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Sysco Corporation,

Petitioner

v.

Commissioner of Internal Revenue

Respondent

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Docket No. 5728-23
Document No. 1

Petition

SERVED 04/20/23

UNITED STATES TAX COURT

SYSCO CORPORATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Docket No.**
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	
	)	

PETITION

Sysco Corporation ("Petitioner") hereby petitions for a redetermination of the deficiencies in tax for the taxable year ended June 30, 2018 ("FY18"), set forth by the Commissioner of Internal Revenue ("Respondent") in his Notice of Deficiency, dated January 19, 2023 (the "Notice").

As a basis for this proceeding, Petitioner alleges as follows:

1. **Petitioner.** Petitioner is a corporation organized under the laws of Delaware and has a principal place of business located at 1390 Enclave Parkway, Houston, Texas, 77077. Petitioner's U.S. federal income tax return for FY18 was filed with the Internal Revenue Service at Ogden, Utah.

2. **Notice of Deficiency.** The Notice of Deficiency upon which this Petition is based is dated January 19, 2023, and on information and belief, was placed

in the mail on or about January 19, 2023. A copy of the Notice, including the statement and schedules accompanying the Notice, is attached and marked as Exhibit A. The Notice was issued by Respondent through the Internal Revenue Service, Small Business and Self-Employed Division, Technical Services West Area, 1919 Smith Street, Houston, Texas, 77002.

3. **Amounts in Dispute.** Respondent asserts deficiencies in Petitioner's income tax for FY18 in the amount of $108,025,610[1] and a penalty or addition to tax for FY18 in the amount of $21,605,122, the entire amounts of which are in dispute.

4. **Assignments of Error.** The determinations of tax set forth in Respondent's Notice are based upon the following errors:

a. **Foreign Tax Credit.** Respondent erred in increasing Petitioner's tax liability for FY18 by the amount of $114,765,717 by erroneously disallowing $114,765,717 of foreign tax credits authorized under the Code for foreign taxes paid or accrued by Petitioner's U.S. and foreign subsidiaries based on Respondent's erroneous application of sections[2] 901, 902, 903, 904, 960, and 965, and based on

[1] The $108,025,610 increase in tax is net of an adjustment to allow a deduction for software development costs in the amount of $32,049,648.

[2] Unless otherwise indicated, all references to "section" or "Code" are references to the Internal Revenue Code of 1986, as amended and in effect for the tax year at issue. All references to the "Treasury Regulations" are references to the Treasury Regulations promulgated under the Code that were in effect during the tax year at issue.

Treas. Reg. §§ 1.965-5(b), (c)(1)(i), and (c)(1)(ii), which are invalid as applied. Paragraphs 4.b. through 4.g. address the components of the $114,765,717 of foreign tax credits, as summarized in the following table:

Petition Paragraph	**Amount**[3]	**Earnings and Profits ("E&P")**	**Type of Foreign Taxes**	**Treas. Reg. §**
4.b.	$77,173,903[4]	Offset Earnings[5]	Foreign taxes paid or accrued by Petitioner's foreign subsidiaries (full disallowance)	1.965-5(c)(1)(ii)
4.c.	$77,173,903	Offset Earnings	Foreign taxes paid or accrued by Petitioner's foreign subsidiaries (partial disallowance)	1.965-5(c)(1)(i)

[3] The Code provided to Petitioner $131,352,337 of credits for foreign taxes paid or accrued on and in connection with the distribution of Offset Earnings and Section 965(a) E&P. Petitioner used approximately $114,768,774 of these credits on its FY18 Form 1120, leaving approximately $16,583,563 for carryover to other taxable years. Respondent's Notice did not identify the specific amounts of each type of creditable foreign taxes that the Notice purported to disallow, and instead identified an aggregate disallowance of $114,765,717 of foreign tax credits. Petitioner disputes the entire amount of the disallowance, and due to Respondent's failure to reconcile the $114,768,774 of foreign tax credits claimed with the disallowance of $114,765,717 of foreign tax credits, assigns error to the approximate amounts of credits associated with certain types of E&P and certain types of foreign taxes paid or accrued, as referenced in the table above.

[4] Paragraphs 4.b. and 4.c. relate to the same credits for foreign taxes paid or accrued by Petitioner's foreign subsidiaries, but paragraph 4.b. relates to Respondent's disallowance of all of those credits (based on the application of Treas. Reg. § 1.965-5(c)(1)(ii)) whereas paragraph 4.c. relates to Respondent's partial disallowance of those credits (based on the application of Treas. Reg. § 1.965-5(c)(1)(i)).

[5] Treas. Reg. §§ 1.965-5(b), -5(c)(1)(i), and -5(c)(1)(ii) sometimes refer to Offset Earnings as "section 965(b) previously taxed earnings and profits," which are sometimes also called "section 965(b) PTEP" or "section 965(b) PTI."

4.d.	$1,282,362	Offset Earnings	Foreign withholding taxes paid or accrued by Petitioner's U.S. subsidiaries	1.965-5(b)
4.e.	$7,198,431	Offset Earnings	Foreign withholding taxes paid or accrued by Petitioner's foreign subsidiaries	1.965-5(c)(1)(i)
4.f.	$4,645,747	Section 965(a) E&P	Foreign withholding taxes paid or accrued by Petitioner's U.S. subsidiaries	1.965-5(b)
4.g.	$24,449,271	Section 965(a) E&P	Foreign withholding taxes paid or accrued by Petitioner's foreign subsidiaries	1.965-5(c)(1)(i)

b. **Foreign Tax Credit: Foreign Taxes Paid or Accrued by Petitioner's Foreign Subsidiaries on Offset Earnings (Full Disallowance).** Respondent erred in increasing Petitioner's tax liability for FY18 by the amount of approximately $77,173,903 by erroneously disallowing (in whole or in part) $77,173,903 of foreign tax credits authorized under sections 901, 902, 904, and 960 for foreign taxes paid or accrued by Petitioner's foreign subsidiaries associated with $265,127,198 of Offset Earnings distributed in FY18 based on Respondent's erroneous application of sections 901, 902, 904, 960, and 965, and based on Treas.

Reg. § 1.965-5(c)(1)(ii) (which is invalid and cannot apply to disallow the approximately $77,173,903 of foreign tax credits at issue).

c. **Foreign Tax Credit: Foreign Taxes Paid or Accrued by Petitioner's Foreign Subsidiaries on Offset Earnings (Partial Disallowance).** Respondent erred in increasing Petitioner's tax liability for FY18 by erroneously disallowing part of the approximately $77,173,903 of foreign tax credits authorized under sections 901, 902, 904, and 960 for foreign taxes paid or accrued by Petitioner's foreign subsidiaries associated with $265,127,198 of Offset Earnings distributed in FY18 based on Respondent's erroneous application of sections 901, 902, 904, 960, and 965, and based on Treas. Reg. § 1.965-5(c)(1)(i) (which is invalid and cannot apply to disallow part of the approximately $77,173,903 of foreign tax credits at issue).

d. **Foreign Tax Credit: Foreign Withholding Taxes Paid or Accrued by Petitioner's U.S. Subsidiaries on the Distribution of Offset Earnings.** Respondent erred in increasing Petitioner's tax liability for FY18 by the amount of approximately $1,282,362 by erroneously disallowing (in whole or in part) $1,282,362 of foreign tax credits authorized under sections 901, 903, and 904 for foreign taxes paid or accrued by Petitioner's U.S. subsidiaries on the distribution in FY18 of Offset Earnings based on Respondent's erroneous application of sections 901, 903, 904, and 965, and based on Treas. Reg. § 1.965-5(b) (which is invalid and

cannot apply to disallow the approximately $1,282,362 of foreign tax credits at issue).

e. **Foreign Tax Credit: Foreign Withholding Taxes Paid or Accrued by Petitioner's Foreign Subsidiaries on the Distribution of Offset Earnings.** Respondent erred in increasing Petitioner's tax liability for FY18 by the amount of approximately $7,198,431 by erroneously disallowing (in whole or in part) $7,198,431 of foreign tax credits authorized under sections 901, 902, 903, 904, and 960 for withholding taxes paid or accrued by Petitioner's foreign subsidiaries on the distribution in FY18 of Offset Earnings based on Respondent's erroneous application of sections 901, 902, 903, 904, 960, and 965, and based on Treas. Reg. § 1.965-5(c)(1)(i) (which is invalid and cannot apply to disallow the approximately $7,198,431 of foreign tax credits at issue).

f. **Foreign Tax Credit: Foreign Withholding Taxes Paid or Accrued by Petitioner's U.S. Subsidiaries on the Distribution of Section 965(a) E&P.** Respondent erred in increasing Petitioner's tax liability for FY18 by the amount of approximately $4,645,747 by erroneously disallowing (in whole or in part) $4,645,747 of foreign tax credits authorized under sections 901, 903, and 904 for withholding taxes paid or accrued by Petitioner's U.S. subsidiaries on the distribution in FY18 of Section 965(a) E&P based on Respondent's erroneous application of sections 901, 903, 904, and 965, and based on Treas. Reg. § 1.965-

5(b) (which is invalid and cannot apply to disallow the approximately $4,645,747 of foreign tax credits at issue).

g. **Foreign Tax Credit: Foreign Withholding Taxes Paid or Accrued by Petitioner's Foreign Subsidiaries on the Distribution of Section 965(a) E&P.** Respondent erred in increasing Petitioner's tax liability for FY18 by the amount of approximately $24,449,271 by erroneously disallowing (in whole or in part) $24,449,271 of foreign tax credits authorized under sections 901, 902, 903, 904, and 960 for withholding taxes paid or accrued by Petitioner's foreign subsidiaries on the distribution in FY18 of Section 965(a) E&P based on Respondent's erroneous application of sections 901, 902, 903, 904, 960, and 965, and based on Treas. Reg. § 1.965-5(c)(1)(i) (which is invalid and cannot apply to disallow the approximately $24,449,271 of foreign tax credits at issue).

h. **IRC § 965 Transition Tax: Increase to Petitioner's Aggregate Foreign Cash Position.** Respondent erred in increasing Petitioner's section 965 aggregate foreign cash position in the approximate amount of $153,270,201 by erroneously (1) disallowing items (in an amount to be determined later) that reduced the section 965 cash position of Petitioner's specified foreign corporations; (2) failing to account for the negative bank account balance of Sysco Canada, Inc. ("Sysco Canada") in determining Sysco Canada's section 965 cash position; and (3) treating certain currency swaps between SMS Global Holdings Sarl and Sysco

Canada as having positive value (even though the swaps had a negative value) and including that positive value in Sysco Canada's section 965 cash position.

i. **IRC § 965 Transition Tax: Goodwill Amortization Expense For Purposes of Determining Sysco Canada's E&P.** Respondent erred in increasing Petitioner's section 965(a) inclusion by erroneously disallowing approximately $79,153,940[6] of expenses relating to the amortization of acquired goodwill for E&P purposes based on Respondent's misapplication of section 446 and Treas. Reg. § 1.964-1.

j. **Transfer Pricing for Sourcing Commissions.** Respondent erred in increasing Petitioner's taxable income for FY18 in the amount of $26,304,331 by erroneously allocating income from Sysco Merchandising Services International ("SMSI") to Petitioner based on Respondent's determination that

[6] Respondent's Notice identifies an increase of $52,849,609 to Petitioner's section 965(a) inclusion. The $52,849,609 increase is the net of (1) Respondent's erroneous determination that Petitioner understated its section 965(a) inclusion by approximately $79,153,940 and (2) Respondent's erroneous adjustment under section 482 regarding the commissions paid to Sysco Merchandising Services International, which adjustment correspondingly decreased the section 965(a) inclusion by $26,304,331.

Sysco Merchandising and Supply Chain Services, Inc. ("SMS U.S.") overpaid SMSI for the procurement services that SMSI performed for SMS U.S.

k. **Section 245A Deduction.** Respondent erred by not accounting for a section 245A dividends received deduction for section 78 dividends in an amount of not less than $323,924,795.

l. **IRC § 6662 Penalties: Total Alleged Deficiency.** Respondent erred in determining an addition to tax or penalty in the amount of $21,605,122 under section 6662(a), (b)(1), (b)(2), (c), and (d) with respect to an alleged underpayment of tax of $108,025,610.

m. **IRC § 6662 Penalties: Transfer Pricing for Sourcing Commissions.** Respondent erred in determining an alternative addition to tax or penalty in the amount of $2,946,085 for a gross valuation misstatement under section 6662(h) and (in the alternative) $1,473,042.60 for a substantial valuation misstatement under section 6662(b)(3).

n. **Computational Errors.** Respondent erred in determining the amount of any deficiency or overpayment in Petitioner's income tax for FY18 by making various computational errors in calculating Petitioner's taxable income, available tax credits, and other attributes. These computational matters can be addressed under Tax Court Rule 155.

5. **Facts Relied Upon.** The facts upon which Petitioner relies as the basis for this proceeding are as follows:

a. **Foreign Tax Credit.**

(1) On its FY18 Form 1120 (U.S. Corporation Income Tax Return), Petitioner reported approximately $114,768,774 of foreign tax credits associated with the distribution in FY18 of Offset Earnings and Section 965(a) E&P.

(2) Respondent's Notice disallows $114,765,717 of foreign tax credits associated with the distribution in FY18 of Offset Earnings and Section 965(a) E&P.

(3) The Notice's disallowance of $114,765,717 of foreign tax credits is based on an erroneous application of sections 901, 902, 903, 904, 960, and 965.

(4) The Notice's disallowance of $114,765,717 of foreign tax credits is based on Treas. Reg. §§ 1.965-5(b), (c)(1)(i), and (c)(1)(ii).

(5) Treas. Reg. §§ 1.965-5(b), (c)(1)(i), and (c)(1)(ii) are substantively and procedurally invalid as applied to disallow $114,765,717 of foreign tax credits associated with the distribution in FY18 of Offset Earnings and Section 965(a) E&P.

(6) Accordingly, Respondent erroneously disallowed foreign tax credits to which Petitioner was entitled under sections 901, 902, 903, 904, and

960 in the amount of $114,765,717 relating to foreign taxes paid or accrued on or with respect to Offset Earnings and Section 965(a) E&P distributed as part of the FY18 Distributions.

b. **Foreign Tax Credit: Foreign Taxes Paid or Accrued by Petitioner's Foreign Subsidiaries on Offset Earnings (Full Disallowance).**

Company Background.

(1) The allegations set forth in paragraphs 5.a.(1) through 5.(a).6, above, are incorporated by reference in this paragraph 5.b.

