Lum, Drasco & Positan, LLC
ATTORNEYS AT LAW SINCE 1870

Lum Law Notes
Business Law Alert
May 2018

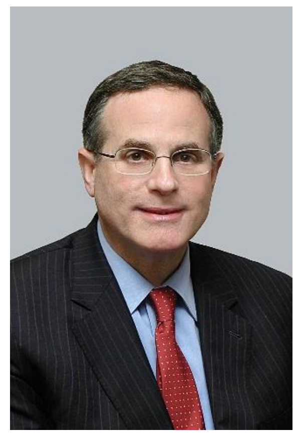
Lum, Drasco & Positan LLC

Attorneys At Law Since 1870

- **Involved in the Sale or Transfer of a Business or Business Assets? Don't Overlook the New Jersey Bulk Sale Law!**
- **Choice of Entity Under the New Tax Law**
- **The Importance of Updating Beneficiary Designations**

Involved in the Sale or Transfer of a Business or Business Assets? Don't Overlook the New Jersey Bulk Sale Law!

By Jack P. Baron



Parties to a transaction involving the bulk sale or transfer of all or any business assets, particularly purchasers, should be mindful of compliance with the New Jersey Bulk Sale Law ("Bulk Sale Law" or the "Act"), which applies to "transactions involving the sale, transfer or assignment in bulk of business assets, other than in the ordinary course of business." N.J.S.A. 54:50-38.

Business assets may include tangible property, such as equipment, inventory or materials; real property, such as land and buildings; and intangible assets, such as patents, licenses and trademarks. The sale of a one or two family home owned by an individual, estate or trust is exempt from the Bulk Sale Law.

Of particular importance, the Act provides that a purchaser who fails to comply with the Act's prescribed notice and escrow provisions shall be personally liable for the payment to the State for any taxes then or thereafter determined by the State to be due from the seller. N.J.S.A. 54:50-38(c). Simply stated, if the purchaser fails to comply with the Act's notice and escrow provisions, the purchaser is exposed to "inheriting" the seller's tax liabilities, including delinquencies for unpaid prior taxes.

The primary purpose of the Bulk Sale Law is twofold. One is to insure that the State of New Jersey – Division of Taxation (the "Division") receives prior notice of the transaction to enable the Division to examine the seller's tax records. The second is to establish an escrow from the proceeds of sale for the payment of the seller's tax obligations, including outstanding tax deficiencies, such as sales, payroll, and income taxes, and taxes arising from the underlying transaction.

How do the purchaser and seller comply, in a transaction subject to the Bulk sale Law with the Bulk Sale Law?

(a) The purchaser must inform the State about the transaction by submitting to the Bulk Sale Unit of the Division of Taxation, a Form C-9600 ("Notification of Sale, Transfer, or Assignment in Bulk") not less than ten business days prior to the sale. The Form C-9600 requires information about the purchaser, the seller, and details of the underlying transaction, including a copy of the executed contract. Following receipt of Form C-9600, the Bulk Sale Unit will provide an escrow letter to the purchaser (with a copy to the seller), informing the amount of money to be held in escrow at the time of closing. The Bulk Sale Unit also will provide a returns required letter to the seller, informing which tax returns must be filed, and taxes and fees paid to obtain clearance.

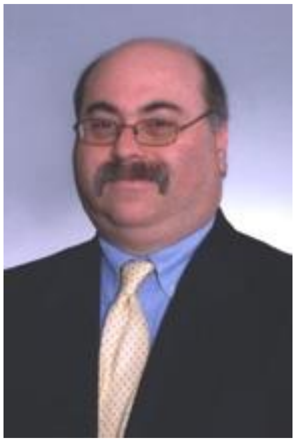
(b) The seller may submit to the Bulk Sale Unit Form TTD ("Asset Transfer Tax Declaration"). The submission typically is made directly with the Bulk Sale Unit after the purchaser has filed its C-9600 and a caseworker has been assigned, or by the Seller providing the Form TTD to the purchaser for submission with the C-9600. The seller is also required to respond to the Bulk Sale Unit regarding any issues raised in the returns required letter.

At closing, any amount owed by the seller to the State will be disbursed to the State from the escrow. After all of seller's New Jersey tax returns have been filed and all New Jersey state taxes are paid, the Bulk Sale Unit will issue a Clearance Letter to the purchaser's counsel authorizing release of the balance of the escrow to the seller.

Given the potential exposure a purchaser might incur for non-compliance with the Bulk Sale Law, it is imperative that the underlying contract properly address compliance with the Bulk Sale Law, including the parties' filing responsibilities, escrow of sale proceeds and disbursement therefrom, and seller indemnifying purchaser for seller's tax obligations. Purchasers and sellers are well advised to consult with their tax attorney in navigating the requirements and nuances of the Bulk Sale Law.

Choice of Entity Under the New Tax Law

By Steven J. Eisenstein



Among the most notable provisions of the 2017 Tax Cuts and Jobs Act was the lowering of the corporate tax rate from 35% to 21%. This tax cut for "C" corporations, unlike for individuals, has no expiration date and has many people considering whether to incorporate as part of their business planning. The easy answer to this question is "it depends".

Businesses may be operated in a number of ways. Common forms of business ownership include corporations, partnerships, limited liability companies and sole proprietorships. Corporations can be either "C" corporations which pay a separate corporate tax or "S" corporations which, as a general rule, do not pay a separate corporate tax but have income that flows through directly to the owner. Each form has its own legal and tax characteristics and the choice of which to use is an essential consideration when starting a new business. While "C" corporations have fallen out of favor for small businesses in the last few years, the 2017 Tax Act requires that they be reexamined.

