Verne, B. Michael

802.4

From: [redacted]
Sent: Thursday, March 04, 2010 10:44 AM
To: Verne, B. Michael
Subject: Questions about Potential Transactions

Good morning,

I have some questions about a few transactions that I'm working on. Please see the scenarios described below and let me know whether you agree with the analyses and please provide corrections where appropriate. Thanks very much for your tremendous assistance.

Scenario 1

A is buying all of B's stock. The acquisition will include

Warehouses = $80m (exempt under 802.2(h)) (acquisition price)

Trademarks = $40 m (The acquisition price and fair market value are the same)

Under the 802.2(h) analysis and 801.15 (a) analysis and respective examples, A's acquisition is exempt from a filing because the value of the non-exempt assets standing alone, is below the $63.4 million size of transaction threshold.

Question:
Do you also apply the 802.4 analysis, which would give the same result?

Scenario 2

A is buying all of B's stock. The acquisition will include

Warehouses = $80m (exempt under 802.2(h)) (acquisition price)

Trademarks = $80 m (The acquisition price and fair market value are the same)

Under the 802.2(h) analysis and 801.15 (a) analysis and respective examples, A's acquisition is not exempt from a filing because the value of the non-exempt assets standing alone exceeds the $63.4 million size of transaction threshold.

Questions:
Do you also apply the 802.4 analysis, which would give the same result?

Is the transaction value for the filing the value of the trademarks only - $80 million or is it the original total transaction value of $160 million? Is the voting securities box checked only or do you also check the assets box because trademarks are being acquired?

Does the result change if the warehouses are held by one wholly owned US sub and the trademarks are held by a different wholly owned US sub (trademarks are for use in US)?

Scenario 3

A is buying all of B's stock. The acquisition will include

Warehouses = $80m (exempt under 802.2(h)) (acquisition price)

Trademarks = $40 m (The acquisition price and fair market value are the same)

Under the 802.2(h) analysis and 801.15 (a) analysis and respective examples, A's acquisition is exempt from a filing because the value of the non-exempt assets standing alone, is below the $63.4 million size of transaction threshold.

Approximately 75 days later, A buys more trademarks from B and voting securities of B's subsidiary.

New trademarks = $80 m (The acquisition price and fair market value are the same)

voting securities = $70

This transaction is reportable because the value, $150 m exceeds the $63.4 threshold.

Questions:

Under rule 801.15, does A have to aggregate the value of the trademarks, $40 m–from the first acquisition, with the current acquisition such that the filing is for the old and new trademarks and the voting securities of B's subsidiary?

Should the filing value be $190 million?

Are there any other factors that should be noted or considered as part of the analysis?

<u>Scenario 4</u>

A is buying all of B's stock. The acquisition will include

Warehouses = $80m (exempt under 802.2(h)) (acquisition price)

Trademarks = $80 m (The acquisition price and fair market value are the same)

Under the 802.2(h) analysis and 801.15 (a) analysis and respective examples, A's acquisition is not exempt from a filing because the value of the non-exempt assets standing alone exceeds the $63.4 million size of transaction threshold.

Approximately 75 days later, A buys more trademarks from B and voting securities of B's subsidiary.

New trademarks = $80 m (The acquisition price and fair market value are the same)

voting securities = $70

This transaction is reportable because the value, $150 m exceeds the $63.4 threshold.

Questions:

Does A need to aggregate the value of the current transaction $150 m with the value of the earlier one?

Or is that the value of the previous transaction simply counts in A's size of person/balance sheet calculation?

Please state the value of the transaction to be put on the form and indicate whether assets and securities are checked?

Scenario 5 - Different transaction

A is buying 100% of B's voting securities. B has three subsidiaries and B is a US company.

Sub 1 - US Sub = $150 million

Sub 2 - Foreign Sub with no US sales or assets = $75 million

Sub 3 - Foreign Sub with no US sales or assets = $150 million

Questions:

Subs 2 and 3 are exempt under 802.51, but is the filing for the value of only the US sub, $150 million or the entire transaction value, including all three subs, $375 million? Please explain whether 802.4 is relevant to this analysis.

I greatly appreciate your taking the time to review this and your quick responses (as I'm under pressure to give answers). As you may know from queries from others, these issues can be confusing sometimes so I want to be sure the answers are consistent with the PNO's views.

I think you are mixing apples and oranges a bit here. These are all voting security deals, so 802.4 would be used for scenarios 1-4 and 802.51 (and maybe 802.4) for scenario 5. I have attached a link to a tip sheet on 802.4. I'm assuming in all of these scenarios that you are using acquisition price and fair market value interchangeably.

Scenario 1 : Under 802.4, B holds on $40 MM in non-exempt assets, so exempt. Note that the 802.4 analysis does not affect the size of transaction in any of these scenarios. The size of transaction is till $120 million, but the acquisition is exempt.

Scenario 2: Same 802.4 analysis, but now B holds $80 million in non-exempt assets, so not exempt. Transaction value is $160 million. Only check the voting securities box because you are not directly acquiring the trademarks. The result could change if you are acquiring the two subs directly, not B. If that is the case, the value of the transaction would only be $80 MM, but still not exempt.

Scenario 3: Agree – the initial acquisition is exempt under 802.4. Now I'm a bit confused. If A acquired all of B's stock in step 1, how is making additional acquisition from B which is now within the person of A. Let me make the scenario a little different.

Alternative scenario 3(a): A is acquiring all of the stock of B's sub which holds the warehouses and trademarks in step 1. This step is exempt under 802.4. 75 days later A buys trademarks directly from B for $80 million and voting securities of another B sub for $70 million (I'm assuming that this sub does not have any exempt assets). This would be reportable and the value would be $150 million.

Alternative scenario 3(b): A is acquiring all of the voting securities of B's sub which holds the warehouses and trademarks in step 1. This step is exempt under 802.4. 75 days later A acquires all of the stock of another B sub which holds only warehouses. A also acquires trademarks directly from B for $40 million. The transaction is not reportable. The acquisition of the second sub is exempt under 802.4. The $40 million in trademarks is an asset acquisition, so it is not aggregated with the trademarks acquired in step 1 through a voting securities deal. The value of the second transaction is only $40 million, so not reportable.

Scenario 4: Agree both steps are reportable. Step 1 is valued at $160 million and Step 2 is valued at $150 million. Step 1 is reported only as a voting securities deal and Step 2 is reported as an acquisition of voting securities and assets.

Scenario 5: Because you are acquiring the stock of B and not its subsidiaries you would use the 802.4 analysis. Assuming all of US sub's assets are US assets and not otherwise exempt, the transaction would be reportable and the value would be $375 million.

If A was acquiring the stock of the three subs instead, Sub 2 and Sub 3 would be exempt under 802.51 and the value of the transaction would be $150 million.

If Sub 1 held $100 million in foreign assets with no sales into the US and $50 million of US non-exempt assets, and A was acquiring all of B's voting securities, the transaction would be exempt under 802.4. All of Sub 2 and Sub 3's assets are exempt and the $100 million of Sub 1's foreign assets are exempt. So under 802.4, B only holds $50 million in non-exempt assets and the transaction is not reportable.

BL
3/4/10