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February 9, 2024

CC:PA:LPD:PR (Notice 2023-80), Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Via online submission

RE: Notice 2023-80, the Dual Consolidated Loss and GloBE Rules

Dear Sir or Madam:

The Internal Revenue Service and U.S. Department of the Treasury (together, the "Government") released Notice 2023-80 (the "Notice")[1] on December 11, 2023. The Notice provides interim guidance on certain issues under sections 59(l), 78, 704, 901, 903, 951A, 954, 960, and 1503(d) of the Internal Revenue Code.[2] Specifically, the Notice provides guidance addressing the application of those sections, including the foreign tax credit ("FTC") and dual consolidated loss rules ("DCL"), to certain types of taxes described in the OECD Pillar Two Global Anti-Base Erosion ("GloBE") Model Rules. The Government requested comments from stakeholders no later than February 9, 2024. On behalf of Tax Executives Institute Inc. ("TEI"), I am pleased to respond to the Government's request.

About TEI

TEI was founded in 1944 to serve the needs of business tax professionals.[3] 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.

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[1] 2023-52 I.R.B. 1583 (Dec. 11, 2023).

[2] All "section" references herein are to the Internal Revenue Code of 1986, as amended (the "Code"). Terms capitalized but not defined herein have the same meaning as in the OECD's GloBE Model Rules and the associated commentary and administrative guidance.

[3] TEI is organized under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the Code.

TEI is dedicated to the development of sound tax policy, compliance with and uniform enforcement of tax laws, and minimization of administration and compliance costs to the benefit of both government and taxpayers. These goals can be attained only through the members' voluntary actions and their adherence to the highest standards of professional competence and integrity. TEI is committed to fostering a tax system that works—one that is administrable and with which taxpayers can comply in a cost-efficient manner. The diversity, professional training, and global viewpoints of our members enable TEI to bring a balanced and practical perspective to the issues raised by the Notice.

TEI Comments

Summary of Recommendations

TEI appreciates the opportunity to provide comments on the Notice and the interaction of the DCL rules and the GloBE Model Rules. Our comments and recommendations herein respond to some of the questions raised in the Notice and highlight areas and issues requiring further guidance regarding the treatment of DCLs in relation to the GloBE Model Rules. To summarize our recommendations, which are set forth in further detail below:

1. Due to the immediate financial statement impact of the GloBE rules potentially triggering a foreign use of a DCL, TEI recommends that relief for pre-2024 DCLs allowed in Notice 2023-80 be extended through at least 2024 while this issue is under study. Timely guidance is needed as TEI members currently see a broad range of views on this question from advisors and auditors, leading to inconsistent positions (and potential financial statement risk) among taxpayers.

2. TEI recommends that the Government clarify that the CbCR Safe Harbor (as defined below) does not trigger a foreign use of DCLs, because the Safe Harbor does not result in the imposition of tax, deviates substantially from traditional tax and accounting notions of "income," and such clarification would drive increased taxpayer certainty and administrability.

3. TEI recommends that the Government provide guidance that the application of the GloBE rules is not a foreign use for purposes of the DCL rules.

4. In the alternative, if the prior recommendation is not adopted, TEI recommends the Government provide guidance that the GloBE rules do not give rise to a foreign use to the extent the duplicate loss arrangement rules in the December 2023 Administrative Guidance are incorporated into the GloBE Model Rules (as defined below).

Background on the GloBE Model Rules

The Organisation for Economic Co-operation and Development (the "OECD") Pillar Two project provides model rules to support a new global tax system for large multinational companies. It introduces GloBE Model Rules, which provide for a 15 percent global minimum Effective Tax Rate ("ETR") for Multinational Enterprise Groups ("MNE Groups") with consolidated revenue over €750

million. The regime discourages shifting of profits by establishing a global minimum level of taxation in relation to each country where an MNE Group operates.

