressed to you outside of the United States) to file a petition with the United States Tax Court for a redetermination of the liability. You can get a copy of the rules for filing a petition and a petition form you can use by writing to the address below.

United States Tax Court, 400 Second Street NW., Washington, D.C. 20217

The Tax Court has a simplified procedure for small tax cases when the amount in dispute for each tax year is \$50,000 or less. If you intend to file a petition for multiple tax years and the amount in dispute for any one or more of the tax years exceeds \$50,000, this simplified procedure is not available to you. If you use this simplified procedure, you cannot appeal the Tax Court's decision. You can get information about the simplified procedure for small cases from the Tax Court by writing to the court at the above address or from the court's internet site at www.ustaxcourt.gov.

Send the completed petition, a copy of this letter, and copies of all statements and/or schedules you received with this letter to the Tax Court at the above address. The Court cannot consider your case if the petition is filed late. The petition is considered timely filed if the postmark date falls within the prescribed 90 or 150 day period and the envelope containing the petition is properly addressed with the correct postage.

Letter 902-T (12-2008)
Catalog Number 52444G

EXHIBIT
PwC Dep Ex. No.

80

A-16-735910-B

ADMIN_TRI02604

TRICAR-NV0027037
APP0800

The time you have to file a petition with the court is set by law and cannot be extended or suspended. Thus, contacting the Internal Revenue Service (IRS) for more information, or receiving other correspondence from the IRS will not change the allowable period for filing a petition with the Tax Court.

If you decide not to file a petition with the Tax Court, please sign the enclosed waiver form and return it to us at the IRS address on the top of the first page of this letter. This will permit us to assess the liability quickly and can help limit the accumulation of interest.

If you decide not to sign and return the waiver, and you do not file a petition with the Tax Court within the time limit, the law requires us to assess and bill you for the liability after 90 days from the date of this letter (150 days if this letter is addressed to you outside the United States).

If you have questions about this letter, you may write or call the contact person whose name, telephone number, and IRS address are shown on the first page of this letter. If you write, please include your telephone number, the best time for us to call you if we need more information, and a copy of this letter to help us identify your account. Keep the original letter for your records. If you call and the telephone number is outside your local calling area, there will be a long distance charge.

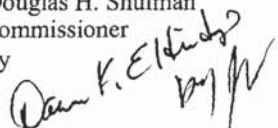
The contact person can access your tax information and help answer your questions. You also have the right to contact the office of the Taxpayer Advocate. Taxpayer Advocate assistance is not a substitute for established IRS procedures such as the formal appeals process. The Taxpayer Advocate is not able to reverse legally correct tax determinations, nor extend the time fixed by law that you have to file a petition with the Tax Court. The Taxpayer Advocate can, however, see that a tax matter that may not have been resolved through normal channels gets prompt and proper handling. If you want Taxpayer Advocate assistance, please contact the Taxpayer Advocate for the IRS office that issued this Notice of Liability. See the enclosed Notice 1214, *Helpful Contacts for Your "Notice of Deficiency,"* for Taxpayer Advocate telephone numbers and addresses.

Thank you for your cooperation.

Sincerely,

Douglas H. Shulman
Commissioner

By


Darwin K. Eldridge, Acting Territory Manager
Technical Services, Gulf States Area

Enclosures:
Explanation of tax changes
Waiver
Notice 1214

Letter 902-T (12-2008)
Catalog Number 52444G

ADMIN_TRI02605

TRICAR-NV0027038
APP0801

JUN 25 2012

Form **870-T**
(Rev. September 2009)Department of the Treasury — Internal Revenue Service
**Waiver of Restrictions on Assessment and Collection
of Transferee or Fiduciary Liability**Date received by
Internal Revenue Service

Transferee or Fiduciary name, address and identification number

Michael Tricarichi, Transferee
20 Hawk Ridge Dr.
Las Vegas, NV 89135

Redaction

Taxpayer name, address and taxpayer identification number

**Liability of the above transferee or fiduciary for the following liability(ies) of the above taxpayer,
subject to the limitation below.**

This represents the undersigned's liability as a transferee of assets of West Side Cellular, Inc. (EIN: 34-1685059), 1155 W Fourth St., #225-18, Reno, NV 89503, for the unpaid income tax, penalties/additions to tax, plus interest as provided by law, due from West Side Cellular, Inc. to the extent of the net value of the assets received, plus interest thereon as provided by law. It has been determined that the net value of the assets received by the above referenced transferee is \$35,199,372.00.

Tax period ended	Tax	Penalties			
		Deficiency	IRC 6662(c)-(d)	IRC 6662(h)	
December 31, 2003	\$15,186,570.00	\$61,851.00	\$5,950,926.00		

(For instructions, see back of form)

Consent to Assessment and Collection

I consent to the immediate assessment and collection of any liability shown above. I understand that by signing this waiver, I will not be able to contest this liability in the United States Tax Court, except as additional transferee or fiduciary liability is determined for these years.

TRANSFEEE OR FIDUCIARY SIGNATURE HERE		Date
TRANSFEEE OR FIDUCIARY REPRESENTATIVE HERE		Date
CORPORATE NAME		Date
CORPORATE OFFICER(S)	Title	Date
SIGN HERE	Title	Date

Catalog Number 52446C

www.irs.gov

Form **870-T** (Rev. 09-2009)

ADMIN_TRI02606

TRICAR-NV0027039

APP0802

JUN 20 2016

Form 870-T (Rev. September 2009)	Department of the Treasury — Internal Revenue Service Waiver of Restrictions on Assessment and Collection of Transferee or Fiduciary Liability	Date received by Internal Revenue Service
Transferee or Fiduciary name, address and identification number Michael Tricarichi, Transferee 20 Hawk Ridge Dr. Las Vegas, NV 89135		Taxpayer name, address and taxpayer identification number
Redaction		

**Liability of the above transferee or fiduciary for the following liability(ies) of the above taxpayer,
subject to the limitation below.**

This represents the undersigned's liability as a transferee of assets of West Side Cellular, Inc. (EIN: 34-1685059), 1155 W Fourth St., #225-18, Reno, NV 89503, for the unpaid income tax, penalties/additions to tax, plus interest as provided by law, due from West Side Cellular, Inc. to the extent of the net value of the assets received, plus interest thereon as provided by law. It has been determined that the net value of the assets received by the above referenced transferee is \$35,199,372.00.

Tax period ended	Tax		Penalties		
	Deficiency	IRC 6662(c)-(d)	IRC 6662(h)		
December 31, 2003	\$15,186,570.00	\$61,851.00	\$5,950,926.00		

(For instructions, see back of form)

Consent to Assessment and Collection

I consent to the immediate assessment and collection of any liability shown above. I understand that by signing this waiver, I will not be able to contest this liability in the United States Tax Court, except as additional transferee or fiduciary liability is determined for these years.

TRANSFEE OR FIDUCIARY SIGNATURE HERE		Date
TRANSFEE OR FIDUCIARY REPRESENTATIVE HERE		Date
CORPORATE NAME		Date
CORPORATE OFFICER(S)	Title	Date
SIGN HERE	Title	Date

Catalog Number 52446C

www.irs.gov

Form **870-T** (Rev. 09-2009)

ADMIN_TRI02607

TRICAR-NV0027040

APP0803

Name of Transferee or Fiduciary and Name of Taxpayer: Michael Tricarichi, Transferee

Identification Number of transferee or fiduciary and taxpayer: Redaction

Form 870-T page 2

Instructions

General Information

If you consent to the assessment of the transferee or fiduciary liability shown in this waiver, please sign and return the form in order to limit any interest charge and expedite the adjustment to your account. Your consent will not prevent you from filing a claim for refund (after you have paid the liability) if you later believe you are so entitled. It will not prevent us from later determining, if necessary, that you owe additional liability; nor extend the time provided by law for either action.

If you later file a claim and the Service disallows it, you may file suit for refund in a district court or in the United States Claims Court, but you may not file a petition with the United States Tax Court.

Who Must Sign

If this waiver is for a corporation, it should be signed with the corporation name, followed by the signatures and titles of the corporate officers authorized to sign. An attorney or agent may sign this waiver provided such action is specifically authorized by a power of attorney which, if not previously filed, must accompany this form.

If this waiver is signed by a person acting in a fiduciary capacity (for example, an executor, administrator, or a trustee) Form 56, Notice Concerning Fiduciary Relationship, should, unless previously filed, accompany this form.

ADMIN_TRI02608

TRICAR-NV0027041

APP0804

Notice of Liability Statement**Exhibit – 1.0****Michael Tricarichi, Transferee**TIN: Redaction**West Side Cellular, Inc., Transferor**

EIN: 34-1685059

1155 W. Fourth St., #225-18

Reno, NV 89503

Income tax liability for the taxable year ended December 31, 2003:

Income Tax Liability	\$15,186,570.00
Accuracy-Related Penalty IRC 6662(c) / (d)	61,851.00
Accuracy-Related Penalty IRC 6662(h)	5,950,926.00
Total	\$21,199,347.00

Michael Tricarichi, TransfereeTIN: Redaction

20 Hawk Ridge Dr.

Las Vegas, NV 89135

It has been determined that West Side Cellular, Inc. has been liquidated and that its assets were transferred to you in 2003.

The above amount, plus interest as provided by law, is your liability as a transferee of the assets of West Side Cellular, Inc., for an income tax deficiency and penalties for the taxable year ended December 31, 2003.

It has been determined that the transaction, in which you purportedly sold your shares of stock in West Side Cellular, Inc., is not respected for tax purposes. See, e.g., Owens v. Commissioner, 568 F.2d 1233 (6th Cir. 1977). Rather, the purported stock sale is a sham that lacks substance. The purported stock sale should be disregarded under the substance-over-form doctrine, and/or the economic substance doctrine and/or the step transaction doctrine. The purported stock sale is recast, in substance, as a liquidating distribution to you as shareholder.

Assets Transferred to Michael Tricarichi – West Side Cellular Inc.: Transferor

Assets	Value
Cash	\$34,621,594.00
Check – (amount of shareholder loan)	<u>\$577,778.00</u>
Total Transfers	\$35,199,372.00

ADMIN_TRI02609

TRICAR-NV0027042

APP0805

Notice of Liability Statement

Exhibit – 1.0

Michael Tricarichi, Transferee

TIN

Redaction

The amounts listed above reflect the transfer of assets West Side Cellular Inc. made to you. Because the total amount of the assets transferred to you exceeds the amount unpaid by West Side Cellular, Inc., your liability as a transferee for the income tax and penalties due from West Side Cellular, Inc. equals \$21,199,347.00, plus interest as provided by law.

ADMIN_TRI02610

TRICAR-NV0027043

APP0806



Helpful Contacts for Your “Notice of Deficiency”

The IRS office whose phone number appears at the top of the notice can best address and access your tax information and help get you answers.

You may be eligible for help from the Taxpayer Advocate Service (TAS) if you have tried to resolve your tax problem through normal IRS channels and have gotten nowhere, or you believe an IRS procedure just isn't working as it should. TAS is your voice at the IRS. TAS helps taxpayers whose problems are causing financial difficulty or significant cost, including the cost of professional representation (this includes businesses as well as individuals).

You can reach TAS by calling the TAS toll-free number at 1-877-777-4778 or by contacting the local Taxpayer Advocate office, whose address and phone numbers are listed here. To learn more about TAS and your basic tax responsibilities, visit www.taxpayeradvocate.irs.gov.

The Taxpayer Advocate Service can't reverse a legally correct tax determination or extend the time you have to file a petition in the United States Tax Court (that time is set by law). TAS can help you resolve tax problems that you haven't been able to resolve on your own.
The worst thing you can do is nothing at all!

ALABAMA
Birmingham Office
Taxpayer Advocate
801 Tom Martin Drive, Stop 151
Birmingham, AL 35211
(205) 912-5631

ALASKA
Anchorage Office
Taxpayer Advocate
949 East 36th Avenue, Stop A-405
Anchorage, AK 99508
(907) 271-6877

ARIZONA
Phoenix Office
Taxpayer Advocate
4041 N. Central Avenue, MS 1005
Phoenix, AZ 85012
(602) 636-9500

ARKANSAS
Little Rock Office
Taxpayer Advocate
700 West Capitol Avenue
Stop 1005 LIT
Little Rock, AR 72201
(501) 396-5978

CALIFORNIA
Laguna Niguel Office
Taxpayer Advocate
24000 Avila Road, Room 3361
Laguna Niguel, CA 92677
(949) 389-4804

Los Angeles Office
Taxpayer Advocate
300 N. Los Angeles Street
Room 5109, Stop 6710
Los Angeles, CA 90012
(213) 576-3140

Oakland Office
Taxpayer Advocate
1301 Clay Street, Suite 1540-S
Oakland, CA 94612
(510) 637-2703

Sacramento Office
Taxpayer Advocate
4330 Watt Avenue, Stop SA5043
Sacramento, CA 95821
(916) 974-5007

San Jose Office
Taxpayer Advocate
55 S. Market Street, Stop 0004
San Jose, CA 95113
(408) 817-6850

COLORADO
Denver Office
Taxpayer Advocate
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Denver, CO 80202
(303) 603-4600

CONNECTICUT
Hartford Office
Taxpayer Advocate
135 High Street, Stop 219
Hartford, CT 06103
(860) 756-4555

DELAWARE
Newark Office
Taxpayer Advocate
1352 Marrows Road, Suite 203
Newark, DE 19711
(302) 286-1654

DISTRICT OF COLUMBIA
Washington DC Office
Taxpayer Advocate
77 K Street, NE
Suite 1500
Washington, DC 20002
(202) 874-7203

FLORIDA
Ft. Lauderdale Office
Taxpayer Advocate
7850 SW 6th Court, Room 265
Plantation, FL 33324
(954) 423-7677

Jacksonville Office
Taxpayer Advocate
400 West Bay Street
Room 535A, MS TAS
Jacksonville, FL 32202
(904) 665-1000

GEORGIA
Atlanta Office
Taxpayer Advocate
401 W. Peachtree Street
Room 510, Stop 202-D
Atlanta, GA 30308
(404) 338-8099

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Honolulu, HI 96813
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IDAHO
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Taxpayer Advocate
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Boise, ID 83724
(208) 389-2827 x276

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Taxpayer Advocate
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Chicago, IL 60604
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Indianapolis, IN 46204
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Des Moines, IA 50309
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KENTUCKY
Louisville Office
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Taxpayer Advocate
1555 Poydras Street
Suite 220, Stop 2
New Orleans, LA 70112
(504) 558-3001

MAINE
Augusta Office
Taxpayer Advocate
68 Sewall Street, Room 313
Augusta, ME 04330
(207) 622-8528

MARYLAND
Baltimore Office
Taxpayer Advocate
31 Hopkins Plaza, Room 900A
Baltimore, MD 21201
(410) 962-2082

MASSACHUSETTS
Boston Office
Taxpayer Advocate
15 New Sudbury Street, Room 725
Boston, MA 02203
(617) 316-2690

MICHIGAN
Detroit Office
Taxpayer Advocate
500 Woodward
Stop 07, Suite 1000
Detroit, MI 48226
(313) 628-3670

ADMIN_TRI02611

TRICAR-NV0027044

APP0807

MINNESOTA

St. Paul Office
Taxpayer Advocate
Wells Fargo Place, Suite 817
30 East 7th Street, Stop 1005
St. Paul, MN 55101
(651) 312-7999

MISSISSIPPI

Jackson Office
Taxpayer Advocate
100 West Capitol Street, Stop 31
Jackson, MS 39269
(601) 292-4800

MISSOURI

St. Louis Office
Taxpayer Advocate
Robert A. Young Building
1222 Spruce Street, Stop 1005 STL
St. Louis, MO 63103
(314) 612-4610

MONTANA

Helena Office
Taxpayer Advocate
10 West 15th Street, Suite 2319
Helena, MT 59626
(406) 441-1022

NEBRASKA

Omaha Office
Taxpayer Advocate
1616 Capitol Avenue, Suite 182
Stop 1005
Omaha, NE 68102
(402) 233-7272

NEVADA

Las Vegas Office
Taxpayer Advocate
110 City Parkway, Stop 1005
Las Vegas, NV 89106
(702) 868-5179

NEW HAMPSHIRE

Portsmouth Office
Taxpayer Advocate
80 Daniel Street, Federal Office Bldg
Portsmouth, NH 03801
(603) 433-0571

NEW JERSEY

Springfield Office
Taxpayer Advocate
955 South Springfield Avenue
3rd Floor
Springfield, NJ 07081
(973) 921-4043

NEW MEXICO

Albuquerque Office
Taxpayer Advocate
5338 Montgomery Boulevard NE
Stop 1005 ALB
Albuquerque, NM 87109
(505) 837-5505

NEW YORK

Albany Office
Taxpayer Advocate
11A Clinton Avenue, Suite 354
Albany, NY 12207
(518) 427-5413

Brooklyn Office

Taxpayer Advocate
10 Metro Tech Center
625 Fulton Street
Brooklyn, NY 11201
(718) 488-2080

Buffalo Office

Taxpayer Advocate
Niagara Center
130 South Elmwood Avenue
Buffalo, NY 14202
(716) 961-5300

Manhattan Office

Taxpayer Advocate
290 Broadway, 5th Floor
Manhattan, NY 10007
(212) 436-1011

NORTH CAROLINA

Greensboro Office
Taxpayer Advocate
2303 W. Meadowview Road, MS#1
Greensboro, NC 27407
(336) 378-2180

NORTH DAKOTA

Fargo Office
Taxpayer Advocate
657 Second Avenue North
Stop 1005 FAR, Room 244
Fargo, ND 58102
(701) 237-8342

OHIO

Cincinnati Office
Taxpayer Advocate
550 Main Street, Room 3530
Cincinnati, OH 45202
(513) 263-3260

Cleveland Office

Taxpayer Advocate
1240 East 9th Street, Room 423
Cleveland, OH 44199
(216) 522-7134

OKLAHOMA

Oklahoma City Office
Taxpayer Advocate
55 North Robinson, Stop 1005 OKC
Oklahoma City, OK 73102
(405) 297-4055

OREGON

Portland Office
Taxpayer Advocate
100 S.W. Main Street, Stop O-405
Portland, OR 97204
(503) 415-7003

PENNSYLVANIA

Philadelphia Office
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600 Arch Street, Room 7426
Philadelphia, PA 19106
(215) 861-1304

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Taxpayer Advocate
1000 Liberty Avenue, Room 1400
Pittsburgh, PA 15222
(412) 395-5987

RHODE ISLAND

Providence Office
Taxpayer Advocate
380 Westminster Street, Room 550
Providence, RI 02903
(401) 528-1921

SOUTH CAROLINA

Columbia Office
Taxpayer Advocate
1835 Assembly Street
Room 466, MDP-03
Columbia, SC 29201
(803) 253-3029

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Aberdeen Office
Taxpayer Advocate
115 4th Avenue Southeast
Stop 1005 ABE, Suite 413
Aberdeen, SD 57401
(605) 377-1600

TENNESSEE

Nashville Office
Taxpayer Advocate
801 Broadway, Stop 22
Nashville, TN 37203
(615) 250-5000

TEXAS

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300 East 8th Street, Stop 1005 AUS
Austin, TX 78701
(512) 499-5875

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MC 1005 DAL
Dallas, TX 75242
(214) 413-6500

Houston Office

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1919 Smith Street, MC 1005 HOU
Houston, TX 77002
(713) 209-3660

UTAH

Salt Lake City Office
Taxpayer Advocate
50 South 200 East, Stop 1005 SLC
Salt Lake City, UT 84111
(801) 799-6958

VERMONT

Burlington Office
Taxpayer Advocate
Courthouse Plaza
199 Main Street, Suite 300
Burlington, VT 05401
(802) 859-1052

VIRGINIA

Richmond Office
Taxpayer Advocate
400 North 8th Street
Room 916, Box 25
Richmond, VA 23219
(804) 916-3501

WASHINGTON

Seattle Office
Taxpayer Advocate
915 2nd Avenue, Stop W-405
Seattle, WA 98174
(206) 220-6037

WEST VIRGINIA

Parkersburg Office
Taxpayer Advocate
425 Juliana Street, Room 2019
Parkersburg, WV 26101
(304) 420-8695

WISCONSIN

Milwaukee Office
Taxpayer Advocate
211 West Wisconsin Avenue
Room 507, Stop 1005 MIL
Milwaukee, WI 53203
(414) 231-2390

WYOMING

Cheyenne Office
Taxpayer Advocate
5353 Yellowstone Road
Cheyenne, WY 82009
(307) 633-0800

**TAXPAYERS LIVING ABROAD
OR IN U.S. TERRITORIES**

International
Taxpayer Advocate
City View Plaza
48 Carr 165, Suite 2000
Guaynabo, PR 00968
(787) 522-8600 Spanish
(787) 522-8601 English

CAMPUSES

Andover
Taxpayer Advocate
310 Lowell Street, Stop 120
Andover, MA 01812
(978) 474-5549

Atlanta

Taxpayer Advocate
4800 Buford Highway, Stop 29-A
Chamblee, GA 30341
(770) 936-4500

Austin

Taxpayer Advocate
3651 South Interregional Highway
Stop 1005 AUSC
Austin, TX 78741
(512) 460-8300

Brookhaven

Taxpayer Advocate
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Holtsville, NY 11742
(631) 654-6686

Cincinnati

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201 West Rivercenter Boulevard
Stop 11G
Covington, KY 41011
(859) 669-5316

Fresno

Taxpayer Advocate
5045 East Butler Avenue, Stop 1394
Fresno, CA 93888
(559) 442-6400

Kansas City

Taxpayer Advocate
333 West Pershing, Stop 1005 S2
Kansas City, MO 64108
(816) 291-9001

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Taxpayer Advocate
5333 Getwell Road, Stop 13
Memphis, TN 38118
(901) 395-1900

Ogden

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1973 North Rulon White Boulevard
Stop 1005
Ogden, UT 84404
(801) 620-7168

Philadelphia

Taxpayer Advocate
2970 Market Street
Mail Stop 2-M20-300
Philadelphia, PA 19104
(267) 941-2427

Form **977**
(Rev. 5/2001)

Department of the Treasury - Internal Revenue Service

**Consent to Extend the Time To Assess
Liability at Law or in Equity for Income, Gift, and
Estate Tax Against a Transferee or Fiduciary**

In reply refer to:

AP:AO:OH:CL:PRS

Taxpayer Identification Number

Redaction

Michael A. Tricarichi

a transferee or fiduciary,

(Name)

of 341 Arbour Garden Ave., Las Vegas, NV 89148

(Number, Street, Town or City, State, and ZIP Code)

and the Commissioner of Internal Revenue hereby consent and agree as follows:

The amount of the liability, at law or in equity, of the transferee or fiduciary named above for any income, gift, or estate taxes (including interest, additional amounts, and additions to the tax provided by law) imposed against or due from

West Side Cellular, Inc.

for the tax periods ended December 31, 2003 may be assessed at any time on or before June 30, 2012.

