



Tax Controversy and Dispute Resolution Quarterly

Summer 2022 Issue

- Why unilateral IRS rulemaking is obsolete
- Impact of foreign tax credit regs
- Advance pricing agreement trends
- Transfer pricing: operationalizing and controversy
- BEPS Pillars One and Two

Summer 2022

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IRS practice





No notice: Why unilateral IRS rulemaking is obsolete

By Gregory T. Armstrong, Alexandra DeSantis, Tom Greenaway, Aaron Vaughan, Michael P. Dolan and Sean Foley
Washington National Tax

The IRS and Treasury have long claimed that subregulatory published guidance is exempt from notice and comment requirements established by the Administrative Procedure Act. Two recent cases, *Mann Construction* in the Sixth Circuit and *CIC Services* on remand from the Supreme Court, however, rejected this claim in the context of two IRS notices, paving the way for taxpayers to wage similar successful attacks. An **article** in the May 2 edition of *Tax Notes Federal* focuses on IRS rules carrying the force of law that were issued without any notice and comment procedures. It also reviews court opinions addressing those rules and the Administrative Procedure Act and explains how taxpayers may use the opinions in future disputes.



No credit where credit is due: Exploring the practical impact of the foreign tax credit regulations

An **April 6 episode** of the *Inside International Tax* podcast features Gary Scanlon, Seth Green and Danielle Rolfes exploring the foreign taxes that are most “at risk” under the regulations and highlighting the relevant considerations for taxpayers as they assess the credibility of each foreign tax paid or accrued.

- Also see an April 19 webcast: [New U.S. Foreign Tax Credit Rules: Navigating the Impact on Brazilian Businesses](#)



Proposed changes to qualified intermediary (QI) agreement

The IRS on May 3, 2022, released an advance version of Notice 2022-23 setting forth the proposed changes to the qualified intermediary (QI) agreement described in Reg. section 1.1441-1(e)(5) and (6). The proposed changes will permit a QI to act in that capacity when receiving certain amounts from a publicly traded partnership (PTP) that are subject to withholding under sections 1446(a) and (f). A May 2022 **KPMG report** provides analysis and observations of the proposed changes to the QI agreement.

Other IRS practice news in *TaxNewsFlash*

- IRS releases tax collection data for fiscal year 2021
- GLAM: Allocation and apportionment of deferred compensation expense for purposes of calculating FDII—departure from prior IRS legal adviceTax
- IRS practice unit: Penalties for erroneous claims for refund or credit
- IRS releases PLR, granting consent to taxpayer’s request regarding cost-sharing arrangement and intangible development costs



Tax enforcement trends





The Whirlpool case and subpart F

By Mark Martin and Thomas Bettge

Washington National Tax

An **article** in the April edition of *International Tax Review* describes the *Whirlpool* case, a decision by the Sixth Circuit Court of Appeals that upends a settled understanding of how subpart F applies, and its implications for planning and controversy.



Planet of the APA: Liberty Global and the future of reg invalidity

In a **May 11 episode** of the KPMG LLP *Inside International Tax* podcast, Washington National Tax professionals discuss the impact of the latest case in a recent trend of courts rejecting the concept of tax exceptionalism, *Liberty Global*, the Administrative Procedure Act, and challenges to the validity of Treasury regulations.



US: 2021 statistics show an uptick in demand for APAs

By Mark Martin and Thomas Bettge

Washington National Tax

A **column** in the May issue of the *International Tax Review* discusses the Internal Revenue Service's advance pricing agreement (APA) statistics for 2021, and the state of the IRS APA program.

Also see:

- KPMG report: Comments submitted to IRS regarding plans to update MAP and APA guidelines
- *TaxNewsFlash*, APMA program, APA statistics for 2021 (IRS Announcement 2022-7)



Federal district court vacates Notice 2016-66 on microcaptive insurance transactions

This March 23 **KPMG report** provides an overview and analysis of *CIC Services*, in which a district court ruled that Notice 2016-66 was invalid because the IRS did not comply with the notice-and-comment requirements.



