NEW YORK STATE BAR ASSOCIATION

TAX SECTION

Report with Respect to Regs. §1.367(a)-3(c)

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This report, prepared by an ad hoc committee of the Tax Section of the New York State Bar Association,[1] suggests possible changes to Regs. §1.367(a)-3(c), relating to a transfer by a US person of stock or securities of a US corporation to a foreign corporation.

Broadly speaking, Regs. §1.367(a)-3(c), adopted in its present form in 1996, addressed "inversions" of widely-held US corporations. The prior rules only required US shareholders or security holders to recognize gain on an exchange of shares or securities of a US corporation for shares of a foreign corporation if the transaction resulted in a single more than 50% US shareholder of the foreign corporation or the exchanging US person was a 5% shareholder of the foreign corporation who did not enter into a gain recognition agreement. Regs. §1.367(a)-3(c) provided for the recognition of gain by all US shareholders of the US corporation if as a group they acquired more than 50% in voting power or value of the foreign corporation or certain other conditions were met.

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[1] Consisting of Peter Blessing, Ronald Creamer, Jay G. Milkes, Joseph Septimus, Julia Shin, Phil Tretiak, and Willard Taylor, who was the principal draftsperson. Helpful comments were received from Peter Canellos, Kimberly Blanchard, David Hariton, Charles Kingson, David Miller, Deborah Paul, Yaron Reich, Michael Schler and Diana Wollman.

Summary of Recommendations

As set out more fully below, we think that serious consideration should be given by the IRS and Treasury to the questions of whether Regs. §1.367(a)-3(c) continues to serve a useful purpose and whether it continues to be appropriate, as Regs. §1.367(a)-3(c) does, to require US shareholders and security holders, other than a 5% or greater US shareholder or a single US shareholder owning more than 50% of the foreign corporation, to recognize gain on exchanges of shares or securities of a US corporation for shares of a foreign corporation to any greater extent than if the exchange had been for shares of a US corporation.

Adopted to deal with corporate inversions or expatriations of widely-held corporations, such as the Helen of Troy transaction, Regs. §1.367(a)-3(c) did not deal directly with the targeted "abuse", which was not the avoidance of shareholder tax but that an inversion transaction may permit the avoidance of corporate tax.[2] In any event, Regs. §1.367(a)-3(c) did not succeed in stopping the corporate expatriation phenomenon,[3] leading Congress to

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2 *See* Notice 94-46, 1994-1 C.B. 356, acknowledging that avoidance of the controlled foreign corporation provisions of the Code was the main issue that concerned the IRS; and NYSBA Tax Section Rept. No. 1014, Report on Outbound Inversion Transactions (May 24, 2002) (hereafter, "NYSBA Tax Section Report on Inversion Transactions").

3 *See* NYSBA Tax Section Report on Inversion Transactions.

step in and enact Sections 7874 and 4985 of the Internal Revenue Code.

In general, the Executive Committee does not believe Sections 7874 and 4985 were a sufficient response to the issues raised by expatriation transactions. We continue to recommend, as we did in 2002, that Congress seriously consider additional steps to address corporate expatriations, such as tightening the earnings stripping and reforming the transfer pricing rules.[4] For the reasons set out above, however, the Committee believes that Reg. §1.367(a)-3(c) should be eliminated. The Committee is divided on the question of whether elimination should precede further Congressional action on corporation inversions.

If the IRS and Treasury do decide to continue the basic concept of Regs. §1.367(a)-3(c), we believe that serious consideration should be given to conforming Regs. §1.367(a)-3(c) to Section 7874, in whole or in part, in order to reduce the significant complexity that would otherwise result from different but overlapping rules. Conformity should, of course, be consistent with the purposes underlying Section 7874 and, as reconsidered by Treasury and the IRS, the Section 367(a) regulations.

For example, the IRS and Treasury might define the triggers on the recognition of gain by US persons transferring shares and securities of a US to a foreign

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[4] *See* NYSBA Tax Section Report on Inversion Transactions.

corporation by reference to Section 7874, relating to "expatriated entities", and not by the criteria of the present regulations. Under this approach there would be no gain recognition under Section 367(a) unless the shareholders of the US corporation acquired 60% or more of the shares of the foreign corporation and the foreign corporation, through its expanded affiliated group, did not have "substantial business activities" in the country of its organization.[5]

This approach would conform the Section 367(a) regulations to the abuse defined by Congress in Section 7874 and would also have the great merit of simplicity -- a single set of rules to deal with corporate expatriations rather than two overlapping but different sets of rules. We recognize, of course, that there may be some areas -- specifically, the different trade or business tests of Section 7874 and Regs. §1.367(a)-3(c) -- in which conformity may have to yield to policy concerns about facilitating inversions. Consideration should therefore be given to the circumstances in which the IRS and Treasury might impose shareholder-level gain recognition under the Section 367 regulations, notwithstanding that the transaction was not targeted by Congress in Section 7874.

