Let's Get Together, See What's in the Bag and Acquire Some M&A Knowledge

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Agenda

- Developed by You!
- We Will Grab from the Bag and Cover the Selected Topic
  - Or maybe celebrate a drawing of a special gift
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Which Business Restructuring Transaction Topic Most Interests You?

Sales/Use Tax Implications	0%
Income/Franchise Tax Implications	0%
Other Tax Implications	0%
Fees and Permits	0%
Credits and Incentives	0%
Tax Mitigation	0%
Due Diligence	0%
Due Diligence	0%
I Don’t “Do” M&A Stuff	0%

Dig Deep Into the M&A Grab Bag (OK, It's a Box)

The Grab Bag of M&A Issues			
Key Sales Tax Issues	Due Diligence	Credits and Incentives	Tax Risk Mitigation Strategies
Key Income Tax Issues	Transaction Documents	Government Relations	Successor Liability
Key Issues with Other "Taxes"	Unclaimed Property	Transfer Pricing	Post-Closing Integration

Sales Tax Issues

- Application of Sales Tax in Restructuring Transaction
  - Sales taxes should not apply in “stock” deals because transferred interest is an intangible interest, which is generally not subject to sales tax.
    - But due diligence is crucial to uncover potential liabilities
  - Sales tax could potentially apply in any type of deal in which there is a transfer of taxable assets for consideration.
  - Most states define “sale” broadly.
  - Therefore, sales tax will apply to a transfer of otherwise taxable assets unless an exclusion or exemption applies.

Sales Tax Issues

- Exclusions and Exemptions
  - Occasional sale exemption
  - Sale for resale exemption
  - Manufacturing machinery and equipment exemption
  - Asset-specific exemptions
  - Transaction-specific exemptions

Sales Tax Issues

- Transaction-Specific Exemptions
  - These exemptions are typically drafted narrowly and require strict compliance (sales tax generally follows form over substance).
    - In New Jersey, “[t]he term ‘retail sale’ does not include . . . [t]he transfer of tangible personal property to a corporation, solely in consideration for the issuance of its stock, pursuant to a merger or consolidation effected under the laws of New Jersey or any other jurisdiction.” (Emphasis added)
    - What if the assets are transferred to a corporation pursuant to a merger in exchange for the stock of the transferee corporation’s parent?
    - Under the N.J. statute, the merger would qualify as tax-free for federal income tax purposes, but the N.J. exemption would not apply.

Sales Tax Issues

- Transaction-Specific Exemptions
  - An example where the exemption only applies if the consideration is stock.
    - In Oklahoma, transfers of tangible property from one corporation to another corporation pursuant to a reorganization are exempt.
    - "Reorganization" means "a statutory merger or consolidation or the acquisition by a corporation of substantially all of the properties of another corporation when the consideration is <u>solely</u> all or a part of the voting stock of the acquiring corporation, or of its parent or subsidiary corporation." (Emphasis added)
  - An example where the exemption applies regardless of the consideration.
    - In Missouri, the definition of "retail sale" excludes "[t]he transfer by one corporation of substantially all of its tangible personal property to another corporation pursuant to a merger or consolidation effected under the laws of the state of Missouri or any other jurisdiction."

Sales Tax Issues

- Transaction-Specific Exemptions
  - An example where the transaction must qualify as a tax-free reorganization under I.R.C. §368 to qualify for the exemption.
    - In Maryland, "[t]he sales and use tax does not apply to a transfer of tangible personal property . . . under a reorganization within the meaning of § 368(a) of the Internal Revenue Code."
  - An example where the sale must be of all the assets of a business in order to qualify for the exemption.
    - In Texas, the exemption applies to "the sale of the entire operating assets of a business or a separate division, branch, or identifiable segment of a business."

