April 5, 2021

CC:PA:LPD:PR
Room 5203
Internal Revenue Service
PO Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments on foreign tax redeterminations (TD 9922 and REG-209020-86)

Dear Sir or Madam:

The Alliance for Competitive Taxation ("ACT") is a coalition of leading American companies from a wide range of industries that supports a globally competitive corporate tax system that aligns the United States with other advanced economies.

Attached are ACT's comments on certain aspects of foreign tax redeterminations, including guidance implementing changes made by the Tax Cuts and Jobs Act ("TCJA"). We recognize and commend the extraordinary efforts of the Treasury Department ("Treasury") and the Internal Revenue Service ("IRS") staffs in issuing TCJA guidance in a timely and comprehensive manner.

We appreciate your consideration of these comments. ACT representatives welcome future discussion of these comments with your staff.

Yours sincerely,

Alliance for Competitive Taxation

cc: Charles P. Rettig, Commissioner, Internal Revenue Service
Jose Murillo, Deputy Assistant Secretary (International Tax Affairs), U.S. Treasury Department
Barbara Felker, Branch Chief, Office of Associate Chief Counsel (International), Internal Revenue Service
Wade Sutton, Deputy International Tax Counsel, U.S. Treasury Department
John J. Merrick, Senior Level Counsel to Associate Chief Counsel (International), Internal Revenue Service
Kinna Brewington, Internal Revenue Service

COMMENTS BY THE ALLIANCE FOR COMPETITIVE TAXATION

I. INTRODUCTION

On February 2, the IRS requested comments on various foreign tax redetermination issues.[1] This document sets forth ACT's comments in response to the IRS's request.

II. COMMENTS RELATING TO FOREIGN TAX REDETERMINATIONS

1) Election under Treas. Reg. § 1.905-5(e)

Final Regulations

The final regulations under Treas. Reg. § 1.905-5(e) provide an irrevocable election (the "Election") to account for foreign tax redeterminations ("redeterminations") that relate to all taxable years of foreign corporations beginning before January 1, 2018 ("pre-2018 tax years") as if the redetermination occurred in the foreign corporation's last taxable year beginning before January 1, 2018 (the "last pooling year"). The Election is irrevocable and must be made in the first taxable year that ends with or within a taxable year of a United States shareholder of the foreign corporation ending on or after November 2, 2020 in which the foreign corporation has a redetermination.

Treasury Explanation

The preamble to the final regulations states that Treasury and the IRS provided the Election in response to taxpayer comments in support of a "simplified and reasonably accurate" alternative adjustment mechanism to account for post-2017 redeterminations with respect to pre-2018 taxable years of foreign corporations.

ACT Recommendations

ACT recommends that:

(1) The Election apply to all pre-2018 redeterminations that occur in a post-2017 tax year;

(2) Taxpayers be given additional time to make the Election; and

(3) The Election allow a one-time revocation.

Reasons for ACT Recommendations

(1) The Election should be expanded to apply to all pre-2018 redeterminations that occur in post-2017 tax years

The Election currently applies only with respect to redeterminations that relate to all pre-2018 tax years (i.e., years beginning before the enactment of the TCJA) that occur in the foreign

[1] FR Doc. 2021-02229

corporation's taxable years ending with or within a taxable year of a United States shareholder of the foreign corporation ending *on or after November 2, 2020*. As an example, if both a foreign corporation and a foreign corporation's U.S. shareholder are calendar-year taxpayers, the Election is only applicable for redeterminations that occur on or after January 1, 2020. In this case, a pre-2018 redetermination that occurs in the 2018 or 2019 calendar years would not be eligible for the Election.

As no section 902 pooling adjustments are available for *any* post-2017 tax year, ACT does not believe there is a policy rationale for treating a pre-2018 redetermination that occurs in the 2018 or 2019 calendar year differently from a pre-2018 redetermination that occurs in a subsequent tax year. Moreover, limiting the Election to prospective redeterminations is inconsistent with Treasury's and the IRS's stated intent of providing the Election to account for all post-2017 redeterminations with respect to pre-2018 taxable years.

(2) Taxpayers should be given additional time to make the Election

Taxpayers making the Election must file a statement with the timely filed original tax return for the taxable year of each controlling domestic shareholder of the foreign corporation in which, or with which, the foreign corporation's first pre-2018 redetermination year ends.

For example, if a calendar year taxpayer has a pre-2018 redetermination that occurs on December 1, 2020, such taxpayer must decide whether or not to make the Election by the extended due date of its 2020 tax return. As the election is irrevocable, a substantial amount of analysis is required to determine whether the simplicity that the Election provides results in a reasonably accurate alternative to the more burdensome alternative of filing multiple amended tax returns. When conducting this analysis, taxpayers will need to analyze, not only the current redetermination, but also the effect that all outstanding pre-2018 foreign tax audits would have on the foreign tax credit calculation (to the extent feasible). In order to give taxpayers more time to analyze the Election, ACT recommends that taxpayers be able to make the Election on an amended return.

