

# WELCOME TO AMERICA

## DOING BUSINESS IN THE UNITED STATES



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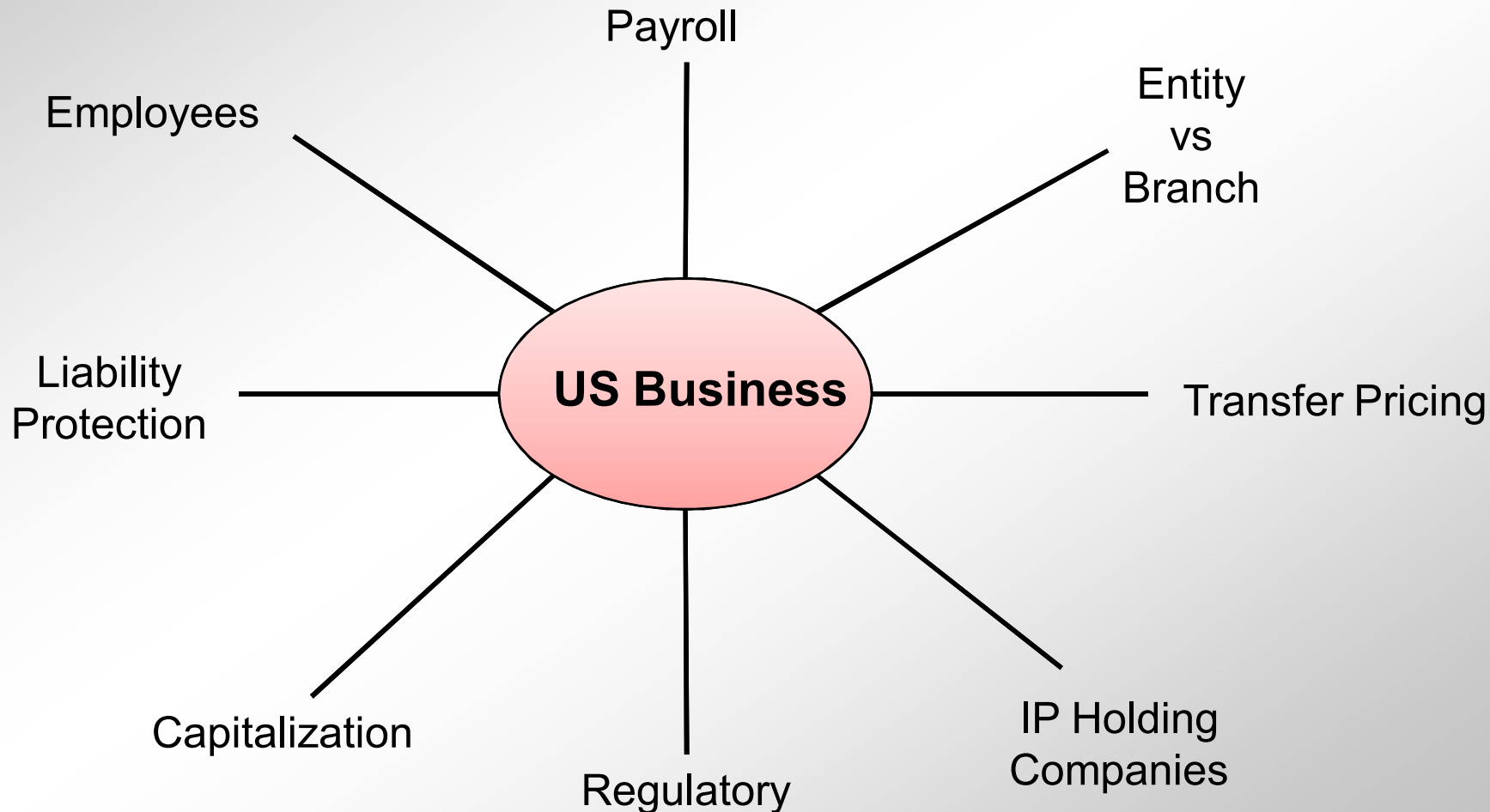
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# GENERAL CONSIDERATIONS





# REGULATORY ENVIRONMENT

Open Competition vs. Consumer & Employee Protection

Interstate Commerce vs. Intrastate Commerce

- Mergers & Acquisitions – Federal Trade Commission & Dep't of Justice
- Securities – SEC, Public Co. Accounting Oversight Board (PCAOB)
- No statutory audit required for private companies (except banks)
- Consumer Protection – Consumer Product Safety Comm. (CPSC), Environmental Protection Agency (EPA), Food & Drug Admin. (FDA), Dep't of Transportation (DOT), Federal Commercial Comm., Unfair Trade Laws, Anti-Trust Laws, Customs & Import, Foreign Corrupt Practices Act

