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PROTECTING YOUR REGISTERED BUSINESS NAME: MANDATORY DECENNIAL FILINGS IN 2011 *by Andrew D. Clapp*

The Commonwealth of Pennsylvania maintains a registry of entity names in use by corporations and associations registered in Pennsylvania. Corporations in Pennsylvania are required to use a name that is distinguishable from these names. Pennsylvania requires that each entity with a registered name file a report every ten years to show that it still exists (i.e., a decennial filing). The next decennial filing must be made on or before December 31, 2011, unless a registered entity qualifies for an exemption.

Exemptions from the Decennial Filing Requirement

There are three ways that a registered entity may be exempt from the decennial filing requirement.

Other filing

If an entity has made any filing other than the following between January 1, 2002, and December 31, 2010, it is not required to make a decennial filing. If the only filing made within the last ten years was one of the following, this exemption does not apply:

- A prior decennial filing. A late decennial filing (i.e., one made after January 1, 2002), despite having been made within the last ten years, will not exempt an entity from the requirement to make a 2011 decennial filing.
- Reservation of name. An application to merely reserve a name within the last ten years will not exempt an entity from making a 2011 decennial filing.

Nonqualified foreign business corporation

A nonqualified foreign business corporation that has registered its name pursuant to 15 Pa. C.S. § 4131 does not need to make a decennial filing, since it is already required to renew its name annually.

Change of officers

A corporation that has submitted a change in officer information to the Department of Revenue between January 1, 2002, and December 31, 2010, does not need to make a decennial filing. This exemption only applies, however, if the Department of Revenue has forwarded the officer information to the Department of State.

Result of a Failure to File

Effective as of January 1, 2012, the name of each entity that was required to make a decennial filing and has failed to do so will be deemed to be no longer registered. As a result, until a filing is made, those names will be available for any other company or association to register. While late filings are permitted, an entity may reinstate registration of its name with a late filing only if another company or association did not register that name in the interim.

Procedure for the Decennial Filing

If your company is required to make a decennial filing in 2011, you should receive a notice from the Department of State by mail at your registered address. The Department of State is required to provide notice on or after November 1, 2010, to each entity that is required to make a decennial filing. However, each entity that is not subject to

continued on back page

IN THIS ISSUE

A Lesson On Renewable Contracts....page 2
Important Change In Rules For Bank Qualified Tax-Exempt Obligations.....page 2
Tax Considerations In Foreign Joint Ventures....page 3

A LESSON ON RENEWABLE CONTRACTS *by Kathy Pandelidis Granbois*

For some companies, keeping track of all of their contracts can be a difficult task, particularly in today's economic climate when fewer employees are available to help shoulder the burden. While all contract provisions are important, some of those provisions, such as the expiration/termination provisions, need special attention. Some contracts are automatically renewed unless one party provides notice within a certain period of time before expiration. Other contracts require express action by one or both of the parties in order to renew. A recent federal case in the Eastern District of Pennsylvania highlights the unanticipated consequences associated with the failure to renew a contract.

In *Tinder Box International, Ltd., v. Patterson*, the court was faced with two parties, neither of whom was aware that their franchise agreement had expired. For approximately five months after the expiration, the parties continued their franchisor-franchisee relationship. Once the oversight was discovered, the franchisor offered to renew the agreement, but the franchisee declined. Eight months later, the franchisor filed a lawsuit, alleging, among other things, a violation of the one year non-compete provision contained in the franchise agreement.

The court ruled that the franchise agreement had not been implicitly renewed. The court acknowledged the general principle that when parties maintain their business relationship after a contract lapses, the provisions of the expired contract continue to govern the relationship. However, the court noted that the principle only applies in the absence of evidence that the parties intended a different result. In examining the evidence, the court found it persuasive that the contract stated that it could only be amended by written agreement and that the contract "anticipated its own expiration" by imposing obligations upon expiration, including the non-compete provision.

As a result, the franchisee was permitted to walk away from the contract and, perhaps most damaging to the franchisor, the court barred the franchisor's breach of contract claims (including the breach of the non-compete clause) ruling that the contract's one year limitation period on claims had begun to run from the date the contract's stated term expired. Perhaps not surprisingly, the court showed little sympathy to the franchisor's argument that the neglect of its employees should prevent the limitation period from running. Instead, the court decided that the franchisor, as a corporate entity, had "imputed" knowledge of the contract's terms when it was signed by the company's president. Furthermore, the court was influenced by the fact that the franchisor had at least three employees that were involved in administering its franchise agreements.

This case highlights the prudence of a reliable docketing system for companies to stay abreast of their contract terms, so as to avoid unintended results. It also shows the importance of negotiating the expiration/termination provisions carefully. If the contract is one that is vital to your company's future, consider requiring affirmative action of some sort before permitting the agreement to expire. ■

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IMPORTANT CHANGE IN RULES FOR BANK QUALIFIED TAX-EXEMPT OBLIGATIONS

by Daniel J. Malpezzi

As part of the American Recovery and Reinvestment Act of 2009 (ARRA), Congress provided important, but temporary, modifications to the "bank qualified" rules that greatly expanded the ability of banks and other financial institutions to make loans to nonprofit organizations and governmental entities.

