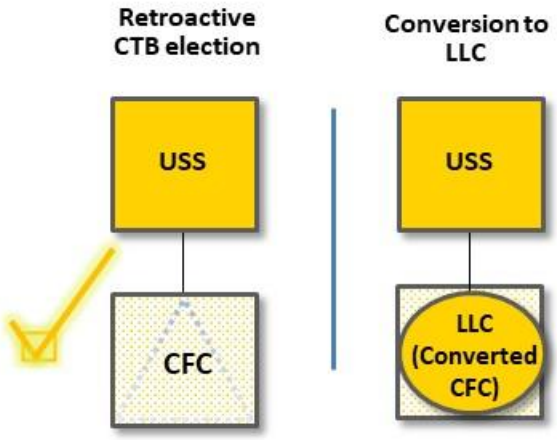
Tax M&A Update

National Tax M&A
International Tax and Transaction Services

Vol. XII, Issue 10 **June 2023**

Technical Developments and Musings

Worthlessness and CTB election time travel. The broader tax issue presented by ILM 202325007 is one that many taxpayers contemplated during the COVID-19 pandemic: whether worthless stock of a subsidiary could qualify for more favorable timing rules under §165(i), as a disaster loss. But the actual issue addressed is narrow, involving worthless CFC subsidiaries; the IRS concluded that any loss sustained by the domestic corporate shareholder of the CFCs did not occur "in" the federally-declared disaster area for purposes of §165(i). (Among other metrics, the CFCs in question did not derive substantially all of their revenues from US customers.) Although the memo declined to tackle many of the larger questions involving the application of §165(i) to worthless stock, perhaps its most interesting analysis and assertions are found in the footnotes, where the IRS associate chief counsel (International) encourages IRS exam personnel to take a closer look at overall loss entitlement, given the timing and method by which the taxpayer sustained a loss with respect to its CFCs. As depicted here, one of the foreign entities in question had been treated as a partnership, filed a retroactive check-the-box (CTB) election to be treated as a corporation, and then was deemed to dissolve by converting into a disregarded domestic LLC about one month after filing the retroactive CTB election. The memo questions not only whether the late-filed CTB election qualified for late-filing relief but also whether the overall series of steps appropriately results in a loss deduction, citing older case law involving "soft" doctrines: e.g., substance over form, circularity, step transaction, and even disregard of the corporate form. The IRS seems most troubled by the overall timing of the steps, given that one month elapsed between the *filing date* of the retroactive CTB election and the subsequent deemed liquidation. "For purposes of applying these concepts, we believe the date the reclassification election was filed rather than the effective date of the change is relevant." This statement suggests a "time travel" imputation of taxpayer filing date knowledge back to the date of the deemed organization of the corporation for purposes of determining its tax effects, which has been suggested as well by other informal guidance (e.g., ILM 201446019). But unlike the 2014 ILM, the recent memo also apparently takes into account events *following* the filing date as well (i.e., the conversion to LLC).



IRS denies late election request for transaction cost deduction safe harbor. In PLR 202324001, also involving late elections, the IRS denied a taxpayer's request to make a late safe harbor election under Rev. Proc. 2011-29 to deduct 70% of an investment banker fee, concluding that the taxpayer had not acted reasonably and in good faith to qualify for such relief. For further info, see Tax Alert 2023-1156.

CAMT and stock buyback excise tax penalty waivers. In two separate announcements, the IRS has provided certain procedural relief with respect to two new Code provisions: the corporate alternative minimum tax (CAMT) and the stock buyback excise tax. Notice 2023-42 waives addition to tax for a corporation's failure to make estimated tax payments of its CAMT**,** while Announcement 2023-18 effectively extends due dates for the excise tax and return, waiving associated penalties, until additional guidance is provided. For further info, see Tax Alert 2023-1038 (CAMT) and Tax Alert 2023-1166 (excise tax).

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