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March 31, 2024

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Internal Revenue Service
Attn: SE:LB:CBA
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Via email: LBI.SOP.Initiative.Feedback@irs.gov

Re: Comments on Section 905(c) Foreign Tax Redeterminations, in Response to IR-2023-171

Dear Ms. Palacheck:

The Internal Revenue Service (the "Service") and U.S. Department of the Treasury (together, the "Government") issued proposed regulations in 2019[1] (the "Proposed Regulations") modifying how taxpayers inform the Service of foreign tax redeterminations ("FTRs") under section 905(c), among other things.[2] The modifications in the Proposed Regulations were necessary due to amendments to the Code made by Pub. L. 115-97, colloquially known as the Tax Cuts & Jobs Act ("TCJA"). The TCJA eliminated the pre-TCJA "pooling" approach to accounting for foreign tax credits, thus complicating how taxpayers account for FTRs, notify the Service of FTRs, and pay any extra tax due or request a refund for overpayment.

Pursuant to the TCJA amendments, the Proposed Regulations included burdensome compliance requirements in respect of FTRs. On February 18, 2020, TEI submitted a letter (the "Prior Letter") commenting on the Proposed Regulations, warning of the severe compliance burden they would impose on taxpayers reporting FTRs if the Regulations were adopted without significant

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1 *See* 84. Fed. Reg. 69,124 [REG-105495-19].

2 All "section" references herein are to the Internal Revenue Code of 1986 (as amended) (the "Code") and all "§" references are to the Treasury regulations promulgated thereunder.

change.[3] Our letter made numerous recommendations regarding how the Proposed Regulations could be revised to avoid or at least mitigate the anticipated compliance burden. Regrettably, the Proposed Regulations were finalized without substantial change.[4] As anticipated in our Prior Letter, taxpayers have experienced a greatly increased compliance burden in respect of FTRs following promulgation of the Final Regulations.

Perhaps realizing the substantial compliance and administrative burden imposed by the Final Regulations regarding FTR notification and documentation requirements, the Service requested comments from stakeholders about "improving and expanding tax certainty and issue resolution options for business taxpayers" on September 15, 2023.[5] Following this announcement, representatives of the Service noted that taxpayers should submit comments that may assist in streamlining the process of submitting information about, and auditing, FTRs in response to this request.

This letter responds to the Service's request, as well as follows up on our video conference with you and other representatives of the Service on October 18, 2023, where members of TEI's legal staff discussed various FTR-related compliance issues. Below we outline some of the burdensome requirements of the current regulations and our recommendations for simplifying the FTR process, some of which were included in our prior letter. We would also welcome another opportunity to meet with you and other Service representatives to further discuss these issues with TEI members.

About TEI

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organization has 56 chapters in North and South America, Europe, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting sound tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our nearly 6,000 individual members represent over 2,900 of the leading companies around the world.

TEI Comments

TEI commends the Service for reaching out to stakeholders for potential solutions to the significant administrative and compliance burdens related to FTRs, which as noted are substantial for both taxpayers and the Service. Some of the more notable taxpayer compliance burdens are:

1. The requirement to file an amended return for the year in which the FTR arose, rather than some other process.[6] Taxpayers do not have the personnel to accommodate this additional, often

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[3] TEI's prior letter is available at: https://www.tei.org/sites/default/files/advocacy_pdfs/TEI%20Comments%20-%20Proposed%20FTC%20Regulations%20-%20FINAL%20to%20IRS%2018%20February%202020.pdf.

[4] *See* T.D. 9922 (Nov. 2, 2020) (the "Final Regulations").

[5] *See* New Release IR-2023-71.

[6] From a practical perspective, many TEI members report that if their exam team receives an amended return, they will stop working on the current audit to examine the amended return, which delays finalizing the audit.

annual, workstream and the funding required to outsource this effort is not always available. Further, the Service's e-file schema only reaches back two prior years so any FTRs arising in earlier years must be paper-filed, which can run to hundreds or even thousands of pages.[7]

2. Requiring the inclusion of an additional extensive disclosure with the current year's return.

3. Requiring a notification to the Service's audit team within a 120-day window of any changes in foreign taxes resulting in additional U.S. tax liability for the years under audit.[8]

4. Requiring taxpayers to amend Form 5471. An FTR at one entity will change its earnings and profits and tested income. This in turn changes the GILTI allocation percentages and the amount of previously taxed earnings and profits at each CFC. Thus, one small change can result in changes to thousands of data points across all of a taxpayer's Form 5471s.

5. "Knock-on" financial statement issues and state & local filing requirements arising from filing an amended federal return.

We understand the amended return, notice, and other information and disclosure requirements under the Final Regulations also impose a significant burden on the Service, which you relayed to us during our October 18, 2023, discussion. Overall, both taxpayers and the Service would benefit immensely from a simplified method of notifying the Service of FTRs compared to those provided by the Final Regulations.

The Biden Administration has recognized the compliance and administrative burden associated with FTRs in its *General Explanations of the Administration's Fiscal Year 2025 Revenue Proposals* (the "Green Book"), published on March 11, 2024. The Green Book states "In recent years, FTRs have become burdensome for the government and taxpayers. A U.S. multinational may have hundreds of FTRs each year. The required amended returns for each affected year impose costs on taxpayers and are administratively difficult for the government. Similarly, while the requirement that additional tax be collected on notice and demand promoted compliance and efficient enforcement when FTRs were uncommon, in recent years, the audit and the assessment of tax outside of the ordinary audit work stream have proven inefficient."[9]

Fortunately, the Final Regulations permit the Service to provide "alternative notification requirements . . . through forms, instructions, publications, or other guidance." (the "Alternative Notification Requirement").[10] Should the Service provide an alternative notification method, then

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[7] An amended return requires the Service to review the data submitted, review the return, and decide what action should be taken. For taxpayers under exam, the exam team often asks the taxpayer for a presentation of the changes, a summary of the impact on the amount of tax due, and the associated workpapers. In this case, the requirement to file an amended return requires taxpayers to spend thousands of hours preparing returns that will never be looked at by the Service.

