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IRS Releases New Competent Authority Revenue Procedure



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The Internal Revenue Service (IRS) on August 12 released Revenue Procedure (Rev. Proc.) 2015-40, which provides guidance on the process of requesting and obtaining competent authority assistance under the mutual agreement procedure (MAP) article of U.S. tax treaties.

Rev. Proc. 2015-40 updates and supersedes Rev. Proc. 2006-54. The revenue procedure is applicable to the following types of requests: (1) cases arising under the associate enterprises and business profits articles of U.S. tax treaties; and (2) cases arising under all other articles of U.S. tax treaties. Rev. Proc. 2015-40 is effective for competent authority requests filed on or after October 30, 2015.

The Rev. Proc. was issued concurrently with Rev. Proc. 2015-41, which provides guidance on advance pricing agreements (APAs). Many of the changes in the Rev. Proc. are consistent with similar changes in the new APA procedures.

A proposed version of Rev. Proc. 2015-40 was released for public comment in Notice 2013-78 (the notice). The IRS received numerous comments on the notice, and in finalizing Rev. Proc. 2015-40 made some welcome amendments to reflect a number of concerns raised by taxpayers and practitioners. Overall, Rev. Proc. 2015-40 provides a greater level of transparency in terms of the process of requesting and obtaining competent authority relief, and will be useful reading for taxpayers unfamiliar with the competent authority process. However, Rev. Proc. 2015-40 imposes significantly more information and procedural requirements on taxpayers than the prior guidance.

Summary

A summary of the salient changes under the final revenue procedure is provided below.

Assistance for Taxpayer-Initiated Transfer Pricing Adjustments: Consistent with the proposal contained in the notice, Rev. Proc. 2015-40 allows requests for assistance arising from taxpayer-initiated transfer pricing adjustments. In the past, the IRS generally has not accepted such cases, on the basis that double taxation was not the result of government action as predicated in the MAP article of the relevant tax treaties. This would allow U.S. taxpayers to proactively address foreign transfer pricing risks in a manner that would otherwise be prohibited by Treas. Reg. §1.482-1(a)(3). The taxpayer must submit a prefilling memorandum (see below) prior to filing its request for assistance. The IRS reserves the right to deny requests for assistance for taxpayer-initiated positions if the taxpayer failed to request the assistance of the foreign competent authority and the U.S. competent authority in a timely manner in relation to the taxable year for which relief is sought, or the taxpayer otherwise has pursued competent authority assistance in a way that has undermined or prejudiced the competent authority process or has impeded the U.S. or foreign competent authority from engaging in full and fair consultations on the competent authority issue(s). This is a welcome

addition, given the IRS's historical policy position regarding taxpayer-initiated adjustments.

Mandatory Prefiling Memoranda/Conferences: In welcome news, Rev. Proc. 2015-40 requires mandatory prefiling procedures only for proposed competent authority requests that involve a taxpayer-initiated adjustment. The notice required mandatory prefiling procedures for a wide variety of circumstances, which would have significantly increased the administrative burden on taxpayers, particularly in light of the time frames contained in most U.S. tax treaties under which a taxpayer must file a request for competent authority assistance. A taxpayer must submit a prefiling memorandum prior to filing a competent authority request for a taxpayer-initiated adjustment with the specific information set out in Rev. Proc. 2015-40, and once received, the U.S. competent authority will decide whether to hold a prefiling conference with the taxpayer. Rev. Proc. 2015-40 also lists the following issues for which an optional prefiling conference is recommended by the U.S. competent authority:

- A foreign-initiated adjustment that exceeds \$50 million for all competent authority years combined;
- A competent authority issue that is likely to involve interrelated issues;
- An intangible development arrangement;
- A business restructuring;
- A global trading arrangement;
- An unincorporated branch, passthrough entity, hybrid entity, or entity disregarded for U.S. tax purposes;
- A discretionary limitation on benefits (LOB) request; or
- A competent authority issue that has arisen outside the context of an examination, for example, through the withholding of tax by a withholding agent or a ruling or promulgation issued by a foreign tax authority.

Scope of Requests for Assistance: To ensure that taxpayers have broad access to the U.S. competent authority to resolve disputes under U.S. tax treaties, Rev. Proc. 2015-40 provides that taxpayers are not required to expand the scope of a competent authority request to include interrelated issues as a condition of receiving competent authority assistance, as proposed in the notice. However, the U.S. competent authority may determine during the competent authority process that it cannot reach a competent authority resolution consistent with principled, effective, and efficient tax administration unless it evaluates the relief sought by the taxpayer in light of whether such relief, together with the taxpayer's position on interrelated issues, would yield consistent and appropriate results.

Rev. Proc. 2015-40 provides examples of interrelated issues and notes that the U.S. competent authority may request, in writing, that the taxpayer amend its competent authority request to include interrelated competent authority issues identified by the U.S. competent authority. Rev. Proc. 2015-40 states that taxpayers should be prepared to provide information on interrelated issues throughout the competent authority process. If a taxpayer declines to amend its request, the U.S. competent authority will still endeavor to reach a resolution, but it will take into account the taxpayer's position on interrelated issues in determining the extent to which it will provide relief for the matters in the competent authority request. Rev. Proc. 2015-40 also provides that the U.S. competent authority may encourage (but will not formally request or require) taxpayers to extend competent authority resolutions forward into APAs or accelerated competent authority procedure (ACAP) years.