# INTELLECTUAL PROPERTY PROTECTION

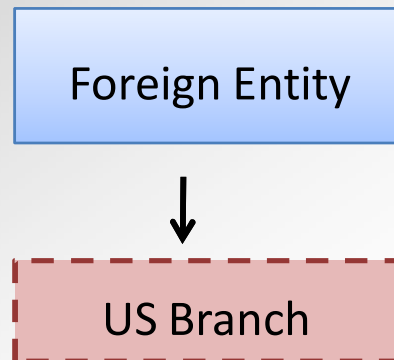
- Trademark
  - word, phrase, symbol or design
  - lasts as long as symbol is used
- Copyright
  - original artistic or literary work, including software
  - lasts 70 years after death of creator
- Patent
  - novel, useful, non-obvious invention in area covering patentable subject matter; decided by USPTO
  - lasts 20 years from grant

# ACCOUNTING

- Tax Accounting
  - cash or accrual depending on amount of gross receipts (> \$5 million)
- Financial Accounting
  - GAAP

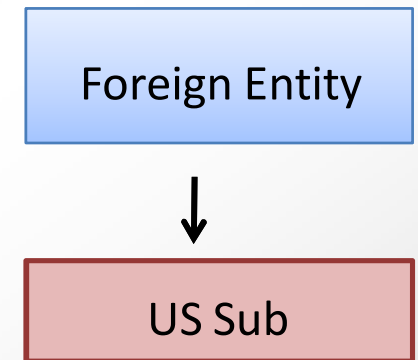
# US BRANCH VERSUS US INCORPORATION

## US Branch



- A “branch” is generally a fixed place of business (i.e. an office or factory)
- Will be taxed on ECI, or “business profits” attributable to a permanent establishment
- Need US Tax ID and FEIN
- Branch Profits Tax may apply
- No liability shield
- Treaty exceptions

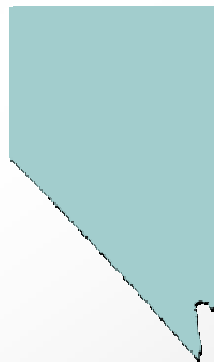
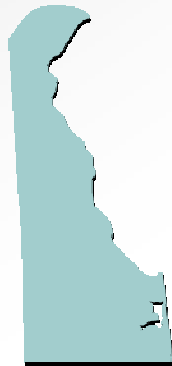
## US Incorporation



- Incorporating means a new legal entity will be established in the US
- Such entity will be taxed on worldwide income
- Need organizational documents; bylaws, management, etc
- Need US Tax ID and FEIN
- Dividend withholding
- Transfer Pricing
- Shields liability

# WHERE TO INCORPORATE

Delaware vs. Nevada vs. California





# CHOICE OF ENTITY

- Limited Liability Company (LLC)
- Limited Partnership (LP)
- C Corporation
- S Corporation
- Statutory Trust

# EFFECTIVELY CONNECTED INCOME

- Foreign corporations are taxable on income that is effectively connected with a US trade or business
- Income attributable to a US office or other fixed place of business
- A U.S. trade or business can be carried on through an agent
- A foreign corporation's "independent" agent will not constitute a US office but a dependant agent might.
- The office of a dependant agent is disregarded unless the agent has and regularly exercises the authority to conclude contracts in the name of the foreign company or has a stock of goods belonging to the foreign company from which orders are regularly filled on behalf of the foreign company.

