

¶737 Foreign Base Company Oil Related Income

NEW LAW EXPLAINED

Foreign base company oil related income eliminated from foreign base company income.—

Foreign oil related income is eliminated as a category of foreign base company income. Thus, U.S. shareholders of controlled foreign corporations (CFCs) are no longer required to include this type of income in gross income as subpart F income (Code Sec. 954(a), as amended by the Tax Cuts and Jobs Act). Foreign base company oil related income was defined as income of a foreign corporation and large oil producer (i.e., producer of 1,000 barrels a day or more) that is foreign oil related income (FORI), defined in Code Sec. 907(c)(2) and (c)(3). Foreign base company oil related income did not include oil related income of a CFC from sources within a foreign country where the oil or gas was extracted (extraction exception) or within the foreign country where the oil or gas is used or consumed (or is loaded in the foreign country on a vessel or aircraft as fuel for the vessel or aircraft) (use or consumption exception) (Code Sec. 954(g), prior to being stricken by the 2017 Tax Cuts and Jobs Act).

COMMENT

According to the House Committee Report, the foreign base company oil related income rules were not necessary in the context of the other international tax reforms. Moving to the participation exemption system could put U.S. oil and gas companies at a competitive disadvantage because of the loss of the Code Sec. 902 credit (see ¶705). Additionally, separate anti-base erosion rules under the bill (see ¶750 et seq.) make the separate anti-base erosion rules for oil and gas operations unnecessary (House Committee Report for the Tax Cuts and Jobs Act) (H. R. Rep. No. 115-409)).

Effective date. The amendments made by this section apply to tax years of foreign corporations beginning after December 31, 2017, and to tax years of U.S. shareholders with or within which such tax years of foreign corporations end (Act Sec. 14211(c) of the Tax Cuts and Jobs Act).

¶741 Subpart F Inclusions for Withdrawal of Qualified Investments

NEW LAW EXPLAINED

Subpart F inclusions for withdrawal of qualified investments repealed.—The provision repeals Code Sec. 955, which provides rules for determining a U.S. shareholder's pro rata share of the controlled foreign corporation's previously excluded subpart F income withdrawn from qualified investment in foreign base shipping operations (Act Sec. 14212(a) of the Tax Cuts and Jobs Act), striking Code Sec. 955). The U.S. shareholder's corresponding subpart F inclusion for the decrease in investment in foreign base company shipping operations is repealed. Also repealed are the provisions requiring a subpart F inclusion for: (1) a U.S. shareholder's pro rata share of the corporation's previously excluded subpart F income withdrawn from investment in less developed countries, and (2) a decrease in export trade assets, with respect to deferred export trade income (Code Sec. 951(a)(1)(A), as amended by the 2017 Tax Cuts Act and Act Sec. 14213(b)(5), striking Code Sec. 970(b)).

COMMENT

The House Committee Report states that because foreign base company shipping income is no longer taxed under Subpart F, a corresponding decrease in the CFC's investment should not result in an income inclusion for a U.S. shareholder of the CFC (House Committee Report for the Tax Cuts and Jobs Act) (H. R. Rep. No. 115-409)).

Effective date. The amendments made by this section apply to tax years of foreign corporations beginning after December 31, 2017, and to tax years of U.S. shareholders in which or with which such tax years of foreign corporations end (Act Sec. 14212(c) of the Tax Cuts and Jobs Act).

¶743 CFC Stock Attribution Rules

NEW LAW EXPLAINED

CFC constructive stock ownership attribution rule modified.— The modified constructive ownership rule of Code Sec. 958(b)(4), which precludes the attribution rules of Code Sec. 318(a)(3) from applying when stock of a foreign person would be treated as owned by a U.S. person, is eliminated. Elimination of this provision allows for the downward attribution of stock ownership from a foreign person to a related U.S. person (Code Sec. 958(b), as amended by the Tax Cuts and Jobs Act).

