Byrle Abbin's
Comprehensive Quality Control FLP Checklist

Author: Byrle M. Abbin

We don't know how long the advantageous tax treatment of FLPs will last.

What we do know is that with the significant deficits we are facing, we may have a very limited window of opportunity – and that it is important not to squander that by failing to create or operate an FLP properly.

You will find some inconsistency and overlap as a result of the judges' statements and actions. Note also that the results have changed over time. For instance, the simultaneous FLP formation and gift now has been overcome by Judge Halpern's seven day hiatus rule.

EXECUTIVE SUMMARY: LISI is very pleased to present a customized version of Byrle Abbin's comprehensive FLP checklist approach. Byrle created this checklist in direct response to the trend of recent valuation decisions and IRS attitudes. He's updated it for **LISI**.

CHECKLIST - PART I - FORMATION OF FAMILY LIMITED PARTNERSHIPS

A. PROBLEMS THAT ARE CREATED – THE 39 "POT HOLES"

1. Have we used the proper timing and sequence in funding the partnership?[i]

2. Did the sole or main transferor place nearly all of the assets he/she owned into the partnership, including a personal residence?[ii]

3. Was the sole asset contributed to the FLP a personal residence?[iii]

4. Was the transaction promoted [e.g. The Fortress Group] on a flat fee basis through a "package" which included standardized documents?[iv]

5. Did the FLP creator/asset transferor retain (as sole or majority general partner) excessive powers over the operation of the FLP, including distributions to partners?[v]

6. Was documentation and recordation of transfer of FLP interests delayed for an unreasonable period of time?[vi]

7. Was the transaction integrated through simultaneous transfers by the founding partner to fund the FLP and to make gifts of partnership interests to donees?[vii]

8. Did the transferor, acting as a limited partner under the partnership agreement, have sufficient partnership interest to control, remove and/or replace the general partner, so s(he) is deemed to be in control of the partnership?[viii]

9. Was the FLP formed and funded when the transferor was very elderly and/or in extremely poor health or terminally ill?[ix]

10. Was a "Procter" type valuation adjustment clause utilized?[x]

11. Was a defined valuation [stated in dollars] clause used, in a form that is a derivative of that applied to marital deductions, disclaimers [i.e., excess value passes to charity]?[xi]

12. Was there a lack of an independent trustee?[xii]

13. Did the Partnership [or LLC membership] agreement provide powers that may be considered to vitiate the fiduciary responsibilities of general partner?[xiii]

14. Was no expert independent appraisal obtained? Was a "cheap and dirty" type used to file transfer tax returns, with a plan to obtain a "real good one" if and when challenged?[xiv]

15. Was there an insufficient segregation of management and administration of FLP assets from powers/rights retained by Donor?[xv]

16. If the FLP structure establishes "frozen value" interests, was sufficient attention given to the rate of return required for "frozen" interests?

17. Do FLP's and related estate planning documents indicate that the needs of the FLPs creator have first call on the entire income of and distributions from the FLPs?[xvi]

18. Did transferor retain use of family residence?[xvii]

19. Do written and/or oral statements by main movers in the formation of FLPs and related estate planning, who were transferor's guardian and children, indicate that there is an implied agreement that the creator of the FLPs is entitled to enjoy all of the income?[xviii]

20. Is there an agreement (expressed *or* implied) that the FLP creator can enjoy the partnership's sole asset, a personal residence, for life?[xix]

21. Were investment funds in partnership, as retained, assets illiquid?[xx]

22. Did gift of FLP interests record Trust as done? Is there a trust document? Was the document executed by an independent trustee.[xxi]

23. Was the partnership funded solely by the senior generation and solely with portfolio assets?[xxii]

24. Was the partnership funded solely with a personal [i.e., non-business or investment] asset, creator's residence?[xxiii]

25. Were no non-tax reasons evident or stated by taxpayer at Tax Court or upon appeal so no business purpose existed?[xxiv]

26. Was "practical" control retained through FLP creator, solely with limited partnership interests, because he did not take steps to redeem company stock owned by LLC and the LLC units held by FLP, so there was absence of asset management?[xxv]

27. Was control retained by creator as CEO/board member to transform FLP's illiquid asset into a liquid asset?[xxvi]

28. Was control retained through FLP creator's power to decide if FLP's major asset should be transformed into a liquid asset; was prior control over the operating company that is now owned by an LLC he formed not altered by formation of FLP with LLC units?[xxvii]

29. Were there no business activities conducted by the FLP such as asset diversification, asset management, so the FLP formation was a mere recycling of assets?[xxviii]

30. Was the stated purpose for the FLP's formation to save estate tax while allowing the creator to enjoy the use of her personal residence for life (or use the income and principal from the transferred assets?)[xxix]

31. No bona fide sale for adequate and full consideration as the only purpose of the FLP was to reduce estate tax?[xxx]

32. Was there a transfer of significant majority interest in the LLC to an FLP where creator retained a 99% interest – which indicates he did not really alter his control of the LLC units?[xxxi]

33. If the FLP is a second tier entity wrapper, owning LLC units of LLC that owned the stock of the operating company, will it provide any extra creditor protection not already existing in the LLC? (and therefore not function as a protection against creditors – eliminating that non-tax justification?[xxxii] [Is this just an application of the smell test regarding multiple entity discounts?]

34. Is the entity lacking a profit motive if the partnership's sole asset was a residence that was not leased to the occupier, the FLP creator, at fair rental?[xxxiii]

35. Was the FLP formed by a family member under power of attorney?[xxxiv]

36. Was there no independent counsel for various family members who became GPs or received LP interests?[xxxv]

37. Surviving spouse's marital fund did not receive assets from husband's estate, so she had no legal title to transfer to limited partnership.[xxxvi]

38. If the transfer was made in exchange for a private annuity; did the obligors have sufficient funds to discharge the requisite annuity payment obligation?[xxxvii]

39. Do the documents evidence significant drafting errors/ inconsistencies?[xxxviii]

B. POSITIVE FACTORS, ACTION STEPS TO BE TAKEN

- Did we record business and other tax and non-tax reasons leading to FLP formation, other than transfer tax valuation discounting?[xxxix]

- Did we provide sufficient time from formation of LP to effect title transfers, recordation before additional actions are taken? e.g., gifts.[xl]

- Did we provide record of contentious sibling relationships, need to segregate assets by child and for asset protection?[xli]

- Do all parties involved, parents and children, have their *own* legal and financial counsel and a settlement agreement was involved as part of the intra-family negotiations that led up to the formation of FLPs?[xlii]

- Even though originally sourced as gifts from the parents, have children funded the new FLPs with significant amount of their own assets?[xliii]

