

M&A Update

Treasury Announces Second Anti-Inversion Notice

November 20, 2015

On November 19, 2015, Treasury issued Notice 2015-79 (the "Notice"), which announces Treasury's intent to issue regulations reducing the tax benefits available to inverted groups and making it more difficult for some U.S. companies to invert. The Notice, which includes rules governing inversions and post-inversion restructuring, notably does not impose additional limits on earnings stripping. The Notice generally applies to inversions completed after November 18, 2015.

Overview

Anti-Stuffing Rules

A foreign acquiror's shareholders must own more than 20% of the foreign acquiror's stock after a U.S. target's acquisition for the foreign acquiror to avoid being treated as a U.S. corporation. The Notice confirms that "stuffing" the foreign acquiror with active assets, as well as cash or passive assets, with a principal purpose of satisfying the 20% rule will be disregarded. This anti-stuffing rule may reduce a foreign acquiror's size, and so the amount of stock its shareholders are treated as holding, by disregarding prior asset and/or stock acquisitions that were part of a plan that includes the inversion. Applies to acquisitions completed after November 18, 2015.

Increased Cost of Post-Inversion Restructuring

- The Notice generally increases the cost of transferring a U.S. target's foreign subsidiaries out from under the U.S. target to a foreign affiliate after an inversion by taxing all of the built-in gain in the transferred foreign subsidiary's stock. Applies to exchanges occurring after November 18, 2015 with respect to inversions completed after September 21, 2014.
- The Notice expands the prohibition on the use of tax attributes to shelter gain on post-inversion transfers to include indirect transfers or licenses of property by a controlled foreign subsidiary of a U.S. target whose shareholders receive between 60% and 80% of the foreign acquiror's stock. Applies to transfers or licenses of property occurring after November 18, 2015 with respect to inversions completed after September 21, 2014.

Tax Residency Limitations

- The Notice precludes a foreign acquiror resident in one country from becoming a tax resident of a second country while retaining the first country's corporate law and other benefits. Applies to acquisitions completed after November 18, 2015.
 - The Notice provides that foreign acquirors that are tax resident in a country different than the country in which the foreign acquiror was created or organized cannot qualify for the exception whereby a U.S. company can successfully invert if, after the transaction, at least 25% of the combined group's business activity is in the foreign country where the foreign acquiror is created or organized. Applies to acquisitions completed after November 18, 2015.

Technical Corrections:

- The Notice makes narrow technical corrections with respect to the "cash box" and the "extraordinary dividend" rules introduced in Notice 2014-52 that will benefit taxpayers.

Takeaways

While the Notice presents additional challenges for U.S. companies seeking to invert, many companies should be able to navigate these challenges successfully and invert with proper planning.

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