This Month in M&A / Issue 1 / January 2013

M&A tax developments

This month features:

- IRS addresses *Merrill Lynch* type redemption issues in interal restructuring and rules that a cash distribution followed by a deemed liqudation of distributing corporation is a separate section 301 distribution (PLR 201252008)
- Final anti-avoidance regulations issued under section 304
- Final regulations remove de minimis partners rule under section 704
- Separate return limitation year rules not applied to deconsolidated subsidiary (PLR 201251003)
- Triple drop and check transaction treated as successive section 351(a) contributions followed by a D reorganization (PLR 201252002)
- PLR respected F reorganization with addition of nominal shareholder followed by qualified stock purchase (PLR 201252011)
- Revenue Procedures governing letter rulings updated (Rev. Proc. 2013-1, 2013-3, and 2013-7)
- Business provisions in American Taxpayer Relief Act of 2012

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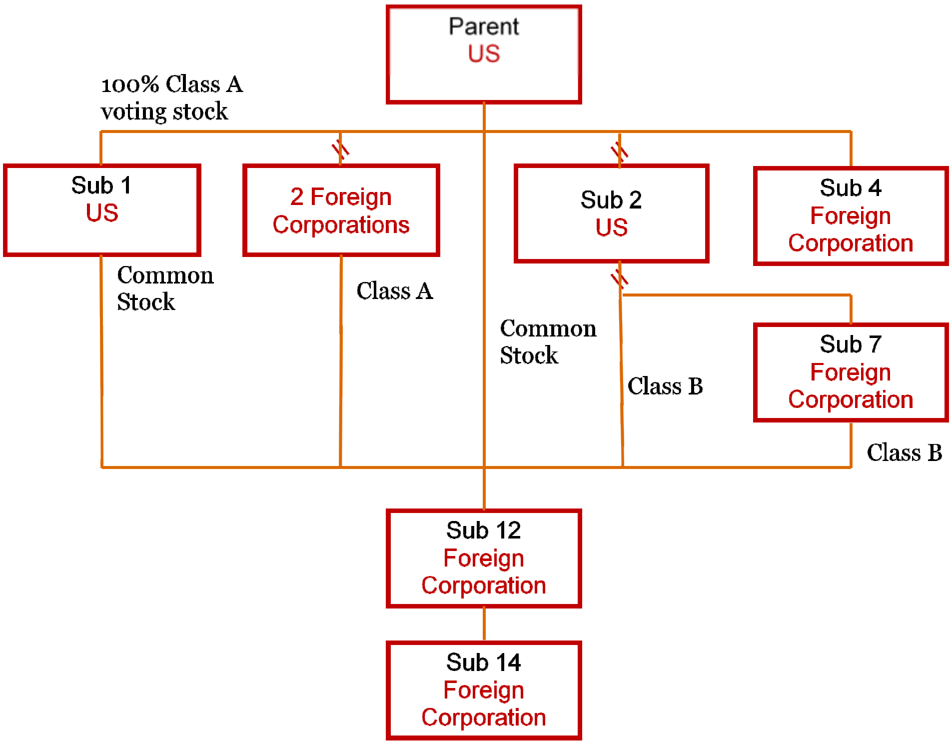
Did you know...?

In PLR 201252008, the IRS appears to have differentiated a redemption transaction from the transaction in *Merrill Lynch & Co. v. Comm'r*, 131 T.C. 293 (2008), in its determination that a section 304 transaction resulted in a dividend equivalent redemption where the selling shareholder liquidated following the section 304 sale. In addition, the PLR suggests that under certain circumstances a distribution of cash may be respected as a section 301 distribution even though the distribution occurs pursuant to an overall plan that includes the check-the-box liquidation of the distributing corporation.

Facts of proposed distribution, liquidation transactions

In the PLR, Parent, a domestic corporation, owned all the Class A voting stock of Sub 1, a domestic corporation, and all the stock of Sub 4, a foreign corporation. Parent and Sub 1 owned all the common stock of Sub 12, a foreign corporation, which also had two classes of preferred stock outstanding, class A and class B.

