



MERGERS AND ACQUISITIONS

United States

Taxation of Cross-Border
Mergers and Acquisitions

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TAX

United States

Introduction

U.S. law regarding mergers and acquisitions (M&A) is extensive and complex. Guidance for applying the provisions of the Internal Revenue Code of 1986, as amended (Code), is provided by the federal government, generally by the Internal Revenue Service (IRS) in revenue rulings, revenue procedures, private letter rulings, announcements, notices and Treasury Department regulations, and by the courts.

In structuring a transaction, the types of entity involved in the transaction generally help to determine the tax implications. Parties may structure a transaction in a non-taxable, partially-taxable, or fully-taxable form. A non-taxable corporate reorganization or corporate organization generally allows the acquiring corporation to take a carryover basis in the assets of the target entity. In certain instances, a partially-taxable transaction allows the acquiring corporation to take a partial step-up in the assets acquired, rather than a carryover basis. A taxable asset or share purchase provides a basis step-up in the assets or shares acquired. Certain elections made for share purchases allow the taxpayer to treat a share purchase as an asset purchase and take a basis step-up in the acquired corporation's assets.

Taxpayers generally are bound by the legal form they choose for the transaction. The particular legal structure selected by the taxpayer will, therefore, have substantive tax implications. However, the IRS can challenge the tax characterization of the transaction on the basis that it does not clearly reflect the substance of the transaction.

Recent Developments

The following summary of U.S. tax developments is based on developments in 2008, 2009, and early 2010.

Extended NOL Carryback Provisions

Previously, net operating losses (NOLs) could generally be carried back two years to claim refunds for tax paid during profitable years. The Worker, Homeownership, and Business Assistance Act of 2009 signed into law on 6 November 2009, allows most taxpayers an extended NOL carryback period from two years to three, four, or five years for losses incurred in a tax year beginning or ending in 2008 or 2009 (but only from one such year).

An NOL carried back to the fifth year preceding the year of the NOL is limited to 50 percent of the taxpayer's taxable income for that fifth year. Any remaining NOLs can be used to offset 100 percent of the taxable income in the remaining carryback years and in the usual 20-year carryforward period. If an election to use a three-, four-, or five-year carryback is made, it also extends the carryback period for an alternative minimum tax net operating loss (ATNOL). In addition, for the NOL for which an extended carryback election is made, the general limitation that the ATNOL can only offset 90 percent of the alternative minimum taxable income (AMTI) (the 90-percent limit) is eliminated (except for the fifth year preceding the year of the NOL, in which case the ATNOL is limited to 50 percent of the pre-ATNOL AMTI). The extended NOL carryback provision is not available to taxpayers in receipt of Troubled Asset Relief Program (TARP) funds (as defined in the Act). Life insurance companies and small business taxpayers (see following discussion) are also eligible for the extended NOL carryback provisions.

The American Recovery and Reinvestment Act of 2009 (ARRA 2009), enacted on 17 February 2009, allows small business taxpayers (with average annual gross receipts of USD 15 million or less for the three tax years ending with the year of the NOL) to elect to carry back the NOL incurred in one taxable year either ending or beginning in 2008 for up to three, four, or five years, instead of the general two-year carryback period. The extended carryback period applies to ATNOLs and suspends the 90-percent limit in the carryback years. A small business that previously elected (or will elect) to extend the carryback period under the ARRA 2009, can also elect to extend the carryback period for either 2008 or 2009, but not for a year in which an election under the ARRA 2009 was (or will be) made.

Deferral of Cancellation of Debt income

The ARRA 2009 included section 108(i) which provides an irrevocable election to defer recognition of all or a portion of certain cancellation of indebtedness (COD) income realized on the reacquisition, in calendar years 2009 and 2010, of an applicable debt instrument. The COD income deferred under the election must be included in the taxpayer's income pro rata in the five taxable years beginning with the fifth taxable year

following a reacquisition in 2009, and the fourth taxable year following a reacquisition in 2010. If a section 108(i) election is made to defer COD income from the exchange (or deemed exchange) of the applicable debt instrument for another debt instrument, any original issue discount (OID) attributable to the new debt instrument not in excess of the COD income deferred, shall also be deferred and allowed as a ratable deduction over the same five taxable year period for which the COD income is included in the taxpayer's income.

Suspension of AHYDO Rules

Generally, OID on obligations is deductible by the issuer as interest over the life of the obligation. With limited exceptions, if the obligation is an applicable high yield debt obligation (AHYDO), no deduction is allowed to the corporate issuer (other than a Subchapter S corporation) for the disqualified portion of the OID and the remaining OID is deferred until actually paid. The ARRA 2009 suspended the AHYDO rules for any AHYDO issued during the period beginning on 1 September 2008 and ending on 31 December 2009, in exchange (or deemed exchange) for an obligation by the same issuer that is not an AHYDO. The AHYDO suspension period may be extended by the IRS if it decides continued distressed conditions in the debt capital markets may necessitate such an extension. Notice 2010-11 generally further extended the AHYDO suspension period through 31 December 2010.

Application of Section 382 to U.S. Government Investments

As discussed below, section 382 can apply to limit NOLs and certain other tax attributes following a section 382 ownership change. The IRS issued a series of notices in 2008 and 2009 to address the treatment of U.S. government investments for section 382 purposes, culminating in Notice 2010-2 issued in December 2009. The underlying idea behind the notices appears to be to prevent an ownership change from being triggered as a result of the U.S. government investment.

Asset Purchase or Share Purchase

The decision to acquire assets or stock is relevant in evaluating the potential tax exposures that the purchaser may inherit from the corporation being acquired (the target). A purchaser of assets generally does not inherit the U.S. tax exposures of the target, except for certain successor liability for state and local tax purposes and certain state franchise taxes. Also, an acquisition of assets constituting a trade or business may result in amortizable goodwill for U.S. tax purposes.

However, there may be adverse tax consequences for the seller (such as, depreciation recapture, and double taxation resulting from the sale followed by distribution of the proceeds to foreign shareholders). In contrast, in a stock acquisition, the target's historical liabilities, including liabilities for unpaid U.S. taxes, generally remain with the target (effectively decreasing the value of the purchaser's investment in the target's shares). In negotiated acquisitions, it is usual and recommended that the seller allows the purchaser to perform a due diligence review, which, at a minimum, should include:

- a determination of the adequacy of tax provisions/reserves in the accounts, identifying open years, and pending income tax examinations;
- the major differences in the post-acquisition book and tax balance sheets;
- the existence of special tax attributes (such as, NOLs), how those attributes were generated, and whether there are any restrictions on their use; and
- issues relating to acquisition and post-acquisition tax planning.