Further, ACT recommends that the Election be available for any taxable year beginning before November 2, 2023 (3 years after promulgation of the Election). Once elected, all pre-2018 redeterminations occurring in the year elected and any future pre-2018 redeterminations would be accounted for in the last pooling year.[2] As discussed in greater detail below, whether or not the Election should be made requires a significant amount of analysis and estimation. Accordingly, not all taxpayers will be in a position to make the Election by the due date of the tax return in the year in which the redetermination occurs. ACT believes that providing additional time would increase the likelihood that taxpayers would make the Election, which would lead to significant administrative convenience for both taxpayers and the IRS.

[2] If ACT's recommendation is adopted a taxpayer that has a redetermination that occurs in 2022 - that relates to a pre-2018 year - could make the Election. The redetermination in 2022 and any future redetermination that relates to a pre-2018 year would be accounted for in the last pooling year.

(3) The Election should allow a one-time revocation

The Election is constructed on two basic pillars: (i) the Election must provide a simplified notification process; and (ii) the Election must result in a "reasonably accurate" numerical result when compared to the normal operation of section 905(c) and to the regulations promulgated thereunder. Where made, the Election would substantially decrease the administrative burden of both taxpayers – who could be forced to amend multiple tax returns – and the IRS – who would be forced to audit multiple amended tax returns. However, due to its irrevocability, we are concerned that few globally engaged companies will make the Election because it would apply to any and all future (as yet unknown) redeterminations that relate back to pre-2018 years.

ACT understands and agrees the Election should contain certain guardrails to prevent abuse.[3] As discussed previously, the purpose of the Election is to reduce the administrative burden of filing multiple amended returns, not to provide a mechanism materially to affect the amount of refund or tax due. The Election contains a cross reference to Treas. Reg. § 1.905-3T, which, among other things, prevents taxpayers from accounting for a redetermination in the last pooling year if the redetermination causes a reduction in deemed paid taxes by 10 percent or more. Had the Election been available for a redetermination that gives rise to a reduction in deemed paid taxes by more than 10 percent, the second pillar of the Election would be frustrated (i.e., the Election would no longer yield a "reasonably accurate" numerical result).

While the simplicity the Election provides is readily apparent, simplicity will only be achieved if taxpayers affirmatively make the election. However, due to uncertainty about future redeterminations affecting pre-2018 years that are beyond the taxpayer's control, ACT is concerned few taxpayers will make the election unless there is an opportunity for revocation.

For example, consider a taxpayer that made the Election in 2020 with respect to a pre-2018 redetermination. For taxable years 2011-2017 the taxpayer recognized subpart F income from its CFCs, made distributions to the U.S., and has unresolved foreign tax audits related to such years. At the time of the Election, the Election provided significant administrative advantages for the taxpayer (and the IRS) without a material impact to the taxpayer's tax liability (e.g., the Election prevented the taxpayer from being forced to file numerous amended returns - both Federal and State). However, the aggregate effect of the foreign tax audits related to 2011-2017 could cause the taxpayer to be unable to credit taxes in one or more CFCs in the last pooling year. In such a case, the objective of the Election, to provide a "reasonably accurate" result compared to the normal operating section 905(c) rules, is frustrated.

For many companies, section 965 created the largest ever income inclusion. Accordingly, the section 965 year (i.e., the last pooling year) also resulted in companies taking the largest ever foreign tax credit. If the foreign tax credits in both the section 965 year and the years which are redetermined are placed at risk due to the aggregation of multiple future redeterminations, taxpayers should be able to protect themselves from such a harsh result. If such protection is not

[3] For example, ACT does not believe that the Election should apply on a redetermination by redetermination basis. If such an election were to be provided, taxpayers would have the flexibility to choose the year for which each redetermination is taken into account.

provided, few taxpayers will make the Election resulting in unnecessary administrative costs to both the taxpayer and the IRS.

Accordingly, ACT believes that taxpayers should be provided a single opportunity to revoke the Election. Once revoked, taxpayers should be prohibited from making the Election in any future year. ACT further recommends the revocation apply prospectively, i.e., once revoked the taxpayer will account for all redeterminations that relate to a pre-2018 year in the year to which it relates. This would decrease administrative burden for both taxpayers and the IRS and provide an adequate and administrable approach. We acknowledge that retroactive adjustments (i.e., requiring a taxpayer that revokes an Election to proceed as if the Election were never in effect, resulting in amended returns for each redetermination that relates to a pre-2018 year) is a second option should Treasury and the IRS adopt ACT's recommendation to permit a one-time revocation.

