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50th Annual Conference

Traps for The Wary: Cross-Border Tax Conundrums

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TROUBLED COMPANIES

AND

ACCIDENTAL INVERSIONS

Inversion Transactions Generally

- An "inversion transaction" is a transaction in which a U.S. corporation or partnership (a "Domestic Entity") is expatriated by inserting a foreign corporation above it (the "Foreign Acquiring Corporation").

- The primary benefits of inversion transactions have historically included:
  - "Earnings stripping" through the issuance of debt by the Domestic Entity, taking advantage of the U.S. interest expense deduction;
  - Accessing cash in foreign subsidiaries of the Domestic Entity without repatriating such cash to the U.S.;
  - Reducing tax on future foreign earnings;
  - Avoidance of "subpart F" income and other anti-deferral rules;
  - Avoids subjecting income from non-U.S. operations to U.S. income tax (e.g., by doing "out from under planning" or where there is a foreign target entity involved in the inversion transaction).

Section 7874 – Generally

- Section 7874 applies if, pursuant to a plan (or series of related transactions):
  - A foreign corporation (a “foreign acquiring corporation”) completes the direct or indirect acquisition of substantially all of the properties held directly or indirectly by a Domestic Entity;
  - After the acquisition, at least 60% (but less than 80%) of the stock (by vote or value) of the foreign acquiring corporation is held by former shareholders (or former partners) of the Domestic Entity by reason of holding stock (or capital or profits interests) in the Domestic Entity; and
  - After the acquisition, the “expanded affiliated group” (“EAG”) which includes the foreign acquiring corporation does not meet the “substantial business activities” (“SBA”) test.

Section 7874 – 60% Inversion

- Effect of 60% Inversion
  - If the three requirements in the prior slide are met, a "60% Inversion" has occurred.
  - In a 60% Inversion, the Domestic Entity, its owners, and certain other related parties must recognize the full amount of "inversion gain."
    - Whether parties are "related" is determined under sections 267(b) and 707(b)(1).
  - Inversion gain is income or gain recognized from transfers of stock or other properties by the Domestic Entity and any income from licensed property of the Domestic Entity incurred (i) as part of the Domestic Entity acquisition or (ii) after such acquisition if the transfer or license is to a foreign related person.
  - The consequences of a 60% Inversion are generally limited to a 10-year period, and may be managed with additional tax planning.

Section 7874 – 80% Inversion

- Effect of an 80% Inversion
  - If the three requirements on slide 4 are met except that shareholders (or partners) of the Domestic Entity own 80% or more of the foreign acquiring corporation by reason of holding stock in the Domestic Entity, an 80% Inversion has occurred.
  - In an 80% Inversion, the *foreign acquiring corporation* is treated as a U.S. corporation for all U.S. tax purposes.
  - The effect is to deny any potential benefits of the inversion and subjects the foreign acquiring corporation to tax in the U.S. (and also likely in its jurisdiction of incorporation).

Section 7874 – Creditors of a Domestic Entity

- Treas. Reg. 1.7874-2(i)(2) provides that, if immediately prior to a domestic entity acquisition, either (i) the Domestic Entity is in a title 11 or similar case or (ii) the value of the Domestic Entity's assets do not exceed its liabilities, then the claims of a Domestic Entity's creditors are treated as stock (or a partnership interest) in the Domestic Entity and each creditor of the Domestic Entity shall be treated as a shareholder (or partner) of the Domestic Entity.

- Furthermore, a creditor that is treated as a shareholder (or partner) of a Domestic Entity is treated as such *for all purposes of Section 7874* under Treas. Reg. 1.7874-2(i)(2)(iii).

- Accordingly, restructuring transactions involving a Domestic Entity in a bankruptcy plan (or planning in anticipation of bankruptcy) or of an insolvent Domestic Entity may result in unanticipated consequences under Section 7874 and the regulations thereunder without proper awareness and planning.

Section 7874 – Disqualified Stock

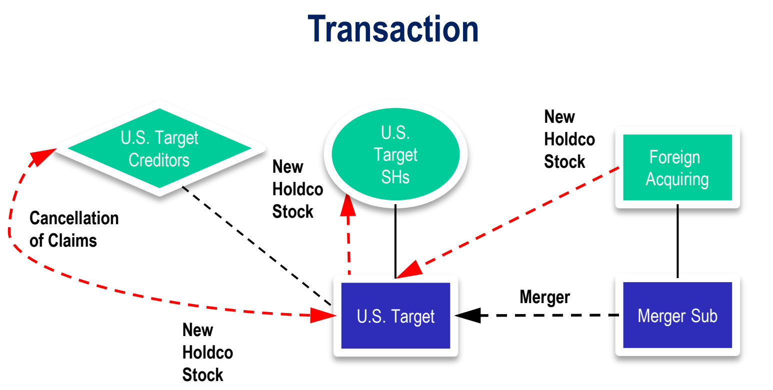
- Treas. Reg. 1.7874-4 generally provides that, stock of foreign acquiring corporation exchanged for (i) cash, (ii) marketable securities, (iii) obligations owed to EAG members and certain former shareholders of the Domestic Entity target, or (iv) property with a principal purpose of avoiding 7874 (collectively "nonqualified property") is "disqualified stock that is excluded from the denominator of the fraction used to determine the ownership percentage of former shareholders of a Domestic Entity for purposes of section 7874 (the "ownership fraction").

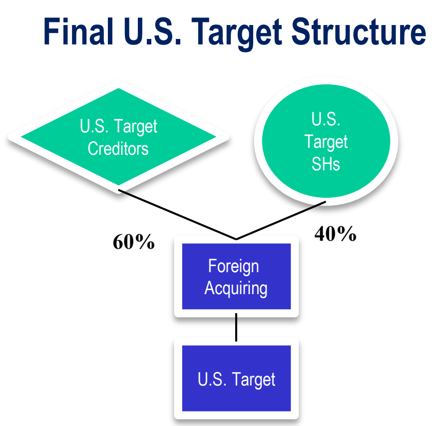
- Additionally, if a person (the "acquirer") acquires stock of a foreign acquiring corporation in exchange for property and the acquirer subsequently uses such foreign acquiring corporation stock to satisfy an obligation of such acquirer (or a person related to the transferee), then such foreign acquiring corporation stock is generally treated as "disqualified stock". Treas. Reg. 1.7874-4(c)(1)(ii)(A).
  - Treatment of a portion of the stock received by the acquirer as disqualified stock may be limited to the extent that the foreign acquiring corporation receives property that is not nonqualified property in the exchange with the acquirer. Treas. Reg. 1.7874-4(c)(1)(ii)(B).

Section 7874 – Disqualified Stock (continued)

- An "obligation" is defined under Treas. Reg. 1.7874-4(h)(3) as "any fixed or contingent obligation to make a payment or provide value without regard to whether the obligation is otherwise taken into account for purposes of the Internal Revenue Code."
  - However, "[a]n obligation does not include any obligation treated as stock for purposes of section 7874 (see, for example, § 1.7874-2(i), which treats certain interests, including certain creditor claims, as stock)."