However, if a notice of liability is sent to the transferee or fiduciary on or before that date, the time for assessing the tax will be further extended by the number of days during which the assessment is prohibited and for an additional 60 days.

• TRANSFEE OR FIDUCIARY
(OTHER THAN CORPORATE)
SIGN HERE

 1/23/2011

(Date signed)

TRANSFEE'S OR FIDUCIARY'S
REPRESENTATIVE
SIGN HERE

(Date signed)

CORPORATE NAME OF
TRANSFEE OR
FIDUCIARY

CORPORATE
OFFICER(S)
SIGN HERE

(Title)

(Date signed)

(Title)

(Date signed)

INTERNAL REVENUE SERVICE SIGNATURE AND TITLE

Diane S. Ryan

(Division Executive Name - see instructions)

Chief, Appeals

(Division Executive Title - see instructions)

BY Peter M. Sepolite, Appeals Team Case Leader

(Authorized Official Signature and Title - see instructions)

2/2/2011

(Date signed)

Signature instructions are on the back of this form.

Form **977-c** (Rev. 5/2001)

ADMIN_TRI02613

TRICAR-NV0027046

APP0809

Exhibit 20

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12 *Attorneys for Defendant*
13 *PricewaterhouseCoopers LLP*

DISTRICT COURT
CLARK COUNTY, NEVADA

16 MICHAEL A. TRICARICHI,
17 Plaintiff,

18 vs.

19 PRICEWATERHOUSECOOPERS LLP,
20 COÖPERATIEVE RABOBANK U.A.,
UTRECHT-AMERICA FINANCE CO.,
21 SEYFARTH SHAW LLP, and GRAHAM R.
TAYLOR,

22 Defendants.
23
24
25
26
27
28

Case No.: A-16-735910-B

Dept. No.: XI

**ORDER GRANTING SUMMARY
JUDGMENT**

1 Defendant PricewaterhouseCoopers LLP ("PwC") filed its Renewed Motion for Summary
2 Judgment ("Motion") on June 14, 2018. Plaintiff Michael A. Tricarichi ("Plaintiff") filed an
3 opposition to the Motion on July 30, 2018. PwC filed a reply on August 29, 2018.

4 A hearing on the Motion was held on September 24, 2018. Plaintiff was represented by
5 Mark A. Hutchison, Esq. of Hutchison & Steffen and Scott F. Hessel, Esq. of Sperling & Slater,
6 P.C. PwC was represented by Patrick G. Byrne, Esq. of Snell & Wilmer L.L.P. and Peter B.
7 Morrison, Esq. of Skadden, Arps, Slate & Flom LLP. Having considered the relevant briefing
8 and exhibits, having heard the arguments of the parties, and with good cause appearing, the Court
9 hereby enters the following Order Granting Summary Judgment in favor of PwC:

10 1. Plaintiff engaged PwC in April 2003 to provide certain advice regarding a
11 potential transaction between Plaintiff and Fortrend International, LLC (the "Transaction").

12 2. In connection with this engagement, Plaintiff and PwC entered into an engagement
13 agreement (the "Engagement Agreement"), which contained a New York choice-of-law
14 provision.

15 3. Plaintiff completed the Transaction in September 2003.

16 4. In the late 2000s, the Internal Revenue Service ("IRS") audited Westside's 2003
17 tax return, determined that the Transaction was a reportable Midco transaction under IRS Notice
18 2001-16, and assessed over \$21 million in unpaid tax deficiencies and tax penalties.

19 5. When Westside failed to pay its liabilities, the IRS initiated a transferee liability
20 examination to determine whether it could recover the liabilities from anyone who had received
21 Westside's assets.

22 6. As part of that investigation, the IRS sent Plaintiff an Information Document
23 Request ("IDR") regarding Plaintiff's potential transferee liability arising out of the Transaction.

24 7. Plaintiff responded to that IDR and produced documents to the IRS on February
25 21, 2008.

26 8. In January 2011, the parties entered into a tolling agreement with respect to any
27 claims Plaintiff might have against PwC arising out of services performed by PwC for Plaintiff
28

1 regarding the Transaction, which became effective January 19, 2011 and remained in place
2 through May 1, 2016.

3 9. The IRS ultimately issued a Notice of Liability, that Plaintiff was subject to
4 transferee liability for Westside's tax liabilities, dated June 25, 2012.

5 10. In September 2012, Plaintiff petitioned the United States Tax Court for review of
6 the IRS's determination.

7 11. In October 2015, the Tax Court held Plaintiff liable for Westside's tax liabilities.
8 The Tax Court's decision is pending before the U.S. Court of Appeals for the Ninth Circuit.

9 12. On April 29, 2016, Plaintiff filed this action.

10 13. In March 2017, PwC moved for summary judgment on statute of limitations
11 grounds.

12 14. The Court denied PwC's motion without prejudice based on Plaintiff's request for
13 NRCP 56(f) relief so that Plaintiff could conduct discovery with respect to his allegation that
14 PwC had fraudulently concealed its negligence from Plaintiff, which, Plaintiff maintained, tolled
15 the statute of limitations on his claims.

16 15. Plaintiff conducted discovery relative to his fraudulent concealment allegations
17 between May 30, 2017 and May 15, 2018, when NRCP 56(f) discovery closed.

18 16. PwC filed its present Motion on June 14, 2018.

19 17. The Court holds that regardless of whether New York's or Nevada's statute of
20 limitations applies, Plaintiff's claims are time-barred.

21 18. In the best-case scenario for Plaintiff, his claims were time-barred under NRS §
22 11.2075(1)(a)'s two-year statute of limitations because Plaintiff discovered or, as a matter of law,
23 should have discovered the alleged act, error or omission no later than when he received the IDR
24 from the IRS.

25 19. Plaintiff responded to the IDR on February 21, 2008. Therefore, Plaintiff's claims
26 were time-barred no later than February 21, 2010 under NRS § 11.2075(1)(a), nearly a year
27 before the parties entered into a tolling agreement in January 2011.
28

20. For these reasons, there are no genuine issues of material fact and Defendant PwC is entitled to judgment as a matter of law.

ORDER

Based upon the foregoing, this Court enters the following Order:

IT IS ORDERED that PwC's Renewed Motion for Summary Judgment is **GRANTED**. Judgment is **ENTERED** in favor of PwC regarding any and all claims arising from the services PwC provided Plaintiff in 2003.


If Plaintiff believes that he has claims arising out of a subsequent retention of PwC in 2008 that may have a different statute of limitations, Plaintiff may file a motion for leave to assert such claims within 30 days of entry of this Order.

DATED: October 22, 2018.


DISTRICT COURT JUDGE

Respectfully submitted by:

SNELL & WILMER L.L.P.


Patrick Byrne, Esq.
Bradley Austin, Esq.
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Las Vegas, NV 89169

*Attorneys for Defendant
PricewaterhouseCoopers LLP*

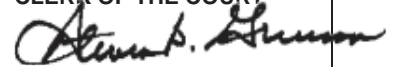
Approved as to form and content by:

SPERLING & SLATER, P.C.

/s/ Scott F. Hessel

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17 *Attorneys for Defendant*
PricewaterhouseCoopers LLP

DISTRICT COURT
CLARK COUNTY, NEVADA

21 MICHAEL A. TRICARICHI,
22
23 Plaintiff,
24
25 vs.
26 PRICEWATERHOUSECOOPERS LLP,
COÖPERATIEVE RABOBANK U.A.,
27 UTRECHT-AMERICA FINANCE CO.,
SEYFARTH SHAW LLP, and GRAHAM
R. TAYLOR,
28 Defendants.

CASE NO.: A-16-735910-B
DEPT. NO.: XI

**APPENDIX OF EXHIBITS IN SUPPORT OF
PRICEWATERHOUSECOOPERS LLP'S
MOTION FOR SUMMARY JUDGMENT
AND MOTION TO STRIKE JURY
DEMAND**

VOLUME 3 OF 4

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Exhibit No.	Description	Bates
1	Hearing Transcript on Defendant PwC's Motion to Dismiss Amended Complaint, dated July 8, 2019	001 – 019
2	February 2, 2011 Tolling Agreement between PwC and Michael Tricarichi	020 – 031
3	T.C. Memo. 2015-201, Michael A. Tricarichi v. Commissioner of Internal Revenue, No. 23630-12, dated October 14, 2015	032 – 059
4	Excerpts of the deposition of James Tricarichi, taken August 3, 2020	060 – 070
5	Engagement Agreement, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0117243 – 117250	071 – 078
6	Richard P. Stovsky Memo to Westside Cellular, Inc./Michael Tricarichi files/Cleveland BP Tower regarding potential transaction, dated April 13, 2003, produced in this action by PwC with Bates-stamp PwC-049330 – 49334	079 – 083
7	Excerpts of the deposition of Richard P. Stovsky, taken September 1, 2020	084 – 111
8	PwC's Invoices to Michael A. Tricarichi, dated May 20, 2003, June 27, 2003, July 31, 2003, August 27, 2003, September 29, 2003, and October 29, 2003, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0007532 – 7537	112 – 117
9	Excerpts of the deposition of Michael A. Tricarichi, taken October 1, 2020	118 – 144
10	IRS Letter to Michael A. Tricarichi ("IDR"), dated January 22, 2008, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0121454 – 121458	145 – 149
11	IRS Letter to Michael A. Tricarichi, dated February 3, 2009, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0067021 – 67070	150 – 199
12	Excerpts of the deposition of Glenn Miller, taken August 18, 2020	200 – 217
13	Excerpts of the deposition of Donald L. Korb, taken August 11, 2020	218 – 234
14	Excerpts of the deposition of Michael Desmond, taken August 19, 2020	235 – 247
15	Glenn S. Miller Letter to IRS, dated April 29, 2009, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0093731 – 93752	248 – 261
16	Glenn S. Miller Letter to IRS, dated October 9, 2009, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0009424 – 9557	262 – 395
17	Don Korb Email to Michael Tricarichi, et al., dated June 9, 2010, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0123530 – 123589	396 – 455
18	IRS Notice 2008-111, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0026636 – 26644	456 – 464
19	IRS Letter to Michael Tricarichi, dated June 25, 2012, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0027037 – 27046	465 – 474

Exhibit No.	Description	Bates
20	Order Granting Summary Judgment, dated October 22, 2018	475 – 478
21	Expert Report of Craig L. Greene, CPA/CFF, CFE, MAFF, dated May 26, 2020	479 – 499
22	Excerpts of the deposition of Craig L. Greene, taken September 25, 2020	500 – 510
23	Richard Corn Email to Michael Desmond, et al., dated October 22, 2010, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0122486 – 122561	511 – 586
24	IRS Transferee Report to Michael Tricarichi, dated August 11, 2009, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0093619 – 93643	587 – 598
25	Timothy Lohnes Email to Richard P. Stovsky regarding Notice 2002-111, dated December 2, 2008 produced in this action by PwC with Bates-stamp PwC-001371 – 1382	599 – 610
26	Richard Corn Email to Peter Szpalik, et al., dated October 26, 2010, Bates-stamp ADMIN_TRI00910 – 930	611 – 618
27	Donald L. Korb, et al. Memo to Michael Tricarichi, et al., dated October 8, 2009, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0135479 – 135488	619 – 628
28	IRS Letter to Randall G. Dick, dated September 22, 2005, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0008109 – 8129	620 – 649
29	Taxpayer Interview Transcript of Michael Tricarichi, taken November 30, 2007, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0073774 – 73876	650 – 752
30	Peter Szpalik Email to Donald L. Korb, dated August 29, 2011, Bates-stamp ADMIN_TRI01034 – 1035	753 – 754
31	Rebuttal Report of Arthur J. “Kip” Dellinger, dated June 25, 2020	755 – 759
32	ABA Formal Opinion 481, dated April 17, 2018	760 – 768
33	Statements on Standards for Tax Services, dated August, 2000, Nos. 1-8, produced in this action by PwC with Bates-stamp PwC-028404 – 28439	769 – 804
34	Excerpts of the 30(b)(6) deposition of Brian Meighan, taken October 9, 2020	805 – 814
35	Excerpts of the deposition of Kenneth Harris, taken October 1, 2020	815 – 823
36	Expert Report of Kenneth L. Harris, dated May 23, 2020	824 – 877
37	Cross-Motion <i>In Limine</i> to Exclude From Trial Any Evidence or Arument [sic] That the Stock Purchase Transaction at Issue Is an “Intermediary Transaction Tax Shelter” Within the Meaning of IRS Notice 2001-16 and IRS Notice 2008-20, dated May 19, 2014, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0077953 – 77959	878 – 884
38	Affidavit of Michael A. Tricarichi in Support of Plaintiff’s Opposition to Defendant PricewaterhouseCoopers LLP’s Motion for Summary Judgment, dated April 7, 2017	885 – 889

Exhibit No.	Description	Bates
39	Affidavit of Katharine A. Roin in Support of Defendant PricewaterhouseCoopers LLP's Motion for Summary Judgment and Motion to Strike Jury Demand, dated November 13, 2020	890 – 894
40	Affidavit of Richard P. Stovsky in Support of Defendant PricewaterhouseCoopers LLP's Motion for Summary Judgment and Motion to Strike Jury Demand, dated November 11, 2020	895 – 897

DATED this 13th day of November, 2020.

SNELL & WILMER L.L.P.

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*Attorneys for Defendant
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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On November 13, 2020, I caused to be served a true and correct copy of the foregoing **APPENDIX OF EXHIBITS IN SUPPORT OF PRICEWATERHOUSECOOPERS LLP'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE JURY DEMAND (VOLUME 3 OF 4)** upon the following by the method indicated:

☐

BY FAX: by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).

☒

BY E-MAIL: by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

☐

BY U.S. MAIL: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

☐

BY OVERNIGHT MAIL: by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

☐

BY PERSONAL DELIVERY: by causing personal delivery via messenger service of the document(s) listed above to the person(s) at the address(es) set forth below.

☒

BY ELECTRONIC SUBMISSION: submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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DATED this 13th day of November, 2020.

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Exhibit 21

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DISTRICT COURT
CLARK COUNTY, NEVADA

Michael A. Tricarichi,

Plaintiff

v.

PricewaterhouseCoopers, LLP,
Cooperatieve Rabobank, U.A.,
Utrecht-America Finance Co.,
Seyfarth Shaw LLP and Graham R.
Taylor

Defendants

Case No. A-16-735910-B

Department No. X1

EXPERT REPORT OF
CRAIG L. GREENE, CPA/CFF,
CFE, MAFF

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INTRODUCTION AND SCOPE OF ENGAGEMENT

I was retained by Sperling & Slater, PC on behalf of their client, Michael A. Tricarichi (“Plaintiff”), to opine on whether PricewaterhouseCoopers, LLP (“PWC”) complied with professional standards in providing tax advice to him concerning the sale of all of his stock in Westside Cellular, Inc. I have also computed the related damages as a result of their negligence.

PROFESSIONAL BACKGROUND AND EXPERTISE IN ACCOUNTING

I am a founding and managing partner responsible for the forensic accounting and fraud examination practice of Greene Forensic Accounting Solutions LLP (GFAS). GFAS has offices in Las Vegas, NV and Chicago, IL. I am a Certified Public Accountant (“CPA”); Certified in Financial Forensics (“CFF”) by the American Institute of Certified Public Accountants n/k/a Association of International Certified Professional Accountants (“AICPA”); Certified Fraud Examiner (“CFE”) certified by the Association of Certified Fraud Examiners (“ACFE”); and am credentialed as a Master Analyst in Financial Forensics – Business and Intellectual Property Damages Specialty (“MAFF”) by the National Association of Certified Valuators and Analysts.

Currently I am licensed to practice as a CPA in the states of Nevada and Illinois. I hold a Master of Criminal Justice (“MCJ”) degree from Boston University and a Bachelor of Arts degree in Accounting from Aurora University. I have practiced as a CPA for over forty (40) years and have supervised and/or performed thousands of tax, attestation, business consulting and forensic accounting engagements. I started my career with Coopers & Lybrand, a predecessor firm to PWC. I have served as a Peer Review Captain for the AICPA performing reviews of attestation work performed by member firms.

As a forensic accountant I have been retained as an expert witness in many CPA malpractice cases by both defense and plaintiff counsel. Some of these cases have involved claims of malpractice in the preparation and consultation of tax matters like those asserted in this Matter. As a licensed and registered CPA in Nevada I have been regularly retained by legal counsel in the state to work on various business disputes. In addition, I have been retained by

Nevada defense counsel for several CPA's accused of malpractice in their audit, accounting and tax practices, as well as, plaintiff's counsel in a case of a defective review of financial statements.

Based on the foregoing, I am qualified to render professional opinions in this Matter based on my skills, knowledge, education, experience, and training.

Attached as **Exhibits 1** and **2**, respectively, are my curriculum-vitae, which also includes publications authored by me during the last ten years, and a listing of cases where I have testified as an expert at trial or by deposition during the past four years. The procedures performed in connection with this engagement were performed by me and or staff under my direct supervision and control.

In forming my opinions in this Matter, I have examined certain information. Such information is presented as of the date of this Report. A listing of the documents I considered and/or relied upon in forming my opinions is presented at **Exhibit 3**.

The collection of data, facts, and information relevant to the issues and opinions discussed in this Report is ongoing and it is my understanding that no depositions have yet been taken in this Matter. Therefore, I reserve the right to revise and supplement my opinions in the event additional information becomes available.

GFAS is being compensated at its usual and customary billing rates for all work performed including deposition and trial based on actual hours incurred and any out-of-pocket expenses. These rates range from \$125.00 to \$250.00 per hour for staff working under my supervision and at my direction, to \$400.00 per hour for my time.

SUMMARY OF OPINIONS

Based on the work I have performed to date and more fully described in this report, I have formed the following opinions:

- 1) The engagement team assigned by PWC breached AICPA Professional Standards specifically the Code of Professional Conduct due care requirement concerning that the member must be competent in performing client services. The Team performing services for the Plaintiff were not competent in the rendering of their tax advice on such a complex matter in 2003 when they approved of the transaction, as well as, in 2008 when they should have notified the Plaintiff that the advice given in 2003 was incorrect.
- 2) The quality control system that should have been or was in place at PWC did not function properly as the transaction should have been reviewed by the Firm's Quality and Risk Management Group. Further, at a minimum, the advice should have been flagged by the firm as being inconsistent with other PWC tax advice and those risks should have been discussed with the Plaintiff.
- 3) Under AICPA Professional Standards, PWC should have notified the Plaintiff that the transaction he entered into was a reportable transaction by no later than late 2008. PWC knew more about the issues with listed transactions than others and had a duty to tell Tricarichi and his attorneys about the material facts that they knew.
- 4) Total damages to the Plaintiff are \$19,474,862.76.

BACKGROUND

Prior to 2003, the plaintiff was president and sole shareholder of Westside Cellular, Inc. ("Westside"). In 1993 the Plaintiff engaged the Cleveland law firm of Hahn Loeser & Parks, LLP ("Hahn Loeser") to file a complaint with the Public Utilities Commission of Ohio ("PUCO") against certain major cellular service providers alleging noncompetitive trade practices. PUCO ruled in Westside's favor and ultimately the Ohio Supreme Court upheld the ruling. In early 2003 a settlement was reached with the Carriers and the Plaintiff received

proceeds of \$65 million and in exchange Westside agreed to terminate its business and end all its services to customers in June 2003.

The plaintiff had instructed Hahn Loeser to investigate minimizing his tax burden from the settlement. Hahn Loeser introduced the Plaintiff to a company called Midcoast and thereafter met with another company called Fortrend, an alleged competitor of Midcoast. The Plaintiff decided to proceed with a Fortrend transaction to sell all his stock in Westside to. He also engaged PWC to consult with him regarding the tax ramifications of the transaction. Specifically, PWC was to provide tax research and evaluation services relating to the proposed sale of the stock.

PWC found there was no reason not to go ahead with the Fortrend transaction and the Plaintiff following that advice closed the transaction on September 9, 2003. In February 2008, the Plaintiff was required to respond to a request by the Internal Revenue Service (“IRS”) for information in connection with a “transferee liability” issue that the IRS was investigating in connection with the 2003 Fortrend purchase. Ultimately, the IRS’ investigation determined the Plaintiff had transferee liability in connection with the Fortrend transaction.

The Plaintiff petitioned the U.S. Tax Court and following a trial the Court found that the Plaintiff had entered into an improper Midco transaction and was liable for a tax deficiency of about \$21.2 million plus interest and penalties. The Tax Court finding was affirmed by the U.S. Court of Appeals in November 2018. A Midco transaction was considered a reportable transaction or a transaction that is required to be registered with the IRS as a tax shelter. The Plaintiff was never informed by PWC of the need to report the transaction nor that he may have transferee liability.

Plaintiff contends that PWC, at a minimum in late 2008, early 2009 had a duty to inform him of their erroneous advice regarding the Fortrend transaction and of the resulting errors on his tax returns with respect to that transaction.

