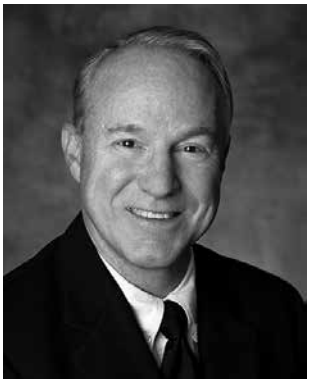
Professional Practice Transitions, Section 197, and the Anti-Churning Rules



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ONE OF THE newer and more perplexing mazes for the tax adviser to negotiate involves the anti-churning rules of Section 197. Taxpayers generally can claim an amortization deduction over a 15-year period on purchased intangible assets defined as "amortizable Section 197 intangibles"[1] to the extent they are acquired after August 10, 1993[2] and held in connection with the conduct of an active trade or business or for the production of income. Amortizable Section 197 intangibles most commonly include goodwill and going-concern value (as well as intellectual property such as franchises, trademarks, trade names, copyrights and patents) purchased in connection with the acquisition of a business. Covenants not to compete provided by the seller to the buyer incident to the acquisition of a business are also amortizable Section 197 intangibles.[3] Self-created intangibles (as opposed to purchased intangibles) are not amortizable Section 197 intangibles.[4]

The concepts analyzed in this article are particularly germane to the taxable acquisition of a professional practice. Our examples will illustrate the tax results in that context.

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[1] Section 197(a). All Section references are to the Internal Revenue Code of 1986, as amended, unless otherwise noted.

[2] An alternative possibility would apply to intangible assets acquired after July 25, 1991, which was an earlier effective date for taxpayers who elected early application of the Section 197 rules. This second possibility would be of unlikely relevance to the professional practice scenarios addressed in this article.

[3] Section 197(d).

[4] Section 197(c)(2).

Example 1: Old Doc began practicing in 1990 and has grown the business into a very profitable practice. Unrelated New Doc purchases all the assets of the practice in 2015, including Old Doc's personal practice goodwill. New Doc will be able to amortize the purchased goodwill (as well as other amortizable Section 197 intangibles such as a covenant not-to-compete) over a 15-year period beginning in the month in which the intangibles are acquired and used in the acquired practice. The 15-year amortization period applies regardless of the actual useful life of the amortizable Section 197 intangible such as a 5-year covenant not-to-compete given to New Doc by Old Doc.

CAPITAL CONTRIBUTIONS OF INTANGIBLES • Capital contributions do not make them amortizable. The owner of a non-amortizable, pre-August 11, 1993, intangible cannot convert it into an amortizable intangible by contributing it to the capital of a controlled corporation or partnership on a tax-free basis under Sections 351 or 721.[5] Despite the fact that there is a new legal owner of the intangible, because the entity takes a carry-over tax basis in that asset by virtue of Sections 362 or 723, the entity is deemed to have "stepped into the shoes" of the transferor's non-amortizable status.

Example 2: Old Doc creates a wholly-owned C or S corporation, Old Doc Professional Corporation, Inc. ("Old Doc, Inc."). Old Doc contributes all assets associated with his professional practice, including his personal goodwill, to his wholly-owned corporation on a tax-free basis in return for all of the issued and outstanding stock of the corporation. Old Doc, Inc., the new owner of the practice assets, is unable to amortize any of the intangibles contributed to it by Old Doc as they were non-amortizable in his hands prior to the capital contribution and were received by the transferee corporation in a tax-free capital contribution under Section 351.[6]

THE ANTI-CHURNING RULES • Conceptually similar to the restriction just illustrated, Section 197 also has so-called "anti-churning" rules that are meant to prevent "related" taxpayers from buying and selling intangibles amongst themselves in order to transform previously non-amortizable intangibles into newly-purchased, amortizable intangibles.[7] The anti-churning rules apply only to intangible assets that were used by the seller (or a person related to the seller) between July 25, 1991[8] and August 10, 1993 (the latter day being the day before the general effective date of the Section 197 rules) and that are sold to a related taxpayer after that later date.

