Corporate Taxation
Through the Lens of Mergers & Acquisitions
Corporate Taxation Through the Lens of Mergers & Acquisitions

Including Cross-Border Transactions

SECOND EDITION

Samuel C. Thompson, Jr.
Professor of Law, Penn State Law
Arthur Weiss Distinguished Faculty Scholar
Director of the Center for the Study of Mergers & Acquisitions

Carolina Academic Press
Durham, North Carolina
Dedication

This book is dedicated to the late Professor Bernard Wolfman, who first introduced me to this subject in his Corporate Tax course in my third year at the University of Pennsylvania School of Law and to the late Professor James S. Eustice who deepened my understanding of this subject in his Advanced Corporate Tax Problems course in the Graduate Tax Program at the NYU School of Law.
## Contents

Table of Principal Cases ................................................................. xlv

Preface ............................................................................................ xlvii

Chapter 1 · Introduction and Review of Basic Concepts ................. 3

§ 1.1 Scope of Book ................................................................... 3

§ 1.2 Scope of Chapter ................................................................. 5

§ 1.3 General Descriptions of the Three Basic Forms of Business 6

A. The C Corporation ................................................................. 6

B. The Partnership and the Limited Liability Company ............ 8

C. The S Corporation ................................................................. 9

§ 1.4 Realization and Recognition .............................................. 10

A. The Structure of the Statute: Realization and Recognition 10

B. The Relationship between Basis and Amount Realized ....... 11

Philadelphia Park Amusement Co. v. United States ................. 11

C. The Open Transaction Doctrine .......................................... 13

Burnet v. Logan ........................................................................ 13

D. Installment Sales Reporting under § 453 ......................... 14

E. Introduction to Like Kind Exchanges ................................. 16

§ 1.5 Treatment of Liabilities ...................................................... 17

A. Introduction ........................................................................ 17

B. Transfer of Property Subject to a Nonrecourse Liability: Liability 17

   Included in § 1001 Amount Realized ..................................... 17

   Crane v. Commissioner .......................................................... 17

   Questions ........................................................................... 21

C. The Supreme Court Addresses Footnote 37 in Crane: Liabilities in 21

   Excess of Fair Market Value .................................................. 21

   1. Crane Footnote 37 ............................................................. 21

   2. The Supreme Court’s View ............................................... 21

   Commissioner v. Tufts ............................................................ 21

   Question ........................................................................... 22

§ 1.6 Treatment of Capital Gains and Losses ..................... 22

   Joint Committee on Taxation Description of Capital Gains 22

§ 1.7 Disposition of Property Used in a Trade or Business: § 1231 Gains and Losses; Recapture of Depreciation under § 1245 23
CONTENTS

§ 1.8 Introduction to Tax Accounting 24
  A. Introduction to the Cash and Accrual Methods 24
  B. The Tension between Expensing and Capitalizing 24
§ 1.9 Introduction to the Original Issue Discount Rules 24
  A. Introduction 24
  B. Guide to the Regulations 25
      Preamble to Proposed Regulations under OID and Imputed Interest Rules 25
§ 1.10 Introduction to Taxable and Tax Free M&A 26
§ 1.11 Introduction to International Aspects of Business Taxation 26
§ 1.12 Selected References 28

Chapter 2 · An Overview of Basic Corporate Tax Principles 31
§ 2.1 Scope 31
§ 2.2 Introduction to Federal Income Tax Consequences on the Formation of a Corporation: § 351 32
  A. Contributions Not Involving Liabilities 32
     1. Introduction 32
     2. Introductory Problems on §§ 351(a) and (b) 34
  B. Contributions Involving Liability Assumptions 34
     1. Introduction 34
     2. Introductory Problems on Liability Assumptions 35
  C. Illustration of Use of § 351 in Acquisition of Publicly Held Corporation 35
      Revenue Ruling 74-502 35
      Question 36
  D. Limitation on Transfer of Built in Losses by the American Jobs Creation Act of 2004 37
      Conference Committee Report to the American Jobs Creation Act of 2004 37
§ 2.3 Introduction to Issues Arising in the Capitalization of a Corporation 38
  A. The Difference between Debt and Equity 38
      Treasury Report, Integration of Individual and Corporate Tax Systems 38
  B. Introduction to Tax Stakes Involved in Debt Equity Issues 39
§ 2.4 Distributions of Cash to Individual Shareholders 41
  A. In General 41
  B. Congress's Explanation of the Maximum 15% [Now 20%] Rate on Dividends Received by Individuals 44
§ 2.5 Distribution of Non-Cash Property to Individual Shareholder 45
  A. Treatment of the Shareholder 45
  B. Treatment of the Corporation on a Distribution of Non-Cash Property: The General Utilities Doctrine and Its Repeal 46
     1. The General Utilities Doctrine 46
CONTENTS

General Utilities & Operating Co. v. Helvering 46

Note 49

2. The Court Holding Doctrine and Its Relationship to General Utilities 49
   a. Liquidating Distribution Followed by Sale by Shareholders, Treated as Sale by Corporation 49
      Commissioner v. Court Holding Co. 49
      Question 50
   b. Liquidating Distribution Followed by Sale by Shareholders Held to Be Bona Fide 51
      United States v. Cumberland Public Service Co. 51
      Questions 53

3. Introductory Note on the Repeal of the General Utilities Doctrine 53

   General Explanation of Tax Reform Act of 1986 53

5. Further Elaboration on the Current § 311 Distribution Rule 56

C. Impact on Computation of Corporation's Earnings and Profits of Distribution of Appreciated Property 57

§ 2.6 Corporation's Distribution of Cash and Property to Corporate Shareholders 57

§ 2.7 Redemptions of Stock by Corporations: Impact of §§ 302 and 318 58
   A. Introduction 58
   B. Illustration of Impact of § 302(b)(1) 59
      Revenue Ruling 76-364 60
   C. Illustration: Purchase of Stock Followed by Redemption 61
      Zenz v. Quinlivan 61

§ 2.8 Redemptions through Related Corporations: Legislative History of § 304 63
   A. Introduction 63
   B. A Look at § 304 through the Legislative History 64

§ 2.9 General Description of the Stock Dividend Provisions 67
   A. Introduction 67
      1. Section 305 67
      2. Section 306 68
      3. Section 307 70
   B. Illustrations of Impact of § 305(b)(2) on Redemption Transactions 70
      1. Periodic Redemption Plan Gives Rise to Stock Dividend to Non-Redeemed Shareholders 70
         Revenue Ruling 78-60 70
      2. Isolated Redemptions from Retired-Shareholder Employees 72
         Revenue Ruling 77-19 72
   C. Impact of § 305 on Distribution of a Poison Pill 72
      Revenue Ruling 90-11 72

§ 2.10 Liquidations of Corporations 74
   A. Introduction 74
Chapter 2 · Shareholder Recognition of Gain or Loss on Complete Liquidation  

§ 2.9 The General Rule of Shareholder Recognition of Gain or Loss on Complete Liquidation: § 331  

§ 2.10 Non-Taxable Liquidations of Subsidiaries under § 332  


1. The General Utilities Doctrine  

2. Impact of Repeal of General Utilities on Nonliquidating Distributions  


4. Legislative History of §§ 336 and 337  

E. Introduction to § 338  

1. In General  

2. The Kimbell Diamond Doctrine: Purchase of Stock Followed by Liquidation Treated as Purchase of Assets  

Kimbell-Diamond Milling Company v. Commissioner  

Note  

F. Introduction to the 2013 Regulations under Section 336(e)  

G. Introduction to the 2015 May Department Stores’ Final Regulations  

§ 2.11 The Business Purpose and Step Transaction Doctrines  

A. Introduction  

B. The Business Purpose Doctrine  

Gregory v. Helvering  

Note  

C. Interrelationship Between Conduit Treatment, Step Transaction and Business Purpose Doctrines  

Esmark, Inc. v. Commissioner  

D. Codification of the Economic Substance Doctrine, Section 7701(o)  

Staff of Joint Committee on Taxation, Technical Explanation of the Revenue Provisions of the “Reconciliation Act of 2010,” As Amended, in Combination with the “Patient Protection and Affordable Care Act”  

Chapter 3 · Introduction to Taxable and Tax-Free Mergers and Acquisitions  

§ 3.1 Scope  

§ 3.2 Introduction to Federal Income Tax Issues in Taxable Asset and Stock Acquisitions  

A. Introduction  

B. Acquisitions of the Assets of a Stand-Alone C Corporation  

C. Acquisitions of the Stock of a Stand-Alone C Corporation  

D. Acquisition of Assets of a Consolidated Subsidiary  

E. Acquisition of Assets of an S Corporation  

F. Acquisition of (1) Stock of a Consolidated Subsidiary and (2) Stock of an S Corporation  

G. Acquisition of Subsidiary as Part of Asset Acquisition  

§ 3.3 Introductory Note on the Current Reorganization Provisions  

CONTENTS
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Introduction</td>
<td>103</td>
</tr>
<tr>
<td>B. In General</td>
<td>103</td>
</tr>
<tr>
<td>C. Tax Treatment to the Taxpayers Involved in a Reorganization</td>
<td>104</td>
</tr>
<tr>
<td>D. Introduction to § 368 Acquisitive Reorganizations</td>
<td>106</td>
</tr>
<tr>
<td>1. In General</td>
<td>106</td>
</tr>
<tr>
<td>2. Asset Reorganizations</td>
<td>106</td>
</tr>
<tr>
<td>a. The Direct Merger under § 368(a)(1)(A)</td>
<td>106</td>
</tr>
<tr>
<td>b. Forward Subsidiary Merger under § 368(a)(2)(D)</td>
<td>107</td>
</tr>
<tr>
<td>c. Direct Stock for Asset Reorganization under § 368(a)(1)(C)</td>
<td>109</td>
</tr>
<tr>
<td>d. Triangular Stock for Asset Reorganization under § 368(a)(1)(C)</td>
<td>110</td>
</tr>
<tr>
<td>e. Summary of Asset Reorganizations</td>
<td>111</td>
</tr>
<tr>
<td>3. Stock Reorganizations</td>
<td>111</td>
</tr>
<tr>
<td>a. Reverse Subsidiary Merger under § 368(a)(2)(E)</td>
<td>111</td>
</tr>
<tr>
<td>b. Stock for Stock Reorganization under § 368(a)(1)(B)</td>
<td>112</td>
</tr>
<tr>
<td>c. Triangular (B) Reorganization under § 368(a)(1)(B)</td>
<td>113</td>
</tr>
<tr>
<td>d. Summary of Stock Reorganizations</td>
<td>114</td>
</tr>
<tr>
<td>4. Summary of Acquisitive Reorganizations</td>
<td>115</td>
</tr>
<tr>
<td>E. The Non-Acquisitive Reorganizations</td>
<td>115</td>
</tr>
<tr>
<td>1. The (D) Reorganization</td>
<td>115</td>
</tr>
<tr>
<td>a. Introduction</td>
<td>115</td>
</tr>
<tr>
<td>b. The Nondivisive (D)</td>
<td>115</td>
</tr>
<tr>
<td>c. The Divisive (D): Spin-Offs, Split-Offs and Split-Ups</td>
<td>117</td>
</tr>
<tr>
<td>2. The (E) Recapitalization</td>
<td>118</td>
</tr>
<tr>
<td>3. The (F) Mere Change in Form</td>
<td>118</td>
</tr>
<tr>
<td>§ 3.4 Introductory Problems on Reorganizations and Taxable Acquisitions</td>
<td>119</td>
</tr>
</tbody>
</table>

