*This Month in M&A / Issue 7 / July 2013*


# M&A Tax Recent Guidance

This month features:

- IRS will restrict scope of letter rulings available under sections 332, 351, 355, 368 and 1036 (Rev. Proc. 2013-32)
- Deferred loss recognized following formation of joint venture (PLR 201323005)
- IRS analyzes licensing fees in determining worthless stock loss deduction under section 165(g) (PLR 201325007)
- Tax Court partially denies installment sale treatment on sale of interest in partnership holding accounts receivable (*Mingo v. Commissioner*)
- Supreme Court declines to review Third Circuit's decision in *Historic Boardwalk Hall, LLC v. Commissioner*
- IRS applies section 752 anti-abuse rules to indemnity agreement in leveraged partnership transaction (CCA 201324013)
- IRS addresses contribution of promissory note to disregarded entity (CCA 201326014)
- IRS characterizes collaboration agreement as partnership (CCA 201323015)

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## *Did you know…?*

The IRS recently issued revised ruling procedures and guidelines (Rev. Proc. 2013-32) that will narrow the scope of letter rulings it will issue under sections 332, 351, 355, 368, and 1036 (Covered Transactions). The IRS no longer will rule on whether a Covered Transaction qualifies for nonrecognition treatment. Rather, the IRS only will rule on a 'significant issue' raised by a Covered Transaction or a significant issue under related Code sections that address the tax consequences that result from applying the above provisions.

Rev. Proc. 2013-32 defines a significant issue and specifies what information taxpayers need to include in PLR requests. The changes made in Rev. Proc. 2013-32 apply to all letter ruling requests postmarked, or, if not mailed, received, after August 23, 2013.

### *Covered Transactions*

Under Rev. Proc. 2013-32, the IRS no longer will rule on whether a transaction qualifies for nonrecognition treatment under sections 332, 351, 355, or 1036, or whether a transaction constitutes a reorganization under section 368, regardless of whether the transaction presents a significant issue and regardless of whether the transaction is an integral part of a larger transaction that involves other issues upon which the IRS will rule.

Rather, the IRS will rule on one or more issues under the above provisions to the extent that those issues are deemed significant. The IRS has indicated that the new PLR policy does not limit the number of significant issues that may be the subject of a single letter ruling.

The IRS also will rule on the tax consequences of applying one of the above provisions only to the extent that a significant issue is presented under a related Code section that addresses such tax consequences. For example, if a section 351 exchange does not present any significant issues under section 351 but presents a significant issue under section 358, the IRS will rule only on the significant issue under section 358.

Information and representations should be included in a letter ruling request only to the extent that they relate to the significant issues with respect to which the letter ruling is requested.

### *Significant issue defined*

For purposes of Rev. Proc. 2013-32, a significant issue is an issue of law the resolution of which is not essentially free from doubt *and* that is germane to determining the tax consequences of the transaction.

For example, the IRS may decline to rule on an issue under section 368 with respect to an upstream merger of a wholly owned subsidiary into its shareholder if (1) qualification of the transaction under section 332 is essentially free from doubt and (2) it is essentially free from doubt that the tax consequences of section 332 qualification would be the same as the tax consequences that would result if the transaction constituted a reorganization within the meaning of section 368.

### *Procedures*

Under Rev. Proc. 2013-32, PLR ruling requests must include, for each significant issue:

- a narrative description of the transaction that puts the issue in context;
- a statement identifying the issue;
- an analysis of the relevant law, which should set forth the authorities most closely related to the issue and explain why these authorities do not resolve the issue, and an explanation of why the issue is significant;
- information and representations relevant to the issue; and

- the precise ruling(s) requested.

To effect the updated letter ruling process, Rev. Proc. 2013-32 modifies (or eliminates) certain other revenue procedures.

### *Observations*

The IRS decision to expand its no-rule policy is a result of a decrease in resources at the Office of Associate Chief Counsel (Corporate). Rev. Proc. 2013-32 represents a fundamental change in IRS ruling policy. While the changes are significant, it should be noted that all aspects of transactions that do not constitute Covered Transactions -- such as those under section 382 and those affecting a consolidated return -- remain eligible for a letter ruling from the IRS.

