THE SOURCING OF GOODWILL

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***International Multifoods* reconsidered in light of revised IRS policy for like-kind exchanges of intangibles.**

In *International Multifoods,*[1] the Tax Court denied foreign sourcing for the income that was allocated to goodwill, essentially accepting the Service's argument that any goodwill associated with franchises and trademarks being sold "...was part of, and inseverable from, the franchisor's rights and trademarks" being transferred.[2] As a result, International Multifoods was denied the favorable foreign sourcing of income provided for the transfers of goodwill pursuant to Section 865(d)(3). Instead the income from the sale of the intangibles was sourced to the residence of the seller (the United States).[3] Treating the income as foreign source instead of domestic source may permit taxpayers to maximize their ability to utilize foreign tax credits by increasing the limitations provided for by Section 904.

This article will review *International Multifoods* and some other authorities addressing goodwill that is transferred with other marketing based intangibles. It will then explore whether the reasoning in the case and the Service's position therein is at variance with certain comments provided in CCA 200911006. Furthermore it will delve into whether the Service was correct in citing the Supreme Court decision in *Newark Morning Ledger*[4] as the basis for its analysis.

In CCA 200911006, the IRS Office of Associate Chief Counsel concluded both that intangibles such as trademarks, trade names, mastheads, and customer-based intangibles that can be separately described and valued apart from goodwill, qualify as like-kind property under Section 1031 and very importantly stated that "...except in rare and unusual situations, intangibles such as trademarks, trade names, mastheads, and customer-based intangibles can be separately described and valued apart from goodwill."

CCA 200911006 is a reversal of an IRS position set forth in TAM 200602034 and FAA 20074401F addressing the applicability to trademarks and trade names of like-kind exchanges under Section 1031. In TAM 200602034, the Service had indicated that "[t]rademarks and trade names are, we believe, a component of a larger asset, either of goodwill or of going concern or both" and thus did not qualify for Section 1031treatment. As discussed below, the quoted language in CCA 200911006 is incompatible with the reasoning

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of *International Multifoods* and numerous other cases that find trademarks, trade names, and franchises to be inseparable from goodwill.

Section 865(d)

The general rule provided by Section 865(a) is that income from the sale of personal property is sourced by the residence of the taxpayer. Thus a sale at a gain of personal property subject to this general rule by a U.S. resident would result in domestic source income.[5] Section 865(d) carves out several exceptions to the general rule in the case of sales of intangibles. Section 865(d)(1)(B) provides that upon the sale of intangibles, as defined in Section 865(d)(2), that are contingent on the productivity, use, or disposition of the intangible, the source of the gain "...shall be determined under this part in the same manner as if such payments were royalties." Royalties, in turn, are sourced where the intangible is used under Sections 861(a)(4) and 862(a)(4).[6] Intangibles are defined for purposes of Section 865(d)(1) broadly to mean "...any patent, copyright, secret process or formula, goodwill, trademark, trade brand, franchise or other like property." Thus pursuant to Section 865(d)(1)(B), in general, gain from, e.g., the sale of a French patent right for contingent consideration of 6% of net sales of products sold in France that are manufactured in France using the French patent, would generate foreign source income.[7]

Treating income as foreign source instead of domestic source may permit taxpayers to maximize their ability to utilize foreign tax credits by increasing the limitations provided for by Section 904.

There is also a special rule in Section 865(d) covering amortization recapture of intangibles. Section 865(d)(4)(A) provides that gain not "in excess of depreciation adjustments" is sourced pursuant to Section 865(c). Section 865(c) in turn provides that gain from the sale of depreciable property that is not in excess of depreciation adjustments is allocated between U.S. and foreign sourcing "...by treating the same proportion of such gain as sourced in the United States as the United States depreciation adjustments with respect to such property bear to the total depreciation adjustments" with the residual foreign source.[8]

Another major exception in Section 865(d) to the rule that income from the sale of intangibles should be sourced by the residence of the seller is Section 865(d)(3) covering income from the sale of goodwill. Section 865(d)(3) provides that "[t]o the extent this section applies to the sale of goodwill, payments in consideration of such sale shall be treated as from sources in the country in which such goodwill was generated."

In *International Multifoods*, the taxpayer argued, but lost its assertion, that a large portion of its gain was from the sale of goodwill generated in the Asia-Pacific region and therefore should be foreign source pursuant to Section 865(d)(3).

