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Temporary regulations under section 245A held invalid (federal district court)

A federal district court this week held that temporary regulations under section 245A issued in June 2019 with retroactive effect are invalid.

The case is: *Liberty Global, Inc. v. United States*, 1:20-cv-03501 (D. Colo. April 4, 2022). Read the [final judgment](#) [PDF 176 KB]

Summary

The taxpayer petitioned the federal district court in Colorado in November 2020 for a refund of approximately \$109 million in taxes (including penalties and interest) on the basis that temporary regulations under section 245A issued on June 18, 2019, are invalid. In particular, the taxpayer claimed that it met the requirements under section 245A to deduct income from a transaction that occurred in December 2018, but because the temporary regulations were made retroactive, it did not receive the full deduction.

Section 245A, created by the 2017 Tax Cuts and Jobs Act (TCJA), permits certain U.S. corporate taxpayers to obtain a 100 percent deduction for dividends from their foreign subsidiaries out of foreign earnings and profits (E&P). However, the temporary regulations, as is relevant here, limited the deduction under section 245A for dividends out of E&P created by certain extraordinary transactions that occurred during the period between the effective dates of section 245A (dividends received after December 31, 2017) and GILTI (taxable years beginning after December 31, 2017). The temporary regulations were published in the Federal Register on June 18, 2019, with an immediate effective date. The temporary regulations applied retroactively to distributions occurring after December 31, 2017, under section 7805(b)(2), which allows Treasury regulations to apply retroactively when promulgated within eighteen months of the enactment of the underlying statute (here, the TCJA).

The taxpayer advanced several arguments to support its assertion that the temporary regulations are invalid:

- The temporary regulations were contrary to the express language of the statute, and there is no ambiguity in the language of the statute that would give the Treasury Department gap-filling authority to promulgate regulations.
- The Treasury Department did not have authority to make the temporary regulations retroactive.
- The temporary regulations were not promulgated in compliance with the Administrative Procedure Act's (APA's) notice and comment requirements.

The court did not address the taxpayer's first two arguments because it found that the temporary regulations were not promulgated in compliance with the APA's notice and comment requirements. In particular, the court rejected the government's "good cause" argument that compliance with the APA's 30-day notice and comment period was "impracticable, unnecessary, or contrary to the public interest." In that regard, the court repeatedly noted that the Treasury Department had adequate time from the date of enactment of the TCJA until the 18-month deadline of June 2019 to issue the regulations in a manner that would satisfy the APA's notice and comment requirements.

The court did not decide whether the taxpayer was entitled to the refund it sought because it found that factual questions remain as to the taxpayer's compliance with the underlying tax laws in connection with its 2018 transaction.

KPMG observation

The holding of the district court is limited to the validity of the temporary regulations. The court did not address the validity of the final regulations under section 245A, which were issued in November 2020 with a June 2019 applicability date. The final regulations finalized the proposed regulations accompanying the temporary regulations, which proposed regulations would presumably satisfy the APA's notice and comment requirements for the final regulations. Further, because the court did not address whether the temporary regulations were contrary to the express language of the statute, no inference can be drawn about whether a court would conclude the final regulations, which are substantially similar to the temporary regulations, are substantively invalid.

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