Many transactions, such as spin-off transactions (especially in the public context), have proceeded on the basis of receiving a favorable letter ruling from the IRS addressing the transaction's qualification under section 355. After the effective date of Rev. Proc. 2013-32, to the extent that a Covered Transaction will proceed on the basis of an opinion, it will be possible to augment such an opinion with a private letter ruling addressing significant issues raised by the Covered Transaction.

The definition of significant issue had been set forth in Rev. Proc. 2013-3, which is the IRS's annual no-rule revenue procedure. Rev. Proc. 2013-32 eliminates the requirement from Rev. Proc. 2013-3's definition of significant issue that an issue not be clearly and adequately addressed by a statute, regulation, or other authority.

In modifying the definition of significant issue, the IRS has expanded the number of issues that may qualify for letter ruling purposes. An IRS official has stated publicly that, consistent with prior ruling practices, the IRS will not closely scrutinize whether an issue qualifies as a significant issue (see Amy S. Elliott, 'IRS Ends Rescission Study, Leaving No-Rule in Effect,' 2013 TNT 127-1).

Rev. Proc. 2013-32 does not limit the number of significant issues that may be the subject of a single letter ruling request. The IRS also has reserved the right to rule on any other aspect of the transaction (including ruling adversely) to the extent that the IRS believes it is in the best interests of tax administration.

Taxpayers will not be required to submit all the information and representations that previously have been required by the applicable revenue procedures. This should limit the information the taxpayer must provide to the IRS and reduce the time and resources expended by taxpayers in preparing a ruling request. Until this new program has been in effect for some time, it will be uncertain whether the new policy will result in a shorter timeline to obtain a PLR from the IRS.

Taxpayers that have an agreement in principle to effect a Covered Transaction still may seek a ruling from the IRS on all aspects of the transaction as long as the private letter ruling request is filed by August 23, 2013.

*For additional information please contact Derek Cain, Jerry Towne, Bruce Decker, or Meryl Yelen.*

## *Private letter rulings*

### *PLR 201323005*

The IRS ruled that losses realized on a cross-chain sale of certain entities no longer were deferred under section 267(f) upon formation of a joint venture with a third party (Third Party).

In this PLR, parent (Parent) is the parent corporation of a multinational group and the common parent of a consolidated group. To accomplish a number of business objectives, — including, for example, creation of a single owner in Parent's group to minimize management and reporting requirements and limit liability risk — Parent, through its wholly owned subsidiaries, caused its interests in certain entities (Target

Subs) to be consolidated under a foreign entity that Parent indirectly controlled (Buyer).

Through a series of sales (Intra-group Sales), Parent's subsidiaries sold shares of the Target Subs to Buyer, realizing gains and losses on the Intra-group Sales. Parent represented that the Intra-group Sales were acquisitions within the meaning of section 304(a)(1).

Following the Intra-group Sales, the Target Subs were contributed down Buyer's chain, so that one of Buyer's disregarded entities (Disregarded Entity) held directly and indirectly all the shares in the Target Subs. Pursuant to a pre-existing binding agreement with Third Party to enter into a joint venture, Third Party subsequently acquired an interest in Disregarded Entity in exchange for an interest in Third Party's wholly owned subsidiary (Joint Venture Formation).

The IRS ruled that on Joint Venture Formation, the losses realized on the Intra-group Sales no longer would be deferred under section 267(f)(2)(B) and would be taken into account under Reg. secs. 1.1502-13(c), (d).

*Observations*

This PLR reflects a mechanical application of section 267(f), which generally defers losses from the sale or exchange of property between members of a controlled group until either (1) the controlled group relationship terminates or (2) the property is transferred outside of the controlled group and the loss would be taken into account under consolidated return principles.

The PLR describes in detail the business rationale for consolidating ownership of Target Subs under the Buyer, thereby potentially raising the question whether a taxpayer must have a business purpose to engage in an intragroup sale where losses are realized. The PLR also sets forth the specific business purpose for the Joint Venture Formation. It is possible that the business purpose for the Joint Venture Formation alleviated any concern that the IRS might apply the partnership anti-abuse rules described in Reg. sec. 1.701-2.

