Memo

To Holly Paz, LB&I Commissioner

From KPMG LLP

Date March 29, 2024

Ref KPMG Comments on Expanding Tax Certainty and Issue Resolution Programs for Business Taxpayers

KPMG LLP ("KPMG") welcomes the Internal Revenue Service's ("IRS") invitation for comments on the improvement and expansion of tax certainty and issue resolution options. The important commitment of the IRS's Strategic Operating Plan Initiative 2.4, which emphasizes enabling taxpayers to proactively resolve potential compliance issues and expanding pre-filing and certainty programs, is crucial where tax certainty for U.S. taxpayers is frequently endangered. The IRS' aim to expedite the resolution of taxpayer issues and reduce post-filing compliance obligations for taxpayers is of paramount importance.

Although KPMG represents a wide range of clients that may be affected by the expansion and enhancement of programs and tools that improve tax certainty and issue resolution, we are submitting these comments in our own name and not on behalf of any client. Accordingly, our comments offer feedback in order to assist the IRS improve post filing alternative dispute resolution programs to better serve participating business taxpayers.

KPMG's Tax Controversy & Dispute Resolution practice has built deep experience assisting clients to engage at all administrative levels with the Service across a wide range of IRS programs. We fully support the IRS strategic goal of expanding the availability of pre-filing and certainty programs, many of which already exist, both formally and informally. This goal is in line with the longstanding IRS policy to resolve tax disputes at the earliest possible level, a policy we support and work towards every day with our clients.

In our comments below, we recommend potential changes to improve the following programs:

- Compliance Assurance Process (CAP);
- Prefiling Agreements (PFAs);
- Voluntary international submissions;
- Pass-through examinations;
- Advance Pricing Agreements (APAs); and

- US Residency Certification.

CAP

The IRS announced updates to the 2024 Compliance Assurance Process (CAP) program, including the new pilot "Bridge Plus" program and updates to eligibility requirements. The continuation and possible expansion of this type of cooperative prefiling program provides an important option for large taxpayers to reach agreement with the IRS on the tax treatment of specific issues.

The Bridge Plus phase also improved taxpayer certainty by allowing suitable taxpayers to obtain a prefiling review of a draft return as compared to the previous Bridge phase, which did not allow for IRS review or assurances.

In order to be eligible for the CAP, an applicant must be a publicly traded corporation that is legally required to submit SEC Forms 10-K, 10-Q, and 8-K. The IRS has stated that it may allow returning CAP participants who no longer meet these requirements to remain in the program if they commit to provide the IRS with financial statements prepared in accordance with U.S. GAAP.[1]

Expansion of Program Eligibility

We believe this exception is too narrow and that non-public companies should be eligible to apply for the program as new participants if they prepare financial statements in accordance with U.S. GAAP and meet other existing eligibility requirements. There are many private companies that have audited financial statements and follow U.S. GAAP. Although they are not required to follow GAAP, these private companies may choose to do so in order to obtain access to capital or funding from private equity firms. These companies often have complex operations and US filing obligations, and many of them would benefit from obtaining greater certainty by participating in CAP.

Returning Control over Issues to the CAP Team Coordinator

Most taxpayers in CAP value the relationship and the results the CAP program delivers. Some CAP participants, however, find that some of their most complex issues remain unresolved, year over year. Other CAP-eligible taxpayers choose not to apply, in part based on others' experience, in our view. We observe that the proximate cause of this situation in most cases is that the current CAP matrix management approach to issue development. One possible solution would be to modify the matrix management approach to return control over issue development to the Team Coordinator and the Team Coordinator's management, with the active involvement of issue specialist teams.

PFAs

In 2000, the IRS piloted the PFA Program. In 2001, after the IRS determined that PFAs were cost efficient, resulted in taxpayers filing more compliant tax returns, and conserved the resources of both taxpayers and the IRS, the PFA Program was made permanent with the issuance of Rev. Proc. 2001-22.[2] The PFA Program provides an excellent opportunity for taxpayers to get certainty on positions before they file. Indeed, taxpayer

[1] CAP Eligibility and Suitability Requirements, https://www.irs.gov/businesses/corporations/cap-eligibility-and-suitability-criteria.
[2] Rev. Proc. 2001-22, 2001-9, I.R.B. 745.

satisfaction with the program is reflected in the positive survey results.[3] Despite taxpayers' satisfaction and likelihood to recommend the process to others, the number of PFAs concluded has decreased in recent years. We would encourage the IRS to better publicize the issues suitable to be covered by a PFA and reduce the time between a taxpayer's application and acceptance into the PFA program.

