S Corps and "F" Reorganizations in M&A

Chattanooga Tax Practitioners

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In over 40 years of practicing tax and business law, Leigh Griffith has helped clients grow their businesses from the start-up stage to multimillion-dollar corporations. Transaction-oriented businesses, healthcare companies, private equity firms, Limited Liability Companies (LLCs), and partnerships rely on Leigh's experience and counsel to structure their tax matters, which can range from a few million dollars to over $1 billion. Colleagues and clients regularly turn to him for his deep knowledge of tax at the state, national, and global levels as well as the intersection of non-profit tax law, for-profit tax law and healthcare regulatory law.

Leigh is also a sought-after seminar leader for continuing professional education programs and has a featured column, "The Pass Through Partner," in Taxes Magazine, published bimonthly by CCH Tax and Accounting. His background as a certified public accountant has contributed to groundbreaking legal work, including:

- Creation of the first LLC in Tennessee
- Development of the Double Holdco LLC structure for the home healthcare industry
- Being named principal draftsman of the Tennessee LLC Act
- Participating in the first life insurance/annuity combination securitization, recognized by the rating agencies as a new security and a new asset class
- American Bar Association Tax Section Advisor to National Conference of Commissioners on Uniform State Laws - Series of Unincorporated Business Entities Drafting Committee

Excited by the intellectual challenges presented by the ever-changing landscape of tax laws, Leigh provides advice that "looks around the corner" and he "looks out the windshield rather than in the rear-view mirror."

Recognitions
Best Lawyers recognizes Leigh in the categories of Government Relations Practice, Litigation & Controversy–Tax, and Tax Law. Leigh is also one of only two Tennessee Fellows of the American College of Tax Counsel and a Fellow in the American College of LLC and Partnership Attorneys.

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Introduction

- Although the LLC is the most popular form of closely held business today, the S corporation remains popular and has a long history.
- This program looks at M&A transactions involving S corporations. Some will have been around for decades and some relatively new.
- In a typical situation, unless the buyer is a C corporation (and even then we often use the "F" reorganization), an "F" reorganization is used.
- There is a common perception that an "F" reorganization is difficult and often as resistance on the part of closely held businesses and sometimes their advisors.
- Hopefully this program will demystify the "F" reorganization and make its advantages to both the Buyer and the Seller clear.

Introduction – The Common Situation

- Buyer is interest in acquiring all or most of a business currently conducted by an S corporation.
- The corporation has a number of shareholders and has been in business a number of years and filed its S election several years ago.
- The classic options are:
  - Sell the stock
  - Sell the assets
  - Restructure in an F reorganization and sell part of the assets and "rollover" the rest
  - Restructure in an F reorganization and convert the Q Sub into an LLC taxable as a pass-through

Advantages of a Stock Transaction

Buyer Advantages to Stock Transaction

- Easier to acquire "difficult to transfer assets"
  - IP transfers
  - Lease consents
  - Contracts
- Subject to limitations favorable tax attributes of Seller acquired
  - NOL subject to use limitations

Seller Advantages to Stock Transaction

- Only one level of tax
- Generally capital gains
- Generally state tax is only in State of shareholder domicile
- Simplicity
  - Increased diligence by Buyer may make this illusory

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Disadvantages of Stock Transaction

Buyer

- May assume unknown tax and other liabilities
- No Step-up in tax basis of assets
- May be stuck with unfavorable tax elections
- Less flexibility

Seller

- Difficult to "carve out" assets that are to be retained without tax cost.
- If most shareholders wish to sell and a minority do not, a viable transaction option may be facilitated by an acquisitive merger

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Advantages of an Asset Sale

Buyer

- Less likely to have hidden liability exposure including taxes
  - Note state treansfer taxes, payroll and sales tax will follow over
- FMV basis in acquired assets
- Flexibility
- Federal and most state historical tax liability and tax elections are not assumed

Seller

- Retention of selected assets without tax cost
- Ability to use losses and credits of corporation

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Disadvantages of an Asset Sale

Buyer

- Landlord, creditor, licensor, regulatory agency approvals
- Effect on contracts (often non-assignable with other party's approval)
- Generally more expensive and burdensome for the parties
- Favorable tax attributes are lost
- Increased likelihood of transfer taxes
- New payroll systems, etc.