- Prior to FLP formation, were accountant and financial advisors involved in computing FLP creators' needs for standard of living and related requirements, to determine how much of their wealth should be *retained* in their direct ownership? Were only *excess* amounts transferred to the new FLPs?[xliv]

- Was substance in the partnerships proved through asset protection needed to thwart additional intra-family litigation? Was cohesive asset management effected through the partnerships? Was bona fide consideration received?[xlv]

- Was business purpose shown?[xlvi]

- Was the sale bona fide?[xlvii]

- Is one legitimate and significant non-tax reason sufficient to create a bona fide sale?[xlviii]

- Did we document that maintaining single stock portfolio intact [buy and hold] is and has been a dominant investment philosophy that represents a legitimate and significant non-tax reason for formation of entity?[xlix]

- When trusts FBO generations 2/3 are co-contributors to an entity with G1, did this transaction involve independent trustee in review and approval of arrangement. Schutt v. Comm'r
- Were significant sums held outside of DBT entity to provide for lifestyle needs?[l]

- Did generations 2 and 3 contribute through trusts over half [53%] of entity; joint funding with senior generation?[li]

- Was a defined value [dollar] clause to fix value on transfers used, especially if charity is the final 'tranche' that is to receive in dollar value of FLP interests for any amount left over after prior dollar transfers of interests are effected?[lii]

- Was there joint management of family assets by the partnership?[liii]

- Was there joint pooling of investment assets to attain special investment opportunities that require minimum size-derivatives, hedging and other riskier investments? [liv]

- Did the parties provide a mechanism for a pro rata sharing of investment return: growth and income?[lv]

- Was there a recordation of, and *actual* participation by all family members, G1, G2s and investment advisors and legal counsel in annual investment retreat?[lvi]

- Did State law and/or documents require that all distribution and termination decisions re the partnership be accomplished in a fiduciary capacity?[lvii]

- Did appraiser for taxpayer reflect trading discounts that related to FLP interests as traded on the secondary market?[lviii]

- Were different factors applied for discount *pertinent* to real estate?[lix]

- Was the time interval between FLP formation and gifts of FLP units at least one week?[lx]

PART II - OPERATION OF THE FLP

A. Actions Taken That Generated Judge's Attention [or Overlooked] During Administration Of FLP

- Were required state filings accomplished (timely)?[lxi]

- Were a separate set of books and records maintained?[lxii]

- Were there *separate* bank accounts for the partnership and the transferor partner(s), i.e., was there a co-mingling of funds?[lxiii]

- Were disproportionate distributions made between partners [usually distributions primarily were made to senior generation FLP creator][lxiv]

    - To pay for personal living costs?
    - To pay for special medical needs, including nursing homes?
    - To make annual donee exclusion gifts and/or loans to family members?
    - Indirect distribution from rent free use of residence or free use of other personal property transferred to the FLP?

- Was actual management of assets entitled in the partnership from transfers continued outside of the partnership entity by the transferor?[lxv]

- Was donee charitable partner redeemed soon after FLP formation based upon a "call" right set forth in the partnership agreement? (Did donee have independent appraisal to support redemption price?)[lxvi]

- Did FLP creator retain indirect control of partnership through size of LP interest retained, that under partnership agreement allows implicit control through veto power and powers of removal or replacement of general partner [GP]?[lxvii]

- Subsequent to FLP creation, did sole or major partnership interest holder make little or no transfers of FLP interests?[lxviii]

- Was Partnership [and/or LLC] administered more like a trust than a business entity?[lxix]

- Was there a lack of regular meetings of partners [and/or LLC members] and recordation through minutes of discussions of operating factors and decisions made?[lxx]

- Did Partnership fail to compensate Donor for services rendered to it?

- Was there a failure to make required distributions to "frozen" partnership interest?

- Was the GP that in name only with most management decisions made by limited partners?[lxxi]

- Was the trustee-donee ignored in reporting K-1 share of income with such amounts directly reported by the individual beneficiaries on their U.S. Individual Income Tax Return?[lxxii] Were mistakes made in reporting accurate information on Form 1065 K-1s and balance sheet?[lxxiii]

- Were there were no lifetime gifts except for small transfers to a QTIP?[lxxiv]

- Was there a lack of adequate fair rental payments? Were there late rental payments? Did other partners make funding contributions?[lxxv]

- Was sole asset of partnership personal residence of creator?[lxxvi]

- Was house sold by partnership to one G2 soon after creator died?[lxxvii]

- Was interest of decedent/founder of FLP redeemed soon after her death?[lxxviii]

- Did Partnership make loans to estate of major entity creator to provide for estate taxes and expenses of administration?[lxxix]

- Did Husband's estate make transfers to marital fund, so it could not fund LP on behalf of the widow?[lxxx]

- Did the chosen investment advisor not receive transfer of assets, mainly stocks, that were not retitled in LP or the investment advisor?[lxxxi]

- Did Taxpayer's appraiser fail to back up conclusions with sufficient corroborating evidence? Did appraiser differentiate from government's expert based upon actual secondary market valuation for resale of limited partnership interest? Use investment banker?[lxxxii]

PART III - SOME 'BIG PICTURE' CONSIDERATIONS, OFTEN OF PERCEPTION OR COSMETICS OR PRACTICAL

A. NEGATIVE ASPECTS

- Is size of FLP: $1,000,000 too small an amount to warrant the transaction costs: appraisals, attorney for planning and drafting, an accountant for annual return filings and often as a planning participant?[lxxxiii]

- Was FLP concept promoted by "product marketer"? (E.g. Two Tax Court decisions noted in the opening paragraph of the opinion the fact that the transaction package involved a financial planner, The Fortress Group.)[lxxxiv]

- Is the creator of the FLP at an extreme age? (E.g. in several cases where the taxpayer lost, a number were in their 80s, one was 96!).[lxxxv]

- Does the FLP creator lack (due perhaps to age and/ or physical or mental impairment) ability to act on his/her own in evaluating and effectuating such transactions?[lxxxvi]

- Is partnership unwound soon after death of FLP creator? Is partnership a major source (through disproportionate distributions) of funds to pay estate administrative expenses and estate tax liabilities?[lxxxvii]

- Was FLP formation accomplished by an agent of the creator (who at that time is so physically or mentally impaired that he/she could not accomplish it without the

intercession of one with a durable power of attorney, a trustee of a revocable trust that holds title to the assets, etc or was suicidal and died soon after FLP formed)?[lxxxviii]

- Does evidence (hard copy or e-mail) suggest that the sole [or predominate] purpose of the FLP is to save taxes and not to change any other important facet of ownership?[lxxxix]

- Does statement by counsel indicating primary, if not sole purpose, was to reduce estate tax liability?[xc]

- Did planners and the general partner(s) wait until IRS examines, or Tax Court docketing, before engaging an expert to provide a top-flight appraisal?

