MAINTAINING CORPORATE STATUS WITH CORPORATE MINUTES

All corporations should keep minutes of their meetings throughout the year, but at a minimum once a year in order to protect their corporate structure and for planning purposes, both for the corporation's business and tax planning scenarios.

One of the primary business reasons for making sure that the corporation is conducting business as a separate legal entity is to keep the individuals from being liable for corporate actions. Often referred to **"piercing the corporate veil,"** if the corporation does not "act" like a separate entity and co-mingles personal and business assets, fails to keep proper books and records (including corporate minutes) it is sometimes likely a court could say that the company was just a "sham" or a "fraud". A court would look beyond the "legal form" to the substance or reality of the situation.

In the United States, corporate veil piercing is the most litigated issue in corporate law. Corporations exist in part to shield the personal assets of shareholders from personal liability for the debts or actions of a corporation. Unlike a general partnership or sole proprietorship in which the owner could be held responsible for all the debts of the corporation, a corporation traditionally limited the personal liability of the shareholders.

FACTORS THE COURTS MAY CONSIDER FOR PIERCING THE CORPORATE VEIL

- ☐ Absence or inaccuracy of corporate records
- ☐ Concealment or misrepresentation of members
- ☐ Failure to observe corporate formalities in terms of behavior and documentation
- ☐ Intermingling of assets of the corporation and of the shareholder
- ☐ Manipulation of assets or liabilities to concentrate the assets of liabilities
- ☐ Non-functioning corporate officers and/or directors
- ☐ Significant undercapitalization of the business entity (capitalization requirements vary based on industry, location, and specific company circumstances)
- ☐ Siphoning of corporate funds by the dominant shareholder(s)
- ☐ Treatment by an individual of the assets of corporation as his/her own
- ☐ Was the corporation being used as a "façade" for dominant shareholder(s) personal dealings

FOR BOTH BUSINESS AND TAX-EFFECTIVE CORPORATE MINUTES, CONSIDER THE FOLLOWING

PRIOR TO ANNUAL CORPORATE MEETING

☐ Meet with your attorney and/or CPA to consider all tax issues to be discussed

→ Annual meeting sometime within 12 months after the date the business was incorporated

→ If within 1 to 2 months of the year-end, the meeting can be used as tax planning session

BE SURE TO DOCUMENT DURING THE MEETING

☐ Approved annual budget, review the prior year financials and approve the estimated budget for the upcoming year

☐ Leases or rental agreements for offices and equipment

☐ Contributions (or decision not to contribute) to any retirement plan

☐ Purchase or sale of any real estate, large equipment, automobiles, any other major corporate assets, etc.

☐ Approval of any employment or business contracts entered into during the year

☐ Issuance, redemption, or transfer of any of the corporation's stock

☐ The establishment or change in any personnel policies or fringe benefit plans

☐ Change in corporate name, office location or a change in the Registered Agent

CORPORATE MINUTES SHOULD ADDRESS

☐ Election or removal of Directors and Officers.

→ Minutes should describe officer's responsibilities, skills and experience levels to reduce IRS's challenge of officer's compensation levels

☐ Any mergers, acquisitions, liquidations and dissolution

☐ The establishment change of any banking or brokerage relationships

☐ If corporation is an S corporation, then any S-election or termination should be addressed

OTHER THINGS TO CONSIDER WHEN RECORDING CORPORATE MINUTES

☐ If accumulating funds inside the corporation, be sure to document the need for the funds in order to avoid accumulated earnings tax in a C (not S) Corporation (i.e., planned expansion, debt retirement, inventory increase)

→ Corporate minutes should not refer specifically to accumulated earnings, as the IRS will normally read corporate minutes as part of a routine IRS exam

☐ Loaning funds to or borrowing from a shareholder should include:

1.) The need for the borrowing
2.) corporate officers' authorization of the loan and
3.) summary of loan terms (interest rate, repayment schedule, loan rollover provisions). There must be an adequate rate of interest charge and a business purpose for the loan from the corporation: otherwise, it may trigger an unwanted dividend payment which is taxable to the owner and nondeductible by the corporation. Loans to a corporation that do not charge adequate interest may be considered a capital contribution.

☐ Buy/Sell agreements may call for an annual valuation overseen by the Board of Directors. This can reduce funding problems that an untimely death or disability can cause.

☐ Charitable contributions are normally only deductible in the year paid. Special rule applies to accrual basis C Corporations; these corps can claim a current year deduction for a donation made up to 2 ½ months after year-end if:

1.) by the end of current year, the contribution is approved by the corporation's board of directors if it pays the contribution by the due date for filing the corporation's tax return (not including extensions) and
2.) an election to claim the deduction on the current year return is attached to that return.

☐ Transactions intended as taxable sales between the corporation and its shareholders should have detailed minutes to support a bona fide sale transaction in order to avoid capital recharacterization as tax-free contributions to capital.

☐ Shareholder/employee's business use of employer-provided automobiles that is treated as compensation (deductible by corporation) versus treatment as constructive dividends (not deductible by corporation). Clearly document in minutes for deduction.

- ☐ Liquidating corporations may deduct certain expenses on the final tax return even when the expenses were incurred in prior years. Detailed minutes can serve as a reminder of abandoned assets, capitalized reorganization expenses, unamortized purchased goodwill, unamortized intangible assets, and organization and start-up expenses.
- ☐ As you can see, many of these issues are related to the payment of dividends by the corporation. The IRS likes dividends, the corporation doesn't normally. To help support the corporation's stance that payments to shareholders should be deductible expenses, corporate minutes should document how dividend payments were considered and how the amount paid, if any, was determined. If there is a specific reason not to pay them, this should also be documented. If there are accumulated profits within the corporation and given the current low rate on dividends, even though not deductible by the corporation, it may be advisable to consider paying them while the rates are still low rather than waiting for future years when the tax rates may be higher.

Some of the above information was obtained from Wikipedia.[1] We will address minutes for LLCs, General Partnerships and Sole Proprietorships in a future article.

[1] Wikipedia contributors. "Piercing the corporate veil." *Wikipedia, The Free Encyclopedia*. Wikipedia, The Free Encyclopedia, 07 Sep. 2020. Web. 06 Nov. 2020.