DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9959]

RIN 1545-BP70

Guidance Related to the Foreign Tax Credit; Clarification of Foreign-Derived Intangible Income; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final rule; correction and correcting amendments.

SUMMARY: This document contains corrections to Treasury Decision 9959, which was published in the **Federal Register** on Tuesday, January 4, 2022. Treasury Decision 9959 contained final regulations relating to the foreign tax credit, including the disallowance of a credit or deduction for foreign income taxes with respect to dividends eligible for a dividends-received deduction, the allocation and apportionment of interest expense, foreign income tax expense, and certain deductions of life insurance companies; the definition of a foreign income tax and a tax in lieu of an income tax; the definition of foreign branch category income; and the time at which foreign taxes accrue and can be claimed as a credit.

DATES: *Effective date:* These corrections are effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].**

Applicability dates: For dates of applicability, see §§1.245A(d)-1(f), 1.338-9(d)(4), 1.367(b)-4(h), 1.861-20(i), 1.901-2(h), 1.904-4(q), 1.905-1(h), 1.951A-7(b), 1.960-7(b).

FOR FURTHER INFORMATION CONTACT: Concerning §§1.245A(d)–1, 1.336–2, 1.338–9, 1.861–20, 1.960–1, and 1.960–2, Suzanne M. Walsh, (202) 317–4908 and Teisha Ruggiero, (202) 317-5282; concerning §§1.861–8 and 1.861-13, Jeffrey P. Cowan, (202) 317-4924; concerning §§1.901–2 and 1.905–1, Tianlin (Laura) Shi, (202) 317–6987; concerning §1.367(b)–4, Arielle Borsos, (202) 317–4939; concerning §1.904–4, Jeffrey L. Parry, (202) 317–4916; concerning §1.951A–2, Jorge M. Oben and Larry Pounders, (202) 317–6934 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

The final regulations (TD 9959) that are the subject of this correction are issued under sections 245A, 338, 367, 861, 901, 904, 905, 951A, and 960 of the Internal Revenue Code.

Need for Correction

As published on January 4, 2022 (87 FR 276), the final regulations (TD 9959) contain errors that need to be corrected.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Corrections to the Federal Register

Accordingly, the final regulations (TD 9959) that are the subject of FR Doc. 2021-27887, starting on page 276 in the **Federal Register** of January 4, 2022, are corrected as follows:

§1.861-13(a) [Corrected]

1. On page 326, in the third column, amendatory instruction 20, amending §1.861-13(a), is removed.

2. On page 326, in the second column, through page 375, in the third column, amendatory instructions 21 through 34 are redesignated as amendatory instructions 20 through 33.

§1.861–20 [Corrected]

3. On page 327, in the second column, in newly redesignated amendatory instruction 21, amending §1.861-20, instruction 12 is removed and instructions 13 through 15 are redesignated as instructions 12 through 14.

§1.960-1 [Corrected]

4. On page 374, in the second and third columns, in newly redesignated amendatory instruction 31, amending §1.960-1, the second instruction 21 and instructions 22 and 23 are redesignated as instructions 22 through 24, respectively.

Corrections to the Regulations

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.245A(d)-1 is amended:

a. In paragraph (c)(26) by adding the language “in” after the word “forth”;

b. In the second sentence of paragraph (d)(4)(i) by removing the third parenthesis at the end;

c. In the fourth sentence of paragraph (d)(4)(ii)(B)(*2*) by removing the language “Year 2” and adding the language “Year 3” in its place;

d. By revising paragraph (d)(6)(i); and

e. By revising the fifth and seventh sentences of paragraph (d)(6)(ii)(B) and the third and fifth sentences of paragraph (d)(6)(ii)(C).

The revisions read as follows:

§1.245A(d)-1 Disallowance of foreign tax credit or deduction.