- Does FLP's creator have Alzheimer's disease, or terminal illness and estate planning and FLP documents indicate that his/her needs were primary? Does a "call" exist on all of the FLP income?[xci]

- Do statements by the guardian and decedent's children indicate that at a minimum there was an implied agreement that all of the income of the FLP is available to the decedent who created the FLPs?[xcii]

- Is the FLP funding solely comprised of "portfolio" assets with no other type of assets requiring significant management being transferred?[xciii]

- Did no other family member(s) make any or significant funding transfers to the FLPs?[xciv]

- Is FLP information reporting of income on K-1 directly reflected in beneficiaries' individual income tax return (ignoring trust donee status)?[xcv] Was erroneous information set forth on partnership K-1s and tax return balance sheet?[xcvi]

- Did FLP founder/transferor of funding assets provide "evasive" testimony, indicative of lack of understanding of mechanics of the FLP formation and gifts of partnership interests and non-tax reasons for the formation and use of the FLP?[xcvii]

B. POSITIVE ACTION/STEPS THAT SHOULD BE TAKEN

- Were regular meetings of partners, LLC member held and documented through minutes?

- Were separate bank accounts and books and records maintained?[xcviii]

- Were all distributions "proportionate"?[xcix]

- Did donor/transferor sever control over Partnership asset management/ distributions when he/she is only LP? Does he/she have no power to remove, replace GP?

- Is partnership managed as business investment entity?[c]

- Do trading discounts relate to actual trading in real estate LPs? [ci]

PART IV - CIRCUIT COURTS AND TAX COURT NOW SET OUT CONFLICTING DEFINITIONS OF 'BONA FIDE SALE FOR ADEQUATE AND FULL CONSIDERATION'

A. KIMBELL (5TH CIR.) INTERPRETATION OF BONA FIDE SALE FOR ADEQUATE AND FULL CONSIDERATION

- Arms length bargaining is not based upon a third party willing seller-buyer approach, but serious, business-like intra family negotiations

- Bona Fide Sale relates to objective factors at inception such as each contributor to the partnership receiving a proportionate interest that is credited to their capital account in exchange for assets transferred to the partnership, not subjective conclusory attitude that intra family transactions cannot be bona fide, even though they dictate close scrutiny to avoid designation as a sham or imputed gift.

- A de minimis partnership interest is not a requirement: what is important is that transferor part with personal assets for a FLP interest.

- Adequate and full consideration involves transfer of assets for a FLP interest that does not deplete the transferor's estate: discounting in value does not connote lack of consideration or depletion of the estate, since intangible long term factors need to be reflected in what the transferor receives from the FLP interest, such as income/gain in the future, asset protection, management of assets and removal of potential intra family friction and disputes. Lower courts' concern about the discount affecting adequate and full consideration inappropriately assume immediate resale for the lower value.

- The partnership rules are to be respected, that 1) a proportionate FLP interest is given to each transferor relative to the value of their contribution; 2) asset value transferred is credited to the capital account of each transferor; and 3) upon dissolution or termination each partner is entitled to the value of her/his capital account.

B. TURNER'S INTERPRETATION (3RD CIR.) IS MORE RESTRICTIVE AND DIFFICULT TO APPLY BECAUSE OF IMPRECISE AND INTERNALLY CONFLICTING ANALYSIS

To be a bona fide sale for adequate and full consideration, the transaction does not have to reflect arms-length bargaining based upon applying the willing buyer-willing seller standards.

a) However, family transactions are held to a higher review.

b) A bona fide sale cannot exist when the transfer of assets to an entity had no business purpose, as it was devoid of any non-tax benefits that were realized or anticipated.

c) The Kimbell conclusion, that when transferors obtain entity interest proportionate to their contribution this constitutes a bona-fide sale, is rejected by the Turner Court.

d) Insufficient consideration was obtained for assets transferred to the FLP entity because of the claimed discounts applied to interests in the FLP.

e) Yet no front end gift resulted per the Turner judges!!!

The standard of a sales price based upon arms-length bargaining between a willing buyer and a willing seller is not *required* in a family transaction setting, yet it is "highly probative" of what constitutes a proper sales price.

The discount in value applied to an interest in an entity, here an FLP, contrary to the holding in Kimbell, connotes a lack of adequate and full consideration.

a) Especially such discount cannot be ignored in determining what is "money or Moneys worth" and as a result the presence of a discount in value precludes meeting the "money or worth" standard.

b) Future intangible benefits, such as more efficient management of assets, future gains in value and continuity of management, are not relevant, and thus not to be factored into the valuation process, as was done in Kimbell to offset the current discount applied to the interest in the entity to which assets were transferred.

C. BONGARD (TAX COURT) CREATES SIGNIFICANT UNCERTAINTY—ITS APPARENT OBJECTIVE STANDARD OF "NON-TAX REASON" MAY INSTEAD CAUSE TAXPAYERS AND THE COURT TO ENGAGE IN SUBJECTIVE APPLICATION OF INTENT, BEHAVIORAL PRESUMPTION, ETC., SCHUTT REPEATS THIS TEST.

Are the two elements of (i) bona fide sale and (ii) for adequate and full consideration in money or money's worth essentially analyzed as one overall test since the same standards appear to be applied to each?

a) A legitimate and significant non-tax reason for the FLP's creation.

b) The partnership interests received are proportionate to the value contributed to the FLP.

c) SS one non-tax reason sufficient?[cii]

Or does a) apply to a bona fide sale test and b) to adequate and full consideration?

The Tax Court continues to apply the two elements separately.[ciii]

How equivalent is a legitimate and significant non-tax reason to a "business" reason? Should one read into the Bongard terminology a significant non-tax business reason?[civ]

Can a legitimate and significant non-tax reason be measured on an objective basis? Or in reality does its application turn on the Court's subjective attitude, possibly including the "smell test" applied to what it considers egregious planning transactions, [result orientation] that is couched in terms of objectivity?

a) "Actual motivation, not just theoretical justification," is the Bongard standard for what is required by the Tax Court.

b) The taxpayer's reasons "cannot just mask transfer tax savings".

c) Continuing a buy and hold investment philosophy is accepted as a significant non-tax reason for the entity formation. [cv]

A higher standard of scrutiny is required for intra-family transactions. Is this a lesser test than dealings accomplished on an arm's length basis?