Under U.S. tax principles, the acquisition of assets and stock of a target may be structured such that gain or loss is not recognized in the exchange (tax-free reorganizations). Such transactions allow the corporate structures to be rearranged, and range from simple recapitalizations and contributions, to complex mergers, acquisitions and consolidations. Typically, the tax-free reorganization requires a substantial portion of the overall acquisition consideration to be in the form of stock of the acquiring corporation or a corporation that controls the acquiring corporation, except for acquisitive asset reorganizations between corporations under common control (the Cash-D Reorganization), where cash and/or other non-stock consideration may be used. In addition, there may be restrictions on the disposal of stock received in a tax free reorganization. In such a reorganization, the acquirer generally inherits the tax basis and holding period of the target's assets, as well as the target's tax attributes, except in cases where certain built-in loss assets are imported into the U.S., in which case, the tax basis of such assets may be reduced to their fair market value. In taxable transactions, the purchaser generally receives a cost basis in the assets or stock, which may result in higher depreciation deductions for taxable asset acquisitions (assuming that there is built-in gain in the item acquired). In certain types of taxable stock acquisitions, the purchaser may elect to treat the stock purchase as a purchase of the assets (the Section 338 election

discussed later [see Purchase of Shares]). In general, U.S. states and local municipalities respect the federal tax law's characterization of a transaction as a taxable or tax-free exchange.

Careful consideration must be given to cross-border acquisitions of stock or assets of a U.S. target, because certain acquisitions may result in adverse tax consequences under the Corporate Inversion rules. Depending on the amount of shares of the foreign acquiring corporation issued to the U.S. target shareholders, the foreign acquiring corporation may be treated as a U.S. corporation for all U.S. federal income tax purposes, or, in some cases, the U.S. target may lose the ability to reduce any gain related to an inversion transaction by the U.S. target's tax attributes (such as, NOLs and foreign tax credits).

Purchase of Assets

In a taxable asset acquisition, the purchased assets will have a new cost basis in the hands of the purchaser, and the seller will recognize gain (either capital or ordinary) on the amount that the purchase price exceeds its basis in the asset. An asset purchase generally provides the buyer with the opportunity to select the desired assets, leaving unwanted assets behind. An asset purchase may be recommended when a target has potential liabilities. While a section 338 election (described later) is treated as an asset purchase, it does not necessarily allow for the selective purchase of the target's assets or avoidance of its liabilities.

Purchase Price

In a taxable acquisition of assets that constitute a trade or business, the purchaser and seller are required to allocate the purchase price among the purchased assets using a residual approach among seven asset classes described in the regulations. The buyer and seller are bound by any agreed allocation of purchase price among the assets. To help establish the fair market value of all asset categories, a sales contract typically contains a detailed allocation of the purchase price. In addition, contemporaneous third-party appraisals relating to asset values can be beneficial.

Depreciation and Amortization

The purchase price allocated to certain tangible assets, such as inventory, property, plant, and equipment, provides future tax deductions in the form of cost of sales or depreciation. As stated above, in an asset acquisition, the acquirer receives a cost basis in the assets acquired for tax purposes. Frequently, this

results in a step-up in the depreciable basis of the assets, but could result in a step-down in basis if the asset's fair market value is less than the seller's tax basis.

Most tangible assets are depreciated over tax lives ranging from three to 10 years under accelerated tax depreciation methods, thus resulting in enhanced tax deductions. Buildings are depreciable using a straight-line depreciation method generally over 39 years (residential buildings are depreciable over 27.5 years). Other assets, including depreciable land improvements and many non-building structures, may be assigned to a recovery period of 15 to 25 years, with a less accelerated depreciation method. In certain instances, section 179 allows taxpayers to elect to treat as a current expense the acquired cost of tangible property and computer software used in the active conduct of trade or business. For tax years beginning in 2008 and 2009, the deductible section 179 expense limitation is USD 250,000 (and this limitation is phased out when the taxpayer's total investment for the year exceeds USD 800,000). The limit was scheduled to drop to USD 134,000 in 2010 (and the phase-out level to begin at USD 530,000). Separately from section 179, so-called qualified property used in a taxpayer's trade or business or for the production of income may be subject to an additional depreciation deduction in the first year the property is placed into service. The additional depreciation – 50 percent of the cost basis, referred to as bonus depreciation – applies to qualified property acquired after 31 December 2007 and before 1 January 2010 (with exceptions). Buildings are generally not qualified property. The remaining 50 percent of basis is depreciated under the general depreciation rules. Bonus depreciation automatically applies to qualified property, unless a taxpayer elects to apply the general rules to the full basis (there is also a separate election that involves the taxpayer foregoing any bonus depreciation, but accelerating the use of certain credit carryovers from earlier years, but this election also requires straight-line depreciation for the full basis). If both the section 179 expense and bonus depreciation are claimed for the same asset, the asset basis must first be reduced by the section 179 expense before applying the bonus depreciation rules. It should be noted that land is not depreciable for tax purposes and accelerated depreciation is unavailable for most assets considered predominantly used outside the U.S.

In general, the capitalized cost of most acquired intangibles, including goodwill, going concern value, and covenants not to compete, if acquired after 10 August 1993, are amortizable over 15 years. A narrow exception

exists for certain intangibles that were not previously amortizable, if they were held, used, or acquired, by the purchaser (or related person) before the effective date. These tainted intangibles may not be amortizable under the so-called anti-churning rules. Costs incurred in acquiring assets are typically added to the purchase price and considered part of the intangible assets under the residual method of purchase price allocation. Thus, these acquisition costs that are part of the intangible asset are generally capitalized and amortized over 15 years (as described above).

Tax Attributes

The seller's NOLs, capital losses, tax credits, and other tax attributes are not transferred to the acquirer in a taxable asset acquisition. In certain circumstances where the target has substantial tax attributes, it may be beneficial to structure the transaction as a sale of its assets so that any gain recognized may be offset by the target's tax attributes. Such a structure may also reduce the potential tax for the target's stockholder(s) on a sale of its shares if accompanied by a section 338 election to treat a stock purchase as a purchase of its assets for tax purposes (assuming the transaction meets the requirements for such election, see *Purchase of Shares*).

Value-Added Tax (VAT)

The United States does not have a VAT. However, certain state and local jurisdictions impose sales and use taxes, gross receipts taxes and/or other transfer taxes.

Transfer Taxes

The U.S. does not impose stamp duty taxes at the federal level on transfers of tangible or intangible assets (including stock, partnership interests, or limited liability company membership interests). Certain state and local jurisdictions do impose sales and use tax on the sale of certain tangible assets; however, the acquirer may be able to benefit from exemptions from sales and use tax in the case of the acquisition of all or a substantial portion of the target's assets through bulk sale and/or occasional sale provisions.

