

## **HIGHLIGHTS OF THIS ISSUE**

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

### **INCOME TAX**

**T.D. 9368, page 382.**

**REG-114126-07, page 410.**

Final, temporary, and proposed regulations under section 904 of the Code provide transition rules regarding the reduction of the number of separate foreign tax credit limitation categories under section 904(d). A public hearing is scheduled for April 22, 2008.

**T.D. 9369, page 394.**

**REG-104713-07, page 409.**

Temporary and proposed regulations under section 1561 of the Code affect component members of a controlled group of corporations and consolidated groups filing life-nonlife federal income tax returns. The regulations also provide guidance for calculating and apportioning between component members any amount of additional tax and any reduction in the amount exempted from the alternative minimum tax.

**Notice 2008-20, page 406.**

This notice identifies the components of the Intermediary Transaction Tax Shelter transaction listed and described in Notice 2001-16. The notice also identifies the persons who are treated as participants in an Intermediary Transaction Tax Shelter under regulations section 1.6011-4(c)(3)(i)(A). Notice 2001-16 modified.

**Rev. Proc. 2008-13, page 407.**

This procedure provides the maximum vehicle values for use with the special valuation rules under regulations sections 1.61-21(d) and (e). These values are indexed for inflation and must be adjusted annually by referring to the Consumer Price Index.

### **TAX CONVENTIONS**

**Announcement 2008-8, page 403.**

This announcement provides the tax rates for various types of income under a new tax treaty with Belgium and new protocols with Denmark, Finland, and Germany. The tables in this announcement can be used, depending on the effective dates, to replace the entries for these four countries in Tables 1 and 2 in Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities (For Withholding in 2007)* and Publication 901, *U.S. Tax Treaties* (Rev. June 2007).

### **ADMINISTRATIVE**

**T.D. 9369, page 394.**

**REG-104713-07, page 409.**

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**Announcements of Disbarments and Suspensions begin on page 412.**  
**Finding Lists begin on page ii.**



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Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying

the tax law with integrity and fairness to all.

## Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents are compiled semiannually into Cumulative Bulletins, which are sold on a single-copy basis.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations,

court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

### **Part I.—1986 Code.**

This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

### **Part II.—Treaties and Tax Legislation.**

This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

### **Part III.—Administrative, Procedural, and Miscellaneous.**

To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

### **Part IV.—Items of General Interest.**

This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

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# Part I. Rulings and Decisions Under the Internal Revenue Code of 1986

## Section 904.—Limitation on Credit

26 CFR 1.904-2: Carryback and carryover of unused foreign tax.

### T.D. 9368

#### DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 1

#### Reduction of Foreign Tax Credit Limitation Categories Under Section 904(d)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

**SUMMARY:** This document contains final and temporary Income Tax Regulations regarding the reduction of the number of separate foreign tax credit limitation categories under section 904(d) of the Internal Revenue Code (Code). Section 404 of the American Jobs Creation Act of 2004 (AJCA) reduced the number of section 904(d) separate categories from eight to two, effective for taxable years beginning after December 31, 2006. These temporary regulations affect taxpayers claiming foreign tax credits and provide guidance needed to comply with the statutory changes made by the AJCA. The text of these temporary regulations also serves as the text of the proposed regulations (REG-114126-07) set forth in the notice of proposed rulemaking on this subject published elsewhere in this issue of the Bulletin..

**DATES:** *Effective Date:* These regulations are effective on December 21, 2007.

*Applicability Dates:* For dates of applicability, see §§1.904-2T(i)(3), 1.904-4T(n), 1.904-5T(o)(3), 1.904-7T(g)(6), and 1.904(f)-12T(h)(6). These regulations apply to taxable years of United States taxpayers beginning after December 31, 2006, and ending on or after December 21, 2007, and to taxable years

of foreign corporations which end with or within taxable years of their domestic corporate shareholders beginning after December 31, 2006, and ending on or after December 21, 2007.

FOR FURTHER INFORMATION CONTACT: Jeffrey L. Parry, (202) 622-3850 (not a toll-free call).

#### SUPPLEMENTARY INFORMATION:

##### Background

This document contains amendments to the regulations under section 904 relating to the application of separate foreign tax credit limitations to certain categories of income under section 904(d), as amended by the AJCA. Prior to the effective date of the AJCA amendments (that is, for taxable years beginning before January 1, 2007 (“pre-2007 taxable years”)), the foreign tax credit limitation applied separately to the following categories of income: passive income, high withholding tax interest, financial services income, shipping income, certain dividends from a DISC or former DISC, taxable income attributable to certain foreign trade income, certain distributions from a FSC or former FSC, and any other income not described in this sentence (“general limitation income”). Other provisions of the Code that subject other categories of income to separate foreign tax credit limitations were not amended by the AJCA. See, for example, sections 56(g)(4)(C)(iii)(IV), 245(a)(10), 865(h), 901(j), and 904(h)(10); see also H.R. Rep. No. 108-755, at 383 (October 7, 2004).

Effective for taxable years beginning after December 31, 2006 (“post-2006 taxable years”), the AJCA reduced the number of section 904(d) separate categories to two categories for “passive category income” and “general category income.” New section 904(d)(2)(A) defines passive category income as passive income and specified passive category income, and general category income as income other than passive category income. In addition, new section 904(d)(2)(C) and (D) provides rules concerning the treatment of financial services income and companies.

These temporary regulations modify the regulations under section 904 to reflect the new separate categories for passive category income and general category income, and provide transition rules for the treatment of earnings and profits and foreign income taxes of controlled foreign corporations and noncontrolled section 902 corporations accumulated in pre-2007 taxable years, overall foreign losses and separate limitation losses under section 904(f), and the carryover and carryback of excess foreign taxes under section 904(c).

##### Explanation of Provisions

###### I. Carryovers and Carrybacks of Excess Foreign Taxes under Section 904(c)

Section 904(d)(2)(K)(i), as added by the AJCA, provides that excess taxes carried from a pre-2007 taxable year to a post-2006 taxable year shall be assigned to the post-2006 separate categories based on where the related income would have been assigned had such taxes been paid or accrued in a post-2006 taxable year.

Consistent with this statutory amendment, §1.904-2T(i)(1)(i) provides that if a taxpayer carries over to a post-2006 taxable year any excess taxes that were paid, accrued, or deemed paid with respect to income in any pre-2007 separate category, the excess taxes are assigned to the appropriate post-2006 separate category as if the taxes had been paid or accrued in a post-2006 taxable year. For example, to the extent that any taxes were related to income that would have been treated as high-taxed income under section 904(d)(2)(B)(iii)(II), such taxes will be assigned to the post-2006 separate category for general category income.

Because the IRS and the Treasury Department recognize that taxpayers may face difficulties in reconstructing excess taxes accounts, §1.904-2T(i)(1)(ii) of the temporary regulations provides a safe harbor. Under the safe harbor, a taxpayer may assign excess taxes in any pre-2007 separate category, except the passive category, to the post-2006 separate category for general category income. The safe harbor provides that excess taxes in the pre-2007 passive category will be assigned to the

post-2006 separate category for passive category income.

Section 904(d)(2)(K)(ii), as added by the AJCA, authorizes the Secretary to issue regulations for allocating carrybacks of excess taxes with respect to income from a post-2006 taxable year to a pre-2007 taxable year for purposes of allocating the excess taxes among the separate categories in effect for the taxable year to which carried. The IRS and the Treasury Department believe that it is appropriate to allow a taxpayer to reconstruct separate categories of income earned and excess taxes paid or accrued in its first post-2006 taxable year as if the pre-2007 rules applied. Accordingly, §1.904-2T(i)(2)(i) provides that if a taxpayer carries back excess taxes paid, accrued, or deemed paid with respect to income in the post-2006 separate category for passive category income or general category income to a pre-2007 taxable year, the excess taxes are assigned to the appropriate pre-2007 separate category or categories as if the taxes had been paid or accrued in a pre-2007 taxable year. Section 1.904-2T(i)(2)(ii) provides that a taxpayer may, in lieu of reconstruction, assign excess taxes in the separate category for general category income to the pre-2007 general category, and excess taxes in the separate category for passive category income to the pre-2007 passive category.

## II. Definition of Passive Category Income

New section 904(d)(2)(A)(i) defines passive category income as passive income and specified passive category income. New section 904(d)(2)(B)(i) generally defines passive income as “any income received or accrued by any person which is of a kind which would be foreign personal holding company income (as defined in section 954(c)).” Passive income includes amounts includible in gross income under section 1293, except as provided in section 904(d)(3)(H) (providing that look-through treatment applies to an amount included in gross income under section 1293 if the passive foreign investment company is a controlled foreign corporation (CFC) and the taxpayer is a United States shareholder in such CFC) and section 904(d)(2)(E)(ii) (providing that an inclusion under section 1293 with respect to a foreign corporation that is a noncontrolled section 902

corporation with respect to the taxpayer shall be treated as a dividend from such corporation). See section 904(d)(2)(B)(ii). Passive income does not include export financing interest and high-taxed income. See section 904(d)(2)(B)(iii). New section 904(d)(2)(B)(iv) provides that in determining whether income is of a kind which would be foreign personal holding company income, the rules of section 864(d)(6) apply only in the case of income of a CFC.

New section 904(d)(2)(B)(v) defines specified passive category income as dividends from a DISC or former DISC (as defined in section 992(a)) to the extent such dividends are treated as income from sources without the United States, taxable income attributable to foreign trade income (FTI) within the meaning of section 923(b), and distributions from a FSC or former FSC out of earnings and profits attributable to FTI (within the meaning of section 923(b)) or interest or carrying charges (as defined in section 927(d)(1)) derived from a transaction which results in FTI (as defined in section 923(b)).

The temporary regulations reflect the new definitions of passive category income, passive income, and specified passive category income. Section 1.904-4T(b)(3) incorporates the definition of specified passive category income in section 904(d)(2)(B)(v), which includes dividends from DISCs, distributions from FSCs, and FTI. Because these types of income constitute specified passive category income and not passive income, such income can never qualify as financial services income that could be treated as general category income.

The final regulations at §1.904-5(h)(3) currently provide that gain from the sale of a partnership interest is assigned to the separate category for passive income. Section 954(c)(4), which was enacted by the AJCA, provides a look-through rule for sales of 25-percent-owned partnerships. Because the definition of passive income in section 904(d)(2)(B) refers to section 954(c), these temporary regulations revise §1.904-5(h)(3) to reflect that gain on the sale of a partnership interest by a 25-percent partner is assigned to the separate category for general category income, to the extent that, under the section 954(c)(4) look-through rule, the gain is not classified as foreign personal holding company income.

## III. Definition of Financial Services Income

Section 904(d)(2)(C)(i), as amended by the AJCA, provides that financial services income shall be treated as general category income in the case of a member of a financial services group and any other person predominantly engaged in the active conduct of a banking, insurance, financing or similar business. New section 904(d)(2)(C)(ii) defines a financial services group as “any affiliated group (as defined in section 1504(a) without regard to paragraphs (2) and (3) of section 1504(b)) which is predominantly engaged in the active conduct of a banking, insurance, financing or similar business.” In determining whether a group is so engaged, only the income of members of the group that are U.S. corporations or CFCs in which U.S. corporations own, directly or indirectly, at least 80 percent of the vote or value of the stock are taken into account. Section 904(d)(2)(C)(iii) provides that the Secretary “shall by regulation specify for purposes of this subparagraph the treatment of financial services income received or accrued by partnerships and by other pass-thru entities which are not members of a financial services group.”

