December 28, 2011

Transfer Pricing Developments – Cost Sharing Arrangements

IRS Finalizes Cost Sharing Regulations & Issues Supplemental Guidance on the Application of the Income Method

SUMMARY

On December 16, 2011, the Internal Revenue Service (the "IRS") and the Treasury Department finalized regulations (the "Final Regulations") under Section 482 of the Internal Revenue Code of 1986, as amended (the "Code"), relating to cost sharing arrangements with respect to the development of intangibles. On December 19, 2011, the IRS and the Treasury Department released proposed and temporary regulations (the "Income Method Regulations") that provide additional guidance regarding the application of the income method for valuing platform contributions to a cost sharing arrangement (*i.e.*, contributions of resources, rights or capabilities that are reasonably expected to benefit the development of the cost shared intangibles and for which a buy-in payment is required).

The Final Regulations replace temporary and proposed regulations (the "Temporary Regulations") issued in 2009. The Final Regulations contain several changes and clarifications to the Temporary Regulations, and the preamble to the Final Regulations (the "Preamble") provides insight into the IRS's overall approach to cost sharing, particularly with respect to valuing platform contributions. The language in the Preamble suggests that the IRS is committed to using the aggregation approach and the income method in many cases, despite the IRS's loss on this issue under older regulations in the 2009 Tax Court decision *Veritas* v. *Commissioner*.

The issuance of the Final Regulations is set against a backdrop of increased IRS attention to transfer pricing in general and to cost sharing arrangements and platform contributions in particular.

BACKGROUND

Under US cost sharing rules, commonly controlled parties may enter into a “cost sharing arrangement” (a “CSA”) under which the parties share the costs of developing one or more intangibles (the “cost shared intangibles”) in proportion to each party’s share of reasonably anticipated benefits (“RAB Shares”) from the cost shared intangibles. Buy-in payments are required for the transfer of any resource, capability or right to the CSA if such resource, capability or right is reasonably anticipated to contribute to the development of the cost shared intangibles (any such transfer, a “platform contribution transaction” or a “PCT,” and any such buy-in payment a “PCT Payment”). The principal benefit of cost sharing is that, for transfer pricing purposes, the development of intangibles is paid for by the participants on the basis of the *costs* of the development on an ongoing basis rather than on the basis of the *value* of the development after the intangible has been developed and rights in the intangible have to be licensed or otherwise transferred.

The Final Regulations retain the “investor model” adopted by the Temporary Regulations in respect of valuing PCT Payments.[1] Under the “investor model,” the determination of whether an arm’s length buy-in payment has been made is based on the participant’s expected risk-adjusted return from its total investment in the CSA. Under a periodic adjustment provision, the IRS may adjust the amount of required PCT Payments if the ratio of (i) the present value of a participant’s actual benefits from the CSA to (ii) the present value of the participant’s costs under the CSA falls outside of a safe harbor range. The Final Regulations contain various methods for valuing platform contributions, including the “income method,” which is discussed in greater detail below. A best method rule applies to the choice of method. The Temporary Regulations provided for transitional grandfathering rules for CSAs governed by the prior regulations and these rules have been preserved in the Final Regulations.

A significant 2009 taxpayer victory in *Veritas* v. *Commissioner*[2] sparked discussion and speculation regarding how the IRS would address CSAs going forward. In *Veritas*, a US parent company granted its Irish subsidiary the right to use all of its existing technical and marketing intangibles in order to develop software under a CSA. The Irish subsidiary made a buy-in payment that was determined on the basis of what would be charged in a comparable transaction among unrelated parties (the “comparable uncontrolled transaction method”). The IRS argued that the buy-in payment was insufficient because it should have been determined under an income method approach (whereby the buy-in payment is determined on the basis of the foregone income from the most realistic alternative transaction) on an aggregate basis, assuming a perpetual life for the intangible assets and their income stream, as opposed to a license-by-license approach. In particular, the IRS argued that the buy-in payment should

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[1] 74 Fed. Reg. 340, 343.

