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Global Tax Alert

Report on recent US international tax developments – 23 August 2019

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The United States (US) Court of Appeals for the Ninth Circuit on 16 August 2019 released its opinion in *Amazon.com, Inc. & Subsidiaries v. Commissioner*, affirming the Tax Court's decision of March 2017. In that decision, the Tax Court concluded that, under the then-applicable transfer pricing regulations, the definition of "intangible" does not include residual business assets, such as the value of employees' experience, education and training (known as "workforce in place"), a culture of innovation, going concern value, goodwill and other unique business attributes and expectancies (which the parties refer to as "growth options").

The Court of Appeals went out of its way to point out that its opinion interprets the definition of "intangible property" under the transfer pricing regulations promulgated in 1994 and 1995, and not the subsequently issued 2009 regulations or the statutory amendment introduced with the *Tax Cuts and Jobs Act of 2017* (TCJA). In a footnote at the beginning of its opinion, the Court of Appeals explicitly stated that, if the case were governed by the 2009 Internal Revenue Service (IRS) regulations or by the 2017 statutory amendment of the TCJA, the Commissioner's position would undoubtedly be correct. The statement in the footnote may be considered dicta and thus not legal precedent, but taxpayers should still consider the potential implications on post-2009 cost-sharing arrangements.[1]

Building a better working world

On the regulations front, the IRS will permit domestic partnerships and S corporations to apply the rules from the proposed Global Intangible Low-taxed Income (GILTI) regulations for tax years ending before 22 June 2019. In Notice 2019-46 issued on 22 August, the IRS announced that it plans to issue regulations that will permit domestic partnerships and S corporations that are US shareholders of a controlled foreign corporation to apply Reg. Section 1.951A-5 of the proposed GILTI regulations for tax years ending before 22 June 2019. The forthcoming regulations provide relief from possible compliance burdens resulting from differences between the proposed and final GILTI regulations. Until the regulations are issued, taxpayers may rely on the Notice.

The Notice also includes penalty relief for domestic partnerships and S corporations that acted consistently with Prop. Reg. Section 1.951A-5 on or before 21 June 2019 but file a tax return consistent with the final regulations under Reg. Section 1.951A-1(e). Certain notification and reporting requirements apply.

The Office of the US Trade Representative (USTR) held a public hearing on 19 August on the Section 301 (*US Trade Act of 1974*) investigation of France's Digital Services Tax (DST). According to press reports, the representatives of various US technology companies testifying at the hearing were unanimous in opposing France's DST, noting it could result in double taxation and calling it discriminatory and against tax treaty practice. The French DST consists of a 3% tax levied on revenue derived from specific digital activities by companies with qualifying revenue of more than €750 million worldwide and €25 million in France. For the first year of application, a unique advance payment of the tax will be due as early as November 2019. The Trump Administration's position is that the DST is unfairly aimed at US companies. An adverse finding by the USTR could lay the groundwork for US action against France.

Endnote

1. See EY Global Tax Alert, *United States Court of Appeals affirms Tax Court's decision in Amazon case*, dated 22 August 2019.

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