International Tax Update for Individuals and Private Equity

Moderator/Panelist
Neil Feinstein, Deloitte Tax LLP, Philadelphia, PA

Panelists
Karen Brodsky, Deloitte Tax LLP, New York, NY
Joe Calianno, BDO, Washington, DC
Michael J. Miller, Roberts & Holland LLP, New York, NY
Expansion of Constructive Ownership Rules
Transition Tax
Global Intangible Low-Taxed Income (GILTI)
Foreign Derived Intangible Income (FDII)
Elimination of Subpart F exception when CFC< 30 days
Expansion of Constructive Ownership Rules
Section 958(b) provides constructive ownership rules which attribute stock holdings in foreign entities to related parties for the purpose of determining if the foreign corporation is a CFC and whether a U.S. person is a U.S. shareholder.

Under prior law, the constructive ownership rules prevented certain US entities from being attributed stock which is considered to be owned by a non-US interest holder in the entity.

The new law removes this restriction, 
— *BUT does not impact the restriction set forth in section 958(b)(1)* (i.e., shares owned by a non-resident alien spouse is still not attributed to a US citizen or resident).

— Applies for the last taxable year of foreign corporations beginning before 1/1/18 – *and therefore can trigger the application of the transition tax (but inclusion may be limited to 2017 earnings).*
Repeal of Section 958(b)(4)

- As in effect before repeal, section 958(b)(4) provided that subparagraphs (A), (B), and (C) of section 318(a)(3) (providing for “downward” attribution) were not to be applied so as to consider a U.S. person as owning stock that is owned by a person who is not a United States person.

- Repeal of 958(b)(4) allows downward attribution from a foreign person to a U.S. person (the repeal is effective for the last tax year of foreign corporations beginning before 1/1/2018 and each subsequent year of such foreign corporations and for the taxable years of U.S shareholders in which or with which such tax years of foreign corporations end)
Senate Finance Committee included the following language (Conference report generally followed the Senate proposal):

- “[t]he provision is not intended to cause a foreign corporation to be treated as a controlled foreign corporation with respect to a U.S. shareholder as a result of attribution of ownership under section 318(a)(3) to a U.S. person that is not a related person (within the meaning of section 954(d)(3)) to such U.S. shareholder as a result of the repeal of section 958(b)(4).”

However, no carve out was added to the Code to reflect the above language.
Repeal of Section 958(b)(4)

- USSUB is a U.S. shareholder of FSUBs via constructive ownership but given no section 958(a) ownership, no income inclusion under CFC anti-deferral rules. See Notice 2018-13 relating to compliance issues (Form 5471).

- USP does have section 958(a) ownership of FSUBs--implications to USP under CFC anti-deferral rules
Repeal of Section 958(b)(4)

- Will (can) Treasury and the IRS provide a carve out?
  - See Notice 2018-13 addressing issues relating to compliance (Form 5471) and special rules relating to space and ocean and international communications income but no general carve out relating to Senate Finance language above
  - In addressing comments from taxpayers on the repeal of section 958(b)(4), Treasury stated in the preamble to the proposed section 965 regulations that “This issue is beyond the scope of the proposed regulations.”
Transition Tax
Transition Tax

- The transition tax is a one-time tax required to transition to the new international tax system. The transition tax requires U.S. shareholders of certain foreign corporations to pay tax on the amount of “accumulated post-1986 deferred foreign income” of the foreign corporation (reduced by certain deficits and offset by a reduced FTC in the case of domestic corporate shareholders) at a reduced rate of tax.

