Treasury, IRS Deem Proposed Regulations Under Sec. 2704 Put Undue Burden on Taxpayers

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The U.S. Department of the Treasury and the IRS, in **Notice 2017-38**, have identified the proposed regulations (the ?Proposed Regulations?) under § 2704 of the Internal Revenue Code as potentially imposing an undue burden on U.S. taxpayers or adding undue complexity to the U.S. Federal tax laws. Consequently, Treasury intends to issue proposed reforms to the Proposed Regulations in a report to President Trump that is due September 18, 2017. These proposed reforms may range from streamlining problematic rule provisions to complete repeal. By IRS Notice 2017-38, Treasury and the IRS seek comments from the public on whether the Proposed Regulations should be rescinded or modified and, in the latter case, how such regulations should be modified to reduce or minimize burdens and complexity.

Executive Order 13789

Earlier this year, President Trump issued Executive Order 13789, instructing the Secretary of the Treasury to (1) review all ?significant tax regulations? issued on or after January 1, 2016, and (2) submit two reports to the President.[1] The first report is a 60-day interim report whereby the Secretary of the Treasury must identify tax regulations that (i) impose an undue financial burden on U.S. taxpayers; (ii) add undue complexity to the Federal tax laws; or (iii) exceed the statutory authority of the IRS[2] The second report must recommend ?specific actions to mitigate the burden imposed by regulations identified in the interim report.?[3]

Treasury?s Review of Significant Tax Regulations

Treasury has completed its review of all tax regulations issued from January 1, 2016 to April 21, 2017, and has identified eight regulations that either impose an undue financial burden on U.S. taxpayers or add undue complexity to the Federal tax laws. Among these are the Proposed Regulations.

Section 2704 of the Code provides that certain restrictions on the ability to dispose of or liquidate family-controlled entities should be disregarded in determining the fair market value of an interest in that entity for estate and gift tax purposes. The Proposed Regulations would create an additional category of restrictions that would be disregarded in reaching the fair market value of an interest in a family-controlled entity and would eliminate or restrict common discounts, such as those for lack of control or lack of marketability. Together, an additional category of restrictions and eliminating or restricting common discounts would result in increased valuations of family-owned entities and increased transfer tax liability. Increased valuations and transfer tax liability would place further financial burdens on U.S. taxpayers. In addition to this increased financial burden, the IRS noted that many commenters have expressed concern that the narrowing of existing regulatory exceptions under the Proposed Regulations is arbitrary and capricious, and therefore, exceeds the IRS?s statutory authority.

Request for Comments and the Final Report to the President

Treasury has concluded that the Proposed Regulations, in their current form, either (1) impose an undue financial burden on U.S. taxpayers, or (2) add undue complexity to the Federal tax laws. Because of this, Treasury must propose reforms to the Proposed Regulations aimed at mitigating the burdens wrought by such regulations. These proposed reforms may range from addressing and simplifying problematic provisions to a complete withdrawal of the Proposed Regulations. Treasury?s deadline to submit its proposed reforms to the President is September 18, 2017.

To comply with this obligation, the IRS is requesting comments from the public on whether the Proposed Regulations should be withdrawn or modified. Any such comments advocating for modification should include how the Proposed Regulations should be modified to reduce the burden or complexity. All comments are due by August 7, 2017. For details on submitting comments, please see IRS Notice 2017-38.

Impact on the Proposed Regulations

The Proposed Regulations have been in a holding pattern since President Trump took office, with many practitioners speculating that such regulations would eventually be withdrawn completely. Now that Treasury itself has concluded that the Proposed Regulations unduly burden U.S. taxpayers or add undue complexity to the U.S. Federal tax laws, IRS Notice 2017-38 appears to be one more nail in the Proposed Regulations? coffin.

[1] See Executive Order 13789 (April 21, 2017).

[2] Id. § 2(a).

[3] Id. § 2(b).

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