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Reevaluating the Intellectual Property Holding Company

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IN THEIR ZEAL TO SAVE ON TAXES, MANY COMPANIES ISOLATE THEIR INTELLECTUAL PROPERTY IN WHOLLY OWNED SUBSIDIARIES CALLED INTELLECTUAL PROPERTY HOLDING COMPANIES (IPHCS). THE IPHC LANDSCAPE, HOWEVER, IS CHANGING. RECENT STATE ACTIONS HAVE REDUCED THE TAX BENEFITS OF IPHCS, IMPACTING THE BUSINESS AND LEGAL RAMIFICATIONS OF MANAGING INTELLECTUAL PROPERTY THROUGH A HOLDING COMPANY.

Many companies isolate their most valuable assets—intellectual property—in wholly owned domestic subsidiaries. Known as intellectual property holding companies (IPHCs), these subsidiaries have provided companies with substantial state corporate income tax benefits. But the recent confluence of increased state challenges to IPHCs and the issuance by the Financial Accounting Standards Board (FASB) of Financial Interpretation No. 48, *Accounting for Uncertainty in Income Taxes*, (FIN 48; now codified in FASB Accounting Standards Codification (ASC) topic 740) have significantly reduced the efficacy of the IPHC as a tax-planning technique. With the tax benefits of the IPHC dwindling, companies have an opportunity to reevaluate how they deploy their intellectual property and whether the IPHC represents the best structure to carry out their business strategies.

In this article, we briefly provide some background on IPHCs, then document and analyze how recent state responses to IPHCs and FIN 48 have combined to reduce the tax and financial statement benefits that IPHCs historically provided. We also discuss the business and legal ramifications of continuing to hold and manage intellectual property through an IPHC and innovative ways in which a company can use an IPHC to facilitate structured finance and securitization or joint venture transactions.

BACKGROUND

To use an IPHC, a business isolates its intellectual property (trademarks, patents, and so forth) in a wholly owned subsidiary (the IPHC). The IPHC licenses the intellectual property to its parent and sister companies—the affiliates that actually carry out the business operations of the enterprise. The operating affiliates pay a royalty to the IPHC, taking a state tax deduction for the amount paid and reducing state corporate income tax liability. Because the IPHC is typically established in a state that does not tax royalty income or does not have a corporate income tax, such as Delaware, the IPHC pays no tax on the royalty income it receives. Further, the IPHC will often lend money to other members of the affiliated group, generating interest deductions for the operating companies. In effect, IPHCs allow taxpayers to siphon profits from high-tax states to no-tax states. IPHCs thus provide cash flow benefits and, often, financial statement benefits via reduced reported income tax expense.

State Responses to IPHCs

Historically content to live with IPHCs, states have become more aggressive in recent years in response to fiscal pressures and press accounts of the prolificacy of IPHCs. For example, in an August 9, 2002, *The Wall Street Journal* article titled "Diminishing Returns: A Tax Maneuver in Delaware Puts Squeeze on States," Glenn R. Simpson listed many well-known companies that used IPHCs. As Table 1 shows, only three states with a corporate income tax—Delaware (a haven for IPHCs), Missouri, and Pennsylvania—have not enacted anti-IPHC measures. Every other state combats IPHCs in some fashion.

States can eliminate the tax benefits of an IPHC by arguing it is a sham under the economic substance doctrine. Beyond this general approach—or in combination with it—states use one or more of the following categories of anti-IPHC measures: mandatory combined reporting, add-back statutes, and economic nexus rules (see Table 1). Nexus generally means having some connection with the state, such as having employees or property in the state.

Economic Substance and Business Purpose

With the right facts, states can claim an IPHC is a sham that lacks economic substance. If the state prevails in this argument, it can disallow deductions for royalties paid to the IPHC. The Supreme Judicial Court of Massachusetts heard two cases on the same day that best illustrate this approach: *Sherwin-Williams Co.* v. *Commissioner of Revenue*, 778 N.E. 2d 504 (Mass. 2002) and *Syms Corp.* v. *Commissioner of Revenue*, 765 N.E. 2d 758 (Mass. 2002).

