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Helpful IRS guidance for tenant in common

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The IRS Office of Chief Counsel recently issued helpful guidance for tenants in common who are faced with the bankruptcy of the sponsor of a syndication of tenancy in common interests in commercial property.

In response to the sponsor's filing of a bankruptcy petition, the tenant in common owners took several interim actions to protect their investments, including (i) pooling funds on a non-pro rata basis for the purpose of paying legal fees and costs and making debt service payments, with the intent of subsequently making reimbursements to those co-owners who paid in excess of their pro rata share, (ii) designating a co-owner as a payment agent, whose duty was to collect funds from the co-owners and forward them to legal counsel, and (iii) designating a co-owner as a communications agent to serve as a point person for communications between the co-owners and third parties. The co-owners equalized the non-pro rata pooling of funds more than 31 days after the non-pro rata contributions were initially made.

The tax issue was whether the co-owners' actions created a partnership among them. The IRS Counsel referenced Revenue Procedure 2002-22, which sets out the conditions under which the IRS will consider a ruling request as to whether an undivided fractional interest in real property is a partnership interest. Among the conditions are (i) each co-owner must share in all revenues and all costs in proportion to the co-owner's undivided interest in the property, (ii) no co-owner may advance funds to a co-owner to meet expenses associated with the co-ownership interest, unless the advance is recourse to the co-owner and is not for a period exceeding 31 days, and (iii) the co-owner's activities must be limited to those customarily performed in maintaining and repairing rental real estate.

Emphasizing the urgency of the co-owners' response to the sponsor's bankruptcy, the IRS Counsel determined that the co-owners' actions did not create a partnership. Although the non-pro rata payments were not equalized within 31 days, the compliant co-owners had affirmatively represented that they would cause the equalization to occur. Furthermore, given the circumstances, the appointment of payment and communications agents was not sufficiently extensive to cause the tenancy in common to become a partnership.

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