

December 7 - 8, 2009
International Tax Planning Conference
Foreign Partnerships and Funds

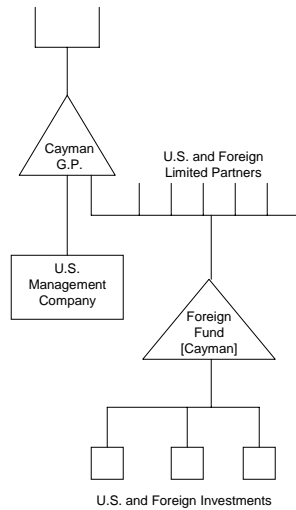
California CPA Society

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Foreign Partnerships and Funds

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Foreign Partnerships Doing Business in the U.S.

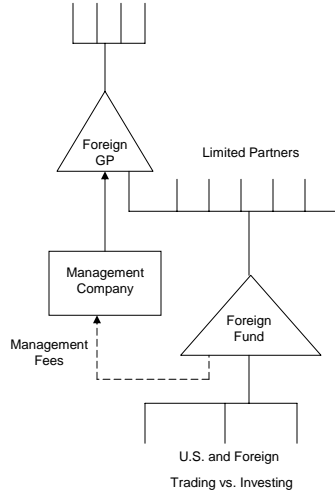


1. Doing Business in the U.S.
2. Does Foreign Fund File:
 - a) Form 1065
 - b) K-1s for U.S. Partners
3. Protective Filings for U.S. Returns for
 - a) Foreign Corporations
 - b) Foreign Partnership
 - (i) Effectively connected income [§1.864-7]
 - (ii) Filing upon 60 days notice §301.6231(f)-1(b)
 - (iii) Denial of deductions after 60 days §6231(f)

U.S. Reporting Requirements for Foreign Partnerships

- U.S. Investors: PFIC Rules may create problems
- Foreign Partnership not required to file U.S. returns unless
 - Gross income from U.S. trade or business [§864, 6031(e)]
 - Merely investing in stocks and securities is not a U.S. trade or business
 - Taxpayers Relief Act of 1997 eliminated the need to follow the “ten commandments” to avoid a U.S. trade or business
 - State tax laws may not conform to Federal laws and can be problematic
 - De Minimus Rule for filing 1065:
No filing if (a) no ECI, and (b) no more than \$20,000 and no more than 1% allocable to U.S. partners.

Claiming Losses from Funds



Trading vs. Investing

K-1 Disclosures:

- (a) Interest
- (b) Dividends
- (c) Gains & Losses
- (d) Ordinary income or losses [trading]

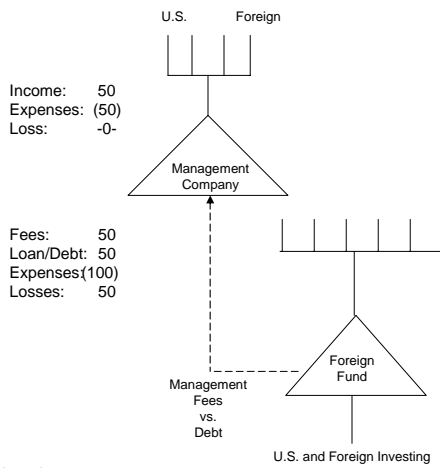
Deductions for management fees are either itemized deductions (§212) or ordinary deductions §162

Rev. Rul. 2008-39, July 3, 2008

Other considerations

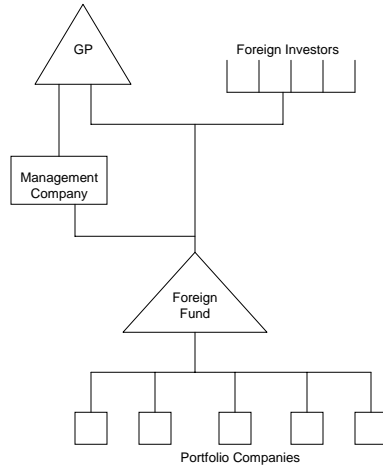
- (a) Active or Passive [§469]
- (b) Tax basis §731
- (c) Expenses of foreign taxpayer not carrying on business in U.S. disallowed §1.864-2(c)

