Nonprofit Joint Ventures

Partnering with For-Profit Organizations

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I. Introduction.

In a time of economic upheaval, nonprofits everywhere are struggling for new sources of funding and expense sharing. Simultaneously, the nonprofit sector has seen a growth in "social enterprises" – businesses designed not just to make a profit, but to further social goals. Given these two trends, more and more nonprofits find themselves considering for-profit activities such as joint ventures. This presentation will cover the basic tax issues of for-profit/nonprofit joint ventures, applicable IRS pronouncements and court cases to date, and some drafting tips and practical issues that may arise in forming a joint venture.

For the purpose of this program, a "joint venture" is an arrangement in which a for-profit entity ("FP") and a nonprofit entity exempt under Section 501(3) ("NFP") become joint owners of an entity (the "joint venture" or "JV") to accomplish a project. There are really two types of joint ventures: whole entity joint ventures and ancillary joint ventures. A whole entity joint venture occurs when the NFP places all of its operations in the joint venture, such that the sole activity of the NFP is to hold and manage its joint venture interest and to spend any income it receives as distributions from the joint venture. An ancillary joint venture occurs when the joint venture holds only a portion of the NFP's activities – the NFP directly conducts other activities. For example, a hospital that drops its entire hospital operation into a joint venture with a FP is a whole hospital joint venture; it has no other activities. A hospital that joins with a FP to create a freestanding surgical center is participating in an ancillary joint venture – the hospital carries out all of its other activities through its NFP. Whole entity joint ventures are scrutinized more closely than ancillary joint ventures, as there is no separate Section 501(c)(3) activity on which the NFP potentially could rely to maintain its tax-exempt status. Most of the guidance in the area is in the whole entity (and specifically, whole hospital) joint venture area, which can make it difficult to extrapolate general legal principles applicable to non-hospital whole entity joint ventures and especially ancillary joint ventures.

For the purpose of this program, joint ventures generally do not include purely contractual arrangements, grants to non-Section 501(c)(3) entities, or passive investments in private equity or hedge funds.

II. Basic Tax Issues in Joint Ventures.

When presented with a joint venture by a NFP, there are two main categories of tax issues that need to be analyzed: will the JV endanger the NFP's tax-exempt status, and then, will the JV generate unrelated business income (UBI). This analysis often involves very similar issues and facts, but the underlying legal principles are slightly different.

A. Exemption Issues.

An organization's tax-exempt status is one of its most valuable assets. When approaching a joint venture, the first issue to address is whether or not participation in the venture is consistent with the NFP's tax-exempt status. The statutory language of Section 501(c)(3) exempts from federal income tax the following organizations:

> Corporations, and any community chest, fund, or foundation, ***organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes,*** or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, ***no part of the net earnings of which inures to the benefit of any private shareholder or individual,*** no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

I.R.C. §501(c)(3)(emphasis added).

1. Private Inurement.

Section 501(c)(3) specifically provides that no part of the net earnings of a NPF can inure to the benefit of any private individual. The inurement prohibition is absolute **–** there are legally no *de minimis* exceptions, and the penalty for violation of the inurement prohibition is revocation of exemption.

In its most basic form, the inurement prohibition means that a NFP cannot have equity owners, make distributions of income or profit to private individuals, or distribute assets back to individuals upon dissolution. More broadly, individuals in close association with the organization (referred to in inurement analysis as "insiders") cannot use their positions of influence over the organization to divert assets away from the organization's charitable purposes and toward private gain. Therefore, inurement includes paying insiders excess compensation, "sweetheart" lease or sale transactions, use of charitable assets for personal purposes (such as use of computers or automobiles), or payment of an insider's personal debts. *See Treas. Reg. 1.501(c)(1)-1(c)*(defining private shareholder or individual as someone having a personal and private interest in the activities of the organization).

It seems obvious that anything that a NFP could not do directly, it cannot do indirectly through an intermediary. When reviewing a joint venture structure (such as a partnership agreement, a LLC operating agreement, or associated management contract) it is important to remember that the assets contributed by the NFP to capitalize the joint venture are charitable assets, and as such, cannot be used in a way that would violate the private inurement principle. Therefore, if the joint venture is going to transact business with a company owned by insiders (such as an arrangement between a hospital and physicians or staff), then that transaction needs to be analyzed as if the NFP were entering into the activity directly. Such a transaction can arise in many forms in a joint venture context, including compensation of insiders, asymmetrical loan liabilities, guarantees, real estate rentals, and the like.

