

Workouts and Debt Restructuring in the Real Estate Context

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Portland Tax Forum

Special Thanks

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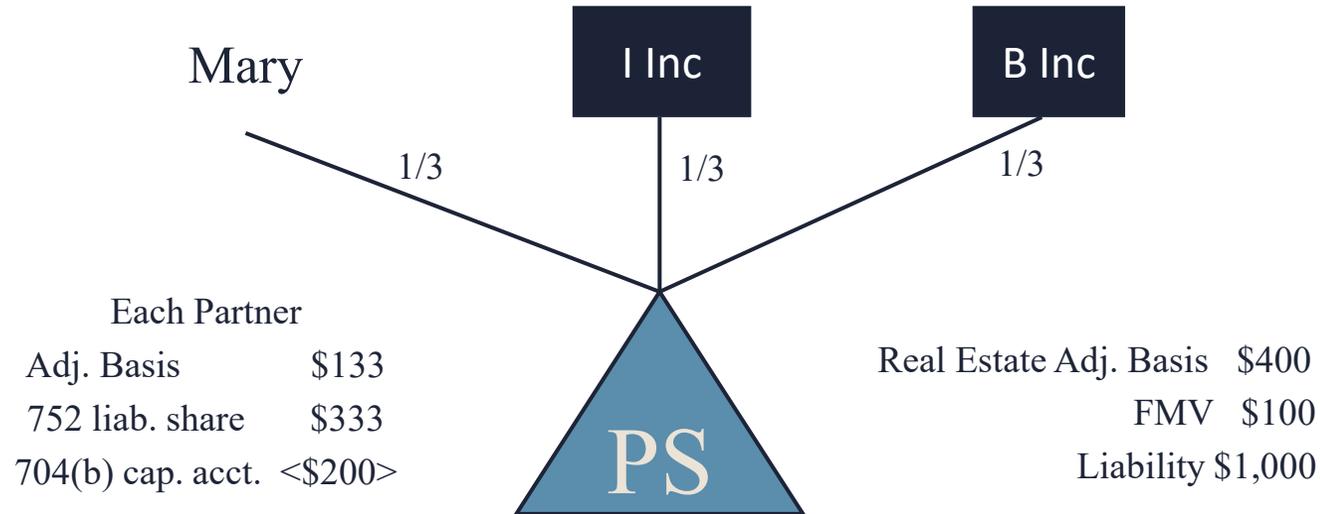
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Agenda

- Basic Facts
- Analyzing Debt Discharge Transactions
- Excluding COD Income
- Admission of Lender
- Allocation of Debt Discharge Income and Deemed Distributions
- Third-party Debt Acquisition
- Actions Proposed in Advance of a Workout
- Debt Modifications

Basic Facts



Mary is a solvent individual.

I Inc. is a corporation that is insolvent by \$100, not taking into account its investment in PS. I Inc. has \$300 in NOLs.

B Inc. is a corporation that is currently going through a bankruptcy reorganization under chapter 11. B Inc. has \$200 in pre-2018 NOLs that will expire next year.