A legitimate and significant non-tax reason does *not* exist when:

a) The FLP creator stands on *both* sides of the transaction.

b) The FLP creator has financial *dependence* on FLP distributions.

c) There is *co-mingling* of creator's personal assets with the FLP's.

d) The FLP creator did not actually transfer the purported contributed property to the FLP.[cvi]

A bona fide sale based upon non-tax reasons was absent in the FLP formation, since there was no additional creditor protection provided, gift facilitation only involved a 7.7% interest give to spouse in QTIP.

The legitimate and significant non-tax reasons test in Bongard and Schutt *replace*:

a) Legitimate business operations—Turner v. Comm'r
b) Ordinary commercial transaction—Turner v. Comm'r
c) Primary business purpose—Thompson v. Comm'r
d) Transfer in ordinary course of business—Reg. 25.2512-8

"Practical control" can affect ownership in *all* entities, not just trusts as well as FLPs/LLCs, but also S Corporation shareholders and shareholder in decades' old and cold corporations that were recapitalized into common and preferred stock or whose stock was contributed to a holding company with common and preferred stock, that was used to effect a pre-1990 asset value freeze.

D. THE STRANGI "IV" DEFINITION

Full and adequate consideration is accomplished as a sec. 2036(a) exception if there is a proper crediting of contributions to partnership capital accounts. (Diminution of value, i.e., lack of receiving equivalent value in partnership interest for the assets transferred in funding the partnership is not required.)

However, a second prong of the test, a "bona fide sale" must also be met through existence of significant non-tax reasons for the entity's formation.(The Tax Court's rejection of five reasons was not clearly erroneous, and it, not the circuit court, is the fact finder.)

The Strangi court appeared to move from a significant business or non-tax reason, to just a significant non-tax reason.

E. Judge Laro's definition of bona fide sale for adequate and full consideration in Rosen, that IRS says it will follow in examinations is multi-factored:

- FLP must engage in a valid, functioning, business operation; FLP must serve a legitimate or significant non-tax purpose, more than just change in form.

- Partners did not negotiate or set any of the FLP terms; family member was on all sides of the transaction.

- Funding by all partners delayed for 2 1/2 to 3 months after agreement was signed.

- Generation 1 decedent transferred nearly all of her assets to FLP; management of assets before and after FLP formation was the same.

- After the FLR funding G1 was unable to meet financial needs/obligations; all distributions from the FLP were for her benefit.

- Assets contributed to the FLP were solely comprised of marketable assets and cash, and no trades ever were accomplished.

- Decedent's advanced age and deteriorating health condition when FLP formed.

PART V - HOW TO COMBAT STRANGI, POINT FOR POINT

A. SECTION 2036(A)(1): RETENTION OF RIGHT TO INCOME, POSSESSION OR ENJOYMENT

1. Significant assets [more than 2%!!] are retained outside of partnership to take care of:

   - Normal living costs, including medical care, nursing home, etc.
   - Estate and Inheritance tax costs
   - Estate administration expenses

2. Personal assets, especially personal residence, are not transferred to FLP:
   (Retention of enjoyment especially is an exposure if rent is not paid)

3. Other family members make significant contributions to the FLP, i.e., there is an investment pooling that provides evidence that a joint venture or enterprise to obtain gain has been formed. (Pooling of assets aids in overcoming the appearance, and argument by IRS, that the transaction essentially is an estate planning structure.)

4. The general partner [GP] is someone other than a person with power of attorney from the senior generation, the main contributor to the FLP and/or one who is trustee of such transferor's revocable trust. (For the recalcitrant transferor who does not desire giving up control, provide a GP interest that does not allow control [50% or less], but does give her/him veto power over major decisions, especially distributions and liquidation.)

5. The main contributor to the partnership should make significant lifetime gifts to thwart IRS contention that a testamentary alternative was formed.

6. The partnership should be operated as a joint venture/enterprise with the objective to generate income and gains

   a) Section 2036(a)(2): Right to Designate Possession or Enjoyment of Property:

      (i) The main transferor to the FLP is not made the controlling GP. As discussed in D.1.d. above, it is preferable that she/he have no GP interest; the maximum GP interest should be 50% [preferably less], the amount that allows exercise of veto power over major partnership decisions, but avoid an amount that is legal control.

      It is important to provide evidence that precludes IRS/the courts from deeming that an implicit agreement exists with other partners to provide the major transferor with the means to control. That is, establish a block to deny use of behavioral presumptions where IRS and the courts conjure control was indirectly retained.

(ii) The general partner [GP] who has the power and authority to determine distributions [and preferably liquidation and other major partnership decisions] is not the major FLP contributor, nor her/his attorney under a power of attorney and/or as trustee of the revocable trust that contributed assets to the FLP. In other words, separate the powers of the major contributor to the FLP from that of the persona of the controlling GP.

(iii) Transfer the FLP units into a trust with an independent trustee who has control that qualifies under the Byrum decision

- If payment of gift tax is to be avoided, make the transfer in the form of an incomplete gift.

- Establish evidence that partnership terms are "bargained for" by parties involved in partnership formation.

PART VI - HOW TO ADDRESS AND OVERCOME BONGARD: WHO KNOWS FOR SURE?

A. Diversify the portfolio transferred to FLP.

Yet in Schutt v. Comm'r. the Tax Court approved a buy and hold investment philosophy resulting in a single stock position as being a sufficient significant non-tax reason.

B. Effect significant gifts after formation of FLP.

C. Sell significant portion of FLP interest after its formation.

D. Liquify portfolio if it is comprised of illiquid assets.

1. This is counter-intuitive and contrary to continuity of investment decisions when the assets comprise a business, conducted as a C Corporation, and S Corporation, an LLC or as a partnership.

2. Schutt v. Comm'r suggests this may not be necessary if there are provable investment philosophy reasons not to diversify.

E. Do not form a second entity wrapper to own the first level FLP or LLC without establishing a significant reason [not easy, as in Bongard all such reasons were rejected by the Tax Court].

F. Be sure to live for a reasonable period of time after the entity formation!!

G. Other family members/trusts for their benefit contribute significant amounts, e.g., more than 1%, to the entity being formed. Do DBTs look better than FLPs? (Bank trustee and trust beneficiaries 'sign off' with their permission to transfer.)

H. Emphasize proportionate capital accounts, when there are multi-generation co-co-transferors, proportionate distributions of income and capital upon liquidation.

