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In this issue

Treasury news

2. Treasury expects to release most TCJA international proposed regulations by year-end

IRS news

2. IRS issues proposed regulations reducing potential income inclusions for certain domestic corporations owning stock in foreign corporations
2. IRS announces changes to Section 965 transition tax rules affecting basis election deadline, aggregate foreign cash position, and relief related to Hurricane Florence
3. IRS issues guidance for REITs on treatment of certain income inclusions from foreign corporations
3. IRS to move on withholding tax campaigns in 2019

Digital Taxation

4. US reaffirms opposition to unilateral digital tax measures

OECD developments

4. OECD on track for digital tax framework
4. OECD releases 2017 Mutual Agreement Procedure statistics

Treasury news

Treasury expects to release most TCJA international proposed regulations by year-end

US Treasury officials in early October indicated they are on track to release proposed regulations on the majority of the international tax provisions enacted by the *Tax Cuts and Jobs Act* (TCJA) by the end of the year. The government specifically plans to release before the Thanksgiving holiday proposed regulations on the Section 163(j) interest limitation, foreign tax credits and the Base Erosion and Anti-abuse Tax (BEAT).

The government further plans to release before the end of the year proposed regulations on the Section 250 deduction, the Foreign Derived Intangible Income (FDII) rules, the remainder of the proposed Global Intangible Low-taxed Income (GILTI) regulations and the Section 267A anti-hybrid rules. Pointing to the ambitious deadlines, a government official tamped down expectations by saying the proposed regulations would be neither perfect nor comprehensive.

As we go to press, the Section 163(j) regulations have been sent to the OMB Office of Information and Regulatory Affairs (OIRA) for review. OIRA review is generally expected to take 10 business days, although in certain circumstances it may take as long as 45 business days. After OIRA review is complete, Treasury is expected to move quickly to send the proposed regulations to the Federal Register.

Treasury indicated that they plan to finalize most of the proposed regulations covering the TCJA international provisions by June 2019. A Treasury official was also quoted as saying the government aims to finalize the Section 965 transition regulations by year-end.

Commenting on the upcoming proposed previously-taxed income (PTI) regulations, a senior Treasury official indicated they are unlikely to be released as a complete package by year-end, but the government hopes to get some guidance out by then on issues affecting financial statements. The IRS reportedly is still determining the full scope of the pending PTI regulations.

The OIRA also released their Fall Agenda on 17 October, generally confirming Treasury statements on the pending release of various TCJA international tax regulations.

IRS news

IRS issues proposed regulations reducing potential income inclusions for certain domestic corporations owning stock in foreign corporations

The IRS on 31 October 2018 issued [proposed regulations](#) reducing the amount determined under Section 956 for certain domestic corporations that own (or are treated as owning) stock in controlled foreign corporations (CFCs). The proposed regulations would reduce a corporate US shareholder's Section 956 inclusion with respect to a CFC by the amount for which the US shareholder would have been allowed a Section 245A dividend received deduction (DRD) if it had received a distribution from the CFC equal to the amount otherwise determined under Section 956. That is, the tentative Section 956 inclusion is reduced by the amount of the hypothetical Section 245A eligible dividend the US shareholder could have otherwise received from the CFC. The preamble notes that this is to maintain symmetry between the taxation of actual repatriations and the taxation of deemed repatriations.

The proposed rules address Treasury's concern with Section 956 being retained post-*Tax Cuts and Jobs Act* and the ability of taxpayers to affirmatively trigger Section 956 inclusions in order to access foreign taxes. The proposed regulations would limit taxpayers' ability to take that course of action by reducing (or eliminating) the Section 956 inclusion itself. Special rules are also provided to address indirect ownership.

The proposed regulations would apply prospectively for taxable years of CFCs beginning on or after the date final regulations are published. The preamble allows taxpayers to rely on the proposed regulations currently, however, but only if done so for all CFCs.

IRS announces changes to Section 965 transition tax rules affecting basis election deadline, aggregate foreign cash position, and relief related to Hurricane Florence

In [Notice 2018-78](#), the IRS announced certain amendments to the rules included in the proposed regulations under Section 965 that were issued on 1 August 2018 ([REG-104226-18](#)).

The Notice announced that the final regulations will include a transition rule extending the due date and providing limited revocability for the basis election under Prop. Reg. Section 1.965-2(f)(2) until 90 days after the Section 965 proposed regulations are finalized. With a more reasonable due date and limited revocability for the basis election, taxpayers that previously decided not to make the election based on the impracticality of performing the requisite due diligence should reconsider that decision.

The Notice also announced that the final rules will include a rule treating a consolidated group as a single US shareholder for purposes of disregarding certain assets in calculating the aggregate foreign cash position of the US shareholder. This update aligns the aggregate foreign cash position calculation more closely with the anticipated result of the rules as originally described in Section 3.01(b) and (c) of Notice 2018-07.

Final regulations will also include relief on the deadline to file an election under the Section 965 proposed regulations for taxpayers eligible for the extended due date of their income tax return in response to Hurricane Florence. Taxpayers that believe they are entitled to this relief are instructed to mark "Hurricane Florence" on the top of the relevant Section 965 election statement or transfer agreement, and, in the case of a transfer agreement, to note which party to the agreement is an affected taxpayer.

IRS issues guidance for REITs on treatment of certain income inclusions from foreign corporations

In [Revenue Procedure 2018-48](#), the IRS has determined, under its Section 856(c)(5)(J)(ii) authority, that the subpart F inclusions, Passive Foreign Investment Company (PFIC) inclusions and Global Intangible Low-taxed Income (GILTI) inclusions attributable to investment by a real estate investment trust (REIT) in foreign corporations constitute qualifying income for purposes of the 95% income test in Section 856(c)(2).

