AUBURN MLS MEETING MEMO

To: Auburn Brokers/Title Officers/Lenders
From: Brigit S. Barnes, Brigit S. Barnes & Associates, Inc.
Subject: What Quantum Meruit Means in Commission or Real Property Services Disputes – Whatever the Plaintiff *Wants* it to Mean
Date: July 1, 2010

New Case: MKB Management, Inc. v. Melikian, Case No. B213479 2nd App. Dist. 2010 Cal. App. LEXIS 679, May 13, 2010

This appellate case reversed the trial court and held that an unlicensed property manager could recover payment for any actions performed which do not require a license: charging less than $500.00 per apartment for management services. Plaintiff could not collect for any portion of its management fee related to leasing the rental units, because such acts require a license under Bus. & Prof. Code §10131(b), but all non-leasing management services, repairs, maintenance, etc. could be collected under the management agreement without a license.

The appellate court confirmed that when part of a contract is lawful and part unlawful because the actor does not have a license, the lawful portions can still be enforced. The theory of recovery is called quantum meruit, law talk for the reasonable value of the services actually rendered, even if the object of the entire contract is illegal or unenforceable. However, when a plaintiff is reduced to a quantum meruit claim, what he recovers is limited to the value of his services as determined by the court, not what the contract amount was.

This same kind of theory applies to claims or disputes for payment regarding commissions which are not otherwise legitimate; for example, in claims by brokers for shares in commissions where no writing has been completed, as a sub-agent or cooperating broker. Under normal circumstances, a broker's right to a real estate commission from either principal, the seller or buyer, must be in writing, and of course the broker must be licensed [Bus. & Prof. Code §10130]. In the absence of an agreement with sub-agents, the sub-agent or cooperating broker may be able to collect a commission *if* he can show he is the procuring cause -- in other words, has produced a ready, willing, and able buyer who consummates the sale. The sub-agent, not protected by MLS or an explicit agreement with the seller or the listing agent, has to show that he had a pre-existing relationship with the purchaser or the selling agent. Simank Realty, Inc. v. DeMarco (1970) 6 Cal.App.3d 610, 617. The determination of rights to share in the commission will be a question of fact, which means that it will be resolved by the jury, not at an early stage when the costs are easier to bear.

Our office is defending just such a claim involving ranch property in Butte County, where the rancher would only execute a pocket listing for each buyer who was registered by the listing agent. In this case there is a question as to who introduced the buyer to the ranch, but the listing agent actually showed the property, wrote up the agreement, and handled 100% of the purchase transaction. The buyer instructed the agent, for business confidentiality purposes, not to provide any information about the sale, the final price, etc. to the claimed sub-agent, and then reneged on its oral promises to pay the sub-agent for his trouble. The sub-agent is now suing the listing agent for one-half of the commission paid, and refuses the offer of a finder's fee.

In this kind of case, the trier of fact, either jury or arbitrator, is forced to sift through conflicting evidence to determine:

1. Did sub-agent contribute in any real way to the eventual purchase?
2. Can sub-agent rely on any verbal statements made by either listing agent or buyer?
3. Is listing agent liable to sub-agent where buyer made decision to cut sub-agent out of deal?
4. If sub-agent is not "procuring cause" under Simank Realty, or Derish v. San Mateo-Burlingame Bd. Of Realtors (1982) 136 Cal.App.3d 534, 538, should he be paid a finder's fee?
5. If no agreement for finder's fee is established, how should the value of his services be established?

Our position is that if the sub-agent can establish a substantial relationship with buyer and efforts to introduce it to the property, a quantum meruit claim will be established. What is the value of one meeting and a phone call?

MORAL TO THE STORY:

In the case we are handling, the total commission on the ranch was over $300,000.00. The "sub-agent" is demanding one half of the commission, and rejecting the finders' fee. The broker's E&O insurance excludes commission disputes; therefore, the cost of defense is being absorbed by the broker. Unless the matter is settled, a substantial amount of the contested commission will be spent in attorney's fees for both sides, and because there is no agreement, there is no attorney's fees agreement.

