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From: [REDACTED]
Sent: Tuesday, August 29, 2023 4:48:30 PM
To: [REDACTED]
Cc: [REDACTED]
Bcc:
Subject: RE: Advice Request (P&A)

Hi Nicole,

We've finalized our advice with ACCI regarding disclosures under (k)(4). I believe [REDACTED] plans to share the advice with Treasury. Please find it attached.

Please let us know if you have any questions.

Thanks,

[REDACTED]

ATTACHMENT 1

Issue(s) Presented

For both Scenario 1 & 2, is the IRS permitted to disclose the name, U.S. TIN, DOB, address, and other identifying information of account holders who were erroneously identified as not having a U.S. TIN but for whom a U.S. TIN was subsequently identified to the HCTA under IRC section 6103, specifically, sections 6103(k)(4) and/or 6103(k)(6)?

Conclusion

For both scenarios, the IRS is authorized to disclose to the HCTA the name, U.S. TIN, DOB, address, and other identifying information (1) under section 6103(k)(4) to the extent the disclosures are made through the foreign competent authority and so the HCTA can address issues described in the compliance and enforcement provisions of the respective FATCA IGA

and (2) under section 6103(k)(6) to the extent the disclosures are necessary to ensure the IRS receives from the HCTA accurate information to administer the IRS FATCA reporting program. Section 6103(k)(4) should be viewed as the primary authority for making the disclosures sought here.

Law and Analysis

Returns and return information are confidential except as authorized in the Internal Revenue Code (IRC or Code). IRC § 6103(a). The definition of return information is broad and includes all data that is collected, received, or generated by the IRS with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under the Code. IRC § 6103(b)(2). The identifying information (name, U.S. TIN, DOB, address, etc.) of account holders that were erroneously identified as not having a U.S. TIN, but for whom a U.S. TIN was subsequently identified by IRS, is the return information of the account holders because the information about those account holders was originally gathered by the IRS with respect to those account holders' potential liability under the Code.

Section 6103 (k)(4)

The IRS is authorized to disclose return information to a competent authority of a foreign government which has an income tax or gift and estate tax convention, or other convention or bilateral agreement relating to the exchange of tax information, with the United States to the extent provided in, and subject to the terms and conditions of, such convention or bilateral agreement. IRC § 6103(k)(4). Upon a review of the template Model 1 IGA and a sampling of Model 1 IGAs in effect, we found that the language in the compliance and enforcement articles of these agreements would support reliance on IRC § 6103(k)(4) with respect to the contemplated disclosures. The language pertaining to disclosure of information from the IRS to the foreign competent authority under Model 1 IGAs authorizes the IRS to notify the foreign competent authority when the U.S. Competent Authority has reason to believe that administrative errors or other minor errors may have led to incorrect or incomplete information reporting or resulted in other infringements of the IGA. As described in the IGA, these notifications are intended to spur the foreign competent authority into action so the FFI can provide corrected and/or complete information reporting. It follows that the terms of Model 1 IGAs permit the IRS to make disclosures of return information to the foreign competent authority so it, through the relevant FFI, can address those issues.¹ The alternative, that the IGA does not permit the IRS to disclose return information in such a notification, would significantly thwart the efforts of the foreign competent authority, and ultimately the relevant FFI, to remedy the errors and therefore conflict with the general purpose of the compliance provisions of the IGA. In both Scenario 1 and Scenario 2, the IRS would be providing the foreign competent authority with notice of errors that may have led to incorrect or incomplete information reporting and the disclosure of individuals' names, TINs, and other identifying

¹ Other provisions of the IGA and other agreements relating to the exchange of tax information may authorize disclosure pursuant to IRC § 6103(k)(4). For example, the standalone Model 1 IGAs generally permit the IRS to make general inquires to the foreign competent authority pursuant to which the foreign competent authority would obtain additional information with respect to the U.S. Reportable Account. See Article 5(1).

information will allow the foreign competent authority, through the relevant FFI, to correct its information reporting. Accordingly, section 6103(k)(4) does apply here given that the terms of the Model 1 IGAs provide for the disclosures at issue.

The foreign competent authority may redisclose return information received from the IRS pursuant to IRC section 6103(k)(4) to the relevant FFI, as the disclosure would be for the purpose of carrying out the IGA and ensuring that the FATCA reporting provided is accurate and complete.² However, the foreign competent authority must comply with the confidentiality and other protections provided for in the applicable IGA between the two countries, including the provisions limiting the use of the information exchanged.

Section 6103(k)(6)

The IRS is specifically authorized by IRC section 6103(k)(6) and Treas. Reg. § 301.6103(k)(6)-1, in connection with official duties relating to any audit, collection activity, or civil or criminal tax investigation, to disclose return information to the extent that disclosure is necessary in obtaining information which is not otherwise reasonably available with respect to the correct determination of tax, liability for tax, or the amount to be collected, or with respect to the enforcement of any other provision of the Code. The Treasury Regulations further specify that disclosures are authorized under section 6103(k)(6) to “accomplish properly any activity connected with [] official duties” related to tax administration including to “establish[] or verify[] the correctness or completeness of any return or return information” or to “establish[] or verify[] the liability (or possible liability) of any person . . . for any tax, penalty, interest, fine, forfeiture, or other imposition or offense under the internal revenue laws or related statutes.” Treas. Reg. § 301.6103(k)(6)-1(a)(1).

The necessary elements of investigative disclosures under IRC section 6103(k)(6) are:

1. Information is sought for an official purpose.
2. The information is not reasonably available without disclosing return information. In other words, it cannot otherwise reasonably be obtained in sufficiently accurate and probative form, or in a timely manner, and without impairing the proper performance of official duties, without making the disclosure.
3. Disclosure is confined to only the return information that is necessary to obtain the information sought. This inquiry is not whether the information sought is necessary for the investigation or examination, the inquiry is whether the disclosure of each item of return information is necessary to obtain the particular information sought.

In both Scenario 1 and Scenario 2, the IRS would be disclosing individuals’ names, TINs, and other identifying information to improve the accuracy and completeness of FATCA records related to those individuals’ accounts. A more robust FATCA dataset will improve IRS compliance activities by allowing it to identify additional U.S. individuals who failed to

² See, e.g., Article 5, Collaboration on Compliance and Enforcement, of the Model 1A IGA, which requires the Competent Authority to apply its domestic law to address minor administrative errors and significant non-compliance by an FFI.

accurately report their foreign assets and more accurately evaluate whether FFIs are fulfilling their reporting obligations under the IGAs. These are official tax administration purposes. The improved accuracy and completeness of FATCA reporting would not be received by the IRS without making the disclosures at issue because the FFIs have been unable to associate a U.S. TIN with the reportable accounts. The scope of return information disclosed is sufficiently tailored for this purpose: in order for the FFI to connect the U.S. TIN to its account holder, it would need to know both the TIN and the account holder's identity. Under the terms of the Model 1 IGA, the HCTA is the intermediary between the IRS and FFIs, and communication channels between the two parties are established for FATCA activities, so the HCTA is well-positioned to assist the IRS in accomplishing properly FATCA-related compliance activities. The HCTA may redisclose information provided to it pursuant to IRC section 6103(k)(6), including redisclosure to the relevant domestic financial institutions for the purpose of resolving incomplete information reporting in the FATCA dataset.

Risks

[Redacted]

[Redacted]

[Redacted]

Please contact [Redacted] with any questions regarding IRC 6103(k)(6) and [Redacted] regarding IRC 6103(k)(4) and IGA interpretation.

Thank you.