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IRS Issues New Competent Authority and Advance Pricing Agreement Procedures

William Byrnes (Texas A&M University Law) · Tuesday, August 25th, 2015

On August 12, 2015 the IRS released two final revenue procedures impacting the U.S. transfer pricing regime. Revenue Procedure 2015-40 concerns the protocols and procedures for requesting assistance of the U.S. competent authority (CA) and the other, Revenue Procedure 2015-41, the protocols and procedures for seeking an Advance Pricing Agreement with the IRS.^[1] In 2013 the IRS issued proposed regulations, and then received extensive public comments. Because of the public comments, the final regulations departed from the proposed ones, which did not take effect.

The final revision to Revenue Procedure 2015-40 and to Revenue Procedure 2015-41 is extensive and impacts several aspects of the CA, mutual agreement procedure (MAP), and APA process, both substantively and procedurally. Revenue Procedure 2015-40 is effective for competent authority requests filed on or after Oct. 30, 2015, whereas Revenue Procedure 2015-41 applies to APAs filed after December 29, 2015. Before these dates, the 2006 revenue procedures continue to apply.

Revenue Procedures 15-40 encourages U.S. taxpayers to take advantage of the CA process, stating: “The mutual agreement procedure articles of U.S. tax treaties grant taxpayers the right to request the assistance of the U.S. competent authority when the taxpayer believes that the actions of the United States or a treaty country result or will result in the taxpayer being subject to taxation not in accordance with the applicable U.S. tax treaty.” The IRS reminds taxpayers that there is no user fee charged for CA assistance, except for limitation on benefits requests for which the user fee is \$32,500 October 30, 2015 until September 29, 2016 and thereafter \$37,000. The fees for an APA are increasing to \$60,000 and again each year thereafter through 2020 until the full IRS cost of the APA process is recovered (currently estimated at \$120,000).

Revenue Procedure 2015-40 states that: “The U.S. competent authority will endeavor to resolve competent authority issues arising under the mutual agreement procedure articles of U.S. tax treaties through consultations with the applicable foreign competent authority(ies) but in some cases may resolve such issues unilaterally.” Thus, it is possible that in the case of a foreign transfer pricing adjustment, the CA will work with the IRS to make a corresponding U.S. adjustment without need of consultation with the foreign CA.

Interestingly, the 2015 Final CA procedure drops the incorporation of the OECD, its Transfer Pricing Guidelines. The previous Revenue Procedure 2006-54 Section 3.03 provides:

“The U.S. competent authority and its counterpart in the treaty country will be bound by the arm’s length standard provided by the applicable provisions of the relevant treaty. The U.S. competent authority also will be guided by the arm’s length standard consistent with the regulations under IRC Section 482 and the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations as published from time to time by the Organisation for Economic Co-operation and Development. When negotiating mutual agreements on the allocation of income and deductions, the U.S. competent authority will take into account all of the facts and circumstances of the particular case and the purpose of the tax treaty, which is to avoid double taxation.”

The reference to the OECD was new starting with the 2002 CA Revenue Procedure and along with the instructions, emanating from the LB&I Deputy Commissioner (International), to International Examiners and other Field personnel, directed them to take the international obligations of the United States into account when proposing transfer pricing adjustments. However, Revenue Procedure 2015-40 drops this language and mention of the OECD Transfer Pricing Guidelines. Instead at Section 8.01, it reads:

“In cases involving foreign-initiated actions, the U.S. competent authority may grant correlative relief without such consultations if it is satisfied on the basis of its own review and assessment that the foreign-initiated action is justified under the U.S. tax treaty (e.g., the action represents a reasonable application of the arm’s length standard in a transfer pricing case).”

One may speculate that the OECD BEPS project, its impact on the OECD Transfer Pricing Guidelines, and the U.S. Treasury Officials criticisms thereof, may have influenced the backing away from its inclusion.

The CA final revenue procedure encourages taxpayers to file a competent authority request promptly after a competent authority issue arises or is likely to arise. However, in alignment with its 2006 predecessor, Revenue Procedure 2015-40 provides:

“For a competent authority issue that arises from an examination by the IRS, the U.S. competent authority will not accept a competent authority request before the IRS has communicated the amount of the proposed adjustment in writing to the taxpayer, e.g., with a Form 5701, *Notice of Proposed Adjustment*, or a Form 4549, *Income Tax Examination Changes*. For a competent authority issue that arises from other actions undertaken by or on behalf of the IRS (such as the withholding of tax by a withholding agent), the U.S. competent authority will not accept a competent authority request before such other action occurs.”

