



**Section of Taxation**

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March 10, 2014

Mr. John Koskinen  
Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20024

Re: Comments on Notice 2013-78

Dear Commissioner Koskinen:

Enclosed are comments addressing procedures set forth in Notice 2013-78 for requesting assistance of U.S. competent authority in resolving tax issues raised in jurisdictions covered under a U.S. tax treaty. These comments represent the view of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Michael Hirschfeld  
Chair

Enclosure

cc: Mark J. Mazur, Assistant Secretary (Tax Policy), Department of the Treasury  
Emily S. McMahon, Deputy Assistant Secretary (Tax Policy), Department of  
Treasury  
Danielle Rolfes, International Tax Counsel, Department of the Treasury  
William J. Wilkins, Chief Counsel, Internal Revenue Service  
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**AMERICAN BAR ASSOCIATION SECTION OF TAXATION  
COMMENTS ON NOTICE 2013-78**

These comments (the “Comments”) are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

These comments were prepared by members of the Committee on U.S. Activities of Foreigners and Tax Treaties (the “Committee”) of the American Bar Association Section of Taxation. Principal responsibility for preparing these Comments was exercised by Joan Arnold of the Committee USAFTT. Substantive contributions were made by Henry Birnkrant, Kerwin Chung, Carmina D’Aversa, Alan Granwell, Jim Lynch, Fred Murray, Mary Prosser, Stanley Ruchelman, and Michael Thomas. The Comments were reviewed by David Shapiro, Chair of the Committee, Michael J. Miller, Chair-Elect of the Committee, and Joseph Calianno, Chair of the Section’s Committee on Foreign Activities of U.S. Taxpayers. The Comments were further reviewed by Sean Foley of the Section’s Committee on Government Submissions, and by Brian Trauman, Council Director for the Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal income tax principles addressed by these Comments, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date:           March 10, 2014

## INTRODUCTION

The following comments address proposed procedures set forth in Notice 2013-78<sup>1</sup> (the “Notice”) for requesting assistance of U.S. competent authority (“USCA”) in resolving tax issues that are or may be raised in both the United States, and a country with which the United States has a tax treaty. While proposed procedures relating to advance pricing agreements (“APAs”) were issued at the same time in Notice 2013-79<sup>2</sup>, the comments herein are limited to issues relating to USCA assistance outside of the APA context.

The Committee appreciates the substantial effort and thought put into the proposed procedures by the IRS, and specifically the offices of the Deputy Commissioner (International), the Large Business and International division (“LB&I”) and the Office of the Chief Counsel (International). As noted in our detailed comments below, the proposed procedures improve upon the current procedures in many ways. However, we are concerned that some of the proposed procedures could result in practical administrative challenges, and may be unduly burdensome for certain classes of taxpayers.

## BACKGROUND

Revenue Procedure 2006-54<sup>3</sup> sets forth the procedures and limitations currently in effect for requesting the assistance of USCA. The Notice includes the terms of a proposed revenue procedure that would update and supersede Revenue Procedure 2006-54. The Notice requests comments on the terms of the proposed revenue procedure.

Notice 2013-79 includes the terms of a proposed revenue procedure that would update the procedures for requesting an APA with respect to transfer pricing issues. That notice is the subject of a separate submission from the Section of Taxation, prepared in coordination with these comments.

## SUMMARY

Our comments are focused on the following:

1. We expect, and appreciate, that one of the goals of the proposals is to make deployment of the resources of USCA as efficient as possible. We do, however, suggest balancing that goal against the similar resource challenges faced by a taxpayer leads to some recommended modifications of the ability and timing to request USCA involvement. See below for suggestions as to the interaction of USCA, the examination function and the appeals process.

2. Many treaties contain within the Limitation on Benefits article a provision that allows USCA to grant treaty benefits even if the objective tests in that article (such as ownership, base erosion, etc.) are not met. Because decisions of USCA on this issue are not subject to public

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<sup>1</sup> 2013-50 I.R.B. 633

<sup>2</sup> 2013-50 I.R.B. 653

<sup>3</sup> 2006-2 C.B. 1035

release, the parameters of such decisions are in effect “private law,” and the ability of taxpayers to judge whether they might qualify is shrouded in mystery. We recommend that guidelines be published that would allow more taxpayers to understand what they need to prove to have the possibility of obtaining such a ruling.