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38-453SA California Forms of Pleading and Practice--Annotated Scope

California Forms of Pleading and Practice--Annotated

Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
SPECIAL ALERT TO CHAPTER 453 Status of the Federal Estate Tax, GST Tax, and Gift Tax in 2010

38-453SA California Forms of Pleading and Practice--Annotated Scope

Scope

Background:

The Economic Growth and Tax Relief Reconciliation Act (EGTRRA), enacted in 2001, provided for gradual increases in estate and gift tax exemption amounts and decreases in maximum tax rates. That law mandated repeal, only for the year 2010, of the estate tax and generation-skipping transfer tax, but not the gift tax. It was long assumed that this repeal would never be permitted--that Congress would act to either extend the law as it existed in 2009, or possibly enact a new law on a similar basis but with different exclusion and tax rates.

As late as December 2009, Congress expressed its intent to pass legislation to prevent repeal. However, Congress failed to act and, as of this writing, there is no estate tax or generation-skipping transfer (GST) tax.

EGTRRA also provided that, in **2011,** the estate tax and GST tax would be reinstated, but with only a $1 million applicable exclusion amount for each.

The estate tax applicable exclusion amount was $3.5 million per person in 2009, and the GST tax exemption was also $3.5 million. In 2010, both taxes were repealed, allowing unlimited bequests free of these taxes.

Unlike the estate and GSTs taxes, the gift tax was not repealed for 2010. The amount of lifetime gifts that may be made free from gift tax using the gift tax applicable exclusion amount (after any annual gift tax exclusion amounts) remains at $1 million in 2010, and any excess is subject to tax at the highest individual income tax rate, currently 35 percent. The maximum rate for federal estate tax and GST tax in 2009 was 45 percent. Because of the repeal, there is no estate or GST tax in 2010. In **2011,** if new legislation is not enacted, the estate tax and GST tax each will carry a maximum rate of 55 percent, and the maximum rate for gift tax will climb to 55 percent.

The annual gift tax exclusion amount permits individuals to make gifts up to that amount, per donee, without incurring gift tax or using any of their lifetime applicable exclusion amount against estate and gift tax. This exclusion remains at $13,000 per donee in 2010. Because a husband and wife may agree to combine their gifts, together they will be able to gift $26,000 to each done in 2010. The annual gift tax exclusion with respect to gifts made to non-citizen spouses is $134,000 in 2010.

Another effect of EGTRRA in 2010 was to significantly limit the step-up in basis of appreciated assets that had long been granted to the beneficiary of a decedent. In 2010, the beneficiary will receive a step-up only for the first $1.3 million of unrealized gain or appreciation. A surviving spouse will receive a step-up in the basis of acquired assets for an additional $3 million of unrealized gain or appreciation. Assets exceeding this amount take a carryover basis, thus making it much more likely for at least part of the distribution to be subject to capital gains tax. The gift tax laws have always conveyed a carryover basis; the step-up in basis for property acquired from a decedent had long been a benefit to a decedent's beneficiaries. Allocation of the stepped-up basis will be made by the executor or trustee. It is anticipated that administrative difficulties will arise, in terms of determining and reporting the basis of assets when acquired as well as their fair market value at the time of decedent's death.

Planning Ideas and Cautions:

Certain estate planning techniques require caution, in light of the unknown future of the estate and GST taxes.

One major caution concerns wills that use a formula to divide an estate between marital and by-pass trusts. If the by-pass trust is not capped, i.e., if the formula does not set a maximum funding for the by-pass trust, the portion intended for the surviving spouse may be largely or entirely depleted.

Similarly, a will that defines a charitable bequest in terms of the charitable deduction allowed under the now-repealed estate tax laws may produce unintended results.

Other techniques are still viable, whether there is an estate tax or not.

