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## Excise Tax Refund Opportunity for Foreign Reinsurers for Retrocession Policies

The IRS has decided to back off its position that the 1 percent excise tax is due on a policy of reinsurance where a foreign reinsurer reinsures a policy of reinsurance issued by another foreign reinsurer (referred to in the industry as a retrocession policy). Foreign reinsurers who have previously paid the excise tax on such retrocession policies should determine whether opportunities exist to file excise tax refund claims for those payments.

The IRS publicly announced its shift in position in Revenue Ruling 2016-03, which revoked a 2008 Revenue Ruling in which the agency stated that the 1 percent excise tax applied to reinsurance policies where a foreign reinsurer purchased a retrocession policy from another foreign reinsurer. The change in IRS position is a result of the decision of the D.C. Circuit Court of Appeals in *Validus Reinsurance, Ltd. v. United States*, in which the Court said that there is a presumption that Congress does not intend to tax extraterritorial transactions unless the intention is specifically expressed. Because there was no such intent expressed in the Internal Revenue Code provision on reinsurance transactions or in the congressional record, the Court reasoned that foreign reinsurer to foreign reinsurer retrocession transactions are not subject to excise tax.

By publishing Revenue Ruling 2016-03, the IRS has signaled that it has conceded its position, and will not seek a different result in another circuit of appeals. The ruling says that the 1 percent excise tax will not be due on retrocession policies issued by a foreign reinsurer to another foreign reinsurer provided that the policy of reinsurance is **not** issued to a foreign reinsurer that either has elected to be treated as a domestic corporation for U.S. tax purposes, or that is exempt from the excise tax on premiums because the premiums are effectively connected to the conduct of a U.S. trade or business that is taxable under section 882(a) of the Internal Revenue Code.

This means that any foreign reinsurer who has paid excise tax on a retrocession policy with another foreign reinsurer that is qualified as exempt from excise tax per Revenue Ruling 2016-03 should consider filing a refund claim. A refund claim should be filed on an IRS Form 8849 "Claim for Refund of Excise Taxes." The schedules to the form 8849 should include evidence that the policy was a retrocession policy between foreign insurers who have not elected to be treated as a domestic corporation, and that the premiums are not effectively connected with a U.S. trade or business. The statute of limitations for excise tax refund claims is 3 years from the date the excise tax return was filed, so only taxes paid within this time frame are eligible for refunds.

If you would like more information regarding the excise tax refund opportunity or how to obtain a refund, please contact us.

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