2013

Partnership Current Developments

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William & Mary Tax Conference

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8 November 2013

Building a better
working world

Today's agenda

- Administrative guidance
- Partner and partnership status
- Current issues
- Legislative developments
- Priority guidance plan
- Questions and (hopefully) answers

Administrative guidance

Noncompensatory option regulations

Final regulations – an overview

- A noncompensatory option is defined as an option that was not acquired in connection with the performance of services
- An option is defined as a call option or warrant to acquire an interest in the issuing partnership, the conversion feature of convertible debt, or the conversion feature of convertible equity
- The regulations generally do not apply to any option issued by a disregarded entity

Final regulations -- issuance

- Section 721 does not apply to the transfer of property to a partnership in exchange for a noncompensatory option, or to the satisfaction of a partnership obligation with a non-compensatory option
- Open transaction treatment to the partnership
- The regulations provide that the issuance by a partnership of a noncompensatory option is a permissible revaluation event

Final regulations – pre-exercise accounting

- Contra-asset approach adopted
- Preserves headroom

Final regulations – exercise

- Section 721 generally applies on exercise regardless of whether the price is satisfied with cash or non-cash property or whether the terms of the option require or permit a cash payment
- Section 721 does not apply to the extent the partnership interest transferred is in satisfaction of the partnership's indebtedness for rent, royalties, or interest (original issue discount) that accrued on or after the creator's acquisition of the indebtedness

Final regulations – exercise

- Revaluation required after exercise
- If insufficient capital to option holder after revaluation, the partnership may have to make corrective allocations to the former option holder

Final regulations – recharacterization rule

- An option holder will be treated as a partner for tax purposes if, on various testing dates, (i) the option holder has rights that are substantially similar to that of a partner and (ii) there is a strong likelihood that the failure to treat the holder of the option as a partner would result in a substantial reduction in the present value of the partners' and holder's aggregate Federal tax liabilities
- Testing dates are the dates of issuance, transfer, or modification
- Various safe-harbors apply to this determination
- Additionally, the option holder may be treated as a partner for tax purposes as a result of general tax principles

Newly proposed regulations

- Three additional testing events would include the following:
  - Issuance, transfer or modification of an interest in, or liquidation of, the issuing partnership
  - Issuance, transfer or modification of an interest in any look-through entity that directly, or indirectly through one or more look-through entities, owns the non-compensatory option, and
  - Issuance, transfer or modification of an interest in any look-through entity that directly, or indirectly through one or more look-through entities, owns an interest in the issuing partnership

Newly proposed regulations

- Proposed Regulations under §1234 provide that the term “securities” as used in §1234(b)(2)(B) includes partnership interests

Final regulations revoking de minimis partner exception

EY

Final regulations revoking de minimis partner exception

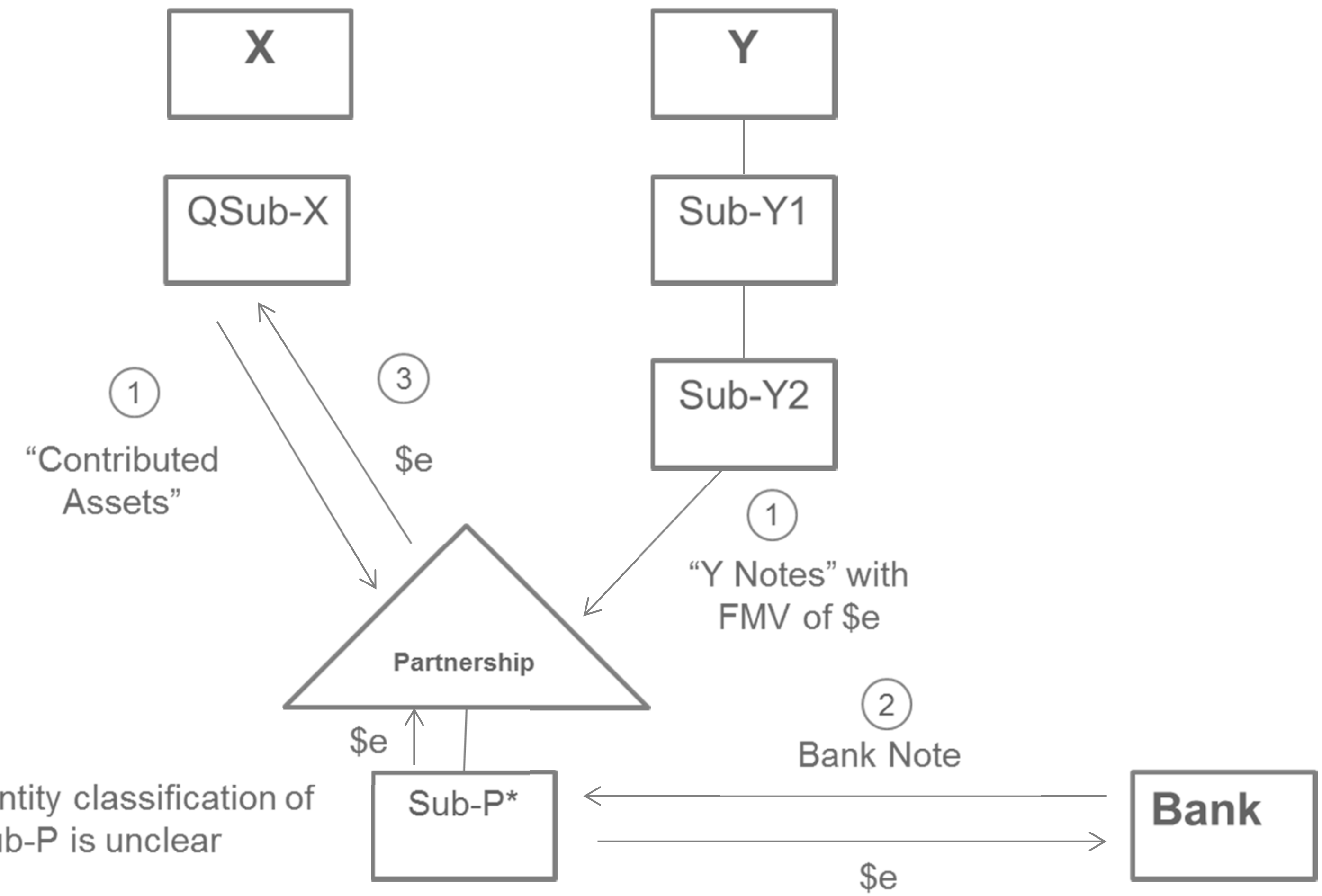
- Final regulations remove the de minimis partner exception from the §704 substantiality regulations
  - The rule allowed taxpayers to ignore the tax attributes of de minimis partners when applying the substantiality rules. A de minimis partner was defined as a partner that owns, directly or indirectly, less than 10% of the capital and profits of a partnership and is allocated less than 10% of each partnership item of income, gain, loss, deduction, and credit
  - The intent of the de minimis rule was to allow partnerships to avoid the complexity of testing the substantiality of insignificant allocations to partners owning very small interests in the partnership. However, the IRS and the Treasury determined that the rule may allow for unintended tax consequences

