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FATCA; Norway - International Benefits Developments for US Multinational Plan Sponsors

Treasury Department Notice on FATCA Guidance - Non-US Retirement Plan Exemption Comments Still being Considered

The Treasury Department has issued Notice 2011-34 indicating that it is still considering comments on which non-US retirement plans should be exempt from the significant and controversial reporting requirements under the Foreign Account Tax Compliance Act (FATCA), which generally imposes substantial tax withholding on certain US payments to foreign accounts unless those reporting requirements are adhered to. (For prior discussion of FATCA and non-US retirement plans, see here: http://www.groom.com/resources-545.html). Many non-US pension plans and associations have already commented on this issue. The Notice also provides guidance on identifying whether an account has a US owner, the calculation of pass-through payments by Foreign Financial Institutions (FFIs), rules for "deemed compliant" FFIs, rules for reporting on US accounts, and rules for affiliated groups of FFIs.

While the Notice indicates that it remains the intention of the Treasury to provide an exemption for some non-US plans, it is not clear which non-US retirement plans will be covered and which will not. For example, the original notice raised issues as to whether multiemployer and paritarian plans, plans sponsored by employee associations, and plans which may cover some US taxpayer participants would be exempted. Unless they have done so already, sponsors of non-US retirement plans may wish to consider making comments on the proposed exemption, in particular providing specific descriptions of which plans should be covered or not covered and why. In light of the new Notice, commenters may wish to address whether an exemption for a non-US plan should be a blanket exemption (because there is a "low risk of tax evasion") under section 1471(f) of FATCA, or a "deemed compliant" FFI under section 1471(b)(2), which may be subject to some procedural or filing requirements. We would be happy to assist in preparing such comments.

While the Notice does not indicate when the regulations will be issued, it is understood that the Treasury is trying to issue them as quickly as practical to provide non-US institutions time to prepare.

Excerpt from the Notice:

"As discussed in Notice 2010-60, Treasury and the IRS intend to issue guidance providing that certain foreign retirement plans pose a low risk of tax evasion under section 1471(f), and therefore payments beneficially owned by such retirement plans will be exempt from withholding under section 1471(a). Treasury and the IRS are still considering the many comments received regarding the types of foreign retirement plans that should be treated as posing a low risk of tax evasion under section 1471(f), and intend to provide further guidance on the types of foreign retirement plans that may qualify for such treatment. In addition, Treasury and the IRS intend to provide further guidance on foreign retirement plans or retirement accounts that may be deemed compliant under section 1471(b)(2)."

Norwegian Tax Administrator Issues Guidance on Taxation of Norwegian Pensions under the US-Norway Tax Treaty

The Skatteetaten, the Norwegian Tax Administrator, has issued a helpful explanation on the application of the US-Norway tax treaty to pensions paid from Norway. The general rule in the absence of a treaty would be that persons not tax resident in Norway must pay Norwegian tax on pensions paid from Norway; the tax is 15 per cent of the gross pension, and it is deducted by the party that pays the pension.

However, under the current US-Norway tax treaty dating to 1971 (and thus not based on the current model), persons who can document that they are resident in the US within the meaning of the tax treaty are entitled to tax exemption in Norway for annuities and for pensions that are remuneration for previous employment in private service provided that the pension is not paid by the Norwegian Labour and Welfare Administration (NAV) (social security-like and public pensions are commonly excepted from the general treaty rule of taxation of pensions in the state of residence and are instead taxed by the payor country regardless of residence).

The following pensions are still liable to tax in Norway:

- basic pensions from the National Insurance scheme.
- supplementary pensions paid by NAV.
- pensions earned through work in Norwegian public service when the pension is not paid by NAV.
- private pension schemes not related to employment, with the exception of individual pension savings (IPA, IPS and EPES) and other annuities.
- pensions related to previous business activities (but presumably not previous employment) when the pension is not paid by NAV.

The following pensions are only liable to tax in the US:

- pensions that are remuneration for previous employment in private service when the pension is not paid by NAV.
- individual pension savings such as IPA, IPS and EPES.

Only persons who can document that they are liable to tax in the US as residents pursuant to the tax treaty are granted tax exemption for annuities and pensions that are remuneration for previous employment in private service when the pension is not paid by NAV. The guidance also provides the procedures for claiming the tax exemption. A IRS Form 6166 "Certification of US Tax Residency" from the IRS must be submitted.

The new Skatteetaten guidance can be found here: http://www.skatteetaten.no/en/Artikler/2011/Withholding-tax-on-pensions--persons-resident-in-the-United-States/?printmode=true