Section 904(d)(2)(D), as amended by the AJCA, generally adopts the definition of financial services income of former section 904(d)(2)(C)(i) and (ii), except that it includes neither the rule providing that financial services income includes export financing interest that would be high withholding tax interest, nor the exception in former section 904(d)(2)(C)(iii) for high withholding tax interest and export financing interest that would not be high withholding tax interest. New section 904(d)(2)(D)(i) defines financial services income as “any income which is received or accrued by any person predominantly engaged in the active conduct of a banking, insurance, financing or similar business,” and which is either described in section 904(d)(2)(D)(ii) (which provides a general description of financial services income) or is passive income (determined without regard to whether it is high-taxed). An item of income satisfies the general description of financial services income if such income is (1) derived in the active conduct of a banking, financing, or similar business; (2) derived from the investment

by an insurance company of its unearned premiums or reserves ordinary and necessary for the proper conduct of its insurance business; or (3) of a kind which would be insurance income as defined in section 953(a) determined without regard to section 953(a)(1)(A), which limits insurance income to income from countries other than the country in which the corporation was created or organized. See section 904(d)(2)(D)(ii).

The final regulations at §1.904-4(e) provide rules concerning the separate category for financial services income. Section 1.904-4(e)(1) provides a general definition of financial services income. Section 1.904-4(e)(2) provides an exclusive list describing items of income that are treated as active financing income. Section 1.904-4(e)(3)(i) provides that a person is considered to be predominantly engaged in the active financing business for any taxable year if for that year at least 80 percent of its gross income is active financing income, as defined in §1.904-4(e)(2).

On June 26, 2007, the IRS and the Treasury Department issued Notice 2007-58, 2007-29 I.R.B. 88 (see §601.601(d)(2)(ii)(b)), in which the IRS and the Treasury Department announced that in light of the amendments to the foreign tax credit rules in the AJCA, they were reviewing the provisions relating to financial services income, active financing income, and financial services entities in §1.904-4(e). The notice also solicited comments relating to these definitions. The IRS and the Treasury Department received several written comments and are continuing to study this issue. Accordingly, the rules of §1.904-4(e) of the current final regulations are not being revised at this time.

#### IV. Pre-2007 Separate Categories

To reflect the reduction of separate categories, §§1.904-4(d) (definition of high withholding tax interest), 1.904-4(f) (definition of shipping income), and 1.904-4(g) (treatment of dividends from a noncontrolled section 902 corporation) are reserved.

It should be noted that the separate category for shipping income remained effective for taxable years beginning before January 1, 2007. Section 415 of the

AJCA repealed the foreign base company shipping income rules of section 954(f), effective for taxable years of foreign corporations beginning after December 31, 2004, and taxable years of U.S. shareholders in which or with which such taxable years of the foreign corporations end. Notice 2007-13, 2007-5 I.R.B. 410, stated that in light of the repeal of section 954(f), §1.954-1(e)(4)(i)(A) (providing a trump rule for income that qualifies as foreign base company shipping income) is obsolete, and §1.954-6 (providing rules for determining foreign base company shipping income) is effective only for purposes of applying the rules for the withdrawal of previously excluded subpart F income from qualified investments. However, a technical correction in the Tax Increase Prevention and Reconciliation Act of 2005 confirmed that the separate category for shipping income is defined by reference to shipping income as defined in section 954(f) prior to its repeal. Accordingly, the subpart F shipping regulations continued to apply for section 904(d) purposes, and the separate category for shipping income continued to exist, through the end of taxable years beginning before 2007. See §601.601(d)(2)(ii)(b).

The final regulations at §§1.904-4(h) (definition of and rules relating to treatment of export financing interest), 1.904-4(i) (concerning the interaction of section 907(c) and §1.904-4), 1.904-4(j) (concerning DASTM gain or loss), 1.904-4(l) (priority rules for income meeting the definitions of more than one pre-2007 separate category), and 1.904-5 have been revised to reflect the new separate categories for passive category income and general category income.

#### V. Post-1986 Undistributed Earnings and Post-1986 Foreign Income Taxes of a Foreign Corporation as of the End of the Corporation's Last Pre-2007 Taxable Year

##### A. General rule of reconstruction

If a dividend is paid, or an amount is included in the gross income of a U.S. shareholder under section 951, out of post-1986 undistributed earnings (or pre-1987 accumulated profits) of a foreign corporation attributable to more than one separate category, the amount of foreign income taxes

deemed paid by the domestic shareholder or upper-tier corporation under section 902 or 960 is computed separately with respect to the post-1986 undistributed earnings (or pre-1987 accumulated profits) in each separate category out of which the dividend is paid or to which the subpart F inclusion is attributable. See §§1.902-1T(d)(1); 1.960-1(i)(1). The temporary regulations implement the reduction of separate categories under the AJCA by recharacterizing the foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes in the pre-2007 separate categories as pools of post-1986 undistributed earnings and post-1986 foreign income taxes in the separate categories for passive category income and general category income on the first day of the foreign corporation's first post-2006 taxable year.

Section 1.904-7T(g)(2) of the temporary regulations provides that in the case of a CFC or noncontrolled section 902 corporation that has pools of post-1986 undistributed earnings and post-1986 foreign income taxes in any pre-2007 separate category, the earnings and foreign income taxes that exist as of the end of the foreign corporation's last pre-2007 taxable year are treated as if they were accumulated and paid during a period when the post-2006 rules applied, including the rules under section 904(d)(3)(E). Recharacterized amounts of earnings and taxes are taken into account in determining the opening balance of the post-1986 undistributed earnings and post-1986 foreign income taxes pools in each of the foreign corporation's post-2006 separate categories on the first day of the foreign corporation's first post-2006 taxable year.

Section 1.904-7T(g)(3)(i) of the temporary regulations provides that in order to substantiate the recharacterization of the pools of post-1986 undistributed earnings and post-1986 foreign income taxes in any pre-2007 separate category, the pools must be reconstructed for each pre-2007 taxable year, beginning with the first year in which earnings were accumulated in the pool with respect to each such pre-2007 separate category. Earnings are treated as if they were accumulated in a period when the post-2006 rules applied, taking into account earnings distributed and taxes deemed paid *pro rata* from the amounts that were added to the pools in each sep-

arate category in subsequent pre-2007 taxable years. As reconstructed, the pools of earnings and taxes in a pre-2007 separate category are assigned to the post-2006 separate categories on the first day of the foreign corporation's first post-2006 taxable year. (A hovering deficit is subject to the same rules for purposes of identifying the post-2006 separate categories to which the deficit is assigned, but the hovering deficit is not included in determining the opening balance of the pool. See §1.367(b)-7.)

Similar rules apply to assign to the post-2006 separate categories amounts of previously-taxed earnings and profits described in section 959(c)(1)(A), accumulated deficits, and pre-1987 accumulated profits in pre-2007 separate categories. For example, if there is an accumulated deficit in any pre-2007 separate category as of the end of a CFC's or noncontrolled section 902 corporation's last pre-2007 taxable year, the deficit and associated taxes (if any) are treated in the same manner as if there had been positive accumulated earnings and taxes in the separate category, that is, the deficit and taxes are treated as if the post-2006 rules applied in the year the deficit was accumulated and the taxes were paid. The earnings and deficits in earnings making up the accumulated deficit are assigned to the post-2006 separate categories based on where those items of income and expenses or losses would have been assigned had they been incurred when the post-2006 rules were in effect. As reconstructed, the deficit is taken into account in determining the opening balance of the post-1986 undistributed earnings pool in the appropriate post-2006 separate category or categories on the first day of the foreign corporation's first post-2006 taxable year.

The IRS and the Treasury Department recognize that shareholders may face difficulties in reconstructing historical accumulated earnings and taxes accounts of a foreign corporation. Therefore, a reasonable approximation of the amounts properly included in the post-2006 separate categories, based on available records obtained through reasonable, good-faith efforts by the taxpayer, will adequately substantiate reconstruction.

## B. Safe harbors

### 1. In general

For pools of undistributed earnings and foreign income taxes in the pre-2007 separate categories of CFCs and non-controlled section 902 corporations, the temporary regulations provide that a taxpayer may elect to apply one of two safe harbors in lieu of reconstructing historical accumulated earnings and taxes accounts of the foreign corporation. See §1.904-7T(g)(3)(ii). The safe harbors apply to allocate post-1986 undistributed earnings (as well as deficits and previously-taxed earnings, if any) and pre-1987 accumulated profits and associated foreign income taxes in a foreign corporation's pre-2007 separate categories. Amounts allocated to the post-2006 separate categories under a safe harbor are taken into account in computing the opening balance of the post-1986 undistributed earnings and post-1986 foreign income taxes pools, as well as pre-1987 accumulated profits and pre-1987 foreign income taxes, in each of the foreign corporation's post-2006 separate categories on the first day of the foreign corporation's first post-2006 taxable year.

### 2. General safe harbor

Under §1.904-7T(g)(3)(ii)(B)(1) of the temporary regulations, the safe harbor for post-1986 undistributed earnings and post-1986 foreign income taxes (as well as deficits and previously-taxed earnings, and pre-1987 accumulated profits, if any) in a CFC's or noncontrolled section 902 corporation's pre-2007 separate category for passive income, certain dividends from a DISC or former DISC, taxable income attributable to certain foreign trade income, or certain distributions from a FSC or former FSC provides that such earnings and taxes are allocated to the post-2006 separate category for passive category income. Under §1.904-7T(g)(3)(ii)(B)(2), the safe harbor for post-1986 undistributed earnings and post-1986 foreign income taxes (as well as deficits, previously-taxed earnings, and pre-1987 accumulated profits, if any) in a CFC's or noncontrolled section 902 corporation's pre-2007 separate category for financial services income, shipping income, or general limitation

income provides that such earnings and taxes are allocated to the post-2006 separate category for general category income.

Under §1.904-7T(g)(3)(ii)(B)(3), the safe harbor for post-1986 undistributed earnings and post-1986 foreign income taxes (as well as deficits, previously-taxed earnings, and pre-1987 accumulated profits, if any) in a CFC's or noncontrolled section 902 corporation's pre-2007 separate category for high withholding tax interest generally provides that such earnings and taxes are allocated to the post-2006 separate category for passive category income. However, §1.904-7T(g)(3)(ii)(B)(4) provides that if a CFC has positive post-1986 undistributed earnings or pre-1987 accumulated profits and foreign income taxes attributable to high-withholding tax interest, such earnings and taxes are allocated to the post-2006 separate category for general category income if the earnings would qualify as income subject to high foreign taxes under section 954(b)(4) if the entire amount of earnings in the pre-2007 pool in the separate category for high withholding tax interest were treated as a net item of income subject to the rules of §1.954-1(d). If the earnings would not qualify as income subject to high foreign taxes under section 954(b)(4), the earnings and taxes are allocated to the post-2006 separate category for passive category income. The IRS and the Treasury Department believe that, given that high withholding tax interest generally constitutes subpart F income unless it is high-taxed, this safe harbor is an appropriate alternative to reconstructing earnings and taxes in a CFC's separate category for high withholding tax interest.

### 3. Interest apportionment safe harbor

A second safe harbor is provided under §1.904-7T(g)(3)(ii)(C) which allows taxpayers to allocate the post-1986 undistributed earnings and post-1986 foreign taxes (and deficits, previously-taxed earnings, and pre-1987 accumulated profits, if any) in a CFC's or noncontrolled section 902 corporation's pre-2007 pools following the principles of the safe harbor method described in the transition rules under §1.904-7T(f)(4)(ii) for post-1986 undistributed earnings and post-1986 foreign income taxes in the non-look-through pool of a controlled foreign corporation or noncontrolled section 902 corporation.