Sales Tax Issues

- Transaction-Specific Exemptions
  - "No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock in such corporation and immediately after the exchange such person or persons are in control . . . of the corporation." I.R.C. Section 351(a).
  - In New York and New Jersey, I.R.C. Section 351 transfers are only exempt when they occur "at the time of organization of the entity."
    - "Petitioners" claim that it is unfair to interpret the term 'organization' with 'incorporation' when a shell corporation is involved ignores the fact that petitioners freely chose to do business through an existing shell corporation instead of forming a new corporate entity." P-H Fine Arts v. New York State Tax Appeals Tribunal (N.Y. App. Div. 1996).
  - In California, a partial exemption is permitted for I.R.C. § 351 transfers, to the extent that the property is exchanged for stock (the transfer is taxable, to the extent that the transferor receives any non-stock consideration, including having the transferee assume liabilities).

Sales Tax Issues

- Post-Closing Compliance
  - Be ready
- Record Retention
  - Address in due diligence, transaction documents and at closing
- Software Licenses and Integration

Income Tax Issues

- Effects on the Acquirer’s SALT Filing Profile and Filing Methodology
  – Acquiring Target’s assets located in a jurisdiction in which the acquirer is not taxable may cause the Acquirer to become taxable in that jurisdiction.
  – Acquiring Target’s stock may result in Acquirer and Target having to file state combined returns if they are engaged in a unitary business.
  – Effect of acquisition on Acquirer’s income apportionment factors.
  – Non-physical presence or attributional nexus.

Income Tax Issues

- Can the gain from the sale of a business be apportioned (U.S. constitutionally)?
  - Unitary business principle: unitary with another business, operational with respect to an asset
- Is the gain from the sale of a business apportioned (by statute)?
  - Majority follow the extent of the U.S. Constitution
  - Minority apply a version of the older model statute from the Multistate Tax Commission
  - Business income is sometimes defined as: "Income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." UDITPA, Section 1(a) (emphasis added).

Income Tax Issues

- I.R.C. § 338(h)(10) Transactions
  - Federal Income Tax Treatment
    - If election is made by the parties, a sale of the stock of a corporate subsidiary or an S corporation is treated as if the corporation had sold its assets and distributed the sale proceeds to its shareholders in liquidation. The actual sale of stock is ignored. Target has a stepped-up basis in the Acquired corporation's assets.
  - State Income Tax Treatment
    - States generally respect the fiction of the deemed sale and liquidation.
    - There is typically no mechanism that allows the Target's gain from the deemed sale of assets to be transferred to its selling parent in states that require separate company reporting. *See, e.g.*, *Newell Window Furnishing, Inc. v. Johnson* (Tenn. Ct. App. 2008).
    - A potential solution is to reduce the purchase price for the amount of the tax that is due and have the Target pay the tax on the gain after its ownership has been transferred to the Acquirer.
    - California and Wisconsin allow taxpayers to elect I.R.C. § 338(h)(10) treatment, regardless of whether they elect it for federal tax purposes.

Income Tax Issues

- Federal Tax-Free Reorganizations
  - States generally conform to the federal reorganization provisions, and a transaction that is tax-free under I.R.C. § 368 will be tax-free for state income tax purposes.
  - Transactions that are tax-free for state income tax purposes may still be subject to other state and local taxes (e.g., gross receipts taxes, sales/use taxes, real property transfer taxes).
- Spin-Offs and Restructurings
  - States generally conform to the federal treatment of spin-offs, and a transaction that qualifies under I.R.C. § 355 as a tax-free spin-off will be tax-free for state income tax purposes.
  - Spin-offs and restructurings within a federal consolidated tax group that do not qualify under I.R.C. § 355 may still qualify for deferred tax treatment (e.g., I.R.C. § 311(b) gain).
    - Such gain would not be deferred in states in which the corporation files a separate income tax return.

