IRS proposes updates to procedures for competent authority assistance

Executive summary

On 22 November 2013 the Internal Revenue Service (the Service) issued Notice 2013-78, which contains a proposed Revenue Procedure that when finalized would update and supersede the Revenue Procedure 2006-54, 2006-2 C.B 1035 providing guidance for requesting assistance from the US competent authority acting through the Advanced Pricing and Mutual Agreement program (APMA) and the Treaty Assistance and Interpretation Team (TAIT). The intent of the proposed Revenue Procedure is to substantially improve clarity, readability, and organization of Rev. Proc. 2006-54. The proposed Revenue Procedure would also provide guidance on determinations the US competent authority may make on competent authority issues including considering taxpayer initiated positions as well as expanding the scope of mutual agreement procedure cases to include multiple treaty countries or issues. The Service is seeking comments from taxpayers and requests that all comments to be provided by 10 March 2014.

Background

Most tax treaties to which the US is a party contain a mutual agreement procedure (MAP) article. Under the MAP article, US taxpayers who consider actions by either the US or its treaty partner, or both, to be contrary to the provisions of the treaty may seek US competent authority assistance to resolve the impact of such actions. For example, taxpayers may seek competent authority assistance to relieve economic double taxation resulting from a US- or foreign-initiated transfer pricing adjustment. Competent authority assistance is also generally available to resolve residence issues, limitation of benefits (LOB) questions, etc. Currently, taxpayers are required to follow
Rev.Proc. 2006-54 when requesting such assistance from the US competent authority.

Over the past seven years, there have been significant changes to the structure of the IRS (e.g., the creation of the Large Business & International division and the restructuring of the US competent authority function), new treaty provisions have been introduced, and new administrative procedures have been given effect in the international context, all of which are not currently reflected in the language of Rev. Proc. 2006-54 and therefore needed to be addressed in a revised and comprehensive manner.

Detailed discussion

Most changes included in the proposed Revenue Procedure are procedural in nature and have either already been implemented by the Service or followed by the Service in practice. Nonetheless, the proposed Revenue Procedure also includes certain new, substantive changes, as discussed below.

• **Taxpayer initiated adjustments:** Section 2.02 of the proposed Revenue Procedure clarifies that while MAP consultations are usually the product of an adjustment proposed by the tax authority of the US or of the foreign party, MAP issues could also be initiated, in certain circumstances by taxpayers. However, Section 6.02(12) of the proposed Revenue Procedure would deny a taxpayer’s request for assistance, or terminate an existing one, where, for example, a taxpayer’s request “evinces after the fact tax planning or fiscal evasion or is otherwise inconsistent with sound tax administration.”

  • **Informal Consultations:** Sections 2.05 and 2.06 make explicit that the offices of the competent authority are available for informal consultations on competent authority issues, including discussions regarding steps necessary to insure that a foreign tax will qualify as a compulsory payment for foreign tax purposes.

  • **Time for filing:** For US initiated adjustments, the US competent authority will generally not accept a MAP request before the IRS has communicated the amount of the proposed adjustment in writing. For non-US initiated adjustments, taxpayers may submit its mandatory or optional pre-filing memo or file its MAP request as soon as it is reasonably believes that a MAP issue exists or is likely to arise. US and non-US initiated request will not be accepted if the MAP case would be barred by the time limits set forth in the U.S. tax treaty or by limitations prescribed by domestic law in the US or treaty country.

  • **Expansion of the scope of the MAP case:** Section 2.08 of the proposed Revenue Procedure clarifies that in order to efficiently resolve all potential MAP issues concerning a taxpayer, the Service could seek to initiate a MAP case in the absence of a request to do so or to expand the scope of an existing case, so as to include additional treaty countries or MAP issues previously not addressed. The Service may also notify foreign competent authorities of MAP cases from anticipated US-initiated adjustments.

  • **Pre-filing requirements:** Section 3.02 of the proposed Revenue Procedure provides new pre-filing procedures for mutual agreement cases, including a requirement to submit a pre-filing memorandum when raising certain issues. The pre-filing memorandum, submitted under penalties of perjury, would be required where the underlying MAP issues involve or can reasonably be expected to involve:
    - Foreign-initiated adjustments exceeding $10 million for all MAP years involved;
    - Taxpayer initiated requests;
    - License granting or other transfers of intangibles in connection with intangible development agreements;
    - Global trading arrangements;
    - Unincorporated branches, pass-through, hybrid, or disregarded entities for US tax purposes;
    - Discretionary LOB relief;
    - MAP issues arising outside the context of an exam (e.g., withholding taxes).
• **Foreign Pension plans**: Under the proposed Revenue Procedure, the US competent authority would accept requests for assistance with respect to certain foreign pension plan determinations.

• **Accelerated competent authority procedure (ACAP)**: The proposed Revenue Procedure provides a streamlined procedure for invoking an ACAP. A taxpayer would be able to request that the terms of an unresolved MAP case be extended to cover subsequent tax years for which tax returns have been filed. The proposed Revenue Procedure also specifies that a taxpayer’s request for ACAP may be denied if it does not comply with the requirements of the Revenue Procedure or if acting on the request would be inconsistent with sound tax administration.

• **Coordination of MAP and APA Processes**: APA and MAP resolutions are two interconnected processes to address transfer pricing and other cross border tax issues. The US competent authority will encourage taxpayers to extend MAP resolutions to future years that could be covered by an APA.

• **Small case MAP requests**: Currently, to facilitate requests for assistance involving small cases, Rev. Proc. 2006-54, provides a special procedure simplifying the form of a request for assistance and, in particular, the amount of information that initially must be submitted. Eligible taxpayers may file an abbreviated request for competent authority assistance under the small case procedure if the total proposed adjustment does not exceed $1 million (corporations and partnerships) or $200,000 (individuals and others). The proposed Revenue Procedure increases the dollar amount threshold for small cases to $5 million for a corporation or partnership and $1 million for other types of entities.

• **Content and Form of MAP request**: The proposed Revenue Procedure significantly expands the amount of information and documentation that needs to be submitted. The MAP request must include a thorough explanation of the MAP issue including discussions of the transactions and circumstances surrounding the MAP issue, taxpayer’s understanding of the legal basis for the adjustments, taxpayer’s justification for requesting assistance, and any differences in the requests made to the respective competent authorities. An appendix is provided that identifies the contents and order thereof (as well as additional administrative aspects involved), that should be included in a MAP request.

Implications
The acceptance of self-initiated adjustments giving rise to double taxation into the MAP program is a major development, and one that taxpayers and practitioners have sought for many years. Should the proposal to accept self-initiated adjustments be ultimately adopted in the final version of the Revenue Procedure, taxpayers will benefit from an additional avenue for obtaining MAP relief. The proposed Revenue Procedure shows an attempt to harmonize MAP and APA procedures by requiring pre-filing memoranda in complex cases on both sides and represents a shift toward a more coordinated and systematic approach to information gathering prior to embarking upon both processes. However, the Revenue Procedure substantially increases the amount of documentation that must be submitted and adds situations in which competent authority assistance can be denied.

Based on the deadline of 10 March, 2014 for the comment period, it is anticipated that a final Revenue Procedure would be issued some time in 2014. Once finalized, the Revenue Procedure will supersede Rev. Proc. 2006-54, providing important up-to-date guidance on APMA, while making the process more streamlined and transparent. Given that once finalized, all taxpayers will be required to follow the guidance, taxpayers should carefully review the proposed Revenue Procedure and strongly consider whether to provide comments to the Service.
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EYG No. CM4000

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