International Multifood

International Multifoods Corporation and affiliated companies (hereinafter "Taxpayer") was in the business of franchising the right to operate Mister Donut shops in the United States and abroad. In 1983, Taxpayer entered into an agreement for the sale of its assets, rights, and interests in Mister Donut in Japan to Duskin, a Japanese corporation. In January 1989, following two years of negotiations, Taxpayer and Duskin entered into an agreement for the sale of Taxpayer's remaining Mister Donut business in the Asian and Pacific region, including countries in which Taxpayer owned trademarks but had no franchises as yet, for $2,050,000.

Taxpayer had entered into Mister Donut franchising agreements in Indonesia, the Philippines, Thailand, and Taiwan. Taxpayer had registered trademarks but no franchises in Australia, Hong Kong, Malaysia, New Zealand, the People's Republic of China, Singapore, and South Korea.

Taxpayer granted Mister Donut franchisees the right to open a fixed number of Mister Donut shops pursuant to established terms and conditions in specified locations. Franchisees prepared and merchandised distinctive quality donuts, pastries, and other food products. Taxpayer's franchise agreements for Mister Donut referred to the "Mister Donut System" and provided that "the name 'Mister Donut' [is] a unique and readily recognizable design, color scheme and layout for the premises wherein such business is conducted...and for its furnishings, signs, emblems, trade names, trademarks, certification marks and service marks..."[9]

Franchisees of Mister Donut were entitled to use the distinct building design, layout, signs, emblems, and color schemes of the Mister Donut system. Franchisees were given the right to use Taxpayer's copyrights, trade names, trade secrets, know-how, preparation, and merchandising methods, as well as confidential information. Taxpayer retained ownership of current and future trademarks. Taxpayer provided franchisees training including manuals covering all aspects of the business, which however remained the property of the Taxpayer. Franchisees were obligated to meet established standards covering such items as quality, preparation, appearance, cleanliness, and service.

The purchase agreement between Taxpayer and Duskin covered the franchise agreements, trademarks, Mister Donut System, and goodwill in the Asia and Pacific countries where Taxpayer operated and its trademarks and Mister Donut system in the other countries in the Asia and Pacific region where it had registered trademarks but no current franchisees. The purchase agreement also contained a 20-year covenant not to complete by the Taxpayer. Duskin in turn agreed not to compete with a business similar to Mister Donut for five years in the United States, Canada, and 38 specified countries in other regions.

An employee of Taxpayer's tax department suggested that there be a purchase price allocation in the purchase agreement and that "[i]t could be advantageous to have a portion of the purchase price allocated to 'goodwill' in the four Far East countries where Mister Donut already has franchisees."[10] He also suggested the allocation to trademarks in the People's Republic of China, Taiwan, Indonesia, Malaysia, Singapore, and Hong Kong be "...as little as possible" because of local tax concerns.[11]

Similarly, a tax department employee of the Taxpayer also noted that Duskin should be able, for Japanese tax purposes, to claim an amortization deduction for goodwill, trademarks, and the covenant not to compete and "...it is possible that Duskin may be indifferent to the specific amount allocated to each type of asset."[12] He also noted that "[t]he amount allocated to the trademarks and pending trademark applications will be subject to a tax of approximately 38% in the U.S. and potentially additional taxes in the countries in which such trademarks are registered."[13] Conversely, undoubtedly because of the foreign source income benefit that results in increased foreign tax credit utilization, he stated that "...the amounts allocated to goodwill and non-compete covenant, to the extent upheld upon IRS audit, will be tax-free to Multifoods."[14]

Taxpayer retained the Valuation Engineering Associates Division of Touche Ross to prepare an allocation of the purchase price among the assets to be sold, which was included in the purchase agreement. The allocation consisted of the following: trademarks, $120,000; noncompetition, $820,000; and goodwill, $1,110,000. Taxpayer's tax return reflected this valuation less selling expenses, which it allocated to goodwill and trademarks.

In denying foreign source income treatment to the amount allocated to goodwill, the Tax Court stated that Taxpayer's "...argument mistakes goodwill for the intangible assets which embody it."[15] The court went on to indicate that "[g]oodwill represents an expectancy that 'old customers will resort to the old place' of business"[16] and that "[t]he essence of goodwill exists in a preexisting business relationship founded

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1 108 TC 25 (1997).

2 *Id.* at 40-41.

3 The amount of income determined by the court allocable to the covenant not to compete was also sourced foreign.

4 507 U.S. 546, 71 AFTR 2d 93-1380 (1993).