**Chapter 4 · Taxable Asset Acquisitions: Including the Treatment of Net Operating Losses**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 4.1 Scope</td>
<td>121</td>
</tr>
<tr>
<td>§ 4.2 Issues of Concern to Both the Acquiring Corporation and the Target Corporation</td>
<td>121</td>
</tr>
<tr>
<td>A. Structure of the Transaction</td>
<td>121</td>
</tr>
<tr>
<td>1. Direct Purchase by Acquiring Corporation of Target’s Assets</td>
<td>121</td>
</tr>
<tr>
<td>2. Forward Cash Merger</td>
<td>123</td>
</tr>
<tr>
<td>a. Introduction</td>
<td>123</td>
</tr>
<tr>
<td>b. Illustration of a Taxable Forward Subsidiary Merger</td>
<td>123</td>
</tr>
<tr>
<td><strong>West Shore Fuel, Inc. v. United States</strong></td>
<td>123</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>124</td>
</tr>
<tr>
<td>3. Sub’s Use of Parent’s Stock in a Taxable Asset Acquisition or Taxable Forward Subsidiary Merger</td>
<td>125</td>
</tr>
<tr>
<td>a. Section 1032 Generally Not Applicable to Sub’s Sale of Parent’s Stock</td>
<td>125</td>
</tr>
<tr>
<td><strong>Revenue Ruling 70-305</strong></td>
<td>125</td>
</tr>
<tr>
<td>b. Exception for Immediate Disposition by Sub of Parent’s Stock in Taxable Acquisition</td>
<td>125</td>
</tr>
</tbody>
</table>
CONTENTS

Preamble to Notice of Proposed [Now Final] Rule Making on Guidance under § 1032 125

B. Shareholder Overlap Problem: Potential Nondivisive (D) Reorganization 127
   1. Introduction 127
   2. 1984 Amendment to the Control Requirement in the Nondivisive (D) Tax Bill of 1984 128
       The Senate Finance Committee’s Report on the Deficit Reduction Tax Bill of 1984 128
   3. Illustration of Purported Taxable Purchase of Assets that is Treated as Reorganization 130
       Revenue Ruling 61-156 130
   4. The All Cash (D) Reorganization Regulations 133
       Preamble to Final Regulations on All Cash (D) Reorganizations under Sections 368(a)(1)(D) and 354(b)(1)(B) 133

C. Use of Partnership or S Corporation as Acquisition Vehicle 136

§ 4.3 Issues of Concern Principally to the Acquiring Corporation and Its Shareholders 136
   A. Structuring the Capital of the Acquiring Corporation 136
   B. Treatment of Covenants Not to Compete 136
      1. Introduction 136
      2. Illustration: Is the Covenant Bona Fide? 137
         Revenue Ruling 77-403 137
   C. Amortization of Goodwill and Certain Other Intangibles Including Covenants Not to Compete; Legislative History of § 197 138
      House Report to the Revenue Reconciliation Act of 1993 138
   D. Allocation of Purchase Price under § 1060 145
      1. The Basic Rules Governing Allocation of Purchase Price to Assets 145
         Preamble to Temporary Regulations under § 1060 145
      2. Requirement of Consistent Treatment and Reporting of Employment and Other Payments by 10% Shareholders 146
         House Report to Revenue Reconciliation Act of 1990 146
      3. The 1999 Proposed Regulations under § 1060 148
         Preamble to Proposed Regulations 148
   E. Treatment of the Target’s Liabilities 150
   F. General Capitalization Requirement and Potential Deductibility of Startup expenses under § 195 152
      Revenue Ruling 99-23 152
      Note 153

§ 4.4 Issues of Concern Principally to Target Corporation and Its Shareholders 153
   A. Repeal of General Utilities Doctrine and Former § 337 153
   B. Computation and Character of Target’s Gain or Loss on the Sale of Assets of a Business 153
b. Transfer by U.S. Acquiror of Property to Foreign Sub
General Explanation of the Tax Reform Act of 1984
166

c. Outbound Operations Conducted through a Foreign Subsidiary
Joint Committee on Taxation, Description and Analysis of Present-Law Rules Relating to International Taxation
167

§ 4.8 Sample Asset Acquisition Agreement: Selected Provisions
Sample Asset Acquisition Agreement
172

Chapter 5 · Taxable Stock Acquisitions and LBOs: Including Treatment of Net Operating Losses

§ 5.1 Scope
181

§ 5.2 Acquisition of Stand-Alone Target: Issues of Concern to Both the Acquiring Corporation and the Target Corporation

A. Structure of the Transaction
182
1. Direct Stock Purchase of Target’s Stock for Cash
182
2. Purchase of Target’s Stock in Exchange for Stock or Securities of Acquiror
182
3. Reverse Triangular (or Subsidiary) Cash Merger to Deal with Recalcitrant Shareholders
Revenue Ruling 73-427
Note and Question
183
183
184

4. Liquidation of Target under § 332 after Acquisition by Acquiring Corporation
184
5. Direct (i.e., Non-Triangular) Reverse Merger
Revenue Ruling 78-250
185
185

B. Overlap Problem: If Shareholders of Target Corporation Own Stock of Acquiring Corporation, Ensure that the Transaction Does Not Qualify as a § 304 Redemption
186
1. Background on Section 304
186
2. Illustration of the Interaction between § 304(a)(1) and § 302 in the Stock Acquisition Context
Zimmerman v. Commissioner
186
186

C. Possible Use of § 351 for Nonrecognition Treatment for Shareholders who are to Continue as Shareholders in the Acquiring Corporation
188
1. Background on the Overlap between § 351 and the Reorganization Provisions
188
2. Illustration: The Service’s Initial Ruling: The National Starch Transaction: Combination § 351 and Reverse Subsidiary Taxable Merger
Private Letter Ruling 7839060
Notes and Questions
188
188
189

D. Principal Parties in Leveraged Buyout
190

E. Introductory Problems on Structuring Stock Acquisitions
191
§ 5.3 Acquisition of Stand-Alone Target: Issues of Concern Principally to the Acquiring Corporation and Its Shareholders

A. Structuring of the Capital of the Acquiring Corporation or of the Continuing Target Corporation
   1. Debt/Equity Structure of Acquiring Corporation or Continuing Target Corporation
   2. Impact of § 279: Disallowance of Interest on Certain Corporate Acquisition Indebtedness
      a. Introduction
      b. Legislative History of § 279
         *Senate Report to the Tax Reform Act of 1969*

B. Treatment of Covenants Not to Compete and Similar Items

C. Reporting Requirement under § 1060(e) with Respect to Covenants Paid to 10% Shareholders

D. Possibility of Making a § 338 Election
   1. Introduction to Section 338
   2. Taxable Reverse Subsidiary Merger Treated as Qualified Stock Acquisition
      *Revenue Ruling 90-95*
   3. Introduction to Consistency Requirements of 1992 Proposed Regulations
      *Preamble to Proposed Regulations under § 338*
   4. Preamble from the Final Consistency Regulations
      *Preamble to Treasury Decision 8515*
   5. The 1999 Proposed Regulations Dealing with Issues Other than Consistency
      *Preamble to Proposed Regulations*
   6. Merger of Target into Sister Sub after Qualified Stock Purchase of Target under § 338
   7. Introductory Problems on § 338
   8. Capitalization of Stock Acquisition Expenses

$5.4 Issues of Concern Principally to Target and Its Shareholders

A. Treatment of Covenants Not to Compete

B. Reporting Required under § 1060(e) with Respect to Covenants Paid to 10% Shareholders

C. § 453 Treatment of Receipt of Installment Obligations

D. Golden Parachute Payments
   *General Explanation of the Deficit Reduction Act of 1984*

E. Greenmail Payments
   *House Report to the Revenue Act of 1987*

F. Deductibility of Investment Banking and Other Expenses in M&A
   1. Deductibility by Target of Expenses in Friendly Transaction the Supreme Court’s View
      *INDOPCO, Inc. v. C.I.R.*
Questions

2. The Treasury’s Initiative to Resolve INDOPCO Capitalization Issues
   a. Notice of Proposed Rule Making Regarding Capitalization Issues
      "Preamble to Reg-125638-01"
   b. Final Capitalization Regulations
      "Final Regulations Addressing Amounts Paid for Intangibles"
   c. I.R.S. 70-30 Option for Treatment of Success Fees
      in M&A Transactions
      "Rev. Proc. 2011-29"
   d. Treatment of Amounts that Facilitate Certain Tax-Free
      and Taxable Acquisitions
      "Notice 2004-18"

§ 5.5 Planning for the Acquisition of a Target that Is a Subsidiary
in a Consolidated Group

A. Introduction to Consolidated Return Issues Generally
   1. Purpose
   3. Definition of Affiliated Group in § 1504
      a. Legislative History of § 1504(a)
         "General Explanation of Deficit Reduction Tax Act of 1984"
      b. Elaboration on §§ 1504(a) and (b)
   4. Computation of Consolidated Taxable Income and
      Consolidated Tax Liability
   5. Intercompany Transactions
   6. Introduction to the Investment Adjustment System
   7. The Prior Investment Adjustment System
      a. In General
         "Preamble to Proposed Regulations on Investment Adjustments"
      b. The Woods Investment Problem
      c. Section 1503(e)(1)(A) Response to Woods Investment
         "Preamble to Proposed Regulations on Investment Adjustments"
   8. General Approach of the Proposed and Final Regulations
      a. The Preamble to the Proposed Regulations
         "Preamble to Proposed Regulations on Investment Adjustments"
      b. Preamble from the Final Investment Adjustment Regulations
         "Preamble to Treasury Decision 8560"
   9. Basis Adjustment Rules under Reg. § 1.1502-32
      a. Background
         "Preamble to Proposed Regulations on Investment Adjustments"
      b. Stock Basis under Reg. § 1.1502-32(b)(2)
      c. Amount of the Adjustment under Reg. § 1.1502-32(b)(2)
      d. Operating Rules under Reg. § 1.1502-32(b)(3)(i)
      e. Determining the Amount of an Excess Loss Account
         under Reg. § 1.1502-32(a)(2)(ii)
CONTENTS

f. Illustration: Taxable Income 233
g. Illustration: Tax Loss 233
h. Illustration: Distribution 234