Typically, state or local transfer taxes are not applicable to the transfer of intangible assets such as stock, a partnership interest, or a limited liability company membership interest. However, the majority of states, and certain local jurisdictions, impose a tax on the actual transfer of real estate, and certain of those jurisdictions may impose a tax, in certain instances, on the transfer of a beneficial or controlling interest in real estate.

Purchase of Shares

As stated above, in a stock acquisition, the target's historical tax liabilities remain with target, which would affect the value of the acquirer's investment in target stock. In addition, the target's tax basis in its assets will remain unchanged and the target will continue to depreciate and amortize its assets over their remaining lives using the same methods previously used by the target. As a general rule, costs incurred in acquiring assets or stock are capitalized into the basis of the acquired assets or stock. Although the target will retain its tax attributes in a stock acquisition, its use of its net operating losses and other favorable tax attributes may be limited if it experiences what is referred to as an ownership change. (See generally, *Tax Losses*). Additionally, costs incurred by either the acquirer or the target in connection with the stock acquisition are generally not deductible.

In a taxable purchase of the target stock, the acquirer, if eligible, can elect to treat the purchase of stock as a purchase of the target's assets by making either a unilateral election under section 338(g) (338 Election) or if available, a joint election (with the common parent of the consolidated group of which the target is a member, or with shareholders of a target S corporation) under section 338(h)(10) (338(h)(10) Election).

In certain circumstances involving a taxable stock sale between related parties, special rules (section 304) may re-characterize the sale as a redemption transaction in which a portion of the sale proceeds may be treated as dividend to the seller. Whether the tax consequences are adverse or beneficial will depend on the facts. For example, the dividend treatment may result in the imposition of U.S. withholding taxes (WHT) at a 30-percent rate on a portion of the sale proceeds paid by a U.S. acquirer to a foreign seller. On the other hand, the dividend treatment may be desirable on sales of foreign target stock by a U.S. seller to a foreign acquirer, both of which are controlled by a U.S. parent corporation. In this case, the resulting deemed dividend from the foreign acquirer and/or foreign target may allow the U.S. seller to use foreign tax credits.

Tax Indemnities and Warranties

In a stock acquisition, the target's historical tax liabilities remain with target. As such, it is important that the acquirer procures representations and warranties from the seller (or its stockholders) in the stock purchase agreements to ensure that it is made free from any post-transaction liabilities arising from the target's pre-transaction activities. In circumstances where significant sums are at issue, the acquirer generally performs a due

diligence review of the target's tax affairs. In general, the acquirer would seek tax indemnifications for a period through at least the expiration of the statute of limitations, including extensions. The indemnity clauses sometimes include a cap on the indemnifying party's liability, or may specify a dollar amount that must be reached before indemnification occurs. Please note that KPMG LLP in the U.S. cannot and does not provide legal advice. The purpose of this paragraph is to provide general information on tax indemnities and warranties that needs to be addressed and tailored by the client's legal counsel to the facts and the client's circumstances.

Tax Losses

One of the most significant limitations imposed on the target's NOLs is in section 382, which generally applies if a target that is a loss corporation undergoes an ownership change. Generally speaking, an ownership change occurs when more than 50 percent of the beneficial stock ownership of a loss corporation had changed hands over a prescribed period (generally three years). The annual limitation on the amount of post-change taxable income that may be offset with pre-change NOLs is generally equal to the adjusted equity value of the loss corporation multiplied by a long-term tax-exempt rate established by the IRS. The adjusted equity value used in calculating the annual limitation is generally the equity value of the loss corporation immediately before the ownership change, subject to certain potential downward adjustments. Common potential downward adjustments include acquisition debts pushed down to the loss corporation, and certain capital contributions to the loss corporation within the two-year period prior to the ownership change.

Crystallization of Tax Charges

This is not applicable and is not a concept that translates into U.S. tax.

Pre-Sale Dividend

In certain circumstances, the seller may prefer to realize part of the value of its investment in the target through a pre-sale dividend. This becomes attractive when the dividend is subject to tax at a rate that is lower than the tax rate on capital gains. In general, for corporations, dividend and capital gains are subject to tax at the same federal corporate tax rate of 35 percent, but depending on the ownership interest in the subsidiary, the seller may be entitled to various amounts of dividend received deduction (DRD) on dividends, or foreign tax credits if the subsidiary is a foreign corporation. However, certain dividends may also result in reducing the tax basis of

the target's stock by the amount of the DRD. In general, an individual is taxed at the 15-percent rate on capital gains and dividends from domestic corporations and certain foreign corporations. Individuals are not entitled to DRDs or indirect foreign tax credits on dividends. Thus, the tax effect of a pre-sale dividend may depend on the recipient's circumstances and each case must be examined on its facts. In certain circumstances, proceeds of pre-sale redemptions of target stock may also be treated as a dividend by the recipient stockholder (see discussion under Equity).

Transfer Taxes

The U.S. does not have a federal stamp duty tax; however, certain states may impose a tax on the transfer of a controlling interest in the ownership of a company. In such a case, the controlling interest transfer tax generally applies only to certain assets, including real property and certain leases of real property.

Tax Clearances

In general, a clearance from the IRS is not required prior to engaging in an acquisition of stock or assets. However, a taxpayer can request a private letter ruling, which is a written determination issued to a taxpayer by the IRS in response to a written inquiry about the tax consequences of the contemplated transactions. Although it provides a measure of certainty on the tax consequences, the ruling process can be protracted and time-consuming and may require substantial expenditures on professional fees. Thus, the benefits of a ruling request may have to be carefully considered beforehand. Private letter rulings are taxpayer-specific rulings furnished by the IRS National Office in response to requests made by taxpayers and/or IRS officials and can only be relied on by the taxpayers to whom they are issued. It is important to note that, pursuant to 26 U.S.C. § 6110(k)(3), such items cannot be used or cited as precedent. Nonetheless, such rulings can provide useful information about how the IRS may view certain issues.

Choice of Acquisition Vehicle

A particular type of entity may be better suited for a transaction because of its potential tax treatment. Previously, companies were subject to a generally cumbersome determination process to establish entity classification. However, effective 1 January 1997, the IRS and Treasury issued regulations that allow certain eligible entities to elect to be treated as a corporation or a partnership (if the entity has more than one owner), or as a corporation or disregarded entity (if the entity has

only one owner). Rules governing the default classification of domestic entities are also provided under these regulations.

