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U.S. International Tax Policy: 10 Questions for 2015

By David G. Noren

The year 2015 promises to be an active one in U.S. international tax policy, as new players take the stage in the tax reform debate, the Base Erosion and Profit Shifting (BEPS) effort continues to develop and even begins to go into effect around the world, and corporate inversions remain a hot tax policy topic after a year of intense publicity and aggressive executive action. Against this backdrop, 2015 likely will feature a great deal of activity in the international tax arena, even if fundamental changes to the U.S. international tax regime remain unlikely in the near term. Here are 10 pressing questions that may be answered as the year unfolds.

1. Can "business only" tax reform be made to work?

It is widely agreed that President Obama and congressional Republicans are too far apart on individual income tax policy to make that a productive area of discussion. On the other hand, it is often said that the two sides "are not that far apart" on business tax reform, in the sense that almost everyone agrees that the U.S. corporate income tax rate is too high and that the tax base should be broadened in at least some respects as part of a rate reduction effort. Thus business tax reform could be an area of constructive engagement during 2015. More detailed discussions over the course of this year will reveal how much agreement there really is between the two sides, as well as how challenging it will be to design a coherent business tax reform approach without broadly implicating the individual income tax rules, in light of the fact that so much business is conducted through pass-through entities whose income is taxable under the individual regime.

2. Can policy makers agree on revenue goals for business tax reform?

It is likely that President Obama and congressional Republicans can agree that revenue-neutral business tax reform would be a worthwhile objective, if reform could improve the efficiency, perceived fairness and administrability of the rules.

However, disagreements might arise as to whether, for example, the legislation must be revenue-neutral over the conventional 10-year budget window, or indefinitely in a "steady state." If there is a one-time surge in tax revenues from a deemed repatriation of foreign earnings as a transition into a territorial dividend exemption system, will that enable the enactment of policies with negative longer term budget effects as conventional budgeting principles would permit, or will President Obama invoke steady state neutrality to require dedication of this one-time revenue surge to other priorities, such as infrastructure spending, as indicated in the president's fiscal year (FY) 2016 budget proposal? The latter scenario would mean that the permanent policy would have to tilt more heavily towards base broadening in order to accomplish tax reform on a revenue neutral basis.

In addition, the concept of revenue neutrality for a business tax reform package as a whole may obscure many other revenue effects of potential interest. In particular, various segments of the business community (*e.g.*, large multinationals, smaller businesses, U.S.-based companies, non-U.S.-based companies, various industrial sectors) will be interested in whether tax reform is revenue neutral *for them*, or if instead they are being called upon to finance someone else's tax cut (or benefiting from someone else's tax increase). Accomplishing revenue-neutral business tax reform to the satisfaction of both major political parties and all of these different segments of the business community will be a challenge.

3. Will "dynamic scoring" materially lighten tax reform's base-broadening load?

Although conventional revenue estimates are already "dynamic" in the sense that anticipated behavioral responses to proposed legislation are taken into account (*i.e.*, microeconomic analysis), these estimates historically have been "static" in the sense that the macroeconomic baseline (overall size of the economy) is held constant. For the vast majority of business tax proposals, this distinction is of no consequence, as only the very broadest business tax proposals would be more than a drop in the macroeconomic bucket in view of the size of the U.S. economy. But for the most significant changes, such as a several-point reduction in the corporate income tax rate, there may be macroeconomic effects as well, and congressional Republicans are taking steps to account for these effects in scoring the revenue effects of tax reform. Their hope is that macroeconomic growth expected to result from large tax-cutting measures could boost projected tax receipts, thereby partially offsetting the more direct revenue-losing effects of such measures. This in turn would reduce the amount of base broadening necessary to accomplish tax reform on a revenue-neutral basis, making tax reform an easier lift.

Whether this scenario plays out in practice remains to be seen, and depends critically on what kind of political buy-in these dynamic scores receive—they will still be presented alongside (not instead of) conventional scores, and the White House and congressional Republicans might continue to differ regarding which one is the appropriate yardstick for determining revenue neutrality.