When is there a sale to a related party that would trigger the anti-churning rules? Related parties are defined under the wide-ranging Section 267(b) and the similar definition for partners and partnerships under Section 707(b).[9] However, the normal more-than 50 percent threshold of ownership between owners and controlled entities is lowered to more-than 20 percent.[10] The most common relationships under Section 267(b) involve members of a family and an individual as well as a corporation in which the individual owns, directly or indirectly, the requisite percentage of the corporation's outstanding stock. Section 707 defines a similar relationship in which the partner owns, directly or indirectly, the required percentage of a capital or profits interest in a partnership entity. With regard to indirect, or constructive, ownership in the corporation or partnership, the family attribution rules under Section 267(b)(1) are much broader than the similar

[5] Section 197(f)(2).

[6] Section 351(a).

[7] Section 197(f)(9).

[8] See footnote 2.

[9] Section 707(b) incorporates Section 267 by reference.

[10] Section 197(f)(9)(C).

family attribution rules governing stock redemptions under Section 318(a)(1).[11] For example, Section 267 includes siblings and all ancestors and lineal descendants as related parties, whereas Section 318 includes only children, grandchildren and parents and excludes siblings and grandparents.[12]

As will be illustrated later in this article, partners in a partnership or NOT deemed related to each other by virtue of being partners in the same partnership (e.g., the partners aren't additionally related to each other as family members). This is the basis for the very confusing but all-important Section 754 exceptions to the anti-churning rules that will be detailed below.[13]

Example 3: Old Doc from Example 1 (who commenced practice in 1990) sells his practice to New Doc, his son, in 2015. Because the two doctors are related to each other as parent and child, New Doc is unable to amortize any of the purchased intangibles.

Having a related party purchase the intangibles through a controlled entity would not change this result as the original owner would indirectly (through attribution) control the purchasing entity.

Example 4: Old Doc sells all the assets of his practice (again, founded in 1990) to New Doc Professional Corporation, Inc. ("New Doc, Inc."), a corporation wholly-owned by his son, New Doc, in 2015. Under the constructive ownership provisions just noted, Old Doc is deemed to own the stock actually owned by New Doc, so he is considered the 100 percent owner of New Doc, Inc. and amortization of the purchased intangibles would be prohibited. If there was another unrelated shareholder in New Doc, Inc., the same result would occur unless New Doc owned 20 percent or less of New Doc, Inc. Also, the same result would occur if the entity was a limited liability company or other partnership entity as opposed to an S or C corporation.

BIFURCATING INTANGIBLES • Recall that the anti-churning rules apply to the sale of intangibles between related parties that were in existence between July 25, 1991 and August 10, 1993 (the "Transition Period"). Professor Eustice used to have fun with the tax students at New York University by questioning them as to how little an amount of prohibited boot was necessary to blow-up a Type B reorganization (a tax-free voting stock for voting stock swap). The answer is, with very few exceptions (e.g., cash for fractional shares) any other consideration flowing to the target shareholders will do so. There is an analogous issue under the anti-churning rules.

An intangible asset in the form of goodwill and going-concern value is an ever-evolving asset. What if in the prior Examples the business commenced shortly before the general effective date of Section 197 such that a small, even *de minimis*, portion of the current goodwill accrued before August 11, 1993. Can pre- and post-effective date goodwill be bifurcated so that post-August 10, 1993 goodwill can be sold to a related party without invoking the anti-churning rules?

The legislative history is not particularly clear on this issue.[14] Perhaps because of the practical difficulty of splitting the baby in two, the Treasury Regulations take the position that any pre-effective date goodwill will taint the whole.[15]

Example 5: Return to the facts of Example 3, except that Old Doc commenced his practice in July 1993 rather than in 1990. A few of his original 1993 patients are still with him and his practice has

[11] Section 267(c)(4).