Finally, if the foregoing suggestions are not adopted, we have a number of specific changes that, with the benefit of ten years of experience, we believe should

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[5] *See* Section 7874(a)(2)(B)(iii).

be made in Regs. §1.367(a)-3(c). Some of these will be relevant to guidance under Section 7874 as well.

Background

Regs. §1.367(a)-3(a) treats an exchange by a US person of stock or securities of a US corporation for stock or securities of a foreign corporation as a gain recognition transaction unless the exchange is excepted by Regs. §1.367(a)-3(c).

Prior to the issuance of Notice 94-96, US shareholders or security holders were not required to recognize gain on an exchange of shares or securities of a US corporation for shares of a foreign corporation unless the transaction resulted in a single more than 50% US shareholder of the foreign corporation or the exchanging US person was a 5% shareholder of the foreign corporation who failed to enter into a gain recognition agreement.[6] As a consequence it had no practical application to the acquisition of a widely-held US corporation by a foreign corporation.

Regs. §1.367(a)-3(c) was adopted in its present form in the wake of the Helen of Troy expatriation.[7] Under Regs. §1.367(a)-3(c), all US persons recognize gain on a

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6 Notice 87-85, 1987-2 C.B. 395 (Dec. 16, 1987).

7 T.D. 8702, 61 FR 68633 (December 30, 1996). The regulations were preceded by Notice 94-46, 1994-1 C.B. 356, and by temporary and proposed regulations. *See* NYSBA Tax Section, Report on Notice 94-46, Relating to Certain Outbound Stock Transfers (October 18, 1994).

transfer of shares or securities of a US corporation to a foreign corporation unless (a) the US shareholders do not acquire in the transaction more than 50% in voting power or value of the foreign corporation, (b) the foreign corporation satisfies a three-year active trade or business test, one part of which requires that on the effective date of the acquisition it be at least as large in market capitalization as the US corporation (reducing the value of the foreign corporation for this purpose by assets acquired within 36 months prior to the acquisition outside of the ordinary course that produce passive income or were acquired to satisfy the just-as-large test) and (c) there is no US "control" group.[8] Extensive rules are provided with respect to the valuation of the foreign corporation for purposes of the active trade or business test ((b) above), other aspects of the trade or business test, options, "vestigial" interests in the US corporation, the presumed ownership of the US corporation by US persons and other matters.[9]

While the not-more-than-50%-of-the-stock requirement generally cannot be waived, the IRS may grant relief by a private letter ruling if a proposed acquisition does

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[8] More specifically, US persons that are either officers or directors of the US corporation or 5% or greater shareholders do not own more than 50% in voting power or value of the foreign corporation, whether or not such shares were acquired in the transaction.

[9] Reporting requirements set out in Regs. §1.367(a)-3(c)(6) must also be satisfied in order to avoid the recognition of gain.

not fully satisfy the active trade or business requirement but there is "substantial compliance" with that requirement.[10] A number of private rulings have found substantial compliance.[11]

The principal relevance of Regs. §1.367(a)-3(c) has been its impact on cross-border acquisitions into the United States. Regs. §1.367(a)-3(c) has not worked to prevent corporate expatriations,[12] and Congress ultimately addressed the phenomenon in the American Jobs Creation Act of 2004. Under Section 7874 of the Code, added by the Act, the "inversion gain" realized by an expatriated entity during the ten-year "applicable period" is subject to US tax without offsets. Under Section 4945 of the Code, also added by the Act, certain stock-based compensation of disqualified individuals is subject to a 15% excise tax if the expatriation transaction is taxable to the corporation's shareholders.[13]

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[10] Regs. §1.367(a)-3(c)(9)(i). A ruling may also be issued where the failure to satisfy the not-more-than-50%-of-the-stock test results from constructive ownership. Regs. §1.367(a)-3(c)(9)(ii).