ILM 201324013

ILM 201324013 (14 March 2013) Leveraged Partnership

- IRS addressed a leveraged partnership structure and concluded that gain recognition is not properly deferred
- Basic facts (see diagram on next slide)
  - X, an S Corporation, wanted to sell assets
    - Section 1374 would apply to a sale as X recently converted from C corporation status
  - Disposition was structured as a leveraged partnership
    - Step 1
      - X, through a QSub, contributed assets
      - Y, contributed its own note (the Y Note had a FMV of $e) and cash through a subsidiary
    - Step 2
      - Partnership's subsidiary, Sub-P, borrowed $e from Bank, as evidenced by the Bank Note
    - Step 3
      - Sub-P distributed $e, through Partnership, to X
  - Y had a call right after 10 years and X had a put right after 13 years

ILM 201324013



*Entity classification of Sub-P is unclear

ILM 201324013

- Bank debt needed to be allocated to X under Sections 707 and 752 to achieve the desired tax result
- Partnership, Sub-Y1, and Sub-Y2 guaranteed Partnership's obligation under the Bank debt
  - X indemnified Sub-Y1 and Sub-Y2 on their guarantees of the debt
    - Matured on a payment by Sub-Y1 or Sub-Y2
    - No net worth maintenance requirement on X
    - No lender requirement for the indemnity
    - No financial reporting obligation for the indemnity
- Taxpayer took the position that the indemnity caused the Bank debt to be allocated to X
- X reported the contribution and distribution as nontaxable under Sections 721(a) and 731(a)

ILM 201324013

- IRS asserted that the indemnity by X of the Bank debt should be disregarded pursuant to the anti-abuse rule in Treas. Reg. Section 1.752-2(j)
- IRS applied the Tax Court's holding in *Canal Corp. v. Comm'r*, 135 T.C. 199 (2010)

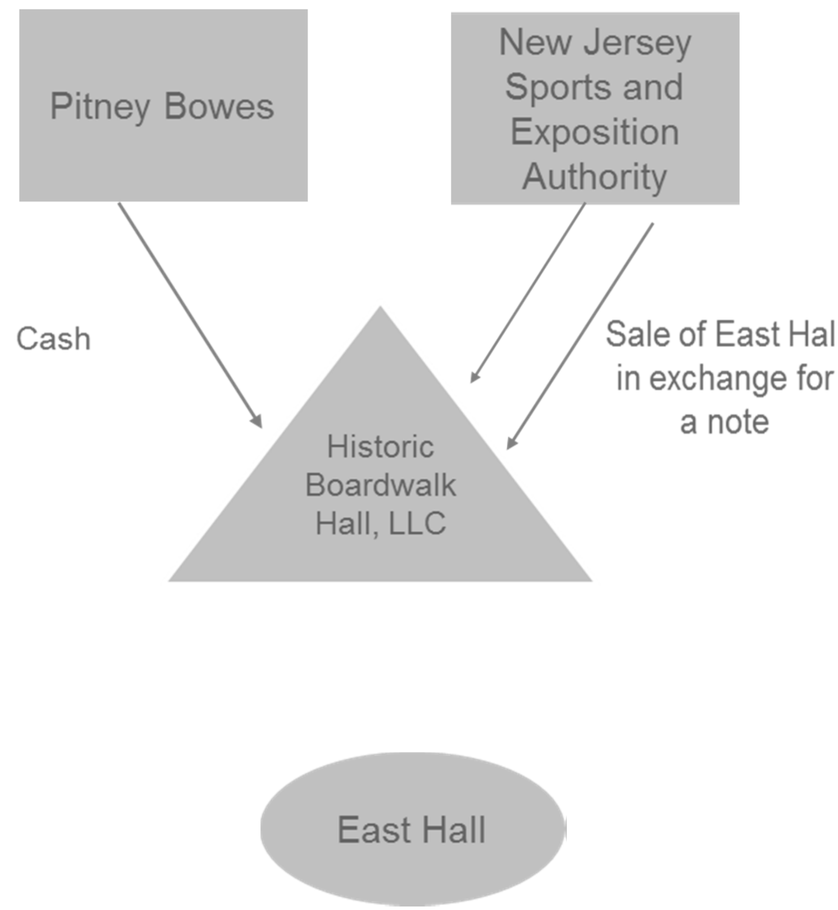
ILM 201324013

- IRS said that there were three “compelling arguments” to apply the Section 752 anti-abuse rule to disregard the indemnity
  - Indemnity lacks important features typical of an indemnity in a commercially-driven transaction
  - Indemnity is “specious” because there is no practical or commercial risk of enforcement
  - Y merely used the Partnership as a conduit to borrow $e from Bank in order to accommodate X’s desired leveraged partnership structure
- Two alternative IRS arguments for current gain recognition
  - Transaction should be recast under the general partnership anti-abuse rule
  - Under substance over form principles, the form of the transaction (contribution) should be disregarded and treated as a sale