[2] 133 T.C. 297 (Dec. 10, 2009).

compensate the US parent for access to its R&D team, marketing team, distribution channels, customer lists, trademarks, trade names, brand names and sales agreements. The court, however, (1) rejected the aggregation approach, (2) limited the useful life of the intangibles to the useful life of the actually-transferred intangibles and (3) determined that the buy-in payment should be valued using, with some adjustments, the comparable uncontrolled transaction method employed by the taxpayer.

While the CSA at issue in *Veritas* was not subject to the Temporary Regulations, the IRS's arguments in the case reflected key principles embodied in the Temporary Regulations, which the court largely rejected. At the time of its issuance, the *Veritas* decision raised uncertainty regarding the IRS's litigation strategy going forward and the IRS's overall approach to the cost sharing rules. Although the IRS decided not to appeal the ruling, the IRS clarified in a subsequent Action on Decision that it did not acquiesce in the result or the reasoning of the ruling.[3]

Despite the IRS's loss in *Veritas*, in adopting the Final Regulations and in its commentary in the Preamble, the IRS appears to continue to endorse a number of its positions in *Veritas* for purposes of determining PCT Payments, including: (1) using the aggregation approach and the income method, (2) defining the relevant useful life period in valuing PCT Payments with reference to life of the development activity rather than the life of the contributed item, and (3) requiring a PCT Payment for the contribution of a research team's experience and expertise (separate from and in addition to the ongoing sharing of the salary costs of such team under the CSA) and aggregating that contribution with other platform contributions in many cases. Had the Temporary Regulations or the Final Regulations been in effect for the transactions at issue, the court may have ruled differently, particularly in light of the Supreme Court's 2011 ruling in *Mayo Foundation* v. *US* that "interpretive" Treasury regulations (*i.e.*, regulations promulgated pursuant to a general, rather than a specific, legislative grant of regulatory authority) are entitled to a high degree of deference and will generally be struck down only if they are found to be arbitrary, capricious or manifestly contrary to the Code. Accordingly, the *Veritas* ruling may have limited effect in respect of cases adjudicated under the Temporary Regulations (and now under the Final Regulations).

Within this legal landscape, the cost sharing rules have been an area of growing concern for the IRS. For example, in his remarks before the Annual Institute on Current Issues in International Taxation in December 2010, IRS Commissioner Shulman emphasized the importance of transfer pricing to the tax system in general and referred in particular to the problem of "migrating valuable intangibles through cost sharing arrangements."[4] More recently, in November 2011, the former director of the IRS Advance Pricing Agreement ("APA") program, Craig Sharon, stated that cost sharing was "no doubt the No. 1 issue

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[3] A.O.D. 2010-05, I.R.B. 2010-49 (Dec. 6, 2010).

[4] Prepared Remarks of IRS Commissioner Doug Shulman before the 23rd Annual Institute on Current Issues in International Taxation, Washington, DC, IR-2010-122 (Dec. 9, 2010).

within IRS transfer pricing enforcement" and that there were more than $50 billion in possible adjustments under review and billions more in cases not under scrutiny.[5]

The heightened focus on transfer pricing issues is evidenced by recent IRS realignments. The IRS has committed additional resources to its transfer pricing practice by establishing the position of Director, Transfer Pricing Operations, in its Large Business and International Division ("LB&I"), who is responsible for developing and coordinating the IRS's transfer pricing strategy and operational approaches to key transfer pricing matters arising in the areas of field examinations, competent authority, and the APA program.[6] As part of this effort, the current Director, Samuel Maruca, has indicated that his office aims to improve the IRS's case selection in the transfer pricing area by "picking good cases and winning them by asserting realistic positions" and emphasized the need to carefully select cases in the cost sharing area.[7] Commissioner Shulman has also cited the IRS's centralization of its transfer pricing practice as an example of the IRS's aspiration to "operate strategically based on risk assessment and business insight."[8] Within his subdivision of LB&I, Mr. Maruca has assembled a group of transfer pricing specialists, including international examiners, lawyers, economists and other experts, who, under a pilot program, have already been involved in the examination process at an early stage and throughout the process in an effort to improve case development.[9]

THE NEW REGULATIONS

A. PLATFORM CONTRIBUTIONS

1. Broadened Definition of a Platform Contribution

The Final Regulations and the Preamble continue to take a broad view of what constitutes a "platform contribution" for purposes of the cost sharing rules. As an example, the IRS notes in the Preamble that a

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5 Amy S. Elliott, "LB&I May Be Winning Internal Fight Over *Veritas*, Practitioners Say," 2011 Tax Notes Today 217-2 (Nov. 9, 2011).