Analyzing Debt Discharge Transactions

Recourse Debt

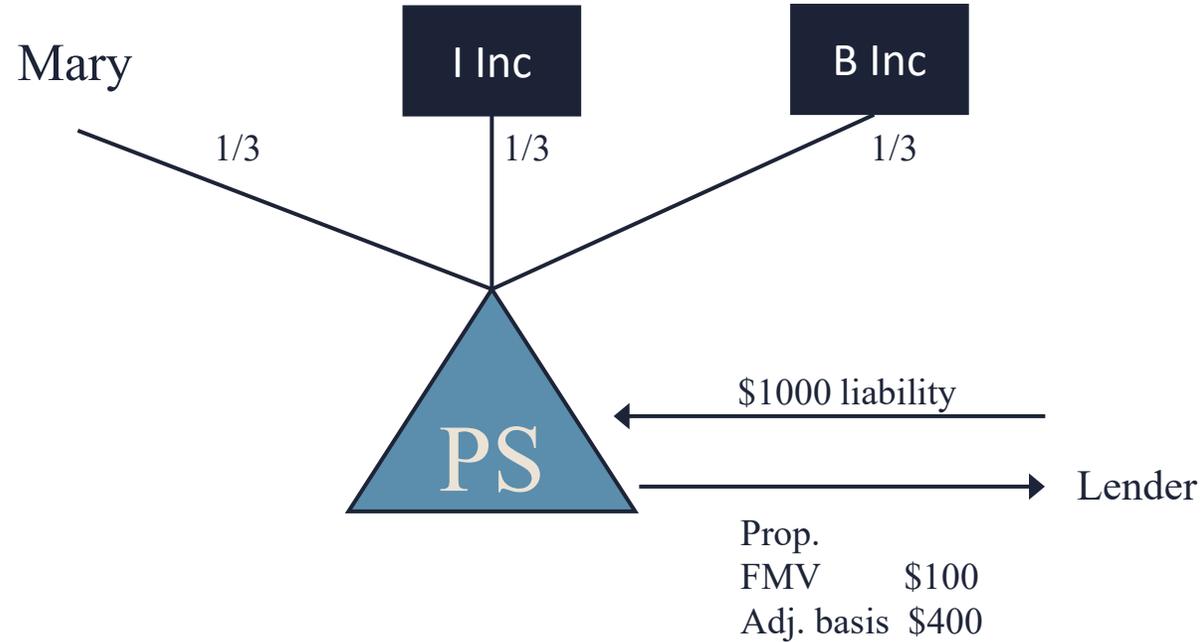
PS is a general partnership, and the debt is recourse to all the partners.

Lender forecloses and takes the property in complete satisfaction of the debt.

Property is treated as sold for an amount of debt equal to the value of the property. Reg. §1.1001-2(c), ex. 8.

To the extent that the amount of the debt exceeds the value of the property, debt relief will result in COD income. Rev. Rul. 90-16, 1990-1 C.B. 12.

Recourse Debt



Amt. real.	\$100
– Adj. basis	<u>\$400</u>
Cap. loss	<\$300>

Remaining \$900 of debt.
All COD income.

Nonrecourse Debt

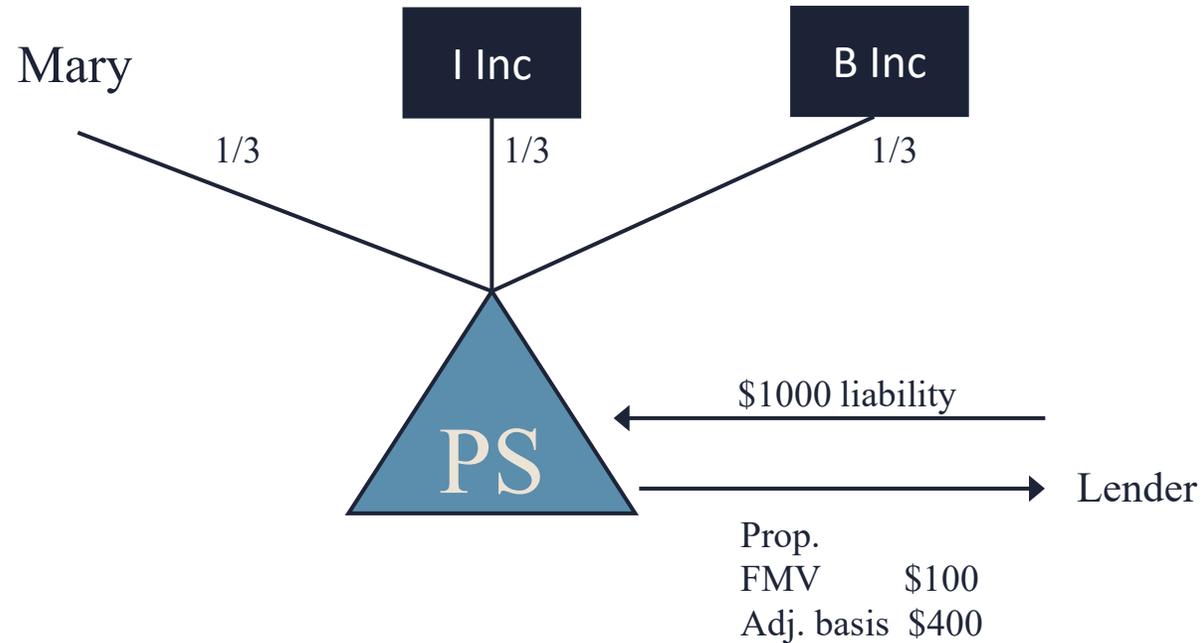
PS is an LLC, and the debt is nonrecourse and secured only by the property. Neither the partners nor the LLC are personally liable for the debt.