Partner and partnership status

Historic Boardwalk Hall, LLC
694 F.3d 425 (3d Cir. 2012)

- Pitney Bowes made more than $18m in cash contributions
- Cash was used to pay NJSEA management fees
- Pitney Bowes was allocated losses from HBH
  - Included were qualified section 47 credit rehab expenditures of $109m, giving rise to section 47 credits of almost $22m
    - Section 47 credit equals 20% of qualified rehabilitation expenditures for certified historic structures
- Pitney Bowes also received a 3% preferred return based on its capital contribution



Historic Boardwalk Hall, LLC

- IRS's arguments
  - Pitney Bowes' investment in HBH lacked economic substance because there was no possibility of profit without the section 47 credits
  - Pitney Bowes' investment in HBH was debt, not equity
  - NJSEA did not sell east hall to HBH
  - Partnership anti-abuse rule in reg. section 1.701-2(b)
- Tax Court's holding
  - Held for taxpayer, rejected all of the IRS's arguments
  - Creating a partnership to transfer tax attributes from an entity that cannot use them to persons that can use them is a legitimate business purpose and not against the purpose of subchapter K
    - Section 47 credits can be taken into account in economic substance analysis due to Congressional purpose for the credits

Historic Boardwalk Hall, LLC

- Third Circuit Opinion
  - Reversed the Tax Court
  - Focused on whether Pitney Bowes was a bona fide partner of HBH under the totality-of-the-circumstances partnership test in *Commissioner v. Culbertson*
  - Concluded that Pitney Bowes was not a bona fide partner. The Court reached this conclusion based upon its application of both the Castle Harbor and the Virginia Historic Tax Credit Fund decisions, finding that Pitney Bowes did not have any meaningful downside risk or any meaningful upside potential in HBH

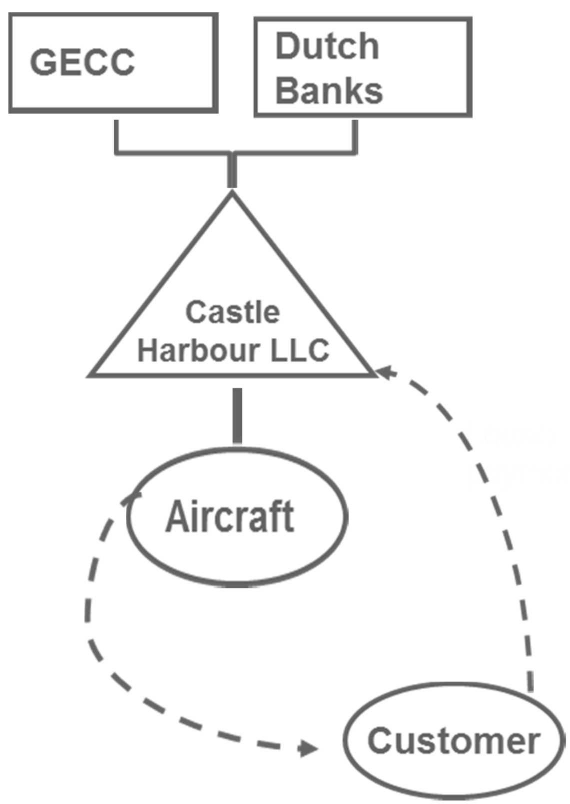
Historic Boardwalk Hall, LLC

- Third Circuit Opinion
  - Lack of downside risk:
    - The majority of Pitney Bowes' capital contributions were not made until certain criteria were met and those criteria were designed so that Pitney Bowes "knew it would receive at least that amount in return"
    - Once the installments were committed, Pitney Bowes was protected by a Tax Benefits Guaranty Agreement that compensated it for any disallowed tax credits, along with any related penalties and interest
    - The Court felt that Pitney Bowes bore no risk that the Tax Benefit Guaranty Agreement would not be upheld based on a memorandum by the project's accountants who stated "there [was] no ceiling on the amount of funds to be provided [by NJSEA to HBH]"

Historic Boardwalk Hall, LLC

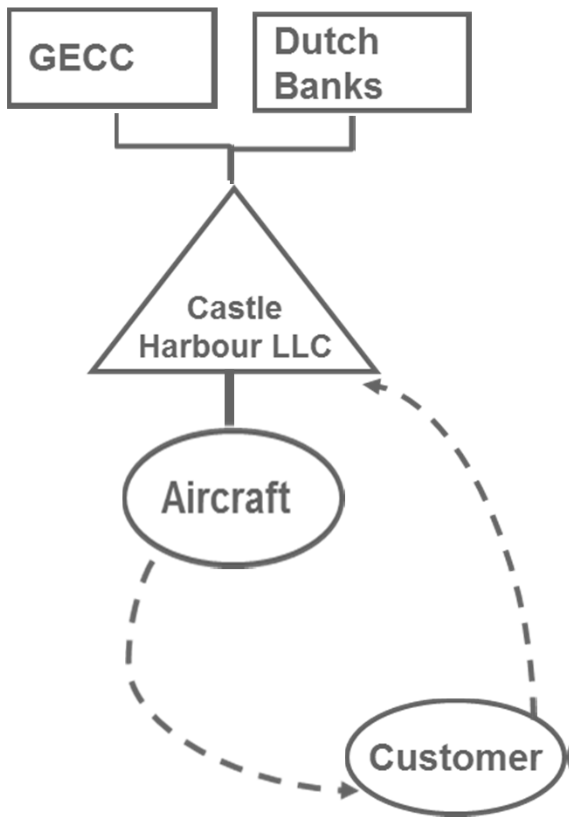
- Third Circuit Opinion
  - Lack of upside potential:
    - The Court determined that Pitney Bowes' 99.9% interest was illusory due to the presence of a call option held by NJSEA and a put option held by Pitney Bowes, both of which were priced at the greater of accrued but unpaid preferred returns and the fair market value of their partnership interest
    - The Court determined that the fair market value of project $0. This differed from the closing projections, which were likely relied on by the party offering a tax opinion on this transaction. The Court dismissed the projections by stating "[t]o put it mildly, the parties and their advisors were imaginative in creating financial projections to make it appear that HBH would be a profit-making enterprise"