4. Will Congress invoke budget reconciliation procedures in order to pass tax reform legislation?

Although Republicans currently control both houses of Congress, "control" means different things as applied to the House of Representatives and the Senate, respectively. In the Senate, individual members and the minority party have greater blocking power (for example, in the form of the filibuster), such that a supermajority of 60 (out of 100) votes is typically required to pass legislation in the Senate, whereas in the House the majority party can more easily work its will. An exception to the Senate's supermajority requirement is legislation put before the Senate to "reconcile" taxing and spending measures with a budget resolution. Under this reconciliation process, only a simple majority vote in the Senate is required, but the legislation must be limited substantively in various respects (for example, it cannot increase deficits beyond the budget window, and thus might need to include "sunset" provisions). Such legislation would remain vulnerable to a presidential veto.

Passing tax reform legislation through the reconciliation process would be no one's first choice, but it is possible that congressional Republicans could pursue it in the event that a deal with the White House proves impossible otherwise. Although the legislation might not become law in the event of a

veto, it could be an achievable legislative accomplishment and an important political document heading into the 2016 elections. As such, it could be a meaningful marker for what a potential Republican president and Congress might enact in 2017 or later.

5. How deep and wide is the agreement on "tough territorial" as the basic model for the U.S. outbound regime?

It is likely that both President Obama and congressional Republicans can agree that the United States should move to a territorial-type dividend exemption system to eliminate the distortions created by making the repatriation of earnings a major taxable event, and also should tighten the existing rules (*e.g.*, subpart F) limiting the ability to defer or avoid tax on certain kinds of income earned by non-U.S. subsidiaries. These two policy initiatives cut in opposite directions, in that one would decrease and the other would increase the U.S. tax burden on income earned by U.S.-based multinational groups outside the United States; together the initiatives are sometimes described as a "tough territorial" approach. It remains to be seen whether President Obama and congressional Republicans can agree on the nature, extent and balance of the territorial-type features and the base-broadening features of such a regime, and whether the business community would be any better off under a regime that might result from these deliberations. The president's FY 2016 budget proposal includes a "minimum tax" regime that would fit the tough territorial description. Although the proposal's various numerical thresholds make it more "tough" than "territorial," the proposal nevertheless suggests there is a chance that the two sides might be able to meet somewhere in the middle.

6. What will be the revenue and policy goals for the inbound rules as part of U.S. tax reform?

Although the U.S. international tax reform discussion has tended to focus more on the outbound rules (primarily directed at U.S.-based multinationals) than on the inbound rules (primarily directed at non-U.S.-based multinationals), more recently some focus has shifted toward the inbound rules, particularly in the wake of various BEPS developments and increased attention to inbound structures in connection with corporate inversions. As the tax reform discussion advances in 2015, it will be interesting to see how prominently inbound approaches feature in the debate, and what balance of tax-cutting and tax-raising measures are proposed by different policy makers with respect to the inbound business community.

7. If business tax reform proves elusive in 2015, will policy makers pursue a more limited tax package as a consolation prize?

It is possible that the White House and congressional Republicans will conclude that they are unable to enact business tax reform in 2015 but will agree on a more limited package of tax proposals, potentially including both revenue-raising and revenue-losing items. For example, some members propose another partial repatriation holiday, while others urge that further anti-inversion legislation be enacted without delay, and numerous industry-specific tax issues continue to be discussed (such as potential repeal of the medical device excise tax). Although the tax writers may resist the pursuit of a more limited tax package, it is possible that the mutual desire to accomplish something, even something short of true tax reform, could lead to the passage of a more limited tax package in 2015. Thus, even if tax reform remains a long shot in the coming year, the tax legislative area could still present near-term risks and opportunities for the business community.

