



January 10, 2019

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Mr. William M. Paul
Acting Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Proposed Guidance Related to Section 951A (Global Intangible Low-Taxed Income)
[\(REG-104390-18\)](#)

Dear Commissioner Rettig and Mr. Paul :

The American Institute of CPAs (AICPA) appreciates the opportunity to submit the following recommendations related to the proposed regulations under section 951A,¹ also known as Global Intangible Low Tax Income, enacted under Public Law No. 115-97, commonly referred to as the Tax Cuts and Jobs Act (TCJA).

Our recommendations, detailed below, address the following areas:

1. Carryforward of Net Tested Losses by United States Shareholders;
2. The Pro-Rata Share Anti-Abuse Rule under Prop. Reg. § 1.951-1(e)(6);
3. The Anti-Abuse Rule for Temporarily Held Property under Prop. Reg. § 1.951A-3(h)(1); and
4. Availability of Section 245A Dividends Received Deduction to Controlled Foreign Corporations.

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The AICPA is the world's largest member association representing the accounting profession, with more than 431,000 members in 137 countries and territories, and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. Please contact Philip Pasmanik, Chair, AICPA International Taxation Technical

¹ All references herein to "section" or "§" are to the Internal Revenue Code of 1986, as amended, or the Treasury regulations promulgated thereunder.

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Resource Panel, at (212) 686-7160, ext. 156 or Philip.Pasmanik@hertzherson.com; Jonathan Horn, Senior Manager – AICPA Tax Policy & Advocacy, at (202) 434-9204 or Jonathan.Horn@aicpa-cima.com; or me at (408) 924-3508 or Annette.Nellen@sjsu.edu.

Respectfully submitted,



Annette Nellen, CPA, CGMA, Esq.
Chair, AICPA Tax Executive Committee

cc: Mr. Douglas L. Poms, International Tax Counsel, Department of the Treasury
Ms. Marjorie A. Rollinson, Associate Chief Counsel (International), Internal Revenue Service
Mr. Daniel M. McCall, Deputy Associate Chief Counsel (International – Technical), Internal Revenue Service
Ms. Melinda E. Harvey, Attorney-Advisor, Office of Associate Chief Counsel (International), Internal Revenue Service
Mr. Michael Kaercher, Attorney-Advisor, Office of Associate Chief Counsel (International), Internal Revenue Service
Mr. Austin Diamond-Jones, Assistant to the Branch Chief – Branch 1), Office of Associate Chief Counsel (Corporate), Internal Revenue Service
Mr. Kevin M. Jacobs, Senior Technician Reviewer, Office of Associate Chief Counsel (Corporate), Internal Revenue Service

AMERICAN INSTITUTE OF CPAS

Proposed Guidance Related to Section 951A (Global Intangible Low-Taxed Income) ([REG-104390-18](#))

January 10, 2019

1. Carryforward of Net Tested Losses by United States Shareholders

RECOMMENDATION

The American Institute of CPAs (AICPA) recommends that the Department of the Treasury (“Treasury”) and the Internal Revenue Service (IRS) draft regulations allowing a United States (U.S.) shareholder of Controlled Foreign Corporations (CFCs) with a “net tested loss” (total tested losses exceeds total tested income) in any tax year the ability to carryforward the amount of the net tested loss to offset net CFC tested income of that U.S. shareholder in future tax years.

ANALYSIS

Section 951A² does not address the situation in which a U.S. shareholder has an overall tested loss with respect to all of its CFCs (a net tested loss). Specifically, the statute is silent as to whether a taxpayer may carryforward a net tested loss to offset tested income in a subsequent tax year.

For purposes of section 951A, net tested income is the excess of a U.S. shareholder’s pro-rata share of tested income over the tested loss of each CFC.³ To the extent that a shareholder’s net CFC tested income exceeds a shareholder’s net deemed tangible income return for a taxable year, the excess is Global Intangible Low Tax Income (GILTI).⁴

We recommend that the final section 951A regulations provide that a net tested loss is eligible for a carryforward to offset tested income in a future tax year. Section 951A effectively ends deferral for income earned by a CFC to the extent such income exceeds the U.S. shareholder’s Deemed Tangible Income Return. If there is no carryforward for a net tested loss, U.S. shareholders of a CFC may have a net U.S. tax liability even though their CFCs have no net tested income over a multi-year period.

