

## KEY TAX INSIGHTS

## MERGERS AND ACQUISITIONS NEWSLETTER

FOREIGN COMPANY ACQUISITION OF U.S. COMPANY  
AND NEED FOR PROFESSIONALS IN EACH RELEVANT  
JURISDICTION

When there is a cross-border merger and acquisition there are additional complexities to plan for, typical acquisition planning in one country may be different than in another country, and the resulting tax implications can be significant. We have represented both the acquiror and target in a number of cross-border acquisitions and getting the right result requires a careful analysis of the tax implications involved. What may seem like a very small detail may have very serious tax implications that greatly impacts the result of the acquisition for either the acquiror or target.

In one acquisition where we represented the target, which was a U.S. domestic partnership, who was being acquired by a fund located outside the U.S., the letter of intent provided

that the target owners would receive no cash from the target that accumulated within six months of closing. This concept in general can make sense if it is planned for in the flow of cash and what the owners of the target believe they are receiving in total consideration for the sale of their interest in the target.

The letter of intent was written in a fashion that the proposed agreement was for the purchase of stock in a corporation, however the target was a partnership. In the U.S., the tax treatment of a c-corporation as compared to a partnership is significantly different. It would appear that the acquiror either thought there was an entity level tax for the target or wanted to get one by on the target owners thereby deriving more benefit to acquiror's equity owners.

The issue is that while the acquiror will acquire the target with the six months of revenue, the target owners will be stuck with the tax bill since the target is taxed as a partnership. At the time of the acquisition the target will change from a partnership to a disregarded entity. The partnership will file a final tax return allocating all of the income pre-acquisition to the pre-acquisition owners of the target, thus the benefit of the revenue goes to the acquiror with the tax detriment being stuck with the former target owners.



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This was no small detail given the size of the acquisition, based on the revenues for the six-month period, the tax liability to the former target owners would be in the range of \$1.5 million on revenue that went to the acquiror. If the selling target owners did not plan for this as part of the purchase price, the result would be subtracting \$1.5 million from the proceeds they expected to receive.



Per usual, the acquisition was well along before the target had us review the tax implications of the transaction. We quickly spotted the tax issue with the six months of revenue going to the acquiror and provided solutions to deliver the essence of the deal, for the acquiror to get the six months of revenue without the sellers bearing the burden of the tax.

It is best to catch these issues at the time of negotiating the letter of intent, as it can be difficult to renegotiate with the acquiror terms that are provided in the letter of intent. For avoidance of doubt, it is better to bring in your tax advisor at the starting stages of an acquisition instead of at the

end. It goes without saying, the \$1.5 million in phantom tax liability to the target sellers was significant to their overall return on the sale of their interest in the target.

### NOTICE OF FIRM NAME CHANGE

We have long believed that the firm is larger than any one person and it is time for the name of the firm to reflect this value. **In 2024, the name of the firm will transition over time from Klug Counsel PLLC to Basswood Counsel PLLC.** The Basswood Tree is known as a symbol of unity, prosperity, versatility, and justice. The Basswood Tree is found all over the world and in some cultures important meetings and outdoor celebrations occur under the shade of a Basswood Tree. Pulling this all together and in line with our firm ideals, Basswood symbolizes that ***“we have you covered.”***

In order for the name change to proceed smoothly it will transition over time. There will be notifications when the official name change occurs with our new contact information. Should you contact us through the Klug Counsel contact information after the name change, we will still receive the messages so there will be no disruption to our clients as a result of the name change.

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