The Potential Paradox of a Decision in *Moore* Invalidating the Transition Tax

*By Jeffrey M. Tebbs**

In November 2023, the taxpayers and the government completed their briefing in *Moore v. United States*, the high-profile case pending in the Supreme Court addressing the constitutionality of the Code Sec. 965 transition tax.[1] Oral argument is scheduled for December 5th, and a decision is expected by early summer 2024. As practitioners eagerly await a decision, taxpayers continue to evaluate whether to file claims for refund (or protective claims for refund) for amounts paid pursuant to Code Sec. 965. The nonpartisan Tax Policy Center estimates that refund claims (and the termination of installment payments) following a Supreme Court decision invalidating the transition tax may cost the fisc more than $200 billion, even adjusting for the possibility that the statute of limitations will bar certain claims.[2]

While a decision invalidating the transition tax may result in a significant benefit for many taxpayers, for others, the value of refunding the transition tax may be outweighed by the tax detriment to transactions occurring after 2017.

In general, if any provision of the Internal Revenue Code is held invalid, Code Sec. 7852 provides that the remainder of the Code will not be affected. This article assumes that, if the Supreme Court invalidates the transition tax in *Moore*, the Court will consider the transition tax severable from the remainder of the international tax system established in the Tax Cuts and Jobs Act ("TCJA").[3] Under longstanding judicial principles, taxpayers must apply consistent treatment to the same items across taxable years.[4] If a taxpayer claims a refund of its transition tax liability, the Internal Revenue Service ("IRS") would likely conclude that the taxpayer must reflect the corollary consequences that follow from the U.S. shareholder eliminating the deemed inclusion under Code Sec. 965(a) of earnings and profits ("E&P") from specified foreign corporations ("SFCs").[5] Those consequences would be reflected not only in the year(s) of the original deemed inclusion but also subsequent years.[6] In particular, if a U.S. shareholder never included amounts under Code Sec. 965(a), a decision invalidating the transition tax may prevent the creation of Code Sec. 965 previously taxed earnings and profits ("PTEP"), leaving SFCs with their original, untaxed Code Sec. 959(c)(3) E&P.[7] Similarly, a U.S. shareholder may no longer increase its basis in

JEFFREY M. TEBBS is a Tax Member at Miller & Chevalier Chartered. He advises multinational companies on complex U.S. tax planning matters and represents businesses in related tax controversies.

the stock of a deferred foreign income corporation under Code Sec. 961(a).[8]

The elimination of valuable tax attributes would affect the treatment of post-2017 distributions from SFCs and may prevent the creditability of withholding taxes on such distributions. Furthermore, U.S. shareholders may be required to reduce or eliminate capital losses on post-2017 sales of stock of SFCs. The negative impact on post-2017 transactions may exceed the value of any refund of the transition tax amount, particularly for U.S. shareholders for which the original inclusion was wholly or partially sheltered by an indirect foreign tax credit,[9] wholly or partially sheltered with offsets from E&P deficit foreign corporations,[10] or for which the 8-percent rate equivalent percentage applied, in whole or in part.[11]

Part I of this article considers the mechanisms by which a decision in *Moore* invalidating the transaction tax may affect the treatment of post-2017 distributions from SFCs. Part II of this article considers the potential impact on post-2017 sales of SFC stock. Part III concludes. The article emphasizes the impact on U.S. corporate taxpayers, and issues specific to U.S. individual shareholders are beyond the scope of the discussion that follows.

