GEORGETOWN LAW
TAX PLANNING FOR CORPORATE ACQUISITIONS SEMINAR
(LLM Seminar 784)
Spring 2017

Professor John P. Barrie

Syllabus

This is a tax seminar designed to discuss the practical aspects and technical analysis of taxable and tax-free corporate acquisitions, with a focus on a review of recent and pending publicly disclosed transactions.

The first part of the seminar (which is intended as a review of selected corporate tax topics covered in other courses) will cover the basic (and not-so-basic) tax issues associated with corporate acquisitions, including a review of the use of section 351 as an acquisition vehicle, the section 368 reorganization rules, the use of single member limited liability companies in an acquisition context, the impact of the section 355 anti-Morris Trust rules on acquisition transactions, utilization of the section 338 and 336(e) elections, the section 1060 basis allocation rules, application of the section 381 tax attribute carryover rules, the application of the section 382 net operating loss carryover rules, and the tax implications of contingent consideration.

The second part of the seminar will examine the tax planning for recent public M&A transactions from the practical vantage points of tax counsel advising the buyer and the seller. Using selected current publicly filed transactional documents (and the transactional form documents in the last volume of Ginsburg & Levin, Mergers, Acquisitions and Buyouts Transactional Analysis), the seminar will focus, from both a pro-seller and a pro-buyer perspective, on (1) the tax structure utilized; (2) the tax representations, warranties, covenants and indemnification provisions in the acquisition documents, along with any tax sharing agreements; (3) the tax disclosure discussion in the proxy/prospectus delivered to the shareholders; and (4) the form, and necessity, of tax opinions provided by the buyer’s and seller’s tax counsel.

Course Materials:
Ginsburg & Levin, Mergers, Acquisitions & Buyouts Transactional Analysis
(Wolters Kluwer) (5 volumes)
Current Internal Revenue Code and Treasury Regulations

Exams:
Midterm – a short take-home paper assignment.
Final – a take-home paper assignment
**Weeks 1 and 2:**

Review of the basic provisions to qualify as a tax-free reorganization under the Code

Focus of review:

- statutory requirements
- use of disregarded entities
- continuity of interest ("COI") requirements
- continuity of business enterprise ("COBE") requirements
- post reorganization restructuring
- basis determination issues

**Code Section 368**

Treas. Reg. 1.368-2(b)(definitions) - relating to use of disregarded entities (single member LLCs)

Treas. Reg. 1.368-1(e) - relating to COI requirements and binding contract/signing date rule

Rev. Rul. 99-58, 1999-2 CB 701 (relating to stock reacquisition programs)

Treas. Reg. 1.368-1(d) - relating to COBE requirements

Treas. Reg. 1.368-2(k) - relating to permissible post-reorganization restructuring

Prop. Reg. 1.368-1(f) - relating to exchanges of "net value"

**Code Section 1032**

Treas. Reg. 1.1032-2 - relating to treatment of parent stock in triangular reorganizations

Rev. Proc. 2017-3 – relating to IRS “no rule” areas

**The Williams Companies, Inc. v. Energy Transfer Equity, LP, C.A. Nos. 12168-VCG, 12337-VCG (Court of Chanery of the State of Delaware, June 24, 2016)**

**Week 3:**

Step Transaction Issues

**J.E. Seagram Corp. v. Commissioner, 104 TC 75 (1995)**
Tribune Company v. Commissioner, 125 TC 110 (2005)

Treas. Reg. 1.368-2(k) – relating to permissible post-reorganization restructuring

Rev. Rul. 90-95, 1990-2 CB 67
Rev. Rul. 2001-26, 2001-1 CB 1297
Rev. Rul. 2003-51, 2003-1 CB 938
Rev. Rul. 2015-09, 2015-21 IRB 972
Rev. Rul. 2015-10, 2015-21 IRB 972

Week 4:

Review basic tax aspects of taxable stock and asset acquisitions and use of section 338, section 338(h)(10) and 336(e) basis step-up elections

Code Sections 336(e), 338, 1001, and 1060
Treas. Reg. 1.338-2 and -3 relating to definition of a qualified stock purchase
Rev. Rul. 99-6, 1991-1 CB 432 (relating to sale of partnership interests)
Rev. Rul. 90-95, 1990-2 CB 67 (reverse subsidiary cash merger)
Treas. Reg. 1.338(h)(10)-1 relating to application of section 338(h)(10) elections to (i) a target corporation that is part of an affiliated group and (ii) a target corporation that is an S corporation
Background on section 338 - Ginsburg & Levin, paragraphs 205 and 206
Treas. Reg. 1.336-1, -2 and -3 (relating to section 336(e) elections)
Peco Foods, Inc. & Subsidiaries v. Commissioner, TC Memo 2012-18 (purchase price allocation issues)

