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The New APMA Procedures — Cosmetic or Cosmic?

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On December 9, 2013, the Internal Revenue Service proposed revised Revenue Procedures to govern requests for Advance Pricing Agreements and U.S. Competent Authority assistance.[2] The revisions were triggered in part by the 2012 merger of the Advance Pricing Agreement Program and the Competent Authority office to become the Advance Pricing and Mutual Agreement Program (APMA) within the Large Business & International Division (LB&I).[3] Non-transfer pricing-related Competent Authority matters are now handled through the new Treaty Assistance and Interpretation Team (TAIT) in LB&I.

The New APA RP and the New CA RP update the previously applicable revenue procedures[4] both to reflect this restructuring and to clarify and refocus the processes themselves. Two critical subtexts are resource constraints in the face of global proliferation of challenging transfer pricing issues, and case resolution pressures from the expanding injection of ''baseball'' arbitration into treaties as a mandatory remedy for stalled Competent Authority and bilateral APA proceedings. Combined, the IRS objective is to improve efficiency and effectiveness.

Because of the significance of these programs and the extent of the revisions, the revenue procedures were issued in draft form with a request for public comments. This article focuses on the transfer-pricing-related[5] aspects of the proposals. The procedures applicable to TAIT matters largely track those applicable to APMA matters, apart from content variances appropriate to the different subject matter.

There is a natural overlap between the Advance Pricing Agreement and Competent Authority processes for substantive as well as procedural reasons. Substantively, both processes focus on transfer pricing issues under Code[6] §482: Advance Pricing Agreements (APAs) are specifically intended to address sec-

[1] The author appreciates the insight contributed by her Caplin & Drysdale colleague, J. Clark Armitage.

[2] Notices 2013-78, 2013-50 I.R.B. 633 (regarding Competent Authority, referred to hereinafter as the ''New CARP''), and 2013-79, 2013-50 I.R.B. 653 (regarding Advance Pricing Agreements, referred to hereinafter as the ''New APA RP'').

[3] APMA is part of the new Transfer Pricing Operations (TPO) within LB&I. Prior to these restructurings, Advance Pricing Agreements were handled by the APA Program in the Office of the Associate Chief Counsel (International) (ACCI), and Competent Authority requests were handled by the Tax Treaty Office of the Large and Mid-Size Business Division (LMSB, the predecessor of LB&I) headed by the Assistant Commissioner (International).

[4] Rev. Proc. 2006-54, 2006-2 C.B. 1035 (re Competent Authority); Rev. Procs. 2006-9, 2006-1 C.B. 278, and 2008-31, 2008-1 C.B. 1133 (re APAs).

[5] ''Transfer pricing,'' as used herein, refers loosely to both (1) intercompany pricing governed by Code §482 and the ''Associated Enterprises'' article of income tax treaties and (2) intracompany allocations governed by the ''Business Profits'' article of treaties that deals with the profits attributable to permanent establishments.

[6] Internal Revenue Code of 1986, as amended (the ''Code'').

ISSN 0090-4600

tion 482 and similar determinations, and cases in need of Competent Authority (''CA'' or ''MAP'')[7] assistance to avoid international double taxation are dominated by transfer pricing disputes.

Although the procedural context may differ at first blush — APAs are generally forward-looking and voluntary, whereas CA requests typically derive from audits of past transactions and are more of a necessity[8] — the APA process requires CA involvement in the prevalent situation where coordinated agreements with other countries on transfer pricing outcomes are sought. Moreover, existing IRS programs and practices already link past, current and future taxable periods, and the proposed Revenue Procedures reflect a deliberate theme of fusing these approaches into a seamless and consistent process.

The subject matter of the proposed Revenue Procedures is necessarily cast as ''procedures,'' rather than the substantive law of transfer pricing. Yet there are some clear themes that are likely to have a significant impact on the strategy, conduct and outcome of transfer pricing cases. This article will focus on these new directions, delving as pertinent into the more process-oriented details but not attempting to cover all the minutiae. The proposed Revenue Procedures are well organized and readable for the latter purpose.

The IRS spent almost two years crafting the revisions, and it shows. There is an unmistakable effort to integrate the APA and CA programs in a way that channels specialized IRS resources to address transfer pricing issues in an efficient and risk-focused manner. The process aspects have been creatively reassembled to produce more standardized submissions and other documentation, facilitate review and understanding of often complex situations, and recognize existing ''best practices.'' APMA has taken increased control over the tributaries that feed into APA and CA in an effort to compress the use of resources and attain more consistent and appropriate results. The trade-off for what one hopes will be faster and better-informed processes is significantly reduced flexibility for taxpayers. The IRS seems also to be seeking improved U.S. fiscal outcomes, which could ultimately affect taxpayer behavior.

Efforts to revamp these programs are not new and have been ongoing for a decade. To date, the gold ring has been elusive. The combination of the restructured APMA organization with the comprehensive and somewhat radical nature of the instant proposals seizes the opportunity to make a real difference.

The topics addressed below are:

- **Competent Authority Sooner — and Stronger.** Competent Authority will become the principal — and up-front — strategic player in the resolution of U.S.-initiated transfer pricing cases. The Examination process will for the first time be shaped by Competent Authority's input and dictate, and the traditional role of IRS Appeals will be markedly revised. Appeals will serve largely as a coordinate function to Competent Authority, through either the Simultaneous Appeals Process or the newly accessible Fast Track Settlement process at Examination. This push to get more quickly to the heart of double-taxation issues will significantly change taxpayers' procedural options and call for different strategic analyses.

- **Weaving Together Years, Issues and Countries.** The revised rules will offer new opportunities and attitude toward comprehensively resolving a broad swath of a taxpayer's transfer pricing-related matters. This efficiency effort should be beneficial for most, though there will be no place to hide for others due to the peremptory role that the IRS has accorded itself.

- **Increasing the Scope of and Access to Competent Authority.** Taxpayers will benefit from being able to address self-initiated adjustments, penalties, and interest in Competent Authority resolutions. A consultation process will be available with respect to foreign tax credits on foreign-initiated adjustments even if formal resolution through MAP is not sought.

- **Conversely, Using Access as an Enforcement Tool.** Implementation of the increased Competent Authority role will be effected in significant part by denying access to Competent Authority assistance or APAs for uncooperative taxpayers.

- **Increasing Transparency.** The IRS will benefit from an increased flow of information about taxpayers and their foreign proceedings, to help remedy its perceived ''information asymmetry.'' Transparency of Competent Authority proceedings *to* taxpayers is not enhanced, however, missing a valuable opportunity to improve the overall process.

- **Focusing on Hard Issues First/Improving Risk Assessment.** Extensive new pre-filing requirements are intended to assess prospects for resolution and, correspondingly, move cases forward (or

[7] The ''Mutual Agreement Procedure'' article of income tax treaties empowers the competent authorities of the treaty partners to resolve differences regarding cross-border allocations, *inter alia*, and thus the process is interchangeably referred to as ''MAP.''

[8] The other way to avoid double taxation is through the foreign tax credit, but the IRS is appropriately vigilant, via regulatory rules and enforcement, about ceding excessive tax revenue to other countries through overly liberal allowance of such credits.

ISSN 0090-4600

out of the system) faster. Hopefully the end will justify the means, as this could be burdensome for taxpayers.

- **Seeking a More Comprehensive and Efficient APA Process — Procedural Innovations.** Major changes to taxpayers' APA and Competent Authority submissions include the use of ''covered issue diagrams,'' executive summaries, financial templates, uniform formats, and existing §6662(e) documentation. Taxpayers will have the up-front opportunity to submit a draft of the APA agreement they seek. Presentations by the taxpayer jointly to the IRS and foreign tax authorities in appropriate cases are contemplated. As a collateral benefit, the relevance of APA submissions in determining whether taxpayers have satisfied the §6662(e) documentation requirements to avoid potential penalties on underpayments is explicitly acknowledged, though an even stronger statement is desirable.
- **Reconsidering Prior Procedural Reforms.** Existing procedures to expedite the processing of APA renewals and small APA or Competent Authority cases have been curtailed, presumably in recognition of their ineffectiveness. This is unfortunate, because there are significant taxpayer needs in these regards.
- **Reflecting the Impact of Treaty Arbitration Provisions.** While the draft Revenue Procedures contain few explicit procedures directed at arbitration rules (these are included instead in pertinent treaties and related promulgations), arbitration provisions are a major driver of the effort to expedite the resolution of Competent Authority and APA cases.

This list of meaty topics provides a ready answer to the question posed by the title: the proposed changes go well beyond the cosmetic and are *potentially* cosmic. Fulfilling the aspirations of the new approaches is an enormous but worthwhile challenge. It will, however, need to be matched by similar undertakings by foreign tax authorities in order to yield overall net benefits to the system.

A. COMPETENT AUTHORITY SOONER — AND STRONGER

The proposed Revenue Procedures (hereinafter referred to, though only drafts, as the ''New CA RP'' and the ''New APA RP'') seem intended to radically change the role of CA in the resolution of transfer pricing cases and dispel any notion that CA is a tail-end or last-resort process. In a way, the new guidance is an extension of the 2012 APMA Office slogan, emblazoned on buttons handed out by its Director — ''Certainty Sooner.'' While that campaign sought to assuage taxpayers' immediate complaints about the length of the APA process, the theme of the New RPs more broadly embodies the desire to make productive use of limited government resources, recognizing that ultimately, most roads lead to CA, and that it is more efficient to involve CA early and limit detours. An enhancement of the decisional role of U.S. Competent Authority (USCA) vs. other IRS offices (Examination, Appeals and ACCI) is also quite evident.

