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IRS Proposes Regulations That Would Liberally Apply Exemption from FIRPTA to Qualified Foreign Pension Funds

Auteurs : Peter Glicklich, Gregg M. Benson et Heath Martin

Traduction en cours.

The IRS recently released long-awaited proposed regulations to implement an exemption from U.S. federal taxes on the disposition of interests in U.S. real estate by certain foreign pension funds known as "qualified foreign pension funds" (QFPFs).

Background

Under the *Foreign Investment in Real Property Tax Act of 1981* (FIRPTA), the United States imposes income tax on a foreign person that disposes of an interest in real estate located in the United States (a USRPI). A transferee is obligated to withhold 15% of the purchase price.

In 2015, Congress enacted several exemptions from FIRPTA, including an exemption for QFPFs and entities wholly owned by QFPFs (controlled entities). Generally, a QFPF is a trust, corporation or other organization or arrangement that (i) is created or organized under foreign law, (ii) is established to provide retirement or pension benefits to employees, (iii) does not have a participant with a right to more than 5% of its assets or income, (iv) is subject to government regulation and annual information reporting, and (v) is eligible for certain tax benefits in the country in which it was created or organized. Since the QFPF exemption was enacted, its scope has been a matter of some uncertainty.

The proposed regulations generally take taxpayer-friendly positions that would apply the QFPF exemption broadly. The proposed regulations rely on the explanation of the 2015 legislation published by Congress's Joint Committee on Taxation to support these positions.

The Proposed Regulations

Highlights of the new provisions include the following:

- An expansive reading of the definition of controlled entities would allow the exemption when a controlled entity is owned indirectly (as well as directly) by a QFPF. The exemption would also apply when the controlled entity is owned by multiple QFPFs.
- The QFPF exemption is generally not available to an entity that was not a QFPF, a part of a QFPF or a controlled entity at any time during the 10 years preceding a disposition of a USRPI held by that entity (10-Year Rule). This rule prevents avoidance of FIRPTA tax on gain that accrues before the entity qualified for the exemption.
- A pension plan would be able to qualify as a QFPF if it was created or organized under the law of a political subdivision of a country (and not just under the law of the country itself). However, the requirement that a QFPF be eligible for local tax benefits would not be met when tax benefits are available only with respect to taxes imposed by the political subdivision.
- A multi-employer pension plan or a government-sponsored pension plan would be able to qualify as a QFPF, as well as pension plans organized by a trade union, professional association or similar group.

- A pension plan would qualify even if it provides “ancillary” benefits, as long as the present value of such benefits does not exceed 15% of the present value of all the benefits provided by the plan. Ancillary benefits include benefits for long-term care, death, disability, healthcare and unemployment.
- A QFPF’s annual information reporting requirement would be satisfied whenever the pension plan is administered by the government (other than in its capacity as an employer).
- The requirement that a QFPF be eligible for tax benefits in its country of creation or organization would be met if the relevant country has no income tax. A QFPF would not fail this requirement as long as at least 85% of the contributions to the plan are tax-deductible, excluded from gross income or taxed at a reduced rate, or when at least 85% of the QFPF’s investment income is tax-deferred or taxed at a reduced rate.
- Form W-8EXP is expected to be revised to allow a QFPF to certify that it is not subject to U.S. withholding taxes under FIRPTA. In the meantime, a QFPF may still certify its status on a “certificate of non-foreign status” as described in the FIRPTA regulations.
- The QFPF exemption does not apply to withholding on allocations of income effectively connected to a U.S. trade or business from a partnership, other than from the disposition of a USRPI.

Effective Date

The proposed regulations would generally be effective for dispositions of USRPIs occurring after they are finalized. The 10-Year Rule, however, is effective immediately. In addition, pension plans may rely on the proposed regulations with respect to any disposition of a USRPI occurring on or after December 18, 2015, as long as the plan “consistently and accurately” complies with the proposed regulations.

Conclusion

The proposed regulations are notable for their liberal construction of the QFPF exemption. We expect that there will be some tightening of the 10-Year Rule and the requirements for controlled entities in the final version of the regulations. However, even with some tightening, these provisions represent a reasonable and pro-taxpayer approach that should encourage foreign investment in U.S. real estate assets.

Personnes-ressources : Peter Glicklich, R. Ian Crosbie et Michael N. Kandev