Informal Advice and Consultation: The U.S. competent authority is available for informal consultations with taxpayers (including consultations in which the taxpayer chooses to be anonymous) regarding any competent authority issue. Any such informal advice is advisory only and is not binding on the IRS. Rev. Proc. 2015-40 also provides that the U.S. competent authority is available for informal consultations on issues that arise in connection with competent authority issues (e.g., advice regarding whether a taxpayer has exhausted all effective and practical remedies to reduce its liability under foreign law for tax within the meaning of Treas. Reg. 1.901-2(e)(5) and Revenue Ruling 92-75). In practice,

informal consultations have always been available; however, the new revenue procedure makes such consultations explicitly available.

Protective Claims and Treaty Notifications: Under Rev. Proc. 2015-40, an annual notification of a protective claim and treaty notification must be filed following the close of each taxable year ending after the taxable year in which the taxpayer filed the protective claim, but no later than the date on which the taxpayer timely files a tax return for such taxable year. Under the old revenue procedure, the annual notification was required to be filed every 12 months until the formal request for competent authority assistance was filed. The authors have clarified with the IRS APMA Team that the new annual notification rules under Rev. Proc. 2015-40 will apply only for original and annual update protective claims and treaty notifications filed on or after October 30, 2015. Rev. Proc. 2015-40 indicates that a template treaty notification will be made available.

Content and Form of Competent Authority Request: The appendix to Rev. Proc. 2015-40 sets forth the required contents of a competent authority request and specifies the order in which such contents should be presented. A competent authority request must comply with all such requirements before it will be considered complete. The new revenue procedure considerably expands the scope of information that must be submitted and outlines specific requirements for cases filed with the Advance Pricing and Mutual Agreement (APMA) program, cases filed with the Treaty Assistance and Interpretation Team (TAIT), discretionary LOB requests, and pension plan requests.

Small Case Competent Authority Requests: Consistent with the proposal contained in the notice, Rev. Proc. 2015-40 increases the threshold amounts at issue for a small case competent authority request from \$1,000,000 to \$5,000,000 for corporations and partnerships and from \$200,000 to \$1,000,000 for others (including individuals). Certain cases are excluded from qualifying for a small case competent authority request, including if it (a) arises from a taxpayer-initiated position; (b) is a discretionary LOB request; or (c) is a pension plan request filed by a person other than an individual plan participant. While the increased thresholds are welcome, it is unclear exactly what benefit the small case procedures will offer, because a taxpayer that meets the threshold amounts must seek an exemption from the usual competent authority request content requirements by contacting the TAIT or APMA, as appropriate. In addition, even if the U.S. competent authority initially agrees to abbreviate the usual competent authority requirements, the U.S. competent authority may subsequently require the taxpayer to supplement its competent authority request with any or all of the information required.

Coordination with U.S. Administrative and Judicial Proceedings: Unlike the proposal contained in the notice, Rev. Proc. 2015-40 does not condition acceptance on the taxpayer's notification of the U.S. competent authority, or on obtaining its concurrence, with respect to signing a standard Form 870 with IRS examination. Similarly, a taxpayer will not be required to obtain the U.S. competent authority's agreement prior to entering into a Form 870-AD, closing agreement, or similar agreement with IRS examination, but in those cases the assistance provided by the U.S. competent authority will be limited to seeking correlative relief from the foreign competent authority, thus potentially not eliminating double taxation. Rev. Proc. 2015-40 notes that this is a change from the notice consistent with the objective of providing taxpayers with broad access to the U.S. competent authority to resolve disputes under U.S. tax treaties.

A taxpayer may request the simultaneous appeals procedure (SAP) as part of its competent authority request or in a separate written submission filed no later than 60 days after the taxpayer receives notification that the U.S. competent authority has accepted its competent authority request. The U.S. competent authority in its sole discretion will decide whether to accept the taxpayer's request for SAP review after consulting with IRS appeals and after considering whether SAP review would unduly burden tax administration, including the competent authority process. For a competent authority issue that is initially under the jurisdiction of the IRS Appeals, the U.S. competent authority will decline to provide assistance unless the taxpayer effectively severs the issue from its protest and then timely files a U.S. competent authority request with respect to the issue and meets the requirements set out in Rev. Proc. 2015-40. The new revenue procedure also provides for transitional rules for cases in which the competent authority issue is

before IRS appeals or the IRS has issued a 30-day letter notifying a taxpayer of the right to request IRS Appeals prior to the effective date.

Acknowledgement of Receipt: The U.S. competent authority will acknowledge to the taxpayer in writing that it has received a competent authority request. The acknowledgement will indicate whether the competent authority request is complete and whether the U.S. competent authority accepts the request. The acknowledgement will also provide the name and contact information of the APMA team leader, the TAIT analyst, or the members of the combined APMA-TAIT team to which the request has been assigned and any supplemental instructions.

