802.51

Verne, B. Michael

From:
Sent: Wednesday, December 02, 2009 12:30 PM
To: Verne, B. Michael
Cc:
Subject: 802.51 asset valuation questions

Mike,
As we discussed, below I summarize the asset valuation issues we would like to discuss at 2 PM. I understand that spoke to you about this transaction a few days back. The target is a foreign issuer valued in excess of $65.2 million. Target's business involves specialized cargo transportation. Although much of the transportation involves pick up and deliveries outside the US, some portion of the customers are global companies headquartered in the US. In undertaking an assessment of the 802.51 exemption regarding revenues in or into the US, I understand that you advised a few days back that revenue from these transportation services is US revenue if the pickup or delivery is in the US.

We now have some questions relating to determining the value of US assets under 802.51. The target has some office space and other physical assets in the US which will of course need to be valued. However, much of the asset value relates to assumed contracts and related customer relations (goodwill).

Turning to the contracts, I have seen some informal opinions indicating that contracts written under US law are US assets, but in the past when I discussed this with you we concluded that if there is little US nexus to the services provided under the contracts then they are not US assets even if governed by US law. Here, we have some contracts governed by US law where the counterparties to the target are global companies with US headquarters (US persons), but the transportation pickup and drop-off points are outside the US. When the services are provided outside the US, can we assume that the assumed contract is a non-US asset? Assume instead that the pickup or drop-off point is in the US. Since, as noted above, the revenue associated with that contract is US revenue, I assume that the contract is a US asset. Do you agree? Do these answers change if the contract counterparty is a non-US person? Does the place of contract negotiation matter?

Most of the assumed contracts are short term, and a significant portion of the business value relates to the customer relationships (goodwill leading to future contracts). Assuming we can place a value on total goodwill, is it fair to apportion it based on the proportion of US to worldwide revenue, with US revenue determined as noted above? Alternatively, would it be appropriate to apportion it on the basis of the value of assumed US to worldwide contracts (determined as detailed in the prior paragraph) on the assumption that the goodwill is tied to the current contracts?

Many thanks,

Your understanding is correct on the sales.

I think it is fair to say that any contract that involves pickup and delivery outside of the US is a non-US asset, regardless of whether it is enforceable under US law. Conversely, if the contract is for either pickup or delivery in the US, it would be a US asset. If the contract covers both types of service, you can allocate the value between US and foreign services. I don't think in this particular instance you need to look at what jurisdiction would have authority over enforcing the contract.

The answers do not change if the counter-party is a non-US person or based on where the contract is negotiated.

I think the best approach on the goodwill is to allocate it based on the US sales vs non-US sales as determined in your first paragraph.

BL

12/2/09