ANALYSIS AND FINDINGS

PWC ENGAGEMENT

PWC initially sent their engagement letter, prepared by partner, Richard P. Stovsky, to the Plaintiff on April 10, 2003 [PWC-WS 1206-10]. PWC's assignment as contained in that letter was to "perform tax research and evaluation services." Also contained in that letter was a discussion of PWC's responsibility to maintain a list of clients where they acted as "material advisors to clients that have participated in either a reportable transaction or a transaction that is required to be registered with the IRS as a tax shelter."

When the Plaintiff signed and returned the engagement letter to Stovsky he struck through the sentence: "You agree to advise us if you determine that any matter covered by this Agreement is a reportable transaction that is required to be disclosed under section 1.6011 4." [PWC-WS 1207] The Plaintiff, of course, was not a tax expert and the reason he engaged PWC was to advise him on the tax ramifications of the sale of his stock and therefore was looking to them for to make a determination if his stock sale was a reportable transaction. Stovsky made notes attached to the letter that stated: "He understands and agrees that this is required." [PWC-WS 1208] presumably concerning the struck sentence though from his notes that certainly is not clear. Stovsky testified that this document was the (1) the only engagement letter with the two stipulations added to it and (2) that it was accepted by PWC.¹

The engagement commenced in April 2003. In performing the engagement, Stovsky relied heavily on Timothy Lohnes, a PWC partner in PWC's Washington, DC national tax office.

PWC invoiced \$48,552 for their services in 2003 as follows:

¹ Deposition of Richard P. Stovsky in the Matter of Michael A. Tricarichi, Petitioner v. Commissioner of Internal Revenue, Respondent, August 6, 2013, p.86:16-24

<u>Invoice Date</u>	<u>For Month</u>	<u>Amount</u>	<u>Bates No. Ref</u>
5/20/2003	4/30/2003	\$ 6,766.00	PWC-WS 1214
6/27/2003	5/31/2003	12,884.00	PWC-WS 1215
7/31/2003	6/30/2003	4,000.00	PWC-WS 1216
8/27/2003	7/31/2003	3,892.00	PWC-WS 1217
9/29/2003	8/31/2003	18,811.00	PWC-WS 1218
10/29/2003	9/30/2003	2,199.00	PWC-WS 1219
		<u>\$ 48,552.00</u>	

Despite billing in excess of \$48,000 PWC never issued a formal report of their research or findings to the Plaintiff.² Professional Standards applicable to tax services rendered by CPAs are issued by the AICPA as described in more detail later in this Report. Specifically, Statement on Tax Standards No. 7 discusses the form and content of advice to taxpayers. This Statement in discussing the form of communications states “Although oral advice may serve a taxpayer’s needs appropriately in routine matters or in well-defined areas, written communications are recommended in important, unusual, or complicated transactions.”³ In my professional opinion, PWC should have issued a written report to the Plaintiff as to their findings based upon the importance of their advice to the Plaintiff’s tax filings and the complexity of the proposed transaction. These same issues remained in importance in 2008 as discussed later in this Report and should have been disclosed to the Plaintiff at a minimum in late 2008.

There is evidence during the 2003 PWC engagement that the advisors considered that the transaction was a reportable transaction or a transaction that is required to be registered with the IRS as a tax shelter⁴. Further, there were discussions concerning whether the Plaintiff may be subject to transferee liability.⁵ As discussed in the background section above the IRS concluded

² Deposition of Richard P. Stovsky in the Matter of Michael A. Tricarichi, Petitioner v. Commissioner of Internal Revenue, Respondent, August 6, 2013, p.97:10-13

³ American Institute of Certified Public Accountants. Tax Executive Committee, "AICPA Professional Standards: Statements on standards for tax services as of June 1, 2003" (2003). AICPA Professional Standards. TS §800.06

⁴ Deposition of Richard P. Stovsky in the Matter of Michael A. Tricarichi, Petitioner v. Commissioner of Internal Revenue, Respondent, August 6, 2013, p.62:5-14

⁵ Deposition of Richard P. Stovsky in the Matter of Michael A. Tricarichi, Petitioner v. Commissioner of Internal Revenue, Respondent, August 6, 2013, p.49:19-20

that the Plaintiff was subject to transferee liability, as well as, the U.S. Tax Court, and later affirmed by the U.S. Court of Appeals.

The PWC Tricarichi engagement team on the other hand never identified the transaction as being either reportable or subject to transferee liability.⁶ In fact PWC national tax partner, Tim Lohnes told local PWC partner, Richard Stovsky he “would do the transaction ten times out of ten?”⁷

SIMILAR TRANSACTIONS PWC WERE CONSULTING ON

During the time period that PWC was providing tax advice to the Plaintiff it was also consulting on at least two other similar transactions leading to differing advice than that given to the Plaintiff.

Midcoast Energy Resources, Inc.

In 1999 PWC consulted with Midcoast Energy Resources, Inc. and recommended using a “midco transaction” to minimize the tax consequences of a stock sale. PWC recommended Fortrend to facilitate the transaction and like in this case, Rabobank provided the financing.⁸

In February 2001 the IRS issued Notice 2001-16 designating certain intermediary transaction tax shelters as “listed transactions” that can be challenged by the Government. Unlike this case, PWC brought this notice to Midcoast’s attention, but advised that disclosure of their transaction was unnecessary because it was not the “same or substantially similar to the transaction” described in the Notice. Nevertheless, Enbridge, the successor in interest to Midcoast disclosed the transaction when in their opinion the IRS broadened the meaning of “substantially similar” in January 2003. The IRS began its audit of the Midcoast transaction in November 2003 and assessed a deficiency in September 2004 that was ultimately upheld by the Courts.⁹

⁶ See Deposition of Richard P. Stovsky in the Matter of Michael A. Tricarichi, Petitioner v. Commissioner of Internal Revenue, Respondent, August 6, 2013, p.48:20-21 and p.49:19-20

⁷ Deposition of Richard P. Stovsky in the Matter of Michael A. Tricarichi, Petitioner v. Commissioner of Internal Revenue, Respondent, August 6, 2013, p.66:2-10

⁸ See Enbridge Energy Co. v. United States, 354 Fed. Appx. 15

⁹ See Enbridge Energy Co. v. United States, 553 F. Supp. 2d 7

It is important to note that unlike this Matter, PWC did bring Notice 2001-16 to the attention of its client. Further, the PWC Tricarichi engagement team knew or should have known of the audit of Midcoast commencing prior to the filing of the Plaintiff's tax returns reporting the tax sale and the involvement of Fortrend in that Midco transaction.

In May 2008 Mark Boyer gave a presentation to the Washington National Tax Service office, (where Lohnes practiced in) concerning "Midco" Transaction Update based on Enbridge Energy and Notice 2008-20. The Memo discussing the presentation provides Take-Aways to Discuss with Clients one of which states: "Remind clients to be wary of transaction structures that eliminate income or gain, shift tax basis, or duplicate losses. If its too good to be true, it likely isn't..." [PwC-028534-028536] Despite the admonition, neither Lohnes nor Stovsky informed the Plaintiff of the risks associated with their previous advice.

Estate of Marshall

Marshall Associated Contractors, Inc. ("MAC") had a very similar set of facts as those of the Plaintiff. On May 16, 2002 MAC received a \$40 million litigation award. The Company had been winding down operations since one of its shareholders, Richard Marshall had a stroke. Like the Plaintiff in this case, company management sought help from PWC to determine what the tax liability would be and recommend strategies to shelter some of the gain from the litigation award. The Marshalls decided not to pursue any of the tax planning options offered by PWC which did not include using a Midco transaction like in this Matter and Midcoast Energy.

Instead the Marshalls were ultimately introduced to Fortrend like the Plaintiff in this Matter by another consultant. A letter of intent was drafted to acquire the stock in the fall of 2002. The Marshalls engaged PWC and a law firm to advise them on the proposed transaction. In reviewing the transaction, the PWC witnesses during the trial claimed that they became concerned about Fortrend's plan to offset MAC's income with its losses because it was like a listed transaction. Further stating that Don Mendelson was a national partner in PWC's quality and risk management group (QRM) in 2002 and 2003. The QRM group assessed PWC's compliance with IRS Regulations to reduce the risk of noncompliance and penalties being imposed on PWC. Mendelson according to the testimony determined that PWC should not consult or advise on the proposed stock sale. Thus, in this case, PWC concluded that the stock

sale was like a listed transaction and that it could not consult or advise on the proposed stock sale any further.¹⁰ PWC's witnesses claimed during the testimony that they had told the client that they were unable to advise or consult on the project.

IRS EXAMINATION OF PWC AND RELATED CLOSING AGREEMENT

Unbeknownst to the Plaintiff, PWC had been examined by the IRS in 2002 concerning Listed Transactions and entered into a closing agreement on June 26, 2002. As part of that agreement, PWC agreed to turn over a list of clients that had apparently made investments in Notice 2001-16 transactions [PwC-001363]. In fact, Laura Erdberg of PWC sent out a message on behalf of Dennis Lubozynski to the Firm's partners that PWC will be served by the Internal Revenue Service with a summons with respect to all transactions during the 1995-2002 period that are the same or substantially similar to Listed Transactions. [PwC-008759-008760]. There was no disclosure to the plaintiff of these facts. This is another example that PWC was aware of the IRS' interest in Notice 2001-16 transactions that the Tricarichi engagement team should have known about but nevertheless never informed the Plaintiff of the potential risks.

APPLICABILITY TO PWC TRICARICHI ENGAGEMENT TEAM

I found no evidence that either PWC partners, Stovsky or Lohnes consulted with the QRM group. Further, it seems that there was a breakdown in PWC's system of quality control that the Plaintiff's tax advice was not reviewed by the QRM group. Nor does there appear to have been a system of communication within the firm to notify the firm's tax practitioners about positions taken concerning IRS Notices, audits of significant tax matters affecting clients and IRS examinations of PWC and related closing agreements.

In reading through the depositions of the partners I found that Stovsky considered himself a tax generalist with administrative duties.¹¹ Thus, he asked for assistance from Lohnes. Lohnes, on the other hand, testified that transferee liability was not an area of his expertise and it rarely came up.¹² In fact, when questioned about transferee liability, Lohnes testified that Don Rocen of

¹⁰ See 2016.06.20 T.C. Memo 2016-119

¹¹ See Deposition of Richard P. Stovsky in the Matter of Michael A. Tricarichi, Petitioner v. Commissioner of Internal Revenue, Respondent, August 6, 2013, p.16:24-25 and p.17:1-4

¹² Deposition of Timothy J Lohnes in the Matter of Michael A. Tricarichi, Petitioner v. Commissioner of Internal Revenue, Respondent, December 10, 2013, p.17:13-21

PWC's national tax office was apparently consulted with regarding transferee liability.¹³ Unfortunately, Rocen left PWC in 2004 and subsequently passed away in 2012.¹⁴ Rocen allegedly made the determination that the Plaintiff was not subject to transferee liability but no notes exist that document his reasoning and conclusions.¹⁵

Lohnes further testified that his analysis of the implications of Notice 2001-16 was limited and a less common occurrence and he made very limited analysis of the superseding Notice 2008-111.¹⁶

Notice 2008-111 should have been identified by the PWC Tricarichi engagement team as being of relevance to the Plaintiff. Notice 2008-111 clarified Notice 2001-16 with respect to Midco tax shelters. It discussed the four components of a Midco transaction as identified in IRS Notice 2008-20 issued earlier in the year and clarified that a person who engages in the transaction pursuant to a plan under circumstances where the person primarily liable for any Federal income tax obligation with respect to the disposition of the Built-In Gain Assets will not pay that tax. PWC was aware of Fortrend's plan to write off the distressed assets that it would contribute to Westside in order to reduce Westside's tax liability. Therefore, Tricarichi under Notice 2008-111 had engaged in a transaction pursuant to a Plan, and the transaction was thus likewise deemed to be a Midco transaction. Nevertheless, Lohnes reviewed the notice and in an email to Stovsky concluded "that it shouldn't change any of our prior analysis." [PwC-001371] There is no explanation of his reasoning, nor any consultation with others such as QRM or others within the Firm.

Despite Lohnes dismissal of the Notice, there was within PWC considerable discussion and debate regarding the IRS Notices. Upon issuance of IRS Notice 2008-20 Rochelle Hodes of PWC's Tax Quality & Risk Management wrote an email on May 27, 2008 that the "M&A broadened the scope of Notice 2001-16 and noted that PWC had not canvassed when the Notice

¹³ Deposition of Timothy J Lohnes in the Matter of Michael A. Tricarichi, Petitioner v. Commissioner of Internal Revenue, Respondent, December 10, 2013, p.37:11-18

¹⁴ See <https://www.legacy.com/obituaries/washingtonpost/obituary.aspx?pid=160503100> retrieved on April 24, 2020

¹⁵ Deposition of Richard P. Stovsky in the Matter of Michael A. Tricarichi, Petitioner v. Commissioner of Internal Revenue, Respondent, August 6, 2013, p.49:15-25 and p.50:1-23

¹⁶ Deposition of Timothy J Lohnes in the Matter of Michael A. Tricarichi, Petitioner v. Commissioner of Internal Revenue, Respondent, December 10, 2013, p.18:10-21

was issued. [PwC-008615] Then on May 29, 2008 she wrote an email to numerous Firm personnel commenting: “This is to alert you that the IRS midco modification. . . issued in January 2008 is so broad as to make almost every deal to sell stock of a company. . . a potential listed transaction.” She continues: “I’m not sure what the normal canvass we usually do with listed transactions will get us (but we can certainly do one.) . . . However, other than alerting the practice to the issue, which already exists when you apply substantially similar to the original midco notice, what do we tell the practice to do?” [PwC-008651]

Nayan Bhikha of the Firm questioned Hodes about IRS Notice 2008-20 in an email dated January 18, 2008 wherein she wrote: “With respect to these types of notices, which are not new listed transactions, are we going to follow the ‘Procedures When a New Listed Transaction or Transaction of Interest is Released’?” [PwC-018369] This demonstrates that the Firm had Procedures in place to address IRS Notices.

In March 2009 Elaine Church wrote an email to Hodes commenting “I would proceed, carefully, very carefully when responding to questions about using a Midco transaction for another client.” [PwC-024369 - 024370]

Further, PWC was aware of an investigation by the IRS of the Plaintiff’s transaction that was occurring in early 2008. All of this evidence concerning the IRS Notices leads me to conclude that the engagement team assigned to the engagement was not competent enough to provide the proper tax advice to Tricarichi as there is no evidence, they discussed the matter with others including the Quality and Risk Management Group.

AICPA PROFESSIONAL STANDARDS

Code of Professional Conduct

The Code of Professional Conduct was adopted by the membership to provide guidance and rules to all members – those in public practice, in industry, in government, and in education – in the performance of their professional responsibilities.

Article V of the Code in 2003 addressed due care stating in §56.01: “The quest for excellence is the essence of due care. Due care requires a member to discharge professional

responsibilities with competence and diligence. It imposes the obligation to perform professional services to the best of a member's ability with concern for the best interest of those for whom the services are performed and consistent with the profession's responsibility to the public.”¹⁷

Further §56.03 states: “Competence represents the attainment and maintenance of a level of understanding and knowledge that enables a member to render services with facility and acumen. It also establishes the limitations of a member's capabilities by dictating that consultation or referral may be required when a professional engagement exceeds the personal competence of a member or a member's firm. Each member is responsible for assessing his or her own competence—of evaluating whether education, experience, and judgment are adequate for the responsibility to be assumed.”¹⁸

Although, the PWC Tricarichi engagement team allegedly was comprised of experts in various tax issues the work files do not document the advice and research done in an apparent organized and well thought out process. One of the practice tools published by the AICPA in 2003 was a book entitled *Tax Research Techniques* by Robert L. Gardner, Dave N. Stewart and Ronald G. Worsham.

That publication discusses the importance of “Leaving Tracks” in Chapter 7 of the book where in it states:

“Once the necessary information has been recorded in a memo to the files, the researcher may begin the task of identifying questions and seeking solutions. Supporting documentation for conclusions, such as excerpts from or references to specific portions of the Internal Revenue Code, Treasury Regulations, revenue rulings, court decisions, tax service editorial opinions, and periodicals should be put in the files. All questions and conclusions should be appropriately cross-indexed so information can be retrieved quickly. Pertinent information in supporting documents should be highlighted to avoid unnecessary reading...

Because time is one of the most important commodities that any tax adviser has for sale, a well-organized client file is of the utmost importance: It can eliminate duplication of effort.

¹⁷ AICPA Professional Standards: Code of Professional Conduct and Bylaws as of June 1, 2003, ET §56.01

¹⁸ AICPA Professional Standards: Code of Professional Conduct and Bylaws as of June 1, 2003, ET §56.03

Supervisory review of a staff person's research can be accomplished quickly, and additional time can be saved if and when it becomes necessary to refer to a client's file months (or even years) after the initial work was performed. Such a delayed reference to a file may be required of subsequent Internal Revenue Service audits, preparation of protests, or the need to solve another client's similar tax problem. Because promotions, transfers, and staff turnover are common occurrences in accounting firms, well organized files can be of significant help in familiarizing new staff members with client problems.

Another time-saving device used by practitioners is the tax subject file. To prepare such a system, members of the practitioner's tax staff contribute tax problems together with documented conclusions. In a multioffice firm, such files are then pooled and arranged by subject matter, usually in a computer database, and made available to each office. A subject file can eliminate many hours of duplicative research.”¹⁹

In examining the files produced by PWC in the Matter of Michael A. Tricarichi, Petitioner v. Commissioner of Internal Revenue, Respondent, I did not find an organized tax file as described above. Further, as discussed above it is important to have a well-organized file due to staff turnover. As discussed earlier, the opinion that the Plaintiff was not subject to transferee liability was that of a partner that left the firm in 2004 and subsequently passed away. His notes and comments were never documented. Finally, it points out the importance of having a tax subject file that is pooled from multi-offices in a computer database. As I discussed above, it is my opinion that PWC's system of quality control was lacking and certainly if the Tricarichi engagement team could have accessed information concerning the Midcoast Energy Resources, Inc, Fortrend and Estate of Marshall matters they could have advised the Plaintiff of the potential risks he was taking on and that the transaction should have been a reportable transaction.

Statement on Standards for Tax Services

In performing their services on behalf of the Plaintiff PWC was also subject to Professional Standards concerning tax services. The AICPA sets forth ethical tax practice standards for members of the AICPA referred to as Statements on Standards for Tax Services

¹⁹ Gardner, Robert L.; Stewart, Dave N.; and Worsham, Ronald G., “Tax research techniques”, AICPA, 2003, pp.182-183.

(SSTSs). These rules are enforced as part of the AICPA's Code of Professional Conduct Rule 201, *General Standards*.

Since the PWC Tricarichi engagement team was providing consulting on a tax return position they would have been subject to SSTs No. 1.

SSTs No. 1 – Tax Return Positions

“.02 The following standards apply to a member when providing professional services that involve tax return positions:

- a. A member should not recommend that a tax return position be taken with respect to any item unless the member has a good-faith belief that the position has a realistic possibility of being sustained administratively or judicially on its merits if challenged.²⁰

As discussed above, PWC took a position that was contrary to the advice given in the Estate of Marshall matter wherein the national QRM office considered the transaction to be a listed transaction. Thus, the firm had already determined that Midco transactions were subject to challenge and should have been reportable transactions. PWC would have also known this from the prior year experience in the Midcoast Energy Resources, Inc. matter wherein it advised the client that reporting may be required under IRS Notice 2001-16, as well as the agreement with the IRS requiring the firm to disclose all client investments in IRS Notice 2001-16 transactions.

SSTs No. 6 – KNOWLEDGE OF ERROR: RETURN PREPARATION

Also as previously discussed, the PWC Tricarichi engagement team should have notified the Plaintiff following the issuance of IRS Notice 2008-20/111 of the potential risk that the IRS would consider the stock sale as a listed transaction. The notice was issued after PWC became aware of the IRS investigation into the Plaintiff's stock transaction; four years after the IRS assessment in the Midcoast Energy Resources, Inc. matter and five years after the Estate of

²⁰ American Institute of Certified Public Accountants. Tax Executive Committee, "AICPA Professional Standards: Statements on standards for tax services as of June 1, 2003" (2003). *AICPA Professional Standards*. TS §100.02

Marshall matter. Further there was extensive discussion and concern by Firm personnel concerning the Notices.

Under SSTS PWC should have informed the Plaintiff of IRS Notice 2008-20/111. The term error includes a position taken on a prior year's return that no longer meets the standards of SSTS No. 1 discussed above due to legislation, judicial decisions, or administrative pronouncements having a retroactive effect. In my professional opinion, the following taken from the SSTS Statement No. 6 applied to this Matter:

“03 A member should inform the taxpayer promptly upon becoming aware of an error in a previously filed return or upon becoming aware of a taxpayer's failure to file a required return. A member should recommend the corrective measures to be taken. Such recommendation may be given orally. The member is not obligated to inform the taxing authority, and a member may not do so without the taxpayer's permission, except when required by law.”²¹

“.09 If a member becomes aware of the error while performing services for a taxpayer that do not involve tax return preparation, the member's responsibility is to advise the taxpayer of the existence of the error and to recommend that the error be discussed with the taxpayer's tax return preparer. Such recommendation may be given orally.”²²

Hodes and Greg Fowler had prepared a memo entitled Professional Standards Consultation wherein it discussed the obligations of the Firm under the above Standards as well as IRS Circular 230 to inform clients of errors in previously filed returns on January 10, 2010. [PwC-018574 – 018575] Further, contained within the Firm's TaxSource Tax Technical reference file is a discussion of the Firm's responsibility to notify clients of errors found in their returns even if they are not the preparers. [PwC-030643-030644] This same issue is addressed in the Firm's Quality & Risk Management Repository issued in 2007 with the same conclusions. [PwC-030632-030636]

²¹ American Institute of Certified Public Accountants. Tax Executive Committee, "AICPA Professional Standards: Statements on standards for tax services as of June 1, 2003" (2003). *AICPA Professional Standards*. TS §600.03

²² American Institute of Certified Public Accountants. Tax Executive Committee, "AICPA Professional Standards: Statements on standards for tax services as of June 1, 2003" (2003). *AICPA Professional Standards*. TS §600.09

PWC clearly knew more about the issues with listed transactions than others and had a duty to tell Tricarichi and his attorneys about the material facts that they knew. The evidence as discussed above shows that the engagement team assigned to the Tricarichi matter were negligent in providing tax consultation.

