MERGERS AND ACQUISITIONS FROM A TO Z – OVERVIEW OF STATE AND LOCAL TAX CONSIDERATIONS

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Mergers and Acquisitions
from A to Z
Overview of
State and Local Tax Considerations

State taxation is an exceedingly complex subject. The state and local taxation of corporate mergers and acquisitions is no exception. The issues presented by such transactions range from sublime questions of the meaning of the Constitution's guarantee of due process, to mundane questions like which tax forms are to be filed where, when and how.

The author acknowledges with thanks the assistance of Debra L. Silverman in the preparation of this outline. The author also recommends, for further reading on this subject, the comprehensive outline on "State and Local Tax Issues in Corporate Transactions" prepared by Professor Rebecca S. Rudnick (Indiana University School of Law) et al. for the February 2, 1991 meeting of the ABA Corporate Tax Committee, as well as BNA Portfolio Nos. 1520 and 1530.
While state and local planning often does not attract the same attention as other aspects of mergers and acquisitions, a careful advisor will attain sufficient familiarity with the area to ensure that state and local tax issues are properly addressed.

In corporate mergers and acquisitions there are, generally speaking, three different time periods for which state and local tax issues must be considered:

• **Due Diligence.** What tax liabilities lurk in the different corporations? Has everyone filed in every jurisdiction to which they are responsible? What are the different companies' audit profiles? What audit positions and caselaw authorities are developing in the (often unfamiliar) jurisdictions in which the targets do business?
• The Transaction Itself. What is the state and local tax treatment of the transaction itself? Will income taxes be imposed on the corporate parties? On their stockholders? Are there sales taxes due? Do any transfer taxes apply? What has to be done before, at, or after the closing to comply with the relevant state and local tax laws?

• The Conduct of Business After the Transaction. What implications does the corporate combination have for future state taxation? Which entities will be doing what, and where? Can their post-transaction activities be arranged to reduce state taxes? Or will those activities worsen the state tax picture?

There can be a very wide variety of taxes implicated by a corporate merger or acquisition. Here, it is useful to organize one's thoughts along subject matter lines:

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• **Income Taxes.** What taxes are relevant at the shareholder level? What are the structures of the relevant state taxes on corporate franchises, income and/or capital? How are affiliates treated?

• **Sales Taxes.** Will the transaction itself attract sales or use tax? Have the parties complied with applicable sales taxes in their previous operations? Will subsequent restructuring transactions trigger sales taxes?

• **Other.** Are there stock transfer taxes? Are real property, tangible property or intangibles ad valorem taxes of concern? Could a real property transfer tax apply? Are any of the parties subject to special entity tax regimes (e.g., as utilities)?

In each time period, and under each tax, three basic questions should be posed:
WHERE are the parties subject or potentially subject to state and/or local tax?

HOW do those jurisdictions' taxes operate?

WHAT can legitimately be done to minimize state and local taxes?

In exploring the state and local tax treatment of corporate merger and acquisition transactions, it also is useful to reflect on certain "big picture" areas in which the state and local taxes are fundamentally different from the federal income tax. These include:

- Constitutional limits on states' abilities to impose tax. The most common limitations are those of the Due Process Clause, U.S. Const. amend. XIV, §1, and the Commerce Clause, U.S. Const. art. I, §8, cl. 3. Other limitations of some relevance include the Privileges and Immunities Clause, U.S. Const.,
art. IV, §2; the Equal Protection Clause, U.S. Const. amend. XIV, §1; and, to a limited extent, the First Amendment.

- Federal statutes which define the states' abilities to impose tax. Examples include Public Law 86-272 (15 U.S.C.A. §§381-384), which prohibits the imposition of state income taxes on businesses whose in-state activities are confined to solicitation; the Internet Tax Freedom Act (P.L. 105-277) and the Internet Tax Nondiscrimination Act (P.L. 107-75) which prohibit(ed) certain state taxation of Internet Access; 1995 Federal Legislation prohibiting the imposition of state income tax on certain pension income; 2001 federal legislation which prescribes a unified approach to state taxation of mobile telecommunications; and statutes like those currently under consideration to address nexus for purposes of sales tax, and potentially also

- States' needs to identify the kinds of activities that trigger state taxation. By way example, the New York State Department of Taxation and Finance has ruled that hiring a subcontractor as an independent contractor to service customers in New York does not constitute "doing business" in New York if no agency relationship is established, TSB-A-02(6)C, but that assembling and disassembling items shipped into New York takes the taxpayer beyond the protection of P.L. 86-272, rendering it subject to New York tax. TSB-A-02(16)C.

- States' needs to divide income or business activities among themselves, so as to tax only that portion of the income or activity that is fairly attributed to each state. The Uniform Division of Income for Purposes of
Taxation Act, or "UDITPA," is used in many states around the country as a foundation for allocating and apportioning income. However, it is not necessarily uniformly applied in all UDITPA states, and a number of states (including New York) do not follow UDITPA at all. The sourcing of business income does usually follow some version of a three-factor formula that compares payroll, property and receipts (but see Michigan); but again there are numerous issues and inconsistencies. Three recent New York pronouncements provide an inkling into the scope of these issues, and the controversies that arise.

A foreign corporation is treated as providing financing, notwithstanding the documents' use of purchase and sale terminology; as a result, the corporation is not treated as owning property, or as deriving receipts from the sale of such property, in New York. CS
Integrated, NYS ALJ, DTA No. 817548, May 9, 2002.

A licensor of intellectual property has New York receipts to the extent the licensee uses a New York facility to manufacture products using the licensor's trade secrets or patent. TSB-A-02(2)C.


The same need to "source" activities to a specific location arises under the sales tax as well. See Oklahoma Tax Comm'rs v. Jefferson Lines, Inc., 514 U.S. 1135 (1995) (permitting Oklahoma to impose sales tax on the full price of a bus ticket purchased in Oklahoma, even where the travel was interstate).

- Divergent rules for taxing affiliated groups. Many states utilize combination of
unitary businesses, but it is important to appreciate that combined reporting is not the same as Federal consolidation. Some states require combination of affiliates engaged in a unitary business. Some make combination elective. Others condition combination on a finding of "distortion." See, e.g., N.Y. Regs. §§6-2.1 through 6-2.7; Panavision, New York State Tax Appeals Tribunal DTA No. 816660 (combination not permitted where taxpayers (i) were not unitary and (ii) failed to prove distortion).