Income Tax Issues

- Sale of a Partnership or LLC Interest
  - Buyers of partnership and LLC interests are deemed asset buyers for federal income tax purposes. *McCaulsen v. Comm'r* (U.S. Tax Ct. 1966); Rev. Ruling 99-6 (Feb. 8, 1999).
  - States generally conform to the federal income tax treatment of sales of partnership or LLC interests.
  - For sellers, gain from the sale of a partnership or LLC interest may be classified as apportionable business income or allocable nonbusiness/nonoperational income based on the facts and circumstances of the sale.
    - Gains could be sourced to the state of residency of the selling partner or sourced based on the location of the underlying assets of the partnership.
  - Many states require partnerships and LLCs to withhold state income tax from nonresident partners or members on their gains.

Income Tax Issues

- Other Income Tax Considerations
  - Apportionment factor issues
  - Conformity issues
    - Tax base and tax basis issues
  - Preservation of:
    - Tax attributes
    - Credits and incentives
  - State-specific elections
  - Conformity issues
  - Changing classification or status
  - Changes to state tax reporting methodologies
  - Loss of P.L. 86-272 protection
  - Implications of TCJA

Issues with “Other Taxes”

- Now more than ever, identifying exposure to “other taxes” is a critical component of due diligence
- Many other taxes are above-the-line adjustments that could directly affect the valuation of the business to be acquired
- Other taxes often lead to increased successor liability exposure
- “Other Taxes” must be on someone’s due diligence, transaction document drafting, and compliance lists

Issues with “Other Taxes”

- What are some of the “other taxes”?
  - Gross receipts taxes (many different forms/names)
  - Commercial activity taxes
  - Margin tax
  - Franchise/capital stock taxes
  - Occupational/business license taxes
  - Fees and permits
  - Employment/unemployment taxes
  - Real estate transfer taxes
  - Property taxes

Issues with “Other Taxes”

- What are some of the “other taxes”?
  - Real property transfer taxes
    - Most states impose real estate transfer taxes on direct sales of real property.
    - Approximately 15 states impose a transfer tax when a controlling interest in an entity that owns real property is transferred.
      - Some states only impose controlling interest transfer tax (CITT) on transfers involving certain kind of entities.
      - For example, Illinois imposes CITT only on “real estate entities,” defined as entities for which real property constitutes more than 75% of their total assets.
    - States may look through multiple tiers of subsidiaries to an ultimate change in ownership at the parent level (e.g., New York) for purposes of imposing CITT.

Property Tax Issues

- Valuation of Assets for Future Assessment Purposes
  - Purchase accounting likely will result in new "book values"
- Change in Classification of Property for Assessment Purposes
- Impact on Existing Credit and Incentives
- Opportunities for New Credit and Incentives
- Record Retention
- Government Relations

Permits, Licenses and Fees

- Know the Business
  - Different businesses have different licenses, fees and permits (e.g., motor fuel, tobacco, alcohol, environmental)
- Due Diligence
  - Must be on someone's due diligence list
- Transaction Documents
  - Address in transactions documents (e.g., cooperation between parties for transferring or securing permits and licenses)
- Closing and Post-Closing
  - Address transfers of transferable permits or licenses, if any, and obtain new permits and licenses as necessary
- Timing is Critical

Issues with “Other Taxes”

- Compliance Issues
  - “Other taxes” could be imposed at both the state and/or local levels
  - Statutes of limitations could be an issue
  - Taxing jurisdictions may not allow VDAs for “other taxes”
  - Reporting requirements vary among taxing jurisdictions and could be due shortly after closing a business restructuring transaction

Due Diligence – Key Take Aways

- Get to the table early and stay there to the end
  - Be a part of the deal team
  - Be a facilitator to help the whole team get the deal done
- Understand the type of restructuring transaction
  - Restructuring transactions often are discussed in terms of how they are treated for federal income tax purposes
  - Some restructuring transactions are internal organizational restructuring transactions
- Due diligence generally is different for every transaction
- Due diligence carries through to every aspect of a restructuring transaction
- Have a robust due diligence checklist focused on SALT matters
- Learn your way around the data room
- Get to know your colleague on the other side of the deal

