

## LB&I International Practice Service Transaction Unit

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| Sub-Chapter | 3.1.2.2 | Exhaustion of Remedies and Transfer Pricing |             |            |

|                  |   |
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## Issue and Transaction Overview

### Exhaustion of Remedies and Transfer Pricing

The United States taxes income on a worldwide basis. To prevent double taxation, under the Internal Revenue Code (IRC) U.S. taxpayers are allowed a credit for foreign income taxes paid. However, the ability to credit foreign income taxes paid is limited. Pursuant to Treasury Reg. § 1.901-2(e)(1) U.S. companies may not obtain credits for foreign taxes paid in which they are not legally compelled to pay. If the U.S. Treasury were to allow foreign tax credits (FTCs) without requiring U.S. taxpayers to effectively and practically reduce their foreign tax payments as legally imposed, taxpayers would have no incentive to challenge any foreign tax, whether or not properly imposed. As a result, foreign tax costs may potentially be improperly shifted to the United States.

The purpose of this IPS unit is to assist the examiner in identifying “exhaustion of remedies” issues in transfer pricing contexts. For a more developed general overview and description of exhaustion of remedies concepts, please see the IPS Unit: Exhaustion of Remedies FTM/9413.01-02\_01(2013).

As a general rule under Treas. Reg. Section 1.901-2(e)(5)(i), taxpayers cannot claim foreign tax credits for amounts paid to foreign taxing authorities where they have failed to exhaust all effective and practical remedies (including competent authority procedures where applicable).

The most typical situations presenting compulsory payment/exhaustion of remedies issues are transfer pricing adjustments made by the IRS or foreign authorities. Such transfer pricing adjustments may be for the sale or use of goods, services, intellectual property, or financing. In addition, compulsory payment and exhaustion of remedies issues arise where inconsistent tax treatment of a transaction or instrument by the U.S. and foreign authorities could be conformed to reduce or eliminate foreign tax through foreign administrative or judicial appeals or invoking competent authority. These issues are addressed in a separate IPS unit: Exhaustion of Remedies in Non Transfer Pricing Situations FTM/9413.01-02\_03(2013).

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## Transaction and Fact Pattern

| Exhaustion of Remedies and Transfer Pricing                            |  |
|--|--|
| Diagram of Transaction   | Facts  |
| <p style="margin-left: 150px;">1. IRS reallocation from CFC to USP</p> | <p><b>Scenario #1</b><br/> US Parent Corporation (USP) acquires goods from Controlled Foreign Corporation (CFC) in exchange for payment. Similarly, USP may exchange property, services, use of intellectual property, or financing services for payment.</p> <p>IRS reallocates income from CFC to USP. This will have the effect of increasing income to USP in the United States and decreasing the E&amp;P pool of the CFC in the foreign country by a like amount.</p> <p>The amount of the reallocation of income represents a possibility of double taxation in the foreign country. If a taxpayer does not pursue Competent Authority or other relief to reduce the amount of taxable income in the foreign country, the CFC's tax pool remains unadjusted for the transfer pricing reallocation while the E&amp;P pool would be decreased to reflect the transfer pricing reallocation.</p> <p>Under the exhaustion of remedies regulations a taxpayer is obliged to pursue Competent Authority or other relief to reduce taxes paid in the foreign country. Taxpayer's efforts would normally result in a reduced tax pool and thereby reduce any current or future deemed paid credits to properly reflect the transfer pricing reallocation.</p> |