- Differing treatments of net operating loss carry-forwards and carry-backs. Many states limit either or both, in some cases as a means to coordinate the federal carryover/carryback to the instate activities and in other cases, purely as a matter of budget constraints.
- Different rules for capturing income earned by out-of-state affiliates. Some states
use combination to include these affiliates or their income in the tax base; some employ §482-like transfer pricing; some disallow deductions for amounts paid to affiliates. See, e.g., New Jersey's recent legislation.

- Conformity to or divergence from federal definitions of income. Many states have long followed the federal definition of taxable income. However, the emergence of pass-through entities with potentially nontaxable owners puts stress on federal conformity.

Even more recently, the federal economic stimulus legislation, with its 30% and 50% bonus depreciation deductions, has prompted budget-driven nonconformity in states that could not afford to provide such costly tax incentives.

- The importance of regional issues. State tax regimes can be heavily influenced by regional considerations, and by the tensions that
exist in the relatively small worlds of state and local politics. In New York, for example, the corporate tax regime includes a number of key features designed to encourage the maintenance of corporate headquarters within New York, as well rather sophisticated rules for financial services sector companies. In Michigan, by contrast, the "Single Business Tax," which apportioned all corporate income by reference solely to the source of the receipts, was enacted to encourage the maintenance of manufacturing and industrial facilities in that state.

Florida's constitution prohibits the enactment of an individual income tax; and prohibits the imposition of an estate tax greater than what is creditable against the federal estate tax. Florida thus tends to look for taxes on tourism (sales taxes on hotel occupancy, and

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potentially on services) to fund its government without offending its voters.

This outline sets forth an overview of state and local tax issues relevant to one particular type of activity -- corporate mergers and acquisitions. The purpose of the outline is to acquaint advisors who are not state tax specialists with the general parameters of state taxation, and to introduce areas where state and local tax issues often arise.

I. Due Diligence and State and Local Concerns

A. As with federal income taxes, in negotiating and documenting a transaction it is important to deal with the state and local tax liabilities that come along with the acquired business or entity. Proper planning will address the assignment of financial responsibility as well as the procedural aspects involved in
preparing and filing returns during the transition, handling audits of pre-acquisition years, and protesting asserted deficiencies.

B. In investigating the potential state and local tax exposure of a desired target entity it is critical to appreciate that state and local taxation is considerably more complex than the federal income tax. It potentially involves a wide range of different types of taxes, as well as state-to-state differences in approaches to similar tax regimes. For example, as noted above, many states impose corporate income taxes based on UDITPA, while other states, notably New York, employ an entirely different approach to corporate taxation. Many states impose sales and use taxes, but the applications of such taxes to corporate, partnership and LLC transactions can vary widely, as can states' exemptions for different types of property and services. Some
states have enacted special rules to encourage in-state activities that do not invoke state taxation, for example New York's fulfillment house legislation. Other states, notably New Jersey, employ exceedingly broad notions of the ability of the state to impose tax on corporations whose intangible assets are used in-state.

C. Acquirors also must be sensitive to the myriad "miscellaneous" state and local liabilities lurking in an acquired business or entity. Some issues are theoretical: For example, has a corporation filed tax returns in each jurisdiction where it should have? What was its position regarding nexus? If returns have not been filed, the statute of limitations on assessing additional state taxes usually will be open indefinitely, which could represent a substantial risk for additional tax liabilities.
D. If due diligence reveals significant and long-running exposure in particular states for persons who have not filed tax returns at all, consideration may be given to pursuing a voluntary disclosure. Many states maintain these programs, under which nonfiling companies can negotiate a limited look-back period and an abatement of penalties, provided they are not yet known to the State. In other states, voluntary disclosure may not be possible. For example, Massachusetts suspended its voluntary disclosure program when its tax amnesty program was recently enacted. Because amnesties may require filings for all open periods, they may be less useful than voluntary disclosure.

E. Other due diligence questions may be more practical: for example, did the acquired company actually remit withheld income and unemployment taxes? What will be the
unemployment tax "experience factor" of the surviving entities?

II. Corporate Tax Issues

A. Transactional Issues

Almost all of the states have some form of corporate income tax. Most of the states conform their tax in large respect to federal income tax law. Nevertheless some economically important states, like New York and California, deviate from federal law in some significant respects. As noted, the constitutional restrictions on the scope of states' ability to tax multi-state enterprises, also adds a significant element of complexity -- and opportunity -- to state income tax planning.

1. Which States Can Tax The Parties?

   This question raises two levels of inquiry.

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(a) Nexus. Under due process and commerce clause limitations, does a person have sufficient contacts with a jurisdiction to be responsible for tax in that jurisdiction?

- Quill, a 1992 Supreme Court decision regarding the level of personal presence necessary for a mail order vendor to be obligated to collect state use tax, is an important part of this jurisprudence. 504 U.S. 290, 1992 U.S. Lexis 3123 (1992). In that case the Supreme Court held that, to be required to collect and remit use tax from one's customers, it is necessary to have some physical presence in the state.

- What "physical presence" means is far from clear. See Orvis v. Tax Appeals Tribunal, 86 NY2d 165 (1995). New York recently proposed regulations under which appearances at trade shows for no more than 14 days would not
render a corporation subject to income taxation. However, these proposed regulations did not address sales tax nexus.

- It is not clear whether physical presence is the standard with respect to the imposition of income taxes as well. In *Geoffrey*, a Delaware corporation was held to be subject to South Carolina income tax based on the presence of intangibles -- in the form of accounts receivable under franchise agreements -- in South Carolina. *Geoffrey, Inc. v. South Carolina Tax Commission*, 437 S.E. 2d 13 (1992), cert. denied 114 S. Ct. 550 (1993). Following *Geoffrey*, the New Mexico Tax and Revenue Department concluded that a Michigan subsidiary that licensed trademarks to its parent corporation for use within the state of New Mexico was subject to income tax on the part of its royalty income attributable to the parent corporation's sales.
within the state, on the theory that it purposefully availed itself of the state's economic market. *K-Mart Properties, Inc. v. New Mexico Tax'n and Rev. Dept.*, No. 21,140 (Nov. 27, 2001). The Department had found "little difficulty" determining that the licensing agreement created the "requisite physical presence" under the Commerce Clause, and was upheld in taxing K-Mart's royalty company. That decision is however currently on appeal to New Mexico's Supreme Court (cert. granted, Jan. 9, 2002).

