
COMMENTS
of
TAX EXECUTIVES INSTITUTE, INC.
on
Notice 2013-79
relating to
Revisions to the Revenue Procedure for Requesting Advance Pricing Agreements
submitted to
The Internal Revenue Service
March 10, 2014

On November 22, 2013, the Internal Revenue Service (IRS) and Treasury Department released Notice 2013-79,¹ proposing revisions to the procedures for advanced pricing agreement (APA) requests. The proposed revenue procedure reflects structural changes undertaken by the IRS since the publication of Revenue Procedure 2006-9, which currently governs the procedures for APA requests.² 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.

The IRS and Treasury Department requested comments on the proposed revisions to Revenue Procedure 2006-9 on or before March 10, 2014. On behalf of Tax Executives Institute, Inc. (TEI), I am pleased to respond to the request for comments.

¹ 2013-50 I.R.B. 653 (Nov. 22, 2013).

² 2006-1 C.B. 278.

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.

TEI's members 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 submitting APA requests, 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 current APA revenue procedure.

Overall Comments on the Revised APA Procedure

Notice 2013-79 proposes substantial revisions to Revenue Procedure 2006-9, many of which reflect the current practice of the APMA program. The proposed changes in the revised APA revenue procedure (New APA Procedure) include additional details regarding the “pre-filing” process, a detailed appendix regarding the materials and information that a taxpayer must include in an APA request, and rules for when the IRS may cancel or revoke a completed APA.

TEI commends the IRS and Treasury Department for revising Revenue Procedure 2006-9 to reflect changes in the IRS's transfer pricing operations and organization and the current

practice of the APMA program with respect to APAs. Regrettably, the New APA Procedure, while substantially improved in many respects, takes an audit-like approach that significantly undermines the benefits of an APA for both taxpayers and the government.

The APA program has historically been a collaborative process between the taxpayer and the IRS, aimed at promoting trust and providing certainty for both parties. Indeed, the New APA Procedure notes that an APA request is a “voluntary process” for solving transfer pricing issues “in a principled and cooperative manner on a prospective basis.”³ TEI believes the revised processes and additional information required by the New APA Procedure will only lengthen the time it takes to complete an APA request, significantly decreasing its utility. The New APA Procedure appears to treat the process as an examination by giving APMA sole control over aspects of the process that were, in the past, more collaborative. In addition, the New APA Procedure significantly broadens the scope of the information required for a complete submission. TEI’s members view the advance nature of the program, cooperative and flexible procedures, and ability to achieve certainty as key factors in determining whether to file an APA request. The New APA Procedure significantly diminishes these factors and thus the appeal of an APA to taxpayers. This will result in many taxpayers forgoing an APA request that would have been filed under the current revenue procedure and lead to significant delays and uncertainty for requests filed under the New APA Procedure.

Information Required by the New APA Procedure

Under the Appendix to the New APA Procedure, taxpayers must include much more information in an APA request than that required under the current revenue procedure. In addition, the flexibility of the current revenue procedure has been removed as the new procedure requires taxpayers to submit the information in the Appendix unless it is irrelevant (and in that

³ New APA Procedure, § 2.02(2).

case, the taxpayer still must provide enough information to document the irrelevancy). For example, Exhibit 11 of the Appendix in the New APA Procedure requires taxpayers to provide “covered issue diagrams” in its request, noting that the diagrams must each be “presented in a manner similar to and with a degree of detail no less than that presented in the diagrams accompanying the case studies ‘Alpha’ through ‘Foxtrot’” in a Joint Committee on Taxation (JCT) document.⁴ The covered issue diagrams are ironically required even for an abbreviated APA request.⁵ In addition, the New APA Procedure asks for a draft APA, showing changes from a “model” APA, which the IRS will release at a yet to be determined date.⁶

In TEI’s view, the usefulness of much of this information to facilitating the APA process and communications between the taxpayer and the APMA program team is questionable. It has been the experience of TEI members that producing irrelevant and immaterial information in an APA proceeding leads to further questions (and requests for still more information), many of which are irrelevant to the issues in the APA request, causing additional delays in an already time consuming process. It also seems premature for taxpayers to submit a draft APA as part of the APA request, when in all likelihood there will be substantial changes before the draft is finalized (such a draft may be more useful when there has been a pre-filing conference). The amount of information required by the New APA Procedure to file an APA request, or even to submit a pre-filing memorandum, will discourage taxpayers from participating in the APA process due to the increased time and expense, and the decreased certainty, of obtaining a satisfactory resolution.