For example, a discounted and leveraged gift of a residence or second home may still be effected through a qualified personal residence trust (QPRT). The donor may reside in the home until the end of the QPRT, and may even be able to lease back the property at fair market value from the new owners.

The donor of a gift to a charitable remainder trust may retain a life payment of up to 90 percent of the value of the gifted property. The donor would receive an income tax deduction equal to the value of the gifted property not retained. There is no gain or loss recognized by the charitable remainder trust on sale of the property. Payments to the donor from the trust will be taxed partly as income, partly as capital gain; it is possible that a portion of the payments will be considered a distribution from principal and thus not taxable.

If new legislation is not enacted, the GST tax exemption will drop to $1 million in **2011.** Therefore, it might be expedient to make lifetime gifts now. Of course, if Congress acts before the end of 2010, this strategy may lose its effectiveness.

For continuing coverage of developments on Capitol Hill affecting the estate and GST taxes, please visit our FREE website, **the LexisNexis Estate Practice & Elder Law Center, at http://law.lexisnexis.com/practiceareas/Estate-Practice-Elder-Law.**

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Capital Gains Taxes and the Recovery

Long-term investments should be rewarded with lower rates.

By SCOTT DAVIS

There is no question the U.S. economy is showing encouraging signs of recovery. But the recovery is fragile, and we should not do anything that would dampen or jeopardize its momentum. Businesses and individuals should therefore take note that the country is moving inexorably toward an increase in capital gains tax rates. This increase is not being sufficiently debated in Congress but could have a major impact on economic growth, job creation and long-term investment in America.

On Jan. 1, only seven months from now, the top general capital gains tax rate is going to rise to 20% from 15% as previously enacted tax cuts expire. Many do not believe the current administration can leave the rate where it is today because of the budget deficit. But if nothing else is done, the rate will rise to nearly 24% in 2013 under the new health-reform law.

As the president and Congress consider the appropriate capital gains tax rate in connection with tax reform or efforts to reduce the deficit, they have a golden opportunity to assist small businesses and keep America competitive in global markets. How? By applying truly long-term holding periods to the application of capital gains taxes, allowing those who maintain their investments for five years or more to avoid the highest rate.

Under this approach, any individual willing to make long-term investments in public or private businesses for five or 10 years (rather than the current one year) would not face the top capital gains rate when they retired, sold their company or sold their investment. Rather, the small business owner or individual would be taxed at a lower rate to reward long-term investment. Rate steps could be established depending on the length of the investment. Whatever the specific rates, adopting the concept of lengthy holding periods would support multiple important policy goals.

The 34 million small businesses that employ 141 million Americans are the growth engine of our economy. Other U.S. taxpayers make long-term investments in public and private companies, providing the capital needed to create jobs. And yet if Congress accepts the scheduled increases in capital gains tax rates without changing other provisions, we will be imposing new costs and disincentives on those who can most directly fuel our future success. We should not penalize those who invest for long-term growth.

Even with some of the changes in consumer behavior we saw in 2008 and 2009, the U.S. is substantially behind other industrialized nations in the amount individuals save. Tax legislation that encourages holding investments for longer periods will help close the personal savings gap, thereby creating sources of capital for reinvestment, recovery and a growing economy.

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It's time to refocus this country on a long-term view of building commercial enterprises, to reinvest for the future rather than pursuing rapid, short-term profits. This perspective should apply to small and larger businesses.

UPS has focused on long-term growth for 103 years, producing a stability that leads many of our employee-shareowners to hold their stock through their entire career. This has taught us that a long-term view really does ensure better alignment between the interests of stockholders and corporate strategy, creating a foundation for generations to come.

Mr. Davis is chairman and CEO of UPS.

ARTICLES & COMMENTARY

Tax Bill Sends Wrong Message

By R. Glenn Hubbard | Politico
Friday, June 18, 2010

In the fine print of the $110 billion tax "extenders" bill that is due to come before the Senate is an obscure provision that would do three things at once: turn the tables on decades of business tax law and practice, impose a penalty on more than a million entrepreneurs and further stall the country's economic recovery.