For example, X is a U.S. person whose only foreign investment is a 100% share of CFC1. CFC1 has a tested loss in Year 1 of \$100 and in Year 2 has tested income of \$100. If the Year 1 unutilized tested loss does not carryforward to Year 2, then X will have a GILTI inclusion in Year 2 notwithstanding that X has no economic gain over the two-year period. This result appears unduly harsh.

We further recommend applying the tested loss carryover at the U.S. shareholder level and not at the tested loss CFC level. The determination of whether a tested loss is a net tested loss is made

² All references herein to “section” or “§” are to the Internal Revenue Code of 1986, as amended, or the Treasury regulations promulgated thereunder.

³ Section 951A(c)(1).

⁴ Section 951A(b)(1).

at the U.S. shareholder level. Thus, it is appropriate that the carryforward of the tested loss is also determined at the U.S. shareholder level.

2. The Pro-Rata Share Anti-Abuse Rule under Prop. Reg. § 1.951-1(e)(6)

RECOMMENDATION

The AICPA recommends that Treasury and the IRS modify the pro-rata share anti-abuse rule in Prop. Reg. § 1.951-1(e)(6) as follows:

- a) Provide for a specific and narrow application of the rule that will apply only in cases where abuse is clearly intended, such as non-economic transactions designed to minimize the tax under this provision.
- b) Provide an explicit exclusion for transactions conducted with unrelated parties within the meaning of sections 267(b) and 707(b).
- c) Provide an explicit exclusion for transactions conducted with related parties located in the same country of tax residence as the relevant CFC.
- d) Provide a small business exception to the provision for U.S. shareholders with worldwide gross receipts under \$25 million as determined under section 448(e).

ANALYSIS

Proposed Reg. § 1.951-1(e)(6) provides for a broad anti-abuse rule which would include, but is not limited to, transactions or arrangements where the principal purpose is to reduce a U.S. shareholder's pro-rata share of subpart F income or GILTI tested income, tested losses, Qualified Business Asset Investment (QBAI) and other GILTI attributes. There are no examples contained within the proposed regulations regarding the application of this rule, nor do they illuminate any potential abuses. Furthermore, the Preamble does not discuss the background to this proposed rule.

The broad nature of this rule causes ambiguity in terms of other transactions to which it may apply, including many which are not directly attributable to determining a U.S. shareholder's pro-rata share of subpart F or GILTI income. There is no guidance provided in the proposed regulations on how extensively this rule applies. It is unclear if only section 958(a) shareholders are affected or if the rule extends to the CFC as well. Further, taxpayers are not provided clear instructions on whether it affects all or part of a U.S. shareholder's allocation of subpart F or GILTI income, the earnings and profits of the CFC, a U.S. shareholder's redemptions, as well as any foreign tax credits and their related baskets.

The broad scope of the proposed rule seems excessive, particularly in view of the following relevant language on page 645 of the [Joint Explanatory Statement of the Committee of the Conference](#) (Conference Report) for the TCJA:

“the conferees intend that non-economic transactions intended to affect tax attributes of CFCs and their U.S. shareholders (including amounts of tested income

and tested loss, tested foreign income taxes, net deemed tangible income return, and QBAI) to minimize tax under this provision be disregarded. For example, the conferees expect the Secretary to prescribe regulations to address transactions that occur after the measurement date of post-1986 earnings and profits under amended section 965, but before the first taxable year for which new section 951A applies, if such transactions are undertaken to increase a CFC's QBAI.”

3. The Anti-Abuse Rule for Temporarily Held Property Under Prop. Reg. § 1.951A-3(h)(1)

RECOMMENDATION

The AICPA recommends that Treasury and the IRS modify the proposed anti-abuse rule for temporarily held property to exclude assets acquired or disposed to/from unrelated parties (within the meaning of sections 267(b) and 707(b)) provided that the taxpayer can reasonably establish that the transaction occurred in the ordinary course of a trade or business.