[11] *See, e.g.*, PLR 9849014 (September 4, 1998); and PLR 199929039 (April 12, 1999).

[12] *See* NYSBA Tax Section Report on Inversion Transactions.

[13] Section 4985(c).

While Regs. §1.367(a)-3(c) provided part of the background to the Congressional enactment of Section 7874, the legislative history does not restrict the IRS's ability to change the regulations or indeed to abandon the fundamental concepts of those regulations.[14] In evaluating changes to Regs. §1.367(a)-3(c) that might be made in light of the enactment of Section 7874, however, it is important to take into account a number of changes that were not made. For example, while the interest deduction provided much of the impetus for inversion transactions, Congress did not address changes in the earnings stripping rules.[15] Nor have adequate rules been developed with respect to transfers of intellectual property.

Recommendations

We make three alternative recommendations with respect to Regs. §1.367(a)-3(c).

1. <u>Should Regs. §1.367(a)-3(c) be continued?</u>

First, Regs. §1.367(a)-3(c) did not directly address the principal "abuse" involved in corporate expatriations, which is the potential erosion of the

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[14] Section 7874 in effect overrides Regs. §1.367(a)-3(c) in part in so far as it treats "inverted" corporations as domestic if 80% or more by vote or value is owned by the shareholders of the US corporation.

[15] Earnings stripping changes have been proposed by the Administration. *See* Department of Treasury, <u>General Explanation of the Administration's Fiscal 2006 Revenue Proposals</u> (February 2005).

corporate tax base,[16] but rather was an effort to penalize, and thus deter, such transactions by requiring US shareholders to recognize gain. If a foreign corporation acquires the shares of a US corporation in exchange for its shares, the assets of the US corporation remain subject to US taxing jurisdiction and, in theory at least, any transfer of its assets to a foreign corporation would be taxable, under Section 367(a) or general principles, any license or other transaction with related persons would be subject to Section 482 and, if paid by a domestic subsidiary of the foreign corporation, any interest would be subject to the earnings stripping rules in Section 163(j). All of these rules have been the subject of on-going Congressional study and consideration in the last ten years.[17]

We see no conceptual reason why the Section 351 and the reorganization provisions of the Code should not apply in the same way to US shareholders and security holders of a US corporation whether they exchange shares or securities for shares or securities of another US corporation or for shares or securities of a foreign corporation. Shareholder taxation should in general not be a surrogate for taxing the corporation. In any event, Regs. §1.367(a)-3(c) did not work to accomplish its goal.

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[16] *See* NYSBA Tax Section Report on Inversion Transactions.

[17] Modifications of the earnings stripping rules are contemplated by the Administration's Fiscal Year 2006 Revenue Proposals.

Expatriations, although fully taxable to the US shareholders, continued.[18]

As a consequence, we recommend that serious consideration be given by the IRS and Treasury to the question of whether Regs. §1.367(a)-3(c) should be eliminated. The Committee is divided, however, on the question of whether such elimination should preclude further Congressional action on corporation inversions. In general, the Executive Committee does not believe Sections 7874 and 4985 were a sufficient response to the issues raised by expatriation transactions. We continue to recommend, as we did in 2002, that Congress seriously consider additional steps to address corporate expatriations, such as tightening the earnings stripping and reforming the transfer pricing rules.[19] Likewise, in evaluating what might be done with Regs. §1.367(a)-3(c) after the enactment of Section 7874, Treasury and the IRS should take into account that Congress did not tighten the earnings stripping rules, although interest deductions provided much of the impetus for inversion transactions; nor have adequate rules been developed with respect to transfers of intellectual property.

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[18] *See* NYSBA Tax Section Report on Inversion Transactions ("… the premise that … shareholder-level taxation of built in gains pursuant to Section 367(a) would serve as an effective deterrent against outbound inversions … [is belied by] [t]he boom of completed and announced outbound inversions in recent months").

[19] *See* NYSBA Tax Section Report on Inversion Transactions.