I. Other Commentators' Views

1. With the change in Tax Court analysis and reasoning for their holding, it is not possible to be sure that any interpretation of what is acceptable will prevail in the future, Richard Covey, Editor, "Practical Drafting" 8036 [U.S. Trust, April 2005]:

"…writings on the subject taking a position as to the result are speculation and should not be regarded as persuasive. A client is entitled to be advised as to the uncertainty of the current law on the point…." …page 8044

"Strangi, and the Chiechi dissent [in Bongard] are inconsistent in some respect regarding the significance of Byrum. A discussion of these two cases is, in our opinion, largely non-productive because, after doing so the inconsistencies are such that either analysis as a whole is reasonable. Until the Supreme Court deals with its application in the FLP area uncertainty will continue"…page 8050

2. Korpics, "How Estate Planners Can Use Bongard to Their Advantage", 32 Estate Planning [July, 2005] concludes that the bona fide sale for adequate and full consideration test can be met by evidencing, 1) that there is at least one legitimate and significant non-tax reason for creation of the FLP, 2) transferors receive partnership interests proportionate to the value of the property transferred [inferring that a pooling of investments by multiple generations, not less than 1% of the total from younger generation members], and there are sound formation/operational facts that he considers "the objective evidence".

    a) Management of partnership assets [or continuation of a 'buy and hold' investment philosophy].

    b) Personal assets are not placed into the FLP.

    c) Accomplish the FLP formation with legitimate negotiations regarding partnership mechanics and substantive provisions.

    d) Close attention must be given to partnership formation and operations that avoid the many problems surfaced in decisions that have been decided against taxpayers [summarized above in parts I-III].

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Byrle Abbin

CITES:

Tax Court Decisions, in cases where respondent is Commissioner:

Abraham T.C. Memo 2004-39, aff'd 408 F 3d 26, 95 AFTR 2d 2005-2591 (1st Cir. 2005), cert. den. June 5, 2006 [2006 TNT 108-7]
Astleford T.C. Memo 2008-128
Bigelow T.C. Memo 2005-65, aff'd 100 AFTR 2d 5271 [9th Cir. 20007]
Bongard 124 T.C. No. 8 [March 15,2005]
Disbrow T.C. Memo 2006-34
Erickson T.C. Memo 2007-107
Gore T.C. Memo 2007-169, supplemented in T.C. Memo 2007-370
Gross T.C. Memo 2008-221
Hackl 118 T.C. No 14 (2002), aff'd 335 F.3d 664 (7th Cir. 2003)
Harper T.C. Memo 2002-121
Hillgren T.C. Memo 2004-4
Holman 130 T.C. No. 12
Huirford T.C. Memo 2008-278
Jorgensen T.C> Memo 2009-66
Karmazin T.C. Docket 2127-03
Kelley T.C. Memo 2005-235
Kerr 113 T.C. 449 (1999), aff'd 292 F.3d 490 (5th Cir. 2002)
Knight 115 T.C. 506 (2000)
A.Korby [I], T.C. Memo 2005-103, aff'd 98 AFTR2d 2006-5897 (8th Cir. 2006)
E.Korby [II], T.C.Memo 2005-102, aff'd 98 AFTR 2d 2006-5897 (8th Cir. 2006)
Leichter T.C. Memo 2003-66
McCord 120 T.C. 358 (2003), rev'd, remanded, 98 AFTR 2d 2006-6147 [5th Cir. 2006]
Miller T.C. Memo 2009-119
Mirowski T.C. Memo 2008-74
Rector T.C. Memo 2007-367
Reichardt 114 T.C. 114 (2000)
Rosen T.C. Memo 2006-115
Schauerhamer T.C. Memo 1997-272
Schutt T.C. Memo 2005-126
Senda T.C. Memo 2004-160, aff'd 433 F.3d 1044, 97 AFTR 2d. 2006-419 (8th Cir. 2006)
Shepherd 115 T.C. 376 (2000), aff'd 283 F.3d 1258 (11th Cir. 2001)
Strangi "I" 115 T.C. 478 (2000), aff'd in part and remanded, nee Gulig, 293 F.3d 270 (2002)
Strangi "II" T.C. Memo 2003-145, aff'd in "IV", 96 AFTR 2d 2005-5230 (5th Cir.)
Stone T.C. Memo 2003-309
Thompson T.C. Memo 2002-246, aff'd Turner, Executrix of Thompson, 94 AFTER 2d. 2004-5764 (3rd Cir. 2004)

Tehan T.C. Memo 2005-128

Federal Court Decision, respondent is U.S.

Anderson 97 AFTR 2d Par. 2006-381 [D LA.]
Kimbell 224 F. Supp. 2d 700 (N.D. TX. 2003), reversed and remanded 371 F3d 257; 93 AFTR 2d 2400; 2004-1 USTC ¶60, 486; [5TH Cir. 2004]
Robertson as Trustee, 97 AFTR 2d Par. 2006-371 [D TX].

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[i] Partnership is formed under provisions of controlling state law before FLP creator contributes assets to it [improper sequence]. This also is termed "delay in funding" and may also involve delay in recordation of title in name of transferee of assets. See Harper v. Comm'r, Shepherd v. Comm'r, Senda v. Comm'r, aff'd (8th Cir.), Korby v. Comm'r [I and II], aff'd (8th Cir.), Rosen v. Comm'r, Est. of Erickson v. Comm'r, Gore v. Comm'r, Rector v. Comm'r

[ii] Thompson v. Comm'r, aff'd sub nom Turner v. Comm'r (3rd Cir.), Reichardt v. Comm'r, Hillgren v. Comm'r, Bigelow v. Comm'r, Strangi v. Comm'r, noted in second appeal 5th Cir, Rosen v. Comm'r, Rector v. Comm'r, Hurford v . Comm'r, Jorgensen v . Comm'r. Miller v. Comm'r (Second Transfer to FLP)

[iii] Disbrow v. Comm'r [cf. Tehan v. Comm'r]

[iv] All too often, the drafting attorney is not experienced in the technicalities or has not customized the documents. Strangi v. Comm'r, aff'd (5th Cir.),Thompson v. Comm'r, aff'd sub nom Turner v. Comm'r (3rd Cir.)

[v] Harper v. Comm'r, Thompson v. Comm'r, aff'd sub nom Turner v. Comm'r (3rd Cir.),Korby v. Comm'r [I and II], aff'd (8th Cir.)