Other tax enforcement trends developments

- U.S. Supreme Court grants certiorari, whether penalty for FBAR violation applies on per-account or per-form basis
- U.S. Supreme Court: Certiorari denied in states' challenge to 2017 tax law limiting SALT deduction
- Fourth Circuit: IRS summons to taxpayer not quashed despite criminal referral of taxpayer's agent
- Fifth Circuit: Butane not eligible for tax credit; tax on exports of domestic crude oil held unconstitutional
- Sixth Circuit: IRS failed to comply with notice-and-comment process in issuing Notice 2007-83 regarding "listed transactions"
- Sixth Circuit: Rehearing en banc denied in subpart F income case
- Ninth Circuit: Tax return considered filed when sent in response to IRS inquiry; Tax Court reversed
- Eighth Circuit: Expert witness testimony excluded and deductions for management fees denied; Tax Court affirmed
- Ninth Circuit: Mandatory repatriation tax under section 965 is constitutional
- Ninth Circuit: Tax return considered filed when sent in response to IRS inquiry; Tax Court reversed
- Ninth Circuit: Prior supervisory approval for penalty assessment for listed transaction; Tax Court reversed
- Tenth Circuit: Taxpayer did not qualify as small insurance company; Tax Court decision affirmed
- U.S. Tax Court: Initial determination of penalties, after IRS supervisory approval was obtained
- U.S. Tax Court: At-home private nurses were employees for federal employment tax purposes
- U.S. Tax Court: Fees for use of securities exchanges not deductible under section 199



Global tax disputes





Chief Tax Officer Insights: Key trends in global tax disputes

Corporations are facing greater quantities of tax controversies as recent trends increase the complexity of determining corporate tax liabilities and greater aggression on the part of revenue authorities. The challenging audit environment is taking a toll on tax functions, raising the burden of compliance. The **July 2022 issue** of *CTO Insights* examines the drivers of increased audit activity and approaches to managing and resolving disputes.



Why operationalizing transfer pricing is more important than ever

By Vesela Grozeva, Economic Valuation Services; Chris Schulman, National Operational Transfer Pricing Technology Leader; Jessie Coleman, Washington National Tax; and Pravin Ugalat, National Operational Transfer Pricing Leader

Over the past several years, U.S. and global tax rules have undergone fundamental changes that affect how multinational enterprises think about transfer pricing. How should their transfer pricing processes evolve considering the tax, regulatory and economic disruptions? An **article** in the April 18 issue of *Tax Notes* examines how companies can better use transfer pricing processes and technology to prepare for regulatory and reporting changes.



Transfer pricing controversy— The tax director's view

In this one-hour **June 14 webinar**, executives from Johnson & Johnson, Netflix, and 3M Company talk with Sean Foley, Global Transfer Pricing Dispute Resolutions Services leader, about the increasing number of tax controversies multinationals are facing around the world and how tax departments are addressing these challenges.



How transfer pricing practitioners can respond to ESG-related changes

By Jessie Coleman and Jack O'Meara
Washington National Tax

While the breadth and depth of how and if companies embrace environmental, social, and governance (ESG) policies vary significantly by industry and company, many companies are moving toward more sustainable business practices. Given this change, companies need to reevaluate the value drivers of their business to determine if they need to modify their transfer pricing policies, according to an [article](#) in the May 26 edition of Bloomberg Tax, "A Closer Look."



Brazilian transfer pricing: Here today, gone tomorrow?

By Roberto Salles, KPMG Brazil, and Kimberly Tan Majure
Washington National Tax

An [article](#) in the June 3 edition of Bloomberg's *Tax Management International Journal* provides an overview of the new Brazilian transfer pricing system envisioned by the OECD and the Brazilian Federal Tax Authorities, which represents a complete departure from Brazil's old system. The newly announced transfer pricing regulations would be an improvement for U.S.-based multinationals — particularly those seeking foreign tax credits under the new regulations — but there is still uncertainty whether holistic consistency between the Brazilian and U.S. income tax systems (and correlative creditability) can be achieved.

- See also: KPMG June 2 podcast: *Destination Country X— Brazilian Transfer Pricing Developments: One Giant Step?* on expectations for a new transfer pricing system for Brazil.



What's the deal with local files and local documentation?

When it comes to transfer pricing compliance, each jurisdiction sets its own rules for transfer pricing documentation. Fortunately, the OECD/G20 outlined specific guidance for what ought to be included in a "Local File" to promote global consistency. The [May 13 episode](#) of the KPMG podcast *Exploring Transfer Pricing*, lays out some of the differences between OECD Local Files and other types of Local Documentation, and discusses some of the approaches and challenges to preparing these reports.