Changing 212 losses to 162 losses for GP



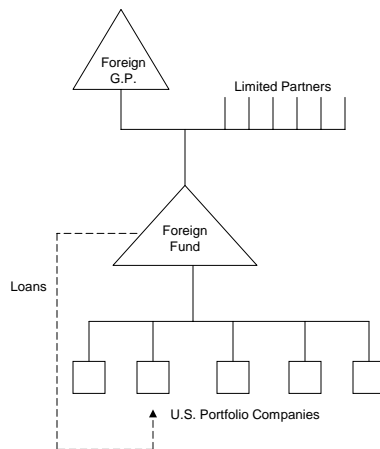
- GP's need tax basis in management company
- At risk rules must be satisfied [§465]
- Any debt structure

Tax Disasters with Foreign Funds



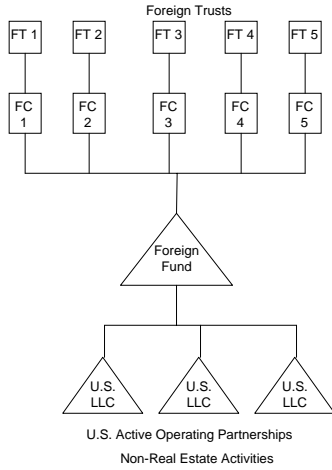
- Foreign Investors normally tax-free on sales of portfolio stock
- Ownership through U.S. companies results in double tax
- Getting out of bad structures:
 - Rescission
 - Agency
 - Distribution / valuation

U.S. Lending = Trade or Business?



- Fund loans to U.S. Corporations
- U.S. trade or business being considered §864
- Imputed income [§482, 1441]
- Portfolio debt income exclusion §871(h)

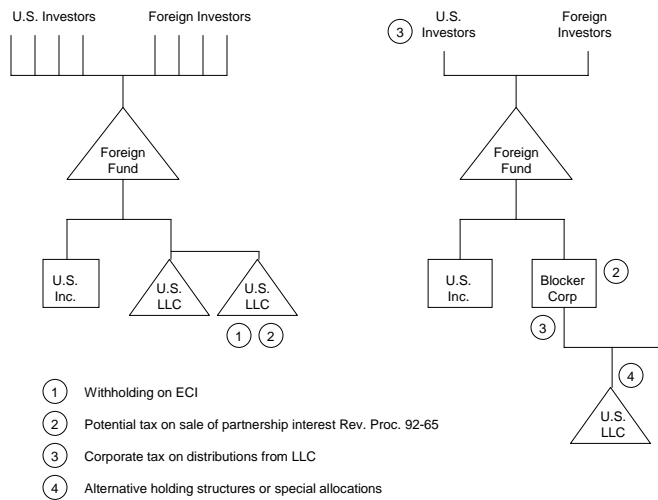
Foreign Funds in U.S. Investing in U.S. LLCs Revenue Procedure 91 - 32



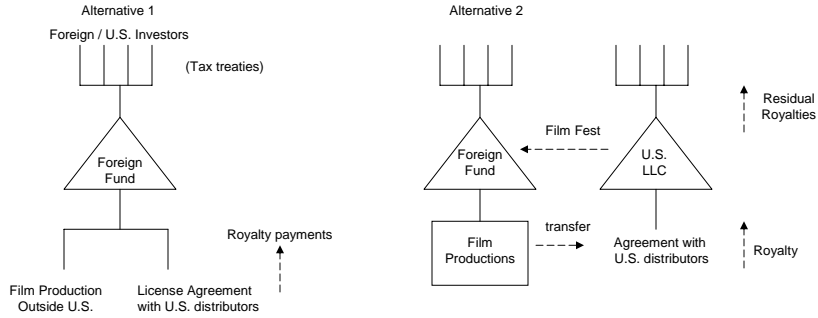
Partnership Challenges

- §1446 Withholding Rules are problematic
- Sale of partnership interest:
 - Allocation loss
 - Operating ECI in year of sale
 - Sale of ECI property (goodwill)
 - Sale of Security exempt [§§ 871, 881]
- Relying on Rev Proc 91-32
 - IRS position

