

Hamilton Estate Planners Council Post-mortem Planning and the '88(1)(d) bump'

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Who we are



Simpson Wigle LLP is a business law firm with offices in Hamilton & Burlington



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Things to come



What we will cover

- Outline a scenario
- Problems that can arise with an attempt to carry back a loss
- What is the bump, how does it work and what are its problems?

A scenario



Meet Homer

- **Homer is a successful entertainer**
- **He earns income each year so that he is in the top bracket for Canadian income tax purposes**

A scenario

Homer

2,000 prefs
voting
ACB=PUC=\$1
FMV=\$2,000

Bart

1,000 c/s
voting
ACB=PUC=\$1
FMV=\$100

Holdco

No liabilities
No CDA or RDTOH

Securities

Acb=\$2
FMV=\$2,100

A scenario



Homer dies

- **Homer's odyssey ends in a bizarre skateboarding accident**
- **Fortunately, Homer had a Will that gives his sole executor, Bart, broad powers**

A scenario



Death and taxes

- Among other things, Homer is deemed to dispose of his Holdco shares for proceeds equal to their value.
- Homer realizes a gain of \$2,000 in respect of Holdco. In his terminal return, he pays tax of about \$464 as a result.

A scenario



What to do with Holdco?

- We want to minimize the taxes that must be paid by Homer in his terminal return, by his estate, by Holdco and by the beneficiaries of the estate

Choices



The loss carry back

- Typically, an estate executor would seek to minimize taxes by causing Holdco to redeem Homer's prefs.
- The redemption creates a capital loss that can be used to reduce or eliminate Homer's gain on death

Choices



The loss carry back

- With the carry back, and the right planning, total tax should be only slightly higher than the tax Homer paid on death in respect of the Holdco shares

A problem



A loss denial rule

- **But there is a problem: Bart is Homer's sole executor!**
- **Subsection 40(3.6) could apply so that "double tax" will result: the loss cannot be carried back, and Homer will have paid tax and the estate will pay tax again (on the deemed dividend)**