Foreign Corporation



US PE

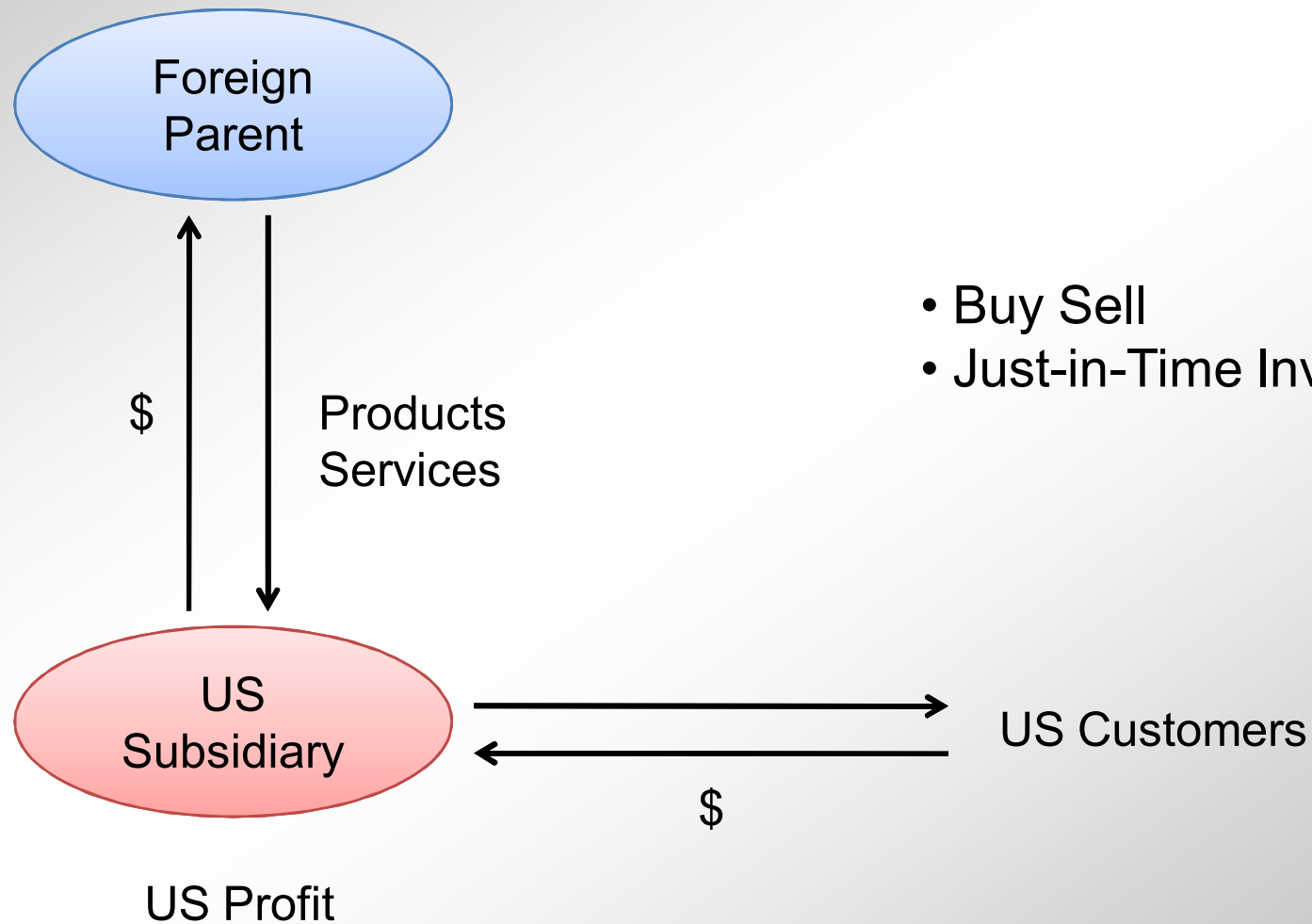


# TRANSFER PRICING

- Under Code section 482, the IRS can re-allocate income among “controlled” entities, such as a Foreign parent and a US sub, to properly reflect income. The prices charged between such related parties (“transfer prices”) are required to be arm’s length.
- Current regulations impose substantial penalties for understatements of US tax due to transfer pricing adjustments – 20% or 40% of the underpaid tax, depending on the size of the understatement. The US sub can avoid penalties, even if the IRS does not accept its transfer prices, by completing a transfer pricing study (“TPS”) before the income tax return has been filed. The TPS must meet the requirements of the regulations and apply the best method for determining the US sub’s transfer prices.
- Most often, the TPS will utilize the comparable profits method for determining the appropriate transfer price. Such method determines the “arm’s length price” by referring to objective measures of profitability derived from uncontrolled taxpayers that engage in similar business activities with other uncontrolled taxpayers under comparable circumstances.
- The allocation of income between related entities is a major tax issue for multi-national companies.