The 13 principal differences between the 2006 procedures and the new 2015 CA and APA procedures are as follows:

1. If the Advance Pricing and Mutual Agreement program (APMA) requires, as a condition of

continuing with the APA process, that the taxpayer expand the proposed scope of its APA request to cover interrelated matters (interrelated issues in the same years, covered issues or interrelated issues in other years, and covered issues or interrelated issues in the same or other years as applied to other countries), APMA will do so with due regard to considerations of principled, effective, and efficient tax administration and only after considering the views of the taxpayer and the applicable foreign competent authority. Further, APMA will communicate to the taxpayer any concerns about interrelated matters and possible scope expansion as early as possible.

2. In the interest of efficient tax administration, rollback years may be formally covered within an APA. A rollback will be included in an APA when a rollback is either requested by the taxpayer and approved after coordination and collaboration between APMA and other offices within the IRS or, in some cases, is required by APMA, after coordination and collaboration with other offices within the IRS, as a condition of beginning or continuing the APA process.

3. Expanded guidance as to when an APA request will be considered complete.

4. The required contents of APA requests that were specified in the Appendix of the 2013 proposed revenue procedure have substantially been retained.

5. Taxpayers are required to execute consent agreements to extend the period of limitations for assessment of tax for each year of the proposed APA term, and the required consent may be either general or restricted.

6. User fees, already mentioned above, will increase.

7. The final revenue procedure limits the scope of requests to which mandatory pre-filing procedures apply to requests involving taxpayer-initiated positions.

8. The U.S. CA may consult with taxpayers with respect to certain additional issues that may arise in connection with CA requests, such as issues relevant to the determination of foreign tax credits and repatriation payments.

9. To ensure that taxpayers have broad access to the U.S. CA to resolve disputes under U.S. tax treaties, taxpayers are no longer be required to expand the scope of a CA request to include interrelated issues as a condition of receiving competent authority assistance.

10. Additional guidance on requesting discretionary determinations under the limitation on benefits articles of U.S. tax treaties, including time frames for taxpayers to provide notification of material changes in fact or law and the introduction of a triennial statement procedure to maintain a favorable grant of discretionary benefits.

11. The U.S. CA will not condition assistance on the taxpayer's notification of the U.S. CA, or on obtaining its concurrence, with respect to signing a Form 870 with IRS Examination. Similarly, a taxpayer will not be required to obtain the U.S. CA agreement prior to entering into a closing agreement with IRS Examination, but in these cases the assistance provided by the U.S. CA will be limited to seeking correlative relief from the foreign competent authority, thus potentially not eliminating double taxation.

12. Provides additional information about the process followed by the U.S. CA in conducting its review under the simultaneous appeals procedure.

13. Clarifies and refines the basis on which the U.S. CA may decline to accept a competent authority request or may cease providing assistance.

Professor William Byrnes (Texas A&M Law) is the primary author of a 3,000 page treatise on [Practical Guide to U.S. Transfer Pricing](#).

[1] See Procedures for Advance Pricing Agreements (Revenue Procedure 15-41) and Procedures for Requesting Competent Authority Assistance under Tax Treaties (Revenue Procedure 2015-40) <http://www.irs.gov/pub/irs-drop/rp-15-40.pdf> and <http://www.irs.gov/pub/irs-drop/rp-15-41.pdf> (last visited August 20, 2015).

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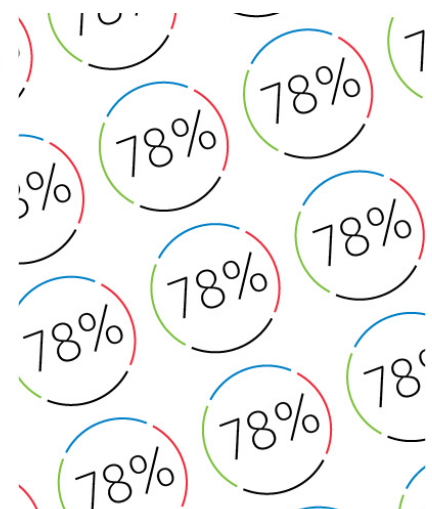
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