#### 4. Election of safe harbor

To allocate pools of undistributed earnings (and deficits, previously-taxed earnings, and pre-1987 accumulated profits, if any) and foreign income taxes in the pre-2007 separate categories of a CFC or noncontrolled section 902 corporation to the foreign corporation's post-2006 separate categories, the temporary regulations at §1.904-7T(g)(3)(iii) provide that a taxpayer may elect to apply a safe harbor in lieu of reconstruction on a separate-category-by-separate-category basis. If a taxpayer elects to apply a safe harbor to allocate pre-2007 pools of more than one pre-2007 separate category of a foreign corporation, the same safe harbor (that is, the general safe harbor described in §1.904-7T(g)(3)(ii)(B) or the interest apportionment safe harbor described in §1.904-7T(g)(3)(ii)(C)) shall then apply to allocate the pre-2007 pools of all of the foreign corporation's pre-2007 separate categories for which the taxpayer elects to apply a safe harbor method in lieu of reconstructing the pre-2007 pools.

#### C. Post-1986 undistributed earnings and taxes of lower-tier foreign corporations

The transition rules described in Sections V.A. and B in this preamble apply to post-1986 undistributed earnings and post-1986 foreign income taxes (as well as deficits, previously-taxed earnings, and pre-1987 accumulated profits, if any) not only of a first-tier foreign corporation but also of lower-tier foreign corporations as well. See §1.904-7T(g)(5). Accordingly, to the extent a lower-tier foreign corporation has pools of post-1986 undistributed earnings (attributable to amounts not yet included in gross income by the U.S. shareholder) and foreign income taxes in a pre-2007 separate category, the rules of §1.904-7T(g) apply in treating the earnings and taxes as the opening balance of the foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes in the appropriate post-2006 separate category or categories on the first day of the foreign corporation's first post-2006 taxable year. Similarly, pre-1987 accumulated profits and pre-1987 foreign income taxes in a pre-2007 separate category of a lower-tier foreign corporation are allo-

cated to the appropriate post-2006 separate categories in accordance with the rules of §1.904-7T(g).

#### VI. Separate Limitation Losses and Overall Foreign Losses

Because the AJCA reduced the number of section 904(d) separate categories from eight to two for post-2006 taxable years, the temporary regulations provide transition rules for recapture in a post-2006 taxable year of an overall foreign loss (OFL) or separate limitation loss (SLL) in a pre-2007 separate category that offset U.S. source income or income in another pre-2007 separate category, respectively, in a pre-2007 taxable year.

Section 1.904(f)-12T(h)(1) of the temporary regulations provides that to the extent a taxpayer has an OFL or SLL at the end of the taxpayer's last pre-2007 taxable year in the pre-2007 separate category for passive income, certain dividends from a DISC or former DISC, taxable income attributable to certain foreign trade income, or certain distributions from a FSC or former FSC, such OFL or SLL is allocated on the first day of the taxpayer's next taxable year to the taxpayer's post-2006 separate category for passive category income. Accordingly, such OFL or SLL will be subject to recapture in subsequent taxable years out of the taxpayer's passive category income. Where a taxpayer has an SLL in some other pre-2007 separate category (for example, a general limitation SLL) that offset passive income, certain dividends from a DISC or former DISC, taxable income attributable to certain foreign trade income, or certain distributions from a FSC or former FSC, the SLL will be recaptured in subsequent taxable years as passive category income.

Section 1.904(f)-12T(h)(2) of the temporary regulations provides that to the extent a taxpayer has an OFL or SLL at the end of the taxpayer's last pre-2007 taxable year in the pre-2007 separate category for financial services income, shipping income, or general limitation income, such OFL or SLL is allocated on the first day of the taxpayer's next taxable year to the taxpayer's post-2006 separate category for general category income. Accordingly, such OFL or SLL will be subject to recapture in subsequent taxable years out of the taxpayer's general category in-

come. Where a taxpayer has an SLL in some other pre-2007 separate category (for example, a passive SLL) that offset financial services income, shipping income, or general limitation income, the SLL will be recaptured in subsequent taxable years as general category income.

Section 1.904(f)-12T(h)(3) provides that to the extent a taxpayer has an OFL or SLL at the end of the taxpayer's last pre-2007 taxable year in the pre-2007 separate category for high withholding tax interest, the allocation of such OFL or SLL to the taxpayer's post-2006 separate categories depends on the taxpayer's allocation of excess taxes in the high withholding tax interest loss category for carryover purposes. Accordingly, if the excess taxes are assigned to the appropriate post-2006 separate category or categories based on reconstruction (that is, treating the taxes as if they had been paid or accrued in a post-2006 taxable year under §1.904-2T(i)(1)(i)), the OFL or SLL is allocated *pro rata* to the taxpayer's post-2006 separate categories based on the proportions in which the excess high withholding taxes are assigned to the post-2006 separate categories. If instead the taxpayer elects to assign the excess taxes to the post-2006 separate category for general category income under the safe harbor described in §1.904-2T(i)(1)(ii), the OFL or SLL is also allocated to the same post-2006 general category. If there are no excess taxes in the loss category that are carried over to post-2006 taxable years, an OFL or SLL in the pre-2007 separate category for high withholding tax interest is allocated to the post-2006 separate category for passive category income.

Similarly, where a taxpayer has an SLL in a pre-2007 separate category that offset high withholding tax interest, the SLL will be recaptured in subsequent taxable years *pro rata* as income in the post-2006 separate categories for general category income and passive category income based on how the taxpayer allocated excess taxes in the pre-2007 separate category for high withholding tax interest under §1.904-2T(i)(1). If no excess taxes in the pre-2007 separate category for high withholding tax interest are carried over to post-2006 taxable years, the SLL will be recaptured in subsequent taxable years as income in the post-2006 separate category for passive category income.

Section 1.904(f)–12T(h)(4) provides that after application of paragraphs (1) through (3), any separate limitation loss account allocated to the post-2006 separate category for passive category income for which income is to be recaptured as passive category income will be eliminated, since “recapture” to and from the same category would be meaningless. For the same reason, any separate limitation loss accounts allocated to the post-2006 separate category for general category income for which income is to be recaptured as general category income will be eliminated.

Section 1.904(f)–12T(h)(5) provides that taxpayers may in the alternative determine the treatment of OFLs and SLLs in pre-2007 separate categories following the principles of the transition rules of §1.904(f)–12T(g)(1) and (2) concerning the treatment of OFLs and SLLs in the separate category for dividends from a noncontrolled section 902 corporation.

#### Effective/Applicability Date

The effective date for these regulations is December 21, 2007. The temporary regulations apply to taxable years of United States taxpayers beginning after December 31, 2006, and ending on or after December 21, 2007, and to taxable years of a foreign corporation which end with or within a taxable year of its domestic corporate shareholder beginning after December 31, 2006, and ending on or after December 21, 2007.

#### Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble of the cross-referenced notice of proposed rulemaking published in this issue of the Bulletin. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

#### Drafting Information

The principal author of these regulations is Jeffrey L. Parry of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

\* \* \* \* \*

#### Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

##### 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 1.904–0 is amended as follows:

1. Add the entry for §1.904–2(i).
2. Remove and reserve the entries for §1.904–4(a), (b), (d), (f), (g), (h)(3), and (l).
3. Remove and reserve the entry for §1.904–5(h)(3).
4. Add and reserve the entry for §1.904–5(o)(3).
5. Add the entry for §1.904–7(g).
6. Add the entry for §1.904(f)–12(h).

The revisions and additions read as follows:

##### §1.904–0 Outline of regulation provisions for section 904.

\* \* \* \* \*

##### §1.904–2 Carryback and carryover of unused foreign tax.

\* \* \* \* \*

(i) [Reserved].

\* \* \* \* \*

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

(a) [Reserved].

(b) [Reserved].

\* \* \* \* \*

(d) [Reserved].

\* \* \* \* \*

(f) [Reserved].

(g) [Reserved].

\* \* \* \* \*

(h)(3) [Reserved].

\* \* \* \* \*

(l) [Reserved].

\* \* \* \* \*

##### §1.904–5 Look-through rules as applied to controlled foreign corporations and other entities.

\* \* \* \* \*

(h) \* \* \*

(3) [Reserved].

\* \* \* \* \*

(o) \* \* \*

(3) [Reserved].

##### §1.904–7 Transition rules.

\* \* \* \* \*

(g) [Reserved].

##### §1.904(f)–12 Transition rules.

\* \* \* \* \*

(h) [Reserved].

Par. 3. Section 1.904–2 is amended by adding paragraph (i) to read as follows:

##### §1.904–2 Carryback and carryover of unused foreign tax.

\* \* \* \* \*

(i) [Reserved.] For further guidance, see §1.904–2T(i).

Par. 4. Section 1.904–2T is amended by adding paragraph (i) to read as follows:

##### §1.904–2T Carryback and carryover of unused foreign tax (temporary).

\* \* \* \* \*

(i) *Transition rules for carryovers and carrybacks of pre-2007 and post-2006 unused foreign tax*—(1) *Carryover of unused foreign tax*—(i) *General rule*. For purposes of this paragraph (i), the terms *post-2006 separate category* and *pre-2007 separate category* have the meanings set forth in §1.904–7T(g)(1)(ii) and (iii). The rules of this paragraph (i)(1) apply to reallocate to the taxpayer’s post-2006 separate categories for general category income and passive category income any unused foreign taxes (as defined in §1.904–2(b)(2)) that were paid or accrued or deemed paid under section 902 with respect to income in a pre-2007 separate category (other than a category described in §1.904–4(m)). To the extent any such unused foreign taxes



are carried forward to a taxable year beginning after December 31, 2006, such taxes shall be allocated to the taxpayer's post-2006 separate categories to which those taxes would have been allocated if the taxes were paid or accrued in a taxable year beginning after December 31, 2006. For example, any foreign taxes paid or accrued or deemed paid with respect to financial services income in a taxable year beginning before January 1, 2007, that are carried forward to a taxable year beginning after December 31, 2006, will be allocated to the general category because the financial services income to which those taxes relate would have been allocated to the general category if it had been earned in a taxable year beginning after December 31, 2006.

(ii) *Safe harbor*. In lieu of applying the rules of paragraph (i)(1)(i) of this section, a taxpayer may allocate all unused foreign taxes in the pre-2007 separate category for passive income to the post-2006 separate category for passive category income, and allocate all other unused foreign taxes described in paragraph (i)(1)(i) of this section to the post-2006 separate category for general category income.

(2) *Carryback of unused foreign tax*—(i) *General rule*. The rules of this paragraph (i)(2) apply to any unused foreign taxes that were paid or accrued or deemed paid under section 902 with re-

spect to income in a post-2006 separate category (other than a category described in §1.904-4(m)). To the extent any such unused foreign taxes are carried back to a taxable year beginning before January 1, 2007, a credit for such taxes shall be allowed only to the extent of the excess limitation in the pre-2007 separate category, or categories, to which the taxes would have been allocated if the taxes were paid or accrued in a taxable year beginning before January 1, 2007. For example, any foreign taxes paid or accrued or deemed paid with respect to income in the general category in a taxable year beginning after December 31, 2006, that are carried back to a taxable year beginning before January 1, 2007, will be allocated to the same separate categories to which the income would have been allocated if it had been earned in a taxable year beginning before January 1, 2007.

(ii) *Safe harbor*. In lieu of applying the rules of paragraph (i)(2)(i) of this section, a taxpayer may allocate all unused foreign taxes in the post-2006 separate category for passive category income to the pre-2007 separate category for passive income, and may allocate all other unused foreign taxes described in paragraph (i)(2)(i) of this section to the pre-2007 separate category for general limitation income.

(3) *Effective/applicability date*. This paragraph (i) applies to taxable years of

United States taxpayers beginning after December 31, 2006 and ending on or after December 21, 2007.

4) *Expiration date*. The applicability of this paragraph (i) expires on December 18, 2010.

Par. 5. Section 1.904-4 is amended as follows:

1. In the table below, for each section listed in the left column, remove the language in the middle column and add the language in the right column.

