6-5-17

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Corporate Mergers and Acquisitions

Case Study

- Acquiror (“A”) is either a French, Spanish or Swiss corporation.
- Target (“T”) is a U.S. corporation or, alternatively, limited liability company (“LLC”) having U.S. shareholder(s).
- For U.S. tax purposes, an LLC may elect to be treated either as a corporation or as a “transparent” entity which as outlined herein, will have dramatically different U.S. tax consequences to A, T, and the seller(s) of T.

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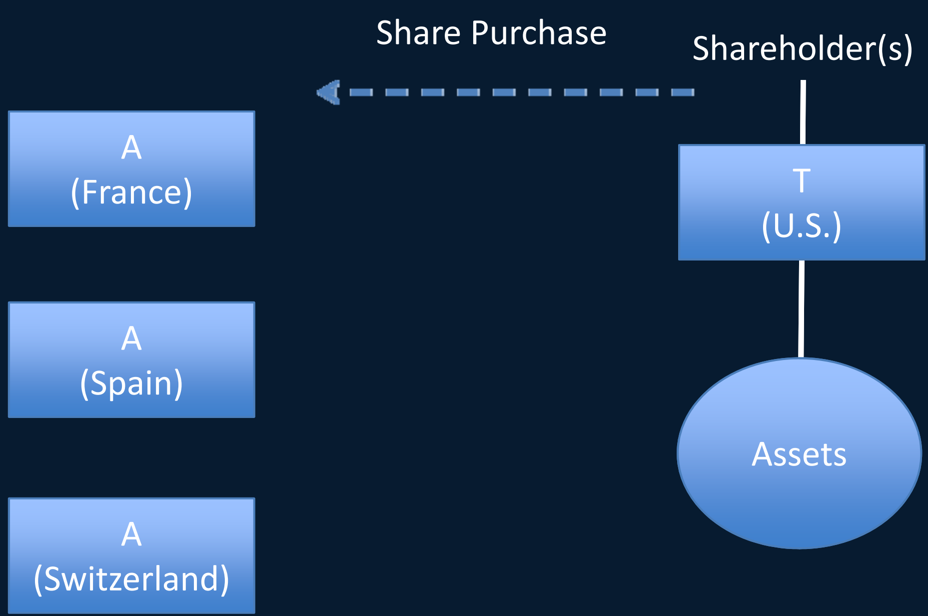
Stock vs. Asset Purchase – U.S. Non-Tax Considerations



- A plain stock purchase or LLC membership purchase is probably the most common acquisition structure.
- T retains its assets and liabilities which are typically subject to negotiated seller representations and indemnities.

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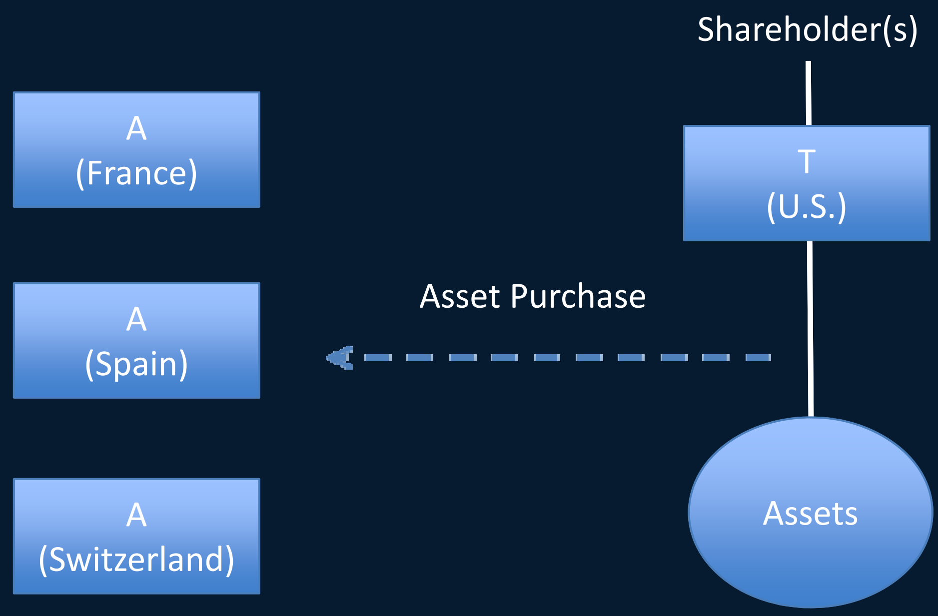
Stock vs. Asset Purchase – U.S. Non-Tax Considerations



- A pure asset purchase structure generally protects A from inheriting T's liabilities (including T tax liabilities) and is therefore typically desirable for A. The need for seller representations and indemnities is typically less than in a stock purchase.
- Transfer of individual assets and liabilities is cumbersome and may not be feasible.

