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FOREIGN ACCEPTANCE AGENT AGREEMENTS TERMINATED – MORE HURDLES FOR NON-U.S. PERSONS TO OBTAIN AN I.T.I.N.

When claiming a refund of over-withheld tax, purchasing or selling real property, or complying with U.S. filing requirements, a non-U.S. person is required to obtain an individual taxpayer identification number ("I.T.I.N."). Under I.R.S. regulations, an original passport or an official copy prepared by the issuing agency must be filed with the I.T.I.N. application, which is submitted on Form W-7. Prior to 2017, where neither option was feasible, a U.S. or foreign certifying acceptance agent could attest to the accuracy of the identification documents (usually passports). A recent change to these rules significantly limits the options available to non-U.S. I.T.I.N. applicants.

Effective January 1, 2017, the rules relating to foreign-based certifying acceptance agents have changed considerably.[1] Consequently, all agreements with agents located outside the U.S. have been terminated.[2] While domestic acceptance agent agreements are not affected by these new rules, the language in the standard agreement with U.S.-based certifying acceptance agents suggests that they can act only on behalf of applicants that reside in the U.S.

Under the new rules, I.T.I.N. applicants residing outside the U.S. may only submit the Form W-7 application (i) by mail or (ii) in person to an employee of the I.R.S. or a designee of the Treasury Department at a U.S. diplomatic mission or consular post. While it has been the practice for these diplomatic offices to offer document authentication services and provide certified copies of documents to I.T.I.N. applicants, services vary from country to country. Further, it should be noted that all I.R.S. employees authorized to review and accept such applications are currently located in the U.S.

At this time, no further guidance is available regarding the I.T.I.N. application process at U.S. diplomatic missions or consular posts. Thus, the new rules leave several questions open for non-U.S. applicants and their advisors:

- Will U.S. diplomatic missions or consular posts continue to certify the accuracy of documents, as was the case under the acceptance agent agreements?
- If not, must a foreign individual leave his or her passport at the diplomatic

1 Code §6109(i)(1)(B).

2 Section 203 of the Protecting Americans from Tax Hikes Act of 2015 (PATH Act), Pub. L. 114-113, div. Q, enacted on December 18, 2015, modified Code §6109.

mission or consular post if the issuing agency does not provide official copies, which is the case in some countries?

In terminating the acceptance agent agreements of organizations operating in foreign countries, the I.R.S. exercised its authority under the standard agreement with acceptance agents and Revenue Procedure 2006-10. However, it is not clear whether denying foreign persons the option to use certifying acceptance agents for filing I.T.I.N. applications is the result of an intentional policy shift or mere legislative error. A proposed correction of the new rules, introduced in two bills in April and December of 2016,[3] points in the direction of the latter. If approved, the correction would allow foreign applicants to, at least, use the services of domestic certifying acceptance agents.[4] While the I.R.S. has stated that the change in law will eliminate the need for non-U.S. certifying acceptance agents, the agency appeared reluctant to terminate foreign acceptance agent agreements in its communications to agents. Nonetheless, as the bills to correct the language of this provision were not passed by Congress, the I.R.S. had no choice but to implement the new rules.

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These new rules combined with other newly promulgated rules on the expiration of I.T.I.N.'s that have not been used for consecutive three years (with special rules for I.T.I.N.'s issued before 2008 through 2012)[5] hinder the process for non-U.S. taxpayers to be compliant with U.S. filing and reporting requirements. It remains to be seen how this new rule will be applied in practice. Updates on guidance and administrative practice or a correction of the new provision will follow.

CANADIAN COURT UPHOLDS KPMG OFFSHORE DISCLOSURES

On November 29, 2016, the Federal Court of Canada allowed the Canadian Revenue Agency ("C.R.A.") to demand that KPMG disclose confidential information relating to clients who participated in an Isle of Man tax structure. Names of clients and documentation relating to participation in the structure must now be disclosed. The ruling follows the C.R.A.'s discovery that KPMG clients transferred assets to an offshore company incorporated in the Isle of Man. The Isle of Man corporation was not registered in the names of the clients but in the names of third parties. A report of the Standing Committee on Finance states the following on the matter:

> The offshore corporate structure developed by KPMG and located on the Isle of Man allows KPMG clients to gift sums of money to an offshore corporation that would hold or invest that money for an indeterminate period of time. According to KPMG, the structure was designed for the purposes of estate planning, asset protection or philanthropic use; KPMG indicated that a tax benefit would also be present. KPMG believed that the structure operated as follows: KPMG clients would not own shares in the offshore corporation, and

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[3] H.R. 4891, the "Technical Corrections Act of 2016."; H.R. 6439 (114th).