Two foreign corporations — one directly owned by Parent and the other indirectly owned by Parent — owned all the outstanding Sub 12 class A preference shares. A related domestic corporation, Sub 2, and a related foreign corporation, Sub 7, owned all the outstanding Sub 12 class B preference shares. Sub 12 owned, among other assets, all the stock of Sub 14, a foreign corporation.



The proposed transactions in the PLR consisted of three steps:

- Step One consisted of a section 304 transaction in which Sub 12 sold a portion of its interest in Sub 14 to a disregarded entity held by Sub 4 in exchange for cash (the 'Sub 14 Sale').
- Pursuant to Step Two, Sub 12 declared and distributed a cash dividend to its class A preference shareholders (the '301 Distribution').
- In Step Three, Sub 12 adopted a plan of liquidation for US federal tax purposes that was effected through Sub 12's check-the-box election. As a result, Sub 12 was deemed to distribute all its assets to its shareholders in liquidation (the 'Sub 12 Liquidation'). Sub 12 represented that the 301 Distribution would be declared and paid prior to the adoption of the plan of liquidation.

IRS rulings

With respect to the Sub 14 Sale, the IRS concluded that the exchange would be treated as section 304 transaction that resulted in a dividend-equivalent redemption under sections 302(b) and 302(d).

In addition, the IRS ruled that the 301 Distribution and the Sub 12 Liquidation should be respected as separate transactions. Specifically the 301 Distribution would be a section 301 distribution of property and the Sub 12 Liquidation would be either a section 331 liquidation or a section 165(g) worthless stock deduction depending on whether a particular class received property in the liquidation.

Section 304 transactions and dividend equivalency

In general, section 304 determines the consequences of certain related-party stock sales by treating the sales proceeds as a deemed redemption of the acquiring corporation's stock under section 302. Although most related-party stock sales subject to section 304 result in dividend-equivalent redemption transactions, whether the deemed redemption is treated as a sale or exchange or a dividend-equivalent redemption is determined by reference to the selling corporation's continuing ownership (including through attribution) of the issuing corporation (i.e., the entity sold in the section 304 transaction) after the sale. The deemed redemption in the section 304 fiction can be treated as a sale or exchange under section 302(b) if the seller has a meaningful reduction in its interest in the target corporation. This treatment is relevant, among other reasons, because the seller recognizes gain in a sale or exchange characterization while the sales proceeds are treated as a section 301 distribution in a dividend-equivalent redemption.

In general, the IRS and certain courts have concluded that it is appropriate to determine the application of section 302(b) by taking into account all steps occurring pursuant to a 'firm and fixed plan.' *See Merrill Lynch & Co. v. Comm'r*, 131 T.C. 293 (2008), where a disposition of a selling corporation to a third party was viewed as part of a firm and fixed plan with a prior section 304 sale by such selling company. For a more detailed discussion of the *Merrill Lynch* case, see *This Month in M&A*, January 2009.

Observations

In ruling that the Sub 14 Sale was a dividend-equivalent redemption, the IRS did not appear to apply *Merrill Lynch*. Followed literally, the selling corporation in the PLR, Sub 12, ceased to exist pursuant to the overall steps of the PLR in a taxable transaction with no carryover of attributes, and without a tax successor. In such a situation, there appears to be a complete termination of interest under section 302(b)(4) with respect to Sub 12's ownership in Sub 14. This holding is of particular importance because it appears that Sub 4 and/or Sub 14's E&P moved into Sub 12 as a result of the dividend equivalent section 304 transaction, only to then (although perhaps not entirely) disappear upon the non section 332 liquidation of Sub 12. This PLR may indicate that the IRS believes that dividend equivalency may be determined on a broader (perhaps controlled group) basis, and because all the assets of the selling corporation and the stock of the target remained in the affiliated group, there had been no complete termination of interest of Sub 12 in the stock of Sub 4.

