

Report on recent US international tax developments - 27 April 2018

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The United States (US) Treasury and Internal Revenue Service (IRS or Service) officials took to the tax conference circuit this week, offering some insights into various international tax projects related to the *Tax Cuts and Jobs Act* (TCJA). A Treasury official said the Government is aware of the many ambiguities in the legislation as well as the need to coordinate the various international provisions in the TCJA, and will address them in coming proposed regulations.

Regarding the TCJA's foreign derived intangible income (FDII) provision, a Treasury official was quoted as saying the Government is actively looking at how to apply the disqualification for related-party services that are substantially similar to services provided by the related party to US taxpayers. Another issue under review is whether, in regard to the ratio of foreign-derived deduction-eligible income to total deduction-eligible income, the method for splitting deemed intangible income into US and foreign parts can be greater than one. The official indicated that if it is assumed that foreign-derived deduction-eligible income is a subset of deduction-eligible income, then it is hard to get to a ratio greater than one.

Reflecting on the base erosion anti-abuse tax (BEAT), the official said Treasury is presently undecided if including a markup disqualifies the entire charge or just the amount of the markup for related-party services, that otherwise qualifies for the services cost method exception. How the BEAT relates to flow-through entities is also under review.

There has been some speculation in regard to the interaction between the US foreign tax credit regime and the TCJA's global intangible low-taxed income (GILTI) provision. The TCJA establishes a new GILTI foreign tax credit basket, opening the issue of how to allocate expenses. A senior IRS official said the legislative history and the purpose of the provision strongly suggests that the Internal Revenue Code¹ Section 78 GILTI gross-up should be placed in the GILTI basket. The official conceded that that interpretation is not in the statute, however.

Finally, a Treasury official down-played the possibility of another Notice on the Section 965 repatriation transition provision (there have been three Notices). The official indicated that the department's goal now is to release proposed regulations as soon as possible, although no timetable was offered.

An IRS official this week was quoted as saying the Service will very shortly release final regulations under the *Foreign Account Tax Compliance Act* (FATCA) addressing periodic responsible officer certification and other compliance verification requirements of participating foreign financial institutions, compliance financial institutions of consolidated compliance programs, sponsoring entities and trustees of trustee-documented trusts. The official said the regulations are nearly complete and will generally be consistent with the proposed regulations issued in December 2016, with some limited modifications.

The Office of Management and Budget (OMB) has hired University of Minnesota law professor Kristin Hickman to serve as a special adviser to the Office of Information and Regulatory Affairs (OIRA) Administrator in regard to the new Treasury-OMB tax regulation agreement. The Treasury-OMB agreement was announced earlier this month. It creates a new framework for the review of tax regulations that is intended to add a cost/benefit analysis to the review

of certain tax regulations. Under the agreement, OIRA will review a subset of tax regulatory actions and "provide expedited review of these actions." Professor Hickman, a leading tax and administrative law expert, said the agreement is a step away from the concept of "tax exceptionalism," the idea that tax law is so different from other regulatory areas that general administrative law principles do not apply.

The IRS released a [Memorandum of Understanding](#) (MOU) between the Competent Authorities of the US and Indonesia that includes an announcement of the temporary suspension of Indonesian secondary country-by-country (CbC) filing obligations for constituent entities of US multinational groups resident in Indonesia for fiscal years commencing on or after 1 January 2016. Pursuant to the law of Indonesia, if a Competent Authority Agreement (CAA) between the US and Indonesia for the exchange of CbC reports is not operative by 30 April 2018, local filing obligations could be imposed on constituent entities resident in Indonesia with respect to fiscal years commencing on or after 1 January 2016. Notwithstanding such law, until a CAA becomes operative, the MOU provides that the Competent Authority of Indonesia does not intend to impose local filing with respect to such constituent entities. The MOU states that the two Competent Authorities are in the process of concluding a CAA and will endeavor to make the CAA operative no later than 31 May 2018. With local filing in Indonesia for calendar-year 2016 taxpayers due by 30 April 2018, this MOU is welcome news for US multinational groups with constituent entities that could otherwise be subject to Indonesian local filing requirements. Click [here](#) for the IRS CbC Reporting Jurisdiction Status Table.

And finally, the US and Costa Rica have signed a new tax information exchange agreement (TIEA), according to the Costa Rican Government. The new agreement will replace a TIEA signed in 1989.

Endnote

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

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