December 20, 2024

CC:PA:01:PR (REG-112129-23)
Room 5203
Internal Revenue Service
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National Foreign Trade Council Comments on the Corporate Alternative Minimum Tax (REG-112129-23)

The National Foreign Trade Council ("NFTC") is writing to provide comments on REG-112129-23 ("Proposed Regulations") regarding the application of the corporate alternative minimum tax ("CAMT") released by the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") on September 13, 2024.

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.

Overview

The CAMT imposes a 15 percent minimum tax on the adjusted financial statement income ("AFSI") of an applicable corporation. Under the CAMT, an applicable corporation pays the larger of the minimum tax calculated under the CAMT rules or the regular tax. The CAMT applies to companies with an average of $1 billion or more in AFSI in any three-year period and to U.S. subsidiaries of foreign-parented groups where the U.S. subsidiaries have average AFSI over $100 million and the foreign-parent group has an average AFSI over $1 billion. Under the CAMT, the AFSI of an applicable corporation includes a pro-rata share of all of the AFSI of controlled foreign corporations ("CFCs"). A simplified foreign tax credit ("FTC") is provided to eliminate double taxation, consistent with the apparent purpose of the CAMT to ensure a minimum level of tax (foreign and U.S. tax) on AFSI.

The Proposed Regulations provide comprehensive guidance with respect to the CAMT. NFTC members greatly appreciate the opportunity to comment on this proposed rule. Our comments focus on select cross-border issues raised by the guidance.[1] As provided in more detail below, the NFTC respectfully recommends that the IRS and Treasury reconsider the importation of regular tax restrictions and limitations on the FTC into the CAMT in light of the text and the purpose of the CAMT. The NFTC also respectfully recommends that the IRS and Treasury reconsider the application of section 482 principles to create AFSI, rather than reallocate AFSI, in a manner that seems inconsistent with the purpose of the CAMT. Finally, the NFTC respectfully recommends that the calculation of AFSI and related reporting for foreign-parented groups be simplified to avoid undue burden on taxpayers while providing the IRS information needed to administer the CAMT.

CAMT Foreign Tax Credit

The NFTC respectfully recommends that the IRS and Treasury reconsider the wholesale importation of regular tax restrictions and limitations on the FTC into the CAMT. In particular, the application of the limitations in sections 245A(d), 901(m), 907, and 909 is not consistent with the text or the purpose of the CAMT. Accordingly, the final regulations should provide that a foreign income tax paid or accrued by an applicable corporation and taken into account in its applicable financial statement ("AFS") is an eligible tax, notwithstanding that a credit is disallowed or suspended for regular tax purposes under these sections.

The CAMT statute provides for a CAMT FTC for "the amount of income, war profits, and excess profits taxes (within the meaning of section 901) imposed by any foreign country or possession of the United States" to the extent such taxes are paid or accrued by an applicable corporation and taken into account on its AFS. *See* section 59(l)(1)(B). The CAMT FTC has two elements: a "direct" FTC for taxes paid by an applicable corporation, and an "indirect" FTC for taxes paid by CFCs of an applicable corporation. The indirect CAMT FTC is subject to an overall limitation based on 15 percent of the AFSI attributable to a pro-rata share of CFC earnings. *See* section 59(l)(1)(A)(ii). Section 59(l) does not include any other limitation on the ability of an applicable corporation to claim a CAMT FTC for foreign income taxes paid and does not reference the various statutory and regulatory restrictions and limitations that apply to FTCs in the regular tax system. The FTC system provided by the statute makes sense given the apparent purpose of the CAMT, which is to ensure a minimum level of tax on AFSI of applicable corporations, without regard to whether that tax is a U.S. tax or a foreign tax (or a combination of each). Notwithstanding the plain language of section 59(l), the Proposed Regulations adopt many limitations from the regular tax system in the definition of an "eligible tax" for which a CAMT FTC is available. *See* Prop. Treas. Reg. § 1.59-4(b)(1). The preamble to the Proposed Regulations states that "the policies underlying these disallowances and suspensions for regular