In *Sherwin-Williams*, the company claimed $47 million in deductions for payments to its related IPHCs. The court ruled for the taxpayer and upheld the deductions. While the court upheld the Commissioner's ruling that the IPHCs did not have a business purpose independent of tax savings, the court found that the IPHCs had economic substance—indicating that they were not shams. The following influenced the court:

- Sherwin-Williams's in-house intellectual property lawyer suggested setting up the IPHCs to centrally manage the property.
- The IPHCs had legal title and physical possession of the marks.
- The IPHCs entered into licensing agreements with third parties.
- The funds the IPHCs generated did not return to Sherwin-Williams as dividends.
- The IPHCs made third-party licensing and investment decisions independently rather than Sherwin-Williams making them.

In *Syms*, the court held that Syms's IPHC was a sham and lacked economic substance. The key factors included:

- An outside consultant suggested setting up the IPHC to save on taxes rather than to manage the Syms trademarks.
- The company paid the outside consultant a fee of 25% of the tax savings the IPHC generated and placed a portion of the fee in escrow in case of an audit.
- Syms only paid the royalty to the IPHC once per year; the IPHC would hold the funds for a couple of weeks and then remit the amount of the royalty, less expenses, back to Syms as a dividend.
- Syms managed the trademarks the same before and after it formed the IPHC.
- Syms continued to pay most of the expenses of maintaining the marks despite the existence of the IPHC.

In both *Syms* and *Sherwin-Williams*, the Supreme Judicial Court of Massachusetts used a "disjunctive" test under which it would respect the IPHC if it had either business purpose or economic substance. In 2010, Congress enacted Internal Revenue Code (IRC) Section 7701(o) to codify and clarify the common law economic substance doctrine. Section 7701(o) applies a "conjunctive" test under which the IRS would respect a transaction for federal tax purposes only if it had both business purpose *and* economic substance apart from federal income tax savings. As of this writing, it is unclear whether states that have traditionally used a disjunctive test will follow the federal lead and switch to a stricter conjunctive test. Had the court in *Sherwin-Williams* applied a conjunctive test, the taxpayer may have lost because the court found that the IPHCs—while having economic substance—lacked business purpose.

Companies should follow the *Sherwin-Williams* example and ensure that their IPHCs have economic substance and fulfill a valid business purpose. (The business reasons for IPHCs and guidance on establishing a valid business purpose for an IPHC are addressed in the section titled "The Business and Legal Ramifications of IPHCs.") Companies should also monitor for states possibly using a conjunctive economic substance test and ensure that they structure IPHCs to pass the test.

Mandatory Combined Reporting

An increasing number of states are reducing the tax benefits of IPHCs by requiring affiliated corporations engaged in the same business to file a combined tax return. To understand this approach, some background is necessary. States take either a separate-entity or combined-reporting approach to taxing an affiliated group of corporations in which only some members have nexus with the state. Separate-entity states base their tax on an apportioned share of the income of only those members with nexus in the state. Combined-reporting states, in contrast, base their tax on the apportioned share of the income of the single unitary business earned by the entire affiliated group—regardless of whether all members have nexus in the state. While the boundaries of the unitary business are not always clear, states usually consider IPHCs to be engaged in the same unitary business as their operating affiliates.

The combined tax return eliminates intercompany income and deductions, such as royalty payments from an operating company to a related IPHC. As such, mandatory combined reporting effectively eliminates the tax benefits of the IPHC in the combined-reporting state. The U.S. Supreme Court in *Container Corp. of America* v. *Franchise Tax Board*, 463 U.S. 159 (1983) held that mandatory combined reporting based on the unitary business concept is constitutional.

Prior to 2004, only 16 states used combined reporting. Vermont sparked a small trend in 2004 when it became the first state in more than 20 years to adopt mandatory combined reporting. How far this trend will go is not clear, but more separate-entity states may turn to combined reporting if they fail to stem revenue losses from IPHCs by other means, such as the add-back and economic nexus approaches we will discuss later. As Table 1 shows, 23 states and the District of Columbia currently use mandatory combined reporting. In addition, separate-entity states sometimes have the right to force companies to file on a combined-reporting basis under certain circumstances.

There is little that companies can do to recapture the tax benefits eliminated by combined reporting. Combined-reporting statutes, however, normally do not mandate *worldwide* combined reporting, so a company could move its IPHC offshore to increase the available tax benefits. Many large companies have done so, and the states are just beginning to recognize the impact on their revenue streams. As of this writing, some states are contemplating mandatory worldwide combined reporting as a solution. (For details on the state-by-state revenue impact of foreign IPHCs, see the February 2013 article, "The Hidden Cost of Offshore Tax Havens: State Budgets Under Pressure from Tax Loophole Abuse," on the U.S. PIRG Education Fund's website, www.uspirgedfund.org.) Establishing an IPHC in a foreign jurisdiction raises many practical and legal issues that are beyond the scope of this article.