An interesting comparison to the *Geoffrey* and *K-Mart* cases can be found in *J.C. Penney Nat'l Bank v. Johnson*, where the Tennessee Court of Appeals held that Tennessee lacked the power to tax a subsidiary banking corporation, based upon the in-state activities of its parent retail corporation. 19 S.W. 3d 831 (1999), cert.
denied 121 S.Ct. 305 (2000). Since the activities of the parent corporation failed to assist the subsidiary in maintaining its credit card business within Tennessee, and thus maintaining a market for the subsidiary in the state, the Court determined that the state lacked the necessary connection to the parent corporation to assert tax liability from credit card activities in the state. But in Am. Online, Inc. v. Johnson, 2002 Tenn. App. Lexis 555 (July 30, 2002), the Tennessee Courts of Appeals sent a very confusing signal about the meaning of its decision in Penney, and the scope of Tennessee sales tax nexus, by stating that AOL was potentially taxable in Tennessee based on the "substantial number of businesses operating in [TN] helping make the AOL service available...." Note, however, that the facts recited in the AOL decision included a statement that the taxpayer
owned equipment in Tennessee through which it provided services to customers; this may make the apparent "reversal" of the Tennessee court's position less startling than advertised.

- Commercial (as compared to tax) liability can be premised on a finding that the defendant "purposefully availed itself" of the economic opportunities offered in the state, without regard to physical presence. See, e.g., Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

Suffice it to say that the "nexus question" is both elemental and fraught with uncertainties. Intangibles, agents, subsidiaries, LLC's, satellites and software all contribute to the prevailing confusion in determining where businesses are taxable. However, it is exceedingly incautious to proceed with a merger
or acquisition without asking this basic question.

(b) Allocation and Apportionment.

Assuming that a corporation clearly is within the jurisdictional reach of the state, to what extent can a state tax the income and assets of that corporation? Again, the commerce clause requires that a tax be fairly apportioned to the taxing state, not be discriminatory against interstate commerce, and be fairly related to the services provided by the state. Complete Auto Transit Inc. v. Brady, 430 U.S. 274 (1977). However, as noted above, the inquiry into proper allocation and apportionment can be difficult.

These issues present particularly important planning questions regarding the state tax treatment of corporate mergers and acquisitions. For example, in many cases a
taxable sale of assets will produce corporate income or franchise taxes in the states where such assets are located, while a taxable sale of stock can produce entirely different results -- and perhaps no tax at all.

The UDITPA rules classify income as either business or non-business. Business income is apportioned among the states in which a corporation does business. Non-business income is allocated either to the location of the related tangible property, or to the taxpayer's commercial domicile. In UDITPA states, the question of whether a state can impose tax will often depend on whether the income or gains in question constitute "business income."

In the context of dividends and capital gains realized on an investment in corporate stock, the Supreme Court decision in Allied-Signal reinforced the concept that
taxation of such income by a UDITPA state requires some connection to the business that is conducted by the corporate investor in that state. *Allied-Signal Inc. v. Director, Division of Taxation*, 504 U.S. 768 (1992), 1992 U.S. Lexis 3682. That connection generally is sought to be established by looking for a "unitary business" encompassing both the in-state and out-of-state activities. See *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 455 U.S. 425 (1980); *ASARCO Inc. v. Idaho State Tax Commission*, 458 U.S. 307 (1982). The connection might, however, also be found if it can be shown that a corporate investment is used in the in-state business (e.g. for working capital).

The *Hercules* series of cases offer a telling example of conflicting interpretations of the state tax treatment of gain from a corporate sale of stock. Maryland's intermediate
court (117 Md. App. 29, 1997) and the Tax Departments of Utah (State Tax Comm. App. No. 90-1521 (September 19, 1996)) and Wisconsin (1997 Wisc. Tax Lexis 3) treated Hercules' $1.3 billion gain as business income that was apportionable to and taxable in those states. The Maryland Court of Appeals reversed, however, 351 Md. 101 (1998). Its approach was followed by Minnesota (575 N.W.2d 111, 1998) and Illinois (324 Ill. App. 3d 329 (1st Dist. 2001)). Those three state courts held that the $1.3 billion was not taxable in those states, notwithstanding the protestations of a leading commentator to the contrary. See Hellerstein & H., State Taxation, at ¶8.09(5)(a).

As Hellerstein writes in his rejoinder, "we have a long way to go before the precise meaning [of the UDIPTA rules] becomes clear."

In Hunt Wesson Inc. v. Franchise Tax Board, the Supreme Court recently made clear
that it is impermissible for a state to unreasonably allocate non-unitary expenses to income. 528 U.S. 458 (2000). California, which utilizes the unitary method for determining its taxable share of a multi-state corporation's business income, disallowed interest deductions to non-California domiciled corporations to the extent that such corporations had received non-unitary dividend and interest income. Although the state's interest offset provision did not impose a direct tax on non-unitary income, the Supreme Court ruled that the provision was unconstitutional, because it effectively denied a portion of a deduction to non-domiciliary corporations from unitary income that had a nexus to the state. Thus, a state cannot assume that all borrowing first supports nonunitary investment, and draw such income associated with the borrowing into the tax base.
In contrast to UDITPA, New York takes a markedly different approach to taxing income that corporations derive from investments in other corporations. New York bundles corporate income and assets into three categories:

- Business income, which is apportioned based on a three-factor formula comparing payroll, property and receipts;
- Investment income, which is apportioned based on a formula that looks to the in-state activities of the corporations in which the taxpayer invested; and
- Subsidiary income, which is entirely exempt from New York tax.

N.Y. Tax Law §210.3. Corporate expenses are likewise allocated among the three categories of income and apportioned or, in the case of
expenses attributable to subsidiary capital, disallowed. See N.Y. Tax Law §208.9(a)(1), Carpenter Technology Corp., 2002 N.Y. App. Div. Lexis 6788 (3d Dept. June 27, 2002). New York State and City have issued audit guidance regarding the allocation of non-interest expenses among the three categories of income and capital, but the treatment of interest expenses is still awaiting similar guidance.