The GloBE Model Rules released in December 2021 define the scope and key mechanics of the GloBE Rules,[4] which consist of: (i) the income inclusion rule ("IIR"), which provides for the jurisdiction of the group's ultimate parent entity, or at times an intermediate parent entity, to collect an allocation of a top-up tax according to its ownership interest; and (ii) the under-taxed payment rule ("UTPR"), which is intended to apply as a backstop if the top-up tax with respect to low-taxed income is not fully collected under the IIR and which can be applied in the jurisdictions of fellow MNE Group members through denials of deductions or other adjustments. The country to which the top-up tax relates may instead collect that amount itself via a qualified domestic minimum top-up tax ("QDMTT"). Entities and permanent establishments that comprise an MNE Group are referred to herein as Constituent Entities.

Background on DCLs

A "dual consolidated loss" or DCL is defined in section 1503(d) of the Code. The rules were added to the Code as part of tax reform changes in 1986 and were intended to prevent a double dip of a single economic loss in both the United States and a foreign country.[5] A DCL is a loss of a domestic corporation that is incurred through a structure that is subject to foreign tax. This can arise when a corporation is considered a tax resident of both countries or when a domestic corporation incurs the loss through a branch or hybrid entity (a separate unit) that is subject to tax in a foreign country (typically a foreign disregarded entity). A DCL from a particular foreign country generally cannot offset the income of the domestic corporation or another member of its U.S. affiliated group that is not also subject to tax in such foreign country. However, the Code provides a critical exception to the denial of a DCL deduction where the loss "does not offset the income of any foreign corporation." The Code defers all definition and operation of this rule to regulations, which have since defined any such offset as a "foreign use" of the DCL, and for the allowance of using such exception where there is no foreign use by making a "domestic use election."

Regulations define a foreign use of a DCL as when any portion of the loss offsets under foreign law the income of an entity that is not directly subject to net income tax in the United States. For example, a foreign use arises when a separate unit with a DCL and a foreign corporation participate in foreign tax consolidation. Where any item included in a DCL is made available to reduce the foreign income of a foreign corporation, the DCL is deemed to be put to foreign use, and the taxpayer may not make a

4 References in this letter to the GloBE Model Rules refer to the rules published by the OECD. References to the GloBE Rules refer to implementing legislation enacted into law and pursuant to which a top-up tax may be collected.

5 *See*, *e.g.*, S. Rep. No. 99-313, at 420 (1986).

domestic use election to deduct the DCL for U.S. tax purposes. The final regulations adopted this "all or nothing approach" to avoid administrability concerns.[6]

The regulatory "mirror legislation rule" may also deem a foreign use to occur. Although the statute does not discuss mirror legislation, the regulations define it as a provision of foreign law that, similar to the DCL regime, prevents any opportunity to use a loss that is used in another country or offsets income of another person under another country's tax law.[7] The mirror legislation rule attempts to address Congress's concern, described in legislative history, that, if other countries responded to the DCL regime with similar rules to prevent foreign use, the U.S. fisc would bear the full cost of attempts to double dip.[8] Instead, if both the DCL rules and foreign mirror legislation would deny the same deduction, Congress intended for the Treasury Department to negotiate with the relevant countries, so that each loss is only available to offset income in one country.[9]

The DCL Rules' Interaction with the GloBE Rules

As noted above, the computation of the GloBE top-up tax is imposed on a jurisdictional basis by combining the loss of one Constituent Entity with the income of other Constituent Entities in that same jurisdiction. This mandatory jurisdictional blending raises concerns regarding "foreign use" such that the loss either may not be currently used for U.S. tax purposes or may be recaptured into income.[10] This may be the case even where the DCL does not reduce the tax base or tax liability under a GloBE

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6 *See*, "Dual Consolidated Loss Regulations," T.D. 9315, 72 CFR 12902, 12911 ("The IRS and Treasury Department continue to believe that … departing from the all or nothing principle would lead to substantial administrative complexity.")