Add-Back Statutes

As Table 1 shows, 18 states and the District of Columbia have enacted add-back statutes to blunt the tax benefits of IPHCs. An add-back statute disallows deductions for royalties, interest, or other payments to an affiliated IPHC. There is an unresolved issue over whether add-back statutes are constitutional.

Add-back statutes do not merely eliminate the tax benefit of IPHCs; they effectively leave the taxpayer worse off than if the IPHC did not exist. If the in-state operating affiliate held the intellectual property directly, there would be no royalty deduction, but the costs of maintaining such property would be deductible. If the IPHC holds the intellectual property and an add-back statute applies, then the royalty deduction is eliminated and the maintenance costs are *not* deductible because they are incurred by the out-of-state IPHC.

Add-back statutes often contain many exceptions that companies can use to lessen the impact. For example, some states exempt payments to IPHCs that are taxed to the IPHC in another jurisdiction, are "reasonable," or are not made with a tax-avoidance purpose. Many states that provide these exceptions require explicit disclosures of the IPHC arrangement. Furthermore, a company may be able to structure its IPHC arrangements to fall outside the scope of the add-back statute. For example, if the statute disallows "royalties," the company may attempt to reclassify its payments to the IPHC as management fees, interest, or some other payment.

Economic Nexus

Rather than disallowing the royalty deduction on the in-state operating company's tax return, some states assert nexus and tax an apportioned share of the income of the out-of-state IPHC. This is an aggressive approach because the IPHC normally has no physical presence in the taxing state. States taking this approach argue that the IPHC has economic nexus by virtue of using its intellectual property in the state.

The battle between the states and taxpayers over economic nexus has been one of the most contentious in recent memory and has resulted in a great deal of costly litigation. The battle lines are drawn around the interpretation of *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), which addressed nexus in the sales and use tax context under the Commerce Clause of the U.S. Constitution. *Quill* reaffirmed the rule that an out-of-state mail order company could not be forced to collect use tax on behalf of a state in which the company's only contacts were the mailing of catalogs into the state and shipment of orders into the state via U.S. mail or common carrier. Taxpayers argue that *Quill* provides a "physical presence" concept of nexus that extends into the corporate income tax arena and forbids states from taxing companies, like IPHCs, that have no physical presence in the taxing state. States, however, argue that *Quill's* physical presence concept is limited to sales and use tax collections by mail order companies and does not apply in the income tax context.

The South Carolina Supreme Court gave the concept of economic nexus credence in *Geoffrey, Inc.* v. *South Carolina Tax Commission*, 437 S.E.2d 13 (S.C. 1993). Geoffrey, Inc. was the IPHC for Toys "R" Us and held the Toys "R" Us trade name and licensed it to affiliated companies that ran the Toys "R" Us stores. Geoffrey licensed the trade name to the Toys "R" Us affiliate that owned the South Carolina store, but Geoffrey itself had no employees or tangible property in the state. Nonetheless, the court ruled that Geoffrey had nexus in the state because the Toys "R" Us affiliate that operated the South Carolina store was using Geoffrey's intangible property (the trade name) in the state.

As Table 1 shows, at least 20 states have economic nexus rules in some form. These states either generally assert economic nexus, whether or not targeted at IPHCs, or specifically follow the *Geoffrey* doctrine by regulation, administrative practice, or judicial decision. Actual practice can vary, so it is unclear how far some of these states will assert economic nexus for IPHCs. States that have mandatory combined-reporting rules, for example, may assert economic nexus. But such states should not, absent special circumstances, need to deploy economic nexus rules against an IPHC because the combined return already captures the income of the IPHC. In addition, states that are not identified as having economic nexus rules in Table 1 may have broadly worded nexus rules that could be interpreted as asserting economic nexus. Some states, for example, have generic rules that assert nexus as far as the U.S. Constitution allows—a standard that can change over time as the courts interpret the constitutional limits on state tax jurisdiction.