[1] NFTC members have numerous other concerns related to the Proposed Regulations, including with respect to the rules for partnerships, corporate reorganizations, adjustments to AFSI, and CAMT attributes (including the rules for financial statement net operating losses). The omission of these items from this letter should not be read to reflect an endorsement of these aspects of the Proposed Regulations. Given the voluminous guidance provided by the Proposed Regulations, the IRS and Treasury should consider re-proposing aspects of the rules that receive significant comments from stakeholders so as to allow a meaningful opportunity for ongoing input.

tax purposes apply equally in the context of the CAMT FTC" and gives as an example the section 901(j) disallowance that applies to taxes paid to certain foreign countries for U.S. foreign policy reasons. 89 F.R. 75119. The preamble also states that "[i]ncorporating the same amount of disallowances or suspensions for regular tax purposes, instead of creating a separate, parallel set of CAMT FTC rules, is intended to reduce taxpayers' compliance burden and the IRS's administrative burden." 89 F.R. 75119.

The final regulations should provide that a foreign income tax is an eligible tax for purposes of the CAMT without regard to the restrictions and limitations on FTCs in the regular tax, in particular the limitations in sections 245A, 901(m), 907, and 909, because doing so would be consistent with the policies of the CAMT and with the plain language of section 59(l). Unlike the regular tax system, the base of the CAMT system is ASFI of the applicable corporation and its foreign subsidiaries, and the CAMT does not provide for an exemption for any foreign earnings. Accordingly, the restrictions and limitations in the regular tax that are premised on the application of the narrower regular income tax base, or on an exemption for foreign earnings under the regular tax, should not apply in the context of the CAMT. Moreover, unlike the regular tax system, there are no rules in the CAMT for determining the source or category of AFSI (other than AFSI attributable to CFC earnings). Accordingly, the restrictions and limitations in the regular tax that are premised on concerns regarding cross-crediting of foreign taxes against U.S. tax on unrelated categories of income should not apply in the context of the CAMT.

For example, the section 245A(d) disallowance should not be imported into the CAMT because it is premised on an exemption for certain foreign earnings under the regular tax system, which is an irrelevant consideration under the CAMT. The rationale for the section 245A(d) disallowance in the regular tax system is that the dividend income and the earnings out of which the dividend was paid are not subject to U.S. tax. The regular tax system does not include certain foreign subsidiary earnings as income and provides an exemption from regular tax for certain dividends from such foreign earnings through the section 245A dividends-received deduction. Accordingly, there can be no double taxation of such earnings. Under the CAMT rules, however, all earnings of foreign subsidiaries are included in AFSI under section 56A(c)(3). As such, the policy rationale for disallowing the CAMT FTC with respect to withholding taxes on dividends from such earnings is absent. The same rationale that supports allowing a CAMT FTC for foreign income taxes on distributions of earnings and profits previously included in U.S. income under sections 951 or 951A applies with equal force to foreign income taxes on section 245A dividends. Because there is no exemption of foreign earnings in the CAMT, a foreign tax credit should be allowed with respect to foreign income taxes imposed on such earnings to mitigate double taxation.

As another example, the section 901(m) disallowance should not be imported into CAMT because it is intended to police discrepancies between the regular U.S. income tax base and the income tax base for foreign tax purposes, which is an irrelevant consideration under the CAMT. Section 901(m) denies a foreign tax credit for the "disqualified portion" of any foreign income tax following a covered asset acquisition. In a covered asset acquisition, the U.S. or CFC acquirer obtains a stepped-up basis in the foreign target's assets for regular U.S. tax purposes without a corresponding basis step-up for foreign income tax purposes, leading to a potential disparity between U.S. regular taxable income and foreign taxable income and the generation of excess FTCs that could be applied to other foreign source income. The policies underlying section 901(m) do not apply to the CAMT because the base of the CAMT system is ASFI, not U.S. taxable income (or taxable income under foreign law). Accordingly, the application of section 901(m) in the context of the CAMT would result in double taxation in a manner that is inconsistent with the purposes of the CAMT FTC.