It appears that the IRS accepted the taxpayer's sale/exchange treatment for the transfer of the Target Subs shares within the controlled group followed by the Joint Venture Formation — rather than characterizing the Intra-group Sales as dividend equivalent redemptions under sections 304, 302(d), and 301 — because of the taxpayer's representation that there was a binding commitment to sell an interest in the transferred subsidiaries to the Third Party on the Joint Venture Formation. While the taxpayer realized losses on the Intra-group Sales, it is not apparent whether the IRS concluded the losses *recognized* related to the deemed issued Buyer stock or the Target Sub stock.

The taxpayer’s position seems consistent with the principles underlying *Merrill Lynch & Co., Inc. & Subsidiaries v. Commissioner*, 120 T.C. 12 (2000), aff'd and remanded, 386 F.3d 464 (2d Cir. 2004), and *Zenz v. Quinlivan*, 213 F.2d 914 (6th Cir. 1954). The statute treats a section 304(a)(1) transaction as a deemed redemption of Buyer stock regardless of whether the deemed redemption is dividend equivalent. This implies there is a deemed exchange of Target Sub stock for Buyer stock in an exchanged basis transaction, followed by a subsequent redemption of the deemed issued Buyer stock. If the losses *recognized* were in fact with respect to the deemed issuance/redemption section 304 fiction, which appears to be the position more consistent with application of the statute, it remains unclear how the IRS tested the section 267 relationship, given that the Buyer remained within the Parent’s controlled group after the transaction was completed.

*For additional information, contact Horacio Sobol, Bruce Decker, or Ciara Foley.*

*PLR 201325007*

The IRS ruled that licensing fees earned by a company (Company) did not fall within the meaning of 'royalties' as used in section 165(g)(3)(B) for purposes of determining the character of a taxpayer's (Taxpayer) worthless stock loss deduction under section 165(g).

The IRS concluded that the licensing fees (related to R&D activities in the pharmaceutical industry) were attributable to Company's significant business activities and arose as a direct result of Company's activities as an operating company. In light of that conclusion, the IRS ruled that for purposes of determining the character of Taxpayer's section 165(g) deduction, gross receipts generated by Company from licensing fees were excluded from the definition of 'royalties' under section 165(g)(3)(B).

*Observations*

In this PLR, the IRS looked to Congressional intent (*i.e.,* to permit the loss as an ordinary loss only when the subsidiary is an operating company as opposed to an investment or holding company) in interpreting section 165(g)(3)(B), rather than applying the literal language of the statute, in as much as licensing fees would seem to fall within the statutory term 'royalties.' The IRS based its ruling not only on its conclusion that the licensing fees were generated incidental to Company's business operations, but also on Company's satisfaction of the 'passive or active' test outlined in Rev. Rul. 88-65. That ruling held that automobile leasing revenue was not 'rent' for purposes of section 165(g)(3)(B) because the taxpayer, an automobile leasing company, performed significant services in connection with the leases. Thus, based on the PLR facts, in order for Congressional intent to be met, the IRS required the taxpayer to demonstrate either that significant services were provided in connection with generating the gross receipts or that the company was an operating company.

*See also* the July 2009 issue of *This Month in M&A* for a discussion of PLR 200924040, ruling that licensing fees received by a software development company should be excluded from the definition of royalties under section 165(g)(3)(B).

*For additional information please contact Julie Allen, Jerry Towne or Jon Lewbel.*

## Court Watch

### *Mingo v. Commissioner*, T.C. Memo 2013-149 (June 12, 2013)

The Tax Court ruled that a partner was not entitled to report the sale of a partnership interest as an installment sale to the extent the proceeds were attributable to the partner's interest in the partnership's accounts receivable.

*Transactions*

Lori Mingo was a partner in the management consulting and technology service business (MC&TS Business) of PricewaterhouseCoopers, LLP (PwC). During the 2002 tax year, PwC sold its MC&TS Business to IBM. The sale was completed through a series of transactions:

- First, certain subsidiaries of PwC formed PwCC L.P. (PwCC) and contributed the MC&TS Business assets in exchange for a partnership interest. The assets contributed included uncollected accounts receivable.
- Next, PwC distributed some of its PwCC partnership interests to the MC&TS Business partners (including Mingo) in exchange for their PwC partnership interests.
- In the final step of the sale, the MC&TS Business partners transferred their PwCC partnership interests to IBM in exchange for convertible promissory notes. At the time of the 2002 transaction, the value of Mingo's partnership

interest in PwCC was $832,090, and $126,240 of that amount was attributable to the uncollected accounts receivable.

