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2012 Second Annual Global Structuring Tax Forum

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Event highlights

On November 8, a group of PwC Global Structuring Partners facilitated an engaging discussion with a group of senior tax professionals on a range of issues impacting the way multinational corporations align global structures to manage their US tax burden. PwC Partners and Principals hosting the event included Gregory Barton, Patrick Berrigan, Dale Bond, Troy Collman, Oren Penn, David Petrick, James Prettyman, Nick Raby, Rebecca Rosenberg, and Tim Sacheck. Among other topics, the PwC leaders provided their perspectives on trends in international tax legislation, recent issues in IRS review of transfer pricing policies, and traps for the unwary arising in cross border mergers and acquisitions. Over lunch, attendees were treated to a legislative update from the Honorable Bill Archer, who spoke on the current regulatory environment unfolding in Washington following the election.

Updated international tax legislation is imminent

Following a prolonged period of silence on complicated international tax issues, the service is finally nearing completion on a number of regulatory packages which are intended to provide clarity to taxpayers on a broad range of issues.

Final regulations under section 987 are among those projects identified by the panel as being nearly completed. Jeff Dorfman, a recently admitted Managing Director with PwC's Washington National Tax Services practice group, shared his perspective as the author of the 2006 proposed section 987 regulations. Dorfman indicated that the Treasury Department has announced that forthcoming final section 987 regulations should be significantly similar to the 2006 proposed regulations. Dorfman emphasized that until final section 987 regulations are issued, corporations must comply with the section 987 statute by adopting a reasonable method in making section 987 computations. Reasonable methods include use of the equity pool method of the 1991 proposed regulations, the foreign exchange exposure pool method of the 2006 proposed regulations, an "earnings only" method and other methods consistent with the statutory language. He indicated that failure to use a reasonable method will likely limit the choices available when corporations transition to the method adopted in the forthcoming final section 987 regulations.

Rebecca Rosenberg, International Tax Services Principal, led the panel and audience in a discussion of new foreign tax credit splitter regulations issued under section 909. Rosenberg pointed out that while the 909 statutory definition of a foreign tax credit splitting event may be vague and appears to be broadly applicable, presently there is an exclusive list of foreign tax credit splitting events recognized by the IRS in the 909 regulations. Any scenario which does not fit within the regulations is not currently a splitting event. Rosenberg indicated that future guidance under 909 would likely be clarification of mechanical rules under the statute. Rosenberg did not expect that the list of splitting events would be expanded in the near future. Of note on the horizon is the Supreme Court's review of controversy around the creditability of certain taxes paid in the UK (PPL Corp. v. Commissioner, US, No. 12-43, cert. granted 10/29/2012), as the case will mark one of the few times the high court has commented on the section 901 test for creditability of foreign taxes.

Troy Collman, Houston International Tax Services Partner and Inbound Tax Market Leader, and Oren Penn, Washington National Tax Services Principal, provided insight into complicated US tax matters receiving heightened scrutiny from the IRS, which may catch foreign based multinationals by surprise. Of particular importance to the panelists were recent developments in the Tax Court's interpretation of intercompany agreements as either debt or equity. The key take away in recent Tax Court cases has been the focus on "economic factors" supporting the treatment of an intercompany item as either debt or equity, without special focus on the relationship between the parties. Panelists encouraged foreign based corporations with a US presence to recognize the complexity of this issue from a US perspective, and to take efforts to properly document and characterize their intercompany agreements using a consistent approach.

US taxpayers face a reinvigorated and sophisticated IRS review of transfer pricing

Greg Barton, National Tax Practice Transfer Pricing Principal, led the panelists and audience in a discussion of recent trends in transfer pricing controversy. Barton provided an overview of the current transfer pricing environment, reviewing statistics which reveal an increased volume in tax audits worldwide. Barton also revealed that authorities are using increasingly sophisticated audit techniques to address transfer pricing issues, including joint audits between foreign tax authorities. At the same time, worldwide competent authority cases are at an all time high, putting a serious strain on the system.

Panelists also highlighted the corresponding emphasis on transfer pricing issues from a US perspective. The IRS has dedicated more resources to evaluate transfer pricing issues. The IRS transfer pricing program is now led by the newly appointed Director of Transfer Pricing Sam Maruca, Chief Economist Bill Morgan, and Advance Pricing and Mutual Agreement Director Richard McAlonan. In addition, there is a hiring initiative for field positions in the IRS transfer pricing practice. Many of those hired thus far have significant law firm and Big 4 experience, particularly at a supervisory level. These professionals often represent a higher caliber of resources available for IRS examinations. Finally, the panelists commented on positive trends in the US advance pricing agreement (APA) program, noting that under new leadership there has been an uptick in successfully completed APAs.

The panelists and the audience had a lively discussion around the distinction between services and intangible property. The discussion focused on transactions which appear to provide for the performance of a service, but which may also, in the view of the IRS, involve the transfer of a valuable intangible property. The issues highlighted included services which require special know-how or unique processes that could be viewed as valuable intangible property. Nick Raby, Transfer Pricing Leader for the Texas Market, and Dale Bond, Leader for Transfer Pricing in Houston, highlighted the importance of understanding investments being made by companies and properly planning for those investments (i.e., training for a workforce in place) is particularly important in view of regulations under section 367(d). The proposed revisions to section 367(d) regulations would expand and clarify the definition of intangible property, a development which is expected to significantly impact the structuring of cross border transactions involving the sale of specialized services.

Mergers & Acquisitions developments create opportunities and uncertainty

James Prettyman, Mergers and Acquisitions (M&A) Tax Partner, and Pavithra Mani, M&A Tax Director, led the audience in a discussion of proposed regulations and tax court cases impacting the calculation of basis in distinct blocks of shares in a company. The panelists clarified that under the proposed rules and in light of the court's interpretation of the statute, a shareholder may be viewed as possessing multiple distinct blocks of shares, each block with a separate basis, resulting in what the panelists referred to as "lumpy" basis. The panelists highlighted that "lumpy" basis may result in taxable gain with respect to return of capital distributions where the taxpayer does not expect it. Panelists discussed how certain transactions (e.g., section 304) may be useful in "cleaning up" lumpy basis prior to any potential M&A activity.

David Petrick, International Tax Services Principal, lead a discussion of certain issues and planning opportunities under 367(d), in light of recently published IRS Notice 2012-39. Petrick highlighted for attendees the transaction the IRS intended to address in the Notice, where-in concurrent application of section 361 and section 367(d) in asset reorganizations results in a tax benefit by permitting "boot" in the reorganization and deemed section 367(d) royalties to be received in the US with only one taxation event. Petrick pointed out that while the Notice did address the abuse perceived by the IRS, the Notice also included concepts not entirely consistent with the stated policy of section 367 or the existing 367 regulations. Petrick suggested that when the 367 regulations are issued, the principals of the Notice may be codified in a form more consistent with the existing regulations. Taxpayers should be aware of the rules applied under the Notice, as well as be on the lookout for regulations under section 367.

Planning for the future

There was clear agreement among the panelists that tax legislation focused on global structuring is becoming more complex and the disclosure demands on tax teams have intensified. These developments are occurring as focus on tax reform is becoming a key issue for US political leaders. This puts the onus on senior tax professionals who must stay abreast of new rules and guidelines and effectively react to a changing environment. PwC's partners work together to focus on customizing global structuring tax services to meet the unique challenges facing the market today. They use their combined knowledge and experience gained from serving large and complex multinational companies, as well as entrepreneurial start-ups and private equity backed operations, to counsel clients as they navigate today's global tax environment.

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