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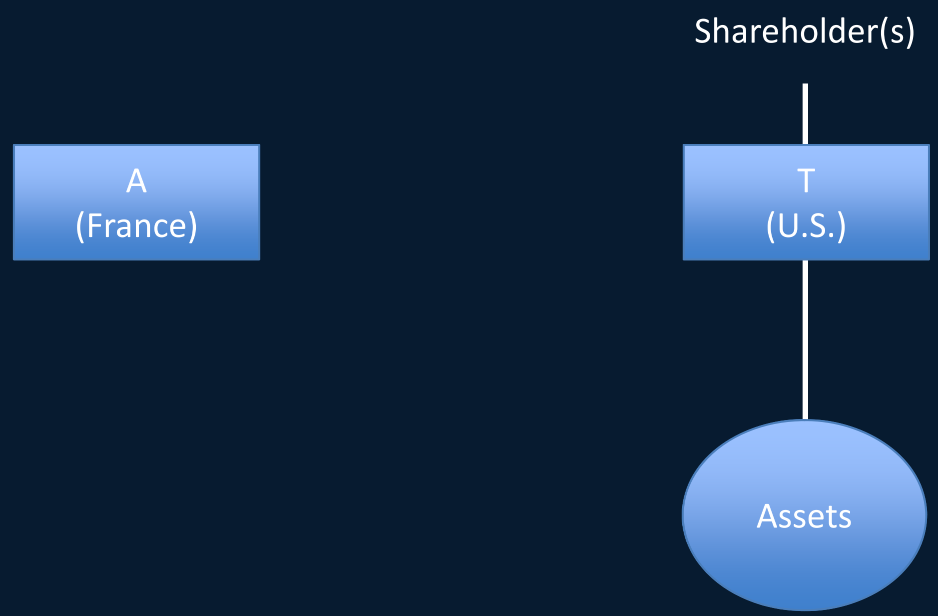
Stock vs. Asset Purchase – French Non-Tax Considerations



- One of the main advantage s of an asset deal compared to a share deal for A is the protection from inheriting tax and other liabilities, no due diligence needed
- The transfer of real estate assets may trigger heavier registration procedures.
- Transfer of going concerns can be more burdensome
- In both cases an SPV, particularly for leveraging will be set up

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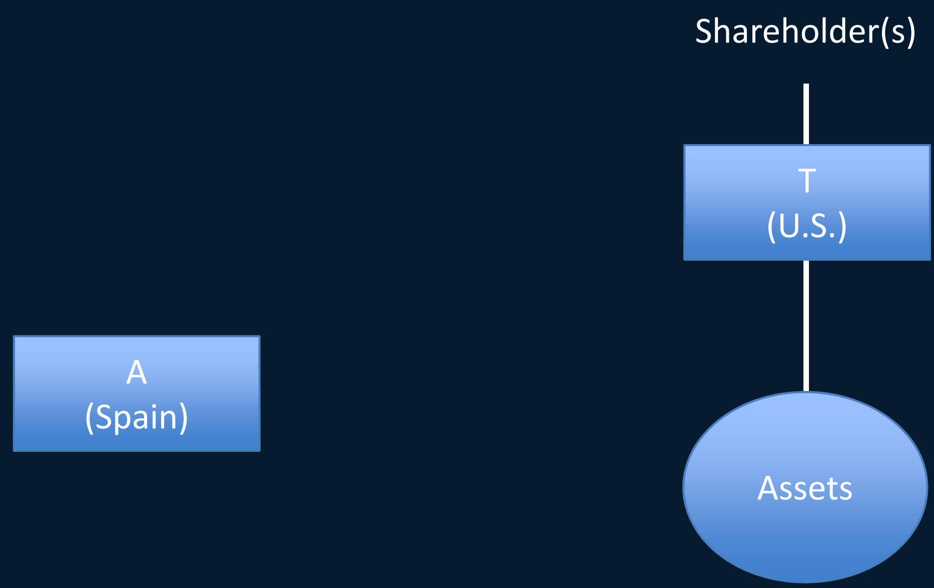
Stock vs. Asset Purchase – Spanish Non-Tax Considerations



- Spanish investors tend to prefer share deals to asset deal due to a number of factors: usually simpler documentation package, protection from potential liabilities inherent or attached to the assets, easier management and compliance in connection with acquisition of various assets, regulatory framework, etc.
- This may be a bit different in real estate intensive deals, but legal entities would be in any case interposed due to high risks perceived in the US from a legal standpoint.