[8] *See* Prior Letter at p.2-4.

[9] Green Book at p.180.

[10] Treas. Reg. § 1.905-4(b)(3).

taxpayers would not be required to file an amended return, Form 1118 (Foreign Tax Credit – Corporations) or 1116 (Foreign Tax Credit – Individual, Estate, or Trust) "to notify the Service of the foreign tax redetermination and redetermination of U.S. tax liability . . . ."[11] TEI recommends the Service utilize the flexibility granted by the Alternative Notification Requirement to prescribe other methods by which taxpayers can notify the Service of an FTR and redetermination of U.S. tax liability. Such other methods could include one or more of the below.

One method would be to modify Schedule L of Form 1118 to provide the Service with the information needed to make any necessary tax adjustments. Schedule L already includes much of the information the Final Regulations require taxpayers to submit to the Service in respect of FTRs and therefore a modified Schedule L could be used to notify the Service of a taxpayer's FTRs. Moreover, such a schedule could be filed on an annual basis with the current year's return and inform the Service of all a taxpayer's FTRs that occurred in the current year, instead of the taxpayer filing multiple amended returns for multiple years (and indeed, sometimes multiple amended returns for the same prior year), as required by the Final Regulations. For example, if in FY2023 the taxpayer had FTRs from FY2018, 2019 and 2020, the taxpayer could file the modified Schedule L for all three prior years with the current year's return. The taxpayer would then pay any tax due plus applicable interest and penalties. The taxpayer could then adjust its current year return to account for the FTRs from the prior years. This is not an ideal solution. Form 1118, Schedule L itself is difficult to complete and audit, but at least there would not be multiple amended returns to prepare, file, and audit.[12] It would, however, alleviate some of the processing burden and complexity the Service must work through when amended returns, often multiple iterations for the same year or multiple years, are filed.

A separate method could be applied to taxpayers eligible to make disclosures under revenue procedure 2022-39,[13] which applies to taxpayers that are effectively under continuous audit. This disclosure would notify the Service exam team of the FTR and could be used to disclose FTRs from any year, even those not under audit. This would allow taxpayers and their Service exam teams to work together to make any needed tax adjustments. If this approach were adopted, we recommend taxpayers and their exam teams be permitted to informally agree on what is required in the disclosures and when they should be provided. Further, we recommend taxpayers be permitted to inform the Service of FTRs via this process throughout the audit period, and for FTRs that both increase and decrease the taxpayer's U.S. income tax liability. This flexibility would permit the exam team to better manage their resources and the timing of audits.

A more limited, but still welcomed, method for taxpayers under continuous audit would be to allow them to submit FTRs for years under audit on a Form 15307 (Post-Filing Disclosure for Specified

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11 *Id*.

12 Indeed, there is the opportunity to simply the Schedule L as part of this process as many of the data points required to be included on the Schedule force taxpayers into making judgment calls that provide very little additional benefit to the Service. We are happy to elaborate on this point in a future meeting.

13 2022-49 I.RB. 507 (Nov. 16, 2022).

Large Business Taxpayers), provided when required under revenue procedure 2022-39. This could be done simply by changing the instructions to the form to allow for submissions of FTRs. This would obviously not eliminate the amended return burden for years not under audit or for FTRs that happen after a Form 15307 is provided, but it will eliminate some amended return filing requirements.

A third method would be to adopt an approach similar to section 481(a) adjustments via Form 3115 (Application for Change in Accounting Method). That is, instead of adjustments to income under section 481(a), an FTR adjustment would be to foreign taxes paid and the adjustment would simply flow through the prior years to the current year's return. This could be done on a prior-year-by-prior-year basis (i.e., one form for each prior year in which a FTR has arisen) or cumulatively for FTRs from all prior years that occur in a specific period.

Finally, as in our Prior Letter, we recommend the Service implement a *de minimis* rule so only FTRs above a certain dollar or percentage threshold would be subject to the FTR notification and reporting process (in whatever form). Our Prior Letter recommended a *de minimis* threshold of ten percent of the amount of foreign tax paid on a consolidated basis and we reiterate recommend that here. Another option would be to exempt FTRs below a certain dollar threshold from the notification and reporting process, no matter their percentage of tax paid. Preferably the Service would do both and only require notification and reporting if the FTR amount was above both the percentage and dollar thresholds.

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TEI appreciates the opportunity to provide input on how to manage the compliance and administrative burdens accompanying disclosing and auditing FTRs. As noted above, we would welcome the opportunity to meet with you and other Service representatives to discuss the recommendations in this letter, as well as other ideas to simplify international tax compliance.

TEI's comments were prepared under the aegis of its U.S. International Tax Committee. Should you have any questions regarding TEI's comments, please do not hesitate to contact Ag Samoc, Chair of TEI's U.S. International Tax Committee at ag.samoc@danaher.com, or Benjamin Shreck of TEI's legal staff at bshreck@tei.org or + 1 202 464 8353.

Respectfully submitted,

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