Seller

- If C corporation is the Seller, there will generally be double tax (corporate and shareholder levels)
  - If S corporation unless BIG tax is applicable, only one level of tax (few state are exceptions)
- Character of gain will likely be mix of orginary income and capital gain
- Due diligence of prospective buyer may be more extensive and disrupt customers and employees
- May have more time dealing with due diligence.

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Typical Transaction Transaction

- A typical transaction involves shareholders of an S corporation that are selling part of their business to a buyer and often rolling over part of the business to the buyer or buyer's parent in exchange for equity in Buyer.
- The buyer is skidish about hidden liabilities, desires a stepped-up basis in the assets it purchases, and in the medical and certain other areas, desires to obtain and use the EIN of the corporation.
- The buyer may also want to hold the assets in an LLC taxable as a pass-through.
- Is an "F" reorganization pre-transaction restructuring the answer?

What is an "F" Reorganization?

- An "F" reorganization often involves only one corporation
- For federal (and most state) income taxes an "F" reorganization includes a mere change in identity, form, or place of organization of one corporaton , however effected. See IRC 368(a)(1)(F)
- Transaction that involves an actual or deemed transfer of property from one corporation (a Transferor Corporation) to one other corporation (a Resulting Corporation).
- This can be in a transaction or series of related transactions which can be tested against the requirements.

What is an "F" Reorganization (Cont'd)

- A potential "F" reorganization begins when Transferor Corporation begins transferring (or is deemed to begin transferring) its assets, directly or indirectly to the Resulting Corporation and it ends when the Transferor Corporation has distributed (or is deemed to have distributed) to its shareholders the consideration it receives (or is deemed to receive) from the Resulting Corporation and has completely liquided for federal tax purposes.
- Final Treasury Regulations released on September 18, 2015 and are

"… based on the premise that it is appropriate to treat the Resulting Corporation in an "F" reorganization as the functional equivalent of the Transferor Corporation and to give its corporate enterprise roughly the same freedom of action as would be accorded to a corporaton that remains within the original corporate shell." Preamble to T.D. 9739

Treasury Regulation Terminology for "F" Reorganizations of S Corporation

- Transferor Corporation is the original S corporation.
- Resulting Corporation is the newly created corporation that will become the parent corporation of the original S corporation and become an S corporation itself. The Resulting Corporation will generally be the Seller.

Requirements for an "F" Reorganization

- Treas. Reg. §1.368-2(m) Basic requirements for an "F" reorganization
  - 1 All of the stock of the new Resulting Corporation must be distributed, actually or in a deemed transaction, in exchange for stock of the Transferor Corporation (disregard de minimis amount of stock to facilitate organization of Resulting Corporation).
  - 2 Same persons who own the stock of the Transferor Corporation must own all the stock of the Resulting Corporation in the same proportions (disregarding the de minimis amount of stock to facilitate organization of Resulting Corporation).
  - 3 Resulting Corporation cannot hold property or have any tax attributes before the transaction that are part of the Potential F Reorganization (but can hold de minimis amount of assets to facilitate its organization).
    - Needs to be a new clean corporation

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Requirements for an "F" Reorganization (cont'd)

- 4 Transferor Corporatoin must completely liquidate for federal tax purposes – but it does not have to dissolve for legal purposes. A deemed dissolution or deemed transfer of all property for tax purposes is sufficient.
- 5 There can be only one acquiring corporation. No corporation other then the Resulting Corporation can hold property that was held by the Transferor Corporation if the other corporation would succeed to items of the Transferor Corporation under the attribute carryover rules of Code §381.
- 6 There must not be multiple Transferor Corporations transferring assets to the Resulting Corporation. The Resulting Corporation cannot hold property acquired from a corporation other than the Transferor Corporation if the Resulting Corporaton woud succeed to items of the other corporation under Code §381(c).