This theme is manifested in many aspects of the New RPs, and definitely falls into the cosmic category.

1. Accelerating the Point for Requesting CA Assistance

The currently applicable rules under Rev. Proc. 2006-54 grant considerable flexibility to taxpayers as to when a CA request may be made.[9] For U.S.-initiated tax return adjustments, the request may be submitted at any time after the adjustment is communicated in writing to the taxpayer, e.g., through a Notice of Proposed Adjustment issued by the IRS Examination Division (''Exam'' or ''the Field''). Assistance regarding foreign-initiated adjustments may be requested ''as soon as the taxpayer believes such filing is warranted based on the actions of the country proposing the adjustment,'' if the taxpayer can establish the probability of double taxation. Rev. Proc. 2006-54 notes that, apart from any applicable treaty restrictions, ''taxpayers have discretion over the time for filing a request; however, delays in filing may preclude effective relief.''

The front-end timing would not be significantly altered by the New CA RP. What would be changed is the effective back-end limit. Under §7.05 of Rev. Proc. 2006-54, there is a semi-cliff effect on the potential for CA relief if a taxpayer has already entered into a closing agreement, settled an issue with IRS Appeals or Chief Counsel through a closing agreement or other written agreement such as Form 870-AD, or ended up with a judicial decision or settlement. After that point, USCA will ''endeavor only to obtain a correlative adjustment from the treaty country and will not undertake any actions that would otherwise change such agreements'' — that is, USCA will not compromise the U.S. adjustments as a tool to achieve resolution with the foreign CA, making full relief from double taxation less likely. Before that point, there are few constraints on when the taxpayer can seek CA assistance.

[9] Rev. Proc. 2006-54 §4.01.

ISSN 0090-4600

The New CA RP would both narrow the request window (or, to continue the analogy, get to the cliff sooner) — *and* make it a *real* cliff. Per §9 of the New CA RP, USCA would not provide assistance — *at all* — for cases where the taxpayer has executed a closing agreement, a Form 870-AD, or a Form 870 with the Field, or which were in or were designated for litigation, unless certain additional conditions had been satisfied. Specifically:

- USCA would not accept a request regarding a U.S.-initiated adjustment memorialized in an Exam resolution (e.g., Form 870) *unless* USCA agreed in writing to the terms of such resolution in advance.[10] The proposed language evinces considerable control by USCA over the Exam resolution: ''If [USCA] disagrees with the terms [of the proposed Exam resolution], [USCA] will request that IRS Examination and the taxpayer amend them accordingly.'' This is all new.
- USCA would not accept a request regarding a U.S.-initiated adjustment emanating from the Fast Track Settlement process in the Field[11] *unless* a USCA representative was named as a ''participant'' in the Fast Track proceeding and was given a reasonable opportunity to participate in all Fast Track Settlement meetings.[12] This is in clear contrast to current rules, which provide that Fast Track cannot be used by a taxpayer that has requested CA assistance and which are silent as to the ability to seek CA assistance after conclusion of a Fast Track proceeding.[13]
- USCA would not accept a request regarding a U.S.-initiated adjustment that had been protested to IRS Appeals *unless* the taxpayer: (1) filed a MAP request or invoked the Simultaneous Appeals Procedure (discussed below) within 30 days after the opening Appeals conference; (2) severed the MAP issue from other issues under Appeals jurisdiction; (3) had not executed a Form 870, Form 870-AD, closing agreement or any other similar agreement concerning the MAP issue; and (4) had not invoked either the Appeals Arbitration Program[14] or the Appeals Mediation Program.[15] Many of these limitations are new.

  The 30-day time limit on seeking CA assistance would be a real game-changer. The effective elimination of Appeals Arbitration and Mediation for transfer pricing cases would be less significant because of their infrequent use, though a taxpayer is currently permitted to ask USCA to request correlative relief from the counterpart CA after going through either Program, albeit without potential leverage via compromise.

  Thus the taxpayer would quickly have to choose whether it wanted CA to have a sole, or joint with Appeals, role, or whether it instead wanted to cast its lot with Appeals alone without any future opportunity to avoid double tax through the CA process.
- USCA would not accept a request regarding an issue and taxable period that was designated for litigation or that was pending in a U.S. federal court and was previously considered by IRS Appeals.[16] Under current rules, USCA can accept such a case with the consent of ACCI and then coordinate with those handling the litigation to sever the MAP issue, delay trial, or stay proceedings pending the outcome of the MAP proceeding.[17] Under the New CA RP, those rules would still apply to cases that have not gone through Appeals.
- As currently, USCA would be able to accept a request relating to a final judicial determination or settlement, but only for requesting correlative relief without departing from the amount of the final determination.[18] The New CA RP also states that USCA would not authorize loan treatment of conforming adjustments in this situation (''MAP repatriation''); see A.5 below.

The substantial alteration of the role of IRS Field and Appeals personnel in cases destined for a CA pro-

[10] New CA RP §9.01(1).

[11] Rev. Proc. 2003-40, 2003-1 C.B. 1044, sets forth the procedure governing this time-limited process, which involves an Appeals facilitator and enables consideration of hazards of litigation in the settlement evaluation.

[12] New CA RP §9.01(2).

[13] Because Fast Track cases may variously be finalized through a Form 870, a Form 870-AD or a closing agreement, the pertinent CA access rules discussed above would logically seem applicable.

[14] Rev. Proc. 2006-44, 2006-2 C.B. 800.

[15] Rev. Proc. 2009-44, 2009-50 I.R.B. 463.

[16] New CA RP §9.03(1).

[17] Rev. Proc. 2006-54 §7.03.

[18] New CA RP §9.03(2).

ISSN 0090-4600

cess under the new rules, along with the concrete consequences for taxpayers, are explored further below. The revisions to the procedural routes to CA are also summarized in the appended diagram.

2. Increasing the Involvement of CA in Field Determinations

Under current procedures, USCA has *no* involvement in determinations at the Field level. A taxpayer may wrest a MAP issue from Exam by filing a CA request after receiving a notice of proposed adjustment. Many taxpayers, however, hesitate to move so quickly to CA, in hopes of reducing or eliminating the adjustment through factual development and argument with Exam. That effort may result in a Form 870 agreement that the taxpayer then takes to CA, or a 30-day letter that the taxpayer takes to Appeals (see A.3 below). Field teams have often been relatively insensitive to the potential of eventual CA involvement, and may end up proposing adjustments or framing issues in ways that are inconsistent with international practices or hard to defend at CA. The Field also lacks authority to resolve cases based on an assessment of the hazards of litigation. All this may mean that the Field eventually proposes a large adjustment which the taxpayer revisits at Appeals and again later at CA. Conversely, the Field may miss or go easy on transfer pricing adjustments due to complexity or workload. The TPO, through its Transfer Pricing Practice, has been trying to improve the situation by bringing transfer pricing expertise and strategic considerations to the Field and emphasizing the need for complete factual development there.

The Field- and Appeals-related initiatives in the New CA RP would greatly bolster this effort. At the Field level, a Form 870 agreement in the new regime would necessarily involve consultation with (and agreement by) USCA in order to be eligible for USCA assistance. This may be helpful to taxpayers if USCA injects some realism or country-specific considerations into the process, making the adjustment easier to defend in CA negotiations, but it could be unhelpful if USCA sees the facts or law differently from the Field or if there are other governmental policies or attitudes in play.

Another proposed change separately demonstrates increased control by USCA over the adjustment process. The New CA RP (§7.02) provides that after evaluating a case, USCA ''may recommend or *require* that IRS Examination revise or withdraw the U.S.-initiated adjustment'' (emphasis supplied). This is quite different from the current USCA rule that ''unilateral withdrawal or reduction of U.S. initiated adjustments . . . generally will not be considered,'' as the primary goal is simply to obtain correlative adjustment from the treaty country or avoid taxation not in accordance with the treaty.[19] The broad explicit assertion in the New CA RP of CA's ability to potentially override Field determinations holds significant potential benefit for taxpayers,[20] and should also enable USCA to strengthen the meritoriousness of its case inventory.

Moreover, the new opportunity to use the Fast Track Settlement process — amalgamating Field case development, hazards-of-litigation settlement authority, mediation skills of an Appeals facilitator, and USCA insight into the relevant MAP process, all within a 120-day turnaround — may prove a particularly attractive option for many taxpayers.

Resource realities suggest that USCA's role in various Field-related aspects would be more consultative than deep. Presumably the plan is to combine the insights of USCA and the TPP (both part of the TPO) in a strategic, non-superficial way, but the practical ability to carry this off given the volume of transfer pricing examinations remains to be seen.

3. Limiting the Stand-Alone Role of Appeals

Currently, taxpayers can protest a transfer pricing issue to Appeals and see how discussions progress before deciding whether the likely outcome of the case merits CA involvement. They can even negotiate through a Form 870AD settlement and still be entitled to have USCA formally request correlative adjustments from the foreign CA. Appeals officers are experienced, senior analysts dedicated to resolving cases, with whom acceptable resolutions can often be achieved due to the ability to take into account the hazards of litigation. They also tend to have more sensitivity to the bilateral nature of the issue. Even if the issue is not entirely eliminated, some taxpayers may conclude that a modest amount of double taxation, combined with certainty of outcome through an Appeals resolution, is acceptable in lieu of an extended and expensive CA proceeding.