Understanding whether the IRS would consider a PFA on a given issue is critical to a taxpayer's analysis of whether to submit a PFA application. We acknowledge that Rev. Proc.[4] 2016-30 provides general guidelines on eligible issues and the PFA Fact Sheet provides examples of issues received and/or accepted. Notwithstanding, more specificity regarding the issues accepted and rejected could increase the number of PFA applications submitted each year. At the outset, it would be helpful to understand which issues were accepted, which were rejected, and the reason for the rejection. In addition, further description of the issue and not just, e.g., a code section citation, will help taxpayers to make decisions on whether to pursue a PFA. For a given code section, there are a myriad of potential issues for which a taxpayer could seek a PFA.

If there is more transparency into the specific types of issues that the IRS has and would be willing to consider participating in the PFA Program, we expect taxpayer interest in PFAs to increase. An example of a report that provides this additional data is the annual PFA program report that was issued during the initial years of the PFA Program.[5] This report provided more granular data on types of issues accepted, the reason for rejection, issues for which a PFA was executed, and a more robust description of the issue. In addition, having the number of applications received and accepted by industry segment would provide another valuable data point for taxpayers to consider. Understanding what one's industry peers are doing to achieve tax certainty would increase interest in the PFA Program.

In addition, it would be helpful for the IRS to publicize issues which it would consider for a PFA for but for which it has not yet received an application. Having data about the past is of course useful, but understanding how the PFA Program could be used to achieve certainty on new or emerging issues has the potential to significantly increase interest in the program. One example of an eligible issue is "the application of well-established legal principles to known facts."[6] The definition of "well-established legal principles" is subjective and could discourage applications based on a taxpayer's belief that the law is not well-established. This in turn could result in applications for a small group of issues. Providing examples of issues that have not been the subject of a PFA application, but would meet the "well-established legal principles standard," would expand the universe of issues that a taxpayer would consider seeking a PFA for. In connection with potential applications of the PFA to new areas, the IRS should consider whether the PFA user fee should be reduced or eliminated. The magnitude of the current user fee may make the PFA Program less attractive for some issues.

One of the factors considered when determining whether to accept a PFA application is the time remaining until the due date of the return and the probability of completing the process by that date. As such, it is imperative that the entire process, including the consideration and acceptance of an application, be as efficient as possible. The Internal Revenue Manual ("IRM") states that the PFA analyst gathers information on the suitability and

[3] IRS, Fact Sheet: Pre-Filing Agreement (PFA) Program – January 2023, https://www.irs.gov/businesses/fact-sheet-pre-filing-agreement-pfa-program-january-2023.
[4] Rev. Proc. 2016-30, 2016-21 I.R.B. 981.
[5] *See, e.g.,* Announcement 2002-54*, Announcement and Report Concerning Pre-Filing Agreements*.
[6] Rev. Proc. 2016-30, § 3.03(1).

technical aspects of the issue from subject matter experts and Counsel. The information is then transmitted to the appropriate practice area director, "generally within two weeks of receipt."[7] The practice area director then makes the decision whether to accept a taxpayer's application. Unlike the initial stage of the review, the IRM does not provide an estimated time frame for this decision. This makes it difficult to assess whether there is enough time to complete the process. We suggest setting a defined time frame to complete the screening process and communicate the decision to the taxpayer. This will provide more clarity about the overall process and timeline but allows more time for taxpayers to consider alternative options for achieving tax certainty in the event that their application is not accepted.

Voluntary International Submissions

The U.S. income tax system is built on the idea that taxpayers are responsible for reporting all their income, filing a timely tax return, and timely paying all tax due. Although taxpayers strive to meet their obligations, mistakes, of course, happen. When issues are identified after a return has already been filed, most taxpayers endeavour to promptly correct and disclose the error to the IRS. The motivation for self-correction is generally driven by a desire to mitigate potential penalty exposure, reduce the underpayment interest due by making payment earlier, and not wanting to record a financial statement reserve for penalties and interest. There are two separate but related areas where a formal voluntary disclosure program would be beneficial for taxpayers: (i) delinquent information return reporting, and (ii) delinquent returns of foreign corporations.