6 Steve Schuster, "Transfer Pricing: Maruca Says IRS Must Produce 'Winners,' Hints at Changes to Cost-Sharing Strategy," 111 Daily Tax Report G-8 (June 9, 2011).

7 Steve Schuster, "Transfer Pricing: Maruca Says Strategic Case Selection Key Aspect of Transfer Pricing Practice," 146 Daily Tax Report G-3 (July 29, 2011). Separately, Mr. Maruca has stated that, with respect to the IRS's inventory of cases that fall under the pre-2009 cost sharing regulations: "We have to review these cases carefully and evaluate the methodology against this backdrop, and we must start down that road immediately. It's at the top of my agenda." David D. Stewart, "IRS To Take a 'Fresh Look' at Cost Sharing Case Inventory, Transfer Pricing Director Says," 2011 Tax Notes Today 145-7 (July 28, 2011).

8 Prepared Remarks of Douglas H. Shulman, Commissioner of Internal Revenue, Before the IRS/George Washington University 24th Annual Institute on Current Issues in International Taxation, Washington, DC, Dec. 15, 2011.

9 David D. Stewart, "Newly Aligned Transfer Pricing Practice to Take Shape in January, IRS Official Says," 2011 Tax Notes Today 178-4 (Sept. 14, 2011).

PCT Payment would be required for the "commitment" of a research team's "experience and expertise" to intangible development under a CSA, in addition to the ongoing sharing of such research team's salary costs under the CSA.[10] The Final Regulations further expand the scope of what constitutes a platform contribution by providing that the grant of make-or-sell rights (*e.g.*, the right to make, replicate, license or sell an item) with respect to an existing resource, capability or right will constitute a platform contribution if the use of the existing item without further development is reasonably anticipated to contribute to the development of a cost shared intangible.[11] The Final Regulations add an example illustrating this rule: in the example, the right to use a patent protecting a research tool that is helpful in developing and testing new pharmaceutical compounds constitutes a platform contribution, if the research tool is anticipated to contribute to the research activity covered by the CSA, notwithstanding the fact that the right to use the research tool is not anticipated to contribute to the development of the research tool or the patent protecting such research tool.[12]

2. Aggregation Approach

Both the Temporary and Final Regulations provide that an aggregation approach to valuing transactions in connection with a CSA may be appropriate in order to determine the combined effect of multiple contemporaneous transactions.[13] The IRS notes in the Preamble that it continues to recommend an aggregation approach in many cases: "The combined effect of multiple contributions, potentially including controlled transactions outside of the CSA (for example, make-or-sell licenses, or intangible transfers governed by [Code] [s]ection 367(d)), may need to be evaluated on an aggregate basis, where that approach provides the most reliable measure of an arm's length result."[14] Furthermore, in responding to comments that the cost of services plus method should be permitted for valuing and determining the form of PCT Payments, the IRS discourages the use of disaggregated valuation approaches and states, using the contribution of services of a research team as an example:

> In theory, therefore, the arm's length charge for a platform contribution of services of a research team might be converted into a cost-of-services-plus form of payment, provided that, among other conditions, the method and form of payment treating the platform value of such research team separately from the arm's length charge for any other platform contributions provide the most reliable measures of the arm's length charges. The experience of the IRS, however, is that the arm's length charges for platform contributions of the services of a research team along with

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10 76 Fed. Reg. 80082, 80083 (citing Final Regulations Section 1.482-7(c)(5) (*Ex. 2*) (also included in the Temporary Regulations)).

