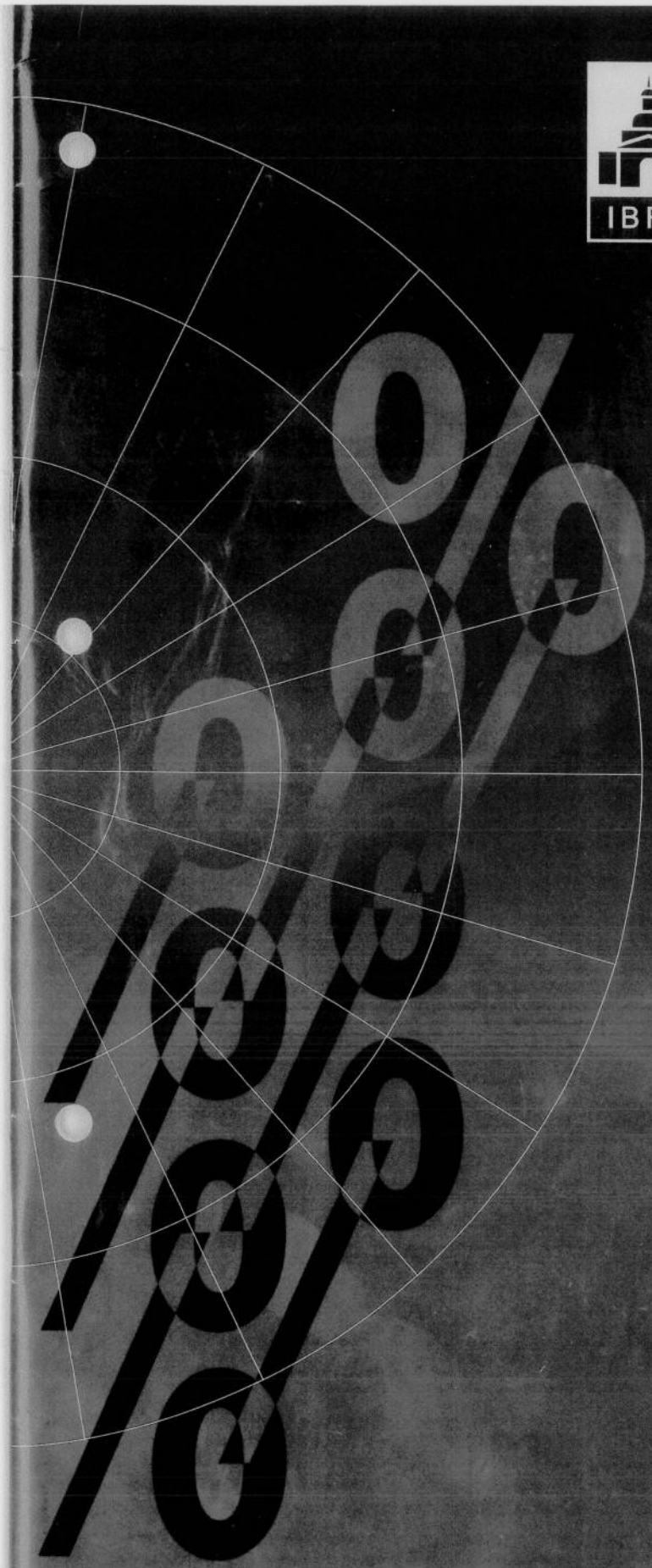

DERIVATIVES & FINANCIAL INSTRUMENTS

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United States

Viva Hammer*

What's New in US Tax and Accounting?

The first half of 2010 has been a busy period for tax developments in the financial services industry in the United States. In this piece the author discusses fifteen of these.

1. FASB to Defer Consolidation Requirements for Interests in Certain Investment Entities

The Financial Accounting Standards Board (FASB) agreed at its 27 January 2010 meeting to issue an Accounting Standards Update (ASU) to finalize its proposal to defer indefinitely Statement 167's consolidation requirements for reporting enterprises' interests in entities that either have all of the characteristics of investment companies or for which it is industry practice to apply measurement principles for financial reporting purposes consistent with those that apply to investment companies, if other conditions are met.

The FASB also decided to defer indefinitely Statement 167's consolidation requirements for reporting enterprises' interests in all registered money market funds and other entities that comply with requirements similar to the money market fund rules of the Investment Company Act of 1940.

Reporting enterprises with interests in entities that meet the deferral criteria will be required to apply Statement 167's disclosure conditions if those entities are variable interest entities under Interpretation 46R before it was amended by Statement 167. The ASU will also revise the language from Statement 167 that addresses whether fee arrangements represent a variable interest for all service providers and decision makers.

The final ASU will be effective for interim and annual reporting periods in fiscal years beginning after 15 November 2009, which is the same as the effective date of Statement 167.

2. Updated IRS Guidance When Disclosure on Tax Return Is Adequate for Reducing Accuracy-Related Penalty and for Avoiding Preparer Penalty

Rev. Proc. 2010-15 updates provisions previously set out in Rev. Proc. 2008-14 concerning circumstances when disclosure on a taxpayer's return with respect to an item or a position is adequate for the purpose of reducing the understatement of income tax under Sec. 6662(d) (relating to the substantial understatement aspect of the accuracy-related penalty), as well as for the purpose of avoiding the preparer penalty under Sec. 6694(a) (relating to understatements due to unreasonable positions) with respect to income tax returns.

Rev. Proc. 2010-15 does not apply with regard to any other penalty provisions (including the disregard provisions of the Sec. 6662 accuracy-related penalty, which are subject to an exception for adequate disclosure). Also, the revenue procedure provides that no disclosure on a return (other than an income tax return) will be adequate with respect to a preparer penalty under Sec. 6694(a).

Rev. Proc. 2010-15 applies to any income tax return filed on 2009 tax forms for a tax year beginning in 2009, and to any income tax return filed on 2009 tax forms in 2010 for short tax years beginning in 2010.

3. IRS Considers Requiring Taxpayers to Report Uncertain Tax Positions Pursuant to FIN 48; Comments Requested

Announcement 2010-9 states that the IRS is considering implementing a reporting requirement relating to uncertain tax positions pursuant to FIN 48 (or other accounting standards such as IFRS).

3.1. Observation

If the IRS implements the requirements described in this announcement, affected taxpayers would be required to disclose significant and detailed additional information. Although the IRS indicates that it will retain its current tax accrual workpaper policy of restraint, the practical effect of the new provisions would be to require routine disclosure of information that goes beyond that which the IRS has historically sought, except under the relatively rare circumstances in which it formally requests workpapers during an examination. The IRS explained in the announcement that the additional disclosures are intended to help it focus its examination resources on returns that contain specific uncertain tax positions.

