

One-Year Delay in the Application of § 1.385-2

Notice 2017- 36

PURPOSE

Final and temporary regulations (T.D. 9790) under section 385 of the Internal Revenue Code (Code) were published in the Federal Register (81 FR 72858) on Friday, October 21, 2016. Notice 2017-38, 2017-30 IRB 1, issued by the Internal Revenue Service (IRS) and the Department of the Treasury (Treasury Department) on July 7, 2017, requested comments on all aspects of the final and temporary regulations under section 385. This notice announces and invites comments on a change to be made to the timing of application of certain portions of the final regulations under section 385. The affected regulations are set forth in 26 CFR § 1.385-2 and relate to the documentation necessary to determine whether an interest in a corporation is treated as stock or indebtedness for all purposes of the Code (Documentation Regulations).

Because taxpayers may be expending resources to develop systems and processes to comply with the Documentation Regulations, there is an urgent need for taxpayers to be aware of this change to the timing of application of the Documentation Regulations in advance of any agency actions in connection with Notice 2017-38.

BACKGROUND

I. In General

Section 385 authorizes the Secretary of the Treasury to prescribe rules to determine whether an interest in a corporation is treated for purposes of the Code as stock or indebtedness (or as in part stock and in part indebtedness) by setting forth factors to be taken into account with respect to particular factual situations.

On April 8, 2016, the Treasury Department and the IRS published proposed regulations (REG-108060-15) under section 385 of the Code (proposed regulations) in the Federal Register (81 FR 20912) concerning the treatment of certain interests in corporations as stock or indebtedness. A public hearing on the proposed regulations was held on July 14, 2016. The Treasury Department and the IRS also received numerous written comments in response to the proposed regulations, all of which are available at www.regulations.gov and were carefully considered in developing the final and temporary regulations.

The comments received on the proposed regulations, decisions reached by the Treasury Department and the IRS, and the revisions made to the proposed regulations as a result of the comments are thoroughly described in the preamble to T.D. 9790.

Under the proposed regulations, the Documentation Regulations would apply to interests issued or deemed issued on or after the date the proposed regulations were finalized.

Of particular relevance to this notice is the comment received from numerous

sources that the applicability date of the proposed regulations would not give taxpayers adequate time to develop the necessary systems or processes to comply with the Documentation Regulations.

II. Summary of the Documentation Regulations

The Documentation Regulations in § 1.385-2 have two principal purposes. The first is to provide guidance regarding the documentation and other information that must be prepared, maintained, and provided to be used in the determination of whether an instrument subject to the Documentation Regulations will be treated as indebtedness for federal tax purposes. The second is to establish certain operating rules, presumptions, and factors to be taken into account in the making of any such determination. The Documentation Regulations, once applicable, implement these purposes by generally requiring taxpayers to prepare and maintain documentation that evidences specified “indebtedness factors” with respect to purported debt instruments subject to the regulations. Thus, compliance with the Documentation Regulations does not establish that an interest is indebtedness; it serves only to satisfy the minimum documentation for the determination to be made under general federal tax principles.

In response to the concern expressed by taxpayers that the proposed regulations provided inadequate time to begin complying with the Documentation Regulations, the final Documentation Regulations were made applicable only with respect to interests issued or deemed issued on or after January 1, 2018. See §§ 1.385-1(f), 1.385-2(d)(2)(iii), and 1.385-2(i).

Following the issuance of the final Documentation Regulations, the final and temporary regulations under section 385 were identified in Notice 2017-38 as significant tax regulations requiring additional review pursuant to Executive Order 13789.

CHANGE TO DOCUMENTATION REGULATIONS DELAYING THEIR APPLICATION

In response to the concern that taxpayers have continued to raise with the application of the Documentation Regulations to interests issued on or after January 1, 2018, and in light of further actions concerning the final and temporary regulations under section 385 in connection with the review of those regulations, the Treasury Department and the IRS have determined that these concerns warrant a delay in the application of the Documentation Regulations by 12 months. Accordingly, the Treasury Department and the IRS intend to amend the Documentation Regulations to apply only to interests issued or deemed issued on or after January 1, 2019. Pending the issuance of those regulations, taxpayers may rely on the delay in application of the Documentation Regulations set forth in this notice.

REQUEST FOR COMMENTS

Comments are requested concerning whether the proposed amendment and delay of the application of the Documentation Regulations affords adequate time for taxpayers to develop any necessary systems or processes to comply with the Documentation Regulations. Comments, identified by Notice 2017-36, may be submitted using one of the following methods:

- By Mail:

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2017–36)
Room 5203
P.O. Box 7602
Ben Franklin Station
Washington, D.C. 20044

- By Hand or Courier Delivery: Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to:

Courier's Desk
Internal Revenue Service
Attn: CC:PA:LPD:PR
(Notice 2017–36)
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

- Electronic: Alternatively, persons may submit comments electronically to Notice.Comments@irsounsel.treas.gov. Please include “Notice 2017-36” in the subject line of any electronic communications.

All submissions will be available for public inspection and copying in room 1621, 1111 Constitution Avenue, N.W., Washington, DC, from 9 a.m. to 4 p.m. Comments should be submitted no later than Friday, September 1, 2017.

DRAFTING INFORMATION

The principal author of this notice is Theresa Abell of the Office of Associate Chief Counsel (Corporate). For further information regarding this notice, contact Austin Diamond-Jones at (202) 317-5363 (not a toll-free call).