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IRS Updates FAQs to Provide FATCA Guidance on Forms W-8

The IRS updated the “General Compliance” section of its list of general FAQs under the Foreign Account Tax Compliance Act (FATCA) to provide information on the taxpayer identification number (TIN) requirements for a beneficial owner withholding certificate. (See General Compliance FAQs Nos. 20 through 22. (<https://www.irs.gov/businesses/corporations/frequently-asked-questions-faqs-fatca-compliance-legal>)) One FAQ states that a beneficial owner withholding certificate will not be considered invalid for calendar year 2017 if it does not include a foreign TIN absent “actual knowledge” that the beneficial owner has a TIN and did not provide it. The FAQ also states that an individual must give his or her date of birth, but the absence of it on the withholding certificate will not invalidate the form if the withholding agent otherwise has the date of birth in its files. Although the relief is welcome news, on Jan. 1, 2018, all beneficial owner withholding certificates from beneficial owners will change to invalid status, resulting in withholding (or increased withholding) unless the financial institution has a foreign TIN (and date of birth for individuals) or an explanation for why there is no foreign TIN. Remediating the certificates prior to 2018 will take significant effort.

IRS Again Rules on Consequences of Settlement Involving REMICs

The IRS has issued an additional private letter ruling – private letter ruling 201714017 (<https://www.irs.gov/pub/irs-wd/201714017.pdf>) – relating to the tax consequences of a REMIC’s receipt of settlement proceeds. (See our additional coverage here (<http://www.stradley.com/insights/publications/2017/04/tax-insights-april-12-2017>)).) For each REMIC that made a timely, valid and continuing REMIC election pursuant to the applicable governing agreement, and that sued certain mortgage sellers for breaching the representations and warranties in the sales agreements, none of their execution of the settlement agreement, right to receive or receipt of settlement payments caused each taxpayer to fail to meet the requirements of Section 860D(a)(4), relating to the definition of a REMIC, since the settlement payments arose from each of their interests in mortgage loans and status as a REMIC. (Section references are to the Internal Revenue Code of 1986, as amended.)

IRS Disagrees That Store Does Not Need to Be Open for Business for Building to Be Placed in Service

The IRS has announced its nonacquiescence with the decision of a district court (<https://www.irs.gov/pub/irs-irbs/irb17-15.pdf>) (Stine, LLC v. United States (<https://casetext.com/case/stine-llc-v-united-states-ex-rel-internal-revenue-serv>)) that Treasury Regulation Section 1.167(a)-11(e)(1)(i), which defines when property is “first placed in service,” does not require, in the case of a building housing a retail store, that the store be open for business in order for the building to be considered placed in service. (See also AOD 2017-02 (<https://www.irs.gov/pub/irs-aod/aod-2017-02.pdf>)).)

Pennsylvania Issues Revised Guidance on Software Service

The Pennsylvania Department of Revenue (DOR) has issued a revised Sales and Use Tax Ruling No. SUT-17-001 (<http://www.revenue.pa.gov/GeneralTaxInformation/TaxLawPoliciesBulletinsNotices/Documents/Letter%20Rulings/SUT/sut-17-001.pdf>) explaining to what extent support services for canned computer software or digital property are subject to sales and use tax. Sales and use tax applies to the “transfer, for a consideration, of the ownership, custody or possession of tangible personal property” and “rendition for a consideration of the service of ... altering ... tangible personal property.” Act 84 of 2016 includes “maintenance, updates and support” of electronic or digital tangible personal property in the definition of “tangible personal property” for sales and use tax purposes. The DOR considers support to be providing advice or guidance regarding taxable digital or electronic tangible personal property, including identifying the source of a problem or attempting to restore the property to a usable state. Call center and help desk support are included, as well as support delivered verbally, online or through automated means that reside on an owner’s device or human means. Support can be delivered by the vendor or a third-party provider. The method of billing does not affect taxability. Examples of “support” include a vendor providing support through a remote desktop where the software is altered or accessed directly; a vendor providing telephone support to troubleshoot the issue with the owner and subsequently providing a patch to fix the issue; the customer sending the software to the vendor and the vendor changing the software and returning a usable version to the customer; and a vendor providing a call-in help desk which provides guidance on the use, correction or manipulation of the software. Support does not include consulting (unless the activities described



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as consulting fall within the definition of support) or training. The medium of transfer of the software does not affect taxability. The ruling replaces a previous version of SUT-17-001, which was retracted following complaints that its interpretation of Act 84 of 2016 was an over-reach and went beyond the intent of the act. Taxpayers that are charged sales tax should consider whether the revised ruling offers refund opportunities.

IRS Issues Revised Publication on Employment Tax Audits Explaining Audit Triggers

The IRS has updated Publication 5146, Employment Tax Returns: Examinations and Appeal Rights (<https://www.irs.gov/pub/irs-pdf/p5146.pdf>), which explains, among other things, employment tax audit triggers and where IRS looks for information once an audit begins. It also covers the various relief measures that may be available to taxpayers with employment tax issues.

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