5 Section 865(g) contains a special definition of U.S. resident for purposes of Section 865.

6 Thus had International Multifoods structured the sale of franchises, trademarks, and associated goodwill for contingent consideration tied to, e.g., sales generated by these assets, it would have achieved its objective of obtaining foreign source treatment for the income.

7 Peter H. Blessing and Gregory P. Lubkin question what "use" means where a patent covers manufacturing in country A of products sold in country B. This is academic if A and B are both foreign countries but does raise questions if one but not the other is the United States. See Blessing and Lubkin, 905-2nd T.M. *Sources of Income Rules* A-56.

8 Section 865(c)(3)(A) defines the term "United States depreciation adjustments" to mean in general "...the portion of the depreciation adjustments to the adjusted basis of the property which are attributable to the depreciation deductions allowable in computing taxable income from sources in the United States."

9 Note 1, *supra*, at 28

10 *Id.* at 34

11 *Id.*

12 *Id.* at 35

13 *Id.*

14 *Id.* While not specifically dealt with in the Code, covenants not to compete are sourced to the country in which they operate. See, e.g. Korfund Co., 1 TC 1180 (1943); Rev. Rul. 74-108, 1974-1 CB 248; Rev. Rul. 83-177, 1983-2 CB 112. The theory behind such treatment is that covenant not to compete agreements should be sourced similar to the general rule for income from services, i.e. where performed, pursuant to Sections 861(a)(3) and 862(a)(3).

15 Note 1, *supra*, at 36

16 *Id.* at 36-37 citing Houston Chronicle Publishing Co., 481 F.2d 1240,1247, 32 AFTR 2d 73-5312-A (CA-5, 1973).

upon a continuous course of dealing that can be expected to continue indefinitely."[17]

The Tax Court, citing *Canterbury*, stated that "[t]his Court has recognized that intangible assets such as trademarks and franchises are 'inextricably related' to goodwill."[18] The court pointed out that in *Canterbury*, the Tax Court found that the McDonald's "...franchise acts as the repository of the goodwill"[19] and that "...the goodwill produced by the McDonald's system was embodied in, and inseverable from, the McDonald's franchise that the taxpayer received."[20]

Similar to a McDonald's franchise, the Tax Court in *International Multifoods* cited *Montgomery Coca-Coca Cola Bottling Co.* for the proposition that with a Coca-Cola bottling franchise "...the value of goodwill, and the franchise are so interrelated as to be indistinguishable, all the value then should be assigned to the franchise."[21] In further support of its position, the Tax Court cited cases standing for the proposition that goodwill in a car dealership was "embodied in the franchises."[22]

The Tax Court in *International Multifoods* also pointed out that it believed Congress' intention in enacting the special sourcing rule in Section 865(d)(3) was to apply it "...only where goodwill is separate from the other intangible assets that are specifically listed in section 865(d)(2). If the sourcing provision contained in section 865(d)(3) also extended to the goodwill element embodied in the other intangible assets enumerated in section 865(d)(2), the exception would swallow the rule."[23]

The Tax Court pointed out that "[c]onsumers associate the Mister Donut trademarks with their pleasurable experience at Mister Donut shops. As a result, goodwill is also embodied in the trademarks, which Duskin acquired and which cause customers to return to Mister Donut shops in the future and patronize them."[24] The Tax Court concluded in *International Multifoods* that the Taxpayer "...did not establish that it transferred any goodwill separate and apart from the goodwill inherent in the franchisor's interest and trademarks that petitioner conveyed to Duskin."[25]

The decision in *International Multifoods* is not *sui generis*. Its reasoning is based on a plethora of authorities that have treated goodwill and trademarks, trade names, and franchises as inseverable from and the embodiment of goodwill.[26]

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[17] Note 1, *supra*, at 37 citing Canterbury, 99 TC 223, 247 (1992) and Computing & Software, Inc., 64 TC 223, 233 (1975).

[18] Note 1, *supra*, at 37 citing Canterbury, *supra* note 17 at 249-251 (1992).

[19] Note 1, *supra*, at 41 citing Canterbury, *supra* note 17 at 249.

[20] Note 1, *supra*, at 41.

[21] Note 1, *supra*, at 42 citing Montgomery Coca-Cola Bottling Co., 615 F.2d 1318, 1331-1332, 45 AFTR 2d 80-795 (Ct. Cl., 1980).

[22] Note 1, *supra*, at 42 citing Zorniger, 62 TC 435, 444-445(1974) quoting Akers, 6 TC 693, 700 (1946).