8. When and how will the "tax extenders" package be addressed?

The "tax extenders" package of expiring tax provisions (*e.g.*, research and experimentation credit, subpart F "look-through" and active financing rules) has again expired and thus will require legislative attention in 2015. As always, questions center on when exactly Congress might pass the extension of the provisions, whether any key provisions might fall out of the package, and the term of any extension. The rationale for pursuing such a limited extension at the end of 2014 apparently was to enable congressional Republicans to pursue a more Republican-leaning package for 2015. In addition, the nature and timing of tax extenders (routinely enacted without revenue offsets) affect the budget baseline for subsequent tax

reform and thus can have a real effect on whether and what kind of tax reform eventually is achieved.

9. Will the impasse over tax treaty ratification finally be broken?

The Senate has not ratified a tax treaty instrument since 2010, because the objections of a senator have blocked the invocation of the unanimous consent procedures typically used to approve tax treaties, and tax treaties are generally not seen by Senate leadership as sufficiently important to warrant the use of extended Senate floor time, as would be required without such procedures. Several signed tax treaties and protocols are currently pending as a result, and it is likely that the impasse has some effect on the conduct of current treaty negotiations with existing and prospective treaty partners. It remains to be seen whether the new Senate majority leadership will be able to negotiate an end to the impasse.

10. What surprises may come in the form of executive action?

One of the more remarkable U.S. international tax policy developments of 2014 was the Internal Revenue Service's (IRS's) issuance of Notice 2014-52, which aggressively asserted executive authority to limit certain tax benefits following certain corporate inversion transactions. Officials have suggested that there could be more to come in this area. Even if there are no new bold strokes on inversions, the notice sets a precedent for a somewhat elastic interpretation of various anti-avoidance rules in the tax code and regulations when important tax policy objectives are thought to be at stake, which could have reverberations beyond the inversion area.

Meanwhile, even if no new tax policy issue "heats up" like inversions did in 2014, the IRS's existing guidance plan includes several important and potentially controversial items, including in the areas of repatriation and outbound transfers of intangibles. If the White House and congressional Republicans continue to have a hard time coming together on legislation in 2015, IRS guidance may remain on center stage in U.S. international tax policy.

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The New UK Diverted Profits Tax

By Matthew Herrington and James Ross

The United Kingdom is an active participant in the Base Erosion and Profit Shifting (BEPS) project currently being undertaken by the Organisation for Economic Co-operation and Development and the G20, and has already committed to implementing several of the project's forthcoming recommendations. Ahead of those recommendations, however, the United Kingdom recently announced its own unilateral measure to combat BEPS, known as the Diverted Profits Tax (DPT). The new tax will come into force on April 1, 2015.

Scheme of the Legislation

There are two separate charges to DPT: one on companies that are UK resident or have a UK permanent establishment (PE), and one applicable to all other companies.

The charge on a company that is UK resident or has a UK PE can apply if the company enters into a transaction with a related party that results in an effective tax mismatch and the related party has insufficient economic substance. An effective tax mismatch occurs where the transaction causes a reduction in the principal entity's UK tax (either by increasing the entity's deductible expenses or by reducing its taxable income) and the corresponding increase in the counterparty's non-UK tax liability is less than 80 percent of the UK tax saved. The counterparty has insufficient economic substance if the value of the tax benefit from the transaction exceeds any other financial benefit, or where the tax benefit exceeds the economic benefit provided by the staff of the counterparty, provided, in each case, that it is reasonable to assume that the transaction was designed to secure the tax reduction.

The charge on companies not falling within the ambit of the aforementioned rules can apply where a company conducts activities in the United Kingdom in the course of supplying goods or services to UK customers without creating a UK PE, provided that it is reasonable to assume that the arrangements in question were designed to avoid giving rise to a UK PE. Under the rules, arrangements can be treated as being designed to avoid giving rise to a UK PE even if there are

legitimate commercial or other reasons why they are structured in that fashion.

Companies falling within this test will be subject to DPT if it is reasonable to assume that the main purpose, or one of the main purposes, of the arrangements in question is the avoidance of UK corporation tax. Where a UK tax avoidance main purpose cannot be established, a charge to DPT will apply if there is an effective tax mismatch arising from transactions with a related party and the counterparty has insufficient economic substance.

