

Table of Contents

About the Authors	v
Table of Chapters	vii
Preface and Acknowledgments	xix

PART I: International Tax Audits and Appeals

Chapter 1 Early Preparation and Documentation for Audit and Controversy

§ 1:1	Introduction	1-1
§ 1:2	Sensitizing the Business	1-2
§ 1:3	Documenting a Cogent Business Purpose Narrative.....	1-4
§ 1:4	Developing Documentation Supporting the Tax Treatment of the Transaction.....	1-7
§ 1:5	Transactions Likely to Be Scrutinized	1-9
§ 1:6	Case Studies	1-11
§ 1:6.1	International Hybrid Instrument Transactions	1-11
§ 1:6.2	Transfer Pricing Issues	1-14

Chapter 2 Pre-Audit Planning, Including Document Retention and Spoliation

§ 2:1	Introduction	2-2
§ 2:2	The Duty to Retain Documents	2-2
§ 2:3	Establishing an Effective Document Retention Policy.....	2-5
§ 2:3.1	Which Documents Should Be Retained	2-6
§ 2:3.2	Document Retention Periods	2-8
§ 2:3.3	Special Consideration for Email and Other Electronically Stored Information	2-9
§ 2:3.4	Document Retention Policy Training	2-10
§ 2:3.5	Accidental Document Destruction.....	2-10

§ 2:4	Protecting Privileges Applicable to Retained Documents	2-11
§ 2:4.1	Attorney-Client Privilege.....	2-12
§ 2:4.2	Work Product Doctrine	2-18
§ 2:4.3	Section 7525: Communications with Federally Authorized Tax Practitioners.....	2-23
§ 2:4.4	Privilege in the International Context.....	2-24
[A]	Whose Privilege Law Applies?	2-25
[B]	Can U.S. Privilege Be Waived by Disclosure to Another Jurisdiction?	2-28
§ 2:5	Spoliation	2-29
§ 2:5.1	Interplay with Work Product Doctrine	2-32
§ 2:5.2	Litigation Holds	2-34

Chapter 3 Handling the International Examination

§ 3:1	Introduction	3-2
§ 3:2	The IRS's Selection of Returns to Be Examined	3-2
§ 3:3	The IRS's Authority to Examine Returns.....	3-2
§ 3:4	Time Limits on the Examination.....	3-4
§ 3:5	The Composition of the IRS Examination Team	3-5
§ 3:6	The Type of Examination to Be Conducted.....	3-8
§ 3:7	Setting the Ground Rules for the Examination	3-10
§ 3:8	Information Document Requests.....	3-11
§ 3:9	Interviews and Facility Visits	3-17
§ 3:10	Formal Document Requests.....	3-18
§ 3:11	The Summons Process	3-18
§ 3:11.1	Issuance of Administrative Summons to the Taxpayer	3-18
§ 3:11.2	Issuance of a Designated Summons to the Taxpayer	3-21
§ 3:11.3	Judicial Enforcement of Summons Issued to the Taxpayer	3-23
§ 3:12	Requests for Information from Third Parties	3-35
§ 3:13	Issuance of Summons to Third Parties	3-38
§ 3:14	Judicial Enforcement of a Third-Party Summons.....	3-39
§ 3:15	IRS Development of Issues and Proposed Adjustments	3-42
§ 3:16	Special Examination Processes and Procedures.....	3-43
§ 3:17	Mutual Agreement Procedure and Competent Authority	3-45
§ 3:18	Resolution of Issues During the Examination.....	3-46

Table of Contents

Chapter 4 Special Document Issues in International Examinations

§ 4:1 Introduction 4-1
§ 4:2 Information Made Available to the IRS..... 4-1
§ 4:3 Information Document Requests..... 4-2
§ 4:4 Examination of Documentation or Facilities at Foreign Sites 4-4
§ 4:5 Formal Document Requests for Foreign-Based Documentation 4-4
§ 4:6 Administrative Summons 4-16
§ 4:7 Judicial Enforcement of Summonses 4-18
§ 4:8 Judicial Review of Section 6038A Summons..... 4-28
§ 4:9 Privilege Defenses to Production..... 4-30

