KPMG REPORT: INITIAL IMPRESSIONS OF NOTICE 2015-79 ON INVERSIONS

Notice 2015-79—released November 19, 2015, by the Treasury Department and IRS—announces their intention to issue regulations relating to inversion transactions and post-inversion restructuring transactions.

20 November 2015

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Notice 2015-79 provides for rules that:

- Limit the ability of domestic companies to effect an inversion
- Limit the advantages of certain post-inversion restructuring transactions
- Clarify certain aspects of previously issued anti-inversion guidance in Notice 2014-52 (the "2014 Notice")

Of significant importance, Notice 2015-79 does not include earnings stripping guidance, but does provide that Treasury and the IRS are still considering such guidance and other anti-inversion guidance.

The following discussion provides initial impressions of Notice 2015-79 [PDF 85 KB].

BACKGROUND

Section 7874 applies to a foreign corporation's (such foreign corporation, "Foreign Acquiring") direct or indirect acquisition of substantially all of the properties directly or indirectly held by a domestic corporation ("Domestic Target") if:

- Immediately after the acquisition, the former Domestic Target shareholders have a certain level of continued ownership (by vote or value) in Foreign Acquiring by reason of owning Domestic Target (the "Ownership Test" and such percentage, the "Ownership Percentage"), and
- Foreign Acquiring's expanded affiliated group ("EAG") does not have substantial business activities in Foreign Acquiring's country of organization or creation as compared to the EAG's worldwide business activities (the "Substantial Business Activities Test").

Similar rules apply to Foreign Acquiring's acquisition of substantially all the properties of a trade or business of a domestic partnership.

If the Ownership Percentage is at least 80%, section 7874 treats Foreign Acquiring as a domestic corporation for all purposes of the Internal Revenue Code—i.e., section 7874 essentially prevents an inversion from occurring for U.S. tax purposes. If, however, the Ownership Percentage is at least 60% but less than 80%, Foreign Acquiring is respected as a foreign corporation for U.S. tax purposes, but Domestic Target and certain related U.S. person are treated as "expatriated entities" and, thus, generally limited in using losses and other U.S. tax attributes with respect to income or gain recognized on certain property transfers and licenses during the inversion and the following 10 years (such income or gain, the "Inversion Gain").

NOTICE 2015-79: MODIFICATION OF "SUBSTANTIAL BUSINESS ACTIVITIES TEST"

Currently, the determination of whether the Substantial Business

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Activities Test is satisfied is made by reference to the level of business activities that Foreign Acquiring's EAG has in Foreign Acquiring's country of creation or organization without regard to whether Foreign Acquiring is a tax resident in such country. Under U.S. law, a corporation's tax residency is generally determined by reference to its country of creation or organization. Many foreign jurisdictions, however, determine tax residency using another criteria—e.g., where a corporation is managed or controlled. Thus, Foreign Acquiring may not be a tax resident in the foreign country where the Substantial Business Activities Test is applied.

Notice 2015-79 provides that Treasury and the IRS determined it was contrary to the policy of section 7874 for the Substantial Business Activities Test to be satisfied where Foreign Acquiring is not subject to tax as a resident in the country in which it is created or organized.

This rule applies to inversion transactions completed on or after November 19, 2015.

KPMG OBSERVATION

This provision effectively prevents the Substantial Business Activities Test from being satisfied when Foreign Acquiring is not otherwise a tax resident for local country purposes because, for example, Foreign Acquiring is managed or controlled in another jurisdiction or a hybrid entity that is treated as a flow-through for local country purposes, but as a corporation for U.S. tax purposes. This provision is interesting for two reasons: (1) it places importance on Foreign Acquiring's tax nexus with its country of organization or incorporation; and (2) it disregards the fact that the business activities of Foreign Acquiring's EAG may actually be subject to local country tax. Accordingly, this provision would prevent Foreign Acquiring and its EAG from satisfying the Substantial Business Activities Test when Domestic Target inverted to a foreign jurisdiction but kept its management and control in the United States when the foreign jurisdiction uses a management and control standard for tax residency.

