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Alternative Dispute Resolution Processes In the Current U.S. Transfer Pricing Landscape

In view of recent developments affecting the transfer pricing landscape, which likely forecast an uptick in Internal Revenue Service adjustments, the authors examine the various alternative dispute resolution processes available to taxpayers.

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Throughout his tenure as Internal Revenue Commissioner, Douglas Shulman has placed a great deal of emphasis on international tax compliance. In large measure, the commissioner's emphasis may be due to the realization that shortfalls in reporting income from foreign sources for both U.S. individuals and corporations cause a permanent loss to the U.S. Treasury.

To this end, perhaps the most significant staffing change has been in the area of international agents in the Large Business and International (LB&I) Division. IRS Deputy Commissioner, Service and Enforcement, Steven Miller recently stated at the Tax Executives Institute's mid-year conference in Washington, D.C., that there are now 856 agents in international operations—a substantial increase over prior years—and 300 more are expected to be hired.[1] A recent Forbes article offered an amusingly graphic description of the increased efforts in international corporate compliance.[2]

These and other recent changes elevate the usefulness of historically unpopular alternative dispute resolution (ADR) processes. Unsurprisingly, ADR mechanisms generally have been underappreciated in the resolution of transfer pricing issues given the inherent push-and-pull factors and the staggering adjustments involved in many of these matters. In tax disputes, both the taxpayer and the IRS seek to manage the examination. Taxpayers try to accomplish this by carefully managing the information and documentation that is shared with the IRS. On the other side, the IRS attempts to assert control by carefully crafting its requests for documents, site tours, and witness interviews. Effective resolution of a tax dispute through an ADR process, however, requires the IRS to be more transparent about the issues and the taxpayer to provide more robust disclosures. As such, meaningful and successful application of ADR processes calls for a change in philosophy from both sides of the table.

In the last few years, there have been developments that signal the IRS's increased focus on making transfer pricing adjustments. These developments include the reorganization of the IRS's Large and Mid-Size Business Division to focus on international tax matters, the more recent migration of the Advance Pricing Agreement program to LB&I,[3] the centralization of IRS transfer pricing expertise in the new Advance Pricing and Mutual Agreement (APMA) program announced in March,[4] and shifts in IRS approaches at the examination level.[5] Indeed, the inventory of transfer pricing cases increased by approximately 10 percent from 283 cases in 2010 to 312 cases in 2011.[6]

[1] Miller's prepared remarks, given March 26, are available at http://www.irs.gov/newsroom/article/0,,id=255996,00.html.

[2] See "IRS Brings 'A Team' To Crush Transfer Pricing Abuse," *Forbes*, 3/27/12.

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[3] 20 *Transfer Pricing Report* 283, 7/28/11.

[4] 20 *Transfer Pricing Report* 1194, 4/5/12.

[5] IRS Deputy Commissioner (International) Michael Danilack recently spoke of the need for a cultural overhaul at the IRS under which "what we do in the field should be completely in line with the view we may have at competent authority." See 21 *Transfer Pricing Report* 151, 6/14/12.

[6] 20 *Transfer Pricing Report* 689, 1/12/12.

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In response to these recent developments, tax counselors should consider the use of ADR processes to effectively and efficiently resolve transfer pricing disputes. Litigation, though necessary in some cases, generally should be an option of last resort or invoked when there is a strategic advantage to being in a judicial forum. Effective use of ADR processes also will provide the means and opportunity for taxpayers to be better prepared in the event that tax litigation should occur.

To understand how to use ADR processes effectively, however, it helps to understand what is concerning the IRS. These concerns will have to be addressed in some fashion in the ADR forum.

Targeting Income Shifting

A July 20, 2010 report titled ''Present Law and Background Related to Possible Income Shifting and Transfer Pricing'' (JCX-37-10), prepared by the staff of the Joint Committee on Taxation, has pressured the IRS to focus on worldwide business structures.[7] Prepared in connection with a public hearing on transfer pricing issues, the report developed six case studies to identify business structures viewed as facilitating income shifting by multinational corporations, thereby creating tax deficiencies under the transfer pricing rules. The taxpayers in all six case studies had in common effective worldwide tax rates of less than 25 percent and disproportionately small earnings in the United States relative to sales. The case studies featured were not random selections; they were based on a targeted review of public and private documents of specific taxpayers. Although the report does not explicitly say so, it signals the IRS's special interest, if not increased audit activity, of similar structures. Taxpayers in similar situations should, therefore, pay particular attention to their transfer pricing methods and documentation.