If passed, it would single out more than 1.5 million business partnerships--mainly those that invest in real estate--for punitive and discriminatory tax treatment.

At the same time, the bill would levy a heavy penalty on the owners of these businesses--and potentially destroy billions of dollars in value created by years of hard work.

The bill would achieve all this by, for the first time, denying capital gains tax treatment to investment partnership owners when they sell their stake in the business.

Why would Congress decide to take such an unwise step at this critical moment in the economic recovery, when capital markets are still fitful and the most recent government reports show job growth sputtering?

The answer is neither clear nor simple.

Proponents of the proposal say that they are trying to prevent the owners of real estate, venture capital, private equity and other investment partnerships from evading another, equally ill-considered tax provision contained in the extenders bill.

The proposal would unfairly change the rules of the game for entrepreneurs who have struggled to build value in their businesses, by subjecting them to punitive new taxes.

The provision in question would tax as ordinary income the "carried interest" profits earned by the general partners in these ventures when they buy an asset like a building or company, increase its value over time and then sell it at a profit.

This would more than double the tax rate on carried interest profits earned by general partners.

The appropriateness of taxing carried interest as a long-term capital gain is often misunderstood. In fact, providing lower rates for carried interest produces the same behavioral responses to favorable tax treatment of dividends and capital gains.

Consider $100 of long-term capital gains income. Carried interest of 20 percent allows the swap of $20 between the manager and a tax-exempt investor.

But carried interest is not unique in producing tax savings. Suppose the manager sold bonds producing $20 of interest income, taxed at 39.6 percent in 2011--and bought stocks that produced $20 of capital gains, taxed at 20 percent in 2011.

At the same time, suppose the tax-exempt investor bought bonds and sold stocks. This portfolio reallocation results in the same tax savings (19.6 percent x $20 = $3.92) as carried interest.

The supporters of the additional carried interest tax grab believe that once the tax increase on carried interest becomes law, the general partners would sell their ownership stakes in their firms to avoid the new tax increase.

So they've decided to "fix" the problem by taxing the entire gain on the sale of shares in the investment firm as ordinary income. Not only would carried interest be taxed as ordinary income but so would any gain attributable to increases in the "enterprise value" of the business arising from brand, market share and superior performance.

This shift would make these investment partnerships the only U.S. businesses whose owners would be denied capital gains tax treatment when they sell shares in their business.

Consider two businesses, exactly alike but for the product that they sell. One is a partnership that buys, builds and sells apartment buildings. The other, a partnership that sells and services automobiles. Both are structured in the same manner, with the same ownership allocations.

But when the owner of the real estate firm decides to diversify by selling shares, he or she would pay a tax of approximately 40 percent on any gains. The owners of the auto dealership, in the same situation, pay the lower ca

The truth is that there is no valid policy reason to treat investment partnerships differently from other types of businesses when their owners decide it is time to sell a piece of the business they built.

The proposal would unfairly change the rules of the game for entrepreneurs who have struggled to build value in their businesses, by subjecting them to punitive new taxes.

It sends the wrong message to our nation's innovators. Instead of rewarding their risk-taking and hard work, we are telling them that their work is worth less than that of others.

This might also be the opening shot in a campaign to eliminate the preferential tax treatment of capital gains--at least on the sale of businesses.

Congress long ago understood the importance of capital investment and created a tax differential to reflect this. A lower capital gains rate provides a strong incentive for entrepreneurial risk-taking and higher-risk, cutting-edge investment--essential for strong economic growth.

That tax treatment--long-term capital gains--recognizes that funds are more valuable to the economy when invested in our future. There is much Congress needs to do to reform the nation's tax code. The proposal to deny capital gains tax treatment to owners of investment partnerships goes in exactly the wrong direction.

Glenn R. Hubbard is a visiting scholar at AEI.

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