Table of Contents

About the Authors ............................................................... vii
Table of Chapters .................................................................. ix
Preface and Acknowledgments .................................................. xxi

PART I: International Tax Audits and Appeals

Chapter 1 Early Preparation and Documentation for Audit and Controversy

§ 1:1 Introduction ........................................................................ 1
§ 1:2 Sensitizing the Business .................................................... 2
§ 1:3 Documenting the Business Purpose Narrative ................... 4
§ 1:4 Developing Documentation Supporting the Tax Treatment of the Transaction ........................................... 6
§ 1:5 Avoiding the Creation of Contradictory Documents ......... 9
§ 1:6 Transactions Likely to Be Scrutinized ............................... 9
§ 1:7 Case Studies ................................................................. 10
§ 1:7.1 International Hybrid Instrument Transactions ............. 10
§ 1:7.2 Transfer Pricing Issues ................................................ 13
§ 1:8 Conclusion .................................................................... 16

Chapter 2 Pre-Audit Planning, Including Document Retention and Spoliation

§ 2:1 Introduction .................................................................... 20
§ 2:2 The Duty to Retain Documents ....................................... 20
§ 2:3 Establishing an Effective Document Retention Policy ...... 23
§ 2:3.1 What Documents Should Be Retained ......................... 24
§ 2:3.2 Document Retention Periods ....................................... 27
§ 2:3.3 Special Consideration for Email and Other Electronically Stored Information ........................................ 28
§ 2:3.4 Document Retention Policy Training .......................... 29
Table of Contents

§ 3:16 Special Examination Processes and Procedures.............. 102
§ 3:17 Mutual Agreement Procedure and Competent Authority ......................................................... 105
§ 3:18 Resolution of Issues During the Examination.............. 106

Chapter 4 Special Document Issues in International Examinations

§ 4:1 Introduction ................................................................... 111
§ 4:2 Information Made Available to the IRS ......................... 112
§ 4:3 Information Document Requests ................................. 113
§ 4:4 Examination of Documentation or Facilities at Foreign Sites .................................................. 114
§ 4:5 Formal Document Requests for Foreign-Based Documentation ................................................. 114
§ 4:6 Administrative Summons ............................................... 126
§ 4:7 Judicial Enforcement of Summons ......................... 128
§ 4:8 Judicial Review of Section 6038A Summons ................. 139
§ 4:9 Privilege Defenses to Production .................................... 140

Chapter 5 IRS Appeals and Special Appeals Procedures

§ 5:1 Introduction ................................................................... 145
§ 5:2 Resolution of Issues in Fast Track and Early Referral .... 146
  § 5:2.1 Fast Track Settlement .............................................. 146
  § 5:2.2 Early Referral ........................................................... 147
§ 5:3 Issuance of a Revenue Agent’s Report ......................... 149
§ 5:4 Potential Responses to the Revenue Agent’s Report ...... 150
§ 5:5 Deciding Whether to File a Protest ....................... 152
§ 5:6 Preparation of the Protest ............................................. 153
§ 5:7 Exam’s Rebuttal to the Protest and the Ex Parte Conference .................................................................. 154
§ 5:8 Extensions of the Assessment Period ......................... 155
§ 5:9 Conduct of the Appeals Conference .......................................................... 156
§ 5:10 Appeals Settlement Authority .................................. 157
§ 5:11 Appeals Settlement Considerations and Procedures ...... 158
§ 5:12 Appeals Alternative Dispute Resolution Programs ...... 160
§ 5:13 Appeals and Competent Authority Cases ..................... 162
§ 5:14 Concluding the Appeals Process ......................... 164
§ 5:15 Taking Unagreed Issues into Litigation .................... 165
PART II: Government-to-Government Cooperation