[23] Note 1, *supra*, at 37.

[24] *Id.* at 43.

[25] *Id.* at 44. The Tax Court in International Multifoods also reduced the amount Taxpayer had allocated to the covenant not to compete to $300,000.

[26] The Tax Court in Canterbury, *supra* note 17 at 252, cites Philip Morris, Inc., 96 TC 606, 634 (1991) that "[t]rademarks and trade names are the embodiment of goodwill."

[27] Blessing and Lubkin are somewhat less pessimistic stating that "when an ongoing business is sold along with valuable, specified intellectual property rights, a question of fact arises as to what portion of the goodwill is inseparable from the intellectual property right and what portion relates to the conduct of the ongoing business. Where a business has not had an opportunity to develop significant goodwill through its business activities, its other intellectual property rights presumably represent the entire intangible value of the business, as the Tax Court determined here...However, the court's decision may set a difficult precedent for future cases with different fact patterns." See Blessing and Lubkin, *supra* note 7 at 76. While beyond the scope of this article, an alternative position for foreign source treatment on income from the sale of goodwill may be found in certain tax treaties. See Blessing and Lubkin, *supra* note 7 at 77.

[28] Note 4, *supra*.

[29] The Tax Court in *International Multifoods* cited *Newark Morning Ledger* as follows: "[t]he Supreme Court has explained that '[t]he value of every intangible asset is related, to a greater or lesser degree, to the expectation that customers will continue their patronage[i.e. goodwill]'". Note 1, *supra*, at 37, citing *Newark Morning Ledger, supra* note 4, at 556.

[30] Note 4, *supra*, at 551-552.

[31] *Id.* at 566.

[32] Section 197 was enacted as part of the Revenue Reconciliation Act of 1993 (Pub. L. No. 103-66, 107 Stat. 312).

[33] See H. Rep't No. 103-111, 103d Cong., 1st Sess. 760 (1993), at 777.

[34] But see the comment in International Multifoods, *supra* note 1 at 37, that "an asset does not constitute goodwill, however, simply because it constitutes to this expectancy of continued patronage." This line in the opinion does not appear to be of consequence to the holding or the rest of the analysis.

[35] In his dissent, Justice Souter criticized the taxpayer's argument stating that "it (the taxpayer) argues first that the Court ought to adopt a new definition of 'goodwill' that would not cover any expectation of future custom with a lifespan subject to definite advance estimate; then it claims that the asset here falls outside the new definition because Ledger's expert has predicted the length of the asset's wasting life with reasonable accuracy." Note 4, *supra*, at 573.

[36] Note 4, *supra*, at 566.

[37] *Id.*

[38] For an article critical of TAM 200602034, see Alton and Weller, "New IRS Ruling Unveils Restrictive Approach to Like-Kind Exchanges of Intangibles," 104 J. of Tax'n 208 (April 2006).

[39] The taxpayer intended the transaction to meet the deferred exchange rules under Section 1031, although the TAM notes there were deficiencies in compliance with the identification requirements of the replacement property.

[40] 15 U.S.C. at sections 1051-1126.

Aside from CCA 200911006, it would have seemed that after the well-reasoned *International Multifoods* decision, taxpayers would have a difficult burden in trying to use Section 865(d)(3) to allocate amounts to goodwill to the extent the asset was very closely tied to a marketing-based intangible such as trademarks, trade names, and franchises.[27]

Newark Morning Ledger

One of, if not the most significant case addressing the tax treatment of intangibles closely connected to goodwill is the Supreme Court decision in *Newark Morning Ledger.*[28] Importantly the case was decided four years prior to *International Multifoods*. The case is briefly referred to in *International Multifoods* but was not critical to the Tax Court's analysis.[29]

In *Newark Morning Ledger*, the Court held that the taxpayer could claim a tax deduction for amortization of an amount paid for acquired newspapers' "paid subscribers." The Government in *Newark Morning Ledger* argued that "... 'paid subscribers' represents an asset indistinguishable from the goodwill" of the acquired newspapers.[30] The Court said that the "[t]he significant question for purposes of depreciation is not whether the asset falls 'within the core concept of goodwill'...but whether the asset is capable of being valued and whether that value diminishes over time."[31] In holding for the taxpayer, the Court determined that the asset "paid subscribers" had a useful life that can be ascertained with reasonable accuracy and that the asset was not self-regenerating.