The taxpayers, Lori and John Mingo, reported the sale of the entire PwCC partnership interest on the installment sale method. The convertible promissory notes were not converted until the 2007 tax year. The only income reported by the taxpayers before 2007 was interest income from the convertible promissory notes. The IRS asserted that Mingo established an income accounting method because Mingo reported the sale of the partnership interest under the installment sale method. Therefore, the IRS applied section 481(a) to issue a notice of deficiency for the 2003 tax year, including tax on ordinary income of $126,240.

*Tax Court decision*

The Tax Court determined that Mingo's interest in the partnership's accounts receivable could not be reported on the installment method. The Tax Court bifurcated Mingo's interest in accounts receivable from her interest in other partnership property, relying heavily on the legislative history of section 751.

In addition, the Tax Court cited *Sorenson v. Commissioner*, 22 T.C. 321 (1954), in support of its position that Mingo's interest in accounts receivable could not be reported on the installment sale method because the installment sale method does not apply to income arising from compensation of services.

*Observations*

When determining the Federal income tax consequences of partnership transactions, a common issue is whether a partnership is considered to be a separate entity or an aggregate of its partners. In some instances, a careful reading of the Code can provide insight into the proper treatment.

Section 453(i) provides that the installment method does not apply to a selling partner's share of the partnership's section 1245 'recapture income.' Section 453(i)(2) defines recapture income as the amount that would be treated as ordinary income under section 1245 or 1250 (or so much of section 751 as related to section 1245 or 1250).

The statute thus considers section 751 property and includes recapture items but does not refer to other section 751 property. One might argue that Congress would have referred to all section 751 property in section 453 if it intended that the installment method should not apply to any section 751 property. In other words, one might argue that entity treatment applies to the installment sale of a partnership interest, except as specifically provided by section 453.

Despite the plain language in section 453, the IRS has bifurcated other section 751 property in order to deny installment sale treatment:

- In Rev. Rul. 89-108, a taxpayer sold an interest in the partnership's inventory. Generally, inventory items are excepted from installment sale treatment under section 453(b)(2)(B). However, there is no reference in section 453(b)(2)(B) to section 751. In the ruling, the IRS bifurcated the partner's share of inventory items from the rest of the partnership interest and denied installment sale treatment on that portion of the sale.

- In CCA 200722027, the IRS bifurcated a taxpayer's interest in a partnership's accounts receivable and denied installment sale treatment on that portion of the sale, citing Rev. Rul. 89-108 and *Sorenson*, under facts similar to the facts in *Mingo*.

The Tax Court in *Mingo* did not address Rev. Rul. 89-108 or the limited exclusions from installment sale treatment in section 453.

The sale of the interest occurred during the 2002 tax year. It appears the 2002 statute closed and may have been the reason the IRS issued the notice of deficiency for the 2003 tax year. Section 481(a) may have been the only way the IRS could deny installment sale treatment to Mingo's share of accounts receivable.

*For additional information please contact Todd McArthur, Jennifer Kennedy, Gretchen Van Brackle, or Matthew Arndt.*

### *Historic Boardwalk Hall LLC v. Commissioner,* Sup. Ct. Dkt. No 12-01 (2013), 694 F.3d 425 (3rd Cir. 2012)

The US Supreme Court denied the taxpayer's petition to review the Third Circuit's decision. The denial fully shifts resolution of the historic rehabilitation credit industry issues to the IRS or Congress. *See* the September 2012 issue of *This Month in M&A* for prior coverage of the facts and analysis of the Third Circuit's decision.