The international information return reporting rules are incredibly complex. The compliance burden associated with these forms has only increased since the TCJA repealed former section 958(b)(4) and section 958(b) now provides for downward attribution through the application of Section 318(a)(3) from a foreign person to a U.S. person in circumstances in which Section 958(b)(4), prior to its repeal, did not so provide. Even the most diligent taxpayers could have a "foot fault" when working through these provisions to determine its filing requirements. The current process of filing delinquent returns in the same manner as any amended return provides taxpayers with little to no certainty on the issues of whether the IRS will seek to impose penalties and whether the statute of limitations on assessment remains open for the entire return or just the items related to the missed reporting pursuant to section 6501(c)(8). In most cases taxpayers file these returns and must wait for the statute of limitations to expire to get any certainty. As a result, taxpayers are required to maintain a financial statement reserve on their financial statements. Similarly, Treasury Regulation section 1.882-4 subjects a foreign corporation to gross basis taxation in cases where the foreign corporation files a return more than 18 months after the due date. Just as is the case with the delinquent international information returns, foreign corporations file their delinquent returns with a reasonable cause letter and must wait for the statute of limitations to expire to receive certainty that the issue of whether they are subject to gross basis taxation is closed. These returns may also be subject to section 6651 late filing and late payment additions to tax. As a result, taxpayers must work to resolve the section 6651 additions to tax separately. Having a defined process whereby taxpayers can seek to resolve both issues at one time will conserve resources for both the taxpayer and the IRS.

An example of a voluntary disclosure program that provides the desired certainty to taxpayers is the delinquent withholding tax return process set forth in IRM Section 4.10.21.8.1 et seq. Importantly, at the end of the process, the IRS issues an acknowledgement letter if it is satisfied that the withholding agent has corrected its systems

[7] IRM 4.30.1.3(3).

and has paid or arranged to pay the tax due.[8] Issuing something akin to the acknowledgement letter for delinquent international information returns and delinquent foreign corporation returns will further encourage a taxpayer to voluntarily correct missed filings.

Pass-throughs

Background on BBA and Determining the Imputed Underpayment

Congress enacted the Bipartisan Budget Act of 2015 ("BBA") to create a new centralized partnership audit regime with the goal of providing a more efficient process for the IRS to audit, adjust, and collect amounts attributable partnership-related items. The BBA provides for the determination of partnership adjustments at the partnership level and empowers the IRS to assess and collect the rough equivalent of tax, penalties, and interest attributable to those adjustments from the partnership itself. That rough equivalent amount, referred to as an "imputed underpayment", is determined by multiplying each "positive adjustment" (i.e., taxpayer-unfavorable adjustment) by the highest rate of tax. The regulations treat any adjustment to a "non-income item", such as a balance sheet item, capital account, or basis in partnership property, as a positive adjustment. Despite a provision in the statute generally allowing for netting in accordance with section 702, netting of taxpayer-favorable adjustments generally is not permitted under the regulations.

The scope of items that can be audited at the partnership level under the BBA is broad. A "partnership-related item" includes any item shown or required to be shown on a partnership return or required to be maintained in the partnership's books and records that is relevant in determining any person's Chapter 1 income tax liability. Relevance for this purpose is itself defined broadly to reach any item or amount that affects any person's chapter 1 income tax liability, without regard to whether there is an actual tax impact on any person. For example, the characterization of debt as recourse rather than nonrecourse is a partnership-related item under the regulations, even if under the facts and circumstances that characterization does not, in fact, affect the amount of any partner's tax.