3. We are concerned that the increased formality of pre-filing conferences, and the extensive pre-submissions that may be required, may discourage certain taxpayers from seeking assistance from USCA. To that end, we request clarification that certain items, such as potential Limitation on Benefits matters, are appropriate subjects for the non-binding informal advice described in section 2.05.

4. We request clarification that the informal consultations described in section 2.06 of the proposed revenue procedure are not required for a taxpayer to demonstrate that it has exhausted all administrative remedies to reduce tax liability under foreign law.

5. We greatly appreciate the time and involvement of the members of LB&I that are involved in the USCA process. We suggest that the IRS publish a periodic update of the members responsible for countries or topics (with their contact information) so that questions can be appropriately directed.

6. We welcome the specific reference in the proposed revenue procedure to email communication, and suggest that the benefits of email communication be specifically identified in order to encourage USCA personnel to take advantage of email communication where appropriate.

7. For ongoing MAP matters, we also suggest that the proposed revenue procedure provide that the appropriate officer of USCA will update the taxpayer on the status of the matter on a periodic basis, at least quarterly.

8. In our experience, cross-border estate tax matters raise challenges that are not present in the income tax area. We have detailed those in section VI below and suggest that it would be preferable to handle them in a separate revenue procedure.

9. In our experience, employees of foreign employers often remain on the foreign payroll when they come to the United States for limited-term assignments, and pay home country taxes, even where that is not appropriate under the applicable treaty. This can create challenges for the individuals when the issue is discovered, particularly where refunds of foreign tax are not forthcoming. We recommend clarifying that USCA can assist in such matters, and recommend streamlining procedures in such cases.

## COMMENTS

### I. Interaction With Examination and Appeals.

A. **Interaction with Examination.** Section 9.01 of the proposed revenue procedure provides that if there is a U.S.-initiated adjustment during examination, the taxpayer must involve USCA before the examination is completed, and unless USCA accepts the resolution of the issue, USCA will not be available to assist if its involvement is subsequently requested in a MAP with respect to the U.S.-initiated adjustment.

In our experience, taxpayers generally have a significant interest in as prompt a resolution of an audit examination as reasonably possible. The examination process involves the dedication of personnel and monetary resources, and for taxpayers with audited financial statements there is the very real need to assess the impact of the examination on the financial statements in a timely fashion. The proposed revenue procedure would add the hurdle of getting USCA involved prior to the time the examination can otherwise be concluded.

We recognize that in many cases USCA involvement could help resolve issues quickly, particularly with examiners who may be less experienced in international issues, and we appreciate that this requirement could help ensure consistency in international audits. However, we are concerned that in some instances the involvement of USCA could be unnecessary and could slow the process down. For instance, in some cases, a U.S. taxpayer may decide that it is willing to accept double taxation as a result of a U.S.-initiated adjustment, as it may be more costly to resolve the issue with USCA than simply to settle with the IRS Examination team. In such a case we believe that there should be no requirement to involve USCA. In addition, we are concerned about resource allocation issues arising if USCA is required to be involved in every proposed U.S.-initiated adjustment, regardless of the size.

At the same time, we understand that there are U.S.-initiated adjustments that are sufficiently material that the goals of USCA for upfront involvement should be paramount. Thus, we recommend a threshold, below, for which the provisions of the proposed revenue procedure should be mandatory. In those cases, we believe that the IRS Examination team should be responsible for involving USCA. We do not see any advantage to requiring that the taxpayer initiate communications with USCA, and are concerned that it could be a trap for less sophisticated taxpayers who may not realize that they have waived rights by not involving USCA in an examination.

Some of our members have raised a concern that while Section 9.01 appears to address only U.S.-initiated adjustments, the section could be read to mean that if there were a U.S.-initiated adjustment with respect to which USCA was not consulted, and if there is a later foreign-initiated adjustment of the same item, then at that time there might be a limitation on the involvement of USCA in helping to resolve the foreign-initiated adjustment. A clarification that requesting USCA assistance with the resolution of a foreign-initiated adjustment is not affected by section 9.01 would be helpful.

Lastly, the process for involving USCA in an examination contains no guidelines or deadlines for USCA response. The inability to be able to effectively manage expectations for

involving USCA would, we expect, compel many taxpayers to forgo involving USCA at the examination level.

