

Select Corporate Migration and Combination Considerations in an Ever Changing Environment—Update

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Last quarter's article was intended to highlight key developments in, as well as the evolution of, the world of corporate migrations, "inversions" and other cross-border combinations, with a particular focus on changes in transactional structures, statutory provisions and regulatory and other guidance. Among other things discussed, was the "Coordination Rule" for prioritizing application of Code Sec. 367(a) and Code Sec. 367(b) in certain transactions. As indicated, this rule allowed in particular circumstances the shareholder-level tax rule of Code Sec. 367(a) to be "turned off" in favor of the so-called Killer B rules of Code Sec. 367(b). It also contained other relevant rules (*e.g.*, the deemed contribution rule).

After the article was beyond our reach in the publication process, the IRS and the Treasury issued Notice 2014-32 (Apr. 25, 2014) (the "Notice"), which alters the priority rule by reducing significantly the ability for taxpayers to turn off the Code Sec. 367(a) shareholder-level tax rule. The Notice also makes other changes.

For example, the Notice indicates that the IRS and the Treasury believe that taxpayers were exploiting the "deemed contribution" rule in the regulations. The Notice concludes that this rule is inconsistent with the purpose of Reg. §1.367(b)-10. The government also expressed the view that some taxpayers may be inappropriately taking the position that the "no-U.S.-tax exception" is not applicable when a subsidiary (the stock of which is not a USRPI) has no current or accumulated earnings and profits. Lastly, the Notice indicated that taxpayers may be interpreting the anti-abuse rule of the regulations too narrowly.

Accordingly, the Notice removes the deemed contribution rules under the existing regulations,¹ modifies the amount of income and gain taken into account for purposes of applying the priority rules of Code Sec. 367(a) and (b)² and clarifies application of the anti-abuse rule.³

ENDNOTES

- ¹ The deemed contribution rules in Reg. §§1.367(b)-10(b)(2) and -10(c)(2) will be removed and conforming changes will be made to other parts of the regulations. See Notice 2014-32, Section 4.01.
- ² Regulations will provide that Code Sec. 367(b) income includes a Code Sec. 301(c)(1) (dividend) or 301(c)(3) gain that would arise if Reg. §1.367(b)-10 applied to the triangular reorganization only to the extent such dividend income or gain would be subject to U.S. tax or would give rise to an income inclusion under Code Sec. 951(a)(1)(A) that would be subject to U.S. tax. A conforming change will be made to the Code Sec. 367(b) priority rule under Reg. §1.367(a)-3(a)(2)(iv). See Notice 2014-32, Section 4.02.
- ³ The anti-abuse rule in Reg. §1.367(b)-10(d) will be clarified to provide that subsidiary's acquisition of parent's stock or securities for a note may invoke the anti-abuse rule. In addition, the earnings and profits of a corporation or a successor corporation may be taken into account in determining the consequences of the adjustments in the final regulations as modified regardless of whether such corporation is related to parent or subsidiary before the triangular reorganization. Reg. §1.367(b)-10(d) will also be clarified to provide that a funding of subsidiary may occur after the triangular reorganization and that a funding includes capital contributions, loans and distributions. See Notice 2014-32, Section 4.03.

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