

## The Chinese Are Getting Serious About Investing In The U.S., But Are Still Failing

By Charles R. Stone

In April, I attended a speech by Weiping Zhao, Consul General of the People's Republic of China in Chicago. It was called "The Strategy and Focus of China's Outward Direct Investment," and it was part of the Emerging Markets Summit that was hosted by the University of Chicago Booth School of Business.

*China is convinced that it must change, and its strategy is to buy U.S. companies that already know how to innovate*

Consul General Zhao noted that China is famous for having attracted a large volume of foreign direct investment over the past two decades. Everybody knows that. What people don't know is that Chinese outbound investment to the United States is increasing at a rapid rate, and that the Chinese government is actively encouraging even more investment here. China's Ministry of Commerce webpage, in fact, contains a link to an entire section (written in Chinese) that is devoted to teaching the Chinese how to invest in the U.S., and the Bank of Chi-

na opened a branch in Chicago last December to assist with the expected increase of Chinese investments in the Midwest.

China is increasing its investments in the U.S. for many reasons, but the biggest reason is that the World Bank and many economists have concluded that China is in danger of getting stuck in the "middle income trap." For the past three decades, China's growth in productivity has relied upon moving cheap agricultural labor to more productive industrial facilities in the cities. Those days are nearing an end. If China is to become a wealthy country like its neighbor South Korea, it will have to become innovative and creative, something that China admits that it does not do well. If China does not learn how to innovate, the World Bank predicts that its economy will stagnate, and the ultimate result will be a banking crisis and political turmoil.

So China is convinced that it must change, and its strategy is to buy U.S. companies that already know how to innovate. The theory is that by buying successful companies, the Chinese will learn how to innovate too, and avoid getting stuck in the middle income trap.

The problem is that Chinese companies have a very difficult time buying U.S. companies. According to the Chinese themselves, their M&A failure rate is six to twelve times worse than the average, or among the worst in the world. Why?

China's M&A failure rate is bad for several reasons, but one of the most obvious reasons is that many Chinese find it difficult to negotiate with Americans in the U.S. Most Chinese deals die while they are still being negotiated, long before the final difficult details need to be hammered out. Americans have been negotiating successful deals in China for a couple of decades now, and the Chinese have by and large learned to adapt. But they have not yet learned how to negotiate in the U.S., they do not understand our system, and most business owners who want to sell part or all of their companies to the Chinese don't know how to negotiate with them either.

Aggressive negotiating styles that are favored by many successful American deal makers almost never work with the Chinese. The most frustrating part is that the Chinese will almost never tell you that. Instead, they usually just disappear, leaving the Americans to wonder what went wrong. The Chinese will of course



Charles R. Stone

Business Law

crs@wbb-law.com

414-270-2513

eventually learn to adapt to business practices in the U.S.—they have no choice—but for now at least, their approach to negotiations is probably the greatest obstacle to closing a deal. **WBB**

### INSIDE

Tax Deferral Using A Build To Suit Like Kind Exchange	2
A Few Thoughts On Selecting a Trial Attorney	3
Around the Firm	4

## Tax Deferral Using A Build To Suit Like Kind Exchange

By John A. Sikora



**John A. Sikora**  
**Business Law,**  
**Real Estate, Tax**  
**jas@wbb-law.com**  
**262-646-1528**

Taxpayers routinely structure real estate transfers and acquisitions as exchanges qualifying for favorable tax treatment under Section 1031 of the Internal Revenue Code. Properly structured, an exchange allows deferral of income tax otherwise currently payable on gain from the disposition of the taxpayer's property.

Almost any type of business or investment real property can be exchanged for the same or another type of business or investment real property. For example, a taxpayer might exchange an apartment complex for a single tenant retail location, farmland for an industrial property or a shopping center for an office building.

In most cases, the exchange involves acquisition of property in its existing state. However, a taxpayer may also exchange its property for real property constructed by another to its specifications. Such a transaction is commonly referred to as a "build to suit" exchange.

Such transactions are undertaken in a variety of settings. An enterprise might want to relocate in order to expand, or change the nature of, its production or office facilities or for other reasons. A landlord may want to use the equity in an existing property to build a new facility sought by a current or prospective tenant. A taxpayer might receive an offer for a property it desires to accept, but be dissatisfied with the existing inventory of improved property that might be available to complete the exchange. Other examples exist, the common element among all being that the taxpayer has concluded the cost of a taxable disposition of its property is prohibitive.

While each build to suit exchange must be structured in light of the particular situation, and each will therefore differ, basic steps that might be involved with respect to the

replacement property to be constructed include:

- location of land upon which a taxpayer would like improvements constructed, and execution of an agreement to purchase it containing appropriate contingencies relating to approval of the project, financing and other matters

- identification of the contractor that will provide construction services, and discussion of the build to suit structure with it, the construction lender, service providers (such as, if known, subcontractors, title insurers and the like), municipal officials and other interested parties

- the identification of an accommodation party, who might be a transaction principal such as the contractor, who will own the land and constructed improvements, usually indirectly in an LLC, until the taxpayer acquires the project to complete its exchange

- the formation of such an LLC and the purchase of the land by the LLC

- construction of the project, with the accommodation party (or, usually, the LLC) executing various instruments relating to the

project, including construction and loan documents

At some point the taxpayer will transfer its property using regulatory exchange safe harbors, designate the land and improvements as replacement property to be acquired to complete its exchange and subsequently acquire the new project (usually, by acquiring all of the membership interests in the LLC), with the funds from the earlier disposition of the taxpayer's property typically being used at closing to make payments on loans made to finance the project.