Similarly, section 909 should not be imported into the CAMT because it is intended to address timing differences in the accounting for foreign taxes and related foreign income under the regular tax system, which is an irrelevant consideration under the CAMT. Under section 909, a foreign income tax that has been paid or accrued by the taxpayer is not taken into account until the income to which the tax relates is taken into account under the regular tax system. But under the CAMT, all AFSI of an applicable taxpayer, including all foreign earnings of that taxpayer and its foreign subsidiaries, are taken into account when earned. The fact that income related to a foreign tax may not be taken into account until a later period under the regular tax rules is irrelevant to whether a CAMT FTC is appropriate. Moreover, the application of section 909 to the CAMT could result in a permanent deferral of FTCs rather than a temporary suspension, contrary to the intended operation of section 909, because the suspended foreign tax would not be taken into account on the taxpayer's AFS in the later period and therefore would not be creditable under the "paid or accrued" and "taken into account" requirements of section 59(l) (and the Proposed Regulations). Prop. Reg. § 1.59-4(c)(2) provides that eligible taxes are taxes paid, within the meaning of Treas. Reg. § 1.901-2(g)(5), during the taxable year to the extent the taxes have been taken into account within the meaning of Prop. Reg § 1.56A-8(d). Under Prop. Reg § 1.56A-8(d), taxes are taken into account if any journal entry has been recorded in the books and records for any year. These rules would appear to preclude the ability to claim a CAMT FTC in a later period for a foreign tax taken into account in a prior period but suspended under section 909, reinforcing the proposition that the section 909 rules should not be imported into the CAMT FTC.

As a final example, section 907 should not be imported into the CAMT because it is intended to address the cross-crediting of foreign taxes imposed on one category of income against U.S. taxes imposed on unrelated categories of income, which is an irrelevant consideration under the CAMT. Section 907 provides for a limitation on the FTC in the regular tax system equal to the U.S. tax on combined foreign oil and gas income. Section 907 is a cross-crediting limitation, similar to the separate category limitations of section 904. In general, these limitations are intended to prevent the crediting of high foreign taxes on one category of income against U.S. taxes on unrelated categories of income that are subject to no or low rates of foreign tax. The distinction between AFSI attributable to foreign oil and gas income and other AFSI, or between AFSI attributable to income categorized in separate categories under section 904 and other AFSI, is irrelevant for CAMT purposes. There are no rules in the CAMT for determining the source or category of AFSI, and no statutory text or legislative history indicating an intention to address cross-crediting concerns in the CAMT beyond the overall limitation applicable to AFSI attributable to CFC earnings. The Proposed Regulations are self-evidently correct in not importing the section 904 separate category limitations into the CAMT because section 59(l) plainly does not provide for such limitations. The section 907 limitation should be treated in the same manner.

Finally, the preamble's additional stated rationale of reducing compliance and administrative burden does not support the denial of a CAMT foreign tax credit that is provided by the CAMT statute. Section 59(l) does not provide a textual basis for excluding foreign income taxes to the extent such taxes are subject to limitations under 245A(d), 901(m), 907, or 909. So long as the foreign income taxes are paid or accrued by an applicable corporation and otherwise fall within the meaning of foreign income taxes under section 901, they are described in section 59(l)(1)(B) and a credit should be allowed.

Application of Section 482 in CAMT

The NFTC respectfully recommends that the IRS and Treasury reconsider the application of the clear reflection principles of section 482 in the CAMT as these principles in general do not appear to further the policies of the CAMT. The purpose of the CAMT is to ensure a minimum level of tax on AFSI, recognizing that AFSI and taxable income differ. The CAMT effectuates this purpose by including AFSI of an applicable corporation, including the pro rata share of AFSI of foreign subsidiaries, in the CAMT tax base, thereby generally obviating incentives to shift income between entities under common control. The clear reflection principles of section 482, which provide a tool to the IRS to reallocate income to address income shifting concerns in the regular tax system, would not appear relevant given the context of the CAMT.