- **The transition tax is imposed on:**
  - US shareholders that own 10% or more of a controlled foreign corporation (CFC), and
  - US shareholders that own 10% or more of *any* foreign corporation where at least 1 domestic corporate shareholder is a direct, indirect or **constructive** owner (not just CFCs).
  - These entities are collectively referred to as “specified foreign corporations” under section 965(e).
    - Does not include any corporation which is a passive foreign investment company (as defined in section 1297) with respect to the shareholder and which is not a CFC.
# Key Points on Calculation of Transition Tax

<table>
<thead>
<tr>
<th>Who it applies to</th>
<th>US Shareholders (10% or greater owners) of CFCs</th>
<th>US shareholders (10% or greater owners) of ForCos with at least one 10% U.S. corporate owner</th>
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<td>![Diagram](CFC USP US Corp Unrelated Non-US USP US Pship US Corp ForCo &gt;50% &gt;50% 10% &lt; 50%)</td>
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| Income Inclusion Amount | • Accumulated post-86 deferred foreign income (§965(d)(2)) – greater as of 11/2/17 or 12/31/17  
                          | • Only with respect to shares held directly or indirectly under §958(a) |

| Tax Rate Applied | • 15.5% to extent E&P consists of cash and cash equivalents for corporations (17.54% for individuals - strict statute reading)  
                  | • 8% to extent of remaining E&P for corporations (9.05% for individuals - strict statute reading)  
                  | • Assumes highest applicable tax rates |

| Timing of Payment of Tax | • May **elect** to pay net tax liability under §965 over 8 years  
                          | – 8% in each of Years 1-5  
                          | – 15% in Year 6, 20% in Year 7, and 25% in Year 8  
                          | • Special rules for S corporations – can defer until “triggering event” |

| Treatment of Future Remittances | • US Shareholders generally can receive amounts included in income under §965 free of tax (except a certain portion of foreign exchange gains and, for individuals, the NII tax) |
Transition Tax – Guidance

• Notice 2018-07, December 27, 2017

• Notice 2018-13, January 19, 2018

• FAQs:
  
  • March 13, 2018
  • Updated April 13, 2018 (addressed overpayments and application to deferred transition tax)
  • Updated June 4, 2018 (additional guidance related to installment elections)

• Notice 2018-26, April 2, 2018

• Proposed Regulations, August 1, 2018

• IRS OCC Memo, August 2, 2018 (reiterates IRS position in 4/13/18 FAQs re: overpayments)
August 2, 2018

- Taxpayers expressed concerns with the legal basis for IRS FAQ #14, and some would like to obtain a refund of or apply as a credit to their next year’s estimated tax liability any amount that exceeds the amount currently due. Questions have also been raised about whether the Service’s offset refund bypass procedures apply.

  - IRS FAQ #14: No refund or credit of any portion of properly applied 2017 tax payments unless and until the amount of payments exceeds the entire unpaid 2017 income tax liability, including all amounts to be paid in installments in future years under section 965(h).

- “In the case of a tax payable in installments,” section 6403 provides that any amount paid in excess of the correct amount of the installment “shall be credited against the unpaid installments, if any.”

- Section 6403 does not permit the Service to refund any excess installment payment to the taxpayer prior to there being an overpayment of the entire liability as provided in section 6402.

- Because there is no overpayment under section 6402 until the entire 2017 tax liability is paid, including all of the installments of the deferred payment, the Service’s offset refund bypass procedures will not apply.

- Consider impact to estimated tax payment planning for the next 7 years, especially first quarter estimated tax payments!

PMTA-2018-16: Legal Advice Memo: Overpayments and I.R.C. § 965(h)
Section 965 Regulations

Released August 1, 2018

Proposed regulations under sections 962, 965, and 986

**Basis** – Prop. Reg. § 1.965-2(e)

- A basis increase in DFIC stock in the amount of the section 965(a) inclusion is permitted with respect to the DFIC.

