

Practitioners Discuss FATCA Provision on Statute of Limitations

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COUNTRY DIGEST

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Practitioners at a May 18 conference in Boston debated the financial statement ramifications of a recent amendment to Internal Revenue Code section 6501(c)(8) that suspends the statute of limitations for tax returns that failed to include the required foreign information reporting forms.

The provision was originally included in the Foreign Account Tax Compliance Act (FATCA) and enacted as part of the Hiring Incentives to Restore Employment (HIRE) Act (P.L. 111-147) signed into law on March 18. The HIRE-FATCA bill amended IRC section 6501(c)(8) to provide that the assessment statute of limitations may remain open not only for a failure to file one of the specified foreign information filings (forms 926, 3520, 3520-A, 5471, 5472, 8621, 8858, or 8865) but for the entire tax return in which a foreign reporting obligation was not met. The provision is effective for tax returns filed after March 18, 2010, and for returns filed before March 18, 2010, for which the assessment statute of limitations has not expired.

During a symposium on international tax developments hosted by law firm Sullivan & Worcester, Douglas S. Stransky, a partner with the firm (who said he was speaking on his own behalf), noted that the Joint Committee on Taxation's technical explanation of the HIRE Act described the amendment to section 6501(c)(8) as a "clarification."

"That means theoretically that if it's a clarification, it's always been like that," Stransky said. "And that means it would therefore impact tax returns that the taxpayers and the government previously thought were closed."

Such a scenario could have far-reaching implications for purposes of Accounting Standards Codification (ASC) Subtopic 740-10 (previously known as Financial Accounting Standards Board Interpretation No. 48), Stransky said.

To the extent that tax reserves were dependent on the statute of limitations expiring, auditors may — if they regard the amendment to section 6501(c)(8) as a clarification — now require taxpayers to keep those tax reserves on their financial statement, he said.

"If the rule isn't changed by the close of the second quarter, it will be interesting to see what the auditors will do for ASC 740 purposes, at least with respect to public companies," Stransky said.

Other practitioners in the audience said the provision will put added pressure on auditors to ensure that a taxpayer has completely prepared all the appropriate information returns for all entities. One practitioner said a taxpayer may not even be aware that he has a reporting obligation. He pointed to the new reporting rules in IRC section 1289(f) (a new code section added by the HIRE Act) that require U.S. persons who hold shares of a passive foreign investment company to file an annual report (the IRS has not yet determined what type of report will have to be filed; the current information return for PFIC shareholders, Form 8621, is required to be filed only when a specific triggering event has occurred).

"If you don't know you own a PFIC, how are you going to know to file a Form 8621?" the practitioner said. "If you don't even know you had to file something and you don't file it with your tax return, your entire return is going to remain open."

Stransky said that the provision is significant and that he hopes lawmakers promptly remedy the situation. "I think the general consensus is that it wasn't intended and that it's unlikely to survive," he said. He noted that government officials have recently said that they are aware of practitioner concerns about the provision's impact on financial statements and that they are studying the issue. (For an IRS official's April 30 comments, see *Tax Notes Int'l*, May 10, 2010, p. 462, *Doc 2010-9722*, or *2010 WTD 84-2*. For a JCT staffer's May 7 comments, see *Tax Notes Int'l*, May 17, 2010, p. 538, *Doc 2010-10290*, or *2010 WTD 89-6*.) ◆

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