Under New York's scheme, income derived by a non-New York corporation from investment capital can be subject to New York tax if the investee corporation has a New York presence, even though the investment did not give rise to "business" income. The constitutionality of this approach was upheld by the Court of Appeals in 1991, prior to the Supreme Court's decision in the New Jersey case; the Court of Appeals recently indicated it saw no reason to
revisit that decision. See Allied-Signal, Inc. v. Commissioner of Finance, 79 N.Y.2d 73 (1991); Allied-Signal, Inc. v. Department of Taxation and Finance, 229 A.D.2d 759, appeal dismissed, 89 N.Y.2d 859 (1996), (appeal as of right dismissed November 26, 1996, for want of a substantial constitutional question). By comparison, under the Supreme Court's application of UDITPA, income from investments in intangibles would generally be allocated to and taxable only by the state of the investor corporation's commercial domicile.

A different example: Under New York law, income from the sale of a 50% subsidiary is not taxed at all, N.Y. Tax Law §208.9(a)(1), while under UDITPA such gain from intangibles could be taxed in the state of commercial domicile. See Times-Mirror Co. v. FTB, 102 Cal. App. 3d 872 (1980).
2. How Does The State Characterize The Transaction?

(a) Reorganizations Generally.

State income tax laws in large part follow the federal in defining what constitutes a reorganization. New York, for example, relies upon federal conformity to import into the New York franchise and personal income tax laws the definitions and general consequences of a reorganization. In most cases, therefore, a transaction characterized as a reorganization for federal purposes will have the same state income tax characterization. A related issue, which is important to keep in mind, is that a transaction that qualifies as a merger under state corporate law does not necessarily qualify as a reorganization under federal law. Rev. Rul. 2000-5, 2000-5 I.R.B. 436. This issue arises primarily in the context of state law mergers involving
entities that are disregarded for federal purposes, but recognized as separate legal entities for state purposes. The Service has recently proposed regulations that disallow federal Type "A" reorganization status for mergers into a federally disregarded entity or by such an entity. Prop. Reg. § 1.368-2(b)(1).

There can of course be state income tax consequences of a reorganization that differ from the federal. One obvious area is the different income tax treatment from state to state of individuals receiving corporate dividends or gain on stock. States like New York tax resident individuals on dividends and capital gains, but do not tax "true" nonresidents. If a corporate acquisition or merger generates taxable income or gain, an individual shareholder resident in Florida will have no state income tax on the boot received, while an individual
shareholder resident in New York may owe a sizeable state income tax. Because of the disparate state income taxation of individuals, owners of corporations contemplating taxable dispositions frequently consider pre-sale changes of residence, to reduce or eliminate state income taxes. This, in turn, gives rise to a whole new set of issues: Where is an individual domiciled or resident? There is an enormous body of learning on this highly fact-specific subject, but that is beyond the scope of this outline.

As noted above, corporate shareholders also can have widely disparate state tax effects depending upon whether the dividends and gain are business or non-business income (under UDITPA), or investment or subsidiary capital income (in N.Y.).

(b) Section 338(h)(10) Elections.
One form of acquisition planning that continues to have utility even after the 1986 Tax Reform Act is the federal election under §338(h)(10) of the Internal Revenue Code.

Glossing over important qualification rules, this federal election is available when 80% or more of the stock of a corporation is purchased by another corporation. The federal election takes what was in form a sale of stock and converts it into a sale of assets by the target corporation to a "new" corporation, with the asset sale deemed to occur while the target was still owned by the selling shareholder. The federal election thus disregards the sale of the stock, and instead taxes the transaction as if the target sold all of its assets. Similarly, the federal election treats the buyer as owning a new corporation which, essentially, has just
purchased all of the assets of the target corporation at fair market value.

From a state tax perspective the consequences (and wisdom) of making a §338(h)(10) election can vary widely. One simple variable is that the amount of gain on a stock sale could differ from the gain on an asset sale (see below). Another example is that New York exempts gain on the sale of a subsidiary from tax, but imposes tax on asset sales.

Another important question is how each state treats the federal §338(h)(10) election. For several years New York did not recognize the §338(h)(10) election unless the federal consolidated group was identical to the New York combined group (which often is not the case). TSB-M-87(4)C. Where the §338(h)(10) election was not respected New York treated the transaction as a "plain" §338 election, with the
target being deemed to sell all of its assets in a separate return year. In 1991 New York reversed itself, and now essentially follows the federal treatment of the deemed sale under a §338(h)(10) election, without regard to the composition of the New York group (although the federal consolidated return effects of §338(h)(10) elections are not relevant to New York reporting). TSB-M-91(4)C. As clarified in TSB-a-99(22)c, the 1994 federal extension of §338(h)(10) to nonconsolidated affiliates applies for New York purposes as well, with selling affiliates again following the federal treatment, and excluding gain on the sale of the target stock. Where a §338(h)(10) election is not made, New York respects the parent's stock sale, but since gain on subsidiary capital is tax exempt from State and City franchise/general corporation
taxes, there is no New York tax on the sale of target stock.

If a State does not exempt gain on subsidiary capital, does not recognize an (h)(10) election (meaning that the parent's stock sale is not ignored), and taxes the target by reference to its federal taxable income from the deemed asset sale, making a §338 election could be a state tax disaster, because the parent will owe tax on its stock sale, while the target also will owe tax on its separate asset sale. Such is the case in North Carolina and Mississippi, although Mississippi does give the parent a credit for the tax paid by the subsidiary. Miss. Reg. §801. N.C. DOR Memorandum July 21, 1991, reported at Tax Notes Highlights & Documents Dec. 22, 1992.

Even where they respect the federal election, state rules vary widely. Wisconsin requires a separate state election in
addition to the federal election and permits the election, regardless of whether one was made at the federal level. *tax releases, WI DOR, April, 1991.*

States may also differ in the way they characterize the income resulting from the election. Where one state treats the income arising from the deemed asset sale as allocable but another state treats the income as apportionable, the same income can be taxed by both states.

Further, with the advent of (h)(10) elections for acquisitions of S corporations, see Treas. Reg. §1.338(h)(10)-1, it is important to coordinate the state and local tax treatment of the deemed sale by the corporation with the taxation of the S corporation shareholders to whom the corporate gain passes through, particularly where the state
or locality (e.g., New York City) imposes tax on S corporations.

There are other variations on the theme. See, e.g., New York TSB-A-98(20)C (investment tax credit is recaptured, and unused credit carry forwards are lost, following a Section 338 election); New York TSB-A-02(1)C (actual liquidating distribution is considered part of the deemed liquidation); Connecticut Ruling No. 2003-3 (deemed asset sale also deemed to produce receipts for purposes of factor apportionment). The important message, however, is that the state tax consequences of making elections under §338 can range from insignificant to profound.

