Amended Returns – Let's Try Again

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Introduction: Purposes of This Session

- Explore how TCJA has impacted federal and state amended return process, in terms of changes to technical rules, timing implications, and practical constraints

- Focus on:
  - Accounting Methods and Elections
  - Resource Constraints
  - Foreign Audit Implications
  - State Tax Implications

Tax Cuts and Jobs Act

- GILTI
  - Proposed vs final regs – already filed
  - Aggregate vs. entity approach
  - Level of ownership
  - Form 8082
- 199A
  - RPE that has many lower tier RPE's
    - Inconsistent reporting - inadvertent aggregation; SSTB labeling
  - Overall loss vs income

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Tax Cuts and Jobs Act

- 163(j) - Business interest expense limitation
  - Definition of "business"
  - Reporting for carryforward purposes – from flow through entities
  - Form 8990 – lack of integrity with the rest of the forms
  - After form 8990 – then where?
- 461(l) – Business loss limitation
  - "Business" vs passive
  - NOL conversion
  - Any at risk?

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Tax Cuts and Jobs Act

- Net Operating Losses
  - 962 "elections"
  - Shareholder Basis Schedules
    - Obtaining requisite information
- Foreign forms – 5472
  - Much more complex due to TCJA
  - Lack of information - Delinquent vs material misstatement

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Busy Season: The Agony & the Ecstasy

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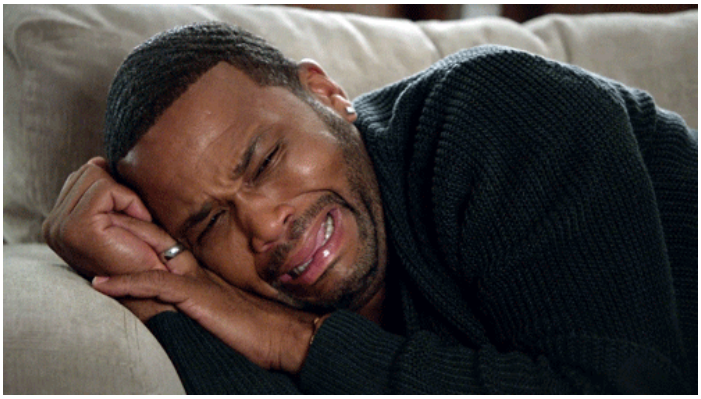

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Accounting Methods and Elections

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Considerations involving TCJA

- Amending the tax return reflects the item in the original year
- Change in method of accounting treats the item as a prospective change in the year in which the accounting method change is made via a Sec. 481(a) adjustment, i.e., you don't go back to the year of the item
- Amended return versus change in method of accounting can be critical where different tax rates or regimes are in effect
  - Corporate tax rate
  - Sec. 965 deemed repatriation tax versus GILTI income
  - NOL carryback potential versus NOL carryforward
  - 163(j) limitations

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Change in Accounting Method

- In general, it is NOT possible to change an accounting method on an amended tax return.
- What is a change in accounting method?
  - A change in overall plan of accounting for gross income or deductions (See Treas. Reg. § 1.446-1(e)(2)(ii)(a))
  - A material item used in such overall plan is treated differently from the way it was treated in a prior period
    - "Item" - not defined in the statute or regulations
    - "Material" - defined as any item that involves the proper time for inclusion of income or the taking of a deduction.
  - In most instances, a method of accounting is not established for an item without consistent treatment.
    - Rev. Rul. 90-38 provides the 1-year/2-year rule for adoption of an accounting method
- A taxpayer is required to secure the consent of the Commissioner before changing a method of accounting (Sec. 446(e))
  - File Form 3115 under the automatic or non-automatic procedure.
  - Change will be made prospectively with a Sec. 481(a) cumulative catch-up adjustment.
- IRS initiated changes – See Rev. Proc. 2002-18

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Change in Accounting Method

- What is NOT a change in accounting method?
  - Some corrections and adjustments are not considered changes in an accounting method (Treas. Reg. § 1.446-1(e)(2)(ii)(b))
  - Correction of mathematical or posting errors
  - Changes in underlying facts
  - Adjustments to income or expense items not involving the proper time for inclusion of the item of income or the taking of a deduction
  - Changes in character of income
  - Changes to reserve for bad debts

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Making Elections

- Many elections must be made on an originally filed tax return
- Some elections may be available on an amended return
- Requesting 9100 Relief for Late Elections (Treas. Reg. § 301.9100-1 through 3))
  - 6-month automatic extension on an amended tax return
    - Oriented to taxpayers who file early and fail to file an extension the original tax return due date
    - Taxpayers with an extension could file a superceding return before the extended due date which will be considered an original return.
  - 12-month automatic extension for certain regulatory elections listed under Treas. Reg. § 301.9100-2(a)
  - Private letter ruling request for regulatory elections, user fee $10,900
    - Taxpayer acted reasonably and in good faith
    - Granting relief will not prejudice the government's interests
    - Generally only available while the statute of limitations is open

