

From: Harry Beller <[REDACTED]>
To: Jeffrey Epstein <jeevacation@gmail.com>
Cc: Rich Kahn <[REDACTED]>

Subject: Sales tax - defective grantor trust

Date: Wed, 13 Feb 2013 15:17:54 +0000

Attachments: Sale_to_IDGT.docx

Jeffrey

Below is the opinion from Drew Benenson of Tarlow & Co. The conclusion in this memo is that an exchange of art for stock under a substitution clause in a defective grantor trust is subject to NY sales tax.

Attached is the memo that I sent Drew to review suggesting some authority to avoid the sales tax.

Begin forwarded message:

From: Drew Benenson <[REDACTED]>
Date: February 12, 2013 3:39:20 PM EST
To: Harry Beller <[REDACTED]>, Rich Kahn <[REDACTED]>
Subject: Sales tax

Harry,

Below is the summary we received from the attorney. Let me know when you want to speak.

Thank you.

Drew

The memorandum Drew Benenson asked us to review looks at two issues with regard to the sales tax consequences of a proposed transfer of art from a (defective) grantor trust to the grantor, apparently in exchange for stock of the grantor. The issues are: (1) whether a grantor trust (disregarded for federal income tax purposes) is recognized as a separate entity for sales tax purposes in a transaction with the grantor; and (2) if so, whether its existence could be disregarded instead on a common-law alter-ego theory.

The memo correctly points out that there is no direct guidance on the sales tax obligations of grantor trusts. However, ample authority does exist with respect to other federally disregarded entities-namely, single-member LLCs (SMLLCs)-and it confirms that New York considers an entity's "disregarded" status for federal income tax purposes to be irrelevant with respect to its sales tax obligations. Numerous rulings have found SMLLCs subject to sales tax obligations, whether in transactions with third parties or with their sole member. See, e.g., Arthur Anderson, TSB-A-99(7)S, Jan. 28, 1999 (ruling that leases of tangible property between a federal disregarded SMLLC and its sole member-a C corporation-were taxable retail sales on which the SMLLC was obligated to collect tax); M Ventures, LLC, TSB-A-04(11)S, April 27, 2004 (ruling that aircraft leases between two SMLLC's owned by the same single member would be subject to tax but for an exemption for certain commercial aircraft).

The memo cites several New York rulings involving transactions among affiliated entities (including

SMLLCs). The Department qualified its findings in those rulings by noting that the analysis presumed that the affiliated companies didn't "so dominate the affairs" of one another to be considered mere alter-egos of each other under common-law tests. But this language alone does not indicate, as the memo suggests, that the mere structure of a defective grantor trust obligates the Department to disregard the separate legal existence of the trust and the grantor in a transaction between the two. In fact, similar language appears in numerous other sales tax rulings involving complex corporate structures and their sales tax consequences-be it C corporations, partnerships or SMLLCs. Like an individual, any trust (acting through its trustee) is, by statute, considered a "person" subject to sales tax obligations under Tax Law § 1101(a).

More critically, the doctrine of piercing the corporate veil (which the memo concludes could work to eliminate the tax here) is not one a taxpayer may generally invoke to avoid unfavorable tax consequences. As the Appellate Division has held: the "asserted right" to pierce the corporate veil "is not usually invoked by the stockholder but by one claiming against him and seeking to avoid the perpetration of a fraud under the cover of the corporate veil." (*Orda v State Tax Commission*, 25 A.D.2d 332, *affd*, 19 N.Y.2d 636). In fact, New York's Court of Appeals stated in *Morris v. New York Dept. of Taxation & Fin.*, 82 N.Y.2d 135 (1993) (a sales tax case) that:

While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required. 82 N.Y.2d at 141-42. (emphasis added) (citations omitted).

Here, the grantor trust was ostensibly set up for legitimate business and/or estate planning purposes. Therefore, New York's position with regard to any transaction between the trust and its grantor would reflect the widely applied concept that a taxpayer must bear the sales tax consequences of its chosen form of doing business. As stated by the Appellate Division, "the choice of form [does] not rest with the tax authorities but with the taxpayer. If he unfortunately chose a form which was taxable instead of an equally available form which was nontaxable, he must bear the consequences." (*Sverdlow v. Bates*, 283 A.D. 487, 491; see also *107 Delaware Associates et al. v. State Tax Comm'n*, 99 A.D.2d 29 (1984); *Commissioner of Internal Revenue v. Moline Properties, Inc.*, 131 F.2d 388 (1942).

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