⁴ The JCT document is *Present Law and Background Related to Possible Income Shifting and Transfer Pricing* (JCX-37-10), July 20, 2010.

⁵ The covered issue diagrams must be included in the taxpayer’s pre-filing memorandum, which is required for an abbreviated APA request. *See* New APA Procedure, § 3.02(d)(6).

⁶ The APA procedure states that the model agreement will be posted on the APMA website. *See* New APA Procedure, Appendix, § 1.02, Part 5.

Pre-filing Memorandum Requirements

The New APA Procedure notes that a pre-filing conference and memorandum are encouraged, and sometimes required, “[i]n the interest of making the APA process effective and efficient”⁷ TEI agrees that pre-filing conferences and memoranda have been very useful in the APA process. Historically, taxpayers and the IRS have used pre-filing processes to collaboratively vet critical issues, agree to the information to be included in the APA request, and consider the economic analysis that must be undertaken to support the requested transfer pricing method. A pre-filing memorandum, while helpful, was not required. The New APA Procedure now requires a pre-filing memorandum if the taxpayer requests a pre-filing conference.

Further, a pre-filing memorandum is always required for the following cases: (i) a unilateral APA that could be addressed by a bilateral or multilateral APA; (ii) APA renewals; (iii) an extension of a mutual agreement procedure case to APA years; and (iv) covered issues that involve any of (a) intangible development arrangements; (b) global trading arrangements; or (c) branches, pass-through entities, hybrid entities, and disregarded entities.⁸ Among other changes, a pre-filing memorandum required by the New APA Procedure “must have a length and content appropriate to the size and complexity of the substantive or procedural issues the taxpayer wishes to raise with APMA” and must include covered issue diagrams.⁹

Under the revised process, the new pre-filing memorandum will require a significant amount of internal and/or external resources to prepare. Further, it is unclear what constitutes an “appropriate” amount of “length and content” for a pre-filing memorandum. It appears that APMA program personnel will be the sole judge of whether the taxpayer has satisfied this (and

⁷ New APA Procedure, § 3.02(1).

⁸ *Id.* at § 3.02(4).

⁹ *Id.* at § 3.02(6).

other) requirements of the New APA Procedure. In addition, the new pre-filing procedures eliminate many of the more informal, but perhaps more effective, aspects of the current process. Thus, instead of collaboratively vetting critical issues, and perhaps dispensing with a few, taxpayers are required to list and provide the necessary information for all covered issues that may be included in a future APA request. Information that may have been omitted from a pre-filing memorandum under the old process for a variety of reasons (*e.g.*, irrelevancy, immateriality, to be provided upon later request if necessary, *etc.*) will now be included as a matter of course in many cases. The potential for discussions regarding the proper economic analysis also appear to have fallen by the wayside. While the pre-filing process under the new APA request may be more thorough and consistent, it will also likely be more time consuming and less efficient, lowering taxpayer participation in the APMA program.

Moreover, based on the experience of our members, the IRS personnel staffing an APA team often change over the course of an APA request – from the pre-filing process, to submission of the formal APA request, to completion (or rejection) of the request. In particular, it is of great concern to TEI's members that the pre-filing memorandum may be reviewed and analyzed by different APMA personnel than those that review the APA request. Each person reviewing the taxpayer's submission brings his or her own experience and judgment to analyzing the appropriateness of the length and content of the submission. Questions that a taxpayer thought had been answered may be raised again, new issues may be brought forth, old issues revisited, and the new APMA team member will need to be educated about the case. As a result, both the IRS and taxpayers will likely expend significant resources during the full APA process due to turnover in APMA personnel alone. In the current APA environment, where it takes a number of years to complete an APA request, it makes little sense to have a pre-filing

mechanism that requires a substantial amount of taxpayer time to prepare and APA personnel time to review when the same issues, questions, and information may end up being fully re-examined by a different APMA team after filing the formal APA request.