**Net investment income (NII) tax** – Prop. Reg. § 1.965-3(f)(3)

- Distributions attributable to a taxpayer’s section 965(a) inclusion amount are subject to NII tax.
- Further, for purposes of the section 1411 NII tax, a section 965(c) deduction is not treated as a deduction properly allocable to a corresponding section 965(a) inclusion.
- In the Preamble that accompanied the release of the Proposed Regulations, the Treasury and the IRS also clarify that elections may **not** be made under section 965(h) to pay NII tax (or other taxes imposed under other subchapters or chapters besides subchapter A of chapter 1 of subtitle A of the Code) in eight installments.
Section 965(h) election to pay transition tax in installments

- For **individual taxpayers who have a net tax liability under section 965 in the individual’s 2017 taxable year of less than $1 million** (*i.e.*, the total of all 8 installments is less than $1 million) and make a timely election under section 965(h) but missed or underpaid the April 18, 2018 deadline for making the 1st of the 8 annual installment payments (or underpaid the 1st installment in April), the guidance in IRS FAQ#16 still applies.
  - Late-payment penalty (but not interest) waived and no acceleration of subsequent installments IF the individual pays the full amount of the 1st (and 2nd) installment by the original (un-extended) due date for the 2018 tax return (for calendar-year taxpayers, April 15, 2019).

- **If IRS FAQ #16 does not apply** (*e.g.*, an individual’s net tax liability under section 965 exceeds $1 million) and the 1st installment payment was not paid or was underpaid, Prop. Reg. § 1.965-7(b)(1)(ii) provides that **the deficiency or additional amount with be prorated to the installments IF the person**:
  - Is assessed a deficiency with respect to the person’s section 965(h) net tax liability, or
  - Timely files a return increasing the amount of its section 965(h) net tax liability above the amount taken into account in the payment of the 1st installment of section 965(h) liability, or
  - Files an amended return increasing the amount of section 965(h) net tax liability.

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The adjustment is made to ALL installments. Therefore:
- The balance of the 1st installment payment is due upon the applicable event described above, and
- The subsequent installment amounts are increased such that the applicable percentage of the re-determined net tax liability under section 965 is paid in at each subsequent installment due date.
Section 965 Regulations

Section 965(h) acceleration events

• Prop. Reg. § 1.965-7(b)(3)(ii) – The occurrence of certain events causes an acceleration of remaining section 965(h) installment payments.

• **Acceleration events** include:

  - An addition to tax is assessed for the failure to timely pay an installment described in Prop. Reg. §1.965-7(b)(1)(i).

  - A liquidation, sale, exchange or other disposition of substantially all of the assets of the person (including in a title 11 or similar case, or, in the case of an individual, by reason of death)

    ◦ The death of an individual will also accelerate the section 965 tax that has been deferred due to the individual owning DFIC shares through an S corporation. The S corporation shareholder (estate) is permitted to make the election to assume the liability as it is an eligible transferee.

  - Any event that results in the person no longer being a US person, including a resident alien becoming a nonresident alien.
Section 965(i): Special Rules for S Corp Shareholders

• In General
  − Each shareholder of an S corporation that is a U.S. shareholder may elect to defer payment of such shareholder’s section 965 net tax liability until the taxable year in which occurs a triggering event.
  − Election is due no later than the due date (taking into account extensions) for the S corp shareholder’s return for the taxable year that includes the last day of the taxable year of the S corp in which the S corp has a section 965(a) inclusion by attaching a signed statement to its return (no late election relief available).

• Triggering Events
  − Corporation ceases to be an S corp;
  − Liquidation, sale, exchange or other disposition of substantially all of the S corp’s assets (including in a title 11 or similar case), a cessation of business by the S corp, or the S corp ceasing to exist; or
  − Transfer of any share of stock in the S corp (including by reason of death)
    ◦ Partial transfers: triggers portion of liability allocable to transferred stock
    ◦ Not treated as a triggering event if transferee enters into a transfer agreement within 30 days of the triggering event (requirements outlined in section 965 proposed regulations)
    ◦ No specific nonrecognition carve-outs in the Proposed Regulations

• Annual reporting requirement
Section 965(i) Triggering Events

Assumptions

- U.S. Individual (USI) wholly owns the shares in a S-corporation (S Corp)
- S Corp wholly owns the shares in various deferred foreign income corporations (CFCs)
- S Corp had an income inclusion under section 965
- USI made a section 965(i) Election to defer the payment of such shareholder’s net tax liability under section 965 with respect to S Corp
- S Corp’s only assets are shares in CFCs; accordingly, such shares are substantially all of S Corp’s assets
Implications of Below Transactions?

