

## The continuing US tax impact of the ‘one-time’ section 965 transition tax

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### Continued footnotes

57 For purposes of applying code provisions included in subchapter K, a partnership may be treated as an aggregate of its partners or as an entity distinct from its partners, depending on the purpose and scope of the provisions. See Rev. Rul. 89-85, 1989-2 C.B. 218, 219; and *Casel v. Commissioner*, 79 T.C. 424 (1982). In fact, the Conference Committee report accompanying the enactment of subchapter K states, “Both the House provisions and the Senate amendment provide for use of the ‘entity’ approach in the treatment of the transactions between a partner and a partnership which are described above. No inference is intended, however, that a partnership is to be considered as a separate entity for the purpose of applying other provisions of the internal revenue laws if the concept of the partnership as a collection of individuals is more appropriate for such provisions.” H.R. Conf. Rep. No 2543, 83d Cong., 2d Sess. 59 (1954).

58 See IRC section 731(a) (in particular, the flush language provides that any gain or loss recognized on distribution governed by section 731(a) “shall be considered as gain or loss from the sale or exchange of the partnership interest of the distributee partner”).

59 If a section 338(h)(10) election is made in connection with a stock purchase, the transaction is treated as an asset purchase for purposes of subtitle A of the code. See reg. section 1.338-2(c)(6). 60 Reg. section 1.965-7(c)(3)(v).

61 IRC section 1362(d)(2)(B); reg. section 1.1362-2(b)(2).

62 It has been held that that the federal government may rely on state law successor liability doctrine to hold a successor corporation liable for the tax debts of its predecessor. See *Atlas Tool Co. Inc. v. Commissioner*, 70 T.C. 86 (1978), *aff’d* 614 F.2d 860 (3d Cir. 1980); see also CCA 200840001. Most states have laws that impose successor liability when a transaction amounts to a de facto merger or when the successor is a mere continuation of the seller corporation. When a person acquires substantially all the assets of a corporation, the transaction can constitute a de facto merger or a mere continuation of the selling corporation.

63 If an affiliated group is filing consolidated returns, the group is treated as a single corporation under section 1.965-8(e) of the regulations for purposes of section 965(h), so an intragroup transfer should not cause an acceleration event.

64 See T.D. 9846 at 609.

65 *Id.*

66 Reg. section 1.965-7(c)(3)(iv)(B)(5).

67 *Id.*

68 *Id.*