3.2. Proposed schedule

Announcement 2010-9 states that the IRS is developing a schedule which would require certain taxpayers to provide information about their uncertain tax positions that affect their US federal income tax liability. The new schedule would be filed by a business taxpayer with total assets in excess of USD 10 million if the taxpayer has one or more uncertain tax positions, and would apply to a taxpayer who prepares financial statements – or is included in the financial statements of a related entity that prepares financial statements – if that taxpayer (or related entity) determines its federal income tax reserves

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under FIN 48, or other accounting standards relating to uncertain tax positions involving US federal income tax. These other accounting standards would include IFRS and country-specific generally accepted accounting standards.

The proposed schedule would be filed with Form 1120, "US Corporation Income Tax Return", or other business tax return, and would require:

- a concise description of each uncertain tax position for which the taxpayer or a related entity has recorded a reserve in its financial statements; and
- the maximum amount of potential federal tax liability attributable to each uncertain tax position (determined without regard to the taxpayer's risk analysis regarding its likelihood of prevailing on the merits).

In addition to those positions for which a tax reserve must be established under FIN 48 or other accounting standards, uncertain tax positions would include any position related to the determination of any federal income tax liability for which a taxpayer or a "related entity" has not recorded a tax reserve because (1) the taxpayer expects to litigate the position or (2) the taxpayer has determined that the IRS has a general administrative practice not to examine the position.

The future schedule would require a concise description of each uncertain tax position in "sufficient detail" so that the IRS could determine the nature of the issue. Such concise description would include the rationale for the position and a concise general statement of the reasons for determining that the position is an uncertain tax position, including:

- the Code sections potentially implicated by the position;
- a description of the tax year(s) to which the position relates;
- a statement that the position involves an item of income, gain, loss, deduction or credit against tax;
- a statement that the position involves a permanent inclusion or exclusion of any item, the timing of that item or both;
- a statement whether the position involves a determination of the value of any property or right; and
- a statement whether the position involves a computation of basis.

The schedule would also require a taxpayer to specify for each uncertain tax position the entire amount of federal income tax that would be due if the position were disallowed in its entirety on audit. This would be the maximum tax adjustment for the position reflecting all changes to items of income, gain, loss, deduction or credit if the position is not sustained.

3.3. Future guidance, requests for comments

Announcement 2010-9 states that the IRS anticipates publishing a notice of proposed rulemaking to provide that certain businesses required to make a return (including corporations required to make a return under Sec. 6012) will be required to file a form or schedule relating to the disclosure of uncertain tax positions as part of their return in accordance with the forms, instructions or other appropriate guidance.

The release also states that the IRS is evaluating additional options for penalties or sanctions to be imposed when a taxpayer fails to make adequate disclosure of the required information regarding its uncertain tax positions. One option being considered is to seek legislation imposing a penalty for failure to file the schedule or to make adequate disclosure.

4. IRS Directive on Total Return Swaps Used to Avoid Dividend Withholding Tax

The IRS Large and Mid-Size Business Division (LMSB) has posted on its website an Industry Director Directive concerning total return swaps used to avoid dividend withholding tax.[1] The LMSB Industry Director Directive[2] is intended to provide IRS field personnel with guidance and information document requests (IDRs) for uncovering and developing cases related to total return swap transactions that may have been executed in order to avoid tax with regard to US-source dividend income paid to non-resident alien individuals, foreign partnerships and foreign corporations.

4.1. Summary

The IRS explained that total return swap transactions have recently been identified as dividend withholding tax avoidance transactions pursuant to a new Tier I issue, "US Withholding Agents, Sec. 1441: Reporting and Withholding on US-source [fixed or determinable annual or periodical] income". Some taxpayers and withholding agents have contended that payments made in relation to certain transactions are foreign-source pursuant to Reg. Sec. 1.863-7 and, therefore, are not subject to US withholding tax and Form 1042-S reporting.

The new directive aims to provide guidance on developing facts for determining when a transaction that is, in form, a total return swap will be respected in substance as a notional principal contract, and when such a swap will be recharacterized in accordance with its substance as an agency agreement, repurchase agreement, lending transaction or some other form of economic benefit by the foreign entity or person.

The purpose of the new Industry Director Directive is to provide guidance for IRS teams examining the withholding tax obligations of US financial institutions (including US branches of foreign banks) that engaged in total return swap transactions with foreign entities or persons. IRS agents examining the income tax liabilities of such foreign entities or persons under Secs. 871 and 881, as well as the withholding liabilities, may use the new

1. LMSB-4-1209-044 (14 January 2010).
2. The text of the LMSB Industry Director Directive is available on the IRS website: http://www.irs.gov/businesses/corporations/article/0,,id=218225,00.html

guidance as a resource in the development of those cases. The IRS recommended that IRS personnel further coordinate and obtain guidance with the Technical Advisor and Industry Counsel for Hedge Funds and Private Equity Funds.

4.2. Examination guidance

The Industry Director Directive describes four factual situations, each of which presents a variation of a typical total return swap transaction. After describing the basic facts of each situation, the directive instructs the IRS field how to proceed with an examination of each situation. When an examination is warranted, the field is to develop facts:

- showing that the form of the total return swap must be disregarded for US federal income tax purposes; and
- supporting a legal conclusion that the foreign entity or person retained ownership of the reference securities for US federal income tax purposes even though the foreign entity or person may have transferred the legal title to such securities. .

The following four factual situations are representative examples of common variations of total return swap transactions:

- situation 1: cross-in/cross-out;
- situation 2: cross-in/IDB[3] out;
- situation 3: cross-in/foreign affiliate out; and
- situation 4: fully synthetic.

The IRS noted that certain transactions under examination may not fit exactly within any one of the four situations, and in such cases, the IRS agent is to use one or more of four situations and recommendations described in the directive to tailor its examination of the facts and circumstances of a specific transaction.

The directive provides a sample total return swap IDR template for each of the four situations.

5. D.C. Circuit Affirms Tax Court's Finding That Partnership Was a "Sham" but Reversed Findings Concerning Partner's Basis and Penalty Determinations

The US Court of Appeals for the D.C. Circuit issued a decision[4] in *Petaluma FX Partners, LLC v. Commissioner*, in which it affirmed the Tax Court's holding that it had jurisdiction to determine that a partnership involving a so-called Son of BOSS tax shelter was a "sham" and was to be disregarded for tax purposes. However, the D.C. Circuit reversed the Tax Court's findings that it had jurisdiction to determine that the individual partners had no outside basis in the partnership, and reversed and remanded the Tax Court's holding that it had jurisdiction to determine the application of accuracy-related penalties and valuation misstatement penalties in this case.

5.1. Background

The partnership (identified as a Son of BOSS tax shelter) was formed in 2000 to engage in foreign currency option trading transactions. The two individual partners contributed pairs of offsetting long and short foreign currency options, and increased their basis in the partnership to reflect the contributed long options, but did not reduce their basis in the partnership to reflect the partnership's assumption of their short options. When the partners liquidated their interests in the partnership, they claimed short-term capital losses that were used to offset long-term capital gains.