Taken together, the regulatory rules for calculating the "imputed underpayment" and the broad scope of the BBA rules often can result in a significantly large imputed underpayment liability determined against the partnership by the IRS, even if no tax would be due at the partner level (or in some cases, partners may have overpaid tax). Take, as an example, the recharacterization of debt at the partnership level. Because the regulations treat any adjustment to a "non-income item" as a positive adjustment resulting in an imputed underpayment, any adjustment recharacterizing the partnership's debt automatically produces an imputed underpayment.[9] This is the case even if the adjustment would not result in tax for any partner. For example, the debt recharacterization may not affect a particular partner's outside basis because the partner does not have a negative tax capital account, or the partner may have reported the adjustment correctly on the partner's original return, or corrected the reporting error in a subsequent year's return. Another example is an adjustment to the basis of a non-depreciable asset held by the partnership that does not give rise to a tax increase in the hands of the partnership or any partner.

[8] IRM 4.10.21.8.1.1(5).
[9] See Reg. §301.6225-1(d)(2)(iii).

BBA Shifts the Burden to Partnerships and Partners to Determine the Correct Tax

As a result, the imputed underpayment often exceeds the amount of tax that would be due from the partners if the partnership and its partners had originally reported the items as adjusted by the IRS. Under the TEFRA audit regime, it was the task of the IRS to compute and assess the tax resulting from partnership-level adjustments. In contrast, the BBA procedures shift that burden to the partnership and its partners. The default rule is that the partnership is liable for the imputed underpayment determined by the IRS. Through the modification process, the partnership can demonstrate the imputed underpayment should be reduced based on the make-up of its partners and its partners' tax attributes.[10] Whether a modification is approved, however, is subject to the discretion of the IRS.

In lieu of paying at the partnership level and seeking modifications, the partnership may elect to push out the adjustments to its partners with the result that the partners effectively pay the tax on the adjustments. The "push out" election allows a partner to utilize its own effective tax rate and tax attributes to determine and report the tax impact of the audit adjustments. That tax, however, is subject to a higher interest rate and implementing the push-out in a tiered structure can be administratively difficult and costly. There are also timing considerations that may bar a push-out if certain deadlines are missed.

With the BBA rules in place, the IRS has a powerful tool to impose adjustments and determine imputed underpayments against partnerships. Moreover, the BBA shifts the burden to determine the ultimate tax effect of those audit adjustments to the partnership and its partners, either through utilizing the modification procedures or going through the push-out process. Thus far, it has been our experience that IRS examination teams ("Exam") will not consider "partner-level" facts when making an adjustment or determining an imputed underpayment resulting from that adjustment. Exam has indicated that such partner-level facts can and must be raised only in modification, or if the partnership elects to push out the adjustments.

Recommendation for Exam to Consider Partner-Level Facts and to Resolve Cases at Exam

We recommend that, in appropriate cases, Exam permit partner-level facts to be introduced at the exam level and to allow for case resolution with Exam based on partner-level facts without the need for the partnership to pay an imputed underpayment, go through modification, or implement the push-out. This resolution could be achieved through a closing agreement or a form created by the IRS that allows both agreement to the adjustments and agreement that no further action is needed by the partnership and its partners to implement those adjustments.[11]

The modification procedures and the push-out process take place after the examination ends, and the revenue agent has "left" the case. Once the examination ends (and assuming no review by the Office of Appeals), the

[10] The types of "modifications" are specifically enumerated and do not address all fact patterns. Requesting a modification can involve obtaining affidavits from far-removed, indirect partners, and the request is handled by Technical Services rather than directly by the revenue agent who conducted the exam.
[11] In appropriate cases, the closing agreement or other form could address the treatment of adjustments to partnership-level and partner-level tax attributes as needed.

revenue agent prepares a package for Technical Services, and Technical Services issues a “notice of proposed partnership adjustment,” triggering the ability to go to modification and raise partner-specific facts.

In cases where the partnership can demonstrate there is no change in tax due as a result of the proposed adjustments, both the partnership and Exam should be given the opportunity to resolve the matter together. It has long been the objective of the Service to obtain the greatest possible number of agreements to tax determinations without sacrificing the quality or integrity of those determinations, and to dispose of tax differences at the lowest level.[12] We understand the IRS goal of detecting potential non-compliance and proposing adjustments to incorrect partnership returns. In some cases, however, the law or the facts may dictate that even with incorrect reporting at the partnership level, correction would not lead to tax consequences to the partners. We encourage the IRS to recognize this common fact pattern and likewise to recognize the inefficiencies and limitations (for both the IRS and the taxpayer) of only permitting partner-level facts to be raised in modification or through the push-out process. Accordingly, we recommend the IRS to provide an ability, in appropriate cases, to consider partner-level facts at Exam and to resolve a case with Exam without the need to pay an imputed underpayment, go through modification, or implement the push-out.