[vi] Senda v. Comm'r, aff'd (8th Cir.), two months' delay. Est. of Erickson v. Comm'r, Gore v. Comm'r

[vii] Senda v. Comm'r, aff'd (8th Cir.), Korby v. Comm'r [I and II], aff'd (8th Cir.) Rosen v. Comm'r, Est. of Erickson v. Comm'r, Gore v. Comm'r, Rector v. Comm'r, Hurford v. Comm'r, Miller v. Comm'r (Second Transfer to FLP)

[viii] Kimbell v. U.S. Upon appeal, the Fifth Circuit rejected the implicit control theory and looked to measurement of control as being at the general partner [GP] level. Kimbell v. U.S. [2004]

[ix] Harper v. Comm'r, Thompson v. Comm'r, aff'd sub nom Turner v. Comm'r (3rd Cir.), Strangi v. Comm'r, aff'd (5th Cir.), Abraham v. Comm'r, aff'd 1st Cir, Hillgren v. Comm'r, Bigelow v. Comm'r, aff'd (9th Cir.), Korby v. Comm'r [I and II], aff'd (8th Cir.), Disbrow v. Comm'r, Rosen v. Comm'r, Est. of Erickson v. Comm'r, Rector v. Comm'r, Hurford v. Comm'r

[x] Knight v. Comm'r

[xi] McCord v. Comm'r. Tax Court's negation of the efficacy of using a defined value clause was rejected by the 5th Circuit that reversed and remanded to reflect its impact. (Note that the IRS considers *any* form of valuation clause to be against public policy. TAM 200245053)

[xii] Strangi v. Comm'r (not relevant to 5th Cir. affirmance), Thompson v. Comm'r, aff'd sub nom Turner v. Comm'r (3rd Cir.), Harper v. Comm'r, Rosen v. Comm'r; Jorgensen v. Comm'r.

[xiii] The result may be that entity wrapper is ignored. Hackl v. Comm'r, Karmazin v. Comm'r docketed in Tax Court; then settled very satisfactorily for taxpayer

[xiv] The IRS has been winning the argument that valuation set forth on filed return is an admission against interest so lower appraisals obtained for trial are ignored. Est. of Leichter v. Comm'r, Jorgensen v. Comm'r

[xv] Bigelow v Comm'r, aff'd (9th Cir), Korby v. Comm'r [I and II], Gore v. Comm'r

[xvi] Abraham v. Comm'r, aff'd 1st Cir., Hillgren v. Comm'r, Bigelow v.Comm'r, aff'd (9th Cir), Korby v Comm'r [I and II], aff'd (8th Cir.), Disbrow v. Comm'r [cf. Tehan v. Comm'r], Rosen v. Comm'r, Gore v. Comm'r, Rector v. Comm'r, Hurford v. Comm'r, Jorgensen v. Comm'r, Miller v. Comm'r (Second Transfer to FLP)

[xvii] Disbrow v. Comm'r

[xviii] Abraham v. Comm'r , aff'd 1st Cir., Hillgren v. Comm'r, aff'd sub nom Turner v. Comm'r (3rd Cir.), Bigelow v. Comm'r, aff'd (9th Cir), Korby v. Comm'r [I and II], aff'd (8th Cir.), Strangi v. Comm'r, emphasized in IV, aff'g (5th Cir), Rosen v. Comm'r, Gore v. Comm'r, Rector v. Comm'r, Hurford v. Comm'r

[xix] Disbrow v. Comm'r [cf. Tehan v. Comm'r],

[xx] Est. of Erickson v. Comm'r, Jorgensen v. Comm'r

[xxi] Senda v. Comm'r, aff'd (8th Cir.)

[xxii] Senda v. Comm'r, aff'd (8th Cir.), Turner v. Comm'r (3rd Cir.), Bigelow v. Comm'r, aff'd (9th Cir), Korby v. Comm'r [I and II], aff'd (8th Cir.), Rosen v. Comm'r, primarily funded by G1, Est. of Erickson v. Comm'r, Gore v. Comm'r, Rector v. Comm'r

[xxiii] Disbrow v. Comm'r

[xxiv] Turner v. Comm'r (3rd Cir.), Bongard v. Comm'r, Bigelow v. Comm'r, aff'd (9th Cir), Korby v. Comm'r [I and II], aff'd (8th Cir.), Strangi v. Comm'r, emphasized upon appeal, aff'd (5th Cir.), Disbrow v. Comm'r, Rosen v. Comm'r, Est. of Erickson v. Comm'r, Gore v. Comm'r, Rector v. Comm'r, Hurford v. Comm'r, Joregensen v. Comm'r

[xxv] Bongard v. Comm'r: a)Dissent noted that such acts were not possible under state law requirements for exercising fiduciary duties as 1) CEO and board member, and 2) the GP of the FLP. b)Rejected in Strangi (IV) v. Comm'r, (5th Cir.) based upon Byrum, that defined "enjoyment" under sec. 2036(a) is a "substantial present economic benefit".

[xxvi] Bongard v. Comm'r

[xxvii] Bongard v. Comm'r

[xxviii] Bongard v. Comm'r, Korby v. Comm'r [I and II], aff'd (8th Cir.), Emphasized in Strangi(IV) v. Comm'r in 5th Cir. affirmance, Rosen v. Comm'r, Est. of Erickson v. Comm'r, Gore v. Comm'r, Rector v. Comm'r, Jorgensen v. Comm'r

[xxix] Disbrow v. Comm'r,. Rosen v. Comm'r, Est. of Erickson v. Comm'r, Gore v. Comm'r, Rector v. Comm'r, Hurford v. Comm'r

[xxx] Bongard v. Comm'r, Korby v. Comm'r [I and II], aff'd (8th Cir.), Rosen v. Comm'r, Est. of Erickson v. Comm'r, Gore v. Comm'r, Rector v. Comm'r, Hurford v. Comm'r, Jorgensen v. Comm'r, Miller v. Comm'r (Second Transfer to FLP)

[xxxi] Bongard v. Comm'r

[xxxii] Bongard v. Comm'r

[xxxiii] Disbrow v. Comm'r

[xxxiv] Strangi v. Comm'r, Rosen v. Comm'r, Est. of Erickson v. Comm'r, Gore v. Comm'r, Jorgensen v. Comm'r

[xxxv] Rosen v. Comm'r, Est. of Erickson v. Comm'r, Gore v. Comm'r, Rector v. Comm'r, Jorgensen v. Comm'r

[xxxvi] Gore v. Comm'r

[xxxvii] Hurford v. Comm'r

[xxxviii] Hurford v. Comm'r

[xxxix] Schutt v. Comm'r.[a DBT], Mirowski v. Comm"r, Gross v. Comm'r, Miller v. Comm'r (First Transfer to FLP)

[xl] Mirowski v. Comm'r, Gross v. Comm'r

[xli] Stone v. Comm'r, Schutt v. Comm'r

[xlii] Stone v. Comm'r, and DBTs: Schutt v. Comm'r

[xliii] Stone v. Comm'r; Kimbell v. U.S. (5th Cir.), where a minimal amount, under 1% [$20,000] of the total partnership funding, was considered sufficient contribution to justify treatment of the partnership as a joint enterprise for profit/gain. Where the entity is a Delaware Business Trust, half of funding was contributed by trusts for the benefit of second/third generations. Schutt v. Comm'r.