DAMAGES

The Plaintiff relied upon the tax advice of PWC in entering into the sales agreement with Fortrend. Further, it continued to rely upon this advice through the investigation by the IRS and its dispute in U.S. Tax Court and the U.S. Court of Appeals. Had PWC disclosed to Plaintiff all material information about Plaintiff's reporting of the transaction, I understand plaintiff would have resolved the balances due rather than litigating and incurring substantial legal fees in litigating with the IRS. As a result, the Plaintiff had damages comprised of legal fees and interest due to the U.S. Government. Had PWC disclosed to Plaintiff all material information about Plaintiff's reporting of the transaction, I understand plaintiff would have resolved the balances due rather than litigating and incurring substantial legal fees in litigating with the IRS.

Legal fees related to the defense of the Plaintiff's tax matter are comprised of the following:

Law Firm	Invoiced
Bingham	\$1,274,071.14
Desmond	628,665.73
McGuire Woods	525,495.97
Purcell	105,060.03
Stinson Leonard	129,710.50
Sullivan Cromwell	517,139.66
Total	<u>\$ 3,180,143.03</u>

Interest commencing January 1, 2009 through the U.S. Court of Appeals decision on November 13, 2018 would be an additional \$16,294,719.73.

Therefore, total damages to the Plaintiff are \$19,474,862.76:

Law Firm Fees	\$ 3,180,143.03
Interest commencing January 1, 2009 through November 13, 2018	16,294,719.73
Totals	<u>\$ 19,474,862.76</u>

CONCLUSION

Based on the work I have performed to date and more fully described in this report, I have formed the following opinions:

- 1) The engagement team assigned by PWC breached AICPA Professional Standards specifically the Code of Professional Conduct due care requirement concerning that the member must be competent in performing client services. The Team performing services for the Plaintiff were not competent in the rendering of their tax advice on such a complex matter. The Team performing services for the Plaintiff were not competent in the rendering of their tax advice on such a complex matter in 2003 when they approved of the transaction, as well as, in 2008 when they should have notified the Plaintiff that the advice given in 2003 was incorrect.
- 2) The quality control system that should have been or was in place at PWC did not function properly as the transaction should have been reviewed by the Firm's Quality and Risk Management Group. Further, at a minimum, the advice should have been flagged by the firm as being inconsistent with other PWC tax advice and those risks should have been discussed with the Plaintiff.
- 3) Under AICPA Professional Standards, PWC should have notified the Plaintiff that the transaction he entered into was a reportable transaction by no later than late 2008. PWC knew more about the issues with listed transactions than others and had a duty to tell Tricarichi and his attorneys about the material facts that they knew.
- 4) Total damages to the Plaintiff are \$19,474,862.76.

I declare under penalty of perjury that the foregoing statements are true and correct and if called as a witness, I would testify as to the facts and opinions contained in this report as stated above.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Craig L. Greene", is written over a light gray rectangular background.

Date: May 26, 2020

Craig L. Greene, CPA/CFF, CFE, MAFF

Exhibit 22

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DISTRICT COURT
CLARK COUNTY, NEVADA
- - - - - x
MICHAEL A. :
TRICARICHI, :
Plaintiff, : Case No.
vs. : A-16-735-910-B
PRICEWATERHOUSECOOPERS :
LLP, COOPERATIVE :
RABOBANK U.A., :
UTRECHT-AMERICA :
FINANCE CO., SEYFARTH :
SHAW LLP, AND GRAHAM :
R. TAYLOR, :
Defendants. :
- - - - - x

Remote Videotaped Deposition of CRAIG L. GREENE
Chicago, Illinois
Friday, September 25, 2020
10:06 a.m.

Job No.: 323473
Pages: 1 - 272
Reported By: Jennifer L. Bernier, CSR, RPR, CRR

1 The videotaped deposition of CRAIG L. GREENE,
2 held remotely via Zoom, before Jennifer L. Bernier,
3 Illinois Certified Shorthand Reporter, Registered
4 Professional Reporter, and Certified Realtime
5 Reporter.

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A P P E A R A N C E S

APPEARED ON BEHALF OF PLAINTIFF MICHAEL TRICARICHI:

SCOTT HESSELL, ESQUIRE

BLAKE SERyce, ESQUIRE

SPERLING & SLATER

55 West Monroe Street

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312.641.3200

APPEARED ON BEHALF OF DEFENDANTS

PRICewaterhouseCOOPERS, LLP:

MARK LEVINE, ESQUIRE

BARTLIT BECK LLP

54 West Hubbard Street

Chicago, Illinois 60654

312.494.4400

ALSO PRESENT:

Mr. Michael Tricarichi

Mr. Geoffrey Ezgar, PwC General Counsel

Ken Harris, PwC Expert

Brian Kriegel, PD Technician

Dan Lohaus, PD Videographer

Transcript of Craig L. Greene
Conducted on September 25, 2020

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I N D E X

EXAMINATION OF CRAIG L. GREENE	PAGE
By Mr. Levine.....	7

E X H I B I T S

EXHIBITS REFERENCED AND/OR MARKED

NUMBER	DESCRIPTION	PAGE
Exhibit 2	Intermediary Tax Shelter	
	Notice 2001-16.....	133
Exhibit 3	Intermediary Tax Shelter	
	Notice 2008-111.....	145
Exhibit 9	Tricarichi/PwC Engagement	
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Exhibit 20	E-mail dated 5/29/08 from	
	Hodes to Cesnik.....	157
Exhibit 91	Folkman/Loeser Standstill	
	Agreement.....	219
Exhibit 161	Joel Levine letter.....	220
Exhibit 163	Tricarichi/Loeser Settlement	
	Agreement.....	222
Exhibit 229	IRS Computation of Pre-Notice	
	Interest.....	215
Exhibit 242	SSTS 1-8.....	127
Exhibit 316	E-mail dated 3/23/09 from	
	Church to Hodes.....	162

Transcript of Craig L. Greene
Conducted on September 25, 2020

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1	make sense to me, that that would be their concerns.	14:35:05
2	MR. HESSELL: Hey, Craig, you've got to stop	14:35:09
3	hitting the mic, because --	14:35:12
4	THE WITNESS: Okay.	14:35:12
5	MR. HESSELL: -- it's giving feedback.	14:35:16
6	And, Mark, can we take a break now?	14:35:19
7	MR. LEVINE: Sure.	14:35:21
8	MR. HESSELL: Five minutes?	14:35:23
9	MR. LEVINE: Sure. Somebody need to say off	14:35:25
10	the record?	14:35:32
11	THE REPORTER: Yes. Where is our	14:35:32
12	videographer?	14:35:33
13	VIDEO TECHNICIAN: Thank you. I'm right	14:35:33
14	here. Yep.	14:35:35
15	We are now going off the record. The time	14:35:36
16	is 2:35 p.m.	14:35:37
17	(A short recess was had.)	14:35:40
18	VIDEO TECHNICIAN: We are now going back on	14:45:08
19	the record. The time is now 2:45 p.m.	14:45:10
20	BY MR. LEVINE:	14:45:16
21	Q Looking at your expert report, Exhibit 325,	14:45:16
22	page 15, and on page 15 you refer to SSTs Statement	14:45:20
23	No. 6, and then, in particular, you quote from	14:45:34
24	paragraphs 3 and 9, correct?	14:45:38
25	A Yes.	14:45:41

1 Q And paragraph 3 is the statement and 14:45:41
2 paragraph 9 is part of the explanation, correct? 14:45:48
3 A As I recall, yes. 14:45:51
4 Q And paragraph 9 that you quote says that if 14:45:54
5 a member becomes aware of the error while performing 14:46:13
6 services for a taxpayer that do not involve tax 14:46:16
7 return preparation. 14:46:19
8 If you have a situation where the accounting 14:46:22
9 or the tax practitioner is not performing any 14:46:25
10 services for a taxpayer, is there an obligation to 14:46:29
11 advise a taxpayer of the existence of an error 14:46:34
12 that's due to new developments in the law? 14:46:40
13 A Well, if they're not actually doing the tax 14:46:43
14 work, I don't know that they would know the -- know 14:46:55
15 that. May I have the question back one more time? 14:46:56
16 Q Well, let me -- if you have a tax 14:47:00
17 practitioner who keeps abreast of new developments 14:47:02
18 in the law and, as a result of those new 14:47:05
19 developments, learns of an error in something that 14:47:08
20 was done for a former client years before and is no 14:47:13
21 longer performing any services for that taxpayer or 14:47:17
22 client, is there a requirement to notify this former 14:47:24
23 client about the error? 14:47:29
24 A I don't believe so. 14:47:30
25 Q Your expert report doesn't refer to the 14:47:35

1	discussion in paragraph -- or in the SSTS No. 8,	14:47:40
2	which is now SSTS No. 7, concerning the subject of	14:47:47
3	the duty to -- of whether there is a duty to update.	14:47:52
4	At the time that you came to your opinions	14:47:57
5	in this case, were you aware of the discussion in	14:48:02
6	Standard No. 8 about whether or not there is an	14:48:05
7	obligation to update a taxpayer?	14:48:09
8	MR. HESSELL: Objection to the form of the	14:48:16
9	question.	14:48:17
10	A Yeah. I'm not sure I understand what you're	14:48:18
11	asking me. I'm sorry.	14:48:20
12	Q Let's do this. Let's look at Exhibit 242.	14:48:21
13	A Yes.	14:48:29
14	Q And in Exhibit 242, that's a standard -- why	14:48:30
15	don't you turn to page 28436?	14:48:36
16	A Okay.	14:48:40
17	Q Are you there?	14:48:55
18	A Yeah. I'm here.	14:48:55
19	Q Sorry. And this is Standard No -- SSTS	14:48:57
20	Standard No. 8 that we saw earlier, correct?	14:49:00
21	A Correct.	14:49:03
22	Q And what we looked at earlier were	14:49:03
23	paragraphs 5 and 6 concerning whether the advice is	14:49:06
24	oral or in writing; do you recall that?	14:49:13
25	A Yes.	14:49:16

1	the IRS computation of pre-notice interest, as well	15:16:03
2	as other things?	15:16:07
3	A As I recall, yes.	15:16:08
4	MR. HESSELL: Hold on. Objection. Try to	15:16:12
5	wait.	15:16:12
6	Q Is Exhibit 229 the document or at least one	15:16:15
7	of the documents that you mentioned that you didn't	15:16:18
8	have at the time of the preparation of your initial	15:16:19
9	report?	15:16:25
10	A Correct.	15:16:25
11	Q And you've seen that the PwC's damages	15:16:26
12	expert does rely on this calculation in Exhibit 229,	15:16:31
13	correct?	15:16:38
14	A Correct.	15:16:39
15	Q And if you -- and what Exhibit 229 shows is	15:16:40
16	separately for the interest on the unpaid tax	15:16:53
17	liability, interest on the penalty, what is -- what	15:16:56
18	it added up to over -- on a quarterly basis,	15:17:02
19	correct?	15:17:07
20	A Correct.	15:17:07
21	Q And if you take the quarterly amounts for	15:17:08
22	each of the quarters starting on January 1, 2009 and	15:17:11
23	add them up going through to June 25th of 2012, you	15:17:15
24	can get the total amount of	15:17:20
25	pre-interest -- pre-notice interest that's due as of	15:17:21

Transcript of Craig L. Greene
Conducted on September 25, 2020

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1	June 25th, 2012, correct?	15:17:25
2	A As I recall, yes.	15:17:27
3	Q And that amount would be the amount that's	15:17:29
4	stated in the Anthem report of \$6,129,396.23,	15:17:31
5	correct?	15:17:38
6	A Correct, if you verified that number.	15:17:38
7	Q So looking back at your spreadsheet on	15:17:43
8	Exhibit 324, and the first page --	15:17:54
9	A Yes.	15:17:57
10	Q -- the number that is listed as	15:17:58
11	\$7,486,715.78 for pre-notice interest commencing	15:18:04
12	January 1, 2009 is incorrect, right?	15:18:12
13	A As I recall, yes.	15:18:15
14	Q And you would agree that, in its place, the	15:18:17
15	number should be \$6,129,396.23?	15:18:21
16	A As I recall, yes.	15:18:28
17	Q By the way, you know, I asked about	15:18:29
18	penalties. The penalty that was assessed here by	15:18:35
19	the IRS was for underpayment under Section 6662,	15:18:38
20	correct?	15:18:44
21	A Mm-hmm. I'd have to go back. What is the	15:18:45
22	document we were looking at previously with the IRS,	15:18:48
23	the amount that was owed?	15:18:52
24	Q It's 229.	15:18:53
25	A And what was the question, sir?	15:18:59

1 Q The penalties that were being charged to 15:19:01
2 Tricarichi were for underpayment of the taxes 15:19:05
3 pursuant to Section 6662, correct? 15:19:12
4 MR. HESSELL: Objection. Did you say 15:19:16
5 Tricarichi? 15:19:19
6 Q Let me rephrase. I appreciate that. 15:19:20
7 The penalty that was being assessed here by 15:19:22
8 the IRS was for underpayment of taxes under Section 15:19:28
9 6662, correct? 15:19:32
10 A I believe 6621. Is it? 15:19:33
11 Q Let's forget about what provision. 15:19:46
12 A Yeah. I'm not certain of the exact 15:19:49
13 provision, but there was certainly a penalty here. 15:19:51
14 Q But the penalty that was asserted by the IRS 15:19:54
15 was not for failure to report the transaction under 15:19:57
16 2001-16, correct? 15:20:00
17 A I don't recall. 15:20:02
18 Q Are you aware of any penalty assessed 15:20:02
19 against Mr. Tricarichi for failure to report his 15:20:08
20 transaction under 2001-16? 15:20:11
21 A Well, certainly this document shows there 15:20:14
22 was a penalty assessed. There was no reason not to 15:20:17
23 believe that it was for the underpayment. 15:20:19
24 Q Did you -- there is no reason to believe it 15:20:25
25 was for the underpayment or not to believe? 15:20:30

C E R T I F I C A T E

I, Jennifer L. Bernier, a Certified
Shorthand Reporter, Registered Professional
Reporter, Certified Realtime Reporter, in and for
the state of Illinois, do hereby certify:

That the foregoing witness was by me duly
Sworn; that the deposition was then taken before
me remotely at the time herein set forth; that the
testimony and proceedings were reported
stenographically by me and later transcribed into
typewriting under my direction; that the foregoing
is a true record of the testimony and proceedings
taken at that time.

That before the conclusion of the
deposition, the witness requested a review of this
transcript pursuant to Rule 30(e)(1).

IN WITNESS WHEREOF, I do hereunto set my
hand of office at Chicago, Illinois, on October 2,
2020.



My commission expires: May 31, 2021
C.S.R. Certificate No. 084.004190

Exhibit 23

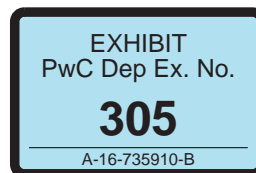
To: 'Desmond, Michael'[Michael.Desmond@bingham.com]; 'Glenn.Miller@bingham.com'[Glenn.Miller@bingham.com]; 'Randy Hart'[randyjhart@gmail.com]; mtricarichi@aol.com[mtricarichi@aol.com]; Mason, Andrew S.[MasonA@sullcrom.com]; Korb, Don[Korbd@sullcrom.com]
Cc: Corn, Richard M.[cornr@sullcrom.com]
From: Corn, Richard M.[cornr@sullcrom.com]
Sent: Fri 10/22/2010 9:37:20 PM (UTC)
Subject: IRS Appeals presentation
NY12530 - #296258 v#8 - Tricarichi, Summary Slides, Appeals Conference Presentation.ppt
NY12530 - #296255 v#6 - Tricarichi, Long slide presentation, initial appeals meeting.ppt

Please find attached (1) a set of summary slides for the presentation to IRS Appeals, and (2) a longer, more detailed set of slides. We intend to present the first set of slides at the Appeals conference, and to keep the second set in reserve if a more detailed presentation becomes necessary.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

Richard Corn
Sullivan & Cromwell LLP
(212) 558-3195

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TRICAR-NV0122486
APP0855

S&C Draft of October 22, 2010
PRIVILEGED AND CONFIDENTIAL
ATTORNEY WORK PRODUCT

Tricarichi Opening Appeals Conference

October 27, 2010

NY12530-#296258-v8

TRICAR-NV0122487
APP0856

This Case Is Not a “Midco” Case

- The Transferee Report takes a round peg and tries to fit it into a square hole by using boilerplate arguments developed for “Midco” transactions and misapplying these arguments to the facts in this case.
- “Midco” transactions require four parties: (1) a corporation with low-basis assets, (2) a seller that wants to sell the corporation’s stock, (3) a buyer that wants to buy the corporation’s assets, and (4) an intermediary that steps in between the buyer and seller to permit the asset sale to obtain a basis step-up.
- There is no such fact pattern here, as there are no relevant built-in gain assets.
- The IRS itself issued a Notice, Notice 2008-111, setting forth four requirements for a Midco transaction and three of the requirements are not present in this case.

The Requirements of Notice 2008-111 Are Not Met

Notice 2008-111 Requirements	Applicable?
T owns built-in gain assets and has insufficient tax benefits to completely eliminate recognition of such gain upon a sale.	NO. West Side did not own any relevant built-in gain assets
At least 80% of T's stock is sold within a 12 month period.	Yes
Within a 12 month period before or after the stock sale, at least 65% of T's built-in gain assets are sold.	NO. West Side did not own any relevant built-in gain assets
At least half of the tax resulting from T's built-in gain assets is offset or avoided.	NO. West Side did not own any relevant built-in gain assets

Facts

- West Side recognized ordinary income in settlement of a lawsuit. West Side did not have substantial built-in gain assets to sell before or after the stock sale.
- Tricarichi sold his West Side stock to a buyer in an arm's length transaction.
- West Side did not sell substantial built-in gain assets to any other person desiring a basis step-up, either before or after the stock sale.
- West Side continued in existence after the stock sale resisting imposition of excise tax penalties and prosecuting excise tax refund claims.

Summary

- The Transferee Report articulates two arguments under which the IRS suggests that Tricarichi should have transferee liability for West Side. As set forth in the Transferee Report, both arguments—the “conduit” theory and the “step transaction” doctrine—require the conclusion that West Side liquidated in order to succeed.

- To prevail in assessing transferee liability based upon these arguments, in addition to prevailing on the merits of its claims against West Side, the IRS has the burden of proving **both**:

- (1) That West Side liquidated and thus transferred property to Tricarichi;
and

- (2) That the transfer gives rise to transferee liability under section 6901.

- Both of the IRS arguments in the Transferee Report are based on the assertion that West Side liquidated. This is **not** the case.

(1) There Was No Liquidation of West Side

- The “conduit” and “step transaction” arguments fail because there was no liquidation of West Side and therefore no transfer to Tricarichi.
- As with all leveraged transactions, the fact that the buyer used assets of West Side to repay its acquisition debt is not relevant.

(1) Conduit Cases Relied Upon by the Service Are Distinguishable

- The Transferee Report, on page 11, argues that this transaction is a conduit because “[t]he purported stock sale was nothing more than an exchange of cash couched in a form designed to avoid the payment of corporate level tax. The overall transaction should be treated consistent with its substance, with the result that the shareholder of West Side received the cash from West Side *as a liquidating distribution* in the guise of a purported stock sale.” (emphasis added)
- The Transferee Report cites many cases in support of its “conduit” argument, but most are based on entirely different facts and are inapplicable.
- The only cases which are even close to on-point are *Owens v. Commissioner* and *Lowndes v. Commissioner*, and these cases are distinguishable as highlighted by the next charts:

(1) *Owens* Is Distinguishable

FACTOR	<i>OWENS</i>	TRICARICHI
Corporation's Assets	Corporation's only asset was cash	West Side's assets consisted of cash and excise tax causes of action
Corporation's Liabilities	There were no debts or claims, contingent or otherwise, against the corporation	West Side had a potential excise tax penalty liability
Corporation's Business Activity at Time of Sale	Corporation carried on no business activity and was a lifeless shell at time of stock sale	West Side was actively pursuing excise tax causes of action at time of stock sale
Post- Acquisition Liquidation	Corporation adopted a formal resolution of liquidation three days after the stock sale	West Side continues to exist to this day
Form of Transaction Respected?	No	YES

TRICAR-NV0122494
APP0863

(1) Lowndes Is Distinguishable

FACTOR	<i>LOWNDES</i>	TRICARICHI
Corporation's Assets	Corporations' only asset was cash	West Side's assets consisted of cash and excise tax causes of action
Corporation's Liabilities	Corporation had no liabilities	West Side had a potential excise tax penalty liability
Corporation's Business Activity at Time of Sale	Corporation carried on no business activity and had been a lifeless shell for a number of years	West Side had recently ceased its business of reselling cellular telecommunications services but continued to pursue excise tax causes of action
Business Purpose After Sale?	Corporation invested in interest-bearing time deposit certificates	West Side continued to actively pursue excise tax causes of action
Post-Acquisition Liquidation?	Yes, after six months	No
Form of Transaction Respected?	No	YES

(1) Step Transaction Doctrine Does Not Apply

•The Transferee Report, on page 13, argues that the step transaction doctrine applies because “[t]he tax effect desired by the parties (*i.e.* a purported stock sale followed by the avoidance of tax by West Side) could not be obtained unless all of the steps were completed...Through the guise of a stock sale, the cash in West Side was disbursed among the participants, leaving West Side with no business assets and no cash to pay its liabilities.” In effect, the Transferee Report is saying that West Side liquidated in connection with the stock sale.

•This argument fails, just like the “conduit” argument, because there was **no liquidation (in substance or form)** of West Side as part of the stock sale.

