IRS Releases Guidelines for Examining CFC Transactions

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On July 17, 2015, the Internal Revenue Service (IRS) released three new "practice units," each examining a particular type of transaction involving a controlled foreign corporation (CFC). The IRS develops practice units internally for use both as training materials and as job aids for examiners. Practice units are not formal legal authorities and may not comprehensively reflect the IRS' interpretation of current law. They can, however, provide insight into how IRS examiners will approach certain issues during an audit. ***Taxpayers' calculations of Subpart F income have rarely been a focus of IRS audit activity, but these practice units suggest examiners will be encouraged to look more closely at multinational taxpayers' determinations of and accounting for Subpart F income.***

I. CFCs and Subpart F Income

A CFC is a foreign corporation in which U.S. shareholders own, directly or indirectly, stock representing more than 50% of the corporation's aggregate voting power or aggregate stock value. Although the United States generally does not tax U.S. persons on the earnings of a foreign corporation in which they hold stock until the earnings are remitted to them as, for example, dividends, a different rule applies when the corporation is a CFC. In that case, any U.S. shareholder who holds stock representing at least 10% of the corporation's total combined voting power must include in its U.S. income—and pay U.S. tax on—its pro rata share of certain of the CFC's earnings. These certain CFC earnings are known as Subpart F income.

The recently-released practice units deal with two types of Subpart F income: foreign personal holding company income (FPHCI) and foreign base company sales income. FPHCI consists of, essentially, passive income, specifically including dividends and interest. Foreign base company sales income consists of income from the sale of goods that is especially "mobile," in that the activities giving rise to the income need not be performed where the goods are produced or where they are consumed. More formally, foreign base company sales income is income derived by a CFC in connection with: (1) the purchase or sale of goods from, to, or on behalf of a related party, where (2) the goods were manufactured or otherwise produced outside the CFC's country of organization, without any substantial contribution by the CFC, and where (3) the goods are sold for consumption, use, or other disposition outside the CFC's country of organization. For purposes of both FPHCI and foreign base company sales income, a party is related to a CFC if it controls (or is controlled by) the CFC, with control defined as direct, indirect, or constructive ownership of more than 50% of the CFC's (or the related party's) stock, by vote or value.

Each practice unit first presents a fact pattern in which a CFC earns income and then explains how to determine whether that income is Subpart F income.

II. CFC Sale to Related Party with Same-Country Unrelated Party Manufacturing

In the first practice unit, USP, a U.S. corporation, has two wholly-owned foreign subsidiaries, CFC1 and CFC2. Because they are wholly owned by a U.S. person, these foreign subsidiaries qualify as CFCs, and because USP owns 100% of their stock, it is currently taxable on their Subpart F income. CFC1 is incorporated in Country A, and CFC2 is incorporated in Country B. Both CFC1 and CFC2 purchase goods from unrelated Country B manufacturers and sell the goods to USP without substantially altering them. USP sells the goods to U.S. consumers.

The practice unit walks an examiner through application of the three-part foreign base company sales income definition to the foregoing fact pattern. First, because they are wholly owned by USP, both CFC1 and CFC2 sell goods to a related party. Second, both CFC1 and CFC2 sell goods for consumption outside their countries of organization. The CFCs are incorporated in, respectively, Country A and Country B, but the goods are consumed in the United States. Third, CFC1 sells goods that were manufactured in Country B, outside its country of organization, and did not substantially contribute to their manufacture. Consequently, its income from sales to USP is Subpart F income, and USP will be currently taxable on it. CFC2, however, does not sell goods that were manufactured outside its country of organization: It is incorporated in Country B and buys from a Country B manufacturer. Because the goods are manufactured in the same country in which CFC2 is organized, its income from sales to USP is not Subpart F income.

III. CFC Purchase from Related Party with Same-Country Sales

In the second practice unit, complementary to the first, USP manufactures goods in the United States and sells them to its wholly-owned, Country A subsidiary, CFC1. Without substantially altering the goods, CFC1 sells them on to: (1) unrelated third parties in Country A, (2) CFC2, its wholly-owned Country A subsidiary, and (3) CFC3, its wholly-owned Country B subsidiary. The practice unit assumes that the goods are consumed in the locations into which CFC1 sells them but advises examiners to confirm that the location of sale is in fact the ultimate destination.

In analyzing whether CFC1's sales income is foreign base company sales income, the practice unit focuses first on relatedness. The unrelated third parties are, by definition, unrelated, but because CFC1 owns 100% of the stock of CFC2 and CFC3, both CFC buyers are related parties. Second, the goods CFC1 sells to CFC2 and CFC3 are manufactured outside CFC1's country of organization. USP manufactures the goods in the United States, while CFC1 is incorporated in Country A. Third, because the practice unit assumes that the goods are used or consumed in the country into which they are sold, and because CFC1 is incorporated in Country A, CFC1's sales to the unrelated third parties and to CFC2 in Country A do not generate Subpart F income. The opposite result holds for its sales to CFC3. CFC3 is organized in Country B, and the practice unit assumes the goods sold to it are consumed there. Hence, the goods are consumed outside CFC1's country of incorporation, and its income from those sales is Subpart F income.

IV. Receipt of a Dividend or Interest from a Related CFC

The third practice unit focuses on two exceptions to the general rule that interest and dividends are Subpart F income: the same-country exception and the look-through rule. Under the same-country exception, a dividend or interest payment is not Subpart F income if: (1) the payor is a related corporation that (2) is incorporated in the same country as the payee and (3) uses a substantial part of its assets in a trade or business in that same country, unless (4) the payment reduces the payor's own Subpart F income. The much broader look-through rule exempts dividends and interest from Subpart F income if: (1) the payor is a related CFC, and (2) the payment does not reduce the payor's Subpart F income or income effectively connected with a U.S. trade or business (ECI).

