TAX EXECUTIVES INSTITUTE, INC.
U.S. DEPARTMENT OF THE TREASURY OFFICE OF TAX POLICY
2020 LIAISON MEETING
FEBRUARY 28, 2020
AGENDA

I. Introduction

Tax Executives Institute ("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, colloquially known as the Tax Cuts and Jobs Act ("TCJA"). 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 anew with the Office of Tax Policy in addressing them in a constructive manner.

II. Treasury's Updated Guidance Priorities

A. In General

TEI commends the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") for their ongoing, Herculean efforts to implement the TCJA through regulatory and other guidance. We understand that Treasury has set an ambitious goal to complete all remaining TCJA-implementation guidance by fall 2020, which contemplates the release of approximately 100 additional pieces of guidance within the next seven months.[1] At the same time, however, we observe that Treasury and the IRS's *2019–2020 Priority Guidance Plan* contains only 52 TCJA-implementation guidance projects that will be the focus of efforts through June 30, 2020. We invite the Office of Tax Policy to elaborate on its guidance priorities for the New Year and their envisioned sequencing.

B. Tax Regulatory Process

TEI applauds Treasury the IRS for reaffirming their commitment to a tax regulatory process that encourages public participation, fosters transparency, affords fair notice, and ensures adherence to the rule of law.[2] Given the high volume and complexity of TCJA regulations, however, we invite Treasury and the IRS to consider returning to their traditional 90-day deadlines for submitting comments on proposed regulations. We note that doing so would not only afford the public a more meaningful opportunity to comment, but also enable the public to better

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[1] *See, e.g.*, Lydia O'Neal et al., *2020 IRS Regulatory Plan Focuses on Wrapping Up Tax Law Work*, Daily Tax Rep. (BNA), Jan. 2, 2020.

[2] U.S. Dep't of the Treas., Policy Statement on the Tax Regulatory Process (Mar. 5, 2019), https://home.treasury.gov/system/files/131/Policy-Statement-on-the-Tax-Regulatory-Process.pdf.

apprise the government of relevant information that it may not possess or alert the government to consequences that it may not foresee.

C. Deregulatory Priorities

TEI commends Treasury and the IRS for their important efforts to, consistent with the policies stated in Executive Orders 13777 and 13789,[3] reduce regulatory burdens and complexity for taxpayers by repealing or amending existing tax regulations that meet the criteria set forth in the executive orders. We invite a discussion of the Office of Tax Policy's current deregulatory priorities, including the potential repeal of Treasury regulations section 1.385-3 concerning the treatment of certain interests in corporations as stock or indebtedness.

Separately, in October 2019, President Trump signed Executive Order 13891 requiring each executive agency to review its sub-regulatory guidance documents and, consistent with applicable law, rescind those guidance documents that it determines should no longer be in effect.[4] We invite the Office of Tax Policy to comment on the status of Treasury's review under section 3(b) of Executive Order 13891 and any tax-related guidance documents it may have identified for rescindment.

D. Proposed Regulations Under Section 382(h) Related to Built-In Gain and Loss

In September 2019, Treasury and the IRS issued proposed regulations regarding the items of income and deduction that are included in the calculation of built-in gains and losses under section 382(h) of the Internal Revenue Code ("Code").[5] Section 382(h) provides rules for the treatment of a loss corporation's built-in gains and losses as of the date of its ownership change. In general, built-in gains recognized during the five-year period beginning on the date of the ownership change ("recognition period") allow a loss corporation to increase its section 382 limitation, whereas built-in losses recognized during the recognition period are subject to the loss corporation's section 382 limitation. As Treasury and the IRS have explained, these rules exist to implement the "neutrality principle" underlying the statute, under which the built-in gains and losses of a loss corporation, if recognized during the recognition period, generally are to be treated in the same manner as if they had been recognized before the ownership change.

The proposed regulations, in pertinent part, would eliminate one of the two longstanding safe harbor approaches for computing a loss corporation's recognized build-in gain ("RBIG") or recognized built-in loss ("RBIL") during the recognition period (the "338 approach"), and mandate taxpayers to use a modified version of the other approach (the "1347 approach").