Due Diligence – Developing a Strategy

- Some Factors that Impact a Due Diligence Strategy
  - Time constraints
  - Human resources
  - Information constraints
  - Purpose of the transaction
  - Size of transaction
  - Sophistication of parties
  - Prior transactions
  - Nature of parties' respective businesses
  - Risk exposure and tolerance level the parties

Primary Goals of Due Diligence

- Gather information
- Identify, quantify, evaluate and address:
  - Risks/exposure
  - Opportunities (refunds, credits, incentives, etc.)
- Work with deal team to:
  - Structure the transaction
  - Identify and evaluate tax implications of restructuring transaction
  - Address material tax issues, risks, and opportunities in deal negotiations
  - Address material tax issues, risks, and opportunities in deal documents

Due Diligence – SALT Issues

- Nexus
  - Multiple taxes, fees, permits, licenses, etc.
  - Multiple state and local jurisdictions
- Business background of Target
  - Who, what and where?
  - Organizational structure
- Tax reporting processes and practices
- Audits and refund claims
- Existing and new intercompany transactions
- Tax positions/reserves
- Prior restructuring transactions

Due Diligence – SALT Issues

- Tax and Business Credits and Incentives
  - Do they exist?
  - Are they transferable?
- Regulatory Licenses and Permits
  - Do they exist?
  - Are they transferable?
  - Cancel old, non-transferable permits and licenses
  - Obtain new permits and licenses
- Unclaimed Property
  - Needs to be on someone's due diligence checklist

Transaction Documents – Key Take Aways

- Know your role, i.e., representing the seller or the buyer
- Get involved early and stay involved until the end
- Request copies of all versions of all relevant transaction documents
  - Be aware of pitfalls when you review only some of the transactions documents or only some portions of some transaction documents or "stale" versions of transaction documents
- Think about what needs to happen prior to, at, and after closing

Transaction Documents

- Definitions
  - Key part of documents
  - Confirm use of defined terms properly and consistently
  - “Taxes” is a key definition, which probably leads to other key definitions
    - Is the definition of “Taxes” broad enough to cover all applicable state and local taxes, licenses, fees and related amounts, if applicable?
    - Should “Taxes” definition include unclaimed property?

Transaction Documents

- Representations and Warranties
  - What are they and why do we need them?
  - Watch out for "weasel words"
    - Ex: "All 'material Tax Returns' have been filed and all 'material Taxes' have been paid."
    - Ex: "All Taxes reported on filed Tax Returns have been fully satisfied."
    - What about Taxes not shown on the Tax Returns?
  - Use due diligence to help analyze reps and warranties

Transaction Documents

- Other Tax Reps and Warranties:
  - Any ongoing extension of time to file Tax Returns
  - The existence of any assertions of nexus by any state or local taxing authority in jurisdictions in which Seller has not been filing Tax Returns
  - The existence of any liens for Taxes
  - Any ongoing or scheduled Tax audits or notices requesting the scheduling of a Tax audit
  - Any ongoing extension of the statute of limitations for assessment of Taxes
  - Any pending refund/credit claims
  - Tax and business credit and incentives

Transaction Documents

- Covenants
  - What are Covenants and why do we have them in transaction documents?
  - Are the covenants relating to the making of Tax elections broad enough to cover analogous state Tax elections?
  - Who is responsible for transaction Taxes (if any) triggered by the transaction?
  - Who is responsible for complying with state bulk-sale notification requirements or will compliance with such requirements be waived?
  - Is Buyer responsible for providing Seller with resale or other exemption certificates?
  - Are there any covenants regarding voluntary disclosures?
  - Are there any covenants regarding post-closing matters?