A similar approach is available for classifying eligible foreign business organizations, provided such entities are not included in a prescribed list of entities that are per se corporations (that is, always treated as corporations). Taxpayers are advised to consider carefully their choices of entity, particularly when changing the classification of an existing entity. For example, if an association that is taxable as a corporation elects to be classified as a partnership, the election will be treated as a complete liquidation of the existing corporation and the formation of a new partnership. The election could thus constitute a material realization event that might entail substantial adverse immediate or future U.S. tax consequences.

Local Holding Company

A U.S. incorporated C-Corporation (Corporation) is often used as a holding company and/or acquisition vehicle for the acquisition of a target, or a group of assets. A Corporation is generally subject to an entity level federal income tax at the 35-percent corporate rate (lower taxable income amounts may be subject to lower rate brackets), plus any applicable state and/or local taxes. Despite the entity level tax, a Corporation may be a useful vehicle to achieve U.S. tax consolidation to offset income with losses between the target group members and the acquirer, subject to certain limitations (see Group Relief/Consolidation). Moreover, a Corporation may be used to push down acquisition debt so that interest may offset the income from the underlying companies or assets. However, as noted above, a debt push-down may limit the use of a target's pre-acquisition losses under the section 382 regime (see Tax Losses).

Consideration should also be given to the Foreign Investment Real Property Tax Act (FIRPTA) when a non-U.S. person is a shareholder in a Corporation (see Foreign Parent Company).

Foreign Parent Company

If a foreign corporation directly owns U.S. business assets (or owns an interest in a fiscally transparent entity that conducts business in the U.S.), it may be subject to net basis U.S. taxes on income that is either effectively connected to the U.S. business, or earned by a U.S. permanent establishment under a tax treaty. In addition, the foreign corporation may be subject to tax return filing obligations in the U.S.

Alternatively, a foreign corporation may be used as a vehicle to purchase U.S. target stock, since foreign owners are generally not taxed on the corporate earnings of a U.S. subsidiary corporation. However, dividend or interest from a U.S. target remitted to a foreign corporation may be subject to U.S. WHT at a 30-percent rate (subject to a potential reduction under an applicable income tax treaty). Thus, careful consideration may be required when, for example, distributions from a U.S. target are required to service debt of the foreign corporation (such as, holding the U.S. target through an intermediate holding company, as discussed below).

Generally, the foreign corporation's sale of U.S. target stock should not be subject to U.S. taxation unless the U.S. target was a US Real Property Holding Corporation (USRPHC) at any time during a specified measuring period, which would be the case if the fair market value of its U.S. real property interests was at least 50 percent of the fair market value of its global real property interests plus certain other property used in its business during that specified measuring period. The specified measuring period generally is the shorter of the five-year period preceding the sale or other disposition, and the foreign corporation's holding period for the stock. A foreign seller of USRPHC stock may be subject to U.S. income tax on the gain at standard corporate tax rates (generally 35 percent [or possibly AMT] and a 10-percent U.S. WHT on the amount realized, including assumption of debt, [the WHT is creditable against the tax on the gain]), in addition to U.S. tax return filing obligations.

Non-Resident Intermediate Holding Company

An acquisition of the stock of a U.S. target may be structured through a holding company resident in a jurisdiction which has an income tax treaty with the U.S. (an Intermediate Company) potentially to benefit from favorable tax treaty WHT rates. However, the benefits of the structure may be limited under anti-treaty shopping provisions in most U.S. treaties, or under the U.S. domestic rules (such as Code, regulations, etc.).

Local Branch

A U.S. branch may arise if the foreign acquirer is treated as being engaged in business in the U.S. (such as, if the foreign acquirer directly owns U.S. business assets or an interest in a fiscally transparent entity under U.S. tax laws). The income of a profitable U.S. branch may be taxed at the 35-percent federal corporate tax rate, plus applicable state and local taxes. In addition, the U.S. imposes additional tax at a 30 percent rate on branch

profits remitted overseas (subject to tax treaty rate reductions or exemptions).

Joint Ventures

Multiple acquirers may use a joint venture vehicle (Joint Venture) to purchase a U.S. target or U.S. assets. A Joint Venture may either be organized as a corporation or a fiscally transparent entity (a Flow-Through Venture), such as, a partnership or a limited liability company (LLC). A Joint Venture corporation may face issues similar to those described above (see Local Holding Company).

A Flow-Through Venture is generally not subject to U.S. income tax at the entity level (except in some states). Instead, its owners are taxed directly on their proportionate share of the Flow-Through Venture's earnings, whether or not distributed. If the Flow-Through Venture conducts business in the U.S., the foreign owners may be subject to net basis U.S. taxation on their share of its earnings, U.S. WHT and U.S. tax return filing obligations.

Choice of Acquisition Funding

Generally, an acquirer (or the acquisition vehicle) will finance the acquisition of a target with its own cash, issuance of debt or equity, or a combination thereof. The capital structure is of critical importance, because of the potential deductibility of debt interest.

Debt

An issuer of debt may be able to deduct interest against its taxable income (see Deductibility of Interest), whereas dividends on stock are non-deductible. Additionally, debt repayment may allow for tax free repatriation of cash, whereas certain stock redemptions may be treated as dividends, and taxed as ordinary income to the stockholder, and/or be subject to U.S. WHT.

The debt placement, and its collateral security, should be carefully considered to help ensure that the debt resides in entities which are likely to be able to offset interest deductions against future profits. The debt should be adequately collateralized to help determine that the debt will be respected as a genuine indebtedness. Moreover, the U.S. debtor may recognize current income if the debt is secured by a pledge of stock or assets of controlled foreign corporations (see later, Foreign Investments of a Local Target Company).

Deductibility of Interest

Interest paid or accrued during a taxable year on a genuine indebtedness of the taxpayer is generally

allowed as a tax deduction during that taxable year subject to several exceptions, some of which are described later.

For interest to be deductible, the instrument (such as, notes) must be treated for U.S. tax purposes as debt, and not as equity. The characterization of an instrument is largely based on facts, judicial principles, and IRS guidance. Although a brief list of factors cannot be considered complete, the some of the major considerations in the debt-equity characterization include for example, the intention of the parties to create a debtor-creditor relationship; the debtor's unconditional obligation to repay the outstanding amounts on a fixed maturity date; the creditor's rights to enforce payments; and the thinness of the debtor's capital structure in relation to its total debt.

Shareholder loans must reflect arm's-length terms to avoid being treated as equity. If a debtor has limited capability to service bank debt, its guarantor may be treated as the primary borrower. As a result, the interest accrued by the debtor may be re-characterized as a non-deductible dividend to the guarantor. This may entail additional U.S. WHT consequences if the guarantor is a foreign person.