* * * * *

(d) * * *

(6) * * *

(i) *Facts*. CFC is a reverse hybrid. In Year 1, CFC earns a $500x item of gain described in section 907(c)(1)(B) that is non-inclusion income. CFC also earns for Federal income tax purposes and Country A tax purposes a $1,000x item of royalty income, of which $500x is gross included tested income and $500x is non-inclusion income. USP includes the $500x item of foreign gain and the $1,000x item of foreign gross royalty income in its Country A taxable income, and the items are foreign law pass-through income. If CFC included these items under Country A tax law, its $1,000x of royalty income for Federal income tax purposes would be the corresponding U.S. item for the foreign gross royalty income, and its $500x of gain for Federal income tax purposes would be the corresponding U.S. item for the foreign gain. Country A imposes a $150x foreign income tax on USP with respect to $1,500x of foreign gross income.

(ii) * * *

(B) * * * CFC is therefore treated as including a $1,000x foreign gross royalty item and a $500x foreign gross income item of gain and paying $150x of Country A tax in Year 1. * * * No foreign gross income is assigned to the section 245A(d) income group because neither the corresponding U.S. item of royalty income nor the corresponding U.S. item of gain is assigned to the section 245A(d) income group. * * *

(C) * * * For the reasons described in paragraph (d)(6)(ii)(B) of this section, under §1.861-20(d)(3)(i)(C) CFC is treated as including a $1,000x foreign gross royalty item and a $500x foreign gross income item of gain and paying $150x of Country A tax in Year 1. * * * For Federal income tax purposes, the $500x item of gain and $500x of the $1,000x item of royalty income are items of non-inclusion income that are therefore assigned to the non-inclusion income group. * * *

* * * * *

§1.338-9 [Amended]

Par. 3. Section 1.338-9 is amended by removing the language "§1.901-2(a)(1))" from the first sentence of paragraph (d)(1) and adding the language "§1.901-2(a))" in its place.

§1.367(b)-4 [Amended]

Par. 4. Section 1.367(b)-4 is amended by removing "2020 resulting" and "2020 but" in the last sentence of paragraph (h) and adding "2020, resulting" and "2020, but", respectively, in their place.

§1.861-8 [Amended]

Par. 5. Section 1.861-8 is amended by removing the language "and example 17 of paragraph (g) of this section" from the third sentence of paragraph (b)(2).

Par. 6. Section 1.861-20 is amended:

a. By revising the seventh sentence of paragraph (d)(3)(v)(A);

b. By revising paragraphs (d)(3)(v)(D), (d)(3)(v)(E)(*2*), and (d)(3)(v)(E)(*8*); and

c. In paragraph (g)(14)(i) by removing the language ""FDE2 tested unit"," and adding the language ""FDE2 tested unit,"" in its place.

The revisions read as follows:

§1.861–20 Allocation and apportionment of foreign income taxes.

* * * * *

(d) * * *

(3) * * *

(v) * * *

(A) * * * The rules of paragraph (d)(3)(v)(D) of this section apply to assign to statutory and residual groupings items of foreign gross income arising from disregarded payments, other than the portions of disregarded payments that are reattribution payments, in connection with disregarded sales or exchanges of property. * * *

* * * * *

(D) *Disregarded payments in connection with disregarded sales or exchanges of property*. An item of foreign gross income that is attributable to gain recognized under foreign law by reason of a disregarded payment, other than the portion of the disregarded payment that is a reattribution payment, received in exchange for property is characterized and assigned under the rules of paragraph (d)(2) of this section. See paragraph (d)(3)(v)(B) of this section for rules for assigning an item of foreign gross income attributable to the portion of a disregarded payment that is a reattribution payment, including a reattribution payment received in exchange for property.

(E) * * *

(*2*) *Contribution*. The term *contribution* means the excess amount of a disregarded payment, other than a disregarded payment received in exchange for property, made by a taxable unit to another taxable unit that the first taxable

unit owns over the portion of the disregarded payment, if any, that is a reattribution payment.