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## Transaction and Fact Pattern (cont'd)

| Exhaustion of Remedies and Transfer Pricing  |  |
|--|--|
| Diagram of Transaction   | Facts  |
| <p>The diagram illustrates the transaction between a U.S. Parent (USP) and a Branch or Disregarded Entity (DE) in Country X. An upward arrow from the Branch to the USP is labeled with '\$\$', representing cash payments. A downward arrow from the USP to the Branch is labeled 'Goods or other intercompany transfers/services', representing the flow of goods or services. A note next to the USP box states '1. IRS reallocation from CFC to USP', indicating the tax treatment of the arrangement.</p> | <p>A similar occurrence can result, though less common, whereby the IRS may apply transfer pricing principles to determine if the taxpayer has allocated too much income to the branch or DE for foreign tax purposes. While income reflected on the U.S. tax return does not change, the double taxation issue in the foreign country continues to exist. The successful pursuit of tax relief in the foreign country would reduce the section 901 credit of USP.</p> |

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## Transaction and Fact Pattern (cont'd)

| Exhaustion of Remedies and Transfer Pricing   |   |
|---|---|
| Diagram of Transaction  | Facts   |
| <p>The diagram illustrates the transaction between a US Parent Corporation (USP) and a Controlled Foreign Corporation (CFC) or branch in Country X. A downward arrow from USP to CFC is labeled with '\$\$', representing payment. An upward arrow from CFC to USP is labeled 'Goods or other intercompany transfers/services'. Below the CFC box, it is noted that a foreign government reallocation of income from USP to CFC results in additional foreign tax being assessed.</p> | <p><b>Scenario #2</b><br/> US Parent Corporation (USP) acquires goods from Controlled Foreign Corporation (CFC) (or branch) in exchange for payment. Similarly, USP exchanges property, services, use of intellectual property, or financing services with the CFC for payment.</p> <p>In this example, the foreign government reallocates income from USP to CFC. Additional foreign tax in the foreign country will thus be assessed and the CFC's tax pool would be increased by the amount of such foreign tax. As a result, taxpayer would be eligible to obtain a higher deemed paid credit than if the foreign government transfer pricing adjustment was never made.</p> <p>If the transfer pricing reallocation was made by a treaty country, the USP should pursue Competent Authority relief under the tax treaty to alleviate double taxation, with the objective of eliminating double taxation and paying the correct amount of taxes in each jurisdiction.</p> |

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## Transaction and Fact Pattern (cont'd)

| Exhaustion of Remedies and Transfer Pricing   |  |
|---|--|
| Diagram of Transaction  | Facts  |
| <p>The diagram illustrates the flow of goods or services from the CFC (or branch) in Country X to the USP, and the flow of money from the USP to the CFC (or branch) in Country X. The CFC (or branch) in Country X is highlighted in blue.</p> <p>2. Foreign government reallocation from USP to CFC or branch/DE: additional foreign tax assessed</p> | <p>If taxpayer does not pursue relief under the Mutual Agreement mechanism of the applicable treaty, then per the exhaustion of remedies regulations the foreign taxes associated with such double taxation may not be creditable.</p> <p>The same principles apply if the foreign government reallocation is to a foreign branch or disregarded entity rather than a CFC. While the income reported on the U.S. return will not change, the double taxation issue in the foreign country continues to exist. If the foreign government reallocation is proper, this increase in foreign taxes paid with respect to income earned by the foreign branch or disregarded entity will increase the 901 credit available to the taxpayer.</p> <p>If the foreign government reallocation is improper, the successful pursuit of double taxation relief in the foreign country would reduce the section 901 credit available to the taxpayer. If the foreign government reallocation is improper and taxpayer does not pursue Competent Authority or other relief in the foreign country, then under the exhaustion of remedies regulations the foreign taxes associated with the improperly reallocated income amounts may not be creditable to the taxpayer.</p> |

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## Summary of Potential Issues

### Exhaustion of Remedies and Transfer Pricing

|                                |   |
|--------------------------------|---|
| <a href="#"><u>Issue 1</u></a> | How does a taxpayer prove exhaustion of local law remedies?   |
| <a href="#"><u>Issue 2</u></a> | How is the exhaustion of remedies analysis affected where a tax treaty applies?                             |
| <a href="#"><u>Issue 3</u></a> | Can there be an exhaustion of remedies in a treaty country if taxpayer does not invoke Competent Authority? |