But if the taxpayer must eventually turn to CA because the likely Appeals resolution is not sufficient on its own, the IRS sees Appeals resources having been expended without a final resolution. The IRS is also sensitive to the potential for a taxpayer to have ''two bites at the apple,'' achieving some reduction of the adjustment with Appeals and then further modifica-

[19] Rev. Proc. 2006-54 §12.07.

[20] A similar potentially taxpayer-beneficial action is articulated in the case of foreign-initiated adjustments, where USCA may decide to grant correlative relief to the taxpayer without consulting the foreign authority (New CA RP §7.01). That opportunity is not explicit in the current rules, though available in practice.

ISSN 0090-4600

tion in order to achieve resolution with the foreign CA. Taxpayers may characterize this situation differently: The Field, due to lack of expertise or the authority to consider hazards of litigation, or both, often sets up large adjustments, which require Appeals intervention to reduce the adjustments to a somewhat more realistic level and then CA involvement to take into account pertinent international considerations.

Whichever is the case, the proposed rules largely remove the ability of taxpayers to deal with Appeals on a stand-alone basis. A taxpayer would have to decide, within 30 days after the initial Appeals conference, whether it *ever* wanted CA assistance. If so, it would have to choose right then whether to go to CA directly or to combine CA with Appeals through the Simultaneous Appeals Procedure (discussed below). Moreover, the need to prepare a complete CA request during this short window (unless the final version of the CA RP is more flexible) would be particularly challenging. Appeals Mediation and Arbitration options would be off the table.

This design will put great stress on preparation for and conduct of the initial Appeals conference, being the only opportunity for the taxpayer to assess the reasonableness and substantive inclinations of the Appeals team. At the same time, however, Appeals may be disinclined to invest effort in the issues up front because of the possibility that the case will quickly be diverted to CA. The recently initiated ''Rapid Appeals Process,'' where Field personnel continue to provide factual information to Appeals to help resolve a case quickly,[21] may fit in here, but only if it can be finished within the 30-day window.[22]

It thus seems inevitable — and expressly intended by the new rules[23] — that virtually the only role for Appeals in significant transfer pricing cases would be jointly with CA in SAP. This is cosmic.

The SAP process itself[24] would be little changed, apart from acceleration of the time when it must be invoked. USCA consults with Appeals as to whether to accept the case in SAP, which will shift jurisdiction to USCA. Once a case is accepted, USCA and Appeals coordinate on the process and timeframe. In general, Appeals conducts its review in accordance with standard Appeals practice, toward recommending a U.S. position to USCA for the latter's negotiations with the foreign CA. The New CA RP clarifies that USCA has the option of participating in Appeals' meetings with the taxpayer.

4. Disincentivizing Litigation

Litigation is rarely a desirable avenue to resolve transfer pricing issues because of the factual complexity and attendant cost. The proposed rules add a further negative, precluding consideration by CA if a case in litigation had already been considered in Appeals.[25] This represents another conservation of government resources, at the cost of taxpayer flexibility: Appeals or litigation, but not both, if a taxpayer wants to remain eligible for CA relief from double taxation.

5. Increasing CA Discretion with Respect to Repatriation Benefits

Under long-standing procedures, taxpayers can be relieved of certain secondary tax consequences of transfer pricing adjustments by establishing (and satisfying) intercompany accounts receivable in favor of the taxpayer to which an income allocation is made and corresponding accounts payable from the commonly controlled taxpayer where the correlative adjustment is made.[26] This can be coordinated through CA in MAP cases.[27] Similar procedures are available with respect to adjustments to comply with APA terms.[28] Of particular note, repatriations in the APA context are interest-free if the deemed intercompany accounts are satisfied within 90 days of the APA's effective date or the later income tax return due date. The New RPs would modify these rules.

Under the New CA RP, USCA would determine the terms of ''MAP Repatriation'' on a case-by-case basis, taking into account its authority under the pertinent treaty. For example, USCA may determine that it is appropriate to eliminate or modify the requirement for interest on the intercompany accounts. This provision reflects current practice with certain countries and is consistent with the discussion in recent OECD guidance.[29]

Two new limits would be imposed. First, MAP Repatriation would not be available where the MAP is-

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[21] ''IRS Offering 'Rapid Appeals Process' in Bid to Speed Resolutions, Says Wagner,'' 217 *Daily Tax Rpt.* G-10 (11/9/12).

[22] A key difference between the Rapid Appeals Process and Fast Track Settlement is that Appeals is the decision-maker in the former whereas the Field is the decision-maker in the latter.

[23] See New CA RP introductory ''Purpose'' statement: ''the Simultaneous Appeals Procedure is the primary means for obtaining IRS Appeals and U.S. competent authority review of the same issue.''

[24] Rev. Proc. 2006-54 §8; New CA RP §8.

[25] New CA RP §9.02.

[26] Rev. Proc. 99-32, 1999-2 C.B. 296.

[27] Rev. Proc. 2006-54 §10.

[28] Rev. Proc. 2006-9 §11.02(3), referred to as ''APA Revenue Procedure Treatment.''

[29] See Organisation for Economic Co-operation and Development (OECD) Manual on Effective Mutual Agreement Procedures (MEMAP), Feb. 2007, p. 38.

ISSN 0090-4600

sue was previously decided in U.S. litigation.[30] Second, it would not be available if the taxpayer rejects a MAP resolution. However, if the case thereafter reverts to Exam or Appeals, tax-free repatriation of the amount of the income allocation could be available there under Rev. Proc. 99-32.

For APAs, the New APA RP would defer to the CA rules and principles if MAP Repatriation is ''agreed to as part of the MAP resolution'' of a bilateral or multilateral APA.[31] Otherwise, the terms set forth in Rev. Proc. 99-32 would apply. Of particular note, the current APA rule automatically eliminating interest charges for 90-day repayments is gone. Interest charges would be required in all events for unilateral APAs. Whether or not such interest is or is not required with respect to bilateral or multilateral APAs would depend on the terms of the MAP resolution. Repatriation procedures are not common in the government-to-government CA agreements related to APAs, as many countries do not have similar provisions and may have little concern about how the IRS handles this. Thus, unless this practice becomes more ubiquitous, interest-free repatriation procedures for APA-related adjustments would largely be a thing of the past.

In addition, the New APA RP provides that ''APA Repatriation'' would have to be explicitly requested by a taxpayer before the related MAP resolution is reached. That is not how it works today; a taxpayer may elect on a year-by-year basis whether to apply such treatment if a primary adjustment is needed to comply with the APA. The proposed guidance is unclear as to whether Rev. Proc. 99-32 would be available independently in such circumstances. This is important to know, because, unless discretion with respect to interest is favorably exercised in the context of the bilateral APA resolution, there does not appear to be any advantage to ''APA Repatriation'' as such.[32]

6. Expanding CA Submission Requirements

The current content requirements for CA requests would in general be retained, with appropriate modifications to reflect new features, such as Exam resolution notifications and pre-filing memorandum requirements (see F below).[33] Two further additions[34] bear mention.

First, applicants would be required to submit copies of any §6662(e) contemporaneous documentation ''or other documentation analyzing the MAP issues for the MAP years.'' Clarification of the vague ''other documentation'' reference (for example, it is not clear whether the reference would include internal analyses, new analyses, and tax accrual work papers) is needed, as well as a sense of how comprehensive it is intended to be. This requirement seems designed to give the IRS a broader picture of the case, addressing its oft-stated concern with ''information asymmetry,'' and could be a way to ferret out any inconsistencies in the taxpayer's positions.

Second, the New CA RP would require submission of financial data for the controlled group for all MAP years as well as income statements and balance sheets, segmented to demonstrate the effect of the MAP issues, not only for the MAP years but, ''as applicable,'' for three years before and three years after the MAP years. The current rules do not routinely require such financial data, although of course it may be requested by USCA after the submission or volunteered by the taxpayer as part of its explanation of the adjustments.

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In short, for U.S.-initiated transfer pricing cases, CA rules. While this may well be appropriate, given the nature and ultimate destination of these controversies, it certainly represents a sea change from the current situation. Taxpayers' strategic calculus (as well as their FIN 48 calculations) will need to take the new paradigm into account.

B. WEAVING TOGETHER YEARS, ISSUES AND COUNTRIES

The New RPs are replete with approaches that seek to extend the negotiations and/or results of a transfer pricing controversy to other matters involving the same taxpayers — a clear bid for resource efficiency and consistency of application. While these provisions in part incorporate existing administrative mechanisms, the scope is considerably wider and reflects a much more assertive role by the IRS.

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[30] It is not, however, clear whether a pre-decisional request for CA assistance would enable repatriation as part of a court-related resolution.

[31] New APA RP §7.02.

[32] Curiously, the New APA RP omits the extensive discussion in Rev. Proc. 2006-9 (§11.02) about primary and secondary adjustments, a complex subject as to which guidance (or pertinent references) would be helpful. See Lewis and Breen, ''Coming Full Circle? Secondary Adjustments and Repatriation in Transfer Pricing Cases,'' 17 *Transfer Pricing Rpt.* 28 (5/8/08).

