



September 21, 2020

Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20044

RE: IRS REG-127732-19 - Guidance under Section 954(b)(4) Regarding Income Subject to a High Rate of Foreign Tax

Dear Commissioner Rettig:

USCIB¹ is pleased to provide comments on the proposed regulations under section 954(b)(4) regarding income subject to a high rate of foreign tax.

Prop. Treas. Reg. 1.954-1(d)(6)(v) combined election with GILTI high-tax exception

The preamble to the proposed regulations states that the regulations are drafted to address “inappropriate results under section 904” when certain taxpayers exclude some-high taxed income while claiming credits on other high-taxed income. As a result of this perceived abuse, the proposed regulations include a provision that a single high-taxed exception election should be applicable to all income of all CFCs that are members of a CFC group (i.e. consolidated taxpayer). The election also unifies the election for purposes of both Subpart F and GILTI such that a taxpayer must elect to apply the exception for both and cannot apply the exception to one category or the other.

We think it is inappropriate to require a taxpayer to make an election under section 954(b)(4) for all members of a CFC group. Section 954(b)(4) applies by its terms to any item of income of a CFC for which the taxpayer has established meets the criteria for being high-taxed. The statutory language clearly anticipates an election at a more granular level than the entire CFC group, so Treasury should not adopt rules requiring an all or nothing election for all CFCs in the group.

Subpart F and GILTI are fundamentally two separate taxing regimes that drive vastly different considerations in analyzing whether to make a high-tax exception election. Combining the two high-tax exceptions into one unified election will make the analysis more burdensome and make

¹ USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide and works to facilitate international trade and investment.

the unified election less flexible. Sometimes, combining the two elections can penalize taxpayers substantively in a manner that is unintended by the proposed regulations. This is particularly true for taxpayers that cannot claim foreign tax credits. By definition a taxpayer that deducts foreign taxes paid cannot cherry-pick groups of high or low-taxed income for which to claim a credit against US tax. Furthermore, some taxpayers that have capital intensive operations may not be in a net GILTI inclusion position and may not benefit from the GILTI high-tax exception election.

It is this last group of taxpayers that could be most negatively affected by the proposed regulations. For example, a taxpayer who is limited in utilizing foreign tax credits, has capital intensive operations around the world subject to a high effective foreign tax rate, yet has no net GILTI inclusion on a combined basis, may not want to make a high tax election for purposes of section 951A. Because the QBAI of high-taxed CFCs would be removed from the computation of DTIR, it could result in a net GILTI inclusion for such taxpayer.

Furthermore, if the same taxpayer has Subpart F income that is also subject to a high effective foreign tax rate, they would want to make a high-tax exception election with respect to such income. In fact, they would want to make the election for all high-taxed CFCs since they cannot take a foreign tax credit due to limitation and thus face actual double taxation on all Subpart F income.

As written the proposed regulations would be detrimental to such a taxpayer and yield inappropriate results since it would subject them to double taxation (or else require the sacrifice of QBAI for GILTI purposes as the price of avoiding double taxation on any Subpart F income). We can think of no good policy reason to force a taxpayer into such a decision.

We recommend that Treasury maintain the Subpart F high-tax exception and the GILTI high-tax exception elections as two separate elections. If Treasury deems it necessary to have one unified exception, we recommend changing the language in Prop. Treas. Reg. §1.954-1(d)(6)(v) such that it not apply to taxpayers that deduct foreign taxes paid or otherwise cannot claim foreign tax credits. Treasury's policy objective of preventing certain taxpayers from picking and choosing where and when to apply the high-tax exception to obtain "inappropriate results" under section 904 would still be fully achieved if the rules applied only to taxpayers who claim foreign tax credits.

Prop. Treas. Reg. § 1.954-1(d)(3)(v)(A) anti-avoidance rules

The preamble to the proposed regulations states that Treasury is concerned with taxpayers including or failing to include items on applicable financial statements in order to manipulate the application of the high-tax exception. The proposed regulations contain anti-abuse language to address this concern. In setting the anti-abuse standard, the proposed regulation uses the phrase "a significant purpose of avoiding the purposes of" the Subpart F and GILTI rules. While we understand Treasury's concern, the use of a standard other than the more common "a principal purpose" standard leaves open for interpretation transactions that could be routine or

commercial in nature. For example, could a timing difference at a CFC as a result of a routine commercial payment that results in a high effective rate be viewed as a “significant purpose” of avoiding the purposes of the Subpart F or GILTI rules? The standard is troublingly broad and vague, both in using the term “significant” rather than “principal” and in gearing the taxpayer’s purpose to avoiding the “purposes of” the Subpart F and GILTI rules, which purposes of course are themselves open to considerable interpretation.

We think that the standard used elsewhere in Treasury regulations of “principal purpose” should be adopted in the proposed regulations, with examples illustrating problematic and non-problematic transactions under this standard.

Sincerely,

William J. Sample
Chair, Taxation Committee
United States Council for International Business (USCIB)

Washington Office

1400 K Street, N.W., Suite 525
Washington, DC 20005
202.371.1316 [tel](tel:202.371.1316)
202.371.8249 fax
www.uscib.org

Global Business Leadership as the U.S. Affiliate of:
International Chamber of Commerce (ICC)
International Organization of Employers (IOE)
Business and Industry Advisory Committee (BIAC) to the OECD
ATA Carnet System