2. Organizational and Operational Tests.

The language of Section 501(c)(3) requires a NFP to be "organized and operated exclusively" for one or more of the tax-exempt purposes enumerated in the statute. *See Treas. Reg. 1.501(c)(3)-1(a).* The organizational test requires the governing documents of the NFP to provide that its assets are irrevocably dedicated to tax-exempt purposes. *Treas. Reg. 1.501(c)(3)-1(b).* The operational test requires an organization to operate in a manner that is exclusively for tax-exempt purposes. *Treas. Reg. 1.501(c)(3)-1(c).* The tax code being what it is, the term "exclusively" does not necessarily mean to the exclusion of everything else. Rather, "exclusively" means that the organization engages primarily in activities that accomplish tax-exempt purposes. An organization can engage in an insubstantial number of activities that are not directly charitable in nature, so long as those activities are not otherwise prohibited by the statute. *Id.* Thus, while an organization can never engage in inurement or political activities, it may engage in investment activity, lobbying, or an unrelated trade or business, so long as these activities are insubstantial and the organization's tax-exempt purpose remains its primary focus.

3. Private Benefit.

As a corollary to the operational test, there is an additional doctrine applicable to Section 501(c)(3) organizations that is referred to as "private benefit doctrine." The private benefit doctrine is not in the language of Section 501(c)(3) or the regulations directly as such; rather it is gloss from the regulations and from a judicial opinion. The private benefit doctrine provides that a NFP must be operated exclusively for tax-exempt purposes; therefore, if a substantial purpose of the organization is to benefit certain private parties, it ceases to meet the organizational test. *Better Business Bureau of Washington, D. C., Inc. v. United States, 326 U.S. 279 (1945).* In *American Campaign Academy v. Commissioner, 92 TC 1053 (1989)*, the Tax Court defined private benefits as "non-incidental benefits conferred on disinterested persons that serve private interests." An organization may very well undertake activities that are tax-exempt in nature, but the existence of a private benefit taints these otherwise charitable activities. One example might be a scholarship organization that sets its criteria so narrowly that only a limited number of predetermined individuals can benefit – for example, only the members of an extended family in a particular Scottish clan. Another example would be a school that teaches basic political campaign techniques, but that funnels all its graduates to work for a particular political party. *See generally*, *American Campaign Academy.*

Private benefit is often confused with private inurement. While they are related concepts, they are different legal doctrines. The most significant difference is that in order to have in incident of inurement, the benefitted party must be an insider to the organization. Private benefit can apply even if the recipients of the benefits (in our examples, the political party or the individual family members) have no influence over the organization. In addition, there is a substantiality test to private benefit: a benefit that is incidental and tenuous may not endanger an organization's exempt status.

4. *Plumstead Theatre*, Trade or Business, and For-Profit Activities.

A NFP may engage in a trade or business as a substantial portion of its operations, if the trade or business is in furtherance of the organization's tax-exempt purpose and if the NFP is not organized for the primary purpose of operating an unrelated trade or business within the meaning of Code Section 501(c)(3). *Treas. Reg. 1.501(c)(3)-1(e).* Accordingly, when a NFP decides to engage in a joint venture, that will constitute a substantial portion of its operations, it must be able to conclude that such a structure will further its tax-exempt purposes.