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In Revenue Ruling 2008-18; Situation 1 the IRS Roadmaps the basic structure

- Shareholders form Resulting Corporation (a newly formed corporation without any assets other than de minimis to facilitate formation).
- Shareholders contribute 100% of the Transferor Corporation's stock to the Resulting Corporation in exchange for 100% of the Resulting Corporation's stock.
- Resulting Corporatoin elects to treat Transferor Corporaion as a Q Sub, effective immediately after the transaction.

As a Result of the "F" Reorganization on Previous Slide

- The requirements of a reorganization under Code §368(a)(1)(F) are met.
- Under Revenue Ruling 64-250 the Transferor Corporation's original S corporation election does not terminate but "magically" applies to and continues for Resulting Corporation
  - For year of reorganization, Resulting Corporation will report the income, gain and loss of the Transferor Corporation from the first day of the tax year through the date of the reorganization and thereafter the Transferor Corporation's own income, gain and loss.
- Resulting Corporation must abtain an EIN
- Transferor Corporation retains its EIN but is a disregarded entity for Federal income (and most state) tax purposes
- Resulting Corporation informs the IRS of the "F" reorganization and the identity of the parties on the Q Sub Election Form 8869 line 14 by checking a box YES

Sometimes Not All Shareholders Wish to Sell

- Rev. Rul. 2008-18; Situation 2 the IRS roadmaps an alternative structure to set up the structure and complete an "F" reorganization. This involves the creation of two additional corporations and a merger.
  - This alternative structure is used when there are dissenters who will not (or are believed will not) voluntarily transfer their stock to a new parent corporation.
  - Can also be used when one or more shareholders cannot be found.
- The Original S Corporation ("OSC"), not the shareholders, creates a new 100% owned subsidiary corporation (NewCo A) and elects to treat NewCo A as a Q Sub.
- NewCo A after the Q Sub election is filed, creates a new subsidiary corporation (NewCo B) which will be 100% owned by NewCo A (which is disregarded as a result of the Q Sub election) and OSC elects to treat NewCo B as a Qsub.

Sometimes Not All Shareholders Wish to Sell (Cont'd)

- Pursuant to a plan of merger approved by the requisite vote of the shareholders as required by applicable state law
  - OSC and NewCo B merge (a reverse subsidiary merger) with OSC surviving
    - This
  - Shareholders of OSC receive stock of Newco A in exchange for their OSC stock
  - The one share of NewCo A issued to OSC in the formation of the tiered corporations is canceled [referred to as "hook stock"].
    - This makes OSC a wholly owned subsidiaryof NewCo A
- NewCo A elects to treat OSC as a Qsub effective immediately following the merger
- Result NewCo A is an S corporation, the new parent of OSC and OSC is a Q Sub.
- The state merger law forces the recalcitrate shareholders into becoming shareholders of NewCo A by operation of law.
  - Dissenters rights may exist but likely they are being bought out anyway

As a Result of the "F" Reorganization on Previous Slide

- The requirements of a reorganization under Code §368(a)(1)(F) are met.
- Under Revenue Ruling 64-250 the OSC's S corporation election does not terminate but "magically" applies to and continues for NewCo A
  - For year of reorganization, NewCo A will report the income, gain and loss of the OSC from the first day of the tax year through the date of the reorganization and thereafter the OSC's own income, gain and loss.
- NewCo A must abtain an EIN
- OSC retains its EIN but as a Q Sub is a disregarded entity for Federal (and most state) income tax purposes
- NewCo A informs the IRS of the "F" reorganization (Q Sub Election Form 8869 line 14) and the identity of the parties, EIN's, etc.