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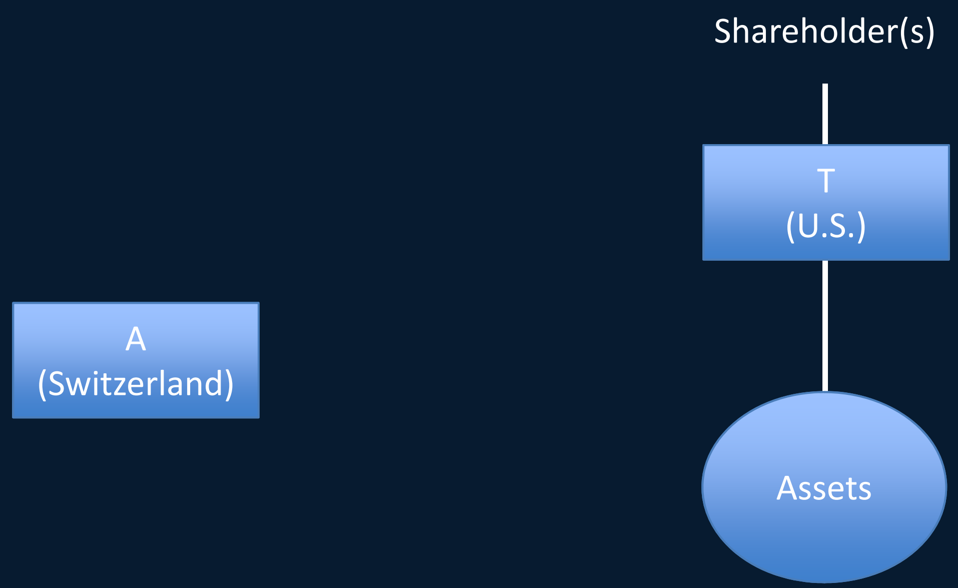
Stock vs. Asset Purchase – Swiss Non-Tax Considerations



- In Switzerland private sellers prefer the sale of stock (tax free capital gain)
- Purchase of U.S. assets leads to direct liability of A in the U.S. and A will become a party to local contracts (rental, employment, sourcing etc.)
- Will an asset purchase structure fully protect A from inheriting any liabilities if employees are taken over? if an ongoing business is taken over?
- If in a regulated business environment: Will manufacturing validation, product certifications, business permits etc. be upheld?
- What reporting requirements will the Swiss company be subject to in the U.S.?

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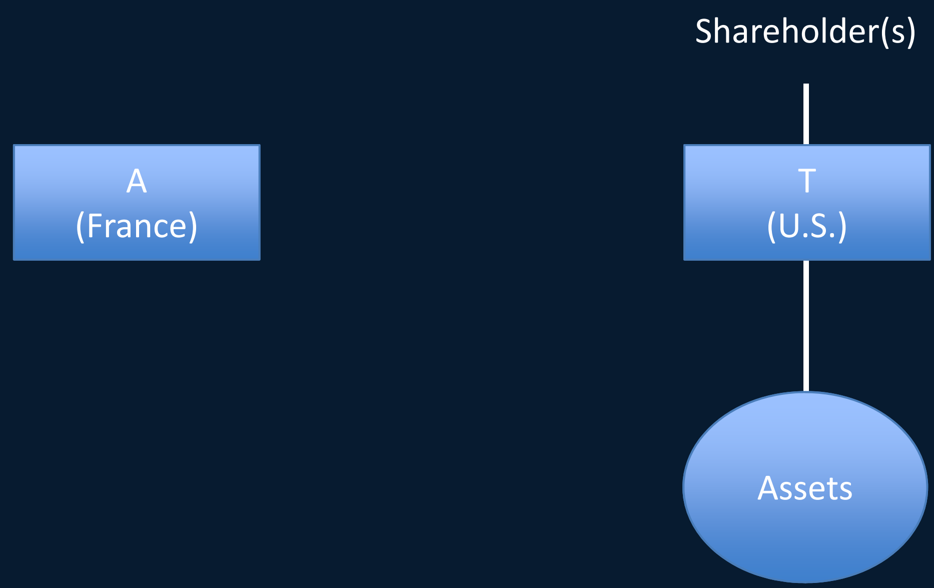
Stock vs. Asset Purchase – U.S. Tax Considerations



- For U.S. tax purposes the tax consequences of a stock and an asset purchase are dramatically different.
- In a stock purchase, A generally inherits the tax attributes of T, subject to limitations intended to combat trafficking in tax attributes. In addition, T has a carryover tax basis in its assets.
- In an asset purchase, A generally does not inherit T's tax attributes and gets a step-up in the tax basis of T's assets.