5% and 50% single shareholders. We considered whether, if Regs. §1.367(a)-3(c) were eliminated, it would continue to make sense to provide for gain recognition by a 5% or greater US shareholder that did not enter into a gain recognition agreement or to go back to the rules announced in Notice 87-85 and the August 1991 proposed regulations[20] and also provide for gain recognition if a single US shareholder owned more than 50% in voting power or value of the foreign corporation after the transfer. Those rules were justified by the concern that, in their absence, gain would not be recognized by significant US shareholders who transferred shares of a US corporation to a foreign corporation in anticipation of the sale of the transferred shares by the foreign corporation.[21] It can be argued that these rules no longer make sense since they go beyond what Congress defined as an "abusive" expatriation in Section 7874; and, in any event, that the enactment of Section 7874, which taxes a surrogate foreign corporation on its "inversion gain", substantially reduces the size of the target at which the rules were directed.

In addition, we question whether the ownership of as little as 5% of the stock of the foreign corporation is sufficient to assume that a tax avoidance motive is present

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[20] Notice of Proposed Rulemaking, INTL-5491, INTL 178-86, 1991-2 C.B. 1070.

[21] *See* NYSBA Tax Section, Report on Notice 94-46, Relating to Certain Outbound Stock Transfers (October 18, 1994).

and to condition the non-recognition of gain by such a 5% shareholder on a gain recognition agreement.

2. <u>If continued, should Regs. §1.367(a)-3(c) be conformed to Section 7874?</u>

Second, if the IRS and Treasury decide to continue Regs. §1.367(a)-3(c), we would recommend that serious consideration be given to conforming Regs. §1.367(a)-3(c) to Section 7874, in whole or in part, in order to reduce the significant complexity that would otherwise result. Conformity would have to be consistent with the purposes underlying the Regulations and Section 7874. This would include consideration of the circumstances in which the IRS and Treasury might impose shareholder-level gain recognition that was not required by Congress under Section 7874 -- for example, the IRS and Treasury should consider whether gain recognition may be appropriate under Regs. §1.367(a)-3(c) for a transaction that is described in Section 7874 (other than Section 7874(b)). We thus recognize that there may be some areas -- specifically, the different trade or business tests of Section 7874 and Regs. §1.367(a)-3(c) -- in which conformity may have to yield to policy concerns about facilitating inversions.

The basis for this change would be the conclusion that, since Regs. §1.367(a)-3(c) was directed at corporate expatriations, it should be conformed to what Congress has defined as an “abusive” corporate expatriation. The IRS and Treasury might also decide that nonrecognition of gain by a 5% or greater US shareholder should no longer be

conditioned upon the filing of a gain recognition agreement.[22]

If the IRS and Treasury decide that complete conformity is appropriate, this would mean that (a) the threshold for recognition of gain would be the acquisition of 60% in vote or value, not more than 50%; (b) the threshold was measured by looking at all shareholders of the US corporation, not just shareholders who are US persons; (c) there was no US "control group" test; (d) except for the "substantial business activities" test, there was no active trade or business test (and no just-as-large-on-the-closing-date rule); and (e) there would be no recognition of gain unless the foreign corporation did not through its expanded affiliated group have substantial business operations in the country of its organization.

In addition to conforming the regulations to the premise of Section 7874, conformity would have the great merit of simplicity -- that is, instead of overlapping but different tests under Regs. §1.367(a)-3(c) and Section 7874, there would be a single test.

For example, suppose a foreign corporation acquires a US corporation for shares of its stock. Absent a change in Regs. §1.367(a)-3(c) that conforms those regulations to Section 7874, the transactions will be subject to two sets of rules with different ownership thresholds (more than 50% as opposed to 60% or more)

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[22] Or upon the absence of a more than 50% US shareholder in the foreign corporation.

focused on different groups of shareholders (US persons who receive stock of the foreign acquirer as opposed to all shareholders of the US target), different trade or business tests (foreign acquiring corporation must have a three-year active business as opposed to foreign acquiring corporation must acquire substantially all the assets of the target and have substantial business activities in the country of incorporation), different testing periods,[23] and possibly different rules with respect to options and other matters.

If the triggers on gain recognition by US shareholders in Regs. §1.367(a)-3(c) were completely conformed to the rules of Section 7874, there would be no shareholder recognition of gain unless the foreign corporation had no substantial business operations in its country of incorporation. As a consequence, the recommended rule would as a practical matter mean that §1.367(a)-3(c) would no longer be relevant to most cross-border acquisitions into the US. This was an option that was considered and rejected by the IRS when Regs. §1.367(a)-3(c) was adopted in 1996.[24]

There is a difference of views in the Executive Committee as to whether Regs. §1.367(a)-3(c), if retained, should be fully conformed to Section 7874 at this time or whether, because that might facilitate inversions, that

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[23] Section 7874(c)(3) contemplates that the acquisition of assets may occur over a four-year period.