In 2005, the IRS issued a final partnership administrative adjustment (FPAA), disallowing all partnership items reported, and reducing the "outside partnership basis" (not originally reported on Form 1065) to zero (USD 0). The FPAA included a determination that the partnership had been formed solely for tax avoidance, was a sham and lacked economic substance. The IRS also determined that accuracy-related penalties applied.

The Tax Court determined that it had jurisdiction (1) to determine whether the partnership was to be disregarded for tax purposes, (2) to determine that the partners' outside bases were zero and (3) over the accuracy-related penalties. The Tax Court also determined that the gross valuation misstatement penalty applied when the adjusted basis was reduced to zero because a transaction was disregarded as a sham or lacking economic substance, and the taxpayer claimed an adjusted basis in the property of a greater amount.

5.2. D.C. Circuit

The D.C. Circuit affirmed the Tax Court's findings that it had jurisdiction to determine that the partnership was a sham, lacked economic substance and was to be disregarded for tax purposes because that determination qualified as a partnership item under the TEFRA[5] partnership proceedings.

Concerning the claim that the Tax Court erred in holding that it had jurisdiction to determine that the partners had no outside basis in the disregarded partnership, the D.C. Circuit held that outside basis is an "affected item" (to be determined at the individual partner level, and not a partnership item), and that the Tax Court had no right to determine that the partners' outside bases were zero. As the Court of Appeals noted, the Tax Court had jurisdiction to determine partnership items, but not affected items.

Turning to address the penalty contentions, the D.C. Circuit held that because the Tax Court lacked jurisdiction to determine outside basis, it also lacked jurisdiction to determine that penalties apply with respect to outside basis because those penalties did not relate to an adjust-

3. Inter-dealer broker.
4. 08-1356 (D.C. Cir. 12 January 2010).
5. Tax Equity and Fiscal Responsibility Act of 1982.

ment to a partnership item. As the Court of Appeals noted, penalties relating to adjustments to partnership items are to be determined at the partnership level, but not penalties relating to affected items. The D.C. Circuit noted that certain penalties might apply in this case, and thus remanded the case to the Tax Court for a determination of penalties.

6. IRS Provides Administrative Relief for Certain FBAR Filings Due on 30 June 2010; Addresses Signature Authority and Commingled Funds; Suspends FBAR Filing Requirement for Certain Non-US Persons

The IRS has issued the following guidance to clarify certain filing requirements for taxpayers that otherwise might be required to file Treasury Form TD F 90-22.1, "Foreign Bank and Financial Accounts" (known as FBAR) by 30 June 2010:

- Notice 2010-23 provides administrative relief to certain persons that otherwise might be required to file the FBAR for calendar year 2009 and earlier calendar years by addressing signature authority and commingled funds (see the discussion below);
- Announcement 2010-16 suspends, for persons that are not US citizens, US residents or domestic entities (e.g. US corporations, US partnerships, US trusts and US estates), the requirement to file the FBAR for 2009 and earlier calendar years. This announcement also states that all persons may rely on the definition of US person as contained in the July 2000 version of the FBAR instructions to determine if they have an FBAR filing obligation for 2009 and earlier years.

6.1. Signature authority

Persons with signature authority over, but no financial interest in, a foreign financial account for which an FBAR would otherwise have been due on 30 June 2010, had until 30 June 2011 to report those foreign financial accounts. This is a continuation of the relief provided last year in Notice 2009-62. The 30 June 2011 deadline applies to FBARs reporting foreign financial accounts over which the person has signature authority, but no financial interest, for the 2010 and prior calendar years. Notice 2010-23 provides that in completing an FBAR that is subject to these extension rules, persons must adhere to FBAR guidance in effect at the time the FBAR is filed (by 30 June 2011).

6.2. Certain foreign commingled funds

Persons with a financial interest in, or signature authority over, a foreign commingled fund that is a mutual fund must file an FBAR unless another filing exception (as provided in the applicable FBAR instructions or other relevant guidance) applies. The IRS will not interpret the term "commingled fund" as applying to funds other than mutual funds with respect to FBARs for calendar year 2009 and prior years. Notice 2010-23 also specifically provides that the IRS will *not* apply its enforcement authority adversely in the case of persons with a financial interest in, or signature authority over, any other foreign commingled fund with respect to that account for calendar year 2009 and earlier calendar years. *A financial interest in, or signature authority over, a foreign hedge fund or private equity fund is included in the administrative relief provided in the preceding sentence and is not required to be reported on the FBAR for calendar year 2009 and earlier calendar years.*

Notice 2010-23 does not address whether FBAR reporting related to a foreign commingled fund for 2010 was required to be filed by 30 June 2011. Presumably, it is expected that this issue will be addressed in guidance in effect in 2011.

6.3. FBAR-related questions on federal tax forms

Provided that there are no other reportable foreign financial accounts for the year in question, a taxpayer that qualifies for the filing relief provided in Notice 2010-23 is to put a checkmark in the "no" box in response to FBAR-related questions found on federal tax forms for 2009 and earlier years. (Such questions ask about the existence of a financial interest in, or signature authority over, a foreign financial account.)

7. Proposed Regulations Concerning FBAR Filing Requirements for Reporting Foreign Financial Accounts

The Treasury Department's Financial Crimes Enforcement Network (FinCEN) bureau released for publication in the Federal Register a notice of proposed rulemaking concerning proposed changes to the regulations implementing the Bank Secrecy Act with respect to reports of foreign financial accounts. The proposed changes would:

- clarify who must file reports of foreign financial accounts, and which accounts are reportable;
- exempt certain persons having signature authority (or other authority) over foreign financial accounts from having to file the reports; and
- include provisions intended to prevent US persons from avoiding the reporting requirements.

7.1. Background

The Bank Secrecy Act (codified under Titles 12 and 31 of the US Code) was enacted to address perceived abuses of foreign financial accounts, and authorized the Treasury Secretary to issue regulations requiring persons to keep records and file reports relating to such accounts. Under existing regulations, each person subject to the jurisdiction of the United States having a financial interest in (or signature or other authority over) a bank, securities or other financial account in a foreign country, must report certain information to the IRS.

The rules require that when the aggregate value of foreign financial accounts exceeds USD 10,000 during a calendar year, a Treasury form, "Foreign Bank and Financial Accounts", Form TD F 90-22.1, known as FBAR, must be filed by 30 June for accounts maintained during

the previous calendar year. Also, records must be maintained for a period of five years by any person having a financial interest in, or signature or other authority over, the account(s).

In 2003, enforcement authority for the FBAR was re-delegated to the IRS. Under this authority, in 2008, the IRS revised the FBAR form (Form TD F 90-22.1). The revised form expanded the definition of US person, and sought to clarify the scope of foreign financial accounts that triggered the FBAR filing requirements.