I. Effect on Distributions After TCJA

The IRS Statistics of Income Division estimates that U.S. corporate shareholders included $3.5 trillion in gross income under Code Sec. 965(a), before the deduction under Code Sec. 965(c) and without regard to any foreign tax credit.[12] Immediately following the enactment of TCJA, U.S. multinational enterprises ("MNEs") repatriated unprecedented earnings to the United States. In 2018, U.S. MNEs received dividends from foreign affiliates of $776.5 billion, which was $621.4 billion more than in 2017 and the first time since 1982 that the amount repatriated exceeded the current earnings of foreign affiliates.[13] The surge persisted through 2019 before subsiding to a pre-TCJA pace in 2020 and continuing at a relatively lower rate thereafter.[14] Under the ordering rules of Code Sec. 959, many (if not most) of these post-TCJA distributions would have been sourced principally from Code Sec. 965 PTEP.[15]

If the Supreme Court invalidates the Code Sec. 965 transition tax, U.S. MNEs will need to reevaluate the tax treatment of those distributions. At a minimum, U.S. MNEs will need to evaluate (i) whether dividends sourced from untaxed E&P accumulated between 1987 and 2017 are eligible for the Code Sec. 245A dividends received deduction ("DRD"), (ii) whether foreign withholding taxes imposed on such distributions are no longer creditable in light of Code Sec. 245A(d), (iii) whether exchange gain or loss recognized on such distributions must be reversed, and (iv) whether the extraordinary dividend rules of Code Sec. 1059 are implicated by distributions of untaxed E&P (rather than PTEP).

A. Whether E&P Accumulated Between 1987 and 2017 is Eligible for the Code Sec. 245A DRD

If the Code Sec. 965 transition tax is held unconstitutional, then U.S. MNEs will need to determine whether the Code Sec. 245A DRD applies to distributions that such taxpayers had expected to be composed of Code Sec. 965 PTEP, and that are, as the result of a transition tax refund claim, instead composed on untaxed Code Sec. 959(c)(3) E&P.

Code Sec. 245A provides that "[i]n the case of any dividend received from a specified 10-percent owned foreign corporation by a domestic corporation which is a United States shareholder with respect to such foreign corporation, there shall be allowed as a deduction an amount equal to the foreign-source portion of such dividend."[16] As a threshold matter, U.S. corporate shareholders will need to satisfy statutory requirements for the Code Sec. 245A DRD that did not apply to distributions of PTEP, including the Code Sec. 245A holding period,[17] the rules for determining the foreign-source portion of such distribution,[18] and the rules governing hybrid dividends.[19] U.S. shareholders may also need to satisfy the regulatory requirements imposed by Reg. §1.245A-5 (and earlier temporary regulations), to the extent those regulations survive current taxpayer challenges to their enforceability.[20] For example, if a distribution had originally been sourced from PTEP, no "extraordinary reduction" amount could have arisen, because there was no "dividend" for U.S. federal income tax purposes.[21] Taxpayers will need to reconsider the application of those rules in light of the revised composition of each cash distribution.

Beyond these requirements, taxpayers (and ultimately the courts) will need to confirm that the Code Sec. 245A DRD is available for distributions of untaxed E&P accumulated between 1987 and 2017. The statute itself does not condition the application of the DRD on the existence or application of the transition tax. Notably, although pre-1987 E&P was excluded from the Code Sec. 965 transition tax, Code Sec. 245A does not exclude such untaxed E&P from the Code Sec. 245A DRD, and the legislative history confirms that Congress intended to afford the DRD to pre-1987 amounts.

Tax reform proposals advanced in 2011 and 2014 by the former Chairman of the House Ways & Means Committee are widely understood as the progenitor of the international tax system established by TCJA. Chairman Camp's original 2011 discussion draft proposal subjected both pre-1987 and post-1986 foreign earnings to the proposed transition tax.[22] Based on concerns about the availability of adequate records for pre-1987 E&P, the 2014 discussion draft limited historical earnings for Code Sec. 965 purposes to post-1986 E&P.[23] The 2014 technical explanation published by the Joint Committee on Taxation confirmed that the Code Sec. 245A DRD nevertheless would apply to pre-1987 earnings, stating that "the participation exemption system is available for both post-1986 and pre-1987 foreign earnings."[24] The 2017 TCJA committee reports describing the transition tax rules proposed by the House of Representatives contain identical language, confirming the extension of the participation exemption system to pre-1987 earnings.[25] The Senate amendments did not contain any changes that would overturn this intention.

