

Report on recent US international tax developments - 10 April 2020

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On 7 April, the United States (US) Treasury Department released final regulations ([TD 9896](#)) implementing the hybrid mismatch rules under Internal Revenue Code Sections 245A(e) and 267A, and making changes to the dual consolidated loss (DCL) rules under Section 1503(d). The final regulations, which are primarily targeted at so-called "deduction - no inclusion" outcomes, retain the basic approach and structure of the proposed regulations issued in December 2018 with certain revisions. The Internal Revenue Service (IRS) also released proposed regulations ([REG-106013-19](#)) providing guidance on hybrid deduction accounts and conduit financing arrangements involving equity interests.

Section 267A, DCL and anti-conduit provisions

The final Section 267A regulations make the following significant changes:

- ▶ Clarify that the rules can apply to interest-free loans and similar arrangements (applicable for tax years beginning on or after 20 December 2018)
- ▶ Modify the "imported mismatch" rules (aimed at preventing the effects of an offshore hybrid arrangement from being imported into the US) and include a list of hybrid deductions limiting their scope
- ▶ Narrow the definition of interest, which may foreshadow a similar approach in the final Section 163(j) regulations, which have yet to be released

The final DCL regulations are largely unchanged from the proposed regulations. The Preamble notes that the IRS and Treasury continue to study structures involving payments from foreign disregarded entities to their domestic corporate owners and may issue guidance in the future.

The proposed regulations would expand the conduit financing rules under Reg. Section 1.881-3 to now capture certain hybrid instrument arrangements that permit deductions under foreign law.

Section 245A(e) provisions

The final Section 245A(e) regulations make the following significant changes:

- ▶ Treat “notional interest deductions” allowed to a controlled foreign corporation (CFC) as hybrid deductions that are taken into account for this purpose only for foreign tax years beginning on or after 20 December 2018 (rather than on or after 31 December 2017, as in the proposed regulations)
- ▶ Revise the applicability date so that the final regulations apply to distributions made after 31 December 2017, but only if the distributions occurred during tax years ending on or after 20 December 2018
- ▶ Provide for a new anti-duplication rule that would reduce the amount of hybrid deductions of a lower-tier CFC by hybrid deductions of an upper-tier CFC in certain back-to-back financing transactions

The proposed regulations provide rules on adjustments to hybrid deduction accounts to reflect subpart F, global intangible low-taxed income (GILTI) and certain Section 956 inclusions.

The proposed regulations ([REG-106013-19](#)) released 7 April under Section 951A include a new rule that would effectively deny deductions for payments made directly or indirectly by a CFC during the period from 1 January 2018 through the effective date of the GILTI provisions for the recipient CFC (the GILTI “disqualified period”). The proposed rule is intended to apply if: (1) a payment is made during the disqualified period that would have given rise to tested income in the hands of the recipient CFC if the GILTI provisions had been effective for the recipient CFC; and (2) a deduction is taken in a later period when economic performance with respect to the earlier payment occurs.

The proposed regulations would apply to tax years of foreign corporations ending on or after the date of filing in the Federal Register and to US shareholders’ tax years in which or with which such years end.

The IRS on 9 April provided guidance under the *CARES Act* to taxpayers with net operating losses (NOLs). [Revenue Procedure 2020-24](#) provides procedures for: (1) waiving the carryback period for an NOL arising in a tax year beginning after 31 December 2017, and before 1 January 2021; (2) excluding Section 965 inclusion years from the carryback period for an NOL arising in a tax year beginning after 31 December 2017 and before 1 January 2021; and (3) waiving or reducing a carryback period or revoking an election to waive a carryback period for tax years that began before 1 January 2018 and ended after 31 December 2017.

[Notice 2020-26](#) grants a six-month extension to corporations filing Form 1139, *Corporation Application for Tentative Refund* and individuals, trusts and estates filing Forms 1045, *Application for Tentative Refund*, in relation to NOL carrybacks that arose in a tax year beginning in 2018 and ending by 30 June 2019.

And in [Notice 2020-23](#), the IRS significantly broadened its tax return filing and payment relief in response to COVID-19. Generally, all taxpayers with a filing or payment deadline falling on or after 1 April 2020, and before 15 July 2020, have until 15 July 2020, to file returns and make payments without penalties or interest.

The IRS in Notice 2020-19 withdrew Notice 2004-20 this week, which identified as listed transactions so-called “Midco” transactions, in which an intermediary was used to facilitate the sale of non-US assets to take advantage of certain foreign tax credit provisions (and similar transactions). Notice 2020-19 indicates that the Treasury Department and the IRS have concluded that the enactment of Section 901(m) “curtailed the use of these transactions because it effectively denies the foreign tax credits ... under Section 901 or 902 (as in effect on 21 December 2017), as described in Notice 2004-20, or Section 960.” Final regulations under Section 901(m) were published on 20 March 2020.

The IRS this week released its annual Advance Pricing Agreement (APA) Report (Announcement 2020-2) for 2019. The IRS reports there were 120 APAs executed in 2019, with a total of 121 APA applications filed last year. The total number of APAs concluded increased from 107 to 120 and the median amount of time to finalize an APA slightly decreased from 40.2 months to 38.8 months. See EY Global Tax Alert, [US IRS issues annual APA report for 2019](#), dated 9 April 2020 for details.

Endnote

1. All "Section" references are to the Internal Revenue Code of 1986, and the regulations promulgated thereunder.

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