Foreign Investors in U.S. LLCs



Foreign Film Production Ventures



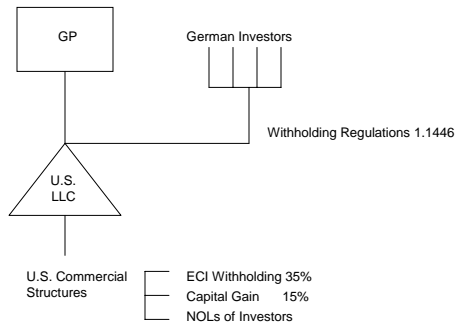
Alternative 1

- Joint venture vs. Partnership
- U.S. withholding concerns

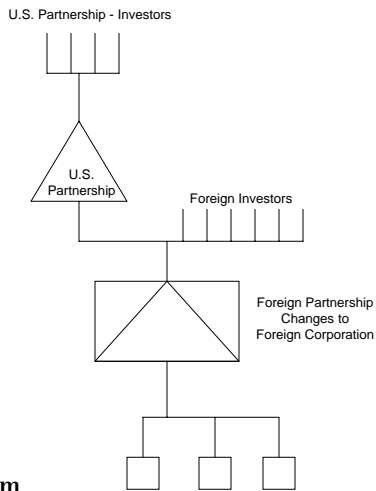
Alternative 2

- Use of U.S. partnership avoids withholding issues
- U.S. partnership is agent for foreign film company
 - PE concerns [§864]
 - Use of treaties to exempt foreign partners

German Investments in U.S. Real Property



Foreign Partnerships Check the Box Election Changes to Foreign Corporation

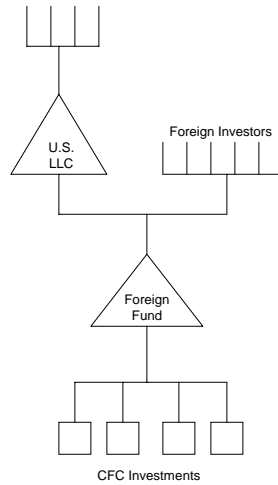


- Check the box results in a 351 transfer to a foreign corporation
- 351 transfer to a foreign corporation
- §367(a) gain triggered
- §367(a) exception if gain recognition agreement filed
- Taxable if U.S. ownership exceeds 50%

Transfers to Foreign Partnerships

- Contributions covered by §721
- §6038B mandates filing of Form 8865
 - U.S. persons direct or indirect ownership of interest in a foreign partnership
 - Value exceeds \$10,000 [Reg. §1.6038B-2]
- §6046A Reportable Events
 - Acquisition or disposition of at least 10%
 - Change in proportionate interest of at least 10%
- Penalties for failure to file
 - \$10,000
 - 10% of fair market value of property transferred
 - Penalties can be abated if oversight is due to reasonable cause

Form 8865 Reporting



- Form 8865 filings
- Form 5471 filings
- Statute: Note §6501(c)(8)
Re: definition for non-reporting

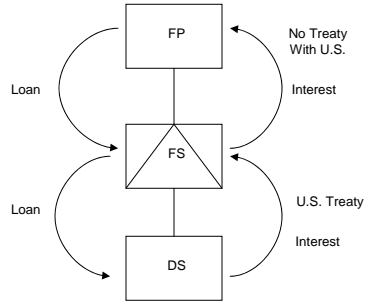
Report of Foreign Bank and Financial Accounts Form TD F 90-22.1

- Due June 30 of each year
- Instructions: Any bank, securities, derivatives or other financial instruments account

2008 New Definition

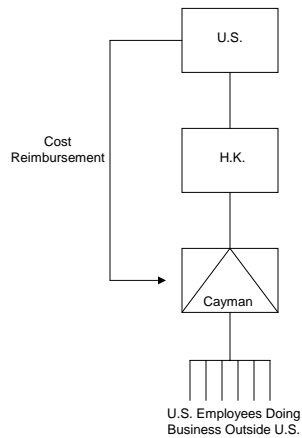
- Financial accounts encompass any accounts in which assets are held in a commingled fund and the account owner holds an equity interest in the fund -[No definition of "account"]
- Civil penalty: \$10,000 per year
- New rules may apply to all foreign mutual funds [PFICs]
- Extension to June 30, 2010 for foreign commingled funds [Notice 2009-62]
- Protective filing may be the best approach

Hybrids and Disregarded Entities



- If FS derives income under local law, treaty can apply
- Conduit regulations may challenge, imposing §894 restrictions on use of treaty
- See proposed Reg. §1.881-3 (Dec 2008) re: disregarded entity is a "person" for conduit rules

Hybrids & Employment



- Employees exempt under FICA rules
- §894(c) re: Treaty denial does not apply
- Structure avoids U.S. withholding and local withholding taxes