In response to a decision in *Moore* invalidating the Code Sec. 965 transition tax, Treasury and the IRS may attempt to promulgate regulations prohibiting the application of the Code Sec. 245A DRD to E&P accumulated between 1987 and 2017. In the preamble to the 2019 extraordinary disposition and extraordinary reduction regulations, Treasury and the IRS stated that such rules were necessary for the short gap period between the effective dates of Code Secs. 245A and 951A to disregard "the literal effect of Code Sec. 245A" in order to uphold the "intended effect of the subpart F and GILTI regimes" and "the structure of the statutory scheme[.]"[26] Similar arguments on the interlocking nature of the transition tax and the participation exemption may be marshaled here. The viability of potential regulations may depend on the manner in which the Supreme Court addresses severability in its decision, and of course, Code Sec. 7805(b) would constrain the ability of those regulations to apply retroactively. It remains possible that Congress would intervene legislatively.

B. Foreign Tax Credit Consequences

For distributions attributable to Code Sec. 965 PTEP, a foreign tax credit may have been available for withholding tax imposed, within the limits prescribed by Code Sec. 960(c).[27] If such distributions were instead composed of Code Sec. 959(c)(3) E&P, and the Code Sec. 245A DRD applies, then Code Sec. 245A(d) and Reg. §1.245A(d)-1 would disallow any credit for foreign taxes paid or accrued with respect to such amounts.[28] If the Code Sec. 245A DRD is unavailable for such dividend (*e.g.*, if the shareholder is an individual or the shareholder fails to satisfy the holding period), and the dividend is taxable to the U.S. shareholder, an indirect foreign tax credit is no longer available, given the repeal of Code Sec. 902.

A decision invalidating the Code Sec. 965 transition tax may affect the mechanics of numerous additional aspects of the foreign tax credit. For example, invalidation of the transition tax would affect the foreign tax credit disallowance in the transition tax regulations addressing offset earnings—the validity of which has been separately challenged by multiple taxpayers.[29]

C. Exchange Gain/Loss Consequences

Under Code Sec. 986(c), on the receipt of Code Sec. 965(a) PTEP, taxpayers must recognize foreign currency gain or loss attributable to movements in exchange rates between the time of a deemed inclusion under Code Sec. 965(a) and the actual distribution of such PTEP. The exchange gain or loss is prorated to reflect the Code Sec. 965(c) deduction.[30] If the Court invalidates Code Sec. 965, and a taxpayer timely files a refund claim, then the deemed inclusion under Code Sec. 965 would not occur, and any foreign exchange gain or loss recognized in a post-TCJA year would be reversed.

D. Application of Extraordinary Dividend Rules (Code Sec. 1059)

Under Code Sec. 1059, a corporation that receives an "extraordinary dividend" may be required to reduce its basis in the stock of the distributing corporation by the "nontaxed portion" of such dividend, and to the extent that reduction would exceed basis, the corporation must recognize gain.[31] Under Code Sec. 959(d), the distribution of PTEP is not treated as a dividend when distributed to the U.S. shareholder (or successor) that previously included such earnings in gross income. In general, the extraordinary dividend rules of Code Sec. 1059 would not have applied to distributions of Code Sec. 965 PTEP. If the Court invalidates Code Sec. 965, and a taxpayer timely files a refund claim, certain distributions will no longer be composed of Code Sec. 965 PTEP and may instead be composed of Code Sec. 959(c)(3) E&P. To the extent the Code Sec. 245A DRD applies to cause such distributions to be "nontaxed," the rules of Code Sec. 1059 need to be considered.

