PLI on Federal Tax Aspects of M&A

By Alex Wu • Wood LLP

Seasoned M&A lawyers know to "get the tax folks involved early," and most usually do. But neglecting to involve tax advisors early *enough* seems to happen all too frequently. Reiterating this advice was one of the takeaway points of a recent PLI presentation on Federal Tax Aspects of Mergers & Acquisitions.

The presentation was part of a broader set of presentations entitled *Advanced Trends and Developments in Mergers & Acquisitions*. The tax presentation was meant for an audience of general legal practitioners, even though it focused solely on tax issues. After all, the more a generalist M&A lawyer knows about lurking tax issues, the more likely he or she will consult a tax lawyer early in the negotiations.

A 75-minute presentation can only explain so much. As with many so-called basic or introductory presentations about tax, nontax persons may come away with their heads

spinning. The presentation covered taxable stock purchases, taxable asset purchases, stock purchases with a section 338(h)(10) election, tax-free reorganizations and inversions and other cross-border considerations.

One of the simplest transaction structures is a stock purchase for cash. The transaction is taxable to the selling shareholders because the purchaser is paying cash. A little more complex, but economically equivalent to a stock purchase, is a taxable reverse subsidiary merger.

Formally involving the merger of a subsidiary of the purchaser into the target corporation (with the target corporation surviving), the reverse subsidiary merger results in the purchasing corporation owning all of the target's stock. Notably, this is the same result as having the purchaser buy the stock of the target. Thus, a reverse subsidiary merger with cash consideration is treated as a taxable stock purchase for tax purposes.

A corporation can also purchase the assets of a target corporation. This triggers gain or loss within the target corporation. Significantly, however, if the selling shareholders want a share of these proceeds, there is generally another layer of tax on any distribution. For that reason and for other reasons, such as the typical messiness of asset purchases, a pure asset purchase is less common.

Next up is a cash forward merger. This one is economically equivalent to an asset purchase. The target merges directly into the purchasing corporation. The result is that the purchaser owns the target's assets directly, just as it would in a direct asset purchase.

Thus, a cash forward merger is taxed the same way as an asset purchase. And from there, the rules and variations on corporate mergers and acquisitions just get more and more complicated. But even with the simplest transactions, there are significant tax consequences.

Taxes may not drive the deal, but the structure of the deal almost invariably has one or more significant tax impacts. Any M&A practitioner would indeed be wise to consult the tax specialist—and to do it early. For details of PLI's program, see *www.pli.com*.

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