TAX EXECUTIVES INSTITUTE

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September 18, 2019

Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20024

Via: Online Submission

RE: Proposed High-Tax Exception to the GILTI Inclusion

Dear Sir or Madam:

The Internal Revenue Service (the Service) and U.S. Department of the Treasury (the Treasury) published a notice of proposed rulemaking on June 21, 2019.[1] The Proposed Regulations, in part, address gross income subject to a high rate of foreign tax under the newly enacted global intangible low-taxed income provisions (the GILTI high-tax exception). The GILTI provisions were added to the Internal Revenue Code (the Code) as part of Public Law No. 115-97, colloquially known as the Tax Cuts and Jobs Act (the TCJA or the Act). The Service and Treasury (the Government) requested comments from interested stakeholders no later than September 19, 2019. On behalf of Tax Executives Institute, Inc. (TEI), I am pleased to respond to the Government's request for comments on the Proposed Regulations.

<u>TEI Background</u>

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organization has 57 chapters in North and South America, Europe, and Asia. Our more than 7,000 individual members represent over 2,800 of the leading companies around the world. TEI members are responsible for administering the tax affairs of their companies. They must contend daily with the new provisions of the TCJA relating to the operation of business enterprises, including the new GILTI regime. We believe the diversity and professional experience of our members enables TEI to bring a balanced and practical perspective to the issues raised by the Proposed Regulations.

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[1] Guidance Under Section 958 (Rules for Determining Stock Ownership) and Section 951A (Global Intangible Low-Taxed Income), 84 Fed. Reg. 29,114 (the Proposed Regulations).

TEI Comments

TEI commends the Government for promulgating regulations that would implement an exception to the required GILTI inclusion if such income is subject to a high rate of foreign tax. Such an exception is consistent with the stated legislative intent of Congress that "there [be] no residual U.S. tax on GILTI" subject to a high effective foreign tax rate.[2] The GILTI high-tax exception is in TEI's view consistent with sound tax policy. The approach is also consistent with the TCJA's attempt reduce the incentives to shift income abroad without unduly burdening multi-national taxpayers. The GILTI high-tax exception accomplishes this goal by recognizing that any purported income shifting is unlikely where a multinational's foreign source income is subject to a high rate of tax. This is consistent with the rationale of the high-tax exception for foreign base company income under section 954(b)(4), which is currently available to taxpayers and existed prior to the Proposed Regulations. TEI believes sound tax policy recognizes the importance of parity between taxpayers who through existing structures or self-help have availed themselves of section 954(b)(4) as well as those who have not so availed themselves. Similarly situated taxpayers should have parity without needing to engage in non-economic tax planning and TEI believes the GILTI high-tax exception moves there partially but requires a few significant changes to achieve full parity.

Thus, TEI recommends the GILTI high-tax exception be available to taxpayers for taxable years beginning after December 31, 2017, *i.e.*, the exception should be available retrospectively. Under the Proposed Regulations, the GILTI high-tax exception would be available only for "taxable years of foreign corporations beginning on or after the date of publication of the Treasury decision adopting" the Proposed Regulations as final in the Federal Register, "and to taxable years of United States shareholders in which or with which such taxable years of foreign corporations end."[3] TEI recommends this language be modified to apply to 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.

In addition, TEI recommends a controlling domestic shareholder group[4] be permitted to elect the GILTI high-tax exception on a controlled foreign corporation (CFC)-by-CFC basis, rather than for all CFCs commonly controlled by such a group. Why the policy rationale compels an "all or nothing" election for a controlling group is unclear. Perhaps it is the Government's attempt at simplicity in application of the election to such groups. However, in TEI's view the simplicity provided by this all-or-nothing election for commonly controlled CFCs is outweighed by the sound tax policy rationale outlined above – a CFC subject to a high effective rate of foreign tax would have section 954(b)(4) available and it is unlikely to be used to avoid U.S. income taxes or shift profits.

Moreover, in TEI's view the effective rate test should be applied at the CFC level, and not at the level of a CFC's qualified business unit as would be required by the Proposed Regulations. This

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2 H.R. Rep. No. 115-466, at 627 (2017).

3 Prop. Treas. Reg. § 1.951A-7(b).

4 "Controlling domestic shareholder group" is defined in Prop. Treas. Reg. § 1.951A-2(c)(6)(E)(2).

approach would be more consistent with the high-tax election under subpart F of the Code while also being simpler for taxpayers to apply in practice and for the Service to administer.

TEI further recommends the Government remove the requirement in the Proposed Regulations requiring taxpayers to wait five years (60 months) to re-elect the high-tax exception if the taxpayer revokes a previous high-tax election. Removing the 60-month waiting period would also be more consistent with the subpart F high-tax election.

Finally, TEI recommends the 90-percent threshold used to determine whether income is subject to a high rate of tax be applied to a rate of 13.125 percent, not to the rate imposed by section 11 (i.e., 90 percent of 21 percent), as this would be consistent with the statement in the TCJA's Conference Report noting that no residual U.S. tax should be due on GILTI subject to a foreign tax rate greater than 13.125 percent.

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TEI commends the Government in its efforts to promulgate regulatory guidance under the TCJA on a timely basis, which has been a monumental undertaking. Should you have any questions regarding TEI's comments, please contact Emily Whittenburg, Chair of TEI's Tax Reform Task Force, at Emily.Whittenburg@shell.com or 832.337.0827; or Benjamin R. Shreck of the Institute's legal staff at bshreck@tei.org or 202.464.8353.

Respectfully submitted,
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