10. Earnings and Profits under Prop. Reg. § 1.1502-33 234
a. Purpose and Effect of E & P Tiering Rules 234
Preamble to Proposed Regulations on Investment Adjustments 234
b. Guiding Principles under Reg. § 1.1502-33(a)(1) 235
c. The Tiering Rules under Prop. Reg. § 1.1502-33(b)(1) 235
d. Illustration of Tiering Rules 236
e. Allocation of Tax Liability in Computing Earnings and Profits 236
Preamble to Proposed Regulations on Investment Adjustments 237

11. Excess Loss Accounts under Reg. § 1.1502-19 237
a. Purpose and Effect of Excess Loss Accounts 237
Preamble to Proposed Regulations on Investment Adjustments 237
b. General Description of the Rules 238
Preamble to Proposed Regulations on Investment Adjustments 238
c. Determining the Amount of an Excess Loss Account 238
d. General Rule of Income Recognition 238
e. Illustration 239
f. The Validity of the § 1.1502-19 Excess Loss Regulations 239
Civil Insulation Co. v. Commissioner 239

12. Treatment of Cash and Property Distributions 241
13. Summary Problems on Basic Consolidated Return Principles 242

B. Planning for the § 338(h)(10) Election 242
1. Introduction 242
Preamble to Temporary Regulations under § 338(h)(10) 242
2. Requirement of Consistent Treatment in § 338(h)(10) Election 243
House Report to Revenue Reconciliation Act of 1990 243
3. The 1999 Proposed Regulations: The § 338(h)(10) 244
for a Consolidated Sub 244
Preamble to Proposed Regulations 244

C. Introductory Problems on Impact of § 338 on 245
Acquisition of Subsidiaries

D. Treatment of Dividend from Sub before Parent Sells Sub’s Stock 246
Litton Industries, Inc. v. Commissioner 246

Problems 248

§ 5.6 Mirror Subsidiaries, Related Transactions, and the Disallowance of 249
Loss Consolidated Return Regulations

A. In General 249
B. The Prototypical Mirror 249
C. The Son of Mirror Transaction 250
Notice 87-14 250
D. Anti-Mirror Regulations: Disallowance of Loss on 251
Dispositions of Subsidiaries
1. Introduction and Purpose  
2. Investment Adjustments Inconsistent with Repeal of General Utilities  
3. Loss Disallowance Rule  
4. Economic Losses  
5. General Loss Disallowance Rule under § 1.1502-20(a)  
6. Allowable Losses under § 1.1502-20(c): Allowing Economic Losses  
7. Treasury’s Reaction to Rite Aid Notice 2002-11  
8. Preamble to 2002 New Loss Disallowance Rules  
   Preamble to Final and Temporary Regulations  
9. The 2002 Regulations under § 1.337(d)-2T  
10. The American Jobs Creation Act of 2004 Clarification of the Rite Aid Decision  
11. Introductory Problems on the 2002 Disallowance of Loss Rule  

§ 5.7 Planning for the Utilization of the Target’s Net Operating Losses and Other Attributes  
§ 5.8 The Impact of § 382 on the Carryover of a Target’s NOLs after an Acquisition  
   A. Introduction to the Scope and Purpose of § 382  
   The General Explanation of the Tax Reform Act of 1986  
   B. Outline of § 382 and the Regulations  
   Preamble to Temporary Regulations under § 382  
   C. Methodology for Approaching Problems under § 382  
      1. First: Is Target a Loss Corporation?  
         a. Net Unrealized Built-In Loss  
         b. Net Unrealized Built-In Gain  
         c. Old and New Loss Corporations  
         d. Annual Information Statement  
   2. Second: Has an Ownership Change Occurred?  
      a. Testing Period  
      b. 5-Percent Shareholders  
      c. Aggregation Rule  
      d. Segregation Rule  
      e. Attribution Rules  
      f. Four Categories of 5-Percent Shareholders  
      g. Definition of Owner Shift  
      h. Determining Percentage of Loss Corporation Stock Owned  
      i. Owner-Shift Involving a 5-Percent Shareholder  
      j. Equity Structure Shift  
      k. Ownership Change: Increase of More than 50 Percentage Points Resulting from Owner Shift or Equity Structure Shift  
      l. Example of Ownership Change in a Stock Acquisition  
   3. Third: Determine the § 382 Limitation  
      a. Pre-Change Losses
b. Change Date 272
c. Post-Change Year 272
d. Section 382 Limitation 272
e. Value of Old Loss Corporation 272
f. Long Term Tax Exempt Rate 272
g. Illustration of Computation of § 382 Limitation 273
h. Excess § 382 Limitation 273
i. Pre-Change Date Income 273
j. Continuity of Business Enterprise 273
k. Net Unrealized Built-In Loss 273
l. Net Unrealized Built-In Gain 273
m. Section 338 Election 274

4. Fourth: Collateral Considerations 274

§ 5.9 Effect of Consolidated Return Regulations on Utilization
of a Target’s NOLs 274
A. Introduction 274
B. Taxable Years of New Members of Consolidated Group 275
C. Separate Return Limitation Year (SRLY) Rules 275
   1. Introduction to the Strong Form and Weak Form SRLY Rules 275
   2. Introduction to the Regulations 276
      Preamble to Treasury Decision 8823 276
   3. Illustration of the Overlap Rule 277
D. The Lonely Parent Rule 278
E. Limitation on Built-In Losses 279
F. Carryover and Carry Back to Separate Return Years 279
G. Interface between § 382 and the Consolidated Return Regulations 279

§ 5.10 The Impact of § 269 on the Utilization of Target’s NOLs 281
A. Introduction to § 269 281
B. Relationship between § 269 and § 382 282
   Preamble to Proposed Regulations under § 1.269-7 282

§ 5.11 Impact of § 384 on Utilization of Acquiring Corporation’s NOL
against Target’s Built-In Gains 283
A. The 1987 Act 283
   House Ways and Means Report on the Revenue Act of 1987 283
B. The 1988 Act 284
   House Ways and Means Committee Report on Technical and
   Miscellaneous Revenue Act of 1988 284

§ 5.12 Limitation on Carryback of Losses after LBOs: The Cert Provision
Senate Finance Committee Report to the Revenue
   Reconciliation Act of 1989 286

§ 5.13 Summary Problems on the Utilization of NOLs after a
Taxable Stock Acquisition 288
§ 5.14 Introduction to Federal Income Tax Consequences of Cross Border
Taxable Stock Acquisitions 290
A. Introduction 290
B. Inbound Stock Acquisitions 290
  1. General Principles 290
  2. Introduction to the Earnings Stripping Rules 291
C. Outbound Taxable Stock Acquisition 292

§ 5.15 Sample Stock Acquisition Agreement: Selected Provision 292
   Sample Stock Purchase Agreement 292

Chapter 6 · Fundamental Reorganization Concepts 297

§ 6.1 Scope 297
   Part A: Concepts Relating to Reorganization Definition: § 368 298
   § 6.2 Introduction to Reorganizations and to the Concept of
      Continuity of Interest 298
      A. Introduction 298
         1. The Law Prior to the 1918 Act 298
            *Marr v. United States* 298
         2. A Review of the Legislative History of the Current
            Reorganization Provisions 300
            *Excerpt from Chapman v. Commissioner* 300
         3. Introduction to Reorganizations 302
         4. Introduction to the Tax Treatment to the Taxpayers Involved
            in a Reorganization 303
         5. Introduction to the Continuity of Interest Doctrine 305
         6. The Service’s Private Ruling Policy on Reorganizations and
            Related Transactions 305
   B. What Type of Interest Satisfies the Continuity of Interest Requirement 305
      1. Short-Term Notes Do Not Provide Continuity of Interest: The (C)
         before the Solely for Voting Stock Requirement 305
         *Pinellas Ice & Cold Storage Co. v. Commissioner* 305
         Questions 307
      2. Interest Must be “Definite and Material” and “Substantial Part of
         Value of the Thing Transferred”: Cash and Common Received
         in a (C) Before the Solely for Voting Stock Requirement 308
         *Helvering v. Minnesota Tea Co.* 308
         Questions 309
      3. Nonvoting Preferred Carries Continuity of Interest in a (C) before
         the Solely for Voting Stock Requirement 309
         *John A. Nelson Co. v. Helvering* 309
         Questions 310
      4. Receipt of Stock and Bonds in a (B) before the Solely for Voting
         Stock Requirement: Bonds Are Securities 311
         *Helvering v. Watts* 311
         Questions 312
5. Acquiring Corporation Acquires Stock of Target in Exchange for
25% Stock and 75% Cash Consideration in (B) Reorganization
Prior to Enactment of Solely for Voting Stock Requirement
Miller v. Commissioner of Internal Revenue
Questions
312
6. Receipt of Cash and Bonds in a (C) Before the Solely for
Voting Stock Requirement
Le Tulle v. Scofield
Questions
314
7. Bankrupt Corporation: Noteholders Exchange Notes for Stock
Helvering v. Alabama Asphalitic Limestone Co.
Questions
316
8. Receipt of Bonds in an (A)
Roebling v. Commissioner
Questions
317
9. Determination of Whether Stock Represents a Substantial Part of
Assets Transferred in an (A)
Southwest Natural Gas Co. v. Commissioner
Questions
319
10. Receipt of Pass Book Savings Accounts on Merger of Savings
and Loan Association
Paulsen v. Commissioner
Questions
320
C. The Service’s Prior Ruling Policy Requirement on Continuity of Interest
Revenue Procedure 77-37
Questions
322
D. An Illustration of the 50% [Now 40%] Continuity Requirement
Revenue Ruling 66-224
Questions
323
E. Impact of Prior Purchase of Target’s Stock
1. Acquiror Purchases 85% of Target’s Stock after which Target’s
Assets Are Acquired by Acquiror’s Subsidiary in Exchange
for Subsidiary’s Stock and Cash
YOC Heating Corp. v. Commissioner
Questions
323
2. Sidewise Mergers after a § 338 Qualified Stock Purchase:
Overriding YOC Heating
a. The Preamble to the Proposed Regulations
Preamble to Proposed Regulations under Section 338(i)
Questions
325
b. Preamble to the Final Regulations
Treasury Decision 8940
Questions
327
F. Pre- and Post-Reorganization Sales and Redemptions
1. Recent Changes to the Continuity of Interest Regulations
on Pre- and Post-Reorganization Sales
Excerpt from Thompson and Sayed, 1998 Developments in the Federal
Income Taxation of Mergers and Acquisitions: The Year of M&A
Questions
328
## CONTENTS