[12] Section 318(a)(1)(A).

[13] Sections 707 (b) (1) and (3).

[14] Conference Report, p. 234, Revenue Reconciliation Act of 1993 (P.L. 103-66).

[15] Treasury Regulation Section 1.197-2(k), Example 18.

grown steadily thanks to favorable referrals from his original patients.

Even though the vast majority of goodwill and going-concern value related to Old Doc's practice accrued after August 10, 1993, some of it was in existence during the Transition Period. None of the intangibles purchased by New Doc, Old Doc's son, constitute amortizable intangibles.

SECTION 197 ISSUES FOR NEW INCOMING PROFESSIONAL OWNER WHEN OLD OWNER REMAINS IN PRACTICE • We will analyze the Section 197 issues where the older owner retires in a moment. Now we will examine more precisely acquisition and post-acquisition practice formats and how Section 197 relates to them where there is a new incoming professional and the old owner remains in that practice. An increasingly common method of accommodating the incoming unrelated owner in a professional practice (New Doc in our previous Examples), where Old Doc will remain in the practice for a future period of time, is for New Doc to form an S corporation and have it purchase some (but not all) of the assets from the existing practice owner (Old Doc) who also drops his or her unsold assets into a second newly-formed S corporation. Thereafter, Old Doc and New Doc will operate the actual practice through a newly-formed limited liability company (owned by the two S corporations) that collects practice revenues, pays the operating expenses (including employee benefits) and employs the general staff. Occupancy expenses are usually allocated pro rata, *e.g.*, 50 percent/50 percent in a two doctor practice. Net profits are passed-through (Schedule K-1'd) to the S corporations owned by the respective Docs. Each of those doctor-owned entities pays the direct business expenses of each owner that may include liability insurance, continuing education, business travel, automobile and possibly lab and/or any other expenses which may be disproportionate between the doctors. The intermediary S corporation format is generally implemented to obtain payroll tax benefits.

For those practices that were originally formed pre-August 11, 1993, the anti-churning rules will be applicable even if New Doc is not a related party and will deny amortization of the goodwill purchased by the incoming owner if Old Doc, directly or indirectly, owns at least twenty percent (20 percent) of the practice entity (the limited liability company).

Example 6: Return to the facts of Example 3, except that New Doc is unrelated and Old Doc sells one-half of his practice assets and goodwill to S-Corp 1, wholly-owned by New Doc. Thereafter, Old Doc (who previously practiced as a sole proprietor or a single member LLC) contributes his unsold practice assets to newly-formed S-Corp 2, wholly-owned by Old Doc. S-Corp 1 and S-Corp 2 then contribute all tangible property and goodwill owned by them as capital contributions to a newly-formed limited liability company ("LLC"), which is owned 50 percent each by S-Corp 1 and S-Corp 2.

The LLC will be unable to amortize any part of the acquired goodwill. The unsold intangibles that have been contributed successively to S-Corp 2 and LLC by Old Doc were contributed as tax-free capital contributions under Sections 351 and 721. As to that portion of the practice intangibles, the LLC has "stepped into the shoes" of Old Doc and is prohibited from amortizing them.[16] With regard to the goodwill and other intangibles bought and then contributed by S-Corp 1 to the LLC by New Doc, that portion would be non-amortizable to the extent that LLC is a related party to Old Doc. S-Corp 2 owns more than 20 percent of LLC and Old Doc is deemed to own the entire membership interest in LLC owned by his controlled corporation, S-Corp 2. S-Corp 2 is a 50 percent member of LLC and as Old Doc is deemed to own

[16] Section 197(f)(2).