Castle Harbour – History



- Simplified facts
  - Dutch Banks contributed $118 million to Castle Harbour LLC
  - GECC contributed aircraft at end of tax lives but with remaining useful lives
  - Dutch Banks entitled to allocation of 98% of Operating Income (rent less expenses)
  - Dutch Banks entitled to allocation of 1% of Disposition Gain/Loss
  - Allocation of §704(b) income to Dutch Banks brought with it substantially all of the taxable income because of §704(b) depreciation
    - Dutch Banks were tax-neutral and therefore indifferent to the allocation of taxable income

Castle Harbour – History

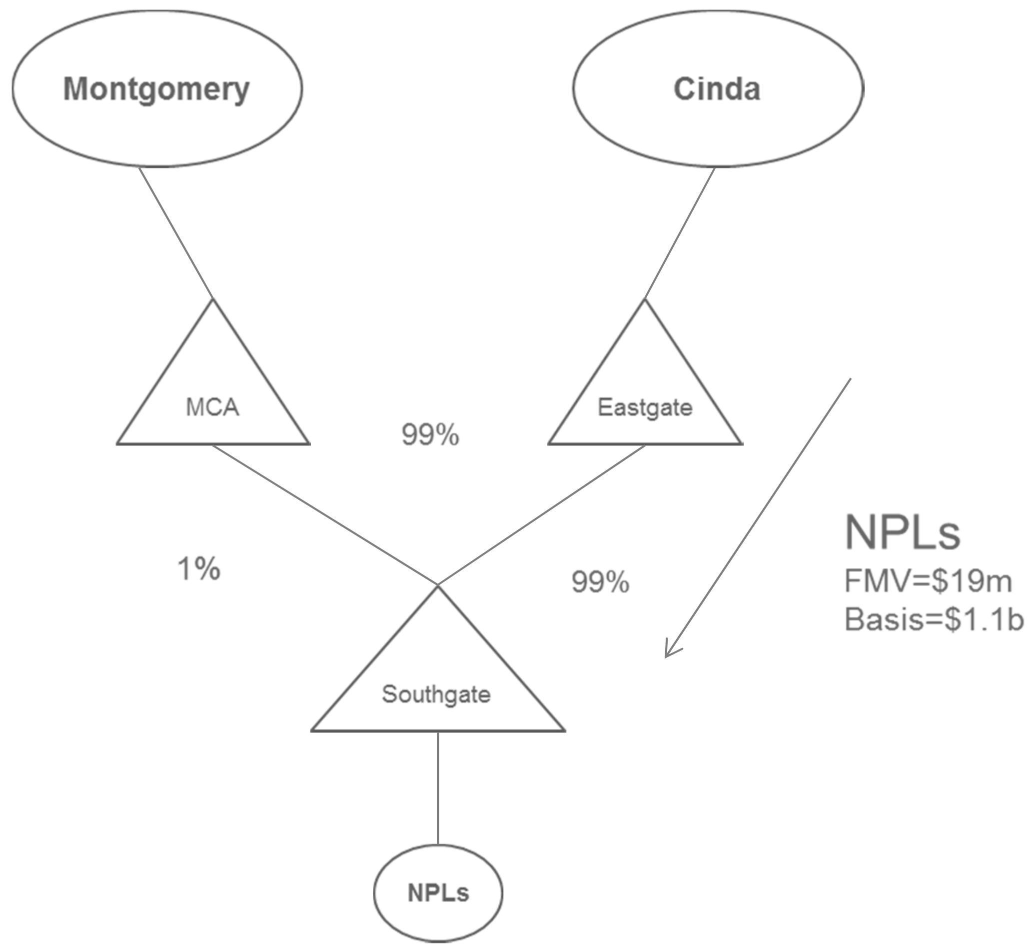


- *Castle Harbour I*, 342 F.Supp. 2d 94, (D. Conn. 2004)
  - Found Dutch Banks to be partners in Castle Harbour LLC and that allocations had substantial economic effect
- *Castle Harbour II*, 459 F.3d 220, (2nd Cir. 2006)
  - Dutch Banks not bona fide equity participants in Castle Harbour LLC
  - Reversed and remanded to District Court for consideration of §704(e) argument
- *Castle Harbour III*, 660 F.Supp. 2d 367, (D. Conn., 2009)
  - Held Dutch Banks were partners under §704(e)

Castle Harbour IV
666 F.3d 836 (2nd Cir. 2012)

- Second Circuit again reversed the District Court
  - Holding
    - Dutch Banks' interests not capital interests under §704(e)(1)
  - Analysis
    - The same evidence that "compelled the conclusion that the banks' interest was so markedly in the nature of debt that it does not qualify as bona fide equity participation" in Castle Harbour II also "compels the conclusion that the banks' interest was not a capital interest under § 704(e)(1)"
    - Banks' interest was "overwhelmingly in the nature of a secured lender's interest"
    - Second Circuit refuted District Court's view of risk of loss – the Dutch Banks' risk of loss "[was] in the nature of appearance of risk, rather than real risk"

Southgate Master Fund, LLC
659 F.3d 466 (5th Cir. 2011)



Southgate Master Fund, LLC (contd)

- Facts
  - Cinda is a Chinese government-owned financial institution
    - Had purchased $1.145B of nonperforming loans ("NPLs") for face value
    - Rough FMV=$19.42M – thus a very large built in loss
    - Had "superpowers" from Chinese government to aid in collection of debts
  - Andrew Beal is Dallas billionaire banker who made his money investing in distressed debt
    - Montgomery is associate of Beal's
  - Beal wanted to invest in Chinese NPLs in 2002
    - Montgomery determined that investment could also provide tax benefits due to Cinda's BIL