Table 1. State Responses to IPHCs

	Mandatory Combined Reporting	Add-Back Statute	Economic Nexus/ *Geoffrey* Rule
Alabama		X	X
Alaska	X		
Arizona	X		X
Arkansas		X	
California	X		X
Colorado	X		X
Connecticut		X	X
Delaware	Haven for IPHCs		
Dist. of Columbia	X	X	
Florida			X
Georgia		X	
Hawaii	X		
Idaho	X		
Illinois	X		
Indiana		X	X
Iowa			X
Kansas	X		
Kentucky		X	
Louisiana			X
Maine	X		
Maryland		X	X
Massachusetts	X	X	X
Michigan	X	X	
Minnesota	X		
Mississippi		X	
Missouri			
Montana	X		
Nebraska	X		
Nevada	No Corporate Income Tax		
New Hampshire	X		
New Jersey		X	X
New Mexico			X
New York	X	X	
North Carolina		X	X
North Dakota	X		
Ohio		X	X
Oklahoma			X
Oregon	X	X	X
Pennsylvania			
Rhode Island		X	
South Carolina			X
South Dakota	No Corporate Income Tax		
Tennessee		X	X
Texas	X		
Utah	X		
Vermont	X		
Virginia		X	
Washington	No Corporate Income Tax		
West Virginia	X		
Wisconsin	X		X
Wyoming	No Corporate Income Tax		

Note: Table 1 depicts laws or policies currently in force and enacted laws scheduled to be effective in the future. Data is current as of January 2013. The purpose of this table is to show that the states are very active in responding to the tax benefits of IPHCs; it is not designed as a comprehensive tax planning guide. Taxation of IPHCs is a complex and dynamic area of the law. Please consult the current law in your state for updates, effective dates, exceptions, and special rules.

While states have been successful with the *Geoffrey* argument, economic nexus raises serious constitutional questions. The U.S. Supreme Court to date has declined to review any of the state court decisions applying the *Geoffrey* doctrine. Congress, however, is considering a Business Activity Tax (BAT) nexus bill that would, among other provisions, mandate a physical presence nexus standard.

Companies can continue to argue that the *Geoffrey* doctrine is unconstitutional and support the federal legislation mandating a physical presence standard. Even if Congress enacts the BAT bill, states still can turn to other devices to combat IPHCs, such as add-back statutes or combined reporting.

FIN 48

Many companies used IPHCs not only because they generated cash from tax savings, but also because they provided financial statement benefits via reduced reported income tax expense. Prior to 2006, accounting for uncertain tax positions varied. Some companies used Statement of Financial Accounting Standards No. 5 (SFAS No. 5), *Accounting for Contingencies*. A company doing so would establish a reserve against a recorded tax benefit if it were probable a court would not sustain the benefit and the company could reasonably estimate the amount of the lost benefit.

In 2006, FASB issued FIN 48 to provide more transparency and standardize financial statement reporting for uncertain tax positions. (FIN 48 is now codified in FASB ASC 740, but practitioners still use the FIN 48 reference.) Under FIN 48, a company can only report a tax benefit on its financial statements if the benefit is more likely than not (a greater than 50% chance) to be ultimately sustained on audit or in court. Even after this threshold is met, the company must go through a complex measurement exercise to determine the benefit that can actually be recorded.

When conducting a FIN 48 analysis, the company must assume that the tax benefits at issue will be audited and that the tax authority will have full knowledge of the relevant facts. Companies that historically took an SFAS No. 5 approach will have to meet a higher standard under FIN 48 before they can report tax benefits on their financial statements. Given this higher threshold and the increased success states have had combating IPHCs, IPHCs are unlikely to provide significant financial statement benefits in the future.

The Business and Legal Ramifications of IPHCs

With the tax and financial statement benefits disappearing, the business and legal ramifications of IPHCs become paramount. In their zeal to save taxes, many companies established IPHCs without critically examining the strategy implications. Even if a company considered the business ramifications before establishing an IPHC, many years may have passed since the IPHC was set up, and industry conditions and business practices may have changed. Accordingly, all companies with an IPHC should consider the business and legal factors we discuss. First, we consider intellectual property administration and asset protection, then look at unique legal issues that arise with respect to two common types of intellectual property: patents and trademarks. We then discuss innovative ways in which IPHCs can help facilitate structured finance and securitization and joint venture transactions.

Intellectual Property Administration

An IPHC allows a company to centrally organize and manage all the intellectual property of the corporate group. The greater the number of operating companies, the greater the need for centralized registration, maintenance, and enforcement of the group's intellectual property. Consolidating these services in-house enables a company to reduce reliance on outside legal counsel and thereby cut costs and improve internal efficiencies.