Example 1 – Creditors as Shareholders





Facts:

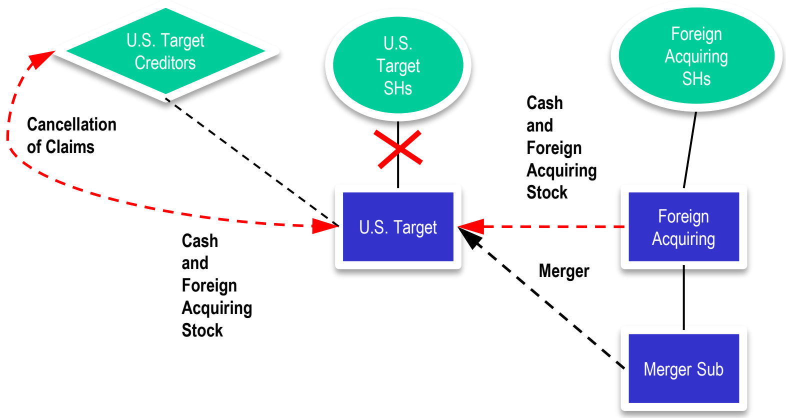
- U.S. Target is a U.S. corporation that is in a title 11 case.
- U.S. Target merges into a merger subsidiary ("Merger Sub") of a newly formed foreign corporation ("Foreign Acquiring") with U.S. Target surviving.
- Pursuant to the merger transaction, 60% of the Foreign Acquiring stock is transferred to U.S. Target's creditors in satisfaction of their claims and the remaining 40% of the Foreign Acquiring stock is transferred to U.S. Target's shareholders in exchange for their U.S. Target Stock.

Analysis:

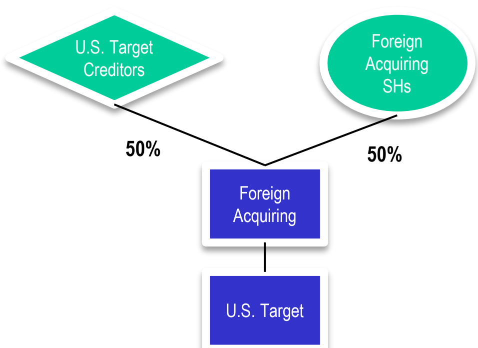
- The acquisition of the stock of U.S. Target by Foreign acquiring is a domestic entity acquisition (i.e., the indirect acquisition of the assets of U.S. Target).
- Absent the application of Treas. Reg. 1.7874-2(i)(2), the former shareholders of U.S. Target only own 40% of the stock of Foreign Acquiring by reason of their stock in U.S. Target. However, because U.S. Target was in a title 11 case immediately before the transaction, Treas. Reg. 1.7874-2(i)(2) treats U.S. Target's creditors as shareholders of U.S. Target and their claims are treated of stock of U.S. Target for purposes of section 7874.
- Accordingly, the transaction is treated as an 80% Inversion (and Foreign Acquiring being taxed as if it were a U.S. corporation) because former shareholders of U.S. Target and former creditors of U.S. Target collectively own 100% of the stock of Foreign Acquiring by reason of holding their stock or claims of U.S. Target (a 100/100 ownership fraction).

Example 2 – Disqualified Stock

Transaction



Final U.S. Target Structure



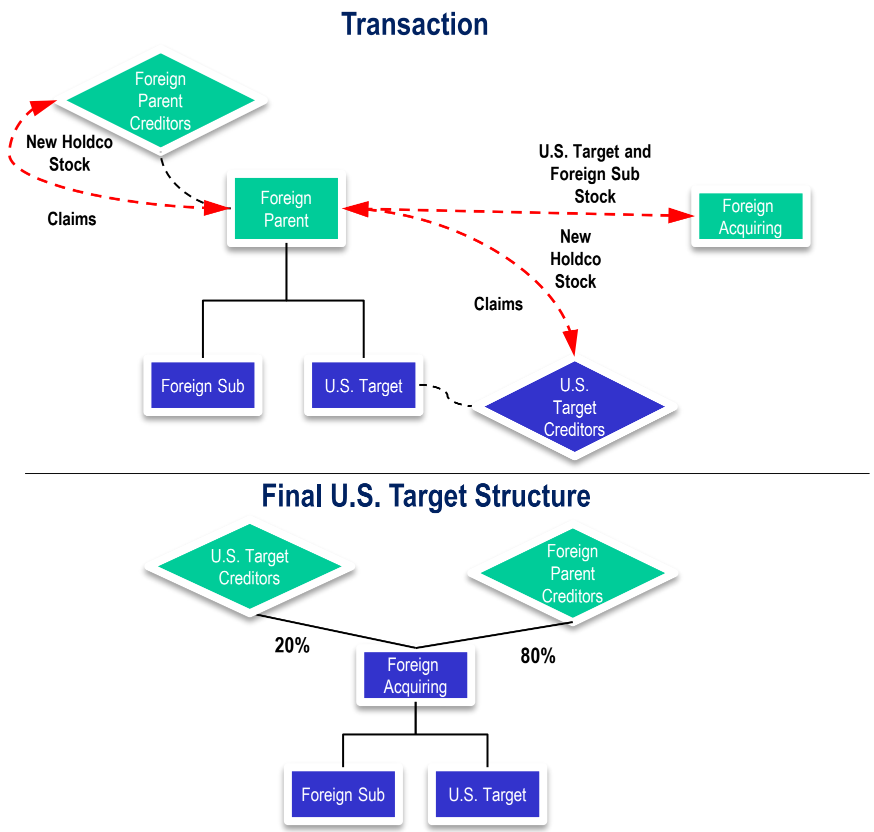
Facts:

- U.S. Target is a U.S. corporation that is in a title 11 case.
- Foreign Acquiring is formed and capitalized with cash by new shareholders (these may be related or unrelated to U.S. target or its creditors).
- U.S. Target merges into a Merger Sub of Foreign Acquiring with U.S. Target surviving.
- Pursuant to the merger transaction, cash and 50% of the Foreign Acquiring stock is transferred to U.S. Target's creditors in satisfaction of their claims and the stock held by U.S. Target's shareholders is cancelled for no consideration.

Analysis:

- The acquisition of the stock of U.S. Target by Foreign Acquiring is a domestic entity acquisition (i.e., the indirect acquisition of the assets of U.S. Target).
- Because U.S. Target was in a title 11 case immediately before the transaction, each of the U.S. Target's creditors is treated as a shareholder of U.S. Target and their claims are treated of stock of U.S. Target for purposes of section 7874.
- The former creditors of U.S. Target, in form, only own 50% of the stock of Foreign Acquiring by reason of their claims. However, because the other shareholders of Foreign Acquiring ("Foreign Acquiring shareholders") received their Foreign Acquiring stock for nonqualified property (i.e., cash) in an exchange related to the domestic entity acquisition, their stock is disqualified stock.
- Accordingly, the former creditors of U.S. Target are treated as owning 100% of the stock of Foreign Acquiring (a 50/50 ownership fraction) resulting in an 80% Inversion (and Foreign Acquiring being taxed as if it were a U.S. corporation).
- To the extent some or all of the Foreign Acquiring Shareholders do not received their Foreign acquiring stock for nonqualified property, the transaction may result in a 60% Inversion or the inapplicability of section 7874.

Treas. Reg. 1.7874-4 – Example #2



Facts:

- Foreign Parent is a non-U.S. corporation that is in a title 11 or similar case.
- U.S. Target is a U.S. corporation that is in a title 11 case.
- Foreign Parent transfers the stock of U.S. Target and stock of a foreign subsidiary ("Foreign Sub") to Foreign Acquiring in exchange for all of the Foreign Acquiring stock.
- Foreign Parent transfers 80% of the Foreign Acquiring stock received to its creditors and transfers the remaining 20% to U.S. Target's creditors (on behalf of U.S. Target) in cancellation of their claims.

