

Notice 2013-78: IRS Proposes Revisions to Competent Authority Process

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Background

On November 22, 2013, the IRS issued Notice 2013-78, which contains draft Revenue Procedures applicable to requests for competent authority (CA) assistance. The IRS requested comments by March 10, 2014. The Revenue Procedure and the associated requirements will take effect only when the document is issued in final form, which likely will be in the second half of 2014. Importantly, none of the new requirements applies to applications or cases currently pending before the IRS.

Prior to 2012, the U.S. Competent Authority (USCA) was under the Director, International, Large and Mid-sized Business (LMSB) and the Advance Pricing Agreement (APA) program was under the Associate Chief Counsel (International) in the Office of Chief Counsel. In 2012, the CA and APA functions were unified under the IRS Deputy Commissioner, Large Business and International (LB&I). The office now consists of the Treaty Assistance and Interpretation Team (TAIT) and the Advance Pricing and Mutual Agreement Program (APMA), the latter office under the Director, Transfer Pricing Operations. In addition, in recent years mandatory arbitration was adopted under bilateral tax treaties with several major trading partners, including Canada.

The Revenue Procedure proposes refinements to the substantive and procedural rules governing CA requests. The apparent goal of the proposed changes is to increase efficiency under the new operating structure and to expand the number of years, issues and countries that might be covered. However, many of the efficiency gains come at the expense of new burdens and costs imposed on taxpayers that use both CA and APA. The draft APA Revenue Procedure ([Notice 2013-79](#)) is covered under a separate client alert.

Measures to Improve Efficiency and Resolve Additional Years and Issues

The Revenue Procedure takes two broad approaches to increasing efficiency and resolving additional years and issues. One of the approaches is to improve coordination within the IRS generally on adjustments to transfer pricing issues. The other approach involves allowing the USCA to cover more issues, countries and years than requested by taxpayers.

Coordination with IRS

Increased CA involvement in IRS Exam proceedings. A series of proposed changes point to more extensive involvement by the USCA in the day-to-day administration of Section 482 by the IRS Examination (Exam). For example, if IRS Exam proposes to settle a Section 482 issue that is likely to involve a U.S. treaty partner, it must consult with the USCA and execute an “examination resolution notification” that documents the terms of the resolution. APMA or TAIT may require changes to be made to the proposed settlement. The USCA also may recommend that IRS-initiated adjustments be conceded in whole or in part.

Giving the USCA a real-time role and de facto veto power over Exam determinations is a major change from current practice. This provision suggests that the USCA wants to

ensure that U.S.-initiated transfer pricing cases that enter the competent authority process are based on the strongest possible grounds. In particular, the USCA apparently intends to prevent IRS Exam from agreeing to partial concessions that might weaken the IRS case in the context of bilateral negotiations.

Simultaneous Appeals Procedure. Under the Revenue Procedure, the Simultaneous Appeals Procedure (SAP) is the only mechanism that allows a taxpayer to obtain joint review by the IRS Office of Appeals and the USCA, while preserving the ability to secure full correlative relief by means of CA procedures. SAP is available under Rev. Proc. 2006-54, but in our experience taxpayers seldom use it. The Revenue Procedure encourages wider use of SAP and notes that the USCA may refer a matter to SAP on its own initiative. When SAP is invoked, traditional appeals-based arbitration and mediation procedures are not available.

Fast Track Settlement. Fast Track Settlement is an alternative dispute resolution procedure that some taxpayers use at the conclusion of an IRS examination. If a case resolved in Fast Track Settlement is subsequently subject to a CA request, that request will be accepted only if a representative from the USCA was a named participant in the Fast Track proceeding and was given a reasonable opportunity to participate in the proceeding.

Extension of the statute of limitations. Under the Revenue Procedure, taxpayers may be denied CA assistance if they refuse to execute extensions of the U.S. statute of limitations for assessment of tax for all years as to which CA assistance is requested and for any ACAP years. The CA Revenue Procedure does not state whether the consents may be restricted or general. However, the draft APA Revenue Procedure in Notice 2013-79 acknowledges that consents may be restricted.

Because most tax treaties allow relief even if the statute of limitations has expired or other procedural bars apply, it was unclear whether taxpayers were obliged to extend the domestic (U.S.) statute of limitations to obtain CA relief. This new rule eliminates any confusion on this point.

Measures to Increase Coverage and Efficiency

Taxpayer-initiated adjustments. Taxpayers may seek CA assistance to relieve double taxation that results from a taxpayer-initiated adjustment, such as an adjustment under Treas. Reg. § 1.482-1(a) (3). While such adjustments have become more commonplace in recent years, the current Revenue Procedure, Rev. Proc. 2006-54, was limited by its terms to government-initiated adjustments.

Increased reliance on ACAP/referral to APMA. Consistent with the desire to leverage the new organizational structure in CA, the Revenue Procedure requires more use of Accelerated Competent Authority Procedures (ACAP) for filed tax years. The Revenue Procedure even allows the USCA to act of its own accord to expand the scope of a taxpayer's Mutual Agreement Program (MAP) request to include ACAP years. The Revenue Procedure also encourages referrals to APMA of current (but non-filed) and prospective tax years for potential coverage by an APA.