Exemptions

Non-resident persons relying on the "investment manager exemption" are excluded from the application of DPT. This exemption will generally protect non-resident funds with investment managers based in the United Kingdom.

DPT does not apply to any small or medium-sized enterprises (which are, broadly, those with fewer than 250 employees and either a balance sheet total of no more than EUR 43 million or a turnover of no more than EUR 50 million). A further exemption applies to companies with sales of no more than £10 million to UK customers.

DPT also does not apply if the provision giving rise to an effective tax mismatch is a loan or other financing arrangement.

The Charge

DPT is charged at a rate of 25 percent. The taxable base is, broadly speaking, the profits that would have been charged to corporation tax in the absence of the arrangement giving rise to the effective tax mismatch. The rate is higher than the standard corporation tax rate (20 percent).

The draft legislation also provides an accelerated assessment and payment timetable relative to the corporation tax regime. The application of DPT is triggered by HM Revenue and Customs (HMRC) serving a preliminary estimated notice of liability, after which the company has 30 days to make representations. HMRC then has a further 30 days to issue a final notice of liability, after which the taxpayer must make payment within a further 30 days. This triggers the start of a 12-month review period in which a designated HMRC officer must review the amount of DPT that has been charged and adjust it accordingly. The company may only appeal a charge after the end of the review period, and there are no grounds for postponement of the payment of DPT.

When HMRC calculates the liability for the purpose of the estimated and final charging notices, 30 percent of otherwise allowable expenses will be disallowed where the mismatch results from provisions that have the effect of inflating the expenses against the receipts from UK sales above what they would have been between independent persons dealing at arm's length. This rule is explicitly targeted at "double Irish" and "Dutch sandwich" type arrangements.

The legislation includes broad provisions allowing enforcement against any group company or persons conducting activities in the United Kingdom on behalf of a non-UK company within the tax charge.

Conclusion

This measure is a far-reaching piece of legislation targeted at multinationals whose tax affairs have been the subject of press criticism in recent years. There is a significant possibility that the DPT is compliant with neither the United Kingdom's tax treaties nor the right to freedom of establishment under the EU Treaty. Moreover, the DPT pre-empts the BEPS process and could encourage other countries to take their own unilateral actions. Multinational groups that may be caught by the DPT should consider their position as a matter of urgency, because it seems likely that these provisions will come into force in less than one month's time.

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France Implements Horizontal Tax Consolidation

By Antoine Vergnat and Jules Bourboulon

The French Amended Finance Act for 2014 allows French companies that are directly or indirectly held by the same non-French parent company established in the European Economic Area (EEA) (EEA Parent Company), without being

held by the same French company (French Sister Companies), to be included in a tax consolidated group (Horizontal Tax Consolidated Group) in France. This reform follows decisions by the EU Court of Justice and a French Administrative Court of Appeal pursuant to which the prohibition of Horizontal Tax Consolidated Groups—as opposed to tax consolidated groups between a parent company and its direct or indirect subsidiaries that are all established in the same jurisdiction (Vertical Tax Consolidated Group)—constitutes a restriction to the EU freedom of establishment. *See* EUCJ, n° C40/13, June 12, 2014, *SCA Holding BV and others*, and CAA Versailles, n° 12VE03684, December 2, 2014.

Advantages of a Horizontal Tax Consolidated Group

The main tax benefits provided by the general French tax consolidation regime are (1) the consolidation of the taxable income recognized by each of the French companies included in the tax consolidated group (Taxable Consolidated Income), such that for tax purposes the profits recognized by profit-making companies can be offset by any losses recognized by the other companies, and (2) the neutralization of the tax consequences of certain transactions entered into between those companies for tax purposes (*e.g.*, distributions of dividends, transfers of assets, waivers of debt and subsidies).

Pursuant to the new legislation, such tax benefits would also be available to French Sister Companies that elect to be included in the same Horizontal Tax Consolidated Group. Groups of companies including French Sister Companies that do not wish to reorganize their corporate structure in order to form a Vertical Tax Consolidated Group should therefore consider the possibility of forming a Horizontal Tax Consolidated Group.