§351 Contribution to Domestic Corporation

§721 Contribution to Foreign Partnership

Liquidation of CFCs

Implications of Below Transactions?
Implications of Below Transaction?

Foreign to Foreign Asset Reorganization

Step 1: CFCs transfer all of their assets to New CFC for New CFC stock
Step 2: CFCs distribute New CFC stock to S Corp in liquidation
Section 965 Regulations

Prop. Reg. §1.962-2(a)

• The election under section 962 may be made only by an individual (including a trust or estate) who is a United States shareholder (including an individual who is a United States shareholder because, by reason of section 958(b), he is considered to own stock of a foreign corporation owned (within the meaning of section 958(a)) by a domestic pass-through entity (as defined in §1.965-1(f)(19)).
Prop. Reg. §1.965-5(b)

- Neither a deduction (including under section 164) nor a credit under section 901 is allowed for the applicable percentage of any foreign income taxes paid or accrued with respect to any amount for which a section 965(c) deduction is allowed for a section 958(a) U.S. shareholder inclusion year. Neither a deduction (including under section 164) nor a credit under section 901 is allowed for the applicable percentage of any foreign income taxes attributable to a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits.

- Accordingly, no deduction or credit is allowed for the applicable percentage of any withholding taxes imposed on a United States shareholder by the jurisdiction of residence of the distributing foreign corporation with respect to a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits.

- Similarly, no deduction or credit is allowed for the applicable percentage of net basis taxes imposed on a United States citizen by the citizen's jurisdiction of residence upon receipt of a distribution of section 965(a) previously taxed earnings and profits or section 965(b) previously taxed earnings and profits.
Section 965: Application to PE Investor

• What is the impact of incomplete pass-through information on Schedules K-1?
  − Potential need to amend certain returns filed prior to the receipt of complete
    information from pass-through entities (or the release of additional IRS
    guidance)

• What is the impact to 2018 estimated tax payments? Is a separate Q1
  payment the new normal for those with outstanding transition tax liabilities?
  − Normal methodology vs. reducing the amount of “cushion”?
  − Note: The IRS FAQs guidance was specific to the 2017 tax year, but the OCC
    memo dated 8/2/18 makes it highly likely that similar rules will be in effect
    for future years.
GILTI
GILTI: The Anti-Deferral Provision

- **Section 951A** – a U.S. shareholder of any CFC for any taxable year of such U.S. shareholder shall include in gross income such shareholders “global intangible low-taxed income” for such taxable year

- GILTI inclusion amount = net CFC tested income – net deemed tangible income return (Net DTIR)
  - Net CFC Tested Income = Sum of CFC Tested Income - Sum of CFC Tested Loss
  - Net DTIR = 10% x qualified business asset investment (QBAI) – specified interest expense
    - QBAI = average of the aggregate of its adjusted bases, determined as of the close of each quarter of the taxable year, in specified tangible property used in its trade or business and of a type with respect to which a deduction is generally allowable under section 167
      - Very generally, specified tangible property is tangible property used in the production of tested income

Note: In addition to GILTI, “regular” Subpart F rules still remain in effect.
GILTI: The Anti-Deferral Provision

- "Net CFC tested income" means, with respect to any U.S. shareholder, the excess (if any) of the aggregate of the shareholder’s pro rata share of the “tested income of each CFC” with respect to which it is a U.S. shareholder over the aggregate of its pro rata share of the “tested loss of each CFC” with respect to which it is a U.S. shareholder.

- Pro rata shares are determined under the rules of section 951(a)(2).

