US International Tax Alert

Treasury, IRS release final and proposed guidance clarifying stock attribution rules

On September 21, 2020, the Treasury and the IRS released final and proposed regulations relating to the repeal of section 958(b)(4) by the 2017 Tax Cuts and Jobs Act (TCJA). As a result of section 958(b)(4) repeal, stock in a foreign corporation owned by a foreign person can be attributed "downward" to a US person under section 318(a)(3) for various purposes, including the determination of whether the US person is a US shareholder and the foreign corporation is a CFC.

The final regulations (Final Regulations) finalize proposed regulations issued on October 1, 2019 (2019 Proposed Regulations) that modify the operation of certain rules outside of Subpart F. They are generally retroactive to October 1, 2019, although a taxpayer can choose to apply them to the last tax year of foreign corporations beginning before January 1, 2018 and subsequent years.

In the Preamble to the Final Regulations, the government declined to adopt requests:

- To apply the portfolio interest exception in section 881(c) to payments to foreign corporations that are CFCs due to section 958(b)(4) repeal, and
- To apply section 1248 without regard to section 958(b)(4) repeal.

One notable change from the 2019 Proposed Regulations is that a regulatory exception from the CFC payee rule in section 267(a)(3)(B)(i) was expanded by the Final Regulations to exclude all amounts payable to CFCs that do not have any section 958(a) US shareholders. (However, the CFC payee rule does continue to apply to a CFC that has a section 958(a) US shareholder even where the foreign corporation is a CFC due solely to section 958(b)(4) repeal.)

Also, the government postponed finalizing a rule that would disregard section 958(b)(4) repeal for purposes of the requirement that the PFIC asset test be performed using adjusted basis (not FMV) if the foreign corporation is a non-publicly traded CFC.

The proposed regulations (2020 Proposed Regulations) generally reverse the impact of section 958(b)(4) repeal for purposes of:

- Outbound transfers of domestic corporation stock under section 367(a), which can affect the eligibility requirements for filing a GRA, and
- The CFC look-through rule in section 954(c)(6), denying its availability to payments received from CFCs due to section 958(b)(4) repeal for tax years ending on or after September 21, 2020.

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