Prop. Reg. § 1.56A-26(d) states that, with respect to a controlled transaction or controlled transfer between two or more CAMT entities, if any item of income, expense, gain, or loss reflected in the financial statement income of a CAMT entity does not reflect the principles of section 482 and the regulations thereunder, the CAMT entity must make appropriate adjustments to reflect section 482 principles (regardless of whether section 482 is otherwise considered to apply). The Proposed Regulations illustrate this rule with an example in which a foreign subsidiary transfers self-developed intangible property to its U.S. corporate parent. Generally applicable accounting rules account for the transfer at the carrying value of the property, which is zero, rather than the arm's length value determined in accordance with section 482. The example provides that the financial statement income of the foreign subsidiary is increased by the arm's length value of the property and that the AFSI of the applicable taxpayer is increased by its pro rata share of that amount.

Accordingly, under Prop. Reg. § 1.56A-26(d), a taxpayer may be required to increase its AFSI (and, thus, potentially increase its CAMT liability) even if such increase is not reflected in the book profits that the applicable corporation reports to its shareholders. This result is inconsistent with the purpose of CAMT because it effectively creates book income (*i.e.*, AFSI) without such additional income being substantiated on the AFSI of the corporation. In the example illustrating the rule, all of the income from the intangible property transferred, whether that property is retained by the foreign subsidiary or transferred to the U.S. corporate parent, will be AFSI and subject to tax under the CAMT. It is not clear why the principles of section 482 should be applied to a transfer of property within the applicable taxpayer group for purposes of the CAMT given that the tax base for purposes of the CAMT equals the aggregate AFSI of the applicable taxpayer group. Put another way, there is no incentive under the CAMT to shift income from a U.S. corporation to its foreign subsidiary (or vice versa), and therefore no income shifting concern for the IRS to police through the application of section 482.

We note that a similar rule is provided in the Model Rules that define GloBE income for purposes of minimum taxes adopted by other countries. Unlike the CAMT, however, the GloBE minimum taxes impose top-up tax on a jurisdiction-by-jurisdiction basis. This approach raises issues related to preserving the integrity of financial statement income on a jurisdiction-by-jurisdiction basis. Those issues are not raised under the CAMT, which generally taxes AFSI earned by an applicable corporation and its foreign subsidiaries in the same manner regardless of what legal entity books the AFSI. The imposition of section 482 principles in this area to create AFSI does not appear to further the purposes of the CAMT, and further does not appear contemplated by the text of the statute, which generally relies on financial accounting principles except where specified.

We recognize that the IRS and Treasury may believe that some version of this rule may be necessary to address potential policy issues under the CAMT, for example, with respect to transactions between an applicable taxpayer (or its foreign subsidiary) and an entity under common control whose AFSI is not included in the CAMT tax base. We urge that any such rule be targeted and proportional to the concerns addressed. For example, such a rule could be limited to material transactions between a CAMT entity and an entity under common control whose AFSI is not subject to tax under the CAMT where such transaction results in the recognition of gain or loss for regular tax purposes. In addition, the transferee should be entitled to reduce its AFSI by amortization or depreciation with respect to the CAMT basis created by the application of section 482 principles.

Applicable Financial Statement for Foreign Parented Multinational Groups

The NFTC respectfully requests that the IRS and Treasury refocus the rules for determining the AFS for a domestic subsidiary of a Foreign Parented Multinational Group ("FPMG") on financial information reasonably available to that domestic subsidiary and already used to comply with reporting obligations under the regular tax system.In particular, the NFTC respectfully requests that the calculation of AFSI for a domestic subsidiary of an FPMG (a "Domestic Subsidiary") begin with the financial statements of the domestic subsidiary in a manner similar to the preparation of Schedule M-3. We believe such a method is aligned with the statute's intent, would be more administrable by both taxpayers and the IRS, and would promote compliance with CAMT.