[33] A helpful innovation from an efficiency standpoint is the New CA RP's promise to provide templates for several documents regularly used during the MAP process: protective claims with respect to foreign tax credits, treaty notifications (e.g., Canada), and combined initial and annual forms for both. New CA RP §§13.04(2), 14.02 and 14.05.

[34] New CA RP Appendix §1.03 Tab 9.

ISSN 0090-4600

1. Competent Authority Forward

The Accelerated Competent Authority Procedure (ACAP) under Rev. Proc. 2006-54 (§7.06) allows a *taxpayer* to request application of the terms of a MAP resolution to subsequent filed years if the same issue continues, a common situation in transfer pricing cases. However, whereas those rules give the Field control over the decision to incorporate ACAP years, the New CA RP[35] would place full discretion and control in USCA.

Moreover, the New CA RP would permit *USCA* ''to act of its own accord'' to bring ACAP years into a MAP case.[36] As explained in D below, USCA can effectively force this extension by threatening to deny the underlying MAP request if the taxpayer does not accede to USCA's desire for ACAP.

Of course, in either case, the ability to apply ACAP would be limited by the need for consensual treatment by the pertinent treaty partner.

The proposed rules also state that USCA can ''encourage'' the taxpayer to extend the MAP resolution even further, into APA-eligible years.[37] To foster this choice, APMA could permit the taxpayer to file an abbreviated APA request if the applicable law, facts and circumstances, economic conditions and other relevant factors in those years ''[were] reasonably expected to be substantially the same'' as for the MAP/ACAP years.[38]

2. APA Backward

Rev. Proc. 2006-9 and its predecessors have long encouraged the ''rollback'' of an APA transfer pricing method (TPM) to prior open years.[39] This feature can be used to resolve years in between an earlier audit resolution and the largely prospective period covered by an APA, to resolve a pending audit, or to cover unaudited open years where the potential for a transfer pricing controversy exists. Rev. Proc. 2006-9 generally contemplates a taxpayer request for rollback, but notes that the IRS may decide to apply the same or similar TPM to prior years even in the absence of a taxpayer request. The Field or Appeals, as applicable, not USCA, has discretion as to whether the rollback is applied to the pertinent years.

APMA's hand would be considerably strengthened under the New RPs. APMA ''may . . . condition its acceptance of an APA request upon the taxpayer's agreement to roll back the terms of its proposed APA (with appropriate modifications, if necessary) where APMA has clear interests in doing so and the taxpayer does not offer clear reasons against doing so.''[40] APMA could initiate a rollback at any time during the APA process and suspend or terminate the APA process if the taxpayer refuses to accept the rollback.[41]

Taxpayers' flexibility, however, would be reduced. The New APA RP would require a rollback request to be submitted no later than three months after the related APA request is filed, unless APMA agrees otherwise.[42] Taxpayers would also have to go on record in the APA request as to their reasons for not seeking a rollback.[43] These constraints may disadvantage taxpayers, as they would have no meaningful opportunity to assess the likely outcome of their APA requests before deciding whether to add on a rollback. These new requirements may not be a problem if all sides eventually agree that a rollback is desirable, but a cautious taxpayer may be frozen out when it alone later desires a rollback. This new dynamic must be carefully considered by taxpayers, because it will tend to accelerate decisions on the scope of proceedings and, therefore, the amounts at stake.[44]

The proposed rules no longer state explicitly that the Field or Appeals has jurisdiction over a rollback; rather, there is a more subtle reference to APMA ''coordinating and collaborating with other offices within the IRS.''[45]

3. Other Issues and/or Countries

The New RPs would give the IRS authority to expand APA or CA proceedings to include other ''coverable'' issues relevant to the proposed covered issues. Although framed as a voluntary taxpayer choice in the APA context (''APMA may encourage the taxpayer to expand the scope . . .''), the proposed rules go on to permit APMA to condition its acceptance of an APA request upon the taxpayer's agreement to include such other issues ''when APMA has clear interests in doing

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[35] New CA RP §4.

[36] New CA RP §4.01.

[37] New CA RP §2.10 and New APA RP §2.02(3).

[38] New APA RP §5.01(1).

[39] Rev. Proc. 2006-9 §2.12 encourages rollbacks ''whenever feasible based on the consistency of the facts, law, and available records for the prior years''; detailed rules are in §8 of the Revenue Procedure.

[40] New APA RP §2.02(3); *see also* §5.02(4).

[41] Note that the proposed procedures require the taxpayer to identify all open pre-APA years in the United States and in relevant treaty country(ies). New APA RP Appendix §1.02 Part 2 §2.3.

[42] New APA RP §5.02(1).

[43] New APA RP Appendix §1.02 Part 3 §3.2.

[44] It would be a nice, counterbalancing, touch if the IRS were to endorse the use of ''telescoping'' to allow any adjustments for completed years to be handled in the latest year, to minimize the need for multiple federal, foreign, and local amended returns.

[45] New APA RP §5.02(3). Rev. Proc. 2006-9 §8.05 makes it clear that the Field or Appeals, as the case may be, has jurisdiction over rollbacks.

ISSN 0090-4600

so and the taxpayer does not offer clear reasons against doing so.''[46] Nor is there any subtlety in the CA context: APMA ''may require that the scope of a MAP case be expanded,'' giving the example of adding treaty countries or MAP issues.[47] A taxpayer's failure to cooperate in adding other countries could result in denial of USCA assistance.[48]

''Coverable issues'' are explicitly defined in the New APA RP.[49] Beyond §482 issues, they would include MAP issues arising under the business profits and associated enterprises articles of U.S. treaties, determination of income effectively connected with a U.S. trade or business, sourcing determinations for income sourced both within and without the United States, ''ancillary issues'' such as repatriation, interest on refunds and deficiencies, penalties, and whether payments are ''compulsory'' for foreign tax credit purposes, and ''any other issues for which transfer pricing may be relevant to their resolution by APMA.'' Interest, penalties, and foreign tax credit issues would be a significant expansion; see C.2 and C.3 below. The same ancillary issues would be eligible for coverage in a MAP resolution.[50]

Adding other countries to a MAP or APA case can be procedurally tricky. To date, so-called ''multilateral'' MAPs or APAs tend to consist of a combination of bilateral agreements. But Michael Danilack, the current U.S. Competent Authority, has emphasized the desire to find ways to facilitate true multilateral agreements.[51]

4. IRS-Initiated MAP Cases

Finally, the New CA RP would authorize the IRS to initiate MAP cases where no CA request had been filed.[52] In contrast to Rev. Proc. 2006-54 (§2.03), this option would not be limited to a ''situation deemed necessary to protect U.S. interests.'' This broad right could presumably encompass situations where the IRS sees a foreign case-law development that appears to disadvantage a class of U.S. taxpayers or otherwise portends heartburn for U.S. taxpayers or the U.S. fisc. It would also surely cover the example given in Rev. Proc. 2006-54, where a taxpayer fails to request CA assistance after agreeing to a U.S. or foreign tax assessment that is contrary to the provisions of an applicable treaty. The New CA RP would also invoke treaty exchange-of-information provisions to cover cases in the examination process where the need for ultimate CA involvement seems likely, probably reflecting the role of the Washington-directed Transfer Pricing Practice in Field examinations.

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Thus, to sum up how the New RPs view matter integration, everything is in play, and the IRS holds the joy stick.

C. INCREASING SCOPE OF AND ACCESS TO COMPETENT AUTHORITY

USCA's subject-matter role is being expanded in three other significant ways: to cover taxpayer-initiated positions, foreign tax credits with respect to taxes on foreign adjustments, and penalties and interest.[53]

1. Taxpayer-Initiated Positions

Regs. §1.482-1(a)(3) allows a taxpayer to report on a timely filed return the results of its intercompany transactions based upon prices different from those actually charged, if necessary to reflect an arm's-length result. This can also be done via amended return if the change would increase the taxpayer's taxable income.

Taxpayers have long wished for access to USCA for such ''taxpayer-initiated'' adjustments, particularly those that increase U.S. income. It has not been clear, however, whether such adjustments could be handled in Competent Authority, because, *inter alia*, there has been no overt ''action'' by one of the governments to trigger the availability of a taxpayer-initiated MAP proceeding under most treaties.[54] The IRS has publicly evinced concerns about granting CA relief where

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[46] New APA RP §2.02(5).

[47] New CA RP §2.08.

[48] New CA RP §6.02.

[49] New APA RP §1.01.

[50] New CA RP §1.01 and Appendix §1.02 Part 3 §3.3.

[51] This topic is apparently being considered, *inter alia*, by the new MAP Forum organized under the auspices of the OECD Forum on Tax Administration, as well as by the OECD focus group working on Action 14 of the OECD's Base Erosion and Profit Shifting (BEPS) project. ''Proposed Changes to Competent Authority Procedure Highlight Increased Engagement with Taxpayers, IRS Official Says,'' *Tax Analysts Highlights & Documents* (12/13/13), p. 9503.

[52] New CA RP §2.08.

[53] In addition, CA assistance will now be available for certain treaty-related foreign pension fund determinations. New CA RP §3.07.

[54] *See, e.g.,* Article 25(1) of the U.S. Model Income Tax Treaty (Nov. 15, 2006) (''U.S. Model Treaty''). For a comprehensive discussion of this issue, see Rosenbloom, ''Self-Initiated Transfer Pricing Adjustments,'' *Tax Notes Int'l* (6/4/07). *See also* ''Self-Initiated Transfer Pricing Adjustments or Virtue Unrewarded,'' *KPMG What's News in Tax* (9/27/10).

