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Global Tax Alert

Report on recent US international tax developments - 30 October 2020

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The United States (US) Internal Revenue Service (IRS) this week announced that it is amending the parameters of the Advance Pricing and Mutual Agreement (APMA) program in regard to mutual agreement procedure (MAP) and advance pricing agreement (APA) cases that are negotiated under US tax treaties. The change is meant to promote compliance with provisions enacted by the *Tax Cuts and Jobs Act* (TCJA) by limiting so-called "telescoping" of the case results to current tax years. According to the announcement, the "IRS anticipates that in many cases spanning TCJA implementation years, changing the U.S. taxpayer's taxable income pursuant to a competent authority resolution is likely to impact the substantive calculation of tax." The IRS states that there are hundreds of US competent authority cases involving tax years that began before 1 January 2018. The IRS therefore is generally requiring that those taxpayers amend their tax returns to implement competent authority resolutions rather than reflect the changes to taxable income in current tax years.

When a competent authority agreement is completed, the US taxpayer will be told the taxable year(s) in which the resolution should be reflected in the taxpayer's US taxable income and will be asked to amend their federal tax return for those years. For cases involving multiple years that begin before 1 January 2018 and that do not cross over the TCJA enactment date, the US taxpayer may request "telescoping," that is to change the taxable income for each year of the case so that income may be aggregated, netted, and reflected in the last of those taxable years.

Building a better working world

A senior IRS official this week said that as the agency moves away from TCJA regulatory efforts, it is now beginning to focus more of its attention on enforcement priorities, including partnership reporting that includes international aspects. According to the official, the IRS has also resumed enforcement in the area of stock-based compensation and cost-sharing arrangements, following the US Supreme Court's denial of certiorari in the *Altera* case.

In a recent IRS Office of Chief Counsel Memorandum (FAA 20204201F), the IRS has advised that the Internal Revenue Code[1] Section 704(c) anti-abuse rule applies to contributions that a US corporate taxpayer made of high-value, low-basis assets to a partnership formed with a related foreign entity. The partnership used the "traditional method," with curative allocations limited to gain on the disposition of the contributed property, for making allocations with respect to the built-in gain for purposes of Section 704(c). The IRS determined that it may exercise its authority to apply a "curative method" that would cure the distortion.

The FAA is significant for a few reasons. First, it provides insight on the IRS's view of the application of the Section 704(c) anti-abuse rule. Second, the FAA raises questions concerning the IRS's interpretation of the "with a view to" requirement in the Section 704(c) anti-abuse rule; more specifically, the FAA suggests that the IRS may seek to apply the Section 704(c) anti-abuse rule even to partnership contributions that were partially motivated by valid non-tax business purposes. Third, it confirms that the IRS cannot apply the remedial allocation method to remedy an adoption of a Section 704(c) method that violates the Section 704(c) anti-abuse rule. See EY Global Tax Alert, *US IRS concludes anti-abuse rule under Section 704(c) triggered in asset contribution to foreign partnership*, dated 27 October 2020 for details.

Endnote

1. All "Section" references are to the Internal Revenue Code of 1986, and the regulations promulgated thereunder.

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