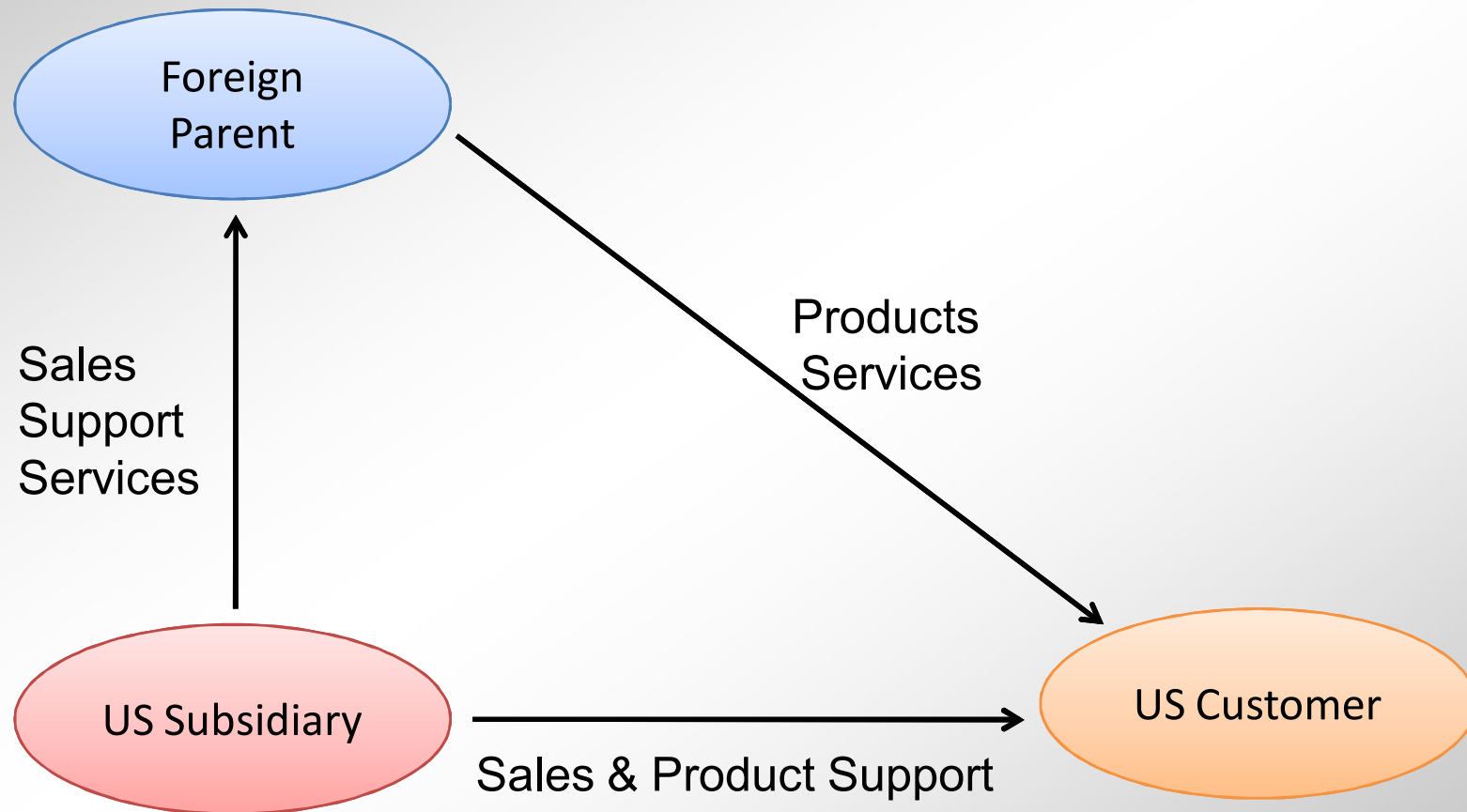
# TRANSFER PRICING

## BUY-SELL MODEL

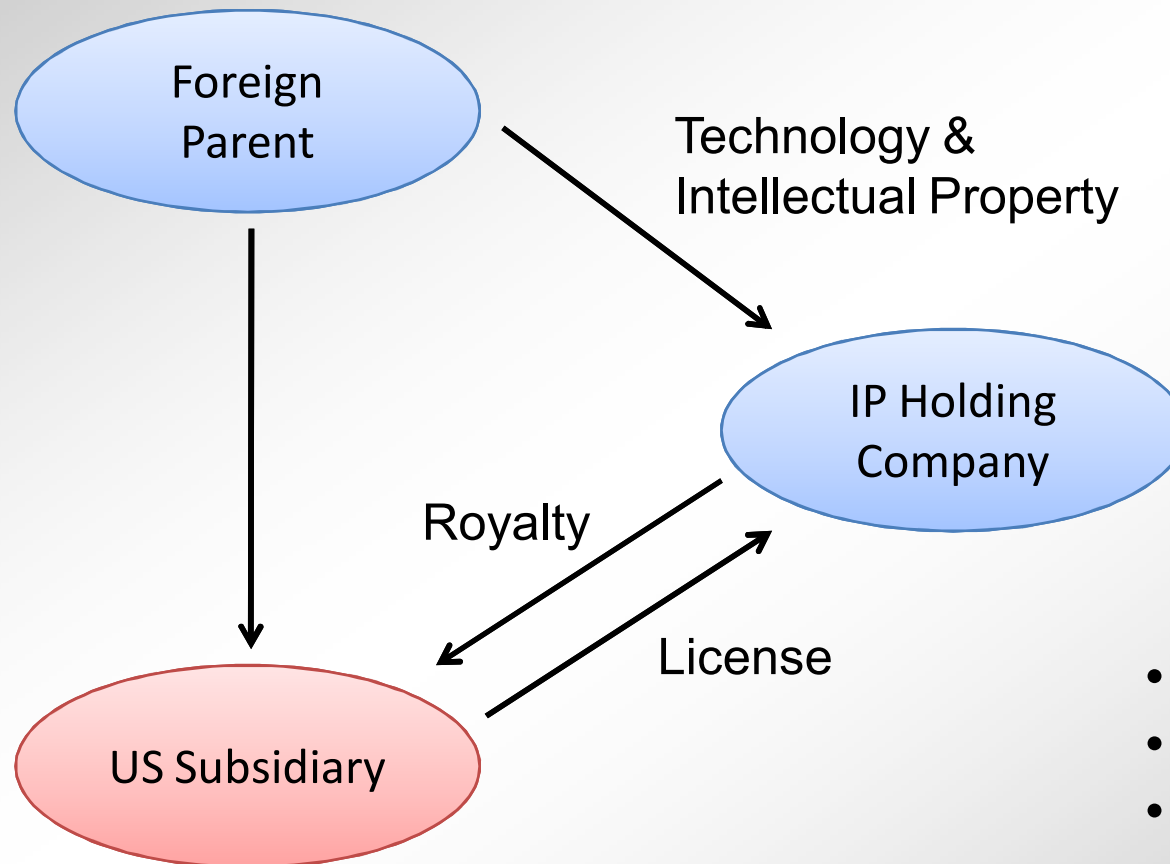


- Buy Sell
- Just-in-Time Inventory System

# TRANSFER PRICING COMMISSION MODEL

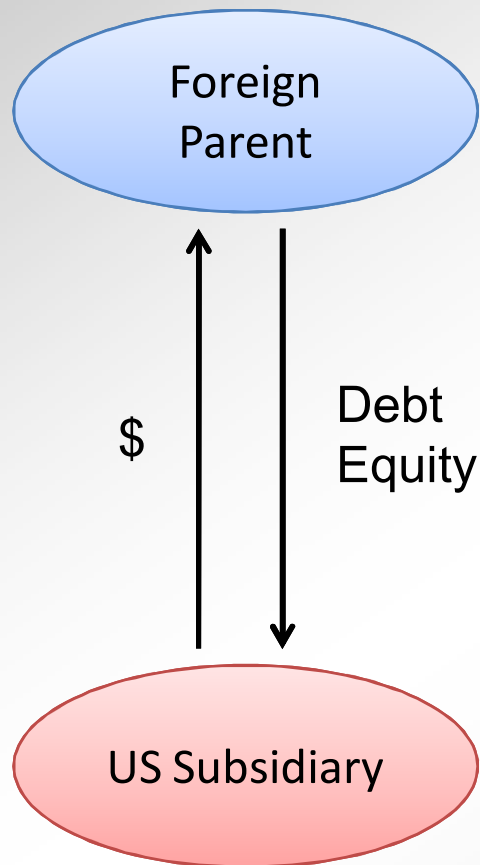


# IP HOLDING COMPANIES



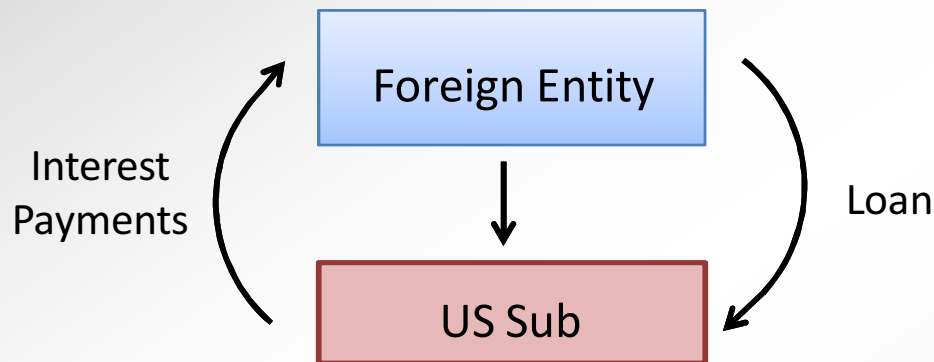
- Deferral
- Worldwide Tax Rate
- Withholding Tax Issues

# CAPITALIZATION



- Debt
  - deductible interest, but must pay or accrue
  - must be repaid
  - “Deep Rock Doctrine”
- Equity
  - not required to be repaid
  - dividends are nondeductible
- Thin Capitalization Rules
- Earnings Stripping