NOTICE 2015-79 MODIFIES APPLICATION OF "OWNERSHIP TEST" WHEN INVERTING TO A THIRD JURISDICTION

Currently, when an inversion is effected through Foreign Acquiring's acquisition of Domestic Target and the stock or property of another foreign corporation (a "Foreign Target"), the Foreign Acquiring stock owned by the former Foreign Target shareholders by reason of owning their Foreign Target stock is generally taken into account for purposes of the Ownership Test (i.e., it reduces the Ownership Percentage). This is the case irrespective of whether Foreign Target and Foreign Acquiring are tax residents of the same foreign country.

Notice 2015-79 provides that inversions in which Foreign Acquiring is a tax resident of a different country than Foreign Target are generally driven by tax planning, not non-tax business purposes (e.g., Foreign Acquiring's jurisdiction has a more favorable income tax treaty with the United States or local tax regime with respect to outbound investment). Notice 2015-79, therefore, concludes that these transactions are against the policy of the Ownership Test's 80% threshold.

Notice 2015-79 announces that regulations will be issued that will disregard, for purposes of the Ownership Test, certain Foreign Acquiring stock received by former Foreign Target's shareholders in a

transaction related to the inversion if the below requirements are satisfied.

1. Foreign Acquiring directly or indirectly acquires substantially all of the properties directly or indirectly held by Foreign Target (a “Foreign Target Acquisition”). This determination will be made using standards similar to those that currently apply in determining whether Foreign Acquiring has directly or indirectly acquired substantially all of the properties directly or indirectly held by Domestic Target. Subject to certain exceptions, a Foreign Target Acquisition will not also result in a Foreign Target Acquisition of Foreign Target’s foreign subsidiaries—e.g., when Foreign Target directly owns stock in a foreign subsidiary.
2. The gross value of all property directly or indirectly acquired by Foreign Acquiring in the Foreign Target Acquisition exceeds 60% of the gross value of all “foreign group property” other than “foreign group nonqualified property” as determined under the 2014 Notice, as modified by Notice 2015-79. Accordingly, the relevant property for these purposes generally is the Foreign Acquiring’s pre-inversion property other than certain passive assets and property acquired by Foreign Acquiring for purposes of avoiding the application of section 7874 to the inversion.
3. Foreign Acquiring is a tax resident of a different country than Foreign Target, as determined before the Foreign Target Acquisition and any related transaction (including a relocation of Foreign Target’s management or control).
4. The Ownership Percentage would otherwise be at least 60% (but less than 80%).

If all four requirements are met, the regulations will provide that Foreign Acquiring stock will be excluded from the Ownership Test—i.e., increasing the Ownership Percentage—to the extent the stock is held by former Foreign Target shareholders by reason of holding their Foreign Target stock. These regulations will be based on the principles of the current rules for determining when the former Domestic Target shareholders receive Foreign Acquiring stock by reason of their Domestic Target stock.

If Foreign Acquiring completes a Foreign Target Acquisition of more than one Foreign Target that were tax residents in the same foreign country, then all such Foreign Targets will be treated as a single entity for purposes of applying this rule. Additionally, this rule will treat Foreign Target’s change in tax residence as a “transaction” and, thus, prevent Foreign Target from changing its tax residence to that of Foreign Acquiring in contemplation of the inversion.

This rule applies to inversion transactions completed on or after November 19, 2015.

KPMG OBSERVATION

Inversions frequently include the formation of a new parent company that is located in a jurisdiction other than the foreign combination partner. This rule does not completely prevent the use of a new parent company, provided the new foreign parent company is a tax resident of the same country as Foreign Target.

Notice 2015-79 is not entirely clear regarding how this rule will apply to an inversion that includes an existing foreign parent corporation’s transfer of foreign subsidiary stock to Foreign Acquiring in connection with an inversion, when such foreign subsidiary stock only represents a portion of the foreign parent corporation’s assets. Additionally, Notice 2015-79 is not entirely clear regarding how the “foreign group property” requirement applies to an inversion that includes multiple Foreign Target Acquisitions when some, but not all, of the Foreign Targets are tax residents of the same country as Foreign Acquiring. Presumably these ambiguities will be resolved in the forthcoming regulations.