indirectly what his 100 percent owned S-Corp 2 owns. Through attribution Old Doc is a 50 percent member of LLC and is well within the more than 20 percent ownership threshold of Section 197(f)(9)(C). In establishing the time to test for a prohibited relationship, the Regulations on these facts (where there is a series of related transactions) will check immediately before the earliest such transaction or immediately after the last such transaction for such a relationship.[17] Except for the exceptions noted below, the only way to amortize the goodwill and other intangibles purchased from Old Doc by New Doc in this scenario would be if Old Doc owned, directly or indirectly, 20 percent or less of LLC.[18]

EXCEPTIONS TO THE ANTI-CHURNING RULES • There are exceptions to the application of the anti-churning rules. The first of these exceptions would be of little practical use in most professional practice transitions as it requires the recognition of significantly greater amounts of tax liability by the seller (Old Doc in our previous examples). This first exception is the so-called "gain recognition" exception to the anti-churning rules.[19] Under this exception, anti-churning rules do not apply if: (i) the practice entity in the Examples would not be related to Old Doc but for the substitution of more than 20 percent (as opposed to more than 50 percent in the previously discussed Section 267 related party rules applicable to an entity and its controlling owner), and (ii) Old Doc actually pays federal income tax on the resulting sale to New Doc (or New Doc's S corporation) at the highest ordinary income tax rate imposed on non-corporate taxpayers under Section 1.

A second exception to the anti-churning rules is that they are inapplicable to acquisitions of intangibles by reason of death where the new owner obtains a Section 1014(a) step-up in basis.[20]

Example 7: The facts are the same as in Example 3 except that Old Doc's practice is bequeathed to his son, New Doc, on Old Doc's death. The adjusted bases in the practice assets, including Old Doc's practice goodwill, are stepped-up to fair market value on the date of death. New Doc can amortize the goodwill as if he were unrelated to Old Doc and had purchased that asset for fair market value.

The last exception to the anti-churning rules, and the one that will be thoroughly explored in this article, poses a much greater possibility in practice transitions. This involves a partnership entity that has made the Section 754 election. General partnerships, limited partnerships, limited liability companies and limited liability partnerships, although all different forms of business entities under applicable state law, are all taxed as partnerships under Subchapter K of the Internal Revenue Code. Any of these entities, therefore, has the ability to make the Section 754 election.[21]

Most practitioners have heard of the "aggregate" and "entity" approach of Subchapter K. Partnership entities, being the purer form of tax-conduit entities as opposed to S Corporations, normally follow the aggregate theory. This theory takes the position that the partnership is not an entity separate from the partners but rather is the individual partners.

The Section 754 election provides one of the better examples of the aggregate theory. In the context of the professional practice transitions we

[17] Code 197(f)(9)(c) and Treasury Reg. Section 1.197-2 (h) (6) (ii).

[18] 1.197-2 (k), Example 18.

[19] Section 197(f)(9)(B) and Treasury Reg. Section 1.197-2(h) (9).

[20] Section 197(f)(9)(D) and Treasury Reg. Section 1.197-2(h) (5)(i).

[21] A single member LLC, taxable as a sole proprietorship, could not make the Section 754 election.

are describing, we would need Old Doc and at least one other partner to have housed their professional practice (including non-amortizable professional goodwill) in a partnership entity. The fact that the practice is fully within a pre-existing partnership that has made the Section 754 election causes a markedly different result than those that we have looked at earlier. Old Doc's share of professional goodwill that has been grown within the partnership may be of significant value but will have little or no "inside" tax basis in the hands of the partnership. Absent any Section 754 election, when New Doc becomes a new partner, New Doc would assume his nonamortizable share of the practice intangibles. The results are very different if the Section 754 election is in effect where we see the aggregate theory in play.

