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2021: US transfer pricing year in review

Mark Martin and Thomas Bettge of KPMG in the US recap and reflect on US transfer pricing developments from 2021.

2021 was certainly not a normal year, but from a US transfer pricing (TP) perspective it may have seemed comparatively calm when compared to prior years.

The late 2017 passage of the Tax Cuts and Jobs Act dramatically changed the US international tax system and ushered in a flurry of activity that set the tone for much of 2018, while 2019 and 2020 each saw the IRS win a large TP victory in *Altera Corp. v. Commissioner* and *The Coca-Cola Co. v. Commissioner*, respectively. Of course, with 2020 also came the COVID-19 pandemic and the need to determine the TP effects of disruptions and stimulus efforts.

That is not to say that 2021 was an uneventful year. In addition to a number of developments that are significant in their own right, much work was done to pave the way for what may be watershed developments in 2022. This is true both domestically, as the Biden administration continues to push for tax reform, and on the global stage, as countries work to finalise and implement pillars one and two. None of those projects would directly alter the existing US TP rules, but each would have a significant impact on a system in which TP plays an integral part.

The absence of a landmark TP opinion does not mean 2021 has been a quiet year in the courts, either. The US Tax Court released important international tax decisions in *Adams Challenge (UK) Ltd v. Commissioner* (holding that treaty language permitting deductions for permanent establishment expenses was subject to a domestic return filing requirement) and *Toulouse v. Commissioner* (holding that treaty language regarding relief from double taxation did not provide a basis for claiming a foreign tax credit where not allowed by domestic law). We discussed *Adams Challenge* and *Toulouse* in detail in two previous articles. At the appellate level, the Sixth Circuit upheld the IRS's Tax Court victory on subpart F issues in *Whirlpool Financial Corp. v. Commissioner*.

In the TP space, *Medtronic, Inc. v.*

Commissioner was retried before the Tax Court in June following the Eighth Circuit's 2018 remand, though the Tax Court has yet to issue a new opinion, while the Tax Court trial in *Facebook, Inc. v. Commissioner* is set to conclude in early 2022. Also pending before the Tax Court are *3M Co. v. Commissioner* (challenging the validity of the Treas. Reg. § 1.482-1(h)(2) blocked income rules) and *Coca-Cola*, which is awaiting the entry of the decision, as well as a number of other significant docketed cases. We also addressed the *Medtronic* retrial and the issues underlying the *3M* case in prior articles.

2021 did not yield any US regulatory developments related to TP, but the Treasury Department and IRS's 2021–22 priority guidance plan indicates a number of projects are in store for the first half of 2022, which we explored in a prior article.

Of course, that timeline could slip, particularly if a significant tax reform bill is passed. The IRS did release guidance on how taxpayers with cost-sharing arrangements that did not share stock-based compensation costs should come into compliance with Treas. Reg. § 1.482-7 following the Ninth Circuit decision in *Altera*. We detailed these issues in an earlier article, but perhaps the most significant message is that the IRS remains invested in ensuring compliance around stock-based compensation, as also evidenced by its September 2020 release of a practice unit for examiners facing these issues.

Important strides forward were made in dispute resolution during 2021. The International Compliance Assurance Programme (ICAP) became a permanent programme for multilateral TP and permanent establishment risk assessment, following two rounds of pilots, as we discussed previously.

Even more dramatically, over 130 members of the OECD/G20 Inclusive Framework on BEPS agreed in an October 8 statement that Amount A of pillar one would be subject to mandatory and binding dispute prevention and resolution, and that in-scope taxpayers would also benefit from mandatory and binding processes for disputes regarding TP and permanent establishment issues. As previously noted, this is a monumental commitment, and care must be taken to ensure that these systems are appropriately designed.

While largely absent during 2021, Amount B of pillar one remains on the horizon for 2022. It is currently unclear what form any final agreement on Amount B would take, but progress on that front could also reduce TP disputes if a solution is well designed. What is clear is that 2022 will be an exciting year on many fronts.

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