Under the Internal Revenue Code, financial institutions that acquire tax-exempt bonds or notes are subject to loss of a corresponding deduction for its interest carry expense unless the subject bonds or notes are designated as "qualified tax-exempt obligations" under Section 265(b)(2)(B) of the Code. If so designated and qualified, a financial institution is subject to only a 20% loss of its allocated interest deduction, the so-called "TEFRA penalty." Prior to the ARRA liberalization, an issuer could only designate a bond or note as a "qualified tax-exempt obligation" if (i) the bond or note was not a private activity bond other than a qualified 501(c)(3) bond, (ii) the issuer reasonably anticipated that it would not issue more than $10 million in tax-exempt bonds (other than non 501(c)(3) private activity bonds) in the calendar year in which the bond or note was issued and (iii) the issuer did not designate more than $10 million of bonds or notes as qualified tax-exempt obligations in that calendar year. Certain special rules apply for purposes of aggregating related issuers and dealing with refunding bonds and composite issues (i.e., issues for more than one purpose, such as a partial refunding and partial new money issue).

ARRA significantly expanded these bank-qualified limitations for obligations issued in calendar year 2009 and 2010 by (i) increasing the ceiling on the $10 million limits described above to $30 million and (ii) allowing the conduit 501(c)(3) borrower or governmental entity (if

TAX CONSIDERATIONS IN FOREIGN JOINT VENTURES *by Timothy M. Finnerty and Julia P. Coelho*

When looking to expand business into foreign markets, U.S. based companies often times compare the benefits of partnering with a foreign partner that is already established in the jurisdiction versus starting a new entity and navigating the business, legal and tax uncertainties of the new jurisdiction on their own. For a variety of reasons, joint ventures have become increasingly popular as a means of penetrating foreign markets, because they offer many advantages over going at it alone in a foreign country, including easier access to foreign markets, sharing of financial risks with the foreign joint venture partner and reduction of the costs of doing business abroad, to name a few. However, there are important business and tax implications that U.S. based companies should be aware of before selecting this business model.

A typical structure for a foreign joint venture entails the transfer of intellectual property to the foreign joint venture in exchange for stock of the venture. Such an exchange between a U.S. individual and a U.S. corporation would generally receive tax-free treatment. In the international arena, however, the same transaction can have very different and adverse tax consequences to the U.S. venturer due to the application of an often overlooked section of the Internal Revenue Code (IRC), §367(d).

Under Section 367(d) of the IRC, if a U.S. corporation transfers intangible property to a foreign venture in the typical structure described above, the U.S. corporation will generally be treated as having sold the intangible asset to the foreign venture in exchange for annual payments that are contingent on the productivity, use or disposition of the intangible asset by the foreign venture. The U.S. venturer is deemed to have received such annual payments (also known as "deemed royalty"), whether or not they were actually received. This deemed royalty accrues throughout the useful life of the intangible asset (not to exceed 20 years) and must be recognized by the U.S. venturer as ordinary U.S. source income.

Despite this unfavorable tax treatment, it is often possible to structure the foreign joint venture so that the transfer of the intangible asset to the foreign venture falls outside the statutory framework of IRC §367(d). The particular tax and business needs of the U.S. venturer doing business abroad should be carefully considered before selecting the best course of action. If you are considering expanding your business in this manner, contact us so that we can help you avoid this often overlooked trap for the unwary. ■

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different from the actual issuer) to be treated as the "issuer" for purposes of the bank-qualified rules so that the expanded $30 million limits could be measured "by borrower" and not "by issuer." ARRA also created a safe harbor basket of tax-exempt bonds or notes that could be held by financial institutions in an amount up to 2% of their assets having the same tax effect as designated bank-qualified bonds. These changes greatly increased the capacity of a single issuer to issue, and ability of financial institutions to acquire and fund, bank-qualified tax-exempt obligations.

Regrettably, Congress failed to include in the year-end tax bill that was signed by President Obama on December 17, 2010 an extension of these special bank-qualified rules, including the 2% safe harbor, beyond December 31, 2010. Consequently, tax-exempt obligations that are issued after that date are once again subject to pre-ARRA rules and limitations.

Other key provisions of ARRA that were similarly not extended beyond calendar year 2010 include (i) direct-pay and tax-credit Build America Bonds, (ii) Recovery Zone Economic Development Bonds, (iii) Recovery Zone Facility Bonds, (iv) the temporary special rules regarding exclusion of interest on private activity bonds from treatment as a preference item for purposes of the alternative minimum tax and (v) the temporary special rules exempting interest on certain tax-exempt bonds from "adjusted current earnings" of corporations for alternative minimum tax purposes. ■

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PROTECTING YOUR REGISTERED BUSINESS NAME: MANDATORY DECENNIAL FILINGS IN 2011 continued from page 1

an exemption is required to make the filing, regardless of whether a notice is received.

The decennial report is available both as an enclosure to the Department of State notice and on the Department of State web site within the Forms section. The report requires the name of the entity and its registered address. The filing fee is $70.

If you have received a decennial filing notice, or if you are unsure whether you qualify for an exemption, we can assist you in determining whether a report is required and making a timely filing. ■

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