7 Treas. Reg. § 1.1503(d)-3(e).

8 *See* Staff of the Joint Committee on Taxation's General Explanation of the Tax Reform Act of 1986 ("1986 Blue Book") at 1065-66 (JCS-10-87) ("Congress, foreseeing adoption of [mirror legislation], did not intend that such a rule of foreign law cause all the revenue gain from termination of the dual resident company device to inure to the benefit of the foreign revenue authority.").

9 *See* 1986 Blue Book at 1066. *See also* United Kingdom/United States Dual Consolidated Loss Competent Authority Agreement dated October 6, 2006 of the Convention Between the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, signed on July 24, 2001, as amended by a protocol signed on July 19, 2002 (the "U.S.-U.K. Treaty").

10 *See* Treas. Reg. § 1.1503(d)-6(d) (permitting a "domestic use election" where the taxpayer certifies that there has not been and will not be a foreign use of a DCL) and -6(e)(1)(i) (a triggering event with respect to a domestic use election includes a foreign use of a DCL). This letter primarily focuses on circumstances in which there are no timing differences between the relevant U.S., foreign, and GloBE tax bases, in which case a foreign use would potentially occur – if at all – in the year in which the DCL arose. If there were timing differences, however, such that the GloBE loss were deemed to arise in a year following the year in which the DCL arose, then a future foreign use of the DCL would constitute a triggering event of the DCL, resulting in recapture of the DCL into income.

minimum tax such as in the case where the ETR in a foreign jurisdiction is at or above the global minimum ETR (irrespective of the loss). In other words, taxpayers are concerned that a foreign use may be considered to occur even where the DCL does not result in a "double dip" of a deduction by reducing tax in two jurisdictions, which is the concern the DCL rules were designed to police.[11]

Interim Guidance on the DCL Rules in Relation to the GloBE Rules

The Notice observes that:

> the GloBE Model Rules take a jurisdictional blending approach under which all income and loss of Constituent Entities in the same jurisdiction are generally aggregated. This aggregation can be viewed as giving rise to double dipping concerns that the DCL rules were intended to address.

Section 3 of the Notice announces that the Government is studying the extent to which the DCL rules should apply with respect to the GloBE Rules, including the extent to which aggregation should result in a foreign use of a DCL. The Notice also announces proposed regulations that would provide temporary relief for "legacy DCLs," which are DCLs incurred in: (i) taxable years ending on or before December 31, 2023; or (ii) provided that the taxpayer's taxable year begins and ends on the same dates as the fiscal year of the MNE group, taxable years beginning before January 1, 2024, and ending after December 31, 2023.

Under the proposed rule, a foreign use would not be considered to occur with respect to a legacy DCL solely because all or a portion of the deductions or losses that comprise the legacy DCL are considered in determining the Net GloBE Income for a particular jurisdiction. However, this relief would not apply to any DCL that was incurred or increased with a view to reducing the top-up tax or qualifying for the proposed relief described in the Notice.

The December 2023 OECD Administrative Guidance

The OECD published its third set of Administrative Guidance on the GloBE Model Rules on December 18, 2023 (the "Administrative Guidance"). A key provision in the Administrative Guidance relates to new anti-arbitrage rules for the Transitional Country-by-Country Reporting Safe Harbor (the "CbCR Safe Harbor"), which provides safe harbors from the GloBE Model Rules based on data from Country-by-Country Reports ("CbCRs"). These safe harbors are based on the CbCR profits attributable to a jurisdiction, as well as the amount of tax paid or a substance-based income exclusion based on payroll expenses and tangible assets therein.

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[11] "Corporate groups attempt to isolate expenses in dual resident companies so that, viewed in isolation, the dual resident company is losing money for tax purposes. This isolation of expenses allows, in effect, the consolidation of tax results of one money-losing dual resident corporation with two profitable companies, one in each of two countries. This use of one deduction by two different corporate groups is sometimes referred to as double dipping." S. Rep. No. 99-313, 99th Cong., 2d Sess. 419, 420 (1986) (internal quotations omitted).