Lender forecloses and takes the property in complete satisfaction of the debt.

The property is treated as sold for the amount of the debt. Sales price is not limited to the value of the property. Reg. §1.1001-2(c), Ex. 7; *Tufts*, 461 U.S. 300 (1983).

The amount realized includes the accrued interest with respect to the debt. *Allan*, 856 F.2d 1169 (8th Cir. 1988); *Catalano*, T.C. Memo. 2000-82; *Milkovich v. U.S.*, 28 F.4th 1 (9th Cir. 2022).

Nonrecourse Debt



Amt. real. \$1,000
– Adj. basis \$ 400
Cap. Gain \$ 600

No remaining debt.
No COD income.

Recourse or Nonrecourse Debt

PS is an LLC and the debt is structured as a recourse debt with respect to PS (*i.e.*, the lender could reach all of the LLC's assets). The partners are not personally liable for the debt.

Is this debt recourse or nonrecourse for purposes of analyzing the workout transaction?

- Compare Great Plains Gasification Associates, 92 T.C.M. (CCH) 534 (2006) (general partnership where debt was secured by “all real or personal property ‘now owned or hereafter acquired’ by the partnership”; court seemed to focus on section 752 rules in determining debt was nonrecourse) with CCA 201525010 (IRS considered characterization of debt owed by an LLC and stated disagreement with argument that Great Plains Gasification supports determining recourse or nonrecourse status of debt by reference to the rules under section 752; IRS emphasized: (1) section 752 regulations apply only “for purposes of section 752”; (2) Reg. §1.704-2(b)(4), relating to nonrecourse deductions and minimum gain, specifically recognizes the possibility that debt guaranteed by a partner may be nonrecourse under section 1001 and hence a “partner nonrecourse liability”; and (3) the specific reference of the taxpayer to FN 35 of *Great Plains Gasification* is not properly read to provide that the recourse/nonrecourse determination is made by reference to section 752, and any implication in the case that such analysis should apply is erroneous).

Recourse or Nonrecourse Debt

- **IRS Field Attorney Advice 20150301F analyzed whether debt owed by a disregarded LLC for which the owner had no personal liability should be treated as recourse or nonrecourse for purposes of section 1001 and the determination of COD income or sale gain or loss.**
 - Citing Reg. §1.465-27(b)(6), Ex. 6, the FAA states that “where the disregarded entity is personally liable on the debt, but its sole member is not (i.e., the creditor may proceed only against the assets of the disregarded entity), the debt is treated as nonrecourse with respect to the sole member.”
 - The taxpayer was required to treat proceeds of debt owed by disregarded LLC as amount realized upon transfer of property in satisfaction of debt
- **In PLR 201644018, the IRS also concluded that debt owed by a disregarded entity where the regarded owner does not have personal liability for any portion of the debt would be treated as a nonrecourse liability of the regarded owner.**
 - As a result, the debt cancelled in exchange for the transfer of the property was treated as amount realized rather than COD income recognized in connection with the transfer
 - The IRS recently reached essentially the same conclusion in PLR 202050014
- **Interestingly, in PLR 202337007, the IRS ruled that the conversion of a disregarded LLC to a corporation did not cause debt that was commercially recourse to the LLC to be treated as modified for purposes of Reg. §1.1001-3 – the IRS did not address whether the debt converted from nonrecourse to recourse for federal tax purposes as a result to the conversion.**

Reduction in Debt Balance

The lender agrees to reduce the balance of the debt to the value of the property (*i.e.*, \$100). PS retains the property.

Where a creditor reduces debt without foreclosing on the property, the debtor realizes COD income. Reg. §1.61-12(a). Accordingly, PS would have \$900 of COD income.

COD income is ordinary in character.

Nonrecourse Debt – Manipulation of Character

Preference for COD income over capital gain?

Could PS sell the property for cash, then transfer the cash in discharge of the indebtedness?

If respected, this would result in PS recognizing a \$300 capital loss and \$900 of COD income.

If property is sold “in connection with” the discharge of indebtedness, the result for the debtor will be as if the debtor gave the property to the lender in discharge of the debt. Compare 2925 Briarpark Ltd., 163 F.3d 313 (5th Cir. 1999), with Gershkowitz, 88 T.C. 984 (1987); see also Milkovich v. U.S., 28 F.4th 1 (9th Cir. 2022).

