COMMENTS

of

TAX EXECUTIVES INSTITUTE, INC.

on

Notice 2013-78

relating to

Revisions to the Revenue Procedure for Requesting Competent Authority Assistance Under U.S. Tax Treaties

submitted to

The Internal Revenue Service

March 10, 2014

On November 22, 2013, the Internal Revenue Service (IRS) and Treasury Department released Notice 2013-78,[1] which proposes revisions to the revenue procedure for requesting assistance from the U.S. competent authority (New CA Procedure). The New CA Procedure reflects structural changes undertaken by the IRS since the publication of Revenue Procedure 2006-54,[2] which currently sets forth the procedures for competent authority requests. These changes include the establishment of the IRS's Large Business & International (LB&I) Division, the realignment and consolidation of the IRS's transfer pricing resources under its Director of Transfer Pricing Operations, and the creation of the Advance Pricing and Mutual Agreement (APMA) program. LB&I includes the office of the U.S. competent authority, which handles

[1] 2013-50 I.R.B. 633.
[2] 2006-2 C.B. 1035.

taxpayer requests for competent authority assistance through its APMA program and Treaty Assistance and Interpretation Team (TAIT).

The IRS and Treasury Department requested comments on the proposed revisions to Revenue Procedure 2006-54 on or before March 10, 2014. On behalf of Tax Executives Institute, Inc. (TEI), I am pleased to respond to the request for comments.

Tax Executives Institute

TEI is the preeminent association of in-house tax professionals in North America. Our approximately 7,000 members represent 3,000 of the leading corporations in the United States, Canada, Europe, and Asia. TEI represents a cross-section of the business community, and is dedicated to developing and effectively implementing sound tax policy, to promoting the uniform and equitable enforcement of the tax laws, and to reducing the cost and burden of administration and compliance to the benefit of taxpayers and government alike. As a professional association, TEI is firmly committed to maintaining a tax system that works — one that is administrable and with which taxpayers can comply in a cost-efficient manner.

Members of TEI are responsible for managing the tax affairs of their companies and must contend daily with the provisions of the tax law relating to the operation of business enterprises, including requests for competent authority assistance, both in the United States and around the world. We believe that the diversity and professional training of our members enable us to bring a balanced and practical perspective to the issues raised by the proposed revisions to the revenue procedure for requesting assistance from the U.S. competent authority.

Overall Comments on the New CA Procedure

Notice 2013-78 proposes substantial revisions to the prior procedures governing competent authority assistance requests under applicable U.S. income tax treaties in Revenue

Procedure 2006-54. TEI commends the IRS and Treasury Department for proposing revisions to Revenue Procedure 2006-54 to reflect changes in the IRS's structure related to requests for competent authority assistance, including the formation of APMA and TAIT. In particular, opening the competent authority process to taxpayer initiated adjustments is a welcome expansion of the mutual agreement procedure (MAP). However, other changes to Revenue Procedure 2006-54 raise troublesome issues, which are discussed below.

Informal Consultations on Noncompulsory Payments for Foreign Tax Credit Purposes

The New CA Procedure provides that the U.S. competent authority, through APMA and TAIT, will informally consult with taxpayers regarding whether a taxpayer has exhausted all of its effective and practical remedies to reduce its tax liability under foreign law before claiming a U.S. foreign tax credit within the meaning of Treas. Reg. § 1.901-2(e)(5) and Rev. Rul. 92.75,[3] including, in appropriate cases, a request for competent authority assistance.[4] In certain cases, the New CA Procedure provides that APMA and TAIT "may provide oral, informal advice regarding necessary next steps."[5] APMA and TAIT may also communicate with IRS Examination regarding such matters to ensure consistent and coordinated treatment.

The ability of taxpayers to consult informally with APMA and TAIT on noncompulsory payment issues under the regulations is welcome. TEI is concerned, however, that such a consultation, informal or not, will be viewed by the IRS as one of the "effective and practical" remedies that a taxpayer must avail itself of before claiming a foreign tax credit, especially if APMA or TAIT would have provided advice regarding "necessary" next steps. Taxpayers should not be required to engage in informal consultations with the U.S. competent authority to

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3 1992-2 C.B. 197.

4 New CA Procedure, § 2.06.

5 *Id.*

be considered to have exhausted their effective and practical remedies before claiming a foreign tax credit. If the IRS considers this step to be one of the possible effective and practical remedies, then the New CA Procedure should state so explicitly. In that case, TEI questions whether this is a practical requirement. In particular, will the U.S. competent authority have the resources to provide timely guidance on such issues? If not, then taxpayers should not be required to take this step to claim a foreign tax credit.