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[3] Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Mar. 1, 2017); Exec. Order No. 13,789, 82 Fed. Reg. 19,317 (Apr. 26, 2017).

[4] Exec. Order No. 13,891, 84 Fed. Reg. 55,235 (Oct. 15, 2019).

[5] REG-125710-18, 84 Fed. Reg. 47,455 (Sept. 10, 2019).

Established by the IRS in Notice 2003-65,[6] the 338 approach identifies items of RBIG and RBIL generally by comparing the loss corporation's actual items of income, gain, deduction, and loss recognized during the recognition period with those that would have resulted if a section 338 election had been made with respect to a hypothetical purchase of all the loss corporation's outstanding stock on the date of its ownership change. As a result, under the 338 approach, built-in gain assets—in particular wasting assets—can be treated as generating RBIG even if they are not disposed of at a gain during the recognition period, and deductions for liabilities that exist on the ownership change date (e.g., contingent liabilities) may be treated as RBIL.

We invite discussion of the government's rationale for proposing to eliminate the 338 approach and, in particular, the assertions in the preamble to the proposed regulations concerning the relative administrability, complexity, and compliance burden of the two approaches.

III. Implementation of the TCJA

The TCJA made substantial changes to the Code by significantly modifying many existing provisions and introducing major new ones, both of which requiring reams of regulatory and other administrative guidance to implement. TEI welcomes the Office of Tax Policy's views regarding our comments, questions, and recommendations about the following provisions of the TCJA.

A. Taxable Year of Income Inclusion Under an Accrual Method of Accounting – Section 451(b) Requirements

The TCJA amended section 451(b) of the Code to provide that, for a taxpayer using an accrual method of accounting, the all events test with respect to any item of gross income (or portion thereof) is not treated as met any later than when the item (or portion thereof) is included in revenue for financial accounting purposes on an applicable financial statement ("AFS") or other financial statement specified by the Secretary. On September 9, 2019, Treasury and the IRS issued proposed regulations under section 451(b) to reflect the TCJA's changes.

The proposed section 451(b) regulations would accelerate the recognition of revenue to the same timing as Generally Accepted Accounting Principles ("GAAP") as reported on an AFS but would not allow an offsetting tax adjustment for cost of goods sold or other contra-income items under GAAP. Specifically, the proposed rules would provide that the transaction price used to determine whether an amount has been included in revenue does not include, inter alia, reductions for amounts subject to section 461 (including allowances, adjustments, rebates, chargebacks, refunds, rewards, and amounts included in the cost of goods sold). This approach would run afoul of the matching principle at the heart of the Code's clear-reflection-of-income requirement by creating a mismatch of revenues with the costs of producing those revenues.

[6] 2003-40 I.R.B. 747.

To allow for reasonable matching, TEI invites Treasury to consider the adoption of a corresponding addition to the standards under section 461. Under this approach, to the extent an expense item is included in net revenue in an AFS, the all events test and economic performance would be deemed to occur under section 461 for the offset in the revenue category for purposes of applying section 451(b). We believe this approach would result in a more accurate matching of gross income and expense, as well as reduce the level of potential distortion, consistent with the clear-reflection-of-income requirement. Furthermore, we note that establishing this matching principle would be within the authority granted to the Secretary by section 461(h)(2) to prescribe the timing of economic performance for specific items.

B. Foreign Tax Credit Guidance Related to the TCJA

i. Foreign Tax Redeterminations Under Section 905(c)