The impact of *Newark Morning Ledger* on future questions of this kind is quite limited with the enactment of Section 197.[32] Section 197 generally permits most purchased intangible assets, including goodwill, to be amortized for tax purposes over 15 years and was enacted in part to eliminate future disputes of the type that occurred in *Newark Morning Ledger.*[33]

The holding of the Court in *Newark Morning Ledger* can be read as not inconsistent with the cases cited by the Tax Court in *International Multifoods* to the effect that many marketing based intangibles like trademarks, trade names, and franchises "embody" and are "inseverable" from goodwill. *Newark Morning Ledger* can be interpreted as standing for the proposition that there is an outer and inner circle of assets both of which are based on the expectation of continuing patronage by existing customers, the core concept of goodwill,[34] but the outer circle contains a subgroup of assets whose value diminishes over time and is not self-regenerating, with the inner circle the residual whose value does not diminish with time.[35]

The Court in *Newark Morning Ledger* attempted to limit the proverbial floodgate that it undoubtedly expected might result from its decision. The Court stated that "...we do not mean to imply the taxpayer's burden of proof is insignificant" with respect to separately valuing and proving the limited useful life of a so-called customer-based intangible that reflects the expectancy of continuing patronage.[36] The Court went on to state that "[o]n the contrary, that burden often will prove too great to bear." [37]

TAM 200602034

In TAM 200602034, the IRS concluded that "trademarks and trade names are...a component of a larger asset, either of goodwill, or of going concern or both" and thus were not eligible for like-kind treatment.[38]

The general rule provided by Section 865(a) is that income from the sale of personal property is sourced by the residence of the taxpayer.

Among the transactions analyzed in TAM 200602034 was a claim of a like-kind exchange treatment by a taxpayer on the sale of certain trademarks, trade names, and design marks pertaining to one product and the subsequent purchase of trademarks, trade names, and design marks of a different product.[39] The taxpayer had argued "...that intangible assets properly registered with the United States Trademark Office under the Lanham Act[40] enjoy essentially the same legal protections. Therefore, the nature and character of such rights are of a like-kind." The taxpayer also asserted that the requirement in Reg. 1.1031(a)-2(c) that "the nature or character of the underlying property to which the intangible relates" met the like-kind requirement because "[t]he Lanham Act applies to a 'word, name, symbol, or device or any combination thereof.' Thus a registered trademark may refer to any item that is within one of those categories. In this case, all of the exchanged trademarks at issue were in the last category, i.e. a combination of words, names, symbols or devices."

In rejecting the taxpayer's arguments, TAM 200602034 states that "[i]t seems disingenuous for anyone to assert that all marks and trade names are alike." The Service quotes Ballentine's *Law Dictionary* as to the definition of trade name as a "name, word, or phrase employed by one engaged in business, as a means of identifying its products, business or services and of establishing good will."[41] TAM 200602034 states that trademarks and trade names "...are so closely related to (if not a part of) the goodwill and going concern value of a business, it is our view that trademarks and trade names should not be considered of like-kind under Section 1031."

CCA 200911006

In CCA 200911006, the IRS reversed its position in TAM 200602034 and FAA 20074401F and stated that "...intangibles such as trademarks, trade names, mastheads and customer-based intangibles that can be separately described and valued apart from goodwill qualify as like-kind property under IRC Sec 1031." In arriving at its conclusion, CCA 200911006 indicated that "...the analysis of *Newark Morning Ledger Co.* applies in determining whether intangibles constitute goodwill or going concern value within the meaning of Reg. 1.1031(a)-2(c)(2). CCA 200911006 goes on to assert that "[i]n our opinion, except in rare and unusual circumstances, intangibles such as trademarks, trade names, mastheads, and customer-based intangibles can be separately described and valued apart from goodwill." This comment is certainly contradictory to the Service's position and the Tax Court's conclusion in *International Multifoods* and numerous other judicial decisions.

The residual approach to valuing goodwill

In a thoughtful article written prior to the issuance of CCA 200911006, Christian McBurney was critical of TAM 200602034 and FAA 20074401F, arguing that what constitutes goodwill for tax purposes has evolved into that of a residual asset.[42] He correctly points out that "Sections 338 and 1060 and the Regulations thereunder, do not provide for separately valuing goodwill or going-concern value as a separate asset. Instead, after allocating purchase price to all other identifiable tangible and intangible assets, the residual is allocated to an asset called goodwill and going-concern value."[43]