* * * * *

(*8*) *Remittance*. The term *remittance* means the excess amount, other than an amount that is treated as a contribution under paragraph (d)(3)(v)(E)(*2*) of this section, of a disregarded payment, other than a disregarded payment received in exchange for property, made by a taxable unit to a second taxable unit (including a second taxable unit that shares the same owner as the payor taxable unit) over the portion of the disregarded payment, if any, that is a reattribution payment.

* * * * *

Par. 7. Section 1.901-2 is amended:

a. By revising paragraph (a)(1)(iii);

b. In the first sentence of paragraph (b)(4)(i)(A) by removing the language "including significant capital expenditures" and adding the language "including capital expenditures" in its place;

c. By revising the fourth and fifth sentences of paragraph (b)(4)(i)(C)(*1*);

d. By revising paragraph (b)(4)(i)(C)(*3*);

e. In paragraph (b)(5)(ii) by removing the language "resident, but" and adding the language "resident. The foreign tax law" in its place; and

f. By adding a sentence before the second sentence of paragraph (h).

The revisions read as follows:

§1.901–2 Income, war profits, or excess profits tax paid or accrued.

(a) * * *

(1) * * *

(iii) *Coordination with treaties*. A foreign levy that is treated as an income tax under the relief from double taxation article of an income tax treaty entered into by the United States and the foreign country imposing the levy is a foreign income tax if the levy is, as determined under such income tax treaty, paid by a citizen or resident of the United States that elects benefits under the treaty. In addition, a foreign levy (including a foreign levy paid by a controlled foreign corporation) that is modified by an applicable income tax treaty to which the foreign country imposing the levy is a party may qualify as a foreign income tax notwithstanding that the unmodified foreign levy does not satisfy the requirements in paragraph (b) of this section or the requirements of §1.903-1(b) if the levy, as modified by such treaty, satisfies the requirements of paragraph (b) of this section or the requirements of §1.903-1(b). See paragraph (d)(1)(iv) of this section for rules treating as a separate levy a foreign tax that is limited in its application or otherwise modified by the terms of an income tax treaty to which the foreign country imposing the tax is a party.

* * * * *

(b) * * *

(4) * * *

(i) * * *

(C) * * *

(*1*) * * * Foreign tax law is considered to permit recovery of significant costs and expenses even if recovery of all or a portion of certain costs or expenses is disallowed, if such disallowance is consistent with any principle underlying the disallowances required under the Internal Revenue Code, including the principles of limiting base erosion or profit shifting and public policy concerns. For example, a foreign tax is considered to permit recovery of

significant costs and expenses if the foreign tax law limits interest deductions based on a measure of taxable income (determined either before or after depreciation and amortization), disallows deductions in connection with hybrid transactions, disallows deductions attributable to gross receipts that in whole or in part are excluded, exempt or eliminated from taxable income, or disallows certain deductions based on public policy considerations similar to those underlying the disallowances contained in section 162. * * *

* * * * *

(*3*) *Timing of recovery*. A foreign tax law permits recovery of significant costs and expenses even if such costs and expenses are recovered earlier or later than they are recovered under the Internal Revenue Code unless the time of recovery is so much later as effectively to constitute a denial of such recovery. The amount of costs and expenses that is recovered under the foreign tax law is neither discounted nor augmented by taking into account the time value of money attributable to any acceleration or deferral of a tax benefit resulting from the foreign law cost recovery method compared to when tax would be paid under the Internal Revenue Code. Therefore, a foreign tax satisfies the cost recovery requirement if items deductible under the Internal Revenue Code are capitalized under the foreign tax law and recovered either immediately, on a recurring basis over time, or upon the occurrence of some future event (for example, upon the property becoming worthless or being disposed of), or if the recovery of items capitalized under the Internal Revenue Code occurs more or less rapidly than under the foreign tax law.