CIT issues decision in Section 301 cases

By Luis Abad and Donald Hok

Washington National Tax

In a highly anticipated decision involving more than 3,600 lawsuits, the U.S. Court of International Trade held that over \$200 billion in tariffs on Chinese-origin imports were valid. Assuming procedural deficiencies are remedied, this means that duties paid will likely not be refunded to importers, according to this April 6 KPMG [article](#).



Inversion 2.0: The proposal to expand the scope of section 7874

By Wade Sutton, PwC; Gary Scanlon and Stephen Massed, KPMG

Washington National Tax

In this April 4 [report](#), the authors examine the changes to section 7874 proposed by the Senate Finance Committee in connection with the Build Back Better Act from an historical perspective, and they explain how the proposal could be fine-tuned to address the government's underlying policy objectives without producing unintended, counterproductive results.

Other global tax disputes news

- KPMG report: Transfer pricing and the audit committee agenda, implementation steps
- IRS practice unit: Country-by-country (CbC) report in the transfer pricing risk analysis process





OECD and BEPS





The diverging paths of Pillars One and Two

By Matthew Herrington, KPMG LLP (U.K.); Marcus Heyland, Quyen Huynh and Alistair Pepper, Washington National Tax; and Vinod Kallou, KPMG in the Netherlands, and Middle East & Africa tax policy leader; and Grant Wardell-Johnson, KPMG Global Tax Policy leader

An **article** in the July 4 issues *Tax Notes International*, *Tax Notes Federal*, and *Tax Notes State*, examines the status of the OECD’s two-pillar approach to modernizing the international tax system and considers the international implications of the different paths countries are taking to implement pillars 1 and 2.



Amount B: The forgotten piece of the Pillar 1 jigsaw

By Alistair Pepper, Thomas D. Bettge, and Jessie Coleman
Washington National Tax

An **article** that ran in the July 11 editions of *Tax Notes Federal*, *Tax Notes State*, and *Tax Notes International* examines a significant but frequently overlooked piece of the OECD’s pillar 1 proposal: amount B. The article explains how Amount B could work, discusses implementation challenges, and considers how businesses can prepare.



Open items in the OECD tax certainty consultations

By Mark Martin and Thomas Bettge
Washington National Tax

An **article** in the June 2022 issue of the *International Tax Review* explains the recent OECD public consultation documents on tax certainty for Amount A of pillar one and related issues, as well as key areas that remain undecided.



A tough pill(ar) to swallow: Computing GloBE effective tax rate for U.S. multinationals

The European Union may have failed yet again to secure an agreement among its members on Pillar Two. But many U.S. trading partners remain interested in legislating on the global anti-base erosion (GloBE) rules. The **June 22 episode** of the KPMG *Inside International Tax* podcast addresses the current status of Pillar Two implementation and the future challenges it may present for U.S. multinationals.



Tax challenges of digitalization: public consultation meeting on the implementation framework of the global minimum tax

The OECD held a public consultation on the framework for base erosion and profit shifting, addressing input on implementation of a global minimum tax and related matters, like the GloBe rules and the effect on multinational companies. See the presentations and watch a replay of this April 25 OECD **event** that included Marcus Heyland from KPMG LLP Washington National Tax discussing the global minimum tax and mechanisms for implementing and applying the rules in a consistent and coordinated manner.

Other BEPS news

- KPMG report: Comments on tax certainty aspects of Amount A under Pillar One (June 10)
- KPMG report: Comments on extractives exclusion under Amount A of Pillar One (May 3)
- KPMG report: Comments on draft rules for domestic legislation on scope under Amount A of Pillar One (April 20)
- KPMG report: Country-by-country reporting notifications, requirements per country (Netherlands)
- KPMG report: Update on tax control framework requirements (Switzerland)



The next chapter for BEPS Pillar Two and the possible implications for multinationals

An April 6 **webcast** features Manal Corwin, Americas Tax Policy leader and principal in charge of Washington National Tax, KPMG in the US, and others discussing what base erosion and profit shifting developments mean for multinational organizations and exploring key considerations and actions for tax leaders.





State and local tax



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KPMG LLP Tax Controversy & Dispute Resolution Services

The KPMG Tax Controversy & Dispute Resolution Services group in the Washington National Tax practice is a large, highly visible team in which those who work in the controversy space operate as one, with a common vision, common strategy, common goals and common rewards.

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