Report on recent US international tax developments – 18 December 2020

The last major piece of the *United States (US) Tax Cuts and Jobs Act* (TCJA) international guidance, the final regulations on Internal Revenue Code[1] Section 163(j) interest expense limitation, was sent by Treasury to the Office of Management and Budget's Office of Information and Regulatory Affairs on 16 December. The Internal Revenue Service (IRS) in late July 2020 issued final and proposed regulations under Section 163(j). The proposed regulations (REG-107911-18) covered several additional aspects of the limitation, including: (i) substantially revised rules for applying the limitation to US shareholders of controlled foreign corporations; (ii) rules for foreign persons with effectively connected income; and (iii) specific aspects of the limitation as applied to partnerships, including partnerships engaged in the trade or business of trading personal property.

A senior Treasury official this week was also quoted as saying that with TCJA guidance nearly complete, Treasury will now refocus on several other international tax areas, including regulations under Sections 959 and 961, 897, and 864(f) – the latter being allocation of interest on a worldwide basis – as well as other projects listed on the IRS's 2021 priority guidance plan.

The official indicated that Treasury is making progress on a new tax treaty with Croatia. Based on the comments made, it would appear that work on other treaties may also be underway. The official also highlighted the resumption of Senate approvals of bilateral tax treaties after nearly a decade of having been blocked from Senate approval.

A senior IRS Large Business and International Division (LB&I) official this week indicated that the IRS will continue to prioritize transfer pricing enforcement in its examinations, even when the tax effect of an adjustment could be largely negated by one of the TCJA's international provisions. For example, while the new Base Erosion and Anti-abuse Tax (BEAT) or Global Intangible Low-taxed Income (GILTI) rules may limit the tax impact of a transfer pricing adjustment, the Government remains committed to "ensuring that taxpayers are pricing their related-party transaction at an arm's-length price." The official was quoted as saying that neither BEAT nor GILTI will be determinative as to whether the IRS moves forward with a transfer pricing adjustment. The LB&I official added that the "new overlapping TCJA provisions are just another factor" that the Government will take into consideration when assessing what will be examined and where to direct IRS resources.

Treasury's Financial Crimes Enforcement Network (FinCEN) released Notice 2020-1 on 11 December, further extending the filing deadline for certain individuals who previously qualified for an extension of time to file the Report of Foreign Bank and Financial Accounts (FBAR) with respect to signature authority under Notice 2019-1 and previous guidance.

The Notice pertains only to individuals who were initially granted extensions of time to report signature authority under FinCEN Notices 2011-1 and 2011-2 (most recently extended by FinCEN Notice 2019-1). Under the Notice, individuals have until 15 April 2022, to file deferred FBARs, subject to any potential further extension. Any persons not covered by the Notice for 2020 will have until 15 April 2021 – automatically extended to 15 October 2021 – to file their FBARs for the 2020 calendar year. In no case is an extension (beyond the automatic extension to 15 October) available for financial interest filing obligations.

The Organisation for Economic Co-operation and Development (OECD) on 14 December closed its comment period for the BEPS 2.0 Pillar One and Pillar Two project. The public consultation meeting on the Pillar One and Two Blueprints will be held virtually on 14-15 January 2021 and the current timetable calls for reaching a global consensus by mid-2021. Among the comments received were those of the Business at OECD (BIAC), an officially recognized business voice to the OECD. In addition to providing detailed comments on the two Pillars, BIAC suggested that with time running out to reach a consensus agreement "consideration … be given to reaching a more limited agreement by June 2021, coupled with a binding undertaking to engage in a more fundamental medium- to long-term discussion."

The OECD on 16 December published jurisdiction-specific information on the status of implementation of the hard-to-value intangibles (HTVI) approach by members of the Inclusive Framework on Base Erosion and Profit Shifting. The information is meant to provide a better understanding of the extent to which the HTVI approach "has been adopted and applied in practice by countries around the world, with the aim to reduce misunderstandings and disputes between governments." The information was provided by the countries in response to a questionnaire.

Endnote

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

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EYG no. 008844-20Gbl

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