Competent Authority Initiated MAP Cases and Scope Expansions

The New CA Procedure provides that "APMA or TAIT may seek to initiate a MAP case in the absence of a MAP request or may require that the scope of a MAP case be expanded."[6] Such expansions may include adding treaty countries or MAP issues to a MAP case, or extending a MAP case to include Accelerated Competent Authority Procedure (ACAP) years.[7] Further, the U.S. competent authority may inform the competent authority of U.S. treaty partners of MAP cases that could arise out of anticipated U.S.-initiated audit adjustments, under appropriate exchange-of-information procedures.[8]

Competent authority initiated MAP cases and the required inclusion of MAP issues that are not part of a taxpayer's request for assistance raise many questions. A MAP case initiated by the U.S. competent authority appears to be very similar to an audit or enforcement action. This is generally at odds with the purpose of the MAP article of U.S. income tax treaties, which is to provide a mechanism for preventing double taxation. Further, the New CA Procedure does not provide a blueprint for how a competent authority initiated MAP case will differ from a taxpayer initiated case. In TEI's view, it would be appropriate for different procedures to apply in a

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6 *Id*. at § 2.08.
7 *Id*.
8 *Id*.

competent authority initiated MAP case, rather than proceeding as if a taxpayer had voluntarily requested assistance. As just one example, presumably taxpayers would bear the burden of proof even in a competent authority initiated MAP case, which has a very different footing than a taxpayer initiated case. That is, in a typical MAP case, the taxpayer approaches the U.S. competent authority to ask for relief from double taxation that arises due to differing views of the United States and one of its treaty partners. In a U.S. competent authority initiated case, however, presumably the United States is of the view that its tax base is at risk. Thus, by initiating a MAP proceeding, the competent authority effectively makes an adjustment to the taxpayer's position and yet it would seem that the burden of proof to show that the adjustment is incorrect will continue to fall on the taxpayer, as it would in an audit. The process for how a taxpayer might make such a showing is an unaddressed issue in the New CA Procedure for competent authority initiated cases. In sum, the New CA Procedure should detail the process for competent authority initiated MAP cases. Taxpayers, like the government, have limited resources. If taxpayers are expected to participate in competent authority initiated MAP cases then the procedures should allow for the parties to agree to a reasonable timeline and work plan for doing so.

The New CA Procedure also does not give taxpayers an opportunity to present arguments why a MAP case should not be expanded to include other issues, treaty countries, or taxable years. This is unlike the revisions to Revenue Procedure 2006-9,[9] proposed in Notice 2013-79,[10] regarding requests for advance pricing agreements (APA). Notice 2013-79 would allow taxpayers to present "clear arguments against" an IRS proposal to add issues or years to an APA

[9] 2006-1 C.B. 278.
[10] 2013-50 I.R.B. 653.

request. TEI recommends that taxpayers be given a similar opportunity to oppose the expansion of a MAP case.

Finally, the ability of APMA or TAIT to expand the scope of a MAP case significantly increases the potential cost and time of filing a request for assistance. Perhaps more importantly, the lack of guidance on when APMA or TAIT may require an expanded scope and the apparent inability of taxpayers to present arguments against the expansion substantially increases the uncertainty associated with filing a request for assistance. For these reasons, many taxpayers that may have otherwise availed themselves of competent authority assistance will forgo a request. While this would obviously be to the detriment of these taxpayers, it would also adversely affect the interests of the government, as the IRS may not be alerted to issues that the government would like to address with its treaty partners because taxpayers that otherwise would have come forward for assistance will choose to forgo the competent authority process.

Requested and Submitted Items[11]

The New CA Procedure requires taxpayers to provide any information and documents turned over to one competent authority to the other competent authority. This provision is overbroad. Not all documents are relevant to each competent authority and documents may be provided to one competent authority for informal discussion purposes only. For example, in certain cases, documentation provided to a foreign competent authority may result in the competent authority declining to pursue a line of argument with the U.S. competent authority, which would be to the United States' benefit (*i.e.*, the U.S. competent authority will not need to take the time and effort to confront the argument in the competent authority proceeding). The documentation would therefore cease to be relevant and does not need to be provided to the U.S.

[11] New CA Procedure, § 3.05(3).

competent authority. A requirement to supply any and all documentation to both sides regardless of the circumstances increases the time and expense of the proceeding for all parties, including the often expensive and time consuming process of translating documents. Thus, the New CA Procedure should permit the taxpayer to explain why certain documentation does not need to be produced, or, alternatively, to provide a brief summary of the documentation.

Small Case Requests

TEI commends the IRS for increasing the small case threshold to $5 million for corporations and partnerships. Unfortunately, $5 million is a relatively insignificant amount in the context of transfer pricing adjustments. TEI suggests that a further increase to $10 million would be consistent with the interests of sound tax administration.

Denial of Assistance

Section 6.02 of the New CA Procedure describes the circumstances under which the U.S. competent authority may deny requested assistance. One example in the procedure includes a taxpayer that agrees to or acquiesces in a foreign-initiated adjustment that involves significant legal or factual issues without consulting the U.S. competent authority.[12] TEI's members are often involved in foreign audit proceedings. Consulting with the U.S. competent authority before agreeing to a foreign-initiated adjustment may be reasonable in theory, but it is not practical. It seems unlikely that the U.S. competent authority will have the necessary resources to timely respond to a taxpayer request for consultation. If competent authority resources are not readily available, the requirement to consult the U.S. competent authority in advance will significantly impede a taxpayer's ability to settle foreign audits in accordance with deadlines set by foreign tax authorities.

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[12] New CA Procedure § 6.02(4).