Interest deductions may be limited for certain types of acquisition indebtedness, if interest paid or incurred by a corporation during the taxable year exceeds USD 5 million, subject to certain adjustments. However, this provision generally should not apply if the debt is not subordinated or convertible.

A U.S. debtor's ability to deduct interest on debt extended, or guaranteed, by a related foreign person may be further limited under the earnings-stripping rules, if the debtor's debt-to-equity ratio exceeds 1.5:1. If these rules apply, interest is deductible only to the extent of 50 percent of the U.S. debtor's adjusted taxable income, which approximates the U.S. target's net positive cash flow. Deferred deductions for interest may be carried forward and deducted in future years, subject to applicable limitations in those years.

Other limitations also apply to interest on debt owed to foreign related parties, and to certain types of discounted securities. (see, Discounted Securities).

Withholding Tax on Debt and Methods to Reduce or Eliminate

U.S. WHT at 30 percent is imposed on interest payments to non-U.S. lenders, unless a statutory exception or favorable treaty rate applies. Furthermore, structures that interpose corporate lenders in more

favorable tax treaty jurisdictions may not benefit from a reduced WHT because of the conduit financing regulations of section 1.881-3 and treaty shopping provisions in most U.S. treaties (see Intermediate Entity). No U.S. WHT is imposed on portfolio interest. Portfolio interest constitutes interest on debt held by a foreign person that is not a bank and owns less than 10 percent (by vote) of the U.S. debtor (including options, convertible debt, etc. on an as-converted basis).

Generally, no U.S. WHT is imposed on interest accruals until the time when such interest is paid by the U.S. debtor or the foreign person sells the debt instrument. Thus, U.S. WHT on interest may be deferred on zero coupon bonds, or debt issued at a discount, subject to certain limitations discussed below (see Discounted Securities).

Checklist for Debt Funding

- Debt should be borne by U.S. debtors that are likely to have adequate positive cash flows to service such debt principal and interest payments.
- Debt should satisfy the various factors of indebtedness to avoid being reclassified as equity.
- Debt must be adequately collateralized to be treated as genuine indebtedness of the issuer.
- The interest expense must qualify as deductible under the various rules limiting interest deductions discussed above.
- Debt between related parties must be issued under terms that are consistent with arm's length standards.
- Guarantees or pledges on the debt may be subject to the earnings-stripping rules or current income inclusion rules under the subpart F rules.

Equity

The acquisition of a U.S. target may be financed by issuing common or preferred equity. Distributions may be classified as dividends if made out of the U.S. target's current or accumulated earnings and profits (E&P; conceptually similar to retained earnings). Distributions in excess of E&P are treated as the tax free recovery of tax basis in the stock. Distributions exceeding both E&P and stock basis are treated as capital gains to the holder.

U.S. issuers of stock interests are not entitled to any deductions for dividends paid or accrued on the stock. In general, U.S. individual stockholders are presently subject to a 15-percent tax rate on dividends from a U.S.

target for tax years beginning before 1 January 2011. Stockholders who are corporations are subject to tax at the 35-percent rate applicable to corporations, but are entitled to DRDs depending on their ownership interest (see, Pre-Sale Dividend).

In general, dividends paid to a foreign shareholder are subject to U.S. WHT at 30 percent unless eligible for favorable WHT rates under a treaty. The WHT rules do provide limited relief for U.S. issuers with no current or accumulated E&P at the time of the distribution and anticipate none during the tax year. Such a U.S. issuer may elect out of the WHT obligation if, based on reasonable estimates, the distributions are not paid out of E&P. In general, no dividend should arise unless the issuer of the stock declares a dividend or the parties are required currently to accrue the redemption premium on the stock under certain circumstances. Of course, U.S. WHT is also imposed on U.S. source constructive (that is, deemed paid) dividends. For example, if a subsidiary sells an asset to its parent below the asset's fair market value, the excess of the fair market value over the price paid by the parent could be treated as a constructive dividend.

Generally, gains from stock sales (including redemptions) are treated as capital gains and are not subject to U.S. WHT (but see FIRPTA above). However, certain stock redemptions may be treated as giving rise to distributions (potentially treated as dividends) if the stockholder still holds a significant amount of stock in the corporation post-redemption of either the same class or (another class(es)). Accordingly, the redemption may result in ordinary income for the holder and would be subject to U.S. WHT.

See Asset Purchase or Share Purchase for a discussion of certain tax-free reorganizations.

Hybrids

Instruments (or transactions) may be treated as indebtedness (or a financing transaction) of the U.S. issuer, while receiving equity treatment under the local (foreign) laws of the counterparty, which may result in an interest deduction for the U.S. party while the foreign party benefits from the participation exemption or foreign tax credits that reduce its taxes under local law. Alternatively, an instrument could be treated as equity for U.S. tax purposes, and debt for foreign tax purposes. International hybrid instrument transactions are considered a Tier 1 issue by the IRS (see the IRS Web site for further information regarding Tier 1, 2 and 3 issues), and are, therefore, a mandatory IRS exam issue.

Discounted Securities

A U.S. issuer may issue debt instruments at a discount to increase the demand for its debt instruments. The issuer and the holder are required currently to accrue deductions and income for the original issue discount (OID) accruing over the term. However, a U.S. issuer may not deduct OID on a debt instrument held by a related foreign person, unless the issuer actually paid the OID.

A corporate issuer's deduction for the accrued OID may be limited (or even disallowed) if the debt instrument is treated as an Applicable High Yield Discount Obligation (AHYDO). In that case, the deduction is permanently disallowed for some or all of the OID if the yield on the instrument exceeds the applicable federal rate (for the month of issuance) plus 600 basis points. The remainder of the OID (if any) is only deductible when paid. The AHYDO rules are temporarily suspended for certain obligations issued in exchange for other obligations of the issuer after 31 August 2008, and before 31 December 2010.

Deferred Settlement

In certain acquisitions, the parties may agree that the payment of a part of the purchase price should be made conditional on the target meeting pre-established financial performance goals after the closing (the earn-out). If the goals are not met, the acquirer can be relieved of some or all of its payment obligations. An earn-out may be treated as either the payment of the contingent purchase price or ordinary employee compensation (where the seller is also an employee of the business). An acquirer would generally prefer to treat the earn-out as compensation for services, so that it can deduct such payments from income.

In an asset acquisition, the acquirer may capitalize the earn-out payment into the assets acquired, but only in the year when such earn-out amounts are actually paid. Such capitalized earn-out amounts should be depreciated/amortized over the remaining depreciable/amortizable life of the applicable assets. In a stock acquisition, the earn-out generally adds to the acquirer's basis in the target stock. Interest may be imputed on deferred earn-out payments unless the agreement specifically provides for interest.