Could PS transfer property to a third party subject to the debt, with the lender reducing the debt in connection with the transfer? See Reg. §1.1274-5(b)(1) (modification of debt treated as occurring in a “separate” transaction).

Excluding COD Income

What are the Partners' Preferences?

Assume that PS has \$900 of COD income, and the income is allocated equally among the partners.

Provisions of section 108 generally apply at the partner level. IRC §108(d)(6).

Insolvency of PS is irrelevant to the partners. IRC §108(d)(6).

Partners' Preferences – B Inc.

B Inc. is a bankrupt corporation with \$200 in pre-2018 expiring NOLs.

B Inc. would like to exclude COD income by applying the general rules of section 108.

Section 108 provides for the exclusion of COD income for bankrupt or insolvent taxpayers.

Bankruptcy exclusion applies if the taxpayer is under the jurisdiction of a court in a title 11 case, and the discharge is granted by the court or is pursuant to a plan approved by the court. IRC §108(d)(2).

Partners' Preferences – B Inc. – Attribute Reduction

When a taxpayer excludes COD income under bankruptcy or insolvency exceptions, must reduce certain tax attributes. IRC §108(b)(4).

Tax attributes generally reduced in the following order:

- Net operating losses
- General business credits
- Minimum tax credits
- Capital loss carryovers
- Property basis
- Passive activity loss and credit carryovers
- Foreign tax credit carryovers

Attribute reductions are made after taxpayer determines tax liability for the taxable year of discharge. IRC §108(b)(4).

Partners' Preferences – B Inc. – Attribute Reduction

B Inc. eliminates NOL carryover of \$200, then reduces basis.

Aggregate basis reduction cannot exceed the excess of the aggregate basis of property and money held immediately after the discharge over the aggregate liabilities of the taxpayer immediately after the discharge. IRC §1017(b)(2).

If B Inc. reduces its basis in its PS interest, it does not appear that a corresponding basis reduction will be made to the assets of the partnership.

Basis reduction creates ordinary income recapture potential. IRC §1017(d).

Partners' Preferences – I Inc. – Measuring Insolvency

Disregarding the investment in PS, the liabilities of I Inc. exceed the value of its assets by \$100.

An insolvent taxpayer can exclude COD income only to the extent of its insolvency.

A taxpayer is insolvent to the extent that the amount of its liabilities exceed the fair market value of its assets, determined immediately before the discharge. IRC §108(a)(3) and (d)(3).

Partners' Preferences – I Inc. – Measuring Insolvency

If a nonrecourse liability is being discharged, the excess of the nonrecourse liability over the value of the property will be treated as a liability in measuring insolvency to the extent that the excess is discharged. Rev. Rul. 92-53, 1992-2 C.B. 48.

If the nonrecourse debt is not being discharged, treat the debt as a liability only to the extent of the value of the property securing the debt. Id.

Preamble to final regulations relating to disregarded entities and the application of the bankruptcy and insolvency exceptions indicates that debt of a disregarded LLC generally will be treated as nonrecourse for purposes of measuring insolvency under Rev. Rul. 92-53, absent a guarantee or some other credit support by the regarded owner. T.D. 9771 (preamble).

Partners' Preferences – I Inc. – Measuring Insolvency

How does a partner's share of partnership liabilities affect the insolvency determination?

- According to Rev. Rul. 2012-14, in order to properly apply Rev. Rul. 92-53 in a partnership context, the partnership's discharged excess nonrecourse debt should be associated with the partner who in the absence of the insolvency or other § 108 exclusion would be required to pay the tax liability arising from the discharge of that debt
- Therefore, a partnership's discharged excess nonrecourse debt is treated as a liability of the partners for purposes of measuring the partners' insolvency under § 108(d)(3) based upon how the COD income with respect to that portion of the debt is allocated among the partners under § 704(b) and the regulations thereunder

Partners' Preferences – I Inc. – Basis Reduction First

Assume that I Inc. is insolvent by \$400.

I Inc. would like to retain its \$300 NOL.

Rather than applying the general attribute reduction ordering rule, I Inc. may elect first to reduce the basis of its depreciable property under section 108(b)(5).

Partners' Preferences – I Inc. – Basis Reduction First

A partner may elect to treat a partnership interest as depreciable property to the extent of the partner's share of depreciable property held by the partnership. IRC §108(b)(5).