Transaction Documents

- Indemnification Provisions
  - What are Indemnifications and why do we have then in the transaction documents?
  - When and why are they important to a SALT professional?
  - Are there special indemnifications related to Taxes or are all indemnifications covered in general indemnification provisions?
    - If they are separate, do they work properly?
    - If they are general, what impact do they have on post-closing matters related to Taxes?
  - Are there any caps or floors that apply to indemnification for state and local Taxes?
  - Do the indemnification provisions survive as long as the statute of limitations for assessments of any pre-Closing Taxes?

Transaction Documents

- Other Tax-Related Issues to Consider
  - Address how audits, refund claims, and related appeals be handled?
  - Returns
    - Address returns for pre-closing periods, straddle periods and post-closing periods
  - Credits and Incentives
    - Assign burdens and benefits
    - Address procedures and documentation for transferring credits and incentives (if they are transferrable)
    - Address “claw backs”

Unclaimed Property

- Unclaimed Property
  - While not a tax, issues regarding unclaimed property must be on the parties’ due diligence list and must be addressed in transaction negotiations and documentation.
  - Examples of unclaimed property
    - After dormancy period, uncashed dividend checks or unexchanged shares in a transaction, uncashed payroll checks, aged payables, negative receivables and uncashed benefits payments.

Unclaimed Property

- Unclaimed Property
  - For stock sales, general tax indemnities may not cover unclaimed property liabilities (unclaimed property is not a tax).
    - Needs special attention in the transaction documents
  - For asset sales, a negative AR account would come with the purchase.
  - Recordkeeping is crucial
    - For example, Delaware has 10-year look-back period and, for property that has a five-year dormancy period, an audit could require records going back as long as 15 years.
    - Parties should address issues regarding responsibilities of unclaimed property audits, liabilities, records and appeals

Credits and Incentives

- During Due Diligence
  - Review and value Target's incentives and credits
  - Determine transferability of incentives and credits and related procedures
- Transaction Documents
  - Address transferability of incentives and credits
  - Address cooperation with transferability
- Closing and Post-Closing
  - Assure legal transfers of existing incentives and credits
  - Look for opportunities for new incentives and credits

Government Relations

- Why should this be on my radar?
- Maximize benefits of incentives and credits
  - You likely will need state and local "buy-in" and assistance
- State and local elected and appointed officials
- Cooperative Endeavor Agreements/PILOTS
- Legislative issues and strategies
- Regulatory issues and strategies
- Tax issues and strategies

Transfer Pricing

- During Due Diligence
  - Obtain, review and analyze existing transfer pricing transactions and documents
  - Review and analyze prior and existing audits of Target for transfer pricing issues
- Post-Closing
  - New corporate structure may lead to new intercompany transactions
  - Review and update transfer pricing studies and intercompany agreements, as necessary
- Other Issues
  - Know what states you are or will be in
  - Important for internation/federal and state income tax purposes

Tax Risks Mitigation Strategies

- It’s a Team Approach
  - Address in due diligence, negotiations and transaction documents
  - Financial modeling is a key
- Traditional Mitigation Strategies
  - Price negotiations
  - Negotiations of indemnification and escrow provisions in transaction documents
  - VDAs

Transaction Documents - Reps and Warranties Insurance

- Traditional Path
  - Seller agrees to indemnify Buyer for breach of R&W
  - Indemnity terms are agreed upon, supported by a healthy escrow (10%-20%)
- Welcome R&W Insurance!
  - **Significant** number of deals are bringing R&W insurance with them
  - R&W Insurance is a policy that protects the Buyer from breach of R&W
  - Like any insurance policy—we see premiums cost, underwriting fee, and deductibles
- What does it cover?
  - DD Findings are almost always scoped out, making tax DD language/approach critical
  - Has limits and exclusions
  - Set policy length (like an expiring indemnity, i.e. 3-6 years)
- Who needs it?
  - Buyers like the coverage, Seller’s like a clean exit with less contingent liabilities
  - Straight terms, less negotiation spend