Liquidation distributions v. section 301 distributions

Generally, pursuant to section 331, amounts received by a shareholder in a distribution in complete liquidation of a corporation are treated as in full payment in exchange for the shareholders stock. Section 331(b) provides that section 301 does not apply to any distribution of property in complete liquidation.

The Code and regulations do not define 'complete liquidation' for section 331 purposes. However, courts have stated that the definition 'complete liquidation' found in Treas. Reg. sec. 1.332-2(c) for section 332 purposes should apply equally to section 331. *See Rendina v. Comm'r*, T.C. Memo. 1996-392, and *Olmsted v. Comm'r*, T.C. Memo. 1984-381.

Treas. Reg. sec. 1.332-2(c) provides: "Where there is more than one distribution, it is essential that a status of liquidation exist at the time the first distribution is made *under the plan* and that such status continue until the liquidation is completed. . . . A status of liquidation exists when the corporation ceases to be a going concern and its activities are merely for the purpose of winding up its affairs, paying its debts and distributing any remaining balance to its shareholders" (emphasis added).

When purported section 301 distributions occur in close proximity to a liquidation, courts have looked to a variety of factors in determining whether that distribution should be integrated with the liquidating distributions. In general, a formal plan of liquidation is neither required nor conclusive in the determination of the character of a distribution. *See Rendina v. Comm'r*, *supra*; *Genecov v. U.S.*, 412 F.2d 556 (5th Cir. 1969); and *Stamler v. Comm'r*, 145 F.2d 37 (3d Cir. 1944).

Instead, courts have looked to whether the distributing corporation has a "manifest intention to liquidate that is carried out." *See Rendina v. Comm'r*, *supra*; *see also*, *Genevco v. Comm'r*, *supra*; *Stamler v. Comm'r*, *supra*; and *Kennemer v. Comm'r*, T.C. Memo. 1971-143. Specifically, courts have developed a three-prong test to aid in the determination of when a corporate distribution qualifies as a section 331 distribution:

- First, there must be a manifest intention to liquidate the corporation;
- Second, there must be a continuing purpose to terminate the corporate affairs; and
- Third, the corporate activities must be directed and confined to such termination (the 'Three-Pronged Test'). *See Rendina v. Comm'r*, supra; *Estate of Maguire v. Comm'r*, 50 T.C. 130 (1968); *Estate of Fearon v. Comm'r*, 16 T.C. 385 (1951).

Observations

This PLR suggests that the IRS believes there are factual situations in which distributions can occur pursuant to an overall plan that includes a liquidation of the distributing entity, but that such distributions may not necessarily be considered part of the liquidating proceeds. It would appear that the requisite intent to liquidate would be present if a corporation makes a dividend distribution and then liquidates pursuant to an overall plan. However, under the facts of the PLR, the IRS may have determined that the 301 Distribution should be respected as a separate distribution because, at the time of the distribution, it did not believe that the Three-Prong Test would be satisfied.

In other contexts, the IRS has viewed the declaration of a dividend as a bright line in determining whether the shareholder receives a dividend or sales proceeds upon the redemption of stock with an accrued dividend. *See* Rev. Rul. 69-130, 1969-1 C.B. 93, and Rev. Rul. 69-131, 1969-1 C.B. 94. Query whether, in view of such authorities, the IRS considered the declaration as a critical component in according the 301 Distribution independent significance.

Treating the 301 Distribution as separate from the liquidating distribution may have resulted in the preservation of certain Sub 12 tax attributes. For example, if, as a result of the Sub 14 Sale, Sub 12 had current E&P — i.e., due to a deemed dividend on the redemption of the deemed issued Sub 4 stock — the 301 Distribution could have preserved E&P and foreign tax credits in the hands of the distributees. Alternatively, if the 301 Distribution were treated as part of a section 331 liquidating distribution, Sub 12's E&P and foreign tax credits likely would have been eliminated.

For more information, please contact Timothy Lohnes, Doug Skorny, or Kasey Kimball.

