Senator Levin reintroduces anti-tax haven proposals with few changes

September 24, 2013

In brief

Sen. Carl Levin (D-MI) recently introduced his 2013 version of the Stop Tax Haven Abuse Act (the new Levin bill), an updated version of the anti-tax haven legislation that he had previously sponsored in 2005, 2007, 2009, and 2011. The provisions of the new Levin bill, introduced on September 19, 2013, are very similar to the international tax provisions in his Cutting Unjustified Tax Loopholes (CUT) Act, as reintroduced in February 2013. Sen. Levin has stated that the new bill "is geared to stop the estimated $150 billion yearly drain on the US treasury caused by offshore tax abuses." The new Levin bill differs in two respects from the international tax provisions in the CUT Act – it removes (i) the proposal to limit earnings-stripping by expatriated entities and (ii) the controlled foreign corporation (CFC) exception to the gross assets test in the management and control provision.

Observation: Neither chamber of Congress has brought up any of the predecessor bills for a vote, but Congress has enacted some provisions in those bills to pay for unrelated legislation, e.g., the codification of the economic substance doctrine in Section 7701(o), for which Levin proposed the legislative language. Similarly, Congress likely will not hold a vote on the new Levin bill. However, specific provisions could appear in other bills as revenue-raisers. In addition, the House and Senate tax committees hope to act on tax reform legislation that may include changes to international tax rules and select anti-base erosion proposals featured in Senator Levin's bill may be considered in the context of future tax reform legislation.

In detail

All of the new Levin bill's 16 provisions have appeared in previous bills introduced by Sen. Levin.

Key corporate international tax provisions

The new version eliminates one proposal: to limit earnings-stripping by expatriated entities.

Observation: The earnings-stripping proposal has appeared in the Obama administration's budget for several years; Sen. Levin surprisingly has omitted it from his list of anti-abuse provisions.

The other difference between the CUT Act international tax provisions from February 2013 and the new Levin bill is an adjustment to Sen. Levin's proposal on management and control. Proposed Section 7701(p) would treat companies organized in a foreign jurisdiction as US companies for US federal income tax purposes if (i) the management and control of the corporation occurs, directly or indirectly, primarily within the United States, and (ii) the corporation is (a) publicly traded or (b) has gross assets of $50 million or more, including investments under management for customers. In earlier versions of this proposal, the asset test did not apply to CFCs with a US parent that has substantial assets (other than cash and stock of foreign subsidiaries) used in the active conduct of a US trade or business. The new

Levin bill removes that CFC exception to the asset test.

Observation: Unlike the removal of the earnings-stripping provision, this change does not appear to be a liberalization of the bill. It is likely to expand the universe of CFCs that could be subject to the management and control proposal.

Among the other headline provisions retained from previous versions are proposals from February 2013 to (i) eliminate the ability of US taxpayers to 'check the box' on foreign business entities that have a single owner without limited liability (or one or more members, all of which have limited liability), and (ii) eliminate CFC look-through (Section 954(c)(6)) altogether.

Observation: Both proposals would have a very significant effect on many current global structures. Both provisions also go beyond other proposals previously introduced on these matters by the Obama Administration or other members of Congress.

Another proposal first introduced in the 2013 CUT Act that the new Levin bill preserves would create a new Section 966 to limit interest deductions for direct or indirect CFC loans to US shareholders. This provision would treat CFC loans to US shareholders as dividends to the extent of aggregate CFC earnings. In addition, any interest income attributable to CFC loans made, directly or indirectly, to US shareholders would be treated as US-source income. This proposal would also affect many US multinationals adversely.

In addition, the new Levin bill retains previous legislative proposals that appeared in the 2013 CUT Act. It addresses foreign expense deferral and foreign tax credit pooling by re-proposing Rep. Charles Rangel's (D-NY) legislative language of 2007. Sen. Levin has also adopted the Obama Administration's legislative language on provisions (i) creating a new subpart F income category for CFCs' excess returns from US-derived intangibles, and (ii) using Sections 367(d) and 482 to limit the impact of outbound intangible property transfers.

Other provisions

The other provisions of the new Levin bill follow the 2013 CUT Act closely. They focus primarily on foreign financial reporting issues and fall under two categories, as follows:

Deterring the use of tax havens for tax evasion:

- Authorizing special measures against foreign jurisdictions, financial institutions, and others that significantly impede US tax enforcement
- Strengthening FATCA
- Reporting US beneficial owners of foreign-owned financial accounts
- Addressing swap payments made from the United States to persons offshore.

Other measures to combat tax haven and tax shelter abuses:

- Country-by-country reporting
- Penalty for failing to disclose offshore holdings
- Deadline for anti-money laundering rule for investment advisers
- Anti-money laundering requirements for formation agents
- Strengthening John Doe summons proceedings
- Improving enforcement of foreign financial account reporting.

The takeaway

Although little is new in the Levin bill, companies that these proposals would affect should remain vigilant about the possibility that one or more of these anti-abuse proposals may appeal to members of Congress as revenue-raisers for unrelated legislation or may be considered as options to address anti-base erosion concerns in future tax reform legislation.

Let's talk

For a deeper discussion of how this might affect your business, please contact:

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