(1) There Was No Liquidation of West Side

- The Transferee Report is premised on various assertions that in substance the stock sale was a liquidation.
- In fact, West Side never liquidated in form or substance, and West Side remains in existence to this day and actively pursues claims in litigation.
- The IRS has itself recognized in Revenue Ruling 74-462 and Treasury Regulations Section 1.6012-2(a)(2) that a corporation that “actively defend[s]” legal actions and “prosecuted actions brought by it” has not liquidated even though the corporation’s only assets are those the corporation retained in connection with the litigation.

(2) Without a Transfer, There Is No Transferee Liability

- There was no liquidation of West Side hence no “transfer of property” to Tricarichi in a liquidation of West Side. Moreover, the purchase price was paid by the buyer (using the buyer’s own funds and funds the buyer itself borrowed), not from West Side.

Conclusion

- The West Side stock sale was not a “Midco” transaction and the Transferee Report misapplies arguments developed for “Midco” transactions to this case.
- Neither the “conduit” theory nor the “step transaction” doctrine applies to the West Side stock sale because West Side **did not liquidate** as part of the stock sale (or, indeed, ever).
- Tricarichi was not the recipient of a “transfer of property” in a liquidation of West Side because there was no liquidation of West Side in form or in substance.
- Therefore, Tricarichi is not liable for West Side’s taxes as a transferee of West Side.

S&C Draft of October 22, 2010
PRIVILEGED AND CONFIDENTIAL
ATTORNEY WORK PRODUCT

Michael Tricarichi: Appeals Presentation

Last Updated: October 22, 2010

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V. Transferee Liability	61

I. Facts

I. Facts

- West Side Cellular Inc. (“**West Side**”) is an Ohio corporation which, from 1988 to 2003, was engaged in the business of reselling cellular telecommunications services.

- During this time, Mr. Michael Tricarichi (“**Tricarichi**”) was the sole shareholder of West Side.

I. Facts

- In 1993, West Side filed complaints against several wholesale cellular service providers alleging that the providers had engaged in discriminatory and illegal business practices against West Side.

- On April 1, 2003, West Side entered into a settlement agreement that fixed the amount of cash West Side would receive at \$64,250,000 in exchange for West Side dropping the complaint and ceasing business relationships with the defendants.

I. Facts

- After paying approximately \$25,000,000 to professionals and employees, West Side was left with cash of approximately \$40,000,000.

- Tricarichi's business plan for West Side was to either cause West Side to reinvest the settlement proceeds (less certain payments to employees and various expenses associated with the litigation) into a new business, or sell West Side.

I. Facts

- In 2003, two bidders for West Side appeared and offered amounts ranging from \$30,000,000 to \$35,000,000 for all of the stock of West Side.
- Tricarichi selected the winning bidder based on the fact that the bidder offered the most money for the stock of West Side.
- On July 23, 2003, Tricarichi and the buyer signed a letter of intent setting forth the key terms of the planned sale of West Side stock for approximately \$35,000,000.
- On September 9, 2003, Tricarichi sold all of the West Side stock to the buyer for approximately \$35,000,000.

I. Facts

- The transaction agreements prevented the buyer from liquidating West Side for several years after the stock sale and required West Side to be engaged in an active trade or business for at least five years.
- West Side did not liquidate at any point after the stock sale and is still in existence today.

I. Facts

- Shortly before the closing date in September 2003, Tricarichi learned the IRS was asserting that West Side had failed to collect and remit approximately \$3,000,000 in telecommunications excise tax from its customers.

- Although Tricarichi believed, and was advised by counsel, that West Side did not have an obligation to collect and remit such tax, West Side paid the required amount in August 2003, before the stock sale.

I. Facts

- After the closing date, the IRS asserted that West Side owed an additional \$1,000,000 in interest and penalties for failing to collect and remit the telecommunications excise tax.

- In late 2006, after active negotiations with West Side, the IRS conceded that West Side did not owe the additional \$1,000,000 in penalties and interest.

I. Facts

- Shortly thereafter, West Side initiated a refund claim against the IRS to recover the approximately \$3,000,000 of telecommunications excise tax it had paid in August 2003.
- In 2008, after approximately two years of active litigation, a federal district court ruled that West Side could not recover the excise tax payment.

I. Facts

•In 2009, however, a panel of the U.S. Court of Appeals for the District of Columbia Circuit ruled, in a separate case, that the refund procedure for telecommunications excise taxes established by IRS Notice 2006-50 could be challenged as inadequate.

•Therefore, although the panel opinion was vacated in early 2010 and oral arguments were heard recently, West Side still might retain a potentially valuable right against the IRS to recover the approximately \$3,000,000 of telecommunications excise tax it paid in 2003.

I. Facts

- On August 11, 2009, the IRS Examination team issued a Transferee Report asserting the following:

1. The stock sale was part of a transaction that was substantially similar to the intermediary transaction tax shelter described in Notice 2001-16;
2. The buyer of the stock served as a mere conduit in a transaction between West Side and Tricarichi, resulting in a liquidating distribution to Tricarichi;
3. The stock sale can be collapsed under the step-transaction doctrine into a transaction in which West Side directly acquired its own shares from Tricarichi as part of a liquidation;
4. Transferee liability may be asserted against Tricarichi.

•**The Transferee Report includes several arguments, but all turn on the assumption that West Side ultimately liquidated (in substance) as part of the stock sale.**

II. Intermediary Transaction

II. Intermediary Transaction

- The Transferee Report asserts that Tricarichi engaged in a transaction that is “substantially similar” to the intermediary transaction tax shelter described in Notice 2001-16.

- Notice 2008-111 clarified Notice 2001-16 and made clear that “[t]here are four components to an Intermediary Transaction, and a transaction *must have all four components* to be the same as or substantially similar to the listed transaction described in Notice 2001-16” (emphasis added).

- Tricarichi’s transaction has only *one* of the four components and, therefore, cannot be “the same as or substantially similar to” the intermediary transaction described in Notice 2001-16.

II. Intermediary Transaction

- This is important because, as Tricarichi's transaction is not an intermediary transaction, it is not an Appeals Coordinated Issue.
- Accordingly, the Appeals Officer is not subject to the intermediary transaction Appeals Settlement Guidelines and any settlement reached at Appeals does not require review and concurrence by the Technical Guidance Coordinator.
- This is also significant because the Transferee Report uses boilerplate arguments developed for "Midco" transactions and misapplies them to the facts in this case.

II. Intermediary Transaction

•Intermediary transactions involve four parties:

T: a corporation with low basis assets

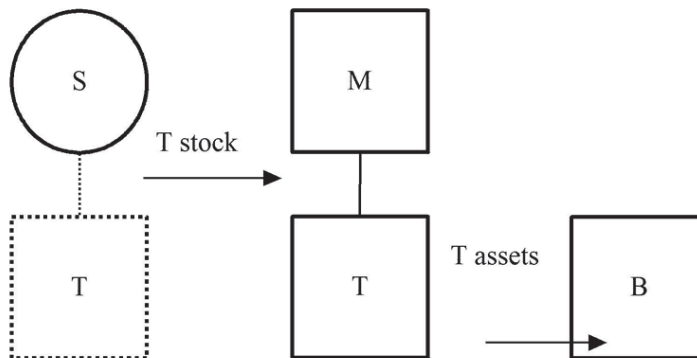
S: a seller who wants to sell T stock

B: a buyer who wants to purchase T's assets

M: an intermediary corporation

II. Intermediary Transaction

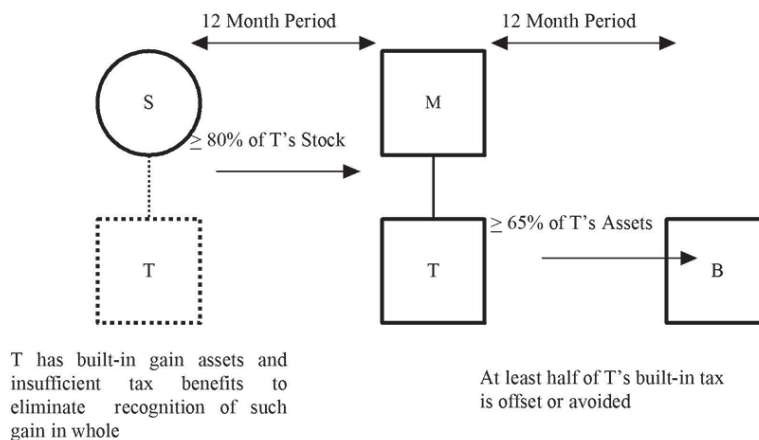
•“Pursuant to a plan, the parties undertake the following steps. S purports to sell the stock of T to M. T then purports to sell some or all of its assets to B. B claims a basis in the T assets equal to B’s purchase price.” Notice 2001-16.



II. Intermediary Transaction

• Notice 2008-111 clarifies Notice 2001-16 by setting forth more objective standards for identifying intermediary transactions:

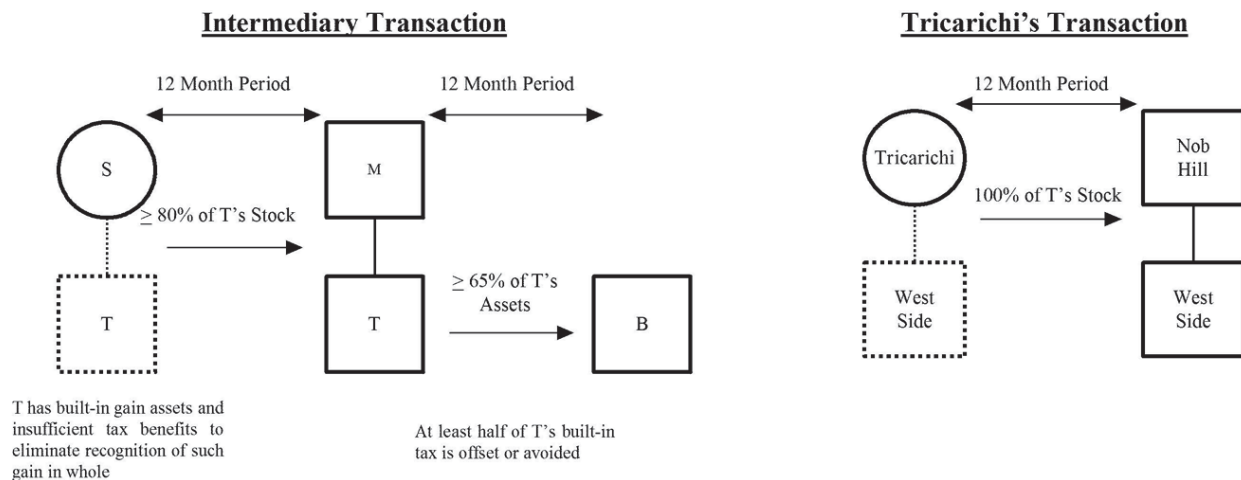
1. T owns built-in gain assets and has insufficient tax benefits to completely eliminate recognition of such gain upon a sale;
2. At least 80% of T's stock is disposed of by S within a 12 month period;
3. Within 12 months before or after the stock sale, at least 65% of T's built-in gain assets are sold to B; and
4. At least half of the tax resulting from T's built-in gain assets is offset or avoided.



II. Intermediary Transaction

•Under Notice 2008-111, a transaction must have **all four objective components** in order to be the same as, or substantially similar to, an intermediary transaction.

•As shown below, Tricarichi's transaction does not have components (1), (3) or (4) and, therefore, it cannot be the same as, or substantially similar to, an intermediary transaction.



II. Intermediary Transaction

•Component #1: T owns built-in gain assets and has insufficient tax benefits to completely eliminate recognition of such gain upon a sale.

•Tricarichi's transaction *does not* satisfy Component #1 because West Side did not own any relevant built-in gain assets.

•Component #2: At least 80% of T's stock is sold within a 12 month period.

•Tricarichi's transaction does satisfy Component #2 because Tricarichi sold 100% of the West Side stock to the buyer in a single day.

•Component #3: Within a 12 month period before or after the stock sale, at least 65% of T's built-in gain assets are sold.

•Tricarichi's transaction *does not* satisfy Component #3 because West Side did not own any relevant built-in gain assets.

•Component #4: At least half of the tax resulting from T's built-in gain assets is offset or avoided.

•Tricarichi's transaction *does not* satisfy Component #4 because West Side did not own any relevant built-in gain assets.

III. Conduit Theory

III. Conduit Theory

- This is the first of two theories raised by the Transferee report in an attempt to reclassify the sale of stock of West Side as a liquidation.
- As explained below, this theory fails because there was **no liquidation (in substance or form)** of West Side as part of the stock sale.

III. Conduit Theory

- The Transferee Report, on page 11, argues that this transaction is a conduit because “[t]he purported stock sale was nothing more than an exchange of cash couched in a form designed to avoid the payment of corporate level tax. The overall transaction should be treated consistent with its substance, with the result that the shareholder of West Side received the cash from West Side *as a liquidating distribution* in the guise of a purported stock sale.” (emphasis added)
- Accordingly, the Transferee Report attempts to use the conduit theory not only to disregard a step in Tricarichi’s transaction (*i.e.*, the stock sale), but also to **manufacture** an event that never occurred (*i.e.*, a liquidation of West Side).
- The application of the conduit theory to Tricarichi’s transaction is without merit.

III. Conduit Theory

- As a general matter, the “mere conduit” cases stand for the proposition that a sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title.

- However, application of these cases must be tempered by the acknowledgment in *Gregory v. Helvering* that taxpayers are permitted to structure their business affairs as they please within the bounds of the law.

- Here, Tricarichi did just that by engaging in a bona fide sale of West Side stock to the highest bidder, an unrelated third party.

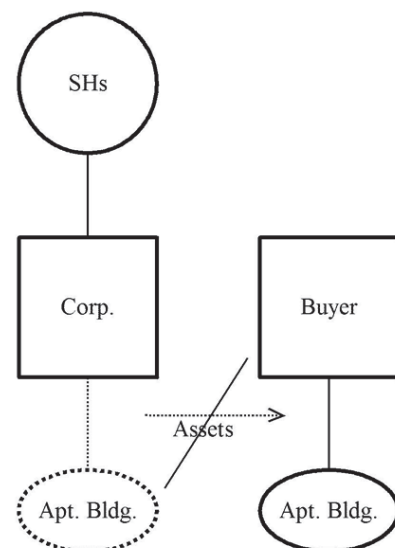
III. Conduit Theory

- The two seminal cases involving the conduit theory are *Commissioner v. Court Holding* and *United States v. Cumberland Public Service*.
- The U.S. Supreme Court applied the “mere conduit” theory and rejected the form of the transaction in *Court Holding* but respected the form of the transaction in *Cumberland*.
- Because Tricarichi’s transaction is substantially more similar to the facts in *Cumberland* than to the facts in *Court Holding*, the form of Tricarichi’s transaction must be respected.

III. Conduit Theory

Court Holding v. Commissioner

- A corporation whose only asset was an apartment building began negotiating a sale of the apartment building and reached an oral agreement.
- Before the agreement was put into writing, the corporation was advised by its tax advisors that an asset sale would result in significant income tax and so withdrew from the proposed transaction.

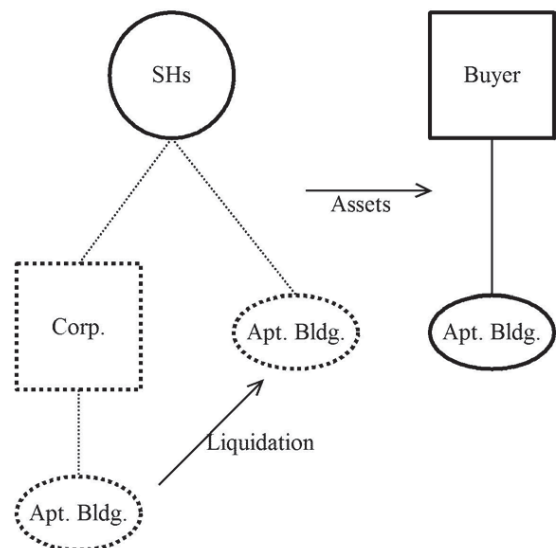


III. Conduit Theory

Court Holding v. Commissioner (cont'd)

•The next day, the corporation distributed the apartment building to its shareholders by way of a liquidating distribution.

•The shareholders then sold the apartment building to the original buyer on substantially the same terms and conditions previously agreed upon.



III. Conduit Theory

Court Holding v. Commissioner (cont'd)

- The U.S. Supreme Court held that the shareholders acted as a mere conduit such that the executed sale was in substance a sale from the corporation to the buyer.
- As shown on the next slide, the facts of *Court Holding* are substantially different from the facts of Tricarichi's transaction. Accordingly, *Court Holding* does not apply to the present case.

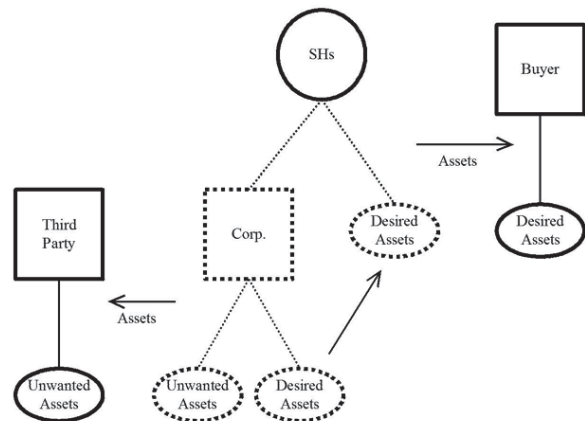
III. Conduit Theory

FACTOR	<i>COURT HOLDING</i>	TRICARICHI
Corporation's Historic Business Operations	Corporation passively held an apartment building	West Side actively engaged in reselling cellular telecommunications services
Corporation's Assets	Corporation's sole asset was an apartment building	West Side's assets included cash and an excise tax cause of action
Original Agreement	Asset sale between corporation and buyer	Stock sale between Tricarichi and buyer
Original Agreement Abandoned?	Yes	No
Liquidation	Corporation liquidated	West Side never liquidated and continues to exist today
Subsequent Agreement	Asset sale between shareholders and buyer (same terms as original agreement)	None
Other Facts	Prior payment from buyer to corporation was applied towards the purchase price	None
Form of Transaction Respected?	No	YES

III. Conduit Theory

Cumberland Public Service v. Commissioner

- A corporation was engaged in the business of generating and distributing electric power. In 1936, the corporation decided to leave the power business when a local cooperative began competing with it.
- The corporation's shareholders offered to sell their stock to the cooperative but it refused. The cooperative then offered to buy certain assets from the corporation but the corporation refused.
- Finally, the parties agreed that the corporation would transfer the desired assets to the shareholders and then the shareholders would on-sell the distributed assets to the cooperative.
- Thereafter, the corporation sold its remaining assets to an unrelated third party and dissolved.



III. Conduit Theory

Cumberland Public Service v. Commissioner (cont'd)

- The U.S. Supreme Court determined that, unlike in *Court Holding*, the corporation never entered into negotiations to make the sale itself. Accordingly, the Court held that the shareholders were the sellers of the assets and were not mere conduits in the sale from the corporation to the cooperative.
- As shown on the next slide, the facts of *Cumberland* are basically the same as the facts of Tricarichi's transaction, and in some ways the facts of Tricarichi's transaction are even stronger. Accordingly, *Cumberland* applies to the present case.

III. Conduit Theory

FACTOR	CUMBERLAND	TRICARICHI
Corporation's Historic Business Operations	Corporation actively engaged in generating and distributing electric power	West Side actively engaged in reselling cellular telecommunications services
Corporation's Assets	Corporation had significant business assets, including transmission and distribution equipment	West Side's assets included cash and an excise tax cause of action
Original Agreement	Asset sale between shareholders and buyer	Stock sale between Tricarichi and buyer
Original Agreement Abandoned?	No	No
Subsequent Agreement	None	None
Other Facts	None	None
Form of Transaction Respected?	YES	YES

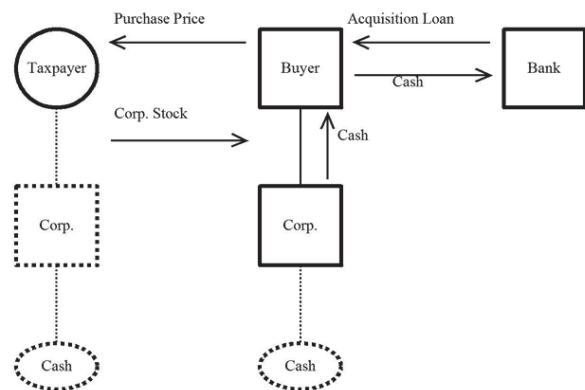
III. Conduit Theory

- Accordingly, Tricarichi's transaction is much closer to *Cumberland* than to *Court Holding*.
- In particular, and perhaps dispositively, unlike *Court Holding*, Tricarichi's transaction was not part of a pre-negotiated transaction that was called off or altered to avoid tax liability. Rather, the facts demonstrate that, from the very beginning, the object of Tricarichi's transaction was always a sale of the West Side stock by Tricarichi to the buyer.
- Moreover, as discussed on the following slides, other "conduit" cases are also easily distinguishable from Tricarichi's transaction. Therefore, the IRS's proposed recharacterization of Tricarichi's transaction as a liquidating distribution under the "mere conduit" theory is without support.

III. Conduit Theory

Owens v. Commissioner

- Taxpayer was the sole shareholder of a corporation whose sole asset was cash (the corporation had previously sold its active assets and operations).
- Taxpayer sold 100% of the corporation's stock to an unrelated buyer.
- On the same day as the stock sale, the buyer withdrew all of the cash from the corporation's bank account and used the proceeds to repay a bank loan that was used to fund the stock acquisition.
- Three days later, the corporation adopted a formal resolution of liquidation.



III. Conduit Theory

Owens v. Commissioner (cont'd)

- The court of appeals found that the stock sale did not constitute a bona fide sale but was actually a disguised liquidating distribution of the corporation's assets to the taxpayer. In other words, the court found that the buyer acted as a mere conduit between the corporation and the taxpayer.