2. Paragraphs (a), (b), (d), (f), (g), (h)(3) and (l) are revised.

3. Paragraph (h)(4) *Example 2* is removed.

4. Paragraph (h)(4) *Example 3* is redesignated as *Example 2*.

5. Paragraph (h)(4) *Example 4* is redesignated as *Example 3*, in the first sentence the language “Example (3)” is removed and the language “Example 2” is added in its place, and in the last sentence the language “general limitation” is removed and the language “general category” is added in its place.

6. Paragraphs (h)(5)(iii) *Example 2* and (h)(5)(iii) *Example 4* are removed.

7. Paragraph (h)(5)(iii) *Example 3* is redesignated as *Example 2* and in the last sentence the language “general limitation” is removed and the language “general category” is added in its place.

The revisions read as follows:

<i>Section</i>	<i>Remove</i>	<i>Add</i>
1.904-4(c)(1), third sentence	general limitation	general category
1.904-4(c)(1), third sentence	general limitation	general category
1.904-4(c)(1), fourth sentence	general limitation	general category
1.904-4(c)(6)(iii), second sentence	general limitation	general category
1.904-4(c)(6)(iii), fifth sentence	general limitation	general category
1.904-4(c)(6)(iv)(A), first sentence	general limitation	general category
1.904-4(c)(7)(i), second sentence	general limitation	general category
1.904-4(c)(7)(iii), third sentence	general limitation	general category
1.904-4(c)(8) <i>Example 1</i> , last sentence	general limitation	general category
1.904-4(c)(8) <i>Example 1</i> , last sentence	general limitation	general category
1.904-4(c)(8) <i>Example 2</i> , last sentence	general limitation	general category
1.904-4(c)(8) <i>Example 3</i> , last sentence	general limitation	general category
1.904-4(c)(8) <i>Example 5</i> , last sentence	general limitation	general category
1.904-4(c)(8) <i>Example 6</i> , seventh sentence	general limitation	general category

<i>Section</i>	<i>Remove</i>	<i>Add</i>
1.904-4(c)(8) <i>Example 8</i> , last sentence	general limitation	general category
1.904-4(c)(8) <i>Example 9</i> (i), last sentence	general limitation	general category
1.904-4(c)(8) <i>Example 9</i> (ii), first sentence	general limitation	general category
1.904-4(c)(8) <i>Example 9</i> (ii), last sentence	general limitation	general category
1.904-4(c)(8) <i>Example 11</i> , first sentence	general limitation	general category
1.904-4(c)(8) <i>Example 11</i> , last sentence	general limitation	general category
1.904-4(c)(8) <i>Example 12</i> , third sentence	general limitation	general category
1.904-4(h)(2)	general limitation	general category
1.904-4(h)(5)(i), first sentence	that is not a financial services entity	
1.904-4(h)(5)(i), first sentence	general limitation	general category
1.904-4(h)(5)(i), last sentence	If a financial services entity receives or accrues that income, the income shall not be considered to be export financing interest and, therefore, shall be treated as financial services income	
1.904-4(h)(5)(ii), first sentence	904(d)(2)(A)(iii)(II)	904(d)(2)(B)(iii)(I)
1.904-4(h)(5)(ii), first sentence	general limitation	general category
1.904-4(h)(5)(ii), first sentence	unless the interest is received or accrued by a financial services entity	
1.904-4(h)(5)(ii), last sentence	If that interest also would be high withholding tax interest but for section 904(d)(2)(B)(ii), then the interest shall be treated as financial services income.	
1.904-4(h)(5)(iii) <i>Example 1</i> , last sentence	general limitation	general category
1.904-4(i), second sentence	Thus, for example, if a taxpayer receives or accrues a dividend distribution from two separate noncontrolled section 902 corporations out of earnings and profits attributable to income received or accrued by the noncontrolled section 902 corporations that is income described in section 907(c), the rules provided in section 907 shall apply separately to the dividends received from each noncontrolled section 902 corporation.	
1.904-4(i), third sentence	dividends received or accrued by the taxpayer from each separate noncontrolled section 902 corporation	income in each separate category
1.904-4(j), last sentence	904(d)(2)(A)(iii)(III)	904(d)(2)(B)(iii)(II)
1.904-4(m)	904(g)(10)	904(h)(10)
1.904-4(m)	and (d)(3)(F)(i)	

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

(a) [Reserved]. For further guidance, see §1.904-4T(a).

(b) [Reserved]. For further guidance, see §1.904-4T(b).

\* \* \* \* \*

(d) [Reserved].

\* \* \* \* \*

(f) [Reserved]. For further guidance, see §1.904-4T(f).

(g) [Reserved]. For further guidance, see §1.904-4T(g).

\* \* \* \* \*

(h) \* \* \*

(3) [Reserved]. For further guidance, see §1.904-4T(h)(3).

\* \* \* \* \*

(l) [Reserved]. For further guidance, see §1.904-4T(l).

\* \* \* \* \*

Par. 6. Section 1.904-4T is amended as follows:

1. Revise paragraphs (a), (b), (c)(4)(i), (c)(4)(ii), (c)(4)(iii), (c)(5), (c)(6), (c)(7), (c)(8), (d), (e), (f), (g), (h), (i), (j), (k), (l), and (m).

2. Add paragraphs (n) and (o).

The revisions and additions read as follows:

*§1.904-4T Separate application of section 904 with respect to certain categories of income (temporary).*

(a) *In general.* A taxpayer is required to compute a separate foreign tax credit limitation for income received or accrued in a taxable year that is described in section 904(d)(1)(A) (passive category income), 904(d)(1)(B) (general category income), or §1.904-4(m) (additional separate categories).

(b) *Passive category income*—(1) *In general.* The term *passive category income* means passive income and specified passive category income.

(2) *Passive income*—(i) *In general.* The term *passive income* means any—

(A) Income received or accrued by any person that is of a kind that would be foreign personal holding company income (as defined in section 954(c)) if the taxpayer were a controlled foreign corporation, including any amount of gain on the sale or

exchange of stock in excess of the amount treated as a dividend under section 1248; or

(B) Amount includible in gross income under section 1293.

(ii) *Exceptions.* Passive income does not include any export financing interest (as defined in section 904(d)(2)(G) and paragraph (h) of this section), any high-taxed income (as defined in section 904(d)(2)(F) and paragraph (c) of this section), or any active rents and royalties (as defined in paragraph (b)(2)(iii) of this section). In addition, passive income does not include any income that would otherwise be passive but is characterized as income in another separate category under the look-through rules of section 904(d)(3), (d)(4), and (d)(6)(C) and the regulations under those provisions. In determining whether any income is of a kind that would be foreign personal holding company income, the rules of section 864(d)(5)(A)(i) and (6) (treating related person factoring income of a controlled foreign corporation as foreign personal holding company income that is not eligible for the export financing income exception to the separate limitation for passive income) shall apply only in the case of income of a controlled foreign corporation (as defined in section 957). Thus, income earned directly by a United States person that is related person factoring income may be eligible for the exception for export financing interest.

(iii) *Active rents or royalties*—(A) *In general.* For rents and royalties paid or accrued after September 20, 2004, passive income does not include any rents or royalties that are derived in the active conduct of a trade or business, regardless of whether such rents or royalties are received from a related or an unrelated person. Except as provided in paragraph (b)(2)(iii)(B) of this section, the principles of section 954(c)(2)(A) and the regulations under that section shall apply in determining whether rents or royalties are derived in the active conduct of a trade or business. For this purpose, the term taxpayer shall be substituted for the term controlled foreign corporation if the recipient of the rents or royalties is not a controlled foreign corporation.

(B) *Active conduct of trade or business.* Rents and royalties are considered derived in the active conduct of a trade or business by a United States person or

by a controlled foreign corporation (or other entity to which the look-through rules apply) for purposes of section 904 (but not for purposes of section 954) if the requirements of section 954(c)(2)(A) are satisfied by one or more corporations that are members of an affiliated group of corporations (within the meaning of section 1504(a), determined without regard to section 1504(b)(3)) of which the recipient is a member. For purposes of this paragraph (b)(2)(iii)(B), an affiliated group includes only domestic corporations and foreign corporations that are controlled foreign corporations in which domestic members of the affiliated group own, directly or indirectly, at least 80 percent of the total voting power and value of the stock. For purposes of this paragraph (b)(2)(iii)(B), indirect ownership shall be determined under section 318 and the regulations under that section.

(iv) *Examples.* The following examples illustrate the application of paragraph (b)(2) of this section.

*Example 1.* P is a domestic corporation with a branch in foreign country X. P does not have any financial services income. For 2008, P has a net foreign currency gain that would not constitute foreign personal holding company income if P were a controlled foreign corporation because the gain is directly related to the business needs of P. The currency gain is, therefore, general category income to P because it is not income of a kind that would be foreign personal holding company income.

*Example 2.* Controlled foreign corporation S is a wholly-owned subsidiary of P, a domestic corporation. S is regularly engaged in the restaurant franchise business. P licenses trademarks, tradenames, certain know-how, related services, and certain restaurant designs for which S pays P an arm's length royalty. P is regularly engaged in the development and licensing of such property. The royalties received by P for the use of its property are allocable under the look-through rules of §1.904-5 to the royalties S receives from the franchisees. Some of the franchisees are unrelated to S and P. Other franchisees are related to S or P and use the licensed property outside of S's country of incorporation. S does not satisfy, but P does satisfy, the active trade or business requirements of section 954(c)(2)(A) and the regulations under that section. The royalty income earned by S with regard to both its related and unrelated franchisees is foreign personal holding company income because S does not satisfy the active trade or business requirements of section 954(c)(2)(A) and, in addition, the royalty income from the related franchisees does not qualify for the same country exception of section 954(c)(3). However, all of the royalty income earned by S is general category income to S under §1.904-4(b)(2)(iii) because P, a member of S's affiliated group (as defined therein), satisfies the active trade or business test (which is applied without regard to whether the royalties are paid by a related person). S's royalty

income that is taxable to P under subpart F and the royalties paid to P are general category income to P under the look-through rules of §1.904-5(c)(1)(i) and (c)(3), respectively.

(3) *Specified passive category income* means—

(i) Dividends from a DISC or former DISC (as defined in section 992(a)) to the extent such dividends are treated as income from sources without the United States;

(ii) Taxable income attributable to foreign trade income (within the meaning of section 923(b)); or

(iii) Distributions from a FSC (or a former FSC) out of earnings and profits attributable to foreign trade income (within the meaning of section 923(b)) or interest or carrying charges (as defined in section 927(d)(1)) derived from a transaction which results in foreign trade income (as defined in section 923(b)).

\*\*\*\*\*

(c)(4)(i) through (h)(2) [Reserved]. For further guidance, see §1.904-4(c)(i) through (h)(2).

(3) *Exception*. Unless it is received or accrued by a financial services entity, export financing interest shall be treated as passive category income if that income is also related person factoring income. For this purpose, related person factoring income is—

(i) Income received or accrued by a controlled foreign corporation that is income described in section 864(d)(6) (income of a controlled foreign corporation from a loan for the purpose of financing the purchase of inventory property of a related person); or

(ii) Income received or accrued by any person that is income described in section 864(d)(1) (income from a trade receivable acquired from a related person).

(h)(4) through (k) [Reserved]. For further guidance, see §1.904-4(h)(3)(iii) through (k).

(l) *Priority rule*. Income that meets the definitions of a separate category described in paragraph (m) of this section and another category of income described in section 904(d)(2)(A)(i) and (ii) will be subject to the separate limitation described in paragraph (m) of this section and will not be treated as general category income described in section 904(d)(2)(A)(ii).

(m) [Reserved]. For further guidance, see §1.904-4(m).

(n) *Effective/applicability date*. Paragraphs (a), (b), (h)(3), and (l) of this section shall apply to taxable years of United States taxpayers beginning after December 31, 2006 and ending on or after December 21, 2007, and to taxable years of a foreign corporation which end with or within taxable years of its domestic corporate shareholder beginning after December 31, 2006 and ending on or after December 21, 2007.

