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Internal Revenue Service
Room 5203
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Ben Franklin Station
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Re: BEAT “Proxy Method” for Net Operating Loss Treatment

As stated in our letter dated February 18, 2019, API and its member companies (hereafter referred to collectively as “API”) strongly support the approach proposed by Treasury to exclude pre-2018 NOLs from the IRC sec. 59A Base Erosion Anti-Abuse Tax (“BEAT”) NOL add-back computation. Such an approach is consistent with the policy objectives and statutory construct of IRC sec. 59A.

Applying the same rationale, API recommends extending such an approach to pre-2018 NOLs for all purposes of the BEAT. In other words, taxpayers should assess their BEAT liability for post-TCJA tax years by comparing their regular tax liability as calculated under IRC sec. 59A(b)(1)(B) to their modified taxable income amount adjusted to reflect, amongst other things, the negative impact of the pre-2018 NOL on their regular tax liability. Such a result is likewise consistent with the policy objectives and statutory construct of IRC sec. 59A because it mitigates the potential for a pre-2018 loss to increase, or depending on the facts, trigger a BEAT tax liability as the result of the application of an entirely new international (minimum) tax rule to a tax base that includes deductions for pre-2018 domestic losses carryovers. If this issue is not addressed, the result is a retroactive application of the BEAT to expenses incurred by taxpayers prior to the enactment of IRC sec. 59A in contradiction to the clear intent of congress to apply BEAT to a taxpayer’s related party deductible expenses on a prospective basis as supported by the statutory definition of Base Erosion Payment under IRC sec. 59A(d)(1)-(5)¹ and the legislative history to the BEAT as reflected in Section 14401(e) of the Tax Cuts and Jobs Act, not codified.²

¹ The definition of a base erosion payment can be found at IRC sec. 59A(d). That subsection does not speak to base erosion payments before enactment of the Tax Cuts and Jobs Act.

² Section 14401(e) of the Tax Cuts and Jobs Act (“TCJA”), not codified, provides that “The amendments made by this section shall apply to base erosion payments (as defined in IRC sec. 59A(d) of the Internal Revenue Code of 1986, as added by this section) paid or accrued in taxable years beginning after December 31, 2017.” This provides with clear statutory authority that base erosion payments made prior to enactment of the TCJA should not be considered under IRC sec. 59A. The same conclusion should also be reached for any NOL carryforwards attributable to these pre-2018 payments because the carryforward deduction itself is not a separate and distinct base erosion payment in the year

API is aware this issue has been raised by numerous taxpayers and supports the BEAT “Proxy Method” as recommended by FORTIS US as one approach to ensure, similarly situated taxpayers will be able to compete on equal footing as they transition into the new international tax system, notwithstanding the fact one of the taxpayers may have a pre-2018 NOL carryforward. Since the exclusion of vintage losses will only apply to pre-2018 NOL carryovers, the complexity introduced by including such a rule is constrained by time and application. API believes the impacts attributable to this approach is limited.

Over the past decade, the natural gas and oil industry has experienced a normal market cycle that has required significant capital spending to achieve growth. As a result, many API companies carry pre-2018 NOLs (i.e., domestic losses) into the post-TCJA period, which, absent regulatory clarification by Treasury, have the potential to become significantly less valuable as the result of changes to the international tax rules.

It is clear from the numerous comments submitted on BEAT and GILTI that taxpayers and Treasury are aware of the complexities introduced by the interaction of pre-2018 tax attributes, including NOLs, with the new international tax rules. It is also clear that Treasury is working hard to address these disconnects to ensure a smooth transition into the post-TCJA tax years as evidenced by proposed regulations for BEAT and GILTI; API commends Treasury for this effort.

For example, the decision to treat pre-2018 NOLs as “vintage” for purposes of the BEAT add-back partially mitigates the negative effect of a pre-2018 NOL in determination of a taxpayers BEAT tax liability. Likewise, the recently proposed GILTI high-tax exception provides taxpayers a means to avoid inefficiently applying domestic NOL carryovers, including pre-2018 NOLs, against otherwise creditable high-taxed GILTI income.

Accordingly, API supports Treasury issuing further clarifying regulatory guidance to ensure pre-2018 NOLs are in effect “vintage” for all purposes of the BEAT.

Thank you for considering this modification to the regulations.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Comstock', with a stylized flourish extending to the right.

Stephen Comstock
Director – Tax & Accounting Policy

it is utilized, but rather the reflection of costs paid and accrued in a pre-tax reform year. In addition, the rules in IRC sec. 172 do not disaggregate the NOLs into components that include a deduction for a base erosion payment.