Code Sec. 1059 is generally restricted to dividends issued with respect to stock held for two years or less, for which the amount of the dividend exceeds the statutory "threshold percentage" (10 percent of adjusted basis for non-preferred stock).[32] However, certain types of dividends, including dividends arising from Code Sec. 304 transactions, are *per se* extraordinary without regard to holding period or the size of the dividend.[33] Moreover, the statutory exception for "qualifying dividends" cannot apply in the context of distributions from SFCs, because foreign corporations are not considered affiliated with a U.S. shareholder.[34] If Code Sec. 1059 applies to a distribution from an SFC, the reduction in basis may result in taxation of noneconomic gain on a subsequent sale of SFC stock.[35]

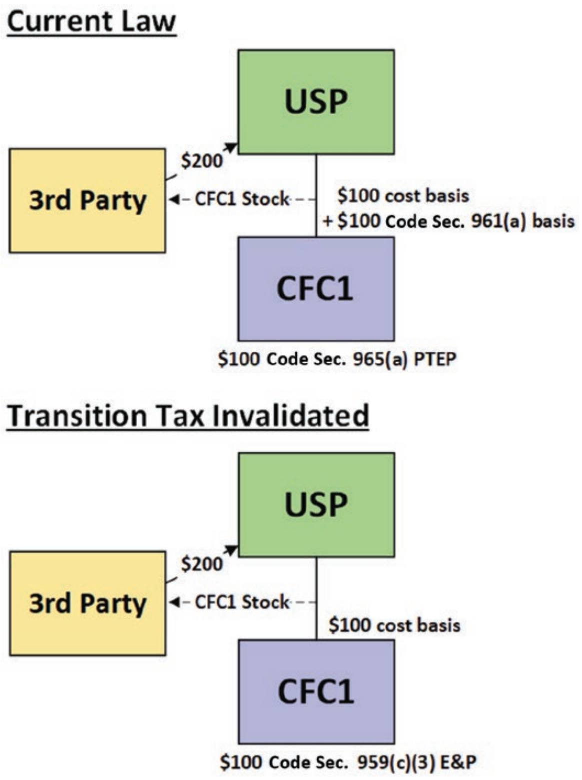
II. Effect on Sales of SFC Stock

A. Post-TCJA Sales of SFC Stock Before Cash Distributions

After 2017, if a U.S. shareholder sold SFC stock with Code Sec. 965(a) PTEP, the upward basis adjustment under Code Sec. 961(a) would prevent recognition of gain attributable to the value of PTEP remaining at the SFC level. A taxpayer filing a refund claim on the basis of a decision invalidating the Code Sec. 965 transition tax may not be afforded the basis increase associated with the former inclusion under Code Sec. 965(a). In such circumstances, the taxpayer will recognize gain attributable to the value of the earnings that remain at the SFC level. Code Sec. 1248(j) provides that, in certain cases, capital gain on the sale of SFC stock may be recharacterized as a dividend to the extent of such untaxed Code Sec. 959(c)(3) E&P, and that dividend may be eligible for the Code Sec. 245A DRD. Thus, in dispositions of SFC stock that result in capital gain, the U.S. shareholder may be left in an equivalent position.

Example 1. Assume USP forms CFC1 with $100 on January 1, 2015. Both entities have a U.S. dollar functional currency. CFC1 generates $100 of E&P from 2015 through 2017. Following the imposition of the transition tax, CFC1 has $100 of Code Sec. 965(a) PTEP, and USP's basis in CFC1 is increased $100 under Code Sec. 961(a), for a total of $200. On January 1, 2018, USP sells CFC1 to an unrelated party for fair market value of $200. No gain or loss would be recognized on the sale. Following

EXAMPLE 1.


Current Law
USP
$200
3rd Party
CFC1 Stock
$100 cost basis
+ $100 Code Sec. 961(a) basis
CFC1
$100 Code Sec. 965(a) PTEP
Transition Tax Invalidated
USP
$200
3rd Party
CFC1 Stock
$100 cost basis
CFC1
$100 Code Sec. 959(c)(3) E&P

a decision in *Moore* invalidating the transition tax, USP claims a refund of its transition tax liability, assuming the limitation period for claims remained open. CFC1 is now considered to hold $100 of Code Sec. 959(c)(3) E&P as of January 1, 2018. USP would recognize $100 of gain ($200 sales price – $100 basis). However, because USP has held CFC1 for at least a year, Code Sec. 1248(j) provides that the $100 gain is treated as a dividend for purposes of applying Code Sec. 245A.