2. Elaboration on Post-Reorganization Redemptions by Acquiror  334  
   *Revenue Ruling 99-58*  
3. Final Regulations Addressing Pre-Reorganization Distributions  
   and Redemptions by Target  
   *Treasury Decision 8898*  
G. Remote Continuity  
1. Party to the Reorganization; Remote Continuity; The Groman  
   and Bashford Doctrines  
2. The Early Anti-Triangular Reorganization Cases  
   a. Acquisition of Stock of Target in Exchange for (1) Stock of  
      Acquiring Parent, (2) Stock of Acquiring Sub, and (3) Cash  
      *Groman v. Commissioner*  
   b. Acquisition of Three Targets by Consolidation with Target’s  
      Shareholders Receiving (1) Stock of Acquiring Parent,  
      (2) Stock of Acquiring Sub, and (3) Cash  
      *Helvering v. Bashford*  
   Questions  
H. Use of Contingent or Escrow Stock in a Reorganization  
1. General Principles  
   *Revenue Ruling 84-42*  
2. Applicability of Imputed Interest Rules to Contingent Payouts  
   *Solomon v. Commissioner*  
I. The Signing Date Regulations  
   *Proposed Amendments of Regulations (REG-129706-04)*  
§ 6.3 The Continuity of Business Enterprise Doctrine  
A. Introduction to the Current Regulations  
   *Preamble Regulations under § 1.368-1(d)*  
B. Sale of Assets in Anticipation of Reorganization  
   1. Sale by Target before a (C) Reorganization  
      *Revenue Ruling 79-434*  
   2. Sale by Target before a (B) Reorganization  
      *Revenue Ruling 81-92*  
   3. Acquisition of Investment Company in a (C) Reorganization  
      *Revenue Ruling 87-76*  
C. Changes to Continuity of Business Enterprise Regulations and  
   Related Remote Continuity of Interest Rules  
   *Excerpt from Thompson and Sayed, 1998 Developments in the Federal  
   Income Taxation of Mergers and Acquisitions: The Year of M&A*  
§ 6.4 The Meaning of Solely for Voting Stock: An Introduction  
   *Helvering v. Southwest Consolidated Corporation*  
   Questions and Notes  
§ 6.5 Definition of Control in § 368(c)  
A. Introduction  
   *Revenue Ruling 76-223*
B. Obama Administration’s Proposed Modification of the “Control” Concept

_U.S. Treasury, General Explanations of the Administration’s Fiscal Year 2017 Revenue Proposals_ 354

§ 6.6 Plan of Reorganization 355

§ 6.7 Business Purpose, Step Transaction, and Economic Substance Doctrines 355

A. In General 355

B. Business Purpose in the (D) before § 355 356

C. Business Purpose in a Recapitalization 356

_Bazley v. Commissioner_ 356

Questions 357

D. Reincorporations and Step Transactions 357

_Revenue Ruling 96-29_ 357

E. Codified Economic Substance Doctrine 360

Part B: Concepts Relating to Exchanging Stockholders and Security Holders under §§ 354 and 358 360

§ 6.8 Meaning of “Securities Exchanged” under § 354 360

A. Exchange of Short-Term Notes for Debentures 360

_Neville Coke & Chemical Co. v. Commissioner_ 360

Questions 361


_Revenue Ruling 59-98_ 361

Note 362

C. Treatment of Debt Instrument with Two Year Term Remaining 362

_Revenue Ruling 2004-78_ 362

§ 6.9 Treatment of Warrants under § 354 364

A. The Standard View 364

_William H. Bateman v. Commissioner_ 364

Questions 365

B. Final Regulations Regarding Treatment of Warrants as Securities in Corporate Reorganizations 365


§ 6.10 Treatment of Exchanging Shareholders under § 354(a)(2) 366

A. Substitution of Acquiror’s Convertible Securities for Target’s Convertible Securities: Treatment under § 354(a)(2) 366

_Revenue Ruling 79-155_ 366

B. Proposed Modification to § 356(a)(2) 368

_Section 444 of the Tax Simplification Bill of 1991_ 368

Note 369

§ 6.11 Section 358 Substituted Basis for Target Shareholders and Security Holders 370

A. The Basic Rules 370

_Revenue Ruling 85-164_ 370
Note and Question 371
B. Final Regulations on Stock Basis under § 358 in Reorganizations and Related Transactions 371
Preamble to Final and Temporary Regulations under § 358 371
Part C: Concepts Relating to Treatment of Boot under § 356 373
§ 6.12 Issues under § 356 373
A. Reorganization: A Condition to § 356 Treatment 373
*Turnbow v. Commissioner* 373
Questions 374
B. Treatment of Nonqualified Preferred Stock as Boot 374
Preamble to Proposed (Now Final) Regulations under § 1.356-7 374
Note 376
§ 6.13 Determination of Whether a Distribution Has the “Effect” of the Distribution of a Dividend 376
A. The Supreme Court Decision 376
*Commissioner v. Clark* 376
Note and Questions 381
B. The Service’s Position 382
Revenue Ruling 93-61 382
C. Application of § 318 Attribution Rules under § 356(a)(2) 383
House Conference Report to the Tax Equity and Fiscal Responsibility Act of 1982 383
D. Cash for Fractional Shares 383
Revenue Procedure 77-41 383
E. No Dividend Where Boot Paid in Respect of Securities 384
Revenue Ruling 71-427 384
F. Determination of E & P under § 356(a)(2) 384
Part D: Concepts Relating to Treatment of Target under §§ 361 and 357 385
§ 6.14 Treatment of Target Corporation upon Receipt and Distribution of Stock, Securities, and Boot 385
A. General Principles 385
B. Protection of General Utilities Repeal upon Mergers with RICs or REITs 386
Treasury Decision 8872 386
Note 387
§ 6.15 Treatment of Liabilities 388
A. The Genesis of the Problem: The Supreme Court Holds that Liabilities Assumed Are Boot in a Reorganization 388
*United States v. Hendler* 388
Questions 389
B. Reaction to Hendler 389
C. Discharge of Intercorporate Debt in an (A) Reorganization 389
Revenue Ruling 72-464 389
Part E: Concepts Relating to Treatment of Acquiror

§ 6.16 Increase Basis by Amount of Transferor’s Gain Recognized, Not Its Shareholders’ Gain Recognized

Schweitzer & Conrad, Inc. v. Commissioner

Problem

Part F: Concepts Relating to Impact of Stock Dividends and § 306 Preferred Stock in Reorganizations

§ 6.17 Impact of § 305 in the Context of Reorganizations

A. In General

B. Illustration of Impact of § 305 in Acquisitive Reorganizations: Redeemable Preferred Issued in a “B” Reorganization

Revenue Ruling 81-190

§ 6.18 Impact of § 306 in the Context of Reorganizations

A. In General

B. Introduction to § 306(c)(1)(B)

C. Illustration of Impact of § 306(c)(1)(B) in an Acquisitive Reorganization

Revenue Ruling 88-100

D. Impact of § 306(b)(4) on § 306(c)(1)(B) Determination: Widely Held Target

Revenue Ruling 89-63

Note

Part G: Concepts Relating to (1) the Overlap between § 351 and Reorganization Provisions, and (2) the E and F Reorganizations

§ 6.19 Survey of Issues Involving Overlap with § 351

A. Incorporation in Anticipation of Reorganization

Revenue Ruling 70-140

B. Use of § 351 to Preserve Separate Existences of Target and Acquiror

Revenue Ruling 76-123

C. Combination Triangular Reorganization and Purported § 351: Determination of Control

Revenue Ruling 84-44

D. Use of § 351 to Avoid Continuity of Interest Requirements

Revenue Ruling 84-71

E. Use of § 351 in Acquisition of Publicly-Held Corporation in a Compulsive § 351

F. Use of § 351 in Horizontal Double Dummy

G. The Triple Drop and Check, Two 351s Followed by a Nondivisive (D) Reorganization, Rev. Rul. 2015-10

Rev. Rul. 2015-10

Note

§ 6.20 Survey of Issues Involving the E, Recapitalization, and F, Mere Change in Form Reorganizations

A. No Continuity of Interest or Continuity of Business Enterprise in an E or F Reorganization
Preamble to Final Regulations Eliminating Continuity of Interest and of Business Enterprise for E and F Reorganizations 407
B. 2015 Final Regulations on the F Reorganization
Reorganizations under Section 368(a)(1)(F); Section 367(a) and Certain Reorganizations under Section 368(a)(1)(F) 407