Week 5:

Use of contingent consideration/use of escrows
Reg. 1.368-1(e)(2)
Weeks 6, 7 and 8:

Review tax aspects basic stock and asset acquisition agreements - tax definitions, tax representations, tax covenants, post-closing obligations, tax indemnification and transfer taxes

Ginsburg & Levin:

- paragraph 2201 - pro-buyer stock purchase agreement
- paragraph 2202 - pro-seller stock purchase agreement
- paragraph 2203 - neutral stock purchase agreement
- paragraph 2204 - purchase of subsidiary out of consolidated group
- paragraph 2205 - purchase price adjustment
- paragraph 2206 - purchase of S corporation stock
- paragraph 2301 - pro-buyer asset purchase agreement
- paragraph 2302 - pro-seller asset purchase agreement
- paragraph 2303 - neutral asset purchase agreement
- paragraph 2401 – pro-buyer divisional purchase
- paragraph 2402 – pro-seller divisional purchase
- paragraph 2403 – neutral divisional purchase
- paragraph 2500 - reverse subsidiary merger of P's transitory sub into T for cash and notes
- paragraph 2600 - tax free merger of T into P for P stock


Treatment of transaction costs

- Treas. Reg. 1.263(a)-5
- PLR 200830009
- CCA 201624021 (transaction not a “covered transaction”)

**Weeks 9 and 10:**

A review of various public M&A transactions with a focus on (i) the Agreement and Plan of Merger (attachment to proxy statement), (ii) tax disclosure in proxy statement, and (iii) tax opinions (exhibits to SEC filing):

Adamis Pharmaceuticals Corporation/US Compounding, Inc. – Agreement and Plan of Merger dated as of March 28, 2016

Yelp, Inc./Eat 24 – Form 8-K, Agreement and Plan of Merger dated February 9, 2015

MCI/Verizon merger - Proxy Statement and Prospectus dated August 31, 2005

Anheuser Busch/InBev merger - Proxy Statement dated October 6, 2008

Wachovia/Well Fargo merger - Proxy Statement and Prospectus dated November 21, 2008

Equity Purchase Agreement By and Among Each of the Members of Fulton Street Brewery, LLC, as Sellers, and Anheuser-Busch, Incorporated, as Purchaser, Dated as of February 18, 2011

Comcast Corporation/Time Warner Cable, Inc. proposed merger – Joint Proxy Statement/Prospectus dated September 5, 2014

AT&T Inc./DIRECTV proposed merger – Proxy Statement/Prospectus dated August 20, 2014.

Notice of Offer To Purchase For Cash All Outstanding Shares of Chiquita Brands International, Inc. dated November 4, 2014

**Week 11:**

Tax Due Diligence/Tax Opinions

New York State Bar Association Tax Section Report on Tax Opinions in Registered Offerings (April 4, 2012)

Circular 230 and tax opinions

Thomas Jaworski, SEC Closely Examining Corporate Tax Opinions, Tax Notes, November 12, 2015

Robert W. Wood and Donald P. Board, Tax Opinions, the SEC Way, Tax Notes, December 7, 2015

Marathon E.G. Holding Limited v. CMS Enterprises Company (Fifth Circuit, filed 2/10/2010) (dispute involving an NOL representation)

FDIC v. AmFin Financial Corporation (Sixth Circuit, Filed 7/8/2014) (interpretation of a tax sharing agreement – right to a refund)

**Weeks 12 and 13:**

Spin-offs by Publicly Traded Companies

Code Section 355

Treas. Reg. 1.355-2(b) relating to business purpose requirement

Treas. Reg. 1.355-2(d) relating to the "non-device" requirement

Prop. Reg. 1.355-3 relating to the active conduct of a trade or business requirement

Treas. Reg. 1.355-6 relating to section 355(d) gain recognition rules

Treas. Reg. 1.355-7 relating to section 355(e) gain recognition rules

Rev. Proc. 96-30, 1996-1 CB 696, and Appendix A, relating to business purposes documentation

Allocation of earnings and profits

- Code Section 312(h)(1)
- Treas. Reg. 1.312-10(a) and (b)

Verizon spin-off of New Communications Holdings, Inc./merger into Frontier Communications Corporation – Information Statement/Prospectus dated May 28, 2010


Pfizer, Inc. Exchange Offer for Zoetis, Inc. – Prospectus dated May 22, 2013