[xliv] Stone v. Comm'r, Kimbell v. U.S. (5th Cir.) where sufficient assets were retained for living needs and related health care requirements that amounted to 15% of transferor's total assets. Cf. Mirowski v. Comm'r. The "retainage" should be based upon tranferor's life expectancy.Turner v. Comm'r (3rd Cir.) emphasized this was not accomplished by taxpayer/or the advisers. In Schutt v. Comm'r, senior generation retained $30 million for personal needs.

[xlv] Since partnership interests received by the major creators and their children was proportionate to the FMV of the assets transferred, so mere recycling of assets evidenced by the court in Harper, Thompson, Reichardt and Schauerhamer were overcome by business reasons in this situation. Stone v. Comm'r, Kimbell v. U.S. (5th Cir.) where the court emphasized need for management continuity and asset protection from liabilities associated with oil and gas working interest investments. In Turner v. Comm'r, (3rd Cir.) the court noted such non-tax business reasons were absent.

[xlvi] Kimbell v. U.S. (5th Cir.) emphasized need for existence of business purpose that it found were evident in:

a) Active management required of oil and gas working interests that comprised 13% of the assets contributed to the partnership.

b) Other non-tax business reasons existed such as the FLP was superior to a revocable trust for legal and asset protection 1) against oil and gas working interest liability, 2) divorce, 3) family squabbles over investment management, etc.

c) Business purpose emanating from non-tax reasons was absent in Turner v. Comm'r (3rd Cir).

d) Strangi (IV) v. Comm'r IV, aff'g (5th Cir.) stated the test as "significant business" OR other non-tax purposes.

Miller found investment management by son under "charting" philosophy to be a business purpose.

[xlvii] A bona fide sale was found to exist in formation of an LLC to own controlling interest in an operating company, since there are legitimate and significant non-tax reasons for the LLC's existence. Bongard v. Comm'r a) Creditor protection
b) Preparation for and ease of accomplishing a "liquidity event"

A bona fide sale for adequate and full consideration occurs when:

a) Interests in the FLP or LLC are received proportionate to assets transferred to it. Mirowski v. Comm'r, Gross v. Comm'r
b) Entity contributions were appropriately credited to transferor's capital account. Mirowski v. Comm'r, Gross v. C omm'r
c) Distributions from an LLC or FLP are charged to distributee's capital account. Bongard v. Comm'r
d) The same tests were applied and approved in Schutt v. Comm'r involving a DBT.

[xlviii] Yes, according to Bongard v.Comm'r and Strangi (IV) v. Comm'r (5th Cir.)
[xlix] Schutt v. Comm'r
[l] Schutt v. Comm'r
[li] Schutt v. Comm'r. G2s form FLP for G1, contribute 5% while creator puts up 95%, he dies within a few months of funding the partnership. Kelley v. Comm'r, Robertson v. Comm'r
[lii] McCord v. Comm., 5th Circuit, rev'g and remanding to Tax Court to reflect this and other factors into the valuation process for lifetime gifts.
[liii] Mirowski v. Comm'r, Gross v. Comm'r
[liv] Mirowski v. Comm'r, Gross v. Comm'r
[lv] Mirowski v. Comm'r, Gross v. Comm'r
[lvi] Mirowski v. Comm'r,
[lvii] Mirowski v. Comm'r, Gross v. Comm'r
[lviii] Astleford v. Comm'r, Gross v. Comm'r.

[lix] Astleford v. Comm'r
a) market absorption
b) minority ownership—50% interest transferred to FLP
c) minority and marketability discounts for gift of minority interest gift in FLPs
[lx] Holman v. Comm'r, Gross v. Comm'r
[lxi] Schauerhamer v. Comm'r
a) Timely transfer of title to partnership not made. Senda v. Comm'r, aff'd (8th Cir., Est. of Erickson v. Comm'r), Gore v. Comm'r
[lxii] Schauerhamer v. Comm'r and Knight v. Comm'r, Senda v. Comm'r, aff'd (8th Cir.), Abraham v. Comm'r, aff'd 1st Cir., Disbrow v. Comm'r, Rosen v. Comm'r, Gore v. Comm'r [reconstructed retroactively], Rector v. Comm'r, Jorgensen v. Comm'r
[lxiii] Schauerhamer v. Comm'r, Senda v. Comm'r, aff'd (8th Cir.), Korby v. Comm'r [I and II], aff'd (8th Cir.), Est. of Erickson v. Comm'r, Gore v. Comm'r, Rector v. Comm'r, or Transferor used partnership account as hers. Jorgensen v. Comm'r
a) Separate bank accounts are irrelevant if major distributions are made directly from the FLP to creator's creditors. Bigelow v. Comm'r, aff'd (9th Cir)

[lxiv] One or more of the above are found in Schauerhamer v. Comm'r, Reichardt v. Comm'r, Thompson v. Comm'r, aff'd sub nom Turner v. Comm'r (3rd Cir.), Bigelow v. Comm'r, aff'd (9th Cir), Korby v. Comm'r [I and II], aff'd (8th Cir), emphasized in Strangi (IV) v. Comm'r, in affirmance (5th Cir.), Rosen v. Comm'r, Est. of Erickson v. Comm'r, Rector v. Comm'r, Jorgensen v. Comm'r

[lxv] Reichardt v. Comm'r; Est. of Erickson v. Comm'r, or is accomplished through the controlling general partner. Thompson v. Comm'r, aff'd sub nom Turner v. Comm'r (3rd Cir.), Korby v. Comm'r [I and II], aff'd (8th Cir.)

[lxvi] McCord v. Comm'r. Upon appeal, this was not considered fatal by the 5th Circuit, as charities were represented by counsel. Or redemption is mutually agreed upon by both parties without a put or call. Commentary: Where possible, delay redemption until after 3 year statutory period.