Our proposed approach has support in the legislative history to the BBA. In describing the modification procedures when BBA was first enacted, the Joint Committee on Taxation described the dual policy goals of the BBA as follows:

> [T]o determine the amount of tax due as closely as possible to the tax due if the partnership and partners had correctly reported and paid while at the same time to implement the most efficient and prompt assessment and collection of tax attributable to the income of the partnership and partners.[13]

Specifically with regard to the modification procedures, where partner-level facts are normally raised, the Joint Committee stated: “modification procedures may be implemented by the partnership after the initiation of the administrative proceeding, including before any notice of proposed adjustment.”[14]

Our proposed approach also has a basis in the regulations. Treasury Regulation §301.6225-1(b)(4) provides that the IRS may treat one adjustment as zero for purposes of computing the imputed underpayment if the effect of that adjustment is reflected in one or more other adjustments.[15] The ability to treat one adjustment as zero for purposes of determining the imputed underpayment pre-supposes the existence of authority to treat each adjustment as zero when calculating the imputed underpayment.

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[12] Policy Statement 4-40, Early agreement primary objective, available at IRM 1.2.1.5.16.

[13] Staff of the Joint Committee on Taxation, JCX-6-18, Technical Explanation of the Revenue Provisions of the House Amendment to the Senate Amendment to H.R. 1625 (Rules Committee Print 115-66) 40 (describing section 6225 modification rules).

[14] Staff of the Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in 2015, JCS-1-16 (March 2016), 16 (emphasis added).

[15] In addition, under the regulation, if a positive adjustment to an item is related to, or results from, a positive adjustment to another item, one of the positive adjustments will generally be treated as zero solely for purposes of calculating any imputed underpayment unless the IRS determines that an adjustment should not be treated as zero in the calculation of the imputed underpayment.

Conclusion

As mentioned above, neither modification nor the push-out is a panacea – each procedure has its own shortcomings. We encourage the IRS to provide an ability, in appropriate cases, to consider partner-level facts and to resolve a case with Exam without the need to pay an imputed underpayment, go through modification, or implement the push-out. This resolution could be achieved through a closing agreement or a form created by the IRS that allows both agreement to the adjustments and agreement that no further action is needed by the partnership and its partners to implement those adjustments.[16]

Advance Pricing Agreements beyond Transfer Pricing

Since the 1990s, the innovative spirit and dedication of the IRS's advance pricing agreement (APA) program (now Advance Pricing and Mutual Agreement, or APMA) have advanced the cause of tax certainty across the world and established the IRS as a pioneer in providing meaningful certainty in bilateral and multilateral cases. In the spirit of this consultation, we would encourage the IRS to expand the scope of the APA program to provide certainty for matters beyond the transfer pricing issues that have traditionally been the focus of APAs.

There are two related and distinct ways in which this can be accomplished, and both would be invaluable to taxpayers. First, the IRS should embrace the use of APAs – whether multilateral, bilateral, or unilateral – to provide certainty on additional U.S. tax issues related to the transfer pricing issues covered by the APA. Second, the IRS should work with its treaty partners to offer bilateral (and, when appropriate, multilateral) agreements on treaty issues beyond transfer pricing.

Expansion of APAs to U.S. International Tax Issues

APMA already has authority to enter into APAs that go beyond transfer pricing in certain respects. Section 2.02(2) of Rev. Proc. 2015-41 provides that:

> APMA's APA program provides a voluntary process whereby the IRS and taxpayers may resolve transfer pricing issues and issues for which transfer pricing principles may be relevant in a principled and cooperative manner on a prospective basis. Ancillary issues such as interest and penalties may also be resolved, but only to the extent to which APMA has authority under the Code or under a U.S. tax treaty to resolve the issues.

While this guidance is helpful, our experience is that in recent years APAs that cover non-transfer pricing issues have become increasingly rare, perhaps because the standard for what issues may be covered – i.e., those for which transfer pricing principles are relevant – is ambiguous. For example, sourcing issues are often issues for which transfer pricing principles are relevant, and we are aware of APAs addressing sourcing issues alongside transfer pricing. However, the ambiguous standard in Rev. Proc. 2015-41 has sometimes led to confusion in this area, and we would recommend that successor guidance expressly permit coverage for issues such as sourcing.