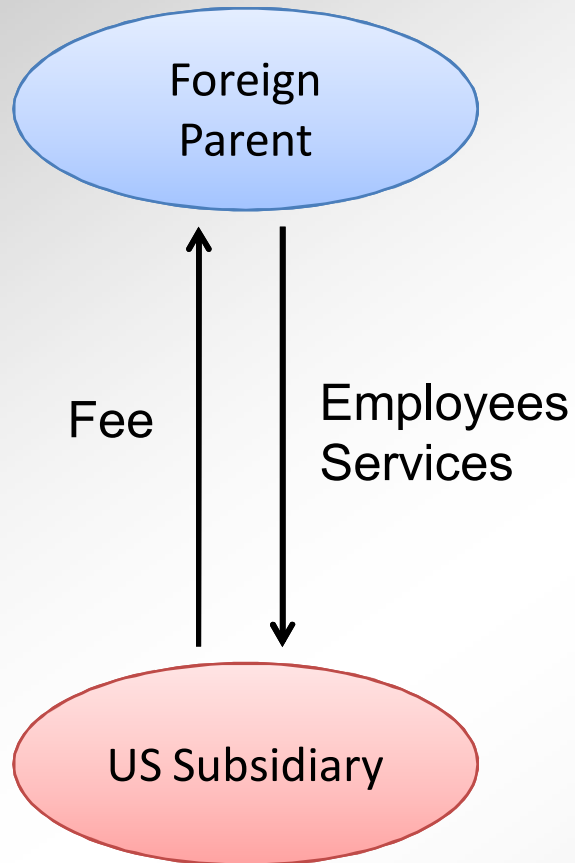
# EARNINGS STRIPPING



- Operating group company structures, with an incorporated subsidiary in the US, may attempt to shift income away from the US Sub by issuing loans from the foreign parent to the US Sub requiring the payment of deductible interest back to the foreign parent. This “earnings stripping” causes the US Sub to have an overall decrease in profit (decrease in tax), shifting the additional profit to the foreign parent (not subject to US tax).
- Section 163(j) of the US Tax Code is applicable if – (1) a domestic corporation’s debt-to-equity ratio exceeds 1.5:1 (i.e. it is “thinly capitalized”) and (2) the domestic corporation makes interest payments to a related person exempt from US taxation (i.e. a foreign entity). Section 163(j) denies the domestic corporation’s deduction for interest payments to the extent the total interest deduction would exceed 50% of the corporation’s income (before deducting the interest).



# EMPLOYEES



- Secondment Agreement
- Limitations on Authority
- Tax Withholdings
- Tax Gross-Ups
- Totalization

# FOREIGN PERSONNEL

- VISA Requirement
- Non-Resident Alien or Resident for Tax
  - Green Card
  - Substantial Presence Test
  - Treaty Definitions
- Estate and Gift Tax
  - Domicile

# EMPLOYEE RIGHTS

- Minimum Wages & Maximum Hours
- Non-Discrimination
- Pension Rights – ERISA & Social Security
- Health and Safety
- Unemployment
- Sexual Harassment
- Mass Layoffs (WARN Act)

# INTER-COMPANY AGREEMENTS

- Shipping Terms
- Payment Terms
- Risk of Loss & Title Passage
- Insurance
- Most Favored Nation Clauses
- Price Protection
- Indemnity
- Warranty
- Trademarks & Marking

# REAL ESTATE

## SECTION 897 – FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT OF 1980 (FIRPTA)

- Section 897
  - Treats gain or loss of a non-resident alien individual or foreign corporation from the disposition of an investment of a “United States real property interest” as if such gain or loss were effectively connected to a US T/B.
  - The term “United States real property interest” generally means, (A) an interest in real property located in the US; or (B) a domestic corporation that was considered a “US real property holding corporation” at any time during the last 5 years. A “US real property holding corporation” is any corporation where (A) the FMV of its US real property interests exceeds, (B) the FMV of (i) its US real property interests, plus (ii) its interests in real property located outside the US, plus (iii) any other of its assets held for use in a trade or business. However, if such corporation already disposed of its real property in a fully taxable transaction, it will be excluded.
  - Under Regulations, assets held by a partnership, trust, or estate shall be treated as held proportionately by its partners or beneficiaries.
- Withholding
  - Generally, all FIRPTA income will be subject to withholding at 10% of the amount realized. Foreign country treaty may offer residents relief from US taxation.

# WITHHOLDING TAXES

## TREATY EFFECT

- Dividend Relief
  - An entity that is a “resident” under the Treaty will pay a reduced rate of withholding tax on dividends.
- Interest Relief
  - An entity that is a “resident” under the Treaty will pay a reduced rate of withholding tax on interest.
- Royalties Relief
  - An entity that is a “resident” under the Treaty will pay a reduced rate of withholding tax on royalties and fees for “included services”.
  - “Included Services” are generally technical services ancillary and subsidiary to the enjoyment of the intellectual property rights.
- Service Income Relief
  - An individual performing services in the US, (1) as an employee of an entity may avoid US taxation if the individual is present in the US for less than 183 days and the compensation is not borne by the foreign entity’s “permanent establishment” in the US, and (2) as an independent contractor may avoid US taxation if the individual renders professional services, without a fixed base in the US, and without staying in the US for 90 days (or more) during the taxable year.