Focus on Valuation Methods

The IRS signaled a new approach to valuation in Chief Counsel advice (CCA) dated June 25, 2010, and released in March 2011.[8] This new approach is to be applied to value intangible property transferred outside of a cost sharing arrangement when that property must be further developed by the recipient before it can be fully exploited. The CCA's comment that this new approach should rely ''less on comparables and more on fundamental financial principles'' puts taxpayers on notice of the potential for valuation controversies for IP transfers made outside of cost sharing.

The IRS views this new approach, which relies heavily on the ''investor model'' framework in capturing ''full economic compensation,'' as circumventing the perceived limitations of the standard methods for valuing an intercompany transfer of intangible property. According to the CCA, the inadequacy of the ''traditional'' methods under Regs. §1.482-4 is that they address rights to exploit intangible property ''as is,'' not property whose anticipated value will be realized only through further development. The residual profit split method of Regs. §1.482-6 addresses this problem ''to some extent,'' the CCA says, but it ''tends to be unreliable'' when one party's investment in intangible property significantly precedes the other party's investment. The CCA essentially determines that only the income method captures ''full economic compensation.''

The Section 482 cost sharing regulations, finalized Dec. 16, 2011,[9] confirm Treasury's commitment to the income method.

The final regulations modified the 2009 temporary regulations to clarify the interaction between input parameters (which include financial projections and associated discount rates) in applying the income method under Regs. §1.482-7(g)(4), as well as provided further guidance on the discount rates appropriate for licensing and cost sharing alternatives. Subsequently, temporary and proposed regulations issued Dec. 19, 2011,[10] provide additional guidance regarding the evaluation of discount rates and introduced a new specified application of the income method based on the difference between projected results under the cost sharing and licensing alternatives, respectively.

IRS Director of Transfer Pricing Operations Samuel Maruca recently announced the withdrawal of a 2007 coordinated issue paper to encourage the field to pay more attention to specific facts and circumstances rather than push for the income method.[11] The CIP addressed cost sharing buy-in adjustments, and, as Maruca noted, it ''took on a life of its own and . . . was applied too routinely, with insufficient attention to specific facts.''[12] The lesson here is that facts matter in positioning a case for resolution in an ADR forum.

Challenging Transfer Pricing Regulations

Recent developments in the Supreme Court foretell battles for taxpayers challenging regulations, making a fact-specific resolution effort in an ADR forum an option that should be carefully considered.

The Supreme Court's decision in *Mayo Foundation for Medical Education and Research v. U.S.*[13] put to rest whether the validity of tax regulations is to be determined by the multifactor analysis of *National Muffler Dealers Association Inc. v. U.S.*[14] or the two-step analysis of *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*,[15] which courts have applied to regulations outside of the tax arena. In *Mayo*, the Supreme Court, applying *Chevron*'s analytical framework, held that the Treasury Department's rule that requires medical residents to pay employment taxes under the Federal Insurance Contributions Act is a reasonable construction of Congress's intent.

Mayo makes clear that taxpayers must frame their challenges of the regulations within *Chevron*'s two-step analysis: (1) whether Congress has ''directly addressed the precise question at issue,''[16] and, if not, then (2) whether the agency's interpretation is based on a permissible construction of the statute. Under this second step of the *Chevron* analysis, the courts ''may not dis-

[7] 19 *Transfer Pricing Report* 361, S-2, 7/29/10.
[8] 19 *Transfer Pricing Report* 1166, 1193, 3/24/11.
[9] 20 *Transfer Pricing Report* 702, 1/12/12.
[10] 20 *Transfer Pricing Report* 764, 767, 1/12/12.
[11] 20 *Transfer Pricing Report* 812, 1/26/12.
[12] *Id.*
[13] 131 S. Ct. 704 (2011).
[14] 440 U.S. 472 (1979).
[15] 467 U.S. 837 (1984).
[16] 131 S. Ct. at 711 (quoting *Chevron*, 467 U.S. at 842-43).