The primary precedent in this area is the *Plumstead Theatre* case. Prior to *Plumstead Theatre*, the INS took the position that a NFP could not be a partner in a partnership, as under most state laws, a partnership requires a business purpose. In *Plumstead Theatre*, a theatre company acted as a general partner of a limited partnership arrangement. The limited partnership raised funds from private individuals in order to allow Plumstead Theatre to stage a production in association with another organization. Without the investment of the limited partners, Plumstead Theatre would not have been able to meet its financial obligations to coproduce the play. The theatre retained control over the partnership to insure that it was always run to further its charitable interests. The Tax Court found that the organization's activities did not jeopardize its tax-exempt status. Any benefit to the individual partners was incidental to the accomplishment of the theatre's exempt purposes. *Plumstead Theatre Society, Inc. v. Commissioner, 74 T.C. No. 97 (September 26, 1980), aff'd 675 F.2d 244. (9th Cir. 1982).*

An organization may engage in unrelated trade or business activity as well. Consistent with the operational test, running an unrelated trade or business cannot be the primary purpose of the NFP. Rather, the IRS will look to see if the operation of the unrelated trade or business is substantial enough in scope to divert the focus of the organization away from its primary tax-exempt purpose. Note that this is not determined solely on the basis of revenue – an unrelated trade or business can produce little or no revenue, but if it involves significant expenditures of resources and consumes the attention of the NFP, it may no longer be insubstantial in nature. Because the test is one of substantiality, there is no bright line test for when an organization's unrelated trade or business operations become so substantial as to endanger the organization's tax-exempt status.

B. Unrelated Business Income.

As indicated, a NFP may engage in an unrelated trade or business so long as it does not violate the operational test. Accordingly, in some cases, an organization may consciously choose to engage in a joint venture that is an unrelated trade or business, but it must be able to determine the scope of those activities.

1. General Background.

Under Code Section 513(a), an unrelated trade or business is defined as "any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its" tax-exempt purposes. The mere fact that an organization will use the profits from an activity to further charitable activities does not make that activity "related."[1] An activity is "substantially related" if there is a causal relationship between the activity and the accomplishment of the NFP's exempt purpose. Thus, the activities which generate the income must contribute importantly to the accomplishment of the organization's exempt purposes to be substantially related. *Treas. Regs. 1.513–1(d).*

A business activity can be broken down into component parts, such that a portion of the activity is related and a portion is not. In such cases, the income and expenses of an activity must be allocated between tax-exempt income and unrelated business income. For example, pharmacy sales to the general public by a hospital pharmacy will be unrelated, but provision of drugs and supplies to hospital patients will be related. *See Treas. Reg. 1.513-1(b).*

2. UBIT Taxation of Partnerships, S Corps, and Dividends.

If a NFP owns an interest in a subsidiary business entity, the UBIT treatment of the distributions received from that entity will depend upon the form of entity.

[1] Note that in order to constitute an unrelated trade or business, an activity must first be a "trade or business" within the meaning of the Internal Revenue Code, and must also be regularly carried on. A discussion of these requirements is beyond the scope of this presentation.

The ultimate manner in which the subsidiary entity is taxed is often a significant factor in the choice of entity for a joint venture arrangement.

If the subsidiary is a partnership (including a LLC taxed as a partnership), the IRS will look through the LLC to its underlying activities. It will determine whether the activity conducted by the partnership would have been an unrelated trade or business if carried on directly by the NFP. When a distribution is received from the partnership, it will retain its character as exempt or unrelated. This structure is often helpful when the NFP thinks that all or most of the joint venture's activity will be related, and therefore, there is no adverse impact to having the character of the income attributed to the NFP. *See also, Revenue Ruling 98-15.*

If the subsidiary is a C corporation, then the IRS will not look through the corporation to determine whether or not the subsidiary's activities are unrelated. Rather, the C corporation will be taxed at the entity level. Dividends from the C corporation are usually exempt from UBIT by statute; therefore, only one level of taxation would ensue. Use of a C corporation is helpful when there are significant trade or business activities at the joint venture level and the NFP wishes to insulate itself from those activities. The downside of the use of a C corporation is that there is an entity level tax that does not distinguish between exempt and unrelated activities; therefore, to the extent that there are related activities, they will be subject to taxation.

If the subsidiary is an S corporation, by statute any distributions from the S corporation are deemed unrelated and, therefore, subject to UBIT.