ISSN 0090-4600

U.S. taxpayers have reallocated income to foreign affiliates.[55]

Nevertheless, in a major expansion of USCA jurisdiction, the New CA RP would answer this question favorably for taxpayers. It states that MAP issues — i.e., issues subject to resolution under the auspices of USCA — may arise as a consequence of ''taxpayer-initiated positions.'' Taxpayer-initiated positions would be defined to include positions taken with respect to either U.S. or foreign tax liability.[56]

However, the New CA RP would guard this opening by providing that requests for assistance with respect to taxpayer-initiated positions would be rejected if ''the request evinces after-the-fact tax planning or fiscal evasion or is otherwise inconsistent with sound tax administration.'' One can understand the IRS's caution, given the newness of this option, the IRS concern about foreign shifts, and a possible undercurrent that self-initiated adjustments would generally not be necessary if the taxpayer had been rigorous with respect to its transfer pricing planning and analysis. In the real world, however, unanticipated situations do arise, despite best intentions. This is particularly true where the comparable profits method (CPM) under Regs. §1.482-5 is used, because it depends on actual profitability finally determined after year-end. Further explication (or examples) of ''after-the-fact tax planning'' would be helpful, because by its nature a taxpayer-initiated adjustment varies from book reporting, occurs after the end of the taxable year, and is done for tax purposes (i.e., to comply with Code §482).

2. Foreign Tax Credits

The New CA RP expressly contemplates that foreign tax credit issues could be addressed in a MAP resolution.[57] Although within the scope of typical treaty MAP articles,[58] this authority was not explicit in prior guidance.

In addition, the proposed rules would expressly offer the possibility of informal consultation as to whether particular foreign tax payments are ''compulsory,''[59] and thus potentially creditable, implicitly without the need to go through MAP proceedings. The notion of a compulsory payment requires the taxpayer to have exhausted all effective and practical remedies to reduce its foreign tax liability — including a request for CA assistance in appropriate cases.[60] IRS officials have said that the new consultation provision merely codifies existing practice, but it is good to have this opportunity on the record. The New CA RP caveats that the consultation would be oral, advisory only, and not binding on the IRS; presumably only the Field can make a real determination on creditability. But the New CA RP does suggest that USCA would consult with the Field ''when appropriate,'' ''to ensure consistent and coordinated treatment.''

The consultation opportunity would replace some explicit admonitions in Rev. Proc. 2006-54,[61] e.g., that taxpayer acts or omissions precluding effective CA assistance may constitute a failure to exhaust remedies, and that failure to reach a MAP agreement generally will not demonstrate the exhaustion of remedies. In the latter case, the New CA RP (§10.04) constructively provides that the notification to the taxpayer of a resolution failure could identify steps the taxpayer must take to establish that the foreign tax was compulsory, e.g., pursuit of administrative and judicial remedies abroad.

The question of foreign tax creditability is a major issue for taxpayers, particularly with the increasing incidence of foreign-initiated adjustments. Informal guidance to help a taxpayer assess whether it needs to invoke CA to button down the credit would be quite beneficial, and could reduce the use of CA resources. It would be even better if a more definitive outcome could be provided, perhaps through a process that involves Chief Counsel or Exam.

3. Penalties and Interest

The New RPs identify penalties with respect to U.S.-initiated adjustments and interest on refunds and deficiencies as ''ancillary issues'' that could be covered in a MAP resolution or an APA.[62] Previously, USCA shied away from these matters, even where there were specific references in treaty MAP articles.[63] Although there is no indication of the amenability of foreign CAs to this inclusion, USCA's willingness to take on these topics is most welcome.

Notably, penalties on foreign-initiated adjustments are not mentioned, perhaps reflecting USCA discomfort with foreign factual determinations. But reciprocity in this respect may prove pertinent to the ability to bilaterally resolve U.S.-initiated penalties.

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[55] *See, e.g.,* ''In Revising Its MAP Revenue Procedure, IRS Might Accept Self-Initiated Adjustments,'' 235 *Daily Tax Rpt.* G-4 (12/7/12).

[56] New CA RP §2.02.

[57] New CA RP §1.01 (definition of ''ancillary issues'').

[58] *See, e.g.,* Articles 23 and 25(1) of the U.S. Model Treaty.

[59] New CA RP §2.06.

[60] *See* Regs. §1.901-2(e)(5) and Rev. Rul. 92-75, 1992-2 C.B. 197.

[61] Rev. Proc. 2006-49 §11.

[62] New CA RP §1.01; New APA RP §1.01.

[63] *See, e.g.,* Article 25(3)(e) of the U.S. Model Treaty.

ISSN 0090-4600

D. CONVERSELY, USING ACCESS AS AN ENFORCEMENT TOOL

Various new initiatives, imperatives and limitations described above are empowered not by statute or regulations but by implementation of the discretion the IRS has accorded itself in the New RPs.

1. Denial of CA or APA Assistance

Section 6.02 of the New CA RP contains an expanded list of situations where CA assistance could be denied.[64] These are incorporated into the New APA RP as well.[65] Some of these preclusions are discussed above, e.g., with respect to Exam resolutions, Appeals cases, litigation settings, addition of other years or countries, and taxpayer-initiated positions. Other newly listed circumstances that would generally lead to denial include those where:

- Based on facts and circumstances known to USCA, providing assistance to the taxpayer would be inconsistent with the terms of the pertinent treaty.
- Adequate resolution would require consideration of other issues involving non-treaty jurisdictions and the taxpayer fails to disclose these issues.

One item no longer listed is the condition in Rev. Proc. 2006-54 that the taxpayer must agree that CA negotiations are a government-to-government activity that doesn't include the taxpayer's participation in negotiations. Perhaps this deletion reflects the new IRS initiative relating to joint presentations (G.11 below) or a view that separate statement of this point was unnecessary.

2. Unreviewable Administrative Decisions

The New RPs also identify certain situations where USCA's decision would be non-reviewable. Added to the current one regarding USCA's decision to deny, suspend or terminate CA assistance[66] would be USCA's decision as to whether a MAP request was complete[67] and APMA's decisions as to whether an APA request was complete or to deny, suspend or terminate assistance.[68]

E. INCREASING TRANSPARENCY

Publicly, APMA officials have declared that the New RPs are in the spirit of and will promote transparency. That is certainly the case from the IRS's perspective; whether taxpayers would see increased transparency is less clear.

1. Between Governments

Both New RPs emphasize the need to file requests and related submissions simultaneously with all affected governments. In MAP cases, the taxpayer's submission would have to include a copy of any submission filed with the counterparty CA, along with an explanation of the nature of that request and any material differences from the U.S. request.[69]

The proposed APA requirements are even more comprehensive. Beyond providing APMA with a copy of the initial foreign submission,[70] the taxpayer would generally be required to provide to all relevant CAs any responses, information, documents or analyses that it provides to one CA — whether provided in response to a request from a CA or submitted voluntarily by the taxpayer in support of its request.[71] While understandable from the IRS's perspective, this broad requirement may impinge on a taxpayer's ability to assist one CA in negotiation strategy or could hinder a government's candor with the taxpayer.

The New APA RP suggests cooperation in developing efficient procedures for disseminating this cross-CA information (e.g., indices of information requested by or provided to one CA that the taxpayer would provide to the other CAs to permit them to decide which documents to request), which acknowledges the potential magnitude of the task.[72] The index approach would make particular sense with respect to foreign countries that conduct extensive due diligence exercises.

2. From Taxpayers to IRS

As indicated in G below, the scope of information to be submitted in an APA or CA request would be expanded to include comprehensive information regarding the taxpayer and its controlled group through a diagram-based approach and copies of existing §6662(e) documentation. Other new taxpayer transparency obligations that would flow to the IRS include the following:

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[64] *Cf.* Rev. Proc. 2006-54 §12.02.

[65] New APA RP §4.02.

[66] *See* Rev. Proc. 2006-54 §12.04.

[67] New CA RP §6.03.

[68] New APA RP §4.02(3). Rev. Proc. 2006-9 §6.10 gave the taxpayer a conference of right with the APA Director if rejection of an APA request was proposed.

[69] New CA RP §3.05(2) and Appendix §1.02 Part 1 §2.1.

[70] New APA RP Appendix §1.03 Exhibit 9.

[71] New APA RP §3.10(2). The New CA RP (§3.05(3)) contains a similar requirement — ''any information or documents requested by or submitted to either competent authority'' — but only, at least on its face, those existing at the time of the initial CA request.

[72] New APA RP §3.10.

