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Completing US tax forms: Form 5472 – foreign-owned disregarded entities

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Introduction

A limited liability company (LLC) that is created under the laws of a US state and wholly owned by a single non-US person (a foreign-owned LLC) is required to report transactions with its non-US owner and other related parties to the Internal Revenue Service (IRS) on Form 5472, which must be submitted with a pro forma Form 1120. A single-member LLC is a disregarded entity for US tax purposes but, when foreign owned, is treated as a corporation solely for the purposes of the Form 5472 filing obligation. In response to the COVID-19 outbreak, the IRS has automatically extended the filing due date from 15 April 2020 to 15 July 2020. A penalty of \$25,000 will be assessed for failure to file Form 5472 when due and in the manner prescribed.

Updated Form 5472

Advisers to families using LLCs in the context of a family succession planning structure should review all 2019 distributions from and contributions to the foreign-owned LLC. (Details on who must file, how and when to file and obtaining a US employer identification number can be found at "Completing and filing Form 5472 for foreign-owned US LLC" and further details on applying for an employer identification number (EIN) can be found at "Completing US tax forms: Form SS-4 – Application for Employer Identification Number".)

The IRS updated Form 5472 as of December 2018, but it still includes references that can be confusing when completing the form for a foreign-owned LLC. For example, the authors check line 3 in Part I to indicate that "the reporting corporation is a foreign-owned domestic disregarded entity (foreign-owned U.S. DE) treated as a corporation" for purposes of filing Form 5472 and does not check line 2. Line 2 was in the form previously when it was filed only by a 25% foreign-owned US corporation and line 3 was added when foreign-owned LLCs became subject to filing.

This article provides further discussion on related parties and reportable transactions.

Related parties

The single direct foreign owner of the LLC is identified in Part II of Form 5472. The LLC then completes Part III of the form with details of the party with which the LLC had reportable transactions during the tax year. If the reportable transaction is between the LLC and its foreign owner, Part III again provides details for the foreign owner.

However, if the reportable transaction is between the LLC and a related party, details of the related party are provided in Part III. The definition of 'related party' is broad and includes IRS constructive ownership and attribution rules. In the context of a family succession planning structure, a related party will be, among other things:

- an indirect foreign owner – for example, the non-US grantor of a foreign grantor trust where the LLC loaned money to the grantor;
- a person who is related to the foreign owner – for example, if the foreign owner is a trust, transactions between the LLC and the

beneficiary or between the LLC and another trust with the same grantor; or

- a person who is a member of the foreign owner's controlled group – for example, if the foreign owner is a corporation, transactions between the LLC and another subsidiary of the foreign owner.

There are many other possible related parties under the complex constructive ownership and attribution rules. The IRS final regulations include examples involving foreign-owned LLCs that form another LLC that does not elect to be treated as a corporation, in which case all transactions involving the other LLC are also reportable.

The foreign-owned LLC is to report in Part III the name, address and other details of the related party (domestic or foreign) with which the LLC had reportable transactions during the tax year. A separate Form 5472 must be filed for each foreign or domestic related party with which the reporting LLC had a reportable transaction. If the reporting LLC is filing more than one Form 5472, all such forms will be filed as attachments to a single pro forma Form 1120.

Reportable transactions

The IRS regulations requiring foreign-owned LLCs to file Form 5472 expanded reportable transactions to specifically include amounts paid or received in connection with the formation, dissolution, acquisition and disposition of the LLC, including contributions to and distributions from the LLC. The reportable transactions enumerated in Part IV of Form 5472 are generally not the types of transaction that occur within the context of a family succession planning structure, with the exception perhaps of loans and interest paid or received on such borrowings. Therefore, the authors will include a zero on the total lines of Part IV and then tick the box in Part V to indicate that reportable transactions of the foreign-owned LLC are described on an attached separate sheet.

'Transaction' is broadly defined in Section 1.482-1(i)(7) of the regulations as follows:

Transaction means any sale, assignment, lease, license, loan, advance, contribution, or any other transfer of any interest in or a right to use any property (whether tangible or intangible, real or

personal) or money, however such transaction is effected, and whether or not the terms of such transaction are formally documented. A transaction also includes the performance of any services for the benefit of, or on behalf of, another taxpayer.

The separate sheet filed with Form 5472 can detail transactions such as:

- the trust beneficiary's use of an apartment owned by the LLC;
- payments made on non-interest-bearing loans to trust beneficiaries;
- expenses of the LLC paid by its foreign owner;
- direct and indirect contributions to LLC capital; and
- payments made to beneficiaries which would be treated for US tax purposes as a deemed distribution from the LLC to its foreign trust owner and then a distribution from the trust to the beneficiary.

Pro forma Form 1120

Careful attention should be paid to the instructions to Form 5472 on completing only the required items on Form 1120. "Foreign-Owned US DE" also should be written across the top of Form 1120. Especially given COVID-19 restrictions and for advisers who may be submitting from overseas, it is recommended that Form 1120 and Form 5472 with attachment be faxed to the number noted in the instructions.

Comment

Form 5472 is an information return and not a tax return. It can sometimes be overlooked since single-member LLCs do not generally have US tax or reporting obligations. Nevertheless, the \$25,000 penalty for failure to file or maintain required books and records is not insignificant. It is therefore recommended that advisers to families using LLCs in the context of a family succession planning structure review all distributions from and contributions to the foreign-owned LLC and report them on Form 5472 prior to the deadline.

For further information on this topic please contact Jennie Cherry or Eileen Reardon at Kozusko Harris Duncan's New York office by telephone (+1 212 980 0010) or email (jcherry@kozlaw.com or ereardon@kozlaw.com).

Please note that the authors are unable to provide legal advice to non-clients. The Kozusko Harris Duncan website can be accessed at www.kozlaw.com.

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