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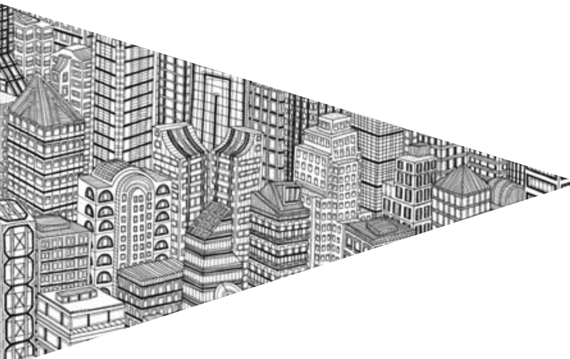
International
Tax Alert



HIRE Act Amendment of Section 6501(c)(8) makes filing of international forms a top compliance priority for taxpayers with cross-border transactions

The modified provisions of the *Foreign Account Tax Compliance Act of 2009* (FATCA), contained in the recently enacted *Hiring Incentives to Restore Employment (HIRE) Act* (P.L. 111-147), have made the consequences of failing to file certain required international information reporting forms (detailed below) more severe. The addition of two words (tax return) to Section 6501(c)(8) could now result in suspension of the statute of limitations for a taxpayer's entire tax return for failure to file the requisite forms.

Although this change may have been aimed at individual tax returns, as enacted, it applies to all returns. Accordingly, corporations and other taxpayers with cross-border operations or transactions must be even more vigilant in complying with the filing requirements for the affected international information reporting forms in a timely and complete manner.

See International Tax Alert, *HIRE Act signed by President Obama; major changes to US tax rules governing payments to non-US persons/entities*, dated 26 March 2010, for a discussion of the FATCA provisions included in the HIRE Act.

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The Amendment

Section 513 of the HIRE Act includes the following:

"(c) Clarifications Related to Failure to Disclose Foreign Transfers — Paragraph (8) of section 6501(c) is amended by striking 'event' and inserting 'tax return, event,'".

As a result of this change and the addition of new PFIC-related provisions, Section 6501(c)(8) now reads as follows:

> Failure to notify Secretary of certain foreign transfers. In the case of any information which is required to be reported to the Secretary pursuant to an election under Section 1295(b) or under Section 1298(f), 6038, 6038A, 6038B, 6038D, 6046, 6046A, or 6048, the time for assessment of any tax imposed by this title with respect to any *tax return*, event, or period to which such information relates shall not expire before the date which is three years after the date on which the Secretary is furnished the information required to be reported under such section. (Emphasis added).

The information required by the code sections enumerated in Section 6501(c)(8) is reported on the following IRS Forms:[1]

- **926** — *Return of a U.S. Transferor of Property to a Foreign Corporation*
- **3520** — *Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*
- **3520-A** — *Annual Information Return of Foreign Trust With a U.S. Owner*
- **5471** — *Information Return of U.S. Persons With Respect to Certain Foreign Corporations*
- **5472** — *Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business*
- **8621** — *Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*
- **8858** — *Information Return of U.S. Persons With Respect to Foreign Disregarded Entities*[2]
- **8865** — *Return of U.S. Persons With Respect to Certain Foreign Partnerships*

Change or Clarification?

Because HIRE Act Section 513 uses the word "clarifications," there is a question as to whether the amendment to Section 6501(c)(8) was meant to apply prospectively or retroactively. Based on Treasury and IRS guidance which interpreted Section 6501(c)(8) prior to the enactment as suspending the statute of limitations only for transactions that were required to be reported under the enumerated code sections,[3] the amendment appears to change prior law. If so, and pursuant to the effective date language used in the HIRE Act,[4] the amendment would apply to (1) returns filed after 18 March 2010 (the enactment date of the HIRE Act) and (2) returns filed on or before that date if the Section 6501 limitations period for the return (determined without regard to the amendment) is still open.

If the amendment was meant to clarify existing law, it would mean that the principles of the revised provision would apply to *all* tax returns for which a taxpayer failed to include information required to be reported under the sections listed in Section 6501(c)(8). As such, the limitations period for otherwise "closed" tax returns for which the company failed to include such required international information would, in fact, remain suspended until such time as all required information was provided.

