

Stradley Ronon Stevens & Young, LLP
2005 Market Street
Suite 2600
Philadelphia, PA 19103-7018
215.564.8000 Telephone
215.564.8120 Facsimile
www.stradley.com

With other offices in:
Washington, D.C.
New York
New Jersey
Illinois
Delaware



www.meritas.org

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IRS Issues Temporary and Proposed Regulations on Electing New Partnership Uniform Audit Rules

The IRS issued temporary regulations (see <https://www.gpo.gov/fdsys/pkg/FR-2016-08-05/pdf/2016-18638.pdf>) on the time, form and manner for making an election to have the new partnership audit regime (see prior coverage at <http://www.stradley.com/insights/publications/2015/tax-insights-web-versions/tax-insights-november-4-2015> and at <http://www.stradley.com/insights/publications/2016/tax-insights-2016/tax-insights-march-16-2016>) that was enacted as part of the Bipartisan Budget Act of 2015 (the BBA, P.L. 114-74) apply to returns filed for tax years beginning before Jan. 1, 2018. The new audit regime generally is effective for tax years beginning after 2017, but at the partnership's election, most of it can apply to tax years beginning after Nov. 2. The text of the temporary regulations also serves as the text of accompanying proposed regulations (see <https://www.gpo.gov/fdsys/pkg/FR-2016-08-05/pdf/2016-18632.pdf>).

The temporary regulations provide that, except for the Section 6221(b) small partnership exception (section references are to the Internal Revenue Code of 1986, as amended), a partnership may elect to have the new partnership audit regime apply to any "eligible tax year." An eligible tax year generally is any partnership tax year beginning after Nov. 2 and before Jan. 1, 2018. The election must be in the time, form and manner prescribed; an election not made in accordance with the temporary regulations is invalid. Once made, the election cannot be revoked without the IRS' consent.

An election must be in writing and include a statement that the partnership is electing to have the new BBA partnership audit regime apply to the partnership return identified in the IRS notice of selection for examination, described below. The partnership must write "Election Under Section 1101(g)(4)" at the top of the statement. The statement must be provided to the individual identified in the notice of selection for examination as the IRS contact for the examination.

The statement must be dated and signed by the tax matters partner or an individual who has the authority to sign the partnership return for the tax year under examination. The statement must include the name, taxpayer identification number (TIN), address and telephone number of the individual who signs the statement, as well as the partnership's name, TIN and tax year to which the statement applies. The statement must include representations that the partnership is not insolvent and does not reasonably anticipate becoming insolvent; the partnership is not currently and does not reasonably anticipate becoming subject to a bankruptcy petition under title 11; and the partnership has sufficient assets, and reasonably anticipates having sufficient assets, to pay the potential imputed underpayment that may be determined during the partnership examination. The statement also must include a representation, signed under penalties of perjury, that the individual signing the statement is duly authorized to make the election under Treasury Regulation Section 301.9100-22T(b) to elect the new partnership regime and that, to the best of the

individual's knowledge and belief, the statement is true, correct and complete.

A partnership electing into the new partnership audit regime also must designate the partnership representative (as defined in Section 6223) and provide the partnership representative's name, TIN, address, daytime telephone number and any other information as required in future guidance. The IRS expects to issue additional guidance regarding designation of a partnership representative, including who is eligible to be a partnership representative.

Subject to an exception, an election to have the new partnership audit regime apply must be made when the IRS first notifies the partnership in writing that a partnership return for an eligible tax year has been selected for examination (a "notice of selection for examination"). A partnership that wishes to make an election must do so within 30 days of the date of the notice of selection for examination. The notice of selection for examination is a notice that precedes the notice of an administrative proceeding required under Section 6231(a).

Under an exception, a partnership that has not received a notice of selection for examination may make an election to have the new partnership audit regime apply to a partnership return for an eligible tax year if the partnership wishes to file an administrative adjustment request under Section 6227. Once an election is made under Treasury Regulation Section 301.9100-22T(c), generally all aspects of the new partnership audit regime apply to the return filed for the eligible tax year subject to the election.

Partnerships may not request an extension of time under Treasury Regulation Section 301.9100-3 to make the election to apply the new partnership rules.

Deadline Set for Jurisdictions to Bring FATCA Agreements Into Force

The IRS issued Announcement 2016-27, 2016-33 IRB (see <https://www.irs.gov/pub/irs-drop/a-16-27.pdf>) stating that on Jan. 1, 2017, Treasury will begin updating the list of countries with Model 1 and Model 2 intergovernmental agreements (IGAs) to provide that certain jurisdictions that have not brought their IGA into force will no longer be treated as if they have an IGA in effect. Jurisdictions that wish to continue to be treated as having an IGA in effect must provide to Treasury an explanation of why the IGA has not been brought into force and a plan for doing so, by Dec. 31.