The government issued proposed regulations addressing the process for taxpayers to claim a foreign tax credit for foreign taxes adjusted by non-U.S. tax authorities, as well as other issues related to the foreign tax credit, in December 2019.[7] The proposed regulations set forth a number of administrative requirements taxpayers must satisfy to obtain a foreign tax credit for adjusted foreign taxes. The administrative requirements account for the new foreign tax credit regime under the TCJA. However, the requirements are much more burdensome than the pre-TCJA process for obtaining a foreign tax credit under section 905(c), including the requirement to file an amended return, filing a disclosure with the taxpayer's current year return, among other things. The addition of the global intangible low-taxed income ("GILTI") and foreign-derived intangible income ("FDII") regimes, moreover, raise the possibility that taxpayers would have to amend the schedules (e.g., to Forms 5471) for all foreign entities (whereas under the pre-TCJA foreign tax credit regime, foreign tax redeterminations typically impacted only a single foreign entity's taxes and tax attributes). TEI's comments on the proposed regulations recommended a simpler "true-up" process whereby a taxpayer would account for the foreign tax redetermination on the taxpayer's current-year return. Thus, taxpayers would claim a credit, or pay additional tax (taking into account interest and differences in tax rates), in the current year instead of filing an amended return for the years at issue, while also informing the government of the redetermination. TEI invites a discussion of the potential for simplifying the process surrounding section 905(c) redeterminations.

TEI's comments also included a question regarding whether rules similar to section 905(c) apply to taxpayers who took a deduction for foreign taxes paid in the year at issue, instead of a credit, and subsequently have their foreign tax paid adjusted. We invite discussion of this issue and encourage the government to issue clarifying guidance.

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[7] T.D. 9882, 94 Fed. Reg. 69,022 (Dec. 17, 2019). TEI's comments on the proposed regulations are available at https://www.tei.org/advocacy/submissions/tei-files-comments-regarding-proposed-regulations-addressing-foreign-tax.

ii. Foreign Taxes Paid or Accrued With Respect to Disregarded Payments

Proposed Treasury regulations section 1.861-20(d), addressing the assignment of items of foreign gross income to the statutory and residual groupings, would effectively disallow a foreign tax credit with respect to foreign-source income derived by a branch in connection with a payment by the foreign branch owner thereto for services, rents, or royalties by assigning such income to the residual grouping. Payments from a foreign branch owner to the branch in exchange for property, however, are assigned to the statutory or residual groupings as if the payment were regarded for U.S. federal income tax purposes. If the branch's business was operated in corporate form, or if the payment for services, rents, or royalties came from a related person other than the foreign branch owner, then the rule above would not apply. TEI believes the Code should not discriminate against businesses choosing to conduct their foreign operations in branch form, and thus recommends the proposed regulations' rule applying to payments in exchange for property be expanded to apply to payments from a foreign branch owner to its foreign branch in exchange for services, rents, or royalties. We invite discussion of this issue.

C. The High-Tax Exception to the GILTI Regime

The government published proposed regulations crafting a "high-tax" exception to the GILTI regime.[8] TEI commends the government for proposing the GILTI high-tax exception to ensure the GILTI regime satisfies Congress' intent that "there [be] no residual U.S. tax on GILTI" subject to a high effective foreign tax rate.[9] Over eight months have passed since the government issued the proposed regulations and TEI invites an update on when Treasury anticipates promulgating final regulations.

In our letter commenting on the GILTI high-tax exception,[10] we made the following recommendations—many of which would provide parity with the high-tax exception to foreign base company income under section 954(b)(4)—on which we invite discussion:

- Make the exception available retrospectively for taxable years of foreign corporations beginning after December 31, 2017, and to taxable years of U.S. shareholders in which or with which such taxable years of foreign corporations end.

- Permit a controlling domestic shareholder group to elect the exception on a controlled foreign corporation ("CFC")-by-CFC basis.

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[8] REG-101828-19, 84 Fed. Reg. 29,114 (June 21, 2019).

[9] H.R. Rep. No. 115-466, at 627 (2017).

[10] TEI's letter commenting on the GILTI high-tax exception is available at https://www.tei.org/advocacy/submissions/tei-files-comments-proposed-gilti-high-tax-exception.

- Apply the effective tax rate test at the CFC level and not at the level of a CFC's qualified business unit.

- Permit taxpayers to elect the exception on a year-by-year basis.

- Apply the 90-percent threshold used to determine whether income is subject to a high rate of tax to a rate of 13.125 percent rather than the rate imposed by section 11 (currently 21 percent).