In response to comments, the IRS issued Announcement 2009-51, which addressed the 2008 reporting responsibility of non-US persons.

The IRS also issued Notice 2009-62, which extended the FBAR filing deadline for 2008 and earlier calendar years to 30 June 2010 for certain filers and requested comments concerning FBAR issues, including the following:

- when a person with signature authority but no financial interest in a foreign financial account would be relieved of filing an FBAR for the account;
- whether to expand the filing exemption currently available to officers and employees of banks and certain publicly traded companies when they have signature or other authority over their employer's account; and
- when an interest in a foreign entity would trigger an FBAR filing requirement.

7.2. Proposed rules: new definitions

The FinCEN notice of proposed rulemaking includes definitions of several terms, as follows.

US person. A citizen or resident of the United States or a domestic entity (including a corporation, partnership, trust or limited liability company, regardless of whether the entity has made an election to be disregarded for federal income tax purposes). A domestic entity for this purpose would be an entity organized in, or under the laws of, the United States. A US resident is defined by reference to Internal Revenue Code (the Code or IRC) Sec. 7701(b) and the accompanying regulations, but using the Title 31 definition of "United States" instead of the (Title 26) definition under the Code.

The proposed regulations adopt the more limited approach of past years as to who must file the FBAR by eliminating those persons "in and doing business in the United States" from reporting. Thus, this proposed change appears generally to eliminate the requirement under the current instructions of reporting by foreign persons.

Types of "reportable accounts". Bank, securities and other financial accounts in a foreign country, including an insurance policy with a cash value, an annuity policy, and a mutual fund or similar pooled fund that issues shares available to the general public with regular net asset value determinations and regular redemptions. The issue regarding whether hedge funds or other alternative investment funds would be treated as financial accounts for FBAR reporting purposes was "reserved" by Treasury.

These definitions are intended to clarify the scope of individuals and entities that would be required to file the FBAR and the types of accounts for which an FBAR must be filed.

Financial interest. The proposed rules state that US persons have a financial interest in each bank, securities or other financial account in a foreign country for which they are the owners of record or hold legal title, regardless of whether the account is maintained for their own benefit or for the benefit of others. If an account is maintained in the name of more than one person, each US person in whose name the account is maintained is deemed to have a financial interest in that account. The proposed rules address a financial interest when another is acting on behalf of the US person and other situations giving rise to a financial interest. The proposed rules include an anti-avoidance rule that deems a US person to have a financial interest in any account in a foreign country if the owner of record of that account is an entity created for the purpose of evading these rules.

7.3. Exception to the rules concerning signature or other authority

Under the proposed rules, certain exceptions from the FBAR requirements are provided for US persons having signature or other authority over reportable accounts. These exceptions generally apply to officers and employees of financial institutions that have a federal functional regulator (e.g. a bank that is examined by the Comptroller of the Currency) and certain entities that are publicly traded on a US national securities exchange or that otherwise must register with the US Securities and Exchange Commission (SEC) or Commodity Futures Trading Commission. Also, an exception is provided for an officer or employee of an "authorized service provider" with respect to a foreign financial account owned or maintained by an investment company (mutual fund) registered with the SEC.

These exceptions apply only when the office or employee has no financial interest in the reportable accounts. In addition, an officer or employee of a US subsidiary is exempt from reporting if the parent company's securities are traded on a US national securities exchange and the US subsidiary is included in the parent's consolidated FBAR report.

Lastly, special provisions in the proposed rules are intended to simplify FBAR filings in certain cases, including:

- when the US person has a financial interest in 25 or more foreign financial accounts;
- when consolidated reports may be filed by a US person owning directly or indirectly more than a 50% interest in an entity on behalf of itself and the other entity;
- when participants and beneficiaries in certain retirement plans are not required to file an FBAR; and

- when certain trust beneficiaries are not required to file if the trust, trustee or agent of the trust, files the FBAR for the trust.

8. Tax Court: Because Guaranty Was Provided from Mexico, Fees for Guaranty Were Mexican-Source Income and Not Subject to Withholding under Sec. 881(a)

The US Tax Court issued an opinion finding that guaranty fees paid by a US subsidiary to a Mexican corporation were not US-source income and therefore not subject to the 30% withholding rate that would apply under Sec. 881(a) with regard to fixed or determinable annual or periodical (FDAP) income.[6] The Tax Court concluded that such guaranty fees are like payments for a service and because the source of the service (the guaranty) was in Mexico, the fees for the guaranty were Mexican-source income and not subject to withholding.

A Mexican corporation charged one of its US subsidiaries a fee to guarantee the subsidiary's debts. For 1992, 1993 and 1994, guaranty fee payments of approximately USD 2.3 million, USD 1.9 million and USD 2.5 million, respectively, were made to the Mexican corporation, but the US entity did not withhold US income tax from the fees. The IRS determined that the US entity was to have withheld 30% of the guaranty fees paid to the Mexican company in 1992-94, pursuant to Sec. 881(a).

The Tax Court, however, determined that for the US taxpayer to be liable under Sec. 881(a), the guaranty fees must be (1) FDAP income and (2) received from a US source. There was no contention that the fees were FDAP income. The key question was whether the source of the income was the United States or Mexico.

Although there is guidance in the Code for sourcing interest and services, there is no specific rule regarding sourcing guaranty fees. As a result, courts have been forced to make determinations based on analogy. Determining that the guaranty fees were more like services than interest, the Tax Court applied the sourcing rule applicable to service fees. Because the guaranty was provided from Mexico, the Tax Court held that the fees for the guaranty were Mexican-source income, and therefore, the taxpayer was not required to withhold 30% of the guaranty fees under Sec. 881(a).

9. Tax Treaty Update: Discussion of Provisions in United States–Chile Income Tax Treaty

On 3 February 2010, representatives of the governments of the United States and Chile signed an income tax treaty and protocol, which is the first income tax treaty between the two countries.

This treaty must be approved by the US Senate, and under the legislative process in Chile, before it will enter into force.

The United States has only two income tax treaties in force with countries in Latin America, namely Mexico (1993) and Venezuela (1999). The United States–Chile treaty clearly represents a new direction in US tax treaty policy toward Latin America because of the numerous departures from the 2006 US Model Income Tax Convention, especially with regard to the taxation of income by the source state. The treaty with Chile is likely to pave the way for additional US income tax treaties with countries in Latin America.

Some of the more noteworthy items included in the United States–Chile income tax treaty (the Treaty) are described below.

9.1. Permanent establishment: Art. 5

A building site or construction or installation project, or a drilling rig or ship used for the exploration of natural resources, creates a permanent establishment if the activity lasts for more than six months. The 2006 US Model Convention specifies 12 months as the threshold.