Treasury regulations

Final anti-avoidance regulations under section 304

The IRS recently released final regulations (T.D. 9606) addressing use of controlled corporations in seeking to avoid application of section 304 (Treas. Reg. sec. 1.304-4). The final regulations adopt without change temporary regulations (T.D. 9477) issued in 2009 and therefore apply to acquisitions of stock occurring on or after December 28, 2009.

Final regulations

The final regulations apply to section 304 transactions entered into with the principal purpose of avoiding the application of section 304 to either (i) a corporation that is controlled by the issuing corporation or (ii) a corporation that controls the acquiring corporation. The final regulations retain the modification made by the temporary regulations that made these regulations self-executing. Further, the IRS previously clarified in the temporary regulations that these rules may apply where the funding of the acquiring corporation is from an unrelated party — e.g., where the deemed acquiring corporation facilitates the repayment of an obligation incurred to acquire the stock of the issuing corporation. As such term is used in section 304, "issuing corporation" is the corporation whose stock is sold in the section 304 transaction.

The purpose of the regulations is to determine the amount of the deemed redemption (and the source thereof) that should be treated as a dividend for purposes of section 304.

Specifically, the regulations provide that if a principal purpose for creating, organizing, or funding the acquiring corporation by any means (e.g., capital contributions or debt) was to avoid the application of section 304 to the deemed acquiring corporation, then the deemed acquiring corporation will be treated as the acquiring corporation — i.e., recharacterizing a return of basis distribution into a dividend. In general, this rule can be invoked where an E&P rich corporation funds a newly formed corporation ('NewCo') for purposes of having NewCo purchase a target in a section 304 transaction. A 'deemed acquiring corporation' for this purpose is a corporation that controls the acquiring corporation. Example 1 in the regulations illustrates the application of this rule.

A similar rule applies to a 'deemed issuing corporation,' which is a corporation controlled by the issuing corporation. Thus, in general terms, this rule can be invoked when an E&P rich issuing corporation (target) is contributed to a NewCo to facilitate a sale of NewCo in a section 304 transaction. If stock of the issuing corporation is acquired for property by the acquiring corporation and the issuing corporation acquired the stock of the deemed issuing corporation with a principal purpose of avoiding section 304 to the deemed issuing corporation, then the acquiring corporation should be treated as acquiring the stock of deemed issuing corporation — i.e., redetermining which corporation's E&P will be distributed. Example 2 in the regulations illustrates the application of this rule.

For additional information, please contact Pat Grube, Jon Thoren, Doug Skorny, or Rob Melnick.

Final regulations remove de minimis partner rule under section 704

The IRS recently published final regulations that remove the de minimis partner rule of Treas. Reg. sec. 1.704-1(b)(2)(iii)(e), (T.D. 9607). The final regulations provide that the de minimis partner rule does not apply to allocations that become part of a partnership agreement after December 27, 2012 or for an existing partnership's taxable year beginning after December 27, 2012.

Section 704(b) provides that if a partnership's allocations to a partner do not have substantial economic effect, a partner's distributive share of income, gain, loss, deduction, or credit will be determined in accordance with the partner's interest in the partnership. Treas. Reg. sec. 1.704-1(b)(2)(i) sets forth a two-part test that requires the allocation to have (i) economic effect and (ii) be substantial. Treas. Reg. sec. 1.704-1(b)(2)(iii)(e) provided a de minimis rule that specified that the tax attributes of partners owning less than 10 percent of each partnership item, directly or indirectly, need not be taken into account when testing the allocations for substantiality. T.D. 9607 removes the de minimis partner rule for all partnership tax years beginning after December 27, 2012, even if the allocation previously had become part of the partnership agreement. The regulations do not provide an amended de minimis rule.

Observations

Starting with the partnership's first taxable year following December 27, 2012, an existing partnership relying on the de minimis partner rule must retest its allocations to determine if the allocations satisfy the substantial economic effect test without the de minimis partner rule. If the allocations in the partnership agreement fail the substantial economic effect test, the allocation provisions will not be respected, and the partners' distributive shares will be determined based on each partner's interest in the partnership.