NOTICE 2015-79 CLARIFIES "AVOIDANCE PROPERTY"

UNDER REG. SECTION 1.7874-4T

Current Reg. section 1.7874-4T provides that Foreign Acquiring stock received in exchange for “nonqualified property” is disregarded from the Ownership Test—i.e., is not included in computing the Ownership Percentage. Nonqualified property is generally defined to include several types of passive assets—e.g., cash and marketable securities—and any property acquired in a transaction related to the inversion with a principal purpose of avoiding the purposes of section 7874 (“Avoidance Property”). Additionally, under section 7874(c)(4) a transfer of properties or liabilities (including by contribution and distribution) that is part of a plan the principal purpose of which is to avoid the purposes of section 7874 is disregarded.

Notice 2015-79 provides that Avoidance Property can be any type of property and is not limited to property used to indirectly transfer the specified passive assets treated as nonqualified property to Foreign Acquiring. Notice 2015-79, to this end, includes an example when Foreign Acquiring acquires business assets in exchange for stock in a transaction related to the inversion with a principal purpose of avoiding the purposes of section 7874. The example concludes that the business assets are nonqualified property and, thus, the Foreign Acquiring stock issued in exchange for the business assets is disregarded under Reg. section 1.7874-4T for purposes of the Ownership Test.

This rule applies to inversion transactions completed on or after November 19, 2015.

KPMG OBSERVATION

This provision of Notice 2015-79 is intended to clarify the application of Reg. section 1.7874-4T and, in particular, how some taxpayers were determining whether property transferred to Foreign Acquiring was Avoidance Property. Section 7874(c)(4), as noted above, provides that a transfer of properties or liabilities is disregarded if the transfer is part of a plan that has a principal purpose to avoid the purposes of section 7874. Accordingly, it appears that section 7874(c)(4) could have applied to disregard the contribution of Avoidance Property to Foreign Acquiring irrespective of whether such property was considered nonqualified property for purposes of Reg. section 1.7874-4T.

NOTICE 2015-79 EXPANDS DEFINITION OF "INVERSION GAIN"

If the Ownership Percentage is at least 60% but less than 80%, expatriated entities—i.e., Domestic Target and certain related U.S. persons—are limited in their ability to reduce the U.S. tax imposed on Inversion Gain. Inversion Gain is generally defined as the income or gain recognized by reason of (1) a transfer or license of property by an expatriated entity as part of the inversion; or (2) a transfer or license of property (other than inventory) by an expatriated entity to certain related foreign persons during the 10 years following the inversion (such period, generally, the “Applicable Period”). The Inversion Gain rule is limited to gain or income recognized as a result of a property transfer or license directly by an expatriated entity.

Notice 2015-79 expands the definition of Inversion Gain to include income or gain recognized with respect to certain indirect property transfers or licenses that are analogous to the current definition of Inversion Gain. Notice 2015-79 provides an example of this rule that treats as Inversion Gain, Subpart F income recognized by Domestic Target as a result of a property transfer by its controlled foreign corporation (a “CFC”) to a related foreign person during the Applicable Period. The notice also provides that, for purposes of determining Inversion Gain, a transfer or license of property by a partnership that is a foreign related person is treated as a transfer or license by a partner in the partnership of its proportionate share of the property, determined under the rules and principles of Subchapter K.

This rule applies to transfers or licenses of property occurring on or after November 19, 2015, but only if the inversion transaction was completed on or after September 22, 2014.

KPMG OBSERVATION

It is not entirely clear whether these provisions will apply to an indirect transfer or license of property that does not produce Subpart F income, but the earnings of which are eventually repatriated to an expatriated entity in the form of a dividend. If this is the case, the earnings would be considered U.S. source income for foreign tax credit purposes.

NOTICE 2015-79 REQUIRES FULL GAIN RECOGNITION IN CERTAIN CFC DILUTION TRANSACTIONS

The section 367(b) regulations generally provide that if section 1248 is not preserved after the transfer of a foreign corporation's stock or assets in an acquisitive nonrecognition transaction, the exchanging shareholder must include into income a deemed dividend equal to the target foreign corporation's section 1248 amount. The section 1248 amount is generally equal to the amount of gain that would be recharacterized as a dividend under section 1248 had the exchanging shareholder sold the stock.

