

Earnings and Profits Studies Could Aid Repatriation Efforts, JCT Official Says

by Stephanie Cumings

Business taxpayers should start conducting earnings and profits studies to be better prepared for tax changes like the Trump administration's effort on deemed repatriation, Viva Hammer, legislation counsel for the Joint Committee on Taxation, said September 26.

"If there's any advice I could give you: Do an E&P study; do a lot of them. That's where the planning is going to be," Hammer said at an event hosted by Anchin, Block & Anchin LLP in New York. "You can't really plan what your income was [in the past], but you can calculate what your liability to the government is going to be."

"It's amazing to me the number of taxpayers that say, 'I have no idea what our E&P is; we've never looked at it; it doesn't make a difference right now,'" Hammer said. E&P is a critical component of all international tax planning and it helps determine what earnings will be deemed to be repatriated, she said, adding that an E&P study is inexpensive and "you should know what you're up against going forward." Hammer's comments came less than a day before the Republican "Big Six" negotiators unveiled their unified tax reform framework, which includes deemed repatriation.

The tax reform framework offers few specifics on repatriation but says it would end "the perverse incentive to keep foreign profits offshore by exempting them when they are repatriated to the United States." Also, foreign earnings "that have accumulated overseas under the old system" would be treated as if they've been repatriated, the framework says. In her remarks, Hammer predicted repatriation would likely be mandatory, noting that the voluntary repatriation tax holiday in 2004 was largely viewed as ineffective because it resulted in higher dividends and stock buybacks by corporations but did not create jobs.

Under the tax reform framework, hard assets would be subject to a lower tax rate than foreign earnings held in cash or cash equivalents, but those rates aren't specified. Hammer said that many tax reform proposals have included two separate rates but added that defining cash and cash equivalents can be challenging. "So of course there's going to be a big battle at the border as to

what's cash and what's not because the differences in rates in most of the proposals are very significant," she said.

After noting that some industries, like the financial sector, are particularly cash-rich, Hammer said, "How are we going to apply deemed repatriation to an industry that has all cash and cash equivalents?"

The framework also proposes that repatriation tax liabilities would be "spread out over several years," while offering no specific time frame. Hammer said there has been disagreement among taxpayers over whether a longer time frame is beneficial. She predicted that some taxpayers would accept a higher rate if they had 35 years to pay it off, but questioned what the accounting benefit of that approach would be. Meanwhile, other taxpayers believe the rate is what matters, not the time frame, she added.

Treasury Regs Overrated?

Hammer questioned the need for tax regulations after being asked about the Trump administration's controversial Executive Order 13771, which requires that any new regulations be accompanied by the repeal of two existing regulations. The validity of the order has been challenged in federal court.

"It's not clear to me why you need the Treasury to tell you what to do. Go think about it for five minutes and then you'll work it out," said Hammer, who noted that she worked on regulations at Treasury for many years. Tax advisers are as smart as any of the officials at Treasury and just as capable of interpreting the code, she said. And practitioners should not be more vulnerable to liability for negligence without the aid of regulations as long as their interpretations of the law are adequately supported, she added. She also noted that regs can never address every detail, so there will always be some questions left unanswered.

"I wouldn't feel any more certain with a reg here or there," Hammer said. "You have to use your intelligence, and I don't think that the regs make any difference. They can give you a lot of hand-holding, but in the end, you're going to have to make calls anyway. That's the bottom line." ■