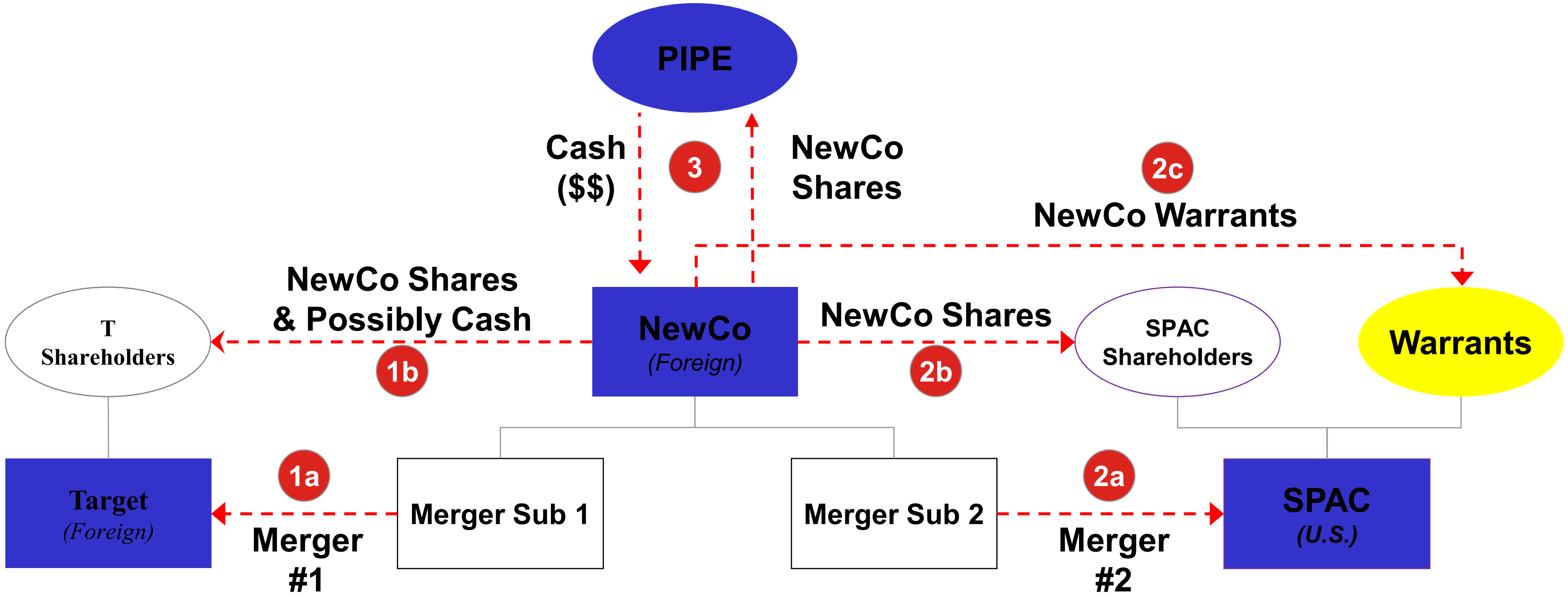
Analysis:

- The acquisition of the stock of U.S. Target by Foreign Acquiring is a domestic entity acquisition (i.e., the indirect acquisition of the assets of U.S. Target).
- Because U.S. Target was in a title 11 case immediately before the transaction, each of the U.S. Target's creditors is treated as a shareholder of U.S. Target and their claims are treated as stock of U.S. Target for purposes of section 7874.
- The former creditors of U.S. Target, in form, only own 20% of the stock of Foreign Acquiring by reason of their claims. However, because Foreign Parent exchanged property for stock of Foreign Acquiring and subsequently transferred such Foreign Acquiring stock received in satisfaction of the claims of the creditors of Foreign Parent, such stock is generally treated as disqualified stock (subject to limitation to the extent the property transferred is not nonqualified property).
- If the stock of Foreign Sub is nonqualified property, the former creditors of U.S. Target are likely treated as owning 100% of the stock of Foreign Acquiring (a 20/20 ownership fraction) resulting in an 80% Inversion (and Foreign Acquiring being taxed as if it were a U.S. corporation). To the extent some or all of assets transferred by Foreign Parent are not nonqualified property, the ownership fraction may be adjusted to a lower ownership percentage under Treas. Reg. 1.7874-4(c)(1)(ii)(B).

SECTION 367

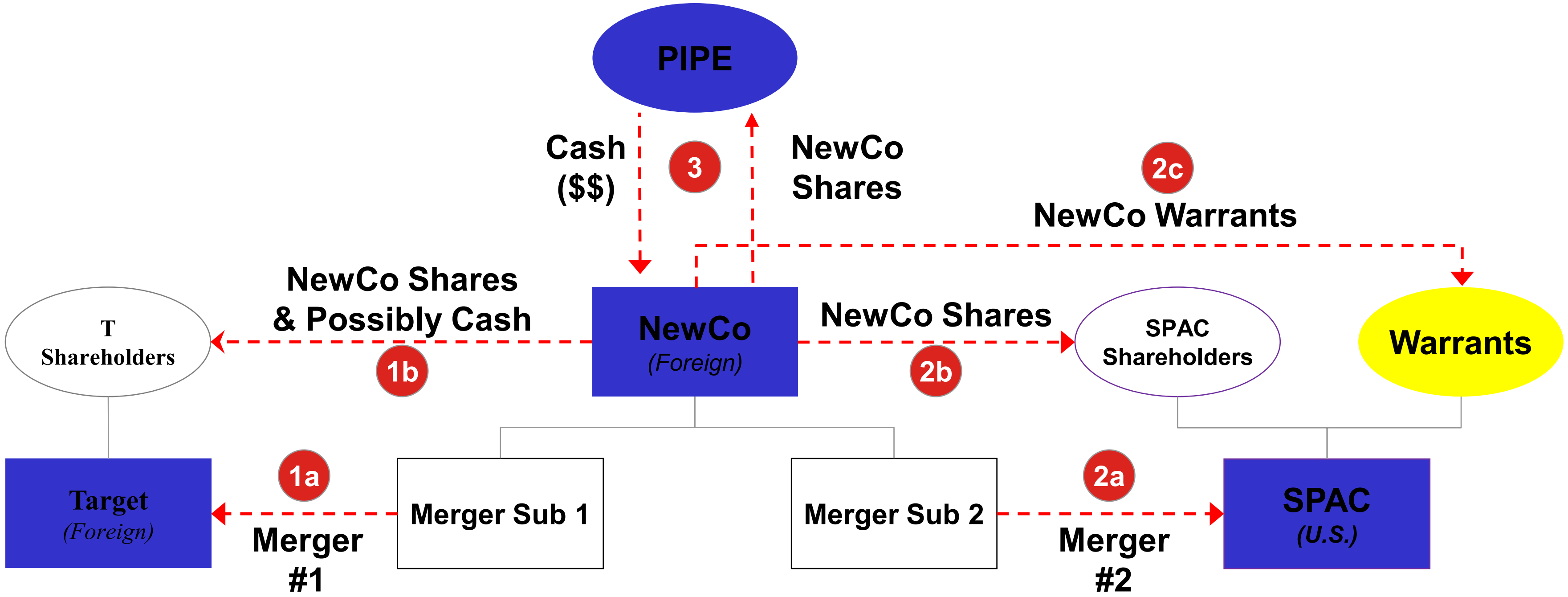
ACTIVE TRADE OR BUSINESS?

