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Circuit Court Issues Decision on Variable Prepaid Forward Contracts

The Court of Appeals for the Second Circuit in *Estate of Andrew J. McKelvey v. Comm.*, (CA 2 September 26, 2018) 122 AFTR 2d ¶2018-5277 (https://www.stradley.com/~/_media/Files/Publications/2018/10/172554_complete_opn%20pdf.pdf) has reversed a decision of the Tax Court, which had held that the extension of the settlement dates of two variable prepaid forward contracts (VPFCs) did not result in either a taxable exchange or a constructive sale. The Second Circuit found that the extension constituted an effective replacement of the original VPFCs with new contracts, and remanded the case for the Tax Court to determine whether the termination of obligations under the original contracts resulted in short-term capital gain. The Second Circuit also found that the amount of shares to be delivered at settlement was “substantially fixed” such that a constructive sale occurred, and instructed the Tax Court to compute the amount of long-term capital gain that resulted from it.

IRS to Extend Basis Election Due Date in Proposed Transition Tax Regulations

The IRS issued Notice 2018-78 (<https://www.irs.gov/pub/irs-drop/n-18-78.pdf>) in which it announced that the due date will be extended for the basis election that would otherwise be required to be made before the final Section 965 transition tax regulations are published, that elections made in the interim will be revocable, and that the rules for determining the aggregate foreign cash position will be revised. (Section references are to the Internal Revenue Code of 1986, as amended (the “Code”).)

Section 965 levies a transition tax on post-1986 untaxed foreign earnings of specified foreign corporations owned by U.S. shareholders by deeming those earnings to be repatriated. Some U.S. shareholders can elect to make basis adjustments regarding each deferred foreign income corporation and each earnings and profit deficit foreign corporation. The Section 965 proposed regulations provide that in some cases, the basis election must be made by Oct. 9.

Notice 2018-78 provides that when the proposed regulations become final, the transition rule will apply to returns due before the date that is 90 days after the date that the final regulations are published, and that the basis election must be made no later than 90 days after the publication of the final regulations. Treasury and the IRS determined that it would be too onerous for taxpayers if they were required to make a binding basis election before the proposed regulations are finalized. The final regulations will provide that if a basis election was made on or before the date the final regulations are published, the basis election may be revoked no later than 90 days after the publication of the final regulations. Relevant tax returns must be filed consistently with an election that has been made and not revoked, the notice states.

IRS Rules Electronic Auction System Is Qualified Matching Service

The IRS issued Private Letter Ruling 201840006 (<https://www.irs.gov/pub/irs-wd/201840006.pdf>), in which it determined that a platform operated by a corporation, which will match potential buyers and sellers of partnership interests through non-public online listings at non-firm prices, will be a qualified matching service and will not be an “established securities market” under Treasury Regulation Section 1.7704-1(b). The fact

that a partnership's interests are listed for purchase or sale on the platform will not cause the partnership to be treated as "publicly traded" under Section 7704.

IRS Issues Information Letter on State Tax Credit Programs

The IRS issued Information Letter 2018-0030 (<https://www.irs.gov/pub/irs-wd/18-0030.pdf>), which provides that a state tax credit program to which business taxpayers can make payments in exchange for credits against various business taxes is not impacted by the recent proposed regulations relating to state and local tax limitation workarounds (see our prior coverage here (<https://www.stradley.com/insights/publications/2018/08/tax-insights-august-29-2018>) and here (<https://www.stradley.com/insights/publications/2018/09/tax-insights-september-12-2018>)). The letter describes the proposed regulations as addressing only the deductibility of certain amounts as charitable contributions under Section 170 (or Section 642, if made by a trust or decedent's estate). The letter clarifies that a business taxpayer's payments under the state's tax credit program that are deductible under any other Code section would not be impacted by the proposed regulations.

Philadelphia Bill Amends Business Privilege Tax

Philadelphia Bill No. 180077-A (<https://phila.legistar.com/LegislationDetail.aspx?ID=3683244&GUID=1BD1B23C-4EA6-4E65-A454-6C1A87A4E38B>) amends Philadelphia City Code Section 19-2610 to provide that no estimated tax payments will be required in the first year that a business is required to file a Philadelphia business privilege tax return. The business is allowed the option of making estimated tax payments in four installments in the second year it is required to file a business privilege tax return, with the schedule and manner of payment determined by regulation.

NYSBA Tax Section Submits Report on Proposed Transition Tax Regulations

The New York State Bar Association Tax Section has submitted a report (http://www.nysba.org/Sections/Tax/Tax_Section_Reports/Tax_Reports_2018/Tax_Report_1401.html) on proposed transition tax regulations under Section

965, addressing the double counting rule, refunds for taxpayers making the Section 965(h) election, clarification of the domestic passthrough entity, and many other aspects of the regulations.

AICPA Submits Suggestions on Partnership Audit Regulations

The American Institute of CPAs has commented on proposed regulations (<https://www.stradley.com/~media/Files/ns/2018/10/201840146TNTIRSdocsaicpacommentscentralizedpartnershipauditregim%20pdf.pdf>) on the centralized partnership audit regime, providing suggestions on several issues, including the allocation of distributive shares in some cases, the rule on subgrouping of reallocation and recharacterization adjustments, and the requirements for requests for changes under Section 6225.



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