(2) Petitioner is the publicly traded parent corporation of a worldwide group of corporations (the "Sysco Group"). The Sysco Group is in the business of the sale, marketing, and distribution of food and non-food products to restaurants, healthcare and educational facilities, lodging establishments, and other customers in 90 different countries around the world. With its global headquarters located in Houston, Texas, the Sysco Group has sales and service relationships in over 600,000 customer locations and is supported by 67,000 employees, primarily in the United States, the Bahamas, Canada, Costa Rica, Europe, Ireland, and Hong Kong.

(3) Petitioner directly or indirectly owned a series of affiliated U.S. subsidiaries. Collectively, Petitioner and its affiliated U.S. subsidiaries were

part of an affiliated group of corporations that filed a consolidated U.S. federal income tax return for FY18.

(4) Petitioner also directly or indirectly owned a series of foreign corporations treated as specified foreign corporations ("SFCs").[7]

(5) Sysco EU IV Sarl ("Sysco EU IV") was a Luxembourg corporation that was wholly owned by Petitioner and classified as a corporation and an SFC for U.S. federal income tax purposes.

(6) Sysco Guest Supply, LLC ("Guest Supply U.S.") was a U.S. limited liability company that was wholly owned by Petitioner and disregarded for U.S. federal income tax purposes.

(7) Sysco Guest Supply Canada, Inc. ("Guest Supply Canada") was a Canadian corporation that was wholly owned by Guest Supply U.S. and classified as a corporation and an SFC for U.S. federal income tax purposes.

(8) FreshPoint, Inc. ("FreshPoint U.S.") was a U.S. corporation that was wholly owned by Petitioner and classified as a corporation for U.S. federal income tax purposes. FreshPoint U.S. was a member of Petitioner's U.S. consolidated group.

[7] Under section 965(e), an SFC generally is any controlled foreign corporation ("CFC") or any other foreign corporation (other than a passive foreign investment corporation that is not also a CFC) having at least one U.S. shareholder that is a domestic corporation.

(9) FreshPoint Vancouver, Ltd. ("FreshPoint Canada") was a Canadian corporation that was wholly owned by FreshPoint U.S. and classified as a corporation and an SFC for U.S. federal income tax purposes.

The FY18 Distributions.

(10) On June 13, 2018, during Petitioner's FY18 taxable year, Petitioner's foreign subsidiaries distributed cash and promissory notes in the aggregate amount of $1,377,238,486 to Petitioner's U.S. consolidated group.

(11) On June 13, 2018, Sysco EU IV distributed to Petitioner $91,518,565 of cash and $1,149,602,386 of promissory notes in the aggregate amount of $1,241,120,951 (the "EU IV Distribution").

(12) On June 13, 2018, Guest Supply Canada distributed to Guest Supply U.S. $23,066,277 of cash and a promissory note (denominated in Canadian dollars ("CAD") and equivalent to $8,978,979) in the aggregate amount of $32,045,256 (the "Guest Supply Distribution").

(13) On June 13, 2018, FreshPoint Canada distributed to FreshPoint U.S. $65,354,452 of cash and a CAD-denominated promissory note equivalent to $38,717,827 in the aggregate amount of $104,072,279 (the "FreshPoint Distribution").

(14) Collectively, the EU IV Distribution, the Guest Supply Distribution, and the FreshPoint Distribution comprise the "FY18 Distributions,"

which were the culmination of distributions from certain of Petitioner's foreign affiliates.

The Transition to a New International Tax System.

(15) Before 1962, Congress deferred U.S. taxation on foreign income earned abroad by CFCs until those CFCs paid a dividend to the U.S. corporation.

(16) In 1962, Congress implemented the Subpart F "anti-deferral" regime, which immediately taxed in the U.S. certain types of foreign income earned by CFCs under section 951(a).

(17) On December 22, 2017, the President signed into law the Tax Cuts and Jobs Act ("TCJA"),[8] which transitioned the U.S. from a worldwide taxation system to a partial territorial taxation system and provided rules for transitioning between the two systems.

(18) To facilitate this change in tax law, Congress imposed a one-time "transition tax" under section 965 on deferred foreign earnings. The section 965 transition tax depended, in part, on a U.S. shareholder's pro rata share of the accumulated deferred foreign E&P of each of the U.S. shareholder's SFCs.

[8] "An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018," Pub. L. No. 115-97, 131 Stat. 2054 (Dec. 22, 2017).

(19) Specifically, section 965(a) included certain deferred foreign earnings in income to be taxed under section 951(a).

(20) To determine the deferred foreign earnings included in income under section 951(a) and subject to the transition tax (i.e., the "Section 965(a) E&P" amount), the U.S. shareholder's pro rata share of the accumulated post-1986 deferred foreign income of its historically profitable SFCs ("deferred foreign income corporations" or "DFICs") was reduced (or offset) by the U.S. shareholder's pro rata share of the aggregate foreign E&P deficit of its historically loss-making SFCs ("earnings and profits deficit foreign corporations" or "EDFCs").

(21) Section 965(a) increases the subpart F income of a DFIC by the Section 965(a) E&P amount in the last taxable year of the DFIC that begins before January 1, 2018.

(22) Section 965(b)(1) reduces the subpart F income of a DFIC by the allocable amount of the U.S. shareholder's aggregate foreign E&P deficit attributable to an EDFC. That reduction gives rise to Offset Earnings—i.e., the accumulated post-1986 deferred foreign income of a DFIC that is offset by the aggregate foreign E&P deficit of an EDFC.

(23) Section 965(b)(1) provides that Offset Earnings are not included in income under section 951(a).

(24) Section 965(b)(4)(A) treats Offset Earnings as included in income under section 951(a) only "for purposes of applying section 959."

(25) Offset Earnings are not included in income under section 951(a) as a result of applying section 965(b)(4)(A).

The Code's Foreign-Tax-Credit Framework.

(26) Section 965 does not supplant the existing historic foreign-tax-credit framework, which permits a credit for foreign taxes paid or accrued unless specifically disallowed by the Code.

(27) Section 901 provided a tax credit to U.S. taxpayers that directly paid or accrued taxes to a foreign country.

(28) Sections 902[9] and 960 provided a tax credit to a U.S. shareholder of a CFC for the U.S. shareholder's portion of foreign income taxes paid or accrued by the CFC.

(29) Section 903 provided that creditable foreign taxes include taxes (such as withholding taxes) paid or accrued to a foreign country "in lieu of" an income, war profits, or excess profits tax.

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[9] Congress repealed section 902 as part of the enactment of the TCJA. Pub. L. No. 115-97, § 14301(a), 131 Stat. 2221 (Dec. 22, 2017). The repeal is effective for taxable years of foreign corporations beginning after December 31, 2017, and for taxable years of U.S. shareholders in which or with which such taxable years of foreign corporations end. Section 902 was in effect during Petitioner's FY18 taxable year.

(30) Section 904 generally limited the amount of creditable foreign taxes to the amount of U.S. taxes attributable to the taxpayer's foreign-source taxable income.

(31) If foreign earnings were actually included in U.S. income under section 951(a) (and thus subject to immediate taxation), then section 960(a)(1) treated those foreign taxes as if the U.S. shareholder had paid them, and section 902 provided a credit against U.S. tax for the foreign taxes paid on the earnings actually included in income.

(32) If foreign earnings were not actually included in income under section 951(a), then section 960(a)(1) did not provide a credit for foreign taxes paid or accrued on those earnings, and upon a subsequent distribution of those earnings to the U.S. shareholder, section 960(a)(3)[10] treated those earnings as a dividend for purposes of section 902, which in turn provided an indirect foreign tax credit for foreign taxes paid or accrued on those earnings.

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[10] Congress amended section 960 as part of the enactment of the TCJA. Pub. L. No. 115-97, § 14301(b), 131 Stat. 2221 (Dec. 22, 2017). New section 960 applies "to taxable years of foreign corporations beginning after December 31, 2017, and to taxable years of United States shareholders in which or with which such taxable years of foreign corporations end." *Id.* at § 14301(d), 131 Stat. 2225. Petitioner and its foreign subsidiaries are on a fiscal year that ends annually on the Saturday nearest to June 30. Sysco's 2018 fiscal year ended on June 30, 2018. Thus, old section 960 continued to apply to distributions from Sysco's foreign subsidiaries that occurred on or before June 30, 2018. This includes the FY18 Distributions (described above).

(33) Section 960(a)(3) broadly applied to "any" foreign taxes paid "on or with respect to the accumulated profits" that were "excluded from gross income under section 959(a)" as long as such taxes were not previously deemed paid by the domestic corporation. Section 960(a)(3) was not limited to foreign taxes paid or accrued on a distribution by a lower-tier foreign subsidiary to an upper-tier foreign subsidiary.

(34) Section 965(b)(4)(A) treats Offset Earnings as included in gross income under section 951(a) solely "for purposes of applying section 959."

(35) Section 960(a)(3) provided a credit for foreign taxes paid or accrued on a distribution of Offset Earnings (which, by operation of section 965(b)(4)(A), were excluded from gross income under section 959(a)). Foreign taxes paid or accrued on Offset Earnings were not previously deemed paid under section 960(a)(1) (because those earnings were not included in income under section 951(a)).

(36) Congress unambiguously addressed the full scope of the disallowance of foreign tax credits in connection with the section 965 transition tax in section 965(g), which disallows a credit for the "applicable percentage" of any taxes paid or accrued with respect to any amount for which a section 965(c) deduction is allowed. Section 965(g) did not disallow any credits for foreign taxes paid or accrued on Offset Earnings.

Petitioner's FY18 Form 1120.

(37) On its FY18 Form 1120, Petitioner reported its section 965 transition tax liability as well as the U.S. federal income tax consequences of the FY18 Distributions.

(38) On its FY18 Form 1120, Petitioner reflected the U.S. federal income tax consequences of the distribution of (i) $235,774,059 of Offset Earnings as part of the EU IV Distribution; (ii) $7,192,491 of Offset Earnings as part of the Guest Supply Distribution; and (iii) $22,160,648 of Offset Earnings as part of the FreshPoint Distribution.

(39) On its FY18 Form 1120, as authorized under sections 901, 902, 903, and 960, Petitioner claimed foreign tax credits in FY18 of approximately (i) $66,638,343 associated with the $235,774,059 of Offset Earnings distributed as part of the EU IV Distribution; (ii) $2,955,679 associated with the $7,192,491 of Offset Earnings distributed as part of the Guest Supply Distribution; and (iii) $7,579,881 associated with the $22,160,648 of Offset Earnings distributed as part of the FreshPoint Distribution.

(40) In determining its section 965 transition tax liability, Petitioner's FY18 Form 1120 reflected accumulated post-1986 deferred foreign income from its DFICs in the amount of $1,654,599,576.

(41) Petitioner's FY18 Form 1120 reflected an aggregate foreign E&P deficit from its EDFCs in the amount of $376,347,096.

(42) Section 965(b) reduced the $1,654,599,576 of accumulated post-1986 deferred foreign income reflected on Petitioner's FY18 Form 1120 by the $376,347,096 aggregate foreign E&P deficit reflected on Petitioner's FY18 Form 1120.

(43) Petitioner's FY18 Form 1120 reflected $1,278,252,480 in Section 965(a) E&P. The $1,278,252,480 was the net amount of Petitioner's share of (1) the $1,654,599,576 of accumulated post-1986 deferred foreign income from Petitioner's DFICs and (2) the $376,347,096 aggregate foreign E&P deficit from Petitioner's EDFCs.

(44) Petitioner's FY18 Form 1120 reflected an inclusion in income under section 951(a) of $1,278,252,480 of Section 965(a) E&P.

(45) On its FY18 Form 1120, Petitioner did not include the $376,347,096 in Offset Earnings in income under section 951(a).

(46) Section 965(b)(1) excluded the $376,347,096 in Offset Earnings from inclusion in income under section 951(a).

(47) Section 965(b)(4)(A) did not provide that the $376,347,096 in Offset Earnings were actually included in income under section 951(a).

(48) Petitioner's FY18 Form 1120 reflected that its DFICs had paid or accrued $93,049,336 of foreign taxes associated with Offset Earnings.

(49) Petitioner's FY18 Form 1120 reflected that its DFICs had paid or accrued $416,974,131 of foreign taxes associated with Section 965(a) E&P.

(50) Petitioner's FY18 Form 1120 reflected the disallowance under section 965(g) of $206,135,817 of foreign tax credits for the $416,974,131 of foreign taxes associated with Section 965(a) E&P.

The Rulemaking Process for Treas. Reg. § 1.965-5(c)(1)(ii).

(51) After the FY18 Distributions (which occurred in June 2018), on August 9, 2018, Treasury and the IRS (the "Agencies") published Proposed Regulation § 1.965-5(c)(1)(ii) in the Federal Register ("Prop. Reg. § 1.965-5(c)(1)(ii)"). 83 Fed. Reg. 39514 (Aug. 9, 2018).

(52) Prop. Reg. § 1.965-5(c)(1)(ii) purported to disallow foreign tax credits for foreign taxes paid or accrued associated with Offset Earnings.

(53) Commenters told the Agencies that Prop. Reg. § 1.965-5(c)(1)(ii) was contrary to statute, in excess of the Agencies' rulemaking authority, and invalid.

(54) The Tax Executives Institute said that Prop. Reg. § 1.965-5(c)(1)(ii) was "inconsistent with the explicit limitations provided under section 965(b)(4)" and that "it effectively results in an unauthorized elimination of a tax

asset granted to taxpayers by Congress." Tax Executives Institute Letter to U.S. Department of the Treasury, dated October 9, 2018, at 23, available at: https://www.regulations.gov/comment/IRS-2018-0019-0132.

(55) The Alliance for Competitive Taxation highlighted that Prop. Reg. § 1.965-5(c)(1)(ii) was contrary to statute "because Congress expressed no intent to limit foreign tax credits beyond [the] limit provided in section 965(g)." Alliance for Competitive Taxation Letter to Charles P. Rettig, Commissioner, Internal Revenue Service, dated October 9, 2018, at 7, available at: https://www.regulations.gov/comment/IRS-2018-0019-0142.

(56) The Alliance for Competitive Taxation also emphasized that Prop. Reg. § 1.965-5(c)(1)(ii) was arbitrary and capricious, as the Agencies inconsistently treated Offset Earnings as both included in income and not included in income. Specifically, the Agencies said that section 965(b)(4)(A) "treats section 965(a) earnings amounts offset by an aggregate foreign E&P deficit [Offset Earnings] as previously included in income under section 951," but the Agencies separately said that for purposes section 986(c)'s foreign-currency gain or loss rules, "[Offset Earnings] are not included in gross income under section 951(a)(1)." *Id.* at 7-8 (quoting 84 Fed. Reg. at 1857, and 83 Fed. Reg. 39514, 39537 (Aug. 9, 2018)).