Horizontal Double Dummy – SPAC Example



- **Transaction is intended to qualify as a valid Section 351 transaction**
  - Section 351: Transfer of property to a corporation (here, NewCo) where the transferors, in the aggregate, receive stock representing (i) ≥ 80% of the voting stock and (ii) ≥ 80% of any class of nonvoting stock – clearly met here (“§368(c) Control”)
  - No COBE issue; similarly, other reorganization requirements are not applicable
  - Ensures transaction will be tax-free to SPAC shareholders (subject to §367)

Horizontal Double Dummy – SPAC Example



- **But, unlike in a reorganization, the receipt of warrants is not tax-free in a § 351**
  - Relevant here because in the traditional double dummy, all of the depicted stakeholders are transferring property to NewCo, including SPAC's warrant holders – warrant treatment can be especially important for Sponsor
- **Section 351 qualification does not preclude taxpayer from making the argument that the SPAC merger (Merger #2) is a valid reorganization (if and when you conclude you will satisfy COBE and any other applicable requirements)**

Section 367 – SPAC Example

- Need to comply with Section 367 to ensure tax-free treatment under Section 351 or Section 368, as applicable, for the SPAC shareholders
  - Key Rule: Generally, the U.S. SPAC's shareholders must receive ≤50% of the resulting foreign parent corporation
  - GRA needed for any U.S. SPAC shareholder that receives ≥5% of the stock of the resulting foreign parent corporation and is a U.S. person
  - **Must comply with the Section 367 active trade or business test (may be particularly relevant if Foreign Target is a start-up, has a short history and/or no revenues yet)**

Active Trade or Business Test

- The active trade or business test under Reg. § 1.367(a)-3(c)(3) is satisfied if:
  - The transferee foreign corporation or a qualified subsidiary or any qualified partnership is engaged in an active trade or business outside the US for the entire 36-month period immediately before the transfer;
  - At the time of the transfer, neither the transferors nor the transferee foreign corporation (and, if applicable, the qualified subsidiary or qualified partnership engaged in the active trade or business) have an intention to substantially dispose of or discontinue such trade or business; and
  - The substantiality test is satisfied.

TRAPS IN TREATIES

Traps in Treaties: Background

- Double tax treaties provide significant relief
  - E.g., US withholding tax of 30% can be reduced or eliminated for royalties, dividends, and interest

- To qualify for treaty benefits, the “beneficial owner” must:
  - satisfy at least one of several “limitation on benefits” tests and
  - meet any additional requirements (e.g., holding periods for dividends)

- Several common LOB provisions in treaties for companies:
  - Public trading test / sub of public trading test
  - Ownership base erosion test
  - Active trade or business test
  - Derivative benefits test
  - Competent authority relief

- However, each treaty has its own requirements and nuances

Traps in Treaties: Public Trading Test

- Requirements in the 1996 Model Treaty for a company to satisfy public trading test:

  - All the shares **in the class (or classes of shares) representing more than 50 percent of the voting power** and value of the company are regularly traded on a recognized stock exchange

  - Ownership of high-vote class of stock by a group (e.g., family, founders, or officers)?

  - Different classes of stock?

Traps in Treaties: Public Trading Test

- Requirements in the 1996 Model Treaty for a company to satisfy sub of public trading test:

  - at least 50 percent of **each** class of shares in the company is owned directly or indirectly by public companies, provided that in the case of indirect ownership, each **intermediate owner is a person entitled to benefits of the Convention under this paragraph**

    - What if the intermediate owner is not a same-country resident?

    - What if a non-resident owns a class of shares?

    - Joint venture with a mix of owners?

Traps in Treaties: ATB Test

- Requirements in the 1996 Model Treaty for a company to satisfy ATB test:

  - the resident is engaged in the active conduct of a trade or business in the resident's State

  - the income is connected with or incidental to the trade or business, and

  - the trade or business is substantial in relation to the activity in the other State generating the income

Traps in Treaties: ATB Test

- Undefined terms have the meaning under the source state.
  - Many technical explanations state: “Accordingly, the United States competent authority will refer to the regulations issued under section 367(a) for the definition of the term "trade or business.”
  - Treas. Reg. § 1.367(a)-2(d)(2) states that the “group of [trade of business] activities must ordinarily include the collection of income and the payment of expenses.”
  - Treas. Reg. § 1.355-2(c)(ii) has nearly identical language.

- In PLR 202009002, Distributing conducts research and development (R&D) to identify and create new products and the Office of Associate Chief Counsel (Corporate) ruled:
  - The absence of income collection does not prevent Distributing's Business 2 from constituting a “trade or business” within the meaning of Treas. Reg.§ 1.355-3(b)(2)(ii) for purposes of determining whether the Distribution satisfies the active trade or business requirement of section 355.

- Would the Office of Associate Chief Counsel (International) provide a similar ruling for treaty purposes?

Traps in Treaties: Competent Authority?

- Most LOB articles provide that a resident may be granted treaty benefits at the discretion of the U.S. competent authority.

- The U.S. competent authority:
  - will not issue a determination regarding whether an applicant satisfies an objective LOB test.
  - requires that the applicant represent that, and explain why, it does not qualify for the requested benefits under the relevant LOB provisions.

- The applicant must demonstrate that it has **substantial nontax nexus** to the treaty country, and that, if benefits are granted, neither the applicant nor its direct or indirect owners will **use the treaty in a manner inconsistent with its purposes.**

Traps in Treaties: Competent Authority?

- The U.S. competent authority typically will not exercise its discretion to grant benefits where:
  - (i) the applicant or any of its affiliates is subject to a special tax regime in its country of residence with respect to the class of income for which benefits are sought (e.g., notional interest deduction with respect to equity in the residence country);
  - (ii) no or minimal tax would be imposed on the item of income in both the country of residence of the applicant and the country of source, taking into account both domestic law and the treaty provision ("double non-taxation"). For example, double non-taxation would occur if a payment under a hybrid instrument was exempt from withholding and generated a deduction in the country of source, while being treated as income exempt from tax in the country of residence of the applicant; or
  - (iii) the applicant bases its request solely on the fact that it is a direct or indirect subsidiary of a publicly traded company resident in a third country and the relevant withholding rate provided in the tax treaty between the United States and the country of residence of the applicant is not lower than the corresponding withholding rate in the tax treaty between the United States and the country of residence of the parent company or any intermediate owner.

Traps in Treaties: Competent Authority?

- What issues have the US competent authority ruled on in the past? What types of issues would the US competent authority consider?

- Treasury priority guidance plan includes guidance updating Rev. Proc. 2015-40. What types of updates are being considered?

Traps in Treaties: Miscellaneous

- Domestic LLCs can present issues and surprises
  - Some treaties do not address domestic LLCs at all
  - Even if the treaty does address domestic LLCs, need to carefully parse the language
    - A payment to a domestic LLC wholly owned by a qualified resident would likely not qualify for treaty benefits
    - But a liquidation of the domestic LLC followed by a payment to the qualified resident would
- Triangular branch trap
  - Treaty benefits may be capped if income is attributable to a low-taxed permanent establishment in a third country
- No relief under treaty for state taxation

VENTURE CAPITAL AND MINORITY INVESTMENT SELECT ISSUES: SEC. 958 AND PFIC CHANGES

Final Sec. 958 Regulations

- Address the treatment of the ownership of foreign corporations by domestic partnerships and their partners

- Purpose was to align subpart F with 2019 final GILTI regulations

- Change to “aggregate treatment”
  - Partners are treated as proportionately owning the stock of the partnership-owned CFCs, rather than taking into account their distributive share of subpart F

- Do not extend the aggregate treatment for determining the controlling domestic shareholders of a CFC under reg. section 1.964-1(c)(5)(i).
  - Proposed 2022 regulations, released simultaneously, would revise to follow aggregate treatment

Final Sec. 958 Regulations (cont.)

