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Memorandum

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to:
Revenue Agent

from: Katherine Ankeny
Industry Counsel for Media
(CC:LM:CTM:LA)

subject: Newspaper Mastheads, Advertiser Accounts, & Subscriber Accounts under Section 1031

Revenue Agent =
Office =
Consolidated Group =
Date =
Relinquished Newspapers =
Acquired Newspaper =

This memorandum is in response to your request for legal advice in the audit of (the Taxpayer). You have requested our advice with respect to the Taxpayer's section 1031 exchange of newspapers. This advice is subject to 15-day post-review by the National Office. CCDM 33.3.1.2.3.2. This advice may not be used or cited as precedent.

ISSUES

Whether the exchanged newspapers' mastheads are like-kind property, whether the exchanged newspapers' advertising accounts are like-kind property, and whether the exchanged newspapers' subscriber accounts are like-kind property under section 1031.

CONCLUSIONS

The exchanged newspapers' mastheads are not like-kind property, the exchanged newspapers' advertiser accounts are not like-kind property, and the exchanged newspapers' subscriber accounts are not like-kind property under section 1031.

FACTS

The Exchange

In _____, the Taxpayer engaged in a section 1031 exchange of newspapers. It relinquished _____ newspapers for _____ newspaper.

The Valuation of the Mastheads

The Taxpayer's appraiser valued the mastheads by using a residual method. In particular, it directly valued each exchanged newspaper's tangible assets, advertiser accounts, and subscriber accounts, subtracted the total of those values from the value of the newspaper, and allocated the difference to the newspaper's masthead.

The Service's appraiser valued the mastheads by using a market approach. Mastheads are bought and sold, and the prices are based on a multiple of each newspaper's operating profit. The Service's appraiser determined an average multiple from a database of the Securities and Exchange Commission. He then applied this multiple to the operating profit of each of the exchanged newspapers to compute the value of that newspaper's masthead.

The Valuation of the Advertiser Accounts and the Subscriber Accounts

The Taxpayer's and the Service's appraisers both used a discounted cash-flow method to value the advertiser accounts and the subscriber accounts. They projected the cash flow attributable to the accounts by estimating the growth rate of the revenue and the average life of active accounts. The appraisers made those projections based both on industry trends and on the particular paper's financial information.

The Valuation of Goodwill and Going Concern

The Taxpayer's appraiser assumed that the newspapers had no goodwill and going concern value.

The Service's appraiser valued the goodwill and going concern by using a residual method, subtracting from the value of each exchanged newspaper the total value of the rest of the newspaper's assets and allocating the difference to the newspaper's goodwill and going concern value.

LAW AND ANALYSIS

General

Section 1031(a)(1) provides that no gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind, which is to be held either for productive use in a trade or business or for investment.

Section 1.1031(a)-2(c)(2) explains that goodwill or going concern value of the exchanged businesses can never be like-kind property. This is because the nature and character of the goodwill and going concern value of a business are inherently unique and inseparable from the business. T.D. 8343, 1991-1 C.B.

Section 1.1060-1(b)(2)(ii) provides:

(ii) Goodwill or going concern value. Goodwill is the value of a trade or business attributable to the expectancy of continued customer patronage. This expectancy may be due to the name or reputation of a trade or business or any other factor. Going concern value is the additional value that attaches to property because of its existence as an integral part of an ongoing business activity. Going concern value includes the value attributable to the ability of a trade or business (or a part of a trade or business) to continue functioning or generating income without interruption notwithstanding a change in ownership. It also includes the value that is attributable to the immediate use or availability of an acquired trade or business, such as, for example, the use of the revenues or net earnings that otherwise would not be received during any period if the acquired trade or business were not available or operational. See *also* Treas. Reg. § 1.197-2(b).

The Exchanged Newspapers' Mastheads Are Not Like-Kind Property, the Exchanged Newspapers' Advertiser Accounts Are Not Like-Kind Property, and

the Exchanged Subscriber Accounts Are Not Like-Kind Property under Section 1031.

As defined in the Copyright Act, a masthead “is a body of information appearing in approximately the same location in most issues of a newspaper, magazine, journal, review, or other periodical or serial, typically containing the title of the periodical or serial, information about the staff, periodicity of issues, operation, and subscription and editorial policies, of the publication.” 37 C.F.R. § 201.20(b)(8). As colloquially defined, a masthead refers to a newspaper’s logo design on the front page. <http://en.wikipedia.org/wiki/Masthead>.