For additional information, please contact Brian Meighan, Jennifer Bennett, or Arielle Krause.

Private letter rulings

PLR 201251003

The IRS ruled that a series of transactions resulted in a deconsolidation of a subsidiary and that thereafter the separate return limitation year (SRLY) rules in Treas. Reg. sec. 1.1502-21(c) would not apply to the deconsolidated subsidiary.

Specifically, Parent purchased all the stock of a lower-tier subsidiary ('Sub 3') that was owned by the consolidated group (a third party owned a minority interest in Sub 3). Thereafter, Parent transferred the Sub 3 stock to a wholly owned foreign corporation in a section 351 transaction. Prior to joining the Parent consolidated group, Sub 3 had incurred net operating losses (NOLs) that arose in separate return years - i.e., NOLs that appear to be subject to the limitations of Treas. Reg. sec. 1.1502-21(c). The IRS ruled that the SRLY rules did not apply to Sub 3.

Observations

Generally, Treas. Reg. sec. 1.1502-21(c) limits use of NOLs arising in separate return limitation years (SRLY NOLs) in the consolidated NOL (CNOL) deduction for the year. Under the SRLY rules, the aggregate amount of a member's SRLY NOL absorbed by a group as of the end of a consolidated return year may not exceed the member's aggregate contribution to the group's consolidated taxable income (CTI) as of the end of the year.

Thus, a member's SRLY NOLs may be absorbed in consolidated years to the extent that the member's cumulative SRLY register is positive, regardless of whether that member contributed to CTI in that consolidated return year. However, a negative cumulative SRLY register generally precludes the absorption of a member's losses even if it contributed to CTI in that consolidated return year.

A taxpayer, concerned with its ability to utilize a subsidiary's SRLY NOLs because of a negative SRLY register, might seek, by deconsolidating such subsidiary, to avoid having to earn out of a negative SRLY register and utilize the SRLY NOLs as soon as such entity generates income. This situation could arise when a member with SRLY NOLs generates losses upon joining a consolidated group, thereby creating a negative SRLY register, but then becomes profitable. However, taxpayers considering such possible planning should be aware of the 60-month waiting period of section 1504(a)(3) before a former member may reconsolidate.

For additional information please contact David Friedel, Doug Skorny, or Ciara Foley.

PLR 201252002

The IRS ruled that consecutive transfers of a foreign subsidiary's stock, followed by the foreign subsidiary's election to be treated as a disregarded entity (a 'triple drop and check' transaction), should be treated as successive section 351(a) transfers of the foreign subsidiary's stock followed by an acquisitive reorganization pursuant to section 368(a)(1)(D) (a 'D reorganization').

In the PLR, Parent wholly owned US1, which in turn wholly owned US2 and FS2. US2 wholly owned US3, which in turn indirectly wholly owned FS6 through a disregarded entity. US1 transferred all the stock of FS2 to US2 ('Contribution 1'). On the same date, US2 transferred all the stock of FS2 to US3 ('Contribution 2'). US3 then contributed all the stock of FS2 to FS6 ('Contribution 3'). Thereafter, an election was made for FS2 to be treated as an entity disregarded as separate from FS6 for US federal tax purposes (the 'CTB election').

The IRS ruled that Contribution 1 and Contribution 2 were section 351(a) exchanges on which no gain or loss was recognized. The IRS held that the transfer of the FS2 stock to FS6 in Contribution 3 together with the CTB election was a D reorganization.

Observations

In this PLR, the IRS appears to be applying principles of Rev. Rul. 67-274 to collapse Contribution 3 and the CTB election into a D reorganization. It is not clear whether Contribution 2, Contribution 3, and the CTB election instead could have qualified as a triangular C reorganization under Rev. Rul. 78-130, or whether the taxpayer was indifferent to the characterization.