The Treaty expands the 2006 US Model's definition of permanent establishment to include the performance of certain personal services in a state by an enterprise of the other state for an aggregate period of 183 days during any 12-month period. The provision is broader than the corresponding provision contained in the 1980 United States–Canada income tax treaty and the commentary to the 2008 OECD Model Income Tax Convention.

For example under the United States–Canada treaty, the performance of services can create a permanent establishment for an enterprise only if either:

- an individual is present in the state to perform services for at least 183 days during any 12-month period and during that period, more than 50% of the gross active business revenue of the enterprise is derived from the performance of such services by that individual; or
- the services performed in the other state are provided for at least 183 days during any 12-month period, and they are performed with respect to the same or connected project for customers that are either resident in the source country or have a permanent establishment in the source country and such services are provided in respect of the permanent establishment.

The United States–Chile treaty's services permanent establishment rule does not contain either of these limiting clauses. Thus, the Treaty will create a permanent establishment under a broader array of fact patterns (e.g. when the services constitute a small percentage of an enterprise's business or when the services are provided for different projects or clients).

The Treaty includes a rule (not found in the 2006 US Model) that makes an installation for the on-land exploration of natural resources (e.g. a drilling rig) a permanent establishment if it continues for more than three months. This provision is apparently aimed at permit-

6. *Container Corp. v. Commissioner*, 134 T.C. No. 5 (17 February 2010).

ting Chile to tax companies that provide drilling services in Chile.

9.2. Business profits: Art. 7

The text of Art. 7 of the Treaty generally follows the language in older versions of the OECD Model. However, the protocol to the Treaty adds a final sentence to para. 2:

> Business profits to be attributed to the permanent establishment shall only include the profits derived from the *assets or activities* of the permanent establishment. [emphasis added]

The 2006 US Model includes a similar final sentence in para. 2:

> For this purpose, the profits to be attributed to the permanent establishment shall include only the profits derived from the *assets used, risks assumed and activities performed* by the permanent establishment. [emphasis added]

This language in the 2006 US Model is intended to permit application of the "authorized OECD approach" for attributing profits to a permanent establishment.[7] Observers believe that the language in the protocol was likely to be intended to permit the use of the authorized OECD approach to determine the profits attributable to a permanent establishment under the Treaty.

Art. 7(8) provides that the United States may impose an excise tax on insurance premiums paid to foreign insurers, and that Chile may impose an excise tax on insurance policies contracted with foreign insurers. The Treaty permits taxes in excess of the rates specified in Sec. 4371 of the IRC (2% in the case of reinsurance premiums and 5% in all other cases).

9.3. Dividends: Art. 10

The Treaty follows the 2006 US Model with regard to the taxation of dividends. The source state generally may impose a 15% tax on dividends. This rate is reduced to 5% if the beneficial owner of the dividends directly owns at least 10% of the voting stock of the payer. Dividends paid to pension funds are tax exempt. The Treaty, as amended by para. 14 of the protocol, follows the 2006 US Model with regard to dividends paid to regulated investment companies (RICs) and real estate investment trusts (REITs).

Art. 10(7) permits the source state to impose a branch profits tax on a company resident in the other state at a rate of 5%, provided that the company conducts business through a permanent establishment in the source state. However, Chile does not have a branch profits provision.

Paras. 12 and 13 of the protocol contain some limitations on the application of the Treaty's dividends article with regard to certain Chilean corporate taxes. With two exceptions, para. 12 provides that certain paragraphs of the Treaty's dividends articles (e.g. reduced withholding tax rates and branch profits tax) do not apply to the second level of Chile's two-level income tax on business profits, when the first level is creditable against the second.

The first exception provides that if Chile amends its two-level income tax so that there is no longer a credit mechanism, the Treaty's dividends article will become fully applicable to the second-level tax. The second exception provides that if Chile's second-level tax rate exceeds 35%, the dividends article will apply such that any income tax withholding does not exceed 15% of the gross amount of the dividends paid.

Para. 13 states that the Treaty's dividends article does not apply to dividends paid by an enterprise when the investment is subject to a foreign investment contract under Chile's Foreign Investment Statute.[8]

9.4. Interest: Art. 11

Unlike the 2006 US Model, the Treaty permits the source state to tax interest. The Treaty permits a 4% withholding tax rate when the lender is: a bank; an insurance company; an enterprise in the finance or lending business; an enterprise that sells machinery on credit when the interest is paid with respect to a sale of machinery on credit; or certain other debt-financed lenders. Chilean domestic law provides for a similar 4% withholding rate for loans provided by foreign banks or foreign financial institutions.

In all other cases, during the first five years during which the Treaty is in force, the withholding tax rate is 15%; thereafter, this rate drops to 10%. Contingent interest is subject to a 15% withholding tax rate.

The interest article includes a unique anti-conduit provision, under which interest is subject to a 10% withholding tax if the interest is paid pursuant to a "back-to-back loan" or similar arrangement.

9.5. Royalties: Art. 12

The Treaty departs from the 2006 US Model and permits a tax at source of 2% for royalties paid for the right to use industrial, commercial or scientific equipment. Royalties paid for the right to use other types of intellectual property (e.g. copyrights, patents, trademarks and "other like intangible property") are taxable at 10%.

Gain from the disposition of property giving rise to royalties is subject to tax at source at the rates described above, provided that the gain is contingent on productivity, use or disposition of the property.

Of necessity, the Treaty provides a source rule for royalties that is similar to the rule contained in the 1989 United States–India income tax treaty. The rule departs from US law and makes the residence of the payer (not the place of use of the intellectual property) the primary rule for determining the source of a royalty.

7. The OECD has proposed a revised version of Art. 7 which would further describe the authorized OECD approach and which would significantly change the language of para. 2.
8. DL 600.

9.6. Capital gains: Art. 13

The 2006 US Model exempts gains from tax at source, with the exception of gains from the disposition of real property interests (i.e. it preserves the US right to tax under Sec. 897) and gains from the disposition of property attributable to a permanent establishment.

The Treaty permits the source state to tax gains from the disposition of shares, and "other rights" of a company resident in that state at a 16% rate, in certain cases (the "share gain tax"). The provision is applicable to gains on the disposition of shares of a Chilean company because the United States has no general tax on the sale of shares of US companies. Art. 13 provides an exemption from this tax for:

- pension funds;
- certain mutual funds and other "institutional investors" that sell shares on a recognized stock exchange in Chile; and
- other investors in shares of a Chilean company that buy and sell the shares on a recognized stock exchange in Chile.

These exceptions do not apply to a majority shareholder and certain major holders of other rights (e.g. warrants).

Under US sourcing rules, income from the sale of personal property is sourced to the residence of the seller. However, para. 5 of Art. 23 (relief from double taxation) of the Treaty provides that when an item of gross income is subject to source state taxation, such item is sourced to that country. Therefore, US persons subject to the Chilean share gain tax ought to receive a domestic foreign tax credit for any share gain tax paid.