11 Final Regulations Section 1.482-7(c)(4)(i).

12 Final Regulations Section 1.482-7(c)(4)(ii) (*Ex. 3*).

13 Temporary and Final Regulations Sections 1.482-7T(g)(2)(iv) and 1.482-7(g)(2)(iv).

14 76 Fed. Reg. 80082, 80082.

other platform contributions (*e.g.*, of a base technology) are most often most reliably determined in the aggregate.[15]

3. Useful Life

The IRS notes in the Preamble that, for purposes of determining a participant's benefits from the CSA over the duration of the activity of developing and exploiting cost shared intangibles (the "CSA Activity") under the investor model, the CSA Activity "may, or may not, correspond to the conventional concept of useful life with respect to any of the underlying economic contributions; it represents the period over which the controlled participants reasonably anticipate returns from the CSA Activity."[16] Thus, for example, if a product with a short useful life is anticipated to benefit the development of a future generation of products, the relevant useful life would include the useful life of the future generation of products for purposes of determining the amount of the PCT Payment required for the contribution of such product.

4. Application of Income Method

The Temporary Regulations and the Final Regulations provide for the "income method" as one of the various methods that may be used in valuing a PCT. The income method's application is generally limited to cases in which only one participant makes non-routine contributions. The income method determines whether a PCT Payment conforms to the arm's length standard by reference to the participant's best realistic alternative to entering into the CSA. Both the Temporary Regulations and the Final Regulations provide that, in general, the best realistic alternative for a payor of a PCT Payment would be to license the cost shared intangibles from an unrelated licensor, while the best realistic alternative from the perspective of a recipient of a PCT Payment would be to bear all the risk of the intangible development and license the intangibles to an uncontrolled licensee.[17]

In connection with these aspects of the Final Regulations, the IRS issued the Income Method Regulations. The IRS explained its concern that "some taxpayers are taking unreasonable positions in applying the income method by using relatively low licensing discount rates, and relatively high cost sharing discount rates . . . , thus deriving PCT Payments that are not in accordance with the arm's length standard."[18] The Income Method Regulations provide that, in certain cases, an analysis of the "differential income stream" may be the best method for applying the income method with respect to platform contribution transactions. In general, the differential income stream method treats the present value of the platform contribution transaction as the difference between the undiscounted income stream

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15 76 Fed. Reg. 80082, 80086.

16 76 Fed. Reg. 80082, 80083.

17 Temporary and Final Regulations Sections 1.482-7T(g)(4)(i)(A) and 1.482-7(g)(4)(i)(A).

18 T.D. 9569, RIN 1545-BK72 (Dec. 19, 2011).

in a licensing scenario and the undiscounted operating income stream in a cost sharing scenario (before PCT Payments), with such difference being discounted at an appropriate rate.

In addition, the Final Regulations provide that if different discount rates are used under an income method analysis to determine the cost sharing alternative and the licensing alternative, the analysis will be more reliable the greater the extent to which the difference between the rates reflects solely the differences in the risk profiles of the two alternatives.[19] This is in part because, as the Final Regulations provide, the licensing scenario should assume contractual provisions that are consistent with those of the actual CSA (apart from any difference in the allocation of risks of the development activity), and, therefore, the financial projections associated with the two scenarios should be the same except for the licensing payments to be made under the licensing alternative and the cost contributions and PCT Payments to be made under the cost sharing alternative.[20]

5. Form of Payment

The Final Regulations, like the Temporary Regulations, permit the parties to a CSA to include payment terms for PCT Payments that are contingent on the exploitation of cost shared intangibles, but only if the allocation pursuant to such terms among the participants is determinable before the outcomes are known or knowable and only if the contingent payments allocate risk consistently with economic substance. The contingent payment terms are required to specify the events that give rise to an obligation to make PCT Payments and how such payments should be computed.

The examples newly added by the Final Regulations make it clear that contingent payments will not be respected if the amounts of such payments are not based on a firm method of allocation. One example describes a contingent payment that lacks economic substance because, under the CSA in the example, one party was permitted but not required to make compensating adjustments to the payments under the CSA once the actual results were known and available.[21] The example states that because the contingent payment terms did not clearly and unambiguously specify the events that would give rise to an obligation to make payments, the obligation was indeterminate. Therefore, the Commissioner may disregard the contingent payment terms of the CSA and instead impute other contractual terms in their place.

