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The Franchise Valuations Reporter

Our Expertise

Within the franchise, distribution and dealership context, we are experts in:

- Valuations, Damages & Expert Testimony
- Finance, Accounting and Tax

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Have a Question About Succession Planning for Franchise Owners?

Call us for a free, confidential consultation. And we're always interested in your comments about the newsletter.

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We Write the Book

Franchise Regulation and Damages, the only treatise that covers valuations and damages in franchise disputes, is updated 3 times a year.

For more details, to see a Table of Contents or to place an order, go to the Wolters Kluwer Law & Business web page here.

DISCLAIMER

An Immediately Functioning Estate Plan: A Must for All Franchisors and Franchisees

A 9/11 Victim and Aretha Franklin

On September 11th they "read the names" again. A client of mine, Stephen Patrick Cherry, was one of them. Seventeen years after Steve was murdered on the 104th floor, his father Don Cherry died. Don was a singer by night and a golfer by day. Stephen's mother was Miss America 1953. Here's Don's obituary.

But Stephen's death is a cautionary tale. Although he died with a will, when I went to his bank to try and get some temporary funds to support his surviving wife and her four children, the bank told me I could only get money to the family if I could give them a death certificate. Obviously, there were no death certificates right after Sept. 11, 2001. Franchisors and franchisees should give heavy consideration to developing estate plans that provide at least some immediate funds and avoid probate courts to the greatest extent possible.

Another more notable recent death was Aretha Franklin at age 76. But the Queen of Soul left no will or trust in place to protect an estate estimated at nearly $80 million, something that seems almost commonplace among entertainers. For example, Prince, Farrah Fawcett and James Brown all neglected to leave a will. They are not exceptions. According to a 2017 report from Caring.com, 58 percent of U.S. adults surveyed said they had no end-of-life plan.

Estate planning for franchisees is particularly complex because a franchise is a contract right - not a fee simple, freely alienable interest like the King Ranch - and it must be devised or bequeathed in accordance with its terms. Advisers to franchise owners must make this clear to their clients. We are experts in the area if anyone has questions.

New Tax Law

Some Overlooked Changes

Moving Expenses: For people who work in the franchise sector, moving from one location to another is quite common. But the expenses incurred are no longer deductible (as they had been formerly since the 1954 Internal Revenue Code). Plus, employers who reimburse for moving expenses will now have to subject such payments to withholding taxes and FICA.

Casualty and Theft Losses: No longer deductible. But the new tax law left a provision that allows those victims an unusual choice on when to deduct their losses: They can claim them for the year in which the losses actually occurred or the prior year. Obviously in 2018 they are not deductible but would be for 2017. Thus sufferers of such losses might be well served to file amended returns for 2017.

The information provided in this newsletter is for informational purposes only and should not be construed as legal or expert advice which can only be obtained from appropriate professionals. Franchise Valuations, Ltd. provides such expert advice on the topics addressed herein.

Please visit our website at www.FranchiseValuations.com

Standard Deduction and Charitable Giving: The standard deduction has been increased by approximately $10,000. But taxpayers who take the standard deduction cannot take charitable deductions. For charitable donors this presents a Hobson's Choice.

Miscellaneous Deductions: The new tax law eliminates most miscellaneous itemized deductions. That includes deductions for employee business expenses, tax-preparation fees, investment expenses (including investment management fees), job-search expenses, and hobby losses, according to the IRS.

Sales and Gross ReceiptsTaxes

New York Rules That Purchaser of a Business is Liable for the Seller's Sales Tax Delinquency

The New York Division of Tax Appeals recently held that a purchaser of a business is liable for the seller's sales tax exposure, even when that exposure was due to the seller's acquisition of another business.[1]

Normally when purchasing a business, acquirers prefer to buy the assets as opposed to the stock or membership interest of the entity that operates the business because they can specify which liabilities they are willing to assume and let other liabilities remain with the seller. However, in the state tax area, there are typically two taxes that purchasers of a business will automatically succeed to by law regardless of whether the deal is structured as an asset or equity purchase: sales/use taxes and withholding taxes. This is often referred to as successor liability, and it means that a state may legally assess a purchaser of a business for sales/use taxes and withholding taxes, even if those liabilities relate to a period during which the seller operated the business.

There are certain procedures to avoid such problems. For example, in New York, purchasers in a bulk sale transaction seeking to avoid transferee liability are required to give notice of the sale to the Division of Taxation at least 10 days prior to making payment for or taking possession of the business assets. If this notice is not properly or timely filed by the purchaser prior to the bulk sale, then the purchaser becomes personally liable for the sales and use taxes due from the seller (limited to the greater of the purchase price or the fair market value of the business assets sold). That is what happened in this case.