In common fact patterns, the Code Sec. 245A DRD would apply, and the taxpayer would be left in an equivalent position, assuming the Code Sec. 245A DRD extends to earnings accumulated between 1987 and 2017. However, if the requirements of Code Sec. 245A are violated (*e.g.*, the holding period is not satisfied, the U.S. shareholder was an individual), the U.S. shareholder will incur capital gain on the sale.

The relief provided by Code Sec. 1248(j) is asymmetric. Code Secs. 1248(j) and 245A, working in tandem, may prevent recognition of capital gain, but those provisions cannot apply to restore a capital loss the U.S. shareholder may have otherwise triggered if the transition tax were upheld as constitutional.

Example 2. Assume the same facts as Example 1, except CFC1's fair market value declines from $200 to $100, perhaps due to contingent liabilities or a negative outlook for CFC1's business. USP sells CFC1 for fair market value of $100 on January 1, 2018. Before the decision in *Moore*, USP would recognize a $100 capital loss: $100 sales price - ($100 initial basis + $100 Code Sec. 961(a) basis). After the decision in *Moore*, USP timely claims a refund of its transition tax liability. Notwithstanding the economic decline in the value of CFC1, USP's sale of CFC1 would not result in gain or loss: ($100 sales price - $100 initial basis). USP has therefore lost the benefit of a capital loss (value equal to 21% of the amount of the loss) in exchange for the refund of the transition tax inclusion (value equal to 8.015.5% of the amount of the foregone loss).

The potential adverse consequences stem from critical policy choices in the architecture of the TCJA. When designing the TCJA, Congress focused on eliminating the "lock-out effect" of the existing deferral system, in which U.S. shareholders refrained from repatriating earnings from foreign subsidiaries operating in low- or no-tax jurisdictions in order to avoid the imposition of residual U.S. tax.[36] Congress sought to reverse the "perverse incentives to keep funds offshore" by adopting "a territorial system with appropriate anti-base erosion safeguards, combined with a lower corporate tax rate."[37]

In order to eliminate the lock-out effect, it was necessary for Congress to provide U.S. shareholders with basis in deferred foreign income corporations equal to the gross amount of Code Sec. 965(a) inclusion, before the deduction under Code Sec. 965(c) and without regard to whether the inclusion had been offset by the indirect foreign tax credit. Without an adjustment to basis equal to the gross amount of the inclusion, a subsequent distribution of PTEP to a U.S. shareholder (or the sale of stock of an SFC with PTEP) had the potential to produce capital gain, effectively reimposing the barriers to repatriating capital.[38] Consequently, U.S. shareholders were afforded Code Sec. 961 basis equal to the gross amount of the inclusion. As illustrated above, a taxpayer that applies a decision in *Moore* invalidating the transition tax may forego a basis attribute with a value equal to 21 percent of the gross inclusion amount under Code Sec. 965(a), in exchange for the refund of a gross inclusion that was taxed at 15.5 percent or less. For SFCs with minimal foreign cash positions (eligible for a lower rate under Code Sec. 965) or SFCs with high-taxed E&P, that gross inclusion may have been taxed at an even lower effective U.S. tax rate.