- The regulations apply to tax years of foreign corporations beginning on or after January 25, 2022, and to tax years of U.S. persons (partners) in which or with which the foreign corporation's tax year ends.
  - But domestic partnership could apply the regulations beginning after December 31, 2017, and to tax years of the domestic partnership in which or with which the tax years of the foreign corporation end, subject to the requirement that the partnership, its U.S. shareholder partners, and other related domestic partnerships and their U.S. shareholder partners consistently apply the regulations for all foreign corporations the partnerships own

Proposed PFIC Regulations

- Released concurrently with final sec. 958 regulations
  - Would apply to tax years beginning on or after they are finalized

- Under the proposed rules, neither domestic partnerships nor S corporations are considered shareholders for purposes of making QEF or mark-to-market (MTM) elections, recognizing QEF inclusions or MTM amounts, making PFIC purging elections, or filing Forms 8621, "Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund."
  - Partners will be required to make the election
  - Partnership notification requirements
  - Grandfathering rule for existing QEF elections

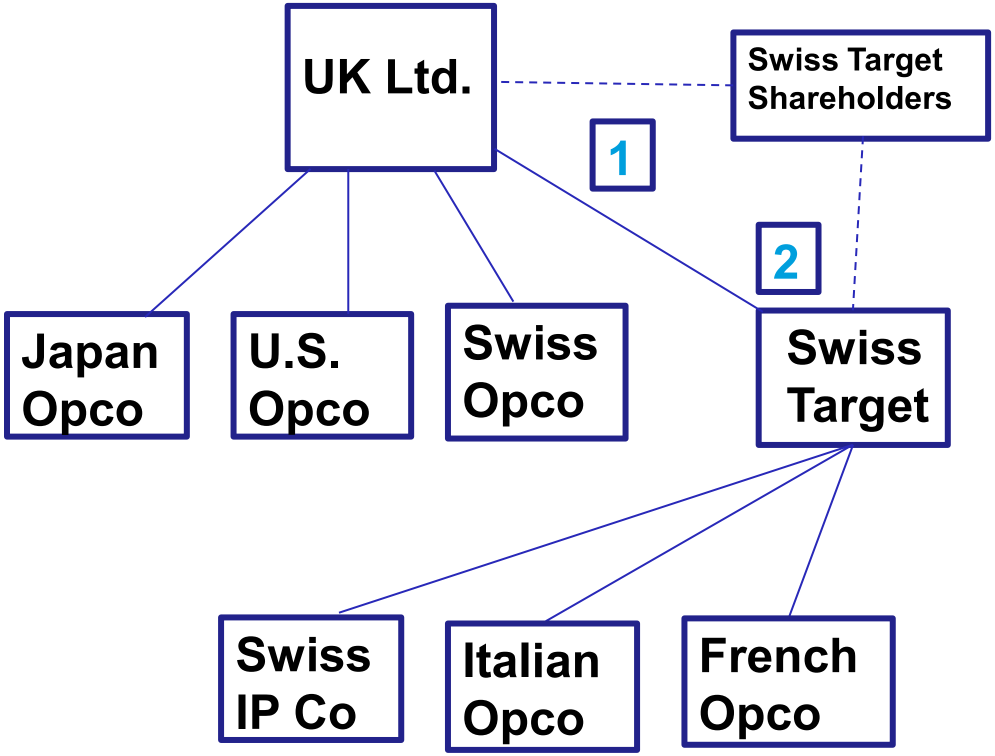
Proposed PFIC Regulations- CFC Overlap Rule

- A foreign corporation that is both a CFC and a PFIC is not considered to be a PFIC for a shareholder during the shareholder's qualified portion of its holding period, defined as the period during which the foreign corporation is a CFC as to which the person is a U.S. shareholder

- Proposed regulations have a transition rule that would apply to tax years of shareholders beginning before the date these regulations are finalized
  - When this transition rule applies, the CFC overlap rule would apply to specified persons that are indirect PFIC shareholders, but not U.S. shareholders, as a result of owning stock of foreign corporations through domestic partnerships or S corporations during periods when the shareholder was subject to current inclusions under section 951 or 951A as a share of a domestic partnership or S corporation's income inclusions.

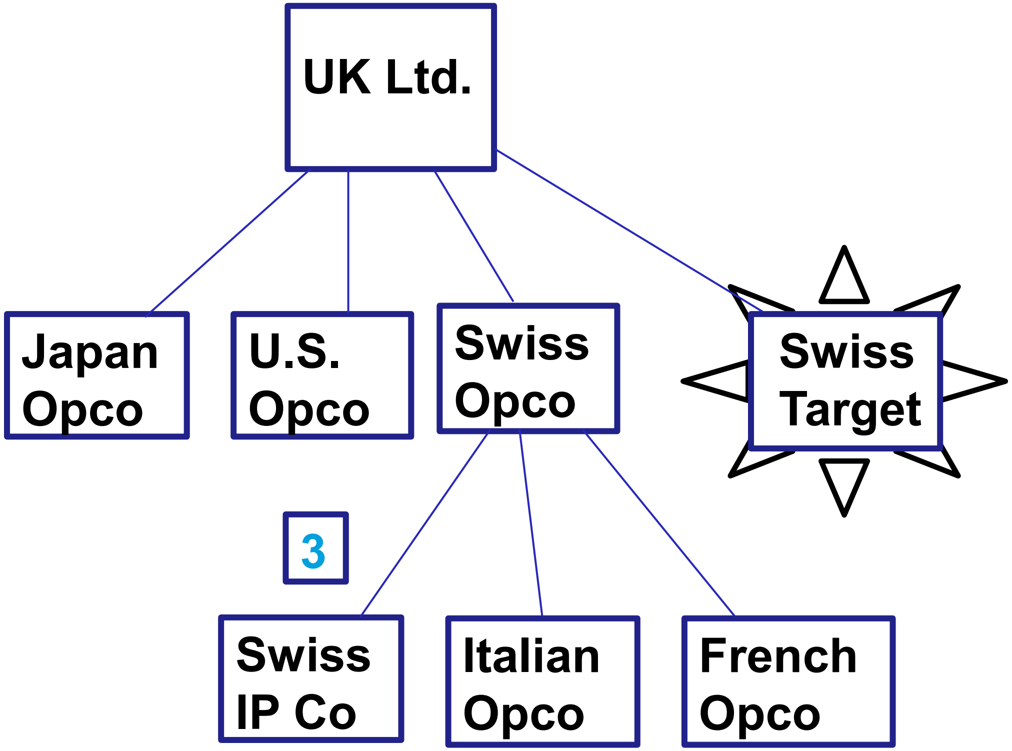
INSURABLE FOOT-FAULTS?

All Cash "D" Reorganization – Foot-faults?



1. UK Ltd. acquires Swiss Target shares for cash.
2. UK Ltd. makes a section 338(g) election with respect to Swiss Target shares.
3. Post-acquisition the intent is to integrate the Swiss target group with Swiss Opco in a transaction that qualifies as an all-cash "D" reorganization.
4. Assume this matters because UK Ltd. has one or more 10% U.S. shareholders.

All Cash "D" Reorganization – Foot-faults?

