

Report on recent US international tax developments - 25 September 2020

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The United States (US) Treasury and the Internal Revenue Service (IRS) this week released several important *Tax Cuts and Jobs Act* (TCJA) related international regulations.

First, the Government released final and proposed regulations on determining controlled foreign corporation (CFC) status for certain provisions following the repeal of Internal Revenue Code¹ Section 958(b)(4). Before the repeal by the TCJA, Section 958(b)(4) prevented a US subsidiary from being treated as owning stock in a foreign-owned brother-sister subsidiary for purposes of determining whether the brother-sister foreign subsidiary was a CFC.

The final regulations ([TD 9908](#)) generally follow proposed regulations that were issued in October 2019. In one notable change, the final regulations expand an exception so that no deductions are deferred under Section 267(a)(3)(B)(i) on payments to a related CFC unless the CFC has an inclusion US shareholder.

Importantly, the proposed regulations ([REG-110059-20](#)) would make payments ineligible for look-through under Section 954(c)(6) if paid by a CFC that is only a CFC as a result of the repeal of Section 958(b)(4). The denial of Section 954(c)(6) look-through treatment is proposed to apply to payments of dividends, interest, rents and royalties made during tax years of the foreign corporation ending on or after 21 September 2020.

The proposed regulations also would apply certain stock ownership thresholds for satisfying nonrecognition treatment on the outbound transfers of stock or securities of a domestic corporation under Reg. Section 1.367(a)-3(c) without regard to the repeal of Section 958(b)(4).

The final regulations generally apply to tax years of a foreign corporation ending on or after 1 October 2019 (or to relevant transfers or payments made or accrued on or after 1 October 2019). However, taxpayers may generally apply the final regulations to the last tax year of a foreign corporation beginning before 1 January 2018, and each subsequent tax year of the foreign corporation, if the taxpayer and related US persons consistently apply the relevant rule with respect to all foreign corporations.

Treasury and the IRS this week also released final regulations ([TD 9919](#)) under Section 864(c)(8) on the treatment of a foreign partner's transfer of an interest in a partnership that is engaged in the conduct of a US trade or business. The final regulations largely adopt proposed regulations that were issued on December 2018 ([REG-113604-18](#)), with some technical changes. Section 864(c)(8), enacted by the TCJA, generally treats any gain or loss from a non-US person's sale of an interest in a partnership that is engaged in a trade or business in the US as effectively connected with that trade or business.

In particular, the final regulations:

- ▶ Limit the extent to which certain property held by a partnership is deemed to give rise to US-source gain or loss, which may decrease the extent to which gain or loss on the transfer of a partnership interest would be treated as effectively connected with the conduct of a US trade or business

- ▶ Coordinate the interaction of Section 864(c)(8) and US income tax treaties, including by clarifying that: (i) the transfer of an interest in a partnership without a US permanent establishment (US PE) may be exempt notwithstanding Section 864(c)(8); and (ii) partnership assets that do not form part of a US PE are generally not taken into account in determining gain or loss under Section 864(c)(8)
- ▶ Clarify that the transfer of a partnership interest in a nonrecognition transaction may be non-taxable under Section 864(c)(8) but may nonetheless be subject to tax under Section 897(g) if the partnership holds one or more US real property interests

The final regulations generally apply to transfers occurring on or after 26 December 2018.

The Organisation for Economic Co-operation and Development (OECD) will publish final blueprints for Pillar 1 and Pillar 2 of the Base Erosion and Profit Shifting (BEPS) 2.0 project, along with an impact assessment, on 12 October 2020, according to Pascal Saint-Amans, Director of the OECD Centre for Tax Policy and Administration. The tax press quoted the OECD tax chief as saying that the Inclusive Framework (IF) on BEPS is currently reviewing revised drafts ahead of the scheduled IF meeting set for 8-9 October. Saint-Amans was further quoted as saying the blueprints will then be delivered to the G-20 finance ministers for their 14 October meeting.

Public consultations on the pillar drafts are expected to begin in mid-October, Saint-Amans said, with comments due before 25 December 2020.

Endnote

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

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