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From: [REDACTED]
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To: [REDACTED]
Cc: [REDACTED]
Bcc:
Subject: Question re 6038C

Good Morning

You asked whether section 6038C(d) applies with respect to a transaction between a foreign corporation that is engaged in the conduct of a trade or business within the United States and a shareholder of that foreign corporation, who is a related party (within the meaning of section 6038A(c)(2)) with respect to that foreign corporation.

Yes, if the foreign shareholder does not agree to authorize the foreign corporation to act as its agent as described in section 6038C(d)(1), then the rules of section 6038C(d)(3) apply with respect to certain transactions between the foreign corporation and its shareholder. See also Treas. Reg. §1.6038A-5. Treas. Reg. §1.6038A-1(a) provides that “[t]his section and §§1.6038A-2 through 1.6038A-7 provide rules for certain foreign-owned U.S. corporations and foreign corporations engaged in trade or business within the United States (“reporting corporations”) relating to information that must be furnished, records that must be maintained, and the authorization of the reporting corporation to act as agent for related foreign persons for purposes of sections 7602, 7603, and 7604 that must be executed.” Emphasis added. Treas. Reg. §1.6038A-1(c) confirms that the term “reporting corporation” as used in Treas. Reg. §§1.6038A-1 through 1.6038A-7 applies for purposes of section 6038C. Treas. Reg. §1.6038A-1(c) (“After November 4, 1990, a foreign corporation engaged in a trade or business within the United States at any time during a taxable year is a reporting corporation. See section 6038C.”). For more information, see Form 1120-F (U.S. Income Tax Return of a Foreign Corporation) and Form 5472 (Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business) and the corresponding instructions.

Treas. Reg. §1.6038A-6(b) provides that where records are obtainable on a timely and efficient basis under a tax treaty or information exchange agreement (TIEA), the IRS will generally make use of the tax treaty or TIEA to obtain the records prior to issuing a summons described in section 6038A. The Exchange of Information Program office can provide additional information on whether a tax treaty or TIEA is in force with respect to a particular jurisdiction and whether records would be obtainable from that jurisdiction

on a timely and efficient basis. See IRM 4.60.1.2.1. Summonses for foreign documents within the scope of IRC 6038A require pre-issuance review by the LB&I Technical Specialist for the Information Gathering IPN, who will coordinate with CC:INTL. See IRM 4.60.8.3.5.12.

Please let us know if you have any additional question.