At This Point, Under Scenario 1 or 2 of Revenue Ruling 2008-18, Where are We?

- The shareholders own the corporation (Resulting or NewCo A) which in turn owns OSC which, as a Q Sub is a disregarded entity
- Buyer has not acquired anything yet
- If transaction did not go forward, no tax has been incurred and no additional tax will be incurred for the shareholders to simply continue operating the business
  - In the future, all income, gain and loss from operations, will be recognized by the new parent and only one Federal income tax return is required. Employment tax returns and other returns will largely depend on where the business operations are.
- The "F" reorganization has been completed
- The going forward options are:
  - Buyer purchases the Qsub Stock
  - An additional action in the form of converting the Q Sub into a disregarded LLC is taken and then Buyer acquires the LLC equity interests.
  - Buyer purchases the assets (in which case should have done so from original S corporation)

Acquisition of Q Sub Stock

- At this point (disregarded entity owned by Resulting Corporation [NewCo A]) assets and some liabilities which the shareholders or Seller desire to retain can be moved from the the Transferor Corporation (OSC) then a Q Sub to the Resulting Corporation (NewCo A) without triggering income tax.
- The Buyer acquires the Q Sub stock which terminates the Q Sub election
  - If Buyer is a (are) qualified S Corporation shareholder(s), the Buyer can have the Transferor Corporation (OSC) make an S Corporation election effective the date of the acquisition
    - It will then go forward as an S Corporation
  - If Buyer is another S Corporation, it can elect for the Transferor Corporation (OSC) to become a Q Sub [This Q Sub election will NOT check the YES box on line 14 of Form 8869
    - Transferor Corporation (OSC) will then go forward as a Q Sub
  - If Buyer does nothing it has purchased a C Corporation which is not what Buyer had in mind
  - Buyer's holding period begins the date after closing.

Acquisition of Q Sub Stock

- From the perspective of the Resulting Corporation (NewCo A) the result of the sale is:
  - If all stock is purchased the Resulting Corparation (NewCo A) is deemed to have sold assets triggering gain or loss inside the Resulting Corporation (NewCo A) which flows to its shareholders
  - If some stock is purchased and some exchanged for Buyer equity
    - If the Buyer is an otherwise single member LLC or a partnership for Federal income tax purposes, generally no gain is recognized by Seller (Code §721) and the equity interest Buyer received in exchange is a partnership/disregarded entity interest for Federal income tax purposes. The partnership interests are deemed to have been held for the period the Transferor Corporation (OSC) has held the assets (technically supposed to be an asset by asset analysis) – multiple holding periods.
    - If Buyer a corporation (S or C) the Buyer and Seller are each deemed to be contributing assets to new corporation. Their ownership interests are being obtained in related and probably simultaneous transactions so each will be transferors of assets in exchange for stock and satisfying Code § 351(b) 80% test.

Conclusion of Sale of Q Sub Stock

- If any rollover occurs, an S corporation Buyer cannot cause the Transferor Corporation (OSC) which had a valid Q Sub election in Resulting Corporation (NewCo A) to elect Q Sub status immediately after the acquisition. 100% of the stock is not owned by a single S corporation.
- Buyer will own an interest in a C corporation with stepped-up basis assets for the assets purchased by Buyer and a carryover basis for the dontribution associated with the rollover.

The "F" Reorganization in a Tax Bubble

- Treas. Reg. §1.368-2(m)(3)(i) provides that transactions preceeding or following a potential "F" reorganization generally will not cause a failure of qualification under Code § 368(a)(1)(F).
- This permits transactions before or after an "F" reorganization to take place in which the "F" reorganization is an integral part without the application of the step-transaction rule.
- The regulation has a number of good and helpful examples.