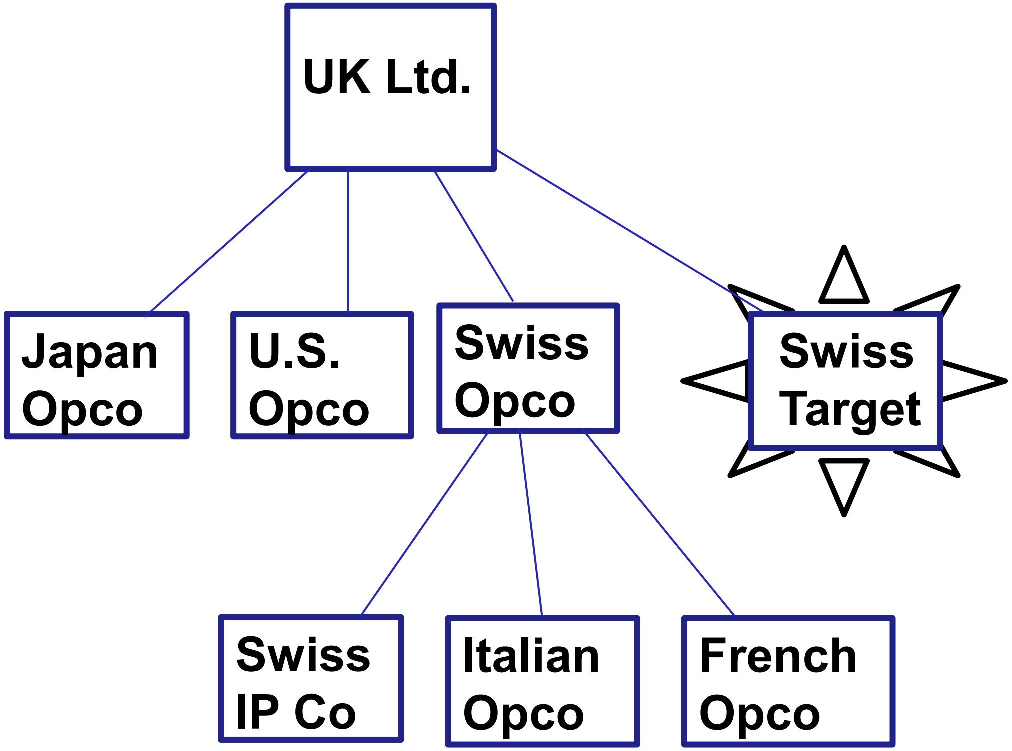


1. Existing Swiss Opco. acquires Swiss IP Co, and the Italian and French Opcos for cash from Swiss Target.

2. Swiss Target files a CTB election to liquidate Swiss Target for U.S. tax purposes.

3. The acquisition by Swiss Opco of "substantially all" the assets of Swiss Target for cash (and the deemed issuance of a share) followed by the liquidation of Swiss Target is intended to qualify as an all-cash "D" reorganization.

All Cash "D" Reorganization – Foot-faults?

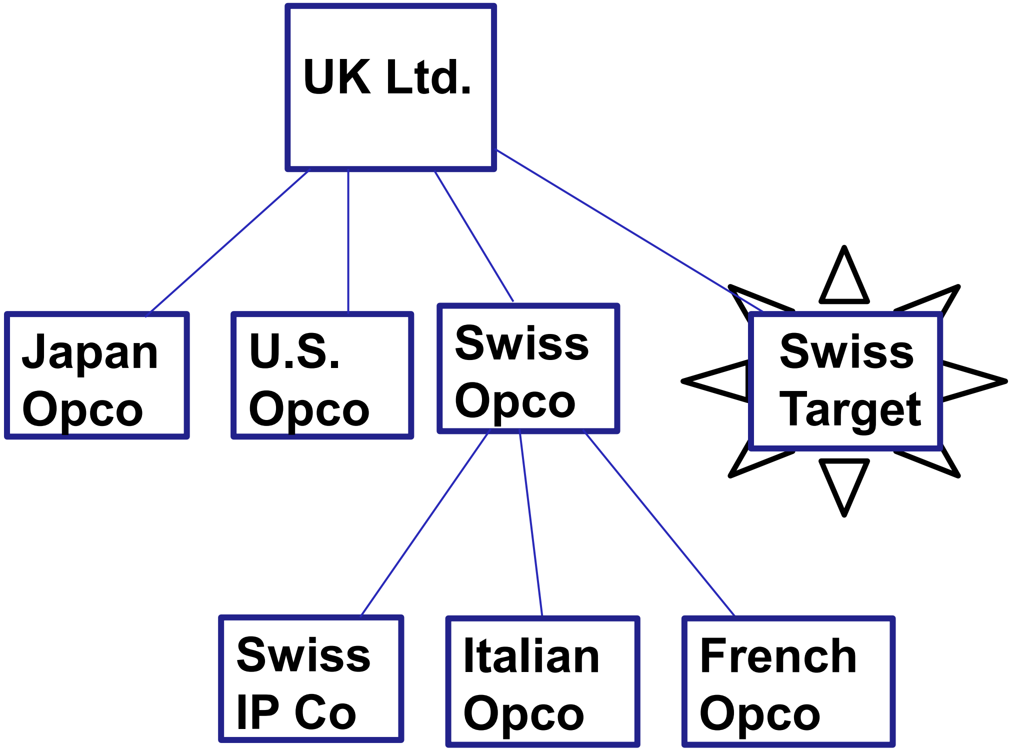


A. Critically, the CTB election needs to be effective **following** the sale of shares. A first step acquisition of "substantially all" the assets is needed.

B. The liquidation of Swiss Target under the CTB election rules is deemed to occur the moment immediately preceding the effective date in order for the election to be effective at the start of the day on the effective date.