[24] *See* Notice 94-46's mention of the possible exclusion for cross-border acquisitions.

should wait on further Congressional action with respect to inversions.[25]

3. Technical changes to Regs. §1.367(a)-3(c).

Third, if the foregoing recommendations are not accepted, we would recommend that consideration be given to the following changes to Regs. §1.367(a)-3(c). Some of these may also be relevant to issues that the IRS will have to address under Section 7474.

(a) The presumption that all shareholders of a US corporation are US persons unless this is rebutted by signed statements of ownership is in practice irrebutable in the case of a publicly-traded corporation because the statements must be signed at the effective time.[26] Other parts of the Section 367 regulations are much more forgiving, permitting the taxpayer to "rely … on and provide … a reasonable analysis of shareholder records and other relevant information that demonstrates" the identity of its shareholders.[27]

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[25] As noted, in our report on inversions we recommended that there be a serious reevaluation of the earnings stripping rules and also transfer pricing reform. NYSBA Tax Section Report on Inversions. *See also* NYSBA Tax Section, Report on Certain Legislative Proposals Relating to Section 163(j) Earnings Stripping Rules (September 12, 2003).

[26] *See* Regs. §§1.367(a)-3(c)(2) and (7).

[27] Regs. §367(e)-1(d)(3)(ii), relating to the rules for determining the US ownership of the distributing corporation under Section 355. *See also* Regs. §1.367(e)-1(b)(5).

(b) Is it appropriate to include cash paid by the foreign corporation to the shareholders of the US corporation in the calculation of the value of the foreign corporation? If the value of the US corporation can be reduced by anticipatory dividends and share buybacks, why should the answer under Section 367(a) differ if the cash is provided by the foreign corporation? Put differently, would it be more appropriate to compare the value of the equity of the US corporation to be acquired with stock with the value of the equity of the foreign corporation?

(c) For purposes of the active business requirement of Regs. §1.367(a)-3(c)(3), the business of a "qualified" subsidiary or partnership is attributed to the foreign corporation, but the definition differs dramatically -- a corporation may be a qualified subsidiary only if owned to the extent of 80% or more in value and voting power by the foreign corporation, but a partnership will be qualified if there is a 25% or greater interest in capital or profits or if the foreign corporation has active and substantial management functions as a partner with respect to its business.[28] Particularly in a check-the-box world, this sharp distinction makes no sense. We would recommend that whatever look-through rule there is should be the same whether the foreign entity in which the foreign corporation has an interest is classified as a partnership or a corporation for US federal income tax purposes.

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[28] Regs. §1.367(a)-3(c)(5)(iv).

(d) The definition of a "qualified subsidiary" for purposes of the active trade or business test of Regs. §1.367(a)-3(c)(3) excludes a US subsidiary. Why is this? The active trade or business test looks only to a trade or business carried on outside the United States, but there seems to be no reason why such a trade or business, if carried on by a US subsidiary of the foreign corporation, should not be taken into account. Likewise, it might usefully be provided that in the appropriate circumstances the stock of a US subsidiary that meets the ownership test for treatment as a qualified subsidiary is a "good" asset for purposes of the substantiality test of Regs. §1.367(a)-3(c)(3)(iii)(B).

(e) The asset exclusions from the business of a foreign corporation are unclear. The Regulations[29] provide that non-ordinary course assets that produce passive income *or* are acquired to satisfy the substantiality test are excluded, but IRS private rulings apparently exclude assets only if both tests are met.[30] The Regulations should, at a minimum, be conformed to the private ruling practice. Going beyond that, we question whether non-passive assets, even if acquired with the purpose of growing the equity value of the foreign corporation, should in all cases be excluded from its value.

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[29] Regs. §1.367(a)-3(c)(3)(iii)(B)(i).

[30] *E.g.*, PLR 200203015 (November 26, 2001); PLR 200122026 (February 27, 2001); and PLR 200021046 (February 28, 2000).

(f) The reduction in the fair market value of the foreign corporation under Regs. §1.367(a)(3)(c)(iii)(B) for "bad" assets could be interpreted as applying the reduction entirely against the equity value of the foreign corporation -- so that, for example, if a foreign corporation with an equity value of $100X acquires "bad" assets of $100X, in whole or in part with borrowed funds, its value for purposes of the test is reduced to zero. Is this the correct answer? Or should the reduction reflect some portion of the corporation's liabilities?

