Guidance on the Anti-*Morris Trust* Provision

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Despite the politically correct moniker of the Taxpayer Relief Act of 1997, most corporate tax practitioners are well aware of the various tax increases and legislative "fixes" to corporate tax provisions that Congress thought were too liberal. Most of these can hardly be thought of as "relief." The changes to Section 355 were perhaps some of the most significant. (For prior coverage of the changes to Section 355, see Wood, "Amended Spinoff Law: How Bad Is It?" Vol. 6, No. 3 *M&A Tax Report* (Oct. 1997), p. 1.)

One of the prime areas of concern under the amended (yet again!) Section 355 is where an acquisition occurs and one or more persons acquire, directly or indirectly, 50% or more of the vote or value of the stock of the controlled or distributing corporation pursuant to a "plan or arrangement." I.R.C. §355(e)(2)(A). The new law does tell us that acquisitions occurring within the four year period beginning two years before the date of the distribution are presumed to have occurred pursuant to such a "plan or arrangement."

Rebutting the Taint

Of course, taxpayers can avoid this gain recognition by showing that an acquisition occurring during the four year period was "unrelated" to the distribution. I.R.C. §355(e)(2)(B). Thus the taint is rebuttable. But just how one rebuts the presumption is troubling right now.

Indeed, given the fact that there is a rebuttable presumption about the tainted plan or arrangement, it is no wonder that tax lawyers and accountants are beginning to question just what kind of bad intent will be imported into this area. Most fundamentally, after all, just what is a "plan or arrangement?" One wonders what constitutes a plan, and just *whose* plan is relevant in making this determination. At a recent meeting of the District of Columbia Bar Tax Section's Corporation Tax Committee, questions like this were asked, but all too few of these questions were answered.

At the meeting, various governmental representatives offered the not-so-comforting view that the law intentionally left out details about just what would be considered part of a plan. Moreover, there may even be an issue about precisely whose "plan" one is discussing. Raising from the ashes like a Phoenix was our old friend the *INDOPCO* issue of when a hostile takeover becomes friendly. One of the participants suggested that it was always difficult to pinpoint just when a hostile takeover became friendly.

Starvation Diet

With all of the other uncertainties in the post-1997 Act spinoff law, it is unfortunate that it may be quite some time before any guidance is forthcoming. (For full details of the changes to Section 355, see Wood, "Amended Spinoff Law: How Bad Is It?" Vol. 6, No. 3, *M&A Tax Report* (Oct. 1997), p. 1. ■