Tax M&A Update

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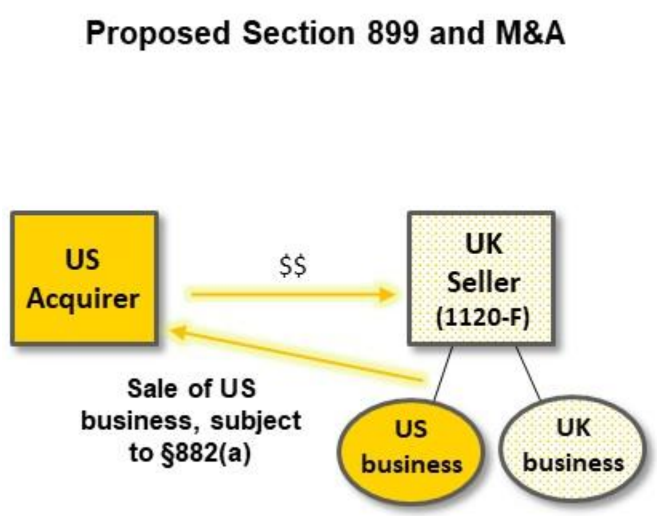
Technical Developments and Musings

Proposed section 899 and cross-border M&A. Proposed legislation that passed the House of Representatives would add new §899 to the tax code, the effect of which would increase the US tax rate applicable to certain foreign persons that have a connection with "unfair foreign taxes." For this purpose, unfair foreign taxes apparently refers to tax regimes of those countries that have adopted rules consistent with the OECD's Global Anti-Base Erosion (GloBE) Pillar Two Rules. Thus, the proposed provision explicitly calls out the undertaxed profits rule (UTPR), digital services tax (DST) and diverted profits tax (DPT), as well as certain other taxes as determined by Treasury and the IRS. Under proposed §899, certain specified rates of tax—including, for example, the 30% withholding rate under §871 or the generally applicable corporate rate for foreign corporations with effectively connected income—would increase by an additional five percentage points initially but continue increasing each following year, up to 20 percentage points. (A withholding safe harbor would effectively delay increased withholding rates until the discriminatory foreign country is listed in Treasury guidance.) The new provision would have broad applicability, affecting a variety of cross-border transactions, including corporate mergers, acquisitions and dispositions. For example, the tax under §882(a) for the sale of an effectively connected US business by a foreign corporation, depicted here, could attract the higher rate if the UK corporate seller is an applicable foreign person. In addition, dividends received by certain applicable foreign persons would be subject to higher rates of tax, including dividend-equivalent "boot" in a cross-border §368(a) reorganization or dividends arising from an internal restructuring transaction involving a §304 stock sale. As of this writing, the Senate Finance Committee has proposed further changes to §899; it thus remains unclear whether §899 will be enacted and if so, the full scope of its application. For further info, see Tax Alert 2025-1085.



Publicly traded spin-offs and stock repurchase programs. PLR 202521019 involves a straightforward pro rata §355 spin-off by publicly traded Distributing of a foreign controlled corporation (Controlled). However, following the spin-off, Controlled will adopt a stock buyback program that necessarily involves planned acquisitions of its own stock, potentially implicating a number of §355 requirements, including §355(e). The ruling thus illustrates that the IRS can typically get comfortable with such fact as long as the taxpayer can represent that, among other things, the share repurchase program involves widely-held stock, and is undertaken for a business purpose that is not intended to benefit any discrete group of shareholders.

Acquisition of nonstock nonprofit entity as a qualified stock purchase. By definition, a qualified stock purchase—necessary for a §338 election—requires an acquisition of *stock* of a target corporation. But PLR 202518014 illustrates that even a nonstock, nonprofit entity—taxable as a corporation for US federal income tax purposes—can be a target for which a §338 election or §338(h)(10) election can be made. Also noteworthy: in this case, the sole member of the selling entity was an exempt organization.