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# All Issues, Step 1: Initial Factual Development

## Exhaustion of Remedies and Transfer Pricing

The United States taxes income on a worldwide basis. To prevent double taxation, U.S. taxpayers are allowed a credit for foreign income taxes paid under IRC § 901. The regulations prevent U.S. companies from obtaining credits for foreign taxes they are not legally compelled to pay. The US taxpayer must exhaust all effective and practical remedies when a transfer pricing adjustment is made by either taxing authority.

| Fact Element  | Resources  | 6103 Protected Resources |
|---|--|--------------------------|
| <p>Was there a transfer pricing adjustment?</p> <ul style="list-style-type: none"> <li>In performing the initial risk analysis, keep in mind that an exhaustion of remedies challenge may not result in a current U.S. tax adjustment (though 904(c) carryovers could be affected) if the taxpayer is in an excess credit position or cannot currently use foreign tax credits due to overall net operating losses.</li> <li>Review Form 5471, Sch H book to tax adjustments and request an explanation of adjustments that may identify differing treatment between the U.S. and foreign tax authorities.</li> <li>Examine foreign books and records, foreign tax returns, and other sections of the 5471 (e.g. schedules C, E, G and I) along with Form 1118 to identify high effective rates of foreign tax that may not have been properly computed or could have been abated.</li> </ul> | <ul style="list-style-type: none"> <li>Treas. Reg. § 1.901-2(e)(5)(i)</li> <li>Form 1118 Foreign Tax Credit – Corporations</li> <li>Taxpayer’s FTC Workpapers</li> <li>Form 5471 Information Return of U.S. Persons With Respect to Certain Foreign Corporations</li> <li>Mandatory Transfer Pricing Information Document Request (IDR): Transfer pricing study</li> <li>Foreign audit or foreign withholding tax documentation</li> </ul> |                          |

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## All Issues, Step 1: Initial Factual Development (cont'd)

### Exhaustion of Remedies and Transfer Pricing

The United States taxes income on a worldwide basis. To prevent double taxation, U.S. taxpayers are allowed a credit for foreign income taxes paid under IRC § 901. The regulations prevent U.S. companies from obtaining credits for foreign taxes they are not legally compelled to pay. The US taxpayer must exhaust all effective and practical remedies when a transfer pricing adjustment is made by either taxing authority.

| Fact Element  | Resources  | 6103 Protected Resources |
|---|--|--------------------------|
| <p>Was the transfer pricing adjustment imposed by a treaty country? A transfer pricing adjustment with a treaty country necessitates additional factual development and includes the Mutual Agreement Process (MAP) and Competent Authority procedures.</p> <p>Request from the taxpayer if there is the existence of foreign audits and if so, obtain the foreign audit reports or status of the foreign audit.</p> <p>Review U.S. initiated adjustments</p> | <ul style="list-style-type: none"> <li>▪ Applicable U.S. tax treaty</li> <li>▪ IRC § 905(c) foreign tax redetermination workpapers</li> <li>▪ IRS Pattern Letter 1853(P): advising taxpayer to extend foreign statutes</li> <li>▪ Mutual Agreement Process (MAP) letter or MAP report</li> <li>▪ Rev. Proc. 99-32: statements filed with the return</li> </ul> |                          |

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## Issue 1, Step 2: Review Potential Issues

### Exhaustion of Remedies and Transfer Pricing

The United States taxes income on a worldwide basis. To prevent double taxation, U.S. taxpayers are allowed a credit for foreign income taxes paid under IRC § 901. The regulations prevent U.S. companies from obtaining credits for foreign taxes they are not legally compelled to pay. The US taxpayer must exhaust all effective and practical remedies when a transfer pricing adjustment is made by either taxing authority.