The 2014 Notice announced that regulations will be issued that will modify the application this general rule to the transfer of an "expatriated foreign subsidiary"—i.e., a CFC of an expatriated entity— to a related foreign corporation during the Applicable Period after an inversion in which the Ownership Percentage is at least 60% but less than 80% (the "Exchange Rule"). In such case, the exchanging shareholder generally will be required to include into income a dividend equal to the expatriated foreign subsidiary's section 1248 amount irrespective of whether section 1248 is preserved. Additionally, the 2014 Notice announced rules under section 7701(l) that would effectively disregard certain transfers or issuances of expatriated foreign subsidiary stock (the "Dilution Rule") unless, among other things, the transaction resulted in a deemed dividend under section 367(b) (under the section 367(b) regulations or the Exchange Rule).

Notice 2015-79 provides that the Exchange Rule will be modified to not only require that the exchanging shareholder recognize a dividend equal to the expatriated foreign subsidiary's section 1248 amount, but also gain for any unrealized appreciation in the expatriated foreign subsidiary that exceeds its earnings. Conforming adjustments will be made to the exception in the Dilution Rule. Specifically, the exception to the Dilution Rule that applies when a deemed dividend occurs will be replaced by an exception that applies when all of the gain in the expatriated foreign subsidiary stock is recognized.

This rule applies to exchanges occurring on or after November 19, 2015, but only if the inversion transaction was completed on or after September 22, 2014.

KPMG OBSERVATION

The forthcoming regulations announced by the 2014 Notice and Notice 2015-79 will be promulgated under section 367(b). Historically, section 367(b) has primarily been concerned with preserving section 1248 in the context of nonrecognition transactions involving a target foreign corporation by requiring an exchanging shareholder to include its section 1248 amount with respect to such corporation as a deemed dividend. Notice 2015-79, therefore, extends the reach of section 367(b) to cover unrealized earnings that have not yet been generated. Section 367(b), however, applies irrespective of whether the target foreign corporation is directly or indirectly owned by a domestic corporation that has effected an inversion. Thus, Notice 2015-79 only extends section 367(b) beyond its primary historic policy objective to the transfer of stock or assets of a particular subset of CFCs.

NOTICE 2015-79 MODIFIES DEFINITION OF FOREIGN GROUP NONQUALIFIED PROPERTY IN 2014 NOTICE

The 2014 Notice provides rules that disregard a portion of Foreign Acquiring's stock for purposes of the Ownership Test—i.e., the Ownership Percentage is increased—if Foreign Acquiring has excessive passive assets referred to in the 2014 Notice as "foreign group nonqualified property." The 2014 Notice specifically excludes from the definition of foreign group nonqualified property certain property that gives rise to income described in section 1297(b)(2)(A), section 954(h), and section 954(i), which relate to income derived in the active conduct of a banking business, "qualified banking or financing income," and "qualified insurance income," respectively.

Additionally, the 2014 Notice includes in the definition of foreign group nonqualified property, any property that would not otherwise be foreign group nonqualified property if, in a transaction related to the inversion, such property is acquired in exchange for property that would be foreign group nonqualified property (the "Substitution Rule").

Notice 2015-79 modifies the application of the 2014 Notice's foreign group nonqualified property rules to exclude certain property used in an active insurance business. Specifically, foreign group nonqualified property will not include: (1) property that gives rise to income described in section 1297(b)(2)(B) (relating to the active conduct of an insurance business); and (2) property held by a domestic corporation that is taxable as an insurance company under Subchapter L, provided the property is required to support, or is substantially related to, the active conduct of an insurance business from the definition of foreign group nonqualified property. The Substitution Rule, however, will apply to this property.

Notice 2015-79 also excludes property held by a domestic corporation from the definition of foreign group nonqualified property if such property gives rise to income described in section 954(h) ("qualified banking or financing income") with conforming changes to reflect the fact that section 954(h) will be applied to a domestic corporation and not a CFC. The Substitution Rule, however, will apply to this property.