## Other Guidance

### *CCA 201324013*

In this CCA, the IRS applies the section 752 anti-abuse rules under Reg. sec. 1.752-2(j) to disregard an indemnity agreement in connection with a leveraged partnership transaction. The IRS analysis is similar to the Tax Court's analysis in *Canal Corp. v. Commissioner*, 135 T.C. No. 9 (Aug. 5, 2010) (for previous coverage *see* the September 2010 issue of *This Month in M&A*).

#### *Transactions*

The CCA addresses the formation of a partnership followed by a debt-financed distribution to one its partners. X Corporation (X) converts from a C corporation to an S corporation after being by acquired by A. X's line of business quickly deteriorates and X desires to monetize its equity interest in the contributed assets without incurring the built-in gain tax imposed under section 1374(a) to C corporations converting to S corporations. Prior to X filing for bankruptcy, a subsidiary of X, QSub-X, contributes assets with built-in gain to a partnership in exchange for a partnership interest. The other party to the transaction is Y Corporation. Y Corporation owns subsidiary Sub Y-1, which turn owns subsidiary Sub Y-2. Sub Y-2 contributes Y notes to the partnership in exchange for a partnership interest. After QSub-X and Sub Y-2 make their respective contributions to the partnership, the partnership forms Sub-P.

Sub-P borrows cash from a bank and distributes the proceeds to QSub-X. The collateral provided for the loan includes (1) all assets of the partnership; (2) Sub-Y1's equity interest in the partnership; (3) capital stock of the partnership's subsidiary, Sub-P; and (4) the Y notes. In addition, the partnership, Sub-Y1, and Sub-Y2 guarantee the loan, and X indemnifies Sub Y-1 and Sub Y-2 (Y) for any amounts actually paid on their guarantees.

If the indemnity were respected, X would be allocated all the partnership liabilities from the bank loan under the section 752 regulations and would not be viewed as selling assets to the partnership under the disguised sale rules, due to the application of the debt-financed distribution rule in Reg. sec. 1.707-5(b)(1). X also would have sufficient tax basis in its partnership interest to avoid gain recognition under section 731. In contrast, if the indemnity were not respected, Y would be allocated the partnership liabilities from the bank loan and X would be treated as selling assets to the partnership for an amount equal to consideration attributed to the Sub-P loan under the debt-financed distribution rule.

#### *IRS analysis*

The IRS focuses on whether X's agreement to indemnify Y for any amounts paid on the Sub-P loan can be disregarded under the partnership liability allocation anti-abuse rule of Reg. sec. 1.752-2(j). The anti-abuse rule provides that an obligation of another partner to make a payment may be disregarded or treated as an obligation of another person if the facts and circumstances indicate that a principal purpose of the arrangement is to eliminate the partner's economic risk of loss with respect to that obligation or create the appearance of the partner bearing the economic risk of loss, when in fact, the substance of the arrangement is otherwise.

The IRS makes three arguments to support the application of the anti-abuse rule to the indemnification agreement:

- First, the arrangement lacks important features of a commercial indemnity, such as a net worth requirement.
- Second, the indemnity is 'specious' because there is no practical or commercial risk of it being enforced. The IRS made certain legal assumptions to reach this conclusion. The IRS believed that if Sub-P defaulted on the loan because Y defaulted on the Y Notes, Y would never make a payment under its guaranty agreement. Further, if Y did not pay on the guaranty, X would not make a payment to Y or the bank since X is not obligated to pay the bank.
- Third, Y merely used the partnership as a conduit to borrow money from the bank in order to accommodate X's structure.

Based on these arguments, the IRS concludes that X's indemnity should be disregarded pursuant to the anti-abuse rules under Reg. sec. 1.752-2(j) and the related contribution and distribution should be treated as a disguised sale under section 707(a)(2)(B). The IRS did not stop there. In the alternative, the IRS asserted that the transaction should be recast under Reg. sec. 1.701-2(b) as Y borrowing from the bank to purchase the contributed assets followed by the formation of a partnership or the form of the transaction (contribution and distribution) should be disregarded and treated in accordance with the underlying substance (sale).

### *Observations*

CCA 201324013 does not take into account either the general presumption under Reg. sec. 1.752-2(b)(6) that X's obligation to indemnify Y would be satisfied or X's ability to make the payment post-bankruptcy. Instead, the IRS made certain legal assumptions to argue that X would likely never make a payment to Y or the bank.