To address these concerns, we recommend that:

1. The IRS Examination team be required to involve USCA, and the limitations of section 9.01(1) of the proposed revenue procedure otherwise apply as written, for all U.S.-initiated adjustments that exceed \$10,000,000 (the threshold set in section 3.02(3) for mandatory pre-filing memoranda). Thus, all cases that would be expected to be large cases would be covered.

2. For cases in which the sum of all U.S.-initiated adjustments does not exceed the \$10,000,000 threshold, the IRS Examination team would only be required to involve USCA if the applicable adjustments were proposed to be resolved through a closing agreement, rather than with Form 870 or a similar method that would not have the effect of a closing agreement, or if the taxpayer requested USCA involvement. This would permit the smaller cases that may not ever require the devotion of resources to cross border resolution be finalized in a prompt manner, but not put the IRS in the position of a possible whipsaw.

3. For all cases, the limitations of section 9.01(1) of the proposed revenue procedure not apply if USCA does not make an initial determination of its acceptance of or disagreement with the proposed resolution (as required by section 9.01(3) of the proposed revenue procedure) within sixty days of receipt of an examination resolution notification filed pursuant to section 9.01(1) of the proposed revenue procedure. The proposed revenue procedure contains no guidelines or deadlines for the USCA actions, which would create challenges for taxpayers, such as determining whether for financial statement purposes an issue had in fact been resolved (or resolved sufficiently to adjust reserves for tax liability).

4. The IRS clarify that the limitations of section 9.01 do not apply with respect to a foreign-initiated adjustment.

**B. Interaction with Appeals.** Section 8.01 of the proposed revenue procedure provides that the only procedure by which a taxpayer may present a U.S.-initiated adjustment to IRS Appeals for its review and maintain the possibility of obtaining correlative relief for the adjustment from USCA, is to request that USCA undertake an evaluation of the U.S.-initiated adjustment in tandem with IRS Appeals.

We have similar concerns about resource deployment and timing as we do with the IRS Examination provisions, and they are heightened because of the requirement in Section 9.02(1) of the proposed revenue procedure that the taxpayer must make the request within 30 days after its opening conference with IRS Appeals. Both the taxpayer and Appeals benefit significantly from the give and take that occurs over successive meetings, and it is not common that the positions are well articulated and considered at the end of the opening conference. Further, because of the constraints that have been placed in the recent past on the ability of Appeals officers to travel, the length of time between meetings and the need to replace team members due to reassignments or even retirement, the 30-day period seems very tight to come to a conclusion as to whether USCA needs to be involved. This is particularly true given that there

are no time guidelines for USCA to resolve a case if it is requested to undertake simultaneous review.

Given these concerns, we recommend that:

1. The \$10,000,000 threshold suggested in Section I.A.1. above for the mandatory provisions of the limitations of the proposed revenue procedure also apply for section 8.01.

2. The deadline for requesting USCA relief in all cases be extended to 30 days after the second conference with IRS Appeals at which the U.S.-initiated adjustment is discussed.

## **II. Determining Qualification Under Limitation on Benefits Articles of Applicable Treaties**

Almost all U.S. tax treaties provide objective tests in the Limitation on Benefits (“LOB”) article to determine if an entity is a qualified resident of the treaty country and thus is able to claim the benefits of the treaty to reduce U.S. taxation. Many of the treaties include in the LOB article a provision that is similar to Article 22(4) of the U.S. Model treaty, which provides that:

If a resident of a Contracting State is neither a qualified person pursuant to the provisions of paragraph 2 nor entitled to benefits with respect to an item of income under paragraph 3 of this Article the competent authority of the other Contracting State may, nevertheless, grant the benefits of this Convention, or benefits with respect to a specific item of income, if it determines that the establishment, acquisition or maintenance of such person and the conduct of its operations did not have as one of its principal purposes the obtaining of benefits under this Convention.

Pursuant to such a provision, a non-U.S. entity may request a ruling from USCA that it is entitled to the benefits of the treaty even though it does not meet any of the objective tests of the applicable LOB article. Because any rulings issued by USCA either are not subject to FOIA release, or if they are released as Private Letter Rulings they are so heavily redacted that the facts are not available, the practice of applying for such rulings is effectively being limited, and taxpayers (particularly smaller taxpayers with more limited resources) have a difficult time in evaluating whether they should spend the resources to approach USCA on the issue.

