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International Tax ADVISORY ■

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The Treasury and IRS Ease up (a Little) as FATCA Approaches

The Foreign Account Tax Compliance Act (FATCA), enacted by the 2010 HIRE Act, generally requires foreign financial institutions (FFIs) and non-financial foreign entities (NFFEs) to report certain information about their U.S. account holders and substantial U.S. owners, respectively, or be subject to a 30 percent withholding tax on "withholdable payments." With the July 1, 2014, effective date for withholding under FATCA less than three months away, the U.S. Treasury and IRS are working to patch up holes in the compliance framework.

In a major step forward, the IRS recently announced (Ann. 2014-17) that jurisdictions that reach an agreement "in substance" prior to July 1, 2014, on the terms of an intergovernmental agreement (IGA) will be treated as having an IGA in effect—even though the IGA is not yet signed. If these jurisdictions consent, they will be listed on the Treasury and IRS websites, which will indicate whether the IGA will be a Model 1 or Model 2 agreement. Until the IGAs are signed, FFIs in these jurisdictions should follow the corresponding model IGA provisions, register on the FATCA website accordingly and certify their FATCA status to withholding agents.

This announcement—which nearly doubles the number of jurisdictions with IGAs in effect (48, as of this publication)—reflects the Treasury's general policy of not deviating from the model IGA provisions. Variations occur only in limited circumstances (e.g., specifying exempt beneficial owners, deemed-compliant FFIs and excluded accounts in Annex II of an IGA), and any deviation in a given IGA would not apply until such agreement is signed. An IGA must be signed by December 31, 2014, for "in effect" status to continue uninterrupted. The Treasury may remove a jurisdiction from the "IGA in effect" list if the Treasury finds that the jurisdiction is not taking steps to bring the IGA into force within a reasonable time or if the jurisdiction does not sign an IGA by December 31. If a jurisdiction is removed, FFIs and branches in that jurisdiction will have to update their FATCA registration status.

The IRS has also extended, by ten days, the deadline by which FFIs must register on the FATCA website to have their global intermediary identification number (GIIN) included on the June 2 IRS FFI list. This deadline is now May 5, 2014, rather than April 25. This decision is based on the IRS' experience processing registrations to date. FFIs that register after May 5 may still make the June 2 list, but the IRS cannot guarantee it. Additionally, FFIs that register by June 3, 2014, will be included on the July 1 IRS FFI list.

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The IRS also released the final version of Form W-8BEN-E, Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities), although instructions remain forthcoming.

Tax Court: Taxpayer Qualified for Foreign Earned Income Exclusion

In *Eram v. Commissioner*, decided April 7, 2014, the tax court considered whether a taxpayer qualified for the exclusion for foreign earned income under Code Section 911(a). The taxpayer, a U.S. citizen and Iraqi national, worked for a defense contractor providing translation services in Iraq. The IRS disputed whether the taxpayer had a "tax home" in a foreign country, arguing that he maintained an "abode" in the United States, which disqualified him from the exclusion. The court disagreed, holding that the taxpayer qualified for the exclusion.

Section 911(d)(3) defines "tax home" as an individual's home for purposes of Section 162(a)(2) (relating to travel expenses while away from home). Generally, a person's tax home is his principal place of employment, not his personal residence. Nevertheless, Section 911(d)(3) provides that an individual "shall not be treated as having a tax home in a foreign country for any period for which his abode is in the United States." "Abode" refers to where a taxpayer lives, not where he works.

The tax court found that the taxpayer's tax home and abode during the relevant period was Iraq. While it was clear that the taxpayer's principal place of employment was in Iraq during the relevant period, the court had to compare his respective ties to the United States and Iraq to determine his abode. The taxpayer argued that he had cut most of his ties to the United States and that any remaining connections were limited. The IRS disagreed, emphasizing the taxpayer's familial ties to the United States (where his parents; brothers; children; and first, second and third wives lived) versus his "limited and transitory" ties to Iraq.

The tax court agreed with the taxpayer's assessment, noting that the taxpayer had divorced his first two wives, rarely saw his children and was separated from his third wife when he left for his job in Iraq. Given the taxpayer's limited familial ties to the United States, the court then discounted his other U.S. ties—a U.S. bank account, driver's license, vehicle and purchase of a home in the United States for his son (near the end of the relevant period). The court accorded greater weight to the taxpayer's testimony of his ties to Iraq, including his nativity, language, familiarity with Iraqi culture and relationships with family and friends who lived in Iraq. Though the taxpayer was confined to a "Green Zone" and prohibited from foreign contact while working in Iraq, the court nonetheless determined that his abode was in Iraq.

Section 911 presents an uneasy tension between the concepts of "tax home" and "abode," where a taxpayer's personal residence has enough import to upset tax treatment based on his place of business. The "closer connection" exception to the substantial presence test has a similar tension, as can certain tie-breaker provisions in the residence articles of many U.S. income tax treaties. The tax court's analysis in *Eram* probes this tension. While the court noted the taxpayer's "credible testimony" on his respective connections to each country as a key factor, it is not difficult to see how this case could have gone the other way. For tax purposes, a taxpayer's place of business is often the paramount consideration relative to personal factors. Indeed, the court's decision in *Eram* could be read to suggest that personal factors are still relatively unimportant when read against the backdrop of an individual establishing his place of business (tax home) in a particular jurisdiction.

For more information, contact **Edward Tanenbaum** at (212) 210-9425 or **Heather Ripley** at (212) 210-9549.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Sam K. Kaywood, Jr.
Co-Chair
404.881.7481
sam.kaywood@alston.com

Edward Tanenbaum
Co-Chair
212.210.9425
edward.tanenbaum@alston.com

John F. Baron
704.444.1434
john.baron@alston.com

Henry J. Birnkrant
202.239.3319
henry.birnkrant@alston.com

James E. Croker, Jr.
202.239.3309
jim.croker@alston.com

Jasper L. Cummings, Jr.
919.862.2302
jack.cummings@alston.com

Brian D. Harvel
404.881.4491
brian.harvel@alston.com

L. Andrew Immerman
404.881.7532
andy.immerman@alston.com

Brian E. Lebowitz
202.239.3394
brian.lebowitz@alston.com

Clay A. Littlefield
704.444.1440
clay.littlefield@alston.com

Ashley B. Menser
919.862.2209
ashley.menser@alston.com

Matthew P. Moseley
202.239.3828
matthew.moseley@alston.com

Heather Ripley
212.210.9549
heather.ripley@alston.com

ALSTON & BIRD LLP

WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213-576-1100
NEW YORK: 90 Park Avenue ■ 12th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260
SILICON VALLEY: 275 Middlefield Road ■ Suite 150 ■ Menlo Park, California, USA, 94025-4004 ■ 650-838-2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333