The Administrative Guidance generally provides that eligibility for the CbCR Safe Harbor should be determined after making certain adjustments attributable to a hybrid arbitrage arrangement. The Administrative Guidance provides three categories of hybrid arbitrage arrangements:

1. A deduction/non-inclusion arrangement;
2. A duplicate loss arrangement; and
3. A duplicate tax recognition arrangement.

Duplicate loss arrangements are most relevant to the application of the DCL rules. A duplicate loss arrangement includes an arrangement that: (i) results in an expense or loss being included in the financial statement of a Constituent Entity; and (ii) also gives rise to a duplicate amount that is deductible for purposes of determining the taxable income of another Constituent Entity in another jurisdiction. However, an arrangement is not a duplicate loss arrangement if the expense is offset by revenue or income that is included in: (i) the financial statements of the Constituent Entity including the expense or loss in its financial statements; and (ii) the taxable income of the Constituent Entity claiming the tax deduction for the relevant expense or loss.

One example of a duplicate loss arrangement is where a domestic corporation incurs an expense through a branch or hybrid entity that is subject to tax in a foreign jurisdiction. The financial statement expense at the branch or hybrid entity reduces the Constituent Entity's financial statement income. The domestic corporation also might deduct the expense in determining its taxable income. Accordingly, the arrangement is expected to constitute a duplicate loss arrangement.[12]

The Administrative Guidance provides that the CbCR Safe Harbor must exclude any expense or loss arising from a duplicate loss arrangement.

Detailed Recommendations

1. *Extend the Relief Provided for Legacy DCLs in the Notice*

The Administrative Guidance provides that "further guidance will be provided to address hybrid arbitrage arrangements, including those addressed in this guidance, that may otherwise affect the application of the GloBE rules outside the context of the Transitional CbCR Safe Harbor." In addition, the Notice states that the Government is "studying the extent to which the DCL rules should apply with respect to the GloBE Model Rules, including the extent to which aggregation should result in a foreign use of a DCL." We understand that the Government may wait to issue DCL guidance until after the OECD has issued new administrative guidance incorporating the hybrid arbitrage guidance into the GloBE Model Rules. The timing of the OECD guidance is uncertain as many previously

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[12] The hybrid arbitrage arrangement rules apply to arrangements entered into on or after December 15, 2022, or, in the case of concerns based on "constitutional grounds or other superior law" in the implementing jurisdiction, December 18, 2023. Certain modifications or changes to the accounting treatment of an arrangement cause the arrangement to be treated as new for purposes of the effective date.

announced deadlines for GloBE guidance were not met. That raises the real likelihood that U.S. guidance reacting to the OECD's new rules will not be issued until late in 2024 or thereafter.

We agree that the OECD and the Government should carefully study the interaction of GloBE Rules with the DCL rules, even if the guidance resulting from such study is issued after 2024. This approach will ensure that future guidance reflects thoughtful comments from taxpayers that consider any forthcoming OECD administrative guidance and, therefore, comprehensively address technical and policy concerns. At the same time, taxpayer certainty with respect to these rules is critical during the interim period pending guidance from the Government and OECD.[13] For this reason, the relief for legacy DCLs described in the Notice should be extended for at least one additional year. Preferably, this relief should be extended such that any future DCL guidance applies prospectively to taxable years that begin on or after the issuance of such guidance.

Taxpayers currently face significant uncertainty with respect to the interaction of the GloBE Rules and DCL rules. For example, there are ongoing debates within the U.S. tax community about what constitutes a foreign use of a DCL under the GloBE Rules. There are also open interpretive questions as to how the Administrative Guidance should be applied and whether future hybrid arbitrage arrangement guidance applicable to the GloBE Model Rules (i.e., guidance that is not limited to the Transitional CbCR Safe Harbor) will address certain technical issues associated with the duplicate loss arrangement rules. Some of these questions are addressed below in part 2, 3, and 4 of this section. Finally, there is significant uncertainty regarding whether and when countries will incorporate any OECD administrative guidance into their domestic GloBE Rules.

