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Bureau of Economic Analysis reporting – Form BE-10

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- › **Introduction**
- › **Gathering information on US direct investments abroad**
- › **Trust is an intermediary**
- › **US limited liability companies**
- › **Comment**

Introduction

The Bureau of Economic Analysis (BEA), an agency of the US Department of Commerce, conducts a survey every five years of US investments abroad. Its stated purpose is to "secure current economic data on the operations of US parent companies and their foreign affiliates"; but the survey's reach is much broader than that. Before the current survey, the BEA selected and contacted US business enterprises and only those who were contacted were required to complete the survey, Form BE-10 – Benchmark Survey of US Direct Investment Abroad. For the current 2014 survey, the BEA is requiring US persons that own "foreign affiliates" to complete the survey without being contacted first. The filing obligations for US persons, including US individuals who are discretionary beneficiaries of trusts, are very different from the US tax reporting requirements.

Gathering information on US direct investments abroad

An 'affiliate' means a business enterprise located in one country which is directly or indirectly owned or controlled by a person of another country. A 'US direct investment abroad' means the ownership or control, directly or

indirectly, by one US person of 10% or more of the voting securities of an incorporated foreign business enterprise or an equivalent interest in an unincorporated foreign business enterprise. A 'business enterprise' means any organisation, association, branch or venture which exists for profit-making purposes or otherwise to secure economic advantage, and any ownership of any real estate. If the foreign operation or activity is incorporated outside the United States, the BEA considers it to be a foreign affiliate. This includes a holding company. It is also irrelevant to the BEA whether the non-US corporation has made a so-called 'check the box' election to be disregarded for US tax purposes. US ownership of foreign real estate held for profit-making purposes is also considered a reportable foreign business enterprise, while residential real estate held exclusively for personal use is not.

Trust is an intermediary

A trust, whether classified as a US domestic trust or a foreign trust for US tax purposes, is a 'person' for the purposes of BEA reporting, but is not a 'business enterprise'. The trust is considered to be the same as an intermediary and is to report in the manner of an intermediary. The trustee must determine whether it has a US direct investment abroad and who is responsible for reporting the foreign business enterprise on Form BE-10.

Creator of revocable trust treated as owner of trust's investments

If the trust has a reversionary interest, the creator of the trust is deemed to be the owner of the investments of the trust for the purposes of determining the existence and reporting of direct investments. Although not defined in the instructions, under general trust law a reversionary interest exists if the settlor will retain complete ownership and possessory rights to the trust property after a condition subsequent occurs. This may be the death of a life interest beneficiary or the settlor's exercise of a right to revoke, arguably with or without the consent of another person.

If the creator is not a US person, there can be no US direct investment abroad. If the creator is a US person, then if the trust is subject to the jurisdiction of a US state, the trust as a US intermediary is responsible for reporting the required information for and in the name of the US creator, or instructing the creator to submit Form BE-10.

If the trust is offshore, then the US creator is considered to own the foreign business enterprise directly and all accounts or transactions of the US person with the intermediary are considered to be with the foreign affiliate. A non-US trust company that acts as trustee for a trust settled by a US person files a Form 3520-A report with the Internal Revenue Service (IRS) and a Foreign Account Tax Compliance Act (FATCA) report for US tax purposes (for further details please see the Overview (May 2014)). That trustee should also discuss with and assist the US settlor in determining whether a BE-10 filing for 2014 is necessary for BEA purposes.

US beneficiaries of irrevocable trusts treated as owners

Where the trust does not have a reversionary interest, the beneficiaries of the trust are considered to be the owners of the trust's investments for the purposes of determining the existence of direct investment. When asked how ownership would be allocated to a class of discretionary beneficiaries, the BEA responded "*pro rata*". It also said that members of the same family are deemed to be an associated group. According to the Form BE-10 instructions, an associated group is deemed to be one "US Reporter", and a US reporter must sum all direct and indirect lines of ownership interest in the foreign business enterprise to determine whether it holds 10% or more.