# TREATIES

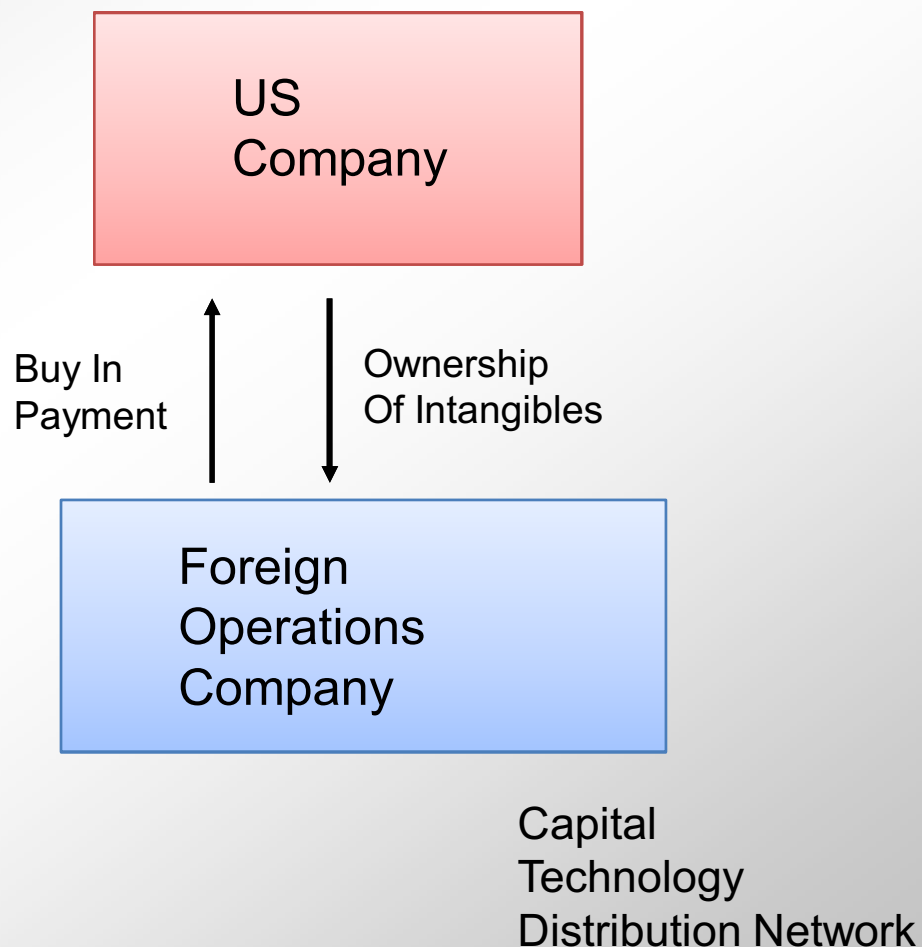
## OTHER

- Permanent Establishment Required for Tax on Business Profits
- Information Exchange
- Competent Authority
- Non Discrimination
- Limitation of Benefits