(57) The Information Technology Industry Council told the Agencies that Prop. Reg. § 1.965-5(c)(1)(ii) was contrary to statute and that "[w]hen

§965(b) previously taxed income is distributed to the United States, the taxes attributable to such previously taxed income should be considered deemed paid under former §960(a)(3) and foreign tax credits should be permitted to be used." Information Technology Industry Council Letter to Internal Revenue Service, dated October 7, 2018, at 5, available at: https://www.regulations.gov/comment/IRS-2018-0019-0106.

(58) Hanesbrands, Inc. told Treasury that "the TCJA maintained long-standing precedent in allowing taxpayers generally to claim a credit against the U.S. tax liability resulting from the transition tax deemed distribution [of previously taxed income or "PTI"], subject to [an] FTC limitation." Hanesbrands, Inc. Letter to Secretary of the Treasury, dated October 4, 2018, at 7, available at: https://www.regulations.gov/comment/IRS-2018-0019-0096. Hanesbrands also said that Prop. Reg. § 1.965-5(c)(1)(ii) would "serve to increase the tax cost associated with repatriating foreign earnings," which "stand[s] in contradiction to overarching congressional intent" of "address[ing] the perverse barrier and subsequent cost burden associated with repatriating foreign earnings at the previous U.S. corporate rate." *Id.* at 8.

(59) Walgreens Boots Alliance, Inc. said that Prop. Reg. § 1.965-5(c)(1)(ii) "conflict[s] with the plain language of section 965(b)(4)(A), which treats the CFC's E&P as PTI only for purposes of section 959." Walgreens Boots

Alliance, Inc. Letter 2 to David J. Kautter, Assistant Secretary for Tax Policy, Charles P. Rettig, Commissioner of Internal Revenue, and William M. Paul, Acting Chief Counsel and Deputy Chief Counsel (Technical), dated October 9, 2018, at 3, available at: https://www.regulations.gov/comment/IRS-2018-0019-0124.

(60) Baker & McKenzie LLP told the Agencies that Prop. Reg. § 1.965-5(c)(1)(ii) was contrary to statute, inconsistent with Congressional intent, and exceeded Treasury's regulatory authority. Baker McKenzie Letter to David J. Kautter, Assistant Secretary for Tax Policy, Lafayette "Chip" G. Harter III, Deputy Assistant Secretary (International Tax Affairs), Charles P. Rettig, Commissioner, and William M. Paul, Acting Chief Counsel and Deputy Chief Counsel (Technical), dated October 5, 2018, at 2, available at: https://www.regulations.gov/comment/IRS-2018-0019-0100.

(61) The Silicon Valley Tax Directors Group stated that Prop. Reg. § 1.965-5(c)(1)(ii) was inconsistent with the policy considerations underlying section 965. Silicon Valley Tax Directors Group Letter to Internal Revenue Service, dated October 9, 2018, at 9-10, available at: https://www.regulations.gov/comment/IRS-2018-0019-0147.

(62) On February 5, 2019, the Agencies published Treas. Reg. § 1.965-5(c)(1)(ii) in the Federal Register. 84 Fed. Reg. 1838 (Feb. 5, 2019). Despite comments informing the Agencies that Prop. Reg. § 1.965-5(c)(1)(ii) was contrary

to statute, exceeded the Agencies' rulemaking authority, and was arbitrary or capricious, the Agencies did not substantially alter Treas. Reg. § 1.965-5(c)(1)(ii), which was essentially identical to Prop. Reg. § 1.965-5(c)(1)(ii).

The Code Provided Foreign Tax Credits to Petitioner.

(63) For its FY18 taxable year, sections 901, 902, 904, and 960 provided to Petitioner credits in the amount of approximately $77,173,903 for foreign taxes paid or accrued in association with Offset Earnings distributed as part of the FY18 Distributions.

(64) Upon information and belief, Respondent's Notice disallowed (in whole or in part) the approximately (i) $66,638,343 of foreign tax credits associated with the EU IV Distribution; (ii) $2,955,679 of foreign tax credits associated with the Guest Supply Distribution; and (iii) $7,579,881 of foreign tax credits associated with the FreshPoint Distribution based on an erroneous application of sections 901, 902, 960, and 965, and based on Treas. Reg. § 1.965-5(c)(1)(ii), which is invalid and cannot apply to disallow those foreign tax credits.

(65) Respondent contends that section 965(b)(4)(A) includes Offset Earnings in income, even though section 965(b)(1) expressly provides that Offset Earnings are not included in income.

(66) Nothing in section 965(b)(4)(A) explicitly or implicitly provides that Offset Earnings are included in income.

(67) Respondent's erroneous application of sections 901, 902, 960, and 965 is contrary to the plain text of those provisions and exceeds the Agencies' rulemaking authority under the Code.

(68) Treas. Reg. § 1.965-5(c)(1)(ii) is substantively and procedurally invalid and thus cannot be applied against Petitioner.

(69) Substantively, Treas. Reg. § 1.965-5(c)(1)(ii) is contrary to controlling statutes and exceeds the Agencies' rulemaking authority under the Code. *See, e.g.*, *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"); *see also FedEx Corp. & Subs. v. United States*, No. 20-cv-2794, 2023 U.S. Dist. LEXIS 57367 (W.D. Tenn. Mar. 31, 2023) (Treas. Reg. § 1.965-5(c)(1)(ii) is contrary to statute and invalid).

(70) Procedurally, the Agencies did not comply with basic administrative law requirements (including requirements under the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (the "APA")) in promulgating Treas. Reg. § 1.965-5(c)(1)(ii).

(71) The Agencies did not provide an adequate explanation for or respond to significant comments regarding Treas. Reg. § 1.965-5(c)(1)(ii) as required under the APA and *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29 (1983) ("*State Farm*").

(72) Because Treas. Reg. § 1.965-5(c)(1)(ii) is substantively and procedurally invalid, it cannot be applied against Petitioner to disallow foreign tax credits that the controlling provisions of the Code otherwise allow.

(73) Accordingly, Respondent erroneously disallowed (in whole or in part) foreign tax credits to which Petitioner was entitled under sections 901, 902, 904, and 960 in the approximate amount of $77,173,903 relating to foreign taxes paid or accrued in association with Offset Earnings distributed as part of the FY18 Distributions.

c. **Foreign Tax Credit: Foreign Taxes Paid or Accrued by Petitioner's Foreign Subsidiaries on Offset Earnings (Partial Disallowance).**

(1) The allegations set forth in paragraphs 5.a.(1) through 5.a.(6) and 5.b.(1) through 5.b.(73), above, are incorporated by reference in this paragraph 5.c.

(2) Section 965(c) provides a deduction of an amount equal to the sum of 15.5% (for cash and cash equivalents) and 8% (for other E&P of DFICs) with respect to the Section 965(a) E&P that is included in gross income under section 951(a).

(3) Section 965(c) did not provide a deduction for Offset Earnings.

(4) Section 965(g), which partially disallows foreign tax credits in connection with the transition tax, determines the "applicable percentage" of disallowed credits by reference to the section 965(c) deduction.

(5) Petitioner's FY18 Form 1120 reflected a $697,635,360 deduction under section 965(c) for the $1,278,252,480 in Section 965(a) E&P included in income under section 951(a).

(6) Petitioner's FY18 Form 1120 did not reflect a deduction under section 965(c) for the $376,347,096 in Offset Earnings.

The Rulemaking Process for Treas. Reg. § 1.965-5(c)(1)(i).

(7) After the FY18 Distributions (which occurred in June 2018), on August 9, 2018, the Agencies published Proposed Regulation § 1.965-5(c)(1)(i) ("Prop. Reg. § 1.965-5(c)(1)(i)"). 83 Fed. Reg. 39514 (Aug. 9, 2018).

(8) Prop. Reg. § 1.965-5(c)(1)(i) purported to disallow a percentage of foreign tax credits for foreign taxes paid or accrued associated with Offset Earnings.

(9) Commenters told the Agencies that Prop. Reg. § 1.965-5(c)(1)(i) was contrary to statute, in excess of the Agencies' rulemaking authority, and invalid.

(10) The Chamber of Commerce stated that Prop. Reg. § 1.965-5(c)(1)(i) was "not supported by the statutory language of §965(g)" and "effectively

limits the amount of foreign withholding tax credits a company may take when, in the future, it chooses to repatriate any of its foreign cash (which was already taxed under §965) back to the United States," which in turn "discourag[es] companies from investing its historic foreign earnings back into the United States." Chamber of Commerce Letter to Steven T. Mnuchin, Secretary of the Treasury, U.S. Department of the Treasury, David J. Kautter, Assistant Secretary (Tax Policy), U.S. Department of the Treasury, Charles P. Rettig, Commissioner, Internal Revenue Service, William M. Paul, Acting Chief Counsel and Deputy Chief Counsel (Technical), Internal Revenue Service, and Office of Associate Chief Counsel (International), Internal Revenue Service dated October 3, 2018, at 23, available at: https://www.regulations.gov/comment/IRS-2018-0019-0087.

(11) Hanesbrands, Inc. told the Agencies that Prop. Reg. § 1.965-5(c)(1)(i) was contrary to Congress's intent to "address the perverse barrier and subsequent cost burden associated with repatriating foreign earnings at the previous U.S. corporate rate." Hanesbrands, Inc. Letter dated October 4, 2018, at 7. Hanesbrands also stated that "Congress did not intend to undervalue the amount of foreign income tax paid subsequent to the transition tax under Section 965, as this would certainly reduce the ability of companies to repatriate earnings in light of the additional cost burden associated with such repatriation." *Id.*

(12) The Information Technology Industry Council told the Agencies that Prop. Reg. § 1.965-1(c)(1)(i) was contrary to statute and that "[w]hen §965(b) previously taxed income is distributed to the United States, the taxes attributable to such previously taxed income should be considered deemed paid under former §960(a)(3) and foreign tax credits should be permitted to be used. Moreover, these foreign tax credits should not be subject to the haircut under §965(g) because … no deduction was allowed relative to this income." Information Technology Industry Council Letter dated October 7, 2018, at 5.

(13) On February 5, 2019, the Agencies published Treas. Reg. § 1.965-5(c)(1)(i) in the Federal Register. 84 Fed. Reg. 1838 (Feb. 5, 2019). Despite comments informing the Agencies that Prop. Reg. § 1.965-5(c)(1)(i) was contrary to statute, in excess of statutory authority, and arbitrary or capricious, the Agencies did not substantially alter Treas. Reg. § 1.965-5(c)(1)(i), which was essentially identical to Prop. Reg. § 1.965-5(c)(1)(i).

The Code Provided Foreign Tax Credits to Petitioner.

(14) For its FY18 taxable year, sections 901, 902, 904, and 960 provided to Petitioner credits in the approximate amount of $77,173,903 for foreign taxes paid or accrued in association with Offset Earnings distributed as part of the FY18 Distributions.

(15) Upon information and belief, Respondent's Notice disallowed a portion of the foreign tax credits of approximately $77,173,903 associated with foreign taxes paid or accrued on Offset Earnings distributed as part of the FY18 Distributions based on an erroneous application of the plain text of sections 901, 902, 960, and 965, and based on Treas. Reg. § 1.965-5(c)(1)(i).

(16) Respondent contends that section 965(b)(4)(A) includes Offset Earnings in income, even though section 965(b)(1) expressly provides that Offset Earnings are not included in income. Based on this flawed premise, Respondent contends that section 965(g) disallowed a portion of the credits for foreign taxes paid or accrued on Offset Earnings.

(17) Respondent's erroneous application of sections 901, 902, 960, and 965 is contrary to the plain text of those provisions and exceeds the Agencies' rulemaking authority under the Code.

(18) The section 965(g) disallowance is based in part on the amount of the section 965(c) deduction. Because the Code did not provide a section 965(c) deduction for Offset Earnings, section 965(g) did not and cannot apply to disallow any portion of credits for foreign taxes paid or accrued on Offset Earnings.

(19) Treas. Reg. § 1.965-5(c)(1)(i), which purports to disallow credits that the Code expressly authorizes for foreign taxes paid or accrued by a U.S. shareholder's SFCs, is substantively and procedurally invalid.

(20) Substantively, Treas. Reg. § 1.965-5(c)(1)(i) is contrary to controlling statutes and exceeds the Agencies' rulemaking authority under the Code. *See, e.g.*, *Chevron*, 467 U.S. 837.

(21) Procedurally, the Agencies did not provide an adequate explanation for or respond to significant comments regarding Treas. Reg. § 1.965-5(c)(1)(i) and otherwise failed to satisfy the rulemaking requirements under the APA and *State Farm*.

(22) Because Treas. Reg. § 1.965-5(c)(1)(i) is substantively and procedurally invalid, it cannot be applied against Petitioner to disallow foreign tax credits that the controlling provisions of the Code otherwise allow.

(23) Accordingly, Respondent erroneously disallowed (in whole or in part) foreign tax credits to which Petitioner was entitled under sections 901, 902, 904, and 960 in the approximate amount of $77,173,903 relating to foreign taxes paid or accrued in association with Offset Earnings distributed as part of the FY18 Distributions.

d. **Foreign Tax Credit: Foreign Withholding Taxes Paid or Accrued by Petitioner's U.S. Subsidiaries on the Distribution of Offset Earnings.**

(1) The allegations set forth in paragraphs 5.a.(1) through 5.a.(6), 5.b.(1) through 5.b.(73), and 5.c.(1) through 5.c.(23), above, are incorporated by reference in this paragraph 5.d.

(2) Guest Supply U.S. paid or accrued $1,602,276 of foreign withholding taxes on the Guest Supply Distribution.

(3) Guest Supply U.S. paid or accrued $359,625 of foreign withholding taxes on the distribution of $7,192,491 of Offset Earnings that were distributed as part of the Guest Supply Distribution.

(4) FreshPoint U.S. paid or accrued $5,203,614 of foreign withholding taxes on the FreshPoint Distribution.

(5) FreshPoint U.S. paid or accrued $1,108,032 of foreign withholding taxes on the distribution of $22,160,648 of Offset Earnings that were distributed as part of the FreshPoint Distribution.

(6) As Guest Supply U.S. (as a disregarded entity of Petitioner) and FreshPoint U.S. were part of Petitioner's U.S. consolidated group, Petitioner was entitled to claim in FY18 foreign tax credits under sections 901, 903, and 904 in the amount of approximately $1,282,362 for approximately (i) $314,221

of foreign withholding taxes paid or accrued by Guest Supply U.S. on the distribution of Offset Earnings as part of the Guest Supply Distribution and (ii) $968,141 of foreign withholding taxes paid or accrued by FreshPoint U.S. on the distribution of Offset Earnings as part of the FreshPoint Distribution.