D. Deduction for Foreign-Derived Intangible Income – Compliance Burdens

Treasury and the IRS published proposed regulations under the FDII and GILTI regimes of section 250 on March 6, 2019.[11] The proposed regulations set forth documentation requirements for determining the foreign use of property as required under section 250(b)(5) for purposes of determining a taxpayer's foreign derived deduction eligible income under section 250(b)(4). The documentation requirements are unduly burdensome and, moreover, in certain cases require multinational enterprises to obtain information not generally collected in the ordinary course or obtain from unrelated customers information the customers would be unwilling to share (or unable to make the required representation). TEI recommends the special rule for small business and small business transactions in proposed Treasury regulations section 1.250(b)-4(d)(3)(ii), permitting the seller to treat property as for a foreign use if the "seller's shipping address for the recipient is outside the United States," be expanded to be the general rule, in lieu of the onerous requirements applying to companies not currently qualifying for this special rule. Any abuse of such a rule could be policed by the "know or have reason to know that the recipient is not a foreign person or that the property will not be for a foreign use" standard in proposed Treasury regulations section 1.250(b)-(4)(d)(1).

IV. Taxation of the Digital Economy and Global Electronic Commerce

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting ("BEPS") is currently discussing changing the basic structure of the international tax system in response to issues arising from the "digitalization" of the economy. This project grew out of Action 1 of the OECD's original BEPS action plan and involves potential changes to taxing rights of market and residence jurisdictions via a revised nexus standard and a partial abandonment of the arm's length standard under "Pillar One" of the project, as well as a global anti-base erosion ("GloBE") proposal under "Pillar Two," which would effectively establish a worldwide minimum corporate income tax for large multi-national enterprises. In December, however, Secretary Mnuchin sent a letter to OECD Secretary-General Jose Angel Gurria suggesting that Pillar One should be a "safe-harbor" regime, raising concerns that the OECD may not be able to

[11] REG-104464-18, 84 Fed. Reg. 8188 (Mar. 6, 2019). TEI's comments in response to the proposed FDII and GILTI regulations are available at https://www.tei.org/advocacy/submissions/tei-submits-comments-regarding-fdii-and-gilti-deductions.

come to a consensus on Pillar One. This would be an unfortunate outcome as Pillar One's primary appeal to multi-national enterprises is the certainty it would provide. In light of the OECD Inclusive Framework's ongoing work and Secretary Mnuchin's letter, we invite the Office of Tax Policy's view on where the Pillar One and Two framework is headed and whether consensus likely to be reached on the current timeline.

A. OECD/G20 Inclusive Framework on BEPS – Pillar One

We invite a discussion regarding the following questions with respect to Pillar One:

- How does Treasury envision a Pillar One safe-harbor regime – which would thus effectively be optional – working in practice?

- What is Treasury's view of limiting the scope of Amount A under Pillar One to income from automated digital services and consumer facing activities?

- How likely does Treasury believe it is that all of the current unilateral measures targeted at the digitalization of the economy and/or consumer facing businesses would be withdrawn should the OECD reach a consensus on Pillar One?

- How would the currently proposed approach of Pillar One deal with losses and potential carryforwards (e.g., could a multi-national enterprise get a refund from an Amount A jurisdiction if it had a residual loss)?

- What is the current status of negotiations on bilateral and multilateral dispute resolution measures under Pillar One (and Two), particularly the views of other countries regarding mandatary binding arbitration? Are other countries becoming more supportive of arbitration?

- How would a Pillar One framework of Amounts A-C be audited? Would there be a single audit jurisdiction, such as that of the parent company, or would every jurisdiction in which a business operates be entitled to audit Amounts A-C?

B. OECD/G20 Inclusive Framework on BEPS – Pillar Two

We invite a discussion regarding the following questions with respect to Pillar Two:

- What would Treasury's view be should the OECD come to a consensus under Pillar Two with, for example, a global top-up tax only at the parent jurisdiction level and not a GILTI-type tax?

- Does Treasury view the GILTI regime as satisfying the requirements of any final OECD GloBE proposal?

- More broadly, assuming consensus is reached on Pillar Two (and One) in a form similar to the current proposals, what current and new bilateral and multilateral agreements would the United States need to amend or enter into?