[4] See "Joint Committee on Taxation Technical Explanation of the Tax Technical Corrections Act of 2016."

[5] See Galia Antebi, Fanny Karaman, and Kenneth Lobo, "Updates and Other Tidbits," *Insights* 7 (2016), pp. 67-68.

> would not have legal ownership of the money gifted to the corporation; therefore, these clients would not be taxed on any interest or income resulting from the offshore corporation's investment activities. KPMG felt that this interest or income would fall under the Isle of Man's taxation system, which has a corporate tax rate of 0%. The offshore corporation could then gift the money to the KPMG clients and their families. Because gifts are generally not subject to taxation under Canadian tax law, KPMG believed that these clients and their families would receive the gifted money on a taxfree basis.[6]

KPMG requested that the order to disclose be quashed or cancelled because Rule 208 of the Code of Professional Conduct for chartered accountants in Ontario provides a general confidentiality rule between a firm and its clients. However, the court found that Section 231.2(3) of the Tax Act is clear and overrides the general confidentiality rule imposed by Rule 208 of the Code of Conduct. The mere fact that Rule 208 exists does not provide a sufficient basis to cancel or set aside an order validly issued by C.R.A. pursuant to Section 231.2(3). However, a clients' claim for attorney-client privilege can be made at the time KPMG provides the information.

POST-ELECTION VIEW FROM THE TREASURY: U.S.-E.U. RELATIONS WILL LIKELY WORSEN

The new Trump administration has been discussing major tax reform overhaul that will, if adopted, dramatically modify the U.S. international tax system in a very pro-taxpayer manner. Tax reform proposals such as adoption of a destination-based tax system and new rules to allow for repatriation of foreign earnings in a low tax manner may help U.S. taxpayers compete better in a global environment. However, the new administration will also have to deal with foreign governments and their representatives whose recent actions may forebode difficulty for the new administration in achieving multilateral tax relief.

Robert Stack is the U.S. deputy assistant treasury secretary for international tax policy in the Obama administration. In a December speech in Washington, D.C., he raised three areas of tension that will persist in 2017 under the Trump administration:

- The European Commission appears to be walking away from multilateral solutions reached by the O.E.C.D. where views of the U.S. were accepted.
- The European Commission is using the O.E.C.D. B.E.P.S. actions as a baseline to mandate global tax rates as part of a political agenda. If those with a low band of tax are forced to increase their rates, those countries with higher rates will no longer be outliers.
- The European Commission is pushing the mandatory adoption of harmonized tax rules in Europe, so that the U.S. is practically dealing with one mega tax authority that gets 22 seats around the table.

In these circumstances, the Trump administration will face a great deal of risk and

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6 Standing Committee on Finance, 42nd Parliament, 1st Session, "The Canada Revenue Agency, Tax Avoidance and Tax Evasion: Recommended Actions," October 22, 2016, p. 22.

difficulty in achieving multilateral solutions that are acceptable. As the new administration moves to reduce tax rates, it will encounter problems with the European Commission attempting to raise taxes to fund government expenditures.

E.U. IDENTIFIES BLACKLIST COUNTRIES

The European Union ("E.U.") has targeted 28 jurisdictions for increased scrutiny in 2017. The blacklisted nations, which are viewed as common tax havens, include a range of Pacific and Caribbean nations that are offshore financial centers. They include Belize, Grenada, the Cook Islands, Montserrat, Cabo Verde, Dominica, Saint Kitts, Nevis, Macao, Saint Lucia, and Samoa. Additionally, the Cayman Islands, the British Virgin Islands, Anguilla, Bahamas, Bermuda, Guernsey, the Isle of Man, and Jersey have been flagged for special screening based upon their zero tax rates. Thirteen of the nations have failed to commit to the O.E.C.D.'s framework for base erosion and profit shifting ("B.E.P.S.") reforms.

The E.U. has taken the screening process further than the O.E.C.D. and is looking specifically into jurisdictions with preferential or harmful tax regimes and zero corporate tax rates. In comparison, the O.E.C.D. targets countries that do not abide by two of the three prescribed transparency criteria, which includes a commitment to the O.E.C.D. common reporting standard for bank information, information exchange of bank information upon request, and ratification of the O.E.C.D. convention on Mutual Administrative Assistance.

In an effort to preserve fair taxation, the E.U. plans to prepare an economic substance test that will determine whether the zero rates facilitate offshore structures or arrangements aimed at attracting profits that do not reflect real economic activity.