# COST SHARING

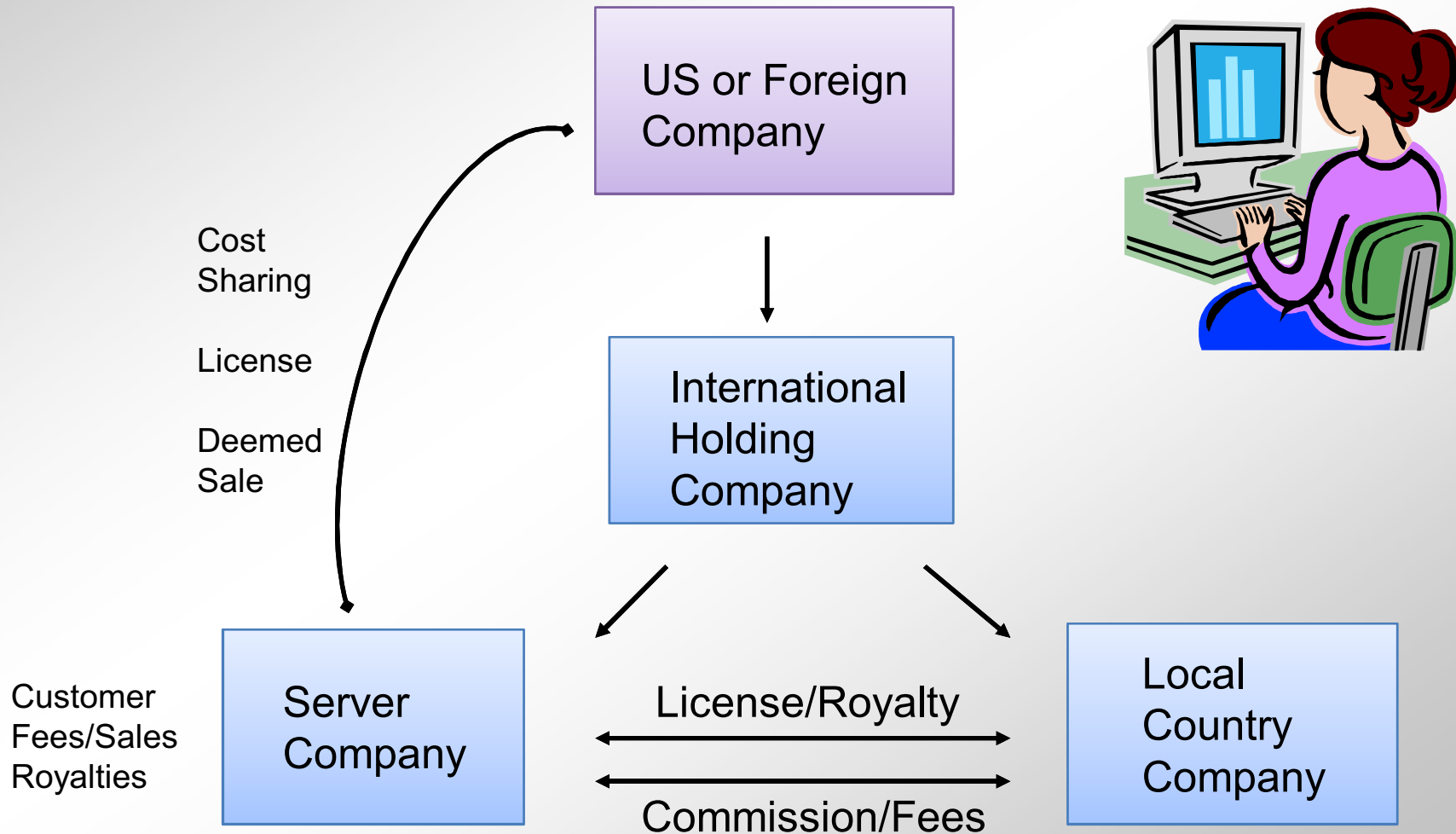


- Split ownership of Intangibles
  - Share costs and exploitation rights
  - No Intercompany Royalty
  - Can migrate intangibles to
  - Low tax country
- 
- Current Problems:
    - Nonexclusive
    - Technology reverts on termination





# INTERNATIONAL E-COMMERCE OPERATIONS



# SALES TAX

- R&D Contracts nontaxable under true object of the contract test
- *Navistar v. SBE* – sale of drawings and manuals were taxable
- Transfer via Remote Telecommunication
- Custom made software: Reg. 1502(f)(2)
- Publishers Exemption: Reg. 1502(f)(1)(B)
- State Sales Tax Nexus Determinations
- Collection / Withholding of Sales Tax

# STATE TAX ISSUES



Services Income

- Employees
- Admin, legal and commercial registrations
- Enforcement
- R&D, commercialization
- Payroll tax withholding

# APPENDIX

<b>Agency or Resource</b>	<b>Web Site</b>
American Institute of Certified Public Accountants (AICPA)	<a href="http://www.aicpa.org">http://www.aicpa.org</a>
Corporate and Individual Tax Rates	<a href="http://www.smbiz.com/sbrl001.html">http://www.smbiz.com/sbrl001.html</a>
Doing Business with NASA	<a href="http://www.nasa.gov/centers/ames/business">http://www.nasa.gov/centers/ames/business</a>
Education Department	<a href="http://www.ed.gov/fund/contract/about/booklet1.html">http://www.ed.gov/fund/contract/about/booklet1.html</a>
Foreign Business Doing Business in U.S.	<a href="http://www.firstgov.gov/Business/Foreign_Business.shtml">http://www.firstgov.gov/Business/Foreign_Business.shtml</a>
<i>Inc.</i> Magazine, Top 25 U.S. Cities	<a href="http://www.inc.com/magazine/20050501/bestcities.html">http://www.inc.com/magazine/20050501/bestcities.html</a>
Internal Revenue Service (IRS)	<a href="http://www.irs.gov/businesses">http://www.irs.gov/businesses</a>
International Federation of Accountants (IFAC)	<a href="http://www.ifac.org/">http://www.ifac.org/</a>
Public Company Accounting Oversight Board (PCAOB)	<a href="http://www.pcaobus.org/">http://www.pcaobus.org/</a>
Sarbanes-Oxley Explained	<a href="http://www.aicpa.org/sarbanes/index.asp">http://www.aicpa.org/sarbanes/index.asp</a>
Securities and Exchange Commission (SEC)	<a href="http://www.sec.gov/">http://www.sec.gov/</a>
Small Business Administration (SBA)	<a href="http://www.sba.gov/">http://www.sba.gov/</a>
Social Security Administration Totalization Agreements	<a href="http://www.ssa.gov/international/agreementsoverview.html">http://www.ssa.gov/international/agreementsoverview.html</a>

# APPENDIX

State Governments and State Agencies Directory	<a href="http://www.statelocalgov.net">http://www.statelocalgov.net</a>
Transportation Department Business Services	<a href="http://www.dot.gov/business.html">http://www.dot.gov/business.html</a>
U.S. Commercial Service (connects U.S. and international companies)	<a href="http://www.buyusa.gov/home">http://www.buyusa.gov/home</a>
U.S. Chamber of Commerce	<a href="http://www.uschamber.com/default">http://www.uschamber.com/default</a>
U.S. Citizenship and Immigration Services	<a href="http://uscis.gov/">http://uscis.gov/</a>
U.S. Department of State	<a href="http://www.state.gov/travelandbusiness">http://www.state.gov/travelandbusiness</a>
U.S. government business portal	<a href="http://www.business.gov">http://www.business.gov</a>
U.S. government regulatory information	<a href="http://www.reginfo.gov/public">http://www.reginfo.gov/public</a>
U.S. Patent and Trademark Office	<a href="http://www.uspto.gov/index.html">http://www.uspto.gov/index.html</a>



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