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turb an agency rule unless it is 'arbitrary and capricious in substance, or manifestly contrary to the statute.' ''[17]

Subsequently, in *U.S. v. Home Concrete & Supply LLC*,[18] the Supreme Court considered, for the first time after *Mayo*, whether a Treasury regulation is entitled to judicial deference. During the pendency of this case in the Fourth Circuit,[19] the Treasury regulation in question was finalized, and the IRS asked the court to apply this regulation retroactively to produce the result the IRS desired (that is, if the regulation were applied, the taxpayers would be subject to a tax liability that otherwise would be barred by the statute of limitations). The Fourth Circuit declined in part because *Chevron* deference is warranted only when a Treasury regulation interprets an ambiguous statute, and the Supreme Court had already interpreted the statute in a prior case. The Supreme Court affirmed the Fourth Circuit although, on this particular point, it did not agree on a single rationale. One justice agreed with the result, but rejected the reasoning, and four justices dissented.

A post-*Mayo* case in the Federal Circuit highlights additional avenues for challenging IRS regulations. In *Dominion Resources Inc. v. U.S.*, the majority invalidated a regulation issued under Section 263A for failing the second step of the *Chevron* analysis and for violating the *State Farm* requirement that ''Treasury 'articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.' ''[20] One judge concurred in the result because of the *State Farm* requirement, but disagreed with the majority's *Chevron* analysis. Therefore, taxpayers can successfully invalidate a regulation by arguing defects under the Administrative Procedure Act.

Taxpayers should consider these complications and other changes in the legal landscape in assessing their filing positions and charting a course of action in resolving transfer pricing issues. ADR processes could be used more prevalently to fend off costly litigation in light of the IRS's evolving attitude toward transfer pricing matters. Indeed, Maruca acknowledged that the agency ''ha[s] taken some very serious hits recently in strategically important [transfer pricing] cases'' and that it needs to ''produce some winners'' in the transfer pricing arena to enhance its credibility.[21] Maruca also has expressed that, in large or strategically important cases, he ''envision[s] [the transfer pricing] group actually being involved shoulder-to-shoulder with [the international examiners] and the exam teams as a whole in developing the very best case [they] can based on the facts.''[22]

The ADR Tool Box

The need for earlier certainty is driven by both external factors, such as FIN 48 and the reporting of uncertain tax positions, and internal factors, such as cost controls and financial reporting concerns. This explains the importance of well-executed ADR alternatives. Such certainty could, at least, eliminate a taxpayer's need for large reserves or allow for an earlier release of reserves. Furthermore, considering that it is not atypical to reach a final judicial resolution a decade after the beginning of a tax examination, ADR alternatives could avert potentially protracted, expensive, and time-consuming litigation.

Although different ADR tools and resources are available at all stages of the tax process, including before the filing of the return, those that are relevant for transfer pricing matters are discussed below.

Pre-Filing ADR Tools

Advance Pricing Agreements. An APA[23] requires a substantial investment by both the taxpayer and the IRS, and may be delayed due to the current backlog in the APA process.[24] However, it may ultimately reduce compliance costs and provide greater predictability in financial reporting.

Compliance Assurance Process Program. Taxpayers in the Compliance Assurance Process (CAP) program, piloted in 2005 and made permanent in 2011,[25] work with IRS examiners to identify and resolve issues as they arise during the tax year prior to the filing of returns. The CAP program is intended to shorten the examination cycle, reduce uncertainty, and unbind resources by increasing transparency and improving currency. To achieve this end, the IRS and taxpayers essentially agree to (1) contemporaneously exchange information regarding completed transactions to reduce taxpayer burden, (2) eliminate uncertainty in tax treatment prior to the filing of a return, and (3) eliminate or reduce the need for post-filing examinations.

Post-Filing ADR Tools

Appeals. Administrative Appeals[26] is the formal IRS process to impartially resolve tax controversies without litigation. Appeals settles 80 to 90 percent of cases that come before it, and final settlements are often significantly lower than the adjustments presented by the examination team. In addition, the exam team can roll forward results effected by Appeals for subsequent years under Delegation Order 4-24, discussed later in this article. Despite the risks of proceeding to Appeals (for example, delay and the risk of educating the IRS on its best arguments), the forum generally remains a sensible route for most taxpayers with transfer pricing cases.[27] Recently, IRS Deputy Commissioner Miller has expressed that Appeals ''should not consider facts or legal arguments for the first time in Appeals'' and that ''LB&I is requesting that Appeals send back cases when

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[17] *Id.* at 711-12 (citations omitted).

[18] No. 11-139, 80 U.S.L.W. 3078 (U.S. 4/25/12).

[19] 634 F.3d 249 (4th Cir. 2011), *aff'd*, No. 11-139, 80 U.S.L.W. 3078 (U.S. 4/25/12).