EXAMPLE 8: We will presume that Old Doc and his older partner have conducted their practice through their equally owned partnership entity ("PS") since 1990. They are interested in bringing in New Doc (unrelated to either of the older partners) as a new one-third partner and to eventually transition the entire practice to him. Prior to New Doc's entry into the practice, presume for simplicity sake that PS's assets consisted of the following:

	AB	FMV
Cash	$90,000.00	$90,000.00
Goodwill	$0	$900,000.00

New Doc pays the existing partners $330,000.00 for his new one-third interest in PS. Because PS has made the Section 754 election (which could have been previously made or made in the year of New Doc's entry into PS), Section 743(b) is invoked. The 754/743 effect is that New Doc is deemed to have purchased one-third of the goodwill and can amortize over 15 years the $300,000.00 he paid for his share of it.[22]

The authors are aware that the IRS is looking for abuse of the Section 754 exception. The Section 197 Treasury Regulations elsewhere empower the government to disregard the amortizable nature of an intangible if one of the principal purposes of the transaction is to avoid the anti-churning rules.[23]

Example 9: Old Doc alone has practiced since 1990 through a corporation that owns all the tangible assets of the practice. Old Doc has negotiated with New Doc to purchase one-half of his practice assets, including half of Old Doc's practice goodwill, and to subsequently practice with him through a partnership entity. The parties are ready to consummate the deal when their advisors determine that the anti-churning rules illustrated as **Example 6** will come into play. The parties then restructure the format so as to shoehorn into the **Example 8** results. Old Doc and his corporation become members of a newly-formed LLC. The corporation transfers its tangible assets to the LLC and Old Doc transfers his personal goodwill to the LLC. The LLC makes a Section 754 election on its first tax return. Thereafter, Old Doc and his corporation sell New Doc 50 percent of the membership interests in the LLC.

If detected on audit, the Service will attempt to recast the transaction as having a principal purpose of avoiding the anti-churning rules. The Service would likely be able to recast the transaction unless the LLC was "old and cold" and not formed incident to the transition of part of the practice to New Doc.

SECTION 197 ISSUES WHEN OLD OWNER RETIRES FROM PRACTICING IN A PARTNERSHIP ENTITY • Now we will look at

[22] Treasury Regulation Section 1.197-2(k), Example 19.

[23] Treasury Regulation Section 1.197-2(h)(11).

Section 197 implications where Old Doc is retiring from the practice. If Old Doc is selling a partnership interest to unrelated New Doc, the same tax result occurs as in Example 8.

Example 10: Again, Old Doc and his older partner have conducted their practice through the equally owned PS since 1990. Prior to New Doc's entry into the practice, PS's assets consisted of the following:

	AB	FMV
Cash	$90,000.00	$90,000.00
Goodwill	$0	$900,000.00

New Doc pays Old Doc $495,000.00 for his one-half interest in the PS. Because PS has made the Section 754 election, Section 743(b) is invoked. The 754/743 effect is that New Doc can amortize over 15 years the $450,000.00 he paid for his share of the goodwill.[24] The analysis is technically more complicated than this simple explanation as selling a 50 percent or more interest in the partnership triggers a Section 708(b)(1)(B) termination of the partnership (as will be more thoroughly detailed below), but the net result will be as just stated.

Here is another fascinating aspect of the Section 754 election and a partnership entity. Now we will change the facts and presume a 3-person partnership entity with a significant amount of previously non-amortizable practice goodwill as the doctors are all older practitioners. Old Doc is again retiring from the practice but is selling to his other two partners not to a new incoming doctor. This transition can be formatted one of two ways, either as a direct sale of Old Doc's partnership interest to the other two partners or as liquidating payments from the partnership to the retiring partner under Section 736.

Let's first examine the direct sale of the partnership interest to the two remaining partners.

Example 11: Old Doc and his older partners have conducted their practice through the equally owned PS since 1990. The PS's assets consist of the following:

	AB	FMV
Cash	$90,000.00	$90,000.00
Goodwill	$0	$900,000.00

Old Doc sells his one-third interest in the partnership entity directly to the continuing partners. Old Doc's gain will be a long-term capital gain and if the PS has made the Section 754 election, Section 743(b) is invoked. The 754/743 effect is that the continuing partners can step up their 15-year amortizable basis in the goodwill by $150,000 each.