B. Post-TCJA Sales of SFC Stock After Cash Distributions

The detriment to a U.S. shareholder's capital loss described above cannot be eliminated by distributing earnings prior to the sale of SFC stock. When enacting the Code Sec. 245A DRD, Congress expressed concern that the benefit of the DRD would be duplicated if taxpayers distributed cash, claimed the DRD, sold the associated foreign corporate stock, and reported non-economic losses attributable to the decline in value from the repatriation of untaxed earnings.[39] Accordingly, Congress adopted Code Sec. 961(d), which reduces the basis of a domestic corporation in the stock of its 10-percent-owned foreign corporation by the amount of the allowable Code Sec. 245A DRD, solely for purposes of determining a loss on a subsequent disposition. A taxpayer applying a decision invalidating the transition tax may be required to reduce its basis in foreign corporate stock under Code Sec. 961(d), to reflect post-TCJA distributions now composed of untaxed E&P, rather than PTEP.

Example 3. Consider the facts of Example 2, but now assume that CFC1 distributed $75 of its accumulated earnings before the third-party sale. As a consequence of the distribution, the fair market value of CFC1 (and the purchase price) would decline to $25, rather than $100. Before a *Moore* decision invalidating the transition tax, the distribution of accumulated earnings would constitute a distribution of Code Sec. 965(a) PTEP. USP would recognize a $100 capital loss: $25 sales price – ($100 initial basis + $25 Code Sec. 961(a) basis). After *Moore*, the distribution of accumulated earnings would constitute a distribution of Code Sec. 959(c)(3) E&P, eligible for the Code Sec. 245A DRD, and triggering a basis adjustment under Code Sec. 961(d). As in Example 2, USP's sale of CFC1 would not result in gain or loss. The $25 sales price would be offset by USP's adjusted basis of $25 ($100 initial basis, with negative $75 adjustment under Code Sec. 961(d)).

In cases of distributions preceding sales of SFC stock, Taxpayers should also analyze whether a dividend distribution of Code Sec. 959(c)(3) E&P (instead of a PTEP distribution) causes a U.S. source loss to be recaptured as a foreign source loss, under the dividend recapture exception in Code Sec. 865.[40]

III. Conclusion

If the Supreme Court concludes that the transition tax is unconstitutional, the post-2017 tax consequences for certain taxpayers will be complex. As illustrated above, the following design features of the TCJA international system may produce unexpected consequences when reconstructing the treatment of transactions between 2018 and the present.

- In Code Sec. 245A(d), Congress declined to extend the foreign tax credit to distributions of exempt income.
- Congress refrained from extending the qualifying dividend exception under Code Sec. 1059(e) to dividends from SFCs.
- Congress afforded U.S. shareholders with Code Sec. 961 basis equal to the gross amount of inclusions under Code Sec. 965(a) in order to prevent "lock-out."
- In Code Sec. 1248(j), Congress extended the participation exemption system to sales of SFC stock that result in capital gains (with underlying untaxed E&P), but Code Sec. 1248(j) will not facilitate the recognition of stock losses.
- Through Code Sec. 961(d), Congress installed a guardrail to prevent the Code Sec. 245A DRD from giving rise to stock losses.

Results will depend on each taxpayer's specific facts,[41] along with detailed considerations beyond the scope of this article.[42] While awaiting a final decision in *Moore*, likely in the first half of 2024, taxpayers should model the consequences of potential holdings, including the treatment of current and historic distributions from SFCs, and the treatment of historic or anticipated sales of SFC stock.

ENDNOTES

[*] The author can be reached by email at *jtebbs@milchev.com*.

[1] *See C.G. Moore*, CA-9, 2022-1 USTC ¶50,165, 36 F4th 930 (2022), 53 F4th 507 (denial of rehearing *en banc*), *cert. granted*, SCt, 143 SCt 2656 (June 26, 2023), Supreme Court Case No. 20-36122.

[2] Eric Toder, *The Potential Economic Consequences of Disallowing the Taxation of Unrealized Income*, TAX POLICY CENTER (October 10, 2023).

[3] Pub. L. No. 115-97 (2017).

