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Kelleher & Buckley, LLC

Something New

NEVADA RESTRICTED LIMITED LIABILITY COMPANIES

Obtaining Larger Discount Valuations

We are writing to discuss a strategy that many clients may consider for both federal and Illinois transfer tax laws and asset protection purposes

NEVADA RESTRICTED LIMITED LIABILITY COMPANIES

Estate planning attorneys have often used family limited liability companies ("FLLCs") to, in part, facilitate gifting (or selling) minority interests or non-voting interests to family members (or trusts for the benefit of family members). FLLCs are popular because, in addition to excellent asset protection qualities, ownership interests can also be gifted or sold on a discounted basis, thereby significantly reducing or even eliminating transfer taxes (i.e., estate, gift and GST taxes).

For gift and estate tax purposes, the value of an FLLC interest is based on its fair market value (i.e., the price a willing buyer would pay to a willing seller). Because of the limited ability of a minority or non-voting member to control management, sell or liquidate the FLLC interest, the valuation of an FLLC interest can be discounted from the sum of the underlying FLLC assets. These discounts are generally referred to as a "lack of control" and "lack of marketability" discounts.

In addition to the general lack of marketability and control discounts, FLLCs are generally subject to restrictive operating agreements which further limit the ability of an owner to sell an interest, exercise control over the FLLC or access FLLC distributions. Such restrictions generally increase discounting opportunities. However, when transferring FLLC interests to family members or trusts for the benefit of family members, any applicable restriction in an operating agreement will be completely disregarded *to the extent a certain restriction is not imposed by state law*. See I.R.C. Section 2704(b). Accordingly, states with more restrictive default statutes will produce greater discounting opportunities for clients.

As of 10/1/09, Nevada has taken the lead regarding valuation discounting planning by creating the Restricted Limited Liability Company ("Restricted LLC"). Due to the imposition of a state law restriction on any distributions to the Restricted LLC's members with respect to their member's interests for a period of "up to" [emphasis added] ten (10) years, a Restricted LLC provides the opportunity to argue for additional valuation discounts above and beyond traditional valuation discounts. Such a strict "state law imposed restriction" regarding an owner's distribution rights greatly enhances valuation discounting arguments (providing an extra 10-30% above the traditional 10-40% discount range assuming a full 10 year "lock-up").

As maximum valuation discounting is usually not the only planning goal, Restricted LLC operating agreement and organizational documentation can also be tailored to (i) lock-up the underlying assets for less than ten (10) years, (i) provide discretionary rights to distribute a percentage or certain dollar amounts of assets in a given timeframe (i.e., allow members to receive distributions to pay income taxes associated with their membership interests), or (iii) be as creative as the facts and circumstances surrounding the business of the proposed entity.

In sum, Nevada Restricted Limited Liability Companies offer significant discounting opportunities over and above what other states are currently offering and many clients should consider this powerful estate planning and wealth transfer vehicle.

Advertising Materials

The Treasury Department recently promulgated regulations that impose significant independent requirements on law firms delivering written tax advice. As a result, we are required under certain circumstances to follow certain procedures when delivering written tax advice. These procedures may result in us spending additional time to confirm the factual assumptions contained in our advice. You may also notice that we will include a notation on certain correspondence not normally considered as written tax advice, to clarify that the correspondence is not intended as written tax advice, and is not intended or written to be used, and cannot be used by a taxpayer, for the purpose of avoiding penalties that may be imposed upon the taxpayer under law. Please contact me if you wish to discuss this issue further.

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The Right Law Firm Can Make All The Difference

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