This uncertainty will raise immediate issues with respect to financial statement audits for the first quarter of 2024 in the coming weeks. Taxpayers that are currently generating DCLs will need to make a judgement as to whether those DCLs will be deductible for U.S. tax purposes. That judgement is clouded by questions around when such DCLs are deemed to be put to a foreign use, which is in turn clouded by questions concerning the interpretation, potential modifications, and country-specific adoption of the Administrative Guidance on duplicate loss arrangements. No clear consensus has yet developed as to many of these questions, with the result that initial positions on these matters may later be reversed for financial accounting purposes. These risks create volatility in earnings reported to investors and lead to similarly situated taxpayers taking disparate positions. This is magnified by a longer period of uncertainty with respect to the interaction of the GloBE Rules with the DCL rules. In this regard, issuing retroactive DCL guidance in late 2024 (e.g., before the UTPR is scheduled to take effect in many jurisdictions) would risk significant financial statement reversals.[14] Although the Government may not view the quality of earnings reporting as within the agencies' principal remit, this

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[13] Section 3.03 of Notice 2023-80 acknowledges this rationale: "In the interest of providing certainty while the Treasury Department and the IRS develop guidance addressing the interaction of the DCL rules with the GloBE Model Rules…."

[14] Such guidance would be retroactive if, for example, it applied to taxable years ending on or after the date of publication.

is a unique circumstance given that the potential financial statement risk is a product of uncertainty created by global tax negotiations, to which the United States is a party, that are still ongoing and may have retroactive effects.

In addition to financial statement risk, taxpayers may be required to amend tax returns because of future OECD and U.S. guidance. For example, a taxpayer may take a position that a DCL is (or is not) put to a foreign use under the GloBE Rules, thereby impacting the ability to make a domestic use election. This position may ultimately prove to be wrong, with the result that a taxpayer will be required to amend its returns to claim (or disallow) a deduction with respect to a DCL. TEI members have significant concern regarding the additional administrative and compliance burdens for both taxpayers and the government created by amended return filings, which would cascade across both federal and state returns.

For these reasons, the legacy DCL relief described in Notice should be extended for at least one additional year. Preferably, this relief should apply for all taxable years beginning on or before the date of future DCL guidance addressing the GloBE Rules. This approach would provide the government with a measured period to study these issues thoughtfully while providing taxpayers with certainty during the pendency.

2. *A DCL Should Not be Put to a Foreign Use Where the Transitional CbCR Safe Harbor Applies*

No foreign use should result in a jurisdiction to the extent it satisfies the CbCR Safe Harbor. While some have suggested there is no meaningful distinction between the CbCR Safe Harbor and the full GloBE calculation, we believe this view glosses over key differences between the two sets of rules.

First, the Safe Harbor is not connected to any tax charging mechanism but is instead a gating mechanism used to determine whether a taxpayer should be subject to an income tax (e.g., a QDMTT or IIR) in the first instance. Once a taxpayer has satisfied the Safe Harbor, the applicable tax does not apply to that taxpayer and therefore the possibility of foreign use is foreclosed. The CbCR Safe Harbor is thus akin to the determination of whether activity rises to level of a permanent establishment under an applicable tax treaty. It is not relevant for this purpose that the Safe Harbor analysis is quantitative rather than qualitative. In this regard, the Safe Harbor is similar to nexus requirements under U.S. state tax law, which are often based on gross receipts or sales thresholds.

Second, in light of the December 2023 Administrative Guidance, the measurement of "income" under the CbCR Safe Harbor is likely to differ substantially from calculations under generally accepted accounting principles, international tax norms, or the GloBE rules. These differences suggest that the CbCR Safe Harbor is not a "foreign income tax" within the scope of the DCL rules.

