Tax Executives Institute, Inc.
2019 Congressional Liaison Meetings
Wednesday & Thursday, May 1–2, 2019

I. Introductions

A. TEI Members

James P. Silvestri
PCS Wireless, Inc.
International President, TEI

Katrina H. Welch
Texas Instruments Incorporated
Senior Vice President, TEI

Kristine M. Rogers
Love's Travel Stops & Country Stores, Inc.
Member, TEI's Executive Committee

Emily T. Whittenburg
Shell Oil Company
Chair, TEI's Tax Reform Task Force

Anthony O'Donnell
EMD Serono, Inc.
Member, TEI's Tax Reform Task Force

Jason Weinstein
Amazon.com, Inc.
Member, TEI's Tax Reform Task Force

B. TEI Staff

Eli J. Dicker
Executive Director

Watson M. McLeish
Tax Counsel

Benjamin R. Shreck
Tax Counsel

II. About TEI

TEI is the preeminent association of in-house tax professionals worldwide, with over 7,000 members representing 2,800 of the leading companies in North and South America, Europe, and Asia. TEI represents a cross-section of the business community, and is dedicated to the development of sound tax policy, uniform and equitable enforcement of tax laws, and minimization of administration and compliance costs to the mutual benefit of government and taxpayers. As a professional association, 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.

III. Substantive Agenda

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Substantive Agenda

TEI members are responsible for administering the tax affairs of their companies and must contend daily with the provisions of the tax law relating to the operation of business enterprises, including those introduced or amended by Public Law 115-97. We believe that the diversity and experience of our members enables TEI to bring a balanced and practical perspective to some of the most challenging issues facing business taxpayers today, and we are eager to engage with the Committee in addressing them in a constructive manner.

I. Technical and Clerical Corrections to Public Law 115-97

The following discussion is intended to highlight three corporate and international tax issues of tremendous mutual concern to TEI members as they work to apply, and comply with, the provisions of Public Law 115-97. Each of these issues has been determined to warrant a technical correction by the nonpartisan staff of the Joint Committee on Taxation.

a. Applicable Recovery Period for Qualified Improvement Property

Public Law 115-97 eliminated the separate definitions of qualified leasehold improvement, qualified restaurant, and qualified retail improvement property, and redefined "qualified improvement property" to mean "any improvement to an interior portion of a building which is nonresidential real property if such improvement is placed in service after the date such building was first placed in service." Due to a now widely acknowledged scrivener's error,[1] however, the statute failed to include this newly consolidated category of qualified improvement property within the definition of "qualified property" eligible for 100-percent bonus depreciation under section 168(k) of the Internal Revenue Code.[2] As a result, qualified improvement property is now unintentionally subject to a 39-year depreciation recovery period.

TEI notes an exceeding sense of urgency amongst our members—across the board—for the enactment of a legislative correction. The current dichotomy between 100-percent expensing and 2.564-percent depreciation (1/39th if placed in service in January 2018) has already had a significant impact on many companies' estimated tax payments and will become only more problematic as the extended corporate income tax filing deadline nears.

b. Modification of Net Operating Loss Deduction – Effective Date

Public Law 115-97 generally repealed the two-year net operating loss carryback in former section 172(b)(1)(A). The *Joint Explanatory Statement of the Committee of Conference* explains that

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[1] *See, e.g.*, Press Release, Congressman Jimmy Panetta, Reps. Panetta, Walorski Introduce Bipartisan Restoring Investment in Improvements Act (Mar. 26, 2019), https://panetta.house.gov/media/press-releases/reps-panetta-walorski-introduce-bipartisan-restoring-investment-improvements (acknowledging that "an inadvertent drafting error" in the 2017 tax law is responsible for this problem, known as the "retail glitch," and announcing the introduction of bipartisan legislation in the House of Representatives to fix it).

[2] All references to "section" herein are to sections of the Internal Revenue Code of 1986, as amended (the "Code").

the House bill, Senate amendment, and conference agreement all intended for that change to apply to losses arising in taxable years beginning after December 31, 2017.[3] The effective date language of the statute, however, states otherwise; it provides that the change to carrybacks applies to net operating losses arising in taxable years *ending* after December 31, 2017. This would appear to be another scrivener's error that warrants a timely legislative correction.

c. Modification of Stock Attribution Rules for Determining Status as a Controlled Foreign Corporation