Chapter 7 · Tax-Free Asset Acquisitions: The (A) Reorganization, the Forward Subsidiary Merger Reorganization, the Straight and Triangular (C) Reorganizations; Including Treatment of Net Operating Losses 411
§ 7.1 Scope 411
§ 7.2 The Straight (A) Reorganization: Statutory Merger or Consolidation 412
A. Introduction 412
B. The Continuity of Interest Requirement 414
C. The Step Transaction Doctrine: Broken (B) Followed by Upstream Merger Equals an (A)
King Enterprises, Inc. v. United States 414
Questions 416
D. Failed § 368(a)(2)(E) Reverse Subsidiary Followed by Upstream Merger
Revenue Ruling 2001-46 417
E. Purchase of a Portion of Target's Stock Followed by Upstream Merger with Minority Shareholders Receiving Parent's Stock
Kass v. Commissioner 421
Questions 423
F. Upstream Merger of Less than 80% Subsidiary
General Counsel Memorandum 39404 424
G. Downstream Merger of Acquiring Corporation into Target after Purchase of Target's Stock
Revenue Ruling 70-223 425
Questions and Note 425
H. Merger Cannot Be Divisive
Revenue Ruling 2000-5 426
J. Regulations Permitting Foreign Mergers
Preamble to Proposed Regulations, REG-117969-00 429
K. Section 305 and 306 Issues Arising in an (A) Reorganization 430
L. Representations Required in a Ruling Request under § 368(a)(1)(A)
Excerpt from Revenue Procedure 86-42, § 7.01 431
§ 7.3 The Straight (C) Reorganization 433
A. Introductory Note 433
B. The Scope of the (C): Acquisition of Target Followed by Liquidation
Revenue Ruling 67-274 436
Questions and Note 436
C. What Constitutes “Substantially All”
1. In General 437
Revenue Ruling 57-518 437
2. Service’s Ruling Policy  
   Excerpt from Revenue Procedure 77-37  
   Problems  
3. Sale of Part of Assets to Unrelated Party Prior to the Transaction  
   Revenue Ruling 88-48  
D. Strip Down of Target Prior to the (C): Spin-Offs and Dividends  
   1. Spin-Off Prior to a (C)  
      Helvering v. Elkhorn Coal Co.  
      Questions  
   2. Payment of Dividends before and after the (C)  
      Revenue Ruling 74-457  
   3. Acquisition of Assets of Newly Formed Controlled Corporation  
      That Is Spun Off under § 355  
      Revenue Ruling 2003-79  
E. Assumption of Liabilities: Assumption of Target’s Obligation to  
   Warrant Holders and Holders of Stock Options  
   Revenue Ruling 68-637  
F. Solely for Voting Stock Requirement  
   1. Acquiring Corporation Pays Reorganization Expenses of Target  
      and Its Shareholders  
      Revenue Ruling 76-365  
   2. Prior Purchase of Target’s Stock by Person Related to Acquiror  
      Revenue Ruling 85-138  
      Questions and Note  
G. The Boot Relaxation Rule: Acquiring Corporation Pays  
   Off Target’s Dissenters  
   Revenue Ruling 73-102  
H. The Creeping (C)  
   1. The Bausch & Lomb Doctrine and Its Repeal  
      a. The Service’s Prior Position on Pre-Transaction Stock Ownership  
         in Target by Acquiror: The Bausch & Lomb Doctrine  
         Revenue Ruling 54-396  
         Note  
      b. Preamble to the to the Proposed Regulations Repealing  
         the Bausch & Lomb Doctrine  
         Preamble to Proposed Regulations Reg-115086-98  
      c. Preamble to the Final Regulations  
         Treasury Decision 8885  
   2. Disqualified Creeping (B) Followed by Liquidation  
      American Potash & Chemical Corp. v. United States  
      Questions and Note  
I. Sections 305 and 306 Issues Arising in (C) Reorganizations  
   § 7.4 The Triangular (C) Reorganization  
   A. Legislative History of the Triangular (C) and § 368(a)(2)(C)
B. Introduction 460
C. Transfer of Target’s Assets to Remote Subsidiary 460
   Revenue Ruling 64-73 460
   Question 461
D. Acquiring Parent Cannot Assume Target’s Liabilities 461
   Revenue Ruling 70-107 461
   Questions 461
E. Triangular (C) Followed by a Push-Up of Substantially All of Target’s Assets; Acquiring Subsidiary Assumes Target’s Liabilities 461
   Proposed Revenue Ruling Attached to GCM 39102 461
F. Dealing with the Zero Basis Problem 463
   1. Background on the Problem 463
      a. Introduction to the Problem: Illustration of Interactions among §§ 358, 362 and 1032 463
         Revenue Ruling 74-503, Revoked by Revenue Ruling 2006-2 463
         Questions 465
      c. Revocation of Revenue Ruling 74-503 by Revenue Ruling 2006-2 466
         Revenue Ruling 2006-2 Revoking Revenue Ruling 74-503 466
      d. Legislative History of Amendments to §§ 358 and 362 Relating to Basis to Acquiring Sub for Target’s Stock or Assets in a Triangular Reorganization 466
         Senate Report to the 1968 Act 466
      e. The Service’s Response to the Problem 467
         Preamble to Proposed Regulations under §§ 1032 and 358 467
      f. Final Regulations Dealing with Triangular Reorganizations under §§ 1.358-6 and 1.1032-2 469
         Preamble to Final Regulations on Basis Adjustments in Triangular Reorganizations 469
      g. 1998 Regulations Addressing Zero Basis Problem in a Taxable Acquisition 470
   § 7.5 Representations Required in a Ruling Request under § 368(a)(1)(C) 471
      Excerpt from Revenue Procedure 86-42 471
   § 7.6 Forward Subsidiary Merger under § 368(a)(2)(D) 471
      A. Legislative History of the Forward Subsidiary Merger 471
      B. Introductory Note 472
      C. Drop Down after Subsidiary Merger 473
         Revenue Ruling 72-576 473
      D. The Parent Can Assume Liabilities of the Target 473
         Revenue Ruling 73-257 473
         Note 474
      E. Creation of a Holding Company 475
         Revenue Ruling 77-428 475
F. Tender Offer Followed by a Forward Subsidiary Merger: The Step Transaction Doctrine in *Seagram*  
*J.E. Seagram Corp. v. Commissioner*  
G. Combination (a)(2)(D) and Purported § 351  
H. Treatment of Target’s Securities in an (a)(2)(D)  
I. Push Up of Target’s Assets after a Forward Subsidiary Reorganization  
J. Pushdown of Stock of Acquiring Sub after a Forward Subsidiary Merger  
*Revenue Ruling 2001-24*  
K. Sale of 50% of Target’s Assets after a Forward Subsidiary Merger  
*Revenue Ruling 2001-25*  
L. Dealing with the Zero Basis Problem  
M. Representations Required in a Ruling Request under § 368(a)(2)(D)  
*Excerpt from Revenue Procedure 86-42*  
¢ 7.7 Summary Problems on Straight and Triangular Acquisitive Asset Reorganizations  
¢ 7.8 The § 381 Carryover Rules  
A. The General Carryover Rules of § 381(a)  
B. Definition of “Acquiring Corporation”  
C. The Operating Rules of § 381(b)  
D. The (F) Reorganization and the Nonapplicability of the § 381(b) Operating Rules  
E. Carryover Items under § 381(c)  
F. Section 381(c)(1) Limitations on Carryover of Net Operating Losses  
¢ 7.9 Impact of § 382 on the Utilization of the Target’s Net Operating Losses  
A. Introduction  
B. Applicability of § 382 to Equity Structure Shifts  
¢ 7.10 Impact of Consolidated Return Regulations on Utilization of a Target’s NOLs  
A. Introduction  
B. Reverse Acquisitions in Acquisitive Asset Reorganizations  
¢ 7.11 Impact of § 269 on Utilization of Target’s NOLs: Transactions Involving Acquisitions of Property  
¢ 7.12 Impact of § 384 on Utilization of Preacquisition NOLs of Either Target or Acquiror  
A. Introduction and Background  
B. Applicability to Acquisitive Asset Reorganizations  
*House Ways and Means Report on the Technical and Miscellaneous Revenue Act of 1988*  
¢ 7.13 Summary Problems on Utilization of NOLs after an Acquisitive Asset Reorganization  
A. Statement of Facts  
1. LC Merges Into PC  
2. PC Acquires LC in a Triangular (C) Reorganization or a Triangular Forward Subsidiary Merger under § 368(a)(2)(D)
§ 7.14 Sample Merger Agreement for a Forward Subsidiary Merger under § 368(a)(2)(E): BT’s Acquisition of MCI

*British Telecommunications PLC and MCI Communications Corporation Merger Agreement*

Chapter 8 · Tax-Free Stock Acquisitions: The Straight and Triangular (B) Reorganizations and the Reverse Subsidiary Merger