This ruling appears consistent with PLR 201150021, in which the IRS held that a triple drop and check transaction should be treated as successive section 351(a) transfers followed by a D reorganization. In that ruling, the taxpayer represented that preferred equity certificates, issued as consideration in the second transfer, were treated as a separate class of non-voting equity for US tax purposes; that fact appeared to prevent the second and third transfers of target corporation stock from being integrated into a triangular C reorganization — i.e., Rev. Rul. 78-130. That is, the "solely for voting stock" requirement applicable to C reorganizations would appear not satisfied.

In the instant case, neither the facts nor the representations provide information that raises a similar concern. Thus, it is unclear whether Contributions 2 and 3 and the CTB election would also satisfy the requirements for a triangular C reorganization. Nevertheless, until Rev. Rul. 78-130 is modified or revoked, it appears the IRS's litigating position continues to be that a double drop and liquidation should be characterized as a triangular C reorganization provided statutory and regulatory requirements have been met. For an additional discussion of PLR 201150021, see *This Month in M&A*, January 2012.

For additional information, please contact Horacio Sobol, Timothy Lohnes, Doug Skorny, or Ciara Foley.

PLR 201252011

The IRS ruled that a foreign amalgamation of Target with a NewCo, which interposed a new nominal common shareholder, qualified as a section 368(a)(1)(F) reorganization ('F reorganization'). Subsequently, the IRS ruled that the remaining shares of AmalCo, the resulting entity, were acquired in a qualified stock purchase, enabling the taxpayer to make a section 338(g) election.

Prior to the F reorganization, Target had common shares, voting convertible preferred shares, and warrants outstanding. Certain Target preferred shareholders exchanged their preferred shares for common shares prior to the amalgamation. Parent wholly owned NewCo 1, which in turn wholly owned NewCo 2, which in turn wholly owned NewCo 3. Parent had three classes of common stock outstanding.

Thereafter, Target and NewCo 3 amalgamated. NewCo 2 received one common share, and Target common shareholders received redeemable nonvoting preferred shares ('AmalCo Redeemable Preferred Shares') in AmalCo. The preferred shareholders in Target received preferred shares in AmalCo. Immediately after, 99 percent of AmalCo's assets consisted of Target's assets.

Subsequently, NewCo 2 acquired the AmalCo Redeemable Preferred Shares from Target's common shareholders in exchange for Class A common shares in Parent plus cash. The warrants and voting convertible preferred shares were redeemed by AmalCo and one of its subsidiaries. The AmalCo Redeemable Preferred Shares that were acquired by NewCo 2 were exchanged for common shares in AmalCo. In the final step, AmalCo sold all the shares of its domestic and foreign subsidiaries to Parent. The IRS ruled that NewCo 2 acquired the shares of AmalCo in a qualified stock purchase.

Observations

In this PLR, the IRS appears to have relied on Prop. Treas. Reg. sec. 1.368-2(m) in ruling that the amalgamation constituted an F reorganization even though AmalCo had a new nominal common shareholder.

While it is unclear whether the amalgamation otherwise could qualify as a reorganization based on the mix of cash and Parent stock consideration issued, it appears the IRS respected the taxpayer's use of multiple holding companies to ensure the amalgamation could not qualify as a reorganization (i.e., because the Parent stock would be non qualifying 'grandparent' stock).

Although the IRS did not expressly address the treatment of the AmalCo Redeemable Preferred Shares, it appears that this stock either (i) was treated as participating preferred stock (not non qualified preferred stock under section 351(g)) or (ii) was disregarded as transitory under step-transaction principles because they were cashed out as part of the plan. Otherwise, it appears that the issuance of the AmalCo Redeemable Preferred Shares would have been considered 'other property' in the reorganization, resulting in gain to Target's common shareholders.

For additional information, please contact Pat Grube, Jon Thoren, Doug Skorny, or Rob Melnick.