(7) Petitioner's FY18 Form 1120 reflected that it claimed foreign tax credits in FY18 of approximately (i) $314,221 for foreign withholding taxes paid or accrued on the distribution of Offset Earnings distributed as part of the Guest Supply Distribution; and (ii) $968,141 for foreign withholding taxes paid or accrued on the distribution of Offset Earnings distributed as part of the FreshPoint Distribution.

The Rulemaking Process for Treas. Reg. § 1.965-5(b).

(8) On August 9, 2018, the Agencies published Proposed Regulation § 1.965-5(b) ("Prop. Reg. § 1.965-5(b)"). 83 Fed. Reg. 39514 (Aug. 9, 2018).

(9) Prop. Reg. § 1.965-5(b) purported to disallow a percentage of foreign tax credits for withholding taxes paid or accrued on the distribution of Offset Earnings.

(10) Commenters told Treasury that Prop. Reg. § 1.965-5(b) was contrary to statute, in excess of the Agencies' rulemaking authority, and invalid.

(11) The Chamber of Commerce stated that Prop. Reg. § 1.965-5(b) was "not supported by the statutory language of §965(g)" and "effectively limits the amount of foreign withholding tax credits a company may take when, in the future, it chooses to repatriate any of its foreign cash (which was already taxed under §965) back to the United States," which in turn "discourag[es] companies from investing its historic foreign earnings back into the United States." Chamber of Commerce Letter dated October 3, 2018, at 23.

(12) Roberts & Holland LP told the Agencies that Prop. Reg. § 1.965-5(b) was contrary to statute because "[t]he 8% or 15.5% rate … creates a section 965(c) deduction only for section 965(a) income." Roberts & Holland LP Letter to the Internal Revenue Service dated September 18, 2018, at 21, available at: https://www.regulations.gov/comment/IRS-2018-0019-0050. Section 965(g) did not apply to haircut credits for foreign taxes paid or accrued associated with Offset Earnings, and the Agencies failed to "clarify … the section 965(g) applicable percentage for a distribution of section 965(b) previously taxed E&P." *Id.* at 21-22 (providing an example of why section 965(g) did not apply to credits for withholding taxes paid or accrued on the distribution of Offset Earnings).

(13) The Information Technology Industry Council stated that Prop. Reg. § 1.965-5(b) was contrary to Congressional intent because haircutting foreign withholding taxes on distributions of earnings already subjected to the

transition tax "discourages foreign cash taxed under §965 from actually being distributed or brought back to the United States for investment, which perpetuates the lockout effect Congress was seeking to eliminate." Information Technology Industry Council Letter dated October 7, 2018, at 6.

(14) The National Foreign Trade Council highlighted the distinction between foreign taxes deemed paid on earnings as of the time of the transition tax determination and additional foreign taxes withheld when the earnings are subsequently distributed, concluding that the Agencies exceeded their authority by applying the section 965(g) haircut to withholding taxes imposed on the distribution of Offset Earnings because such taxes were an "addition to the foreign income taxes deemed paid and the U.S. transition tax liability on those earnings." National Foreign Trade Council Letter to David J. Kautter, Assistant Secretary (Tax Policy), Department of the Treasury, Charles Rettig, Commissioner, Internal Revenue Service, William Paul, Principal Deputy Chief Counsel and Deputy Chief Counsel, Internal Revenue Service, and Kirsten Wielobob, Deputy Commissioner for Services and Enforcement, Internal Revenue Service, dated October 4, 2018, at 6, available at: https://www.regulations.gov/comment/IRS-2018-0019-0090.

(15) On February 5, 2019, the Agencies published Treas. Reg. § 1.965-5(b) in the Federal Register. 84 Fed. Reg. 1838 (Feb. 5, 2019). Despite comments informing the Agencies that Prop. Reg. § 1.965-5(b) was contrary to

statute, in excess of statutory authority, and arbitrary or capricious, the Agencies did not substantially alter Treas. Reg. § 1.965-5(b), which was essentially identical to Prop. Reg. § 1.965-5(b).

The Code Provided to Petitioner Foreign Tax Credits for Foreign Withholding Taxes Paid or Accrued by Petitioner's U.S. Subsidiaries on the Distribution of Offset Earnings.

(16) For its FY18 taxable year, the Code provided to Petitioner foreign tax credits under sections 901, 903, and 904 in the approximate amount of $1,282,362 for foreign withholding taxes paid or accrued by Petitioner's U.S. subsidiaries on the distribution of Offset Earnings as part of the FY18 Distributions.

(17) Upon information and belief, Respondent's Notice disallowed a foreign tax credit of approximately $1,282,362 for foreign withholding taxes paid or accrued by Petitioner's U.S. subsidiaries based on an erroneous application of sections 901, 903, and 965, and based on Treas. Reg. § 1.965-5(b).

(18) Respondent's erroneous application of sections 901, 903, and 965 is contrary to the plain text of those provisions and exceeds the Agencies' rulemaking authority under the Code.

(19) Treas. Reg. § 1.965-5(b), which purports to disallow credits for foreign taxes paid or accrued by the affiliated U.S. corporations of a U.S. shareholder that the Code expressly authorizes, is substantively and procedurally invalid.

(20) Substantively, Treas. Reg. § 1.965-5(b) is contrary to controlling statutes and exceeds the Agencies' rulemaking authority under the Code. *See, e.g.*, *Chevron*, 467 U.S. 837.

(21) Procedurally, the Agencies did not provide an adequate explanation for or respond to significant comments regarding Treas. Reg. § 1.965-5(b) and otherwise failed to satisfy the rulemaking requirements under the APA and *State Farm*.

(22) Because Treas. Reg. § 1.965-5(b) is substantively and procedurally invalid, it cannot be applied against Petitioner to disallow foreign tax credits that the controlling provisions of the Code otherwise allow.

(23) Accordingly, Respondent erroneously disallowed foreign tax credits to which Petitioner was entitled under sections 901, 903, and 904 in the approximate amount of $1,282,362 relating to foreign withholding taxes paid or accrued by Petitioner's U.S. subsidiaries on the distribution of Offset Earnings as part of the FY18 Distributions.

e. **Foreign Tax Credit: Foreign Withholding Taxes Paid or Accrued by Petitioner's Foreign Subsidiaries on the Distribution of Offset Earnings.**

(1) The allegations set forth in paragraphs 5.a.(1) through 5.a.(6), 5.b.(1) through 5.b.(73), 5.c.(1) through 5.c.(23), and 5.d.(1) through 5.d.(23), above, are incorporated by reference in this paragraph 5.e.

(2) Sysco EU IV paid or accrued $36,221,268 of foreign withholding taxes on the EU IV Distribution.

(3) Sysco EU IV paid or accrued $8,238,571 of foreign withholding taxes on the distribution of $235,774,059 of Offset Earnings that were distributed as part of the EU IV Distribution.

(4) For its FY18 taxable year, the Code provided to Petitioner foreign tax credits under 901, 902, 903, 904, and 960 in the approximate amount of $7,198,431 for foreign withholding taxes paid or accrued by Sysco EU IV on the distribution of Offset Earnings as part of the EU IV Distribution.

(5) Petitioner's FY18 Form 1120 reflected that it claimed approximately $7,198,431 of foreign tax credits for withholding taxes paid or accrued by Petitioner's foreign subsidiaries on the distribution of Offset Earnings as part of the EU IV Distribution.

(6) Upon information and belief, Respondent's Notice disallowed foreign tax credits of approximately $7,198,431 for foreign withholding taxes paid or accrued by Petitioner's foreign subsidiaries on the distribution of Offset Earnings based on an erroneous application of sections 901, 902, 960, and 965, and based on Treas. Reg. § 1.965-5(c)(1)(i).

(7) Respondent's erroneous application of sections 901, 902, 960, and 965 is contrary to the plain text of those provisions, which do not disallow foreign tax credits that the controlling provisions of the Code otherwise allow.

(8) Because Treas. Reg. § 1.965-5(c)(1)(i) is substantively and procedurally invalid, it cannot be applied to disallow foreign tax credits that the controlling provisions of the Code otherwise allow.

(9) Accordingly, Respondent erroneously disallowed (in whole or in part) foreign tax credits to which Petitioner was entitled under sections 901, 902, 903, 904, and 960 in FY18 in the approximate amount of $7,198,431 for foreign withholding taxes paid or accrued by Petitioner's foreign subsidiaries on the distribution of Offset Earnings as part of the FY18 Distributions.

f. **Foreign Tax Credit: Foreign Withholding Taxes Paid or Accrued by Petitioner's U.S. Subsidiaries on the Distribution of Section 965(a) E&P.**

(1) The allegations set forth in paragraphs 5.a.(1) through 5.a.(6), 5.b.(1) through 5.b.(73), 5.c.(1) through 5.c.(23), 5.d.(1) through 5.d.(23), and 5.e.(1) through 5.e.(9), above, are incorporated by reference in this paragraph 5.f.

(2) The Guest Supply Distribution included $24,429,097 of Section 965(a) E&P.

(3) Guest Supply U.S. paid or accrued $1,221,455 of foreign withholding taxes on the distribution of Section 965(a) E&P as part of the Guest Supply Distribution.

(4) The FreshPoint Distribution included $81,911,631 of Section 965(a) E&P.

(5) FreshPoint U.S. paid or accrued $4,095,582 of foreign withholding taxes on the distribution of Section 965(a) E&P as part of the FreshPoint Distribution.

(6) As Guest Supply U.S. (as a disregarded entity of Petitioner) and FreshPoint U.S. were part of Petitioner's U.S. consolidated group, Petitioner was entitled to claim foreign tax credits under sections 901, 903, and 904

in FY18 in the amount of approximately (i) $1,067,243 for foreign withholding taxes paid or accrued by Guest Supply U.S. and (ii) $3,578,504 for foreign withholding taxes paid or accrued by FreshPoint U.S. on the distribution of Section 965(a) E&P as part of the FY18 Distributions.

Petitioner's FY18 Form 1120.

(7) Petitioner's FY18 Form 1120 reflected that Petitioner paid $309,535,710 in tax on the $919,213,042 of Section 965(a) E&P distributed in FY18 as a consequence of the inclusion of that $919,213,042 of Section 965(a) E&P in income under sections 965(a) and 951(a).

(8) Petitioner's FY18 Form 1120 reflected that it claimed foreign tax credits in FY18 for the approximately (i) $1,067,243 of foreign withholding taxes paid or accrued on Section 965(a) E&P distributed as part of the Guest Supply Distribution and (ii) $3,578,504 of foreign withholding taxes paid or accrued on Section 965(a) E&P distributed as part of the FreshPoint Distribution.

The Code Provided to Petitioner Foreign Tax Credits for Foreign Withholding Taxes Paid or Accrued by Petitioner's U.S. Subsidiaries on the Distribution of Section 965(a) E&P.

(9) For its FY18 taxable year, the Code provided to Petitioner foreign tax credits under sections 901, 903, and 904 in the approximate amount of (i) $1,067,243 for foreign withholding taxes paid or accrued on the distribution of Section 965(a) E&P as part of the Guest Supply Distribution and (ii) $3,578,504 for

foreign withholding taxes paid or accrued on the distribution of Section 965(a) E&P as part of the FreshPoint Distribution.

(10) Upon information and belief, Respondent's Notice disallowed foreign tax credits in FY18 of approximately (i) $1,067,243 for foreign withholding taxes paid or accrued on Section 965(a) E&P distributed as part of the Guest Supply Distribution and (ii) $3,578,504 for foreign withholding taxes paid or accrued on Section 965(a) E&P distributed as part of the FreshPoint Distribution based on an erroneous application of sections 901, 903, and 965, and based on Treas. Reg. § 1.965-5(b) (which is invalid as applied).[11]

(11) Respondent's erroneous application of sections 901, 903, and 965 is contrary to the plain text of those provisions, which do not disallow credits that the controlling provisions of the Code otherwise allow.

(12) Section 965(g) does not authorize a disallowance of foreign tax credits for foreign withholding taxes paid or accrued on the distribution of Section 965(a) E&P.

[11] The Notice fails to specify the amount of the disallowance of foreign tax credits for foreign withholding taxes paid by Guest Supply U.S. and FreshPoint U.S., but upon information and belief, the amounts set forth above appear to be the amounts disallowed in the Notice.

(13) The section 965(g) disallowance is based in part on the amount of the section 965(c) deduction applied to the inclusion of the Section 965(a) E&P in income under section 951(a) for purposes of the section 965 transition tax.

(14) Foreign withholding taxes paid or accrued on the subsequent distribution of Section 965(a) E&P are not paid or accrued with respect to an amount included in income under section 951(a).

(15) Foreign withholding taxes paid or accrued on the subsequent distribution of Section 965(a) E&P are paid with respect to the distribution of an amount of previously taxed earnings.

(16) Section 965(c) did not apply to the distribution of Section 965(a) E&P and section 965(g) did not and cannot apply to disallow any portion of credits for foreign taxes paid or accrued on the distribution of Section 965(a) E&P.

(17) Because Treas. Reg. § 1.965-5(b) is substantively and procedurally invalid, it cannot be applied to disallow credits that the controlling provisions of the Code otherwise allow.

(18) Accordingly, Respondent erroneously disallowed (in whole or in part) foreign tax credits to which Petitioner was entitled under sections 901, 903, and 904 in the approximate amount of $4,645,747 for foreign withholding taxes paid or accrued by Petitioner's U.S. subsidiaries on the distribution of Section 965(a) E&P as part of the FY18 Distributions.

g. **Foreign Tax Credit: Foreign Withholding Taxes Paid or Accrued by Petitioner's Foreign Subsidiaries on the Distribution of Section 965(a) E&P.**

(1) The allegations set forth in paragraphs 5.a.(1) through 5.a.(6), 5.b.(1) through 5.b.(73), 5.c.(1) through 5.c.(23), 5.d.(1) through 5.d.(23), 5.e.(1) through 5.e.(9), and 5.f.(1) through 5.f.(18), above, are incorporated by reference in this paragraph 5.g.

(2) The EU IV Distribution included $812,872,313 of Section 965(a) E&P.

(3) Petitioner's foreign subsidiaries paid or accrued $27,982,078 of foreign withholding taxes on the distribution of $812,872,313 of Section 965(a) E&P as part of the EU IV Distribution.

