14 December 2018

Global Tax Alert

Report on recent US international tax developments – 14 December 2018

NEW! EY Tax News Update: Global Edition

EY's new Tax News Update: Global Edition is a free, personalized email subscription service that allows you to receive EY Global Tax Alerts, newsletters, events, and thought leadership published across all areas of tax. Access more information about the tool and registration here.

Also available is our EY Global Tax Alert Library on ey.com.

United States (US) House Ways and Means Committee Chairman Kevin Brady on 10 December released a modified year-end tax package that differs from the previous version released on 26 November. The latest iteration of the *Retirement, Savings, and Other Tax Relief Act of 2018* and the *Taxpayer First Act of 2018* omits extension of expired tax provisions and innovation provisions and adds delays in *Affordable Care Act* taxes. The package continues to address retirement policy, *Tax Cuts and Jobs Act* (TCJA) technical corrections, Internal Revenue Service (IRS) reform provisions, and disaster relief.

A new proposed technical correction added to the revised package would seek to alleviate certain issues related to the so-called downward attribution rule that applies to controlled foreign corporations arising under the TCJA. The proposed technical correction in the earlier package that would provide that any non-Internal Revenue Code[1] Section 965 tax payments (e.g., estimated taxes) will not be applied by the IRS to a taxpayer's Section 965 tax liability survived, and is included in the proposed legislation.

The fate of this latest version of the Republican tax package in the House or Senate is uncertain as we go to press.

It is unclear if House Republicans will introduce a separate extenders package before year-end. Outgoing Ways and Means Committee Chairman Kevin Brady reportedly is considering placing tax extenders on a separate legislative track.

Meanwhile, incoming Ways and Means Committee Chairman Richard Neal this week indicated that House Democrats will move to enact at least some tax extenders when they take control in January, if the Republican Congress fails to act in the closing days of the session.

There were several developments in regard to TCJA international guidance this week.

The IRS released proposed Section 59A Base Erosion and Anti-Abuse Tax (BEAT) regulations on 13 December. BEAT, enacted by the TCJA, provides a minimum tax of 10% (5% transition rate in 2018) that is imposed on certain corporations that make specific "base erosion payments" to foreign related parties. It applies to income that is determined after adding back certain deductible payments made to related foreign persons, if certain thresholds are met. Note that the rates are 11% and 6% for banks and broker dealers. The proposed BEAT regulations provide guidance on various gating statutory thresholds and computational matters. Among other things, the proposed regulations confirm that the service cost method exception applies to the cost component of a service for which a markup is charged (assuming certain requirements are satisfied) and exclude, as base erosion payments, amounts subject to US tax as effectively connected income.

The TCJA provides that Section 59A applies to base erosion payments paid or accrued in taxable years beginning after 31 December 2017. The new regulations are proposed to apply to taxable years beginning after 31 December 2017. Until finalization, taxpayers may rely on the proposed regulations for tax years beginning after 31 December 2017 if the taxpayer and all related parties (as defined in the regulations) consistently apply the proposed regulations for all the taxable years that end before the regulations' finalization date.

The IRS also released a new set of frequently asked questions (FAQs) on the Section 965 transition tax on 12 December related to the 2018 tax year, including reporting and payment obligations resulting from amounts included in income for the 2017 tax year.

The Office of Management and Budget Office of Information and Regulatory Affairs this week completed review of the proposed Section 864c()(8) regulations and sent them back to Treasury for final review. Their release by the Government is imminent. The proposed regulations will address the tax treatment of foreign partners' gains on the sale of US partnership interests.

The IRS on 13 December issued proposed regulations (REG-132881-17) under Code Sections 1471–1474 (FATCA) and Sections 1441–1461. The regulations under FATCA eliminate withholding on payments of gross proceeds. The welcome regulations also (1) defer withholding on foreign pass-through payments, (2) eliminate withholding on certain insurance premiums, and (3) clarify the definition of "investment entity." The proposed rules under Sections 1441–1461 include guidance with regard to certain due diligence requirements of withholding agents and guidance on refunds and credits of amounts withheld.

Taxpayers generally may rely on the proposed regulations until final regulations are issued, with certain exceptions. For instance, taxpayers may not rely on the revisions in the proposed regulations that relate to credits and refunds of withheld tax until Form 1042 and Form 1042-S are updated for the 2019 calendar year.

The Financial Crimes Enforcement Network (FinCEN) issued Notice 2018-1 on 10 December, further extending the filing deadline for certain individuals who previously qualified for an extension of time to file a *Report of Foreign Bank and Financial Accounts* (FBAR) with respect to signature authority under Notice 2017-1 and preceding guidance.

The Notice is only relevant for persons who were previously granted extensions of time to report signature authority under FinCEN Notices 2011-1 and 2011-2, and most recently extended by FinCEN Notice 2017-1. FinCEN Notice 2018-1 grants a further extension of time to file FBARs with respect to signature authority for 2018 and prior years under extension.[2]

The Organisation for Economic Co-operation and Development (OECD) will release a major update on its work on the taxation of the digital economy at the end of January 2019, according to Pascal Saint-Amans, Director of the OECD's Centre for Tax Policy and Administration. Saint-Amans recently was quoted as saying that he was optimistic that the OECD's Task Force on the Digital Economy (TFDE), which met in early December, would reach some consensus by January 2019. The TFDE reportedly is considering three proposals on the taxation of the digital economy.

Endnotes

1. All "Section" references are to the Internal Revenue Code of 1986, and the regulations promulgated thereunder.
2. See EY Global Tax Alert, *US Treasury grants another extension of time for reporting signature authority (FBAR, Form 114) over certain foreign financial accounts*, dated 12 December 2018.

For additional information with respect to this Alert, please contact the following:

Ernst & Young LLP, International Tax Services, Washington, DC

- Arlene Fitzpatrick arlene.fitzpatrick@ey.com
- Joshua Ruland joshua.ruland@ey.com

EY | Assurance | Tax | Transactions | Advisory

About EY
EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit ey.com.

EYG no. 012449-18Gbl

1508-1600216 NY
ED None

ey.com