THE US SECTION 338 ELECTION: AN OVERVIEW OF THE MECHANICS FOR CANADIAN TAX PRACTITIONERS

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The US section 338 election should be familiar to Canadian tax practitioners who advise Canadian corporate clients that are contemplating US acquisitions. This election generally treats the sale of the stock of the target corporation as the sale of that corporation's assets, resulting in a potential basis step-up in the target's assets without the commercial complexity of an asset sale. Certain negative target corporation tax attributes may also be eliminated by the election. A thoughtfully made election can be extremely beneficial to the purchaser and have little or no impact on the target's shareholders. A poorly planned election can have the opposite effect. While the principles involved in a section 338 election are generally straightforward, the actual computational process can be quite complex. The purpose of this article is to provide the Canadian tax practitioner with some general information relating to the section 338 election in the context of the acquisition of a single target corporation. The article first presents a general discussion of the two section 338 elections that may be available (sections 338(g) and 338(h)(10)), highlighting the differences between the two. Then it generally describes the mechanics involved in computing a basis step-up in the target's assets. Finally, the application of these general principles is illustrated by way of numerical examples.

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