Tax Insurance

- Insured's Due Diligence
  - Insurer's typical policy limits
  - Scope of coverage risks (probably the most important item)
    - What claims fall under the coverage?
    - What are the exclusions from coverage (both standard and special)?
    - What does the insurer consider when denying coverage?
  - Coverage exclusions
  - Control over handling claims
  - Policy pricing

Tax Insurance

- Insured's Due Diligence (cont.)
  - What costs may erode the retention?
  - Term of coverage and extensions/modifications
  - What types of losses are covered?
    - Audits? Appeals?
    - Taxes, interest, penalties and related costs?
  - When is coverage "triggered"?
  - For policies covering "transfer pricing"
    - Will there be monitoring fees?
    - "Bottom up" approach or "catastrophic risk" approach
  - Does the policy cover dealings with foreign nations?

Tax Insurance

- Insured’s Documentation
  - Covered tax position(s)
  - Full set of facts
    - Consider a NDA or comment interest agreement
  - Memorandum or draft opinion, if any
  - Requested limit of liability
  - Potential loss calculation (e.g., taxes, interest, penalties, expenses and “gross up”

Tax Insurance

- Negotiation Points
  - Pricing
  - Insurer’s assessment of the insured’s tax position
    - Insured should be proactive – try to think of what the insured’s team will want to evaluate and provide it if possible
    - This strategy may help you obtain a good initial assessment of your tax position, which may help your negotiating position from the outset
  - Pricing could be based on many factors, e.g., insured’s financials, compliance track record, industry sector and requested coverage limits
  - Quantification of risks

Tax Insurance

- Negotiation Points (cont.)
  - Premium Costs
    - Could be affected by jurisdiction(s) of tax risk, limits purchased relative to magnitude of risk, amount of risk retained by insured, degree to which the potential tax loss is "all or nothing," the strength of the tax opinion, if any, and the breadth of available legal precedent related to the specific tax issue
    - Use these factors to your advantage
  - Transfer pricing policy
    - Insurer may consider adequacy of available data/comparables, business purpose and quantum of potential adjustment/potential settlement
    - Insurer may also consider high-risk areas such as intercompany debt with non-market interest, minimal documentation, valuation of intangibles, etc.
    - Use these factors to your advantage

Successor Liability & Bulk Sales

- This is one or many reasons why state tax matters as part of due diligence
- When the stock of a corporation is acquired, the corporation will continue to be liable for its previously existing liabilities, including tax obligations.
- What about when the assets of a corporation are acquired instead of the stock?
  - I.R.C. Section 6901 establishes successor liability for federal tax and is a tool used by the IRS to collect a transferor taxpayer's tax liability from a transferee who receives assets from the transferor in a fraudulent conveyance.
  - State successor liability provisions, particularly for sales tax, are typically broader than I.R.C. Section 6901 and do not require a fraudulent conveyance for successor liability to apply.
  - The parties may negotiate and contractually provide for tax indemnifications.

Successor Liability & Bulk Sales

- Commercial law bulk sales provisions and tax law bulk sales provisions are different. Our focus is on tax bulk sales provisions.
- California Tax Bulk Sales
  - If a seller liable for any amount of sales tax sells its business or stock of goods or quits the business, its successors must withhold a sufficient amount of the purchase price to cover such tax amounts until the former owner produces a receipt from the FTB showing that such amount has been paid or a certificate showing that no amount is due.
  - If purchaser fails to withhold as required, purchaser becomes personally liable for the payment of the amount required to be withheld, to the extent of the purchaser price.
- California UCC Bulk Sales
  - There is no purchase price withholding requirement for a seller’s outstanding liabilities (i.e., only a notice requirement), unless the purchase price is $2 million or less.
  - There are no bulk sales notice or withholding requirements if assets sold have a value of $5 million or more on the date of the agreement.