In addition, the IRS determined, under Section 856(n)(3)(C), that Section 986(c) foreign currency gains recognized with respect to distributions of previously-taxed earnings and profits of foreign corporations are excluded from gross income for purposes of the 95% income test.

The IRS previously issued 13 private letter rulings in which it ruled that certain subpart F inclusions and PFIC inclusions constituted qualifying income for purposes of the 95%

2018 QI, W/H foreign partnership and W/H Foreign Trust application deadline is 16 November

The IRS deadline for all Qualified Intermediary (QI) (including Qualified Derivatives Dealer), Withholding Foreign Partnership and Withholding Foreign Trust applications for the 2018 year is 16 November 2018. The Service also reminded taxpayers that applicants that wish to have an agreement in effect in 2018 must submit their applications through the Qualified Intermediary/Withholding Foreign Partnership/Withholding Foreign Trust Application Account Management System (QAAMS) no later than that date.

income test. It was unclear, however, what effect, if any, the character of the underlying subpart F income or PFIC income had on the conclusions.

In addition, neither the underlying legislative history nor subsequently issued guidance addressed the REIT income testing treatment of GILTI inclusions, required under Section 951A, which was recently enacted under the *Tax Cuts and Jobs Act*.

Accordingly, the IRS's determination in Rev. Proc. 2018-48 that subpart F inclusions, PFIC inclusions and GILTI inclusions constitute qualifying income for purposes of the 95% income test is welcome news for REITs and their advisors. It appears that the IRS decided that these inclusions are "dividend-like" income and thus, should be given the same treatment under the REIT income tests as dividend income received from a C corporation.

IRS to move on withholding tax campaigns in 2019

An IRS official in October was quoted as saying the Service will step up action in regard to its withholding tax campaigns in the new year, a number of which were announced last spring.

The IRS Large Business and International Division official said that foreign financial institutions, in particular, should expect more letters asking about data collection in regard to compliance with the *Foreign Account Tax Compliance Act* (FATCA). The official added that the IRS is also interested in learning what kinds of systems are being used by the withholding industry to check for errors, and that it is possible that users of reliable systems could eventually receive preferential treatment by the government.

Digital Taxation

US reaffirms opposition to unilateral digital tax measures

Treasury Secretary Steven Mnuchin issued a statement on 25 October 2018, reiterating US government opposition to any unilateral action taken by countries in the area of digital taxation, instead supporting a common solution agreed to within the OECD. The Secretary's statement said the US opposes "unilateral and unfair gross sales tax that targets our technology and internet companies." The US supports a digital taxation framework that is "based on income, not sales, and should not single out a specific industry for taxation under a different standard."

The Treasury statement follows a letter sent by US Senate Finance Committee Chairman Orrin Hatch, (R-UT) and Ranking Member Sen. Ron Wyden (D-OR) on 18 October to the Presidents of the European Council and the European Commission, respectively, expressing their concern over the EC proposal to introduce a three-percent digital services tax (DST) on revenues resulting from the supply of certain digital services. The US officials pointed to information that an EU agreement in principle on the DST proposal could occur in the coming weeks.

The Finance Committee leaders wrote that the EU DST proposal "discriminates against US companies and undermine the international tax treaty system." They urged the EU to abandon the DST proposal and delay any unilateral action, and instead focus their efforts on reaching a consensus on a digital tax framework within the OECD.

OECD developments

OECD on track for digital tax framework

Pascal Saint-Amans, director of the OECD's Centre for Tax Policy and Administration, said during an OECD webcast on 16 October that the organization is making progress toward

a digital tax framework and expressed the hope that the OECD may have something tangible to report for the G-20 finance ministers meeting in June 2019.

Saint Amans said three main approaches favored by various countries came out of the last meeting of the OECD Task Force on the Digital Economy: (1) one focused on data and user participation and the role they play in highly digitalized businesses; (2) a broader approach on the allocation of taxing rights with an emphasis on market jurisdictions; and (3) a third alternative that favors a minimum tax rate. The next meeting of the OECD digital task force is slated for early December.

OECD releases 2017 Mutual Agreement Procedure statistics

The OECD on 10 October 2018 released its annual publication on Mutual Agreement Procedure (MAP) statistics. For 2017, the report includes statistics from all OECD members and most of the members of the OECD Inclusive Framework on BEPS (BEPS IF) – a total of 87 jurisdictions and almost all MAP cases worldwide. The report provides information separately for transfer pricing cases and non-transfer-pricing cases regarding the:

- ▶ Opening and ending inventory of MAP cases for 2017
- ▶ Number of new MAP cases initiated and completed
- ▶ Cases closed or withdrawn, and
- ▶ Average cycle time for cases completed, closed or withdrawn

In addition, the report provides for each jurisdiction the number of MAP cases it has with each of its treaty partners. This increased transparency should allow greater insight into each jurisdiction's unique MAP situation. According to the OECD data, 299 US MAP cases were initiated in 2017.

US, Israel to review updating tax treaty

Treasury Secretary Steven Mnuchin and his Israeli counterpart in late October reportedly agreed to appoint a joint task force to review the existing US-Israel tax treaty with the goal of updating the convention. The two officials earlier were said to have agreed on the need to amend the existing treaty's withholding rates as well as remove certain barriers to investment.

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