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Common Situations involving TCJA

- Bonus depreciation under Sec. 168(k)
  - Rev. Proc. 2019-33 allows revocation or making of elections under Sec. 168(k) to opt out of bonus by class of property or to claim 50% bonus for property placed in service from Sept. 28-Dec. 31, 2017
    - Amended tax return could be filed BEFORE the return is filed for the next tax year after the election year, OR
    - Form 3115 could be filed for the first, second, or third year
  - Doesn't apply for changes arising from new final and proposed regulations that are able to be relied upon retroactively
    - If reliance upon proposed regulations was a proper method for assets placed in service Sept. 28-Dec. 31, 2017, then can an amended return be filed for 2017 to take additional depreciation.
    - IRS officials have indicated they are considering offering additional relief
      - Component election for 2017 and 2018
      - Floor plan financing – election out
      - Relied on proposed regulations to determine that 100% bonus didn't apply (e.g., binding contract date, self-constructed property)

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Resource Constraints

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Impact of TCJA on IRS Resources

- Any particular drivers of increased burden over past 22 months?
- Any particular concerns/expected drivers of incremental burden in next few years?
- Outlook for additional resources?
- Practical Impacts:
  - More limited review of amended returns?
  - Shifting of resources from other tasks?
  - Delayed processing time?

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Foreign Audit Implications

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Overview of prior § 905(c) Regime

- Section 905(c): "The Secretary may prescribe adjustments to the pools of post-1986 foreign income taxes and the pools of post-1986 undistributed earnings under sections 902 and 960 in lieu of the redetermination under the preceding sentence."
- 1.905-3T general rule: Notification and redetermination required for Section 901 taxes; for Section 902 taxes, adjust tax pools and E&P pools upward/downward upon "foreign tax redetermination"
- Exceptions:
  - Hyperinflationary currencies
  - Deemed paid foreign tax adjustment of 10% or more
  - Distributions of PTI which reduce foreign tax
- Frequency of redetermination vs pooling?
- Notification rules:
  - "The taxpayer shall notify the Secretary, who shall redetermine the amount of the tax for the year or years affected."
  - 1.905-4T (now expired) builds out complex series of rules; generally, taxpayer required to notify IRS of the foreign tax redetermination by filing an amended return, Form 1118 (Foreign Tax Credit — Corporations) or Form 1116 (Foreign Tax Credit), and an accompanying statement for the taxable year with respect to which a redetermination of United States tax liability is required

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Overview of Post-TCJA Regime

- No pooling regime; all adjustments "relate back" to year to which foreign tax relates
- Practical implications:
  - Amended return for each year for which an audit settles; may result in numerous amended returns for a given year
  - State tax returns as well as federal
- Uptick in amended returns yet?
- Timing of associated E&P adjustment?
  - "Contested tax doctrine"?
  - Pending guidance?
- From a practical perspective, where may lines be drawn for de minimis adjustments? Offset during audit process vs formal amended return?

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Timing Constraints/Questions

- Section 6511(d)(3): "If the claim for credit or refund relates to an overpayment attributable to any taxes paid or accrued to any foreign country or to any possession of the United States for which credit is allowed against the tax imposed by subtitle A in accordance with the provisions of section 901 or the provisions of any treaty to which the United States is a party, in lieu of the 3-year period of limitation prescribed in subsection (a), the period shall be 10 years from the date prescribed by law for filing the return for the year in which such taxes were actually paid or accrued."
- "Actually paid or accrued" = per *Albemarle,* at least for Section 901 credits, year in which tax liability originated, not the year in which audit is settled/payment is made
- Protective refund claims?
- Strategic foreign tax timing?
- What is the specific burden to notify, with no effective regulations?
  - 1.905-4T approach? More limited approach?
  - Affirmative duty to refile?

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Potential Pitfalls/Unexpected Results

- For pre-TCJA years:
  - For pools that were never repatriated (or intended to be repatriated), impact is generally fairly straightforward - - reduction to Section 965 inclusion and increase in (haircut) Section 965 FTCs
  - Note: Risk of pushing high-tax/low E&P pool into a deficit, eliminating ability to (ever) credit accompanying FTCs
  - For pools that were repatriated (through cash dividends, Section 304 transactions or other means) in pre-TCJA years, implications if pool is pushed into a deficit, or distribution is converted in whole or part into a capital transaction? Does impact "reverse" in a later year, or are credits lost if still in deficit at 965 inclusion?
- For post-TCJA years:
  - Pushing high-tax "tested income" entity into a tested loss?
  - Loss of QBAI?
- Places a premium on timing of foreign adjustments (particularly for multi-year audits)
  - "Compulsory tax payment" concerns?

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State Tax Implications

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State and Local Taxes

- TCJA and State conformity
- CA – Business loss limitation – 2019 partial conformity
- Wayfair
- 2% deductions – which states?

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