ISSN 0090-4600

- Taxpayers would be expected to supplement APA requests and provide updated information throughout the APA process.[73] While not an entirely new requisite for APAs (or CA) requests,[74] this would include an automatic requirement for updated data within 180 days after the end of each taxable year while the APA request is pending that demonstrate application of the proposed TPM.[75] (Rev. Proc. 2006-9 requires only that the taxpayer ''be prepared'' to so update its APA submission, liberalizing a 120-day submission requirement in prior guidance; the pendulum has swung back.)
- ''Any'' financial data produced in connection with the APA request would have to be updated annually or on a mutually acceptable schedule.[76] The current requirements are narrower.[77]
- Taxpayers would have to submit a table regarding filed years for each member of the covered group, indicating which years are open in the United States or abroad and whether they involve review or adjustment of the covered issue or a substantially similar issue.[78]

3. From IRS to Taxpayers

The New RPs would provide some new *substantive* transparency benefits for taxpayers — consultation with USCA regarding the creditability of foreign taxes (C.2 above) as well as oral, informal, non-binding advice from APMA ''whether or not in the course of the APA process, on general and specific matters concerning APAs.''[79]

However, no significant new *procedural* transparency initiatives to benefit taxpayers are evident. To the contrary, the New CA RP omits the provision in Rev. Proc. 2006-54 (§5.09) that to the extent possible, USCA will consult with the taxpayer regarding the status and progress of the CA proceedings. Although the New CA RP does state that USCA will notify the taxpayer and outline the general terms of any tentative MAP resolution reached during the MAP process,[80] this is a bare minimum of disclosure, not an expansion of transparency. Currently, APMA's practices tend to vary on an individual basis, and the absence of a broader transparency directive is troubling. It would behoove the IRS to consider initiatives to routinely increase transparency to taxpayers, both to demystify the MAP process and to increase opportunities for constructive input from the taxpayers. Such information can often help the CAs to understand the full implications of an agreement and to avoid potentially costly mistakes that undermine the purpose of the process (avoiding double tax) and taxpayers' confidence in it.

The joint CA presentation approach (G.11 below), where used, could also provide an opportunity for increased transparency, to the extent discussions in the taxpayer's presence provide some indication of the issues and views of the various CAs.

F. FOCUSING ON HARD ISSUES FIRST/IMPROVING RISK ASSESSMENT

IRS officials have commented publicly on the temptation of APA (or MAP) teams to spend a lot of time on relatively routine aspects of a case before drilling down on the more challenging, contentious, and hard-to-resolve aspects. Not only do the latter issues have the potential to derail the case, but the IRS may not be able to deal carefully and well with such issues if they are first addressed near the end of the case, especially if a two-year arbitration trigger is looming.

As a mechanism to surface and focus teams on the hard issues sooner, both New RPs would mandate a pre-filing memorandum, and could require a possible pre-filing conference, in certain cases.[81] Specifically:

APAs:

- A pre-filing memorandum would be mandatory where the proposed covered issues included the license or transfer of intangibles related to an ''intangible development arrangement,'' a global trading arrangement, or unincorporated branches, pass-through entities, hybrid entities or disregarded entities. A mandatory memorandum could not be submitted anonymously, and would have to include ''covered issue diagrams'' (discussed below).

  Intangible development arrangements include cost-sharing arrangements, whether qualified under Regs. §1.482-7 or not.
- Pre-filing memoranda would also have to be submitted to explain why a unilateral APA was being requested where the issue

[73] New APA RP §2.03(2).

[74] See Rev. Proc. 2006-9 §5.02, obligating taxpayers ''to update on a timely basis all material facts and information,'' and Rev. Proc. 2006-54 §5.08.

[75] New APA RP §3.11(3).

[76] *Id.*

[77] Rev. Proc. 2006-9 §§5.02 and 5.03.

[78] New APA RP Appendix §1.02 Part 2 §2.3.

[79] New APA RP §2.06.

[80] New CA RP §10.01.

[81] New APA RP §3.02, New CA RP §3.02.

ISSN 0090-4600

was eligible for bilateral or multilateral coverage, or if the taxpayer sought to file an abbreviated APA request (i.e., to extend a MAP or ACAP approach into APA years, for small cases, or for APA renewals).

- A pre-filing memorandum would be recommended, though not mandated, for requests that presented novel or complex substantive or procedural issues. These could be submitted on an anonymous basis, though this would be discouraged.
- After receiving a pre-filing memorandum, APMA could decide whether to accept a taxpayer's request for a pre-filing conference or whether to require such a conference even if not requested by the taxpayer.

MAP:

- The new USCA rules regarding mandatory and optional pre-filing memoranda would mimic those noted above for APAs.
- In addition, pre-filing memoranda would be mandated for foreign-initiated adjustments aggregating over $10 million, taxpayer-initiated positions, or other circumstances in which the taxpayer believes a MAP issue has arisen outside the context of an examination (e.g., withholding taxes).[82]

This approach should benefit the IRS from a risk assessment perspective and help everyone sort out more quickly whether key aspects of the case are capable of resolution.

Whether the expanded pre-filing requirements will lengthen and complicate the process, particularly where foreign-initiated adjustments are at issue, will depend on how the IRS in fact administers the process. Reduced opportunities for anonymous exploration of issues, although conserving IRS resources, may impede some potential applications and also give APMA less visibility into developing issues.

One note: Addressing hard issues first may be less productive for APA cases if the foreign CA is not yet involved, unless the IRS has considerable experience or an established track record of addressing the same type of issues in CA negotiations. In finalizing the New APA RP, the IRS should consider explicitly opening the door for early CA discussions of these issues; the current draft does not say much about the timing of CA engagement.

[82] A pre-filing memorandum is also mandated for TAIT-related requests for discretionary LOB relief.

G. SEEKING A MORE COMPREHENSIVE AND EFFICIENT APA PROCESS — PROCEDURAL INNOVATIONS AND OTHER CHANGES

The New APA RP contains significant procedural innovations intended to improve the APA process for the IRS — increasing its understanding of the nature and context of the covered issues and facilitating the processing of cases. Certain analogous provisions are included in the New CA RP, and are referenced in the discussion below as pertinent. Whether taxpayers will share the same view is likely to depend on whether the process is *significantly* shortened as a result.

1. Covered Issue Diagrams

The New APA RP would require taxpayers to include ''covered issue diagrams'' in all regular APA requests as well as in mandatory pre-filing submissions.[83] Covered issue diagrams are defined as ''diagrams, charts, or similar representations . . . that depict, among other items, the legal structure, tax structure, business unit structure, intercompany flows, and value chain . . .'' of the relevant parties. They would be used to present both background on the covered group and information regarding the covered issues.

The idea is to use the diagrams as a reference point for more detailed prose discussions. Diagrams would have to be referenced in describing the history of business operations, worldwide gross revenue, functional currencies, business lines outside the scope of the covered issues, and industry information (including economic factors, market features, and competitors). With respect to the covered issues, the diagrams would form the basis for detailed discussion of functions, assets and risks, and transactional or commercial flows. Intercompany agreements would have to be depicted — ''whether written or implied.''[84]

The draft is not entirely clear as to the scope of some of the requirements, i.e., whether they would pertain to the covered issue, the covered group (defined as the taxpayers whose intercompany transactions are within the scope of the covered issues),[85] or the entire controlled group, but the IRS has informally

[83] New APA RP §§1.01, 3.02(6)(d) and 3.04(1), and Appendix §1.02 Part 3 §3.4 and §1.03 Example 11. Similar diagrams would be required for transfer pricing-related CA requests, per New CA RP Appendix §1.03 Tab 9.

[84] New APA RP Appendix §1.03, Exhibit 11.

[85] New APA RP §1.02.

ISSN 0090-4600

indicated that it will clarify the language to avoid unintended overreach of this requirement.[86]

While a diagrammatic approach is not innovative in an objective sense — diagrams of this sort are often used in transfer pricing presentations and sometimes requested by other tax authorities — mandating such diagrams would be a new feature of the APA Program. Use of diagrams should certainly help the IRS understand complex transactions and work through often voluminous submissions, and is a good discipline for taxpayers as well. Once everyone gets the hang of balancing effective diagrams with related prose discussions, this tool should facilitate the processing and negotiation of cases.

2. Specified Structure of Submission

Both New RPs specify the order in which the prose submission should be organized, as well as designating specific exhibits to be included (and their order). This should considerably aid review by the APMA teams and also help them determine whether all pertinent information has been included and presented consistently. One minor transitional issue could arise with respect to APA renewals, as it may be harder to demonstrate continuity or identify changes by ready reference to a prior submission in a different format.

3. Executive Summary

The APA submission would have to begin with an executive summary. Submitters following best practices may have already been doing this, but this is in all events a desirable approach to tee up the issues and maintain the proper focus.

Indeed, it would not be entirely facetious to suggest that a combination of covered issue diagrams and an executive summary, along with key exhibits, might suffice for the entire submission in certain cases, leaving it to the IRS to ask for additional detail as needed. This would particularly make sense in renewal situations, and could be authorized at a pre-filing stage. However, the IRS seems to be going in the other direction, driven in part by a belief that taxpayers are too selective in providing information and in part to frontload the provision of information that the IRS has in practice eventually requested. In the author's experience, the opposite is often the case: extensive information is requested, and submitted, that ultimately has no bearing on the development of a CPM range or other TPM. Transfer pricing science, as well as publicly available information for comparable companies, has not evolved sufficiently to allow adjustments for many differences that might exist between the taxpayer and potential comparable companies.

4. IRS Template for Financial Information

Where the CPM method is used, financial data of the taxpayer tested party must be assembled in order both to develop the profit level indicator range and to evaluate its application. The basic categories of required comparable party data are defined in the regulations — revenue, gross profit, selling expenses and operating profit — and financial accounting (typically under U.S. Generally Accepted Accounting Practices) is ordinarily used to achieve appropriate comparability with the publicly available data for potential comparable companies.