For these reasons, we question the utility of a pre-filing memorandum, which must be submitted to secure a conference, especially when the New APA Procedure fixes the content for all formal APA requests. If the procedure were changed to allow flexibility with respect to the content of an APA request, then a pre-filing conference and memorandum could be useful. Overall, we strongly recommend that the New APA Procedure retain the current flexible and collaborative approach to the pre-filing process and that the process have the goal of setting the parameters of the formal APA request.

Relevance of Required Information

Much of the information requested in the New APA Procedure's Appendix will, in many cases, be irrelevant to the issues at hand. While the Appendix provides that taxpayers need not submit inapplicable information, taxpayers must nevertheless provide a "suitable explanation" why the information is not relevant.¹⁰ The only guidance on what constitutes a "suitable explanation" is the statement that an "APA request should provide enough information to allow the reader to concur that a matter is not relevant"¹¹ Again, IRS personnel from the APMA program appear to be in the position to make a unilateral determination of relevance, with no requirement or directive that the personnel consult or discuss the matter with the taxpayer prior to drawing such a conclusion. TEI recommends that the procedure require APMA personnel to consult with the taxpayer before determining relevant information was not provided and rejecting

¹⁰ *Id.* at Appendix, § 1.01.

¹¹ *Id.* at Appendix.

a request for that reason. At a minimum, the New APA Procedure should require APMA to explain why it views information omitted by the taxpayer as relevant to the APA request.

Ability of APMA to Expand the Scope of an APA Request

Under the New APA Procedure, APMA may condition acceptance of an APA request upon the taxpayer's agreement to (i) roll back the terms of its proposed APA, and (ii) expand the scope of its proposed APA to include coverable issues relevant to the proposed covered issues.¹² APMA may require an expanded APA request when it “has clear interests in doing so and the taxpayer does not offer clear reasons against doing so.”¹³ The only guidance on what constitutes a “clear interest” of APMA to roll back the terms of an APA or include additional issues is to “further the interests of sound tax administration.”¹⁴ The ability of APMA to require a taxpayer to expand the scope of an APA significantly increases the potential cost and time of filing a request. Perhaps more importantly, the lack of guidance on when APMA may require an expanded APA request and what constitutes “clear reasons against doing so” substantially increase the uncertainty of filing a request and therefore undermine the primary benefit of an APA. Many taxpayers will forgo an APA request for these reasons.

An APMA-required scope expansion, including any required roll-backs, may also create other issues not necessarily covered by the APA process. For example, there may be indirect tax consequences, such as an increase in VAT due to changes in prices charged between affiliated enterprises as a result of an APA rollback, without the benefit of input credits due to differing statutes of limitations for indirect taxes. Withholding tax consequences also may arise, such as the inability to apply treaty withholding rates because of the lack of documentation contemporaneous with the original dates of the transactions. This requires a taxpayer otherwise

¹² *Id.* at § 2.02(3) and (5).

¹³ *Id.*

¹⁴ *Id.*

entitled to a reduced withholding rate under a treaty to pay the full statutory rate simply due to the lack of documentation – documentation that was not necessary until a required roll-back of an APA. Exchange rate fluctuations present additional complications. For example, at what rate will currency conversions take place due to price adjustments required by an APA rollback – the current rate, the historic rate, some average of the two? It is unclear whether any of these potential complications, or a combination thereof, would constitute a “clear reason” against expanding an APA request that APMA may find compelling enough to reverse its decision to require an expanded scope.

Further, it is unclear when taxpayers will be informed that APMA has decided to require a roll-back or inclusion of other issues as a condition(s) for accepting an APA request. It appears that this notice will take place only after the taxpayer has incurred the time and expense of filing a formal APA request. Indeed, it appears to be the case that APMA could condition its acceptance of an APA request on an expanded scope after the request was filed, even if the taxpayer prepared a pre-filing memorandum and participated in a pre-filing conference. It is simply untenable that APMA may condition its acceptance of an APA request upon a scope expansion and, presumably, reject the taxpayer’s request if it does not agree, after the taxpayer prepares a pre-filing memorandum, participates in a pre-filing conference, and files a formal APA request. TEI recommends that the New APA Procedure require APMA to inform a taxpayer that submits a pre-filing memorandum whether APMA intends to require a roll-back and/or additional covered issues in the formal APA request after completing its review of the memorandum. At that point, the taxpayer could either agree, offer its reasons against such an expansion, or forgo the request. For these taxpayers, the New APA Procedure should prohibit APMA from requiring a scope expansion after the pre-filing process is complete and from

rejecting an APA request outright for that reason. For taxpayers that do not submit a pre-filing memorandum, section 2.02(6) should make clear that APMA will provide advice regarding whether APMA is likely to require a taxpayer to expand the scope of an APA request on an informal basis.

