



International Tax ADVISORY ■

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IRS Unveils New Competent Authority Procedures

In the recent Rev. Proc. 2015-40, the IRS describes updated competent authority procedures for taxpayers seeking certain U.S. treaty relief. The new procedures, effective for requests on or after October 30, 2015, supersede those in Rev. Proc. 2006-54, although there is substantial overlap in the basic procedures. Some updates were previewed as proposals in Notice 2013-78, but a number of the final procedures differ from the notice due in large part to IRS attempts to respond to comments. Rev. Proc. 2015-40 represents the Treasury and IRS's balancing of the goals of principled and efficient administration of and taxpayer access to the competent authority.

Differences Between Rev. Proc. 2015-40 and Notice 2013-78

The final revenue procedure describes eight key substantive differences between it and the 2013 proposal:

1. The revenue procedure restricts the scope of requests to which mandatory pre-filing procedures apply.
Pre-filing procedures are required only for taxpayer-initiated positions. Otherwise, such procedures are optional (though encouraged as potentially beneficial to taxpayers).
2. Taxpayers are not required, as a condition of receiving assistance, to expand the scope of a competent authority request to include interrelated issues.

The U.S. competent authority may require a taxpayer to provide information on interrelated issues to enable the competent authority to evaluate the relief sought in the context of the taxpayer's positions on such issues. Moreover, the competent authority may identify interrelated issues and request that the taxpayer amend its request to include the issues identified. If a taxpayer declines to amend, the U.S. competent authority will still try to resolve the issue in the request but, in doing so, will consider the taxpayer's positions on interrelated issues in determining the extent of any relief.

3. The U.S. competent authority may consult with taxpayers regarding additional issues that arise in connection with their requests—e.g., issues concerning foreign tax credits and repatriation payments.

A taxpayer, in its competent authority request or supplemental submission, may ask the competent authorities to address ancillary issues if the relevant treaty permits the competent authorities to do so. If the competent authorities decline to consult or fail to address such issues, then the applicable provisions of domestic law will control.

4. The procedure gives additional guidance on requesting discretionary determinations under the limitation on benefits (LOB) articles of treaties.

The U.S. competent authority will not accept a discretionary LOB request unless the applicant represents that it does not meet the objective LOB provisions and explains why. Rev. Proc. 2015-40 describes instances where the U.S. competent authority typically will not exercise its discretion to grant benefits, including if the applicant (or an affiliate) is subject to a special tax regime in its country of residence or if there would be double non-taxation. (This language clearly mirrors concepts from the recently proposed updates to the U.S. model treaty.) Rev. Proc. 2015-40 further clarifies that the U.S. competent authority will not issue a determination on whether a taxpayer meets an objective LOB test.

The revenue procedure's guidance also includes timelines for taxpayers to notify the competent authority of material changes in fact or law and introduces a triennial reporting requirement to maintain a favorable discretionary LOB determination.

5. Competent authority assistance is not conditioned on notice to or agreement by the U.S. competent authority with respect to the taxpayer's signing a Form 870 (waiver of restrictions on immediate assessment) or entering a closing or similar agreement with IRS Examination.

This provision in Rev. Proc. 2015-40 is a welcome improvement on Notice 2013-78, under which the U.S. competent authority could reject an exam resolution reached without the competent authority's pre-approval. The revenue procedure warns, however, that in these cases, the U.S. competent authority's assistance will be limited to seeking correlative relief from the foreign competent authority, which may not eliminate double taxation.

6. The revenue procedure provides additional information on the interaction of the U.S. competent authority and IRS Appeals under the simultaneous appeals procedure (SAP) review.

SAP review is an optional process whereby IRS Appeals may assist the U.S. competent authority (and the taxpayer) to develop the U.S. competent authority's position on an issue before consulting with the foreign competent authority. SAP review is meant to facilitate unilateral consideration and resolution of an issue, although SAP review positions are not binding on the U.S. competent authority, IRS Appeals or the taxpayer.

A taxpayer may request SAP review as part of its competent authority request or by separate written submission no later than 60 days after the taxpayer is notified that the U.S. competent authority has accepted its competent authority request. The U.S. competent authority has sole discretion whether to accept a request for SAP review or to terminate SAP review after it has begun.

7. Rev. Proc. 2015-40 clarifies the bases on which U.S. competent authority may reject a request for assistance or stop providing assistance ("consistent with U.S. tax treaty policy that taxpayers have broad access to the U.S. competent authority").

Grounds for denying a competent authority request include the taxpayer's failure to comply with the applicable procedures, the taxpayer's ineligibility for the claimed benefits or requested assistance under a plain reading of the treaty and taxpayer conduct before or after its request that undermines or is prejudicial to the competent authority process.

8. The user fee for discretionary LOB determinations increases from \$27,500 to \$32,500 for requests filed on or after October 30, 2015, and before September 30, 2016. The fee further increases to \$37,000 for requests filed on or after September 30, 2016.

Other Notable Aspects of Rev. Proc. 2015-40

Helpfully, under the revenue procedure, the U.S. competent authority is available to consult informally with taxpayers on competent authority issues. Taxpayers may even choose to be anonymous for these informal consultations. A taxpayer can also seek informal consultation with the U.S. competent authority on issues that arise in connection with competent authority issues—e.g., foreign tax credits. These provisions relax the corresponding parts of Notice 2013-78, which commentators had read as potentially mandating consultation (e.g., as a step required to establish that foreign taxes were compulsory for foreign tax credit purposes). Rev. Proc. 2015-40 cautions, of course, that informal advice is only advisory and not binding on the IRS.

While many provisions in the revenue procedure are more taxpayer-friendly than prior guidance and the 2013 proposal, the rules concerning interaction between a U.S. competent authority and IRS Appeals remain thorny. Specifically, if a taxpayer files a protest involving a competent authority issue to IRS Appeals, the U.S. competent authority may decline assistance unless the taxpayer files a competent authority request within 60 days of its opening conference with IRS Appeals, shows in the request that the competent authority issue was properly severed from the issues in its protest subject to IRS Appeals' jurisdiction, has not invoked an alternative dispute program under IRS Appeals with respect to the competent authority issue and has not executed a Form 870-AD or closing agreement concerning the competent authority issue. (SAP review may be requested for severed competent authority issues.)

For severed issues, a taxpayer will retain recourse to IRS Appeals only if the U.S. competent authority rejects the request for assistance or terminates the process, the taxpayer withdraws the competent authority request, the competent authorities do not reach a resolution or the taxpayer rejects the terms of a competent authority resolution.

Commentators strongly criticized similar provisions in Notice 2013-78 on the relationship between IRS Appeals and a competent authority. While Rev. Proc. 2015-40 doubles the time period for severing competent authority issues, this measure does little to allay concerns about the pressure put on taxpayers and IRS Appeals in light of the conditions above. Further, the new procedures effectively minimize the role of IRS Appeals as an independent decision maker and force taxpayers to choose between competent authority assistance and IRS Appeals. It is unclear why the revenue procedure takes such a harsh stance on the interaction of the competent authority and IRS Appeals, given the gentler terms for coordinating with IRS Examination.

Contemporaneously with Rev. Proc. 2015-40, the IRS released Rev. Proc. 2015-41, which details procedures for requesting, obtaining and administering advance pricing agreements (APAs).

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