Overview
On August 12, the Internal Revenue Service (IRS) released Revenue Procedure 2015-40, which provides guidance on the process of requesting and obtaining assistance from the US competent authority under US tax treaties. Revenue Procedure 2015-40 was issued concurrently with revised procedures (Revenue Procedure 2015-41) for seeking advance pricing agreements (APAs).

Revenue Procedure 2015-40 updates and supersedes Revenue Procedure 2006-54, which previously governed requests for competent authority assistance. In 2013, proposed revisions were released for public comment in Notice 2013-78. Revenue Procedure 2015-40 will generally be effective for competent authority requests filed on or after October 30, 2015. This alert describes and analyzes certain key aspects of Revenue Procedure 2015-40.

Content and Form of Requests
Revenue Procedure 2015-40 modifies the content and form of competent authority requests in several respects. Specific instructions for preparing and filing a competent authority request (which includes certain mandatory attachments) are described in an appendix. Because the new procedures apply to requests filed on or after October 30, 2015, taxpayers currently preparing requests should either file before October 30 or revise their submissions to reflect the new procedures.

Informal Consultations With Taxpayers
Revenue Procedure 2015-40 explicitly states that the US competent authority is available for informal consultations with taxpayers, including consultations in which the taxpayer chooses to be anonymous. Although informal consultations are not mentioned in Revenue Procedure 2006-54, such consultations often occur in practice and are helpful in determining whether and when a request for assistance should be filed and, in the case of foreign-initiated adjustments, gaining the US competent authority’s insight on exhausting effective and practical remedies for foreign tax credit purposes.

Pre-Filing Conferences
Notice 2013-78 proposed requiring taxpayers to attend a pre-filing conference with the competent authority (and file a pre-filing memorandum) in certain specified cases. Under the new procedures, a pre-filing conference and memorandum is mandatory only in the case of a taxpayer-initiated position (i.e., where a taxpayer has taken inconsistent positions with respect to its tax liability in the United States and a treaty country and such positions were not adopted in response to a proposed or actual adjustment made by the IRS or a foreign tax authority). In all other cases, the taxpayer may request a pre-filing conference on either a named or anonymous basis. If a conference is held, the competent authority may request certain pre-filing materials.
In practice, pre-filing conferences are often helpful in determining how the taxpayer’s request can best be tailored to permit the competent authority to act on the case efficiently and effectively. Revenue Procedure 2015-40 lists certain circumstances in which a pre-filing conference is generally recommended, such as in cases involving foreign-initiated adjustments exceeding $50 million for all years; a competent authority issue likely to involve other interrelated issues; an intangibles development arrangement; a business restructuring; branches, passthrough, or hybrid entities; discretionary limitation on benefits (LOB) requests; or issues that have arisen outside of the context of an examination.

**Interrelated Issues**

Revenue Procedure 2015-40 states that the US competent authority may request an expansion of the competent authority request to include certain “interrelated issues.” The revenue procedure lists several examples of interrelated issues, such as when a competent authority request concerns a company’s ongoing license of intangible property to a second company in the same controlled group, and the intangible property had been sold in an earlier year by the second company (the licensor) to the first company (the licensor). In such a case, the US competent authority may consider the assumptions underlying the valuation of the intangible property when it was sold in evaluating the ongoing license. The US competent authority may request information on the interrelated issue and may request that the taxpayer amend its request to cover the interrelated issue. If the taxpayer declines, the US competent authority will endeavor to reach a resolution of the issue that is the subject of the request, but will take into account the taxpayer’s position on the interrelated issues in determining the extent to which it will provide relief for the issue in the request. Notice 2013-78 had stated that the competent authority “may require” that the scope be expanded.

**Discretionary LOB Requests**

Prior to the release of Revenue Procedure 2015-40, there was relatively little written guidance on the standards applied by the US competent authority in deciding whether to grant discretionary treaty benefits where a treaty resident otherwise failed the treaty’s objective LOB tests. Some US tax treaties and/or Treasury technical explanations state that the competent authority shall take into account whether the establishment, acquisition, or maintenance of the treaty resident or the conduct of its operations has or had as one of its principal purposes the obtaining of benefits under the treaty. Other treaty guidance (e.g., a memorandum of understanding between the United States and Netherlands) provides additional factors.

The new revenue procedure provides greater insight into the factors considered by competent authority in deciding whether to grant discretionary relief. Specifically, the revenue procedure states that an applicant must demonstrate to the satisfaction of the US competent authority that it does not qualify under the treaty’s objective tests. It has a substantial non-tax nexus to the treaty country, and that, if benefits are granted, neither the applicant nor its direct or indirect owners will use the treaty in a manner inconsistent with its purposes. The revenue procedure also lists certain situations in which the US competent authority typically will not exercise its discretion to grant benefits, including where the applicant or its affiliates is subject to a “special tax regime” in its county of residence with respect to the class of income for which benefits are sought, no or minimal tax would be imposed on the item of income in both the country of residence and the country of source, or where the applicant bases its request solely on the fact that it is a direct or indirect subsidiary of a publicly traded company resident in a third country and the applicant is not obtaining a lower withholding tax rate than would be obtained by the parent or an intermediate owner. (The term “special tax regime” is not defined in the revenue procedure, but may be interpreted by the IRS consistent with the proposed “special tax regimes” definition in Treasury’s draft revisions to the US Model Treaty.)