Other Considerations

Documentation of each step in the transaction and the potential tax consequences are recommended. Taxpayers generally are bound by the form they choose for a transaction, which may have material tax consequences. However, the government may

challenge the characterization of a transaction on the basis that it does not reflect the substance of the transaction; thus, once parties have agreed on the form of a transaction, they would be well-advised to document the intent, including the applicable Internal Revenue Code sections. Parties should also maintain documentation of negotiations and appraisals, for the purposes of allocating the purchase price among assets. Contemporaneous documentation of the nature of transaction costs should also be obtained. Although the parties to a transaction generally cannot through the contract dictate the tax results, documentation of the parties' intent can be helpful if the IRS challenges the characterization of the transaction

Concerns of the Seller

In general, the tax position may influence the structure of the transaction. The seller may prefer to receive a portion of the value of the target in the form of pre-sale dividend for ordinary income treatment, or to take advantage of DRDs or FTCs. A sale of target stock generally results in a capital gain, except in certain related-party transactions (see Purchase of Shares), or on certain sales of shares of a controlled foreign corporation (CFC). In addition a foreign seller of a USRPHC may be subject to tax and withholding based on FIRPTA, as discussed earlier in the chapter.

A sale of assets should also result in capital gains treatment except for depreciation recapture, which may have ordinary income treatment. If the seller has no tax attributes to absorb the gain from asset sales, gains may be deferred if the transaction qualifies as a like-kind exchange (LKE), where the seller exchanges property for like-kind replacement property (such as, exchanges of real estate).

Alternatively, the transaction may be structured as a tax-free separation of two or more existing active trades or businesses formerly operated, directly or indirectly, by a single corporation for the preceding five years (spin-off). Stringent requirements must be satisfied for the separation to be treated as a tax free spin-off.

Company Law and Accounting

Effective for periods beginning on or after 15 December 2008 (that is, 1 January 2009 for calendar year-end companies), FASB Statements 141R and 160 require most identifiable assets, liabilities, non-controlling interests, and goodwill acquired in a business combination to be recorded at full fair value and require non-controlling interests (previously referred to as minority interests) to be reported as a component of

equity, which changes the accounting for transactions with non-controlling interest holders.

Statement 141R defines a business combination as a transaction or other event in which an entity (the acquirer) obtains control of one or more businesses (the acquiree or acquirees), even if control is not obtained by purchasing equity interests or net assets, as in the case of control obtained by contract alone. This can occur, for example, when a minority shareholder's participating rights expire. Statement 141R defines a business as an integrated set of activities and assets capable of being managed to provide a return to investors or economic benefits to owners, members, or participants.

All business combinations are accounted for by applying the acquisition method (previously referred to as the purchase method). Companies applying this method must identify the acquirer; determine the acquisition date and acquisition-date fair value of the consideration transferred, including conditional consideration; recognize at their acquisition-date fair values the identifiable assets acquired, liabilities assumed, and any non-controlling interests in the acquiree (with certain exceptions); and recognize goodwill or, in the case of a bargain purchase, a gain.

A company that obtains control but acquires less than 100 percent of an acquiree records 100 percent of the fair value of the acquiree's assets (including goodwill), liabilities, and non-controlling interests, excluding certain exceptions to fair-value measurement, at the acquisition date. Under previous accounting requirements, an acquiring company that obtained less than 100 percent of an acquiree adjusted the acquisition-date fair value of the assets and liabilities only for its proportionate ownership interest and recognized only its portion of the goodwill of the acquiree. Non-controlling interests were previously recorded at the acquiree's book value.

Statement 160 specifies that non-controlling interests are treated as a separate component of equity, not as a liability or other item outside of equity. Because non-controlling interests are an element of equity, increases and decreases in the parent's ownership interest that leave control intact are accounted for as capital transactions (that is, as increases or decreases in ownership) rather than as step acquisitions, or dilution gains or losses. The carrying amount of the non-controlling interests is adjusted to reflect the change in ownership interests, and any difference between the amount by which the non-controlling interests are adjusted and the fair value of the consideration paid or received is recognized directly in equity attributable to

the controlling interest (that is, additional paid-in capital). A transaction that results in the loss of control results in a gain or loss comprising a realized portion related to the portion sold and an unrealized portion on the retained non-controlling interest, if any, that is re-measured to fair value.

Group Relief/Consolidation

Affiliated U.S. corporations may elect to file consolidated federal income tax returns as members of a consolidated group. In general, an affiliated group consists of chains of 80 percent (by vote and value)-owned corporate subsidiaries (Members); with a common parent owning such chains directly or indirectly.

The profits of one member may be offset against the current losses of another member. In most cases, gains or losses from transactions between members are deferred until the participants cease to be members of the consolidated group, or otherwise cease to exist. Complex rules may limit the use of losses arising from the sale of stock of a member to unrelated third parties (the Unified Loss Rules).

Transfer Pricing

Following an acquisition of a target, all transactions between the acquirer and the target must be consistent with arm's-length standards. If related parties fail to conduct transactions at arm's length, the IRS may reallocate gross income, credits, deductions, or allowances between the participants to prevent tax evasion or clearly to reflect income arising from such transactions. As stated earlier, such transactions may include loans, sales of goods, leases, or licenses. Contemporaneous documentation must be maintained to support inter-company transfer pricing policies.

Dual Residency

In general, the net operating losses of a dual resident corporation (DRC) and a net loss attributable to a separate unit cannot be used to offset the taxable income of a U.S. affiliate or the domestic corporation that owns the separate unit. Any such loss is a dual consolidated loss (DCL) subject to regulations contained in 1.1503-2 or 1.1503(d)-1 through to 8. A DRC is a domestic corporation subject to income tax in a foreign country on a worldwide income basis or as a resident of the foreign country. A separate unit is a foreign branch or a hybrid entity (that is, an entity not subject to tax in the U.S., but subject to tax in a foreign country at the entity level) that is either directly owned by a domestic corporation or is owned indirectly by a domestic corporation through a partnership, trust, or a

disregarded entity. Limited use of a DCL may be possible if the consolidated group or domestic corporation (in the case of a stand-alone domestic corporation) files a special election that ensures that the deductions taken into account in computing the DCL will not be used to offset the income of a foreign corporation.

Foreign Investments of a Local Target Company

Often a U.S. target may be a shareholder of foreign corporations. Depending on its ownership interest, the U.S. target may be subject to various regimes of taxation on the income or gain with respect to such investments.

