

KILLER B REGULATIONS FINALIZED

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Triangular B reorganizations are often conducted whereby a subsidiary corporation will acquire a target corporation in exchange for stock of the subsidiary's parent corporation. Throw a foreign corporation into the mix and the opportunity exists for tax avoidance, especially as to the acquisition of the subsidiary of stock of its parent for valuable consideration to use in the acquisition. For example, a foreign subsidiary may be able to repatriate earnings to a U.S. parent without a taxable dividend, or if the parent corporation is foreign then funds may be transferred to the parent without a U.S. withholding tax.

So-called 'Killer B' transactions were first addressed in Notices 2006-85 and 2007-48, and then further addressed in 2008 Temporary Regulations under Code Section 367(b). In May of this year, final Regulations were issued.

The final Regulations, when applicable, generally result in deemed distributions that are subject to tax under other Code sections, such as Section 301. They may also result in deemed contributions from the parent to its subsidiary. The deemed distributions may be characterized as 'notional' only, so as to avoid the potential application of Code Section 311(b) gains and losses.

Jeffrey Rubinger has published a recent article in the June 2011 Journal of Taxation that provides the history of the 'Killer B' transactions and an analysis of the new Regulations (*"Final 'Killer B' Regulations Further Expand Likelihood of Gain Recognition by Taxpayers"*). He points out that the deemed distributions can occur even if the target corporation is unrelated to the acquiring parent/sub group. He also notes that in circumstances when Code Section 367(b) does not apply due to a lack of earnings and profits, Code Section 367(a) may still be triggered.

Treasury Decision 9526, 5/19/11

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