Tax M&A Update

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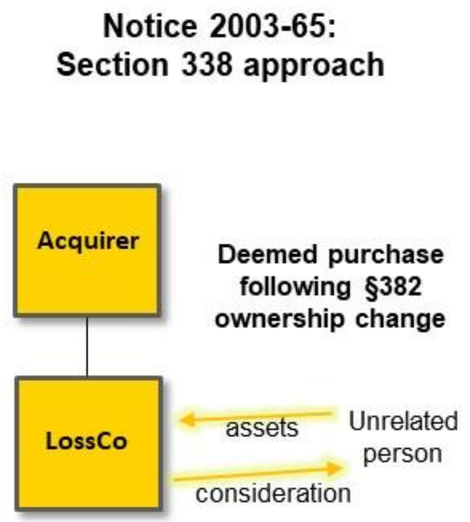
Technical Developments and Musings

The Section 338 approach to RBIG determinations remains viable. The Treasury and IRS withdrew a 2019 notice of proposed rulemaking that would have restricted the options available to taxpayers following an ownership change under §382. This section generally limits utilization of pre-change attributes such as net operating loss (NOL) carryovers for any post-change year following the ownership change, using a tax-exempt rate of return based on the value of the loss corporation to establish the §382 limitation. But §382 also addresses "built-in" items of income or loss—for loss corporations in a net unrealized built-in gain position at the ownership change date, recognized built-in gain (RBIG) during the ensuing five-year recognition period may increase the §382 limitation, thus permitting greater utilization of NOL carryovers within that timeframe. Actual asset sales may not always be feasible, but a 2003 notice had endorsed the "§338 approach" to determine RBIG in such cases; this method compares the loss corporation's actual items of income, gain, deduction and loss recognized during the recognition period with those that would have been recognized if a hypothetical §338 election had been made for the loss corporation on the change date. Under this approach, built-in gain assets may be treated as generating RBIG even in the absence of actual dispositions during the recognition period. The recent withdrawal states that the government had received numerous critical comments about the 2019 proposal, including the elimination of the §338 approach. Thus, with the current withdrawal of the 2019 proposal, the §338 approach set forth in Notice 2003-65 remains a useful methodology undertaken by many loss corporations following an ownership change to determine the amount of their §382 limitation.



Downward attribution prohibition (partially) restored. Another reversal that many taxpayers will likely appreciate comes from Congress in the form of recently enacted legislation, popularly known as the One Big Beautiful Bill Act (OBBBA). In this case, the OBBBA reversed the 2017 repeal of §958(b)(4), which had limited the downward attribution of ownership for purposes of determining whether a foreign corporation was a controlled foreign corporation. While new §951B blocks a complete return to the pre-2017 status quo, many multinational groups—particularly those with foreign parent corporations—may find that the restoration of §958(b)(4), once effective, eliminates CFC status for many foreign corporations within the group that do not have direct or indirect US shareholders. For further info, see Tax Alert 2025-1510.

Legislation supersedes 2004 technical advice memorandum. *Trail King Industries, Inc. v. US,* No. 4:24-CV-04164 (D. S.D. July 24, 2025), is far afield from M&A income taxation, as it involves excise tax liability under §4051(a) on the sale of trailers. But it serves as a reminder of the weight of sub-regulatory tax authorities. The federal district court dismissed the taxpayer's action for failure to state a claim, to the extent the claim was premised upon a 2004 TAM interpreting §4051(a). The court noted that the TAM did not address statutory changes to §4051 that were enacted in 2004. Although the TAM had not been withdrawn or revoked, the court reasoned that the TAM's analysis regarding applicable law in 2001 and 2002 does not supersede the 2004 legislation.