- As shown on the next slide, the facts of *Owens* are substantially different from the facts of Tricarichi's transaction as West Side never liquidated. Accordingly, *Owens* does not apply to the present case.

III. Conduit Theory

FACTOR	OWENS	TRICARICHI
Corporation's Assets	Corporation's only asset was cash	West Side's assets consisted of cash and excise tax causes of action
Corporation's Liabilities	There were no debts or claims, contingent or otherwise, against the corporation	West Side had a potential excise tax penalty liability
Corporation's Business Activity at Time of Sale	Corporation carried on no business activity and was a lifeless shell at time of stock sale	West Side was actively pursuing excise tax causes of action at time of stock sale
Post- Acquisition Liquidation	Corporation adopted a formal resolution of liquidation three days after the stock sale	West Side continues to exist to this day
Form of Transaction Respected?	No	YES

III. Conduit Theory

Lowndes v. United States

- Seller decided to sell four subsidiaries it had not operated for several years. The subsidiaries' assets were reduced to cash and their liabilities were satisfied. However, seller had a loss in each of the subsidiaries that it could not use unless the subsidiaries were sold.
- Taxpayer emerged as a buyer and bought the stock of the four subsidiaries for cash. The purchase was financed by a six-month bank loan bearing interest at 4.5% and secured by the stock.
- Taxpayer caused the subsidiaries to invest their cash in deposit accounts bearing interest at 2.5% for a six-month period.

III. Conduit Theory

Lowndes v. United States (cont'd)

- After six months, the subsidiaries liquidated and distributed their assets to the taxpayer, who in turn used the proceeds to repay the bank loans. Taxpayer reported the excess of the distributions over her cost basis in the stock as long-term capital gain rather than ordinary income.
- The district court found that the corporate entities lacked business purpose and should be disregarded such that the taxpayer actually purchased cash rather than stock.
- As shown on the next slide, the facts of *Lowndes* are substantially different from the facts of Tricarichi's transaction. Accordingly, *Lowndes* does not apply to the present case.

III. Conduit Theory

FACTOR	<i>LOWNDES</i>	TRICARICHI
Corporation's Assets	Corporations' only asset was cash	West Side's assets consisted of cash and excise tax causes of action
Corporation's Liabilities	Corporation had no liabilities	West Side had a potential excise tax penalty liability
Corporation's Business Activity at Time of Sale	Corporation carried on no business activity and had been a lifeless shell for a number of years	West Side had recently ceased its business of reselling cellular telecommunications services but continued to pursue excise tax causes of action
Business Purpose After Sale?	Corporation invested in interest-bearing time deposit certificates	West Side continued to actively pursue excise tax causes of action
Post-Acquisition Liquidation?	Yes, after six months	No
Form of Transaction Respected?	No	YES

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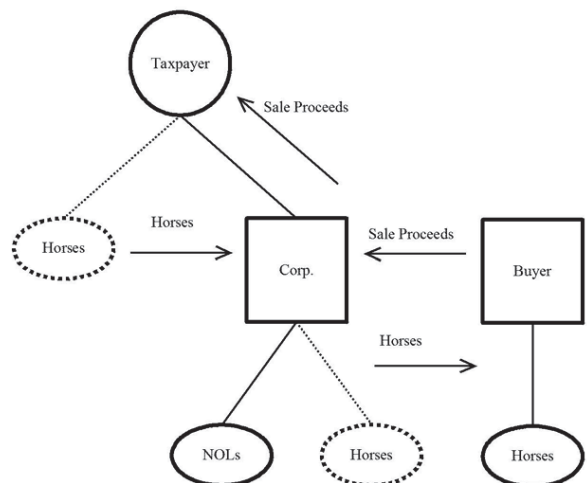
III. Conduit Theory

Estate of Kluener v. United States

- Taxpayer owned thoroughbred horses and was the sole shareholder of a corporation with significant net operating losses.

- Taxpayer decided to sell his horses. Rather than selling them directly, he contributed the horses to his wholly-owned corporation which then sold them at auction. The corporation used its net operating losses to offset the gain realized on the sale.

- Eleven months later, the corporation distributed the sale proceeds to the taxpayer.



III. Conduit Theory

***Estate of Kluener v. United States* (cont'd)**

- The court of appeals found that the taxpayer lacked a business purpose for contributing his horses to the corporation. As a result, the court disregarded the contribution to the corporation and held that the taxpayer, rather than the corporation, sold the horses. In other words, the court found that the corporation acted as a mere conduit.

- As shown on the next slide, the facts of *Kluener* are substantially different from the facts of Tricarichi's transaction. Accordingly, *Kluener* does not apply to the present case.

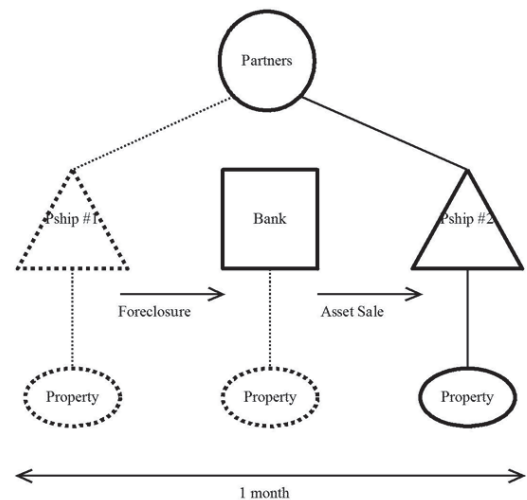
III. Conduit Theory

FACTOR	<i>KLUENER</i>	TRICARICHI
Corporation's Historic Business Operations	Taxpayer transferred the horses to a newly-created division of the corporation that had no historic business operations	West Side actively engaged in reselling cellular telecommunications services
Conduit's Use of Transferred Property	Corporation never used any of the sales proceeds in its own activities (taxpayer never told the corporation's management about the contribution or sales proceeds)	Buyer used the cash in West Side to repay an acquisition finance loan and retained the rest for its own (and its shareholder's) purposes
Control Over Conduit	Taxpayer manipulated the corporation and caused it to make special distributions of the sales proceeds to him	Tricarichi had no formal control or influence over West Side or buyer after the stock sale
Other Factors	Taxpayer continued to finance the horse operations after the transfer to the corporation	Tricarichi had no formal relationship with either West Side or buyer after the stock sale
Form of Transaction Respected?	No	YES

III. Conduit Theory

Davis v. Commissioner

- Taxpayer was a partner in a partnership that allowed real property to go into foreclosure.
- Before the bank foreclosed, the partners and the bank reached an understanding that, after the foreclosure, the bank would sell the property to a newly-formed partnership owned (directly and indirectly) by the same partners.
- One month after the foreclosure, the bank sold the property to the newly formed partnership.
- As a result of the foreclosure, the original partnership terminated and the taxpayer claimed a loss.



III. Conduit Theory

Davis v. Commissioner (cont'd)

- The court found that there was an indirect transfer between the two partnerships and, accordingly, disallowed the taxpayer's loss under Section 707(b)(1)(A) (disallowing losses arising from an indirect sale between two partnerships in which the same persons owned, directly or indirectly, more than 50% of the capital and profits interest).

- As shown on the next slide, the facts of *Davis* are substantially different from the facts of Tricarichi's transaction. Accordingly, *Davis* does not apply to the present case.

III. Conduit Theory

FACTOR	DAVIS	TRICARICHI
Step One	Bank foreclosed on partnership's <i>asset</i>	Tricarichi sold West Side's <i>stock</i>
Step Two	Bank sold the asset back to effectively the same partnership	No second step
Prearranged Second Step?	Before the foreclosure occurred, a plan existed for the bank to resell the property to the taxpayer's new partnership	No second step and so no prearranged plan
Form of Transaction Respected?	No	YES

III. Conduit Theory

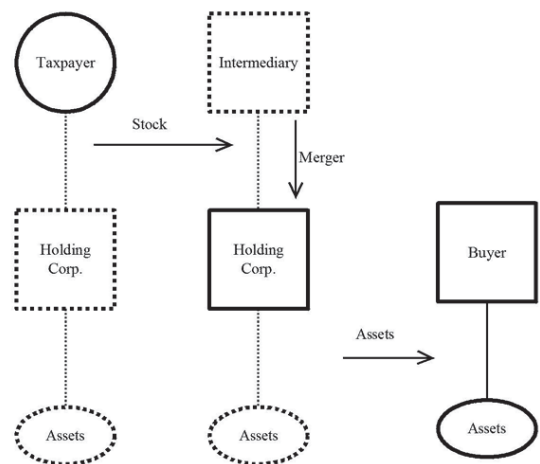
Enbridge Energy Co. v. United States

- Taxpayer was the sole shareholder of a holding corporation that owned and operated natural gas pipelines.

- In early 1999, the taxpayer decided to sell the corporation's stock. A buyer emerged but wanted to purchase assets rather than stock. The parties engaged an intermediary to participate in the transaction and bridge the divide.

- In October 1999, the intermediary purchased all of the stock of the holding corporation from the taxpayer and then merged into the holding corporation. The next day, most of the holding corporation's assets were sold to the buyer.

- The stock purchase was financed with a bank loan secured entirely by funds the holding corporation deposited in escrow.



III. Conduit Theory

***Enbridge Energy Co. v. United States* (cont'd)**

- The court of appeals found that the transaction was a sham conduit transaction and recharacterized the transaction as a direct stock sale from the taxpayer to the buyer. In other words, the court found that the intermediary acted as a mere conduit between the taxpayer and the buyer.

- As shown on the next slide, the facts of *Enbridge* are substantially different from the facts of Tricarichi's transaction. Accordingly, *Enbridge* does not apply to the present case.

III. Conduit Theory

FACTOR	ENBRIDGE	TRICARICHI
Corporation's Business Activity at Time of Stock Sale	Corporation owned and operated natural gas pipelines	West Side was actively pursuing excise tax causes of action.
Time Between Stock Sale and Asset Sale	Less than twenty-four hours	No asset sale
Security for Acquisition Financing	Financing was wholly secured by the holding corporation's funds	No evidence of West Side's assets being used to secure financing while West Side was held and controlled by Tricarichi
Corporation's Business Activity After Stock Sale	Holding corporation conducted no business activity after the stock sale	West Side continued to actively pursue excise tax causes of action
Form of Transaction Respected?	No	YES

III. Conduit Theory

- The fundamental reason why the conduit theory does not apply to these facts is that West Side **did not liquidate (in substance or in form)** as part of the stock sale.

- Instead, in fact, West Side continued to prosecute two excise tax causes of action

III. Conduit Theory

- In support of its argument that the buyer acted as a mere conduit between West Side and Tricarichi, the IRS asserts that Tricarichi intended to cease business operations and liquidate West Side. This claim is without merit.

- First, no formal plan of liquidation was ever adopted here.

- Second, although it is true that, in the absence of a formally adopted a plan of liquidation, a court may find that a plan of liquidation has nevertheless been adopted if there is (1) a manifest intention to liquidate, (2) a continuing purpose to terminate the company's affairs and dissolve and (3) evidence that the company's activities are directed and confined to furthering the liquidation, none of those requirements is satisfied here.

III. Conduit Theory

- Not only did Tricarichi not intend to liquidate West Side, he actually took affirmative steps to prevent a liquidation from happening by requiring the buyer to agree to continue operating West Side for at least five years.

- Moreover, West Side continued to prosecute excise tax causes of action.

- The IRS has itself recognized in Revenue Ruling 74-462 and Treasury Regulations Section 1.6012-2(a)(2) that a corporation that “actively defend[s]” legal actions and “prosecuted actions brought by it” has not liquidated even though the corporation’s only assets are those the corporation retained in connection with the litigation.

III. Conduit Theory

- Because the conduit theory does not apply to Tricarichi's transaction, West Side cannot be said to have made a liquidating distribution to Tricarichi.

- Consequently, Tricarichi is not a "transferee" of West Side and so he cannot be subject to transferee liability for West Side's unpaid federal income taxes.

IV. Step Transaction Doctrine

IV. Step Transaction Doctrine

- This is the second of two theories raised by the Transferee report in an attempt to reclassify the sale of stock of West Side as a liquidation.

- This theory fails, just like the first theory, because there was **no liquidation (in substance or form)** of West Side as part of the stock sale.

IV. Step Transaction Doctrine

•The Transferee Report, on page 13, argues that the step transaction doctrine applies because “[t]he tax effect desired by the parties (*i.e.* a purported stock sale followed by the avoidance of tax by West Side) could not be obtained unless all of the steps were completed...Through the guise of a stock sale, the cash in West Side was disbursed among the participants, leaving West Side with no business assets and no cash to pay its liabilities.”

•The Transferee Report is asserting that the stock sale should be collapsed under the step-transaction doctrine and recharacterized as a transaction in which West Side made a liquidating distribution of all of its assets to Tricarichi, who in turn paid a fee to the buyer.

IV. Step Transaction Doctrine

•The step-transaction doctrine is inapplicable to Tricarichi's transaction because:

1. There was **no liquidation** of West Side, and
2. The proposed recharacterization of the sales proceeds as a liquidating distribution from West Side requires fictitious additional steps that do not reflect the substance of Tricarichi's transaction any more accurately than would giving effect to the transaction's form.

IV. Step Transaction Doctrine

- Fundamentally, the step transaction doctrine is inapplicable to the stock sale because West Side **did not liquidate (in substance or in form)** as part of or in connection with the stock sale.

- Because the step transaction doctrine is inapplicable to Tricarichi's transaction, West Side cannot be said to have made a liquidating distribution to Tricarichi.

IV. Step Transaction Doctrine

•The step-transaction doctrine is also inapplicable to Tricarichi's transaction because the proposed recharacterization of the sales proceeds as a liquidating distribution from West Side requires **fictitious additional steps** that do not better explain the substance of Tricarichi's transaction.

•The step-transaction doctrine does not explain how the buyer came to own the stock of West Side or why it is that West Side has continued to actively pursue excise tax causes of action.

•Such an explanation would require the IRS to create the following fictitious steps: (1) West Side liquidated, (2) Mr. Tricarichi assigned West Side's excise tax causes of action to the buyer, (3) the buyer incorporated a corporation called West Side Cellular, Inc. and (4) the buyer contributed the excise tax causes of action to the newly formed corporation.

IV. Step Transaction Doctrine

- Courts reject the creation of fictitious additional steps in the context of the step-transaction doctrine.

- “Of course, the [step-transaction] doctrine cannot manufacture facts that never occurred to create an otherwise nonexistent tax liability.” *Greene v. United States*, 13 F.3d 577, 583 (2d Cir. 1994).

- “Useful as the step transaction doctrine may be in the interpretation of equivocal contracts and ambiguous events, it cannot generate events which never took place just so an additional tax liability may be asserted.” *Sheppard v. United States*, 361 F.2d 972, 978 (Ct. Cl. 1966).

- See also *Esmark, Inc. and Affiliated Cos. v. Comm’r*, 90 T.C. 171 (1988), *aff’d*, 886 F.2d 1318 (7th Cir. 1989); *Tracinda Corp. v. Comm’r*, 111 T.C. 315 (1998).

- Moreover, the proposed recharacterization under the step-transaction doctrine does not reflect the substance of Tricarichi’s transaction any more accurately than would giving effect to its form.

V. Transferee Liability

V. Transferee Liability

- Based on the prior analysis, West Side did not liquidate as part of the sale of stock and thus Tricarichi did **not** receive any assets from West Side as part of the sale of stock.
- Instead, Tricarichi received cash from the buyer (using the buyer's own funds and funds the buyer itself borrowed), not from West Side.
- Therefore, in no sense is Tricarichi a “transferee” of West Side, and thus Tricarichi **cannot be liable** for West Side's tax liabilities (if any).
- Of great importance, the IRS has **the burden of proving that a taxpayer is a transferee**. Thus, the IRS would bear the burden of proof to show that Tricarichi is a transferee of West Side by virtue of a liquidation of West Side.

Exhibit 24

**Internal Revenue Service
Large and Mid-Size Business**

Department of the Treasury
5450 Stratum Drive, Suite 150
Fort Worth, TX 76137-7248

Date: *August 11, 2009*

Glenn S Miller, c/o Bingham McCutchen LLP
2020 K Street NW
Washington, D.C. 20006

Taxpayer Name:
Michael Tricarichi, Transferee of WestSide Cell
Taxpayer Identification Number:
268-56-5446
Form Number:
Transferee Report
Year(s):
12/31/2003
Person to Contact/ID Number:
Denise McCaskill/02-43426
Contact Telephone Number:
817-232-6383
Contact Fax Number:
817-232-6549

Dear Mr. Miller:

We are sending the enclosed material under the provisions of your power of attorney or other authorization we have on file. For your convenience, we have listed the name of the taxpayer to whom this material relates in the heading above.

If you have any questions, please call the contact person at the telephone number shown in the heading of this letter.

Thank you for your cooperation.

Sincerely,


Don Bouquet, for
Maria Hwang, Director, Field Operations

Enclosures:
☒ Letter(s)
☒ Report(s)
☐ Copy of Determination Letter
☐ Other

EXHIBIT
PwC Dep Ex. No.

74

A-16-735910-B

Letter 937 (Rev. 11-2006)
Catalog Number 30760X

595

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APP0932

Internal Revenue Service
Director, Field Operations

Department of the Treasury

Date: August 11, 2009

Person to Contact:
Denise McCaskill 02-43426
Contact Telephone Number:
817-232-6383
In Reply Refer to:
LMSB:CTM:1296:NFTW

Michael Tricarichi, Transferee
341 Arbour Garden Ave
Las Vegas, NV 89148

If you accept our findings, please sign and return the enclosed waiver form. If additional tax is due, you may want to pay it now and limit the interest charge; otherwise, we will bill you. (See the enclosed Publication 5 for payment details.)

If you do not accept our findings, we recommend that you request a hearing with our Office of Regional Director of Appeals. Most cases considered at that level are settled satisfactorily. If the proposed increase or decrease in tax is \$2,500 or less, you may call the person whose name and telephone number appear above; he or she will arrange for your case to be forwarded to Appeals. If the proposed change to your tax is more than \$2,500 but is \$10,000 or less for any tax period, you must provide us with a BRIEF written statement of the disputed issues. If the proposed change to your tax is MORE THAN \$10,000 for any tax period, we will require a written protest. Follow the instructions in the enclosed Publication 5, which also explains your appeal rights. If you request a hearing, we will forward your written statement or protest to the Office of Regional Director of Appeals and they will contact you to schedule an appointment.

If we don't hear from you within 30 days, we will have to process your case on the basis of the adjustments shown in the enclosed statement. An addressed envelope is enclosed for your convenience.

If you have any questions, please contact the person whose name and telephone number are shown above.

Thank you for your cooperation.

Sincerely yours,


Maria Hwang
Director, Field Operations

Enclosures:
Statement Transfer Liability Memorandum
Waiver Form 870
Publication 5
Envelope

Letter 955 (DO) (Rev. 8-89)
Catalog Number 403922

596

TRICAR-NV0093620
APP0933

Transferee Report

Transferee of the Assets: Michael Tricarichi
268-56-5446

Of 341 Arbour Garden
Las Vegas, Nevada 89148

Transferor: West Side Cellular, Inc.
34-1685059

Of 1155 W. Fourth St. #225-18
Reno, Nevada 89503

Return Form: 1120

Year: Taxable year ended 12/31/2003

ISSUE

Whether Michael Tricarichi is a transferee of the assets of West Side Cellular, Inc., and as such is liable for the unpaid income tax deficiencies of West Side Cellular, Inc. for its taxable year ended 12/31/2003.

FACTS

Introduction

In September 2003 the shareholder of West Side Cellular, Inc. ("Michael Tricarichi") engaged in a transaction that is substantially similar to the Intermediary Transactions tax shelter described in Notice 2001-16. At the time of the tax shelter transaction West Side Cellular, Inc. ("West Side") had a significant taxable gain resulting from the settlement of a lawsuit. The income tax on the gain would be due on 12/31/2003, at the end of West Side's taxable year.

West Side Cellular was the owner and operator of a revenue producing wireless subscriber base operating as a Verizon Wireless reseller. As part of the legal settlement, West Side Cellular had to terminate its business relationship with Verizon. As a result, the shareholder intended to sell the customer base to another Verizon Wireless reseller and then get out of the cellular business completely. The shareholder ended up selling West Side's stock to a tax shelter promoter at a price substantially higher than the amount he would have received from a liquidation of Westside. The promoter that acquired West Side arranged for tax shelter losses to be used by West Side to offset the taxable gain, with the result that no tax on the gain was ever paid.

The description of the tax shelter transaction in this report is based on records received from Michael Tricarichi, West Side, as well as from other participants in the transaction in response to third party summonses. The description that follows is a summary of the transaction that occurred. For detailed analysis of the facts surrounding the settlement agreement, sale of the business assets to a related entity, stock sale to the tax shelter promoter and the subsequent section 351 transfer, see Form 4665.

Intermediary Transactions Tax Shelter

In an Intermediary Transaction tax shelter a specially created entity (the "Intermediary") acquires a target corporation from the original shareholders. The Intermediary is created and controlled by a shelter promoter. The target corporation's assets have either already been entirely sold or their sale is completely prearranged. This sale of assets causes the target corporation to incur taxable gain. The Intermediary acquires the target stock and then provides a shelter to target to offset the gain from the sale of the assets (or other significant taxable gain trapped in corporation). [In West Side's case the taxable gain to be sheltered is from the receipt of settlement proceeds.]

The original shareholders wish to maximize their yield from the sale of the assets (or other significant gain) and limit their exposure to any corporate liability. Ordinarily, the original shareholders would cause the target corporation to pay the corporate level tax on the gain from the asset sale (or other significant gain) and then liquidate the corporation by paying the remainder to themselves. Another option is for the original shareholders to acquire a shelter for the target corporation and then liquidate the target. This is risky however as the original shareholders would be transferees of the target corporation and liable for the corporate level taxes should the corporation be audited.