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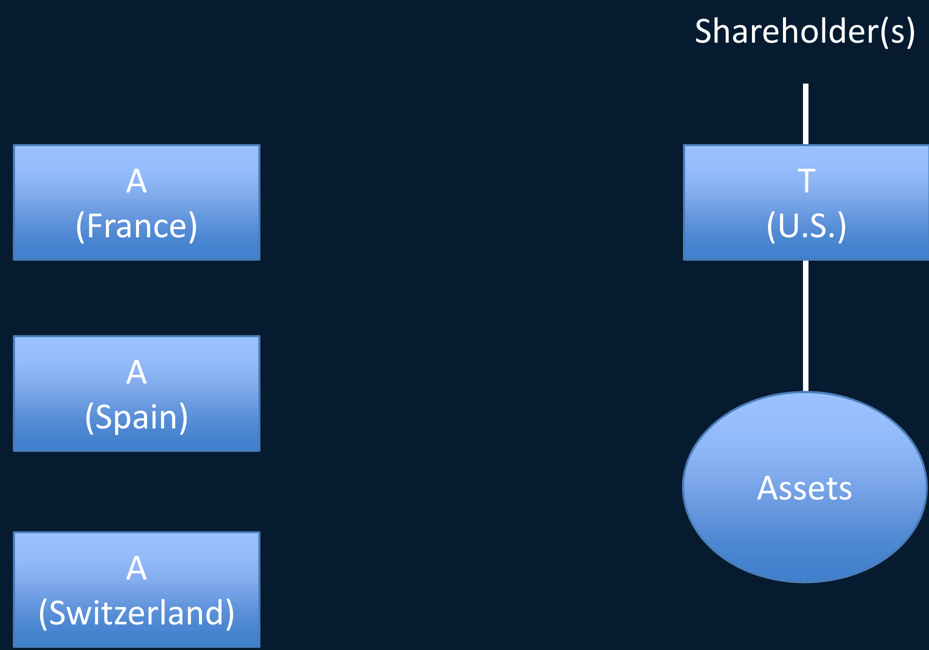
Stock vs. Asset Purchase – U.S. Tax Considerations



- An asset purchase may afford the best tax consequences to A (notably a “step-up” in the basis of assets) but produce significant adverse tax consequences to the seller if T is a stand-alone corporation.
- If T is (1) a subsidiary of a corporate “consolidated group”, (2) an LLC treated as a transparent entity, or (3) an “S Corporation”, the transaction can potentially be structured to provide A the benefits of an asset purchase without adverse tax consequences to the seller.

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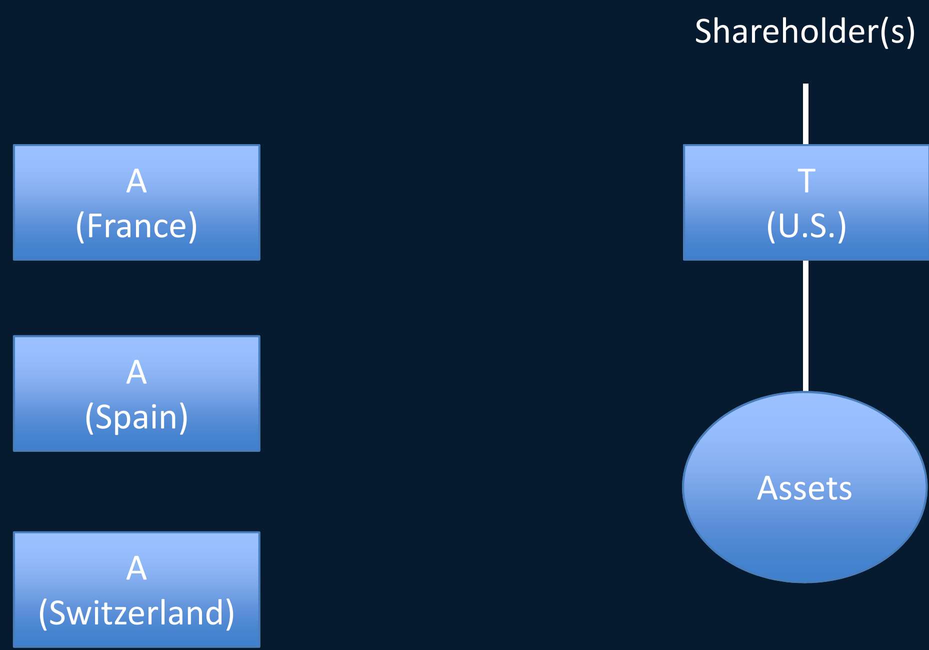
Stock vs. Asset Purchase – U.S. Tax Considerations