- The tested income of a CFC means the excess (if any) of the gross income of the corporation—determined without regard to certain exceptions to tested income—over deductions (including taxes) properly allocable to such gross income (“tested gross income”).
  - The exceptions to tested income are: (1) the corporation’s ECI under section 952(b); (2) any gross income taken into account in determining the corporation’s subpart F income; (3) any gross income excluded from foreign base company income or insurance income by reason of the high-tax exception under section 954(b)(4); (4) any dividend received from a related person (as defined in section 954(d)(3)); and (5) any foreign oil and gas extraction income (as defined in section 907(c)(1))
GILTI: The Anti-Deferral Provision

- Several special rules and formulas relating to determining a domestic corporation’s deemed paid credit for taxes properly attributable to tested income (e.g., 80% limitation, rules relating to creating separate basket for GILTI, calculating the section 78 gross up, restricting the carryover or carryback of excess taxes)

- Domestic C corporation (other than a RIC or REIT) permitted a deduction equal to 50% of the sum of its GILTI inclusion under section 951A and the section 78 gross-up with respect thereto, under section 250
  - See the FDII discussion below for details and various limitations including reduction in deduction post-2025

- Given the 50% deduction and 80% foreign tax credit, a domestic C corporation (other than a RIC or REIT) may potentially avoid federal tax on its GILTI if effective rate of foreign income tax is 13.125%.
  - 13.125% * 80% = 10.5%
The mechanics of the calculation will favor (that is, permit some or all deferral for) U.S. shareholders in CFCs with significant depreciable assets that generate tested income.

— For example, the impact to U.S. shareholders of manufacturing CFCs that own substantial depreciable assets that generate tested income will be able to defer more income.

— On the other hand, U.S. shareholders in CFCs engaged in technology or a service business may likely be disadvantaged—even in certain situations where they are subject to high foreign taxes.
CFC has $1,000,000 of Subpart F income, and pays $180,000 of foreign tax, in 2018.

Absent any election, Curly is subject to US tax as follows:

- $820,000 taxed at 37% = $303,400 (current tax disregarding NII)
  - *Current tax!*
  - *Ordinary income rate!*
  - *No foreign tax credit!*

- Subsequent distribution is tax-free PTI

Total tax = $180,000 + $303,400 = $483,400
Section 962 - Imagine a Corporation

Corporate-level tax:
Holdco taxed at lower corporate rate of 21%
Holdco gets indirect FTC
So, Holdco tax = $210,000 - $180,000 = $30,000

Shareholder-level tax:
Shareholder-level US tax = $790,000 * 20% = $158,000 (disregarding NII)

Total US tax:
$30,000 + $158,000 = $188,000

Total tax:
$180,000 + $188,000 = $368,000.
Corporate-type tax

Curly pays tax on the Subpart F income at corporate rates, taking into account indirect FTC.

As in case with a domestic Holdco, the corporate (type) tax paid by Curly is $30,000. ($210,000 - $180,000 = $30,000.)

Second/shareholder-level tax:

Only $30,000 of the Subpart F income is tax-free PTI. The remaining $790,000 is taxable to Curly when distributed under section 962(d).

So, Curly pays tax twice!

If the distribution of the $790,000 is a qualified dividend, then the total tax will be the same as in the example with domestic Holdco: $180,000 + $30,000 + $158,000 = $368,000.

And, of course, the second tax is deferred, possibly for a long time.

Query: What if Curly, a temporary resident, goes home?
Section 962 Election – GILTI Example

No Section 962 Election

$750,000 * 37% = $277,500

Section 962 Election

Corporate-type tax* = $210,000 - (80% * $250,000)
= $210,000 - $200,000 = $10,000

Shareholder-level tax** = $740,000 * 20% = $148,000

Total US tax = $10,000 + $148,000 = 158,000

* Assumes no 50% GILTI deduction; note FTC “haircut”

** Assumes CFC is a qualified foreign corporation and the dividend is a qualified dividend
Section 962 Election – Tax on Distribution

- Under section 962(d), the E&P in excess of the US corporate-type tax previously paid “shall, when such earnings and profits are distributed, notwithstanding the provisions of section 959(a)(1), be included in gross income ...”

- Is the non-PTI portion of the distribution a dividend?

- If so, is the dividend qualified?

Section 962 Election – Who Can Elect?