Reorganization under § 368(a)(2)(E); Including Treatment of Net Operating Losses

§ 8.1 Scope

§ 8.2 The Straight (B) Reorganization

A. Introduction

B. Can There Be Boot in a (B)? The First Circuit’s View of ITT-Hartford

*Chapman v. Commissioner*

Notes

C. Contemporaneous Acquisition of Target’s Securities in a (B)

1. Purchase of Target’s Convertible Debentures

2. Exchange of Securities in a (B) Reorganization

*Revenue Ruling 98-19*

Questions

3. Exchange of Warrant

4. Acquisition of Target’s Debentures in Exchange for Acquiror’s Voting Stock

*Revenue Ruling 70-41*

5. Purchase of Target’s Unissued Stock Simultaneously with the (B)

6. Substitution of Qualified Stock Options

D. Shareholder of Acquiring Corporation Purchases Stock of Target Prior to the (B)

*Revenue Ruling 68-562*

Note

E. Subsidiary of Acquiror Purchases Target’s Stock

*Revenue Ruling 85-139*

Note

F. Boot Flowing Directly from Acquiror to Target’s Shareholders

1. Purchase of Fractional Shares

*Revenue Ruling 66-365*

2. Cost of Registering Acquiring Corporation’s Stock

*Revenue Ruling 67-275*

3. Acquiring Corporation Pays Reorganization Expenses of Target and Its Shareholders

*Revenue Ruling 73-54*

4. Stock for Services

*Revenue Ruling 77-271*
5. Acquiror Issues Its Voting Convertible Preferred with Right to Buy Additional Stock
   Revenue Ruling 70-108
   Questions
   519
   IRS General Counsel Memorandum 38844
   519
6. Right of Target Shareholders to Have Acquiror Stock Redeemed
   IRS General Counsel Memorandum 38844
   519
G. Pre-Reorganization Payments by Target to Its Shareholders
   520
1. Dividend Before (B)
   Revenue Ruling 70-172
   520
2. Redemption Before (B)
   a. Redemption of Dissenting Shareholders Pursuant to State Law Requirements
      Revenue Ruling 68-285
   b. Redemption in Order to Shrink Target’s Size
      Revenue Ruling 75-360
   Questions and Note
   520
H. The Hybrid Subsidiary (B)
   522
1. Introduction
   522
2. Reverse Subsidiary Merger May Constitute a (B)
   Revenue Ruling 67-448
   Questions
   522
3. Forward Subsidiary Merger Cannot Constitute a (B)
   Bercy Industries, Inc. v. Commissioner
   524
I. Push Up of Target’s Assets after a (B)
   Revenue Ruling 74-35
   525
J. Section 305 and 306 Issues Arising in (B) Reorganization
   526
§ 8.3 The Triangular (B) Reorganizations
   A. Legislative History of the Triangular (B) Reorganization
   B. Introductory Note
   C. Reverse Subsidiary Merger of Second Tier Subsidiary into Target
   D. Zero Basis Problem
   527
§ 8.4 Representations Required in a Ruling Request under § 368(a)(1)(B):
   Straight and Triangular
   Revenue Procedure 86-42
   528
§ 8.5 Section 368(a)(2)(E) Reverse Subsidiary Mergers
   A. Legislative History of the Reverse Subsidiary Merger
   B. Introductory Note
   C. The Final Regulations
      Preamble to Final Regulations under § 368(a)(2)(E)
   D. Creation of a Holding Company
   E. Meaning of “Substantially All” of the Acquiring Subsidiary’s Assets
      Revenue Ruling 77-307
      Question
   529
F. Two-Step Reverse Subsidiary Mergers: Exchange Offer Followed by Merger
   Revenue Ruling 2001-26
G. Sale of 32% of Stock of Acquiring Parent after a Purported § 368(a)(2)(E)
   Technical Advice Memorandum 8702003
H. Effect of Poison Pill Rights in a Reverse Subsidiary Merger under § 368(a)(2)(E)
   Private Letter Ruling 8808081
   Question
I. Reverse Subsidiary Merger Followed by a Liquidation Is Not a Reorganization
   Revenue Ruling 2008-25
J. Section 305 and 306 Issues Arising in (B) Reorganizations
K. Zero Basis Problem
   1. Background
   2. Proposed Regulations Relating to Basis in a Reverse Subsidiary Merger
      Preamble to Proposed Regulations under §§ 1032 and 358
   3. Final Regulations Relating to Basis in a Reverse Subsidiary Merger
      Preamble to Final Regulations
   4. No Regulations under § 1032
L. Representations Required in a Ruling Request under § 368(a)(2)(E)
   Rev. Proc. 86-42
§ 8.6 Summary Problems on Straight and Triangular Acquisitive Stock Reorganization
§ 8.7 Impact of § 382, the Consolidated Return Regulations, and § 269 on the Utilization of the Target’s Net Operating Losses
   A. Introduction
   B. Acquisitive Stock Reorganizations as Equity Structure Shifts
§ 8.8 Impact of § 384 on Utilization of Acquiring Corporation’s Pre-Acquisition NOLs against Target’s Pre-Acquisition Built-In Gains
§ 8.9 Summary Problems on the Utilization of NOLs after an Acquisitive Stock Reorganization
   A. Statement of Facts
      1. PC Acquires LC in a Stock for Stock (B) Reorganization or Reverse Subsidiary Reorganization
      2. Over and Down Triangular (A), (B) or (C) Reorganization
§ 8.10 Sample Merger Agreement for a Reverse Subsidiary Merger: Time’s Initial Proposal to Acquire Warner
   Agreement and Plan of Merger among Time Incorporated (Time), TW Sub, Inc., a Wholly-Owned Subsidiary of Time, and Warner Communications Inc. (Warner)
Chapter 9 · Spin-Offs under Section 355 and Their Use in Acquisitions 557
§ 9.1 Scope 557
§ 9.2 Statutory Structure Governing Spin-Offs 558
§ 9.3 Legislative Background on the (D) Reorganization under §§ 355 and 354(b) 560
A. Legislative Developments through 1954 560
1. Mrs. Gregory’s Transaction under the 1924 Act 560
2. The 1951 Act 561
3. The 1954 Act 561
B. Legislative Developments Since 1954 562
1. 1987 Act: Prevention of Use of § 355 as Surrogate for a Mirror Transaction 562
   House Report to the Revenue Act of 1987 562
2. 1988 Act Amendment to § 355(c) Relating to Treatment of Distributing Corporation 563
   House Report to Miscellaneous Revenue Act of 1988 563
   Conference Report to Revenue Reconciliation Act of 1990 564
   Note and Question 565
4. The 1997 Act, Potential Recognition of Gain under § 355(e) by Distributing Corporation on a Distribution in Connection with an Acquisition: Introduction to the Morris Trust Issue 565
5. The 2004 Act, Modification of Treatment of Creditors in Divisive Reorganizations by the American Jobs Creation Act of 2004 566
   Conference Committee Report to the American Jobs Creation Act of 2004 566
6. Modification of the Active Trade or Business Test by the 2006 Act Amendments to Section 355 by the Tax Increase Prevention and Reconciliation Act of 2005 Signed into Law on May 10, 2006 567
8. Restrictions on Spin-Offs of REITs (Real Estate Investment Trust) by the 2015 Act 569
   Joint Committee on Taxation, Technical Explanation of the Protecting Americans from Tax Hikes Act of 2015, House Amendment #2 to the Senate Amendment to H.R. 2029 (Rules Committee Print 114-40) 569
§ 9.4 Elaboration on the Regulations, Rulings and Cases 569
A. Introduction to the 1989 Regulations 569
   Preamble to the § 355 Regulations 569
B. The Business Purpose Requirement 570
1. The Regulations

Preamble to the § 355 Regulations

2. Illustration of Corporate Business Purpose That Also Serves a Shareholder Purpose

Revenue Ruling 2004-23

C. Device for Distribution of Earnings and Profits

1. The Regulations

Preamble to the § 355 Regulations

2. Illustration: Non-Pro Rata Split-Off

Revenue Ruling 71-383

D. Continuity of Interest Requirement: The Regulations

Preamble to the § 355 Regulations

E. Active Conduct of a Trade or Business Requirement

1. The Regulations

Preamble to the § 355 Regulations

2. The Anti Yahoo Spin-Off of Alibaba Notice and Revenue Ruling

Notice 2015-59

F. Is Retention by Distributing Corporation of Stock or Securities of Controlled Corporation Not for Tax Avoidance within § 355(a)(1)(D)(ii)?

Revenue Ruling 75-321

Note

G. Distributions of Hot Stock under § 355(a)(3)(B)

Final Regulations on Hot Stock

H. Carryover of Tax Attributes in a Divisive § 355

§ 9.5 Determination of Whether Boot Is Treated as a Dividend

Revenue Ruling 93-62

§ 9.6 Spin-Offs Followed by Acquisitive Reorganizations: Morris Trust Issues

A. Subsequent Sale or Exchange of Stock: Impact on the Device Clause

Revenue Ruling 55-103

B. Spin-Off of Controlled Corporation Followed by Merger of Distributing Corporation into Acquiring Corporation

Commissioner v. Morris Trust

C. The Service Accepts Morris Trust

Revenue Ruling 68-603

D. The Regulations under the Basic § 355 Provisions

Preamble to the § 355 Regulations

E. Potential Recognition of Gain under § 355(e) by Distributing Corporation on Distribution in Connection with an Acquisition

1. Gain Recognition on Certain Distributions of Controlled Corporation Stock Followed by Acquisition of Either Controlled Corporation or Distributing Corporation:

Impact of Taxpayer Relief Act of 1997

a. Senate Report
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>b.</td>
<td>Conference Report</td>
<td>597</td>
</tr>
<tr>
<td>c.</td>
<td>Final Regulations under Section 355(e)</td>
<td>600</td>
</tr>
<tr>
<td>c.</td>
<td>Preamble to Final Regulations under Section 355(e), Treasury Decision 9198</td>
<td>600</td>
</tr>
<tr>
<td>2.</td>
<td>Illustration of the Limits of Section 355(e)</td>
<td>603</td>
</tr>
<tr>
<td>3.</td>
<td>Practical Impact of § 355(e)</td>
<td>607</td>
</tr>
<tr>
<td>G.</td>
<td>Applicability of Step Transaction Doctrine in Spin-Off Followed by Reorganization</td>
<td>607</td>
</tr>
<tr>
<td>G.</td>
<td>Revenue Ruling 98-27</td>
<td>607</td>
</tr>
<tr>
<td>H.</td>
<td>Elaboration on Morris Trusts Transactions</td>
<td>609</td>
</tr>
<tr>
<td>1.</td>
<td>Use of Morris Trust in Direct (A) Reorganizations, (B) Reorganizations, and Section 351 Transactions</td>
<td>609</td>
</tr>
<tr>
<td>2.</td>
<td>Spin-Off of Controlled Corporation Followed by Merger of Target Into Distributing Corporation</td>
<td>610</td>
</tr>
<tr>
<td>3.</td>
<td>Spin-Off of Controlled Corporation Followed by Merger of Controlled Corporation into Acquiring Corporation</td>
<td>611</td>
</tr>
<tr>
<td>4.</td>
<td>Spin-Off of Controlled Corporation Followed by Acquisition by Controlled Corporation of Target Corporation in Acquisitive Reorganization</td>
<td>611</td>
</tr>
<tr>
<td>5.</td>
<td>Spin-Off of Controlled Corporation in a (B)</td>
<td>612</td>
</tr>
<tr>
<td>6.</td>
<td>Spin-Off of Controlled Corporation Followed by Disposition of Distributing Corporation in a (B)</td>
<td>613</td>
</tr>
<tr>
<td>§ 9.7</td>
<td>Illustration of Spin-Off Transaction: Spin-Off Pursuant to a Previously Existing Plan: The Comcast-AT&amp;T Transaction</td>
<td>613</td>
</tr>
<tr>
<td>§ 9.8</td>
<td>Summary Problems on Spin-Offs</td>
<td>624</td>
</tr>
<tr>
<td>§ 10.1</td>
<td>Scope</td>
<td>627</td>
</tr>
<tr>
<td>§ 10.2</td>
<td>Impact of Section 367 on Acquisitive Reorganizations</td>
<td>628</td>
</tr>
</tbody>
</table>
CONTENTS

Preamble to Treasury Decision 8702 .......................... 641

B. Summary of the Five Non-Recognition Requirements of the
Section 367(a) Gain Recognition Regulations Applicable
 to Direct Outbound Transfers ........................................ 644
C. The Final Section 367 Inversion Regulations Relating to
Indirect Transfers of Stock of U.S. Targets .......................... 644

§ 10.6 2004 Anti-Inversion Legislation, Section 7874 ................. 644
A. Introduction to Inversions Generally .......................... 644
B. Introduction to the “Old Inversion” Problem ....................... 645
Excerpt from Thompson, Treasury’s Inversion Study Misses the Mark:
Congress Should Shut Down Inversions Immediately ............... 645
C. Anti-Inversion Provision Enacted by the American Jobs Creation
Act of 2004, Section 7874 ................................................. 646
Conference Committee Report to the American Jobs
Creation Act of 2004 ......................................................... 646
Note ............................................................................... 648
D. Elaboration on the Structure of Section 7874 ....................... 648
Preamble to Treasury Decision 9238 .......................... 648

§ 10.7 Impact of Sections 367 and 7874 on Direct Outbound Transfer of
Stock of Domestic Target to a Foreign Acquiror in a (B) Reorganization
and in an Acquisitive Section 351 Transaction ....................... 651
A. General Principles under Section 367 .......................... 651
B. General Principles under Section 7874 .......................... 656
C. Summary of U.S. Tax Results under Section 367 Regulations
 and Section 7874 ............................................................. 657
D. The DaimlerChrysler Acquisition of Chrysler as a (B) Reorganization
 or an Acquisitive Section 351 Transaction .......................... 658

§ 10.8 Impact of Sections 367 and 7874 on Indirect Outbound Stock
Transactions: Reorganizations Involving the Acquisition of Stock of a
Domestic Target by a Foreign Acquiror in a Triangular Reorganization
Involving a Subsidiary of the Foreign Acquiror ....................... 660
A. General Principles ......................................................... 660
1. Introduction .................................................................. 660
2. Indirect Outbound Forward Subsidiary Merger of U.S. Target
 into U.S. Sub of Foreign Acquiror: The Aborted
British Telcom-MCI Merger ............................................. 660
3. Indirect Outbound Reverse Subsidiary Merger:
The Vodafone-AirTouch Merger ........................................ 662
4. Indirect Outbound Triangular (B) Reorganization ............... 663
5. Indirect Outbound Triangular (C) Reorganization ............... 664
6. Economic Effect of Indirect Outbound Triangular Reorganizations
 and Impact of Sections 367 and 7874 .......................... 665
§ 10.9 Impact of Section 367 and Section 7874 on Outbound Transfer of Domestic Target's Assets to Foreign Acquiror in an Outbound Asset Reorganization

