
Deadline extended for avoiding acceleration of toll tax installment payments — potentially relevant for internal nonrecognition exchanges

January 30, 2019

In brief

The [final Section 965 regulations](#), released on January 15, 2019 (and subsequently updated), specify that, for taxpayers that elected to pay their toll tax liability in installments, if a triggering event or acceleration event occurred on or before the date that the final Section 965 regulations are published in the Federal Register, then **a transfer agreement to avoid an acceleration event must be filed within 30 days of that publication date** in order to be considered timely filed. **This is a change from the original version of the regulations that was advance dropped by Treasury following the OMB's OIRA review.** The final regulations have not yet been published in the Federal Register as of this Insight's publishing and there may be minor additional changes to the regulations before they are published. In addition, the regulations provide that Section 9100 relief is not available to file a transfer agreement late.

Transactions may constitute an acceleration event if they result in a disposition of 'substantially all' of the transferor's assets, even if the transferor retains direct or indirect control of all its assets after the transaction. However, the acceleration event rules are not expected to apply in many cases. For purposes of applying the acceleration event rules, members of a consolidated group are treated as one person, including for purposes of determining whether there has been a disposition of substantially all of the transferor's assets. Thus, only large transactions, such as an internal restructuring of a high-value CFC holding company, a sale of a major line of business to a third party, or a disposition of assets by a separately consolidated subgroup that owns the CFC stock, raise the issue of whether an acceleration event has occurred, and whether the taxpayer can file a transfer agreement. In addition, acceleration events include transactions where the US shareholder joins a new consolidated group or where the US shareholder's consolidated group is terminated.

In detail

Acceleration of tax

Section 965 uses the mechanics of the subpart F regime to impose a one-time ‘toll tax’ on the undistributed, non-previously taxed post-1986 foreign earnings and profits (E&P) of certain US-owned foreign corporations as part of the transition to a new territorial tax regime. Under Section 965(h), a taxpayer may elect to pay its toll tax in installments over eight years.

If a taxpayer elects to pay the toll tax in installments and an acceleration event subsequently occurs, the unpaid portion of the remaining installments becomes due on the date of the acceleration event. An acceleration event includes, among other things, a “liquidation, sale, exchange, or other disposition of substantially all of the assets” of the electing taxpayer. For this purpose, all members of a consolidated group are treated as a single person and the determination of whether a transfer of assets by one member to a non-member of the consolidated group constitutes an acceleration event takes into account all assets of the consolidated group.

The final regulations do not define what constitutes substantially all the assets of the taxpayer. The preamble notes that this phrase is used in various Code provisions and

regulations and often is determined based on all of the facts and circumstances. The preamble also describes Treasury and the IRS’s decision not to provide an exception to the general acceleration event rules for nonrecognition transactions in which the assets remain under the control of the taxpayer. Moreover, the preamble articulates a concern that such an exception could hamper the IRS’s ability to collect the outstanding toll tax liability and could enable certain taxpayers to inappropriately dilute their interests in their assets or change their businesses in a way that would be inconsistent with the purposes of the election.

Common internal transactions, including transfers of first-tier foreign subsidiary stock in a Section 351 exchange, inbound F reorganizations and liquidations of foreign subsidiaries, and recapitalizations and foreign-to-foreign F reorganizations of first-tier subsidiaries, could constitute asset dispositions for purposes of Section 965(h) and the final regulations. If the foreign subsidiary stock so transferred constitutes substantially all the assets of the US consolidated group, these internal transactions could result in an acceleration event.

For certain ‘covered acceleration events’ in which the transferor transfers substantially all its assets to an eligible transferee, which is defined

as a single US person (other than a domestic pass-through entity), the taxpayer may avoid immediate tax liability if it enters into a transfer agreement.

State tax impact

In addition, taxpayers should consider the relevant state tax impact of any potential acceleration of toll tax payments for Oklahoma or Utah (which provided a similar installment payment election), or in the states where federal income tax is deductible.

The takeaway

Taxpayers should immediately consider the potential impact of these rules to transactions completed in 2018. Additionally, taxpayers should consider whether transactions contemplated for 2019 are eligible for a transfer agreement that would need to be filed within 30 days of the transaction date (subject to the special filing deadline pending publication of the final regulations in the federal register, as noted above).

See also

- PwC ITS Insight: [Highlights of the final ‘toll tax’ regulations under Section 965](#)
- PwC Tax reform readiness series: [Finally final: the Section 965 regulations](#)

Let’s talk

For a deeper discussion of how this might affect your business, please contact:

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