Regulatory Authority for Recommendations

The recommendation above is within Treasury's authority under section 7805(a) to prescribe all needful regulations for the enforcement of the Code.

2) Notification Requirement with Respect to Multiple Redeterminations Related to the Same Taxable Year under Treas. Reg. § 1.905-4

Final Regulations

The Final Regulations under Treas. Reg. § 1.905-4 generally provide that a taxpayer for which a redetermination of U.S. tax liability is required as a result of a redetermination must file an amended return reflecting the redetermination by the due date (with extensions) of the return for the year in which the redetermination occurs. If more than one redetermination requires a redetermination of U.S. tax liability for the same taxable year and the redeterminations occur within the same taxable year or within two consecutive taxable years, the taxpayer may file one amended return and one statement under Treas. Reg. § 1.905-4(c) with respect to all of the redeterminations.[4]

Treasury Explanation

The preamble to the Final Regulations provides, "[T]he Treasury Department and the IRS continue to study whether new processes or forms can be developed to streamline the filing requirements while ensuring that the IRS receives the necessary information to verify that taxpayers have made the required adjustments to their U.S. tax liability."

ACT Recommendations

ACT recommends that a taxpayer be given the option to file a single amended return with respect to a taxable year in the fifth (or any reasonable) year following such taxable year to report all redeterminations occurring in the five-year period that ends with that taxable year (to

[4] Treas. Reg. § 1.905-4(b)(1)(iv).

the extent not previously reported), with appropriate interest charges for any period for which a redetermination results in an underpayment of U.S. tax liability.

Reasons for ACT Recommendations

Under the Final Regulations, a taxpayer is required to file an amended return with respect to a prior taxable year to reflect any change in U.S. tax liability resulting from a redetermination.[5] If multiple redeterminations take place over multiple taxable years with respect to the same taxable year, the taxpayer may potentially be required to file numerous amended returns to report all the redeterminations separately, even though such redeterminations relate to the same taxable year. Therefore, the current filing requirements have the potential to impose significant administrative burdens on taxpayers and the IRS with respect to multiple amended returns, relating to the same taxable year, which may reflect relatively immaterial amounts.

To ameliorate such administrative burdens on taxpayers and the IRS, ACT recommends that the IRS consider granting an election whereby taxpayers are allowed to file a single amended return with respect to a taxable year in the fifth (or any reasonable) year from such taxable year to report all redeterminations occurring in the interim period with respect to that taxable year. Taxpayers, when filing this single amended return for a taxable year, should be required to provide enough specificity as to all redeterminations reported for that taxable year so as to ensure, as the preamble described, "the IRS receives the necessary information to verify that taxpayers have made the required adjustments to their U.S. tax liability." ACT's recommendation is an expansion of Treas. Reg. § 1.905-4(b)(1)(iv) which provides that if multiple redeterminations occur in a year or two consecutive years, and those redeterminations occur with respect to the same taxable year, taxpayers are able to file a single amended return reflecting the multiple redeterminations. ACT's recommendation is to broaden this rule to redeterminations that occur in a 5-year period.[6]

ACT acknowledges that if provided, the election should be accompanied by appropriate mechanisms to protect the government's interests. Therefore, a taxpayer availing itself of the election should be required to pay interest charges with respect to any interim period for which a redetermination results in an underpayment of U.S. tax liability.

Regulatory Authority for Recommendations

The recommendation above is within Treasury's authority under section 7805(a) to prescribe all needful regulations for the enforcement of the Code.

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[5] The regulations under section 905(c) providing the notification requirements of redeterminations (i.e., amended returns) relate only to federal income tax returns. However, as states begin their calculation of state taxable income based on federal taxable income, in most cases, if taxpayers amend federal tax returns, they are also required to amend state tax returns. As currently constructed, one foreign tax redetermination will lead to numerous amended returns (federal, state, and local).

[6] ACT's recommendation is not intended to negate or otherwise affect the alternative notification procedures for taxpayers under examination within the jurisdiction of the Large Business and International Division. *See* Treas. Reg. § 1.905-4(b)(4).

3) De minimis Redeterminations

Final Regulations

The Final Regulations do not provide a rule for redeterminations that are below a certain de minimis threshold.

Treasury Explanation

The preamble to the Final Regulations provides "[t]he TCJA repealed section 902 and the regulatory authority at the end of section 905(c)(1) to prescribe alternative adjustments to multi-year pools of earnings and taxes of foreign corporations in lieu of the required adjustments to U.S. tax liability for the affected years."

