February 19, 2019

MEMORANDUM FOR LARGE BUSINESS AND INTERNATIONAL DIVISION EMPLOYEES

FROM: Douglas W. O'Donnell /s/ Douglas W. O'Donnell
Commissioner, Large Business and International Division

SUBJECT: Interim Guidance on Mandatory Issue Team Consultations with APMA for Examination of Transfer Pricing Issues Involving Treaty Countries

This memorandum provides guidance to Large Business & International (LB&I) with respect to certain examinations involving transfer pricing issues.

INTRODUCTION

Transfer pricing issues comprise a substantial portion of the U.S. Competent Authority’s caseload and LB&I’s examination inventory. As a result, significant LB&I resources are devoted to these issues. LB&I recognizes it must use subject matter specialist examination resources and related Advance Pricing and Mutual Agreement (APMA) resources efficiently and effectively. This memorandum instructs issue teams on certain transfer pricing cases to consult with APMA.

This guidance applies to examinations of LB&I taxpayers (i.e., assets equal to or greater than $10,000,000) that are required to file Forms 5471 or 5472 with their federal income tax returns.
TRANSFER PRICING ISSUE TEAM GUIDANCE FOR CONSULTATION WITH APMA

Relevant issue teams must consult with APMA regarding issues involving transfer pricing transactions between U.S. taxpayers and related parties in U.S. treaty partner countries that may generate adjustments for which a taxpayer may request competent authority assistance.

This memorandum requires collaboration between transfer pricing issue teams (whether staffed from Transfer Pricing Practice (TPP), Cross Border Activities (CBA) or Geographic Compliance Practice Area personnel) and APMA on examinations with the potential to generate transfer pricing adjustments involving a country with which the United States has a double tax treaty. This consultation requirement applies regardless of whether the taxpayer currently has a mutual agreement procedure (MAP) or advance pricing agreement (APA) case in APMA or whether APMA has an active relationship with the treaty partner.

To ensure that issue teams understand relevant treaty background and competent authority experience with the treaty partner and/or transfer pricing issues, APMA and the corresponding issue teams must consult on procedural and substantive matters regarding potential adjustments when a treaty country is involved. Given the significant time and resources required to develop an adjustment that may subsequently give rise to a MAP case, LB&I issue teams must take appropriate steps to consider the competent authority experience early in issue development in order to properly risk assess the issue.

This early consultation is an important step in developing adjustments consistent with the arm's length standard under the regulations and tax treaties and is consistent with the competent authority’s commitment to “[ensuring] the implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes”. That background can help the issue team understand how certain facts and arguments might be best developed and supported, as well as provide perspective on the history APMA may have with the type of case being pursued (and whether, in some similar situations, an adjustment has been withdrawn, in whole or in part, before or after negotiations have begun). Further consultation may occur as needed as the case development progresses. Such consultations will also afford APMA the opportunity to learn from the experiences and knowledge of the issue teams, information that may be used in APMA’s MAP case negotiations.

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1 Per IRM 4.61.3.3.1, The team assigned to examine a specific issue, such as an intercompany transaction, is referred to as the issue team. For transfer pricing cases, the issue team will include members of the Transfer Pricing Practice (TPP) and/or Cross Border Activities (CBA). For examinations arising under LB&I campaigns, examination team members should follow the specific guidance provided for within the campaign. The transfer pricing issue team generally includes:
   a) Senior revenue agent (SRA) and/or revenue agent (RA)
   b) Economist
   c) Tax Law Specialist

Sharing of information and experience by APMA with the relevant issue team is intended to provide the issue teams with useful information for consideration in their selection and development of transfer pricing issues. The issue teams are ultimately responsible for the selection and development of all examination issues and an appropriate degree of independence is maintained from the competent authority process.

General statements regarding collaboration between APMA and TPP are found in Rev. Proc. 2015-40, 2015-35 IRB 236 (governing MAP cases) and Rev. Proc. 2015-41, 2015-35 IRB 263 (governing APA cases) as well as Internal Revenue Manual (IRM) 4.61.3.6. Specific issue team - APMA consultation instructions are attached.

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This memorandum applies to transfer pricing examinations opened in the IRS Issue Management System (IMS) from the date of issuance of this guidance forward. This does not, however, preclude consultations on any cases opened prior the issuance of this guidance.

This guidance will be incorporated into IRM 4.61.3 by a date not to exceed two years from its release.

For further information regarding this interim guidance memorandum and any of the specific issues addressed herein, please contact the Director of Treaty and Transfer Pricing Operations.

Attachment

cc: Division Counsel, LB&I

www.IRS.gov
Instructions for Consultations between transfer pricing issue teams and APMA personnel

Transfer pricing issue teams are comprised of various individuals and must include staff from the Transfer Pricing Practice (TPP) or Cross Border Activities (CBA) and may include Geographic Compliance Practice Area personnel. The TPP or CBA manager will be the issue manager. For examinations arising under LB&I campaigns, examination team members should follow the specific guidance provided for within the campaign. (See IRM 4.61.3.3.3.)

Transfer pricing issue teams must consult with APMA when reviewing a taxpayer’s intercompany transactions involving a treaty partner, regardless of whether the taxpayer currently has a mutual agreement procedure (MAP) or advance pricing agreement (APA) case in APMA or whether APMA has an active relationship with the treaty partner. To facilitate this consultation, APMA and the transfer pricing issue team will follow these procedures:

1. At the beginning of its review of the taxpayer’s intercompany transactions involving a treaty partner, the transfer pricing issue team manager will send an encrypted email to an APMA e-mail box designated specifically for consultations *LB&I APMA Consult. The transfer pricing issue team manager will copy his/her Territory Manager with this request for a discussion. This e-mail will include:
   a. The language “Request for Consultation” and the country or countries in the subject line,
   b. The taxpayer name, tax year, and a very brief description of the transaction, and
   c. Any other relevant information.

2. The APMA mailbox will be managed by an assigned APMA Management and Program Analyst. The APMA Management and Program Analyst will direct the request to the appropriate APMA Assistant Director.

3. The APMA Assistant Director who receives the request for consultation will:
   a. Choose an APMA team leader, economist, or manager to consult with the transfer pricing issue team making the request; and
   b. Organize a call between APMA and the transfer pricing issue team within two weeks of receiving the referral or will send an email with an expected timeframe for holding such discussion.

4. The transfer pricing issue team manager has discretion to forward the calendar invite to other members of the broader exam team and is encouraged to do so where appropriate.
5. During the consultation, APMA and the transfer pricing issue team will discuss the intercompany transactions and issues under review and APMA will share its experience, both generally and as it pertains to the applicable treaty partner. Among other things, the APMA Team will share its experiences with similar cases, presentations of fact and arguments that can often arise during the competent authority negotiations, and, as appropriate, possible outcomes resulting from the negotiation process. Such consultations will also afford APMA the opportunity to learn from the experiences and knowledge of the issue teams. This information will in turn help inform APMA about the intercompany activity of U.S. taxpayers relevant to specific treaty partner relationships.

6. If the transfer pricing issue team has formed an initial view about whether to pursue an adjustment, APMA may also offer a provisional view on whether the theory under which the adjustment being pursued would be justified under the applicable U.S. tax treaty. Further consultation may occur as needed as the case development progresses.

7. The transfer pricing issue team must document in their activity record in the IRS Issue Management System (IMS) that it consulted with APMA on the specified issue.