This rule applies to inversion transactions completed on or after November 19, 2015, but taxpayers may choose to apply the provision to periods preceding November 19, 2015.

KPMG OBSERVATION

Notice 2015-79's exclusion from foreign group nonqualified property for property used in an active insurance businesses responds to comments that the 2014 Notice's exclusions for insurance companies were too narrow and that certain insurance companies may not be able to meet the tests required in section 954(i). Notice 2015-79, however, highlights that Treasury and the IRS have concerns regarding taxpayers claiming the exception to foreign group nonqualified property but not conducting a bona fide insurance business or having assets in excess of the amount necessary to meet their obligations under insurance or annuity contracts. The notice refers to Prop. Reg. section 1.1297-4, published on April 24, 2015, addressing when a foreign insurance company's income is excluded from the exception in section 1297(b)(2)(B). Treasury and the IRS intend to issue additional guidance under section 1297(b)(2)(B) to prevent companies from inappropriately applying the exception.

NOTICE 2015-79 ADDS DE MINIMIS EXCEPTION TO NOCD RULE OF THE 2014 NOTICE

The 2014 Notice provided rules that would disregard so-called "nonordinary course distributions" made by a Domestic Target during the 36-month period ending on the date of the inversion (the "NOCD Rule"). The general effect of the NOCD Rule is that Domestic Target's

value is increased by the amount of nonordinary course distributions, which results in an increase to the Ownership Percentage. The NOCD Rule, therefore, is intended to prevent Domestic Target from inappropriately "skinnying down" its size to fall below the Ownership Test's 60% or 80% threshold. The 2014 Notice also provided that similar regulations would be issued for purposes of section 367(a).

The application of the NOCD Rule was not subject to a de minimis rule and, thus, technically applied when the former Domestic Target shareholders received no or de minimis equity in Foreign Acquiring by reason of their Domestic Target stock. This application produced improper results in certain circumstances, particularly when Foreign Acquiring was primarily cash-funded to acquire Domestic Target in an all-cash or mostly all-cash purchase, because the Foreign Acquiring stock issued in exchange for the cash proceeds was disregarded under the above-discussed nonqualified property rules of Reg. section 1.7874-4T.

Notice 2015-79, to avoid the improper over application of the NOCD Rule, provides a de minimis rule that prevents the NOCD Rule from applying unless the former Domestic Target shareholders have a certain level of ownership continuity with respect to Foreign Acquiring. Specifically, if (1) the former Domestic Target shareholders own less than 5% of Foreign Acquiring (by vote and value) by reason of owning stock of Domestic Target under the Ownership Test (but determined without regard the application of Reg. section 1.7874-4T(b) and the rules announced by in Sections 2.01(b) and 2.02(b) of the 2014 Notice), and (2) after the inversion and all transactions related to the inversion are completed, the former Domestic Target shareholders own, in the aggregate (applying the attribution rules of section 318, as modified by section 304(c)(3)(B)), less than 5% of the stock of (or a partnership interest in) any member of the Foreign Acquiring's EAG (by vote and value), the NOCD Rule does not apply.

This rule applies to inversion transactions completed on or after November 19, 2015, but taxpayers may choose to apply the provision to periods preceding November 19, 2015.

KPMG OBSERVATION

This clarification settles a significant ambiguity in the 2014 Notice, as the NOCD Rule, read literally, could have caused an all-cash acquisition of Domestic Target to be subject to section 7874—obviously, a result that is inconsistent with section 7874's general requirement that the former Domestic Target shareholders have a substantial continuing ownership interest in Foreign Acquiring. Although the de minimis threshold is welcomed, the threshold level of ownership is only 5% and, thus, severely limits the former Domestic Target shareholders' ability to retain an interest in the combined entity, especially once the constructive ownership rules are taken into account. Presumably, the 5% de minimis threshold is intended to mirror the de minimis threshold in Reg. section 1.7874-4T. It also should be noted that Notice 2015-79 clearly provides that section 7874(c)(4) can apply regardless of the NOCD Rule—i.e., the NOCD Rule should not be viewed as a safe harbor from the application of section 7874(c)(4) general anti-abuse rule.