EXAMPLE

Foreign Corporation A owns 100 percent of one class of stock of Domestic Corporation B and 100 percent of one class of stock of another Foreign Corporation C. Under the constructive ownership rule, Domestic Corporation B is considered as owning the stock owned by its sole shareholder Foreign Corporation A, in Foreign Corporation C.

COMMENT

According to the Conference Committee Report, the reason for modifying the constructive stock ownership rule is to prevent the avoidance of the subpart F rules by turning off the constructive stock ownership rules that would otherwise treat a U.S. person as owning the stock of a foreign person. This type of avoidance transaction converts former CFCs to non-CFCs despite continuous ownership by U.S. shareholders (Conference Report on H.R. 1, Tax Cuts and Jobs Act (H. Rept. 115-466)). The subpart F inclusion amount continues to be determined based on direct or indirect ownership of the CFC, without application of the new downward attribution rule.

Effective date. The amendments made by this section apply to: (1) the last tax year of foreign corporations beginning in January 1, 2018, and each subsequent tax year of such foreign corporations, and (2) tax years of U.S. shareholders in which or with which such tax years of foreign corporations end (Act Sec. 14213(b) of the Tax Cuts and Jobs Act).

¶745 Definition of U.S. Shareholder

NEW LAW EXPLAINED

Definition of U.S. shareholder expanded.— The definition of a U.S. shareholder is expanded to include a U.S. shareholder who owns 10 percent or more of the foreign corporation's stock by value. A U.S. shareholder is defined as any U.S. person who owns directly, indirectly, or constructively: (1) 10 percent or more of the total combined voting power of all classes of stock of the foreign corporation, or (2) 10 percent or more of the total value of shares of all classes of stock of the foreign corporation (Code Sec. 951(b), as amended by the Tax Cuts and Jobs Act). The definition of a U.S. shareholder also applies for purposes of Title 26, and not just the subpart F provisions (Act Sec. 14101(e)(1) of the 2017 Tax Cuts Act, amending Code Sec. 951(b)).

COMMENT

Expanding the definition of U.S. shareholder also expands the number of shareholders who will be subject to the subpart F rules. The definition of a U.S. shareholder now corresponds to the definition of a CFC in Code Sec. 957(a), which looks to vote or value.

See ¶747 for a discussion of the elimination of the 30-day required period of CFC status.

Effective date. The amendment made by this section applies to tax years of foreign corporations beginning after December 31, 2017, and to tax years of U.S. shareholders with or within which such tax years of foreign corporations end (Act Sec. 14214(b) of the Tax Cuts and Jobs Act).

¶747 Required Period of CFC Status

NEW LAW EXPLAINED

Required period of CFC status eliminated.— In determining whether a U.S. shareholder is required to include amounts in income under subpart F, the required period that the controlled foreign corporation (CFC) must be controlled by U.S. shareholders is eliminated (Code Sec. 951(a)(1), as amended by the Tax Cuts and Jobs Act). The foreign corporation is no longer required to be a CFC for an uninterrupted period of 30 days or more during the tax year. Instead, if the foreign corporation is a CFC at any time during the tax year, U.S. shareholders must include amounts in income under subpart F.

COMMENT

The provision now corresponds to the definition of a CFC in Code Sec. 957, which only requires that the stock ownership requirements be met on any day during the tax year. The House Committee Report states that the original purpose of the provision to facilitate tax administration is no longer necessary in light of technology that tracks owner and corporate tax attributes on a daily basis. It also states that the rule presents opportunities for taxpayers to structure transactions to avoid tax (House Committee Report for the Tax Cuts and Jobs Act) (H. Rept. 115-409)).

See ¶745 for a discussion of the expanded definition of a U.S. shareholder.

Effective date. The amendment made by this section applies to tax years of foreign corporations beginning after December 31, 2017, and to tax years of U.S. shareholders with or within which such tax years of foreign corporations end (Act Sec. 14215(b) of the Tax Cuts and Jobs Act).