- There are request-and-consent procedures pursuant to which the partnership will make corresponding adjustments to the basis of the property held by the partnership. Reg. §1.1017-1(g)(2)(ii).

A taxpayer also may elect to treat real property described in section 1221(a)(1) as depreciable property. IRC §1017(b)(3)(E).

Partners' Preferences – Mary

Qualified Real Property Business Indebtedness

Mary is not bankrupt or insolvent.

However, Mary is an individual, and thus she can take advantage of the provisions relating to qualified real property business indebtedness. IRC §108(a)(1)(D).

Partners' Preferences – Mary

Qualified Real Property Business Indebtedness

Qualified real property business indebtedness is indebtedness which:

- was incurred or assumed by the taxpayer in connection with real property used in a trade or business and is secured by such real property;
- was incurred or assumed before January 1, 1993, or was incurred or assumed after that date to acquire, construct, reconstruct, or substantially improve such property, and
- with respect to which the taxpayer makes an election.

Can debt secured by “dealer” property qualify?

- Rev. Rul. 2016-15 provides that “dealer” property is not considered “real property used in a trade or business.”

Partners' Preferences – Mary

Qualified Real Property Business Indebtedness

Is “Mezz Debt” secured by an interest in a disregarded entity that owns real property treated as actually “secured by” the real property?

- Rev. Proc. 2014-20 provides that, if the following five requirements are satisfied, debt secured by a 100-percent ownership interest in a disregarded entity holding real property will be treated as indebtedness that is “secured by” real property for purposes of section 108(c)(3)(A).
 - The taxpayer or a wholly owned disregarded entity of the taxpayer ("Borrower") incurs indebtedness.
 - Borrower directly or indirectly owns 100% of the ownership interest in a separate disregarded entity owning real property ("Property Owner"). Borrower is not the same entity as Property Owner.
 - Borrower pledges to the lender a first priority security interest in Borrower's ownership interest in Property Owner. Any further encumbrance on the pledged ownership interest must be subordinate to the lender's security interest in Property Owner.
 - At least 90 percent of the fair market value of the total assets (immediately before the discharge) directly owned by Property Owner must be real property used in a trade or business and any other assets held by Property Owner must be incidental to Property Owner's acquisition, ownership, and operation of the real property.
 - Upon default and foreclosure on the indebtedness, the lender will replace Borrower as the sole member of Property Owner

Partners' Preferences – Mary Qualified Real Property Business Indebtedness

Rev. Proc. 2014-20 also provides that, if a taxpayer fails to meet the requirements of the safe harbor, it will not be precluded from arguing, based on facts and circumstances, that its debt satisfies the “secured by” requirement in section 108(c)(3)(A).

Partners' Preferences – Mary

Qualified Real Property Business Indebtedness

When COD income is excluded with respect to qualified real property business indebtedness, the taxpayer must reduce the basis of depreciable real property.

- As with section 108(b)(5), a partner may elect to treat its interest in a partnership as depreciable real property to the extent of the partner's share of such property held by the partnership. Request-and-consent procedures are the same for inside basis reduction. IRC §1017(b)(3)(F)(i).
- A taxpayer may not treat section 1221(a)(1) real property as depreciable real property.

Partners' Preferences – Mary

Qualified Real Property Business Indebtedness

Limitations for qualified real property business indebtedness.

- The amount excluded cannot exceed the excess, if any, of the outstanding principal of the qualified real property business indebtedness immediately before the discharge over the net fair market value of the qualifying real property immediately before the discharge. IRC §108(c)(2)(A); see also CCA 201623009 (providing guidance regarding calculation where multiple debts are secured by multiple assets).
- Excluded COD income cannot exceed total adjusted basis in depreciable real property reduced by (1) depreciation claimed with respect to such property for the year of the discharge and (2) reductions to the basis of the property pursuant to section 108(b) (the general attribute reduction provision). IRC §108(c)(2)(B).

Purchase Money Debt Reduction

If debt of a purchaser to a seller of property that arose out of the purchase of such property is reduced, and the reduction otherwise would give rise to COD income for the debtor, then the reduction will be treated as a purchase price adjustment. IRC §108(e)(5).

Rule is mandatory, not elective.

Rule does not apply where debtor is bankrupt or insolvent. IRC §108(e)(5)(B).

