

Welcome to the USA

Forming Companies in the USA and Operating Tax
Efficiently & and get not lost at home in Europe

Düsseldorf
4 September 2023

Forming Companies in the USA and Operating Tax Efficiently



Overview

- US tax system – key issues to consider
 - ❖ Entity selection
 - ❖ Federal and state reporting requirements - generally
 - ❖ Potential restrictions on claiming certain deductions
 - ❖ Eligibility for relief under applicable income tax treaties
 - ❖ US withholding and reporting obligations
- Basic US inbound issues when investing in the US via a US corporation
 - ❖ Corporate formation
 - ❖ Financing the new US corporation
 - ❖ Use of foreign owned intangible assets
 - ❖ Repatriation
 - ❖ Exit

Forming Companies in the USA and Operating Tax Efficiently



Overview (continued)

- Traps for the Unwary - Recent Issues Commonly Seen
 - ❖ Gifting
 - ❖ Commonly overlooked US reporting
 - ❖ German participation exemption structuring and potential US subpart F conflict
 - ❖ Loans to US resident shareholders of non-US subsidiaries
- Questions

US Tax System

Key Issues to Consider

- Entity selection
 - ❖ Type of entity
 - ❖ Entity classification (aka, “check-the-box”) rules and elections
 - ❖ US limited liability companies – corporation or pass-through?
 - ❖ What about from a German perspective?
- Federal and state reporting requirements - generally
 - ❖ In addition to the federal government there are 50 states and an estimated 12,000 local jurisdictions
 - ❖ Each may impose income, sales and franchise taxes.
 - ❖ Often raised as diligence issue in a future sale.

US Tax System

Key Issues to Consider (continued)

- Eligibility for relief under applicable income tax treaties
 - ❖ Limitation on benefits articles in US treaties
- US withholding and reporting obligations

Overview of US Tax System

Basic US inbound issues when investing in the US via a US corporation

- Corporate formation
 - ❖ Transfers of property can import gains into the US
 - ❖ Planning opportunities to mitigate US tax
- Financing the new US corporation
 - ❖ Debt versus equity
- Use of foreign owned intangible assets
 - ❖ Licence versus transfer
 - ❖ Extraction of intangibles from the US very difficult

Overview of US Tax System

Basic US inbound issues when investing in the US via a US corporation

- Repatriation
 - ❖ Loan repayment versus dividend
 - ❖ Withholding tax exposure
- Exit
 - ❖ Sale of shares versus sale of assets

Traps for the Unwary

Recent Issues Commonly Seen

- Gifts to US persons
 - ❖ Requires US reporting on Form 3520
 - ❖ Penalties where filings are late
 - ❖ Penalties are often significant (35% of balance) and difficult to abate
- Overlooked US Reporting – German shareholder of US LLC treated as a DRE for US tax purposes
 - ❖ US reporting required on Form 5472
 - ❖ Failure to report results in automatic \$25,000 penalty.

Traps for the Unwary

Recent Issues Commonly Seen (continued)

- German § 8b KStG structuring and US subpart F conflict
 - ❖ US resident German citizens pre-immigration structuring with subsidiaries and certain investments transferred to GmbH
 - ❖ Disposals at a gain may be lightly taxed in Germany
 - ❖ US subpart F rules will impose US tax on gains derived
- Loans to US shareholders from German and other non-US affiliates

Commonly encountered US-German tax issues

Unique US Reporting Issues

- Ownership Attribution - German parented group with multiple non-US subsidiaries and a US subsidiary
 - ❖ Ownership of all but the parent is attributed to the US subsidiary making its brother-sister entities controlled foreign corporations for US purposes.
 - ❖ US shareholders owning 10% or more shares in the German parent may have US taxable income inclusions as a result
- Family attribution in Erbengemeinschaft setting

Matthew D. Hitchcock, CPA, MST

Dr. Andreas Striegel, RA, StB, Attorney
at Law (New York)