(o) *Expiration date*. The applicability of paragraphs (a), (b), (h)(3)(ii) and (l) of this section expires on December 18, 2010.

Par. 7. Section 1.904-5 is amended by revising paragraph (h)(3) and adding paragraph (o)(3) to read as follows:

*§1.904-5 Look-through rules as applied to controlled foreign corporations and other entities.*

\*\*\*\*\*

(h) \*\*\*

(3) [Reserved]. For further guidance, see §1.904-5T(h)(3).

\*\*\*\*\*

(o) \*\*\*

(3) [Reserved]. For further guidance, see §1.904-5T(o)(3).

Par. 8. Section 1.904-5T is amended by revising paragraphs(c)(4)(iv), (d), (e), (f), (g), and (h) and adding paragraph (o)(3) to read as follows:

*§1.904-5T Look-through rules as applied to controlled foreign corporations and other entities (temporary).*

\*\*\*\*\*

(c)(4)(iv) through (h)(2) [Reserved]. For further guidance, see §1.904-5(c)(4)(iv) through (h)(2).

(3) *Income from the sale of a partnership interest—(i) In general*. To the extent a partner recognizes gain on the sale of a partnership interest, that income shall be treated as passive category income to the partner, unless the income is considered to be high-taxed under section 904(d)(2)(B)(iii)(II) and §1.904-4(c).

(ii) *Exception for 25-percent owned partnership*. In the case of a sale of an interest in a partnership by a partner that is a 25-percent owner of the partnership under the principles of section 954(c)(4)(B), income recognized on the sale of the partnership interest shall be treated as general category income to the extent that such

gain would not be classified as foreign personal holding company income under the look-through rule of section 954(c)(4).

\*\*\*\*\*

(o) \*\*\*

(3) *Rules for income from the sale of a partnership interest—(i) Effective/applicability date*. Paragraph (h)(3) of this section shall apply to taxable years of United States taxpayers beginning after December 31, 2006 and ending on or after December 21, 2007, and to taxable years of a foreign corporation which end with or within taxable years of its domestic corporate shareholder beginning after December 31, 2006 and ending on or after December 21, 2007.

(ii) *Expiration date*. The applicability of paragraph (h)(3) of this section expires on December 18, 2010.

Par. 9. Section 1.904-7 is amended by adding paragraph (g) to read as follows:

*§1.904-7 Transition rules.*

\*\*\*\*\*

(g) [Reserved.] For further guidance, see §1.904-7T(g).

Par. 10. Section 1.904-7T is amended by adding paragraph (g) to read as follows:

*§1.904-7T Transition Rules (temporary).*

\*\*\*\*\*

(g) *Treatment of earnings and foreign taxes of a controlled foreign corporation or a noncontrolled section 902 corporation accumulated in taxable years beginning before January 1, 2007—(1) Definitions—(i) Pre-2007 pools* means the pools in each separate category of post-1986 undistributed earnings (as defined in §1.902-1(a)(9)) that were accumulated, and post-1986 foreign income taxes (as defined in §1.902-1(a)(8)) paid, accrued, or deemed paid, in taxable years beginning before January 1, 2007.

(ii) *Pre-2007 separate categories* means the separate categories of income described in section 904(d) as applicable to taxable years beginning before January 1, 2007, and any other separate category of income described in §1.904-4(m).

(iii) *Post-2006 separate categories* means the separate categories of income described in section 904(d) as applicable to taxable years beginning after December 31, 2006, and any other separate category of income described in §1.904-4(m).

(2) *Treatment of pre-2007 pools of a controlled foreign corporation or a noncontrolled section 902 corporation.* Any post-1986 undistributed earnings in a pre-2007 pool of a controlled foreign corporation or a noncontrolled section 902 corporation shall be treated in taxable years beginning after December 31, 2006, as if they were accumulated during a period in which the rules governing the determination of post-2006 separate categories applied. Post-1986 foreign income taxes paid, accrued, or deemed paid with respect to such earnings shall be treated as if they were paid, accrued, or deemed paid during a period in which the rules governing the determination of post-2006 separate categories (including the rules of section 904(d)(3)(E)) applied as well. Any such earnings and taxes in pre-2007 pools shall constitute the opening balance of the foreign corporation's post-1986 undistributed earnings and post-1986 foreign income taxes on the first day of the foreign corporation's first taxable year beginning after December 31, 2006, in accordance with the rules of paragraph (g)(3) of this section. Similar rules shall apply to characterize any deficits in the pre-2007 pools and previously-taxed earnings and profits described in section 959(c)(1)(A) that are attributable to earnings in the pre-2007 pools.

(3) *Substantiation of post-2006 character of earnings and taxes in a pre-2007 pool—(i) Reconstruction of earnings and taxes pools.* In order to substantiate the post-2006 characterization of post-1986 undistributed earnings (as well as deficits and previously-taxed earnings, if any) and post-1986 foreign income taxes in pre-2007 pools of a controlled foreign corporation or a noncontrolled section 902 corporation, the taxpayer shall make a reasonable, good-faith effort to reconstruct the pre-2007 pools of post-1986 undistributed earnings (as well as deficits and previously-taxed earnings, if any) and post-1986 foreign income taxes following the rules governing the determination of post-2006 separate categories for each taxable year beginning before January 1, 2007, beginning with the first year in which post-1986 undistributed earnings were accumulated in the pre-2007 pool. Reconstruction shall be based on reasonably available books and records and other relevant information. To the extent

any pre-2007 separate category includes earnings that would be allocated to more than one post-2006 separate category, the taxpayer must account for earnings distributed and taxes deemed paid in these years for such category as if they were distributed and deemed paid *pro rata* from the amounts that were added to that category during each taxable year beginning before January 1, 2007.

(ii) *Safe harbor method—(A) In general.* Subject to the rules of paragraph (g)(3)(iii) of this section, a taxpayer may allocate the post-1986 undistributed earnings and post-1986 foreign income taxes in pre-2007 pools of a controlled foreign corporation or a noncontrolled section 902 corporation (as well as deficits and previously-taxed earnings, if any) under one of the safe harbor methods described in paragraphs (g)(3)(ii)(B) and (g)(3)(ii)(C) of this section.

(B) *General safe harbor method—(1)* Any post-1986 undistributed earnings (as well as deficits and previously-taxed earnings, if any) and post-1986 foreign income taxes of a noncontrolled section 902 corporation or a controlled foreign corporation in a pre-2007 separate category for passive income, certain dividends from a DISC or former DISC, taxable income attributable to certain foreign trade income, or certain distributions from a FSC or former FSC shall be allocated to the post-2006 separate category for passive category income.

(2) Any post-1986 undistributed earnings (as well as deficits and previously-taxed earnings, if any) and post-1986 foreign income taxes of a noncontrolled section 902 corporation or a controlled foreign corporation in a pre-2007 separate category for financial services income, shipping income or general limitation income shall be allocated to the post-2006 separate category for general category income.

(3) Except as provided in paragraph (g)(3)(ii)(B)(4) of this section, any post-1986 undistributed earnings (as well as deficits and previously-taxed earnings, if any) and post-1986 foreign income taxes of a noncontrolled section 902 corporation or a controlled foreign corporation in a pre-2007 separate category for high withholding tax interest shall be allocated to the post-2006 separate category for passive category income.

(4) If a controlled foreign corporation has positive post-1986 undistributed earnings and post-1986 foreign income taxes in a pre-2007 separate category for high withholding tax interest, such earnings and taxes shall be allocated to the post-2006 separate category for general category income if the earnings would qualify as income subject to high foreign taxes under section 954(b)(4) if the entire amount of post-1986 undistributed earnings were treated as a net item of income subject to the rules of §1.954-1(d). If the high withholding tax interest earnings would not qualify as income subject to high foreign taxes under section 954(b)(4), then the earnings and taxes shall be allocated to the post-2006 separate category for passive category income.

(C) *Interest apportionment safe harbor.* A taxpayer may allocate the post-1986 undistributed earnings (as well as deficits and previously-taxed earnings, if any) and post-1986 foreign income taxes in pre-2007 pools of a controlled foreign corporation or a noncontrolled section 902 corporation following the principles of paragraph (f)(4)(ii) of this section.

(iii) *Consistency rule.* The election to apply a safe harbor method under paragraph (g)(3)(ii) of this section in lieu of the rules described in paragraph (g)(3)(i) of this section may be made on a separate category by separate category basis. However, if a taxpayer elects to apply a safe harbor to allocate pre-2007 pools of more than one pre-2007 separate category of a controlled foreign corporation or a noncontrolled section 902 corporation, such safe harbor (the general safe harbor described in paragraph (g)(3)(ii)(B) of this section or the interest apportionment safe harbor described in paragraph (g)(3)(ii)(C) of this section) shall apply to allocate post-1986 undistributed earnings (as well as deficits and previously-taxed earnings, if any) and post-1986 foreign income taxes for the pre-2007 pools in each pre-2007 separate category of the foreign corporation for which the taxpayer elected to apply a safe harbor method in lieu of reconstructing the pre-2007 pools.

(4) *Treatment of pre-1987 accumulated profits.* Any pre-1987 accumulated profits (as defined in §1.902-1(a)(10)) of a noncontrolled section 902 corporation or a controlled foreign corporation shall be treated in taxable years beginning after De-

December 31, 2006, as if they had been accumulated during a period in which the rules governing the determination of post-2006 separate categories applied. Foreign income taxes paid, accrued, or deemed paid with respect to such earnings shall be treated as if they were paid, accrued, or deemed paid during a period in which the rules governing the determination of post-2006 separate categories applied as well. The taxpayer must substantiate the post-2006 characterization of the pre-1987 accumulated profits and pre-1987 foreign income taxes in accordance with the rules of paragraph (g)(3) of this section, including the safe harbor provisions. Similar rules shall apply to characterize any deficits or previously-taxed earnings and profits described in section 959(c)(1)(A) that are attributable to pre-1987 accumulated profits.

(5) *Treatment of earnings and foreign taxes in pre-2007 pools of a lower-tier controlled foreign corporation or non-controlled section 902 corporation.* The rules of paragraphs (g)(1) through (4) of this section apply to post-1986 undistributed earnings (as well as deficits and previously-taxed earnings, if any) and post-1986 foreign income taxes in pre-2007 pools, and pre-1987 accumulated profits and pre-1987 foreign income taxes, of a lower-tier controlled foreign corporation or noncontrolled section 902 corporation.

(6) *Effective/applicability date.* This paragraph (g) shall apply to taxable years of United States taxpayers beginning after December 31, 2006 and ending on or after December 21, 2007, and to taxable years of a foreign corporation which end with or within taxable years of its domestic corporate shareholder beginning after December 31, 2006 and ending on or after December 21, 2007.

(7) *Expiration date.* The applicability of this paragraph (g) expires on December 18, 2010.

Par. 11. Section 1.904(f)-12 is amended by adding paragraph (h) to read as follows:

*§1.904(f)-12 Transition rules.*

\* \* \* \* \*

(h) [Reserved.] For further guidance, see §1.904(f)-12T(h).

Par. 12. Section 1.904(f)-12T is amended by adding paragraph (h) to read as follows:

*§1.904(f)-12T Transition rules (temporary).*

\* \* \* \* \*

(h) *Recapture in years beginning after December 31, 2006, of separate limitation losses and overall foreign losses incurred in years beginning before January 1, 2007—(1) Losses related to pre-2007 separate categories for passive income, certain dividends from a DISC or former DISC, taxable income attributable to certain foreign trade income or certain distributions from a FSC or former FSC—(i) Recapture of separate limitation loss or overall foreign loss incurred in a pre-2007 separate category for passive income, certain dividends from a DISC or former DISC, taxable income attributable to certain foreign trade income or certain distributions from a FSC or former FSC.* To the extent that a taxpayer has a balance in any separate limitation loss or overall foreign loss account in a pre-2007 separate category (as defined in §1.904-7T(g)(1)(ii)) for passive income, certain dividends from a DISC or former DISC, taxable income attributable to certain foreign trade income or certain distributions from a FSC or former FSC, at the end of the taxpayer's last taxable year beginning before January 1, 2007, the amount of such balance, or balances, shall be allocated on the first day of the taxpayer's next taxable year to the taxpayer's post-2006 separate category (as defined in §1.904-7T(g)(1)(iii)) for passive category income.