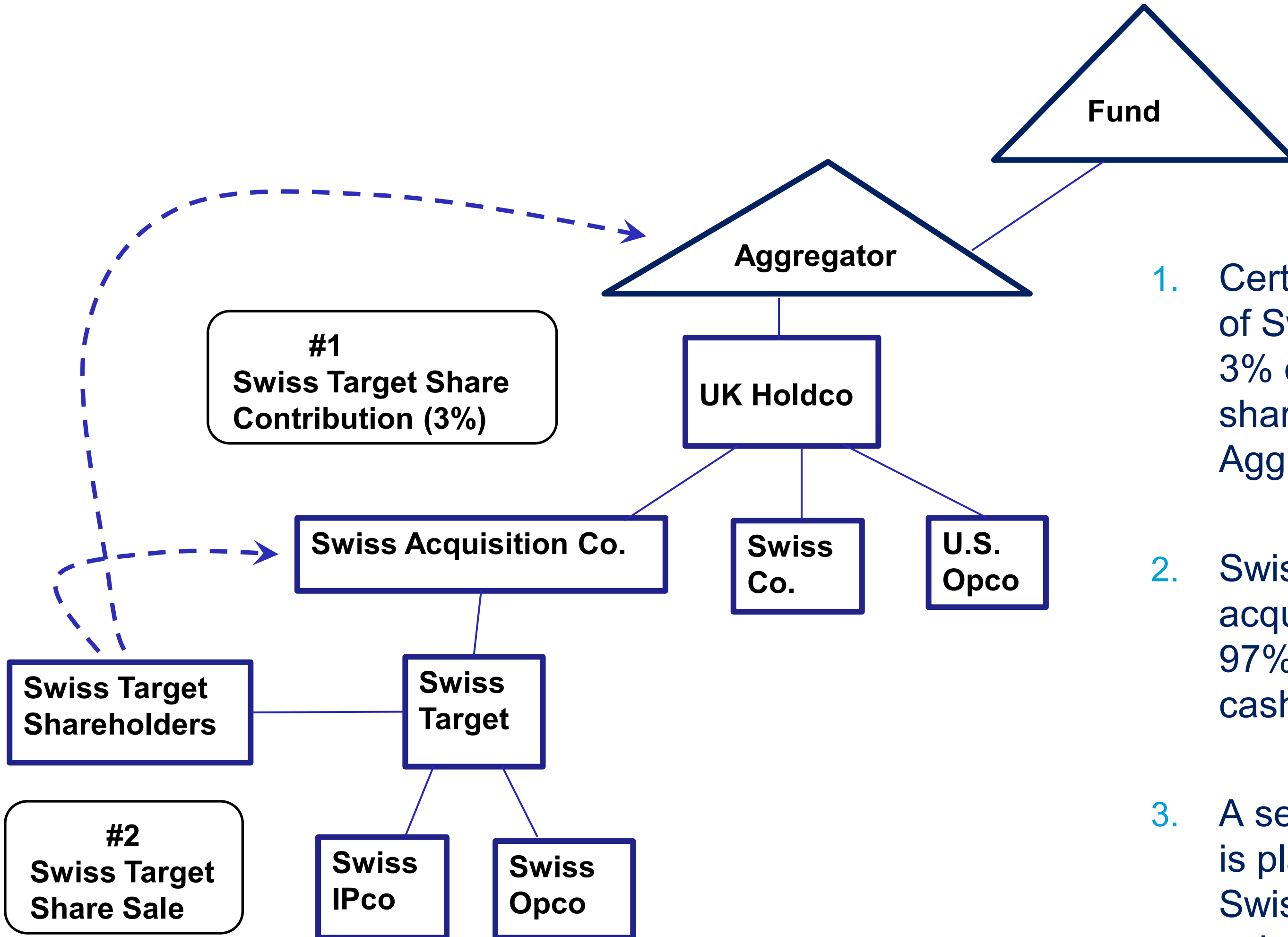
C. A CTB election identifying the effective date as the same day on which the shares are sold would result it a (deemed) liquidation of Swiss Target that precedes the sale of shares.

All Cash "D" Reorganization – Foot-faults?



1. Would IRS relief be available were the election effective on the wrong day?
2. Could the risk be insured if IRS relief is possible or self-help (via recission)?