| Explanation of Issue  | Resources   | 6103 Protected Resources |
|---|---|--------------------------|
| <p>Foreign taxes are not “paid” under the noncompulsory payment rules to the extent that payments to a foreign taxing authority exceed the amount reasonably owed under foreign law. One element of this requirement is that taxpayers must prove that they <u>exhausted all effective and practical remedies</u> to contest their liability for taxes.</p> <p>The amount paid is a compulsory tax (and creditable, assuming other relevant requirements in the IRC and Treasury regulations are met) if (1) it is determined in a manner that is consistent with a reasonable interpretation and application of the substantive and procedural provisions of foreign law (including treaties) to reduce, over time, the taxpayer’s reasonably expected liability under foreign law for tax; and (2) the taxpayer <u>exhausts all “effective and practical” remedies (including competent authority procedures provided under applicable tax treaties) to reduce, over time, its liability for tax.</u></p> | <ul style="list-style-type: none"> <li>Treas. Reg. § 1.901-2(e)(5)(i)</li> </ul>  |                          |
| <p>The process a taxpayer should undergo to exhaust its remedies is largely the same whether the issue is in a transfer pricing or non-transfer pricing context.</p>  | <ul style="list-style-type: none"> <li>IPS Unit: Exhaustion of Remedies FTM/9413.01-02_01(2013) subchapter 3.1.2.1, Step 1</li> </ul> |                          |


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## Issue 1, Step 3: Legal Analysis

### Exhaustion of Remedies and Transfer Pricing

#### Issue 1

How does a taxpayer prove exhaustion of local law remedies?

| Explanation of Approach   | Resources   | 6103 Protected Resources |
|---|---|--------------------------|
| <p>The determination of whether an amount of tax paid is a noncompulsory amount and thus, is not eligible for U.S. foreign tax credit is a factual determination to be made on a case-by-case basis.</p> <p>An additional consideration in the transfer pricing context is whether Country X has a history of raising unsupported transfer pricing adjustments and whether the courts of Country X have been available to contest such transfer pricing adjustments.</p> <p> <b>CONSULTATION:</b> APMA should be consulted on the particular characteristics of Country X and its transfer pricing adjustments.</p> | <p>IPS Unit: Exhaustion of Remedies<br/>FTM/9413.01-02_01(2013)</p> |                          |

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## Issue 2, Step 2: Review Potential Issues

| Exhaustion of Remedies and Transfer Pricing   |   |                          |
|---|---|--------------------------|
| Issue 2   |   |                          |
| How is the exhaustion of remedies analysis affected where a tax treaty applies?   |   |                          |
| Explanation of Issue  | Resources   | 6103 Protected Resources |
| <p>The process a taxpayer should undergo to exhaust its remedies in a treaty country is largely the same whether the issue is in a transfer pricing or non-transfer pricing context. Mutual Agreement Procedures (MAP) generally available and double taxation may be mitigated when transfer pricing situations (issues) arise. In the United States, transfer pricing issues with treaty countries are handled by APMA (Advanced Pricing and Mutual Agreement).</p>   | <ul style="list-style-type: none"> <li>Competent Authority discusses both transfer pricing and non-transfer pricing adjustments. In the U.S., Competent Authority personnel are located in the APMA section of LB&amp;I.</li> </ul> |                          |
| <p><b>T TREATY IMPLICATION.</b> For transfer pricing adjustments that involve a branch, there is an issue whether the Authorized OECD Approach would apply to determine the income of the branch under the relevant treaty. Also, it may not be clear whether a DE is eligible for treaty relief since, for U.S. tax purposes (IRC Section 7701(a)(10)) and related regulations, a DE is not a company and not a person for U.S. tax purposes. Some U.S. tax treaties would allow for MAP, but this will depend on the language of the relevant treaty.</p> |   |                          |

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## Issue 2, Step 3: Legal Analysis

### Exhaustion of Remedies and Transfer Pricing

#### Issue 2

How is the exhaustion of remedies analysis affected where a tax treaty applies?