In general, a U.S. target is taxed on income of a foreign subsidiary on receipt of a dividend from the subsidiary, but under the Subpart F rules, Subpart F income earned by a controlled foreign corporation (CFC) may be currently included in the income of the U.S. target that is a U.S. Shareholder of the CFC, even if the income is not distributed by the CFC. A U.S. shareholder is a U.S. person that owns stock that is at least 10 percent (by vote) of the foreign corporation. A CFC is any foreign corporation more than 50 percent of whose stock (by vote or value) is owned by U.S. shareholders on any day during the taxable year of the foreign corporation. Subpart F income includes, among other elements, the CFC's income from dividends, interest, royalties, rents, annuities, gains from certain commodity transactions, gains from sales of property producing passive income or no income, and foreign currency gains. In certain circumstances, Subpart F income also includes the loan principal on debts extended by CFCs or loans from unrelated parties that are secured by pledges of CFC assets or stock.

Instead of the subpart F regime, a U.S. target may be subject to taxation and interest charges resulting from owning stock in a passive foreign investment company (PFIC). A PFIC is any foreign corporation (that is not a CFC) that satisfies the following income or asset tests: at least 75 percent of its gross income for the taxable year consists of certain passive income; or at least 50 percent of the average percentage of assets consists of assets that produce certain passive income. A U.S. target owning PFIC stock is subject to a tax and interest charge on gains from the disposal of PFIC stock or receipt of an excess distribution from a PFIC. To avoid the PFIC tax regime, the U.S. target may elect to treat the foreign corporation as a qualified electing fund (the QEF Election), with the U.S. target being currently taxed on the QEF's earnings and capital gain, or elect to

recognize the built-in gain in the PFIC stock under a mark-to-market election.

Comparison of Asset and Share Purchases

Advantages of Asset Purchases

- The purchase price may be depreciated or amortized for tax purposes.
- Previous liabilities (including income tax liabilities) of the target generally are not inherited.
- It is possible to acquire only part of a business.
- Profitable operations can be absorbed by loss companies in the acquirer's group, thereby effectively gaining the ability to use the losses, subject to any applicable limitations.

Disadvantages of Asset Purchases

- Possible need to renegotiate supply, employment and technology agreements, and change stationery.
- A higher capital outlay is usually involved (unless the debts of the business are also assumed).
- It may be unattractive to the seller, thereby increasing the price.
- The transaction may be subject to state and local transfer taxes.
- The benefit of any losses incurred by the target remains with the seller.

Advantages of Share Purchases

- Lower capital outlay (purchase net assets only).
- May be more attractive to seller, therefore price could be lower.
- Acquirer may benefit from tax losses of the target subject to certain limitations.
- Acquirer may benefit from existing supply or technology contracts.

Disadvantages of Share Purchases

- Acquire unrealized tax liability for depreciation recovery on difference between market and tax book value of assets.
- Liable for any claims or previous liabilities of the target.
- No deduction for the purchase price (assuming no section 338 election).

- Losses incurred by any companies in the acquirer's group in years prior to the acquisition of the target cannot be offset against certain recognized built-in gains recognized by the target.
- The use of certain tax attributes of the target may be limited after the acquisition.

Withholding Tax Rate Chart

The rate information and footnotes contained in this table are from the 2009 IBFD/KPMG Global Corporate Tax Handbook.

Country	Dividends		Interest ¹ (%)	Royalties (%)
	Individuals, Companies (%)	Qualifying Companies ² (%)		
Armenia ³	– ⁴	– ⁴	– ⁴	0
Australia	15	0/5 ⁵	10	5
Austria	15	5	0	0/10 ⁶
Azerbaijan ³	– ⁴	– ⁴	– ⁴	0
Bangladesh	15	10	10	10
Barbados	15	5	5	5
Belarus ³	– ⁴	– ⁴	– ⁴	0
Belgium	15	0/5 ⁷	0	0
Bulgaria ²⁹	10	5	5	5
Canada	15	5	0 ³⁰	0/10 ⁸
China (People's Rep.)	10	10	10	10 ⁹
Cyprus	15	5 ¹⁰	10	0
Czech Republic	15	5	0	0/10 ¹¹
Denmark	15	0/5 ⁷	0	0
Egypt	15	5 ¹⁰	15	15
Estonia	15	5	10	5/10 ¹²
Finland	15	0/5 ⁷	0	0
France ¹³	15	0/5 ³⁷	0	0
Germany	15	0/5 ⁷	0	0
Georgia ³	– ⁴	– ⁴	– ⁴	0
Greece	– ⁴	– ⁴	0 ¹⁴	0
Hungary	15	5	0	0
Iceland ²⁹	15	5	0	0/5 ³¹
India	25	15	15	10/15 ¹²
Indonesia	15	10 ¹⁵	10	10
Ireland	15	5	0	0
Israel	25	12.5 ¹⁰	17.5	15
Italy	15	5/10 ¹⁶	15	5/8/10 ¹⁷
Italy (New treaty) ³⁸	15	5 ³⁹	10	0/5/8 ⁴⁰
Jamaica	15	10	12.5	10
Japan	10	0/5 ¹⁸	10	0
Kazakhstan	15	5	10	10 ¹⁹
Korea (Rep.)	15	10 ¹⁰	12	15
Kyrgyzstan ³	– ⁴	– ⁴	– ⁴	0
Latvia	15	5	10	5/10 ¹²
Lithuania	15	5	10	5/10 ¹²
Luxembourg ²⁰	15	5	0	0
Mexico	10	0/5 ²¹	15	10
Malta ³²	15	5	10	10
Moldova ³	– ⁴	– ⁴	– ⁴	0
Morocco	15	10 ¹⁰	15	10
Netherlands	15	0/5 ²¹	0	0/15 ²²
New Zealand	15	15	10	10
Norway	15	15	0	0
Pakistan	– ⁴	15 ²³	– ⁴	0
Philippines	25	20 ²⁴	15	15

Country	Dividends		Interest ¹ (%)	Royalties (%)
	Individuals, Companies (%)	Qualifying Companies ² (%)		
Poland	15	5	0	10
Portugal	15	5 ²⁵	10	10
Romania	10	10	10	15
Russia	10	5	0	0
Slovak Republic	15	5	0	10
Slovenia	15	5 ¹⁵	5	5
South Africa	15	5	0	0
Spain	15	10 ¹⁵	10	5/8/10 ²⁶
Sri Lanka	15	15	10	5/10 ²⁷
Sweden	15	0/5 ⁷	0	0
Switzerland	15	5	0	0
Tajikistan ³	- ⁴	- ⁴	- ⁴	0
Thailand	15	10	15	8/15 ¹²
Trinidad and Tobago	- ⁴	- ⁴	- ⁴	15
Tunisia	20	14 ¹⁵	15	10/15 ¹²
Turkey	20	15	15	5/10 ¹²
Turkmenistan ³	- ⁴	- ⁴	- ⁴	0
Ukraine	15	5 ²⁸	0	10
United Kingdom	15	0/5 ²¹	0	0
Uzbekistan ³	- ⁴	- ⁴	- ⁴	0
Venezuela	15	5	10	5/10 ¹²