(4) For its FY18 taxable year, the Code provided to Petitioner foreign tax credits under sections 901, 902, 903, 904, and 960 in FY18 in the approximate amount of $24,449,271 for foreign withholding taxes paid or accrued on the distribution of Section 965(a) E&P as part of the EU IV Distribution.

(5) Petitioner's FY18 Form 1120 reflected that it claimed approximately $24,449,271 of foreign tax credits in FY18 for foreign withholding taxes that Petitioner's foreign subsidiaries paid or accrued on Section 965(a) E&P distributed as part of the EU IV Distribution.

(6) Upon information and belief, Respondent's Notice disallowed approximately $24,449,271 of foreign tax credits for withholding taxes that Petitioner's foreign subsidiaries paid or accrued on Section 965(a) E&P distributed as part of the EU IV Distribution based on an erroneous application of sections 901, 902, 903, 960, and 965, and based on Treas. Reg. § 1.965-5(c)(i).

(7) Respondent's erroneous application of sections 901, 902, 903, 960, and 965 is contrary to the plain text of those provisions, which do not disallow foreign tax credits that the controlling provisions of the Code otherwise allow.

(8) Because Treas. Reg. § 1.965-5(c)(1)(i) is substantively and procedurally invalid, it cannot be applied to disallow credits that the controlling provisions of the Code otherwise allow.

(9) Accordingly, Respondent erroneously disallowed foreign tax credits to which Petitioner was entitled to claim under sections 901, 902, 903, 904, and 960 in FY18 in the approximate amount of $24,449,271 for foreign withholding taxes paid or accrued by Petitioner's foreign subsidiaries on the distribution of Section 965(a) E&P as part of the EU IV Distribution.

h. **IRC § 965: Increase to Petitioner's Aggregate Foreign Cash Position.**

(1) The allegations set forth in paragraphs 5.a.(1) through 5.a.(6), 5.b.(1) through 5.b.(73), 5.c.(1) through 5.c.(23), 5.d.(1) through 5.d.(23), 5.e.(1) through 5.e.(9), 5.f.(1) through 5.f.(18), and 5.g.(1) through 5.g.(9), above, are incorporated by reference in this paragraph 5.h.

(2) Respondent's Notice increases Petitioner's aggregate foreign cash position under section 965(c)(3) by $153,270,201 (from $804,167,933 to $957,438,134) by disallowing certain items that decreased Petitioner's aggregate foreign cash position and by mischaracterizing certain financial instruments with less-than-zero value as cash equivalents.

(3) Section 965(c)(3) and the Treasury Regulations thereunder define the aggregate foreign cash position for purposes of the section 965 transition tax. Generally, the aggregate foreign cash position is determined by reference to a U.S. shareholder's pro-rata share of the cash position of each SFC in which it has an ownership interest.

(4) Section 965(c)(3)(B) generally provides that the "cash position" of an SFC includes cash held by the SFC, the net accounts receivable of the SFC, and the fair market value of certain "cash equivalents."

(5) In computing its FY18 section 965 transition tax liability,

Petitioner applied section 965(c)(3) and the Treasury Regulations thereunder to determine the aggregate foreign cash position of its SFCs.

(6) Respondent's Notice adjusted Petitioner's section 965 aggregate foreign cash position with respect to certain items identified as "accounts payable." Section 965(c)(3)(C) generally defines an SFC's "net accounts receivable" as the corporation's accounts receivable over its accounts payable.

(7) To determine the net accounts receivable of its SFCs, Petitioner determined that certain items constituted accounts payable. For example, these items included taxes owed to foreign governments and held in trust by some of Petitioner's specified foreign corporations for those foreign governments. Because an SFC had a legal obligation to pay those taxes to foreign governments and acted only as a trustee with respect to the funds identified to satisfy these tax liabilities, Petitioner did not include the amounts related to the tax liabilities in the cash position of its specified foreign corporations.

(8) Respondent's Notice erroneously determined that certain items (including taxes owed to foreign governments) did not constitute accounts payable and should not be taken into account in determining the net accounts receivable of an SFC.

(9) Respondent's Notice adjusted Petitioner's section 965 aggregate foreign cash position based on an adjustment to the bank accounts of

Sysco Canada and other of Petitioner's Canadian affiliates.

(10) Sysco Canada and Petitioner's Canadian affiliates had a banking relationship with Toronto-Dominion Bank under which Sysco Canada and Petitioner's Canadian affiliates had multiple accounts with Toronto-Dominion. Some accounts had a negative balance, others had a positive balance. Sysco Canada and Petitioner's Canadian affiliates could draw on only the net positive balance of the accounts (i.e., the positive balance of some accounts less the negative balance of other accounts).

(11) To determine Sysco Canada's section 965 cash position, Petitioner included the net positive balance (not the total positive balance) of the accounts with Toronto-Dominion.

(12) Respondent's Notice erroneously ignored the negative account balance of the accounts with Toronto-Dominion in determining Sysco Canada's section 965 cash position. Respondent erroneously alleged that only the positive account balances (and not the negative account balances) should be included in Sysco Canada's section 965 cash position.

(13) Respondent's Notice adjusted Petitioner's section 965 aggregate foreign cash position to include the alleged positive value of currency swaps between SMS Global Holdings Sarl and Sysco Canada.

(14) SMS Global Holdings Sarl and Sysco Canada entered into

certain currency swaps. Petitioner determined that the value of these swaps was negative as of the pertinent section 965 measurement date and thus did not include the value of the swaps in Sysco Canada's section 965 cash position. *See* Treas. Reg. § 1.965-1(f)(16)(iii).

(15) Respondent's Notice erroneously ignored the negative value of the swaps and included in Sysco Canada's section 965 cash position some amount of positive value attributable to the swaps. Respondent's Notice did not specify the amount of positive value attributed to the swaps.

(16) Respondent's adjustments to Petitioner's section 965 aggregate foreign cash position do not accord with the pertinent facts or the applicable law. Accordingly, Respondent erroneously increased Petitioner's aggregate foreign cash position by approximately $153,270,201 and erroneously decreased Petitioner's section 965(c) deduction by approximately $3,304,797.

i. **IRC § 965: Goodwill Amortization Expense For Purposes of Determining Sysco Canada's E&P.**

(1) The allegations set forth in paragraphs 5.a.(1) through 5.a.(6), 5.b.(1) through 5.b.(73), 5.c.(1) through 5.c.(23), 5.d.(1) through 5.d.(23), 5.e.(1) through 5.e.(9), 5.f.(1) through 5.f.(18), 5.g.(1) through 5.g.(9), and 5.h.(1) through 5.h.(16), above, are incorporated by reference in this paragraph 5.i.

(2) Respondent's Notice increases Petitioner's section 965(a)

inclusion by the net amount of $52,849,609 based on Respondent's disallowance of amortization expense for goodwill associated with Petitioner's acquisition of SERCA Foodservice (a Canadian entity) and its subsequent amalgamation into Sysco Canada.

(3) In Petitioner's fiscal year ended June 29, 2002 ("FY02"), Petitioner acquired SERCA Foodservice and its subsidiaries (collectively, the "SERCA entities").

(4) The SERCA entities subsequently amalgamated into Sysco Food Services of Canada, Inc. (which subsequently changed its name to Sysco Canada, Inc.), a Canadian entity that was classified as a corporation for U.S. federal income tax purposes. As part of the amalgamation, Sysco Food Services acquired $266,104,824 of goodwill associated with the value of the SERCA entities.

(5) In determining the E&P of Sysco Canada for purposes of its annual Form 5471 (Information Return of U.S. Persons With Respect to Certain Foreign Corporations), Petitioner amortized the goodwill of the SERCA entities over a 15-year period (from FY02 to its fiscal year ended June 30, 2018 ("FY18")), but the annual Forms 5471 for Sysco Canada initially inadvertently misstated the amount of annual goodwill amortization expense.

(6) Sysco Canada's Forms 5471 for FY04 to its fiscal year ended June 30, 2012 ("FY12") understated the amount of amortization expense for the goodwill acquired from the SERCA entities.

(7) From Petitioner's fiscal year ended July 3, 2004 ("FY04") to FY12, Sysco Canada's E&P was overstated as a result of the understatement of amortization expense for goodwill acquired from the SERCA entities.

(8) From FY12 through its fiscal year ended June 28, 2014 ("FY14"), Sysco Canada corrected the understated amortization expense on its Forms 5471.

(9) In determining Sysco Canada's E&P for purposes of the section 965 transition tax, Petitioner decreased Sysco Canada's E&P to account for the goodwill amortization expense for FY04 through FY13.

(10) Respondent's Notice disallowed $79,153,940[12] in amortization expense in computing Sysco Canada's E&P based on a misapplication of section 446 and Treas. Reg. § 1.964-1.

(11) Section 446(e) requires a taxpayer that changes its method of accounting to secure Respondent's consent before computing its taxable income under the new method.

[12] The $79,153,940 reflected in the Notice is net of an overstatement of Sysco Canada's amortization expense.

(12) The correction of Sysco Canada's goodwill amortization expense on the Forms 5471 for Sysco Canada was not a change in accounting method that required Respondent's consent.

(13) Under Treas. Reg. § 1.964-1(c)(6), a foreign corporation is not required to elect or adopt a method of accounting until the controlling domestic shareholder's first taxable year in which the computation of E&P is "significant for United States tax purposes."

(14) The deemed distribution under section 965 in Petitioner's FY18 taxable year was a "significant event" under Treas. Reg. § 1.964-1(c)(1).

(15) Prior to the deemed distribution under section 965, Petitioner did not adopt and did not need to adopt a method of accounting with respect to Sysco Canada's goodwill amortization expense.

(16) Any change in the amount of amortization of goodwill in determining the E&P of Sysco Canada prior to FY18 was not a change in method of accounting, as no method of accounting had been established. Consequently, Respondent's consent under section 446(e) was not required.

(17) Accordingly, Petitioner was entitled to adjust Sysco Canada's E&P by an amount to be determined later to account for amortization expense associated with goodwill acquired from the SERCA entities, and Respondent erroneously increased Sysco Canada's E&P (and Petitioner's section

965(a) inclusion) based on a misapplication of section 446(e) and Treas. Reg. § 1. 964-1(c)(1).

j. **Transfer Pricing for Sourcing Commissions.**

(1) The allegations set forth in paragraphs 5.a.(1) through 5.a.(6), 5.b.(1) through 5.b.(73), 5.c.(1) through 5.c.(23), 5.d.(1) through 5.d.(23), 5.e.(1) through 5.e.(9), 5.f.(1) through 5.f.(18), 5.g.(1) through 5.g.(9), 5.h.(1) through 5.h.(16), and 5.i.(1) through 5.i.(17), above, are incorporated by reference in this paragraph 5.j.

(2) Respondent's Notice disallows an ordinary deduction of $26,304,331 for commissions that SMS U.S. paid to SMSI for food and non-food procurement services.

(3) SMS U.S. helped the Sysco Group to source products and manage its supply chain by providing procurement, logistics, and warehousing services to Petitioner's affiliated entities worldwide. SMS U.S. determined the demand for certain products of Petitioner's operating entities in the U.S. and liaised with international and domestic third-party suppliers to procure the products needed. Before SMSI was established, SMS U.S. primarily relied on brokers and trading companies to contract with suppliers outside of the U.S.

(4) In FY14, Petitioner established SMSI to facilitate SMS U.S.'s procurement activities overseas. SMSI consisted of three entities: one in

Ireland, SMS International Resources Ireland Unlimited Company; and two in Hong Kong, SMS GPC International Limited and SMS GPC International Resources Limited.

(5) On June 30, 2014, SMSI entered into a Procurement Services Agreement with SMS U.S. (the "Sysco Procurement Agreement") to procure an extensive array of products from foreign suppliers, including frozen seafood, frozen vegetables, canned fruit, canned vegetables, fats, oils, and certain disposable non-food products. These products included products packaged under Sysco's private brands ("Sysco Brand Products") and nationally branded merchandise ("Unbranded Products"). For its services, SMSI received a commission based on the value per purchase order placed by SMS U.S. from suppliers managed by SMSI; specifically, that commission was 6% for Sysco Brand Products and 2.5% for Unbranded Products.

(6) Under the Sysco Procurement Agreement, SMSI performed business development, quality assurance, and sourcing activities in its territory, which included Europe, Asia, Australia and New Zealand, the Middle East, Africa, South America, and Canada.

(7) SMSI's business-development team expanded SMSI's global network of suppliers, facilities, and products.

(8) SMSI's quality-assurance team ensured that suppliers complied with SMS U.S.'s rigorous food-safety and quality specifications through product-sample evaluation, initial and routine facility audits, pre-shipment sampling and testing of finished products, and additional quality-control procedures including internal Sysco programs and industry-standard audits and checkpoints.

(9) SMSI's sourcing team sourced a wide variety of food and non-food products; oversaw the request-for-information and the request-for-proposal process with respect to foreign suppliers; tracked and evaluated existing suppliers' performance and compliance with food-safety requirements; and analyzed the suppliers' offered prices and sometimes recommended that SMS U.S. split the work between suppliers to mitigate risk.

(10) In conducting its global food-and-beverage sourcing activities, SMSI bore substantial food-safety and recall risks, foreign-currency and exchange risks, and market and credit risks.

(11) Petitioner's intercompany pricing was and continues to be consistent with the pricing observed in comparable uncontrolled transactions between unrelated third parties and between SMSI and an unrelated party. Specifically, Petitioner reviewed third-party agreements and identified those most like the Sysco Procurement Agreement in terms of functions performed by each party, risks assumed, and assets employed. Petitioner used those agreements to set

the price that SMS U.S. paid to SMSI for SMSI's procurement services during FY18. The 6% and 2.5% commission fees that SMSI received from SMS U.S. fell squarely within the arm's-length range of prices set forth in the comparable uncontrolled transactions.

(12) In the Notice, Respondent increased Petitioner's taxable income by $26,304,331. Respondent failed to provide Petitioner or this Court with an explanation for its income allocations, other than a scant reference to section 482. Upon information and belief, Respondent's income allocations are consistent with Respondent's position on audit. On audit, Respondent treated SMSI as a routine service provider and applied a version of the comparable profits method to decrease the compensation that SMSI was owed for its procurement services.

(13) Based on real-world benchmarks, SMSI received arm's-length compensation from SMS U.S. for its sourcing services. Accordingly, Respondent erroneously adjusted Petitioner's income by decreasing the arm's-length compensation that SMSI received for its procurement services. That adjustment was arbitrary, capricious, and unreasonable.

k. **Section 245A Deduction.**

(1) The allegations set forth in paragraphs 5.a.(1) through 5.a.(6), 5.b.(1) through 5.b.(73), 5.c.(1) through 5.c.(23), 5.d.(1) through 5.d.(23), 5.e.(1) through 5.e.(9), 5.f.(1) through 5.f.(18), 5.g.(1) through 5.g.(9), 5.h.(1)

through 5.h.(16), 5.i.(1) through 5.i.(17), and 5.j.(1) through 5.j.(13), above, are incorporated by reference in this paragraph 5.k.