A. Scope of Transactions

B. General Principles under Section 367

1. Treatment of U.S. Target

2. Treatment of Shareholders of U.S. Target

§ 10.10 Summary Problems on Outbound Acquisitive Reorganizations under Section 367

§ 10.11 Introduction to the New Inversions

A. Background

B. Treasury’s September 2014 Notice on Actions to Rein in Inversions


C. Treasury’s November 2015 Notice Announcing Additional Actions to Rein in Inversions

IRS and Treasury Fact Sheet: Additional Treasury Actions to Rein in Corporate Tax Inversions

D. Introduction to the 2016 Treasury Regulations: (1) Implementing the 2014 and 2015 Treasury Notices, and (2) Promulgating Regulations under Section 385

E. Introduction to the 2016 General Inversion Regulations

1. In General

2. Introduction to the Significance of the Ownership Percentage, Right Sizing, and Pfizer’s Abandoned Inversion with Allergan

3. Clarification of the Calculation of the Ownership Percentage: Implementing the Anti-Stuffing Provisions of the 2015 Notice, Section 1.7874-4T

4. Calculation of the Ownership Percentage: The Passive Asset Rule, which is the Anti-Cash Box Rule of the 2014 Notice, Section 1.7874-7T

5. Calculation of the Ownership Percentage: The Acquisition of Multiple Domestic Entities Rule, the Pfizer Rule, Section 1.7874-8T

6. Calculation of the Ownership Percentage: The Third Country Rule, Section 1.7874-9T

7. Calculation of the Ownership Percentage: The Non-Ordinary Course Distributions (N OCD) Rule, Section 1.7874-10T

8. Application of the EAG Rules When There is a Related Transfer of Stock of the Foreign Acquiring Corporation, Section 1.7874-6T

9. The Substantial Business Activities Test, The Subject to Tax Rule, Section § 1.7874-3T(b)(4).

10. The Anti-Hopscotch Loan Rule, Section § 1.956-2T(a)(4)

11. The Section 7701(l) Recharacterization Rule, Section § 1.7701(l)-4T
12. The Section 367(b) Stock Dilution Rule, Section § 1.367(b)—4T(c) 691
13. The Section 367(b) Asset Dilution Rule, Section § 1.367(b)—4T(f) 692
14. The Section 304 Rules, Section § 1.304—7T 692
15. The Inversion Gain Rule, Section § 1.7874-11T 693

F. The 2016 Treasury Interest Stripping Regulations under Section 385 694
1. In General 694
2. The Words of Section 385 695
3. Introduction to the 2016 Section 385 Regs 696
4. Overview of the 2016 Section 385 Regs 696
5. The Substantiation of Related-Party Indebtedness Requirement, Proposed Reg. § 1.385-2 697
6. Certain Distributions of Debt Instruments and Similar Transactions, Proposed Reg. § 1.385-3 698
7. Exception for Real but Not False Fundings, Proposed Reg. § 1.385-3 701
8. General Anti-Abuse Rule 701
9. Exceptions to the General Rule 702
10. Treatment of Notes Issued within a Consolidated Group, Proposed Reg. § 1.385-4 703
11. My Take on the 2016 Section 385 Regs 703

G. Illustration of a New Inversion that Turned Off the Section 367(a) Gain Recognition Regulations through the Use of the Killer B Regulations — The Endo Inversion 704

H. Potential Use of the UPREIT Structure to Turn Off the Section 367(a) Gain Recognition Rule 719

§ 10.12 Policy Perspectives on Inversions 723
A. The Obama Administration’s 2015 Legislative Proposal on Inversions 723
U.S. Treasury, General Explanations of the Administration’s Fiscal Year 2017 Revenue Proposals 723

B. My Take on the Policy Aspects of Inversions 726
1. Introduction 726
2. Issues Addressed in My August 12, 2014 Letter to the Secretary of Treasury regarding Inversions 726
3. Treasury’s Current Legislative Proposal: Inverter Treated as a U.S. Corporation Rule 726
4. Proposed Additional Legislative Initiative by Treasury: The CFC Taxable Disposition Rule 727
5. Administrative Action: As Proposed by Professor Shay, Regulations under Section 385 for Future Inversions 728
6. Administrative Action: Challenging the “Note-for-Stock” Part of Current and Past Inversions 729
7. Administrative Action: Fixing the “Joe Frazier Left Hook” in the Current Section 367 Regulations 730
8. Administrative Action: Preventing Avoidance of the Purposes of Section 956 through Hop-Scotch Loans 730
9. Administrative Action: Addressing the Gross-Ups of the Section 4985 Excise Tax

10. A Word on the Merits of a Territorial Regime and Its Effect on Inversions

Thompson, Territoriality Would Make All U.S. Companies De Facto Inverters

C. Potential Impact of Integration of Corporate and Individual Taxes on Inversions

§ 10.13 Introduction to Section 367(b)

§ 10.14 Legislative Background to Section 367(b)

General Explanation of the Tax Reform Act of 1976

§ 10.15 Introduction to the General Principles Underlying the Regulations under Section 367(b)

Preamble to Notice of Proposed Rulemaking

§ 10.16 Section 355 Spin-Offs by Domestic Corporations to Foreign Shareholders

A. In General

B. Spin-Off by Domestic Distributing Corporation of a Domestic Sub to both Domestic and Foreign Shareholders

1. Introduction

2. Final Regulations on Spin-Offs under Section 367(e)(1)

Preamble to Treasury Decision 8834

§ 10.17 Impact of Sections 1248(a) and (f) on Spinoffs by Domestic Corporations of CFCs

Chapter 11 · Use of Partnerships, Including LLCs, and S Corporations in Mergers and Acquisitions

§ 11.1 Scope

§ 11.2 Taxable Acquisition by Partnership of a C Corporation’s Assets

A. Treatment of the C Corporation

Javaras, Acquisition Techniques and Financing Considerations for Partnerships and S Corporations

B. Treatment of the Partnership

§ 11.3 Taxable Acquisition by Partnership of C Corporation’s Stock

Javaras, Acquisition Techniques and Financing Considerations for Partnerships and S Corporations

Note

§ 11.4 Introduction to Subchapter S and Elaboration on Provisions of Particular Significance in Mergers and Acquisitions

A. Introduction

B. The Basic Administrative Provisions: §§ 1361, 1362 and 1363

C. Introduction to Provisions Governing Operations

D. S Corporations Permitted to Hold Subsidiaries: Effect of the Small Business Job Protection Act of 1996
Joint Committee on Taxation, General Explanation of Tax Legislation
Enacted in the 104th Congress 748

E. Treatment of S Corporations under Subchapter C: Impact of the Small Business Job Protection Act of 1996 750

Joint Committee on Taxation, General Explanation of Tax Legislation
Enacted in the 104th Congress 750

F. Rules Regarding Termination of S Status 751
1. The Subchapter S Revision Act of 1982 751
   Senate Finance Report on the Subchapter S Revision Act of 1982 751
   Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 104th Congress 752
3. Final Regulations under § 1377 752
   Preamble to Treasury Decision 8696 752

G. Section 1374 Built in Gains Tax 753
1. Introduction and Purpose of § 1374 753
   Announcement 86-128 753
2. Legislative History of § 1374 753
   a. The Tax Reform Act of 1986 753
      General Explanation of the Tax Reform Act of 1986 753
   b. The Technical and Miscellaneous Revenue Act of 1988 754
      House Report to the Technical and Miscellaneous Revenue Act of 1988 754
3. Treatment of Installment Sales under § 1374 754
   Notice 90-27 754
4. Final Regulations under § 1374 Relating to Acquisition by S Corporation of Assets of a C Corporation in a Reorganization 755
   Preamble to Final Regulations under § 1374, Treasury Decision 8579 755
5. Reduction of Income by Amount of § 1374 Tax 755

§ 11.5 Taxable Acquisition by an S Corporation of the Assets of a C Corporation 756
§ 11.6 Taxable Acquisition by an S Corporation of the Stock of a C Corporation 756
§ 11.7 Taxable Acquisition by a C Corporation of the Assets of an S Corporation 757
§ 11.8 Taxable Acquisition by a C Corporation of the Stock of an S Corporation: Impact of § 338(h)(10) 758
   A. Introduction 758
   B. The § 338(h)(10) Election for an S Target 759
      1. The 1999 Proposed Regulations: The § 338(h)(10) for an S Corporation 759
         Preamble to Proposed Regulations 759
      2. The 2001 Final Regulations: The § 338(h)(10) for an S Corporation 760
Preamble to Final Regulations

C. Acquisition of Stock of S Corporation by a Consolidated Group

Preamble to Proposed Regulation, Reg-1006219

§ 11.9 Tax-Free Acquisition by an S Corporation of the Assets of a
C Corporation in an Asset Reorganization
A. Illustration of an (A) Reorganization Prior to the Current § 1371
Revenue Ruling 69-566
B. Elaboration

§ 11.10 Tax-Free Acquisition by an S Corporation of the Stock of a
C Corporation in a Stock Reorganization

§ 11.11 Tax-Free Acquisition by a C Corporation of the Assets of an S Corporation

§ 11.12 Tax-Free Acquisition by a C Corporation of the Stock of an S Corporation

§ 11.13 Spin-Offs Involving S Corporations

Chapter 12 · Introduction to Bankruptcy Restructurings
and Related Transactions

§ 12.1 Scope

§ 12.2 Treatment of Corporate Creditor on Swap of Debt Instrument
for Stock or Debt

§ 12.3 Introduction to Cancellation of Indebtedness Income (COD) and
the Structure of § 108: Dealing with of the Corporate Creditor
A. Introduction to COD Income and to the Basic Rules under § 108
1. Legislative History
Senate Report to the Bankruptcy Tax Act of 1980
2. Elective Basis Reduction under § 1017 for COD Income
Realized under § 108
a. Proposed Regulations
Proposed Regulations Reg-208172-91
b. Final Regulations
Treasury Decision 8787
3. Introductory Problems on §§ 108 and 1017
B. Modification of the Stock-for-Debt Exception
1. The Revenue Reconciliation Act of 1993
Conference Report to the Revenue Reconciliation Act of 1993
2. Introductory Problems on Stock-for-Debt Exceptions

§ 12.4 Debt-for-Debt Swaps: Relationship between COD Provisions of
§ 108 and the OID Provisions of § 1274
A. Legislative History
House Report to the Revenue Reconciliation Act of 1990
B. Introductory Problems on Debt-for-Debt Swaps

