

President Biden's Made in America Tax Plan Would Treat More Cross-border Transactions as Inversion Transactions

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Generally, an “inversion” is a transaction in which a non-U.S. corporation directly or indirectly acquires substantially all of the properties held by a U.S. corporation or partnership, after which the former owners of that U.S. corporation or partnership are in control of the acquiring non-U.S. corporation. Inversion transactions can take many different forms. Over the years, inversion transactions have continually drawn scrutiny, perceived to be transactions pursuant to which a U.S. company effectively changed its domicile to a non-U.S. jurisdiction and, accordingly, reduced its U.S. income tax liability. In response, Congress enacted the anti-inversion rules under Code Section 7874 as a means of discouraging inversion transactions and preserving the U.S. tax base.

Under Code Section 7874, if a non-U.S. corporation (the “non-U.S. acquiror”) acquires, directly or indirectly, substantially all of the assets of a U.S. corporation or U.S. partnership (the “U.S. domestic target”), and the former owners of the U.S. domestic target hold stock in the non-U.S. acquiror constituting at least 80%, by vote or value, of all issued and outstanding stock of the non-U.S. acquiror after the transaction by reason of their ownership in the U.S. domestic target, then the non-U.S. acquiror will be treated as a U.S. domestic corporation for U.S. federal income tax purposes.

If stock constituting at least 60%, but less than 80%, of the aggregate voting power or value of the non-U.S. acquiror is held by the former owners of the U.S. domestic target after the transaction by reason of their ownership in the U.S. domestic target, then the non-U.S. acquiror is generally respected as a non-U.S. corporation, but it would thereafter be subject to various disadvantages for U.S. federal income tax purposes for a period of 10-years after the inversion transaction.

Code Section 7874 and the Treasury Regulations and administrative guidance promulgated thereunder contain a number of exceptions and additional rules applicable to determining whether an inversion transaction has occurred. For example, shares issued by the non-U.S. acquiror in a public or private financing which is related to the acquisition are disregarded in determining what percentage of the non-U.S. acquiror is

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owned by former owners of the U.S. domestic target.

An “inversion” transaction in which the non-U.S. acquiror is treated as a U.S. domestic corporation for U.S. federal income tax purposes may have certain benefits, including permitting its acquisition of the U.S. domestic target to constitute a tax-deferred transaction (if the requirements applicable to the acquisition structure are met) and permitting future tax-deferred acquisitions of other U.S. companies.

On April 7, 2021, the U.S. Department of Treasury released a report outlining the Biden Administration’s “Made in America Tax Plan” (the “Plan”). As part of the Plan, the Biden Administration proposed to expand the existing anti-inversion rules. Under the Plan, a non-U.S. acquiror that acquires a U.S. domestic target would be treated as a U.S. domestic corporation for U.S. federal income tax purposes if either (i) the former owners of the U.S. domestic target hold stock of the non-U.S. acquiror constituting 50% or more (presumably by vote or value, although the Plan is not specific in that regard) of the non-U.S. acquiring corporation after the transaction by reason of their ownership in the U.S. domestic target, or (ii) the non-U.S. acquiror is subsequently managed and controlled from within the United States. It remains uncertain whether the Plan will be enacted into law and, if so, what anti-inversions may be included in ultimately enacted legislation.