

802.2
802.4**Verne, B. Michael**

From: [REDACTED]
Sent: Tuesday, September 15, 2009 2:02 PM
To: Verne, B. Michael
Subject: HIGHLY CONFIDENTIAL

Mike,

Thank you for responding to my voicemail message. In the interest of time, I thought I would set forth the essential facts and analysis of the hypothetical I mentioned concerning the "recreational land" exemption under 802.2(f). Please let me know whether you concur with the analysis.

FACTS

Company A will acquire Company B, an LLC, for an amount in excess of \$65.2 million. Assume that the size-of-persons test is satisfied. The assets of Company B consist essentially of the following:

(a) Real property comprising:

- (i) a tennis club, including twenty or so tennis courts, a clubhouse, locker rooms, and exercise facilities;
- (ii) a tennis stadium that is used for an annual, two-week international ATP/WTA (men's and women's professional tours) tennis tournament and other special events, such as concerts;
- (iii) Land that is used to set up temporary retail and food-and-beverage facilities in connection with the tennis tournament and other stadium special events;
- (iv) parking lots that are used both year-round for tennis club purposes and for stadium special events; and
- (v) parking lots that are used exclusively for stadium special events.

(b) Other assets, including tangible and intangible personal property, contracts and leases, equipment, permits, licenses, trademarks and other intellectual property, and other assets that need not be defined further for present purposes.

The tennis club and improvements identified at (a)(i) above are used year-round by club members for recreational purposes except that, during the annual two-week tennis tournament, the tennis club's courts are turned over for use by the tournament. Similarly, the parking facilities identified at (a)(iv) above are used year-round for tennis club purposes exclusively, except that they are turned over to stadium use during the annual two-week tennis tournament and whenever there is a special stadium event. Special stadium events, excluding the tennis tournament, occur approximately twice per year on average.

In Company A's good faith view, the acquisition price in this case reflects the fair market value of the underlying assets. Furthermore, Company A estimates in good faith that, after subtracting from the total acquisition price the value of the tennis club (with improvements) identified at (a)(i) above, and of the parking facilities identified at (a)(iv) above, the fair market value of the remaining assets is below \$65.2 million.

ANALYSIS

We believe that this acquisition is exempt from the HSR Act under 16 C.F.R. §§ 802.4 and 802.2. Section 802.4 exempts the acquisition of interests in an LLC if the LLC and all entities that it controls do not hold non-exempt assets with an aggregate fair market value in excess of \$65.2 million. 16 C.F.R. § 802.4. In this case, some of the assets held by the LLC are exempt from the HSR Act as "recreational land" under 16 C.F.R. § 802.2(f). Thus, the acquisition is reportable only if the aggregate fair market value of the non-exempt assets exceeds

\$65.2 million.

The HSR rules define "recreational land" to include, among other things, "real property used primarily as...a tennis club facility, and assets incidental to the ownership of such property." *Id.* In promulgating these rules, the Federal Trade Commission has made clear that tennis club improvements such as parking facilities are included under the category of "recreational land," while tennis stadia are not. Statement of Basis and Purpose, 61 F.R. 13666, 13676, 13677 (1996).

In this case, the tennis club (including the twenty or so tennis courts, the clubhouse, locker rooms, and exercise facilities, but excluding the stadium) qualifies as recreational land because it is used solely for recreational purposes as a tennis club for the entire year except during the annual, two-week tennis tournament. Similarly, the parking lots used both by tennis club members and for stadium special events are exempt because they are used solely for tennis club purposes except during the annual two-week tennis tournament and for special stadium events, which account approximately for an additional 2 days per year.

As indicated above, Company A estimates in good faith that, after subtracting from the total acquisition price the value of the tennis club (with improvements) and of the parking facilities that are used for both the tennis club and the stadium events, the fair market value of the remaining assets is below \$65.2 million. Based upon this calculation, Company A estimates in good faith that the aggregate fair market value of the non-exempt assets in this case is below \$65.2 million. Accordingly, the acquisition is exempt under 802.4.

Thank you very much in advance for your help.


Regards,



AGREE
B
9/15/09



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