Rule may apply in partnership context where partnership is bankrupt or insolvent. Rev. Proc. 92-92, 1992-2 C.B. 505. (Remember, bankruptcy and insolvency exceptions apply at partner level.)

Admission of Lender

Section 108(e)(8)

IRC Sec. 108(e)(8)

- American Jobs Creation Act amended section 108(e)(8) to apply to transfers of a partnership capital or profits interest in exchange for a recourse or nonrecourse debt of the partnership
 - The partnership has COD income in the amount that it would have if the debt were satisfied for an amount of money equal to the FMV of the interest
 - The COD income must be allocated to the partners in the partnership immediately before the exchange

Section 108(e)(8) Regulations

Final Regulations issued in 2011:

- Provide a safe harbor allowing the parties to treat the partnership interest's "liquidation value" as equal to its FMV.
- Provide that section 721 applies to the debt-for-equity exchange other than any amount transferred for unpaid rent, royalties and interest.
- Provide that the creditor takes its basis in the partnership interest under section 722 and does not recognize loss on exchange.

Allocation of Debt Discharge Income and Deemed Distributions

Allocation of Discharge Income

COD income generally will be allocated consistent with the terms of the partnership agreement.

The result may vary, however, where a partner has a negative capital account and no deficit restoration obligation. Rev. Rul. 92-97, 1992-2 C.B. 124.

Elimination of partnership debt will give rise to a deemed distribution under section 752.

- This deemed distribution will be considered an “advance” against the COD income and thus will not occur until the end of the taxable year after the COD income has been allocated and increased a partner’s basis in its interest. Rev. Rul. 92-97; Rev. Rul. 94-4, 1994-1 C.B. 196.

Allocation of Discharge Income

Rev. Rul. 99-43, 1999-2 C.B. 506, provides that a special allocation of COD income to an insolvent partner will not be respected where the partnership agreement is amended after the COD income has been realized.

See generally J. Sowell, [Allocation of COD Income in Partnership Workouts](#), 26 Tax Mgmt. Real Est. J. 23 (2010)

Third-Party Debt Acquisition

Acquisition of Debt

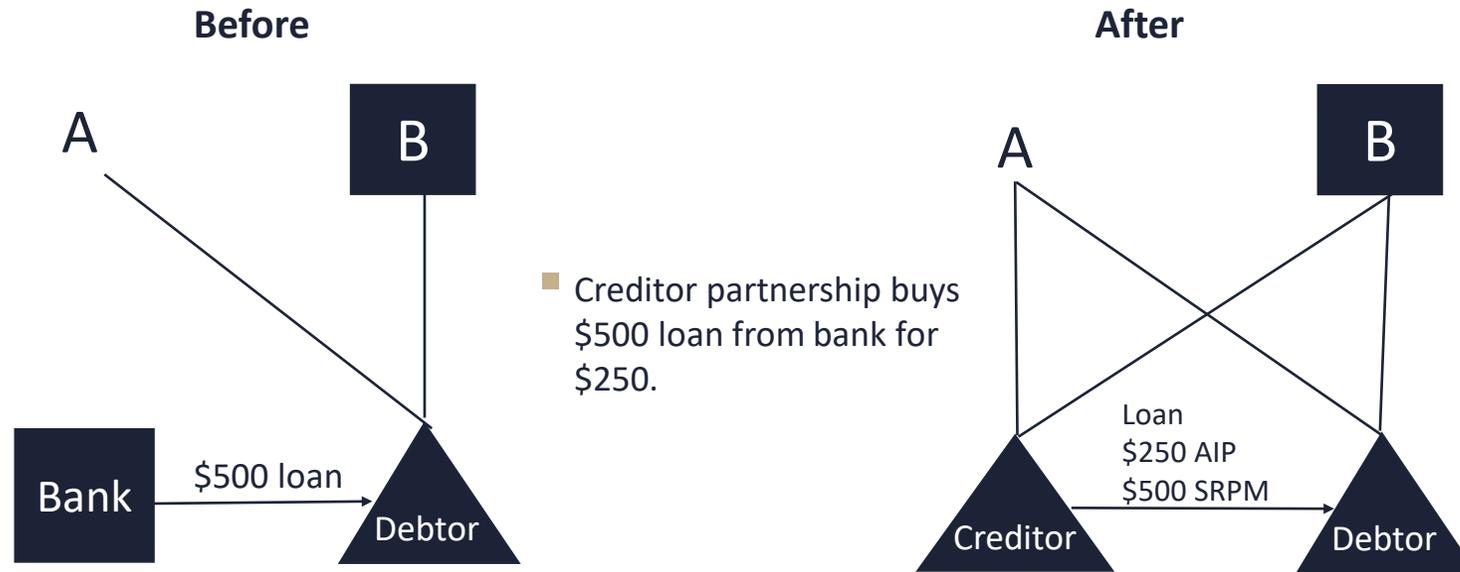
Rather than discharging a liability for less than the face amount of the debt, partners may defer COD income by having a third party acquire the debt from lender.