Chapter 5 IRS Appeals and Special Appeals Procedures

§ 5:1 Introduction 5-1
§ 5:2 Resolution of Issues in Fast Track and Early Referral 5-2
 § 5:2.1 Fast Track Settlement 5-2
 § 5:2.2 Early Referral 5-3
§ 5:3 Issuance of a Revenue Agent’s Report 5-5
§ 5:4 Potential Responses to the Revenue Agent’s Report 5-6
§ 5:5 Deciding Whether to File a Protest 5-8
§ 5:6 Preparation of the Protest 5-9
§ 5:7 Exams’ Rebuttal to the Protest and the Ex Parte Conference..... 5-10
§ 5:8 Extensions of the Assessment Period 5-11
§ 5:9 Conduct of the Appeals Conference..... 5-12
§ 5:10 Appeals Settlement Authority 5-13
§ 5:11 Appeals Settlement Considerations and Procedures..... 5-14
§ 5:12 Appeals Alternative Dispute Resolution Programs..... 5-16
§ 5:13 Appeals and Competent Authority Cases 5-17
§ 5:14 Concluding the Appeals Process 5-18
§ 5:15 Taking Unagreed Issues into Litigation..... 5-20

PART II: Government-to-Government Cooperation**Chapter 6 The Role of the Competent Authority: Mutual Agreement Procedures**

§ 6:1	Introduction	6-2
§ 6:2	Legal Basis and Organization of U.S. Competent Authority Office.....	6-4
§ 6:3	Overview of the Competent Authority Process	6-5
§ 6:4	The Taxpayer's Interest and Involvement in Competent Authority Negotiations	6-6
§ 6:5	Common Kinds of Double Taxation Issues.....	6-7
§ 6:5.1	Transfer Pricing Issues	6-7
§ 6:5.2	Permanent Establishment Issues	6-8
§ 6:5.3	Residency Issues	6-9
§ 6:5.4	Limitation on Benefits Issues.....	6-10
§ 6:5.5	Withholding Tax Issues.....	6-12
§ 6:5.6	Thin Capitalization/Debt Equity Issues	6-13
§ 6:5.7	Pension Plan Qualification.....	6-13
§ 6:6	Do Taxpayers Have a "Right" to Competent Authority Consideration?	6-14
§ 6:7	Exhaustion of Foreign Administrative Remedies: Seeking Competent Authority Relief Can Be a Requirement for Claiming Foreign Tax Credits.....	6-17
§ 6:8	Procedures for Requesting Competent Authority Assistance.....	6-19
§ 6:8.1	Importance of Reference to Revenue Procedure and Procedural Rules of Applicable Treaty.....	6-19
§ 6:8.2	Deadlines for Seeking Competent Authority Assistance.....	6-19
Table 1	Competent Authority Time Limitation Provisions of Selected U.S. Income Tax Treaties.....	6-21
§ 6:8.3	Need for Taxpayer to Keep U.S. and Foreign Statutes of Limitations Open Pending Competent Authority Negotiations.....	6-24
§ 6:8.4	Effect of Closing Agreements	6-25
§ 6:8.5	Drafting and Filing the Competent Authority Request	6-26
§ 6:8.6	User Fees	6-27
§ 6:8.7	Pre-Filing Conferences	6-27
§ 6:8.8	Discretionary LOB Requests	6-29

Table of Contents

§ 6:9	Coordination of Competent Authority Negotiations with Other Administrative and Judicial Proceedings	6-32
§ 6:9.1	Suspension of U.S. Administrative Action	6-32
§ 6:9.2	Coordination of Competent Authority and IRS Administrative Proceedings	6-33
§ 6:9.3	Competent Authority and Litigation	6-35
§ 6:10	Practical Observations on the Competent Authority Negotiation Process	6-36
§ 6:10.1	Taxpayer's Role in Negotiation	6-36
§ 6:10.2	"Tacking On" Additional Years to Ongoing Competent Authority Negotiation	6-37
§ 6:10.3	Closing Agreements and Correlative Adjustments	6-37
§ 6:10.4	Small Case Procedure	6-39
§ 6:11	Effectiveness of the Competent Authority Process	6-40
§ 6:12	Tax Treaty Arbitration.....	6-41

