¶755 Limits on Income Shifting Through Intangible Property Transfers

NEW LAW EXPLAINED

Intangible property definition modified and allowable valuation methods clarified.— The scope of the statutory definition of intangible property is revised to include goodwill, going concern value, and workforce in place as well as a residual category of any other item the value or potential value of which is not attributable to tangible property or services of any individual. In addition, the requirement that each specific type of intangible property have substantial value independent of the services of any individual is removed so that the source or amount of value is no longer relevant in determining whether that property is within the scope of the definition (Code Sec. 936(h)(3)(B), as amended by the Tax Cuts and Jobs Act).

In addition, the new law clarifies the authority of the Secretary of the Treasury to specify the method to be used to determine the value of intangible property in the context of both Code Sec. 367(d) transfers as part of outbound restructurings of U.S. operations and Code Sec. 482 intercompany pricing allocations by authorizing the use of the aggregate basis valuation and the application of the realistic alternative principle. Specifically, the Secretary will require (i) the valuation of transfers of intangible property, including intangible property transferred with other property or services, on an aggregate basis, or (ii) the valuation of such a transfer on the basis of the realistic alternatives to such a transfer, if the Secretary determines that such basis is the most reliable means of valuation of such transfers (Code Sec. 367(d)(2)(D), as added by the 2017 Tax Cuts Act; Code Sec. 482, as amended by the 2017 Tax Cuts Act). In the Code Sec. 367(d)(2) context, the use of these valuation methods is required for purposes of determining if the annual amounts taken into account are commensurate with the income attributable to the intangible.

COMMENT

Accordingly, the use of the aggregate basis valuation method is required in the case of transfers of multiple intangible properties in one or more related transactions if the Secretary determines that an aggregate basis achieves a more reliable result than an asset-by-asset approach. This is consistent with the position that the additional value resulting from the interrelation of intangible assets can be properly attributed to the underlying intangible assets in the aggregate, if doing so produces a more reliable result. This approach is also consistent with the cost-sharing regulations in Reg. §1.482-7(g)(2)(iv).

COMMENT

The provision codifies the realistic alternative principle, which is based on the concept that a taxpayer would only enter into a transaction if none of its realistic alternatives were economically preferable to the transaction undertaken.

Effective date. The amendments made by this section apply to transfers in tax years beginning after December 31, 2017. Nothing in the amendment to the Code Sec. 936(h)(3)(B) definition of intangible property will be construed to create any inference with respect to the application of Code Sec. 936(h)(3) or the authority of the Secretary of the Treasury to provide regulations for such application, with respect to tax years beginning before January 1, 2018 (Act Sec. 14221(c) of the Tax Cuts and Jobs Act).