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Incorporation Techniques: Planning Today for Tax Advantages Tomorrow

I

INTRODUCTION — BASIC DECISIONS PRIOR TO INCORPORATION

Norman A. Sugarman

The organization of a corporation is one of the more frequent and important services performed by a lawyer. It is also one of the areas of the law that is generally considered quite free from most of the complexities and problems that are injected into many business transactions by the federal income tax law. Thus, the tax-free organization of a corporation is generally regarded as a routine procedure. This is a proper attitude in many cases. However, in a large number of situations there are decisions, problems and alternatives, which should be dealt with prior to and at the time of incorporation, to avoid subsequent regrets.

This is not to imply that the tax aspects of the organization of a corporation are or must necessarily be complicated; but there are some basic tax questions that should be asked or explored before a transaction involving the organization of a corporation is considered "routine" from a tax viewpoint. These questions include basic pre-incorporation matters, such as whether to incorporate, how many corporations to organize, where to incorporate, and when is the right time? What property should be transferred to the corporation? Are there any problems in a transfer of property in exchange for stock that might prevent the transaction from being tax-free? Should such an exchange be made taxable? Further, what planning and method should be used at the time of incorporation to gain tax advantages in the future?

This series of articles on incorporation technique will be concerned with these and related questions, with primary emphasis upon tax implications that may frequently be overlooked to the financial detriment of the parties involved.

Much has already been written concerning the basic decision of whether to incorporate.¹ Recent developments indicate the increasing importance of that decision. The enactment of "Subchapter S" of the Internal Revenue Code,² permitting the shareholders of a "small business

1. See Calkins, Coughlin, Hacker, Kidder, Sugarman & Wolf, *Tax Problems of Close Corporations: A Survey*, 10 WEST. RES. L. REV. 9, 10-15 (1959).

2. INT. REV. CODE OF 1954, §§ 1371-77.