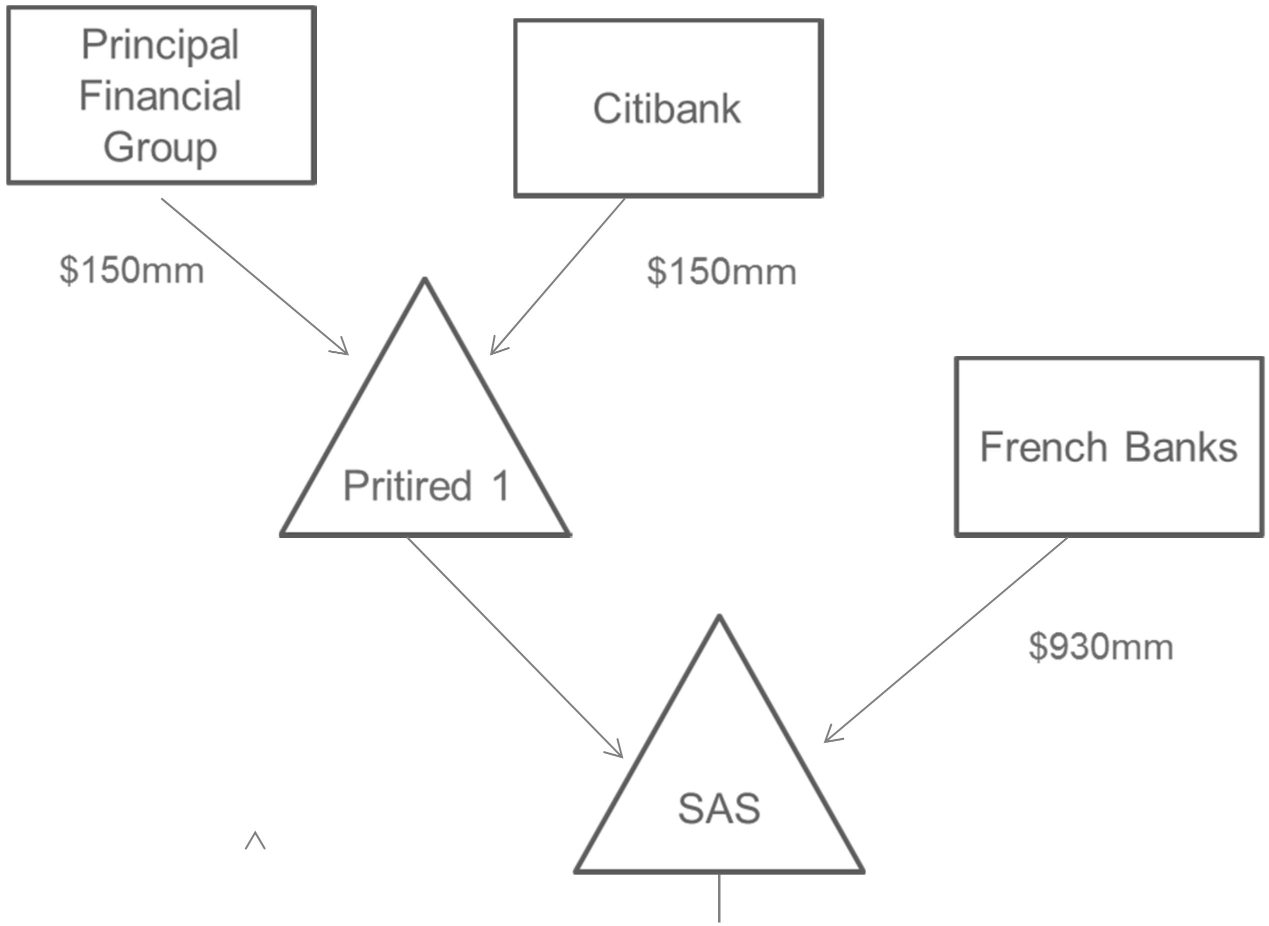
Southgate Master Fund, LLC (contd)

- Facts
  - Cinda signed a loan-servicing agreement with Southgate
  - Beal purchased 90% of Cinda's interest in Southgate
    - Inherited Cinda's BIL – transaction was prior to amended §743(d) and §704(c)(1)(C)
  - In 2002, Southgate sold 25% of loan portfolio and generated large tax loss, which was primarily allocable to Beal
    - Due to §704(d) limitations, Beal contributed $180.6M in GNMA securities
    - Beal retained vast majority of GNMA's value through restrictions and privileges related to income allocations and distributions
  - Overall, Southgate was a failed investment
    - Primarily due to Cinda's poor performance as loan servicer
    - Cinda sabotaged Southgate's business plan and did not abide by the partnership agreement

Southgate Master Fund, LLC (contd)

- Did acquisition of NPLs have economic substance?
  - Yes – satisfied Klamath factors
    - Had reasonable possibility of making a profit
    - Acted for legitimate purposes (not a one-off transaction)
    - Would have done deal regardless of tax benefits
- Was Southgate a sham partnership?
  - *Culbertson* analysis
    - Lacked intent to join together
      - Beal did not pursue actions against Cinda for failure as loan servicer due to threat by Cinda to disclose transaction to IRS
  - Lack of intent to share profits and losses
    - GNMA income sharing reserved for Beal
  - Lack of a business purpose
    - No need for a partnership

Pritired 1, LLC
816 F. Supp. 2d (2011)



$1.23b in "high quality debt securities"