- Domestic Fund, a US shareholder, has GILTI
  - Or Subpart F income
  - Or an investment in U.S. property

- Curly and Berto would like to make an election under section 962

- However, only a US shareholder, as defined in section 951(b), may elect

- Good news for Berto; bad for Curly
Section 962 – Other Issues

• Will Berto pay state and local tax *twice*?
  • Nothing in section 962 provides that any amount (other than the corporate-type tax) is excluded from income
  • *Cf. Smith v. Commissioner, supra*
  • However, note instructions to Form 1040, which seem to produce the correct amount of tax if, and only if, the “corporate” income is excluded from the individual return

• How about three (or more) levels of *federal* tax?
  • Is it clear that “classic” Subpart F income for which the section 962 election was made in 2017, or a prior year, cannot also be included in post-1986 accumulated deferred foreign income?

• If Berto elects under section 962 with respect to GILTI and is subject to foreign tax (whether withholding or residence-based) upon his subsequent receipt of PTI, does section 960(c) apply to allow FTC?

• Election may be less favorable for section 965 income, since the section 965(c) deduction is consumed at the corporate level, and then entire distribution is taxable (even if at qualified dividend rates)

• Any issue with residents who never pay shareholder-level tax?
  • Temporary resident goes home
  • Taxpayer dies
Recently Issued Proposed Regulations - General Overview

• On September 13, 2018, the IRS and Treasury issued proposed regulations implementing section 951A (the “Proposed Regulations”).

• Emphasis on computational aspects of section 951A:
  - CFC-level computations of tested income/loss, QBAI, and tested interest income/expense
  - US Shareholder-level computations of net CFC tested income and net DTIR

• New pro rata share rules for purposes sections 951A and 951.

• Topics not addressed in the Proposed Regulations:
  - Foreign tax credits (deemed paid taxes under 960(d); expense allocation and apportionment to GITLI basket; look through rules under 904(d))
  - Section 250 deduction

• The Proposed Regulations generally effective for first year to which section 951A applies.
  - BUT, the new pro rata share rules effective to pre-GILTI years
GILTI Proposed Regulations

Significant Items in Proposed Regulations

• Rules addressing partnerships and consolidated groups.

• Anti-abuse rules with respect to “disqualified basis” (affect both computation and QBAI and tested income/loss).

• Anti-abuse rule for purposes of computing pro rata share.

• Basis adjustment rules of utilization of tested losses.

• No broad high-tax exception for GILTI

• Confirmation that future guidance will assign the section 78 gross-up to the GILTI basket.
Domestic Partnerships and their Partners

General Rules

• The GILTI Proposed Regulations provide that, in general, a domestic partnership that is a U.S. shareholder of one or more CFCs (“U.S. shareholder partnership”) computes its own GILTI inclusion amount in the same manner as any other U.S. shareholder, and each partner takes into account its distributive share of the domestic partnership’s GILTI inclusion amount under section 702 and Reg. §1.702-1(a)(8)(ii). See Prop. Reg. §1.951A-5(b)

• However, for purposes of section 951A and the GILTI Proposed Regulations, a partner that is itself a U.S. shareholder (within the meaning of section 951(b)) (“U.S. shareholder partner”) of one or more CFCs owned directly or indirectly by a domestic partnership (“partnership CFC”) is treated as owning proportionately section 958(a) stock in each such partnership CFC as if the partnership were a foreign partnership. See Prop. Reg. §1.951A-5(c)
Domestic Partnerships and their Partners

General Rules

• As a result, a partner that is itself a U.S. shareholder of a CFC owned by a domestic partnership computes its GILTI inclusion amount for a taxable year by taking into account its proportionate share of the partnership’s pro rata share of each of the relevant items – tested income, tested loss, QBAI, tested interest income, and tested interest expense – of such CFC

  – This rule applies regardless of whether the domestic partnership itself has a GILTI inclusion amount for the taxable year. See Prop. Reg. §1.951A-5(g), Example 6