Finally, we again emphasize that these additional complications and uncertainties will result in fewer taxpayers availing themselves of the APMA program. We therefore recommend that, in addition to the procedural steps outlined above, the New APA Procedure set forth additional detail or criteria regarding when APMA may require an expanded APA request and under what circumstances and for what reasons a taxpayer may overcome such a requirement.

“Effect of Filing” an APA Request¹⁵

The New APA Procedure provides that submission of a complete APA request, including any updates and supplements required in accordance with the procedure, will be a “factor taken into account in determining whether the taxpayer has met the documentation requirements of Treas. Reg. §1.6662-6(d)(2)(iii) for the proposed APA years.”¹⁶ While this is a welcome statement, TEI recommends that the IRS take the logical next step and deem the regulatory documentation requirements satisfied upon the submission of a complete APA request (with updates). Indeed, in many cases a primary reason for an APA request is to avoid the documentation requirements, and associated costs, in the covered years. If the documentation requirements were deemed satisfied by a completed request, this would increase the benefits of submitting a request, offsetting some of the detriments and burdens of the New APA Procedure discussed herein. On a related point, if the IRS ultimately does not enter into an APA with a

¹⁵ *Id.* at § 3.08.

¹⁶ *Id.*

taxpayer after granting a request, then a taxpayer should be granted additional time to produce the documentation required under section 6662 during an examination.

The New APA Procedure also provides that while “APMA will coordinate with the IRS to minimize duplicative requests in conducting its due diligence, the taxpayer remains obligated to respond to information document requests issued, and according to deadlines set, by other IRS offices in any examination or enforcement proceedings.”¹⁷ TEI recommends that the New APA Procedure go further than requiring “coordination” between APMA and the IRS examiners and provide that APMA will not request information in the course of its due diligence that has already been requested in the course of an examination or enforcement proceeding, and vice versa. One way to minimize duplicative efforts between APMA and IRS would be to exempt from current audit issues covered by an accepted APA request after the request has been filed for the years covered by the APA request. If the APA request is denied, then the IRS could, of course, audit the issues independently of APMA. In this regard, the New APA Procedure requires taxpayers to extend the statute of limitations for each proposed APA year and proposed APA rollback year, and thus the interests of the government are protected.

Criteria for Accepting, Rejecting, and Expanding APA Requests

Due to the substantially increased time and expense burden placed on taxpayers by the New APA Procedure, it is critical that the IRS provide transparent and clear criteria for accepting, rejecting, and revoking APA requests, so that taxpayers know before going through the effort of drafting and filing an APA request (and pre-filing memorandum) whether a request is likely to be accepted. The additional detail on when the IRS may revoke or cancel a completed APA in section 7.06 of the New APA Procedure is a welcome development. TEI recommends that the IRS provide a similar amount of detail with respect to accepting or

¹⁷ *Id.*

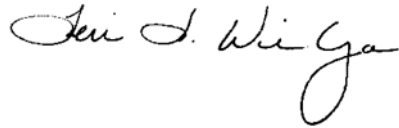
rejecting a request and, as noted above, with respect to when the IRS will require an expanded scope of an APA request.

Conclusion

Tax Executives Institute appreciates the opportunity to offer its views on Notice 2013-79 regarding the new procedures for APA requests. 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. Shreck, TEI Tax Counsel, at 202.638.5601 or bshreck@tei.org, should you have any additional questions.

Respectfully submitted,

TAX EXECUTIVES INSTITUTE, INC.

A handwritten signature in black ink, reading "Terilea J. Wielenga". The signature is written in a cursive, flowing style.

By:

Terilea J. Wielenga
TEI International President