9.7. Limitation on benefits: Art. 24

The Treaty includes all of the various limitation on benefits provisions found in the 2006 US Model, with the following additions:

- *headquarters companies*: Art. 24(2)(d) provides the benefits of the Treaty to a "headquarters company". A nearly identical provision is included in the US income tax treaty with the Netherlands; and
- *triangular provision*: Art. 24(5) addresses income derived through a permanent establishment located in a country other than the United States or Chile. Generally, if the combined rate of tax in the permanent establishment state and the residence state is less than 60% of the tax that would have been payable in the residence state if the income were earned in the residence state, then the source state may tax the income at a 15% rate in the case of interest, dividends and royalties and under its domestic law with respect to other types of income. A similar provision is included in the United States–Switzerland income tax treaty.

9.8. Mutual agreement procedure: Art. 26

The Treaty follows the 2006 US Model and does not contain an arbitration provision. In this regard, it is unlike many recent US income tax treaties.

9.9. Limited most favoured nation provision (protocol)

Para. 22 of the protocol provides that if Chile concludes an income tax treaty that provides for a lower withholding tax rate for interest or royalties, or further limits the right of the source country to tax capital gains, the United States may initiate discussions to conclude a protocol that will provide such lower rates or limitations.

9.10. Ratification process

In the United States, ratification requires that a signed income tax treaty be forwarded to the Senate for advice and consent to ratification. The treaty is then referred to the Senate Foreign Relations Committee for consideration. A public hearing for the treaty is typically held. The Senate Foreign Relations Committee must report the treaty out of the committee with a recommendation to the full Senate. Once the full Senate has approved the treaty, the tax treaty is referred to the US State Department where the Instrument of Ratification is drafted and forwarded to the President for signature.

A provision in the Treaty provides that the United States and Chile will notify each other in writing, through diplomatic channels, when the ratification procedures are completed in each country. The Treaty will then enter into force on the date of the later of these notifications.

9.11. Effective dates

Once it enters into force, the Treaty's provisions will be effective:

- in respect of taxes withheld at source: for amounts paid or credited on or after the first day of the second month following the date on which the treaty enters into force; and
- in respect of other taxes: for tax periods beginning on or after 1 January of the calendar year immediately following the date on which the treaty enters into force.

10. IRS Provides Safe Harbour for Like-Kind Exchanges When Qualified Intermediary Defaults on Obligation to Acquire and Transfer Replacement Property to the Taxpayer

Rev. Proc. 2010-14 provides a safe harbour method of reporting gain (or loss) for certain taxpayers that initiate deferred like-kind exchanges under Sec. 1031, but fail to complete the exchange because the qualified intermediary defaults on its obligation to acquire and transfer replacement property to the taxpayer.

10.1. Reason for guidance

Rev. Proc. 2010-14 notes that there are situations when taxpayers initiated like-kind exchanges by transferring relinquished property to a qualified intermediary, but were unable to complete these exchanges within the exchange period solely because the qualified intermediary failed to acquire and transfer replacement property to the taxpayer (referred to by the IRS as a "qualified

intermediary default"). The IRS explained that in many of these qualified intermediary default situations, the qualified intermediary entered into bankruptcy or receivership, thereby preventing the taxpayer from obtaining immediate access to the proceeds of the sale of the relinquished property.

The view of the IRS is that a taxpayer which, in good faith, sought to complete the exchange using the qualified intermediary, but failed to do so because the qualified intermediary defaulted on the exchange agreement and became subject to a bankruptcy or receivership proceeding, ought not be required to recognize gain from the failed exchange until the tax year when the taxpayer receives a payment attributable to the relinquished property.

10.2. Revenue Procedure 2010-14

An eligible taxpayer may report gain realized on the disposition of the relinquished property as the taxpayer receives payments attributable to the relinquished property using the "safe harbour gross profit ratio method". Rev. Proc. 2010-14 defines an eligible taxpayer as one which:

- transferred property to a qualified intermediary pursuant to a Sec. 1031 like-kind exchange transaction;
- properly identified replacement property within the identification period (unless the qualified intermediary default occurs during that period);
- did not complete the like-kind exchange solely because of a qualified intermediary default (involving a qualified intermediary that becomes subject to a bankruptcy proceeding or a receivership proceeding under federal or state law); and
- did not have actual or constructive receipt of the proceeds from the disposition of the relinquished property or any property of the qualified intermediary before the time when the qualified intermediary entered the bankruptcy or receivership.

If a qualified intermediary defaults on its obligation to acquire and transfer replacement property, the IRS will treat the taxpayer as not having actual or constructive receipt of the proceeds during that period, provided that the taxpayer reports gain in accordance with the rules provided in Rev. Proc. 2010-14.

In general, gain will be recognized on the disposition of the relinquished property only as required under the safe harbour gross profit ratio method described in the revenue procedure. Under this method, the portion of any payment attributable to the relinquished property that is recognized as gain is determined by multiplying the payment by a fraction, the numerator of which is the taxpayer's gross profit and the denominator of which is the taxpayer's contract price.

Rev. Proc. 2010-14 defines several terms for purposes of applying the safe harbour gross profit ratio method, including: payment attributable to the relinquished property; gross profit; selling price; contract price; and satisfied indebtedness. The revenue procedure also sets forth rules for the treatment of satisfied indebtedness in excess of basis and the treatment of recapture income; the calculation of the amount of maximum gain to be realized and any loss deduction; as well as imputed interest determinations.

11. FASB Clarifies Embedded Credit Derivative Scope Exception

The FASB issued Accounting Standards Update 2010-11, "Scope Exception Related to Embedded Credit Derivatives", to clarify how embedded credit derivative features should be analysed to determine whether those features should be accounted for separately. However, some of the ASU's guidance may be subject to different interpretations. Previously it was understood that ASU 2010-11 required investors to bifurcate and separately account for all embedded credit derivative features, including those related to subordination of one financial instrument to another, when a new credit risk is added to a securitization structure (e.g. through a credit default swap). However, based on informal discussions with the FASB staff, it is now understood that the FASB intended that an embedded credit derivative feature related to subordination would always meet the embedded credit derivative scope exception, excluding circumstances where a holder of an interest in a tranche of a securitized financial instrument may be required to make additional payments to the issuing entity. If there is no possibility that a tranche holder could be required to make additional payments to the issuing entity, and the instrument includes both an embedded credit derivative feature created by subordination and an embedded credit derivative feature related to another type of credit risk, such as a written credit default swap, the embedded credit derivative feature created by subordination meets the scope exception and is not required to be evaluated for separation. The embedded credit derivative feature related to another type of credit risk must be evaluated for separation.