Chapter 7 Advance Pricing Agreements

§ 7:1	Introduction	7-1
§ 7:2	APA Program Organization Within IRS	7-5
§ 7:3	The Process of Obtaining an APA	7-5
§ 7:3.1	When to Seek an APA	7-5
§ 7:3.2	The Term of an APA	7-7
§ 7:3.3	Timing of APA Requests	7-7
§ 7:3.4	Filing a Request.....	7-8
§ 7:3.5	Fees.....	7-9
§ 7:3.6	Pre-Filing Conference.....	7-10
§ 7:3.7	The APA Negotiation Process	7-11
§ 7:3.8	Critical Assumptions	7-14
§ 7:3.9	IRS Internal Review of APAs	7-15
§ 7:3.10	IRS Checks on Compliance with APAs	7-15
§ 7:4	Cancellation and Revocation of APAs	7-17
§ 7:5	APA Renewals.....	7-18
§ 7:6	APAs Involving Branches	7-18
§ 7:7	Financial Products APAs	7-19
§ 7:8	Customs Considerations and APAs	7-21
§ 7:9	Transfer Pricing Methodologies Used in APAs	7-22
§ 7:10	APAs and State and Local Taxation.....	7-23
§ 7:11	Public Disclosure of APAs.....	7-25

Chapter 8 Exchange of Information

§ 8:1	Introduction	8-2
§ 8:2	Tax Treaty Information Exchange	8-4
§ 8:2.1	Standard for Information Exchange	8-5
[A]	Overview	8-5
[B]	Requests Lacking a Taxpayer Name	8-8
§ 8:2.2	Limitations on Obligation to Provide Information.....	8-12
§ 8:2.3	Restrictions on Use of Information by Contracting State.....	8-13
§ 8:2.4	Other Common Provisions	8-14
[A]	Domestic Tax Interest.....	8-14
[B]	Form of Information Provided	8-15
[C]	Mode of Application	8-16
§ 8:3	Tax Information Exchange Agreements	8-16
§ 8:4	Mutual Legal Assistance Treaties.....	8-17
§ 8:5	Confidentiality of Information Exchanged.....	8-19
§ 8:6	Types of Information Exchange.....	8-21
§ 8:6.1	Overview.....	8-21
§ 8:6.2	Specific Requests.....	8-21
[A]	Overview	8-21
[B]	Foreign-Initiated Requests	8-22
[B][1]	Process	8-22
[B][2]	Summons to Obtain Information to Be Exchanged	8-23
[B][3]	Considerations for Taxpayers Who Are the Subject of a Foreign-Initiated Information Exchange Request.....	8-27
[C]	U.S.-Initiated Requests	8-28
[C][1]	Process	8-28
[C][2]	Considerations for Taxpayers Who Are the Subject of a U.S.-Initiated Information Exchange Request.....	8-30
[C][3]	IRS Use of Summons in Lieu of Information Exchange	8-30
§ 8:6.3	Routine/Automatic Exchange	8-32
[A]	In General	8-32
[B]	FATCA and the Common Reporting Standard.....	8-33
[C]	Country-by-Country Reporting.....	8-34

Table of Contents

§ 8:6.4	Spontaneous Exchange.....	8-35
§ 8:6.5	Industry-Wide Exchanges of Information.....	8-36
§ 8:6.6	Simultaneous Examination, Simultaneous Criminal Investigation Programs, and Joint Audits	8-37
§ 8:7	Joint International Taskforce on Shared Intelligence and Collaboration.....	8-38
§ 8:8	Collection Assistance	8-38
§ 8:8.1	Overview.....	8-38
§ 8:8.2	The Revenue Rule.....	8-39
§ 8:8.3	U.S. Tax Treaty Modification of the Revenue Rule	8-40
	[A] In General	8-40
	[B] Collection Assistance Treaty Provisions.....	8-41
	[B][1] Broad Assistance Provision.....	8-41
	[B][2] Restrictive Collection Assistance Provision	8-42
	[B][3] The OECD Convention on Mutual Assistance in Tax Matters	8-44