In the case of a Domestic Subsidiary, the Proposed Regulations employ a "top down" approach to calculating AFSI, generally requiring the starting point to be the AFS of the foreign parent. Prop. Reg. § 1.56A-2(g)(1) generally requires a member of a group that prepares consolidated financial statements to use those consolidated financials as the AFS unless the member prepares consolidated financials with a higher priority. Further, Prop. Reg. § 1.56A-2(g)(2)(v) provides that if a taxpayer is a member of an FPMG and the FPMG common parent prepares a

Consolidated AFS ("Consolidated FPMG AFS") that includes the taxpayer, the taxpayer must use the Consolidated FPMG AFS, regardless of whether the taxpayer's financial results also are reported on a separate AFS that is of equal or higher priority to the FPMG Consolidated AFS. The preamble to the Proposed Regulations states that these rules are intended to "minimize the inconsistent treatment of transactions between FPMG members computing AFSI based on different financial accounting standards". 89 F.R. 75070.

Under the top-down approach contemplated by the Proposed Regulations, the foreign parent's consolidated financial statement would need to be carved up to determine amounts attributable to a Domestic Subsidiary. This process could require significant additional administrative effort, require access to financial information outside the control of the Domestic Subsidiary, and distort the amounts used in the calculation of AFSI.[2] The approach of the Proposed Regulations could result in significant administrative burden while at the same time undermining the purpose of the CAMT, which is to impose a minimum tax on AFSI determined on the basis of reliable financial statements used for other purposes rather than created specifically for the CAMT. It could also result in the determination of different amounts of AFSI for a Domestic Subsidiary than for an otherwise identical applicable corporation that is not part of a FPMG, which would not appear to further any policy objective.

Accordingly, we propose that final regulations provide that a Domestic Subsidiary be permitted to determine its AFSI under an alternative "bottom-up" method, which would include using as its AFS, the income statement, other financial statement(s), and books and records that it (or the parent of the section 1502 consolidated return group that includes the Domestic Subsidiary) uses to prepare its Form 1120 Schedule M-3 for the taxable year (in accordance with the rules set out in the Instructions to Form 1120 Schedule M-3). Those financial statements would generally constitute the Domestic Subsidiary's stand-alone financial statements and books and records. Under this bottom-up approach, the Domestic Subsidiary's "net income or loss of the taxpayer set forth on the taxpayer's applicable financial statement for such taxable year" for purposes of section 56A(a) (*i.e.*, the starting point for computing the AFSI) would be the financial statement net income or loss set forth on the Form 1120 Schedule M-3. We also propose that a Domestic Subsidiary be permitted to use a bottom-up approach to determine the net income of other entities to the extent the net income of those other entities is relevant in determining the Domestic Subsidiary's AFSI. To the extent the IRS and Treasury believe that this approach could result in inconsistent treatment of transactions between FPMG members computing AFSI based on different financial accounting standards, we recommend a targeted rule to address that concern. For example, the bottom-up method could be permitted for a Domestic Subsidiary on the condition that financial statement income of the Domestic Subsidiary and all relevant related FPMG members be determined under the same standard. A relevant related FPMG member could be defined as an entity (1) that engages in material transactions with the Domestic Subsidiary and (2) whose income is relevant in determining the AFSI of an applicable

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[2] These issues are discussed in more detail in a letter to the IRS and Treasury from the Global Business Alliance providing comments on Notice 2023-64, dated October 16, 2023, and submitted electronically via regulations.gov.

corporation (other than for the purpose of determining whether the average AFSI test is met pursuant to the rules of section 59(k)(2)).

Reporting Burden on Foreign-Parented Groups

The NFTC respectfully recommends the IRS and Treasury reconsider the requirement that applicable corporations that are part of an FPMG complete Part V of Form 4626, which requires information with respect to each member of the FPMG. This information would be burdensome to collect and provide. Further, it would not provide the IRS with the information necessary to administer the CAMT with respect to a corporation that has already determined that it is an applicable corporation and, therefore, subject to the CAMT. An FPMG may have hundreds or thousands of members, the majority of which are not applicable corporations (or foreign subsidiaries of applicable corporations). Treasury has been helpful in other contexts in encouraging foreign tax authorities to limit undue reporting or filing burdens on U.S.-headed multinationals where the information required is not relevant to the administration of that jurisdiction's tax system, and we encourage the IRS and Treasury to balance compliance burdens with the value of information required in this context as well.

Conclusion

Thank you for consideration of our comments. We are happy to answer any questions or clarify any of the comments raised.