The New APA RP would require use of an ''APA template,'' to be made available on the APMA website, to standardize the information it receives with respect to the tested party and other relevant members of the covered group.[87] The template would have to be populated with five years of income statement data and six years of balance sheet data (or as many years as are available). Assuming the format is reasonably conventional, improved efficiency should result from a uniform data format.

The New APA RP would not, however, require a template to be used for the comparable companies' data or the CPM comparability analysis. The IRS has previously made available its general preferred methodology for purposes of comparability and asset intensity adjustments,[88] but taxpayers have not been obligated to use it.[89] This should be reconsidered in finalizing the new procedures; even though differences of methodology often do not have a significant effect on the outcome, they can consume time and resources for all parties in trying to confirm and reconcile the data.

5. Excel Documents

The new APA RP would require that financial documents in Excel format be submitted ''with formulas and linkages intact.''[90] This obviously would help the IRS confirm the application of the APA template, and, more generally, enable the IRS to readily evaluate and adjust other computations that are provided by the

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[86] ''Practitioners Air Concerns over APA, Competent Authority,'' *Tax Notes* (12/16/13), p. 1153.

[87] New APA RP Appendix §1.03 Exhibit 15.

[88] Regs. §1.482-5(c)(2)(iv).

[89] Announcement 2012-13, 2012-16 I.R.B. 805, Attachment B (copy of APA Program's CPM spreadsheet model is available on request).

[90] New APA RP Appendix §2.03(4).

ISSN 0090-4600

taxpayer. Some taxpayers may worry about facilitating alternative, potentially disadvantageous, calculations by the IRS. However, the IRS can always get there eventually, and making things cumbersome for the IRS is not conducive to the faster process that taxpayers want.

One must note, however, that the proposed rules would not obligate APMA to provide its own analyses to the taxpayer in such a complete format. Fairness suggests the IRS should offer reverse financial transparency to taxpayers for the same reasons the IRS wants it for itself.

6. Required Financial Information

Rev. Proc. 2006-9 currently requires an applicant to submit representative financial and tax data of the parties for the last three taxable years, unless more years are ''relevant to the proposed TPM.''[91] The New APA RP would extend this for CPM cases to routinely require five years of income statement data and six years of balance sheet data for both the tested party and the proposed comparable companies.[92] In practice, the IRS has been gravitating toward five-year CPM testing in recent years; now this would seem the default approach. The current three-year requirement with respect to tax return and financial statement information would be unaltered.[93]

Significantly, beyond continuing the requirement to demonstrate the effect of the proposed TPM for the three most recent pre-APA years, the New APA RP would require taxpayers to demonstrate the effect for the first APA year and, using forecasted data to the extent available, for the full APA term.[94]

7. Proposed APA Document

An excellent addition to the prescribed contents of an APA request is a proposed draft APA document, including a redlined version that would show the differences between the taxpayer's draft and the model APA published on the APMA website.[95] Currently, the APA document is not prepared until the tail end of the APA process, after bilateral agreement (if applicable) has been reached, and, then, is prepared by the APMA team leader. This process can encounter delays due to IRS workloads. More importantly, the drafting process may uncover unseen or unappreciated details that were not adequately addressed in the CA process or that may be forced to fall by the wayside due to the pressure to finish the case.

Asking the taxpayer to propose the draft document up front would hopefully minimize such problems. It would also clarify what the taxpayer is seeking to achieve and help finish the APA more quickly.

8. Submission of §6662(e) Documentation

Absent an in-effect APA, taxpayers are well advised to maintain robust contemporaneous transfer pricing documentation to avoid penalties in the event of transfer pricing audit adjustments, pursuant to the rules of Code §6662(e). The New APA RP would require taxpayers to submit copies of their pertinent §6662(e) documentation for the three pre-APA years.[96] The IRS may be looking for inconsistencies, not just broader information, and taxpayers should be sensitive to this.

9. APAs as 'Contemporaneous Documentation'

One motivation for seeking an APA is to eliminate the need to maintain annual contemporaneous §6662(e) documentation. Once an APA agreement is in place, there is an assumption that §6662(e) penalties will not be imposed even if adjustments must be made to satisfy the APA TPM, though there is no express regulatory provision to this effect. The fact that the New APA RP would consider penalties an ancillary issue that can be covered by an APA may suggest that this assumption could be formalized on a routine basis (ideally, in the model APA language).

There are more significant uncertainties if for some reason an APA agreement is never reached or the application is withdrawn. As a practical matter, advisors generally consider that there is little risk of penalty if a comprehensive APA request contains, in one form or another, the same sorts of information specified in the §6662(e) regulations.[97]

Taxpayers have long sought to have the IRS confirm these understandings.

In a partial nod to these concerns, the New APA RP states that a complete APA request would be considered ''a factor'' in determining whether the §6662(e) documentation requirements have been met.[98] However, this statement is premised on the APA request

[91] Rev. Proc. 2006-9, §4.03(10).

[92] New APA RP Appendix §5.03 Exhibits 14 and 15.

[93] Rev. Proc. 2006-9 §4.03(10); New APA RP Appendix §5.03 Exhibits 16 and 17.

[94] New APA RP Appendix §4.4.

[95] New APA RP Appendix §1.03 Exhibit 21.

[96] New APA RP Appendix §1.03 Exhibit 18. Presumably this requirement will be excused for APA renewals.

[97] There may, however, be a timing concern for ''dollar file'' cases where the APA request is submitted after the extended due date for the U.S. return for the first APA year.

[98] New APA RP §3.08.

ISSN 0090-4600

being ''updated and supplemented in accordance with the requirements of'' the New APA RP. Perhaps the supplementation aspect is pertinent to continued sufficiency of the documentation as years pass during the APA process, but the language is broad. Moreover, a negative inference might be drawn that penalties are a legitimate concern in all cases involving APAs. Hopefully, the IRS will favorably clarify these aspects.

At bottom, one must wonder why the IRS is reluctant to concede the penalty point, particularly for completed APAs.[99] As taxpayers are obligated to make any adjustments called for by the agreed TPM, there is no opportunity for abuse.

10. Overall Content Requirements

It is not clear whether the New AP RP would expand the scale and scope of the items to be submitted in an APA request. The number of required items would be less, but much would be compressed, substantively, into explanations correlating to the covered issue diagrams. Moreover, every document that was submitted would have to be explained, including definitions of terms used, explanation of the goal and flow of calculations, the source of the data, the creator, and the purpose for which the document was created.[100]

Several prior requisites have been dropped, such as descriptions of financial and tax accounting differences between the United States and the counterpart country, information regarding commission transactions, identification of ''relevant non-recognition transactions,'' and detailed additional requirements for APAs covering cost-sharing arrangements.[101] And while the breath of some of the proposed requirements may be unclear, some comfort may be found in the preamble to the Appendix, which says that the level of detail required ''will be governed by relevancy and materiality considerations.''[102]

11. Considering Joint Competent Authority Presentations

The New RPs expressly contemplate the possibility of joint presentations to both CAs.[103] This could be requested by the taxpayer or invited or required by the IRS, and is not expressly limited to fact-finding sessions. This approach could be extremely beneficial in terms of advancing mutual understanding and case progress. Although there are some logistical considerations, a number of presentations of this sort have already occurred and worked well.

12. Starting the APA Process Sooner

Under current rules, an APA request need not be filed with APMA until the due date of the tax return for the first APA year, plus another 120 days if the user fee is paid at that time.[104] Foreign filing deadlines may be shorter, e.g., before the first day of the first APA year. To ensure that APMA prepares the case on the same timetable as its foreign counterpart, the New APA RP provides that bilateral or multilateral requests would have to be filed within 60 days of the foreign request, if sooner.[105] This could move the filing deadline forward by almost *two years* in some cases.

13. Lengthening the APA Term

The New APA RP specifies that the term of an APA would ordinarily be at least five years, or longer if necessary to ensure that at least three prospective years remain following execution of a unilateral APA or MAP resolution of a bilateral/multilateral APA.[106] Under current rules, the suggested term extends to three prospective years following the APA Team's recommended negotiating position (RNP),[107] an intermediate step eliminated when the APA and CA offices were combined into APMA. Whether or not the APA term will now end up longer depends on whether case processing time is reduced.

14. Translation

The New APA RP would not expressly require translation of foreign documents that are submit-

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[99] In an analogous area, the New APA RP (as did its predecessor) provides that the recordkeeping requirements of Code §§6038A and 6038C, which have their own set of punitive enforcement provisions, are satisfied by recordkeeping in accordance with an agreed APA.

[100] New APA RP §3.04(2).

[101] Rev. Proc. 2006-9 §4.03(14), (7) and (8)(g), and §4.04, respectively.

[102] As a side note, the user fee requirements have been modified to eliminate the current single fee for all APA requests filed by members of a controlled group within a 60-day period (Rev. Proc. 2006-9 §4.12(1)). Absent clarifying provisions as to what constitutes an ''APA request,'' this may cause taxpayers to try to combine multiple types of transactions and issues within a single request, adding complexity.

[103] New CA RP §7.04; New APA RP §4.03(4). Note that joint presentations are considered a ''best practice'' for CAs under the OECD MEMAP, fn. 29 above.

[104] Rev. Proc. 2006-9 §4.07(2).

[105] New APA RP §3.03(3).

[106] New APA RP §3.09, subject of course to coordination with the foreign CA.

[107] Rev. Proc. 2006-9 §4.07.