Chapter 6 The Role of the Competent Authority: Mutual Agreement Procedures

§ 6:1 Introduction .............................................................. 168
§ 6:2 Legal Basis and Organization of U.S. Competent Authority Office.............................................................. 171
§ 6:3 Overview of the Competent Authority Process .......... 172
§ 6:4 The Taxpayer’s Interest and Involvement in Competent Authority Negotiations.............................................. 174
§ 6:5 Common Kinds of Double Taxation Issues................. 175
  § 6:5.1 Transfer Pricing Issues............................................. 175
  § 6:5.2 Permanent Establishment Issues........................... 176
  § 6:5.3 Residency Issues .................................................... 177
  § 6:5.4 Limitation on Benefits Issues............................... 178
  § 6:5.5 Withholding Tax Issues ......................................... 181
  § 6:5.6 Thin Capitalization/Debt Equity Issues ............... 182
  § 6:5.7 Pension Plan Qualification...................................... 182
§ 6:6 Do Taxpayers Have a “Right” to Competent Authority Consideration? ..................................................... 183
§ 6:7 Exhaustion of Foreign Administrative Remedies: Seeking Competent Authority Relief Can Be a Requirement for Claiming Foreign Tax Credits............... 186
§ 6:8 Procedures for Requesting Competent Authority Assistance........................................................................... 187
  § 6:8.1 Importance of Reference to Revenue Procedure and Procedural Rules of Applicable Treaty............. 187
  § 6:8.2 Deadlines for Seeking Competent Authority Assistance........................................................................... 187
  § 6:8.3 Need for Taxpayer to Keep U.S. and Foreign Statutes of Limitation Open Pending Competent Authority Negotiations................................. 193
  § 6:8.4 Drafting and Filing the Competent Authority Request ................................................................................. 194
 § 6:8.5 User Fees .................................................................. 196
  § 6:8.6 Pre-Filing Conferences............................................. 196
§ 6:9 Coordination of Competent Authority Negotiations with Other Administrative and Judicial Proceedings...... 198
Table of Contents

§ 6:9.1 Suspension of U.S. Administrative Action .............. 198
§ 6:9.2 Coordination of Competent Authority and Appeals Procedures .................................................. 199
§ 6:9.3 Competent Authority and Litigation ................. 200
§ 6:10 Practical Observations on the Competent Authority Negotiation Process ........................................................ 201
§ 6:10.1 Taxpayer’s Role in Negotiation ...................... 201
§ 6:10.2 “Tacking On” Additional Years to Ongoing Competent Authority Negotiation ...................................... 202
§ 6:10.3 Closing Agreements and Correlative Adjustments ... 202
§ 6:10.4 Small Case Procedure ....................................... 204
§ 6:11 Effectiveness of the Competent Authority Process ...... 204
§ 6:12 Tax Treaty Arbitration .............................................. 205

Chapter 7 Advance Pricing Agreements

§ 7:1 Introduction ................................................................... 209
§ 7:2 APA Program Organization Within IRS ......................... 212
§ 7:3 The Process of Obtaining an APA .............................. 213
  § 7:3.1 When to Seek an APA ............................................. 213
  § 7:3.2 Timing of APA Requests ......................................... 216
  § 7:3.3 Filing a Request ..................................................... 217
  § 7:3.4 Fees ........................................................................ 218
  § 7:3.5 Pre-Filing Conference ............................................ 218
  § 7:3.6 The APA Negotiation Process ................................. 220
  § 7:3.7 Critical Assumptions ............................................... 223
  § 7:3.8 IRS Internal Review of APAs ................................. 224
  § 7:3.9 IRS Checks on Compliance with APAs ............... 224
§ 7:4 Cancellation and Revocation of APAs ......................... 225
§ 7:5 APA Renewals ................................................................. 226
§ 7:6 APAs Involving Branches .............................................. 227
§ 7:7 Financial Products APAs .............................................. 228
§ 7:8 Customs Considerations and APAs ............................. 230
  § 7:8.1 Transfer Pricing Methodologies Used in APAs ... 231
  § 7:8.2 APAs and State and Local Taxation ............... 232
  § 7:8.3 APAs in the Context of Tax Policy; Future of APAs .............................................. 233
  § 7:8.4 Public Disclosure of APAs ....................................... 235
Chapter 8  Exchange of Information

