Proposed Anti-Inversion Regulations Would Affect Foreign Insurers

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For decades American companies have used so-called "corporate inversions" to lower their tax burdens on foreign-earned income. Typically, the American company is acquired by a foreign company located in a tax-favorable jurisdiction, and then adopts that domicile. Inversions do not alter the taxation of corporate income earned from domestic activities and sources. Several times the federal government has issued new or revised rules to regulate what it considers abusive inversion transactions. In the recently-released Notice 2014-52, the IRS announced prospective additional regulations intended to stem a surge of inversions under the existing framework. This article only addresses the Notice's treatment of passive assets (the Notice also revises rules for non-ordinary course distributions and post-acquisition stock transfers). Under existing rules, the IRS deems a foreign acquiring corporation domestic (thus defeating the tax benefits of the host jurisdiction) if, among other factors, shareholders of the domestic acquired corporation own 80 percent or more of the newly-combined company following the inversion (the "expanded affiliated group"). Other negative tax consequences result if, among other things, those same shareholders own at least 60 percent of the expanded affiliated group. Making these ownership ceilings harder to avoid, **the contemplated regulations take aim at foreign corporations flush with so-called "passive assets" (e.g., assets that generate interest, dividends, and capital gains income)**. Where such a foreign corporation's total assets are more than 50 percent passive, the new rules would disregard for purposes of the ownership calculation that portion of the foreign corporation's stock attributable to those passive assets. The IRS contemplates that such a rule would decrease the amount of inversions, given that foreign corporations with "substantial cash and other liquid assets" are tempting inversion partners. The Notice carves out of the passive asset rule a "qualifying insurance company," which the Code defines as a foreign insurer that earns more than 50 percent of its premiums from insurance "covering applicable home country risks" (i.e., risks in the foreign insurer's home jurisdiction). Thus, a domestic company can invert into a foreign insurer that is a qualifying insurance company, regardless of that foreign insurer's passive holdings. Insurers in attractive tax jurisdictions, such as Bermuda or the Cayman Islands, however, will almost certainly not insure significant “home country risks.” While the IRS likely intended this consequence, it may not have intended to restrict other acquisitions motivated by business purposes other than tax savings. The Notice invites comments to the proposed regulations, meaning that the finalized regulations might provide different treatment for that scenario.

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