3. **How Much Is The Taxable Gain?**

In computing the amount of taxable gain many states again conform to the federal rules,
so that the amount of state gain will equal the amount of federal gain. There are, however, two particularly important caveats for state tax planners.

First, while the allocation of purchase price among different assets in a taxable transaction obviously is important under the federal tax law (e.g., because of recapture, MACRS or §197), this allocation can take on an even greater significance for state purposes. For example, state X may be able to tax the gain on asset X because it is part of the state X business, but might not tax the gain on asset Y. In such a context it becomes important to consider the allocation of purchase price between assets X and Y. How much gain does the seller have in state X? How much basis will the buyer have in asset X for purposes of computing its state X income? What effect will the price
allocation have on the buyers' apportionment factors?

The second important caveat is that the federal tax basis for an asset or for stock might not be equal to the state tax basis for the asset or the stock. Several states (e.g., New York and California) have decoupled from the accelerated depreciation and cost recovery structure of ACRS and MACRS. In these states the federal basis of a depreciable asset will not be the same as its state tax basis. Similarly, federal consolidated return rules produce various upward and downward basis adjustments in the stock of group members. These adjustments may not have any corollary under state law, or may be made automatically, even though there is no state consolidation.

With the advent of federal "bonus" depreciation and the widespread state decoupling from these rules, it has become much more likely
that state gain will differ in amount from federal gain.

In comparing the tax costs of alternative forms of a taxable transaction, therefore, one might get an approximation of state taxes by applying state rates to federal taxable income, but this is a shortcut that could lead to the wrong answer.

4. **What Limitations Might Arise As A Result Of The Transaction?**

There are various federal limitations on the deductibility of expenses and losses following corporate mergers and acquisitions. The Code §382 limitations on the use of NOLs following corporate acquisitions, the §279 and §163(e)(5) limitations on the deductibility of certain interest expense, and cases like *Indopco, Inc. v. Commissioner*, 403 U.S. 79, illustrate
various federal limitations that "conformity" states will likewise impose.

Sometimes, however, states go even farther in restricting deductions, and New York offers a few interesting examples. As noted above, New York does not tax income or gains from subsidiary capital. Consequently, interest and other expenses allocated to subsidiary capital are not deductible. For this purpose a subsidiary is defined to include only a direct subsidiary, not a "grandchild." See N.Y. Regulations §3-6.2(b); cf. In re Racal Corp. and Decca Elecs., NYS Tax Appeals Tribunal, 1993 New York State Tax Cases T-458. See also N.Y.C. Rule §3-01(b), effective September 4, 1997.

Accordingly, in any case in which monies are borrowed to acquire or invest in a corporation owned or to be owned 50% or more by the investor's group, care should be taken to
structure ownership to avoid a New York disallowance of the borrower's interest deduction. See, e.g., Suburban Carting Corp. v. Tax Appeals Tribunal, 263 AD 2d 793 (1999) (taxpayer demonstrated interest expense was not attributable to subsidiary capital in 1989 (taxpayer demonstrated interest expense was not attributable to subsidiary capital in 1989, but failed to meet its burden of proof for 1990); Carpenter, supra.

New York also once disallowed a portion of a purchaser's interest expense in large acquisitions that increase corporate leverage. N.Y. Tax Law §208.9(b)(6-a), repealed effective January 1, 2000, by Ch. 407, Laws 1999. Under this now-repealed tax penalty on leveraged acquisitions, five percent of the acquiror's interest deduction was disallowed if:
(i) the ratio of average debt to average equity doubled from the previous year;

(ii) the ratio of average debt to average assets increased by more than 60% over the previous year; and

(iii) the total interest deduction was at least $1 million.

Among the more peculiar aspects of this formula was the fact that it fell most heavily on the acquisition of targets who had not been heavily leveraged prior to the acquisition, while imposing no penalty on the highly-leveraged acquisition of a highly-leveraged company. Moreover, the limitation disallowing 5% of the interest for New York purposes, apparently for only a four-year period, seemed chiefly a nuisance tax, rather than a sound expression of tax policy.
New York also once had an anti-LBO rule disallowing NOLs. N.Y. Tax Law §208.9(f)(2-a), (2-b) and (2-c), repealed, effective January 1, 2000, by Ch. 407, Laws 1999. Again, this was keyed to the above-defined highly-leveraged transactions. In such a transaction, if an acquiror's interest in the target became greater than 50% of the voting stock, the NOLs were no longer available.

New York's practice of restricting the post-merger use of a target's NOLs is not unique. In certain states, an acquirer must establish some level of continuity of the target's business in order to deduct the target's pre-merger losses. Arizona, for example, only permits the use of a target's NOLs to offset post-merger income generated by the target's former assets. Az.Reg. R15-2D-302(B)(3).
There are numerous rules in other states limiting or eliminating NOL carryforwards following corporate reorganizations and acquisitions, some of which are stricter than federal law. Montana, New Jersey and Tennessee all disallow any post-merger use of the target's NOLs by the acquiring corporation. ARM §42.23.415(1); N.J.Regis. §18:7-5.13(b); Tenn. Rule 1320-6-1-.21(2)(d). narrow exceptions from total disallowance for mergers that constitute an F reorganization or a mere change in the state of organization can be found in Massachusetts and Utah, respectively. Mass. Letter Ruling 95-4 (Mar. 31, 1995); Utah Code Ann. §59-7-110(5)(a).

In addition to NOL limitations specific to the merger context, those structuring a transaction need to be aware of states that limit the use of NOLs as a rule. California limits carryforwards to 55% of the NOL. Cal. Rev. and
Tax Code §24416(b). Pennsylvania is a good example of a state with complex NOL limitations that have varied in recent years, and currently cap NOL deductions at $2 million per year. 72 P.S. §7401(3)4(c)(1).

Such state limitations can be further complicated by changes in consolidated and combined reporting. All of these must be carefully considered if the use of NOLs against state taxes is significant to the post-transaction financial picture.

5. **Special S Corporation Considerations.**

S Corporations and their shareholders present special problems in the state and local arena. Many states recognize S status. In some states (such as New York) a separate S election must be made, and there may be reasons for making
a federal S election, but not making a state S election. It is therefore important to ascertain the S Corporation status of a corporation in each state in which it does business.

Moreover, there are states and localities (such as New York City, that do not recognize S Corporation status, and similarly do not treat Qualified S corporation Subsidiaries ("QSubs") as disregarded entities. Tax planning that makes sense from a federal perspective, such as a taxable asset sale by the S Corporation, may not have the same effects, and could in fact be disadvantageous, for state and local tax purposes.