[20] *Dominion Resources Inc. v. U.S.*, No. 2011-5087, 2012 WL 1948995 (Fed. Cir. May 31, 2012) (*quoting Motor Vehicle Mfrs. Ass'n of the United States Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

[21] 20 *Transfer Pricing Report* 152, 168, 6/16/11.

[22] 2011 *Tax Notes Today* 242-4, 12/16/11.

[23] Rev. Proc. 2006-9, 2006-2 I.R.B. 278, *modified by* Rev. Proc. 2008-31, 2008-23 I.R.B. 1133.

[24] Richard McAlonan, newly appointed director of APMA, has acknowledged the backlog and has described changes to the process aimed at speeding case resolution. See 21 *Transfer Pricing Report* 153, 6/14/12.

[25] IR-2011-32, available at http://www.irs.gov/newsroom/article/0,,id=237975,00.html (3/31/11).

[26] IRM 8.1.3.

[27] Note that some coordinated or tiered cases may not be settled on terms satisfactory to taxpayers.

taxpayers bring significant new facts or information to light for the first time during the Appeals process.''[28]

Appeals also offers advantages over directly proceeding to litigation. Among other things, resolution in Appeals allows the taxpayer to avoid incurring the expense of preparing for litigation and keeps open the possibility of invoking Competent Authority. As a procedural matter, a case that is docketed in the Tax Court—the typical forum of choice for transfer pricing cases—directly from an examination is generally returned to Appeals for settlement negotiations.

Fast-Track Settlement Program.[29] The Fast Track Settlement program permits issues that are impeding the completion of the examination to be carved out and resolved using Appeals' settlement authority and mediation skills. Although the program offers various benefits, it generally has not been well-suited for transfer pricing matters because of the large adjustments involved in this area.

Joint Audits. The latest development in international tax resolution is the emergence of joint audits, under which a taxpayer with cross-border activities may voluntarily undergo a single examination conducted jointly by tax officials representing two or more countries. The most notable benefit of a joint audit is increased efficiency, because all tax authorities are informed of the same facts, agree on the same issues, jointly characterize the transaction, and agree on its treatment. As such, double taxation is avoided in a potentially time-saving and less resource-intensive manner. Any issues that otherwise would be handled by Competent Authority may also be embedded into the process.

IRS Commissioner Shulman indicated in April 2011 that the United States has three joint audits under way involving two countries.[30] In November 2011, Danilack confirmed that the IRS and the United Kingdom had concluded, within six months, an APA that began as a joint audit.[31]

Danilack foresees more joint audits as ''[t]he future of tax administration is to draw countries together.''[32] Indeed, the United States is in discussions with several other countries about the possibility of joint audits. For the time being, joint audits are more likely to occur between English-speaking countries.

Limited Issue Focused Examination. Limited Issue Focused Examinations[33] (LIFE) is, in theory, a potential ADR tool for Section 482 issues, but it is unpopular in the transfer pricing context because the IRS and the taxpayer must agree on materiality limitations below which the IRS will not raise issues and the taxpayer will not file claims. It is possible for taxpayers to achieve LIFE-like results by insisting that the examination team share the audit plan early and using the audit planning process to steer the course of the audit.

Accelerated Appeals for Review of Assessed International Penalties.[34] On September 10, 2010, Appeals announced a new program designed to allow certain taxpayers to seek review of international penalties, such as those arising in connection with Forms 5471, 5472 or 8865, before payment.[35] The process allows taxpayers who dispute the applicability of international penalties assessed during an examination to immediately appeal and have the issue resolved before the end of the examination. Under the review process, Appeals will render a decision within 120 days of receiving the taxpayer's protest and the IRS's rebuttal.

Post-Appeals Mediation.[36] Post-Appeals mediation is a nonbinding process that uses a mediator to assist Appeals and the taxpayer in reaching a negotiated settlement. The mediator is an Appeals employee and, potentially, a non-IRS co-mediator. The Appeals mediator generally will be located in the same Appeals office or geographical area as the taxpayer but will not be a member of the same team that was assigned to the case.

Pursuing Administrative Resolution

Successful resolution of any tax matter requires taxpayers and practitioners to recognize and operate within the mutual confines of taxpayer interest, IRS goals, and the law. The specific manner by which a taxpayer chooses to resolve a dispute, whether judicially or administratively, also will affect the opportunities for a favorable outcome.