(2) Before the TCJA was enacted, section 78 required a U.S. shareholder to treat the foreign taxes paid or deemed paid by the taxpayer under sections 902 and 960 as a "dividend received by such domestic corporation from the foreign corporation" for all purposes of the Code "(other than section 245)." (This version of section 78 is referred to as "Old Section 78.")

(3) The TCJA added a new dividends received deduction in section 245A, which provided for a deduction for "any dividend received" by a U.S. shareholder from a specified 10-percent owned foreign corporation (the "section 245A dividends received deduction"). Section 245A was effective for and applied to distributions made after December 31, 2017.

(4) The TCJA also amended section 78 to exclude section 78 dividends from the section 245A dividends received deduction ("New Section 78").[13] New Section 78 applied "to taxable years of foreign corporations beginning

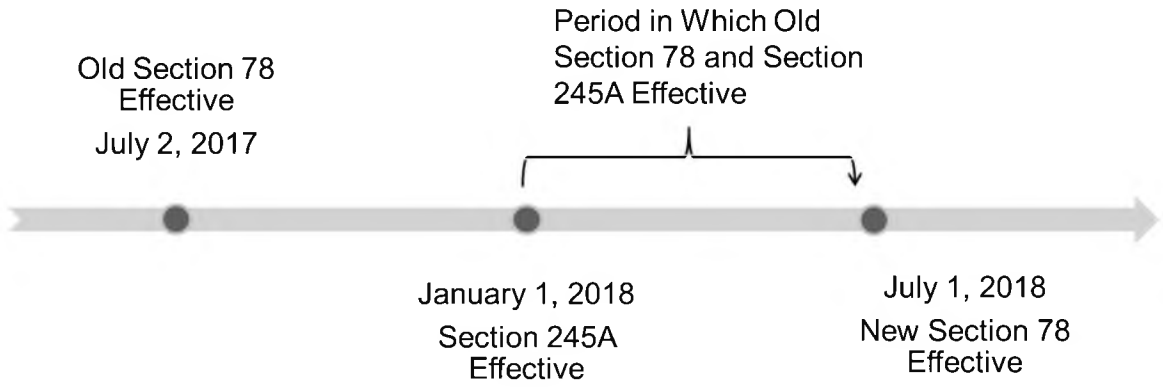
[13] Regulations under Old Section 78, effective for Petitioner's FY18 tax year, provided that section 78 dividends are deemed to have been received on the last day of the parent corporation's tax year. *See* Treas. Reg. § 1.78-1(e)(2) (2018) (prior to amendment by T.D. 9866, 84 Fed. Reg. 29288 (June 21, 2019)); *see also* T.D. 6805, 30 Fed. Reg. 3208 (March 9, 1965) (same).

after December 31, 2017, and to taxable years of United States shareholders in which or with which such taxable years of foreign corporations end."[14]

(5) Accordingly, Old Section 78 was effective for and applied to taxable years that began before January 1, 2018; section 245A was effective for and applied to distributions made after December 31, 2017; and New Section 78 was effective for and applied to taxable years that began after December 31, 2017.

(6) Petitioner's FY18 taxable year began on July 2, 2017, and ended on June 30, 2018. In general, the FY18 taxable year of Petitioner's foreign corporations also began on July 2, 2017, and ended on June 30, 2018.[15]

(7) The following timeline illustrates the effective dates of Old Section 78, Section 245A, and New Section 78 as pertinent to Petitioner's FY18 taxable year.



[14] Pub. L. No. 115-97, § 14301(d), 131 Stat. 2225, (Dec. 22, 2017).
[15] Certain of Petitioner's foreign corporations had short taxable years within FY18.

(8) Petitioner's FY18 Form 1120 reflected that the amount of accumulated post-1986 foreign income taxes associated with Petitioner's section 965(a) inclusion was $323,924,795. The $323,924,795 amount reflected foreign taxes paid or deemed paid by the taxpayer under sections 902 and 960. Old section 78 treated that $323,924,795 of deemed paid foreign taxes as a dividend.

(9) Petitioner's FY18 Form 1120 reflected that its section 78 dividend was not less than $323,924,795.

(10) Petitioner's FY18 Form 1120 did not reflect a section 245A deduction for its section 78 dividends.

(11) Because New Section 78 was not effective for Petitioner's FY18 taxable year, and because Old Section 78 remained effective for and applied to Petitioner's FY18 taxable year, Petitioner was entitled to a section 245A dividends received deduction for the amount of its FY18 section 78 dividends.

(12) On December 7, 2018, the Agencies issued proposed regulations under section 78 ("Prop. Reg. § 1.78-1"). The second sentence of Prop. Reg. § 1.78-1(a) provides that "[a] section 78 dividend is treated as a dividend for all purposes of the Code, except that it is not treated as a dividend for purposes of section 245 or 245A, and does not increase the earnings and profits of the domestic corporation or decrease the earnings and profits of the foreign corporation." Prop. Reg. § 1.78-1(c) purported to override the statutory effective date of New Section

78 and to apply the second sentence of Prop. Reg. § 1.78-1(a) "to a taxable year of a foreign corporation beginning before January 1, 2018." 83 Fed. Reg. 63200, 63228 (Dec. 7, 2018).

(13) Multiple commenters told the Agencies that Prop. § 1.78-1(c) exceeded the scope of Treasury's authority and was contrary to statute because the Agencies could not issue a regulation that purported to override Congressionally mandated statutory effective dates by imposing a special applicability date ("beginning before January 1, 2018") that is contrary to the express effective date that Congress established in New Section 78 ("beginning after December 31, 2017.").[16] *See, e.g.*, American Chemistry Council Letter to the Internal Revenue Service, dated February 6, 2019, at 2, available at: https://www.regulations.gov/comment/IRS-2018-0040-0009 (the Agencies lacked authority to "change effective dates for provisions that on their face are clear in the statute"); Information Technology Industry Council Letter to the Internal Revenue Service, dated February 4, 2019, at 9, available at: https://www.regulations.gov/comment/IRS-2018-0040-0020 (the special applicability date "exceeds Treasury's authority, because Treasury does not have the authority to override the effective date contained in the statute"); Silicon Valley Tax Directors Group Letter to the Internal Revenue Service, dated February 5, 2019, at

[16] Pub. L. No. 115-97, § 14301(d), 131 Stat. 2225 (Dec. 22, 2017).

5-6, available at: https://www.regulations.gov/comment/IRS-2018-0040-0034; Anonymous Letter to the Internal Revenue Service, dated January 3, 2019, at 1-5, available at: https://www.regulations.gov/comment/IRS-2018-0040-0005.

(14) Despite comments informing the Agencies that the "special applicability date" was invalid, the Agencies issued Treas. Reg. § 1.78-1(c), which contained the same "special applicability date" provision in Prop. Reg. § 1.78-1(c). 84 Fed. Reg. 29288, 29335 (June 1, 2019).

(15) Substantively, Treas. Reg. § 1.78-1(c) is contrary to controlling statutes and exceeds the Agencies' rulemaking authority under the Code. *See, e.g.*, *Chevron*, 467 U.S. 837. The special applicability date (which applies to tax years "beginning before January 1, 2018") in Treas. Reg. § 1.78-1(c) contradicts the express statutory effective date of New Section 78 (which applies to tax years "beginning after December 31, 2017"). Accordingly, Respondent's erroneous application of the unambiguous statutory effective dates of sections 78 and 245A is contrary to the plain text of those provisions.

(16) Procedurally, the Agencies did not provide an adequate explanation for or respond to significant comments regarding Treas. Reg. § 1.78-1(c) and otherwise failed to satisfy the rulemaking requirements under the APA and *State Farm*.

(17) Because the special applicability date in Treas. Reg. § 1.78-1(c) is substantively and procedurally invalid, it cannot be applied to disallow a deduction that the controlling provisions of the Code otherwise allow.

(18) Accordingly, Petitioner was entitled to a section 245A deduction for its section 78 dividends for its FY18 taxable year.

l. **IRC § 6662 Penalties: Total Alleged Deficiency.**

(1) The allegations set forth in paragraphs 5.a.(1) through 5.a.(6), 5.b.(1) through 5.b.(73), 5.c.(1) through 5.c.(23), 5.d.(1) through 5.d.(23), 5.e.(1) through 5.e.(9), 5.f.(1) through 5.f.(18), 5.g.(1) through 5.g.(9), 5.h.(1) through 5.h.(16), 5.i.(1) through 5.i.(17), 5.j.(1) through 5.j.(13), and 5.k.(1) through 5.k.(18), above, are incorporated by reference in this paragraph 5.l.

(2) In the Notice, Respondent determined an accuracy-related penalty under section 6662(a), (b)(1), (b)(2), (c), and (d) in the amount of $21,605,122 relating to the adjustments that comprise the alleged $108,025,610 deficiency identified in Respondent's Notice.

(3) Respondent's Notice did not identify any basis for Respondent's determination that part or all of the asserted deficiency in tax for FY18 was attributable to negligence, a disregard of rules or regulations, or a substantial understatement of income tax.

(4) Petitioner is not liable for any penalty under section 6662.

(5) Petitioner did not have a deficiency or underpayment of income tax for FY18.

(6) Any deficiency in Petitioner's income tax for FY18 was not attributable to negligence, a disregard of rules or regulations, or a substantial understatement of income tax.

(7) There was substantial authority for Petitioner's treatment of the tax items that relate to the alleged $108,025,610 deficiency in Respondent's Notice.

(8) Under section 6662(d)(2)(B)(ii)(I), Petitioner adequately disclosed the relevant facts affecting its treatment and recognition of foreign tax credits. Petitioner disclosed its challenge to the validity of Treas. Reg. §§ 1.965-5(b), 1.965-5(c)(1)(i), and 1.965-5(c)(1)(ii) on a Form 8275-R, (Regulation Disclosure Statement) (the "Form 8275-R"), attached to Petitioner's FY18 Form 1120.

(9) There was an objectively reasonable basis for Petitioner's treatment of the tax items that relate to the alleged $108,025,610 deficiency in Respondent's Notice.

(10) With respect to the section 6662(b)(1) and (c) penalty for negligence or disregard of rules or regulations, Petitioner was not negligent in its treatment of the tax items that relate to the alleged $108,025,610 deficiency in Respondent's Notice.

(11) With respect to the section 6662(b)(1) and (c) penalty for negligence or disregard of rules or regulations, Petitioner was not negligent in its treatment of the tax items that relate to the alleged $108,025,610 deficiency in Respondent's Notice.

(12) With respect to the section 6662(b)(2) and (d) penalty for substantial understatement of income tax, Petitioner did not substantially understate its U.S. federal income tax for its FY18 taxable year.

(13) Accordingly, Respondent erroneously determined a penalty under section 6662 for FY18 of $21,605,122 pertaining to the tax items that relate to the alleged $108,025,610 deficiency.

m. **IRC § 6662 Penalties: Transfer Pricing for Sourcing Commissions.**

(1) The allegations set forth in paragraphs 5.a.(1) through 5.a.(6), 5.b.(1) through 5.b.(73), 5.c.(1) through 5.c.(23), 5.d.(1) through 5.d.(23), 5.e.(1) through 5.e.(9), 5.f.(1) through 5.f.(18), 5.g.(1) through 5.g.(9), 5.h.(1) through 5.h.(16), 5.i.(1) through 5.i.(17), 5.j.(1) through 5.j.(13), 5.k.(1) through 5.k.(18), and 5.l.(1) through 5.l.(13), above, are incorporated by reference in this paragraph 5.m.

(2) In the alternative to the penalties described in paragraphs 5.l.(1) through 5.l.(13), above, Respondent's Notice determined two alternative

penalties with respect to the section 482 adjustments to the compensation that SMS U.S. paid to SMSI under the Sysco Procurement Agreement (described above in paragraphs 5.j.(5) through 5.j.(6)). Specifically, Respondent's Notice determined a penalty of $2,946,085 for a gross valuation misstatement under section 6662(h). As an alternative to the section 6662(h) penalty, Respondent's Notice determined a penalty of $1,473,042.60 for a substantial valuation misstatement under section 6662(b)(3).

(3) There was an objective reasonable basis for Petitioner's intercompany pricing of the compensation that SMS U.S. paid to SMSI under the Sysco Procurement Agreement.

(4) To benchmark the arm's-length price for the procurement services that SMSI performed for SMS U.S. under the Sysco Procurement Agreement, Petitioner applied the comparable uncontrolled services price method based on real-world evidence of comparable uncontrolled transactions.

(5) Because the compensation that SMSI received from SMS U.S. under the Sysco Procurement Agreement was arm's length under section 482, Petitioner did not underpay its FY18 U.S. federal income tax in connection with the compensation paid to SMSI under the Sysco Procurement Agreement, and no section 6662(h) or 6662(b)(3) penalties can apply.

(6) Further, Petitioner met the requirements of section 6662(e)(3)(B) and Treas. Reg. § 1.6662-6(d) with respect to the documentation prepared to establish the arm's-length price under the Sysco Procurement Agreement.

(7) Under section 6662(e)(3)(B) and Treas. Reg. § 1.6662-6(d)(2)(ii), Petitioner satisfied the specified-method requirement by reasonably selecting and applying the comparable uncontrolled services price method to determine the arm's-length price under the Sysco Procurement Agreement.

(8) With respect to the transactions described in and the compensation paid under the Sysco Procurement Agreement, Petitioner satisfied the documentation requirement under section 6662(e)(3)(B) and Treas. Reg. § 1.6662-6(d)(2)(iii) by maintaining—and timely providing to Respondent—sufficient contemporaneous documentation to establish that the comparable uncontrolled services price method was the most reliable method and that Petitioner's use of the comparable uncontrolled services price method was reasonable.

(9) The entire portion of the transfer-price increase related to Respondent's section 482 adjustment to compensation paid under the Sysco Procurement Agreement is excluded when determining whether Respondent's section 482 adjustment met the $20 million threshold under section 6662(e)(1)(B) with respect to the section 6662(h) penalty. Accordingly, Respondent's section 482

adjustments fell below the $20 million threshold under sections 6662(e)(1)(B) and (h)(2), and a section 6662(h) penalty does not apply to any section 482 adjustment to compensation paid to SMSI under the Sysco Procurement Agreement.