Notes

- The rates shown are those applied to interest paid by general borrowers and interest other than "portfolio interest" and other than categories of interest that are exempt under domestic law. Many treaties provide special withholding rates for bank loans, commercial credit transactions, and contingent interest (profit sharing) bonds and loans, for which the text of the treaty should be consulted.
- Unless otherwise indicated, the lower rate applies if the corporate shareholder owns at least 10 percent of the voting stock or the share capital of the US corporation, depending on the applicable treaty. In addition, a number of U.S. treaties do not permit (or contain restrictions on) reduced withholding in the case of dividends paid by RICs and REITs. Special withholding rates may also apply in the case of dividends paid to qualified pension funds. The text of the treaty should be consulted.
- The treaty concluded between the United States and the former USSR.
- The domestic rate applies; there is no reduction under the treaty.
- The zero rate applies if the corporate shareholder owns 80 percent or more of the voting stock of the U.S. corporation for the 12-month period ending on the date on which the dividend is declared and qualifies under certain provisions of the limitation on benefits article of the treaty.
- The higher rate applies to film royalties.
- The zero rate applies if the corporate shareholder owns 80 percent or more of the voting stock of the U.S. corporation for the 12-month period ending on the date on which entitlement to the dividend is determined and qualifies under certain provisions of the limitation on benefits article of the treaty.
- The lower rate applies to computer software, patents and know-how.
- In the case of rental of industrial, commercial, or scientific equipment, the withholding rate is imposed on 70 percent of the gross royalties.
- Intentionally left blank.
- The lower rate applies to copyright royalties, including films.
- The lower rate applies to equipment leases.
- The rates reflect the new protocol that entered into force on 23 December 2009. With respect to taxes withheld at source, the new protocol shall have effect for amounts paid or credited on or after 1 January 2009.
- The treaty rate does not apply to corporate shareholders controlling more than 50 percent of the voting stock of the U.S. corporation.
- The lower rate applies if the corporate shareholder owns 25 percent or more of the voting stock (or in some cases share capital) of the U.S. corporation.
- The 5-percent rate applies if the corporate shareholder has owned more than 50 percent of the voting stock of the U.S. corporation for the 12-month period ending on the date the dividend is declared. The 10-percent rate applies if the corporate shareholder has owned 10 percent or more of the voting stock of the U.S. corporation (but not more than 50 percent) for the 12-month period ending on the date the dividend is declared.
- The 5-percent rate applies to royalties for copyrights; the 8-percent rate applies to royalties for films.
- The zero rate applies if the Japanese company has owned directly or indirectly more than 50 percent of the voting stock of the U.S. corporation for the 12-month period ending on the date on which entitlement to the dividend is determined. The 5-percent rate applies if the Japanese company owns directly or indirectly at least 10 percent of the voting stock of the U.S. corporation on the date on which entitlement to the dividend is determined.
- The WHT on payments for the right to use industrial, commercial, or scientific property can, at the election of the beneficial owner, be computed on a net basis.
- The treaty does not apply to income paid to exempt Luxembourg holding companies.
- The zero rate applies if the corporate shareholder owns 80 percent or more of the voting stock of the US corporation for the 12-month period ending on the date the dividends are declared and owned at least 80 percent of such stock prior to 1 October 1998 or qualifies under certain provisions of the limitation on benefits article of the treaty.
- The 15-percent rate applies if the royalty is paid to a permanent establishment of a Netherlands enterprise located in a third jurisdiction and the aggregate rate of tax imposed by the Netherlands and the third jurisdiction is less than 60 percent of the U.S. corporate income tax rate.
- The lower rate applies if the corporate shareholder owns more than 50 percent of the voting power of the US corporation.
- The lower rate applies if the corporate shareholder has owned at least 10 percent of the voting stock of the US corporation for the portion of the taxable year preceding the payment of the dividend and for the whole of the prior taxable year.
- The lower rate applies if the corporate shareholder directly owns at least 25 percent of the capital of the US corporation for an uninterrupted period of 2 years prior to the date of payment of the dividend.
- The 5-percent rate applies to royalties for copyrights; the 8 percent rate applies to royalties for films, royalties for industrial, commercial, or scientific equipment and royalties for scientific works.
- The 5-percent rate applies to rentals for the use of tangible personal (movable) property.
- The 5-percent rate applies if the Ukrainian company owns at least 20 percent of the voting stock of the U.S. company (or, if the U.S. company does not have voting stock, at least 20 percent of the authorized capital).
- Effective from 1 January 2009 in respect of withholding and other taxes.
- The 0-percent rate applies to interest paid or credited between unrelated persons on or after 1 January 2008 and to interest paid or credited between related persons on or after 1 January 2010.
- The 5-percent rate applies to trademarks and any information concerning industrial, commercial, or scientific experience provided in connection with a rental or franchise agreement that includes rights to use a trademark, and to royalties for a motion picture film or work on film or videotape, or other means of reproduction for use in connection with television.
- Rates shown are for the new treaty signed on 8 August 2008. The treaty has not yet entered into force.
- through 36. Intentionally left blank.
- The zero rate applies generally if the French company has owned, directly or indirectly through one or more residents of either the U.S. or France, shares representing 80 percent or more of the voting power of the company paying the dividends for a 12-month period ending on the date on which entitlement to the dividends is determined.
- The 5-percent rate applies if the French company owns directly at least 10 percent of the voting stock of the company paying the dividends.
- With respect to taxes withheld at source, the new treaty shall have effect for amounts paid or credited on or after 1 February 2010.
- The 5-percent rate applies if the corporate shareholder has owned at least 25 percent of the voting stock of the U.S. corporation for the 12-month period ending on the date the dividend is declared.
- The zero rate applies to royalties for the use of, or right to use, a copyright of literary, artistic, or scientific work (excluding royalties for computer software, motion pictures, films, tapes or other means of reproduction used for radio or television broadcasting). The 5-percent rate applies to royalties for the use of, or right to use, computer software or industrial, commercial, or scientific equipment. The 8-percent rate applies to all other royalties.

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