Main Conditions for Forming a Horizontal Tax Consolidated Group

French Sister Companies may form a Horizontal Tax Consolidated Group with their direct and indirect French subsidiaries. The French Sister Companies and their French subsidiaries must be subject to corporate income tax in France, and at least 95 percent of the financial and voting rights attached to their shares must be held by the same EEA Parent Company, directly or indirectly through one or more subsidiaries of the EEA Parent Company subject to corporate income tax in the EEA (Interposed EEA Companies). The EEA Parent Company must be subject to corporate income tax in the jurisdiction of its incorporation, and generally no more than 95 percent of the financial and voting rights attached to its shares may be held, directly or indirectly, by a company subject to corporate income tax in the EEA. However, more than 95 percent of the financial and voting rights attached to the shares of the EEA Parent Company may be held by a company subject to corporate income tax in the EEA if held through one or more companies not subject to corporate income tax, and also may be held through one or more companies subject to corporate income tax in the EEA so long as not greater than 95 percent of the voting and financial rights attached to the companies' shares are held by a company subject to corporate income tax in the EEA.

A further condition for forming a Horizontal Tax Consolidated Group is that the fiscal years of the companies included in the Horizontal Consolidated Group, the EEA Parent Company and any Interposed EEA Company (as the case may be) must not last more than 12 months and must commence and end on the same date. This condition does not apply, however, if it cannot be met because of the mandatory requirements of the relevant jurisdiction.

Election to Form a Horizontal Tax Consolidated Group

Since the EEA Parent Company cannot be included in the Horizontal Tax Consolidated Group, the election to form the group must be made by one of the French Sister Companies, acting in the capacity of parent of the group, and be approved by the EEA Parent Company and any Interposed EEA Company. Each French company included in the Horizontal Tax Consolidated Group must give its consent to become a member of the group, subject to the approval of the EEA Parent Company and any Interposed EEA Company.

The identity of the French companies included in the Horizontal Tax Consolidated Group, the EEA Parent Company and any Interposed EEA Company must be disclosed to the French tax authorities each fiscal year.

Issues to Consider when Forming a Horizontal Tax Consolidated Group

The termination of a tax consolidated group generally triggers the de-neutralization of certain transactions that were previously neutralized for the computation of the Taxable Consolidated Income of the group, resulting in potential additional corporate income tax costs and restrictions on the use of carry-forward tax losses. Such de-neutralization costs should therefore be carefully evaluated prior to forming a Horizontal Tax Consolidated Group, considering that the following events in particular would trigger a termination of the group:

- A change of the (French) parent of the Horizontal Tax Consolidated Group, and any takeover or reorganization (merger or spin-off) involving that parent
- A takeover or reorganization (merger or spin-off) of the EEA Parent Company involving a company subject to corporate income tax in the EEA

In addition, the inclusion in a Horizontal Tax Consolidated Group of a French Sister Company acting as parent of a pre-existing Vertical Tax Consolidated Group would trigger the termination of the Vertical Tax Consolidated Group.

Entry into Force

The new legislation is applicable to fiscal years ending on or after December 31, 2014.

Possible Ground for Tax Refunds

For fiscal years ending before December 31, 2014, groups of companies that were in a position to form a Horizontal Tax Consolidated Group should consider filing a claim for a refund of the relevant French corporate income tax based on the previously mentioned EU and French case law no later than December 31 of the second fiscal year following the one during which such tax was paid.

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China's New General Anti-Avoidance Rules: An Overview

By William (Wenyu) Zhang and Lacoste Qian

On December 2, 2014, the State Administration of Taxation (SAT), China's highest tax authority, issued the Administrative Measures for the General Anti-Avoidance Rules (Trial) (GAAR), which went into effect on February 1, 2015. Prior to this legislation, China had no specific GAAR, only a few general anti-avoidance principles in various regulations, such as the Enterprise Income Tax Law and its Implementation Rules (EIT laws) and the Measures for Special Tax Adjustments (Guo Shui Fa [2009] No. 2, or Circular No. 2). The new GAAR aims to provide taxpayers with more transparent administration procedures for GAAR cases while empowering tax authorities to adjust taxpayers' payments in accordance with clear rules.