* * * * *

(h) * * * For foreign taxes that relate to (and if creditable are considered to accrue in) taxable years beginning before December 28, 2021, and that are

remitted in taxable years beginning on or after December 28, 2021, by a taxpayer that accounts for foreign income taxes on the accrual basis, see §1.901-2 as contained in 26 CFR part 1 revised as of April 1, 2021. * * *

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Par. 8. Section 1.904-4 is amended:

a. By revising paragraphs (f)(3)(viii) and (x) and (q)(1); and

b. By removing the language “Paragraph (f) of this section applies” in paragraph (q)(3) and adding the language “Paragraphs (b)(2)(i)(A), (c)(4), and (f) of this section apply” in its place.

The revisions read as follows:

§1.904–4 Separate application of section 904 with respect to certain categories of income.

* * * * *

(f) * * *

(3) * * *

(viii) *Foreign branch group*. The term *foreign branch group* means a foreign branch and any non-branch taxable units (other than an individual or a domestic corporation), to the extent that the foreign branch owns the non-branch taxable unit (if any) directly or indirectly through one or more other non-branch taxable units.

* * * * *

(x) *Foreign branch owner group*. The term *foreign branch owner group* means a foreign branch owner and any non-branch taxable units (other than an individual or a domestic corporation), to the extent that the foreign branch owner owns the non-branch taxable unit (if any) directly or indirectly through one or more other non-branch taxable units.

* * * * *

(q) * * *

(1) Except as provided in paragraphs (q)(2) and (3) of this section, this section applies for taxable years that both begin after December 31, 2017, and end on or after December 4, 2018.

* * * * *

§1.905-1 [Amended]

Par. 9. Section 1.905-1 is amended by removing the language "§1.901-2(a)(3)(i)" from the third sentence of paragraph (c)(1) and adding the language "§1.901-2(a)(3)" in its place.

Par. 10. Section 1.951A-2 is amended by:

a. Removing the language "current year taxes (as defined in § 1.960-1(b)(4))" from the first sentence of paragraph (c)(7)(vii) and adding the language "eligible current year taxes (as defined in § 1.960-1(b)(5))" in its place;

b. Adding a heading for paragraph (c)(8)(iii)(A)(2)(ii);

c. Adding the language "eligible" before the language "current year taxes" in the first sentence of paragraph (c)(8)(iii)(A)(2)(iv); and

d. Adding the language "eligible" before the language "current year taxes" in the first sentence of paragraph (c)(8)(iii)(C)(2)(v).

The addition reads as follows:

§1.951A–2 Tested income and tested loss.

* * * * *

(c) * * *

(8) * * *

(iii) * * *

(A) * * *

(*2*) * * *

(*ii*) *Foreign income tax deduction*. * * *

* * * * *

Par. 11. Section 1.960-2 is amended by revising paragraph (c)(7)(i)(A) to read as follows:

§1.960–2 Foreign income taxes deemed paid under sections 960(a) and (d).

* * * * *

(c) * * *

(7) * * *

(i) * * *

(A) *Facts.* USP, a domestic corporation, owns 100% of the stock of a number of controlled foreign corporations, including CFC1. USP and CFC1 each use the calendar year as their U.S. taxable year. CFC1 uses the "u" as its functional currency. At all relevant times, 1u=$1x. For its U.S. taxable year ending December 31, 2018, after application of the rules in § 1.960-1(d), the income of CFC1 is assigned to a single income group: 2,000u of income from the sale of goods in a tested income group within the general category ("tested income group"). CFC1 has current year taxes, all of which are eligible current year taxes, translated into U.S. dollars, of $400x that are all allocated and apportioned to the tested income group. For its U.S. taxable year ending December 31, 2018, USP has a GILTI inclusion amount determined by reference to all of its controlled foreign corporations, including CFC1, of $6,000x, and an aggregate amount described in section 951A(c)(1)(A) and § 1.951A-1(c)(2)(i) of $10,000x. All of the income in CFC1's tested income group is included in computing USP's aggregate amount described in section 951A(c)(1)(A) and § 1.951A-1(c)(2)(i).

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