



January 15, 2024

CC:PA:LPD:PR (Notice 2024-10)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

National Foreign Trade Council Comments on Notice 2024-10

The National Foreign Trade Council (the “NFTC”) is writing to provide comments on Notice 2024-10 (“the Notice”) regarding the new corporate alternative minimum tax (“CAMT”) released by the Department of the Treasury (“Treasury”) and the Internal Revenue Service (“IRS”) on December 15, 2023.

The NFTC, organized in 1914, is an association of U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial, and service activities. Our members support establishing and maintaining international tax norms that provide certainty to enterprises conducting cross-border operations.

NFTC members greatly appreciate Treasury’s and the IRS’s responsiveness to the concerns outlined in our letter dated October 12, 2023, responding to Notice 2023-64. In particular, section 3 of Notice 2024-10, remedying the possibility that certain CFC income could be double-counted under the CAMT rules is welcome relief. We highlight that our comments on the Notice only address issues that have an international tax nexus and that our members may have other concerns outside of that scope. Following review of the Notice, NFTC requests clarity and additional guidance on specific categories of distributions detailed below.

Background

Public Law 117-169 (August 16, 2022), commonly referred to as the Inflation Reduction Act of 2022 (IRA), amended section 55 to impose the CAMT. The CAMT is based on the “adjusted financial statement income” (“AFSI”) of an applicable corporation for taxable years beginning after December 31, 2022. Generally, a corporation is an applicable corporation subject to the CAMT for a taxable year if it meets the average annual AFSI test.

Section 55(a) provides that, for the taxable year of an applicable corporation, the amount of CAMT imposed by section 55 equals the excess (if any) of (i) the tentative minimum tax for the taxable year, over (ii) the sum of the regular tax imposed by chapter 1 of the Code, within the meaning of section 55(c), for the taxable year plus the tax imposed under section 59A.

Comments

The Notice provides needed relief to avoid double taxation on CFC distributions. NFTC requests that future guidance provide additional details and clarity on certain distributions, including treatment of section 316 distributions versus distributions from retained earnings, distributions from U.S. tax basis shares of CFCs, and treatment of distributions absent “CFC look-through” in section 954(c)(6).

Treatment of section 316 distributions versus distributions from retained earnings

GAAP rules governing distributions vary depending on whether the distribution is made from current earnings and profit (“E&P”) versus from retained earnings. NFTC requests guidance to address the treatment of these differences as illustrated in this scenario:

USP wholly owns CFC with a tax basis of 100 in CFC’s shares. CFC has revenue of 200 in Year X. CFC has depreciation of 20 for tax and 10 for book with no other expenses. CFC declares a distribution of 200 for year X.

For tax purposes, the distribution would be treated as a section 316 distribution of 180 and a return of basis of 20. For book purposes, the distribution would result in a reduction of retained earnings of 190 in CFC and a reduction of additional paid in capital of 10.

Under CAMT, the starting point for AFSI is book; therefore, the book distribution is sourced from retained earnings of 190. However, under section 316, the distribution for tax purposes is 180.

In the scenario, guidance is requested to address the treatment of the difference between the section 316 result and the potential CAMT result. The Notice states that a Covered CFC Distribution means a distribution 'to the extent' it is a section 316 dividend. Under that treatment, it seems that the amount of the distribution resulting from timing differences (including but not limited to depreciation) should be excluded from AFSI. We further request that the guidance provide confirmation that as long as any amount of a distribution is treated as a Covered CFC Distribution, then the full amount of the distribution that is reported in the AFS should be disregarded and excluded from AFSI.

Distributions exclusively from US tax basis in shares of CFC

NFTC requests that Treasury and the IRS confirm that distributions exclusively from the US tax basis of a CFC should be excluded from AFSI, even if such distributions are in excess of basis and result in capital gain income for US GAAP purposes. For example, a CFC has no book income (and hence no positive E&P) and equity of 10. USP’s tax basis in CFC shares is 200 as a result of deemed equity contributions to CFC resulting from USP equity grants (such as stock-based compensation) to employees of the CFC. For US GAAP purposes, no basis increase is made in connection with the CFC employee equity grants. CFC makes a distribution of 100 that is treated as 100% from the return of tax basis but is treated as capital gain of USP of 90 for US GAAP purposes and, therefore, reported in its AFSI. We suggest that the

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treatment confirms the full amount of the distribution should be excluded from AFSI, including the capital gain portion of 90 that is only included for US GAAP purposes.

Rules for Post-CFC Look-Through

As Treasury and the IRS consider the broader NPRM on CAMT, consideration should be given to the application of section 245A on CFC-to-CFC E&P distributions made after January 1, 2026, when section 954(c)(6) expires. NFTC recommends confirming a Covered CFC distribution from one CFC to another related CFC that meets the requirements for the section 245A dividends received deduction should be excluded from AFSI. This would create consistency with the treatment of distributions from a CFC to a US shareholder.

Conclusion

NFTC appreciates the continued engagement with the business community. We are happy to answer any questions or provide clarification on any of the comments raised.