III. Revenue Ruling 98-15: The Good, the Bad and the Ugly.

From even a cursory review of the general principles of law applicable to joint ventures, it is easy to see how this area can be quite difficult to analyze. There are simply no bright line tests – everything is "facts and circumstances." In an attempt to apply these general principles to specific joint ventures, the IRS issued Revenue Ruling 98-15. The ruling sets forth two examples of whole hospital joint venture arrangements, one of which is good and one of which is bad. *Revenue Ruling 98-15.*

A. The Good Example.

In the good example, the NFP does everything correctly. The NFP concludes that entering into a joint venture with a for-profit hospital would better allow it to provide necessary health care benefits to its community. The NFP and the FP enter into a LLC agreement to house the joint venture. The NFP contributes all of its operating assets to the LLC, and the FP contributes additional financing. Each receives back an interest in the LLC that is proportionate to its contribution and all distributions are similarly proportional. Any distributions received by the NFP are used to support community health care initiatives, including providing care for the indigent.

The LLC is run by a board of managers, three of whom are appointed by the NFP. A majority of the Board must approve major decisions, including budgets, distributions, key executives, large contracts, changes in services, and management agreements, although the operating agreement of the LLC may not be amended without the consent of both parties. The LLC agreement specifically provides that it is operated in a manner that furthers charitable purposes and that the duty to run the LLC charitably overrides any duty to run the LLC for the financial benefit of its owners.

The LLC enters into a management agreement with an unrelated management company. The agreement has a five-year term and is renewable with the mutual consent of the parties. Compensation is based on gross revenues and is market-based.

None of the individuals involved in the decision to enter into the LLC were promised employment or otherwise induced to participate, and none have an ownership interest in the FP or the management company.

B. The Bad Example.

In contrast, the NFP in the bad example does many things that are obviously wrong. As in the good example, the NFP concludes that entering into a joint venture with a for-profit hospital would better allow it to provide necessary health care benefits to its community. The NFP and the FP enter into a LLC agreement. The NFP contributes all of its operating assets to the LLC, and the FP contributes additional financing. Each receives an interest in the LLC proportionate to its contribution and all distributions are similarly proportional. Any distributions received by the NFP are used to support community health care initiatives, including providing care for the indigent.

Unlike the good example, the composition of the LLC's board of managers is equally split, with three managers appointed by each party. A majority of the board must approve certain major decisions, which means that a FP appointee must always agree in order to move forward. These decisions include budgets, distributions, unusually large contracts, and the selection of key executives. Notably absent from the list is the approval of management agreements.

The LLC enters into a management agreement with a wholly owned subsidiary of the FP. It is for a five-year term, but renewable at the discretion of the management company only. The NFP may terminate the agreement for cause only. The fee structure is the same as that at issue in the good example. The NFP agrees that the CEO and the CFO of the LLC will be individuals who previously worked with the FP and will work with the management company with regard to day-to-day operations.

C. The Ugly.

In this situation, the ugly is the amount of guidance, as a practical matter, that Revenue Ruling 98-15 provides to a practitioner setting up a joint venture. The two joint ventures at issue in Revenue Ruling 98-15 are whole hospital joint ventures. Accordingly, the IRS focused on control of the venture. If the NFP ceded control over its sole charitable activity – the operation of the hospital – to the FP, the NFP would have no way to ensure that its charitable assets were used for charitable purposes. As a result, if the joint venture at issue were deemed to be unrelated, then the NFP would have no charitable purpose whatsoever – all of its operations would be carried out through the joint venture. Accordingly, control of the budget, control of the management agreement, and the specific override of any state law obligation to function for the financial benefit of the members were key factors. In the bad example, the IRS highlights the fact that there is no obligation for the hospital to have a charity care policy, to provide for the indigent, or otherwise meet the requirements of a community hospital under Section 501(c)(3). There is, essentially, no way to prevent the FP from placing its profit motive over and above the benefits that the LLC should provide to the community. This constitutes a substantial private benefit to the FP and a violation of the private benefit doctrine and the operational test.

Most of the legal questions considered in the Revenue Ruling are facts and circumstances issues. It is unclear how many – if any – of the factors at play in the "good" example can be varied, and by how much, before the line is crossed. In the good example, there is no question that the NFP has relatively unfettered control over the operations of the LLC. However, in reality, that is rarely the case. Consider these questions:

- Must the Board always be majority-controlled by the NFP or can it be 50/50, especially if it is an ancillary joint venture?
- What if the FP is owned or controlled by insiders, such as doctors on staff at the hospital?
- What if the management agreement is with the FP or an affiliate of the FP, but otherwise meets the requirements of the good example?
- What happens if assets contributed are services, or there are loans in addition to contributions?
- What if certain actions are subject to supermajority control?
- What if the management agreement is for a longer term or automatically renews?