An Intermediary transaction provides the original shareholder with another option. Instead of liquidating the corporation, the original shareholders purportedly sell their target stock to the promoter at a premium price. The original shareholder agrees to this because it not only increases the shareholder's yield but, if it is a legitimate stock sale, would protect the original shareholder from any transferee liability for debts, including tax liabilities, of the target corporation. The promoter is only able to offer a premium price, however, because it will not be paying the target corporation tax liabilities.

The Intermediary Transactions tax shelter was designated as a listed transaction in Notice 2001-16, 2001-1 C.B. 730, which was released on 1/18/2001.

Tax Shelter Promoter - Fortrend

Fortrend began as a group of professionals who decided to implement financial strategies rather than continue to act as advisors. Since its inception, Fortrend has worked closely with owners and shareholders in merger and acquisition transactions to maximize values for their clients. As stated in a Fortrend brochure, "Clients of Fortrend have benefited from our ability to structure transactions that minimize shareholder and corporate liabilities resulting from the sale of the corporation or its assets. Fortrend is prepared to finance the acquisition of the selling corporation, manage the negotiations, oversee the preparation of documents, and close the transaction." Fortrend's two founding principals are Fred Forster and Jeffrey Furman. They are described as having over 30 years of combined experience managing "leading-edge transaction structuring".

From 1996 to 2003, Fortrend was active in the promotion and implementation of abusive tax shelters similar to those described in Notice 2001-16, Intermediary Transaction. In all, Fortrend promoted in excess of 120 transactions, ranging in size from \$5 million to \$1.5 billion. Fred Forster and Jeffrey Furman directed the tax shelter transactions of Fortrend, with the assistance of Fortrend employees and with services provided by accountants, attorneys and others. Fortrend worked closely with Rabobank Nederland in New York to secure financing for the purchase of the target stock in many of the transactions.

Following the acquisition of a target corporation, Fortrend used various tax shelter techniques to avoid the payment of corporate taxes by the target corporation. A Fortrend-controlled entity would own the target after the stock sale and would generally transfer an inflated high-basis asset, such as stock, US Treasury Bills, distressed debt, etc. to the target corporation in a section 351 transfer. By the end of the taxable year, this inflated basis asset would then be sold to another Fortrend related entity or the debt would be deemed worthless and a loss was created.

West Side Cellular, Inc.

West Side was incorporated on March 13, 1988 by Carla Tricarichi. One hundred shares of stock were issued to her son, Michael Tricarichi (WC 00040). Michael served as 100% shareholder and President of West Side from the date of its incorporation until the time the stock was sold.

On October 18, 1993, West Side Cellular (doing business as Cellnet) filed a complaint with Public Utilities Commission of Ohio (PUCO), against wholesale cellular service providers, including Ameritech. The complaint asserted that Ameritech discriminated against Cellnet. (Rabo-F-5430) On January 18, 2001, PUCO ruled in agreement with Cellnet's assertions and held that Ameritech unlawfully discriminated against Cellnet. (Rabo-F-5430) Ameritech submitted an Appeal in 2002. On December 30, 2002, the Supreme Court of Ohio affirmed the decision of PUCO and ruled in favor of West Side.

In April, 2003 two Settlement Agreements were entered into between West Side and the Defendants. Pursuant to the Settlement Agreements, West Side would receive settlement proceeds totaling \$64,250,000 and all business relationships with Verizon would terminate effective June 10, 2003. From the settlement proceeds, Westside would pay employees \$13,000,000 and attorney's fees of \$12,000,000, leaving cash in Westside of approximately \$40,000,000.

As of June 10, 2003, West Side would no longer be able to provide Verizon cellular service to its customers. The shareholder intended to transfer/sell its customer base to another Verizon reseller so that the customers would be able to continue their wireless service. The shareholder would then completely get out of the cellular business.

Contact with Fortrend

As it began to look like West Side would prevail in its lawsuit, Hahn, Loeser & Parks (HLP), the law firm for West Side, began doing extensive research on income tax issues regarding the taxation of settlement proceeds and, ultimately on the tax shelter transaction. (HL 1856 – HL 1861) For example,

- On 9/18/2002, "JB Sims met with attorney DC Carlson regarding tax matters; researched and analyzed tax law on settlement and judgment awards; research timing of S-election and liquidation rules";
- On 2/8/2003, "JB Sims researched and analyzed law relating to reportable transactions, Sham transactions and substance over form; consider potential structuring options";
- On 2/10/2003, "JB Sims, JM Folkman, DC Carlson met regarding tax structuring of entities for potential settlement; researched and analyzed law relating to tax-free spin-offs and collapsible corporations; reviewed certain listed transactions; reviewed substance over form issues and the Sham Transaction Doctrine";
- On 2/11/2003, "JB Sims reviewed and analyzed Notice 2001-16 relating to transaction involving a shareholder who wants to sell stock of a target, an intermediary corporation, and a buyer who wants to buy the assets of the corporation; telephone call to V. Papallo, Technical Advisor, regarding the same";
- On 2/12/2003, "JB Sims researched and analyzed issues relating to listed transactions";

- On 2/19/2003, "JB Sims, JM Folkman, RJ Hart met with Cellnet personnel and MidCoast personnel regarding tax structuring issues relating to the resolution of the Cellnet lawsuits; JB Sims researched and analyzed issues relating to Notice 2001-16 and the applicability of those provisions on the resolution of the pending lawsuits."

In February, 2003, HLP introduced Michael Tricarichi to MidCoast. MidCoast was another intermediary tax shelter promoter that occasionally worked on deals with Fortrend. Jim Tricarichi (Michael's brother) introduced him to Fortrend. Both companies expressed an interest in acquiring the stock of West Side and were actually competing against one another for the deal. Ultimately, Michael Tricarichi chose to sale his stock in West Side to Fortrend because, according to Michael Tricarichi's testimony, Fortrend offered a higher price.

Sale of Business Assets to LXV, Group

Once it became apparent that the stock sale transaction was a viable solution for Michael Tricarichi, it was determined that the business assets (other than cash) needed to get out of West Side. The primary business asset (other than cash) was the customer base.

Michael Tricarichi intended to sell the West Side customer base to another Verizon reseller for an income stream. A percentage of the income generated from the customer base would be paid back to West Side (or the Seller) for a period of 2 or 3 years. According to Michael Tricarichi, the customer base needed to be "parked" in another entity so it could collect the income stream.

On May 1, 2003, Michael Tricarichi filed Articles of Organization for LXV Group with the State of Ohio. This corporation was formed to receive and then sell the customer base to a third-party.

On June 11, 2003 an Asset Purchase Agreement ("APA") between West Side and LXV Group was executed by Michael Tricarichi, as President of West Side; Scott Ginsburg as Treasurer of LXV Group; Lawrence Dubin as Vice President of LXV Group; and, Patrick Scaravilli, as Secretary of LXV Group. It is noted that Scott Ginsburg, Lawrence Dubin and Patrick Scaravilli held the same officer positions with West Side.

Pursuant to the APA, LXV Group acquired all of the wireless business assets of West Side, including the revenue producing wireless customer base, accounts receivables, Trade names, Trade marks, chattels, fixtures and equipment located on its business premises for an amount of \$100,044. This Agreement specifically excluded any cash or cash equivalents in the possession of West Side.

Letter of Intent with Fortrend

On or around July 22, 2003, Nob Hill Holdings (a Fortrend created entity) sent a letter of intent to Michael Tricarichi (Seller) regarding the principal terms to which Fortrend would acquire 100% of the stock of West Side. The Stock Purchase Price shall be \$34,900,000. The Stock Purchase Price shall be adjusted upward or downward, as the case may be, by the amount by which the "Available Cash" differs from the amount of cash held by the Company at the time of closing, on a dollar for dollar basis; and downward by amount of any undisclosed liability of the Company, which is not contained in this Letter of Intent as of the closing date on a dollar for dollar basis. The Company's assets shall consist of cash held by the Company, after all liabilities (other than local, state and federal income tax liabilities for the current fiscal year) have been paid or otherwise provided for, in the sum of \$40,000,000 (such amount, "Available Cash"). The Company will have no liabilities other than the liabilities associated with the Company's ordinary income and capital gains for the fiscal year ending December 31, 2003; provided that, in the event that such liabilities associated with the Company's ordinary income and capital gains for the fiscal year ending December 31, 2003 are greater than the \$40,000,000 amount previously

disclosed to representatives of Purchaser prior to the execution of this Letter of Intent, the Stock Purchase Price shall be adjusted downward proportionately but no such adjustment to the Stock Purchase Price shall be made if such liabilities associated with the Company's ordinary income and capital gains for the fiscal year ending December 31, 2003 are lower than previously disclosed to representative of Purchaser. (HL 281) In addition, West Side was to simultaneously deposit \$50,000 with Fortrend's attorney's escrow account. Seller had to agree to compensate Purchaser for all reasonable professional costs up to \$50,000 if the transaction failed to close based on factors within Seller's control. Purchaser also agreed to reimburse Seller for all reasonable professional costs up to \$50,000 if the transaction failed to close based upon factors within Purchaser's control. The letter of intent was signed by Tim Conn, as Manager of Nob Hill Holdings.

Stock Purchase

West Side Cellular ceased business operations and sold all of its business assets on or about June 11, 2003. Nob Hill Holdings acquired the stock in West Side for a final price of \$35,199,371 on or about September 9, 2003. At the time Nob Hill acquired the stock, West Side had converted all of its assets to cash and paid off all outstanding liabilities. Other than a Notes Receivable from the shareholder in the amount of \$577,777, the only asset remaining in the corporation was cash in the amount of \$39,999,373 (this amount includes the \$50,000 previously deposited into escrow).

Fortrend via Nob Hill received cash of \$40,577,150 (\$39,999,373 plus a check in the amount of \$577,777 for repayment of the shareholder loan. Fortrend only paid \$35,199,371 (\$34,621,594 cash plus check of \$577,777) for the West Side Cellular stock. Fortrend exchanged cash for cash. The difference in cash paid and cash received of \$5,377,779 was the profit retained by Fortrend for participating in the transaction.

Concerns about this transaction being considered a listed transaction were noted throughout the Stock Purchase Agreement: (WC 00069)

- Section 3.2(y): During the period commencing on January 1, 2003, and continuing through the period ending immediately prior to the Closing Date, Company has not directly or indirectly participated in any Listed Transaction ...
- Section 4.1(f): Neither Buyer nor its affiliates has registered the transactions contemplated by this Agreement under Section 6111 of the Code. Neither Buyer nor any of its Affiliates has been advised by their respective professional advisors that the transactions contemplated by this Agreement (separately or in combination) must be registered under Section 6111 of the Code or constitute direct or indirect participation by them in a Listed Transaction
- Section 4.1(n): The Buyer has no intention to cause Company to, directly or indirectly, engage in or be a party to any Listed Transaction, Confidential Transaction ... Loss Transaction, ... or Transaction with a Brief Asset Holding Period.
- Section 5.2(b): Buyer shall maintain the existence of Company for a period of at least five years following Closing and, during such time, Company shall, at all times, be engaged in an active trade or business. Buyer shall maintain a net worth of no less than \$1,000,000 during such time period.

Financing for the Intermediary Transaction

Rabobank was the lender and key participant in the circular money flow that was utilized to acquire West Side. On August 13, 2003, Fortrend sent a letter to Chris Kortlandt at Rabobank setting forth the basis information concerning the acquisition of West Side (also known as "CellNet") by Fortrend's client Nob Hill Holdings. "Nob Hill will purchase 100% of the stock of CellNet from its sole shareholder, Michael Tricarichi pursuant to a stock purchase transaction. The stock purchase is scheduled to close on August 27, 2003. (Rabo-F-5525) Nob Hill will purchase 100% of the stock of CellNet for a purchase price of approximately \$34.9M... Nob Hill is seeking a short-term loan of \$29.9M from Rabobank. Nob Hill has cash in the amount of \$5M, which it will deposit in a new account with Rabobank prior to closing. On the date that Nob Hill purchases CellNet, the only assets of CellNet will be cash in the amount of \$40M realized from the settlement of litigation and certain accounts receivable from cell phone customers. There will be no liabilities at closing. Immediately prior to the stock purchase, the Seller will transfer all of CellNet's cash assets to a new account at Rabobank. Nob Hill will have opened an account at Rabobank and deposited its \$5M; the loan funds will be transferred into that account. On the closing date, Rabobank, on behalf of Nob Hill, will transfer \$34.9M to the Seller, and Seller will relinquish control of CellNet's bank account to Nob Hill. Immediately thereafter, Nob Hill will satisfy the loan and fees to Rabobank. The shareholder of Nob Hill was listed as Millennium Recovery Fund. John McNabola was listed as the Director and President of Millennium Recovery Fund as well. Charles Klink was listed as Counsel for Nob Hill." (Rabo-F-5526)

On August 21, 2003, an email was sent to shareholder's counsel, "West Side Cellular needs to open a bank account at Rabobank. Alice Dill in our SF office sent the account opening forms directly to Michael in Las Vegas yesterday with instructions to forward the completed forms directly to Rabobank in New York. As we discussed, the company money needs to be transferred into this account at least one day prior to closing. The account will be under your sole control until we buy the Company." "Michael needs to open a second account at Rabobank, in his capacity as selling shareholder, for purposes of receiving the stock purchase price. This account will always be under his control. As we explained, it is easier and quicker to transfer the money we are paying you for the company to another account in the same bank. If the stock purchase funds are wired to an outside bank, we play the "waiting game" for Fed wire numbers. Having the shareholder account at Rabobank avoids this problem, as the funds are transferred and confirmed right away." (HL 2519)

On or around August 29, 2003, Rabobank approved an up to 30 day \$29.9mm secured loan to Nob Hill to complete the Stock Purchase Agreement between Nob Hill and the shareholder of West Side Cellular. The following are excerpts from the credit application:

- The purpose of the request was "to allow Nob Hill to purchase 100% of the stock of CellNet, the target company, for approximately \$34.9mm. After the acquisition CellNet will be re-engineered to enter into the business of investing in, collecting and re-investing in distressed receivables, including certain cellular phone receivables currently held by CellNet". (Rabo-F-5528)
- Pledge of the Rabobank account of our borrower, Nob Hill, and West Side Cellular, Inc., with cash balances in excess of the USD 38 mm (held at Rabobank in New York) to transfer those balances from West Side Cellular to Nob Hill (which funds will be used to pay-off our loan). At all times the loan amount will be covered by cash in the pledged account, and the irrevocable payment instructions. The total amount will be more than sufficient to cover our loan, interest and fees. (Rabo-F-5531)

- This transaction was referred to us by Fortrend International LLC. The Fortrend group is an investment banking firm specializing in structuring economic transactions to solve specific corporate and estate or accounting issues. Fortrend and its affiliates have acted as principal or investment banker in numerous transactions, ranging from \$10MM to in excess of \$1 billion in assets. We have entered into various acquisition financing transactions with Fortrend over the past five years, all of which have been concluded satisfactorily. Rabobank has been offered the opportunity to assist in the acquisition financing of a transaction for Fortrend. Rabobank has been offered the opportunity to assist in the completion of a stock purchase transaction for Nob Hill. Rabobank's role will be that of a lending bank to acquirers. (Rabo-F-5528)
- The only assets of CellNet are cash in excess of \$38mm, resulting from a settlement of litigation, and certain accounts receivable from cell phone customers. At closing there will be no liabilities outstanding." (Rabo-F-5530)
- Under the Repayment section, "Although the loan will be provided for up to 30 days, it is expected to be repaid in approximately a week." The upfront fee is \$125,000. (Rabo-F-5530)
- Nob Hill Holdings is a Delaware company formed in November 2001 but has not been used by Fortrend International until now. The company will be used for the purpose of completing this transaction. The principals of Fortrend are highly regarded and well known to Shearman & Sterling, a law firm that has represented Rabobank in numerous financings. Our experience with Fortrend has been highly satisfactory, with the dozens of transactions we have concluded to date. (Rabo-F-5532)
- The loan was classified as an "R-1", due to the fact that the loan will be cash collateralized at all times or covered by an irrevocable payment instruction. (Rabo-F-5532)

To begin the money flow, the ending cash balance of \$39,949,373 [\$50,000 had previously been deposited in escrow] in West Side's account #31v001900 at Pershing Bank was transferred to the new West Side account #21577 at Rabobank and invested in an overnight time deposit, where it earned interest of \$1,076.41. Upon receipt of the cash wire by Rabobank (needed to secure the loan), loan proceeds of \$29,900,000 were credited to the Rabobank Nob Hill Holdings account #21568. A \$5,000,000 short-term loan was also credited to this account from Moffat International, another Fortrend-controlled entity. From the Nob Hill account, \$34,621,594 (cash portion of the purchase price of West Side Cellular's stock) was transferred to the Tricarichi Escrow account #21595 at Rabobank and then to the Michael Tricarichi account #310091918 at Pershing Bank. Upon receipt of the money by Tricarichi, the funds in the Rabobank West Side account #21577 were transferred to the Rabobank Nob Hill Holdings account #21568. Upon transfer of the funds to the Nob Hill account #21568, the \$29,900,000 loan was repaid; and, \$150,000 loan fee was paid. There was no interest paid on the loan as the loan was repaid the same day the proceeds were credited. All of these money transfers occurred over a two-day period, beginning on September 8, 2003 and ending on September 9, 2003. See Exhibit A for cash flow spreadsheet.

It is noted that Fortrend would not have been able to purchase the stock in West Side Cellular without the loan from Rabobank. The loan from Rabobank was conditioned upon the money from West Side Cellular being on deposit at Rabobank prior to the issuance of the loan (security for the loan). The money from West Side Cellular was then used to repay the loan. This circular flow of money was a diversion to the substance of the transaction, that Fortrend used the money from West Side Cellular to buy the stock in West Side Cellular. Neither Fortrend nor Rabobank was ever at risk.

Post-Closing Events

After acquiring the stock, Nob Hill Holdings merged with and into West Side with West Side being the surviving corporation. Millennium Recovery Fund (a partner with Fortrend), now in control of West Side, had access to inflated, high-basis Japanese debt that was transferred to West Side after the merger was completed. The transfer was made pursuant to section 351 on or about November 6, 2003. By year-end, this debt was determined worthless and was written off as a bad debt deduction in the amount of \$42,480,622. No other information is available to support the amount of basis claimed on the Notes or on how the Notes were determined to be worthless.

The bad debt deduction was used to offset the taxable income resulting from the lawsuit settlement proceeds. The West Side corporate income tax return for the period 2003 was examined and an adjustment was made to disallow the basis in the Japanese debt and the resulting bad debt deduction. In addition, an adjustment was made to disallow the legal fees paid in connection with the tax shelter transaction in the amount of \$2,633,387. The proposed adjustments resulted in a tax deficiency of \$15,186,569 and penalties in the amount of \$6,012,777. The case was forwarded to Appeals and ultimately closed for issuance of a statutory notice of deficiency.

Excise Tax Claim

In July, 2003, prior to the stock sale, Mr. Tricarichi directed West Side to make a payment to Internal Revenue Service for the payment of excise taxes and interest owed. The payment was made to satisfy its obligations, although Mr. Tricarichi did not agree that West Side owed the tax.

In May, 2006, IRS issued Notice 2006-50 acknowledging that it had improperly exacted federal communications excise tax on non-taxable services, including wireless services such as those purchased by West Side. On July 31, 2006, West Side filed Forms 8849 – Claim for Refund of Excise taxes for the periods ending September 30, 1991 through March 31, 2003 that was paid in July, 2003. Mr. Tricarichi signed the Claims as “President for all relevant periods.” IRS denied the Claims filed by Mr. Tricarichi. West Side, under the direction of Mr. Tricarichi, subsequently filed a suit in court against the United States requesting a refund of the federal telecommunications excise taxes and interest which had been paid to the IRS. Over the next 2 years, Mr. Tricarichi, on behalf of West Side, pursued the excise tax refunds in various court proceedings. Ultimately, on July 7, 2008, the Court ruled against West Side, stating that West Side was a tax collector (in the matter of the contested excise taxes), not a taxpayer, and that it lacked standing to seek an excise tax refund.

Benefit to Shareholder for doing the transaction with Fortrend

	<u>W/O Fortrend</u>	<u>W/ Fortrend</u>	<u>Net Savings</u>
*Net Taxable Income (includes litigation proceeds)	40,635,945	40,635,945	
*Federal Tax (35%)	14,222,581	N/A	
*State Tax (first 50,000 - .51%)	255		
*State Tax (over 50,000 - 8.50%)	3,449,805		
*Local Tax	597,321		
*State & local tax reduction	-1,416,584		
Estimated Corporate Taxes Due	16,853,378	0	
Net After-Tax Cash for S/H per Liquidation	23,782,567		
Ending Cash Balance (includes N/R from s/h)		40,577,150	
Less Fortrend premium		5,377,779	
Net pay-out to S/H per transaction with Fortrend		35,199,371	
Benefit to S/H			11,416,804

* based on document WC 00104

It was evident throughout the negotiation process that the shareholder engaged in the stock sale transaction with Fortrend solely to avoid corporate tax and was aware that the tax would not be paid.

- In an email attachment from Jim Tricarichi to Price Waterhouse Coopers (PWC) on April 9, 2003, a question was posed that if the stock is not sold and West Side continued to operate, "what can be done to mitigate the tax liability?" (PWC-WS 884)
- In a detailed memo prepared by Richard Stovsky of PWC on April 13, 2003, a computation was prepared (similar to the one above) comparing the amount to be received by Tricarichi from the stock sale vs. the amount that would have been received as liquidating distribution if the corporate stock was not sold and the tax was paid on the settlement proceeds. (PWC-WS 602)
- In this same memo, there was discussion about if the transaction would be a reportable transaction. PWC concluded that a position could be taken that this is not a reportable transaction because a typical "Midco" transaction has 3 parties where as this transaction only has 2; and, typical Midco transactions result in an asset basis step with associated amortization deductions going forward, which this transaction does not have.
- In this same memo, there was discussion about whether Tricarichi would have any liability for the federal income tax liability of West Side should IRS challenge the write off of assets that are intended to offset the taxable income from the legal verdict. PWC concluded that Tricarichi should have no successor/transferee liability for any corporate level tax as he took nothing out of West Side. At the time Tricarichi sold West Side, it was a solvent corporation. Tricarichi was not the transferee of any West Side asset.
- In an email between Rich Stovsky and Tim Lohnes (both of PWC) on August 17, 2003, there was discussion about reviewing the question of whether any of the income received by West Side in its legal verdict could qualify as nontaxable for any reason, thus making the stock sale unnecessary. (PWC-WS 64)

Failure to Disclose Listed Transaction

The Intermediary transaction involving West Side was not disclosed on West Side's returns for the taxable years ended 12/31/2003 or 12/31/2004 or in any other manner.