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[19] Final Regulations Section 1.482-7(g)(4)(vi)(F)(1).

[20] Final Regulations Section 1.482-7(g)(4)(i)(C).

[21] 1.482-7(h)(2)(iii)(C) (*Ex. 6*).

B. OTHER CHANGES

1. Retroactive Adjustments

In response to comments seeking clarification on how and when to update RAB Shares and whether such updates may be made retroactively or only prospectively, the Final Regulations clarify that taxpayers cannot retroactively adjust RAB shares to take into account information discovered at a later time. However, the IRS may use subsequently available information for this purpose.

2. Miscellaneous Changes and Clarifications

Additional changes and clarifications in the Final Regulations include the following:

- **Applicable Tax Rate for Valuing PCTs.** The Final Regulations clarify that the term "tax rate" for purposes of determining amounts on a pre-tax basis means "the reasonably anticipated effective tax rate with respect to the pre-tax income to which the rate of tax is being applied."[22] For example, where the income method is being used to value a PCT, the rate would be the reasonably anticipated effective tax rate of the payer or payee of a PCT Payment under the cost-sharing alternative or licensing alternative. The Final Regulations have added examples to illustrate that "under the income method, the operative rule in all cases is to derive the pre-tax PCT Payments that set the post-tax present value of the cost sharing alternative equal to the post-tax present value of the licensing alternative."[23]

- **Clarification of Residual Profit Split Method ("RPSM") Application.** The RPSM determines whether the allocation of combined operating profits or losses attributable to one or more PCTs is arm's length by reference to the relative value of each participant's contribution to that combined operating profit or loss; this allocation is intended to correspond to the division of profit or loss that would result from an arrangement among similarly situated unrelated parties. Under this method, the present value of each participant's residual divisional profit or loss attributable to nonroutine contributions (the "nonroutine residual divisional profit or loss") is allocated in accordance with the participants' relative nonroutine contributions. This present value is set to equal (i) the present value of the stream of the reasonably anticipated residuals over the duration of the development activity of divisional profit or loss, minus (ii) market returns for routine contributions, operating cost contributions, and cost contributions, using an applicable discount rate.[24] The Final Regulations clarify that, for this purpose, the market returns for routine contributions (i) include market returns for "operating cost contributions" (*i.e.*, costs in the ordinary course of business that are allocable to developing resources, capabilities, or rights (other than anticipated cost shared intangibles)

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[22] Final Regulations Section 1.482-7(j)(1)(i).

[23] 76 Fed. Reg. 80082, 80085. *See* Final Regulations Section 1.482-7(g)(4)(viii) (*Exs. 4, 5 and 6*).

[24] Final Regulations Section 1.482-7(g)(7)(iii)(B).

that are reasonably anticipated to contribute to the CSA Activity within the contributing participant's division[25]) and (ii) exclude market returns for "cost contributions" (*i.e.*, costs that relate to the intangible development activity under the CSA[26]).[27] The IRS explains in the Preamble that market returns are not assigned to cost contributions because resources, capabilities and rights that benefit the development of cost shared intangibles are treated as platform contributions.[28]

- **Exception to Periodic Adjustments.** As described above, under a periodic adjustment provision, the IRS may adjust the amount of required PCT Payments if the ratio of (i) the present value of a participant's actual benefits from the CSA to (ii) the present value of the participant's costs under the CSA (the "actually experienced return ratio" or the "AERR") falls outside of a safe harbor range.[29] However, the taxpayer may avoid an adjustment by satisfying the requirements of one of four exceptions. Under one of these exceptions, the taxpayer must show that the reduced AERR that would result from certain modifications to the calculation of the taxpayer's divisional profits or losses would not have fallen out of the safe harbor range. In response to comments that periodic adjustments were too easily triggered because the definition of "divisional profits or losses" is too broad and includes too much value in arriving at the AERR, the Final Regulations provide that the modifications under the exception described above also take into account the taxpayer's routine platform contributions and the taxpayer's expenses on account of operating contributions and routine platform contributions.[30]

- **Use of Cash Flow Projections vs. Operating Income.** Despite comments that objected to the use of operating income rather than cash flows in the cost sharing rules, the Final Regulations have not adopted any changes to address this issue. According to the Preamble, while the use of cash flow projections is permitted under the regulations, the IRS believes that, for a number of practical and administrative reasons, the detailed guidance on the specific applications of the methods contained in the regulations should be based on discounting operating income rather than cash flows.[31]

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[25] Final Regulations Section 1.482-7(j)(1)(i).