If the party acquiring debt is related to the debtor (or acquires debt “in anticipation of becoming related to the debtor”), the debtor will be treated as acquiring its own debt, thus triggering COD income. IRC §108(e)(4).

If section 108(e)(4) applies, adjusted issue price of purchased debt is generally purchase price of debt

- Stated redemption price at face amount creates significant OID
- AHYDO rules under section 163(e)(5) can create interest disallowance for corporate partners of debtor/partnership for debt with maturity of more than 5 years from issuance date.

Acquisition of Debt



- In creditor partnership's hands, loan is treated as re-issued with a \$250 adjusted issue price and \$500 stated redemption price at maturity, thus creating \$250 of OID
- A and B have OID income accrual from creditor partnership and OID deduction accrual from debtor partnership, but a significant portion of B's deduction is disallowed under section 163(e)(5)

Actions Proposed in Advance of a Workout

Actions Proposed in Advance of a Workout

When partners are aware that a partnership may soon go through a debt workout, they may propose certain actions

Concerns arise most often where restructuring will result in

- Current COD income and capital loss
- Current COD income and no current loss

Actions proposed

- Incorporate partnership
- Abandon partnership interest
- Declare partnership interest worthless

Actions Proposed – Incorporation

Incorporation of insolvent partnership

- If respected, former partners are not allocated COD income, and insolvent corporation excludes COD income
- Could be accomplished by conversion to state law corporation, check-the-box change in status, or contribution to an existing corporation

Issues to consider

- “Born to die/transitory entity” risk where entity will be liquidated soon after conversion to a corporation. Cf. 1994 FSA Lexis 20 (Aug. 5, 1994)
- Prudential Lines, 928 F.2d 565 (bankruptcy ct. might enjoin if entity intended to sell assets with BIG, as corporate tax liability would reduce value of estate); Majestic Star Casino, LLC v. Barden Dev., Inc. (In re Majestic Star Casino, LLC), 716 F.3d 736 (3d Cir. 2013); In re Health Diagnostic Lab, Inc. v. Arrowsmith, 120 A.F.T.R.2d (RIA) ¶2017-6736 (Bankr. E.D. Va. 2017); Taylor & Charnas, Can a Bankruptcy Trustee Avoid an Election to Be Treated as a Corporation?, 17 J. of Tax’n 77 (2012).
- Section 269
- Section 482; Reg. §1.482-1(f)(1)(iii); National Securities, 137 F.2d 600 (3rd Cir. 1943)
- Section 351 qualification – possible business purpose and net value requirements
 - Potential loss disallowance if don’t qualify
 - Application of section 357(c) if do qualify
- Section 7701(o) and economic substance

Actions Proposed - Abandonment

While no authority specifically discusses the ability to avoid COD income by abandoning a partnership interest prior to the COD event, analogous authority is generally favorable:

- Echols, 950 F.2d 209 (abandonment respected following partnership default on debt); Rev. Rul. 93-80, 1993-2 C.B. 239 (abandonment effective in year partnership became insolvent)
- Need to consider any contractual limitations on disposition in partnership agreement that might prohibit abandonment
- Cottle, 89 TC 467, is helpful on “assignment of income”; *see also* Reg. §1.706-4(e)(2)(vi) (COD income is an “extraordinary item”)

If partner has share of liabilities, loss on abandonment generally will be capital.

- Rev. Rul. 93-80 concludes that loss is ordinary if partner has no share of liabilities.
- Proposed legislation under the Build Back Better Act would have treated the loss from abandonment of a partnership interest as a loss from the sale or exchange of the partnership interest regardless of the partner’s share of liabilities – this legislation has not been enacted.