Successor Liability & Bulk Sales

- For tax purposes, state tax bulk sales provisions and successor liability work hand-in-hand.
  - Generally, if parties comply with state tax bulk sales provisions, the buyer is protected from inheriting tax liabilities from the seller.
- As with most state and local tax laws, tax bulk sales provisions vary from state to state.
  - Beware of state that may be able to place a lien on purchases assets
    - Miss this one and you may get a call from the C-suite.

Successor Liability & Bulk Sales

- New York
  - A purchaser must notify the Department of a pending purchase of business assets at least 10 days before paying for or taking possession of the business assets.
  - Within 5 business days after receiving notification, the Department will issue either: (a) a release; or (b) a claim if the seller owes unpaid sales tax, is scheduled for a review, or is under audit.
  - A purchaser that receives a claim from the Department should place the full amount of the purchase price in an escrow account.
    - The Department will notify purchaser of the amount of sales tax due within 90 days of receiving notification from the purchaser.
    - Once notified of the amount of sales tax due, purchaser may pay the amount due to the Department out of the escrow account, up to the purchase price or fair market value of the assets, whichever is greater.
    - Purchaser may then pay any remaining amount to seller.
  - A purchaser who does not comply with the bulk sales requirements is liable for any unpaid sales tax of the seller, to the extent of the amount of the purchase price.

Successor Liability & Bulk Sales

- Illinois
  - Seller or purchaser can elect to file a notice of sale with the Department at least 10 days before the sale.
  - Department will issue an initial order to withhold an amount from the purchase price within 10 days of receipt of the notice, and purchaser must withhold this amount plus additional amounts if there are known outstanding unpaid liabilities or unfiled returns.
  - Department will provide a written notice within 60 days of the initial order stating the actual amount due.
  - Seller is liable to the Department for any amount of unpaid income tax owed by seller up to the reasonable value of the assets acquired.
  - Illinois has a similar provision that applies to sales tax.

Successor Liability & Bulk Sales

- New Jersey
  - Purchaser must notify the Division of the sale at least 10 business days before taking possession of the assets.
  - Division will respond to the notice within 10 business days with an Escrow Letter, a Clearance Letter, or an Insufficient Notice Letter.
  - Purchaser must hold the required amount in escrow until it receives a Clearance Letter.
  - The escrow can exceed the purchase price of the assets
    - If purchaser does not comply with the bulk sales requirements, its potential liability may exceed the value of the assets acquired.
  - If purchaser fails to timely or properly notify the Division, purchaser is liable for any state tax liabilities, such as deficiencies, assessments on delinquent returns, or any possible assessments for future audits, owed by the seller.
- Just because you find sales tax bulk sales law does not mean you found it all.

Successor Liability & Bulk Sales

- Mitigation Strategies
  - Discover potential tax liabilities in due diligence phase
  - Analyze relevant states' tax bulk sales/successor liability laws
  - When possible, strictly comply with relevant states' tax bulk sales/successor liability laws
    - Sometimes, due to time constraints and potential audit exposure, it may not be possible to comply with state tax bulk sales/successor laws
  - Negotiate contractual terms to mitigate buyer's exposure to seller's tax liabilities
  - Negotiate contractual escrow provisions that address potential tax liabilities
  - Tax insurance?

Post-Closing Strategies

- Create your 100-day plan
- Action items may be immediate
  - Think sales/use tax collection, remittance and reporting vs. reporting for other taxes
  - Licenses and permits may need to be renewed or new ones obtained
  - Compliance with terms and conditions of transaction documents
- Credits and incentives may be transferable, but have tight deadlines for approval of any transfer
- Transfer tax filings
  - May be due in as little as 10 days post close

Post-Closing Challenges and Opportunities

- Corporate Organizational Structure
  - Look for opportunities
- Corporate Culture and Human Resources
- Tax Department Structure
- Systems Issues
  - Improve and optimize software systems
- Processes and Procedures
  - Look for opportunities to improve
- Tax Policy and Government Relations Strategies
- Record Access and Retention

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