

DEQUITY

INTRODUCTION

With U.S. corporate bankruptcies poised to hit a decade-long high as a result of the economic impact of COVID-19, we have prepared these materials that detail the key bankruptcy tax issues and guidance offered by Linda Swartz, the chair of Cadwalader's Tax Group, in old and new speeches and panels. We hope you find this presentation to be both useful and informative.

For additional information, contact [Linda Swartz](mailto:linda.swartz@cwt.com) (linda.swartz@cwt.com).

Upcoming speaking engagements:

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| October 14, 2020 | <ul style="list-style-type: none">• Linda Swartz will be presenting "Tax Strategies for Financially Troubled Businesses and Other Loss Companies" at PLI's Tax Strategies for Corporate Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations & Restructurings 2020 |
| November 5, 2020 | <ul style="list-style-type: none">• Linda Swartz will be presenting "A Cause for Distress? The Ways the Federal Income Tax Pushes Taxpayers into Bankruptcy" at The University of Chicago Tax Conference |
| January 25, 2021 | <ul style="list-style-type: none">• Linda Swartz will be presenting "Distressed Corporations: Creditor and Shareholder Issues" at the 2021 University of Southern California Federal Tax Institute |
| February 8, 2021 | <ul style="list-style-type: none">• Linda Swartz will be presenting "Workouts and Debt Restructurings" at PLI's 23rd Annual Real Estate Tax Forum |
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LINDA Z. SWARTZ



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Linda Swartz, the longtime chair of Cadwalader's Tax Group and member of the Firm's Management Committee, focuses her practice on structuring complex restructurings, bankruptcies, mergers and acquisitions, spin-offs, joint ventures, and foreign tax planning strategies. She also regularly advises clients on fund structures, financings and derivative transactions.

Linda is consistently recognized as one of the leading tax lawyers in the country. She was recently named one of 14 "Influential Women In Tax Law" by *Law360*, noted for her role as "a key architect on billion-dollar transactions involving major multinational companies" with clients describing her tax structuring expertise as "so strong that we don't even go to the IRS to get a blessing from them. We go to Linda to get a blessing from her." She has been described by *Chambers USA* as "acclaimed for her vast reservoir of practical knowledge of the U.S. tax code" and "an expert on the law of today but cognizant of where the law might go in the future, allowing clients to make decisions which last for the next ten years." Clients quoted by *The Best Lawyers* in America have described Linda as "the foremost U.S. tax advisor on structured acquisition and divestiture deals" and "a professional force of nature" with "extraordinary technical ability, coupled with fiercest and most trenchant deal negotiation skills of any transactional tax lawyer." She was also recognized as "2017 Foreign Tax Planning Lawyer of the Year" by *Finance Monthly*, and *Dow Jones*, reporting on Procter & Gamble's Reverse Morris Trust transaction with Coty, noted that "it isn't often you see a tax adviser credited on a deal, but that's exactly what happened for Cadwalader, Wickersham & Taft in P&G's complicated \$12.5 billion unloading of its beauty business to Coty."

Linda is widely regarded as a thought leader in the industry and is a prolific speaker and writer on a wide range of transactional tax issues, with articles that include "Partnership Bankruptcy Tax issues," "Debt Exchanges," "Bankruptcy Tax Issues," and "Bankruptcy Tax 101." She also authors the chapters on Debt Exchanges in *Collier on Bankruptcy Taxation* (Matthew Bender) and Securities Lending Transactions in *Taxation of Financial Institutions* (Clark Boardman Callaghan). In addition to writing, she speaks on a broad range of topics, including each year on workout and bankruptcy tax issues at the corporate and real estate tax PLI conferences.

Linda is a member of the Executive Committee of the New York State Bar Association Tax Section and has chaired its Tax-Free Reorganizations; Corporations; Bankruptcy; Consolidated Returns; Real Property; and Tax Accounting and Basis Committees.

Linda received her J.D. from University of Pennsylvania Law School, and her B.A. from Bucknell University, where she graduated *magna cum laude* and was elected to Phi Beta Kappa.

SECTION 382: STOCK OR NONSTOCK?

Section 382 regulations may treat debt as stock under some circumstances if, when it is transferred, it “offers a potential significant participation in the growth of the corporation.”

See Treas. Reg. § 1.382-2T(f)(18)(iii).

- Debt of troubled companies has always traded at a deep discount – web-based trading has simply lent increased visibility to pricing.
- Query whether a debtor corporation could undergo a section 382 ownership change each time enough of its debt changed hands at a low enough price – the better view almost always has to be no.

WHEN DOES DEBT = STOCK?

IRS officials have consistently stated that the stock-nonstock regulation will be used to recharacterize debt as stock only where discounted debt is held by one or more related persons who have some ability to manipulate a debtor's future.

- Note that in *Integrated Resources* the IRS argued that consummation of a liquidating plan that did not cancel stock would cause debt to be recharacterized as stock, producing ownership change under section 382.
- IRS rulings are helpful only by analogy and future IRS actions may not be circumscribed by their holdings.

WHEN DOES THE IRS BELIEVE DEBT = STOCK?

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Corporate taxpayer's paid-in-kind note not considered "stock" under 1.382-2T(f)(18)(ii) even though it was trading at a significant discount where (i) the debtor was not actively involved in the sale of the debt, (ii) more than 50% of the debt was not acquired by one person (or related persons), and (iii) there was no material change in the terms of the debt.

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Creditors' interests not treated as stock where taxpayer in liquidating bankruptcy had liabilities substantially in excess of assets and shareholders were unlikely to receive any value in liquidation.

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Agent's broad reading "cannot be correct," because "then possibly every lender to a debtor that subsequently becomes insolvent or bankrupt would be considered as automatically having the potential for significant participation in the growth of the debtor."