PART III: Litigating International Tax Cases

**Chapter 9 Post-Appeals Litigation Options and
Choice of Forum**

§ 9:1	Introduction	9-1
§ 9:2	Exiting Appeals While Positioning a Case for Litigation.....	9-2
	§ 9:2.1 Positioning a Case for Tax Court Litigation	9-2
	§ 9:2.2 Positioning a Case for Refund Litigation.....	9-3
§ 9:3	The Process of Initiating the Litigation.....	9-4
	§ 9:3.1 Steps to Initiate Tax Court Litigation.....	9-4
	§ 9:3.2 Steps to Initiate Refund Litigation	9-5
§ 9:4	Choice of Forum Considerations	9-8
	§ 9:4.1 Need to Pay the Asserted Tax Deficiency	9-8
	§ 9:4.2 Applicable Precedent.....	9-8
	§ 9:4.3 The Government's Ability to Raise New Issues in Litigation	9-9
	§ 9:4.4 The Taxpayer's Ability to Raise New Issues in Litigation	9-12

INTERNATIONAL TAX CONTROVERSIES

§ 9:4.5	Allowable Discovery	9-15
§ 9:4.6	The Tax Expertise and Experience of the Judge.....	9-15
§ 9:4.7	The Attorneys Representing the Government.....	9-16
§ 9:4.8	The Location of the Trial	9-17
§ 9:4.9	The Possibility of a Jury Trial.....	9-18
§ 9:5	Supreme Court Review	9-18

Chapter 10 Discovery in International Tax Cases

§ 10:1	Introduction	10-1
§ 10:2	Overview of Discovery Methods	10-2
§ 10:3	Discovery in U.S. District Courts	10-3
§ 10:4	Discovery in the Court of Federal Claims	10-10
§ 10:5	Discovery in the U.S. Tax Court.....	10-11
§ 10:6	Hague Evidence Convention.....	10-15
§ 10:6.1	Letters of Request	10-15
§ 10:6.2	Deposition Testimony Taken Through Diplomatic or Consular Officers and Appointed Commissioners	10-19
§ 10:7	Letters Rogatory.....	10-21
§ 10:8	Coordination Between the Hague Evidence Convention and Discovery Rules.....	10-23
§ 10:9	Practical Considerations for Using Letters of Request and Letters Rogatory.....	10-28
§ 10:10	Practical Considerations for Using Letters of Request and Federal Rules of Civil Procedure Discovery	10-29
§ 10:11	Discovery in the United States for Use in Foreign Proceeding.....	10-31

Chapter 11 Trial and Appellate Practice

§ 11:1	Introduction	11-1
§ 11:2	Trial Practice.....	11-2
§ 11:2.1	Drafting the Complaint or Petition.....	11-2
§ 11:2.2	Local Rules and Judge-Specific Rules.....	11-3
§ 11:2.3	Foreign Witnesses	11-3
§ 11:2.4	Foreign Documents	11-6
§ 11:2.5	Foreign Law	11-10
§ 11:2.6	Foreign Experts	11-11

Table of Contents

§ 11:2.7	Burden of Proof.....	11-12
§ 11:2.8	The “Electronic Courtroom”.....	11-14
§ 11:2.9	Use of Demonstratives	11-15
§ 11:2.10	Settlement	11-16
§ 11:2.11	Coordination with Competent Authority Proceedings.....	11-17
§ 11:3	Appellate Practice	11-18
§ 11:3.1	The Decision to Appeal	11-18
§ 11:3.2	Appellate Venue	11-20
§ 11:3.3	Notice of Appeal	11-20
§ 11:3.4	Appeal Bond	11-21
§ 11:3.5	Appellate Procedures.....	11-22
§ 11:3.6	Final Decision or Judgment	11-23
Index	I-1

