UPDATES & OTHER TIDBITS

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FINCEN EXTENDS REQUIRED DISCLOSURES FOR ALL-CASH REAL ESTATE TRANSACTIONS

On July 27, 2016, the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") expanded the reach of previously published Geographic Targeting Orders ("G.T.O.'s").[1] These orders relate to possible money laundering in connection with purchases of U.S. real property when the purchaser uses no mortgage financing to fund the purchase.[2] The Treasury is concerned that individuals purchase U.S. real property in all-cash transactions to conceal the proceeds of unreported income and to hide the true identity of the owner.

The previous G.T.O. required U.S. title insurance companies to identify the "beneficial owners" of L.L.C.'s, partnerships, corporations, and other similar entities that purchase residential real property in certain geographical areas, in all-cash transactions in excess of specified thresholds. The new G.T.O adds other U.S. locations and sets a new expiration date of February 23, 2017.

The G.T.O. applies to both U.S. and non-U.S. entities.[3] While the G.T.O. targets all-cash purchases,[4] it does not include transactions where the purchase is made through bank financing, as the Treasury believes that enough information is disclosed in the mortgage application process. The G.T.O. also does not include transactions where a title insurance company is not involved or where the purchase is made via wire transfer.

The following table provides a listing of the applicable thresholds on a location-by-location basis:

State	Borough/County	Purchase Price
N.Y.	Manhattan	$3,000,000

1 The previous G.T.O. was effective as of March 1, 2016 and was set to expire on August 27, 2016. U.S. Department of the Treasury, FinCEN, *Geographic Targeting Order*, Jan. 13, 2016, §III(B).

2 U.S. Department of the Treasury, FinCEN, "FinCEN Takes Aim At Real Estate Secrecy in Manhattan and Miami," news release, Jan. 13, 2016.

3 U.S. Department of the Treasury, FinCEN, *Geographic Targeting Order*, July 22, 2016, §III(A)(1)(ii).

4 *Id.*, (2)(iv). An all-cash purchase includes purchases made using currency, a cashier's check, a certified check, a traveler's check, a personal check, a business check, or a money order in any form.

State	Borough/County	Purchase Price
N.Y.	Brooklyn, Queens, the Bronx, Staten Island	$1,500,000
T.X.	Bexar County	$500,000
C.A.	San Francisco County, San Diego County, San Mateo County, Santa Clara County, Los Angeles County	$2,000,000
F.L.	Broward County, Palm Beach County, Miami-Dade County	$1,000,000

When these thresholds are met, the title company must report the beneficial owner's identity if the individual owns, directly or indirectly, 25% or more of the equity interests of the purchasing entity.[5] Information about the title company, the purchasing entity, the identity of the purchaser's representative, and details about the actual transaction must also be provided.[6] This information is provided by title companies on FinCEN Form 8300, which must be filed within 30 days of the closing date of the purchase.[7]

Considering that the program was recently expanded, future expansions of the program are likely.

EUROPEAN STATE AID – SOCCER CLUBS TO PAY

On July 4, 2016, the European Commission found that seven Spanish soccer clubs (Real Madrid, FC Barcelona, Valencia, Athletic Bilbao, Elche, Hércules, and Altético Osasuna) had unlawfully received tax breaks and financial guarantees that constituted State Aid from Spain. The decision followed three separate inquiries that resulted in the Commission ordering Spain to recover over €30 million from the clubs.

The first investigation concerned tax privileges in favor of four soccer clubs which were granted a 5% reduction of their corporate tax rate for about 20 years. The unfair aid included "nonprofit" tax status.

The second inquiry concerned a land transfer between Real Madrid and the city of Madrid which was overvalued by more than €18 million. Lastly, the investigation concerned guarantees given by the state-owned Valencia Institute of Finance for loans taken by three soccer clubs which were not financially sound at the time.

Margrethe Vestager, European Commissioner for Competition, stated that these measures were taken to preserve a level playing field for the majority of professional

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5 U.S. Department of the Treasury, FinCEN, *Frequently Asked Questions*, Feb. 1, 2016, Question 2.

