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**From:**

**Sent:** Friday, July 12, 2013 10:31:25 AM

**To:**

**Cc:**

**Subject:**

here are some initial reactions to the case. Please let us know if you would like to discuss.

As you may know, Rev. Proc. 93-27, as clarified by Rev. Proc. 2001-43, provides guidance on the treatment of profits interests. Proposed regs under section 83 (and related Notice 2005-43) regarding profits interests were released in 2005, but they will only be effective for transfers on or after the date the final regs are published.

As background, RP 93-27 provides that if a person receives a profits interest for providing services to or for the benefit of a partnership in a partner capacity or in anticipation of becoming a partner, the receipt of the interest is not a taxable event for the partner or the partnership. This safe harbor does not apply if (1) the profits interest relates to a substantially certain and predictable stream of income from partnership assets, (2) within two years after receipt, the partner disposes of the profits interest or (3) the profits interest is an interest in a "publicly-traded partnership." Also, presumably, if services are performed in someone's capacity as an employee and not in his partner capacity, the safe harbor does not apply. Some of the case law predating RP 93-27 taxed compensatory transfers of profits interests, and whether the individual recipient was acting in his capacity as a partner appears to have been part of the analysis.

RP 2001-43 clarifies 93-27, providing that the determination under 93-27 of whether an interest granted to a service provider is a profits interest is, under certain circumstances, tested at the time the interest is granted, even if, at that time, the interest is substantially nonvested. Accordingly, where a partnership grants a profits interest to a service provider in a transaction meeting the requirements of Rev. Proc. 2001-43 and Rev. Proc.-93-27, neither the grant of the interest nor the event that causes the interest to become substantially vested is a taxable event. RP 2001-43 also provides that "[t]axpayers to which this revenue procedure applies need not file an election under section 83(b) of the Code" in order to be treated as having received the interest.

The proposed regulations released in 2005 provide that a partnership interest is property within the meaning of 83 and that the transfer of a partnership interest in connection with the performance of services is subject to 83. Also, if a partnership interest is transferred in connection with the performance of services, and if an election under 83(b) is not made, then the holder of the interest would not be treated as a partner until the interest becomes substantially vested. (Contrary to RP 2001-43, under which the recipient of an unvested partnership profits interest can be treated as a partner, even if no 83(b) election is made, provided that certain conditions are met.) Also, the FMV of partnership interests will be based on liquidation value. Note that this guidance has not been finalized, so taxpayers can still rely on RP 93-27 and RP 2001-43.

Therefore, the first question is whether the safe harbor of RP 93-27 and RP 2001-43 applies. This is a question for [redacted]. If the safe harbor applies, then there is no issue for [redacted]. However, there are some facts suggesting the safe harbor may not apply, such as the exchange for the A units (possibly a disposition within 2 years), whether the partnership interest was received in a partner capacity (the interest may have been received in an employee capacity), and whether the partnership interest was in return for a predictable stream of income.

If the safe harbor does not apply, then the question would be whether the interest in the LLC (partnership) is a bona fide partnership interest. If the other entities are just funneling cash to this entity based on the results of their activities, this doesn't seem like a bona fide partnership. This again, however, is a question for [redacted]. [redacted] may look into whether the anti-abuse provision in the partnership regs (1.701-2(e)) is applicable here. If it is a bona fide partnership, then there is a section 83 transfer, and we'd have to look at whether the employees paid FMV. If it is not a bona fide partnership interest, we'd have to look at whether there are 409A concerns.

So at this point, we need [redacted] to make the initial determinations. Do you know who in [redacted] has been assigned to assist the [redacted] attorney? If so, we can coordinate with the [redacted] attorney.