Summary

As can be seen in the narrative of facts, the stock sale to Fortrend was constructed in order to avoid corporate income tax upon the receipt of settlement proceeds and liquidation of the company.

LAW AND ARGUMENT

The issues to be considered may be summarized as follows:

- 1) Whether Fortrend, via Nob Hill Holdings, Inc., served as a mere conduit in the transactions between West Side and its shareholder Michael Tricarichi, in order to shelter the gain associated with the settlement proceeds for a fee, with the result that the transfer of assets to Michael Tricarichi in exchange for his stock may be characterized as liquidating distributions;
- 2) Whether the purported sale of the West Side stock to Nob Hill Holdings is properly collapsed under the step transaction doctrine into a transaction in which West Side directly acquired its own shares from its 100% shareholder as part of a liquidation; and
- 3) Whether transferee liability may be asserted against the West Side shareholder.

Issue 1 - Whether Fortrend, via Nob Hill Holdings, Inc., served as a mere conduit in the transactions between West Side and its shareholder Michael Tricarichi, in order to shelter the gain associated with the settlement proceeds for a fee, with the result that the transfer of assets to Michael Tricarichi in exchange for his stock may be characterized as liquidating distributions.

Nob Hill Holdings purportedly purchased the stock of West Side at a time when West Side was no longer engaged in any business and contained only cash and a future tax liability. The purpose of the participation of Nob Hill Holdings in the overall transaction was to serve as a conduit and shelter the gain associated with the receipt of settlement proceeds for a fee. The purported stock purchase in which the shareholder of West Side received cash in exchange for his stock was part of the overall, prearranged transaction.

In *Commissioner v. Court Holding*, 324 U.S. 331 (1945), the Supreme Court addressed intermediary arrangements. The Court recognized that conduits may be disregarded in determining the true substance of a transaction by providing that:

The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant. A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title. [footnote omitted] To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.

Several authorities have focused on the substance of the transaction in determining how a transaction should be treated for Federal income tax purposes. See *Estate of Robert G. Kluener v. Commissioner*, 154 F.3d 630 (6th Cir. 1998). In *Davis v. Commissioner*, 88 T.C. 122 (1987), a bank's foreclosure on a partnership's property and the bank's subsequent sale of property to another partnership related to the first partnership pursuant to an understanding between the bank and the first partnership was treated as an indirect sale by the first partnership to the related partnership. See also *Del Commercial Properties, Inc. v. Commissioner*, 54 T.C. 1305 (1970); *West Coast Marketing Corp. v. Commissioner*, 46 T.C. 32 (1966); and Rev. Rul. 70-140, 1970-1 C.B. 73.

Exhibit 25



Timothy
Lohnes/US/TLS/PwC
12/02/2008 04:48 PM
202-414-1686
Washington D.C.
US
"Reply to All" is Disabled

To Richard P Stovsky/US/TLS/PwC@Americas-US
cc
bcc
Subject notice

I read through the Notice and agree with your assessment that it shouldn't change any of our prior analysis.

Tim

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December 1, 2008

Guidance on Intermediary Transaction Tax Shelters (Notice 2008-111)

By Sean C Pheils

Rating:
(U)
Useful

LoS:
Tax

Doc Type:
Technical & Regulatory Guidance : WNTS
Alert

Use Restriction: Internal use only – U.S. Firm use only
IRC Section: 6011, 6111, 6112

Contact: Corina M Trainer, Rochelle L Hodes

Relevant Geography:

North America, USA

Short Description:

Guidance on Intermediary Transaction Tax Shelters (Notice 2008-111)

Overview

The IRS today issued **Notice 2008-111**, clarifying Notice 2001-16 regarding Intermediary Transaction Tax Shelters. The 2001 Notice identified and described such a transaction as a listed transaction under Reg. sec. 1.6011-4(b)(2). The IRS states that the new Notice defines an intermediary transaction in terms of its plan and of more objective components.

A transaction is treated as an intermediary transaction with respect to a particular person, and not with respect to another person, only if (1) that person engages in the transaction pursuant to the "plan," (2) the transaction contains four objective components indicative of an intermediary transaction, (3) and no safe harbor exception described in the guidance applies to that person. The Notice provides definitions of "plan" and describes the four objective components. The Notice does not affect the legal determination of whether a person's treatment of the transaction is proper or whether such person is liable, at law or in equity, as a transferee of property in respect of the unpaid tax obligation, which is defined in the Notice.

Notice 2008-111 supersedes Notice 2008-20.

Effective Date

The Notice is generally effective January 19, 2001. However, this Notice states that it imposes no requirements with respect to any obligation under sections 6011, 6111, or 6112 due before December 1, 2008, not otherwise imposed by Notice 2001-16. Because this Notice supersedes Notice 2008-20, any disclosure filed pursuant to Notice 2008-20 will be treated as made pursuant to Notice 2001-16.

The IRS states that some taxpayers may have filed tax returns "taking the position that they were entitled to the purported tax benefits of the types of transactions described in Notice 2001-16," and that these taxpayers "should consult with a tax advisor to ensure that their transactions are disclosed properly and to take appropriate corrective action." The IRS seeks comments regarding the Notice 2008-111 definitions, components, and safe harbors "for the purpose of reflecting more accurately which transactions are the same as or substantially similar to an Intermediary Transaction and which parties are engaging in a transaction pursuant to the Plan."

For additional information, please contact Corina Trainer at 202.414.1328 or Rochelle Hodes at 202.312.7859.

Full text of Notice 2008-111:

WNTS 'Blue Sheet'

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Part III - Administrative, Procedural, and Miscellaneous

Intermediary Transaction Tax Shelters

Notice 2008-111

SECTION 1. PURPOSE AND BACKGROUND

This Notice clarifies Notice 2001-16, 2001-1 C.B. 730, and supersedes Notice 2008-20, 2008-6 I.R.B. 406, regarding Intermediary Transaction Tax Shelters. Notice 2001-16 identified the Intermediary Transaction Tax Shelter (hereafter, an "Intermediary Transaction") as a listed transaction under § 1.6011-4(b)(2) of the Income Tax Regulations. For purposes of this Notice, an Intermediary Transaction is defined in terms of its plan and in terms of more objective components. Under this Notice, a transaction is treated as an Intermediary Transaction with respect to a particular person only if that person engages in the transaction pursuant to the Plan (as defined in sections 2 and 4), the transaction contains the four objective components indicative of an Intermediary Transaction set forth in section 3, and no safe harbor exception in section 5 applies to that person. A transaction may be an Intermediary Transaction with respect to one person and not be an Intermediary Transaction with respect to another person. This Notice does not affect the legal determination of whether a person's treatment of the transaction is proper or whether such person is liable, at law or in equity, as a transferee of property in respect of the unpaid tax obligation described in section 3.

SECTION 2. DEFINITION OF THE PLAN

An Intermediary Transaction involves a corporation (T) that would have a Federal

income tax obligation with respect to the disposition of assets the sale of which would result in taxable gain (Built-in Gain Assets) in a transaction that would afford the acquiror or acquirors (Y) a cost or fair market value basis in the assets. An Intermediary Transaction is structured to cause the tax obligation for the taxable disposition of the Built-in Gain Assets to arise, in connection with the disposition by shareholders of T (X) of all or a controlling interest in T's stock, under circumstances where the person or persons primarily liable for any Federal income tax obligation with respect to the disposition of the Built-in Gain Assets will not pay that tax (hereafter, the Plan). This plan can be effectuated regardless of the order in which T's stock or assets are disposed. A transaction is not an Intermediary Transaction for purposes of this Notice if there is neither any X nor any Y engaging in the transaction pursuant to the Plan (as defined in section 4).

SECTION 3. COMPONENTS OF AN INTERMEDIARY TRANSACTION

There are four components of an Intermediary Transaction, and a transaction must have all four components to be the same as or substantially similar to the listed transaction described in Notice 2001-16, even if the transaction is engaged in pursuant to the Plan. The four components are:

1. A corporation (T) directly or indirectly (e.g., through a pass-through entity or a member of a consolidated group of which T is a member) owns assets the sale of which would result in taxable gain (T's Built-in Gain Assets) and, as of the Stock Disposition Date (as defined in component two), T (or the consolidated group of which T is a member) has insufficient tax benefits to eliminate or offset such taxable gain (or the tax) in whole. The tax that would result from such sale is hereinafter referred to as T's Built-

in Tax. However, for purposes of this component, T will not be considered to have any Built-in Tax if, on the Stock Disposition Date, such amount is less than five percent of the value of the T stock disposed of in the Stock Disposition (as defined in component two). In determining whether T's (or the consolidated group's) tax benefits are insufficient for purposes of the first sentence, the following tax benefits shall be excluded: (i) any tax benefits attributable to a listed transaction under § 1.6011-4(b)(2), and (ii) any tax benefits attributable to built-in loss property acquired within 12 months before any Stock Disposition described in component two, to the extent such built-in losses exceed built-in gains in property acquired in the same transaction(s). All references to T in this notice include successors to T.

2. At least 80 percent of the T stock (by vote or value) is disposed of by T's shareholder(s) (X), other than in liquidation of T, in one or more related transactions within a 12 month period (Stock Disposition). The first date on which at least 80 percent of the T stock (by vote or value) has been disposed of by X in a Stock Disposition is the Stock Disposition Date.

3. Either within 12 months before, simultaneously, or within 12 months after the Stock Disposition Date, at least 65 percent (by value) of T's Built-in Gain Assets are disposed of (Sold T Assets) to one or more buyers (Y) in one or more transactions in which gain is recognized with respect to the Sold T Assets. For purposes of this component, transactions in which T disposes of all or part of its assets to either another member of the controlled group of corporations (as defined in § 1563) of which T is a member, or a partnership in which members of such controlled group satisfy the requirements of §1.368-1(d)(4)(iii)(B), will be disregarded provided there is no plan to

dispose of at least 65 percent (by value) of T's Built-in Gain Assets to one or more persons that are not members of such controlled group, or to partnerships not described herein.

4. At least half of T's Built-in Tax that would otherwise result from the disposition of the Sold T Assets is purportedly offset or avoided or not paid.

SECTION 4. ENGAGING IN THE TRANSACTION PURSUANT TO THE PLAN

A transaction that has all four components described in section 3 is only an Intermediary Transaction with respect to a person that engages in the transaction pursuant to the Plan. A person engages in the transaction pursuant to the Plan if the person knows or has reason to know the transaction is structured to effectuate the Plan. Additionally, any X that is at least a 5% shareholder of T (by vote or value), or any X that is an officer or director of T, engages in the transaction pursuant to the Plan if any of the following knows or has reason to know the transaction is structured to effectuate the Plan: (i) any officer or director of T; (ii) any of T's advisors engaged by T to advise T or X with respect to the transaction; or (iii) any advisor of that X engaged by that X to advise it with respect to the transaction. For purposes of this section, if T has more than five officers then the term "officer" shall be limited to the chief executive officer of T (or an individual acting in such capacity) and the four highest compensated officers for the taxable year (other than the chief executive officer or an individual acting in such capacity). A person can engage in the transaction pursuant to the Plan even if it does not understand the mechanics of how the tax liability purportedly might be offset or avoided, or the specific financial arrangements, or relationships of other parties or of T after the Stock Disposition.

A person will not be treated as engaging in the transaction pursuant to the Plan merely because it has been offered attractive pricing terms by the opposite party to a transaction.

Thus, a transaction may be an Intermediary Transaction with respect to X but not Y, or with respect to Y but not X, in situations where one party engages in the transaction pursuant to the Plan and the other does not. A transaction may also be an Intermediary Transaction with respect to some but not all Xs and/or some but not all Ys, depending on whether they engage in the transaction pursuant to the Plan. A transaction will not be an Intermediary Transaction with respect to any person that does not engage in the transaction pursuant to the Plan regardless of the amounts reported on any return.

SECTION 5. SAFE HARBOR EXCEPTIONS FOR CERTAIN PERSONS;

PARTICIPATION GENERALLY

01. Safe Harbor Exceptions for Certain Persons

A transaction is not an Intermediary Transaction with respect to the following persons under the following circumstances:

- Any X, if the only T stock it disposes of is traded on an established securities market (within the meaning of § 1.453-3(d)(4)) and prior to the disposition X (including related persons described in section 267(b) or 707(b)) did not hold five percent (or more) by vote or value of any class of T stock disposed of by X.
- Any X, T, or M, if, after the acquisition of the T stock, the acquiror of the T stock is the issuer of stock or securities that are publicly traded on an established securities market in the United States, or is consolidated for financial reporting

purposes with such an issuer.

- Any Y, if the only Sold T Assets it acquires are either (i) securities (as defined in section 475(c)(2)) that are traded on an established securities market (within the meaning of § 1.453-3(d)(4)) and represent a less-than-five-percent interest in that class of security, or (ii) assets that are not securities and do not include a trade or business as described in § 1.1060-1(b)(2).

02. Participation

If one of the foregoing safe harbor exceptions does not apply to a person, that person engaged in a transaction pursuant to the Plan, and the transaction has all four components described in section 3, the determination of whether the person participated in an Intermediary Transaction for purposes of § 1.6011-4 in any given taxable year is made under the general rule in § 1.6011-4(c)(3)(i)(A).

SECTION 6. EFFECTIVE DATE; DISCLOSURE, LIST MAINTENANCE, AND REGISTRATION REQUIREMENTS; PENALTIES; OTHER CONSIDERATIONS

Transactions that are the same as, or substantially similar to, the transaction described in Notice 2001-16 were identified as "listed transactions" under § 1.6011-4(b)(2) effective January 19, 2001. Accordingly, this Notice is generally effective January 19, 2001. However, this Notice imposes no requirements with respect to any obligation under § 6011, § 6111, or § 6112 due before December 1, 2008, not otherwise imposed by Notice 2001-16. Because this Notice supersedes Notice 2008-20, any disclosure filed pursuant to Notice 2008-20 will be treated as made pursuant to Notice 2001-16. Independent of their classification as listed transactions, transactions that are the same as, or substantially similar to, the transaction described in Notice 2001-16 may

already be subject to the requirements of § 6011, § 6111, or § 6112, or the regulations thereunder.

Persons required to disclose these transactions under § 1.6011-4 and who fail to do so may be subject to the penalty under § 6707A. Persons required to disclose or register these transactions under § 6111 who have failed to do so may be subject to the penalty under § 6707(a). Persons required to maintain lists of investors under § 6112 who fail to provide such lists when requested by the Service may be subject to the penalty under § 6708(a). A person that is a tax-exempt entity within the meaning of § 4965(c), or an entity manager within the meaning of § 4965(d), may be subject to excise tax, disclosure, filing or payment obligations under § 4965, § 6033(a)(2), § 6011, and § 6071. Some taxable parties may be subject to disclosure obligations under § 6011(g) that apply to "prohibited tax shelter transactions" as defined by § 4965(e) (including listed transactions).

In addition, the Service may impose other penalties on persons involved in this transaction or substantially similar transactions (including an accuracy-related penalty under § 6662 or 6662A) and, as applicable, on persons who participate in the promotion or reporting of this transaction or substantially similar transactions (including the return preparer penalty under § 6694, the promoter penalty under § 6700, and the aiding and abetting penalty under § 6701).

Further, under § 6501(c)(10), the period of limitations on assessment may be extended beyond the general three-year period of limitations for persons required to disclose transactions under § 1.6011-4 who fail to do so. See Rev. Proc. 2005-26, 2005-1 C.B. 965.

The Service and the Treasury Department recognize that some taxpayers may have filed tax returns taking the position that they were entitled to the purported tax benefits of the types of transactions described in Notice 2001-16. These taxpayers should consult with a tax advisor to ensure that their transactions are disclosed properly and to take appropriate corrective action.

SECTION 7. EFFECT ON OTHER DOCUMENTS

Notice 2001-16 is clarified. Notice 2008-20 is superseded.

SECTION 8. REQUEST FOR COMMENTS

The Service and the Treasury Department seek comments regarding the above definitions, components, and safe harbors for the purpose of reflecting more accurately which transactions are the same as or substantially similar to an Intermediary Transaction and which parties are engaging in a transaction pursuant to the Plan.

Comments should be submitted to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2008-111), Room 5203, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Alternatively, comments may be hand delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to: CC:PA:LPD:PR (Notice 2008-XX), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Comments may also be submitted electronically, via the following email address: Notice.Comments@irs.counsel.treas.gov. Please include "Notice 2008-111" in the subject line of any electronic submissions. All comments received will be open to public inspection and copying.

DRAFTING INFORMATION

The principal author of this notice is Douglas C. Bates of the Office of Associate

Chief Counsel (Corporate). For further information regarding this notice contact Mr. Bates on (202) 622-7550 (not a toll free call).

Exhibit 26

• Szpalik Peter R

From: Corn, Richard M. [cornr@sullcrom.com]
Sent: Tuesday, October 26, 2010 12:09 PM
To: Szpalik Peter R
Cc: Mason, Andrew S.; 'Desmond, Michael'
Subject: 10-27 Conference Slides
Attachments: NY12530 - #296258 v#10 - Tricarichi Appeals Conference Presentation.ppt

Peter,

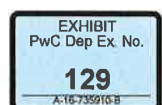
Please find attached a set of powerpoint slides for the Appeals presentation tomorrow. We plan to go through these slides at the meeting tomorrow.

We look forward to discussing this matter with you tomorrow.

Richard Corn
Sullivan & Cromwell LLP
(212) 558-3195

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10/26/2010



Tricarichi Appeals Conference Presentation

October 27, 2010

This Case Is Not a “Midco” Case

- The Transferee Report takes a round peg and tries to fit it into a square hole by using boilerplate arguments developed for “Midco” transactions and misapplying these arguments to the facts in this case.

- “Midco” transactions require four parties: (1) a corporation with low-basis assets, (2) a seller that wants to sell the corporation’s stock, (3) a buyer that wants to buy the corporation’s assets, and (4) an intermediary that steps in between the buyer and seller to permit the asset sale to obtain a basis step-up.

- There is no such fact pattern here, as there are no relevant built-in gain assets.

- The IRS itself issued a Notice, Notice 2008-111, setting forth four requirements for a Midco transaction and three of the requirements are not present in this case.

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The Requirements of Notice 2008-111 Are Not Met

Notice 2008-111 Requirements	Applicable?
T owns built-in gain assets and has insufficient tax benefits to completely eliminate recognition of such gain upon a sale.	NO. West Side did not own any relevant built-in gain assets
At least 80% of T's stock is sold within a 12 month period.	Yes
Within a 12 month period before or after the stock sale, at least 65% of T's built-in gain assets are sold.	NO. West Side did not own any relevant built-in gain assets
At least half of the tax resulting from T's built-in gain assets is offset or avoided	NO. West Side did not own any relevant built-in gain assets

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Facts

- West Side recognized ordinary income in settlement of a lawsuit. West Side did not have substantial built-in gain assets to sell before or after the stock sale.
- Tricarichi sold his West Side stock to a buyer in an arm's length transaction.
- West Side did not sell substantial built-in gain assets to any other person desiring a basis step-up, either before or after the stock sale.
- West Side continued in existence after the stock sale resisting imposition of excise tax penalties and prosecuting excise tax refund claims.

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ADMIN_TRI00912

Summary

•The Transferee Report articulates two arguments under which the IRS suggests that Tricarichi should have transferee liability for West Side. As set forth in the Transferee Report, both arguments—the “conduit” theory and the “step transaction” doctrine—require the conclusion that West Side liquidated in order to succeed.

•To prevail in assessing transferee liability based upon these arguments, in addition to prevailing on the merits of its claims against West Side, the IRS has the burden of proving both:

- (1) That West Side liquidated and thus transferred property to Tricarichi;
and
- (2) That the transfer gives rise to transferee liability under section 6901.

•Both of the IRS arguments in the Transferee Report are based on the conclusion that West Side liquidated. This is not the case.

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(1) There Was No Liquidation of West Side

•The “conduit” and “step transaction” arguments fail because there was no liquidation of West Side and therefore no transfer to Tricarichi.

•As with all leveraged transactions, the fact that the buyer used assets of West Side to repay its acquisition debt is not relevant.

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(1) Conduit Cases Relied Upon by the Service Are Distinguishable

• The Transferee Report, on page 11, argues that this transaction is a conduit because “[t]he purported stock sale was nothing more than an exchange of cash couched in a form designed to avoid the payment of corporate level tax. The overall transaction should be treated consistent with its substance, with the result that the shareholder of West Side received the cash from West Side *as a liquidating distribution* in the guise of a purported stock sale.” (emphasis added)

• The Transferee Report cites many cases in support of its “conduit” argument, but most are based on entirely different facts and are inapplicable.

• The only cases which are even close to on-point are *Owens v. Commissioner* and *Lowndes v. Commissioner*, and these cases are distinguishable as highlighted by the next charts:

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(1) Owens Is Distinguishable

FACTOR	OWENS	TRIC ARICH
Corporation's Assets	Corporation's only asset was cash	West Side's assets consisted of cash and excise tax causes of action
Corporation's Liabilities	There were no debts or claims, contingent or otherwise, against the corporation	West Side had a potential excise tax penalty liability
Corporation's Business Activity at Time of Sale	Corporation carried on no business activity and was a lifeless shell at time of stock sale	West Side was actively pursuing excise tax causes of action at time of stock sale
Post- Acquisition Liquidation	Corporation adopted a formal resolution of liquidation three days after the stock sale	West Side continues to exist to this day
Form of Transaction Respected?	No	YES

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