The regulations again emphasize the aggregate theory on these facts treating the transaction as if Old Doc directly sold his share of the goodwill to the two remaining partners. The regulatory prohibitions in this situation are invoked only if the continuing partners are related to Old Doc under Section 267 or if Old Doc remains a direct user of his goodwill sold to the continuing partners.[25] As noted earlier partners in a partnership or not deemed related to each other by virtue of being partners in the same partnership (e.g., the partners aren't additionally family members).

The Section 736 retiring partner scenario involving a general partner in a service intensive (as opposed to a capital intensive) partnership, like the professional practice situations we have been examining, presents major and additional planning opportunities.

[24] Treasury Regulation Section 1.197-2(k), Example 19.

[25] Treasury Regulation Section 1.197-2(h)(12)(v).

Example 12: Again, Old Doc and his older partners have conducted their practice through the equally owned PS since 1990. Again the PS's assets consist of the following:

	AB	FMV
Cash	$90,000.00	$90,000.00
Goodwill	$0	$900,000.00

Now the documentation clearly indicates Old Doc is retiring from the partnership entity and payments from the partnership will be governed by Section 736. The famous *Foxman* case[26] emphasizes the importance of properly documenting a Section 736 retirement from a direct sale to the continuing partners so as to properly encompass the intentions of all the parties. Whether the partnership pays Old Doc $330,000 in a lump-sum or in a series of payments over time, the character of Old Doc's gain will depend on whether the retirement payments are stated in the partnership or liquidating agreement to be for his share of goodwill.[27] If they are, the entirety of Old Doc's gain will again be long-term capital gain. As to the continuing partners, if again the Section 754 election is in effect, Section 734 (not 743) will be invoked giving each of the continuing partners the same $150,000 basis in their share of the goodwill deemed purchased from Old Doc as in Example 11. The continuing partners (unless related to Old Doc) are considered to be "eligible partners" under the regulations and are therefore entitled to amortize their share of the goodwill basis increase under Section 734.[28]

If the $300,000 of payments is not stated to be for Old Doc's share of the goodwill, the $300,000 will be a guaranteed payment constituting ordinary income to Old Doc and deductible to the continuing partners.[29] In this latter unstated goodwill scenario it appears that the continuing partners would take a current deduction for the guaranteed payment to Old Doc even if they were related to Old Doc as family members. The authors have found no authority either affirming or denying this treatment to continuing related partners.

Return to the facts in Example 10. As noted, the sale of 50 percent or more interest in a partnership entity results in a termination of the partnership under Section 708(a)(1)(B). What technically happens on the sale by Old DOC of his 50 percent interest to New DOC is that PS is deemed to contribute all of its assets (including the goodwill) to new PS in return for ownership interests in new PS and then distributing the new PS interests to the old partners and New DOC in liquidation of the original PS.[30] To the extent that the old partnership has a Section 754 election in effect, Section 743 is invoked and apportions the basis increase in the goodwill entirely to New Doc.[31]

Now change the facts in Example 10. Again we have two 50 percent owners of a partnership entity in which there is a significant amount of pre-1993 un-amortizable goodwill as Old DOC and his partner are older practitioners. Now, however, Old DOC is ceasing practice and transitioning his 50 percent interest to his old partner (Continuing Owner). In this situation, unlike in Example 10 where there was a continuing partnership entity and a termination of the old partnership un-

[26] 41T.C. 535 (1964).

[27] Section 736 (b)(2)(B).

[28] Treasury Regulation Section 1.197-2 (h)(12)(iv).

[29] Section 736 (a)(2).

[30] Treasury Regulation Section 1.708-1(b).