Asset Protection

One of the most important legal benefits of an IPHC is that it allows a company to quarantine its intellectual property from claims against the operating companies exploiting it. By placing the intellectual property in a holding company that does not have a contractual or other relationship with end customers, it becomes less likely that a customer or other third party can bring a claim against the owner of the intellectual property (the IPHC).

Moreover, this arrangement also protects the operating companies. For example, the owner of intellectual property may be contractually obligated to join as a party in litigation to enforce the intellectual property, thereby opening up that party to countersuit. If the operating company does not own the intellectual property, then it may not be joined as a party in the litigation. Furthermore, if the IPHC owns the intellectual property, then it may be joined in the litigation, but it will likely be immune from countersuit because the IPHC does not exploit the intellectual property. The end result is greater protection from liability for the entire corporate enterprise.

Special Issues with Patents

While IPHCs can provide substantial legal liability protection, they can create certain legal problems with respect to patents. Specifically, the IPHC cannot recover profits lost by the operating company when the license between the companies is nonexclusive. Under a nonexclusive license, the IPHC is free to license the same rights to multiple parties, thereby enabling the IPHC to leverage the sales and marketing resources of more than one company.

In *Poly-America, L.P.* v. *GSE Lining Technology, Inc.*, 383 F.3d 1303 (Federal Circuit 2004), the court stated, "Poly-America and Poly-Flex may not enjoy the advantages of their separate corporate structure and, at the same time, avoid the consequential limitations of that structure—in this case the inability of the patent holder to claim lost profits of its nonexclusive licensee." Thus, while an exclusive license arrangement might allow the IPHC to claim the lost profits of the operating company, it also would prevent the IPHC from exploiting its intellectual property to the fullest extent possible.

Special Issues with Trademarks

IPHCs that hold trademarks risk losing the marks if they do not structure their license arrangements properly. If an IPHC does not use the trademark itself, the trademark is susceptible to removal from the U.S. Patent and Trademark Office's register for nonuse. Use of a trademark by the licensee is considered use by the owner only if the owner controls the licensee's use of the mark by financial, quality, or other control. Financial control occurs if the licensee is a subsidiary of the owner and is subject to the owner's financial control, while quality control occurs where the owner enforces quality standards. Thus, the easiest way to address this issue is to structure the corporate enterprise with the IPHC as the parent company and the operating companies as subsidiaries.

The more common arrangement, where the IPHC is a brother/sister or subsidiary (rather than the parent) of the licensee, stands on shakier ground. There are several ways, however, in which the corporate enterprise can minimize the risk of losing trademark rights. In fact, it is a good idea to implement the following practices regardless of where the IPHC resides in the corporate structure. The IPHC should:

- Enter into a formal license agreement with the operating company;
- Monitor and retain records of the operating company's goods and services and their use in commerce;
- Perform periodic inspections of the operating company's marketing and advertising materials;
- Maintain legal staff consisting of at least one qualified attorney;
- Negotiate licenses with third parties; and
- Monitor third-party competitors and prosecute infringers.

Additionally, the license agreement between the IPHC and the operating company should include at least the following provisions:

- Set a definite term for the license;
- Condition renewal on the operating company's full compliance with quality-control measures;
- Define a clear standard of quality that must be maintained, and consider incorporating industry or government standards;
- Grant a nonexclusive license to permit additional licenses to third parties;
- Define accepted forms of trademark use and proper trademark notices;
- Give the IPHC the right to inspect the operating company's goods, services, and facilities; and
- Require the operating company to provide periodic reports describing sales and royalty calculations.

Implementing these measures will make the IPHC look more like a user of the trademarks in the eyes of the courts.

Innovative Ways to Use IPHCs in Transactions

IPHCs can provide innovative benefits beyond their traditional roles of holding and managing intellectual property for an affiliated group of corporations. In particular, IPHCs can play important roles in business strategy by facilitating structured finance and securitization transactions and joint ventures.

Structured Finance and Securitization

By physically separating a company's intellectual property from its other assets, the company can more easily use intellectual property as a security or sell it outright. It is easier to assign value to an enterprise's intellectual property when the company has separated it from the enterprise's other assets. Consequently, it is easier to securitize or sell intellectual property held by an IPHC.