- It may be possible in certain cases to structure an acquisition as a share (or LLC interest) purchase but to treat the transaction as an asset purchase for U.S. tax purposes.
- Section 338(h)(10) transactions, sale of transparent LLC, LLC conversions.

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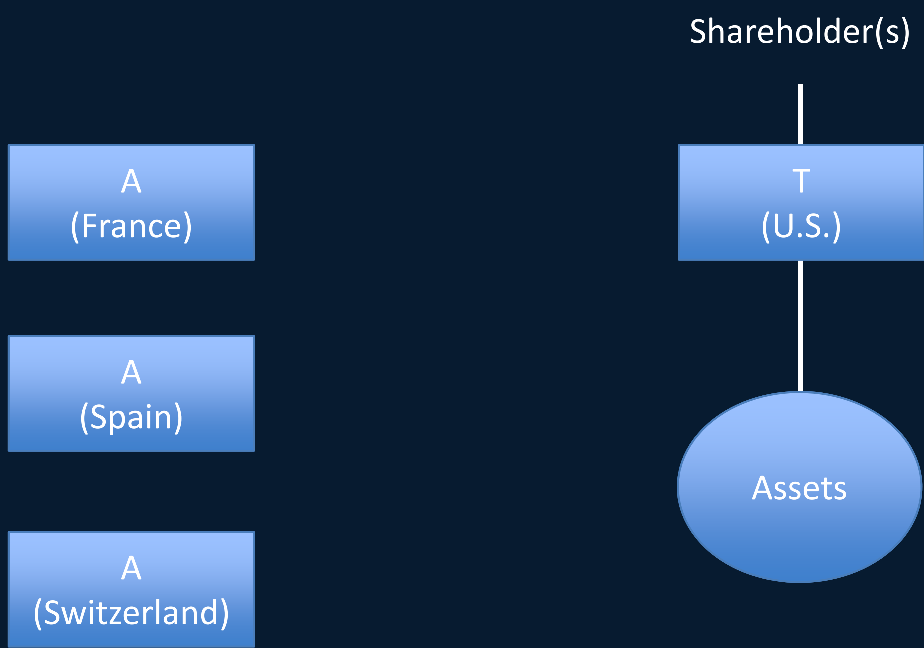
Stock vs. Asset Purchase – U.S. Tax Considerations; Transaction Issues



- Purchase price allocation.
- Separate acquisition of intellectual property.
- Covenant not-to-compete.
- Contractual aspects: Need for seller representations and indemnities; control of tax returns and proceedings.

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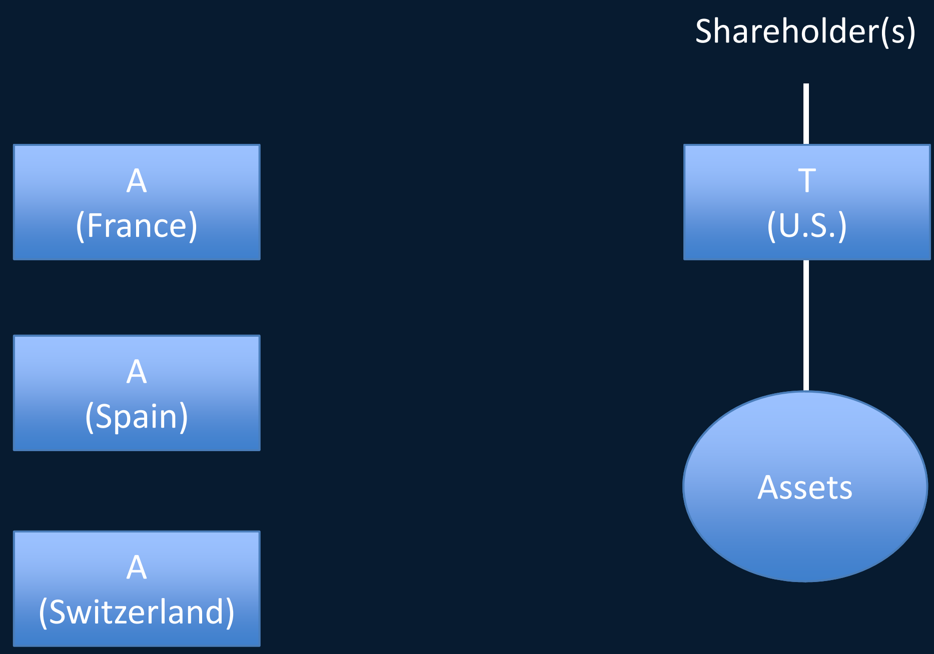
Stock vs. Asset Purchase – French Tax Considerations