In addition, if the U.S. competent authority denies a MAP request (for whatever reason) the denial should have no bearing on whether the taxpayer is entitled to a foreign tax credit. Indeed, in that case the taxpayer should be considered to have exhausted its effective and practical remedies with respect to the U.S. competent authority. Overall, additional guidance on this issue in the New CA Procedure would better inform taxpayers of the consequences of their actions (or lack thereof).

Results of a MAP Case – "Special Issues"

Section 10.04 of the New CA Procedure provides that if the U.S. and foreign competent authorities do not reach a MAP resolution in a case involving a foreign initiated adjustment, the taxpayer will be notified in accordance with section 10.01 of the procedure. The notification "may identify the protective measures or other steps the taxpayer must take to establish that amounts paid to the treaty country in connection with the foreign-initiated adjustment constitute compulsory payments of tax within the meaning of Treas. Reg. §1.901-2(e)(5) and to maintain its eligibility for competent authority assistance."[13]

The noncompulsory payment rule of the cited Treasury regulation provides that "[a] remedy is effective and practical only if the cost thereof (including the risk of offsetting or additional tax liability) is reasonable in light of the amount at issue and the likelihood of success."[14] TEI recommends that the analysis behind the measures that a taxpayer "must take" in a notification of a failed MAP case take into account the balancing test of the regulations. Alternatively, if such a balancing is not taken into account, a taxpayer should be entitled to a foreign tax credit for the foreign tax at issue in a failed MAP case even if it fails to take the

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13 *Id.* at § 10.04 (emphasis added).

14 Treas. Reg. § 1.901-2(e)(5)(i).

measures stated by the U.S. competent authority in the notification, as long as the taxpayer can show that the measure was not "effective and practical" within the meaning of the regulation. TEI recommends the New CA Procedure provide further detail on the consequences that flow from a notification that specifies "must take" measures to a taxpayer.

Interaction with Exam and IRS Appeals

Under section 9.01(1) of the New CA Procedure, in the case of a U.S. initiated adjustment memorialized in an examination resolution the U.S. competent authority will accept a MAP request only if the U.S. competent authority had agreed to the terms of the resolution prior to its execution. Similarly, in case of a Fast Track Settlement in section 9.01(2), the U.S. competent authority will only accept a MAP request with respect to a U.S. initiated adjustment if the U.S. competent authority was allowed to participate in all meetings with LB&I. Although TEI understands the desire to have transfer pricing related adjustments coordinated between IRS Examination and the U.S. competent authority, we are concerned that this will obviate the purpose of the Fast Track Settlement procedure, which is to resolve cases quickly. The requirements are also a trap for the unwary and will cause significant delays in resolving audits. Taxpayers need to be aware of this requirement before they agree to examination adjustments. TEI recommends that this information be required to be disclosed to taxpayers in writing as part of the examination and Fast Track Settlement processes. Further, TEI recommends that the revenue procedure clearly describe the scope of the U.S. competent authority's participation and include a firm deadline within which the U.S. competent authority must respond to the adjustment proposed by exam through a notice of proposed adjustment or as part of a Fast Track Settlement proceeding.

Similarly, for cases under the jurisdiction of IRS appeals, section 9.02(1) of the New CA Procedure provides that the U.S. competent authority will not accept a MAP request regarding issues that are included in an appeals protest unless, among other things, the taxpayer files its MAP request no later than 30 days after its opening appeals conference. The short deadline will put tremendous pressure on the first appeals conference and will inevitably restrict the ability of appeals officers to perform their normal role. A taxpayer will also be under pressure to quickly make tough decisions regarding whether it wishes to continue with the normal appeals process and therefore forgo an opportunity to pursue a later MAP case or to immediately move to a MAP case for MAP issues in an appeals protest. This represents a significant diminution of the role of appeals and jeopardizes appeals' independence. Under the proposed procedure, the "U.S. competent authority will assume sole jurisdiction over all MAP issues set forth in a MAP request . . . ."[15] As a result, taxpayers are denied an independent review by appeals with respect to unagreed issues if they wish to seek relief from double taxation for those issues. TEI recommends that the role of the U.S. competent authority be advisory and that appeals remain the primary decision maker with respect to issues that are subject to an IRS appeals proceeding. In addition, we recommend that taxpayer be informed of the 30 day requirement for filing a MAP request as part of the appeals process.

Conclusion

Tax Executives Institute appreciates the opportunity to offer its views on Notice 2013-78 regarding the proposed revisions to Revenue Procedure 2006-54 regarding requests for competent authority assistance. Please do not hesitate to contact James P. Silvestri, Chair of TEI's U.S. International Tax Committee, at james.p.silvestri@capsugel.com, or Benjamin R.

[15] New CA Procedure § 9.01(4).

Shreck, TEI Tax Counsel, at 202.638.5601 or bshreck@tei.org, should you have any additional questions.

Respectfully submitted,

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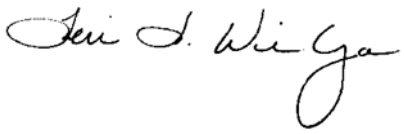

By:

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