The Service's approach to including trademarks, trade names, franchises, and all other Section 197 intangibles except goodwill and going concern in Category VI for applicable asset acquisitions under Section 1060 and deemed asset acquisitions under Section 338 with Category VII reserved for goodwill and going concern value to the extent that there remains any unallocated purchase price can be viewed as a contradiction to the notion of the inseverability of goodwill from other marketing based intangibles.[44]

Even under the residual approach however, presumably there remains goodwill inherent in marketing-based intangibles like trademarks, trade names, and franchises that are included in Category VI. Consider the Tax Court's discussion regarding goodwill connected with trademarks in *Nestle Holdings Inc.*,[45] which dealt in part with a valuation pursuant to a Section 338 election in tax years prior to when the use of the residual approach to valuing goodwill was mandatory, but where the court employed the residual approach in arriving at the goodwill and going concern value. The Tax Court, while rejecting the notion that all the acquired goodwill was embodied in the trademarks and trade names, acknowledged that their entire value is tied to the goodwill. The Tax Court cited the Second Circuit decision in *Marshak v. Green* that "the naked trademark 'has no independent value apart from the goodwill that it symbolizes.'"[46] The Tax Court quoted approvingly from the Service's valuation expert that "their (trademarks and trade names) value is intimately linked with an important element of the company's goodwill...it may not be possible to separate the trademark or trade name from the product or company,

[41] Ballentine's *Law Dictionary* 1289 (3d ed. 1969).

[42] McBurney, "Goodwill in Like-Kind Exchanges of Newspapers - IRS is Inconsistent With Other Areas," 108 J. Tax'n 147 (March 2008).

[43] *Id.* at 149.

[44] See Reg. 1.338-6(b)(2)(vi)and (vii). Furthermore Temp. Reg. 1.367(a)-1T(d)(5)(iii) defines "[f]oreign goodwill or going concern value as "...the residual value of a business operation conducted outside of the United States after all other tangible and intangible assets have been identified and valued."

[45] TCM 1995-441, affd. in part, revd. and remanded in part 152 F. 3d. 83, 82 AFTR 2d 98-5467 (CA-2, 1998).

[46] *Id.* at 95-2741 citing Marshak v. Green, 746 F.2d 927, 929 (CA-2, 1984).

[47] *Id.* at 95-2741-2472.

[48] See Reg. 1031(a)-2(c)(2); See also TD 8343, 1991-1 CB 165.

[49] Note 4, *supra* at 566.

and as such the name has no independent value apart from goodwill."[47]

Conclusion

Suppose a fact pattern similar to *International Multifoods* were to surface today. Could the IRS make an intellectually consistent argument that the trademarks and franchises were "inextricably related to goodwill" and that the franchises and trademarks "embody" goodwill? Could it assert no goodwill was transferred separate and apart from the goodwill "inherent in" the franchises and trademarks conveyed? How can it pass the proverbial blush test in light of the Associate Chief Counsel's statement in CCA 200911006 that "...except in rare and unusual situations, intangibles such as trademarks, trade names, mastheads, and customer-based intangibles can be separately described and valued apart from goodwill?" Is the *International Multifoods* fact-pattern such a "rare and unusual situation"? On its face, it would not seem so.

To be clear, my objection is not to a policy that reduces the barriers to the use of like-kind exchanges for intangibles. While like-kind exchanges of goodwill are not currently permitted under the regulations,[48] why not amend the regulations to permit the exchange of marketing-based intangibles and their associated goodwill? My discomfort is with achieving liberalization of the like-kind exchange treatment with respect to such intangibles by further undercutting the reasoning of *International Multifoods* and many other cases that reject the creation of a wall between goodwill that is closely connected with marketing-based intangibles.

The notion in CCA 20091006 that "...except in rare and unusual circumstances, intangibles such as trademarks, trade names ... can be separately described and valued apart from goodwill" is at variance with some well thought through precedents including *International Multifoods*. Furthermore it is certainly not necessitated by the holding of *Newark Morning Ledger*. The decision of the Court in *Newark Morning Ledger* can be seen as not standing for the principle that marketing based intangibles like trademarks, trade names, and franchises do not embody goodwill. Instead the decision might properly be interpreted as providing that a purchased asset whose value lies in the expectancy of continuing patronage "within the core concept of goodwill"[49] but which wastes over an ascertainable period of time can be depreciated for tax purposes even absent the statutory relief provided by Section 197.

The Service might want to consider modifying its rationale for permitting like-kind exchanges of intangibles in a manner that does not undercut both its prior position in *International Multifoods* and the reasoning of the Tax Court in rendering its decision. ■