

UPDATES & OTHER TIDBITS

Authors

Tomi Oguntunde
Sheryl Shah
Nina Krauthamer

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STOCK-BASED COMPENSATION EXAMINATIONS ON HOLD PENDING ALTERA APPEAL

In the *Altera*¹ decision issued on July 27, 2015, the U.S. Tax Court struck down 2003 cost-sharing regulations that required the sharing of stock-based compensation (“S.B.C.”) under a cost sharing agreement (“C.S.A.”) with a party under common control for purposes of Code §482. The I.R.S. filed an appeal in the *Altera* case with the Ninth Circuit in February 2016.²

On January 12, 2018, the I.R.S. issued a directive that no new examinations on S.B.C. in qualified C.S.A.’s may be opened pending the issuance of an opinion in the *Altera* appeal.³

However, in the case of an ongoing S.B.C. examination, the taxpayer may agree to extend the statute of limitations until the final determination of the appeal in the *Altera* case. Otherwise, the examination will continue without regard to the directive.

DUTCH ENTICE CORPORATE TAXPAYERS WHILE ABUSIVE PLANNING IS TARGETED

On Friday, February 23, 2017, the Dutch government announced its intention to reduce the corporate tax rate to 21% and to abolish dividend withholding tax within a multinational group. The rate reduction for corporate tax matches the recently adopted U.S. tax rates. The elimination of withholding tax on dividends within a multinational group incentivizes the use of the Netherlands as an entrepot into the E.U. by residents of non-E.U. jurisdictions. Residents of the U.S., China, and possibly the U.K. are potential beneficiaries.

In addition, the Dutch government announced that it will adopt additional substance requirements for Dutch holding companies, financing companies, and licensing companies. Currently substance is demonstrated by having Dutch-resident directors comprise at least one-half the board membership and bookkeeping performed in the Netherlands. When effective, companies must incur salary costs of €100,000 or more and must have office space that is actually used to carry on its functions.

¹ *Altera Corp. v. Commr.*, 145 T.C. 3 (2015)

² See *Altera Update – I.R.S. Files Appeal. Altera & Xilinx Respond* in “Updates & Other Tidbits,” *Insights* 9 (2016).

³ LB&I, *Instructions for Examiners on Transfer Pricing Selection- Cost-Sharing Arrangement Stock Based Compensation*, LB&I-04-0118-005.

Finally, the Dutch government confirmed that the Netherlands will adopt Model A of the C.F.C. rules under the E.U. Anti-Tax Abuse Directive. Model A is similar in approach to the U.S. Foreign Personal Holding Company rules of Subpart F. Certain items of “movable” income or passive income will be included in the tax base of a Dutch resident unless the C.F.C. is actively engaged in a business that generates the types of income covered or the items of tainted income comprise not more than one-third of all income of the C.F.C. Tainted income includes the following:

- Interest
- Royalties
- Dividends
- Capital gains on shares
- Leasing income
- Insurance income
- Banking income
- Re-invoicing income

REVISED CODE §1446(F) TIMELINE

Introduced by the Tax Cuts and Jobs Act, the new Code §864(c)(8) provides that a non-U.S. person’s gain or loss from the disposition of a partnership interest will be treated as effectively connected income to the extent that the partnership would have reported effectively connected income and gain had it sold all of its assets at fair market value. This treatment covers the sale of L.L.C. interests to the extent an L.L.C. is treated as a partnership for U.S. income tax purposes. The new rule applies to exchanges or other dispositions occurring on or after November 27, 2017.

To implement tax collection, new Code §1446(f) provides that the transferee of must withhold 10% of the amount realized by the seller on the sale of a partnership interest unless the transferor can provide an affidavit stating that it is not a foreign person. According to the statute, the withholding obligation applies to sales, exchanges, or other dispositions occurring on or after December 21, 2017.

Holders of partnership interests have loudly complained that applying new Code §1446(f) without further guidance is unfairly problematic when the partnership interest is publicly traded. In that fact pattern, the purchaser cannot determine whether the transferor is foreign or domestic when the interests are held by brokers, generally in street name, and transferred by a clearinghouse.

In Notice 2018-08, the Treasury Department and the I.R.S. acknowledged the problem and announced the suspension of withholding under the new section for transfers of publicly traded partnership interests until further guidance is provided. Future guidance under the new law with respect to a disposition of an interest in a publicly traded partnership will be prospective and will include transition rules to allow sufficient time to prepare systems and processes for compliance.

I.R.S. APPEALS CHAMBER OF COMMERCE

In October of 2017, the U.S. District Court for the Western District of Texas struck down a provision under temporary anti-inversion regulations for violating the required notice and comment period under the Administrative Procedures Act (“A.P.A.”)⁴ on the grounds that the rule was a substantive or legislative rule and not an interpretive regulation.⁵

The court also held that the plaintiffs, (i) the U.S. Chamber of Commerce and (ii) the Texas Association of Business, had standing to bring the suit, as they suffered actual and concrete injury and that the plaintiffs could sue on behalf of members who would otherwise have standing in their own right. In addition, the court held that the plaintiffs’ action was not barred by the Anti-Injunction Act pursuant to Code §7874, as the suit did not restrain the assessment nor collection of any tax.

In favor of the government, the court held that the Agency did not engage in arbitrary and capricious rulemaking in issuing the rule and that it did not exceed its statutory jurisdiction.

As expected, the government filed a notice of appeal to the Fifth Circuit on November 27, 2017.



⁴ *Chamber of Commerce of the United States of America and Texas Association of Business v. I.R.S.*, (No. 74) (2017), amended October 6, 2017.

⁵ “Texas District Court on Anti-Inversion Legislation – One Down But Not Out,” *Insights* 11 (2017).