From: "jeffrey E." <jeevacation@gmail.com>
To: Jeffrey Epstein <jeevacation@gmail.com>
Subject: Fwd: Bona Fide Sale Exception 2036
Date: Wed, 09 Dec 2015 09:12:53 +0000

---------- Forwarded message ----------
From: **jeffrey E.** <jeevacation@gmail.com>
Date: Thu, Feb 5, 2015 at 1:47 PM
Subject: Fwd: Bona Fide Sale Exception 2036
To: Melanie Spinella [redacted]

Cant
---------- Forwarded message ----------
From: **Ada Clapp** [redacted]
Date: Thursday, February 5, 2015
Subject: Bona Fide Sale Exception 2036
To: "jeffrey E." <jeevacation@gmail.com>
Cc: "Bradley J. Wechsler [redacted] "Halperin, Alan S" [redacted]

Hi Jeffrey,

This morning you raised the point that there is a "bona fide sale" exception to Section 2036 and asked whether we still need to restrict Leon's powers as a Class A GP of AP Narrows if in the future he sells, rather than gifts, his LP interest in AP Narrows. Your point, as I understand it, is that Leon could have all the power of a general partner if we intend to rely on his receiving full and adequate consideration for any transfer of his LP interests in AP Narrows in the future. This assumes that the IRS will not successfully argue that Leon received less than adequate consideration in the sale because he undervalued the LP interests (with our usual large numbers, even a small undervaluation percentage could result in a sizable estate inclusion amount). You also asked whether I knew of any case where the bona fide sale exception did not apply to a sale of LP interests.

I have taken a quick look through my files and found a summary of a 2009 TC Memo (Estate of Malkin v. Commissioner), where the IRS successfully argued 2036 inclusion of assets held in two limited partnerships where the LP interests were sold to trusts. In that case, the decedent formed and funded two partnership (he was the sole GP) and sold LP interests to trusts for children. The court held that the sales were sham transactions and should be treated as gifts. In Malkin, trusts bought the LP interest for 10% cash and 90% notes (some of which were SCINs). In finding the sales to be shams, the court considered that the decedent (i) was terminally ill at the time of the sale (ii) provided all the cash for the down payment (even though the children had the wherewithal)—so there was no arms-length sale, and (iii) gifted cash to the kids, who loaned the money to the trusts to make the interest payments – which suggested that the decedent had no expectation that the trusts would repay the Notes. Because the court also found that the bona fide sale exception did not apply to the decedent's funding of the partnerships (insufficient non-tax reasons for creating them), the decedent was deemed to have made an indirect gift of the partnerships' underlying assets to the trusts. Of particular note is that the Malkin

court found an implied agreement of retained enjoyment where assets contributed to the one partnership were subject to a personal liability of the decedent and the other partnership pledged almost all its assets toward a personal debt of the decedent (the trusts agreed to the pledge and decedent paid a small pledge fee to the partnership).

Bad fact to be sure but perhaps Alan knows of other cases where sales were not respected and 2036 applied.

Ada Clapp

Chief Legal Officer

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