Tax M&A Update

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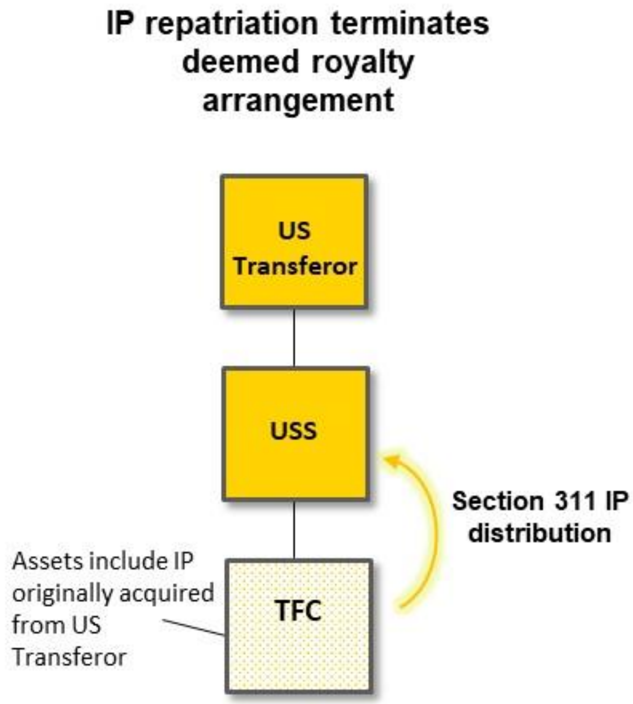
Technical Developments and Musings

Final regulations address termination of Section 367(d) arrangements. Treasury and the IRS released final regulations (TD 9994) under §367(d), which broadly applies when a US person engages in an "outbound" transfer of intangible property (IP) to a transferee foreign corporation (TFC) in an exchange under §§351 or 361. Under the statute, an outbound transfer of IP is treated as a deemed sale by the US transferor to the TFC in exchange for payments that are contingent upon the productivity, use or disposition of the IP over its useful life. The final regulations address the repatriation of the IP, and in particular, the events that will cause a termination of the continued application of §367(d) upon the repatriation of the IP, while still within its useful life. The regulations largely adopt, with limited modification, rules that were proposed in 2023 and which, according to the Preamble, "were intended to address simple, common fact patterns involving repatriations" of IP. Thus, not all related US persons are treated as a "qualified domestic person" that, if the IP were transferred to such person, would terminate the §367(d) arrangement. But as illustrated here, a related US corporation (USS) does qualify, and after it has come to own all of the stock of the original TFC, TFC distributes the IP to USS in a taxable transaction. The final regulations confirm that, whether the IP is distributed in a taxable transaction, or pursuant to a transaction in which TFC completely liquidates into USS under §332, the previously transferred IP is no longer subject to §367(d). For further info, see Tax Alert 2024-1885.



IRS envisions multiple taxable income iterations to compute GILTI/FDII deductions. In a non-precedential generic legal memorandum, the IRS concluded that, for a domestic corporation with foreign-derived intangible income or global intangible low-taxed income inclusions, the taxable income limitations to compute its deduction under §250 also include the limitations set forth in §246(b)(3), which specifically addresses taxable income limitations for "dividends." This means, according to the memorandum, that there could be three sequential calculations: under §250(a)(2), §246(b)(3)(A) and §246(b)(3)(B), likely reducing the amount of the deduction for many taxpayers. According to the IRS, such an approach is dictated by the text of §246(b) "and is informed by both the evolution of the statutory language and policy considerations."

Zero income REITs. In PLR 202440007, the IRS concluded for the first time that a lack of assets and income in the first tax year of a real estate investment trust (REIT) did not cause the entity to fail the 95% and 75% gross income tests or the 75% asset test. The ruling states that $0 of gross income "does not prevent qualification as a REIT." Thus, the IRS declined to issue the requested ruling to treat the taxpayer as if it had not made a REIT election for its first tax year. For further info, see Tax Alert 2024-1877.