In addition, APAs could offer more meaningful tax certainty if they were made available to cover U.S. international tax issues connected with the underlying transfer pricing transactions, such as BEAT, FDII, GILTI (e.g., the high tax exception), and Subpart F issues, as well as whether a transfer pricing arrangement is

[16] E.g., a "no-change" Form 14792-A, Agreement as to Partnership-Related Items and Partnership-Level Determinations as to Penalties, Additions to Tax, and Additional Amounts. Where necessary, a closing agreement memorialized on Form 14792-A could address the effects the adjustments may have on partnership-level or partner-level tax attributes in the "Other information" field.

considered to create a partnership for U.S. tax purposes. In some cases, transfer pricing certainty will be of little or no benefit to a taxpayer without accompanying certainty on a related U.S. international tax issue. Taxpayers and the IRS alike share an interest in obtaining certainty for these issues.

The IRS should therefore include in successor guidance to Rev. Proc. 2015-41 a broader permission for the inclusion of non-transfer pricing in APAs and should include examples of such issues to inform taxpayers of where certainty is available. Coordination with the IRS Office of Chief Counsel for relevant subject matter expertise would likely be necessary in many cases, and the payment of an additional user fee may be appropriate in recognition of the fact that what is being provided is essentially a ruling in addition to an APA. However, we would expect that synergies would arise when considering interrelated issues, which would justify keeping the overall user fee at a reasonable level.

The nature of this coordination would naturally vary from case to case and would be an appropriate topic for pre-filing discussion. In some cases, it might be necessary for consideration of the related issue(s) to precede bilateral consideration of the transfer pricing issue(s) (e.g., where the envisioned transfer pricing arrangement is predicated on a certain determination of the related issue). In other cases, the transfer pricing issue(s) might need to be agreed bilaterally prior to full consideration of the related issue(s) (e.g., where the nature of a related issue depends on the transfer pricing method agreed between the treaty partners).

We recognize the importance of public reporting of APA statistics, including future reporting of such statistics through the OECD, and we do not believe that the APA statistics should disincentivize expanded consideration of related issues. In the case where a related issue is considered prior to a bilateral transfer pricing case, it would seem appropriate to consider the APA case as begun for statistical purposes only after the related issue phase is complete, assuming the issues can be reliably segregated and addressed in separate phases. Similarly, where the related issue follows the bilateral transfer pricing case, it would seem appropriate to consider the APA case as complete after the transfer pricing phase is agreed, again assuming the issues can be reliably segregated.

Advance Agreements for Treaty Issues beyond Transfer Pricing

While transfer pricing remains the most important tax issue for most companies operating across borders, other treaty issues are also critical to many businesses and susceptible to advance resolution in a manner similar to an APA. Since such resolutions frequently would not involve a “pricing” aspect, one might think of them as “advance treaty agreements” or “ATAs.” The recent integration of the Treaty Assistance and Interpretation Team (TAIT) into APMA should facilitate the expansion of the APA program into ATAs.

Withholding tax characterization cases often present the same sort of fact-based issues as transfer pricing cases and would therefore also be susceptible to advance resolution providing on-going certainty (in lieu of a series of MAP cases to address successive audit cycles). These issues are of great importance to many taxpayers, as has been recognized in the work on Amount A of Pillar One, which if enacted would provide in-scope taxpayers with a mandatory and binding dispute resolution process for withholding tax characterization cases.

Similarly, permanent establishment (PE) issues are crucial for many businesses, especially in the years since the Covid-19 pandemic as tax departments have had to adapt to novel ways in which businesses operate across borders. Many taxpayers have novel arrangements in place that do not neatly align with existing PE guidance. In addition, Pillar Two has increased many taxpayers’ focus on PE issues because PEs are separate constituent entities. In general, we would expect that taxpayers seeking certainty with respect to the existence of a PE would be primarily concerned with a single theory under which a PE could be found to exist, and thus the scope of an ATA regarding the existence or non-existence of a PE could generally be limited to one paragraph of the relevant treaty article, rather than an exhaustive agreement with respect to the PE article as a whole.