ISSN 0090-4600

ted.[108] However, it would broadly require the taxpayer to provide any ''additional information'' that the APA team (or foreign CA) determines that it needs to analyze the APA request.[109]

For MAP cases, the New CA RP would drop the explicit provision in Rev. Proc. 2006-54 (§4.07) requiring the taxpayer, on request, to submit an English translation of any documentation required in connection with the CA request. There would be only one up-front translation requirement for transfer pricing cases: for the official notice of a foreign-initiated adjustment.[110]

Given the natural involvement of foreign-language documents in transfer pricing cases, further clarification of potential translation obligations is desirable.

H. RECONSIDERING PRIOR PROCEDURAL REFORMS

Concerns with the efficiency of the APA and CA processes are longstanding, and prior guidance has attempted various improvements. Some have been revisited in the instant exercise, based on experience.

1. Reducing Aspirations to Expedite APA Renewals

Rev. Proc. 2006-9 (§12) expressly contemplates expedited processing of APA renewals if there are not significant differences in the requested TPM or in pertinent facts and circumstances. In eligible cases, the APA team is to start its evaluation by considering the continuing applicability of the existing APA and focus instead on any changes. A pre-filing conference can be used both to discuss streamlined submission requirements and to advise the taxpayer whether a streamlined process will be achievable.

The New APA RP contains a similar approach for streamlined *submissions*. Taxpayers seeking to file an abbreviated APA request would have to submit a pre-filing memorandum, including an explanation of why information they want to omit is unnecessary for APMA's evaluation of the request.[111] Hopefully APMA has some patterns in mind for addressing requests for abbreviated submissions, because this is vital to increasing the efficiency of the renewal process.

However, the current language contemplating streamlined *processing* of renewals has disappeared. Presumably this reflects the reality that APA renewals have often not been processed more quickly than initial APA requests,[112] but the reasons for this bear analysis (is it due to the prevalence of significantly changed facts or TPMs, a change in the IRS's attitude, a bureaucratic approach to requirements, a lack of flexibility, personnel turnover or other factors?). Streamlined processing of renewals is an issue of great concern for taxpayers, and more dialogue on possible approaches would be desirable.

2. Limiting Preferential Treatment for Small Cases

The current procedures contain special rules applicable to small taxpayers: Rev. Proc. 2006-54 (§5) permits an abbreviated CA request for small adjustments (under $1 million for corporate taxpayers), and Rev. Proc. 2006-9 (§9) envisions a shorter process, abbreviated submission, pre-filing conference, IRS-assisted economic analysis, and reduced user fees, for APAs involving small taxpayers or transactions.

The APA Office's Annual Reports indicate that the small case procedure is seldom utilized and, when utilized, has not typically been less resource-intensive.[113] The New APA RP would cut back on the special treatment of small APA cases. Small case APAs would be defined as ones where *all* of the following requirements are met: the controlled group's sales revenues were less than $500 million for each of the three most recent pre-APA years, the value of the covered issues was not expected to exceed $50 million in any proposed APA year, the value of any transferred rights to intangibles was not expected to exceed $10 million in any APA year, and no covered issue related to an intangible development agreement.[114] Although the mandatory pre-filing memoranda rules would be waived,[115] an eligible taxpayer would have to contact APMA to discuss the potential for an abbreviated APA request. The New APA RP contains no mention that IRS technical assistance would be available.

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[108] *See, e.g.,* New APA RP Appendix §1.03 Exhibit 9. Compare New APA RP §7.04, which would permit the IRS to request translation during examination of a completed APA.

[109] New APA RP §3.10(1).

[110] New CA RP Appendix §1.03 Tab 6. However, potentially burdensome translation requirements would apply for some bulky documents related to certain TAIT-related requests: filings with securities regulators and foreign tax rulings/concessions in connection with requests for discretionary LOB relief requests, and foreign pension plan documents and pertinent statutory provisions in connection with pension-related requests (New CA RP Appendix §2.01 Part 4 §4.3 and Appendix §3 Part 5, respectively).

[111] New APA RP §8.03.

[112] *See, e.g.,* Announcement 2012-13, 2012-16 I.R.B. 805 (virtually identical time to complete in 2011), although the situation improved in 2012 (Announcement 2013-17, 2013-16 I.R.B. 911).

[113] *See, e.g.,* Announcement 2012-13, Tables 10 and 11.

[114] New APA RP Appendix §3.04.

[115] New APA RP §3.02(2).

ISSN 0090-4600

In the MAP context, although the definition of ''small'' would be liberalized (total adjustments of up to $5 million for corporations), the potential simplifications for APMA-related requests would be limited.[116] The New CA RP identifies only three content exemptions, all of which are new to begin with (the list of pertinent foreign-language submissions, copies of Code §6662(e) documentation, and covered issue diagrams). The New CA RP would not on its face permit further flexibility, notwithstanding introductory language suggesting that USCA ''will endeavor to minimize undue administrative burdens'' in small cases.[117]

Because the special features for small cases would in most cases need to be negotiated, it is hard to predict whether any significant facilitation of such cases would result, though the tenor is not encouraging. This is disappointing from a taxpayer perspective, particularly where CA relief is needed for audit adjustments. Perhaps a more efficient solution will be found in the development of ''safe harbors'' pursuant to the recent OECD initiative.[118]

3. Case Plans

The New APA RP provides that the parties could discuss, at the opening conference, whether a case plan is appropriate, and goes on to note that any case plan timetable would be only an estimate and subject to revision and extension.[119] This is a marked change from the mandatory and strict case plan requirements under Rev. Proc. 2006-9,[120] presumably reflecting an assessment that the current rules have been difficult to manage. Hopefully, however, this would not effectively preclude the use of case plans in appropriate situations, as they can be a useful tool for both sides. It would be even more helpful if approximate timing commitments could be obtained from the counterpart CA.

4. Process Details and Timetable Targets

Descriptive details of the APA process[121] and timetable goals[122] are noticeably absent from the New APA RP. Understandably, it will be difficult for APMA to realistically assess timing goals until the new procedures substantially kick in. However, the processing steps should be explained somewhere (e.g., through a more flexible announcement or website vehicle), to clarify respective roles of various team members and consultation steps.

I. REFLECTING THE IMPACT OF ARBITRATION PROVISIONS

One motivating factor for the New RPs is the increasing inclusion of mandatory arbitration provisions in U.S. income tax treaties and the time pressures thereby imposed on both MAP and APA processes. Procedural revisions intended to improve the speed of the process and enhance the chances of pre-arbitration resolution reflect this consideration.

Explicit provisions related to arbitration are set forth in §12 of the New CA RP, dealing with: determining the ''commencement date'' from which the period for triggering arbitration rights (typically two years) is measured; the need for properly executed non-disclosure agreements; potential notification of unsuitability for arbitration; notification of the arbitration panel's determination; and remaining rights if the taxpayer rejects the panel's determination or is notified that its case is not suitable for arbitration.[123] USCA generally takes the position that the commencement date occurs when it has received a complete CA request, as described in the New CA RP. Hence the emphasis in the guidance on what is required for a ''complete'' request, and the addition of procedures to provide notification to the taxpayer in this regard.[124]

J. CONCLUSION

The New RPs contain a wide array of new provisions, ranging from minute to cosmic. This is not just

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[116] New CA RP §5. For MAP requests submitted to TAIT (non-transfer pricing), the taxpayer would have to specifically request exemption from particular content requirements. Moreover, no small case procedures would be available for requests involving discretionary LOB relief, foreign pension plan determinations filed by someone other than an individual plan participant, or taxpayer-initiated positions.

[117] New CA RP §5.01.

[118] See Lewis, ''Safe at Last? Transfer Pricing Safe Harbors on the Horizon,'' 21 *Transfer Pricing Rpt.* 450 (9/6/12).

[119] New APA RP §4.03(3).

[120] Rev. Proc. 2006-9 §6.07(2).

[121] *Id. See also, e.g.,* Announcement 2012-13, 2012-6 I.R.B. 805.

[122] Rev. Proc. 2006-9 targets a kick-off meeting within 45 days after assignment of the IRS Team, and 12 months to complete a unilateral APA or the negotiating position for a bilateral APA/multilateral APA.

[123] The New APA RP (§4.05) also mentions the potential role of arbitration, referring to pertinent parts of the New CA RP. The arbitration trigger point under APAs may be later than for MAP cases, e.g., up to approximately four years from filing the APA request in the case of Canada.

[124] *See, e.g.,* New CA RP §6.01, New APA RP §4.01.

ISSN 0090-4600

tinkering around the edges, but a gutsy effort to reset the processes. Taxpayers will encounter significantly fewer options, reduced flexibility and additional documentation burdens, but gain broader coverage and earlier input regarding pertinent CA considerations. The balance of power would definitely be tilted toward APMA, which would also receive a flow of more and more useful taxpayer information. The challenge will be for the IRS to use these expanded tools effectively, in ways that are perceived as fair on the merits and that increase the attractiveness of the programs. This calls for continued strong IRS leadership. Implementation must be intentional and persistent, to overcome the tepid results of past reforms.

In addition, the very nature of the bilateral/multilateral process requires similarly conducive efforts by foreign tax authorities. The new OECD MAP Forum referenced earlier represents a major undertaking spurred by the IRS to do just that.

If, in the end, the process can move more quickly, equitably, and transparently, the entire system will benefit. The increase of cross-border disputes in today's global economy cries out for these types of improvements.

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