[4] *See generally F.D. Arrowsmith*, SCt, 52-2 USTC ¶9527, 344 US 6, 8, 73 SCt 71 (1952) (prohibiting taxpayers from deducting amounts paid to creditors of liquidated corporation as an ordinary business expense, where taxpayers reported original proceeds from the liquidation as capital gain; the principle that each tax year "is a separate unit for tax accounting purposes … is not breached by considering all of the … events in order properly to classify the nature of the … loss for tax purposes"); *see also Skelly Oil Co.*, SCt, 69-1 USTC ¶9343, 394 US 678, 89 SCt 1379 (1969) (deduction for amounts refunded to customers in current year limited to the net amount previously taken into income in prior year).

[5] Code Sec. 951(b) (defining "U.S. shareholder"); Code Sec. 965(e)(1) (defining "specified foreign corporation").

[6] *See*, *e.g.*, FSA 200127010 (Mar. 30, 2001) (advising that, under taxpayer's "duty of consistency," IRS could reduce post-1986 foreign income tax pool of foreign corporation to reflect reduction for indirect foreign tax credit erroneously claimed in closed year).

[7] *See* Reg. §§1.965-2(c) and (d).

[8] Reg. §1.965-2(e), Reg. §1.961-1. In its brief of *amicus curiae*, the Small Business and Entrepreneurship Council contends that, if the Supreme Court decides in favor of the petitioner, then only the requirement to *pay* the Code Sec. 965 transition tax should be held invalid, and U.S. shareholders should still be considered to have included in income the amounts determined under Code Sec. 965(a). BRIEF OF *Amicus Curiae* SMALL BUSINESS AND ENTREPRENEURSHIP COUNCIL IN SUPPORT OF NEITHER PARTY, at 27 (September 6, 2023).

[9] *See generally* Reg. §1.965-5.

[10] Code Sec. 965(b).

[11] Code Sec. 965(c)(2)(A).

[12] Melissa Costa & Bernard Quinn, *Section 965 Inclusion and Net Tax Liability, Tax Years 2017 and 2018*, 41, 2 IRS STAT. INCOME BULL. 39–43 (Fall 2021).

[13] Bureau of Economic Analysis, *Direct Investment by Country and Industry, 2018*, BEA 19-34 (July 24, 2019). Here, "dividends" refers to dividends under commercial law, rather than dividends within the meaning of Code Secs. 301 and 316.

[14] *See* Bureau of Economic Analysis, *Direct Investment by Country and Industry, 2019*, BEA 20-36 (July 23, 2020); Bureau of Economic Analysis, *Direct Investment by Country and Industry, 2020*, BEA 21-35 (July 22, 2021); Bureau of Economic Analysis, *Direct Investment by*

Country and Industry, 2021, BEA 22-34 (July 21, 2022); Bureau of Economic Analysis, *Direct Investment by Country and Industry, 2022*, BEA 23-32 (July 20, 2023).

[15] *See* Notice 2019-01, IRB 2019-02, 275, at §3.02 (January 7, 2019) (describing forthcoming proposed regulations that would address the ordering of PTEP upon distribution and reclassification); T.D. 9882, 84 FR 69,022, 69,046-69,047 (December 17, 2019) (consolidating number of PTEP groups described in Notice 2019-01, IRB 2019-2, 275).

[16] Code Sec. 246(c)(5)(A).

[17] Under Code Sec. 246(c)(1), no deduction is allowed under Code Sec. 243, 245, or 245A in respect of any dividend on any share of stock, unless the taxpayer satisfies the requisite holding period for such share of stock. For the Code Sec. 245A DRD, the taxpayer must hold the stock for more than 365 days during the 731-day period beginning 365 days before the stock becomes ex-dividend with respect to the dividend. Code Sec. 246(c)(5)(A) (modifying Code Sec. 246(c)(1)).

[18] Code Sec. 245A(c).

[19] Code Sec. 245A(e).