NOTICE 2015-79 CLARIFIES "SMALL DILUTION EXCEPTION" IN THE 2014 NOTICE

The 2014 Notice provides that regulations will be promulgated under section 7701(l) that will effectively disregard certain issuances or transfers of expatriated foreign subsidiary stock during the Applicable Period to a specified related foreign person, which is generally defined to include non-CFC related foreign persons and certain domestic flow-through entities that have such persons as interest holders (i.e., the Dilution Rule). These regulations will instead treat the specified related foreign person as having made a direct investment in one or more section 958(a) U.S. shareholders of the expatriated foreign subsidiary.

Thus, these regulations preserve CFC status for the expatriated foreign subsidiary. One exception to this rule is the "Small Dilution Exception." Under the Small Dilution Exception, the issuance or transfer of expatriated foreign subsidiary stock is respected if (1) the expatriated foreign subsidiary is still a CFC after the issuance or transfer, and (2) the amount of stock (by value) owned by the Domestic Target (or a Domestic Target subsidiary that is the U.S. shareholder of the expatriated foreign subsidiary) does not decrease by more than 10% as a result of the transaction and any related transactions. A similar exception applies to the Exchange Rule.

Notice 2015-79 replaces the Small Dilution Exception's "amount of stock (by value)" language with "the percentage of stock (by value)."

This rule applies to exchanges occurring on or after November 19, 2015, but only if the inversion transaction was completed on or after September 22, 2014.

KPMG OBSERVATION

Notice 2015-79 states that this change is intended to address concerns of Treasury and the IRS that the "amount of stock (by value)" literally means the value of the stock. Thus, for example, if an expatriated foreign subsidiary is worth $100 prior to the transaction and the specified related foreign person transfers $100 to the expatriated foreign subsidiary in exchange for stock of the expatriated foreign subsidiary, Treasury and the IRS were concerned that taxpayers would argue that their stock has not decreased by more than 10% because it is still worth $100, rather than the intended result under the rule that the taxpayer's percentage interest (by value) has decreased by 50% ($100/$200).

CONGRESSIONAL REACTION

Both Senate Finance Chairman Orrin Hatch and Ways and Means Chairman Kevin Brady issued statements in the wake of yesterday's release. Chairmen Hatch and Brady each suggested that the best approach for curbing inversions is to reform the U.S. tax system and that Treasury's actions could have the unanticipated effect of making U.S. multinationals vulnerable to foreign takeovers.

In his statement, Brady stated:

"Inversions are a serious problem that need to be addressed, but even Secretary Lew acknowledges that the only real solution to inversions is tax reform that makes American companies more competitive. Mandating new rules to raise taxes on American businesses simply make them more attractive takeover targets for foreign corporations. Treasury is contradicting its own call to pursue a more competitive tax code in favor of shortsighted counterproductive triage which will only lock American businesses in an even more uncompetitive tax system. Instead, we should all redouble our efforts to work together to fix our broken tax code."

Meanwhile Chairman Hatch expressed similar concerns in his statement, although he did not rule out the possibility of more targeted action.

"While the best way to resolve these issues would be through a comprehensive tax overhaul that lowers the corporate tax rate and shifts the U.S. to a territorial tax system with base erosion protections, it's imperative we explore what actions can be taken now. That Treasury has opted to, once again, issue guidance meant to curb inversions only further demonstrates the critical need to update our outdated tax laws and create an economic landscape that not only retains the best and brightest businesses in the world, but also

encourages investment here at home."

CONCLUSION

Notice 2015-79 resolves a number of uncertainties, but also creates several more. For example, there was much speculation that Treasury might issue additional anti-inversion guidance targeted at earnings stripping. While Treasury has reserved the right to do so in the future, yesterday's release was confined to modifying application of the anti-inversion rules of section 7874. Also, as mentioned, Notice 2015-79 resolved another ambiguity by creating a safe harbor under the NOCD rule of Notice 2014-52.

Still, as noted in the foregoing, yesterday's guidance leaves a number of ambiguities for taxpayers to ponder. Intentional or not, these ambiguities may have the practical effect of creating a chilling effect on transactions in the marketplace.

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