Discussions with government officials on this issue and as to affected taxpayers are on-going. It is unknown when or if additional guidance may be issued.

Assessments vs. Refunds

Although the amendment suspends the statute of limitations for tax returns that failed to include information required under the

sections listed in Section 6501(c)(8), it does not extend the period for filing a refund claim for those tax returns. Under Section 6511, a company has three years from the date it files its tax return or two years from the date it pays the tax (whichever is later) to file for a refund. As the amendment only affects Section 6501(c)(8), it does not extend the period for filing for a corresponding refund under Section 6511.

Implications

This amendment has created challenges for many multinational corporations that are seeking certainty around their federal tax returns. At this time, it is unclear how Treasury and IRS will interpret and enforce this amendment, as enacted.

Note that while taxpayers may demonstrate reasonable cause for failure to file the required forms to avoid the imposition of monetary penalties under the Section 6038 regulations, there is no reasonable cause exception to the Section 6501(c)(8) statute suspension. In limited cases, the effect of Section 6501(c)(8) may be mitigated for taxpayers that have entered into a Closing Agreement pursuant to Section 7121, for a final determination of tax liability. Form 866, *Closing Agreement as to Final Determination of Tax Liability*, is used for this purpose. But, because of the finality of these agreements with respect to the entire tax liability or a period, it is unusual for IRS to agree to their use. Instead, the majority of closing agreements that are executed by IRS Examination, Appeals, or Competent Authority involve Form 906, *Closing Agreement on Final Determination Covering Specific Matters.* This type of closing agreement is not likely to fully negate the application of Section 6501(c)(8), since such an agreement only covers particular issues.

With such uncertainty and risk, taxpayers now in the process of filing returns will want to consider what might trigger a statute suspension for the entire return under amended Section 6501(c)(8). For example, the inadvertent omission of international forms, such as Form 5471 for dormant entities or entities that were newly formed or liquidated during the year, or Form 926 for certain outbound transfers of property, including cash to foreign corporations, could have such unexpected consequences. Even when a required form is included with the return, treatment by the Service of the form as substantially incomplete could even subject the taxpayer to a statute suspension under this section.[5] Common examples that could raise this issue include the use of IFRS instead of US GAAP financial statements for the foreign entity and failure to determine earnings and profits under US tax principles, including reflecting all material adjustments, such as elimination of deductions for reserve accruals and deferred taxes.

Finally, companies should consider the amendment's financial statement and tax accounting implications. To the extent any tax years are determined to be affected by this provision, the effects on uncertain tax positions will need to be reviewed and assessed.

Endnotes

1. The HIRE Act amendment to Section 6501(c)(8) also added references to an election under Section 1295(b) as well as information required under new Section 6038D. It is unknown if the Service will develop a new form for reporting information required under Section 6038D or if the information will be reported with the individual's tax return.

2. Though not specifically listed in the Section 6038 regulations, Form 8858 is arguably necessary to comply with the Section 6038 regulations for foreign disregarded entities (FDEs) owned by entities for which the filing of Forms 5471 or 8865 is required. Therefore, Forms 8858 for such entities are arguably covered by the 6501(c)(8) amendment as well.

   There is no apparent authority under the 6038 regulations to require Form 8858 for a first-tier FDE (i.e., owned directly by a US person). Therefore, omissions of Forms 8858 for such entities would not appear to be covered by this amendment. However, to be prudent, taxpayers are advised to avoid any issues and exercise diligence in filing Forms 8858 for first-tier as well as lower-tier FDEs.

3. See ITA 200024051 and the preamble to T.D. 8850.

4. P.L. 111-147, Section 513(d).

5. See, in particular, CCA 200429007 (see International Tax Alert, *IRS analyzes "substantial" standard for Form 5472*, dated 8 October 2004), in which the IRS found Forms 5472 to be substantially incomplete as a result of the following inaccuracies: 1) Reporting 1000x of related-party purchases instead of 500x; 2) reporting related-party trade receivables as a related-party loan; 3) reporting a beginning of the year balance of a related-party loan did not equal the end-of-year balance from the prior year; and 4) materially overreporting related-party purchases and materially underreporting related-party commissions paid, even though the net error was immaterial.

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