It would be very helpful in the administration of this clause if USCA would publish guidelines as to what is considered in the evaluation of a request for relief under the section, along with examples illustrating the application of those guidelines. There is anecdotal experience that is shared among practitioners, but that is limited to a small group of practitioners who specialize in the area and effectively limits access to the process to taxpayers not represented by that group.

### **III. Pre-Filing Conferences**

Section 3.02 of the proposed revenue procedure addresses pre-filing conferences, and establishes a more formal procedure than exists under the Revenue Procedure 2006-54. While we appreciate that this may help further develop many cases and makes pre-filing conferences more useful, they may in some instances create undue burden. For instance, a non-U.S. entity seeking a request for relief under the LOB article of the applicable treaty may not have fully developed all facts or may be seeking guidance as to what facts would be relevant to a USCA decision, such that a pre-filing memorandum with a statement certifying under penalties of perjury to “complete” facts may be unduly burdensome, if not impossible.

In such a case, the increased formality of the proposed pre-filing procedures may drive a taxpayer to seek informal advice before fully developing the facts and seeking a formal pre-filing conference. We welcome the continued availability of informal guidance by the staff of the Advance Pricing and Mutual Agreement Program and Treaty Assistance and Interpretation Team (“TAIT”) set forth in section 2.05 of the proposed revenue procedure, and we request clarification that questions such as those regarding LOB qualification are eligible for the informal advice described in section 2.05.

### **IV. Informal Consultation and Exhaustion of Administrative Remedies**

Section 2.05 of the proposed revenue procedure confirms that USCA is available for informal consultations on MAP issues, which is appreciated, and section 2.06 of the proposed revenue procedure provides that such informal consultation can be had to review whether the taxpayer has taken all steps necessary to ensure that a foreign tax is compulsory. In order to reach a conclusion that the tax is compulsory, the taxpayer needs to have exhausted all effective and practical remedies to reduce its tax liability, which include the possibility of requesting assistance of competent authority.<sup>4</sup>

We view the offer of assistance in sections 2.05 and 2.06 to be a voluntary process. As such, we would appreciate confirmation that not utilizing the procedures in section 2.06 of the proposed revenue procedure for informal consultations on compulsory payments will not be taken into account in determining if the taxpayer has exhausted all effective and practical remedies to reduce the tax liability under foreign law.

### **V. Other Administrative Matters**

#### **A. Contact lists**

We appreciate the efforts that have gone into restructuring the international functions in LB&I, including the competent authority office, and applaud the proactive role that is being taken. We do note, however, that competent authority requests can still be a lengthy process to bring from initiation to fruition, and that during the time the requests are in process there can be changes in personnel at LB&I and the Office of Chief Counsel that can impact the

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<sup>4</sup> See, Rev. Rul. 92-75, 1992-2 C.B. 197.



timing of the completion of the request. It is our observation that taxpayers are not necessarily advised of the changes or the status of the requests.

We recommend that on a periodic basis LB&I publish a list of personnel in TAIT, their areas of responsibility and a means of communications. This would facilitate follow-up on existing requests and the submission of informal or new requests.

#### **B. Email communications**

Under current practice, USCA employees communicate via email with authorized taxpayer representatives, but in most instances do not include any identifying information and frequently make references to relevant parties in code using the first letter of the taxpayer's name.

USCA employees generally do not send email attachments that include a taxpayer's identifying information, and instead rely on faxed materials, notwithstanding the diminished use of faxes in business today. Faxed documents are less efficient to work with than electronic versions and make it harder to identify changes in exchanging draft APAs.

Our Committee supports any proposal that would allow USCA employees to communicate securely, freely, and efficiently with taxpayers and taxpayer representatives. Accordingly, as provided for in section 3.08 of the proposed revenue procedure, we welcome a process whereby a taxpayer and the Service execute a memorandum of understanding (MOU) permitting USCA employees to communicate with the taxpayer's authorized representatives through encrypted e-mail. To encourage USCA personnel to take full advantage of the benefits of email communications, we request that the final revenue procedure go further by indicating how execution of the MOU allows for the IRS to exchange confidential taxpayer information with taxpayer and taxpayer representatives, and how those exchanges result in improved efficiencies in processing a MAP request.