Practical Considerations

In response to increased audit scrutiny in the transfer pricing arena, taxpayers generally should follow three key pieces of advice:

- Know the company and intercompany pricing. Particularly with intangibles, it would be crucial to understand their history and how they are managed. Equally important is to understand the potential exposures posed by the intangibles.
- Monitor the evolution of IRS enforcement of transfer pricing issues. As indicated, both the organization of the IRS and the transfer pricing arena are evolving. It is imperative to keep up with these shifts in attitude and law.
- Talk to peers inside and outside the industry. Part of a taxpayer's approach to monitoring the regulatory and attitudinal changes in transfer pricing should involve ongoing dialogue with other companies inside and outside its industry either at professional forums or privately. In addition to ''comparing notes,'' open dialogue should also allow a taxpayer to assess its areas of deficiency.

This advice, in turn, encompasses numerous general and practical considerations:

Understanding the roles of examination team members. Numerous IRS personnel, playing different roles, are involved in an examination (team manager or team coordinator, revenue agents and international examiners, IRS inside and outside economists, IRS counsel, LB&I management). A taxpayer should understand the

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[28] See note 1, above.

[29] Rev. Proc. 2003-40, 2003-25 I.R.B. 1044 & Rev. Proc. 2003-41, 2003-25 I.R.B. 1047; IRM 8.26.1.

[30] Shulman's prepared remarks at TEI's 2011 mid-year meeting are available at http://www.irs.gov/newsroom/article/0,,id=238154,00.html.

[31] 20 *Transfer Pricing Report* 590, 12/1/11.

[32] *Id*.

[33] IR-2002-133 (12/4/02), available at http://www.irs.gov/newsroom/article/0,,id=104297,00.html; IRM 4.51.3.

[34] IRM 8.11.5.4.

[35] 2010 *Tax Notes Today* 176-1, 913/10.

[36] Rev. Proc. 2009-44, 2009-40 I.R.B. 462; Ann. 2008-111, 2008-48 I.R.B. 1224 & Ann. 2011-6, 2011-4 I.R.B. 433.

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general IRS hierarchy and, more critically, the personalities, professional styles, and dynamics within the IRS group. The taxpayer also should assess the dynamics between individuals on its team with those on the IRS team.

Building a cooperative relationship with the team. To ensure the best possible outcome at the examination level, the taxpayer should establish early a cooperative working relationship with the examination team. This may be achieved by creating ground rules with the team that reflect, among others, realistic expectations and timetables, open lines of communication, and guidelines for escalating issues up the IRS chain of command. Taxpayers working with outside advisers should also be strategic in determining when and how advisers should interact directly with the exam team.

Being mindful of overly broad information document requests. Overly broad IDRs are a common challenge for taxpayers, although potential issues may be averted by establishing agreed boundaries with the IRS prior to responding. With all IDRs, taxpayers should be thoughtful about the process by which responsive information will be identified. A robust search plan should identify the persons who may have any relevant information or documentation, consider who actually will perform the searches and how they will be documented, and establish how privilege review will be handled. In arriving at a search plan, taxpayers also should consider what types of questions to ask to unearth all potential sources of responsive information (for example, what happened to any documents or electronic materials that were in the possession of predecessor employees—or, in the event of a physical move of the taxpayer's location, how did one ensure that all documentation was transferred).

Being mindful of interview requests and site visits. In some cases, taxpayers may also receive requests from the IRS to interview officers or employees or to visit the taxpayers' sites. These situations require taxpayers to understand what the IRS is trying to accomplish and to manage the process accordingly, including negotiation of the time and place. More importantly, as part of the taxpayers' witness preparation, individuals with whom the IRS will come in contact also need to understand their roles in the context of the IRS's objectives.

Carefully consider the use of documentation. Documentation plays a significant role in the transfer pricing area both for compliance purposes and the avoidance of penalties. Taxpayers should consider using documentation defensively to position for subsequent resolution in an ADR forum. Even when the required type of documentation is absent or inadequate, taxpayers could rely on contemporaneous records in substantiating business practices.

Looking ahead. Strategically, it is imperative that the taxpayer look ahead throughout the administrative process, because regardless of what tools and resources are used, a record is being built either for administrative Appeals or litigation. Taxpayers should take into account the evidentiary value of IDR responses and witness testimony and the extent to which information provided to the IRS can affect future efforts at resolution. Other less obvious considerations include the preservation of evidence (for example, where potential key witnesses may separate from a company before a matter reaches Appeals or litigation), the introduction and handling of outside advisers (such as when outside counsel or experts should interact directly with the IRS), the development and introduction of setoffs, and the submission of requests for information under the Freedom of Information Act.