Furthermore, as a company's business objectives change, it may want to sell off certain intellectual property but retain the right to use and exploit such property. Rights conferred by the nonexclusive license between the IPHC and the operating companies will survive the IPHC selling the intellectual property to a third party. In other words, the sale of intellectual property owned by an IPHC does not extinguish the operating company's right to continue to use the property pursuant to a nonexclusive license.

Joint Ventures

One of the most troublesome issues confronting companies that want to partner in an intellectual property-related venture is determining which party owns the intellectual property that results from the collaboration. For example, with respect to patents, each joint owner can exploit the patent without the permission of the other joint owners. Also, the exploiting owner is not required to share the royalties. In effect, these rules create an incentive for third-party licensees to play the joint owners against one another to get the best deal. Furthermore, to enforce the patent, all of the joint owners must join in the suit, which means that any joint owner may block a lawsuit by refusing to join or by entering into a license with the potential defendant.

If more than one type of intellectual property is involved in the venture, then the situation becomes even more complicated. For example, in contrast to patent law, copyright law requires joint owners of a U.S. copyright to share royalties. If the particular asset involved in the venture is software, which both patent *and* copyright law often cover, it will be a challenge for the joint owners to determine which portion of the software is subject to royalty sharing and which is not.

While companies may choose to enter into agreements that set forth their rights and obligations with respect to the jointly owned intellectual property, these agreements are not always enforceable against third parties. For example, if one of the joint owners sells a product to a third party in violation of an agreement prohibiting such sales, the third party still may be protected as a *bona fide* purchaser for value. Therefore, the nonbreaching joint owner will not be able to prevent the third party from using the product.

The IPHC presents companies with a way to avoid the pitfalls associated with joint ownership, and, specifically, parties to a joint venture can choose to set up an IPHC in which each party owns a percentage of equity. The IPHC owns any intellectual property created through the joint venture, and the parties share risks, returns, and management via their equity ownership in the IPHC. This strategy is particularly useful when the parties seek to exploit intellectual property created by the joint venture by licensing it to and/or enforcing it against third parties. With this approach, a single entity manages the intellectual property, thereby avoiding a scenario in which separate joint owners compete with one another to secure favorable licensing deals.

One potential risk of using an IPHC to hold patents in the joint venture context, however, is that it may weaken protection from "prior art" claims. For subject matter to be patentable, it must be sufficiently different from things that the public already knows or uses such that a person having reasonable skills in the area of technology related to the subject matter would not consider to be obvious. The America Invents Act changes the "first-to-invent" patent system to a "first-inventor-to-file" system for applications filed on or after March 16, 2013. Under the Act, "prior art" includes information made available to the public anywhere in the world as of the filing date through sales, publications, public use, or other kinds of public disclosures. This expanded definition, however, includes a grace period for publications by the inventor within one year of the patent filing.

Under Section 103(c) of the Patent Act, subject matter developed by an employee of one of the parties to the joint venture might be considered prior art and could expose the IPHC, the owner of the putative patent, to claims of obviousness. To minimize the likelihood of such claims, employees of the joint venture/IPHC, rather than employees of the joint venture parties, should perform all development work. Alternatively, if one party to the joint venture has already started development work, then that party should complete the work, obtain the patent, and only then transfer the completed patent to the joint venture/IPHC.

While it might be advisable to set up a joint venture as an IPHC from the beginning, a company can also use this technique when winding down a joint venture. For example, the members of the joint venture might decide to end the joint venture's operations but restructure it as an IPHC that can grant licenses to members and enforce the intellectual property rights against third parties. Finally, a joint venture that is structured as an IPHC is more attractive to potential buyers because it isolates the intellectual property from other assets and is, therefore, easier to value.

Rethinking How to Position Valuable Assets

With IPHCs providing fewer tax benefits, companies have the opportunity to rethink how they deploy their intellectual property. Companies should study the state tax rules in this article, position their IPHCs to best maintain the tax advantages still available, and monitor both state law developments and the progress of federal BAT legislation. Companies should also take a critical look at the business and legal ramifications of continuing to use IPHCs to maintain their intellectual property and consider using IPHCs to facilitate strategic transactions, such as structured finance and securitization or joint venture arrangements. Assessing the proper role of an IPHC can be difficult, and the analysis will vary by industry and type of property. Such an analysis, however, ensures that the company best positions its most valuable assets to further the company's business strategy. ■

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