

News

BCLP ATTORNEYS ARGUE FOR BROADER INTERPRETATION OF IMPORTANT FIRPTA EXCEPTION

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BCLP Partner David Holmberg, Counsel Janessa M. Griffin and Associate David White authored a Letter to the Editor in Tax Notes, “Ersatz Aggregate-Entity,” arguing that an important exception to FIRPTA for five percent or smaller interests in publicly traded US Real Property Holding Corporations (ten percent in the case of REITs) should be tested separately for each partner in a partnership based on such partner’s proportional indirect ownership thereof (i.e., an “aggregate” approach).

The authors criticize the contrary view recently articulated in IRS Chief Counsel Memorandum AM 2023-003 that the availability of the exception should be tested based on the partnership’s direct ownership of the interest (i.e., an “entity” approach), arguing that the entity approach fails because FIRPTA, which, broadly, requires a disposition of a United States Real Property Interest by a non-US person, cannot by its terms apply to a direct sale by a domestic partnership.

The propriety of the “aggregate” versus “entity” approach has significant implications for private equity, distressed debt and hedge funds investing in real estate-related assets, as well as public REITs and brokers, and is hotly debated within the tax community. “Ersatz Aggregate-Entity” provides a valuable contribution to these ongoing debates.

David H. advises on the tax aspects of complex commercial transactions, focusing on real estate private equity, direct lending and distressed strategies. Janessa provides comprehensive tax advice to real estate fund sponsors, private and public real estate investment trusts (REITs) and non-U.S. investors. David W.’s transactional practice focuses on representing public and private companies in taxable and tax-free mergers, acquisitions, reorganizations, and restructurings, and analysis of domestic and international tax issues.

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