IRS officials have stated publicly that guidance will be issued in the near future to address situations where the seller's payment obligations are deemed illusory, such as when the seller is a thinly capitalized regarded entity or when the seller guarantees a small portion of the loan (e.g., bottom line guarantee).

*For additional information please contact Karen Lohnes, Todd McArthur, or Jennifer Bennett.*

## *CCA 201326014*

This CCA addresses the contribution of a promissory note to a disregarded LLC by a third party. Prior to the contribution, an S corporation owned 100% of the disregarded LLC and the disregarded LLC held 10 qualified subchapter S subsidiaries (Q-Subs). Without detailed analysis, the CCA concludes that, upon the contribution of the promissory note by C (the third party) to the disregarded LLC in exchange for a 'w%' interest in the LLC, the disregarded entity becomes a partnership under Rev. Rul. 99-5, situation 2. The CCA also cites *Gemini Twin Fund III,* 62 TCM 104 (1991) and Rev. Rul. 80-235 for the proposition that C receives no basis in the partnership interest received.

The CCA also concludes that since the disregarded entity became a partnership (1) the Q-Sub status of the 10 Q-Subs terminated because the partnership, rather than the S corporation, owns the Q-Subs; (2) the Q-Subs are treated as new C corporations acquiring all their assets and liabilities from the S corporation in exchange for stock; and (3) since the formation of the new C corporations occurred before the conversion, the S corporation contributed stock of the new C corporations to the partnership in the deemed section 721 contribution under Rev. Rul. 99-5, situation 2.

*Observations*

Reg. sec. 1.704-1(b)(5), example (1)(ix), provides that a taxpayer who contributes cash along with a promissory note is treated as making only the contribution of cash. The contribution of the promissory note is treated as a non-event.

In the example, it seems clear that the taxpayer should be treated as a partner. However, it is not clear how the IRS reached the conclusion in this CCA that C is a partner in the newly formed partnership. The IRS apparently has not previously issued guidance on whether a taxpayer is considered to be a partner when that person has contributed only a promissory note. We assume that the LLC interest received by C in exchange for the promissory note ('w%') represents an interest in the partnership's profits and losses. It appears this CCA may be cited to support a view that a taxpayer that shares profits and losses, but has no capital interest, may be respected as a partner.

*For additional information please contact Todd McArthur, Gretchen Van Brackle, or Dianna Miosi.*

*CCA 201323015*

This CCA addresses the tax characterization of a written collaboration agreement. The IRS concluded that the collaboration agreement should be treated as a partnership and allowed the taxpayer to claim the section 199 deduction, provided that the taxpayer could satisfy the section 199 requirements and obtain the required information from the partnership.

The CCA states that the determination of whether the arrangement constitutes a partnership is based on an analysis of the facts and circumstances. The IRS relied on the factors set forth in *Commissioner v. Culbertson*, 337 U.S. 733 (1949) and *Luna v. Commissioner*, 42 T.C. 1067 (1964). Some of the factors cited by the IRS as supporting its conclusion include the following: (1) the parties entered into the agreement and did not deviate from the terms; (2) both parties contributed cash and services; (3) both parties shared in the net profits and losses (rather than gross profits); (4) both parties maintained records of their respective revenue and expenses, and (5) both parties exercised mutual control and assumed mutual responsibilities.

*Observations*

As stated in the CCA, the determination of whether a collaboration agreement should be treated as a partnership depends on the relevant facts and circumstances. Therefore, the analysis and conclusion reached in this CCA may not apply to all collaboration agreements. Accordingly, parties to a collaboration agreement should review their agreements carefully to determine whether they should be treating the arrangement as a partnership for federal income tax purposes, and should consider the filing and withholding obligations associated with that treatment.

*For additional information please contact Brian Meighan, Nadine Holovach, or Dianna Miosi.*

## PwC M&A publications

In the article titled, "A Principle Purpose: There Can Only Be One" published in Tax Notes on June 12, 2013, WNTS author Benjamin Willis explores the confusion created by the different interpretations of the principal purpose of tax avoidance standard.

## *Let's talk*

For a deeper discussion of how this issue might affect your business, please contact:


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