- In a stock purchase, A inherits tax attributes of T. In addition, A will support the taxation of the asset's unrealised gain in the US. However, the gain derived from the sale of T'shares by A will qualify for the favourable long term capital gain regime in France. 4,67 % effective rate
- It must be noted that A and T cannot form a group tax consolidation. T losses may not be used by A. In addition, a WHT on dividends paid by T to A will generally apply.
- Also, the French thin capitalization rules applying to all loans granted to the borrowing company by any related undertaking may limit the deduction of the interest paid by A.

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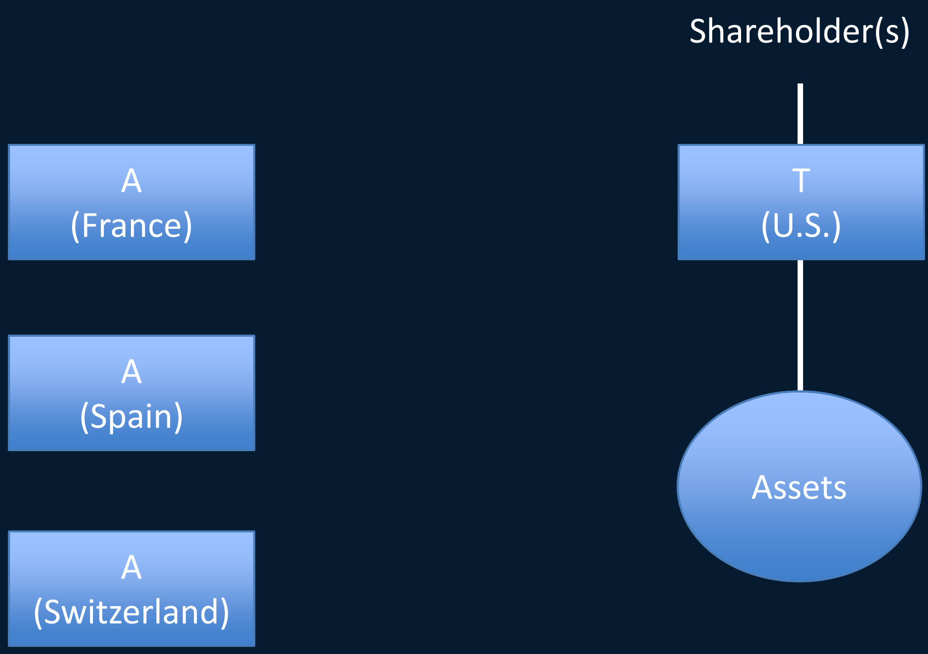
Stock vs. Asset Purchase – French Tax Considerations



- In an asset purchase, A generally does not inherit T's tax attributes and gets a step-up in basis of T's assets which will allow amortisation (not on goodwill). No pregnant gain,
- It must be noted that if an acquisition structure is not set up in the US, the asset purchase can create a permanent establishment and thus a taxable presence of A in the U.S.