6 *Geographic Targeting Order*, July 22, 2016.

7 Form 8300 can be found here: https://www.irs.gov/pub/irs-pdf/f8300.pdf.

clubs who have to operate without subsidies. She further stated:

> Professional football is a commercial activity with significant money involved and public money must comply with fair competition rules. The subsidies we investigated in these cases did not.

"The European Commission found that seven Spanish soccer clubs . . . unlawfully received tax breaks and financial guarantees that constituted State Aid from Spain."

SPANISH DECISION TO PAVE THE WAY FOR HIGH-PROFILE RULINGS

The European Court of Justice ("E.C.J.") is due to rule on certain other Spanish tax break cases by the end of 2016. It is very possible that the Commission is waiting for the ruling before issuing decisions involving high-profile U.S. companies that have been the subject of State Aid investigations over the past several years. These companies include Apple, Amazon, and Starbucks.

In 2007, the Commission found that Spain was allowing tax breaks for Spanish companies investing in non-Spanish companies and opened an investigation. The inquiry concluded that these tax breaks constituted State Aid and that Spain must recover the illegal aid. The companies then appealed the Commission's ruling and the European General Court backed their arguments, concluding that the tax breaks were not "selective" and therefore were not illegal State Aid. The Commission appealed the decision in a case involving World Duty Free Group Holdings. The E.C.J. is expected to rule on this matter by the end of 2016.

Meanwhile, on July 28, 2016, Melchior Wathelet, the E.C.J. Advocate General ("A.G."), backed the Commission's appeal, arguing that the tax breaks offered by Spain to Spanish companies investing in non-Spanish companies were "selective" and therefore illegal, even if available to other companies.

While the A.G. opinion is non-binding, it is rarely not followed. The A.G.'s opinion stated as follows:

> Once a tax measure derogates from the 'normal' or reference tax regime and benefits undertakings performing the transactions in question to the detriment of others that perform similar transactions and are therefore in a comparable situation that measure is by definition discriminatory or selective unless the differentiation created by the measure is justified by the nature or general scheme of the system of which it forms a part.
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> The fact that the conditions attached to the transactions covered by the derogatory tax measure are relatively easy to fulfill and that, for that reason, the benefits which that measure offers are available to a large number of undertakings does not call into question its selective nature but only the degree of selectivity.

If the E.C.J. follows the A.G.'s opinion, the result may be detrimental to other companies facing State Aid inquiries, including the high profile U.S. companies Amazon, Apple, and Starbucks. Such a ruling could also offer the Commission an incentive to open new investigations for rulings that could be said to be based on State Aid.

I.R.S. ANNOUNCES LIMITED LIFE FOR I.T.I.N.'S – BUT ALLOWS FOR CONTINUED USE

In Notice 2016-48, the I.R.S. announced a procedure calling for invalidation of an Individual Taxpayer Identification Number ("I.T.I.N."). An I.T.I.N. is a nine-digit number issued by the U.S. Internal Revenue Service ("I.R.S.") to a nonresident, non-citizen ("N.R.N.C.") individual. It is used by foreign individuals who are required to have a U.S. taxpayer identification number for U.S. tax purposes but who are not eligible to get a social security number. An I.T.I.N. must be used when an N.R.N.C. individual is required to furnish a U.S. taxpayer identification number for one of several tax reasons. Examples include the following:

- An N.R.N.C. individual claims the benefit of a reduced withholding tax rate under an applicable income tax treaty.
- An N.R.N.C. individual is required to file a U.S. tax return or files a U.S. tax return in order to claim a refund.
- An N.R.N.C. individual files a document with the I.R.S. in relation to a real estate transaction that is subject to F.I.R.P.T.A. withholding tax.