(ii) *Recapture of separate limitation loss with respect to a pre-2007 separate category for passive income, certain dividends from a DISC or former DISC, taxable income attributable to certain foreign trade income or certain distributions from a FSC or former FSC.* To the extent that a taxpayer has a balance in any separate limitation loss account in any pre-2007 separate category for passive income, certain dividends from a DISC or former DISC, taxable income attributable to certain foreign trade income or certain distributions from a FSC or former FSC at the end of the taxpayer's last taxable

year beginning before January 1, 2007, such loss shall be recaptured in subsequent taxable years as income in the post-2006 separate category for passive category income.

(2) *Losses related to pre-2007 separate categories for shipping, financial services income or general limitation income—(i) Recapture of separate limitation loss or overall foreign loss incurred in a pre-2007 separate category for shipping income, financial services income or general limitation income.* To the extent that a taxpayer has a balance in any separate limitation loss or overall foreign loss account in a pre-2007 separate category for shipping income, financial services income or general limitation income at the end of the taxpayer's last taxable year beginning before January 1, 2007, the amount of such balance, or balances, shall be allocated on the first day of the taxpayer's next taxable year to the taxpayer's post-2006 separate category for general category income.

(ii) *Recapture of separate limitation loss with respect to a pre-2007 separate category for shipping income, financial services income or general limitation income.* To the extent that a taxpayer has a balance in any separate limitation loss account in any pre-2007 separate category with respect to a pre-2007 separate category for shipping income, financial services income or general limitation income at the end of the taxpayer's last taxable year beginning before January 1, 2007, such loss shall be recaptured in subsequent taxable years as income in the post-2006 separate category for general category income.

(3) *Losses related to a pre-2007 separate category for high withholding tax interest—(i) Recapture of separate limitation loss or overall foreign loss incurred in a pre-2007 separate category for high withholding tax interest.* To the extent that a taxpayer has a balance in any separate limitation loss or overall foreign loss account in a pre-2007 separate category for high withholding tax interest at the end of the taxpayer's last taxable year beginning before January 1, 2007, the amount of such balance shall be allocated on the first day of the taxpayer's next taxable year on a *pro rata* basis to the taxpayer's post-2006 separate categories for general category and passive category income, based on the proportion in which any unused foreign taxes

in the same pre-2007 separate category for high withholding tax interest are allocated under §1.904-2T(i)(1). If the taxpayer has no unused foreign taxes in the pre-2007 separate category for high withholding tax interest, then any loss account balance in that category shall be allocated to the post-2006 separate category for passive category income.

(ii) *Recapture of separate limitation loss with respect to a pre-2007 separate category for high withholding tax interest.* To the extent that a taxpayer has a balance in a separate limitation loss account in any pre-2007 separate category with respect to a pre-2007 separate category for high withholding tax interest at the end of the taxpayer's last taxable year beginning before January 1, 2007, such loss shall be recaptured in subsequent taxable years on a *pro rata* basis as income in the post-2006 separate categories for general category and passive category income, based on the proportion in which any unused foreign taxes in the pre-2007 separate category for high withholding tax interest are allocated under §1.904-2T(i)(1). If the taxpayer has no unused foreign taxes in the pre-2007 separate category for high withholding tax interest, then the loss account balance shall be recaptured in subsequent taxable years solely as income in the post-2006 separate category for passive category income.

(4) *Elimination of certain separate limitation loss accounts.* After application of paragraphs (h)(1) through (h)(3) of this section, any separate limitation loss account allocated to the post-2006 separate category for passive category income for which income is to be recaptured as passive category income, as determined under those same provisions, shall be eliminated. Similarly, after application of paragraphs (h)(1) through (h)(3) of this section, any separate limitation loss account allocated to the post-2006 separate category for general category income for which income is to be recaptured as general category income, as determined under those same provisions, shall be eliminated.

(5) *Alternative method.* In lieu of applying the rules of paragraphs (h)(1) through (h)(3) of this section, a taxpayer may apply the principles of paragraphs (g)(1) and (g)(2) of this section to determine recapture in taxable years beginning after December 31, 2006, of separate limitation losses and overall foreign losses incurred

in taxable years beginning before January 1, 2007.

(6) *Effective/applicability date.* This paragraph (h) shall apply to taxable years of United States taxpayers beginning after December 31, 2006 and ending on or after December 21, 2007.

(7) *Expiration date.* The applicability of this paragraph (h) expires on December 18, 2010.

Linda E. Stiff,  
*Deputy Commissioner for  
Services and Enforcement.*

Approved December 14, 2007.

Eric Solomon,  
*Assistant Secretary of  
the Treasury (Tax Policy).*

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## **Section 1561.—Limitations on Certain Multiple Tax Benefits in the Case of Certain Controlled Corporations**

*26 CFR 1.1561-1T: General rules regarding certain tax benefits available to the component members of a controlled group of corporations (temporary).*

**T.D. 9369**

### **DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 1**

### **Calculating and Apportioning the Section 11(b)(1) Additional Tax Under Section 1561 for Controlled Groups**

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document removes the final regulation for §1.1561-2, amends §§1.1561-2T and 1.1563-1T, and adds §1.1502-47T. These temporary regulations affect component members of a

controlled group of corporations and consolidated groups filing life-nonlife Federal income tax returns. These temporary regulations provide guidance for calculating and apportioning between component members any amount of additional tax and any reduction in the amount exempted from the alternative minimum tax. These temporary regulations also update and clarify the allocation of tax-benefit items in the case in which a component member has a short taxable year not including a December 31<sup>st</sup> date. Finally, these temporary regulations provide explanations of two concepts: a group's testing date and a member's testing period for use in determining which members of the group and which taxable years of those members are subject to the controlled group rules. The text of these temporary regulations also serves as the text of the proposed regulations (REG-104713-07) set forth in the notice of proposed rulemaking in this issue of the Bulletin.

**DATES: Effective Date:** These temporary regulations are effective on December 26, 2007.

**Applicability Dates:** For the dates of applicability, see §§1.1502-47T(t)(1), 1.1561-2T(f)(1) and 1.1563-1T(e)(1). The applicability of these temporary regulations will expire on December 21, 2010.

FOR FURTHER INFORMATION CONTACT: Grid Glycer, (202) 622-7930 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

#### **Background**

*A. Summary of Limitations on Controlled Groups of Corporations Regarding Lower Tax Brackets and Alternative Minimum Tax Exemption Amounts*

Section 1561(a) of the Internal Revenue Code (Code) provides that the *component members* of a *controlled group of corporations* (as those terms are defined in section 1563) are limited for their taxable years which include the same December 31<sup>st</sup> date to an amount of each of the tax-benefit items listed therein to which a corporation that is not a component member of a controlled group is entitled. Two of those items are the section 11(b)(1) tax-bracket amounts and the section 55(d)(2)

exemption from the alternative minimum tax (the “exemption amount”). See section 1561(a)(1) and (a)(3). Each of these two Code provisions requires reductions in calculating the amounts of each of these two tax-benefit items after the taxpayer has passed certain thresholds. The “additional taxes” under section 11(b)(1) serve to reduce a corporation’s use of the lower tax brackets after certain specified threshold levels of income are reached. Section

55(d)(3) requires reductions to the amount exempted from the alternative minimum tax.

*B. The Additional Taxes Imposed by Section 11(b)(1) and the Alternative Minimum Tax Exemption Amount*

In general, section 11(b)(1) provides for a graduated income tax rate structure for taxing the income of a corporation. The income tax rates imposed on a corporation’s

income increase with each higher bracketed range of taxable income. The following chart shows the various tax rates imposed on a corporation and the ranges of taxable income that are subject to each of these tax rates:

Rate of tax	Range of taxable income subject to a rate of tax
15%	\$50,000 (first \$50,000 of corporation’s taxable income)
25%	\$25,000 (\$75,000 – \$50,000)
34%	\$9,925,000 (\$10,000,000 – \$75,000)
35%	> \$10,000,000

Section 11(b)(1) also imposes additional tax on the corporation’s taxable income where its income exceeds two designated income thresholds. This additional tax is designed to reduce the tax benefit that a corporation derives from having some of its income taxed at a lower rate.

For example, if a corporation’s taxable income exceeds \$100,000 (but is not greater than \$15 million), the total amount of the additional tax is the lesser of (1) the amount of 5 percent of the excess over \$100,000 or (2) \$11,750. This \$11,750 amount represents the maximum tax benefit available to a corporation from having all of the first \$75,000 of its taxable income taxed at the 15 and 25 percent tax rates rather than at a 34 percent tax rate. Similarly, if a corporation’s taxable income exceeds \$15 million, there is a further additional tax equal to the lesser of (1) the amount of 3 percent of the excess over \$15 million, or (2) \$100,000. This \$100,000 amount represents the maximum tax benefit available to a corporation from having all of the first \$10 million of its taxable income taxed at the 34 percent tax rate rather than at a 35 percent tax rate.

Section 55(d)(3) provides that a taxpayer’s exemption amount shall be phased out (but not below zero) as the taxpayer’s alternative minimum taxable income increases.

*C. The Controlled Group Rules*

Under section 1561(a), the component members of a controlled group, with regard to taxable years containing a particular December 31<sup>st</sup> “testing date,” are collectively limited to using one full amount of certain tax-benefit items. As noted above, one of the tax benefits so limited is the benefit of the lower tax brackets. Another is the \$40,000 amount for exemption from the alternative minimum tax. Section 1561(a) generally provides that the lower tax brackets and the \$40,000 exemption from alternative minimum tax are divided equally among the component members of the controlled group unless the group adopts an apportionment plan that provides for an unequal allocation.

Section 1563(a) defines the four types of controlled groups. The two most common are parent-subsidiary (defined in section 1563(a)(1)) and brother-sister (defined in section 1563(a)(2)).

Under section 1563(b), a corporation is a component member of a controlled group for a given taxable year if it was a member of such group on the December 31<sup>st</sup> date of its taxable year for at least one-half the number of days of its taxable year that precedes that December 31<sup>st</sup> date. In addition, pursuant to section 1563(b)(3), a corporation is treated as a component member of a controlled group if it was a member of such group during a calendar year, although not on December 31<sup>st</sup>, but was a member of such group for at least one-half the number

of days of its taxable year that precede that December 31<sup>st</sup> date (referred to as an “additional member”). Conversely, pursuant to section 1563(b)(2), a corporation which is a member of a controlled group of corporations on December 31<sup>st</sup> of any taxable year is treated as an excluded member of the controlled group (with regard to that December 31<sup>st</sup> testing date), if such corporation is a member of such group for less than one-half the number of days in its taxable year which precede such December 31<sup>st</sup>. The December 31<sup>st</sup> date of a specified calendar year will be referred to as the group’s testing date. The December 31<sup>st</sup> testing date is used for determining which taxable years of which members will be subject to the limitation rules imposed by, for example, section 1561(a). Furthermore, the total number of days of a member’s taxable year that precede a specified December 31<sup>st</sup> testing date will be referred to as that member’s “testing period.”