[lxvii] Kimbell v. US (D.C.); rev'd and remanded. Implicit control doctrine is rejected upon appeal; control is measured at the GP level. Kimbell v. U.S. (5th Cir.)
[lxviii] Strangi v. Comm'r, aff'd (5th Cir.), Kimbell v. US (D.C.), Bongard v. Comm'r; Lack of transfers was not a significant factor upon appeal. Kimbell v. U.S. (5th Cir.)
[lxix] Schauerhamer v. Comm'r, Harper v Comm'r, Thompson v. Comm'r, aff'd sub nom Turner v. Comm'r (3rd Cir.), Strangi v. Comm'r, (not discussed upon appeal to 5th Cir.), Bigelow v. Comm'r
[lxx] Senda v. Comm'r, Korby v. Comm'r [I and II], aff'd (8th Cir.), Rector v. Comm'r, Jorgensen v. Comm'r
[lxxi] Jorgensen v. Comm'r
[lxxii] Senda v. Comm'r,
[lxxiii] Bigelow v. Comm'r, aff'd (9th Cir)
[lxxiv] [Ignored by the court was the fact the creator was in his 50s and died unexpectedly on a foreign hunting trip]. Bongard v.Comm'r
[lxxv] Here, attorney used commercial lease form, donor directly maintained the property, other partners made no funding contributions. Disbrow v. Comm'r
[lxxvi] Disbrow v. Comm'r
[lxxvii] Disbrow v. Comm'r
[lxxviii] Rosen v. Comm'r, Est. of Erickson v. Comm'r
[lxxix] Est. of Erickson v. Comm'r, Rector v. Comm'r, Jorgensen v. Comm"r, Jorgensen v. Comm'r
[lxxx] Gore v. Comm'r
[lxxxi] Gore v. Comm'r
[lxxxii] Holman v. Comm'r
[lxxxiii] Bigelow v. Comm'r, aff'd (9th Cir),Korby v. Comm'r [I and II], aff'd (8th Cir.), Disbrow v. Comm'r, Rosen v. Comm'r
[lxxxiv] Strangi v. Comm'r, aff'd (5th. Cir.) and Thompson v. Comm'r, aff'd sub nom Turner v. Comm'r (3rd Cir.)

[lxxxv] Thompson v. Comm'r, Kimbell v. U.S. (D.C), Bigelow v. Comm'r, aff'd (9th Cir), Korby v. Comm'r [I and II], aff'd (8th Cir), Rosen v. Comm'r, Est. of Erickson v. Comm'r, Gore v. Comm'r, Rector v. Comm'r. Note: upon appeal age was not focused upon as a negative factor. Kimbell v. U.S. (5th Cir.)
[lxxxvi] Hillgren v. Comm'r, Bigelow v. Comm'r, aff'd (9th Cir), Korby v. Comm'r [I and II], aff'd (8th Cir.), Strangi v. Comm'r, aff'd IV (5th Cir.), Disbrow v. Comm'r, Rosen v. Comm'r, Est. of Erickson v. Comm'r, Gore v. Comm'r, Rector v. Comm'r
[lxxxvii] Harper v. Comm'r; Hillgren v. Comm'r, Rosen v. Comm'r, Est. of Erickson v. Comm'r, Rector v. Comm'r, Jorgensen v. Comm'r
[lxxxviii] Strangi v. Comm'r, aff'd (5th Cir.), Hillgren v. Comm'r, Abraham v. Comm'r, Bigelow v. Comm'r, aff'd (9th Cir), Disbrow v. Comm'r, Est. of Erickson v. Comm'r, Gore v. Comm'r, Jorgensen v. Comm'r
[lxxxix] cf. Fortress Group materials noted in Strangi v. Comm'r, aff'd (5th Cir.), and Thompson v. Comm'r, aff'd sub nom Turner v. Comm'r (3rd Cir.)
[xc] Disbrow v. Comm'r, Rosen v. Comm'r, Est. of Erickson v. Comm'r, Rector v. Comm'r, Jorgensen v. Comm'r
[xci] Abraham v. Comm'r, Hillgren v. Comm'r, Bigelow v. Comm'r, Korby v. Comm'r [I and II], aff'd (8th Cir.), Disbrow v. Comm'r., Rosen v. Comm'r, Est. of Erickson v. Comm'r, Gore v. Comm'r, Rector v. Comm'r, Miller v. Comm'r (Second Transfer to FLP)

[xcii] Abraham v. Comm'r, Hillgren v. Comm'r, Bigelow v. Comm'r, aff'd (9th Cir), Korby v. Comm'r [I and II], aff'd (8th Cir.),Rosen v. Comm'r, Est. of Erickson v. Comm'r, Strangi (IV) v. Comm'r, 5th Cir.and Rector v. Comm'r emphasized assurances provided that partnership assets would be available for needs of senior generation contributor to FLP. Cf. Disbrow v Comm'r where assurances for use of personal residence for life was given to the creator.
[xciii] Senda v. Comm'r, Korby v. Comm'r I and IIr, Est. of Erickson v. Comm'r, Gore v. Comm', Rector v. Comm'r, Jorgensen v. Comm'r or in the case of Disbrow v. Comm'r, a personal residence
[xciv] Senda v. Comm'r, aff'd (8th Cir.), Bigelow v.Comm'r, aff'd (9th Cir), Korby v. Comm'r [I and II], aff'd (8th Cir.), Strangi v. Comm'r, aff'd (5th Cir.), Disbrow v. Comm'r, Rosen v. Comm'r, Gore v. Comm'r, Rector v. Comm'r, Jorgensen v. Comm'r
[xcv] Senda v. Comm'r.
[xcvi] Bigelow v. Comm'r, aff'd (9th Cir).
[xcvii] Senda v. Comm'r, aff'd (8th Cir.)
[xcviii] Schutt v. Comm'r, Miller v. Comm'r (First Transfer to FLP)
[xcix] Bongard v.Comm'r, Schutt v. Comm'r
[c] Schutt v. Comm'r, Mirowski v. Comm'r, Gross v. Comm'r, Miller v. Comm'r (First Transfer to FLP)
[ci] Astleford v. Comm'r
[cii] Schutt v. Comm'r indicates,"Yes".
[ciii] Schutt v. Comm'r
[civ] In Schutt v. Comm'r, the Tax Court appeared to apply a lesser standard since it recognized a buy and hold investment philosophy as meeting the non-tax reason test where the facts likely did not meet a business reason.
[cv] Schutt v. Comm'r
[cvi] These items parrot the tests set out in Hillgren v. Comm'r and Kimball v. Comm'r

Byrle M. Abbin is Managing Director of **WTAS LLC** in McLean, Virginia. Byrle, named Distinguished Accredited Estate Planner by the National Association of Estate Planners and Councils, is the author of the authoritative "**Income Taxation of Fiduciaries and Beneficiaries**" (Panel Publishers /CCH)) Tenth Edition, co-author and editor of the two volume treatise, "**The Corporate AMT**" (CCH), and Editor and co-author of "**Tax Economics of Charitable Giving**" (Warrren, Gorham & Lamont - RIA).

Byrle, who was recently given the singular honor of the Hartman Axley Lifetime Service Award by the National Association of Estate Planners & Councils, compiled and created the following checklist from Tax Court and selected Appellate decisions which represent the judges' analysis setting forth the many "bad" aspects as rationale for their decision.