12. Non-Performing Loans

The IRS Large and Mid-Size Business (LMSB) division released an Industry Director's Directive, LMSB-4-0110-003, "Tier II issue–Non-Performing Loans Directive #1".[9] At issue is when a regulated bank may stop accruing interest on non-performing loans for tax purposes. This directive includes as an attachment a list of eight IDRs for use by IRS agents.

12.1. Background: Issue tiering

Under the LMSB Industry Issue Focus Strategy, Tier I issues are of high strategic importance to the LMSB and have significant effect on one or more industries. Tier I issues may include areas involving a large number of taxpayers, significant dollar risk, substantial compliance

9. The text of the Directive, which was posted on 17 March 2010, is available electronically on the IRS website: http://www.irs.gov/businesses/article/0,,id=220451,00.html.

risk or high visibility, when there are established legal positions and/or LMSB direction.

The Industry Issue Focus Strategy also provides for Tier II issues; these are issues of "significant compliance risk" and reflect areas of potentially high non-compliance and/or significant compliance risk to LMSB or an industry. Tier II can include emerging issues for which the law is fairly well established, but there is a need for further development, clarification, direction and guidance on LMSB's position.

Tier III issues are those issues that represent high compliance risks for a particular industry and that may require unique treatment for an industry.

12.2. Overview

According to the new LMSB directive, the timing of when a regulated bank may stop accruing interest on non-performing loans for tax purposes involves a difficult and time-consuming loan-by-loan analysis (previously the subject of a Coordinated Issue Paper). The IRS explained that interest stops accruing on non-performing loans for tax purposes only when, at the time the interest becomes due, that interest is determined to be uncollectible or the underlying loan is determined to be worthless. The IRS further noted that in connection with determining when a regulated bank may stop accruing interest on non-performing loans for tax purposes, the IRS needs to "be concerned on audit with the treatment of accrued but unpaid interest and the application of any payments after a loan is placed in non-accrual status for regulatory purposes",[10] as some regulated banks may be following regulatory accounting for tax.

As the release states, once a loan is placed in non-accrual status for regulatory purposes, some regulated banks may be reversing any accrued but unpaid interest for both regulatory and tax purposes, instead of continuing to include this interest in income as required for tax purposes. Also, some regulated banks may be applying any subsequent payments on their non-accrual loans to principal, instead of applying these subsequent payments first to any outstanding interest as required for tax purposes.

The directive notes that Rev. Rul. 2007-32 and Rev. Proc. 2007-33 were released to address these issues, and that Rev. Rul. 2007-32 reaffirmed the IRS position regarding the accrual of interest on non-performing loans by regulated banks. Also, under Rev. Rul. 2007-32, a regulated bank under the conformity election for bad debts as provided for in Reg. Sec. 1.166-2(d), stops accruing interest on loans placed in non-accrual status for regulatory purposes and obtains a bad debt deduction for previously accrued but unpaid interest, when that interest is reversed for regulatory accounting purposes. Under Rev. Proc. 2007-33, regulated banks may elect a safe harbour method of accounting where they can limit the amount of unpaid interest on non-performing loans that they must accrue for tax purposes based on a "recovery percentage".

The directive indicates that the issue of non-performing loans must be considered on all examinations of a regulated bank that utilizes the accrual method for tax accounting purposes. Once a determination has been made that the issuer warrants further consideration, materiality thresholds must be established and, if the issue is selected for examination, the Banking Technical Advisor should be contacted for advice and assistance to ensure consistent and uniform treatment.

The directive identifies audit techniques, including the issuance of an information document request, and provides a format for the information document request.

13. Amounts Paid to Settle Lawsuits Concerning Acquisitions Are Capital Expenditure, Not Ordinary Expense

In *WellPoint, Inc. v. Commissioner*, the US Court of Appeals for the Seventh Circuit held that a taxpayer's payments of over USD 113 million to settle lawsuits filed by states' attorneys general with regard to the taxpayer's acquisitions of certain health insurance companies (and the related legal fees) were capital expenditures that could not be deducted as ordinary and necessary business expenses.[11]

13.1. Background

In the 1990s, the taxpayer (a for-profit seller of health insurance policies through subsidiaries that include a number of Blue Cross Blue Shield insurance companies) acquired three health insurance companies (one each located in Connecticut, Kentucky and Ohio). At the time, the companies were mutual insurance companies, so the mergers had no tax consequences. However, the acquired companies had been formed many years earlier as non-profit entities to provide health-related benefits on a charitable basis.

After the acquisitions, the attorneys general of the three states sued the taxpayer, alleging that it was using the acquired assets to make profits (in violation of the restrictions that the charitable status had placed on the acquired companies' use of their assets). The cases were eventually settled with the taxpayer, which paid over USD 113 million to the three states.

The taxpayer claimed a deduction for the settlement payments (and the related legal expenses) on its income tax return. The IRS, however, disallowed the taxpayer's claimed deductions as "ordinary and necessary" business expenses. The Tax Court upheld the IRS' disallowance, finding that the settlement payments were capital expenditures. The taxpayer filed an appeal with the Seventh Circuit.

13.2. Seventh Circuit's decision

The Seventh Circuit affirmed the Tax Court's opinion.

10. Id.
11. 09-3163 (7th Cir. 23 March 2010).

First, the Seventh Circuit addressed the standard for appellate review in this case, noting that decisions on "pure issues of law" (including the meanings of "ordinary and necessary business expense" and "capital expenditure") are subject to plenary review, unlike findings of fact, which are reviewed simply for clear error. The Court of Appeals stated that the instant proceeding was not a case for which the standard of review would determine the outcome, but that it would affirm the Tax Court's opinion under either standard.

Next, the Court of Appeals turned to explain the difference between a capital expenditure and an ordinary and necessary business expense by using a series of examples. Noting similarities among the examples and the expenses at issue in this case (expenses incurred in defending a lawsuit), the Seventh Circuit agreed with the government that the taxpayer was defending its title to the acquired assets and, as such, these expenses were not ordinary expenses. The Court found that the expenses were incurred to defend the taxpayer's property acquisitions (i.e. to claim to own the assets free and clear) and, as such, were capital expenditures.

14. US, Dutch Competent Authorities Revise Qualification Procedures for US Tax-Exempt Trusts, Companies and Organizations for Claiming Tax Treaty Benefits

A recently released agreement of the competent authorities of the United States and the Netherlands concerns the qualification certification procedure used by certain US tax-exempt trusts, companies and other organizations for claiming benefits from the Netherlands under Art. 35 (Exempt Pension Trusts) of the United States–Netherlands income tax treaty.[12]

14.1. Background

Under a 2007 mutual agreement procedure, a US trust, company or other organization that qualifies for benefits under Art. 35 may request treaty benefits from the Netherlands under the exemption method, by supplying IRS Form 6166, Certification of US Tax Residency, or a "qualification" certificate issued by the Dutch competent authority.