ACT Recommendations

ACT recommends, in order to ease taxpayers' compliance with the regulations under section 905(c) and reduce administrative burden for both taxpayers and the IRS, that redeterminations below a certain de minimis threshold qualify for a streamlined procedure as an alternative to the general requirement of filing an amended return for the related year for each redetermination.

Reasons for ACT Recommendations

Currently taxpayers are required to notify the IRS of a redetermination - regardless of the amount of the redetermination - by filing an amended return. As mentioned above, preparing and processing numerous amended returns will be burdensome to both taxpayers and the IRS.

Under prior section 905(c) guidance, accounting for redeterminations in the year to which the redetermination relates was required only in limited fact patterns (e.g., if a redetermination reduced a U.S. shareholder's deemed paid credits by 10 percent or more).[7] While section 905(c) has been amended, the principle behind this rule remains apposite. Adopting a less burdensome approach for de minimis redeterminations continues to be in the best interests of both taxpayers and the IRS. Accordingly, ACT believes taxpayers should be provided a streamlined procedure that obviates the need to amend returns for redeterminations that alter the amount of deemed paid credits (either an increase or a decrease) by a certain amount (e.g., 5 or 10 percent).

ACT recognizes the authority to promulgate a regulation that provides such an exception from the notification requirements under section 905(c) is constrained. However, ACT believes the IRS has the flexibility to provide administrative relief via other forms of guidance (e.g., a revenue procedure indicating that the IRS will accept certain return filing practices of taxpayers).[8] ACT believes a revenue procedure or other guidance indicating that the IRS will accept a taxpayer's decision to reflect a de minimis redetermination in the year in which the redetermination occurs (rather than the year to which it relates) would ease the administrative burden of both the taxpayer and the IRS, without prejudice to the interests of the government.

[7] *See* Treas. Reg. § 1.905-3T(d)(3)(ii).
[8] *See* Rev. Proc. 2008-08, Rev. Proc. 2008-20, Rev. Proc. 2010-30, etc.

Regulatory Authority for Recommendations

The IRS has broad discretion to prescribe the procedural rule discussed above.

4) Coordination with GILTI high-tax exclusion

Final Regulations

The Final Regulations under Treas. Reg. § 1.951A-2(c)(7) provide for an annual election to apply a high-tax exclusion ("HTE") with respect to a CFC's tested income under the GILTI regime and permit the election to be made (or revoked) on an amended return. When making (or revoking) the HTE election on an amended return, the regulations provide that (i) the CFC's domestic controlling shareholder(s) must make such election within 24 months of the unextended due date of the original federal income tax return for its inclusion year with or within which the CFC's inclusion year ends, and (ii) all of the U.S. shareholders of the CFC must file amended federal income tax returns reflecting the effect of such election within a single period no greater than six months within the 24-month period described above.

Treasury Explanation

The preamble to the Final Regulations states that the amended return rules (specifying the 24-month timeframe within which the amended tax returns must be filed with respect to all U.S. shareholders) are necessary because the election (or revocation) may change the amount of U.S. tax due for all U.S. shareholders in the relevant inclusion years or intervening tax years and such changes could potentially result in the issuance of refunds for certain taxable years of shareholders, without the ability to assess deficiencies for years in which the statute is closed.

ACT Recommendations

ACT recommends that a taxpayer be allowed to newly elect the HTE beyond the 24-month period described in Treas. Reg. § 1.951A-2(c)(7) if a redetermination causes a tested unit's tested income to qualify for the HTE.

Reasons for ACT Recommendations

Based on the preamble to the Final Regulations, the 24-month filing requirement with respect to a making or revoking the HTE election on an amended return was promulgated to provide the IRS with the appropriate time to audit and collect any tax due as a result of the amended return. While ACT appreciates the intended purpose of this rule, ACT believes a taxpayer should be able to elect the HTE when foreign taxes are redetermined causing a tested unit to have an effective tax rate of 18.9 percent or greater.

The timing and outcome of foreign tax determinations are beyond a taxpayer's control and are not something that the taxpayer can reflect in its decision to elect the HTE until the redetermination is finalized. Accordingly, ACT believes that a taxpayer should be allowed to elect the HTE subsequent to the 24-month period if the taxpayer did not elect the HTE on its original return and the redetermination has the effect of qualifying a tested unit as high-tax.

Regulatory Authority for Recommendations

The recommendation above is within Treasury's authority under section 7805(a) to prescribe all needful regulations for the enforcement of the Code.

III. CONCLUSION

We understand that a number of details would need to be addressed if Treasury and the IRS accept the recommendations set forth above. ACT member companies have identified a number of these detailed drafting issues and have given some thought as to how they might be addressed. ACT representatives would welcome the opportunity to meet with Treasury and the IRS to discuss any of the above recommendations.