| Explanation of Approach  | Resources  | 6103 Protected Resources |
|--|--|--------------------------|
| <p>The process a taxpayer should undergo to exhaust its remedies in a treaty country is largely the same whether the issue is in a transfer pricing or non-transfer pricing context. If the issue(s) involve transfer pricing government-to-government talks and the possibility of correlative relief are likely to occur. In the United States, transfer pricing issues with treaty countries are handled by APMA (Advanced Pricing and Mutual Agreement).</p> <p>Transfer pricing issues involving treaty partners will generally result in government-to-government talks and the possibility of correlative relief is likely to occur. In the United States, transfer pricing issues with treaty countries are handled by APMA .</p> <p>The determination of whether an amount of tax paid is a noncompulsory amount and thus, is not eligible for U.S. foreign tax credit is a factual determination to be made on a case-by-case basis.</p> | <ul style="list-style-type: none"> <li>▪ Competent Authority handles both transfer pricing and non-transfer pricing adjustments</li> <li>▪ Treas. Reg. § 1.901-2(e)(5)(ii), Example 2 – 4</li> <li>▪ IPS Unit: Exhaustion of Remedies FTM/9413.01-02_01(2013)</li> </ul> |                          |


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## Issue 3, Step 2: Review Potential Issues

| Exhaustion of Remedies and Transfer Pricing  |  |                          |
|--|--|--------------------------|
| Issue 3  |  |                          |
| Can there be an exhaustion of remedies in a treaty country if taxpayer does not invoke Competent Authority?  |  |                          |
| Explanation of Issue   | Resources  | 6103 Protected Resources |
| If a taxpayer does not invoke Competent Authority, it is unlikely that the taxpayer would be considered to have exhausted its remedies and thus a foreign tax credit would be denied for that portion of foreign taxes paid. | <ul style="list-style-type: none"> <li>IPS Unit: Exhaustion of Remedies FTM/9413.01-02_01(2013)</li> </ul> |                          |

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## Issue 3, Step 3: Legal Analysis

| Exhaustion of Remedies and Transfer Pricing  |  |                          |
|--|--|--------------------------|
| Issue 3  |  |                          |
| Can there be an exhaustion of remedies in a treaty country if taxpayer does not invoke Competent Authority?  |  |                          |
| Fact Element   | Resources  | 6103 Protected Resources |
| <p>The process a taxpayer should undergo to exhaust its remedies is largely the same whether the issue is in a transfer pricing or non-transfer pricing context. If a taxpayer does not invoke Competent Authority, it is very unlikely that the taxpayer would be considered to have exhausted its remedies and thus a foreign tax credit would be denied for that portion of foreign taxes paid.</p> <p>The determination of whether an amount of tax paid is a noncompulsory amount and thus, is not eligible for U.S. foreign tax credit is a factual determination to be made on a case-by-case basis.</p> <p> <b>CONSULTATION:</b> APMA should be consulted on the particular characteristics of Country X and its transfer pricing adjustments.</p> | <ul style="list-style-type: none"> <li>▪ IPS Unit: Exhaustion of Remedies FTM/9413.01-02_01(2013)</li> </ul> |                          |



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## Training and Additional Resources

| Chapter 3.1.2 Compulsory Payments/Exhaustion of Remedies |  |            |
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| Type of Resource   | Description(s) and/or Instructions for Accessing         | References |
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## Glossary of Terms and Acronyms

| Acronym    | Definition                            |
|------------|---------------------------------------|
| APMA       | Advanced Pricing and Mutual Agreement |
| CFC        | Controlled Foreign Corporation        |
| DE         | Disregarded Entity                    |
| ETR        | Effective Tax Rate                    |
| FDE        | Foreign Disregarded Entity            |
| FTC        | Foreign Tax Credit                    |
| IDR        | Information Document Request          |
| IE         | International Examiner                |
| MAP        | Mutual Agreement Process              |
| Rev. Proc. | Revenue Procedure                     |
| USP        | U.S. Parent corporation               |

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| Treaties IPN                         | 9450              |            |
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