Additional Step

- After concluding the "F" reorganization (including filing the Q Sub election with the IRS and the distribution of Resulting shares to shareholders), the Transferor (OSC) may become an LLC taxable as a pass-through while still owned by Resulting (NewCo A).
- This is one form of income tax nothing into another form of income tax nothing.
- If the Q Sub is a state law corporation, it can do a conversion in to an LLC. This needs to happen AFTER the Q Sub election is physically filed with the IRS.
  - If the state of formation of the Q Sub corporation has a suitable conversion statute, simply convert to an LLC and do not elect to be taxable as an association taxable as a corporation.
  - No gain recognized
  - EIN remains the same if convert
  - Need to get a 147c letter from the IRS showing the LLC has the former corporation's EIN

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Additional Step (Cont'd)

- If Transferor (OSC) is an LLC that has been taxed as a corporation for over 5 years (or, if shorter, for the period since the Transferor (OSC)'s creation), the Transferor (OSC) can simply check the box to be treated as a partnership/disregarded entity after the Q Sub election is filed. This converts from one business entity form to another.
- If Transferor (OSC) is an LLC taxable as a corporation that originally was a taxable as a disregarded entity or a partnership and has not been classified as a corporation for five years or more, it cannot check the box without the Commissioner's approval. It can do a state law merger of the Q Sub into an LLC after the Q Sub election is filed.
- If Transferor (OSC) immediately above is in a state that does not permit such a merger, it can merge into a newly formed corporation in a state that does. This should be a second "F" reorganization.
  - Thereafter it can convert the corporation (while a Q Sub) into an LLC which is wholly owned by Resulting Corporation (NewCo A).
  - Thereafter the LLC interests can be sold.

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Additional Step (Cont’d)

- If Transferor (OSC) is already an LLC under state law but checked the box to be taxed as an association taxable as a corporation:
  - If it has not been an association taxable as a corporation for over 5 years (or for the shorter period since the Transferor (OSC)’s creation) it cannot simply check the box to be a non-corporate pass-through entity without the Commissioner’s approval.
- **At this point, other than trying to obtaining the Commissioner’s approval, there is not a sure answer as no authority of which the speaker is aware.**
- This may force a Code §336(e) or §338(h)(10) election as applicable if an asset purchase is not feasible.

What Happens if Q Sub Election is not Made Before Transferor Corporation (OSC) Converts by Checking the Box

- Critically important that the Q Sub Election is made while the target is a corporation.
- Treas. Reg. §1.1361-3(a)(1) “The corporation for which the Q Sub election is made must meet all the requirements of section 1361(b)(3) at the time the election is made and for all period for which the election is to be effective.”
- There is a critical difference between “at the time the election is made” and “at the time the election is effective”.
- In the view of the IRS, converting to an LLC before the making of the Q Sub election, not just the effective date of the election, is not a valid Q Sub election.
  - See PLR 201724013

What Happens if No Q Sub Election is Made and Simply Go Forward Converting Original S Corporation into an LLC (Cont'd)

- If NewCo is created and 100% of the S corporation stock is contributed to NewCo but rather than a Q Sub election the S corporation is merely converted into an LLC that does not elect to be taxable as a corporation – i.e., a disregarded entity.
- Should that constitute a good "F" reorganization?
  - One "corporation existed", was contributed to a second, and then changed form into a disregarded entity and, for income tax purposes, liquidated.
  - PLRs to date on "F" reorganization of a corporation to an LLC appears to have delt only with LLCs that elected to be taxed as a corporation. See for example PLR 2008397. Treasury Regulatioin §1.1361-5(b)(3) example 2 support "F" reorganization treatment for a Q Sub.
  - **No authority.** Many think it is.