The federal tax law changes that introduced QSubs have affected state and local tax planning in a variety of ways. Depending upon the circumstances, states may fully conform to the federal see-through treatment of S
corporations (e.g., California Tax. & Rev. Code §§23801 et seq.), may partially conform (e.g., New York State QSub legislation, Ch. 389, Laws 1997, §§45-78, 219), or may not conform at all (e.g., New York City). The State tax treatment of QSubs can be beneficial or detrimental, depending upon the complexion of the group's business activities and the rules of the states in which they are active. Suffice it to say that, where a transaction includes an S corporation and QSubs, care must be taken to analyze the state tax implications of the transaction for the QSub, its S corporation parent, and the shareholders of the S corporation.

B. Post-Transaction Tax Considerations

1. Becoming Subject To Tax In New Jurisdictions.
The acquisition of assets in a jurisdiction in which the acquirer had not previously engaged in business brings the acquirer into a new taxing jurisdiction. This can have significant effects on the state and local tax liability of both the acquirer and the acquired business. The acquisition can trigger new state tax responsibilities with respect to the in-state activities of the acquired business. Perhaps more significantly, an acquisition also can give rise to state taxes on activities of the acquirer that had not previously been taxed in the state. For example, under Quill or P.L. 86-272, the acquirer's presence in the jurisdiction may previously have been too small to trigger tax liability, but the addition of new assets may suddenly make the old line of business subject to new taxes. Similarly, the addition of new assets or lines of business could give rise to new state
taxes on the nationwide or worldwide income of the acquiror, based on the application of unitary reporting rules, or various state allocation and apportionment formulae. Any asset acquisition by a corporation that is conducting a multi-state business must therefore be carefully evaluated, both in terms of the form of the transaction and in light of the potential for combination (discussed below).

2. Changes In Apportionment Formulae.

Blending two corporate groups can produce significant changes in the business or investment allocation percentages of the various corporations. Depending upon the facts, this may mean that income or gain will be more or less heavily taxed following the merger. In such circumstances it may be advisable to accelerate or postpone taxable asset dispositions. Note
also the possibility of overriding a particularly inappropriate formulary result by seeking a discretionary adjustment of an apportionment formula. See British Land, Inc. v. Tax Appeals Tribunal, 85 NY2d 139 (1995).

3. Attributional Nexus.

If a transaction is structured as a stock acquisition, or as an acquisition of assets by a special purpose subsidiary, the income and property of the parent corporation ordinarily will be insulated from taxes imposed in jurisdictions in which the target, but not the parent, conducts business. However, one area of the law to which increasing attention is being paid is the question of "attributional" nexus -- whether the ownership of a subsidiary conducting business in the state can subject the parent to tax in the state. See, e.g., MCI Int'l Telecomm.
Cafcor Trust Reg. Vaduz v. Division of Tax Appeals 1997 New York Tax Cases T-627, SFA Folio Collection v. Tracy, 652 N.E. 2d 693 (Sup. Ct. Ohio 1995). As a practical matter, this question is often closely tied to questions of unitary business, appropriate transfer pricing, substance-over-form, and consolidated or combined reporting. Recent cases have also closely examined the economic substance of the transaction, and whether the newly created subsidiaries were established for valid non-tax—business purpose—reasons. SYL Inc. v. Comptroller and Crown Cork and Seal Inc., 375 Md. 78, June 9, 2003, cert. den. 2003 U.S. Lexis 8004 (Nov. 3, 2003). See also Sherwin Williams, Mass. Supreme Court, October 31, 2002 and Sherwin Williams, NYS Tax Appeals Tribunal, DTA #816712,
June 5, 2003. At this point it is sufficient to note the issue, and the importance of careful planning for intra-group dealings in areas of potentially unitary businesses.

4. Deductibility of Acquisition Interest Expense.

If substantial debt is incurred as a result of the acquisition, the parties must examine the various state provisions that may limit or prevent the deductibility of the interest and plan accordingly. Where the acquiring corporation incurs the debt and bears the interest expense but the target company will generate the ongoing income, push down accounting, intercompany guarantees and combined reporting are methods of offsetting the income against the debt. However, in structuring the
acquisition the various state regimes that operate in this context must also be taken into account.

For example, in computing taxable surplus, a Texas taxpayer can subtract its own debt, but not that of its parent, even where the taxpayer has formally guaranteed debt the parent incurred in acquiring the taxpayer. Comptroller's Decision No. 24, 931, 1992 Tex. Tax LEXIS 74, April 3, 1992. Similarly, the benefits of combined reporting are not available in some states and restricted in others such as where a pure holding company fails to satisfy unitary business requirements. See e.g., First National Bank of Manhattan v. Kansas, 779 P.2d 457 (Ct. App. 1989). Further, Mississippi regulations require the elimination of any transactions entered into solely for the benefit of the shareholders without an equal mutual business
benefit and so deny any deduction for interest expenses incurred by a corporation for the purchase of its own stock. Miss. Reg. 808.

5. Combined Reporting And Consolidated Returns.

Some states permit or require affiliated groups of corporations to file combined reports or consolidated returns. See, e.g., N.Y. Tax Law §211.4. The standards for combination generally require a minimum threshold of common ownership (80% in New York), and that the group be engaged in a unitary business. Combination or consolidation generally results in the elimination of intercompany transactions, and the netting of members' losses against other members' income. Combination can be favorable to taxpayers, for instance when it permits taxpayers to shelter income with other members' losses; but
it also can be unfavorable, for instance when it brings into a state income and activities of another corporation that the taxpayer would have preferred remain outside.

The acquisition of a new line of business or a new subsidiary presents opportunities to create or reconfigure a combined group. It also presents risks that a taxing jurisdiction will either require the new acquisition to join an existing group, or use the new acquisition as a link to join previously non-unitary businesses into a single unitary business. In planning an acquisition, therefore, consideration should be given to both the positive and the negative aspects of combination. If combination is not desired, query whether it is possible to acquire less than the percentage ownership required to combine or consolidate. Alternatively, in a state (such as New York)

Following promulgation of the federal "check-the-box" regulations in 1996 it has become
much easier to use federal pass-through entities. Treas. Reg. §1.7701-3. In particular, the new regulations permit certain entities (such as limited liability companies) that have just one owner to be disregarded for federal income tax purposes. These disregarded entities are treated as a branch or division of their corporate owner.