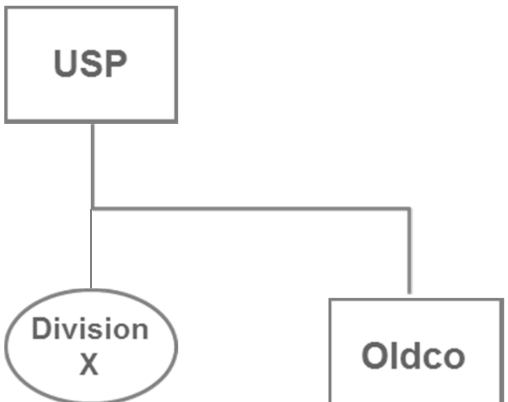
Pritired 1, LLC

- Pritired's Return on its $300mm investment
  - Original return was LIBOR plus 1%
  - Swapped this return for:
    - (1) LIBOR plus ~5% LESS (2) French taxes attributable to the SAS.
      - Also received allocation of foreign tax credits with respect to the French taxes
      - Bore economic burden of 100% of the French taxes and received an allocation of 100% of the foreign tax credits related to those taxes even though it only held a ~25% interest
  - At the time of the transaction, LIBOR was at 6.79%
    - Movement either way made the transaction more dependent on the foreign tax credits
    - Decrease – reduced amount received in (1), results in a reduced total return
    - Increase – increased amount of French taxes in (2), results in a reduced total return

Pritired 1, LLC

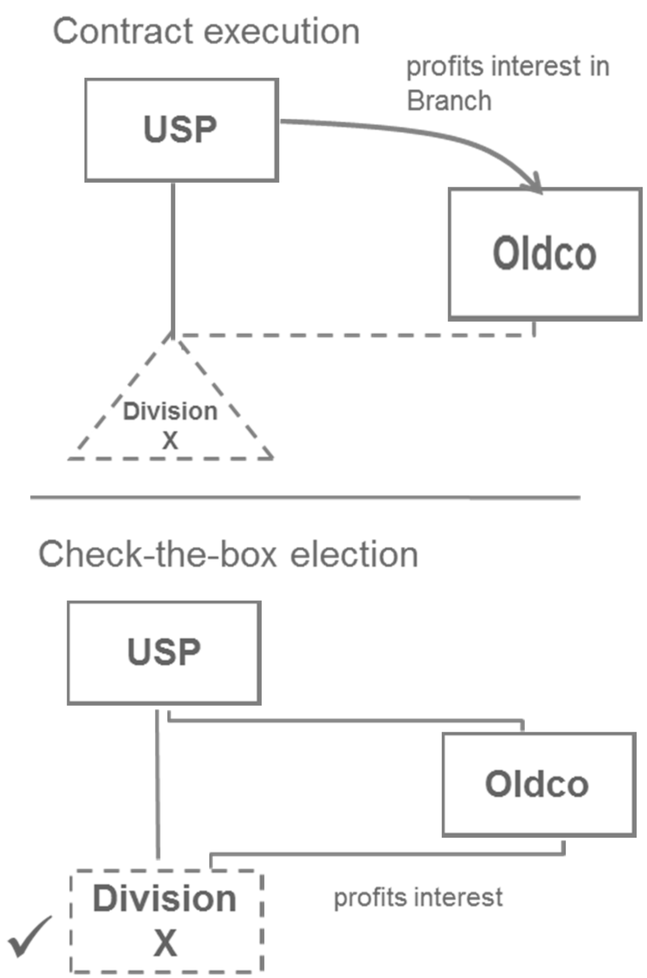
- Holdings
  - The capital contributions were debt, not equity
    - Court held that the transaction was “in the nature or a loan, rather than an equity investment”
      - Citing *Castle Harbour* – The funds “were advanced with reasonable expectations of repayment regardless of the success of the venture [and] were not placed at the risk of the business”
      - See Hewlett-Packard Company – The tax court held that HP’s investment in a foreign corporation was more properly characterized as a loan thus it was not entitled to a capital loss deduction for the sale of its interest
  - The transaction lacked economic substance
    - Transaction not desirable other than to claim foreign tax credits
      - Without credits, cash return and IRR would be lower than investment in general obligation municipal bond

Virtual incorporations



- USP operates division X ("Division X")
- USP also owns 100% of the stock of Oldco
- USP wants to incorporate Division X for tax reasons, but, due to non-tax reasons (e.g., non-transferrable assets, transfer taxes, regulatory, etc.), USP cannot transfer the assets of Division X to another legal entity
- Treas. Reg. § 301.7701-3(a) provides that a "business entity" that is not classified as a corporation (i.e., an "eligible entity") can elect to its classification for US federal tax purposes. Division X is not an "entity" for purposes of the check-the-box regulations

Virtual incorporations (contd)



- In order to obtain the benefits of “incorporating” Division X, the following steps are taken:
  - USP and Oldco enter into a contractual arrangement, under which Oldco will share in the economics of Division X
    - See Treas. Reg. §301.7701-1(a)(2) (“A joint venture or other contractual arrangement may create a separate entity for federal tax purposes if the participants carry on a trade, business, financial operation, or venture and divide the profits therefrom”)
  - Division X elects to be treated as a corporation for US federal tax purposes
- Same result if Division X is a branch
- See, e.g., PLR 201305006
- “Entity” status considerations?

PLR 201305006 (15 October 2012) Simplified Facts

- Taxpayer, a domestic corporation, wholly owns foreign Affiliate
- Taxpayer and Affiliate enter into a Profit Participation Agreement (PPA)
  - Affiliate acquires an X% interest in the capital, profits and losses of all of Taxpayer's branches in a specified region in return for a cash investment equal to X% of the overall FMV of the branches
  - Taxpayer retains legal ownership of all assets, liabilities, obligations of the branches
  - No separate juridical entity
  - Affiliate can nominate one member of a 10-member oversight committee
- Taxpayer will elect to treat the separate business entity as a corporation

PLR 201305006

- The Service ruled:
  - PPA creates a separate business entity under Treas. Reg. § 301.7701-2;
  - All allocable items of income and expense are attributed to the separate entity for federal income tax purposes; and
  - The separate business entity will be a foreign business entity under Treas. Reg. § 301.7701-5
- The Service expressed no opinion as to:
  - Application of Section 367; or
  - Whether the separate business entity is an eligible entity under Treas. Reg. § 301.7701-3