Thus, US discretionary beneficiaries of a trust that owns stock in a foreign business enterprise may have a Form BE-10 reporting obligation. For example, the discretionary class of beneficiaries may be the descendants of the settlor. Suppose that the settlor has three children, each of whom in turn has three children, so that the trust currently has 12 possible discretionary beneficiaries. The trust owns 100% of the stock of a foreign business enterprise. Each beneficiary is allocated an 8.33% ownership interest in the foreign business enterprise. One of the settlor's sons and his own three children are US citizens. Based on the Form BE-10 instructions and BEA responses to inquiries, it appears that these four US beneficiaries constitute one US reporter and as an associated group own 33.33% of the foreign business enterprise. Form BE-10A asks for the "name and address of US Reporter." Although not addressed in the instructions, it would be accurate to say "US beneficiaries of XYZ Trust" and include an address care of the trustee. Then on page two, where "form of organization of US Reporter" is asked, tick the box "other" and specify "associated group".

Because the BEA considers the beneficiaries of an irrevocable trust to be the owners for the purposes of determining the existence of direct investments, this creates the possibility that an irrevocable offshore trust could have US discretionary beneficiaries which have never received a distribution and know nothing about the individual investments of the trust, but are considered by the BEA to own 10% or more of a foreign business enterprise through the foreign intermediary trust. The offshore trust is a foreign intermediary and has no responsibility to report to the BEA. Penalties are imposed for failure to report, but a US discretionary beneficiary with no knowledge cannot be said to have wilfully failed to report, which carries the higher monetary penalty and possible imprisonment. Offshore trustees which are making distributions to US discretionary beneficiaries who are filing Form 3520 with the IRS for tax purposes should discuss with them possible BEA reporting.

US limited liability companies

Where a trust owns the shares of a US limited liability company (LLC) that owns the shares of the foreign business enterprise, the US reporter may be the US LLC. The LLC itself, although not incorporated, is still considered a "US person" under the BEA definitions. The BEA has indicated that the LLC can be a US reporter even if it is disregarded for US income tax purposes. However, it would seem reasonable that where the LLC is interposed merely to hold the stock of the foreign business enterprise for administrative and liability purposes, the LLC could be considered an intermediary. In many family situations the LLC has no financial account, no separate record or financial statement, no employees and no activity. Nonetheless, although this issue has been raised with the BEA, the BEA has as yet not accepted this interpretation.

If the LLC is treated as a US intermediary and the trust (also an intermediary) is revocable by a US person, the LLC can report the foreign business enterprise for and in the name of the creator of the trust. Conversely, where the creator of the revocable trust is a non-US person, there will be no US direct investment abroad and no Form BE-10 reporting requirement. The result would then be the same as for a revocable trust that does not hold its shares of the foreign corporation through a US LLC. Nevertheless, the BEA has not concurred on this position. Thus, since monetary penalties can be imposed and imprisonment ordered, the

prudent course of action is for the manager of the US LLC to file Form BE-10 on its own behalf as a US reporter and report the foreign business enterprise.

Comment

Yet another complicated set of US forms and instructions is affecting trust structures with US beneficiaries or settlors and structures with a non-US settlor and non-US beneficiaries that utilise a US single-member disregarded LLC. The deadline for new filers was extended to June 30 2015. The BEA has said that reasonable requests for extension of the filing deadline will normally be granted if requested before the due date. The request for extension form⁽¹⁾ can be faxed or an extension requested by phone.

For further information on this topic please contact Jennie Cherry, Eric Dorsch or Pamela Goldfarb at Kozusko Harris Duncan by telephone (+1 212 980 0010) or email (jcherry@kozlaw.com, edorsch@kozlaw.com or pgoldfarb@kozlaw.com). The Kozusko Harris Duncan website can be accessed at www.kozlaw.com.

Endnotes

(1) See www.bea.gov/surveys/pdf/be10/BE10_Extension%20Request%20Form.pdf.

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