What Happens if No Q Sub Election is Made and Simply Go Forward Converting Original S Corporation into an LLC (Cont'd)(Cont'd)

- What is status of the BIG tax of Code §1374 if not an "F" reorganization?
  - Code § 1374 taxes net recognized built in gain.
  - Code § 332(a) provides "no gain or loss shall be recognized"
  - Does § 332(a) shield from triggering the BIG tax
  - However when parent sells interests in the LLC or assets, BIG Tax triggered as well.
- What is status of EIN if not an "F" reorganization?
  - If not an "F" reorganization, if the original S corporation as a subsidiary converts into an LLC the EIN should be retained. If the original S corporation merges into an LLC the EIN appears to go away.
- How do you inform the IRS of the "F" reorganization (assuming it is one), the new EIN, and a different entity reporting income of earlier in the year?
  - IRS Form 8869 with the box on line 14 checked will solve a lot of administrative headaches but must make a Q Sub election to accurately check that box.

Transaction After Q Sub Became an LLC Disregarded from its Owner

- Resulting Corporaton (NewCo A) sells 100% of the units (conversion to an LLC has occurred) in Transferor LLC (NewCo A) to Buyer
  - If a valid F reorganization, Resulting Corporation is deemed to sell assets and gain or loss will be determined and will flow through to Resulting Corporaton (NewCo A)'s shareholders
    - Note: If not a good "F" gain triggered on conversion to LLC
    - BIG tax applicable if election was not first day or more than 5 years ago.
  - Buyer is deemed to purchase tangible and intangible assets for FMV and contribute to the LLC but nevertheless the LLC retains it old EIN
  - Code § 1060 is required – filing of form 8594 for the assets deemed sold

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Few Points on Buyer's New LLC – Past Income Taxes

- For federal income tax purposes after the "F" reorganization, including a Q Sub election followed by a conversion to a SMLLC and sale of 100% of the SMLLC interests to Buyer, the tax past income tax exposure is largely left with the Resulting Corporation (NewCo A) and its shareholders.
  - Technically, however, under Treas. Reg. §301.6901-1(b) which has a broad set of successor liability rules including "a party to a reorganization … and all other classes of distributes."
    - Clearly minimizes exposure but does not necessarily extinguish the exposure.
  - Per "F" reorganization rules, the Resulting Corporation is the "taxpayer" and picks up the income, gain and loss of the Transferor Corporation for the period from the beginning of the tax year [to/through] the reorganization
  - Transaction documents should always give the Buyer an indemnity for pre-closing taxes. However, collecting is sometimes a problem.

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Few Points on Buyer's New LLC (Cont'd)

- If it turns out that Transferor Corporation (OSC) was not actually an S corporation then there was not a valid Q Sub election and OSC remained as a C corporation whose shares were purchased in absence of a conversion to an LLC before the sale.
- If the extra step of converting OSC to a pass-through LLC was taken, that conversion would not trigger gain in the C corporation subsidiary at conversion via Code §332 which stopped the triggering of gain as it was a tax liquidation of a wholly owned corporate subsidiary.
- When Buyer purchases an interest in the LLC, Buyer is deemed to be purchasing assets from the parent and contributing them to a new LLC for tax purposes (even though it is the old LLC). That is a Code § 1001 transaction triggering gains to parent. However, since it was a sate law single member LLC that was sold, the EIN does not change.
- The Buyer gets a step up basis, liability protection, the EIN but potential successor liabilities within the LLC under state law. The speaker understands the IRS will go after the Seller/shareholders first.

Few Points on Buyer's New LLC (Cont'd)

- If a Q Sub election is made and a good "F" reorganization has occurred, even though there is a deemed liquidation of Transferor Corporation (OSC) the assets actually do not move without appropriate state law transfer.
  - Any assets which are not supposed to be purchased and even liabilities must be transferred to Resulting Corporation.
- Transferor Corporation (OSC) can continue with its employees and business following the "F" reorganization if the transaction with the Buyer does not occur. No tax has been incurred.
- As noted earlier, if the IRS is unable to collect from the Sellers, under the regulations it appears it may be able to go after the LLC in the hands of Buyer despite F reorganization.
  - If a rollover occurred, however, the IRS is likely on transferability liability likely to go after the Buyer's LLC as a normal matter for at least the portion of the tax attributable to the rollover share.