[31] Treasury Regulation Section 1.197-2 (k), Ex. 16 (iii).

der Section 708)(a)(1)(B), the business now ceases to be conducted as a partnership as there is only one owner and the partnership terminates under Section 708(a)(1)(A). In both case authority (*McCaulsen v. Comm.*, 45 TC 588 (1966)) and Revenue Ruling 99-6, the transition of Old Doc's 50 percent interest to Continuing Owner terminates the entity as a partnership as there is now only one owner. The cited authority deems this situation to involve a distribution of half of the prior partnership's assets (including the goodwill) to Old DOC and Continuing Owner. Continuing Owner would then be deemed to have bought Old Doc's goodwill directly from him, Section 754 is inapplicable as there is no longer a partnership. Recall that in a series of transaction as here, Section 197(f)(9)(c) and the Regulations[32] will mandate examining the first and last step in that series as being the critical ones. On these facts, Continuing Owner would be unable to amortize that purchased goodwill as it was bought from a related party (the partnership entity in which Continuing Owner owned a 20 percent or more interest).

The planning technique here is to not terminate the partnership entity under Section 708(a)(1)(A) because of only one ongoing owner, but to continue the practice as a partnership even though there is a termination under Section 708(a)(1)(B).

Example 13: Again, Old Doc and his older partner, Continuing Owner, have conducted their practice through the equally owned PS since 1990. PS's assets consist of the following:

	AB	FMV
Cash	$90,000.00	$90,000.00
Goodwill	$0	$900,000.00

Continuing Owner's 100 percent owned Corporation, Continuing Owner, Inc., buys Old Doc's 50 percent partnership interest for $495,000.00. Even though there is a partnership termination under Section 708 (a)(1)(B), we are in the Example 10 scenario where the partnership business of the old partnership is continued in a new partnership entity equally owned by Continuing Owner and Continuing Owner, Inc. If old PS had made the Section 754 election, Section 743(b) is invoked. The 754/743 effect is that Continuing Owner, Inc. can amortize over 15 years the $450,000.00 it paid for Old Doc's share of the goodwill.[33]

Recall the logic behind the Section 754 exceptions. It is based on the aggregate theory of Subchapter K and is expressed directly in the statute at Section 197(f)(9)(E): "determinations under [the Section 754 exceptions] shall be made at the partner level and each partner shall be treated as having owned and used such partner's proportionate share of the partnership assets.

There appears to us to be another major formatting difference in analyzing a sale of personal goodwill by Old Doc to the continuing practitioner(s). What if Old Doc's practice goodwill is personal goodwill owned by Old Doc and not of the PS. If sold directly to Continuing Owner, Continuing Owner would now be purchasing Old Doc's personal goodwill in one step outside the partnership and Continuing Owner would not be purchasing the goodwill from a related party.

If, however, Old Doc sells his personal goodwill to a continuing partnership in which Old Doc is a retiring partner more analysis appears to yield a different result. In establishing the time for testing for a prohibited relationship where there is a

[32] Treasury Regulation Section 1.197-2 (h)(6)(ii).

[33] Treasury Regulation Section 1.197-2(k), Example 19.

single transaction, the Code and Regulations will check immediately before or immediately after the transaction for such a relationship. Immediately before the sale, Old Doc, if a more than 20 percent partner at that time, would be a related party to the partnership. The purchasing partnership, being a related party to Old Doc, would be prohibited from amortizing the purchased goodwill.

CONCLUSION • We earlier made reference to the *Foxman* case, which is the leading authority in distinguishing between a sale between partners and a Section 736 retirement from the partnership. Foxman has been made more famous by the excerpted quote from it used in the preface of the Mckee, Nelson and Whitmire treatise on partnership taxation:

"The distressingly complex and confusing nature of the provisions of Subchapter K present a formidable obstacle…even by one who is sophisticated in tax matters with many years of experience in the tax field…when its complex provisions may confidently be dealt with by at most only a small number of specialists who have been initiated into its mysteries."

Could there be a better illustration of the Court's point then what we have just explored in this article, snake dancing through some of the tentacles of a Section 754 election? We hope this publication will assist practitioners in that effort.