Accordingly, while Revenue Ruling 98-15 is the mandatory starting point for any joint venture analysis, it is unfortunately rarely the end. One helpful place to start is a 2002 EO CPE Text issued by the IRS entitled "Update on Health Care." The IRS posits two situations where a joint venture "falls short" of the good example – one where the management company is affiliated with the for-profit, and the other regarding control of the managing board of the joint venture. In the CPE text, the IRS does provide examples of appropriate management by the for-profit manager. However, it states that control is one of the most important factors in a whole entity joint venture, and states that less than 50% would not be permissible.

IV. *est of Hawaii*, *St. David's*, *Redlands* and Other Guidelines.

A. *est of Hawaii*

The *est of Hawaii* case is not strictly a joint venture case. It predates Revenue Ruling 98-15 and, in fact, is cited in it. It is illustrative, however, of the private benefit issues inherent in joint ventures. *See generally, est of Hawaii v. Commissioner, 71 T.C. 1067 (1979).*

At the time, est was a program of yoga and meditation techniques for personal growth, designed by Werner Erhard. Erhard owned the intellectual property associated with the est programs through a for-profit entity, EST, Inc. Various nonprofit entities were set up nationwide to hold educational seminars based on the est program model, including est of Hawaii. est of Hawaii entered into a license arrangement with EST, Inc. for use of the program. The Tax Court found that the sole purpose of est of Hawaii and its sibling entities was to establish a system to present the est seminars to the public through tax-exempt organizations while still profiting Werner Erhard. Although it was true that the for-profit entity had no formal control over any of the tax-exempt organizations, the for-profit entity retained effective control through the terms of the est program license agreement. The for-profit organization set tuition, required a minimum number of seminars, required the tax-exempt organization to host certain events, and provided the est trainers, who were employees of another related for-profit entity. The court stated that, in short, the tax-exempt organization's only function was to open franchises to present ideas to the public, for a fee, that are owned by one for-profit entity using materials and trainers supplied and controlled by another for-profit entity. This structure resulted in the overall benefit of the tax-exempt organizations' activities flowing directly, and nearly exclusively, to private individuals.

It made no difference to the Tax Court whether the payments from the tax-exempt organization to the for-profit were reasonable or agreed upon through arm's length negotiations. The focus of the court's review in these cases was on the fact that the for-profit effectively controlled the content and manner of presentation of the NFP's charitable and educational activities. It did not focus on the fact that particular contractual payments to a related for-profit organization are reasonable or excessive, but focused instead on whether the activities were carried on in such a manner that the for-profit organization benefitted substantially from the operation of the tax-exempt organization.

When looking at the terms of management agreements or control provisions in joint venture operating agreements, the factors considered by the *est of Hawaii* court are illustrative. These factors go to the central issue of what is the purpose of the exempt organization. Was it truly to provide education to the public, or was it to provide a nonprofit, tax-exempt marketing arm to a for-profit company as it exploited its intellectual property?

B. *Redlands Surgical Center.*

After the IRS released Revenue Ruling 98-15, there were two significant cases in the whole hospital joint venture area. The first of which was *Redlands Surgical Services v. Comm'r, 113 T.C. 47, 77 (1999)*. In *Redlands*, a tax-exempt subsidiary of a hospital became a co-general partner with a for-profit organization in a partnership that owned and operated a surgery center. The general partnership holding the venture had a board of managing directors, which was divided equally. All decisions regarding medical standards rested with a medical advisory group, half of whom were selected by the managing directors. The partnership agreement required the partnership to enter into a management agreement with an affiliate of the for-profit partner. The term of the management agreement was 15 years, with two 5-year extensions at the management company's sole discretion. The agreement further provided that the two partners and an affiliate of the nonprofit in the Redlands hospital system would not enter into any other surgical center ventures within a 20-mile radius. The agreement gave the managing directors the authority to determine which procedures would be performed at the surgery center. On a few occasions, the hospital's representatives on the board had to block the for-profit's efforts to move certain types of surgeries to the surgical center, which would have resulted in less revenue to the hospital. The tax-exempt subsidiary had no other purpose than to participate in the partnership passively on behalf of the Redlands hospital system. Through a variety of structures, some of the hospital's physicians, including board members of some of the entities in the Redlands system, participated in the joint venture. The partnership contained no statement of charitable purpose and imposed no requirement to operate in a charitable manner. The surgery center did not offer free care and had no emergency room. In general, most surgeries that would be covered by public programs (Medicaid/Medicare) were not performed at the surgery center.