Franchise Agreements Subject to New Mexico Gross Receipts Tax

The New Mexico Legislature's 2007 amendment to the definition of "gross receipts" to add money or the value of other consideration received from the grant of a franchise employed in New Mexico was intended to subject franchise agreements such as A&W's, the one at issue in this case, with an out-of-state franchisor and a New Mexico franchisee, to New Mexico's gross receipts tax, and include in the taxable gross receipts the royalties received from a limited trademark license granted as part of the franchise, a New Mexico state appellate court has decided. Franchisors Beware![2]

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[1]*In the Matter of the Petition of Singh Restaurant, Inc.*, NYS Division of Tax Appeals, DTA No. 827456, 06/21/2018.

[2]*A&W Restaurants, Inc. v. Taxation and Revenue Department of the State of New Mexico*, August 22, 2018, Gallegos, D..

Joint Employer and Vicarious Liability

Wendy's Franchisee Employee Plausibly Alleged Franchisor as Joint Employer

A Wendy's cashier who claimed she was harassed and groped by a supervisor who later pled guilty to criminal assault advanced to the discovery stage of her sexual harassment claims against not only the franchisee restaurant, but also the franchisor and its affiliates. Denying dismissal of her Title VII and state law claims, a federal court ruled that she plausibly alleged both joint employer and agency theories of liability based on the contents of the franchise agreement as well as her own specific allegations as to Wendy's exercise of control.[1]

Acknowledging that the employee may ultimately be unable to establish joint employment after discovery, the court found that she nevertheless asserted enough facts to state a plausible basis to find that the Wendy's franchisor defendants were her joint employer for purposes of Title VII and/or the Pennsylvania Human Rights Act. The court examined the following factors: "(1) authority to hire and fire employees, promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; (2) day-to-day supervision of employees, including employee discipline; and (3) control of employee records, including payroll, insurance, taxes, and the like."

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[1]*AH v Wendys*, (US DC MDPA, August 22, 2018, Caputo, A.NO. 3:18-CV-0485)

Valuation

Delaware Decisions

The Delaware Chancery Courts are generally considered one of the foremost tribunals with respect to "fair value" decisions covering disgruntled shareholders who sue after mergers and acquisitions claiming the price was too low. Case law was recently upended when Michael Dell took his company private and the price was ruled too low (though more than market). But that lower court decision was overturned and now the Delaware rule is generally that market prices are the most persuasive indicator of value.

But for every rule there are exceptions. For example, in *Blue Blade Capital v. Norcraft*,[1] the issue was whether the merger deal price was the best indicator of fair value. But the Court held that despite *Dell* and *DFC*, two earlier Delaware Supreme Court cases that held that the deal price is a strong indicator of fair value, that it is not the absolute rule and held that in this case it did not reflect fair value. Also the Court was not impressed with the experts for either side, both of whom calculated the target's fair value on a discounted cash flow (DCF) basis.[2]

Tennessee Holds "Modern" Valuation Methods Should Be Used in Fair Value Determinations

In a catch-up-to-current-law valuation decision, the Tennessee Supreme Court overruled its own precedents on how to determine fair value in a dissenting shareholder suit. Valuators are no longer required to use the

Delaware block method (DBM) which was rejected as mandatory by Delaware long ago.[3]

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[1]Case No. 11184-CVS (July 27, 2018)

[2] See also *In re Appraisal of AOL Inc.*, Civil Action No. 11204-VCG (August 15, 2018) where the Court agreed it erred in the calculation and revised the fair value of an AOL share on the merger date from $48.70 to $47.08. See also *Charles Almond as Trustee for the Almond Family 2001 Trust v. Glenhill Advisors LLC*, C.A. No. 10477-CB (August 17, 2018)

[3] *Athlon Sports Communications, Inc. v. Duggan*, 2018 Tenn. LEXIS 310 (June 8, 2018) (*Athlon II*), and *Athlon Sports Communications, Inc. v. Duggan*, 2016 Tenn. App. LEXIS 773 (Oct. 17, 2016).

Quotations

Words of Wisdom from Songwriters

And the sign said, "The words of the prophets are written on the subway walls, and tenement halls" and whispered in the sounds of silence.

Paul Simon, Simon & Garfunkel, "Sounds of Silence"

Clowns to the left of me, jokers to the right - here I am, stuck in the middle with you.

Gerry Rafferty and Stealer's Wheel, "Stuck in the Middle With You"