To further simplify CbCR calculations, the Administrative Guidance provides that a taxpayer's financial accounts used to prepare their consolidated financial statements may not include further adjustments, even when those adjustments would be necessary to comply with applicable accounting principles on a standalone basis. This rule will lead to stark differences between the CbCR calculation

and the method used to determine income for other tax or accounting purposes. For instance, many companies record dividend expense amounts in their financial accounts which are offset by the corresponding dividend income in consolidation. When taken on a jurisdiction-by-jurisdiction basis for Safe Harbor purposes, however, this expense may substantially reduce income in a particular jurisdiction. Expenses related to stock-based compensation ("SBC") are also likely to create income distortions. Many large companies record SBC expense at their parent corporation rather than at the relevant employing entity as a matter of convenience, as the location of the book expense is not relevant for consolidated financial statement purposes. Because such practices will be respected for Safe Harbor calculation purposes, CbCR income differ significantly from taxable income or GloBE income in many jurisdictions. Finally, sales of property between related parties generally does not give rise to gain or loss under U.S. GAAP but would create income or expense under tax or standalone accounting principles.

These items that may not be recorded at local jurisdictional levels for calculation of the ETR Safe Harbor will however be required for calculation of the GloBE ETR if a constituent entity were to fail the safe harbor calculation. Accordingly, the net effect of these differences is a significant disparity between the actual tax base for the GloBE ETR and the base for the calculation of the Safe Harbor ETR.

As noted above, TEI members face significant uncertainty as to the interaction of the GloBE and DCL rules. Timely guidance that the CbCR Safe Harbor does not give rise to a foreign use would provide clarity in this transitionary period.

3. *The GloBE Rules Should Not Result in a Foreign Use of a DCL*

Regardless of whether the Government extends the legacy DCL relief provided in the Notice, we believe that the GloBE Rules' aggregate jurisdictional approach should not result in a foreign use in any case. The GloBE Rules could not have been contemplated by Congress when the DCL rules were enacted in 1986, and the new global minimum tax presents unique issues relative to an ordinary foreign income tax. For example, the GloBE Model Rules generally are designed to apply after ordinary tax rules have applied.[15] Additionally, the current definition of foreign use incorporates an all or nothing approach that disallows domestic use of an entire DCL if any item of expense included therein is put to foreign use. Although this approach was originally justified through administrability concerns, permitting the GloBE Rules to trigger an "all or nothing" foreign use would be unduly punitive. The OECD continues to draft the GloBE Model Rules as we write. Any concerns about inappropriate double deductions should be policed through those rules and not through the U.S. tax code, especially when the United States has yet to adopt the GloBE Model Rules. Finally, taxpayers have a legitimate reliance interest in the historic application of the DCL rules to their existing operating models, which were built upon structuring and financing decisions that were premised on the ability to claim U.S. deductions with respect to a DCL.

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[15] OECD Commentary to the GloBE Model Rules, Article 4.3.2, ¶ 45 ("It is intended that the GloBE Rules apply *after the application of … domestic tax regimes*") (emphasis added).

We believe these arguments apply with particular force in the context of tax imposed under an IIR or UTPR. Unlike a typical foreign income tax or CFC regime, an IIR or UTPR generally does not function by imputing income to an entity in the IIR/UTPR jurisdiction.[16] A DCL is subject to a foreign use only if the relevant loss is made available under the income tax law of the local jurisdiction to offset income recognized under that jurisdiction's income tax law.[17] The IIR and UTPR computation does not cause additional taxable income to be recognized by a legal entity or branch within the IIR/UTPR jurisdiction. It operates as a minimum income tax rate measure of the source jurisdiction, but is wholly unintegrated with the residence income tax of the jurisdiction imposing the IIR/UTPR. All examples in the regulations illustrate the integration of the foreign use within the income tax regime of the foreign country in which the use occurs.[18] A tax that is wholly outside of the income tax regime in which the item arises should not give rise to a foreign use.

The current rules perform as intended in policing the "double dip" of deductions. There is little policy reason to further extend the rules to a "top-up" that operates outside of the current system – without extension of the DCL rules to Pillar Two, the system of policing against double-dipping continues unabated. Put differently, the Government should not fix a system that is not broken.