In this fact pattern, USP has three subsidiaries, none of which earns ECI: (1) CFC1, wholly owned by USP and incorporated in Country A; (2) CFC2, wholly owned by CFC1 and incorporated in Country B; and (3) CFC3, wholly owned by USP and incorporated in Country A. CFC2 earns income from operating an active business in Country B and pays a $100 dividend to CFC1. CFC3 earns $200 of interest income and pays $200 of interest to CFC1.

CFC2's dividend to CFC1 satisfies the look-through rule but not the same-country exception. Because CFC2 is not incorporated in CFC1's country of organization, Country A, and because CFC2 does not use a substantial part of its assets in a Country A business, the same-country exception does not apply. Nevertheless, because CFC1 owns 100% of CFC2's stock, they are related. Further, because CFC2 earns the income from which it paid the dividend by operating an active business in Country B, the underlying income was not Subpart F income, so the dividend payment does not reduce CFC2's Subpart F income. Hence, the look-through rule applies.

At first blush, CFC3's interest payment to CFC1 might appear to qualify for the same-country exception and for the look-through rule. CFC1 and CFC3 are both incorporated in Country A, and they are related because USP owns 100% of their stock. Yet, CFC3's interest payment to CFC1 reduces its Subpart F income. CFC3 earned $200 of interest income, which was Subpart F income. Had it retained those funds, the income would have been currently taxable to USP. When CFC3 paid $200 of interest to CFC1, however, it obtained a $200 interest deduction that reduced its Subpart F income to zero. Consequently, the payment cannot satisfy either of the two exceptions and is Subpart F income to CFC1, currently taxable to USP.

The practice unit offers three additional points of guidance to examiners concerning dividend payments:

1. First, in addition to actual dividends, deemed dividends—such as a distribution to a CFC in redemption of stock that is treated as a dividend under general corporate tax rules—can constitute Subpart F income. The same-country exception and look-through rule apply to some, but not all, deemed dividends.

2. Second, if the funds used to pay a dividend are attributable to earnings accrued before the CFC acquired the payor's stock, then the dividend payment will not qualify as Subpart F income.

3. Lastly, an examiner should take into account previously promulgated anti-abuse rules precluding application of the look-through rule to: (1) payments that reduce the U.S. tax base, (2) payments in avoidance of the rules governing the investment of unrepatriated CFC earnings in U.S. assets, (3) payments involving options and similar interests, where a principal purpose for using the option or similar interest is to qualify the payment for the look-through rule, and (4) payments through a conduit entity that change the character of income in a manner designed to qualify the payments for the look-through rule. The practice unit directs examiners not to apply these rules without first consulting with IRS counsel.

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These practice units present a straightforward interpretation of certain Subpart F definitions, the same-country exception, and the look-through rule, but they also highlight the technical complexity of the Subpart F rules and the disparate results that even small factual variations can produce. The instructions to examiners embedded in them reflect some common themes:

1. All three practice units direct the examiner to determine early in the examination the amount of a taxpayer's unrepatriated offshore earnings. Noting that the taxpayer's Subpart F inclusion is limited to this amount, the practice units characterize this determination as a "decision point," suggesting that the larger the amount, the greater the likelihood that the audit will encompass CFC transactions. Taxpayers should thus pay keen attention to the accuracy of the accumulated earnings and profits data they report for each CFC on its respective Form 5471.

2. Both practice units dealing with sales income emphasize that the Subpart F rules and transfer pricing rules are not mutually exclusive and encourage an examiner reviewing Subpart F issues to consult with the IRS' transfer pricing practice group. These instructions may reflect a more comprehensive approach to auditing taxpayers' foreign related-party transactions.

3. Two of the practice units identify a taxpayer's foreign-country income tax, value-added tax, and property tax returns as resources the examiner may consult to determine the source and destination of goods sold by or to a CFC, as well as the location where and the extent to which a CFC uses its assets in a trade or business. Taxpayers can expect to be asked to provide copies of their foreign tax filings during an IRS audit and should likely be prepared to supply customs or shipping documents.

4. Each practice unit identifies Country A as "low tax," signifying a tax rate lower than that of the United States. The practice units warn examiners that taxpayers may sell or otherwise channel

payments through a low-taxed CFC to shift profits out of the United States or another, relatively high-tax jurisdiction. These comments suggest that transactions involving CFCs in countries with tax rates below the U.S. rate may receive heightened scrutiny.

For more information concerning this Alert, please contact a member of Caplin & Drysdale's International Tax Group.

Peter A. Barnes
pbarnes@capdale.com
202.862.5027

J. Clark Armitage
carmitage@capdale.com
202.862.5078

H. David Rosenbloom
drosenbloom@capdale.com
202.862.5037

Neal M. Kochman
nkochman@capdale.com
202.862.5024

Patricia Gimbel Lewis
plewis@capdale.com
202.862.5017

Mark D. Allison
mallison@capdale.com
212.379.6060

Elizabeth J. Stevens
estevens@capdale.com
202.862.5039

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For more information, please visit us at www.caplindrysdale.com.

Washington, DC Office:
One Thomas Circle, NW
Suite 1100
Washington, DC 20005
202.862.5000

New York, NY Office:
600 Lexington Avenue
21st Floor
New York, NY, 10022
212.379.6000

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