Scope, Definitions and Adjustment Methods

The new GAAR applies to any tax avoidance arrangement by an enterprise that is without reasonable commercial purpose and is intended for the purpose of obtaining tax benefits. It does not apply to arrangements that are not related to cross-border transactions or payments, and is not intended to address tax-related illegal acts, such as tax evasion, evasion of overdue tax, tax fraud, refusal to pay taxes or issuance of false invoices, all of which are dealt with separately.

The new GAAR defines a tax avoidance arrangement as follows: the main or sole purpose of the arrangement is to reduce, secure exemption from or defer the payment of Enterprise Income Tax (EIT); and the arrangement meets the requirements for such reduction in, exemption from or deferral of EIT as a matter of legal form but not as a matter of economic substance.

By following the principle of "substance over form," Chinese tax authorities are authorized to counter tax avoidance arrangements by redetermining the nature of all or part of the transactions under the arrangement; negating the existence of a transaction party or deeming several transaction parties to be a collective whole; reallocating or redetermining the nature of income, deductions, tax preferential treatment or offshore

tax credits among the transaction parties; and applying other reasonable methods.

Clarified Administrative Procedures

Previously, certain tax authorities in practice could initiate anti-tax-avoidance investigations at a local level unconstrained by specific protocols, although according to Circular No. 2, level-by-level reporting to the SAT was required. The GAAR now mandates that examinations conducted by Chinese tax authorities follow the "Case Filing, Investigation, Case Conclusion, Dispute Resolution" procedures (CICD), and re-emphasizes the requirement of level-by-level reporting to the SAT. Under the CICD:

Tax authorities may not start an anti-avoidance investigation until it is approved by the SAT, which should lead to more consistent tax examination procedures.

If, during an investigation, a taxpayer is required to provide documents in its defense, it may now have up to 90 days to do so (60 days plus a 30-day extension upon application). This extended timeframe will allow taxpayers more time to prepare a comprehensive explanation or defense.

Taxpayers under investigation are entitled to formulate their dissent from the conclusions made by tax authorities. Local tax authorities are required to revisit the conclusions reached in their investigations by taking into account comments from the SAT, and the final decision is subject to the SAT's approval.

In addition to regular avenues for dispute resolution, such as administrative reconsideration and litigation, the GAAR establishes a new mechanism to resolve disputes between taxpayers and local tax authorities over double taxation as a result of an anti-avoidance investigation, under which the SAT is to perform a coordinating function. It remains to be seen how exactly the SAT will implement this.

Relation to Other Tax Measures and China's Bi-Lateral Tax Treaties

The new GAAR has been released against the backdrop of numerous existing tax measures governing such matters as transfer pricing, cost sharing, controlled foreign enterprises and thin capitalization, as well as China's network of tax treaties (containing, among other things, specific anti-abuse measures, such as Limitation of Benefit clauses and beneficial ownership tests).

The GAAR makes it clear that such specific tax measures, as well as China's tax treaties, are to be given priority over the GAAR if a tax arrangement of an enterprise being investigated falls within their scope. In other words, the GAAR is to serve as a supplement to other more specific applicable tax measures and effectively as a last resort by which a tax authority may seek to tackle perceived instances of tax avoidance.

Conclusion

The new GAAR increases transparency in local tax authorities' anti-avoidance administrative activities and provides better guidance for multinational enterprises doing business in China. At the same time, as the GAAR provides more certain principles and procedures for examining potential tax avoidance arrangements, Chinese tax authorities may increase their scrutiny of such arrangements.

Enterprises—especially multinational enterprises with significant cross-border transactions—that have implemented tax savings strategies in China should review their positions in light of the enactment of the GAAR and determine if any adjustments to their strategies are warranted.