The International Compliance Assurance Program (ICAP) is available for the consideration of PE issues and is an important step towards addressing these issues in a coordinated manner. However, taxpayers that bring PE issues to ICAP and do not meet with consensus from the tax administrations have no means of obtaining prospective certainty for the issue (unlike transfer pricing issues, for which a lack of consensus in ICAP could be addressed through an APA). Providing ATAs for PE issues would therefore complement and potentially encourage participation in ICAP.

The use of an ATA for a withholding tax or PE issue could be usefully divided into multiple stages. Although we recognize that the IRS does not currently offer rulings on whether an activity constitutes a trade or business,[17] the interests of tax administration might be best served by preliminary consideration of the underlying domestic issue in the appropriate jurisdiction. E.g., for the U.S. and Canadian competent authorities to enter into a bilateral ATA regarding the existence of a potential PE arising from U.S. activities in Canada, it would make sense for the Canadian competent authority to first confirm whether a taxable presence exists under Canadian law – if not, certainty could be obtained on that basis without the need for bilateral consideration of the PE issue. Similarly, at least in the context of ATA requests, we would encourage the IRS to provide unilateral certainty regarding the existence of a U.S. trade or business prior to bilateral engagement. The same principles would apply to withholding tax characterization and other issues (i.e., if the jurisdiction that might have taxing rights under the treaty determines that it lacks a domestic basis for taxation, a bilateral phase to the process would be unnecessary).

Shifting economic circumstances and pressures affect arm's length pricing over time and therefore necessitate that APAs have a finite term, subject to renewal. The facts relevant to withholding tax characterization and PE issues are not affected by economic developments in the same way. For instance, there is no clear reason why an agreement that certain activities do not constitute a PE would need to have a limited duration, assuming the relevant facts remain materially the same and the taxpayer periodically certifies this remains the case.

Rather than APAs with term limits and renewals, the best analogue for an ATA on withholding tax characterization or the existence of a PE would instead be the IRS's procedure for discretionary limitation on benefits (LOB) rulings, and these procedures provide a model for periodic certification that could be usefully applied to ATAs. Sections 3.06(2)(g) and (h) of Rev. Proc. 2015-40 provides that an applicant's favorable discretionary LOB determination will remain in force indefinitely, provided the applicant i) notifies TAIT of any material change within 90 days, which may require a supplemental determination, and ii) files a triennial statement certifying that there has been no material change of fact or law and that the applicant is not claiming benefits other than those granted. This compliance model with a two-fold reporting obligation (i.e., short-term reporting if a material change has occurred and triennial reporting if there has been no material change) would seem well suited to ATAs for non-transfer pricing issues.

We recognize that the ATA process contemplated in these comments cannot be instituted unilaterally, and we encourage the IRS to work with its treaty partners and the FTA MAP Forum to identify opportunities for developing bilateral pilot programs. In particular, we believe that coordination with the OECD's ongoing work to address the increased global mobility of workers could be fruitful for expanding bilateral advance certainty to PE issues.

US Residency Certification Program

The Form 8802 is used by taxpayers to request Form 6166, a letter of US residency certification for purposes of claiming treaty benefits under an applicable US income tax treaty, among other potential uses for establishing

[17] Rev. Proc. 2024-3, 2024-1 I.R.B. 143, § 3.01(35).

tax rate reduction or exemptions under foreign law (e.g., VAT). While the IRS has made progress to reducing the processing time it may take to issue a residency certification, many taxpayers still encounter issues with delays that may jeopardize their ability to seek at-source treaty relief from foreign withholding taxes if they are unable to timely furnish these certificates to foreign withholding agents.

In some jurisdictions, the process for seeking a refund may take several years and expose taxpayers to additional costs of local filings and navigating the local administrative process. We encourage the IRS to continue to refine the program to make the processing more efficient and timely, including allowing certain taxpayers in appropriate cases to escalate a request to the IRS service center that processes these requests or the US Competent Authority when their foreign payments may be at risk of unnecessary withholding due to an extended delay in receiving the certification. In appropriate cases, a streamlined multi-year process should be considered for companies that would otherwise need to make annual requests with respect to high volumes of foreign payments over an extended period.

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