Even if the Government concludes the GloBE rules result in a foreign use in some cases, targeted relief should be considered for DCL jurisdictions with a statutory corporate tax rate of at least 15%. The compliance burdens and complexity of the GloBE rules create substantial costs for TEI members. A simple rate-based test for DCL purposes would be administrable and achieve the same results as a more complex analysis in most cases.

The Government has the authority to provide such relief through regulations issued under section 7805(a) or, pursuant to Treas. Reg. § 1.1503(d)-3(c)(9), through guidance published in the Internal Revenue Bulletin.

4. *No Foreign Use Should Occur if the Duplicate Loss Arrangement Rules are Incorporated into the GloBE Rules*

As noted above, the OECD's Administrative Guidance announced an intention to incorporate the hybrid arbitrage arrangement rules into the GloBE Model Rules. If that were to occur, the Government should provide guidance specifying that a DCL cannot be put to a foreign use for GloBE purposes. The concept is simple – if a DCL cannot be taken into account in determining GloBE income, it is not "made available under the income tax laws of a foreign country to offset or reduce, directly or indirectly, any item that is recognized as income or gain under such laws." Taxpayers will often be able to reason to this position, but clear guidance from the Government stating this in absolute terms would

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16 *See*, *e.g.*, OECD Commentary to the GloBE Model Rules, Article 2.1.1, ¶ 12 (The IIR "requires the [relevant parent entity] to pay a tax equal to" its share of top-up tax due from low-taxed subsidiaries).

17 Treas. Reg. § 1.1503(d)-3(a).

18 Treas. Reg. § 1.1503(d)-7(c)(5) and (10) through (37).

spare taxpayers from a burdensome compliance exercise and the possibility that an unforeseen technicality could result in a potential foreign use.

One reason foreign use "corner cases" may arise is that the duplicate loss and dual inclusion income definitions in the Administrative Guidance and the DCL rules are imperfectly aligned. The most conspicuous example in this regard is that GloBE income differs from U.S. taxable income, such that timing or base differences may create differences in the amount or timing of income or losses for purposes of these rules.[19] Another reason stems from uncertainty regarding whether and how the duplicate loss arrangement rules should be applied, including questions regarding the timing of a disallowance for GloBE purposes where the corresponding U.S. item may be deducted in a future year. Finally, certain arrangements that were entered into on or before December 15, 2022, may not be subject to the duplicate loss arrangement rules.[20]

It could be argued that these issues are already a feature of many foreign income taxes and that the GloBE Rules should be treated no differently. The argument for disregarding these potential technical foreign use foot faults in the GloBE space, however, is twofold. First, it will avoid inordinate complexity. The GloBE Model Rules are already very complex. This complexity will be compounded as each country incorporates the GloBE Model Rules into its domestic legislation with slight variations. For example, some countries may not adopt the Administrative Guidance retroactively or at all. Some countries may decide to change their GloBE legislation in contradiction of the GloBE Model Rules to suit their policy preferences.[21] Some countries may be prevented from applying GloBE Rules under tax or trade agreements. It is simply too much to ask of taxpayers and the Internal Revenue Service to track the GloBE Rules of hundreds of countries to monitor for the potential $1 of foreign use that would prevent or trigger a domestic use election.[22] The second reason is that the United States is one of the most influential members of the Inclusive Framework and has had a significant role in drafting the duplicate loss arrangement rules. Given this special role, the United States should strongly negotiate such that any future duplicate loss arrangement guidance significantly reduces the risk of a foreign use.

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[19] These timing mismatches (e.g., lagging deductions) are issues under the existing DCL rules. *See* AM 2009-011.

[20] This statement assumes that any administrative guidance adopting the hybrid arbitrage rules into the GloBE Model Rules will adopt the same effective date as that used in the Administrative Guidance. The rationale behind this effective date in the Administrative Guidance was that it was the date of introduction of the CbCR Safe Harbor and a taxpayer could not have had a purpose to plan around the safe harbor prior to its existence. For similar reasons, it is unlikely that preexisting arrangements giving rise to a DCL would have been entered into for purposes of manipulating a taxpayer's GloBE top-up tax liability.