Public Law 115-97 repealed section 958(b)(4), which historically precluded the "downward attribution" of corporate stock owned by a foreign person to a U.S. person for purposes of determining the status of a foreign corporation as a controlled foreign corporation ("CFC"). The explicit legislative intent in repealing section 958(b)(4) was to render ineffective certain transactions that were used to as a means of avoiding subpart F of the Code, including so-called "de-control" transactions following corporate inversions—transactions that would effectively convert former CFCs to non-CFCs despite continuous ownership by U.S. shareholders.[4] Congress affirmatively did not, however, intend to subject U.S. taxpayers to additional tax and new information reporting requirements with respect to foreign corporations that they neither control nor to which they are related (within the meaning of section 954(d)(3)).[5]

The blanket repeal of section 958(b)(4) has significantly increased the number of CFCs and exposed many taxpayers to extensive new compliance burdens in the form of information reporting and withholding requirements at both the U.S. shareholder and CFC levels. For these and other concerns to be discussed, TEI urges Congress to restore the language of former section 958(b)(4) as a general rule and, instead, provide an exception for limited downward attribution that is consistent with legislative intent.

II. Other Legislative Priorities

The following discussion introduces three additional TEI legislative priorities of broad application, intended to enhance the efficacy and competitiveness of the U.S. corporate income tax system.

a. Current-year Inclusion of Global Intangible Low-taxed Income by U.S. Shareholders – Rationalization with Foreign Tax Credit Rules

Public Law 115-97 created a new separate foreign tax credit limitation basket for global intangible low-taxed income ("GILTI") under section 904 of the Code, with no carryforward or carryback available for excess credits. The legislation did not, however, adequately address the

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[3] H.R. Rep. No. 115-466, at 394 (2017) (Conf. Rep.).

[4] *Id.* at 633–34 (2017) (Conf. Rep.).

[5] *See* H.R. Rep. No. 115-466, at 633 (2017) (Conf. Rep.) (citing S. Comm. on Budget, 115th Cong., *Reconciliation Recommendations Pursuant to H. Con. Res. 71*, S. Prt. 115-20, at 383 (Comm. Print 2017)).

interrelationship between the GILTI provisions and the foreign tax credit rules, including the section 904 limitation. In particular, TEI members note that the interaction of the new statutory language and the existing expense allocation rules can result in an over-allocation of expenses to the GILTI basket.

TEI urges Congress to rationalize the foreign tax credit rules as they apply to the GILTI basket. For instance, Congress could adopt an approach whereby expense allocations would take into account the reduced effective rate at which GILTI is taxed and enforce consistency in the treatment of expenses for the calculation of direct U.S. tax liability on GILTI and the calculation of foreign-source income for determining the foreign tax credit limitation.

b. Base Erosion and Anti-abuse Tax – Payments for Services

TEI invites Congress to reform the base erosion and anti-abuse tax ("BEAT") to provide parity for services payments when compared to payments for goods. Under the statute, base eroding payments do not include the cost of goods sold ("COGS") component of payments made to purchase goods. The exclusion for COGS from the definition of a base eroding payment reduces the amount of a taxpayer's BEAT liability by that amount multiplied by the applicable tax rate. In contrast, payments for services do not benefit from a reduction for the cost of providing such services and instead the gross amount of a services payment is included in the definition of a base erosion payment.

TEI recommends that Congress remedy this disparity by providing for a reduction in the amount of a base eroding payment for the cost of providing services. Payments for services are not "classic" base eroding payments, which are generally thought of as tax-deductible outbound payments related to highly mobile assets or income that have little or no non-tax business purpose for the location of the asset (e.g., outbound royalty payments to a foreign affiliate located in a low-tax jurisdiction). Instead, services payments are necessary business expenses as many services must be provided outside the United States (consider, for example, industrial equipment sold to foreign third parties by U.S.-based manufacturers serviced by those manufacturers' foreign affiliates outside the United States). Moreover, such payments are generally required by U.S. and local jurisdiction transfer pricing rules and thus not making such payments to foreign affiliates might itself be viewed as a form of tax evasion.

c. Limitation on Deduction for Interest – Definition of Adjusted Taxable Income

Public Law 115-97 amended section 163(j) to generally limit a taxpayer's annual deduction for business interest expense to 30 percent of the taxpayer's adjusted taxable income for the taxable year. For taxable years beginning before January 1, 2022, the statute defines "adjusted taxable income" as the taxable income of the taxpayer computed without regard to certain amounts, including any deduction allowable for depreciation, amortization, or depletion. TEI invites a discussion of the underlying policy and practical effects of this definition, and our recommendations with respect thereto.