Section 1561(a) provides that in computing the amount of additional tax imposed by section 11(b)(1), and the phase-out of the exemption amount under section 55(d)(3), the component members shall, as a first step, combine their taxable incomes. Most controlled groups will easily be able to compute the total of their members’ taxable incomes and determine whether this sum exceeds the applicable income thresholds. Therefore, it is unnecessary to provide any regulatory guidance with regard to such determination. However, the IRS and the Treasury Depart-



ment recognize that various situations exist where a component member may encounter difficulties with obtaining the information needed to calculate its entitlement to the benefit of a lower bracket or its obligation to pay additional taxes. For the benefit of taxpayers that confront such problems, several such situations are discussed below and illustrated in the examples of the regulation, although they are not addressed in the text of these temporary regulations.

Section 1561(a) provides that the taxable income of all of the component members of a controlled group of corporations for the taxable years which are subjected to the same December 31<sup>st</sup> testing date shall be taken into account, that is, added together, for the purpose of determining whether any member owes the additional tax imposed by section 11(b)(1) as well as for determining what portion of that additional tax is to be allocated to each member. As in the case of the additional tax, section 1561(a) provides that the alternative minimum taxable income of all of the component members of a controlled group of corporations for the taxable years that include the same December 31<sup>st</sup> date shall be taken into account, that is, added together, for the purpose of determining the reduction (under section 55(d)(3)) to the exemption amount as set forth in section 55(d)(2). Section 1561(a) further provides that the additional taxes, as well as the reduction to the exemption amount, shall each be apportioned among those members in the same manner that the corresponding tax-benefit item is apportioned. However, the current regulations do not provide any guidance on how to calculate and apportion these reductions to these two tax-benefit items.

## Explanation of Provisions

### A. Allocation of the Benefit Recapture Items

Given that the additional taxes must be apportioned among the component members in the same manner as the tax-bracket amounts, these temporary regulations provide two methods for apportioning the amount of those additional taxes among the component members: the “proportionate method” and the first-in-first-out (“FIFO”) method. Under the proportion-

ate method, the additional tax is allocated to any component member to whom a tax-bracket amount was apportioned in the same proportion as the portion of the tax benefit from that tax bracket which was allocated to that member bears to the total tax-benefit amount provided to all members from the use of that tax bracket. These tax benefits are attributable to the tax savings to the members of the group resulting from having ranges of income (tax-bracket amounts) being taxed at lower rates, instead of the higher tax rates to which income of the group is subject. The text of the regulations sets out the steps for applying this method. Under the FIFO method, the first dollars of the additional tax are to be allocated proportionately to each member to whom a tax-bracket amount was apportioned, starting with the lowest tax bracket and continuing on successively to each next higher tax bracket until the entire amount of the additional tax has been fully apportioned among the members. For example, under the FIFO method of apportionment, the first \$9,500 of additional tax liability of a controlled group would be apportioned entirely to the member(s) that were apportioned the 15 percent tax bracket. Unless the component members of a controlled group elect to use the FIFO method, they are required to use the proportionate method in apportioning the additional taxes among the component members.

These temporary regulations also provide guidance in calculating and apportioning the reduction to the exemption amount. Specifically, they provide that any reduction to the exemption amount shall be apportioned to the component members in the same manner as the exemption amount.

### B. Apportioning Certain Tax-benefit Items Where a Component Member Has a Short Taxable Year Not Including a December 31<sup>st</sup> Date

Section 1561(b) provides that where a corporation has a short taxable year which does not include a December 31<sup>st</sup> date, but is a component member of a controlled group of corporations for such year (a “short-year member”), then, for purposes of subtitle A of the Code, the tax-benefit items described in section 1561(b) (the “section 1561(b) tax-benefit items”) of

such corporation for such year shall be the amount specified in section 1561(a) for that item, divided by the number of corporations which are component members of such group on the last day of that member’s short taxable year. Thus, a short-year member is not permitted to be apportioned a different amount.

Section 1561(b) further provides that the rules of section 1563(b) shall be applied as if the last day of the short-year member’s short taxable year were substituted for December 31<sup>st</sup>. Thus, the determination of whether a short-year member qualifies as a member of the group is determined by looking to its testing period, which begins on the first day of its taxable year and ends on the day before the last day of such short taxable year. See the discussion of testing date and testing period in the following section of this preamble. Section 1.1561-2(e) interprets this provision.

These temporary regulations update and clarify the rules of current §1.1561-2(e). It is not intended that any such updating and clarification constitute a substantive change.

### C. Definitions of a Group’s Testing Date and a Member’s Testing Period

Section 1.1563-1T(b) defines component members and excluded members of controlled groups. These definitions depend upon whether a corporation was a member of a group on the December 31<sup>st</sup> of its taxable year (its “testing date”) and was a member for at least one-half the number of days of its taxable year beginning on the first day of its taxable year and ending on December 30<sup>th</sup> of its taxable year (its “testing period”).

These temporary regulations amend §1.1563-1T(b) to provide explanations of the concepts: testing date and testing period.

A testing date is defined as the date that a controlled group is required to use in determining which of its members and which of their taxable years will be subject to the controlled group rules. Generally, a group’s testing date is the December 31<sup>st</sup> date included within all the members’ taxable years, whether such corporations are on a calendar or fiscal taxable year. However, if a component member of a controlled group has a short taxable year that does not include a December 31<sup>st</sup> date,

then the last day of its short taxable year serves as the member's testing date.

A testing period is defined as the period of time that a member of a controlled group uses to determine its status as either a component member or an excluded member. The testing period begins on the first day of a member's taxable year and ends on the day before its testing date. Thus, in the case of a member on a fiscal taxable year, the portion of its taxable year beginning after December 31<sup>st</sup> and ending on the last day of its taxable year is not taken into account in determining its status as a component member or an excluded member.

#### *D. Information Sharing among Controlled Group Members*

The IRS and the Treasury Department wish to note certain circumstances in which corporations may experience complications in applying the controlled group rules generally or with respect to tax brackets and the alternative minimum tax exemption amount in particular. As noted above, no new rules are provided with respect to these situations, although they are illustrated in several examples in these temporary regulations. Because the controlled group rules apply to multiple corporations each filing its own return, the corporations must have access to sufficient information regarding the other members or potential members to comply with the rules. Taxpayers are alerted to their responsibilities to obtain this information. In certain situations, such information may have to be obtained from corporations that are no longer owned by related parties and taxpayers will need to make arrangements to ensure that they will have access to information that will enable them to meet their compliance obligations. Ideally, the corporations and their shareholders will take these issues into account when contemplating transfers of interests in the corporations to provide access to adequate information sharing afterwards.

For example, if a corporation in a group changes hands during or shortly after the end of a taxable year, the formerly related corporations in the selling group will need information from the sold corporation about its income levels under the regular and alternative minimum tax systems, and the sold corporation will need infor-

mation about the formerly related selling group members.

In addition, if a corporation changes hands during a calendar year in a transaction that does not close the corporation's taxable year, events later in the year after the corporation is no longer related could affect the corporation's status as a member of the controlled group. For example, if the corporation changes hands early in the calendar year, the selling group might assume that the bulk of the testing period will fall after the sale and the corporation will not be a member for the year. However, if the corporation is liquidated by its new owners during the calendar year, the testing period for the year will be truncated and the corporation may be included for the taxable year in the selling controlled group because it was there for more than one-half of the now shorter testing period. The selling group will need to know that the sold corporation will now be treated as included in its group and the relevant data about its income for the taxable year.

Furthermore, events after the close of the taxable year, such as amended returns, audit adjustments or loss carrybacks, could affect the entitlement of other group members to tax benefits such as the lower brackets or the alternative minimum tax exemption amount, as well as other issues that might affect whether the group members will be under the regular or alternative minimum tax. In this case, again, the various members of the controlled group in the earlier year will need to have adequate information sharing to comply with their responsibilities.

#### *E. Consolidated Return Amendment*

Section 1.1502-47 provides rules for a life-nonlife consolidated group to calculate its consolidated taxable income. Paragraph (s) of §1.1502-47 previously required a consolidated group to clearly indicate "by notation" on the face of its return that it is a life-nonlife consolidated return. This requirement presented an impediment to e-filing. Accordingly, as part of T.D. 9304, the IRS and the Treasury Department amended §1.1502-47(s) and published §1.1502-47T(s) to remove this impediment by deleting the requirement that it indicate this "by notation." However, §1.1502-47T(s) was inadvertently removed from the Code of Federal Regu-

lations by T.D. 9342 when other portions of §1.1502-47T were published as final regulations. These temporary regulations republish §1.1502-47T(s).

#### **Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6) refer to the Special Analyses section of the preamble to the cross-reference notice of proposed rulemaking published in this issue of the Bulletin. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

#### **Drafting Information**

The principal author of this regulation is Grid Glycer, Office of Associate Chief Counsel (Corporate). The other author of and principal reviewer for this regulation is Steven J. Hankin, Office of Associate Chief Counsel (Corporate). Other personnel from the IRS and the Treasury Department, however, participated in its development.

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#### **Amendments to the Regulations**

Accordingly, 26 CFR part 1 is amended as follows:

#### **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 \* \* \*

Section 1.1502-47T also issued under 26 U.S.C. 1502. \* \* \*

Par. 2. Section 1.1502-47T is added to read as follows:

*§1.1502-47T Consolidated returns by life-nonlife groups (temporary).*

(a) through (r) (Reserved). For further guidance, see §1.1502-47(a) through (r).

(s) *Filing requirements.* Nonlife consolidated taxable income or loss under paragraph (h) of §1.1502-47 shall be determined on a separate Form 1120, “U.S. Corporation Income Tax Return” or 1120-PC, “U.S. Property and Casualty Insurance Company Income Tax Return”, and consolidated partial Life Insurance Company Taxable Income [defined in §1.1502-47(d)(3)] under paragraph (j) of §1.1502-47 shall be determined on a separate Form 1120-L, “U.S. Life Insurance Company Income Tax Return”. The consolidated return shall be made on a separate Form 1120, 1120-PC, or 1120-L filed by the common parent (if the group includes a life company), which shows the set-offs under paragraphs (g), (m), and (n) of §1.1502-47 and clearly indicates on the face of the return that it is a life-nonlife consolidated return (if the group includes a life company). See also §1.1502-75(j), relating to statements and schedules for subsidiaries.

(t) *Effective date—(1) Applicability date.* Paragraph (s) of this section applies to any consolidated Federal income tax return due (without extensions) after December 26, 2007. However, a consolidated group may apply paragraph (s) of this section to any consolidated Federal income tax return filed on or after December 26, 2007.

(2) *Expiration date.* The applicability of paragraph (s) of this section will expire on December 21, 2010.

Par. 3. Section 1.1561-0T is added to read as follows:

*§1.1561-0T Table of contents (temporary).*

This section lists the table of contents for §§1.1561-1T through 1.1561-3T.

*§1.1561-1T General rules regarding certain tax benefits available to the component members of a controlled group of corporations (temporary).*

- (a) In general.
- (b) Special rules.
- (c) Tax avoidance.
- (d) Effective date.
  - (1) Applicability date.
  - (2) Expiration date.

*§1.1561-2T Special rules for allocating reductions to certain Section 1561(a) tax-benefit items (temporary).*

- (a) Additional tax.
  - (1) Calculation.
  - (2) Apportionment.
    - (i) General rule.
    - (ii) Apportionment methods.
      - (A) Proportionate method.
      - (B) FIFO method.
  - (3) Examples.
    - (b) Reduction to the amount exempted from the alternative minimum tax.
      - (1) Calculation.
      - (2) Apportionment.
      - (3) Example.
  - (c) Accumulated earnings credit.
  - (d) Reserved.
  - (e) Short taxable year not including a December 31<sup>st</sup> date.
    - (1) General rule.
    - (2) Additional rules.
    - (3) Examples.

- (f) Effective date.
  - (1) Applicability dates.
    - (i) Paragraphs (a) and (b) of this section.
    - (ii) Paragraph (c) of this section.
    - (iii) Paragraph (e) of this section.
  - (2) Expiration dates.