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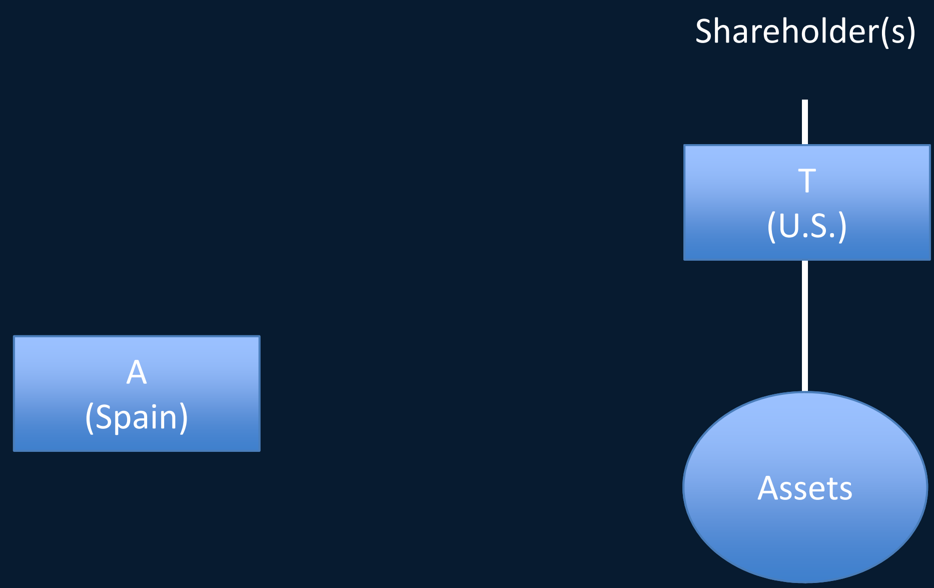
Stock vs. Asset Purchase – Spanish Tax Considerations



- Spanish investors usually focus on: (i) ensuring the so-called “participation exemption” for dividends and gains may apply -or maximization of foreign tax credit is achieved-, (ii) whether tax treaty benefits are available and how LOB provisions may impact flows, particularly if the Spanish company is a holding company, and (iii) financing structure for the deal (leveraged acquisitions and debt pushed down). In case of an asset deal, it is extremely relevant whether such assets constitute a permanent establishment or not.

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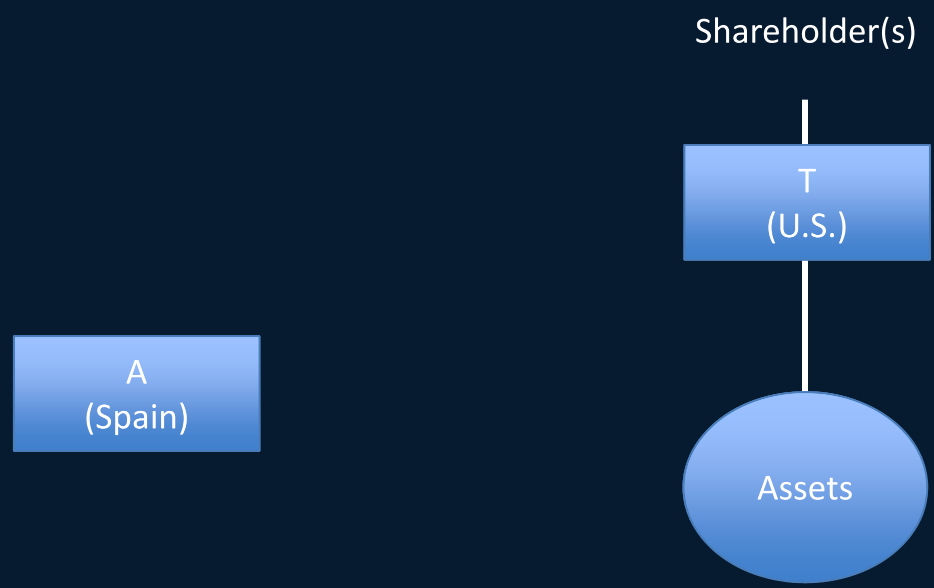
Stock vs. Asset Purchase – Spanish Tax Considerations (II)



- It must be noted that investment into LLCs may pose problems for the application of the “participation exemption” (tax credits may be available). Tiered structures or groups need also to be carefully analysed. Solutions may come through new partnership entities available in Spain (checking the box in the US).
- The 2013 protocol to the US-Spanish tax treaty (pending to be ratified) could create more favourable environment (0% tax on certain dividends, gains, royalties and interest, etc).
- Although depreciation of foreign goodwill and other domestic tax incentives have been limited, post-closing flows and transfer of business profits to Spain is of interest (25% tax)