[26] Final Regulations Section 1.482-7(d)(4).

[27] 76 Fed. Reg. 80082, 80085-80086.

[28] 76 Fed. Reg. 80082, 80085-80086.

[29] Final Regulations Section 1.482-7(i)(6)(i).

[30] Final Regulations Section 1.482-7(i)(6)(vi)(A)(3).

[31] 76 Fed. Reg. 80082, 80084.

- **Tax Adjustments in Acquisition Price and Market Capitalization Methods.** Responding to several comments requesting additional guidance on what types of tax adjustments need to be made with respect to PCT Payments under the acquisition price and market capitalization methods, the Final Regulations remove the specific references to tax adjustments under these methods because the IRS believes that the determination regarding whether to make such adjustments should be made under a facts-and-circumstances approach in each case.[32]

- **Applicability of PCT Valuation Methods to Other Controlled Transfers.** As stated in the Preamble, the IRS believes that payments in controlled transactions reflecting similar economics (regardless of the type of transaction) should be valued using similar principles and methods.[33] Thus, as part of the Final Regulations, the IRS finalized coordination rules stating that the principles and methods for valuing platform and operating contributions under a CSA may also apply under a best method analysis to valuing similar contributions in connection with transfers of intangibles outside the context of a CSA (*e.g.*, pursuant to an ordinary licensing agreement) and to the provision of intercompany services.[34]

3. Future Guidance and Request for Comments

- **Stock-based Compensation.** In 2005, the IRS issued a notice providing guidance with respect to the circumstances under which compensation consisting of restricted equity could be taken into account as an intangible development cost in the context of a CSA and the measurement of such cost, particularly the circumstances under which such cost was eligible for measurement by reference to the fair market value as stated in audited financial statements.[35] The IRS also requested comments concerning other types of stock-based compensation that should be so eligible. In the Preamble, the IRS states that it continues to consider the issues raised in the notice and that it anticipates addressing them in future regulations.

- **Transactions Covered Under an APA.** The IRS reiterates in the Preamble that the Treasury Department and the IRS are considering issuing a revenue procedure which would provide an exception to the periodic adjustments provided for under the Final Regulations in the case of transactions covered under an APA.[36] In addition, the IRS is considering guidance, and solicits

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[32] 76 Fed. Reg. 80082, 80085; Temporary Regulations Sections 1.482-7T(g)(5)(ii), 1.482-7T(g)(6)(ii).

[33] 76 Fed. Reg. 80082, 80083.

[34] Final Regulations Sections 1.482-4(g), 1.482-9(m)(3).

[35] Notice 2005-99, I.R.B. 2005-52 (Dec. 8, 2005).

[36] 76 Fed. Reg. 80082, 80086.

comments, regarding the extent to which CSAs covered by APAs should be deemed to satisfy any of the administrative requirements applicable to CSAs.[37]

C. EFFECTIVE DATE

The effective date of the Final Regulations is December 16, 2011. However, because the Preamble characterizes many of the changes made by the Final Regulations as clarifications of the Temporary Regulations, it is possible that the IRS will attempt to apply the "clarified" rules to grandfathered transactions subject only to the Temporary Regulations as well.

The Income Method Regulations, to the extent they relate to the determination of reliable discount rates, are proposed to apply to taxable years beginning on or after December 19, 2011. To the extent they relate to the differential income stream method, the Income Method Regulations are proposed to apply to taxable years beginning on or after the date of publication of a Treasury decision adopting these rules as final regulations.

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[37] 76 Fed. Reg. 80082, 80087.

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