ANALYSIS

Proposed Reg. § 1.951A-3(h)(1) provides an anti-abuse rule for “temporarily held” QBAI, consistent with the QBAI anti-abuse directive of section 951A(d)(4). This rule disregards for QBAI purposes the entire basis in specified tangible property of a tested income CFC under specific conditions. The tested income CFC must acquire the property with a principal purpose to reduce the GILTI inclusion of a U.S. shareholder and hold the property temporarily, but over at least one calendar quarter end. For this purpose, specified tangible property held for less than 12 months is generally treated as temporarily held and acquired with the principal purpose to reduce a GILTI inclusion.

This anti-abuse rule effectively creates a required minimum 12-month holding period for any tangible property included in a CFC's QBAI. This anti-abuse rule is overly encompassing and is contrary to good tax policy. As part of their the normal course of business, taxpayers will frequently acquire and dispose of QBAI property for legitimate business purposes (such as, expansion or contraction of operations, replacing older and unwanted items, and acquiring the assets of an unrelated trade or business in a taxable or nontaxable transaction).

This rule operates on a per se basis and thus transactions that were not undertaken with the intent to reduce the GILTI inclusion of a U.S. shareholder appear to fall within the scope of the rule. This rule as currently proposed, appears to apply without regard to the intent of the taxpayer, and without regard to whether the transaction has economic substance or a business purpose. The proposed regulations do not contain any examples which would help clarify the application of this rule.

The per se presumption of the proposed regulation will impose a significant compliance burden and potential tax cost on taxpayers with no clear policy foundation, without considering that assets are often held for fewer than 12 months in the normal course of a trade or business. This rule will cause inefficiency as taxpayers postpone asset acquisitions and distributions solely to satisfy the arbitrary holding period. It will also require an after-the-fact reevaluation of a taxpayer's QBAI calculation depending on when assets are acquired or disposed of, sometimes after the filing deadline for the affected tax year.

4. Availability of Section 245A Dividends Received Deduction to CFCs

RECOMMENDATION

The AICPA recommends that the final regulations allow a CFC the section 245A Dividends Received Deduction (DRD) in calculating its subpart F income.

ANALYSIS

Section 245A(a) provides for a 100% DRD on certain foreign source dividends received by a domestic corporation from a 10% owned foreign corporation. Treasury and the IRS requested comments in the Preamble to the proposed regulations as to whether to allow this deduction to CFCs which is limited by statute to domestic corporations.⁵

Based on the Conference Report, it appears that Congress intended to allow CFCs the section 245A DRD as stated in footnote 1486 on page 599:

Including a controlled foreign corporation treated as a domestic corporation for purposes of computing the taxable income thereof. See Treas. Reg. sec. 1.952-2(b)(1). Therefore, a CFC receiving a dividend from a 10-percent owned foreign corporation that constitutes subpart F income may be eligible for the DRD with respect to such income.

The proposed regulations under Treas. Reg. § 1.951A-2(c)(2) provide that a CFC's tested income and allowable deductions are computed in accordance with Treas. Reg. § 1.952-2. Treasury Reg. § 1.952-2 operates to treat a CFC as a domestic corporation in order to determine that CFC's taxable income. Consequently, to ensure a consistent application of these provisions, a CFC computing its tested income would have the section 245A DRD available to it.

In addition, following the sunset of the section 954(c)(6) related party look-through provision on December 31, 2019, a failure to allow CFCs the section 245A DRD would produce different tax results for multi-national enterprises with a tiered tax structure from those with a flat (a/k/a brother/sister) structure. There is no reasonable tax policy purpose served by allowing this disparate treatment to occur.

⁵ The U.S. shareholder must have held the shares of stock of the distributing corporation for more than 365 days during the 731-day period beginning on the date that is 365 days before the date on which the shares become ex-dividend. The U.S. shareholder is treated as holding the stock for any period only if, at all time during the holding period, the specified 10% owned foreign corporation was a specified 10% owned foreign corporation and the taxpayer was a U.S. shareholder with respect to the specified 10% owned foreign corporation.