Revenue Procedure 2015-40 also somewhat modifies the procedures for obtaining discretionary treaty benefits. Under Revenue Procedure 2006-54, a taxpayer was required to make the typical request for assistance and provide certain additional information described in exhibit 4.60.3-3 to section 4.60.3 of the Internal Revenue Manual. Revenue Procedure 2006-54 now specifically lists the additional information required in an appendix and, consistent with the factors relevant to the competent authority’s determination, includes an explanation of the non-tax business reasons why the applicant was formed or maintained in the treaty country and a detailed description of the facts that demonstrate a sufficient relationship or nexus to the treaty country. In addition, fees for discretionary LOB requests will increase from $27,500 to $32,500 for requests filed on or after October 30, 2015, and will further increase to $37,000 for requests filed on or after September 30, 2016.

The revenue procedure also imposes new obligations on the taxpayer after a favorable determination is obtained and may lead to questions about the continued applicability of a determination. A successful applicant must notify the competent authority within 90 days after becoming aware of any “material change” in fact or law with respect to such request. Examples of material changes in fact “may include changes in the ownership structure, assets, or activities of the applicant or relevant entities.” Examples of material changes in law “may include the enactment of a special tax regime that materially affects the applicant’s tax liability.” The revenue procedure states that a grant of discretionary LOB benefits terminates upon the occurrence of a material change in law or fact unless otherwise indicated, although the taxpayer may seek a supplemental determination that may be granted retroactively to the date of the material change. This new “material change” could lead to uncertainty for taxpayers given the relatively undefined standard and the fact that treaty benefits generally terminate upon the occurrence of a material change.
A successful applicant must also file a triennial statement to keep its determination in force. The statement must declare that there has been no material change with respect to relevant facts set forth in the request (or supplemental submissions or oral representations), there has been no material change in law relevant to the benefits being sought, and the applicant is not claiming any benefits different from those granted. The triennial statement requirement will be effective for discretionary LOB determinations issued on or after August 31, 2015.

Pension Plan Requests

Revenue Procedure 2015-40 recognizes that US tax treaties may provide that certain benefits with respect to pensions do not apply unless the foreign pension plan “generally corresponds” to a pension plan recognized for tax purposes in the United States. Where the competent authorities have not agreed on whether a specific plan meets this requirement, an employer, plan trustee, or individual plan trustee may request a competent authority determination. The appendix to Revenue Procedure 2015-40 lists specific additional information that must be provided for pension plan requests, including an explanation of why the plan “generally corresponds” to a plan recognized in the United States, translated copies of the plan documents, and translated copies of all applicable statutory provisions that govern the foreign pension plan.

Coordination of Competent Authority Process With Other US Proceedings

Revenue Procedure 2015-40 does not include certain rules proposed in Notice 2013-78 that could have created impediments to obtaining competent authority assistance where the taxpayer is also involved in IRS administrative proceedings. For example, under the rules in Notice 2013-78, the U.S. competent authority would have accepted a request with respect to a US-initiated adjustment that had been memorialized in an examination resolution only where it had agreed in writing to the terms of the resolution prior to its execution. This limitation has been removed. Under Revenue Procedure 2015-40, the US competent authority will not reject a taxpayer’s request solely because the taxpayer has signed a closing or similar agreement that covers competent authority assistance, but, as under Revenue Procedure 2006-54, the competent authority will endeavor only to obtain a correlative adjustment and will not undertake any actions that would change the determination of taxable income set forth in the agreement.

The procedures proposed in Notice 2013-78 would have conditioned the competent authority’s acceptance of a request for assistance in cases being handled in Fast Track Settlement Program on the US competent authority having had a reasonable opportunity to participate in all Fast Track meetings. Under the new revenue procedure, the competent authority will not deny the taxpayer’s request where the case has already been through Fast Track, but, if a resolution is reached in Fast Track, the competent authority may endeavor only to obtain a correlative adjustment. Where an issue is initially under the jurisdiction of IRS Appeals, however, the US competent authority will decline to provide assistance unless the taxpayer effectively severs the issue from its protest and timely files a US competent authority request. As in Revenue Procedure 2006-54, Revenue Procedure 2015-40 includes a simultaneous appeals procedure (SAP) through which IRS Appeals works jointly with the US competent authority and the taxpayer toward the development of a US competent authority position on an underlying US-initiated adjustment prior to the US competent authority’s consultations with the foreign competent authority.

Under Revenue Procedure 2015-40, the US competent authority will not accept or continue to consider a taxpayer’s request regarding any competent authority issue and taxable period (a) designated for litigation with respect to the same taxpayer or (b) pending in a US federal court where the issue and period were under IRS Appeals jurisdiction with respect to the same taxpayer before the commencement of the litigation. Such a restriction was not contained in Revenue Procedure 2006-54, which would have permitted consideration of a competent authority request in all matters pending before a US court or designated for litigation with the consent of the Associate Chief Counsel (International). For cases in litigation other than those described above, Revenue Procedure 2015-40 is generally consistent with Revenue Procedure 2006-54 (i.e., a request may be accepted with the consent of the Associate Chief Counsel (International)). However, if the court denies a motion to sever competent authority issues, delay trial, or stay proceedings, the US competent authority will terminate any ongoing consideration of the competent authority request.

If a US court makes a final determination with respect to an issue, the taxpayer may subsequently file a US competent authority request, but only for the purpose of seeking correlative relief from a foreign competent authority. A final determination includes one that reflects litigation settlements with the IRS Office of Chief Counsel or the Department of Justice.

Conclusion

Given tax authorities’ focus on cross-border tax issues, the competent authority process will continue to be important. Taxpayers facing the prospect of taxation inconsistent with a US tax treaty should consider whether they should seek competent authority relief and, if so, the best way to do it given the new rules of Revenue Procedure 2015-40. In addition, taxpayers not entitled to treaty benefits under objective LOB tests should consider whether their facts might support a discretionary ruling from the US competent authority under the factors listed in the revenue procedure.