Christopher C. Scarpa



Kristin M. McKenna

If you have any questions about the Acts, please contact Christopher C. Scarpa at 215.564.8106 or cscarpa@stradley.com or Kristin M. McKenna at 215.564.8145 or kmckenna@stradley.com.

New Procedures to Obtain or Renew Individual Taxpayer Identification Numbers

In Notice 2016-48, 2016-33 IRB (see <https://www.irs.gov/pub/irs-drop/n-16-48.pdf>) and a news release (IR 2016-100) (see <https://www.irs.gov/uac/irs-works-to-help-taxpayers-affected-by-itin-changes-renewals-begin-in-october>), the IRS has explained how it will implement the changes made by 2015 legislation to the individual taxpayer identification number (ITIN) program and the potential consequences to taxpayers who do not renew an ITIN when required. An ITIN is a number issued to individuals who are not eligible to be issued a Social Security number but who still have a federal tax filing obligation.

UAE-U.S. FATCA IGA Competent Authority Arrangement Available

The United Arab Emirates and U.S. competent authorities have signed an arrangement (see https://www.irs.gov/pub/irs-utl/unitedarabemirates_competent_authority_arrangement.pdf) under the two nations' 2015 intergovernmental agreement to implement the information reporting and withholding tax provisions of FATCA.

Turks and Caicos Islands-U.S. FATCA IGA Arrangement Available

The Turks and Caicos Islands and U.S. competent authorities have signed an arrangement (see https://www.irs.gov/pub/irs-utl/turksandcaicosislands_competent_authority_arrangement.pdf) under the two jurisdictions' 2014 intergovernmental agreement to implement the information reporting and withholding tax provisions of FATCA.

Tax Court Finds Transferee Liability Applied in Midco Transaction

The Tax Court held in *Weintraut, Transferee, et al.*, TC Memo 2016-142 (see <http://ustaxcourt.gov/UstcInOp/OpinionViewer.aspx?ID=10831>) that shareholders who engaged in a multistep “Midco” tax shelter transaction were liable under Section 6901 for the unpaid corporate income taxes of the entity sold. The shareholders were liable as transferees under Section 6901 under the substance over form doctrine, the economic substance doctrine and the sham transaction doctrine.

Pennsylvania Issues New Common Level Ratios for Realty Transfer Tax

The Pennsylvania Department of Revenue issued new common level ratio (see http://www.revenue.pa.gov/FormsandPublications/FormsforIndividuals/Documents/RealtyTransferTax/clr_factor_historical.pdf) real estate valuation factors for purposes of calculating realty transfer tax. The ratios generally apply to documents accepted for filing from July 1 through June 30, 2017. (Notice: Realty Transfer Tax; 2014 Common Level Ratio; Real Estate Valuation Factors, Pa. Bull. Doc. No. 16-1327, Pa. Bull., Vol. 46, No. 31, 07/30/2016.)

South Carolina Issues Guidance on Income Tax Nexus-Creating Activities

The South Carolina Department of Revenue (DOR) issued Revenue Ruling No. 16-11 (see <https://dor.sc.gov/resources-site/lawandpolicy/Advisory%20Opinions/rr16-11.pdf>) providing guidance concerning nexus-creating activities for income tax purposes. The revenue ruling supersedes Revenue Ruling 03-04, and clarifies the minimum connection or contact between a taxpayer and South Carolina sufficient to subject the taxpayer to the taxing jurisdiction of the state. Revenue Ruling No. 16-11 discusses the following categories of activities: (1) general activities; (2) registration with state agencies and departments; (3) ownership/leasing of property in-state; (4) ownership interest of in-state pass-through entities; (5) licensing intangibles; (6) sales-related employee activities; (7) non-sales-related employee activities; (8) activities of unrelated parties; (9) distribution and delivery; (10) financial activities and transactions; (11) transactions with South Carolina printers; and (12) computer- and internet-based transactions. In all the categories, the revenue ruling presumes that the activity is not de minimis. The DOR notes that a combination of several different de minimis activities or relationships may create nexus with South Carolina, even if each, by itself, does not create nexus.

Stradley Ronon’s Tax Practice Group

Todd C. Vanett, Chair.....	215.564.8070	tvanett@stradley.com
Zachary P. Alexander	215.564.8043	zalexander@stradley.com
Jacquelyn Gordon	215.564.8176	jgordon@stradley.com
Kristin M. McKenna	215.564.8145	kmckenna@stradley.com
William S. Pilling III.....	215.564.8079	wpilling@stradley.com
William R. Sasso.....	215.564.8045	wsasso@stradley.com
Christopher C. Scarpa	215.564.8106	cscarpa@stradley.com
Roger Wise.....	202.419.8436	rwise@stradley.com