Expansion of government's ability to cover additional years, issues and countries. The Revenue Procedure states that the USCA has a strong interest in resolving all potential MAP issues in a timely manner. Under the Revenue Procedure, the USCA may therefore 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. Examples of such expansion include adding treaty countries or MAP issues to the scope of the MAP case and extending the MAP case to include ACAP years. The USCA also may notify foreign competent authorities of MAP cases that could arise out of anticipated U.S.-initiated adjustments. In addition, the Revenue Procedure would allow the USCA to cover "ancillary issues," including MAP repatriation, interest and penalties, and the determination of whether a payment is compulsory for foreign tax credit purposes.

Informal advice generally and on foreign tax credits specifically. The Revenue Procedure states that, as appropriate, APMA and TAIT will provide oral, informal advice to taxpayers, whether or not in the course of the MAP process, on general matters concerning MAP issues. The Revenue Procedure also provides that taxpayers may seek informal advice on whether payment of foreign tax in a particular case might be considered noncompulsory under Treas. Reg. § 1.901-2(e)(5). Such advice is informal and non-binding on the IRS. When appropriate, TAIT may communicate directly with IRS Exam to ensure “consistent and coordinated treatment.”

Mandatory treaty arbitration. The Revenue Procedure addresses cases subject to a mandatory arbitration provision in a bilateral tax treaty. The Revenue Procedure provides general guidance concerning the “commencement date” of a proceeding, execution of non-disclosure agreements, etc., although taxpayers are referred to specific tax treaties for detailed requirements in particular cases.

New Procedural Requirements

Procedurally, the draft Revenue Procedure imposes new documentation requirements, increasing the administrative burden and expense for taxpayers. In part, the Revenue Procedure seems to contemplate additional “gatekeeping” functions to ensure that the CA request includes all necessary information. In other respects, those functions allow the IRS analyst to judge whether a taxpayer is fully cooperative and acting in accordance with the goals of the program. The new procedural requirements are similar to the traditional requirements for engaging in prefiling conferences for potential APAs and for filing APA requests. The new CA requirements appear designed to ensure that CA Requests are focused from the outset and incorporate advice from the USCA personnel on how best to approach particular issues.

Additional prefiling procedures. Taxpayers must follow rigorous prefiling procedures, including filing a memorandum before submitting certain categories of CA requests, such as a request involving an income adjustment of more than \$10 million for all years combined, an intangible development arrangement, global trading arrangement, etc. In the past, taxpayers could submit a prefiling memorandum and often did so when the case presented novel issues, but the new procedures require such memoranda in a broad class of cases.

New filing requirements. An Appendix provides detailed guidance concerning the required elements of a CA request, as well as instructions concerning formatting of documents, order or presentation, number of copies, etc. In general, the required elements are similar to those under existing practice, although some new documents are required. The Revenue Procedure requires that a complete MAP request include either an executed memorandum of understanding permitting the USCA to communicate with its authorized representatives through encrypted email, or a statement that the taxpayer does not permit such email communications and an explanation for its declining to do so.

Rejection of CA request/denial of CA assistance. A CA request will be accepted only when it satisfies all applicable requirements. These new requirements limit the amount of time a case is formally in IRS inventory (which can be important under the arbitration clauses of tax treaties, and for purposes of internal management and recordkeeping). Additionally, the Revenue Procedure identifies 12 distinct situations in which relief may be denied after a CA request has been accepted. For example, CA relief may be denied if the taxpayer resolved a foreign-initiated adjustment without consulting CA, or if it indicates it only will accept a resolution on grounds that are “unreasonable or prejudicial to the interests of the U.S. government.” The USCA also may deny relief if the taxpayer declines to

extend the statute of limitations in accordance with a request by the IRS for any CA or ACAP years. These requirements amount to a “code of conduct” that governs taxpayers while their case is pending. Significantly, the Revenue Procedure states that the USCA’s decision as to whether a MAP request is complete or to suspend, deny or terminate assistance is not subject to administrative review.

Joint presentations. Under the Revenue Procedure, the USCA will consider requests from, and may invite or require, taxpayers to make presentations jointly to the U.S. and foreign competent authorities during the MAP process.

Where is the IRS Heading?

CA requests remain an essential and ever-growing element in the resolution of international tax disputes. The Revenue Procedure suggests that the IRS wants to adopt measures that could help facilitate resolution with both IRS Exam and with foreign governments, not just on issues covered in CA requests, but on additional issues for which taxpayers did not request coverage. Such proposals would take a certain amount of control and decision-making out of the hands of taxpayers and put the control and decisions in the hands of government. Any increased efficiency and coverage may come with a cost for taxpayers in the form of increased filing requirements and taxpayer presentations. These new requirements are similar to those that have been prevalent in the APA/APMA Programs for several years. To the extent possible, taxpayers should use the new requirements to their advantage by framing issues and working collaboratively and jointly with treaty partners to achieve outcomes consistent with taxpayers’ own objectives and structures.