

Ninth
INTERNATIONAL TAX PLANNING CONFERENCE – 2003

Tax Treaty Interpretations in the United States

Saturday, December 6, 2003
15.20 – 16.00
ITC GRAND MARATHA SHERATON HOTEL, MUMBAI, INDIA
Mumbai, India

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Foreign
company

YS
Sub

foreign
pshp

Branch

Trust



Hybrid
Partnership

Reverse Hybrid
partnership

Hybrid
Branch

Hybrid
US Sub

US Perspective

Foreign Perspective

Characterization Issues

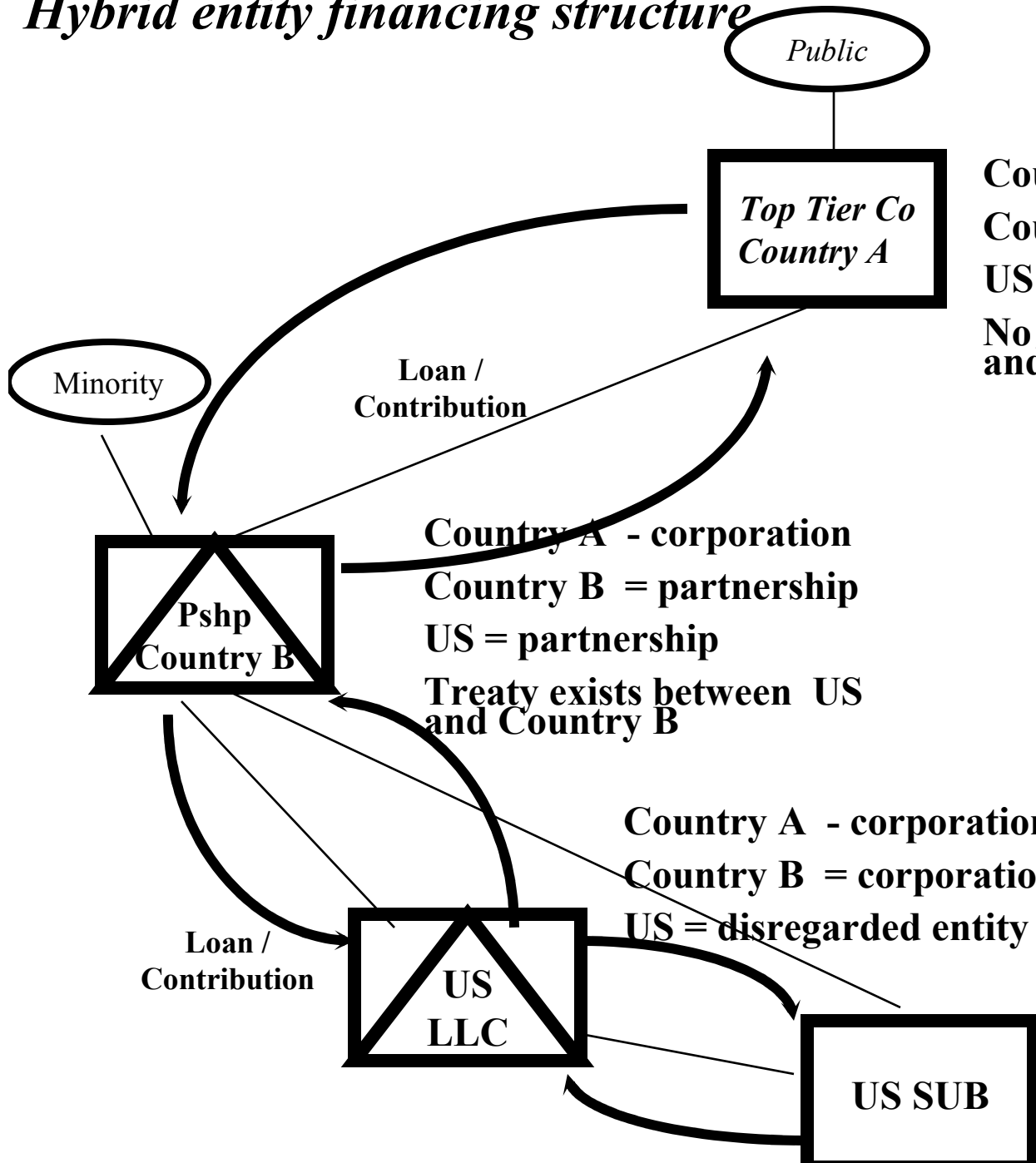
Section 894 Generally

Permanent Establishments Generally

Denial of treaty benefits for certain payments through hybrid entities

Final § 894 Anti –Hybrid Regulations

Hybrid entity financing structure



Country A - corporation
 Country B = corporation
 US = corporation

No treaty exists between US and Country A

Because Country A and Country B treats the US LLC as a corporation, the US treaty with Country A or Country B may not apply

Country A - corporation
 Country B = partnership
 US = partnership
 Treaty exists between US and Country B

Country A - corporation
 Country B = corporation
 US = disregarded entity

Country A = corporation
 Country B = corporation
 US = corporation

Application of Treaties Generally

Items Not Covered in Treaties

State Taxation

Effect of Treaties

Certification

Disclosure of a treaty-based position

LEGAL EFFECT, PRIORITY AND IMPLICATIONS OF U.S. TREATIES

US Constitution

Internal Revenue Code

Priority

Treaty Can Override US Domestic Law

Increase in Income Limit

**Nondiscrimination; Arm's Length Method;
Final Equity Compensation Regulations**

Final Regulations on Equity Compensation Issues

- + Stock Based Compensation
- + Valuing Equity Compensation
 - + Spread Amount Theory: NQSO and ISO and ESPP.
 - + Elective Grant Date Approach.
 - + Financial Accounting Rules
 - + Attempts to Justify Final Regulations with “due regard” to the Rules being “administrable.”
- + General Rule: Focus on Spread Amount
- + Election to use GAAP approach
- + Foreign E&P Reduction
- + Repricings and modifications: Sec 424(h) to determine if new option granted.
- + CSA Termination Results in constructive exercise of options.
- ++ Consistency Rules for all participants.
- + Documentation Requirement
- + Final Effective Date: options granted after August 25, 2003 and for first taxable year beginning after August 25, 2003.

MODEL TREATIES

US Model Treaty

The OECD Model Treaty

Caution

UN Model Treaty

CURRENT TREATY PARTIES AND OVERVIEW OF TREATY PROVISIONS.

Attachments I through VI

TREATY CERTIFICATION PROCEDURES.

PERMANENT ESTABLISHMENTS

BUSINESS PROFITS

Attribution of Income to US PE under 1996 US Model Treaty

General Rule

Relationship to Effectively Connected Income Concepts

Asset and Activity Tests

Divergence from OECD Model Treaty on the Use of Profit Allocation Methodologies

Allocation of Deductions to a PE

Booking Location Not Controlling

Establishing the Relationship of an Expense to a PE

Method of Accounting Issues

Coordination With Other Provisions

Nature of Business Activity

Location and Timing of Payment is Irrelevant

TREATMENT OF MISCELLANEOUS INCOME NOT OTHERWISE ADDRESSED IN A TREATY.

LIMITATION ON BENEFITS

MISCELLANEOUS TREATY ISSUES

Nondiscrimination

Mutual Agreement Procedure

Treaty effective date and termination issues

Exchange of Information and Administrative Assistance

Associated Enterprises

TREATY BASED RETURN POSITIONS: SECTION 6114