ALI-ABA Course of Study: Corporate Taxation

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The first of April each year prompts people to be a touch wary. With current economic news, there is even more caution afoot, almost as if every day merits the wariness of April Fool's Day. For me, the beginning of April carried different kinds of risks, as I spent two days attending ALI-ABA's Corporate Taxation seminar *via* Web cast.

The speakers brought a wealth of experience, with presentations ranging from deferred compensation to ethics and professional responsibility. Just two days of participating in this informative seminar's discussions over complex issues was enough to make me all the more wary and careful. This is not a beginner's course.

Cross-Border Considerations

Considering the numerous reminders that the IRS is focusing more on international issues, the presentation that explored cross-border considerations was of particular interest. These issues were discussed by Timothy Anson, Daniel McCall, John Merrick and Jose Murillo and promise to be of growing importance. In addition to aptly fielding questions from the audience, the speakers walked through a helpful PowerPoint presentation.

The first topic discussed focused on Code Sec. 956 loans involving a U.S. parent company and its associated controlled foreign corporations (CFCs). Discussions centered on planning techniques to avoid the pitfalls of failing to qualify under Notice 88-108 (1988-2 CB 445), Notice 2008-91 (IRB 2008-43, 1001) and Notice 2009-10 (IRB 2009-5, 419), with the audience supplying many questions.

The presenters highlighted planning techniques. For example, they discussed the situation of a U.S. parent company that owns CFCs. The U.S. company may be in danger of having to report substantial amounts of income from loan proceeds granted to it from the CFCs. One notable planning technique given was to stagger loans made from CFCs to a U.S. parent company, and to limit the loan period to the statutorily permitted length of 60 days to prevent an unwanted recognition of income.

The presenters discussed other traps and pitfalls to circumnavigate, many involving acquisitions of foreign corporations. For example, one situation involved the acquisition of one CFC by another CFC. The acquired CFC makes a distribution to its new owner, who in turn makes a distribution in the same amount to its owner, a U.S. corporation, who wants to treat the distribution as previously taxed income.

That may seem perfectly logical, but there's one slight problem. Unfortunately, Code Sec. 959(e) does not include a cross-reference to Code Sec. 964(e). That may cause the transaction to incur double taxation on the acquired CFC's profits.

The panelists then considered international issues regarding basis recovery. Finally, as the hour-and-a-half session came to a close, the presenters discussed the effects of new regulations on gain recognition agreements. The discussion started with an overview of Code Sec. 367(a), and moved into an exploration of these complicated new regulations. Again, helpful diagrams were provided *via* PowerPoint, making it considerably easier to visualize the corporate structures discussed.

Deal Structures

The second day started off with Lewis R. Steinberg of UBS Securities LLC and Robert Willens of Robert Willens LLC outlining cutting-edge merger and acquisition techniques. One of the key aspects that made all of this embraceable was the fact that the speakers used real-world case studies.

The first such case study was the two-stage privatization transaction completed by the

Tribune Company. The transaction resulted in an Employee Stock Ownership Plan (ESOP) owning all outstanding Tribune shares. Sam Zell received rights to acquire up to a 40-percent interest in the Tribune Company.

The first stage consisted of Zell investing $250 million for $50 million of new Tribune shares and a promissory note exchangeable into $200 million of Tribune shares. Next, the ESOP purchased $250 million of new Tribune shares. To finish this first stage, the Tribune Company initiated a cash tender offer to repurchase 50 percent of its outstanding shares.

In the second stage, the ESOP formed a merger subsidiary that merged with and into the Tribune Company. All outstanding shares not held by the ESOP were automatically redeemed. Zell's initial $250 million investment was then redeemed and replaced with a new $315 million investment.

After the merger, the Tribune Company elected to become an S corporation and now passes its taxable income/losses up to the ESOP. The ESOP is its only shareholder and is also a tax-exempt entity. The Tribune's status as an S corporation wholly owned by an ESOP is a particularly tax-efficient structure.

Its operations are not taxed at the corporate level under Subchapter S. Items of income and loss pass through to the ESOP, but are not taxed because the ESOP is exempt from taxation. Of course, participants in the ESOP will ultimately be taxed when they receive distributions from the ESOP.

This transaction was carefully structured to avoid the application of Code Sec. 409(p), which treats an ESOP owning an S corporation as currently distributing to certain "disqualified persons" amounts accruing from the S corporation. Additionally, an excise tax is imposed on the deemed distribution. Zell managed to avoid the application of Code Sec. 409(p) by (1) not being a participant in the Tribune ESOP; (2) not owning any Tribune shares; and (3) limiting his warrant to a 40-percent potential interest in Tribune.

The presentation covered a number of other case studies, and each one was fascinating:

- The Tribune Company & Cablevision Systems, Corp.'s leveraged partnership on Newsday Inc.
- MetLife, Inc.'s tax-free split-off of Reinsurance Group of America to its shareholders
- Focus Media Holding, Ltd.'s asset sale and stock distribution

These case studies brought real-world perspective and timeliness to a discussion of current deal structures and tax effects. The two-day seminar provided 12 hours of continuing legal education instruction. Enlightening and engaging, it covered quite a wide range of topics. If you want an advanced and sophisticated course on corporate taxation, this ALI-ABA conference fits the bill. To purchase an online version of this course or for information about other ALI-ABA courses and live events, go to *www.ali-aba.org* or call (800) 253-6397.