Since trademarks and trade names are so closely related to (if not a part of) the goodwill and going concern value of a business, they are not like-kind property. The Latham Act distinguishes trade names from trademarks. A trademark is used for identifying goods and distinguishing a trademark owner's goods from those manufactured and sold by others. A trade name is any name used to identify the business. 15 U.S.C. § 1127 (2006). A masthead may be characterized both as a trademark and as a trade name. Therefore, we conclude that the exchanged newspapers’ mastheads are not like-kind property. Regardless of whether a masthead is characterized as a trademark or a trade name, a masthead is closely related to (if not a part of) the goodwill and going concern value of the newspaper.

The exchanged newspapers’ advertiser accounts and the exchanged newspapers’ subscriber accounts are also closely related to goodwill, which is the expectancy of continued customer patronage. In addition, going concern value, which is the value attributable to the ability of a business to continue functioning or generating income without interruption notwithstanding a change in ownership, is in part a function of both the advertiser accounts and the subscriber accounts. In this respect, we cannot distinguish advertiser accounts and subscriber accounts from trademarks and trade names. Therefore, we conclude that the exchanged newspapers’ advertiser accounts are not like-kind property and that the exchanged subscriber accounts are not like-kind property.

Taxpayer’s Arguments

The Taxpayer argues that our position is flawed because the exchanged newspapers’ mastheads, advertiser accounts, and subscriber accounts are classified as intangibles separate from goodwill and going concern value under section 197.

We agree with the Taxpayer that the mastheads, advertiser accounts, and subscriber accounts would be classified as intangibles that are separate from the exchanged newspapers’ goodwill and going concern value under section 197. Treas. Reg. §§ 1.197-2(b)(1), (2), (6), (10). But that does not end the analysis. The mastheads, advertiser accounts, and subscriber accounts are not like-kind property because they

are so closely related to, if not a part of, the newspapers' goodwill and going concern value.

The Taxpayer argues that we are ignoring *Newark Morning Ledger Co. v. United States*, 507 U.S. 546 (1993). The Taxpayer stresses that the Court rejected the government's position that Newark Morning Ledger's list of paid subscribers was not depreciable under section 167 because the list fell "within the core of the concept of goodwill." *Id.* at 566.

The holding in *Newark Morning Ledger Co.* is irrelevant. The relevant question is not whether the intangibles are depreciable because they have a limited useful life, the duration of which could be ascertained with reasonable accuracy. The relevant question is whether the exchanged newspapers' mastheads, advertiser accounts, and subscriber accounts are like-kind property under section 1031. The Court held that Newark Morning Ledger's subscriber list was depreciable because Newark Morning Ledger proved that the list constituted an intangible asset with an ascertainable value and a limited useful life, the duration of which could be ascertained with reasonable accuracy. *Id.* at 570. We would not dispute that the exchanged newspapers' mastheads, advertiser accounts, and subscriber accounts are amortizable under section 197. The Court stated that the relationship of the paid subscribers to the expectancy of continued patronage was irrelevant to its holding that the subscriber list was depreciable under section 167 *Id.* at 570. *Newark Morning Ledger Co.* does not address the issue of whether an intangible that is closely related to, if not a part of, goodwill and going concern value is of like kind to another intangible that is closely related to, if not a part of, goodwill and going concern value. There was no like-kind exchange under consideration in *Newark Morning Ledger Co.* Therefore *Newark Morning Ledger Co.* is irrelevant to the Taxpayer's case.

The Taxpayer also cites a prior Service position, which stated that trade names are not excepted from section 1031 as choses in action.¹ Whether the exchanged mastheads, advertiser accounts, and subscriber accounts are choses in action is not the issue in this case. Rather, the issue is whether they are closely related to, if not a part of, goodwill and going concern value. As stated section 1.1031(a)-2(c)(2), effective for exchanges such as the Taxpayer's exchange occurring on or after April 11, 1991, goodwill and going concern value of exchanged businesses can never be like-kind property.

The Taxpayer cites the Service's position that an FCC radio license and an FCC television license are like-kind property because the rights conferred are "basically the same." The Taxpayer neglects to note that the assigned frequency of the

¹ Section 1031 does not apply to the exchange of choses in action. I.R.C. § 1031(a)(2)(F). A chose in action is the right to bring an action to recover a debt, money, or a thing. Black's Law Dictionary (8th ed. 2004).

electromagnetic spectrum referred to in the television license is the sole underlying property to which the television license relates. Unlike a newspaper's masthead, advertising accounts, and subscriber accounts, a station's particular electromagnetic spectrum is not closely related to the station's goodwill and going concern value.

Conclusion

Because the exchanged newspapers' mastheads, the exchanged newspapers' advertiser accounts, and the exchanged newspapers' subscriber accounts are so closely related to (if not a part of) the goodwill and going concern value of the newspapers, none of these assets are like-kind property.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call if me at (213) 894-3027, ext. 155 you have any further questions.

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