The considerable simplification brought by the "check-the-box" regulations encourages the use of limited liability companies, and permits corporations to use single-member LLC's to achieve the liability protection of a subsidiary without the attendant tax complications. One should not, however, assume that the state and local tax treatment of these see-through entities, as well as QSubs, is as simple. While most states now conform to the federal classification of these companies for income tax purposes, that conformity may raise peculiar
problems in the state and local arena. For instance, if an entity is disregarded for purposes of state income taxation, does its owner have nexus with all of the states in which the entity does business? Does the owner lose the protections of Pub. Law 86-272? If the activities of an LLC or QSub are imputed to its owner in the same manner as if the owner were itself conducting business in the state, the use of a single member LLC or QSub, rather than a separate subsidiary corporation, can have dramatically different consequences for its owner.

Where federal conformity obtains, the see-through entity and its owner will automatically achieve "combination." this can be good where combination is desirable but might not otherwise be available, but it can be unfortunate
if it has the effect of increasing the income taxable in a particular jurisdiction.

Outside of traditional state income taxes, the treatment of federal see-through entities also is not always clear -- and not always the same. New York State and City have both indicated that, for sales tax and commercial occupancy tax purposes, single-member LLCs and QSubs are separate entities and separate taxpayers.

There are many more issues regarding the state and local tax treatment of federal see-through entities. (For a discussion of these issues see Lee, Checking Oneself into a Box, State Tax Notes, April 21, 1997, at 1249.) In planning to use these otherwise attractive entities, therefore, it is important to consider how they and their owners will be treated for
state and local tax purposes, and whether that tax treatment is desirable.

6. **Special Entity Taxation.**

Many state tax laws include special tax regimes applicable to different types of industries. New York State, for example, has separate tax systems for telecommunications and transportation companies, banks, insurance companies, and "regular" corporations. Where a merger or acquisition involves entities that are or may be subject to industry-specific tax regimes, it is very important to analyze the post-merger structure, and ensure that the new group does not find itself subject to a new and unwelcome tax regime. Often, advance planning is needed to structure such transactions to avoid problems and achieve optimal results.
III. **Sales and Use Taxes**

The application of state sales and use taxes to mergers and acquisitions raises two fundamental questions:

- **Will tax be due on the merger or acquisition transaction?**
- **Is the acquiror potentially liable for unpaid sales tax owed by the transferor?**
A. Taxability Of The Merger Or Acquisition.

1. Importance Of The Form Of The Transaction.

The sales tax treatment of a merger or acquisition generally depends on its form. State sales and use taxes usually apply only to transfers of tangible property, so transfers of corporate stock and securities are not subject to sales taxes. See, e.g., N.Y. Tax Law §1101(b)(4)(i). See also The TJX Companies, 1997 New York Tax Cases T-221. State tax laws also provide exemptions that should be analyzed. Some states exempt all reorganizations (see, e.g., Md. Code Ann., Tax-Gen §11-209(c)); some states provide specific exemptions applicable to some but not all reorganization transactions.

- A Reorganizations. Many states provide specific exemptions for transfers pursuant to a statutory merger or consolidation.
See e.g., N.Y. Tax Law §1101(b)(4)(iii)(A) (which applies only to transfers "solely" in consideration for the issuance of the transferee’s stock); see also, In re Prospect Dairy, 53 A.D. 2d. 755 (3d Dept. 1976) (form counts). This type of exemption generally covers those transactions that are effected as mergers or consolidations under the corporate law of the taxing state or other state law. One should not assume that "domestications" and mergers of foreign corporations are exempt under such provisions; New York City has clearly taken the position that a "statutory merger" does not include a domestication of a non-U.S. corporation under Delaware law.

- **B Reorganizations.** Stock-for-stock reorganizations should not have any sales or use tax implications, as the property
transferred is, on both sides, intangible property.

- **C Reorganizations.** An acquisition of corporate assets for stock is a clear case in which sales and use taxes must be carefully examined. The corporation is acquiring tangible property, and absent some exemption applicable to the specific transaction or assets, sales or use tax will be due.

- **D Reorganizations.** These involve transfers of property to a corporation, and transfers of stock in that corporation. The property transfer is potentially subject to sales and use tax; however many states provide exemptions for transfers to newly-formed corporations in exchange for their stock, and these exemptions may apply to a "D" reorganization. See, e.g., N.Y. Tax Law §1101(b)(4)(iii)(D). Note, however, the
importance of qualifying the transferee as "newly-formed." See N.Y. Regulations §526.6(d)(5). Note also that the assumption of any liabilities by the newly-formed corporation may affect eligibility for this exemption. See N.Y. Regulations §526.6(d)(5)(v) (assumption of liabilities secured by the transferred assets does not vitiate the exemption, but the assumption of unsecured liabilities will (to that extent?) render the exemption inapplicable).

Transfers to "existing" corporations may not qualify for these exemptions, but may not be taxed if no consideration is received (either in the form of stock issued or as liabilities assumed).

- Recapitalizations under E. Recapitalizations involve transfers of intangibles, and thus do not trigger sales or use taxes.
• **Reorganizations.** Transactions that are a "mere change in identity, form or place of organization" generally are not the subject of specific state exemptions. The common thinking is that such transactions are not subject to sales or use tax, but one should consider whether the form in which such changes are effected constitutes a transfer of assets and, if so, whether any other exemption (e.g., for statutory mergers) applies.

• **Triangular Mergers.** The federal income tax rules provide tax-free reorganization treatment for two common forms of acquisition in which the target corporation merges with a subsidiary of the acquiring corporation. These transactions are commonly called triangular mergers, reflecting the three parties to the transaction. While the federal treatment is similar, however, state sales tax treatment may
differ, based on whose assets are transferred to whom. Thus, in a forward triangular merger, (2)(D), where the target corporation merges into the acquiror's subsidiary (and thus "dies"), the assets of the target are transferred to the surviving corporation. Absent a specifically applicable exemption, this asset transfer may be subject to sales tax. By contrast, in a reverse triangular merger (2)(E), the target emerges as survivor, still owning all its assets. Here, given the lack of any transfer of assets in form, there would be no sales tax on the target's assets.

- 338 Elections. As discussed above, section 338 transactions are stock sales that are treated for federal income tax purposes as asset sales. It is important to check whether state sales tax law follows suit and treats the transaction as including a taxable transfer of
assets from the "old" target to the "new" target. Some states have explicitly rejected this.