Revenue procedures

Rev. Procs. 2013-1, 2013-3, and 2013-7

At the beginning of each year, the IRS issues a series of revenue procedures regarding the private letter ruling process. This includes a list of tax matters on which the IRS will not issue PLRs. This year, Rev. Proc. 2013-3 added three significant items as areas under study by the IRS for which no PLRs will be issued until the IRS resolves the issue through publication of additional guidance:

- <u>Section 355 distributions</u>: No rulings will be issued to determine whether 'control' is distributed if the distributing corporation acquired control by virtue of some transactions involving the exchange of stock of the controlled corporation having different voting power (e.g., in a recapitalization).
- <u>Section 355 distributions</u>: No rulings will be issued to determine whether section 355 or section 361 applies to the distributing corporation's distribution of controlled stock or securities in exchange for the retirement of distributing corporation debt if such debt was issued in anticipation of the distribution.
- <u>'North-south' transactions</u>: No rulings will be issued with respect to whether 'north-south' transactions are respected as separate transactions for US federal income tax purposes. These are transaction in which stock, money, or property is transferred to and by a corporation and at least one such step is either a distribution with respect to stock, a contribution to the corporation's capital, or an acquisition of stock.

Effective January 2, 2013, the IRS discontinued the expedited letter ruling process for ruling requests concerning whether a transaction constitutes a reorganization under section 368 or a distribution under section 355. Previously, the IRS allowed a taxpayer with a compelling need to request that the IRS process the taxpayer's letter rulings submission on an expedited basis.

Rev. Proc. 2013-7 also provided a list of matters under the international jurisdiction in which it will not issue advance letter rulings or determinations. Specifically, the Rev. Proc. added and modified the following areas for which no PLRs will be issued:

- Section 367(a): No rulings will be issued to determine whether a transferred corporation subject to a gain recognition agreement has disposed of substantially all its assets.
- Section 7874: No rulings will be issued to determine whether a foreign corporation completes the direct or indirect acquisition of substantially all the properties held directly or indirectly by a domestic corporation or substantially all the properties constituting a trade or business of a domestic partnership.

For additional information, please contact Derek Cain, Rich McManus, Bruce Decker, or Benjamin Willis.

Legislative update

American Taxpayer Relief Act of 2012

On January, 2 2013, President Barack Obama signed into law the American Taxpayer Relief Act of 2012. The Act extends certain expired and expiring individual and business tax provisions through the end of 2013.

Renewed business tax provisions include the research credit (with modifications), CFC look-through treatment, the subpart F exception for active financing income, and the renewable electricity wind production tax credit, as described below:

- Tax credit for research and experimentation expenses: The Act resolves a conflict between two IRS rulings regarding the calculation mechanics when computing a controlled group's qualified research expenditures, gross receipts, and base amount in the year of acquisition or disposition of a major portion or separate unit of a trade or business.
- CFC look-through treatment: The Act generally allows deferral through 2013 for certain payments (interest, dividends, rents, and royalties) between CFCs.
- Subpart F exception for active financing income: The Act extends through 2013 the deferral of tax on the US parent of a foreign subsidiary engaged in a banking, financing, or similar business if the subsidiary is predominantly engaged in such business and conducts substantial activity with respect to such business.
- Tax credit for renewable electricity property wind production: The Act extends the 2.2 cents per kilowatt hour tax credit for wind electricity produced for a ten-year period from a wind facility placed in service by the end of 2013. The Act also modifies section 45 to allow renewable energy facilities that begin construction before the end of 2013 to claim the ten-year credit.

In addition, the Act extends through 2013 business tax provisions relating to qualified small business stock and the reduction in the S corporation recognition period for built-in gains tax. The Act also extends certain other provisions that expired at the end of 2011 and modifies other renewable energy credits.

Observations

The extension of these provisions may impact planning and structuring for multinational corporations with US and foreign operations. The extension of these provisions is taken into account for financial reporting purposes in the quarter in which the legislation in enacted by Congress and signed into law by the President. Therefore, calendar-year businesses would not be expected to reflect the financial statement benefits of these extensions in their 2012 calendar year-end financial statements. Nonetheless, financial statement disclosure in 2012 may be appropriate depending upon the potential impact of the legislation.

For additional information, please contact Timothy Lohnes, Karen Lohnes, or Larry Campbell.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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