(10) The entire portion of the transfer-price increase related to Respondent's section 482 adjustment to compensation paid under the Sysco Procurement Agreement is excluded when determining whether Respondent's section 482 adjustment met the $5 million threshold under section 6662(e)(1)(B) with respect to the section 6662(b)(3) penalty. Accordingly, Respondent's section 482 adjustments fell below the $5 million threshold under sections 6662(e)(1)(B), and a section 6662(b)(3) penalty does not apply to any section 482 adjustment to compensation paid to SMSI under the Sysco Procurement Agreement.

(11) Accordingly, Respondent erroneously determined a penalty of $2,946,085 for a gross valuation misstatement under section 6662(h). Respondent also erroneously determined a penalty of $1,473,042.60 for a substantial valuation misstatement under section 6662(b)(3).

n. **Computational Errors.**

(1) The allegations set forth in paragraphs 5.a.(1) through 5.a.(6), 5.b.(1) through 5.b.(73), 5.c.(1) through 5.c.(23), 5.d.(1) through 5.d.(23), 5.e.(1) through 5.e.(9), 5.f.(1) through 5.f.(18), 5.g.(1) through 5.g.(9), 5.h.(1) through 5.h.(16), 5.i.(1) through 5.i.(17), 5.j.(1) through 5.j.(13), 5.k.(1) through

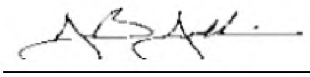
5.k.(18), and 5.l.(1) through 5.l.(13), and 5.m.(1) through 5.m.(11), above, are incorporated by reference in this paragraph 5.n.

(2) Respondent made various computational errors in the calculations reflected in the Notice, and therefore determined an erroneous deficiency for FY18.

(3) The computational errors should be addressed pursuant to Tax Court Rule 155 after the substantive issues identified in paragraphs 5.a.(1) through 5.m.(11) are resolved.

WHEREFORE, Petitioner prays that this Court hear this proceeding and determine that the deficiency in tax determined by Respondent for FY18 is erroneous, that there is no deficiency in Petitioner's income tax for FY18, that if some or all of the deficiency is sustained then Petitioner's income tax for FY18 is reduced by the other items referenced above, and that this Court grant such other further relief to Petitioner as this Court may deem just and proper.

Respectfully submitted,



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Dated: April 18, 2023

EXHIBIT A

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Small Business and Self-Employed
1919 Smith Street
Houston TX 77002

Date: JAN 19 2023

Taxpayer ID number: [redacted]

Form:
1120

Contact person:
Michael Bridges

Employee ID number:
1000699172

Contact numbers:
Phone: 346 227 - 6554
Fax: 877 282 - 5698

Last day to file petition with US tax court:
APR 19 2023

Certified Mail

SYSCO CORPORATION
1390 ENCLAVE PKWY
HOUSTON TX 77077-2025
7020 1810 0000 1261 2481

Notice of Deficiency

Tax Year Ended:	June 30, 2018
Deficiency: Increase in tax	$108,025,610.00
Penalties or Additions to Tax	
IRC 6662	$21,605,122.00

Dear SYSCO CORPORATION:

Why we are sending you this letter
We determined that you owe additional tax or other amounts, or both, for the tax years above. This letter is your **Notice of Deficiency** as we're required by law to send you. The enclosed Form 4549-A, Income Tax Examination Changes (Unagreed and Excepted Agreed), or Form 5278, Statement - Income Tax Changes, shows how we figured the deficiency.

If you agree with the Notice of Deficiency
If you agree with our determination, sign the enclosed Form 4089-B, Notice of Deficiency - Waiver, and return it to us at the address on the top of the first page of this letter. Sending this now can help limit the accumulation of interest.

If you disagree with the Notice of Deficiency
If you want to contest our final determination, you have 90 days from the date of this letter (150 days if addressed to you outside of the United States) to file a petition with the United States Tax Court.

How to file your petition

You can get a petition form and the rules for filing from the Tax Court's website at www.ustaxcourt.gov, by contacting the Office of the Clerk at the address below, or by calling 202-521-0700. Send your completed petition form, a copy of this letter, and copies of all statements and schedules you received with this letter to the address below.

United States Tax Court
400 Second Street, NW
Washington, DC 20217

If this notice shows more than one tax year, you can file one petition form showing all of the years you disagree with.

The Tax Court has a simplified procedure for small tax cases. If you plan to file a petition for multiple tax years and the amount in dispute for any one or more of the tax years exceeds $50,000 (including penalties), you can't use this simplified procedure. If you use this simplified procedure, you can't appeal the Tax Court's decision. You can get information about the simplified procedure from www.ustaxcourt.gov or by writing to the court at the address above.

If you recently sought bankruptcy relief by filing a petition in bankruptcy court, see enclosed Notice 1421, How Bankruptcy Affects Your Right to File a Petition in Tax Court in Response to a Notice of Deficiency.

You can represent yourself before the Tax Court, or anyone allowed to practice before the Tax Court can represent you.

Time limits on filing a petition

The court can't consider your case if you file the petition late.

- A petition is considered timely filed if the Tax Court receives it within:
  - 90 days from the date this letter was mailed to you, or
  - 150 days from the date this letter was mailed to you if this letter is addressed to you outside of the United States.
- A petition is also generally considered timely if the United States Postal Service postmark date is within the 90 or 150-day period and the envelope containing the petition is properly addressed with the correct postage. The postmark rule doesn't apply if mailed from a foreign country.
- A petition is also generally considered timely if the date marked by a designated private delivery service is within the 90 or 150-day period. Not all services offered by private delivery companies are designated delivery services. For a list of designated delivery services available for domestic and international mailings, see Notice 2016-30, which is available on the IRS website at www.irs.gov/irb/2016-18_IRB/ar07.html. Please note that the list of approved delivery companies may be subject to change.
- The time you have to file a petition with the Tax Court is set by law and can't be extended or suspended, even for reasonable cause. We can't change the allowable time for filing a petition with the Tax Court.

If you are married

We're required to send a notice to each spouse. If both want to petition the Tax Court, **both** must sign and file the petition or **each** must file a separate, signed petition. If only one spouse timely petitions the Tax Court, the deficiency may be assessed against the non-petitioning spouse. If only one spouse is in bankruptcy at the time we issued this letter or files a bankruptcy petition after the date of this letter, the bankruptcy automatic stay does not prevent the spouse who is not in bankruptcy from filing a petition with the Tax Court. The bankruptcy automatic stay of the spouse seeking bankruptcy relief doesn't extend the time for filing a petition in Tax Court for the spouse who is not in bankruptcy.

If we don't hear from you
If you decide not to sign and return Form 4089-B, and you don't file a timely petition with the Tax Court, we'll assess and bill you for the deficiency (and applicable penalties and interest) after 90 days from the date of this letter (150 days if this letter is addressed to you outside the United States).

Note: If you are a C corporation, we're required by Internal Revenue Code Section 6621(c) to charge an interest rate two percent higher than the normal rate on corporate underpayments in excess of $100,000.

If you need more assistance
If you have questions, you can contact the person at the top of this letter. If you write, include a copy of this letter, your telephone number, and the best hours to reach you. Keep the original letter for your records.

Information about the IRS Taxpayer Advocate Service
The IRS office whose phone number appears at the top of the notice can best address and access your tax information and help get you answers. However, you may be eligible for free help from the Taxpayer Advocate Service (TAS) if you can't resolve your tax problem with the IRS, or you believe an IRS procedure just isn't working as it should. TAS is an independent organization within the IRS that helps taxpayers and protects taxpayer rights. Contact your local Taxpayer Advocate Office at:

Internal Revenue Service
Taxpayer Advocate Office
1919 Smith Street, Stop 1005HOU
Houston, TX 77002
Phone: 713-209-3660
Fax: 855-829-3841

Or call TAS at 877-777-4778. For more information about TAS and your rights under the Taxpayer Bill of Rights, go to taxpayeradvocate.irs.gov. Do not send your Tax Court petition to the TAS address listed above. Use the Tax Court address provided earlier in the letter. Contacting TAS does not extend the time to file a petition.

Information about Low Income Taxpayer Clinics and other resources
Tax professionals who are independent from the IRS may be able to help you.

Low Income Taxpayer Clinics (LITCs) can represent low-income persons before the IRS or in court. LITCs can also help persons who speak English as a second language. Any services provided by an LITC must be for free or a small fee. To find an LITC near you:

- Go to www.taxpayeradvocate.irs.gov/litcmap;
- Download IRS Publication 4134, Low Income Taxpayer Clinic List, available at www.irs.gov/forms-pubs; or
- Call the IRS toll-free at 800-829-3676, and ask for a copy of Publication 4134.

State bar associations, state or local societies of accountants or enrolled agents, or other nonprofit tax professional organizations may also be able to provide referrals.

Sincerely,

Douglas O'Donnell, Acting

Commissioner
By

David H. Okuda

Territory Manager, Technical Services West Area

Enclosures:
Form 4549-A or Form 5278
Form 4089-B
Notice 1421

Continuation Sheet

NAME: SYSCO CORPORATION TIN: [redacted]

Interest on Deficiencies

Interest on Deficiencies will accrue from the due date of the return until paid.

Accuracy-related Penalty IRC section 6662

IRC section 6662(a)

Since all or part of the underpayment of tax for the taxable year(s) is attributable to one or more of (1) negligence or disregard of rules or regulations, (2) any substantial understatement of income tax, or (3) any substantial valuation overstatement, an addition to the tax is charged as provided by section 6662(a) of the Internal Revenue Code. The penalty is twenty (20) percent of the portion of the underpayment of tax attributable to each component of this penalty. In addition, interest is computed on this penalty from the due date of the return (including any extensions).

IRC section 6662(h)

Since all or part of the underpayment of tax for the taxable year(s) is attributable to one or more of (1) negligence or disregard of rules or regulations, (2) any substantial understatement of income tax, or (3) any substantial valuation overstatement, an addition to the tax is charged as provided by section 6662(a) of the Internal Revenue Code. To the extent that a portion of the underpayment to which this section applies is attributable to one or more gross valuation misstatements, the penalty is forty (40) percent of the portion of the underpayment of tax attributable to each component of this penalty. In addition, interest is computed on this penalty from the due date of the return (including any extensions).

How Bankruptcy Affects Your Right to File a Petition in Tax Court in Response to a Notice of Deficiency

IRS

This notice explains how your right to petition the Tax Court in response to a Notice of Deficiency may be affected by bankruptcy and the automatic stay. Failure to petition the Tax Court within the time provided by law in the Notice of Deficiency will result in the Tax Court lacking jurisdiction to hear your petition. Also, note that the rules set forth below only pertain to petitioning the Tax Court in response to a Notice of Deficiency. If you receive another Notice from IRS that provides you with an opportunity to petition the Tax Court, the bankruptcy may affect your rights, but other rules may apply as well. If you are represented by an attorney in your bankruptcy preceding, you should consult with him or her about how best to proceed. If you are not represented, you may obtain representation.

THE AUTOMATIC STAY

The filing of a bankruptcy petition operates as an automatic stay. Generally, the automatic stay prohibits the commencement or continuation of a Tax Court proceeding and, as a result, may extend the deadline to file a petition with the Tax Court.

You may request the Bankruptcy Court lift the automatic stay so that you are able to file a petition in Tax Court to challenge the Notice of Deficiency while you are in bankruptcy. If you file a Tax Court petition while the automatic stay is still in effect, the Tax Court may dismiss the petition for lack of jurisdiction.

SITUATIONS WHERE THE AUTOMATIC STAY MAY NOT BE IN EFFECT

Bankruptcy Petitions filed by Individuals on or after October 17, 2005

- Tax Court proceedings to redetermine post-petition tax liabilities are not stayed.
- Tax Court proceedings for post-petition periods may be commenced or continued without regard to whether the taxpayer filed a petition in bankruptcy on or after October 17, 2005.
- Liabilities that are owed for tax periods which end after you file bankruptcy are post-petition tax liabilities.
- Generally, a liability for a tax period that straddles the date that you file bankruptcy is considered to be a post-petition tax liability.
- If you do not agree with the Notice of Deficiency with regard to a post-petition tax liability, then you may petition the Tax Court for redetermination by the date shown in the Notice of Deficiency.

Serial Bankruptcy Filings by Individuals Who Filed Bankruptcy Petitions on or after October 17, 2005

- **One Prior Bankruptcy Petition Filed and Dismissed in the Year before the Current Bankruptcy Petition.**
  - The automatic stay will terminate 30 days after the current bankruptcy petition was filed.
  - The Bankruptcy Court may extend the automatic stay beyond the 30 day period if the debtor demonstrates that the current bankruptcy was filed in good faith.
  - If you do not agree with the Notice of Deficiency and the Bankruptcy Court has not extended the automatic stay, then you may petition the Tax Court for redetermination after the automatic stay has expired.
- **Two or More Prior Bankruptcy Petitions Filed and Dismissed in the Year before the Current Bankruptcy Petition.**
  - The automatic stay will not come into effect upon the filing of the current bankruptcy petition.
  - The Bankruptcy Court may provide an automatic stay.
  - The 90-day period (or 150-day period, if we mailed this letter to an address outside the U.S.) to file a petition with the Tax Court continued to run, unless the Bankruptcy Court provided an automatic stay.
  - If you do not agree with the Notice of Deficiency and the Bankruptcy Court has not provided an automatic stay, then you may petition the Tax Court for redetermination by the date shown in the Notice of Deficiency.

  Important: The serial filing rules explained above do not apply to current Chapter 11 or 13 bankruptcy petitions where the previous bankruptcy case was a Chapter 7 that was dismissed under 11 USC § 707(b).

When One or Both Spouses are in Bankruptcy

- If both spouses are in bankruptcy and the bankruptcy automatic stay is in effect, each spouse should request the Bankruptcy Court to lift the automatic stay before filing a Tax Court petition for redetermination of tax liabilities.
- If the automatic stay is lifted with regard to only one spouse, then the Tax Court would only have jurisdiction over that spouse's petition.
- If only one spouse is in bankruptcy, then only that spouse must request that the stay be lifted if that spouse wants to have the tax liability redetermined by the Tax Court.

- The spouse who is not in bankruptcy may file a separate petition in Tax Court and must be vigilant to file by the date shown in the Notice of Deficiency.
- The automatic stay does not extend protection to the spouse who is not in bankruptcy.
- If both spouses are in bankruptcy, it is possible for only one spouse to be considered a serial filer (as addressed above).