• In the case that a partner is treated as owning the section 958(a) stock of one or more partnership CFCs, the partner’s distributive share of the partnership’s GILTI inclusion amount is determined solely by reference to partnership CFCs in which the partner is not a U.S. shareholder. See Prop. Reg. §1.951A-5(c) and (g), Example 3

• A U.S. shareholder partnership is therefore required to provide to its partners their distributive share of the partnership’s GILTI inclusion amount, as well as provide to each U.S. shareholder partner the partner’s proportionate share of the partnership’s pro rata share (if any) of each CFC tested item of each partnership CFC of the partnership, and forms and instructions will be updated accordingly. See Prop. Reg. §1.951A-5(f)
Domestic Partnerships and their Partners

**Facts**

- Domestic partnership (PRS) has two individual partners, US1 and US2, owning 5 percent and 95 percent of PRS, respectively.
- PRS owns 100 percent of the single class of stock of FS1, a CFC with tested income of $100x, and 100 percent of the single class of stock of FS2, a CFC with tested loss of $50x.
- US2 also owns 100 percent of the single class of stock of FS3, a CFC with tested loss of $20x.
Analysis

- Under a pure entity approach, US2's distributive share of PRS's GILTI inclusion amount would be $47.50x (95% x ($100x — $50x)), and US2's pro rata share of FS3's tested loss of $20x would be unused.

- Under the Proposed Regulations, US2, because it is a U.S. shareholder partner with respect to FS1 and FS2, aggregates its proportionate share of the tested income and tested loss of FS1 and FS2 with its pro rata share of the tested loss of FS3 in determining its GILTI inclusion amount of $27.50x ((95% x ($100x — $50x)) — $20x).

- No need to reorganize for US2 to offset his pro rata share of FS1/FS2 tested income/loss with his pro rata share of FS3 tested loss.
FDII
Foreign Derived Intangible Income (FDII)

- Domestic C corporations (other than RICs and REITs) permitted a deduction equal to the sum of -
  - 37.5% of its “foreign-derived intangible income” (“FDII” as defined in section 250) of the domestic corporation, plus
  - 50% of
    i. the GILTI amount (if any) which is included in the gross income of such domestic corporation under section 951A for such taxable year, and
    ii. the amount treated as a dividend received by such corporation under section 78 which is attributable to the amount described in (i)

- Limitation based on taxable income (i.e., potential reduction of deductions)
- Special definitions in applying provision and complex calculation for determining amount
- Percentages for deduction reduced for taxable years beginning after 12/31/2025
  - FDII deduction reduced from 37.5% to 21.875%
  - GILTI deduction reduced from 50% to 37.5%
- Applicable for taxable years beginning after 12/31/17
FDII Formulaic Concepts

**FDII** = Deemed Intangible Income (DII) \( \times \) Foreign-Derived Eligible Income (FDDEI)

\[ \text{Deduction Eligible Income (DEI)} \]

**Deemed Intangible Income (DII) =**

Deduction Eligible Income (DEI) – Deemed Tangible Income Return (DTIR)

**DTIR =** 10% \( \times \) Qualified Business Asset Investment

**Deduction eligible income (DEI):**

- The excess of the gross income of the corporation, determined without regard to certain amounts, over the deductions (including taxes) properly allocable to such gross income.
- **Exceptions:**
  - Section 951(a)(1) inclusions
  - Section 951A inclusions
  - Financial services income
  - Dividends from CFCs
  - Domestic oil and gas extraction income
  - Foreign branch income
CFC <30 days
Elimination of 30-Day Exemption for Subpart F Income

• Prior to tax reform, section 951(a)(1) provided that Subpart F inclusions applied if a foreign corporation was a CFC for an uninterrupted period of 30 days or more for the year.

• The 30-day threshold for taxable years of foreign corporations beginning after 12/31/17 has been removed.

• This can impact planning with check-the-box elections for foreign corporations after an acquisition of a CFC by an individual, partnership or S corporation—as the section 336 gain would be GILTI.
Questions?
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