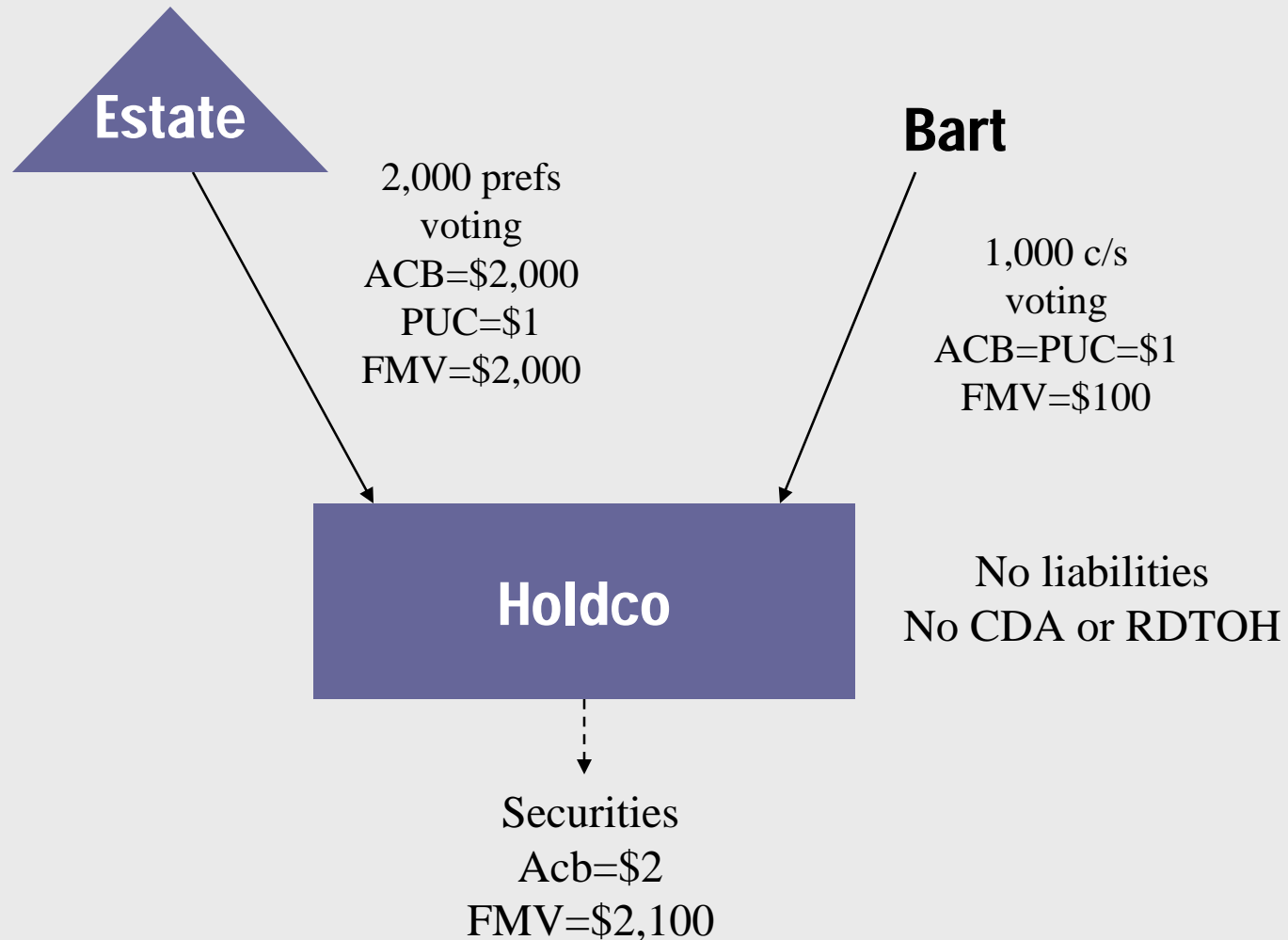
A solution



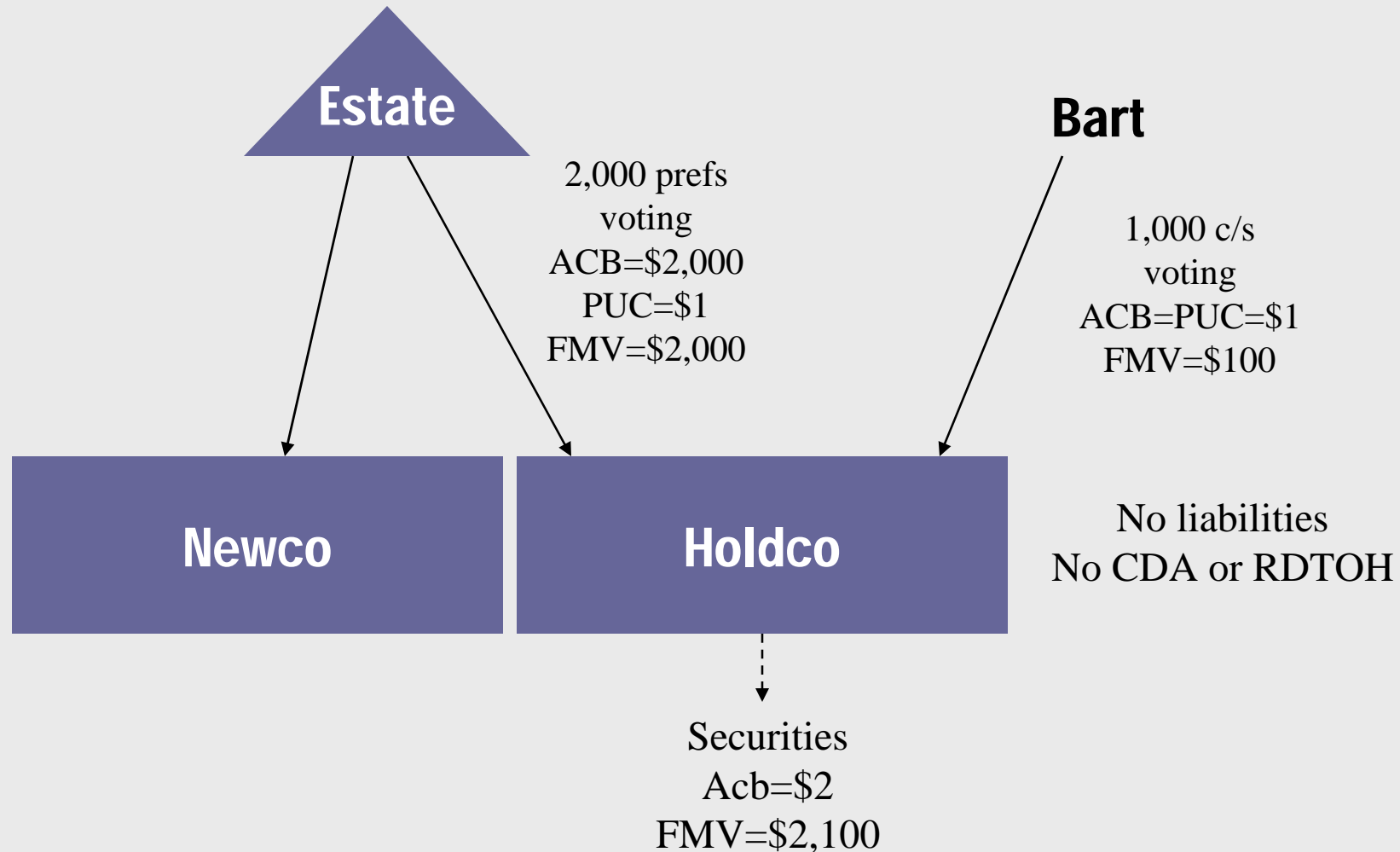
The 88(1)(d) bump

- On the winding-up or amalgamation of a 100%-owned sub with its parent, a “bump” is generally available
- The bump is an increase in the tax cost of non-depreciable capital property of the sub owned when the parent last acquired control of the sub

