

## Dividends

### **Tax Code Section 871(m) Needs Reworking In Any Tax Overhaul, JCT Lawyer Says**

**C**ongress should reconsider tax code Section 871(m) on dividend equivalents if it undertakes any broad overhaul of the U.S. tax system, a Joint Committee on Taxation attorney said.

Speaking Jan. 8 at a Practising Law Institute tax program on financial products and transactions, Viva Hammer, a legislation counsel on the committee staff, said that any “tax reform” package needs to include a look at Section 871(m), which she said was drafted hastily and is “widely disliked.”

Hammer noted that she was stating her own views and not those of any members of the committee, a bipartisan bicameral panel.

Enacted in 2010, Section 871(m) is intended to shut down deals that use instruments such as securities loans, sale-repurchase transactions, specified notional principal contracts or specified equity-linked instruments to avoid U.S. requirements that dividends paid from sources within the U.S. be subject to a 30 percent withholding tax.

Final rules on dividend equivalents under Section 871(m) are due in the near term, IRS officials have said recently. The rules (REG-120282-10) were proposed in December 2013 (234 DTR GG-1, 12/5/13).

Going beyond the specifics of the IRS proposal, Hammer called for an effort to return to “first principles” to answer unresolved basic questions surrounding the unrelated business income tax (UBIT), withholding tax and how derivative income should be sourced.

If the goal is to capture cross-border tax flows, she said, a “principles-based” approach is needed to improve on current law, which she said was enacted hurriedly in response to press reports of corporations formed in tax havens using short-term swaps to avoid withholding on dividends from U.S. equities.

**Suggesting Ideas as ‘Starting Point.’** “Congress needs to think about what is the problem it is seeking to address,” Hammer said. She suggested four ideas as a “starting point for a principles-based approach.”

The first idea, she said, would be to source derivative flows with the payor.

Second, she said, the new approach would “treat foreign taxpayers trading in derivatives with U.S. counterparties as engaged in a U.S. trade or business and the derivative flow as effectively connected with the U.S. business.” Under the tax overhaul proposal offered in the last Congress by then-House Ways and Means Committee Chairman Dave Camp (R-Mich.), she added, mark-to-market would potentially be imposed.

Third, there would be a minimum threshold of what constitutes a U.S. trade or business, she said.

Fourth, she said, counterparties resident in countries that have tax treaties with the U.S. would be able to obtain treaty relief under the article for business profits or other income.

“These are just ideas,” Hammer said. “I’m not suggesting there are members of Congress behind them.”

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