Wood LLP Tax Alert

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Buffett's 'Burger Tim' Inversion Adds Tax Bonus For Shareholders--Think Free Curly Fries

You have to hand it to Warren Buffett, the 83-year old billionaire who has largely managed to avoid flack for doing a deal that seems to contradict his “raise my taxes” mantra. Mr. Buffett is nothing if not savvy. Sure, Burger King is going Canadian, an ideal way for a company to reduce U.S. taxes on foreign income. Admittedly, there were outcries from customers and shareholders who want the classic burger to stay here. A Whopper on a donut bun?

But it appears that Mr. Buffett and Burger King may have struck a unique balance that hits a kind of sweet spot. The companies may not integrate, and besides, each investor seems to have been told ‘to have it your way.’ As noted in whopper reason shareholders should hate inversions, most inversions aren’t attractive to long-term shareholders who face a big tax hit. An inversion is a taxable swap to the IRS.

(Photo credit: Wikipedia)

Tax bills when you don't receive cash are especially painful. And that's where this deal is a kind of mashup, part inversion, part something else. The Burger King deal is quite unusual in bending over backwards to keep Burger King shareholders from getting the usual inversion tax hit. But can everyone have it their way?

One of Burger King's main owners is Brazilian private-equity firm 3G Capital Management. Mr. Buffett seems to like working with them, as he did when it bought H.J. Heinz Co. The Burger King deal appears not to have been born as an inversion, but it morphed into one and that altered the tax treatment for American shareholders including Berkshire-Hathaway.

Yet Burger King shareholders, including 3G Capital, will not automatically owe taxes on their capital gains if they play their cards right. In most inversions, shareholders are treated as selling their shares so will owe U.S. taxes, even if they don't actually cash out. Say you bought stock for $10 that is now worth $110. You swap your old shares for shares worth $110. Sounds OK, but not if you receive no cash and receive a tax bill from the IRS for 23.8% on your paper gain.

But this inversion with bonus fries let's shareholders choose to receive either common stock in the combined company or units in a newly formed Ontario limited partnership, or a combination of the two. As [Warren Buffett funds global donut-burger behemoth](), it's not clear if there are enough units to cover everyone.

It does appear that choosing partnership units should let shareholders defer taxes on their paper gains until they sell the units or convert them into common stock. They are supposed to be able to do that a year after the deal closes. It also looks as though hanging on to the units until death could eliminate the tax entirely. But if everyone wants the partnership units, I'm not sure what happens. Still, you have to hand it to BK for creative ways to avoid the U.S. anti-inversion penalty.

3G Capital is presumably in the driver's seat, and it apparently intends to take all partnership units for its stake. That stake is huge, worth over $7.5 billion. And since the value has more than doubled in the last two years, those billions in gains would otherwise be taxed. It makes you wonder whether the deal got its unusual tax structure to benefit 3G Capital or the little guy.

Rhetorical question? In any case, it may be academic. As long as the little guy gets to take the same deal. Cleverly, the election is flexible. It seems to contemplate that investors could sell or convert the units at a later time. But reports suggest that if 3G wants all partnership units and other shareholders do to, there may not be enough to go around.

All of this could mean that some or all shareholders won't have a tax-free deal no matter how hard they try. Have it your way? Everyone may not get those free curly fries after all. Oh, sorry, turns out Burger King eliminated curly fries from its menu.

Contact me at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.

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