Few Points on Buyer's New LLC (Cont'd)

- The statute of limitations does start when the 1120S return is filed even though it is the wrong return. Treas. Reg. §1.6037-1(c)
  - If statute of limitations has run on the Seller, the Buyer there is no successor

Special Situations to be Aware of - Rollover

- In the context of acquisitions of a business the existing owners either desire or the Buyer desires for the existing owners, particularly those who are going to continue, to have a continuing interest in the business.
- As noted earlier, if a Q Sub election is made and a Buyer acquires an interest in the Q Sub, the former Q Sub will become a C corporation. Any of the prior owners that roll over will not recognize gain on the rollover as their contribution for shares would be part of plan with the Buyer and for testing the Code § 357(c) the contribution shares and Resulting Corporation would be combined.
- If after the Q Sub election, the Q Sub is converted into an LLC taxable as a pass-through, the rollover will be into a partnership and gain or loss will generally not be recognized under Code §721 on the rollover portion.

§338(h)(10) and § 336(e) elections as an alternative

- Many advisors of Sellers recommend that the shareholders of an S corporation enter into a §338(h)(10) or §336(e) transaction based on the identity of the Buyer.
- Although the Buyer can use an LLC taxable as pass-through or disregarded entity to acquire the stock and liquidate the corporation just purchased and achieve the step up in basis:
  - If the Buyer needs the EIN, this will not be satisfactory
  - Any Sellers who are rolling over or not selling (as applicable) will be fully taxed as if they sold their stock
  - If it turns out the S election was not "good", the Buyer has just purchased C corporation stock. Litigation on representations and warranties can follow, but …
  - Clearly taxing authorities and state law creditors can follow because stock of a state law corporation was purchased and the Buyer's corporation is the taxpayer.

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For Valid "F" Reorganization, the Transferor Corporation Must be the Only Asset of Resulting Corporation

- With the exception of di minimis assets to facilate the formation of the Resulting Corporation, the Resulting Corporation can have no other assets.
- The Transferor Corporation is the only Corporation or assets acquired in the F Reorganization and Resulting Corporation must acquire 100% of it.
  - This issue occasionally comes up in the context of sister corporations that are the target entities. Often they have the exact same ownership and in the same proportions.
  - On occasion corporate counsel will want to have the new corporation created and have all of the targets contributed to the one corporation. This will prevent an "F" reorganization. **Each of the targets must undertake their own "F" reorganization with a new parent.**

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Always Use a Newly Formed Corporation to be the Resulting Corporation

- The "F" Reorganization concept is the Resulting Corporation is to wind up be the mirror of the Transferor Corporation. It is not to have additional assets nor undertaking business prior to the transaction.
  - Life is much simpler if the date of formation is on or within a day or two of the contribution of the stock of Transferor Corporation.
  - Historically IRS less interested in looking for business activity and other assets if close in time.
- Occasionally lawyers will have a corporation that was created a few weeks or months before that were not used in a prior transaction. DO NOT USE THEM. You do not want to have to prove later that there were no tax attributes in Resulting Corporation (other than di minimis assets to facilitate formation). Best optics is new corporation.

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End with Importance of Timely Made Q Sub Election if implementing an "F" Reorganization of an S corporaton.

- In a technical reading of the statute which the IRS has identified in PLR 201724013, the Q Sub election must be made before the Q Sub is converted - by which ever means – check the box, state law conversion statuts or merger – in an LLC disregarded entity.
- The Q Sub election can only be made when the Q Sub is a corporation.
- It does not matter that the Q Sub election can be made with an effective date up to two months and 15 days after the transaction as that only applies if the Q Sub is a corporation. The current instructions to Form 8869 do not cover that.
- Have proof of timely filing in a safe place.

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