(g) It should be clarified that assets acquired in an internal restructuring (for example, in the liquidation of a subsidiary owned for more than 36 months) will not be regarded as acquired within 36 months for the purposes of the "substantiality" test of Regs. 1.367(a)-3(c)(3)(iii).

(h) The treatment of options to acquire stock is uncertain in several respects.

(i) First, acquisitions typically accelerate exercisability of the target's compensatory options. In determining whether US transferors receive more than 50% of the stock of the transferee corporation, would it be appropriate to provide for some leeway in respect of shares of the acquiring corporation issued to optionees who, for example, receive such shares in exchange for the target stock they acquired as a result of exercising their options after the announcement of the transaction? An argument in favor of that change is that if the options were not exercised, but instead rolled over into the acquiring

corporation’s stock option plan, the option holder would presumably not be deemed to have received stock of the transferee corporation, even though the option holder eventually will receive such stock.

(ii) Second, how should unexercised options issued by the US corporation and the foreign corporation be treated in determining the fair market value of each company for purposes of the substantiality test? Is the “spread” a liability that reduces the values of the foreign and US corporations? Is it additional equity that increases the values? If ordinary options are treated as equity, should compensatory stock options be treated as liabilities, as the exercise of such options would give rise to a deduction?

(iii) Third, what are the circumstances in which an unexercised option may be deemed to be exercised? Regs. §1.367(a)-3(c)(4)(ii) provides that options will be deemed exercised if granted for a principal purpose of avoiding the tests of the regulations, but 3(c)(4)(iv) also provides that Section 318, including the option rule in Section 318(a)(4), applies for determining the ownership of stock. The regulations should clarify that Section 318(a)(4) does not apply in determining the amount of the transferee’s stock received by US transferors.

(i) The rules in Regs. §1.367(a)-3(c) operate in important cases only if a private ruling is obtained that there has been “substantial compliance” with the valuation or other requirements of the active trade or business test.

The need for a ruling could be reduced if relative values of the US and the foreign corporations were determined on the date that an agreement was reached between the corporations rather than on the effective date of the transaction,[31] but this would not resolve other issues that have been addressed by private rulings, such as the circumstances in which assets acquired by the foreign corporation in the 36-month period will be included in its value,[32] or even all of the date-of-measurement issues that have been raised in private rulings.[33]

The IRS has shown admirable flexibility in resolving valuation and active trade or business issues under Regs. §1.367(a)-3(c). However, we are in principle opposed to resolving such issues through a formalized private ruling process. The private ruling option provided by the Regulations has also led the IRS into the issuance of fact-based rulings and the development of unpublished ruling policies.[34] We believe that it would be better, if

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[31] In another context, the Service proposed a similar rule with respect to the measuring date to determine whether the continuity of shareholder interest requirement has been satisfied. *See* Prop. Reg. § 1.368-1(e).

[32] *E.g.*, PLR 200021046 (February 28, 2000); and PLR 9849014 (September 4, 1998).

[33] *E.g.,* PLR 200020018 (February 15, 2000).

[34] *E.g.*, PLR 200440009 (June 14, 2004)(circumstances in which assets acquired within the 36 month period will be counted);

the relative value test is continued, to provide guidance in the Regulations on the relative value and other issues.

(j) Under Regs. §1.367(a)-3(a), Section 367(a) does not apply to an "asset reorganization" that is not an "indirect stock transfer" under Regs. §1.367(a)-3(d). If there is an indirect stock transfer, Section 367(a) does not apply "to the extent" that assets are transferred to a foreign corporation but does apply "to the extent" the assets are re-transferred to a US corporation.[35]

There is substantially no guidance on how the "to the extent" rule works. Suppose, for example, that the assets of a US corporation are transferred in a Section 368(a)(1)(C) reorganization to a foreign corporation, that the US shareholders acquire in the transaction more than 50% in voting power or value of the foreign corporation, and that the foreign corporation promptly transfers X% of the assets of the US corporation to a US subsidiary. How much gain is recognized by the shareholders? Is it a function of the value or tax basis of the re-transferred assets? Is the percentage, however derived, then multiplied times each shareholder's gain? There is no guidance on these questions in the present Regulations.

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[35] Regs. §1.367(a)-3(d)(2).