



IRS issues memorandum on mandatory consultations between LB&I Exam and APMA Program

Global Transfer Pricing Alert 2019-006

In a memorandum dated February 19, 2019, the Internal Revenue Service revised Internal Revenue Manual (IRM) 4.61.3 regarding certain examinations involving transfer pricing issues. The memorandum requires collaboration between transfer pricing issue teams and the Advance Pricing and Mutual Agreement (APMA) Program on examinations with the potential to generate transfer pricing adjustments involving a country with which the United States has a double tax treaty. This consultation requirement applies regardless of whether the taxpayer currently has a mutual agreement procedure (MAP) or advance pricing agreement (APA) case in the APMA Program or whether APMA has an active relationship with the treaty partner. It also applies to issue teams staffed by Transfer Pricing Practice, Cross Border Activities, or Geographic Compliance Practice Area personnel.

The memorandum applies to transfer pricing examinations of Large Business and International (LB&I) taxpayers¹ opened in the IRS Issue Management System from the date of its issuance. Nevertheless, the memorandum does not preclude consultation on cases opened before it was issued.

The memorandum is consistent with the Transfer Pricing Examination Process (TPEP), released on June 29, 2018, which also requires collaboration with the APMA Program when the transaction involves a treaty country.²

¹ Taxpayers that have assets equal to or greater than \$10,000,000, that are required to file Form 5471 or 5472 with their federal income tax returns.

² For Deloitte's prior coverage of the TPEP, see [Global Transfer Pricing Alert 18-022](#). For a copy of the TPEP, see <https://www.irs.gov/pub/irs-utl/P5300.pdf>.

The memorandum requires that the issue team consider APMA's relevant treaty background and competent authority experience with the treaty partner and/or transfer pricing issues early in the issue-development process to risk-assess the issue properly. According to the memorandum, such background discussions are designed to help the issue team understand how certain facts and arguments might be best developed and supported, as well as to provide perspective on the history APMA may have with the type of case being pursued, particularly whether in similar situations an adjustment has been withdrawn in whole or in part before or after negotiations have begun.

The memorandum also notes that the issue teams are ultimately responsible for the selection and development of all examination issues and for ensuring that an appropriate degree of independence from the competent authority process is maintained.

An attachment to the memorandum sets forth the procedures that must be followed by LB&I employees for implementing the required consultations between the transfer pricing issue teams and APMA personnel. Of note, the issue team must contact APMA at the beginning of the issue team's review. During the consultation, APMA and the transfer pricing issue team are required to discuss the intercompany transactions and issues under review, and APMA is required to share its experience, both generally and as it pertains to the applicable treaty partner. Among other things, the APMA team has been instructed to share its experience with similar cases, presentations of facts, and arguments that can often arise during the competent authority negotiations, and, as appropriate, possible outcomes resulting from the negotiation process.

Observations

APMA has extensive experience dealing with transfer pricing issues in the context of negotiations with tax treaty partners in APA and MAP. In addition, APMA, unlike the examination team, can rely on the OECD transfer pricing guidelines when developing a position (if the intercompany transaction involves a treaty partner).³ APMA may recommend that the examination team modify a transfer pricing adjustment that is under consideration, for example, if APMA considers that the adjustment would be difficult or impossible to sustain in MAP. As a practical matter, it is unclear how much influence APMA will exercise in this regard, given that the issue team is ultimately responsible for the development of the transfer pricing examination.

The memorandum does not indicate whether the results of the consultation will be discussed with the taxpayer or whether any notification will be made to the taxpayer that such consultation has occurred or will occur. However, given the potential benefits of APMA's early involvement during the transfer pricing examination, we recommend that taxpayers proactively discuss the potential involvement of APMA with the issue team during a transfer pricing audit.

³ 2007 GLAM LEXIS 27, GLAM 2007-007 (IRS March 15, 2007). See also *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, OECD Publishing, Paris. <http://dx.doi.org/10.1787/tpg-2017-en>.

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