Denial of Assistance: The U.S. competent authority may decline to accept a competent authority request or may cease providing assistance at any point after the process has commenced. Rev. Proc. 2015-40 sets out circumstances in which this may occur, including:

- The taxpayer fails to comply with procedural requirements set out in the revenue procedure, after having been provided reasonable opportunity to correct or remedy any deficiencies.
- The taxpayer is not eligible for the treaty benefit.
- The taxpayer's conduct has undermined or been prejudicial to the competent authority process. Examples of such conduct include:
 - The taxpayer agreed to or acquiesced in a foreign-initiated adjustment or entered into a unilateral APA with a foreign tax authority, involving significant legal or factual issues in a manner that impeded the U.S. competent authority from engaging in full and fair consultations with the foreign competent authority on the competent authority issues.
 - The taxpayer entered into a unilateral APA with the IRS when the competent authority issue could reasonably and practically have been covered if the taxpayer had instead pursued a bilateral APA.
 - The taxpayer rejected a request to extend the period of limitations for assessment of tax for taxable periods (including ACAP years) covered by the competent authority request.
 - The taxpayer has failed to comply with the provisions of sections 6.03, 6.04, and 6.05 governing coordination between the competent authority process and administrative and judicial proceedings, or has pursued its rights within such proceedings and within the competent authority process in a way that has undermined or is prejudicial to the competent authority process.
 - The taxpayer has presented new material information or evidence during the competent authority process that reasonably could have been presented to IRS Examination during the examination of the taxable years covered by the competent authority request.
 - In competent authority requests or competent authority cases involving taxpayer-initiated positions, the taxpayer failed to request the assistance of the foreign competent authority and the U.S. competent authority in a timely manner in relation to the taxable year for which relief is sought, or the taxpayer otherwise has pursued competent authority assistance in a way that has undermined or prejudiced the competent authority process or has impeded the U.S. or foreign competent authority from engaging in full and fair consultations on the competent authority issue(s).

Rev. Proc. 2015-40 makes it clear that the U.S. competent authority's decision as to whether a competent authority request is complete, or to deny, suspend, or terminate assistance, is final and not subject to administrative review.

Competent Authority Repatriation: Rev. Proc. 2015-40 sets out the requirements for when the U.S. competent authority will consider competent authority repatriation. Competent authority repatriation allows for specific treatment of repatriation payments when a competent authority resolution makes a primary adjustment to income, deductions, credits, allowances, basis, or any other item or element affecting taxable income between two members of a controlled group, as a means to conform their accounts to reflect the primary adjustment. When a competent authority resolution includes competent authority

repatriation for a particular taxable year, that treatment replaces the treatment that otherwise would be available for that taxable year under Rev. Proc. 99-32. The terms of the competent authority repatriation may reflect a prevailing practice with a treaty partner, as well as circumstances specific to a particular case, and may include, among other things, a waiver of intercompany interest on repatriation payments made within a certain time period. The Rev. Proc. notes that repatriation will not be granted if (i) the U.S. competent authority terminates assistance with respect to the competent authority request; (ii) the competent authority request involves issues that previously were decided in litigation or covered by a closing agreement or other similar agreement; or (iii) the taxpayer rejects the competent authority resolution.

Arbitration Procedures: Rev. Proc. 2015-40 includes general procedural issues associated with mandatory arbitration provisions contained in the MAP articles of some U.S. tax treaties. Those provisions require the competent authorities to refer certain MAP cases to mandatory arbitration in the event they are unable to negotiate a mutual agreement within a prescribed time period after the “commencement date.” The U.S. Competent Authority generally takes the position that the commencement date occurs when it has received a complete competent authority request as described in Rev. Proc. 2015-40. The U.S. competent authority will notify the U.S. taxpayer when the commencement date is established.

User Fees: Consistent with the prior revenue procedure, in general, no user fee is required for a competent authority request. A \$32,500 user fee is required for all requests for discretionary LOB relief filed on or after October 30, 2015, and prior to September 30, 2016. A \$37,000 user fee is required for all requests for discretionary LOB relief filed on or after September 30, 2016. This is a significant increase in the user fee of \$15,000 under the prior revenue procedure and the \$27,500 proposed in the notice.

Requirement to Provide Same Information to Both Tax Authorities: Under Rev. Proc. 2015-40, a competent authority request filed with the IRS must include a description or discussion of any related requests for assistance submitted to the foreign competent authority, together with a thorough, informative explanation of any material differences between the competent authority request filed under Rev. Proc. 2015-40 and the request filed with the foreign competent authority. The U.S. competent authority may request that the taxpayer provide a full or partial copy of the corresponding request submitted to the foreign competent authority. In addition, the taxpayer must provide both the U.S. and the foreign competent authority any information, documents, or analyses at approximately the same time, requested by or submitted to either competent authority. In practice, the requirement that taxpayers must provide both the U.S. and the foreign competent authority the same information has always been observed; however, the new revenue procedure explicitly incorporates it into official guidance.

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