#### **C. Status updates**

We appreciate the proposed revenue procedure's focus on improved information flows to streamline the MAP process. This is as important for taxpayers as it is for IRS. We therefore request that the proposed revenue procedure contain guidelines for when a member of USCA will periodically update a taxpayer on the status of the case, and recommend that it be at least quarterly.

### **VI. Estate Tax Matters**

Section 2.04 of the proposed revenue procedure acknowledges that USCA, through TAIT, handles cases arising under U.S. estate and gift tax treaties. We note, however, that none of the scenarios cited as examples in the proposed revenue procedure include estate tax issues, and all specific references to the Code or regulations relate to income tax only. We have some concern about the effective application of the proposed revenue procedure to estate tax issues.

The principal concern that we have identified in applying the provisions of the proposed revenue procedure in estate tax MAP matters relates to the inability of a taxpayer to extend the

period of limitations for assessment of an estate tax. The estate tax is generally to be assessed within three years after the return is filed.<sup>5</sup> Unlike income taxes, however, the time for the assessment of the estate tax cannot be extended by agreement.<sup>6</sup> The inability to extend the time for assessment raises the following issues in the proposed revenue procedure:

A. Section 6.02(7) of the proposed revenue procedure provides that USCA may deny assistance if a taxpayer rejects a request to extend a period for assessment. As noted above, the limitations period for assessment of estate tax may not be extended by statute.

B. Section 9.01(4) of the proposed revenue procedure addresses the cessation of administrative procedures such as assessment and collection as to issues that USCA has accepted for MAP resolution. It does not address the interaction of that cessation with the mandatory three-year period for assessment of the estate tax.

C. Section 13.01, describing protective claims, does not address appropriate circumstances or timing of estate tax protective claims given the inability to extend the statute of limitations by agreement (where, for instance, the statute of limitations to assess foreign inheritance tax extends beyond three years or may be extended).

We recommend that the IRS consider issuing a separate revenue procedure to address special estate tax issues that may be faced by USCA, and that it design procedures to address the special issues arising from the statute of limitation for assessment of estate tax. In the alternative, we request that the proposed revenue procedure clarify these issues, for instance by providing that the requirement that a taxpayer agree to extend a period of assessment only applies to income taxes.

## VII. Individual Employee Cases

The Committee is aware of a number of cases in which an employee of a foreign employer comes into the U.S. while remaining on home country payroll for pension and other purposes. The home country employer collects income taxes from payroll and pays the home country government. At the end of year the individual learns that she has U.S. tax obligations, and cannot claim a foreign tax credit because her income was not foreign source. There is no mechanism to defer the U.S. tax payment while filing for a refund and there are instances in which the foreign tax refund is not forthcoming, which could be resolved with competent authority assistance.

In practice, competent authority procedures generally are perceived as more for the benefit of business taxpayers than individual employees in such matters. The length of time that

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<sup>5</sup> I.R.C. § 6501(c)(1).

<sup>6</sup> I.R.C. § 6501(c)(4)(A) (“Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon.”) (emphasis added); Treas. Reg. § 301.6501-1(d) (“The time prescribed by section 6501 for the assessment of any tax (other than the estate tax imposed by chapter 11 of the Code) may, prior to the expiration of such time, be extended for any period of time agreed upon in writing by the taxpayer and the district director or an assistant regional commissioner.”) (emphasis added).

competent authority resolution of a matter requires is more suited for a business than for an individual. We recommend that the proposed revenue procedure include streamlined procedures explicitly addressing employee tax issues and encouraging individual employees to come to USCA if they see an issue arise. While potentially outside the scope of the revenue procedure, we also recommend that:

1. An individual in such a situation should not be subject to collection procedures, but interest and penalties would continue to accrue, provided that the individual remains within the United States (so that collection could effectively be pursued against the individual in the future).

2. USCA work with its counterparts in other jurisdictions to develop streamlined procedures to handle such cases in the future, and that those procedures be set forth in a supplement to the proposed revenue procedure.

## **VIII. Summary**

The proposed revenue procedure offers opportunities for transparency and greater coordination among taxpayers and USCA and we appreciate the proactive efforts to bring about the change. We appreciate your consideration of the issues that we have raised in this letter. We remain available to expand on any of the recommendations made above.