PLR 201305006

- Service did not cite *Tower*, *Culbertson*, *Luna* or any other existence of a partnership case
- The Service noted three factors that would point to no separate business entity and still found a separate business entity; compare/contrast with Luna factors
  - Business not carried out in the name of the separate entity (*Luna* factor 5)
  - Property of the business not held in the name of the separate entity (*Luna* factor 3?), and
  - One of the participants in the venture is not disclosed to third parties (*Luna* factor 6)

Current issues

Allocating recourse liabilities; Bottom dollar guarantees

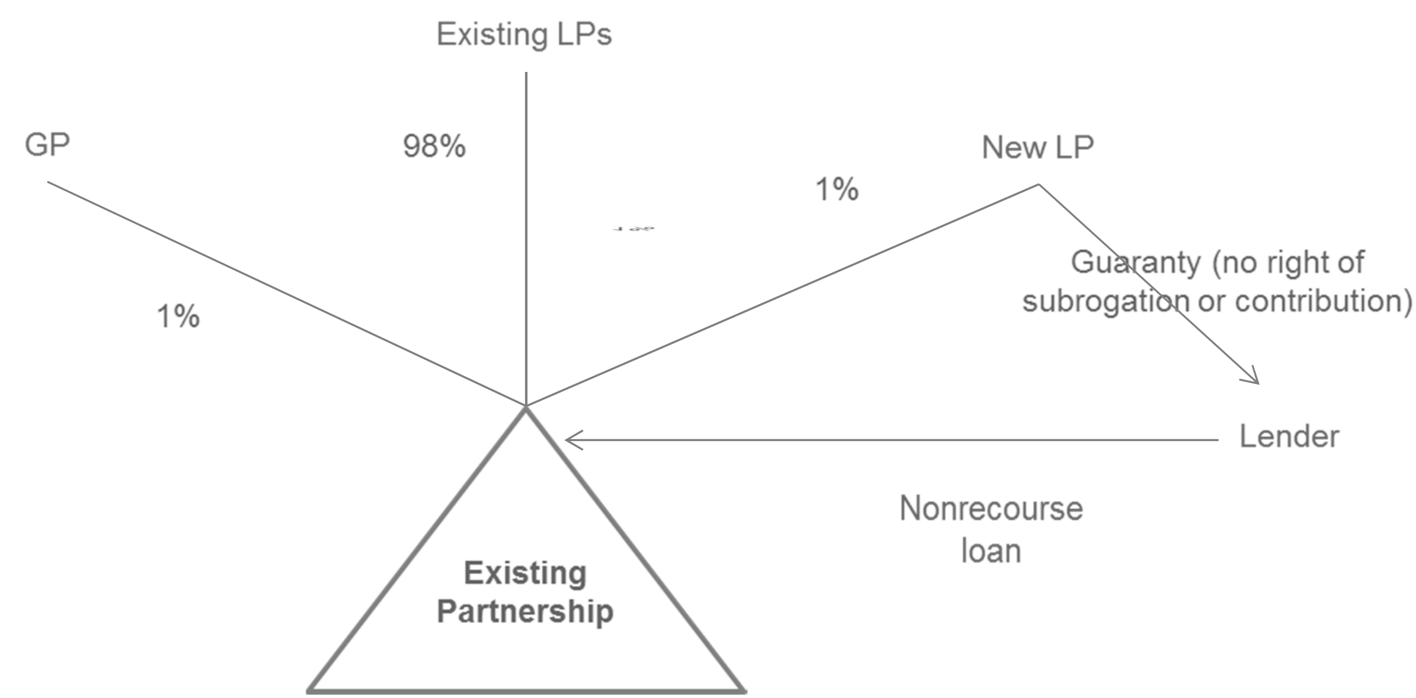
Allocating recourse liabilities

- A recourse liability is allocated to the partner who bears the economic risk of loss for that liability
- A partner bears the economic risk of loss to the extent it has a payment obligation (without any right of reimbursement), assuming:
  - Partnership liabilities become payable in full
  - All partnership assets (including cash) have a value of zero and are disposed of in a fully taxable transaction for no consideration (except relief of nonrecourse liabilities)
  - All items of income, gain, loss, or deduction are allocated to the partners
  - The partnership liquidates

Recourse liabilities

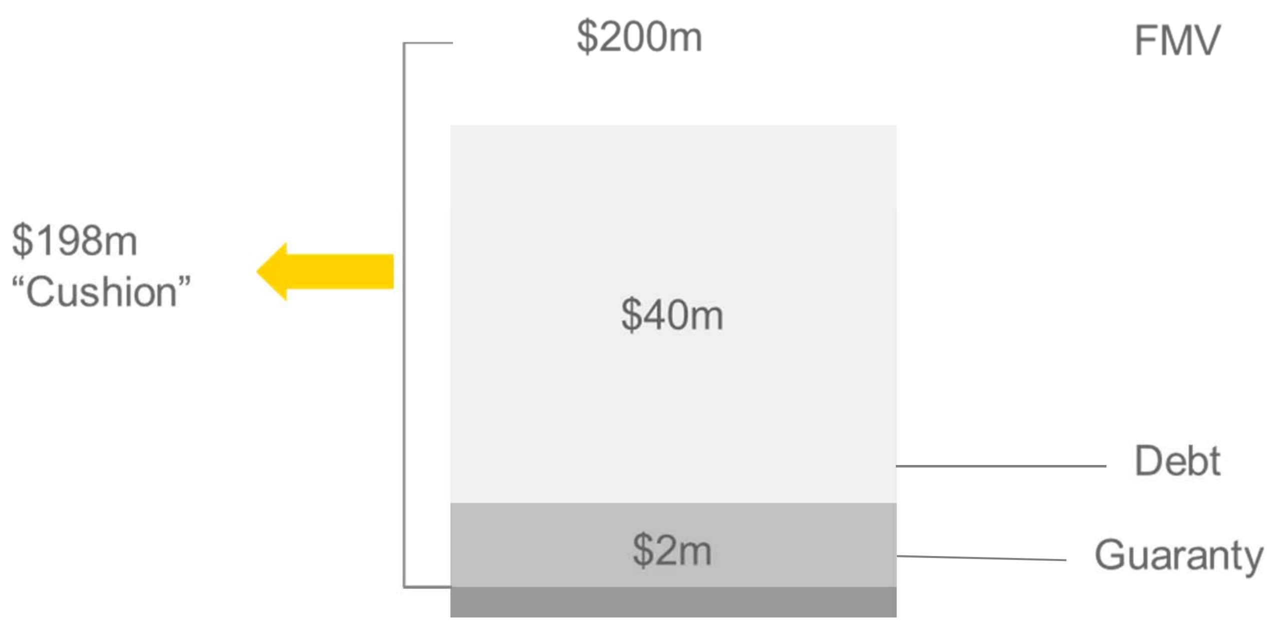
- Treas. Reg. §1.752-2(b)(6) – all partners (or related persons) assumed to pay their obligations regardless of actual net worth unless facts indicate plan to circumvent or avoid the obligation
  - ***But*** see Treas. Reg. § 1.752-2(k) – DREs as partners
- Partner bears economic risk of loss for nonrecourse loans made or guaranteed by partner or related person
  - 10% exception – Treas. Reg. §1.752-2(d)