[20] To date, the only federal court to consider the validity of the Temporary Regulations has held that the Treasury Department lacked good cause for declining to comply with notice-and-comment. *See Liberty Global, Inc.*, DC-CO, 2022-1 USTC ¶50,134, No. 1:20-cv-03501-RBJ, 2022 WL 1001568 at *3 (April 4, 2022) (granting partial summary judgment to taxpayer "on the invalidity of the temporary regulations [§1.245A-5T] on the basis that they were promulgated without notice and comment.").

[21] Reg. §1.245A-5(e)(1)(i).

[22] Ways and Means Discussion Draft, §303 (October 26, 2011) Tax Analysts Document Service 2011-22576.

[23] Brief of *Amicus Curiae* George A. Callas and Mindy Herzfeld in Support of Respondent, at 20 (October 23, 2023).

[24] J. Comm. on Tax'n, 113th Cong., *Technical Explanation, Estimated Revenue Effects, Distributional Analysis, and Macroeconomic Analysis of the Tax Reform Act of 2014*, JCS-1-14, at 515 and 516 (2014); *see also* J. Comm. Tax'n, *Technical Explanation of the Tax Reform Act of 2014*, JCX-15-14, at 24 and 25 (2014).

[25] H.R. Rep. No. 115-466, at 596 (2017) (Conf. Rep.); H.R. Rep. No. 115-409, at 300 (2017).

[26] T.D. 9865, 84 FR at 28,398, 28,400 (June 18, 2019).

[27] *See* Reg. §1.960-4(f), Ex. 1 and Ex. 2.

[28] Foreign income taxes are attributable to Code Sec. 245A(d) income applying the rules of Reg. §1.861-20. Reg. §1.245A(d)-1(b)(1).

[29] *See FedEx*, 2:20-cv-02794, DC-TN, 2023-1 USTC ¶50,153, 2023 WL 2755311 (2023) (holding that Reg. §1.965-5(c)(1)(ii) exceeded Treasury's authority); *Sysco*, Tax Court Docket No. 5728-23 (challenging validity of Reg. §1.965-5(c)(1)(ii)).

[30] *See* Reg. §1.986(c)-1(b).

[31] Code Sec. 1059(a).

[32] Code Secs. 1059(a) and (c). Fair market value may be used in lieu of adjusted basis in certain circumstances. Code Sec. 1059(c)(4). An exception is available if the shareholder owned the stock of the distributing corporation for its entire existence. Code Sec. 1059(d)(6).

[33] Code Sec. 1059(e)(1).

[34] *See* Code Secs. 1059(e)(2), 243(b)(1), and 1504(b)(3).

[35] To the extent Code Sec. 1059 applies, a coordination rule prevents a duplicative adjustment under Code Sec. 961(d).

[36] Preamble to NPRM, 84 FR 8,188 (March 6, 2019).

[37] H.R. Rep. No. 115-409, at 299 (2017).

[38] *See* Code Secs. 961(b) and 301(c)(3).

[39] *See* Ron Dabrowski, *Perspective on the Treatment of Losses in the Reformed U.S. International Tax System*, 130 J. Tax'n 06 (2019); *see also* J. Comm. Tax'n, *General Explanation of Public Law No. 115-97* (JCS-1-18) at 353 (2018) ("A distribution from a foreign corporation eligible for a DRD could reduce the value of the foreign corporation, reducing built-in gain or increasing built-in loss in the stock of the foreign corporation.").

[40] Reg. §1.865-2(b)(1).

[41] Consider, for example, the effect of an election under Code Sec. 965(n) not to apply a net operating loss deduction, a basis shifting election under Reg. §1.965-2(f), or the impact of E&P deficits.

[42] Consider, for example, whether an inclusion under Code Sec. 956 may now arise.

This article is reprinted with the publisher's permission from International Tax Journal, a bimonthly journal published by CCH Incorporated. Copying or distribution without the publisher's permission is prohibited. To subscribe to International Tax Journal or other journals, please call 1-800-344-3734. All views expressed in this publication are those of the author and not necessarily those of the publisher or any other person.