14.2. Changes to 2007 mutual agreement procedure

The new agreement amends the 2007 mutual agreement procedure by providing that a US tax-exempt trust, company or other organization may no longer apply for and receive a qualification certificate from the Dutch tax authorities after 31 March 2010.

US entities that received a "qualification" certificate may continue to claim treaty benefits under the certification for a three-year period beginning 1 April 2010, provided that there is no material change in the facts and circumstances. All other entities must provide Form 6166 to claim treaty benefits after 31 March 2010. US entities can obtain IRS Form 6166 by submitting Form 8802, "Application for US Residency Certification".

15. IRS Releases Draft Schedule UTP and Draft Instructions for Reporting Uncertain Tax Positions

Announcement 2010-30 announces the release of a draft schedule (Schedule UTP, "Uncertain Tax Positions Statement") and related draft instructions for use by those taxpayers required to report uncertain tax positions on their tax returns. The IRS invited public comment on the draft schedule and instructions, which will be finalized after the IRS receives and considers comments on the overall proposal and the draft schedule and instructions. Comments were due 1 June 2010.

15.1. Background

Issued in late January 2010, Announcement 2010-9 stated that the IRS was developing a schedule that would require certain taxpayers to provide information about their uncertain tax positions that affect their US federal income tax liability. Subsequently, in early March 2010, the IRS released Announcement 2010-17, which stated that the filing of a new schedule for reporting uncertain tax positions pursuant to FIN 48 (or other accounting standards, such as IFRS) would apply for returns relating to calendar year 2010 and for fiscal years that begin in 2010.

15.2. Affected taxpayers and others

Schedule UTP requires the reporting of a corporation's federal income tax positions for which the corporation or a related party has recorded a reserve in an audited financial statement. Schedule UTP also requires the reporting of tax positions taken by the corporation in a tax return for which a reserve has not been recorded by the corporation or a related party based on an expectation to litigate or an IRS administrative practice.

Announcement 2010-30 provides that beginning with the 2010 tax year, the following taxpayers with *both* uncertain tax positions and assets equal to or exceeding USD 10 million will be required to file Schedule UTP if they (or a related party) issued audited financial statements:

- corporations required to file a Form 1120, "US Corporation Income Tax Return";
- insurance companies required to file a Form 1120 L, "US Life Insurance Company Income Tax Return" or Form 1120 PC, "US Property and Casualty Insurance Company Income Tax Return"; and
- foreign corporations required to file Form 1120 F, "US Income Tax Return of a Foreign Corporation" (even if filing protective returns).

For the 2010 tax year, the IRS will not require a Schedule UTP from taxpayers filing Form 1120 other than those

12. The Competent Authority Agreement is available on the IRS website: www.irs.gov/pub/irs-utl/dutch_certification_pensions_agreement.pdf. The text of the United States–Netherlands income tax treaty is available electronically on the IRS website: www.irs.gov/businesses/international/article/0,,id=169565,00.html.

identified above (including real estate investment trusts or regulated investment companies, pass-through entities and tax-exempt organizations). Announcement 2010-30 states that the IRS will determine the timing of the requirement to file Schedule UTP for these entities after comments have been received and considered.

15.3. Reporting current year and prior year tax positions

The draft instructions provide that tax positions taken by a corporation:

- in the current year's tax return for which the decision whether to record the reserve was made at least 60 days before filing the tax return, are reported on Part I of Schedule UTP; and
- in a prior year's tax return for which the decision whether to record the reserve was made at least 60 days before filing the tax return, are reported on Part II of Schedule UTP.

According to the draft instructions, a corporation is not required to report a tax position it has taken in a prior tax year if the corporation reported that tax position on a Schedule UTP filed with a prior-year tax return. If a transaction results in tax positions taken in more than one tax return (and a decision whether to reserve has been made), the tax positions arising from the transaction must be reported on Part I of the Schedule UTP attached to each tax return in which a tax position resulting from the transaction is taken (regardless of whether the transaction or a tax position resulting from the transaction was disclosed in a Schedule UTP filed with a prior year's tax return).

The draft instructions provide that a taxpayer is not to report a tax position on Schedule UTP before the tax year in which the tax position is taken in a tax return by the corporation.

15.4. How to calculate the maximum tax adjustment

The draft instructions provide that the maximum tax adjustment for a tax position taken in a tax return is an estimate of the maximum amount of potential US federal income tax liability associated with the tax year for which the tax position was taken. The minimum tax adjustment is determined on an annual basis:

- for tax positions that relate to items of income, gain, loss and deduction, taxpayers are to estimate the total amount in dollars and multiply by 0.35 (35%); and
- for items of credit, taxpayers are to estimate the total amount of credit in dollars.

Taxpayers then are to combine the dollar estimates related to all applicable items of income, gain, loss, deduction and credit to determine the minimum tax adjustment of that tax position. The minimum tax adjustment does not include interest or penalties. The effects of a tax position on state, local or foreign taxes are disregarded when computing the minimum tax adjustment.

Each item of income, gain, loss, deduction or credit relating to a tax position taken in a tax return is determined separately and may be offset only by other such items relating to that tax position.

15.5. Determination of maximum tax adjustment for valuation and transfer pricing tax positions

The draft instructions provide that a determination of a maximum tax adjustment amount is not required for valuation or transfer pricing tax positions. Instead, the minimum tax adjustment reporting requirement is satisfied by indicating whether the tax position is a valuation or a transfer pricing tax position, and by providing a ranking of these tax positions based on either the amount recorded as a reserve for US federal income tax for that tax position taken in the tax return, or the estimated adjustment to federal income tax that would result if the tax position taken in the tax return is not sustained.

For valuation and transfer pricing tax positions that relate to items of income, gain, loss or deduction, taxpayers may alternatively estimate the total amount in dollars and multiply by 0.35 (35%). The corporation may choose either method, and is not required to describe the method chosen or report the reserve or adjustment amounts for the reported positions.

The method selected must be consistently applied to all valuation tax positions and transfer pricing tax positions reported on this schedule. The rankings are to be done separately for the valuation tax positions and the transfer pricing tax positions.

15.6. Coordination with other filings

Announcement 2010-30 indicates that the IRS is reviewing the extent to which the proposed Schedule UTP duplicates other reporting requirements, such as Form 8275, "Disclosure Statement"; Form 8275-R, "Regulation Disclosure Statement"; Form 8886, "Reportable Transaction Disclosure Statement; and Schedule M-3, "Net Income (Loss) Reconciliation for Corporations with Total Assets of $10 Million or More".

The draft instructions state that a taxpayer will be treated as having filed a Form 8275 or Form 8275-R for tax positions that are properly reported on Schedule UTP.

Announcement 2010-30 states that the IRS is considering other circumstances under which a tax position reported on Schedule UTP need not be separately reported elsewhere on the tax return or another disclosure statement.

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