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Renewable Energy Tax Update

By Madeline Chiampou Tully and Heather Cooper

Renewable energy continues to be an active area for tax planning following the legislative extension in late 2014 of the federal tax credits for wind, solar and other renewable projects. Since 2013, there has also been increased interest in the securitization of revenue streams from solar portfolios. Although the future availability of these tax incentives remains uncertain, there are still many tax-planning opportunities in the renewables market for developers and investors.

Impact of 2014 Extenders Bill on Wind Projects

After several failed attempts to enact a two-year extension package, on December 16, 2014, Congress settled on a bill that retroactively extended for one year most of the federal tax code provisions that were otherwise set to expire. The final extenders bill, H.R. 5771, included one-year extensions for the Section 45 production tax credit (PTC) and the Section 48 elective investment tax credit (ITC) for wind and other renewable projects, including biomass, geothermal, solid waste, hydropower, and marine and hydrokinetic renewable energy. Prior to the extension, the PTC and ITC were available to wind projects for which construction had begun prior to January 1, 2014. H.R. 5771 thus gave taxpayers an additional one-year window during which they can satisfy the requirement for beginning construction on wind projects through the end of 2014.

Because this extension occurred so late in the year, it did not provide wind industry participants with much time to begin construction on new projects. Generally, taxpayers can satisfy the beginning of construction requirement by either commencing physical work of a significant nature on the facility (Physical Work Test) or incurring at least 5 percent of the total cost of the facility (Safe Harbor). Thus, taxpayers had just over two weeks to either begin constructing a project or to purchase equipment that could meet the Safe Harbor. Notwithstanding the short timeframe to begin construction, some wind industry participants did enter into turbine supply agreements intended to meet the Safe Harbor in the last week or two of 2014.

One positive consequence of the one-year extension was that it potentially revived projects that had begun construction in 2013 but arguably failed to meet the additional Internal Revenue Service (IRS) requirements of maintaining continuous construction or continuous efforts on the project after 2013. These projects may have encountered delays where it is unclear under the IRS guidance whether or for how long such a delay would be excusable for purposes of satisfying the continuous construction and efforts requirement. With the enactment of the extension, the potential failure to meet the continuous construction and efforts tests in 2014 became moot to the extent progress could be made on those projects by the end of 2014 that satisfied either the Physical Work Test or the Safe Harbor. If those projects could show that they had performed activities by the end of 2014 that would themselves qualify as beginning construction, the clock could restart on the continuous construction and efforts tests in 2015.

While the one-year extension of the ITC and PTC was more helpful to wind and other renewable energy projects than no extension, a longer extension of such credits would have permitted the continued development of projects. Since the ITC and PTC are again expired code provisions for 2015, it seems unlikely that new wind projects will begin construction this year unless such projects have the ability to incorporate equipment that qualified for the Safe Harbor prior to 2015.

Securitizations of Solar Portfolios

Another hot topic in the renewable energy world is the recent securitization of a number of solar portfolios. Since the first securitization of such a portfolio in 2013, solar developers and tax equity investors have shown continued interest in securitizing the revenue streams from host customers (either residential or commercial and industrial) that have solar equipment installed at their homes or sites.

While these securitizations do not necessarily present tax issues, some tax consequences should be considered, such as the potential for recapture of the ITC. The recapture rules broadly provide for recapture of ITCs previously taken if ownership of the solar project changes hands or, in lease transactions where the ITC is passed through to the lessee, the lease is terminated. As a result, any potential securitization generally must retain the original tax equity structure. Nonetheless, there is some flexibility to change the ownership of a lessor in a lease pass-through structure or to change the ownership of a partnership owning solar equipment to the extent no partner transfers more than 33.33 percent of its interest. This is an exciting area likely to see continued growth.

The Renewable Landscape

Unless there is a further extension of the PTC and ITC for wind in the near future, wind projects in 2015 will dwindle without the tax credits to spur new projects. Tax equity

investors and other industry participants continue to make investments in solar and other renewable projects, because the ITC for solar, fuel cell, microturbine and geothermal heat pumps, among others, does not expire until January 1, 2017. The potential for extension or modification of the ITC for solar and other renewable energy beyond 2017 remains uncertain.

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