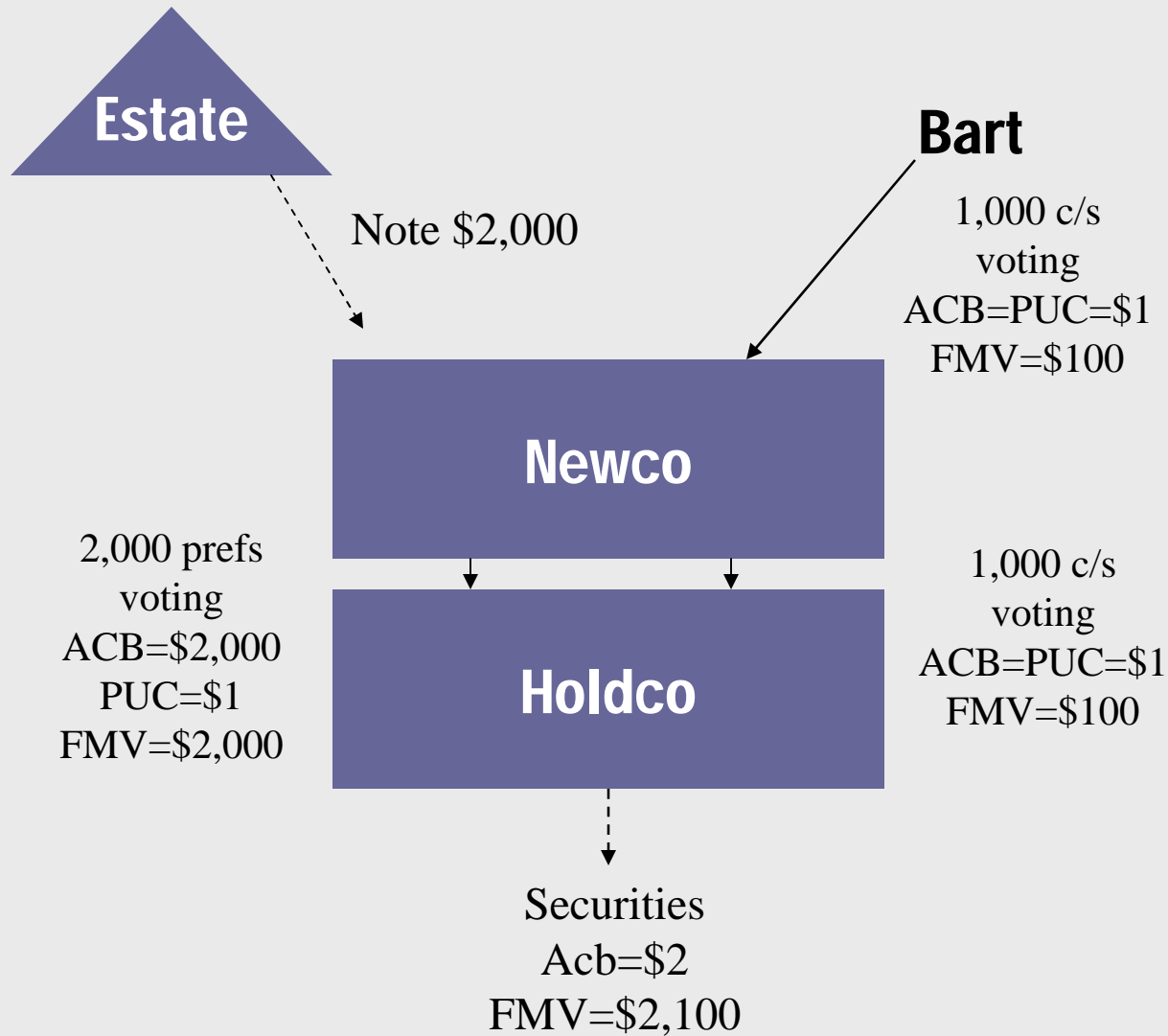
A scenario



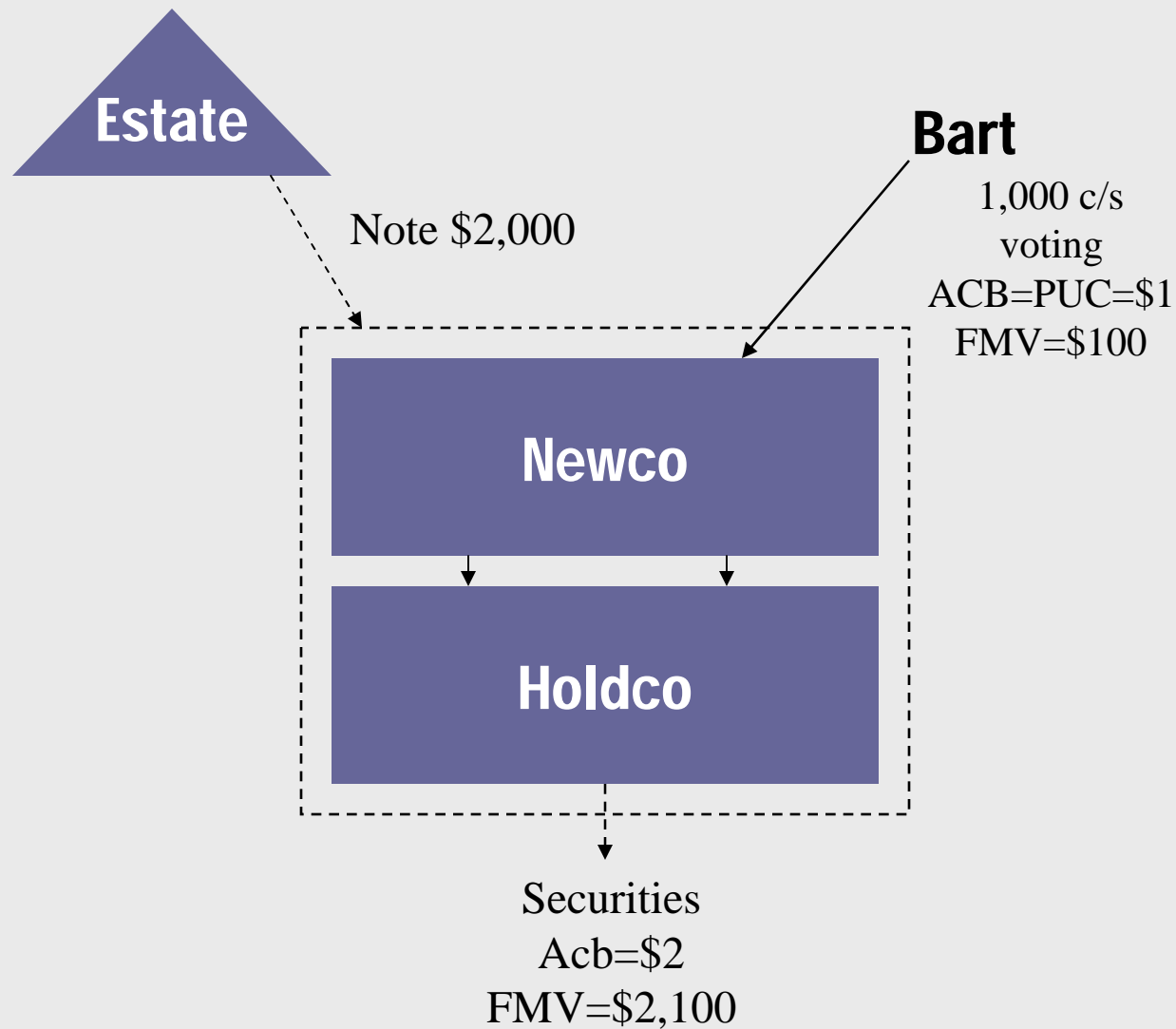
A scenario



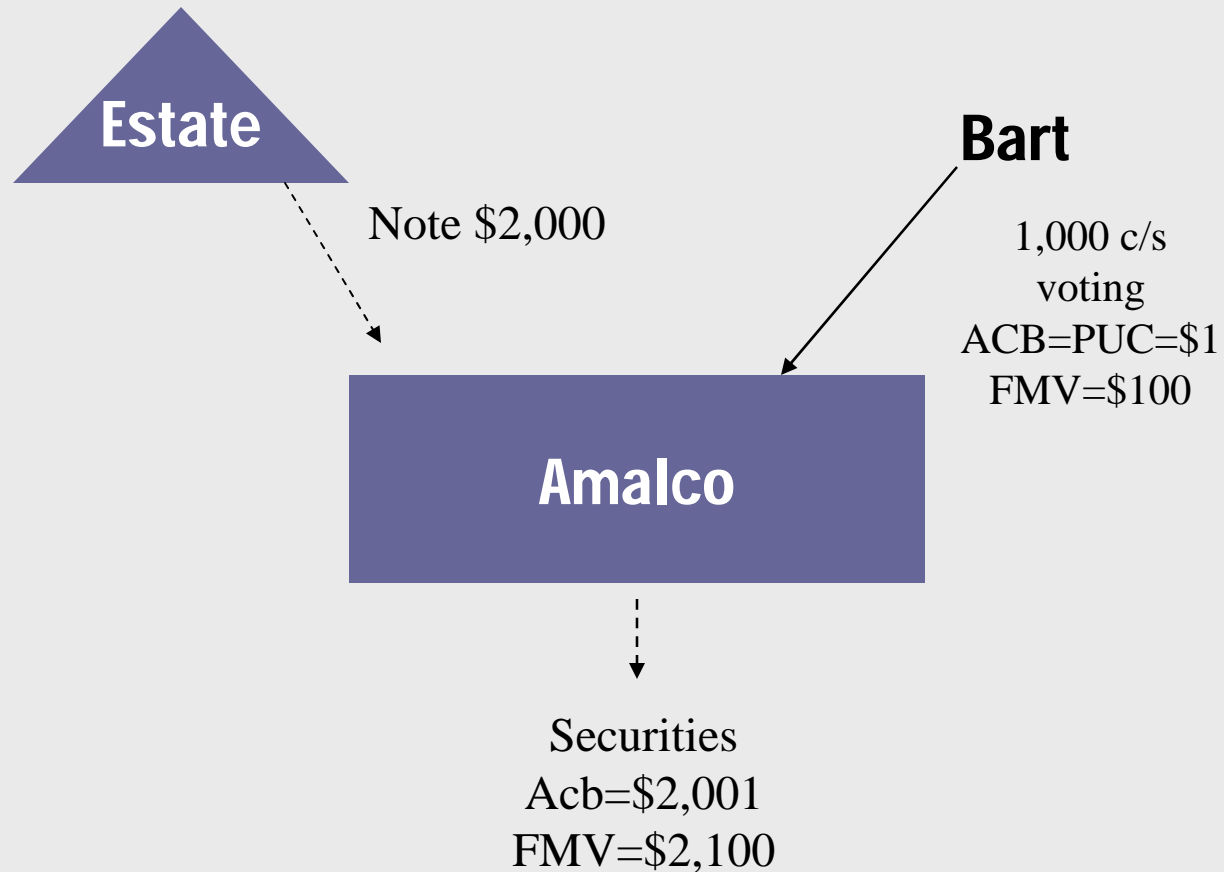
A scenario



A scenario



A scenario



A solution



Bumped assets

- **If the 88(1)(d) criteria are met, the property inside Amalco can be distributed to the estate with little or no tax, and the estate can distribute the property to the estate beneficiaries, and they should receive the property with a tax cost that is about equal to the property's value.**

88(1)(d)



The amount of the bump

- There are two limits. First: the total bump cannot be greater than the difference between (1) the total ACB to Newco of its Holdco shares and (2) the total cost of Holdco's property before the amalgamation less its liabilities and certain reserves.

88(1)(d)



The amount of the bump

- **The second limit: in general, no property of Holdco can be bumped by an amount that exceeds the property's inherent gain at the time Newco last acquired control of Holdco.**

88(1)(d)



Acquisition of control

- Newco will be considered to have last acquired control of Holdco immediately after Homer's death (see 88(1)(d.2) and (d.3) and see also subsection 256(7)).

88(1)(d)



Acquisition of control – 88(1)(d.3)

- **This paragraph provides a special rule for the purposes of the bump:**