The management agreement was signed by the same individual, in his different capacities with the joint venture and the management company. The agreement delegated wide ranging powers, although it excluded the power to make patient care decisions. These powers included staffing, setting fees, managing reimbursements, and providing for the purchase and lease of all supplies and equipment. The management agreement could only be terminated upon breach with a 90-day notice and 90-day cure period, or on bankruptcy or insolvency.

The Tax Court ultimately denied the exemption of the Surgical Center because the profit motivation of the for-profit entities could not be separated from any charitable purpose, the transfer of control over the partnership's activities resulted in a private benefit to the for-profit entities, and a substantial number of non-exempt activities were attributable to the subsidiary. As for the equally divided board, the Tax Court indicated that the ability merely to block actions was not sufficient, as it could not affirmatively initiate actions to protect its charitable purpose. As a result, the surgical center violated the operational test because it provided a more than insubstantial benefit to private parties.

C. *St. David's Health Care System*

In 2003, the Fifth Circuit decided the second important whole hospital joint venture case. *St. David's Health Care System v. U.S., 349 F.3d 232 (5th Cir. 2003).* St. David's was a tax-exempt charitable hospital that entered into a partnership with HCA, a for-profit entity. St. David's had been run as a charitable tax-exempt hospital, but sought a for-profit partner in the 1990s due to financial difficulties. St. David's contributed all of its operating assets to a partnership with HCA, a for-profit owner and operator of hospitals. The partnership hired an affiliate of HCA to manage the hospital under a management services agreement.

Unlike Redlands, St. David's did negotiate for a statement that the partnership would operate in accordance with the community benefit standard. It also obtained a provision stating that, if the management services agreement could adversely affect its tax-exempt status, St. David's could unilaterally terminate the agreement. However, St. David's did not have majority control of the managing board of the joint venture. As with Redlands, it had the power only to block actions, not initiate them. The court also held that the manner in which St. David's could enforce the management services agreement – through termination or court action – was sufficiently onerous to prevent St. David's from regularly questioning day-to-day decision making.

The Fifth Circuit remanded the case to the District Court to determine whether, as a factual matter, St. David's had retained sufficient control over the venture to meet the operational test.

The *St. David's* case reinforces the issue that the retention by the NFP of sufficient control over the joint venture to allow the joint venture to engage in charitable activities is the key to the analysis. Even if the joint venture actually operates in a charitable manner – which the Circuit Court stated that it did, in fact – it is not sufficient to support the continued tax exemption of the participating nonprofit.

D. Revenue Ruling 2004-51: Educational Ancillary Joint Ventures.

In 2004, the IRS issued guidance on ancillary joint ventures for the first time, and importantly, in an area other than health care. Revenue Ruling 2004-51 involved a university that entered into an ancillary joint venture with a for-profit entity to produce educational videos for teachers. The board of managers of the LLC that held the venture was divided equally between university representatives and for-profit representatives. Contributions and distributions were all equal and proportional. The university had the exclusive right to approve the curriculum, the standards for successfully completing the training, and the instructors. The for-profit had the right to determine the location of the video, links to the training, and the right to select certain non-instructor personnel. All other actions required mutual consent. The Revenue Ruling specifically indicates that the University's participation in the venture was insubstantial in terms of its overall activities.

The IRS ruled that the University's activities with regard to the joint venture were insubstantial and, therefore, did not endanger its tax-exempt purpose. The Service further ruled that the activities were related to the University's exempt purpose and, therefore, not subject to UBIT.