Bottom dollar guarantee of nonrecourse debt



Bottom dollar guaranty of nonrecourse debt (cont)

FMV of assets	=	$200m
Nonrecourse debt	=	$40m
Guaranty	=	Bottom $2m



- Guarantor liable only to extent assets lose more than $198m of value.

Legislative developments

Camp proposal

Camp proposal

- On 12 March 2013, house ways and means committee chairman Dave Camp (R-MI) released a discussion draft for reforming the tax rules affecting small businesses
- Intended to solicit feedback from a broad range of stakeholders, practitioners, economists, and members of the general public on how to improve on the proposal
- Two options:
  - Option 1 – retains subchapter K and subchapter S as separate
  - Option 2 – unified rules for partnerships and S corporations

Draft highlights

- The draft would simplify and expand the use of cash accounting with a uniform rule under which all businesses with gross receipts of $10m or less may use the cash method of accounting and exempt these businesses from the inventory uniform capitalization rules under §263A
- In addition, the draft would establish a single provision allowing for the deduction of start-up and organizational expenses up to a threshold amount, subject to a phase-out. In so doing, the draft would repeal the special rules relating to the organizational costs of partnerships

Draft highlights

- The draft also includes changes to the due dates for business tax returns, as follows:
  - Partnerships – 15 March (or 2½ months after the close of their tax year)
  - S corporations – 31 March (or 3 months after the close of their tax year)
  - C corporations – 15 April (or 3½ months after the close of their tax year)
  - Individuals, including sole proprietorships, continue to file by 15 April
- All taxpayers would be eligible for a six-month extension
- Finally, the draft presents two options for the reform of pass-through entities

Option 1 – revisions to subchapters K and S

- Subchapter K revisions:
  - Require mandatory basis adjustments:
    - Partnership distributes and partnership interest sales
    - Corresponding adjustments in cases involving tiered partnerships
  - Eliminate ability to defer the pre-contribution gain or loss when the partnership distributes contributed property
  - Repeal guaranteed payment rules:
    - Payments received by partners treated as either payments to a partner (i.e., part of their distributive shares of partnership income or loss) or a non-partner
    - Repeal guaranteed payment treatment for payments liquidating a partner’s interest

Option 1 – revisions to subchapters K and S (cont.)

- Subchapter K revisions (cont.):
  - Conform partnership rules to S corporation rules regarding allowance for charitable contributions and foreign taxes:
    - Currently, with respect to S corporations, §1366(d) limits the losses and deductions which may be taken into account by a shareholder of an S corporation to the shareholder’s basis in stock and debt of the corporation. For purposes of this limitation, the shareholder’s pro rata share of charitable contributions and foreign taxes are taken into account by reason of the last sentence of §1366(a)(1)
    - Eliminate substantially appreciated requirement to trigger rules policing shifts of ordinary income assets and capital assets

Option 2 – unified pass-through rules

- This options repeals current law Subchapter K and Subchapter S and replaces them with a uniform set of rules that apply to non-publicly traded businesses for Federal tax purposes, regardless of how the business is organized at the state level
- Would any non-public entity qualify?
  - Would publicly traded partnerships be eligible for flow-through treatment?
  - Transition rules?
- The new rules would:
  - Allow tax-deferred contributions of property and money

Option 2 – unified pass-through rules (cont.)

- The new rules would (cont.):
  - Maintain the pass-through of entity items while retaining entity's character
  - Permit only net ordinary income or loss, net capital gain or loss, and tax credits to be specifically allocated to owners
    - Three buckets with no ability to have special allocations across buckets
  - Require entity-level withholding on the pass-through entity's income and gain with a corresponding credit for the owner's tax reporting
  - Limit deductions for losses to an owner's basis in his pass-through interest, but allow excess losses to be carried forward indefinitely

Option 2 – unified pass-through rules

- The new rules would (cont.):
  - Limit tax-free distributions to the owner's basis in the business
  - Require pass-through businesses to recognize gain on all distributions of appreciated property and preserve losses in distributed property by requiring owners to take carryover basis in the distributed property
  - Allow owner's basis in their ownership interests for entity-level debt (both recourse and non-recourse)
  - Allow owners to be treated as employees of the business

Priority guidance plan

Priority guidance plan

- Final §108(i) regulations
- Section 752 regulations regarding related person rules
- Guidance under §751(b)
- JOBS Act regulations
- Section 704(c)(1)(C)
- Mandatory basis adjustments under §§734 and 743
- Fractions rule regulations
- Section 337(d) regulations
- Application of Treas. Reg. §1.267(b)-1(b) to partners and partnerships
- International regulations under §§909 and 901(m)

Q&A

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