[21] The United Kingdom's GloBE Rules are a good example of this behavior. That legislation does not allocate deferred taxes under Article 4.3.2, contrary to the Commentary. *Compare* Commentary, Article 4.3.2, ¶ 52 *with* U.K. Finance (No.2) Act 2023, § 182(2)(a).

[22] The excess burden arising from compliance in such circumstance would likely outweigh the associated revenue gains to the U.S. fisc by a large multiple.

It should then leave well enough alone and provide that a foreign use does not occur where a jurisdiction has substantially adopted the duplicate loss arrangement rules into their domestic GloBE Rules

Similarly, the Government should provide that the duplicate loss arrangement rules are not mirror legislation, regardless of whether those rules are elective or mandatory. As discussed above, the GloBE Rules are fundamentally different from the income taxes that Congress contemplated when enacting the DCL regime. The mirror legislation rule is designed to protect the U.S. fisc from the cost of potential double-dips that are disallowed under foreign tax law.

As an initial matter, where the application of the duplicate loss arrangement rules results in no GloBE top-up tax, the rules have not provided revenue to another jurisdiction and are therefore fundamentally different from the rules that concerned Congress in 1986.[23]

Additionally, as the mirror legislation rule is based solely on policy concerns discussed in legislative history, the Government should tailor the rule to the narrow circumstances that Congress sought to address. Congress intended for foreign use under the mirror legislation rule to be a temporary stop-gap measure until the Government had the opportunity to negotiate agreements that would permit only a single use of a DCL. The Treasury Department is currently engaged in such negotiations as part of the Inclusive Framework. We understand that one of the options under consideration at the OECD is an election to forego a GloBE loss to the extent it gives rise to double-dipping concerns under other tax rules of a relevant jurisdiction, such as the U.S. DCL regime. A rule of this kind would elegantly address Congress's stated concerns regarding mirror legislation by limiting the use of a DCL to a single jurisdiction. It would also harmonize with the current regulations, which do not treat such an elective regime as mirror legislation.[24]

However, as discussed above, the future of the GloBE Rules is uncertain, and the DCL regime should not be left in limbo during this negotiation. If the Inclusive Framework ultimately concludes that the anti-arbitrage rules should mandatorily disallow the use of a DCL for purposes of GloBE income, that will be the negotiated solution that Congress anticipated. In that case, U.S. Treasury should agree to prevent the use of duplicated losses under the GloBE Rules and conform the definition of mirror legislation to make clear that the loss may be used in the United States.

For the reasons described above, if the Government concludes that CbCR Safe Harbor is within the scope of the DCL rules, they should also issue guidance specifying that a DCL is not put to a foreign use if the jurisdiction satisfies the CbCR Safe Harbor after the application of the duplicate loss arrangement rules from the Administrative Guidance. Those rules generally apply to these DCLs such that they cannot be taken into account for purposes of the safe harbor calculations and the risks of a

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23 *See* 1986 Blue Book, supra note 5 (expressing concern that "*revenue gain* from termination of the dual resident company device [would] inure to the benefit of the foreign revenue authority") (emphasis added)..

24 *See* Treas. Reg. § 1.1503(d)-7, Example 18, Alternative Facts (concluding that foreign tax law permitting the taxpayer to elect the country in which it would use a DCL is not mirror legislation).

potential foreign use (e.g., from lagging book deductions) are so remote that the compliance costs would greatly outweigh the any potential revenue benefits to the government.

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TEI appreciates the opportunity to comment on the Notice and the interaction of the DCL rules and the GloBE Rules. TEI's comments were prepared under the aegis of its Tax Reform Task Force, whose Chair is Jason Weinstein of Amazon.com. Should you have any questions regarding TEI's comments, please do not hesitate to contact Mr. Weinstein at jwein@amazon.com or Benjamin R. Shreck of TEI's Legal Staff at bshreck@tei.org or +1 202 464 8353.

Respectfully submitted,

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