§ 8:1  Introduction ........................................................................................................ 238
§ 8:2  Tax Treaty Information Exchange .................................................................... 240
  § 8:2.1  Standard for Information Exchange ......................................................... 241
    [A]  Overview ....................................................................................................... 241
    [B]  Requests Lacking a Taxpayer Name ............................................................ 244
  § 8:2.2  Limitations on Obligation to Provide Information .................................... 249
  § 8:2.3  Restrictions on Use of Information by Contracting State ....................... 251
  § 8:2.4  Other Common Provisions ........................................................................ 251
    [A]  Domestic Tax Interest .................................................................................. 251
    [B]  Form of Information Provided ..................................................................... 252
    [C]  Mode of Application .................................................................................... 253
§ 8:3  Tax Information Exchange Agreements .......................................................... 253
§ 8:4  Mutual Legal Assistance Treaties .................................................................... 255
§ 8:5  Confidentiality of Information Exchanged .................................................... 256
§ 8:6  Types of Information Exchange ....................................................................... 258
  § 8:6.1  Overview .................................................................................................... 258
  § 8:6.2  Specific Requests ....................................................................................... 259
    [A]  Overview ....................................................................................................... 259
    [B]  Foreign-Initiated Requests .......................................................................... 260
      [B][1]  Process .................................................................................................... 260
      [B][2]  Summons to Obtain Information to Be Exchanged .................................. 262
      [B][3]  Considerations for Taxpayers Who Are the Subject of a Foreign-Initiated Information Exchange Request .................................................. 265
    [C]  U.S.-Initiated Requests ................................................................................ 266
      [C][1]  Process .................................................................................................... 266
      [C][2]  Considerations for Taxpayers Who Are the Subject of a U.S.-Initiated Information Exchange Request .................................................... 268
      [C][3]  IRS Use of Summons in Lieu of Information Exchange ......................... 268
  § 8:6.3  Routine/Automatic Exchange .................................................................... 270
    [A]  In General ..................................................................................................... 270
    [B]  FATCA and Other Developments in Automatic Information Exchange ........ 271
  § 8:6.4  Spontaneous Exchange ............................................................................. 272
  § 8:6.5  Industry-Wide Exchanges of Information ................................................. 274
PART III: Litigating International Tax Cases

Chapter 9  Post-Appeals Litigation Options and Choice of Forum

§ 9:1  Introduction ................................................................. 285
§ 9:2  Exiting Appeals While Positioning a Case for Litigation ......................................................... 286
  § 9:2.1  Positioning a Case for Tax Court Litigation .......... 286
  § 9:2.2  Positioning a Case for Refund Litigation .......... 287
§ 9:3  The Process of Initiating the Litigation ................. 288
  § 9:3.1  Steps to Initiate Tax Court Litigation .......... 288
  § 9:3.2  Steps to Initiate Refund Litigation .......... 289
§ 9:4  Choice of Forum Considerations .............................. 292
  § 9:4.1  Need to Pay the Asserted Tax Deficiency .......... 292
  § 9:4.2  Applicable Precedent ........................................... 293
  § 9:4.3  The Government’s Ability to Raise New Issues in Litigation ........................................... 293
  § 9:4.4  The Taxpayer’s Ability to Raise New Issues in Litigation ........................................... 296
  § 9:4.5  Allowable Discovery ........................................... 299
  § 9:4.6  The Tax Expertise and Experience of the Judge ...... 300
  § 9:4.7  The Attorneys Representing the Government ...... 300
  § 9:4.8  The Location of the Trial ........................................ 302
  § 9:4.9  The Possibility of a Jury Trial .............................. 302
§ 9:5  Supreme Court Review ................................................. 302
Table of Contents

§ 11:3.1 The Decision to Appeal.................................................. 355
§ 11:3.2 Appellate Venue......................................................... 358
§ 11:3.3 Notice of Appeal.......................................................... 358
§ 11:3.4 Appeal Bond .............................................................. 359
§ 11:3.5 Appellate Procedures................................................. 359
§ 11:3.6 Final Decision or Judgment........................................ 361

Index ........................................................................................ 363