Section 338(g) – Failed QSP

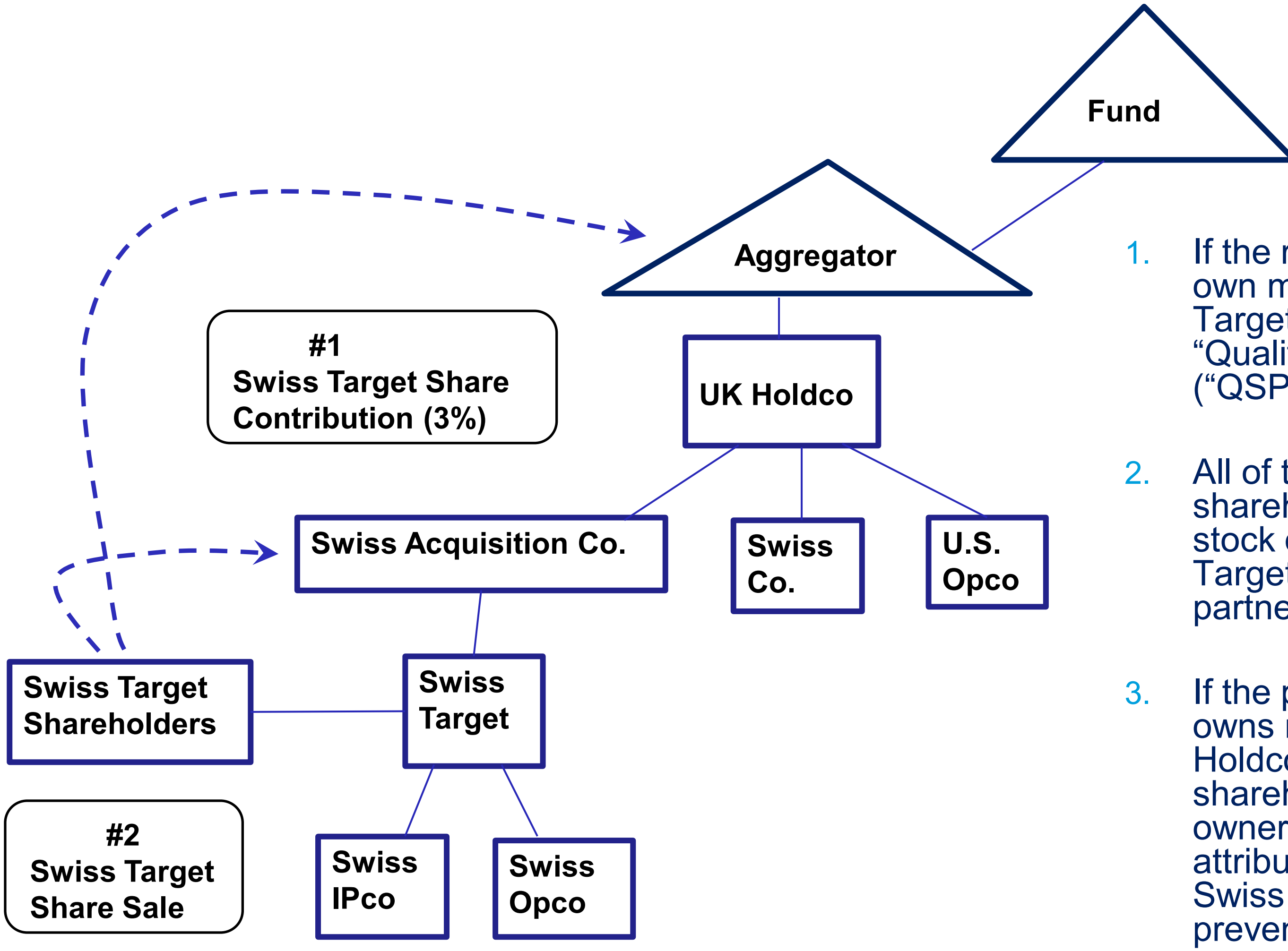


1. Certain key shareholders of Swiss Target rollover 3% of Swiss Target shares into a partnership Aggregator.

2. Swiss Acquisition Co. acquires the remaining 97% of Swiss Target for cash.

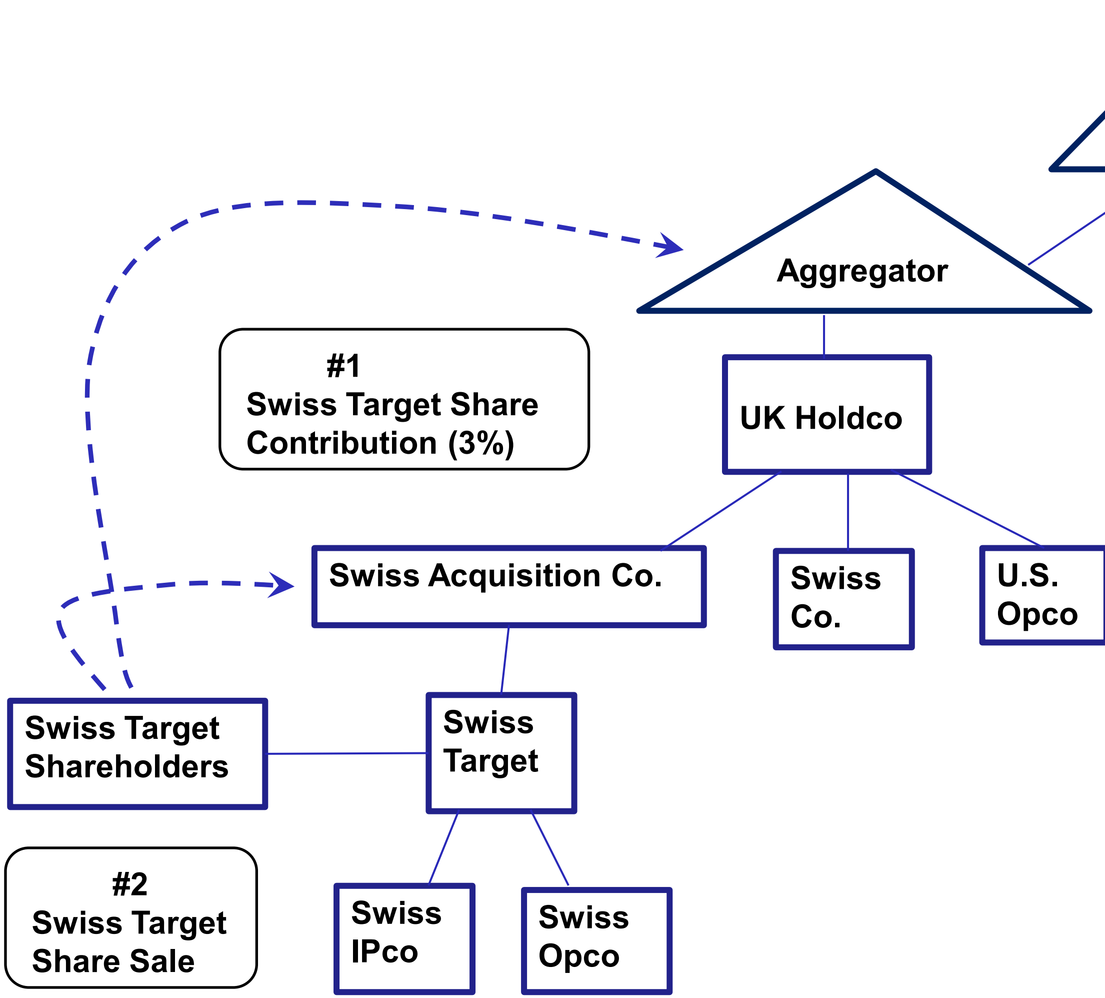
3. A section 338(g) election is planned with respect to Swiss Target and its subsidiaries.

Section 338(g) – Failed QSP



1. If the rollover shareholders own more than 20% of Swiss Target, there will be no "Qualified Stock Purchase" ("QSP").
2. All of the rollover shareholders' pre-acquisition stock ownership in Swiss Target is attributed to the partnership Aggregator.
3. If the partnership Aggregator owns more than 50% of UK Holdco, the rollover shareholders' more than 20% ownership of target will be attributed down the chain to Swiss Acquisition Co., which prevents a QSP.

Section 338(g) – Failed QSP



1. What if no rollover but a founder owning 20% or more interest in target is a limited partner in the Fund (that owns the aggregator)?
2. What if a 20% shareholder in Swiss Target Limited Partnership owns a limited partnership interest in a fund-of-fund that in turn is a limited partnership in the Fund?
3. Ruling?
4. Insurance?

Tax Insurance - State of the Tax Risk Landscape

Uncertainty is inherent in transaction and business tax planning and tax equity investing. Tax insurance addresses a range of tax planning and investing issues to help bring certainty to improve outcomes.

Mergers & Acquisitions

- Complex deal tax planning
- Transfer pricing
- REITs

Tax Planning

- Cash flow and liquidity management
- Balance sheet risk
- Family office and estate planning
- Transfer pricing

Tax Equity Investing

- Section 45Q Carbon Sequestration
- Hybrid tax and representations and warranties

Tax Insurance – Where Tax Insurance Can Be Applied

Representative Tax Issues

- Cross Border and International
- Reorganizations (tax-free and taxable)
- Tax Treaty Qualification
- Executive Compensation
- NOL Carryforwards and Carrybacks
- Transfer Pricing
- Valuations and Basis Studies
- Internal Reorganizations & Restructurings
- REITs / S Corps / Entity Classification
- BEAT / GILTI
- Section 355 Spin Offs
- Employee Benefit Plan Restrictions
- Renewables and other Tax Credits

Key Benefits

- Achieve economic certainty and general corporate risk management
- Protect anticipated tax benefits and tax positions from future challenges
- Alternative to Private Letter Rulings
- Tax risk transfer from balance sheet to insurance market

Tax Insurance – Not Insurable

- Tax Shelters (listed and reportable transactions and transactions of interest)

- Audit Lottery

- Tax is known to be owed

Case Study – Cross-Border Reorganization / FIRPTA

European-based multinational desired to reorganize its global corporate structure. As part of the reorganization, the European parent entity would sell a U.S. subsidiary to another group member.

Solution

Structure and secure a tax insurance policy.

Coverage

Full amount (less the retention) of potential U.S. federal and state income taxes.

Client Challenge

Background

- Under the U.S. Foreign Investment in Real Property Tax Act (FIRPTA), a non-U.S. corporation's gain/loss from the sale of a U.S. real property holding corporation (USRPHC) is treated as effectively connected with the conduct of a U.S. trade or business.

Obstacle

- Client unable to obtain Pre-Filing Agreement from the IRS that the entity to be sold was not a U.S. real property holding corporation (USRPHC) at any time during the five-year period ending on sale date.
- With a potential tax exposure, client was unwilling to undertake reorganization unless it could manage the FIRPTA tax risk.

Case Study – Transfer Pricing Across Multiple Jurisdictions

Client was exiting a JV operating globally and retaining the US/Canadian operations of the business. In connection with the transaction the existing transfer pricing model was terminated, and a new model was implemented with their former partner for use of certain intellectual property (“IP”).

Solution

Structure and secure a tax insurance program, which protected the client from potential transfer pricing adjustments on the actions taken to revise the IP structure across multiple jurisdictions.

Coverage

The Policy covered the additional withholding and/or income taxes in USD, EUR, or CAD.

Client Challenge

Background

- Revising the IP structure included termination of existing licensing agreements, entrance into new licensing agreements, and assignment of certain IP / “Know-How.”
- Due to the complexity and large potential exposure, client was seeking protection for the transfer pricing involved in the transaction.

Case Study – Tax-Free Spin-Off

A Fortune 500 U.S. public company merged with a large business unit of a FTSE 100 U.K. public company, which resulted in certain business lines being restructured.

Solution

Structure and secure a tax insurance policy

Coverage

Full amount (less the retention) of potential U.S. federal and state income taxes.

Client Challenge

Background

- Taxpayers no longer receive comfort rulings on whether spin-off transactions qualify for tax-free treatment under Section 355 of the Tax Code.
- Example: IRS will not rule on certain key technical aspects such as the business purpose, device and Section 355(e) plan requirements.

Obstacle

- Potential tax liability.
- Due to the magnitude of the risk, client desired tax insurance to protect against a successful IRS challenge of the tax-free nature of the spin-off.

Thank you

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