- **351 Transfers.** Property transferred to a corporation solely in exchange for stock where the transferee(s) are left with control of the corporation are exempt from federal income tax but may or may not be exempt from state sales tax. Many states do similarly exempt from sales tax the contribution of property in exchange for stock, although in certain states, the exemption is available only where the corporation receiving the contribution is newly organized. N.Y. Tax Law §1101(b)(4)(iv)(D); N.J. Rev. Stat. §54:32B-2(e)(4)(E); Md. Reg. 03.06.01.13(C); Cal. Reg. 1595(b)(4). Such limitations, which vary from state to state, can be avoided with a little planning. A new corporation created to receive the property can later be merged into the desired
acquiror or, where the transaction permits, the transfer can be made without the issuance of additional stock.

2. General Exemptions Of Relevance To Mergers And Acquisitions.

In addition to merger-specific rules, many states also provide exemptions for "casual" or "bulk" sales. These exemptions can apply to exempt asset transfers from sales and use tax. See, e.g., Cal. Rev. Tax Code §6006.5. New York does not have such an exemption.

Other sales tax exemptions may apply:

- Inventory would normally be exempt as property held for resale. The transferor should obtain a resale certificate from the acquiror.
• Many states exempt production or R&D machinery and equipment. See N.Y. Tax Law §1115(a)(12).

• Where the form of a corporate merger or acquisition involves or potentially involves a sales taxable asset transfer, consideration should be given to the possible uses of disregarded entities. In some cases, these entities might be used to eliminate sales tax on a merger or acquisition. See New York State TSB-A-98(2)S.


Where tax is due (or, in some cases, exemption is claimed), a sales tax return must be filed. A valuation and allocation of purchase price among acquired properties -- realty, personalty and intangibles -- also may be required. As noted, sales tax will generally be
imposed only on the consideration for personal property, although the definition of taxable property can be the subject of considerable dispute. See, e.g., Navistar International Transportation Corporation v. State Board of Equalization, 8 Cal. 4th 868 (Sup. Ct. 1994).

B. Bulk Sales.

In sales tax parlance, "bulk sales" rules are rules that potentially make the acquiror of a business liable for the sales taxes owed for periods prior to the acquisition. In this respect an asset transfer becomes more like the transfer of a corporation -- the unpaid sales tax liability follows the assets.

Most states that impose bulk sales liability also provide for bulk sale notifications. These are procedures under which an acquiror of a business either notifies the state that a bulk sale has occurred, or provides advance
notification of the impending acquisition to the state; the state then advises the acquiror how much unpaid sales tax should be withheld out of the purchase price, and absolves the purchaser of any liabilities in excess of that amount. See, e.g., N.Y. Tax Law §1141(c). In any case involving asset transfers, acquirors must be careful to comply with the bulk sales rules of the applicable states, to avoid the unpleasant surprise having to pay their seller's sales taxes.

C. **Responsible Persons.**

Sales and use tax laws generally include "responsible person" provisions under which individuals can be held personally liable for unpaid sales taxes of a corporation (or other entity) for which they worked or served as an officer or director. Where a sales tax audit
follows the disposition of a corporation or business and a "change in command," it can be difficult, both procedurally and practically, for former officers to coordinate their defense with the audit of the corporate vendor. To protect departing officers, consideration should be given (i) to entering into agreements allocating the financial burden of sales taxes attributable to pre-acquisition periods, and (ii) to providing mechanisms for communication and cooperation in the event sales tax assessments are later made against the entity and its responsible persons.

IV. Real Estate and Other Property Taxes

A. Transaction Taxes

Some states and localities apply traditional real property transfer taxes to corporate transactions. New York is a good example of this -- both the New York State and New York City real
property transfer taxes apply to transfers of controlling interests in corporations, partnerships, trusts and other entities.

In evaluating the transfer tax treatment of a corporate transaction there are a number of questions to consider. First (obviously) is the need to identify the jurisdictions in which the parties own real estate. And it is important to focus on both sides of the transaction, for the issuance of stock of the acquiring company could, either alone or in aggregation with other stock transfers, make the acquiror as well as the target subject to tax.

Once the interested jurisdictions are identified their tax laws must be reviewed to consider whether the transaction is taxable, and if so, at what level. Asset transfers will generally trigger transfer taxes, but stock transfers may or may not. If the transaction is
taxable at the shareholder level, the corporations involved often agree to pay that tax; but such agreements could have income tax ramifications. See PLR 9434025.

Assuming a transaction is taxable, the meaningful question is: How much? This will depend upon:

- the types of property subject to tax. For example, does the tax apply to leases? Does it cover indirect ownership?
- the measure of the tax. Is it fair market value? A formula? Are deductions allowed?
- the availability of exemptions. Are there tax-exempt shareholders? Is there overlapping ownership?

In planning corporate transactions particular attention should be given to the appraisal of real estate interests, the
coordination (or lack thereof) between federal tax allocations and transfer tax positions, and the identification of possible exemptions.

B. Property Taxes

An asset transfer often serves (either officially or de facto) as an occasion for a reassessment of the value of corporate property; this can result in increased local taxes. In New York City, for example, real estate taxes hover around 10% of the assessed value of the property per annum, so increases in assessed value can have a considerable ongoing cost.

Some jurisdictions also provide that a stock transfer can trigger a reassessment. In California, the transfer of a controlling interest in an entity owning real property permits reassessment of the entity's real property. CA. Rev. & Tax Code §64.
Other jurisdictions may not have such a direct linkage, but may be prompted to reassess following a corporate merger or acquisition. It is important to bear in mind that the long-term costs of higher property taxes can be even more significant than the tax cost of the transaction itself. In any acquisition where real estate assets are significant, or where the parties own considerable assets subject to personal property taxes or to other ad valorem taxes, the property tax ramifications of the transaction should be considered.

V. Incentives Opportunities

In today's climate of bidding wars between the states, mergers and acquisitions present unique opportunities. Negotiating favorable state and local tax deals is a common consideration in such transactions. New York
City alone offers numerous examples of corporations who bargained for breaks in sales tax, utility tax, property tax and so forth, in exchange for maintaining jobs in the City.

On the flip side, parties to corporate mergers and acquisitions should take care that their transaction, or the reconfigurations contemplated to follow, will not violate tax deals agreed to in the past. If the closing of an office or plant triggers an obligation to repay past benefits, that could have a significant impact on planning for the future of the combined companies.

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