Satisfaction of deferred and potentially reverse exchange safe harbor requirements, including documentation, time period, identification and other provisions, is essential to qualify the build to suit transactions for tax deferred treatment. Though satisfying these requirements and additional planning and discussions with transaction principals prior to execution of any transaction documents will be necessary, successful structuring and completion of a build to suit exchange can produce significant tax deferral savings helpful in justifying the potential transactions. **WBB**

## A Few Thoughts On Selecting A Trial Attorney

By Neal S. Krokosky

What makes a trial attorney different than others who practice law? If you want to file a lawsuit or if you are served with a summons and complaint, the ability to promptly answer this question is particularly important. Regarding litigation, time, truly, is of the essence.

Determining who to retain to handle a lawsuit requires a consideration of two skill sets. First, you should seek an attorney with substantive knowledge of the law that pertains to your claim(s). Second, you should seek an attorney with knowledge of the litigation process. Not all attorneys are the same. Notably, the substantive law and procedural rules vary from state to state.

Once you locate attorneys with the proper substantive and procedural knowledge, you must then select from among that group. The question is: How?

The primary factor that should influence your decision of who to retain is knowledge that the individual is willing to go to trial if necessary. While this statement may seem oversimplistic, not all people who self-identify as a litigator are willing to

take a case that far. In fact, there are some whose preference, no matter what the situation, is to settle a case if possible. Settlement may be a preferred outcome in some circumstances, but it is not always a reality.

You also need to understand and agree with your attorney's practice philosophy. The concept of practice philosophy was previously alluded to. Does the attorney intend to settle the case from the outset? Does the attorney intend to win-at-all-costs? Simply stated, before retaining an attorney, you should ask yourself two questions: (1) How does this attorney approach a lawsuit? (2) Is that approach correct for me in this situation?

An attorney's practice philosophy drives his litigation strategy. Litigation strategy encompasses a broad range of areas, including discovery, motion practice, alternative dispute resolution, and possibly a trial. Each activity requires an investment of time and money. If you agree with your attorney's practice philosophy, then you should feel comfortable with the decisions that he makes. While litigation is full of

battles, not every battle requires fighting. A good attorney, the one you should hire, can, and will, discern the difference.

*Before retaining an attorney, you should ask yourself two questions: How does this attorney approach a lawsuit? Is that approach correct for me in this situation?*



**Neal S. Krokosky**  
Litigation, Business Law,  
Employment Law,  
nsk@wbb-law.com  
414-270-2530

his litigation strategy, you are more likely to retain an attorney who will help resolve your issue(s) within budget and risk tolerance. Litigation can be stressful, but that stress should not result from the attorney-client relationship. Through an initial investment of time, screening attorneys based on the factors in this article, you should feel comfortable selecting a trial attorney and with the results he obtains. **WBB**

My practice philosophy is fairly simple: Do only what matters, i.e., those things that can change the outcome. If it does not matter, there is no reason to expend the time, energy, and money, required to take action. Yet, I know that some attorneys disagree with that outlook. Some attorneys prefer to do more, even if it is unnecessary. That disagreement is nothing more than a difference of opinion, but one that you should invest time in understanding.

By understanding an attorney's litigation philosophy, and therefore



WEISS BERZOWSKI BRADY  
LLP

**Milwaukee Office**

700 N. Water St., Ste. 1400  
Milwaukee, WI 53202  
P: (414) 276-5800  
F: (414) 276-0458

**Delafield Office**

400-D Genesee St.  
Delafield, WI 53018  
P: (262) 646-5812  
F: (262) 646-3340

**All Business.**

[www.wbb-law.com](http://www.wbb-law.com)

*The WBB Reporter* is a Weiss Berzowski Brady LLP publication. The newsletter is for general information purposes only and should not be construed as legal advice. Consult an attorney for interpretation and application of the law.

**Comments?** We'd like to hear from you. Please send an email to the editor: Megan Wiseman at [reporter@wbb-law.com](mailto:reporter@wbb-law.com).

**AT THE FIRM...**

Since the last issue of the WBB Reporter, Weiss Berzowski Brady LLP welcomed **Michael Ehren** to the firm. A former CPA with Arthur Young and Company, Michael brings with him over 20 years of experience in law firm financial and administrative management.

**Charles Stone** and **Sandy Swartzberg** have been hitting the speaker circuit once more. Both presented at an event through the MMAC in March. Charles has additionally spoken to the Milwaukee Chapter of Financial Executives International and presented at the University of Chicago Booth School of Business Emerging Markets Summit in Chicago earlier this spring.

As of this printing, registration is now open for this year's Estate Planning Conference. Topics for this year include:

- The most recent changes to the estate, gift, and generation-skipping transfer tax laws
- Portability of a deceased spouse's unused estate and gift tax exemption
- Drafting flexible estate plans after the American Taxpayer Relief Act
- The role of life insurance in estate planning today

For more information or to register, go to our website.

Or contact Megan Wiseman,  
414-270-2559  
([mkw@wbb-law.com](mailto:mkw@wbb-law.com))

**2013 Schedule of Events**

**ESTATE PLANNING CONFERENCE**  
June 5, 2013

**31st ANNUAL TAX & BUSINESS SEMINAR**  
September 18, 2013

**EMPLOYMENT LAW CONFERENCE**  
October 16, 2013

Please check our website  
([wbb-law.com](http://wbb-law.com)) for more event  
information.