Like many business decisions, most people look at a choice of entity determination on the basis of their expected return on investment. Tax liability can significantly affect the return on investment and push companies into their choice of entity. The 21% tax rate of "C" corporations sounds attractive at first glance but, of course, the choice is far more complicated.

Among the many factors to consider in choosing whether a “C” corporation is the best vehicle for your business are such things as (a) anticipated time of ownership including ultimate exit strategy; (b) methods of capitalization of the business; (c) accounting method concerns; (d) special allocations of income and loss among the participants; (e) the character of investors such as investment by entities and by foreign nationals; (f) the nature of equipment and machinery involved including special depreciation rules; (g) compliance costs and several others.

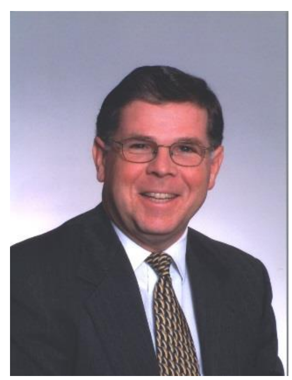
In its simplest terms, the Tax Act replaces the graduated corporate tax rates with a flat rate of 21% when compared to the top marginal rate for individuals of 37%. However, what must be kept in mind is that the 21% corporate rate is what the “C” corporation pays. When income is distributed as a dividend to an owner, that distribution is taxed to the recipient separately. If 100% of the profits of a “C” corporation are distributed, the combination of the corporate rate and the individual tax rate would approach 40%. Distributing only a portion of the profits as dividends would lower the overall tax rate accordingly but would deprive the owner of the dividend income.

Pass through entities, on the other hand, may enjoy a 20% deduction under the new Tax Act for qualified business income though that will vary for professional service companies which have limitations on the deduction at higher income levels and some complex rules regarding the amount of wages paid by the company.

The bottom line for any business owner contemplating a choice is that it is not a decision to be taken lightly. It is imperative that professional advice is obtained from your accountant and tax lawyer to guide you through the decision-making process based upon your own personal situation which can vary greatly from individual to individual and company to company.

The Importance of Updating Beneficiary Designations

By Kevin F. Murphy



A tremendous amount of wealth passes at death by way of beneficiary designations. When completing a beneficiary designation, you want to know with certainty that the people or organizations that you intend to benefit receive the life insurance proceeds or the retirement plan distribution and it does not end up in the hands of unintended beneficiaries.

Oftentimes people complete a beneficiary designation form and move on, maybe even forgetting to update the designation after getting married, divorced or having children.

In the divorce context, this can be problematic. A couple gets married and designate each other as beneficiaries and afterwards divorce but neglect to update their respective beneficiary designation. Fortunately N.J.S.A. 3B:3-14 provides that a divorce revokes any revocable dispositions made by a divorced individual to his or her former spouse in a governing instrument (which includes a life insurance policy), except as otherwise expressly provided.

However, ERISA preempts N.J.S.A. 3B:3-14. For example, the United States Supreme Court in *Kennedy v. Plan Administrator for Dupont Savings and Investment Plan, et al.;* found that where an employee failed to change the beneficiary of his employer related retirement plan subsequent to the entry of a Final Judgment of Divorce, despite the clear terms of a Judgment of Divorce or Agreement between the parties, the Plan Administrator must divide the retirement asset in accord with the Plan documents, i.e. to whom the plan participant designated.

In this matter, the parties had been divorced for several years. In their Agreement, the former Mrs. Kennedy waived her interest in Mr. Kennedy's Savings and Investment Plan. After the divorce was finalized, Mr. Kennedy failed to change the beneficiary designation of this Plan to someone other than his former spouse. Upon his death, his Plan benefits were paid to Mrs. Kennedy. His estate requested that the funds be distributed to them but the Plan Administrator, relying on Mr. Kennedy's designation form and the Plan documents, would not do so.

The matter was litigated up to the Supreme Court which found that Mrs. Kennedy did not waive or assign her interest in the Plan despite the terms of the Agreement between the ex-spouses.

A flawed designation can also have adverse income tax consequences. If an individual is named as a beneficiary of a IRA or qualified retirement plan, he or she has the ability to stretch the distributions over his or her respective lifetime. However, if an estate is designated as the beneficiary, this will cause the required minimum distributions to be accelerated and taxed at the higher marginal income tax rates applicable to estates.

So, do you know who's listed on the beneficiary form for your IRA, life insurance policy or qualified retirement plan? It's possible that it's not who you think or want it to be.

One's failure to review his or her beneficiary designations regularly can lead to unintended results and costly litigation.

To discuss any of the above, please contact any of our Business attorneys:

Jack P. Baron	(973) 228-6781	jbaron@lumlaw.com
Edward M. Callahan, Jr.	(973) 228-6748	ecallahan@lumlaw.com
Elaine R. Cedrone	(973) 228-6778	ecedrone@lumlaw.com
Philip L. Chapman	(973) 228-6786	pchapman@lumlaw.com
Steven J. Eisenstein	(973) 228-6815	seisenstein@lumlaw.com
Kevin F. Murphy	(973) 228-6777	kmurphy@lumlaw.com
Dennis J. Smith	(973) 228-6755	dsmith@lumlaw.com

Tel: (973) 403-9000 | Fax: (973) 403-9021
www.lumlaw.com