Any tax adviser who has assisted an N.R.N.C. individual in obtaining an I.T.I.N. knows the difficulties encountered in the process. Although, the I.R.S. mandates the use of the I.T.I.N. in the circumstances described above and others, it recognizes that the use of the I.T.I.N. can have a legitimizing effect for an undocumented alien.

To the untrained eye, the I.T.I.N. resembles a social security number. To protect the integrity of the form, the process requires the submission of an original passport, an official copy of a passport that is certified by the issuing agency in the foreign country, or a photocopy of the passport that is certified at a U.S. embassy or consulate. If original documents are submitted, the announced policy of the I.R.S. is that the documents will be returned within 60 days. They will be mailed to the applicant's residence abroad. A prepaid Express Mail or courier envelope may be submitted for faster return delivery.

If an N.R.N.C. individual is physically present in the U.S., an in-person application may be submitted to an I.R.S. employee authorized to review and accept applications or to a community-based certified acceptance agent approved by the I.R.S. Individuals who apply in person will have their documentation returned once the in-person application is completed.

Many N.R.N.C. individuals are under the impression that, once the I.T.I.N. is obtained, the number is valid for life. Indeed, that was the original rule when the I.R.S. introduced the concept of the I.T.I.N. Then, in 2014, the I.R.S. announced that if an I.T.I.N. was not used for five consecutive years on a U.S. tax return, it would be invalidated. Nonetheless, this procedure for invalidation was never implemented because Congressional legislation, enacted in 2015, mandated automatic invalidation of an I.T.I.N.

In Notice 2016-48, the I.R.S. explained how it will apply the 2015 legislation. Regardless of when the I.T.I.N. was issued, any I.T.I.N. not used on a U.S. Federal tax return for three consecutive years will now be invalidated, unless renewed.

Furthermore, an I.T.I.N. issued prior to 2013 and used on a U.S. Federal tax return within each three-year cycle since issuance will be invalidated pursuant to the following schedule:

- If issued before 2008, it will be invalidated on January 1, 2017.
- If issued in 2008, it will be invalidated on January 1, 2018.
- If issued in 2009 or 2010, it will be invalidated on January 1, 2019.
- If issued in 2011 or 2012, it will be invalidated on January 1, 2020.

The I.R.S. intends to notify N.R.N.C. individuals by mail when invalidation will occur. The first batch of notices will focus on holders of an I.T.I.N. that has the number 78 or 79 in the fourth and fifth digits.

Having established a procedure for invalidation and the requirements for renewal, the I.R.S. made a surprising announcement: An invalidated I.T.I.N. may continue to be used on a U.S. tax return. Although, the I.R.S. cautions a delay in processing may occur and certain credits may be lost. In addition, an invalidated I.T.I.N. may continue to be used for information return purposes even after invalidation. However, if the individual is later required to file a U.S. tax return, the I.T.I.N. will have to be renewed at that time – subject, of course, to the preceding sentence. At some point, the I.R.S. will no longer accept returns using a terminated I.T.I.N.

Nonetheless, it remains curious that the I.R.S. has adopted an approach that will likely take years of education before awareness sinks in. After all, the I.R.S. could have modified Form W-8BEN to request a certification that an I.T.I.N. remained valid under the schedule outlined in Notice 2016-48. In addition, the I.R.S. could have announced the imposition of penalties for withholding agents that accept certifications with numbers having tainted fourth and fifth digits, such as 78 and 79. If the experience under F.A.T.CA. is any guide, financial institutions would have demanded new W-8BEN forms with renewed I.T.I.N.'s on an A.S.A.P. basis, thereby prompting taxpayer compliance.

"It remains curious that the I.R.S. has adopted an approach that will likely take years of education before awareness sinks in."

Two possible reasons come to mind. One view is that the more effective approach was considered but dropped after consultations with leaders in the financial services industry. An alternative view is that the I.R.S. is bound to follow the 2015 legislation. However, it has decided not to allocate a significant budget to the matter. Hence, the I.R.S. mandates renewal, but it will only enforce that renewal when a tax return is filed by an N.R.N.C. individual.