Multiple Audits

Taxpayers operating in more than one jurisdiction face the additional challenge of monitoring multiple audits to ensure that an audit in a foreign country will not negatively affect the U.S. audit. Multiple audits can be complicated for transfer pricing issues, and careful management of tax controversies is critical to successfully defending a multinational taxpayer's tax positions. Centralized matter management on a global basis is necessary to avoid negative results. Taxpayers faced with multiple audits also should consider:

Educating business personnel. Those responsible for operating a multinational business sometimes are unaware that tax authorities are evaluating the whole business, not just the business of its U.S. operations.

Educating the tax authorities (IRS). To be successful defending transactions in an examination, in Appeals, or in litigation, a taxpayer needs to educate the IRS (or the courts) on the nature of its global business, how and why decisions are made, and how decisions relate to the business overall.

Being mindful in providing documents. Taxpayers need to be careful in providing documentation to local tax authorities in connection with a tax examination. Each country has different rules on privilege and maintaining confidential or proprietary information, such as trade secrets. Being informed of these rules can protect against such information being placed in the public arena.

Being consistent with theories. Taxpayers should coordinate case theories (factual and legal) between jurisdictions. Inconsistencies can result in the impeachment of witnesses and possibly even disallowance of a tax position.

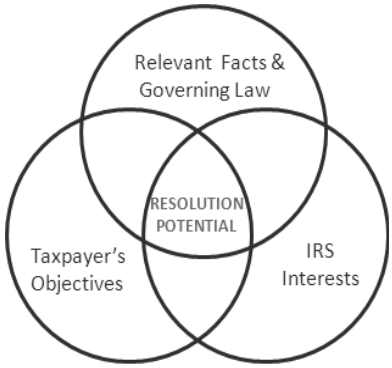
Realistically Evaluating Settlement Opportunities

In evaluating the most suitable manner of settling a transfer pricing controversy, a taxpayer should sort through the realistic possibilities of resolving a dispute with the examination team. This calls for a taxpayer to appreciate the dynamics within the team and its priorities, as well as the type of issue in question (for example, whether the matter involves tiered or non-tiered, recurring or non-recurring, permanent or timing difference issues).

In addition, a taxpayer should consider the exam team's settlement authority, which is limited to what is allowed under Delegation Orders 4-24 and 4-25. Generally, under Delegation Order 4-24, the examination team can roll forward previous settlements effected by Appeals if the facts and law have not changed. Delegation Order 4-25 generally permits the team to settle coordinated issues based on coordinated settlement guidelines. In light of the LB&I reorganization, case managers may no longer have the final say on international issues.

At a higher level, a realistic evaluation of the possibility of settlement requires taxpayers and their advisers to anticipate how the IRS might react to taxpayer positions in the context of the evolving enforcement

landscape. As the examination progresses, the room for resolution potential, as the diagram below shows, is likely a moving target.



When closing a transfer pricing examination, taxpayers ought to bear in mind that correlative adjustments can affect the taxable income of related U.S. and foreign taxpayers, such as by impacting the determination of Subpart F income. Under Rev. Proc. 99-32,[37] Section 482 adjustments also can take the form of an interest-bearing account receivable or payable to or from a taxpayer from or to a related person. In addition, taxpayers can offset accounts by any bona fide debt or distribution from the foreign related party.

Of all the post-filing ADR resources available in the transfer pricing arena, Appeals continues to provide the best forum. In the authors' recent experience, taxpayers continue to perform favorably at this stage of the administrative process, conceding nothing or relatively small amounts on issues that involve adjustments in the hundreds of millions of dollars. Furthermore, full concessions by the IRS occur more than occasionally at Appeals. This taxpayer-friendly trend at Appeals has not gone unnoticed by Maruca, who acknowledges that it is "no secret,"[38] or Danilack, who recently said the current system in which taxpayers give up on fighting an assessment at the examination level in the hopes of achieving a more rational result in Appeals is counterproductive.[39]

Conclusion

Given the various recent and significant changes in the transfer pricing arena, taxpayers would generally benefit from a comprehensive review of their business structures and intercompany pricing arrangements. In this rapidly changing environment, a proactive approach could be a taxpayer's strongest defense.

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[37] 1999-34 I.R.B. 296.

[38] See note 20, above.

[39] See note 5, above.

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