H. STEWART DUNN, JR.
CARROLL J. SAVAGE
ERIC R. FOX
LESLIE JAY SCHNEIDER
ROBERT H. WELLEN
KEVIN P. O'BRIEN
PATRICK J. SMITH
ROBERT B. STACK
JEFFREY B. COHEN
MICHAEL R. HUFFSTETLER
LAURIE E. KEENAN
JEFFREY E. MOELLER
STEVEN H. WITMER
ROSINA B. BARKER
WILLIAM L. SOLLEE, JR.
JODI H. EPSTEIN
ROBIN M. SOLOMON
H. CARTER HOOD
JOSHUA T. BRADY
JENNIFER J. FINN
DANIELLE E. ROLFES

ALEXANDER N. CLARK
JONATHAN ZIMMERMAN
VICTOR S. CHANG
NICOLE OCCHUIZZO
JOHN D. BATES
MATIE B. LITTLE*
JOHN LOVELACE*

IVINS, PHILLIPS & BARKER
CHARTERED

1700 PENNSYLVANIA AVENUE, N.W., SUITE 600
WASHINGTON, D.C. 20006-4723

TELEPHONE (202) 393-7600
FACSIMILE (202) 393-7601
FACSIMILE (202) 347-4256

IPB@IPBTAX.COM
WWW.IPBTAX.COM

JAMES S.Y. IVINS (1885-1960)
PERCY W. PHILLIPS (1892-1969)
RICHARD B. BARKER (1906-1988)

OF COUNSEL
STEPHEN N. SHULMAN
CLIFTON B. CATES III
LISA MILOT
DAVID D. SHERWOOD

LOS ANGELES OFFICE
1875 CENTURY PARK EAST
SUITE 600
LOS ANGELES, CALIFORNIA 90067
TELEPHONE (310) 551-6633
FACSIMILE (310) 551-1188

* NOT ADMITTED IN THE DISTRICT OF COLUMBIA

November 30, 2009

MEMORANDUM

TO: All Tax Accounting Clients

FROM: Les Schneider
Patrick Smith
Ivins, Phillips & Barker

RE: Tax Savings Idea – Change in Treatment of Exchanges of Intangibles For Exchanges that Have Already Taken Place and Been Reported as Taxable

Until recently, the Internal Revenue Service has taken the position that an exchange of certain types of intangible property that are closely associated with the goodwill and going concern value of a taxpayer are not eligible for section 1031 non-recognition treatment. The Service included in this proscribed category such intangible property as trademarks, trade names, customer lists and other customer-based intangibles. The Service maintained this position regardless of the similarity of the properties being exchanged.

In CCA 200911006, the Service appears to have changed its position on this point and will permit tax-free exchange treatment for exchanges of intangible property even for property that is closely associated with goodwill provided the taxpayer is able to separate the intangible from goodwill. The Service notes that under its new position, the exchange of property still must satisfy the like-kind criteria in the section 1031 regulations.

Recent commentary on this subject (see, e.g., Daily Tax Report, Page J-1 (Nov. 24, 2009)) focuses on the potential effect of this change in Service position on the structuring of exchange transactions in the future. However, there has been no discussion of the possibility that a change from taxable to tax-free treatment for *past* exchanges of intangible property might qualify as a change in method of accounting.

We think there is a pretty good argument for treating such a change in treatment as a change in method of accounting. There is clear support for this position in the recent revenue ruling which characterizes as a change in method of accounting a change from reporting a government grant as taxable income to reporting the grant as a tax-free contribution to capital. See Rev. Rul. 2008-30, 2008-25 I.R.B. 1156.

If a change in the treatment of an exchange of intangible property is characterized as a change in method of accounting, the statute of limitations will not bar the recovery of the previously-paid tax on the exchange transaction even if that transaction occurred in a closed year. The reason is that the amount of income previously reported in the closed year is recoverable in the current year pursuant to the operation of section 481(a). This conclusion might have a down side for taxpayers that reported exchanges of intangibles as taxable transactions in taxable years still open under the statute of limitations. In that circumstance, the Service might assert the accounting method change argument to prevent a taxpayer from changing its prior treatment of an exchange of intangibles via an amended return and, instead require the taxpayer to file an accounting method change request.

Accordingly, if your company has previously exchanged intangible property and reported that exchange as taxable and there is a possibility that this prior exchange would have qualified for tax-free treatment under the Service's new policy, please contact us about the possibility of filing an accounting method change request to recoup the previously-reported income and taxes.