“where at any time control of a corporation is last acquired by an acquirer because of an acquisition of shares of the capital stock of the corporation as a consequence of the death of an individual, the acquirer is deemed to have last acquired control of the corporation immediately after the death from a person who dealt at arm's length with the acquirer”

88(1)(d)



88(1)(d) criteria

- What property can be bumped?
- Only *capital* property owned by Holdco when Newco last acquired control of Holdco and continuously until its distribution on the amalgamation that is not “ineligible property”

88(1)(d)



Meaning of “ineligible property”

- Depreciable property
- Property acquired by Holdco from Newco or a person not at arm’s length with Newco where the acquisition is part of a series that includes the acquisition of control of Holdco

88(1)(d)



Meaning of “ineligible property”

- Property transferred to the parent on a “distribution” under 55(3)(b)
- “Bump denial” property

88(1)(d)



The bump denial

- Introduced to eliminate the “backdoor” butterfly
- The rule prevents the bump from applying to property of the subsidiary that is sold “back” to persons who were shareholders of the sub before the parent acquired control of it
- See subparagraph 88(1)(c)(vi)

Paragraph 88(1)(c)(vi):

property distributed to the parent on the winding-up where, as part of the series of transactions or events that includes the winding-up,

(A) the parent acquired control of the subsidiary, and

(B) any property distributed to the parent on the winding-up or any other property acquired by any person in substitution therefor is acquired by ...

Paragraph 88(1)(c)(vi) (cont'd)

(I) a particular person (other than a specified person) that, at any time during the course of the series and before control of the subsidiary was last acquired by the parent, was a specified shareholder of the subsidiary,

Paragraph 88(1)(c)(vi) (cont'd)

(II) 2 or more persons (other than specified persons), if a particular person would have been, at any time during the course of the series and before control of the subsidiary was last acquired by the parent, a specified shareholder of the subsidiary if all the shares that were then owned by those 2 or more persons were owned at that time by the particular person, or

Paragraph 88(1)(c)(vi) (cont'd)

(III) a corporation (other than a specified person or the subsidiary)

1. of which a particular person referred to in subclause 88(1)(c)(vi)(B)(I) is, at any time during the course of the series and after control of the subsidiary was last acquired by the parent, a specified shareholder, or

2. of which a particular person would be, at any time during the course of the series and after control of the subsidiary was last acquired by the parent, a specified shareholder if all the shares then owned by persons (other than specified persons) referred to in subclause 88(1)(c)(vi)(B)(II) and acquired by those persons as part of the series were owned at that time by the particular person;

Select Bibliography

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