Partners sometimes consider sale of interest for nominal consideration rather than abandonment

If ordinary loss on abandonment of a partnership interest (due to no liability allocation) is to be allocated to an individual, need to consider whether loss is properly characterized as an investment or trade or business loss, as this will impact application of the miscellaneous itemized deduction limitation (i.e., disallowance for expenses between now and 2026).

Actions Proposed – Worthlessness

If taxpayer is considered to remain as a partner, should continue to have a share of the liabilities under section 752 upon a declaration of worthlessness

- With no deemed distribution, loss would be ordinary

Case law involving worthless partnership interests is rather favorable, although cases outside the partnership area have found constructive abandonment upon the occurrence of events evidencing worthlessness. See generally Sowell, Worthless Partnership Interests: A Collision of Theories, 44 Tax Mgmt. Memo. (BNA) 480 (2003); MCM Investment Management, LLC v. Commissioner, T.C. Memo 2019-158.

Need to show no liquidation value and no potential value in order to support a deduction for worthlessness. See generally Morton, 38 BTA 1270, aff'd, 112 F.2d 320.

For individuals, section 67 denial of miscellaneous itemized deductions needs to be considered for worthless partnership interests in the same way as for an ordinary loss upon abandonment of a partnership interest.

Proposed legislation under the Build Back Better Act would have treated the loss from worthlessness of a partnership interest as a loss from the sale or exchange of the partnership interest regardless of the partner's share of liabilities – this legislation has not been enacted.

Debt Modifications

Debt Modifications

Parties must be careful to analyze whether there is a “significant modification” of debt, thus triggering a deemed re-issuance of debt. Reg. §1.1001-3(b).

The deemed exchange is an exchange of debt instruments under section 108(e)(10), and this can give rise to COD income depending upon the adjusted issue price of the old and new debt instruments.

Debt Modifications

If a restructuring significantly modifies existing debt, new debt (or possibly new equity if modifications cause instrument to be recast as equity) is deemed exchanged for old debt.

General test is facts and circumstances.

Specific Rules

- Change in Yield
- Change in Timing
- Change of Obligors
- Change in Security
- Change in Nature of Debt Instrument

Debt Modifications

When New Debt is issued in exchange for Old Debt, COD is equal to the amount by which the Adjusted Issue Price of the Old Debt exceeds the Issue Price of the New Debt

Thus, COD turns heavily on Issue Price.

The “adjusted issue price” of the new debt instrument generally will depend on whether the debt is “traded”

Public Trading

If debt is “Publicly Traded,” then the Issue Price equals Fair Market Value of instrument.

If debt is not Publicly Traded, then the issue price is equal to the stated redemption price at maturity so long as there is adequate stated interest (determined by reference to AFR)

Public Trading

Under regulations finalized in September 2012 (Reg. §1.1273-2(f)), the determination as to whether the New Debt or the Old Debt is “Publicly Traded” is made under the 15 before/15 after rule (*i.e.*, 31-day period ending 15 days after the issue date).

Three ways to be “publicly traded:”

- sales price for executed purchase or sale occurring within the 31-day period ending 15 days after the issue date is “reasonably available” within a reasonable period of time after the sale
 - “appears in a medium that is made available to” issuers of debt instruments, regular purchasers or sellers, or brokers
 - proposed regulation preamble: “pricing services and trading platforms that report prices of executed sales on a general basis or to subscribers”
 - proposed regulation preamble: TRACE reporting = public trading
- “firm quote”: price quote from at least one broker, dealer, or pricing service that is “substantially the same as the price for which the person receiving the quote could purchase or sell the property”
- “indicative quote”: price quote other than firm quote provided by at least one broker, dealer, or pricing service.
- **Exception – Debt will not be treated as publicly traded if, at the time the determination is made, the outstanding stated principal amount of the issue that includes the debt instrument does not exceed \$100M.**

Debt Modifications

It also is necessary to test the new instrument to determine if it is debt or equity.

- Is old debt instrument subordinated to new equity contributed in connection with modification?
- Is the reduction in the debtor's creditworthiness taken into account in this analysis?
 - Reg. §1.1001-3(f)(7)(ii) now provides that, in making the determination as to whether an instrument resulting from a modification will be recharacterized as equity, any deterioration in the financial condition of the obligor between the issue date of the debt instrument and the date of alteration will not be taken into account, unless there is a substitution of a new obligor or the addition or deletion of a co-obligor.

Thank you!

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