FILING A TAX COURT PETITION AFTER THE AUTOMATIC STAY HAS TERMINATED

You may file a Tax Court petition after the automatic stay is lifted by the Bankruptcy Court or when the automatic stay is no longer in effect by operation of law.

If the automatic stay was in effect as of the date of the Notice of Deficiency, then once the automatic stay ends, you have 90 days (or 150 days if your address was outside the United States), plus an additional 60, to file your Tax Court petition requesting a redetermination of the deficiency.

Days to petition the Tax Court per the Notice of Deficiency	90 (or 150)
IRC section 6213(f) Days	+ 60
Number of Days to file a Tax Court Petition	= 150 (or 210)
Date Automatic Stay Was Lifted	+
Last Date to File a Petition with the Tax Court	=

If the automatic stay was not in effect as of the date of the Notice of Deficiency and you file a bankruptcy petition within the 90 day period (or 150 days if your address was outside the United States) in which you have to file a Tax Court petition, the bankruptcy automatic stay will extend the deadline for filing your Tax Court petition. Once the stay ends, you have the original 90 days (or if applicable, 150 days) less the number of days that had expired prior to the filing of the bankruptcy petition, plus an additional 60 days, in which to file your Tax Court petition for redetermination of the liabilities for those tax periods that you were previously, by way of the automatic stay, prohibited from filing a petition in Tax Court.

Days to petition the Tax Court per the Notice of Deficiency	90 (or 150)
Number of days that expired prior to filing the bankruptcy petition	-
Number of Days left of the original 90 days *(or 150 days)*	=
IRC section 6213(f) Days	+ 60
Number of Days to file a Tax Court Petition	=
Date Automatic Stay Was Lifted	+
Last Date to File a Petition with the Tax Court	=

CHALLENGING THE IRS'S DETERMINATION OF A TAX LIABILITY IN BANKRUPTCY COURT

Depending on the facts of your bankruptcy filing, the bankruptcy process may give you an alternative forum to determine your tax liabilities. The IRS may file a proof of claim with the Bankruptcy Court for the amounts reflected on the Notice of Deficiency plus applicable interest and additions to tax. You may object to the proof of claim by filing an objection with the Bankruptcy Court. In some bankruptcy petitions, you may be able to initiate a proceeding under Bankruptcy Code § 505 for the court to determine the amount of your tax liability. If your tax liability is determined either by an objection to the claim proceeding or by a § 505 determination by the Bankruptcy Court, then that determination is final, and the Tax Court would no longer have jurisdiction to consider an otherwise timely petition for redetermination after the termination of the automatic stay.

Form **4089-B** (October 1999)	Department of the Treasury — Internal Revenue Service **Notice of Deficiency-Waiver**	Symbols

Name and address of taxpayer(s)

Sysco Corporation

1390 Enclave Pkwy
Houston, Texas 77077-2025
United States

Social Security or Employer Identification Number

[redacted]

Kind of tax	☑ Copy to authorized representative
Income	Jason D Dimopoulos 130 E Randolph St Ste 3700 Chicago, IL 60601-6316

DEFICIENCY — Increase in Tax and Penalties

Tax Year Ended:	June 30, 2018
Deficiency: Increase in tax	$108,025,610.00
Penalties IRC 6662	$21,605,122.00

See the attached explanation for the above deficiencies

I consent to the immediate assessment and collection of the deficiencies (increase in tax and penalties) shown above, plus any interest provided by law.

Your Signature → _____ *(Date signed)*

Spouse's Signature ***(If A Joint Return Was Filed)*** → _____ *(Date signed)*

Taxpayer's Representative Sign Here → _____ *(Date signed)*

Corporate Name → .....

Corporate Officers Sign Here → _____ *(Signature)* *(Title)* *(Date signed)*

_____ *(Signature)* *(Title)* *(Date signed)*

If you agree, please sign one copy and return it; keep the other copy for your records.

Instructions for Form 4089 B

Note:

If you consent to the assessment of the amounts shown in this waiver, please sign and return it in order to limit the accumulation of interest and expedite our bill to you. Your consent will not prevent you from filing a claim for refund (after you have paid the tax) if you later believe you are entitled to a refund. It will not prevent us from later determining, if necessary, that you owe additional tax; nor will it extend the time provided by law for either action.

If you later file a claim and the Internal Revenue Service disallows it, you may file suit for refund in a district court or in the United States Claims Court, but you may not file a petition with the United States Tax Court.

Who Must Sign

If this waiver is for any year(s) for which you filed a joint return, both you and your spouse must sign the original and duplicate of this form. Sign your name exactly as it appears on the return. If you are acting under power of attorney for your spouse, you may sign as agent for him or her.

For an agent or attorney acting under a power of attorney, a power of attorney must be sent with this form if not previously filed.

For a person acting in a fiduciary capacity (executor, administrator, trustee), file Form 56, Notice Concerning Fiduciary Relationship, with this form if not previously filed.

For a corporation, enter the name of the corporation followed by the signature and title of the officer(s) authorized to sign.

Optional Paragraphs

A check in the block to the left of a paragraph below indicates that the paragraph applies to your situation.

☐ The amount shown as the deficiency may not be billed, since all or part of the refund due has been held to offset all or a portion of the amount of the deficiency. The amount that will be billed, if any, is shown on the attached examination report.

☐ The amount shown as a deficiency may not be billed, since the refund due will be reduced by the amount of the deficiency. The net refund due is shown on the attached examination report.

STATEMENT-INCOME TAX CHANGES

Form 5278 — Return Form No. 1120

Name of Taxpayer:
Sysco Corporation

[redacted]

	Notice of Deficiency		
	Tax Years Ended		
1. Adjustments to income	6/30/2018		
a. Other Deductions - Software Development Costs	(32,049,648.00)		
b. Cost of Goods Sold - Transfer Pricing Costs	26,304,331.00		
c.			
d.			
e.			
f.			
g.			
h.			
2. Total adjustments	(5,745,317.00)		
3. Taxable Income per return	1,052,511,900.00		
4. Taxable income as revised	1,046,766,583.00		
5. Tax	293,497,245.00		
6. Alternative tax if applicable			
7. Correct Tax Liability	293,497,245.00		
8. Less credits			
a. Foreign Tax Credit	1,092,095.00		
b. General Business Credit	8,213,978.00		
c.			
9. Balance	284,191,172.00		
10. Plus other taxes			
a. IRC Section 965 Transition Tax	80,852,540.00		
b.			
c.			
11. Total corrected income tax liability	365,043,712.00		
12. Total tax shown on return or as previously adjusted	257,018,102.00		
13. Adjustments to:			
a.			
b.			
14. Increase or (decrease) in tax	108,025,610.00		
15. Additions to the tax			
a. IRC Section 6662 Penalty	21,605,122.00		

Other Deductions – Software Development Costs

Tax Period	Per Return	Per Exam	Adjustment
201806	$0.00	$32,049,648.00	($32,049,648.00)

It is determined that you are allowed a deduction for software development costs in the amount of $32,049,648.00 that you failed to report on your corporate income tax return for your tax year ending June 30, 2018 ("the 201806 tax year"). Accordingly, your income is decreased by $32,048,648.00 for the 201806 tax year.

Transfer Pricing for Sourcing Commissions

Tax Period	Per Return	Per Exam	Adjustment
201806	$29,206,966,745.00	$29,180,662,414.00	$26,304,331.00

It is determined that, under I.R.C. § 482 and the Treasury Regulations thereunder, adjustment is necessary to reflect an arm's length result for certain transactions among your commonly owned or controlled entities (including Sysco Merchandising and Supply Chain Services, Inc. and SMS International). In accordance with I.R.C. § 482, to clearly reflect income attributable to these transactions, it is determined that your income is increased by $26,304,331.00 for the 201806 tax year.

Foreign Tax Credit

Tax Period	Per Return	Per Exam	Adjustment
201806	$115,857,812.00	$1,092,095.00	$114,765,717.00

It is determined that you are allowed a foreign tax credit in the amount of $1,092,095.00 rather than $115,857,812.00 as reported on your corporate income tax return for the 201806 tax year because you improperly claimed foreign tax credits in violation of I.R.C. §§ 901, 902, 960 and 965, as well as Treas. Reg. §§ 1.965-5(b), 1.965-5(c)(i), and 1.965-5(c)(ii). Accordingly, your tax liability is increased by $114,765,717.00 for the 201806 tax year.

I.R.C § 6662 Penalties

It is determined that you are liable for the 20% accuracy-penalty under I.R.C. § 6662(a) and (b) for the 201806 tax year in the amount of $21,605,122.00 because portions of the underpayments constitute substantial understatements of income tax or, alternatively, attributable to negligence or disregard of regulations. I.R.C. § 6662(a), (b)(1) and (2), (c), (d). See the attached penalties explanation following this explanation of items.

It is determined that you are liable for the 40% "gross valuation misstatement" penalty under I.R.C. § 6662(h) in the amount of $2,946,085.00 for the 201806 tax year for the underpayment resulting from the "Transfer Pricing for Sourcing Commissions" adjustment.
Alternatively, it is determined that you are liable for the 20% "substantial valuation misstatement" penalty under I.R.C. § 6662(b)(3) in the amount of $1,473,042.60 for the 201806 tax year for the underpayment resulting from the "Transfer Pricing for Sourcing Commissions" adjustment. See the attached penalties explanation following this explanation of items.

Form **886-A** (May 2017)	Department of the Treasury - Internal Revenue Service **Explanation of Items**	Schedule number or exhibit
Name of taxpayer: Sysco Corporation	Tax Identification Number *(last 4 digits)* [redacted]	Year/Period ended 201806

I.R.C. § 965 Transition Tax

Tax Period	Per Return	Per Exam	Adjustment
201806	$85,981,748.00	$80,852,540.00	($5,129,208.00)

It is determined that you are subject to an I.R.C. § 965 transition tax in the amount of $80,852,540.00, rather than $85,981,748.00 as reported on your corporate income tax return for the 201806 tax year. Accordingly, your tax liability is decreased by $5,129,208.00 for the 201806 tax year. Under I.R.C. § 965(h)(4) and Treas. Reg. § 1.965-7(b)(1)(ii)(C), you are not entitled to prorate the deficiency, and the deficiency (if assessed) is due on notice and demand under I.R.C. § 965(h)(4) and Treas. Reg. § 1.965-7(b)(1)(ii)(C).

It is determined that the correct amount of your aggregate foreign cash position ("AFCP") is $957,438,134, rather than $804,167,933 as reported on your corporate income tax return for the 201806 tax year because you are

(A) not permitted to treat the Accrued Expenses as Accounts Payable under I.R.C. § 965(c)(3)(C)(ii) and Treas. Reg. § 1.965-1(f)(5) to reduce your specified foreign corporations' ("SFCs"") net accounts receivable taken into account for purposes of computing each SFCs' cash position and your AFCP under I.R.C. § 965(c)(3);

(B) not allowed to treat the negative bank account balance of Sysco Canada, Inc. as Accounts Payable under I.R.C. § 965(c)(3)(C)(ii) and Treas. Reg. § 1.965-1(f)(5) to reduce that SFC's net accounts receivable taken into account for purposes of computing that SFC's cash position and your AFCP under I.R.C. § 965(c)(3);

(C) required to include an obligation with a term of less than one year, under I.R.C. § 965(c)(3)(B)(iii)(IV), in Sysco Bermuda Partners, LP's cash position and your AFCP under I.R.C. § 965(c)(3); and

(D) must include the value of SMS Global Holdings Sarl's and Sysco Canada Inc.'s currency swaps in each SFC's cash position and your AFCP under I.R.C. § 965(c)(3)(A) and (B) and Treas. Reg. § 1.965-1(f)(13)(i)(E).

Accordingly, your AFCP is increased by $153,270,201 for the 201806 tax year. The change in AFCP decreases your I.R.C. § 965(c) deduction by $3,304,797. The change in AFCP also impacts the amount of foreign tax credit and the I.R.C. § 78 amount.

Your I.R.C. § 965(a) inclusion was understated by $79,153,940 because you did not obtain the Service's consent before adjusting your amortization method to compute SCI's earnings and profits ("E&P") for the 201806 tax year as required under Treas. Reg. § 1.964-1 and I.R.C. § 446. Your I.R.C. § 965(a) inclusion was decreased by $26,304,331 as a result of SMS International's E&P reduction from the Transfer Pricing for Sourcing adjustment discussed above. As a result, the net increase in your I.R.C. § 965(a) inclusion is $52,849,609.

Explanation of Corporate Income Tax Examination Changes

Department of Treasury
Internal Revenue Service

Name of Taxpayer: Sysco Corporation
TIN: [redacted]

Form 1040 – Tax Year Ending 6/30/2018

Primary Position:

IRC §6662 – Accuracy Related Penalty

It is determined that all or part of the underpayment of tax for the 201806 tax years is due to one or more of the following elements of the accuracy-related penalty:

(1) Negligence or disregard of rules or regulations for filing income tax returns and you have not shown that you had reasonable cause for the underpayment of tax and that you acted in good faith.

(2) The underpayment of tax is due to an underpayment attributable to substantial understatement of income tax and you have not shown that you had substantial authority for the way you reported the items and you did not make any disclosures explaining the adjusted items.

Consequently, the 20 percent addition to the tax is charged on the full deficiency for the 201806 tax year as provided by Sections 6662(a), 6662(b)(1), 6662(b)(2), 6662(c) and 6662(d) of the Internal Revenue Code.

	201806
Tax Subject to Penalty	$108,025,610.00
Penalty Rate	20.00%
Penalty	$21,605,122.00

Alternative Position:

IRC §6662(h) – Gross Valuation Misstatement Penalty

In the alternative, if it is found that the accuracy related penalty above does not apply, then it is determined that the underpayment of tax resulting from the "Transfer Pricing for Sourcing Commissions" adjustment for the 201806 tax year is due to a gross valuation misstatement, the penalty is forty (40) percent of the portion of the underpayment of tax attributable to this component of this penalty.

	201806
Tax Subject to Penalty	$7,365,213.00
Penalty Rate	40.00%
Penalty	$2,946,085.00

Name of Taxpayer: Sysco Corporation
TIN: [redacted]

Form 1040 – Tax Year Ending 6/30/2018

IRC §6662 – Accuracy Related Penalty

Further, if it is found that there is no gross valuation misstatement, then it is determined that the underpayment of tax resulting from the "Transfer Pricing for Sourcing Commissions" adjustment for the 201806 tax year is due to a substantial valuation misstatement, the penalty is forty (20) percent of the portion of the underpayment of tax attributable to this component of this penalty.

	201806
Tax Subject to Penalty	$7,365,213.00
Penalty Rate	20.00%
Penalty	$1,473,042.60