§ 12.5 Treatment of Modifications of Debt Instruments
Preamble to Proposed Regulations under § 1.1001-3
§ 12.6 Introduction to the Bankruptcy Reorganization under § 368(a)(1)(G) 776
   A. Introduction 776
   B. Legislative History of § 368(a)(1)(G) 776
      Senate Report to the Bankruptcy Act of 1980 776
   C. The “Net Value Requirement” in the 2005 Proposed Regulations 779
      Preamble to the Proposed Regulations Addressing “No Net Value” Reorganizations and Other Transactions 779
   D. Preamble to the Final Regulations Addressing Creditor Continuity of Interest in Reorganizations 780
      Preamble to Final Regulations 780
§ 12.7 Impact of § 382 in Bankruptcy and Insolvency Cases 781
   A. Introduction to § 382 781
   B. Legislative History of §§ 382(l)(5) and (6) 781
      General Explanation of the Tax Reform Act of 1986 781
   C. Determining Whether Stock of a Loss Corporation Is Owned by Reason of Being a Qualified Creditor within § 382(l)(5)(E) 783
      1. Proposed Regulations under § 382(l)(5)(E) 783
         Proposed Regulation RIN 1545-AQ08 783
      2. Final Regulations under § 382(l)(5)(E) 786
         Treasury Decision 8529 786
   D. Determining the Value of a Loss Corporation under § 382(l)(6) 787
      Treasury Decision 8530 787
   E. Introductory Problems on Impact of § 382 in Bankruptcy 789
§ 12.8 Impact of § 269 on Utilization of NOLs after a Bankruptcy Reorganization 789
   Preamble to Final Regulations under § 269 789
§ 12.9 Disclosure Statement in WorldCom Bankruptcy 790
   In re WorldCom, Inc. 790

Chapter 13 · Tax Policy Aspects of Mergers and Acquisitions 799
§ 13.1 Scope 799
§ 13.2 Proposal for Repeal of the Reorganization Provisions 800
   Report of Staff of Senate Finance Committee on Subchapter C Revision Bill of 1985 800
§ 13.3 Proposal for Comprehensive Revision of the Merger, Acquisition and LBO Provisions of the Code 805
   Samuel C. Thompson, Jr., Reform of the Taxation of Mergers, Acquisitions and LBOs 805
§ 13.4 An Analysis of the Conceptual Foundations for the Reorganization Provisions 810
   Steven Bank, Mergers, Taxes and Historical Realism 810
§ 13.5 Proposal for Federalizing the (A) Merger 815
   Steven Bank, Federalizing the Tax-Free Merger: Towards an End to the Anachronistic Reliance on State Corporation Laws 815
§ 13.6 Comparison of Corporate Nonrecognition Provisions in Canada and the U.S. 818
Brown and Manolakas, *The United States and Canada: A Comparison of Corporate Nonrecognition Provisions* 818

§ 13.7 House Ways and Means List of Options for Dealing with LBOs 823
Ways and Means Press Release Announcing Hearings on LBO Issues and Setting Forth Options List on LBOs 823
Options Modifying the Current Tax Treatment of Equity 825

§ 13.8 Policy Perspective on Domestic and International Business Tax Reform Generally 826
A. Congressional Research Service Discussion of Issues in Corporate Tax Reform 826
Jane G. Gravelle and Thomas L. Hungerford, *Corporate Tax Reform: Issues for Congress* 826
B. The Obama Administration’s Business Tax Reform Proposals 829
*The President’s Framework for Business Tax Reform* 829

§ 13.9 Policy Perspective on Inversion Transactions and Changing to a Territorial or Imputation System for Taxing Foreign Income 830

Index 831
# Table of Principal Cases

References are to sections

<table>
<thead>
<tr>
<th>Case</th>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Potash &amp; Chemical Corp. v. United States</td>
<td>7.3.H.2</td>
</tr>
<tr>
<td>Bazley v. Commissioner</td>
<td>6.7.C</td>
</tr>
<tr>
<td>Burnet v. Logan</td>
<td>1.4.C</td>
</tr>
<tr>
<td>Chapman v. Commissioner</td>
<td>6.2.A.2, and 8.2.B</td>
</tr>
<tr>
<td>Commissioner v. Clark</td>
<td>6.13.A</td>
</tr>
<tr>
<td>Commissioner v. Court Holding Co.</td>
<td>2.5.B.2</td>
</tr>
<tr>
<td>Commissioner v. Tufts</td>
<td>1.5.C.2</td>
</tr>
<tr>
<td>Crane v. Commissioner</td>
<td>1.5.B</td>
</tr>
<tr>
<td>Covil Insulation Co. v. Commissioner</td>
<td>5.5.A.11</td>
</tr>
<tr>
<td>Esmark, Inc. v. Commissioner</td>
<td>2.11.C</td>
</tr>
<tr>
<td>General Utilities &amp; Operating Co. v. Helvering</td>
<td>2.5.B.1</td>
</tr>
<tr>
<td>Gregory v. Helvering</td>
<td>2.11.B</td>
</tr>
<tr>
<td>Groman v. Commissioner</td>
<td>6.2.G.2</td>
</tr>
<tr>
<td>Helvering v. Alabama Asphaltic Limestone Co.</td>
<td>6.2.B.7</td>
</tr>
<tr>
<td>Helvering v. Bashford</td>
<td>6.2.G.2</td>
</tr>
<tr>
<td>Helvering v. Elkhorn Coal Co.</td>
<td>7.3.D.1</td>
</tr>
<tr>
<td>Helvering v. Minnesota Tea Co.</td>
<td>6.2.B.2</td>
</tr>
<tr>
<td>Helvering v. Southwest Consolidated Corporation</td>
<td>6.4</td>
</tr>
<tr>
<td>Helvering v. Watts</td>
<td>6.2.B.4</td>
</tr>
<tr>
<td>INDOPCO, Inc. v. C.I.R.</td>
<td>5.4.F.1</td>
</tr>
<tr>
<td>John A. Nelson Co. v. Helvering</td>
<td>6.2.B.3</td>
</tr>
<tr>
<td>Kass v. Commissioner</td>
<td>7.2.E</td>
</tr>
<tr>
<td>Kimbell-Diamond Milling Company v. Commissioner</td>
<td>2.10.E.2</td>
</tr>
<tr>
<td>King Enterprises, Inc. v. United States</td>
<td>7.2.C</td>
</tr>
<tr>
<td>Le Tulle v. Scofield</td>
<td>6.2.B.5</td>
</tr>
<tr>
<td>Litton Industries, Inc. v. Commissioner</td>
<td>5.5.D</td>
</tr>
<tr>
<td>Marr v. United States</td>
<td>6.2.A.1</td>
</tr>
<tr>
<td>Miller v. Commissioner of Internal Revenue</td>
<td>6.2.B.5</td>
</tr>
<tr>
<td>Neville Coke &amp; Chemical Co. v. Commissioner</td>
<td>6.8.A</td>
</tr>
<tr>
<td>Paulsen v. Commissioner</td>
<td>6.2.B.10</td>
</tr>
<tr>
<td>Philadelphia Park Amusement Co. v. United States</td>
<td>1.4.B</td>
</tr>
<tr>
<td>Pinellas Ice &amp; Cold Storage Co. v. Commissioner</td>
<td>6.2.B.1</td>
</tr>
<tr>
<td>Schweitzer &amp; Conrad, Inc. v. Commissioner</td>
<td>6.16</td>
</tr>
<tr>
<td>Solomon v. Commissioner</td>
<td>6.2.H.2</td>
</tr>
<tr>
<td>Southwest Natural Gas Co. v. Commissioner</td>
<td>6.2.B.9</td>
</tr>
<tr>
<td>Turnbow v. Commissioner</td>
<td>6.9.A</td>
</tr>
<tr>
<td>United States v. Cumberland Public Service Co.</td>
<td>2.5.B.2</td>
</tr>
<tr>
<td>United States v. Hendler</td>
<td>6.15.A</td>
</tr>
<tr>
<td>West Shore Fuel, Inc. v. United States</td>
<td>4.2.A.2</td>
</tr>
<tr>
<td>William H. Bateman v. Commissioner</td>
<td>6.9.A</td>
</tr>
<tr>
<td>Williams v. McGowan</td>
<td>4.4.B</td>
</tr>
<tr>
<td>YOC Heating Corp. v. Commissioner</td>
<td>6.2.E.1</td>
</tr>
<tr>
<td>Zenz v. Quinlivan</td>
<td>2.7.C</td>
</tr>
<tr>
<td>Zimmerman v. Commissioner</td>
<td>5.2.B.2</td>
</tr>
</tbody>
</table>
Preface

I have long thought that the most interesting issues in corporate taxation revolve around the treatment of taxable and tax free mergers and acquisitions. This is particularly true now that a uniform 20% maximum rate applies to long term capital gains and to dividend income. Thus, this book approaches corporate taxation through the lens of the merger and acquisition provisions of Subchapter C of the Internal Revenue Code, which deals with the tax treatment of corporations.

To ensure that the reader has the appropriate background to explore merger and acquisition concepts, Chapter 1 introduces several basic Federal income tax concepts, and Chapter 2 introduces the basic provisions of Subchapter C. The concepts introduced in Chapter 1 include:

- The basic tax treatment of the four principal forms for conducting business: C corporations, S corporations, partnerships, and LLCs;
- The realization and recognition concept;
- The treatment of like kind exchanges;
- The treatment of liabilities, including the Crane case;
- The treatment of capital gains and losses;
- The impact of Sections 1231 and 1245 on the disposition of property;
- The cash and accrual accounting methods; and
- The treatment of original issue discount.

Chapter 2 introduces the following provisions of Subchapter C:

- Section 351, which deals with the organization of a corporation;
- Section 301, which deals with the treatment of shareholders on the distribution of property;
- Section 302, which deals with the treatment of shareholders on the redemption of their stock;
- Section 311, which deals with the treatment of the corporation on the distribution of dividends;
- Section 331, which deals with the treatment of shareholders on receipt of a liquidating distribution; and
- Section 336, which deals with the treatment of a corporation that makes a liquidating distribution.
Because of the globalization of business activity, it will be virtually impossible for any law student today who goes into a corporate tax practice to avoid dealing with cross-border issues, and for this reason, this book also introduces many of the issues under the Federal income tax affecting both inbound and outbound cross-border mergers and acquisitions.

I want to thank my research assistants for their excellent help in the preparation of this book. The following students at Penn State Law assisted with the second edition: Zachary Burley, Vasilios Vlahakis, Ying Zeng, and Matt Robida. The following former students assisted with the first edition: Robert Allen Clary, II, a graduate of the University of Miami School of Law and the Graduate Tax Program at the NYU School of Law, Matthew Sgnilek, a graduate of the UCLA School of Law, and Daniel Davis, a graduate of the UCLA School of Law. Finally, I want to thank my lovely wife, Becky Sue, and our son, Tommy, for their love and support.

Samuel C. Thompson, Jr.
Professor of Law and Director Center for the Study of Mergers and Acquisitions
Penn State Law
June 10, 2016