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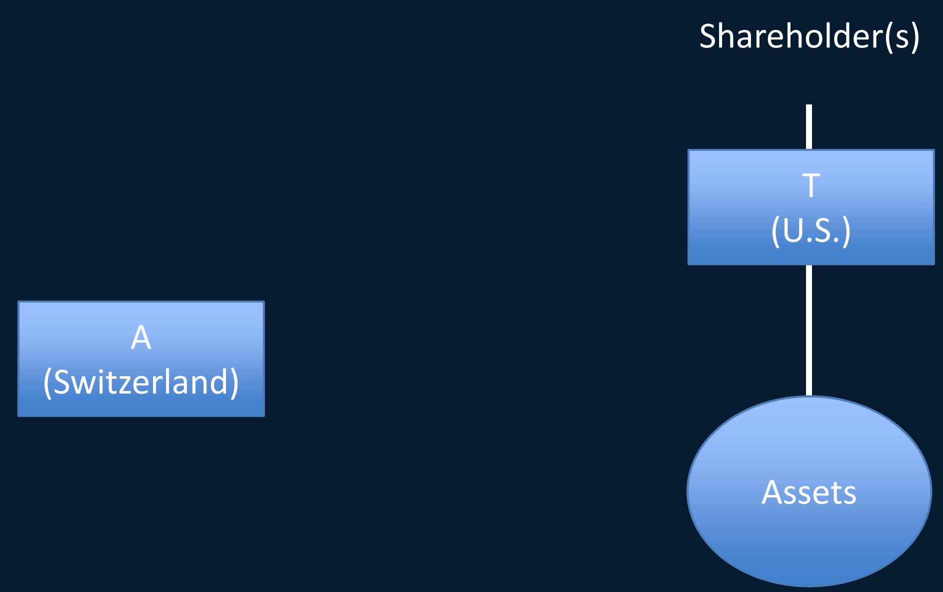
Stock vs. Asset Purchase – Swiss Tax Considerations



- The Swiss – U.S. Tax Treaty of October 2, 1996 applies to income (on U.S. side only federal)
- The tax consequences of a stock and an asset purchase are dramatically different for local U.S. tax but also for international tax aspects:
- Asset purchase creates a permanent establishment and thus a taxable residence of A in the U.S. subjecting A to U.S. taxation for its U.S. PE business profits (arts. 5 and 7 US-Swiss Tax Treaty)
- Stock purchase transfers control over T-company leaving T under U.S. taxation, not subjecting A to U.S. taxation

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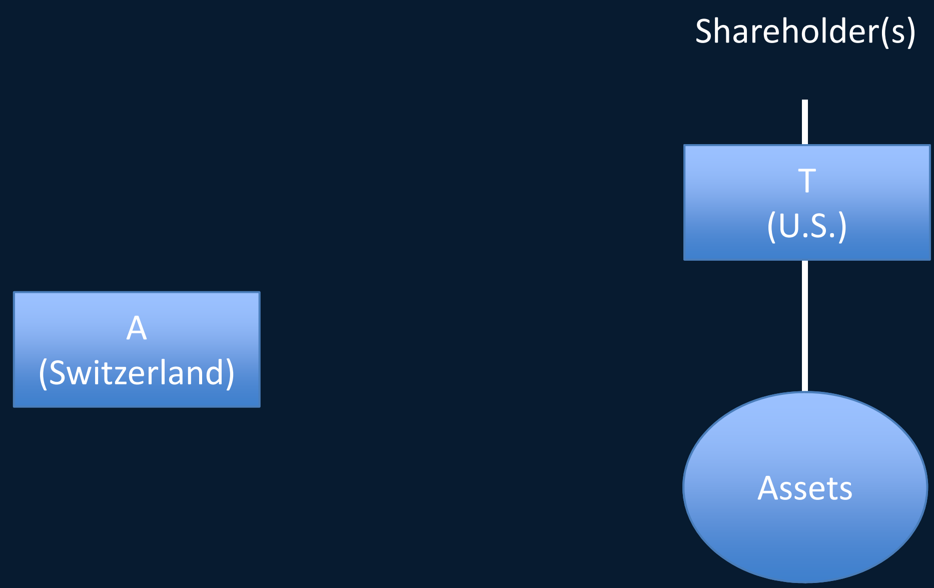
Stock vs. Asset Purchase – Swiss Tax Considerations



- Under asset and stock purchase, business profits from the A-business are taxed in the U.S.
- Switzerland doesn’t consolidate subsidiaries for taxes: An asset purchase allows A to off-set losses from T (interesting to “step-up” assets); share purchase would not
- Art 10, paragraphs 7 and 8 of the US-Swiss Treaty applies to distributions from a US PE of a Swiss company. As a consequence the 5% applies to the "dividend equivalent amount". Not all Swiss Treaties have the same rule, so that in certain cases profits from T to A are not subject to non-recoverable withholding
- Investment into LLCs creates problems, because its unclear legal qualification under Swiss law (partnership or company)

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