*§1.1561-3T Allocation of the section 1561(a) tax items (temporary).*

- (a) Filing of form.
  - (1) In general.
  - (2) Exception for component members that are members of consolidated group.
  - (b) No apportionment plan in effect.
  - (c) Apportionment plan in effect.
    - (1) Adoption of plan.
    - (2) Limitation on adopting a plan.
      - (i) Sufficient statute of limitations period.
      - (ii) Insufficient statute of limitations period.
    - (3) Termination of plan.
    - (d) Effective date.
      - (1) Applicability date.
      - (2) Expiration date.

**§1.1561-2 (Removed)**

- Par. 4. Section 1.1561-2 is removed.
- Par. 5. Section 1.1561-2T is amended by revising the heading, adding paragraphs (a) and (b), and revising paragraphs (e) and (f) to read as follows:

*§1.1561-2T Special rules for allocating reductions to certain section 1561(a) tax-benefit items (temporary).*

(a) *Additional tax— (1) Calculation.* For the purpose of determining the amount, if any, of the additional tax imposed by section 11(b)(1), the taxable incomes of all of the component members of a controlled group of corporations for the taxable years that include the same December 31<sup>st</sup> date shall be combined for determining whether either of the income thresholds for imposing an additional tax have been attained.

(2) *Apportionment— (i) General rule.* Any additional tax determined under paragraph (a)(1) of this section shall be apportioned among such members in the same manner as the corresponding tax bracket of section 11(b)(1) is apportioned. For rules to apportion the section 11(b)(1) tax brackets among the component members of a controlled group, see §1.1561-3T(b) or (c).

(ii) *Apportionment methods.* Unless the component members of a controlled group elect to use the first-in-first-out (FIFO) method described in paragraph (a)(2)(ii)(B) of this section, such members are required to apportion the amount of the additional tax using the proportionate method described in paragraph (a)(2)(ii)(A) of this section. These component members can elect the FIFO method by specifically adopting such method in their apportionment plan.

(A) *Proportionate method.* Under the proportionate method, the additional tax is allocated to each component member in the same proportion as the portion of the tax-benefit amount that inured to a member from utilizing lower tax brackets bears to the amount of the group’s total tax-benefit amount inuring to the group from utilizing those lower tax brackets. The tax-benefit amount that inures to a corporation from using a particular tax bracket is the tax savings that such corporation realizes from having a portion of its taxable income taxed at the lower rate attributed to that tax bracket instead of the high tax rates to which it would otherwise be subject. The steps for applying the proportionate method of allocation are as follows:

(1) *Step 1.* The regular tax (not including the additional tax) owed by a component member under a particular tax bracket

is divided by the total tax owed by all component members under that tax bracket;

(2) *Step 2.* The percentage calculated under *Step 1* is multiplied by the total tax-benefit amount inuring to all the members of the group from their use of this tax bracket. This computed amount equals the portion of the group's tax-benefit amount that inured to such member from using its portion of this tax bracket;

(3) *Step 3.* The amount determined under *Step 2* is divided by the total tax-benefit amount, inuring to all the component members of the group from using all the tax brackets to which any component member's income was subject;

(4) *Step 4.* The percentage calculated under *Step 3* is multiplied by the amount of the group's additional tax. The amount determined under this *Step 4* equals the amount of the additional tax apportioned to such member for that tax bracket; and

(5) *Step 5.* If a component member is liable for regular tax (not including the additional tax) under more than one tax bracket, that member must calculate the amount of the additional tax apportioned to it with respect to each tax bracket. Accordingly, steps 1 through 4 must be applied for each tax bracket applicable to that member. The sum of all the apportioned amounts of additional tax from each tax bracket for which the member is subject is the total amount of the additional tax apportioned to that member.

(B) *FIFO method.* Under the FIFO method, the first dollars of the additional tax are to be allocated proportionately to the members starting with the lowest tax bracket (that is, the first tax bracket), up

to the amount of the tax benefit inuring to those members from using that tax bracket. Any remaining amount of additional tax is then allocated proportionately among the component members who use the next higher tax bracket, and so on, until the entire amount of the additional tax has been fully apportioned among the members. For example, the first \$9,500 of the additional tax liability of a controlled group is apportioned entirely to the member(s) that availed themselves of the benefit of the 15 percent tax bracket.

(3) *Examples.* The provisions of this paragraph (a) may be illustrated by the following examples:

*Example 1. (i) Facts.* A controlled group of corporations consists of three members: X, Y and Z. X owns all the stock of Y and Z. Each corporation files its separate return on a calendar year basis. For calendar year 2007, the component members of the controlled group have an apportionment plan in effect. The members apportioned 80% of the 15 percent tax-bracket amount (\$40,000) to X and the remaining 10% (\$10,000) to Y. The members apportioned 100% of the 25 percent tax-bracket amount (\$25,000) to Y. However, these members have not adopted the FIFO method for apportioning the additional taxes. Therefore, they must follow the proportionate method. For 2007, X had taxable income (TI) of \$40,000, Y had TI of \$60,000 and Z had TI of \$100,000. Thus the total TI of the group is \$200,000.

(ii) *Calculating the tax from the tax brackets and the tax benefit derived from such tax. (A) Regular tax of group subjected to a 15 percent tax rate. (1) Calculating the group's tax which resulted from applying a 15 percent tax rate.* The amount of tax under the 15 percent tax bracket is \$7,500 (15% x \$50,000).

(2) *The tax-benefit amount inuring to the group from using the 15 percent tax bracket.* A tax benefit inures to those members of the group who avail themselves of the 15 percent tax bracket. That tax benefit results from having the first \$50,000 of its income taxed at the 15 percent tax rate, instead of at the 34 percent tax rate. Thus, the tax-benefit amount

inuring to this group from using the 15 percent tax bracket is \$9,500 (\$17,000 (34% x \$50,000) minus \$7,500 (15% x \$50,000)).

(B) *Regular tax of group subjected to a 25 percent tax rate. (1) Calculating the group's tax which resulted from applying a 25 percent tax rate.* The amount of tax under the 25 percent tax bracket is \$6,250 (25% x \$25,000 (\$75,000 - \$50,000)).

(2) *The tax-benefit amount inuring to the group from using the 25 percent tax bracket.* A tax benefit inures to those members of the group who avail themselves of the 25 percent tax bracket. That tax benefit results from having \$25,000 of its income taxed at the 25 percent tax rate, instead of at the 34 percent tax rate. Thus, the tax-benefit amount inuring to this group from using the 25 percent tax bracket is \$2,250 (\$8,500 (34% x \$25,000) minus \$6,250 (25% x \$25,000)).

(C) *Regular tax of group subjected to a 34 percent tax rate. (1) Calculating the group's tax which resulted from applying a 34 percent tax rate.* The amount of tax under the 34 percent tax bracket is \$42,500 (34% x \$125,000 (\$200,000 (total TI) - \$75,000) (amount taxed at lower rates)).

(2) *The tax-benefit amount inuring to the group from using the 34 percent tax bracket.* The group's total TI of \$200,000 is less than the \$15,000,000 income threshold for imposing any 3 percent additional tax on the group. Therefore, there is no tax benefit inuring to the members of this group for using the 34 percent tax bracket.

(D) *The computation of the additional tax.* Since the combined TI of the group exceeds \$100,000, a 5 percent additional tax is imposed on the group. That 5 percent additional tax is the lesser amount of 5 percent of the group's taxable income exceeding \$100,000 or \$11,750. Five percent of that excess amount of taxable income is \$5,000 (5% x \$100,000 (\$200,000 - \$100,000)). Since \$5,000 is less than \$11,750, the group's 5 percent additional tax is \$5,000.

(iii) *Apportioning the amount of additional tax to each applicable tax bracket. (A) The apportioned tax under each bracket.* The amount of tax owed by each member under each tax bracket pursuant to the apportionment plan is as follows:

Name of Component Member	Amount of tax owed under the 15% tax bracket	Amount of tax owed under the 25% tax bracket	Amount of tax owed under the 34% tax bracket
X	\$6,000	0	0
Y	\$1,500	\$6,250	\$8,500
Z	0	0	\$34,000

(B) *Apportioning the 5 percent additional tax among the component members of the controlled group.* Since the group did not elect to adopt the FIFO method of apportionment, it is required to apportion the \$5,000 of its 5 percent additional tax pursuant to the proportionate method in the following manner:

(1) *Amount of the additional tax apportioned to X.* Pursuant to the plan, X was liable for \$6,000 of the group's \$7,500 regular tax (80%) owed under the

15 percent tax bracket (and X is not liable for any regular tax under any higher tax bracket). See *Step 1* of paragraph (a)(2)(ii)(A) of this section. X's portion of the group's tax benefit which it derived from using the 15 percent tax rate is \$7,600 (0.8 x \$9,500). See *Step 2.* The tax benefit inuring to the entire group from using the 15 percent and 25 percent tax brackets is \$11,750 (\$9,500 (from the 15 percent tax bracket) + \$2,250 (from the 25 percent tax bracket)). So, X's percentage portion of the group's total tax benefit is

\$7,600/\$11,750 (64.68%). See *Step 3.* Thus, X's allocated portion of the 5 percent additional tax from using the 15 percent tax bracket is \$3,234 (0.6468 x \$5,000). See *Step 4.*

(2) *Amount of the additional tax apportioned to Y. (i) Regular tax apportioned to Y from using the 15 percent tax bracket.* Pursuant to the plan, Y was liable for the remaining \$1,500 of the group's \$7,500 regular tax (20%) owed under the 15 percent tax bracket. See *Step 1.* Y's portion of the group's tax benefit

which it derived from using the 15 percent tax rate is \$1,900 (\$9,500 - \$7,600, or 0.2 x \$9,500). See *Step 2*. So, Y's percentage portion of the group's total tax benefit is \$1,900/\$11,750 (16.17%). See *Step 3*. Thus, Y's allocated portion of the 5 percent additional tax from using the 15 percent tax bracket is \$809 (0.1617 x \$5,000). See *Step 4*.

(ii) *Regular tax apportioned to Y from using the 25 percent tax bracket.* Pursuant to the plan, Y was liable for 100% of the group's regular tax owed under the 25 percent tax bracket, an amount of \$6,250. See *Step 1*. Y is, therefore, entitled to 100% of the group's tax benefit which it derived from using this tax bracket, an amount of \$2,250. See *Step 2*. So, Y's percentage portion of the group's total tax benefit is \$2,250/\$11,750 (19.15%). See *Step 3*. Thus, Y's allocated portion of the 5 percent additional tax from using the 25 percent tax bracket is \$957 (0.1915 x \$5,000). See *Step 4*. Y's total allocated portion of the additional tax is \$1,766 (\$809 + \$957). See *Step 5*.

*Example 2. (i) Facts.* The facts are the same as in *Example 1*, except that on August 31, 2007, X of the X-Y-Z controlled group sold all of the stock of Z to M of the M-N controlled group, a pair of corporations unrelated to the X-Y group. Pursuant to the terms of the sales agreement, the members of the M-N group properly notified the members of the X-Y group on a timely basis that Z's taxable income for its 2007 taxable year, as based on the group's December 31<sup>st</sup> testing date, was \$100,000.

(ii) *Controlled group analysis.* On December 31, 2007, X and Y are members of the selling controlled group and M, N and Z are members of the buying controlled group. However, pursuant to section 1563(b)(3), Z is treated as an additional member of the X-Y group on December 31, 2007, since it was a member for at least one-half the number of days (243 out of 364) during the period beginning on January 1 and ending on December 30, 2007. Conversely, pursuant to section 1563(b)(2)(A), Z is treated as an excluded member of the M-N controlled group. Therefore, on December 31, 2007, X, Y and Z qualify as component members of the selling group, and only M and N qualify as component members of the buying group.

(iii) *Additional tax analysis.* With regard to X and Y's 2007 taxable years, X and Y together owed \$5,000 of additional tax, as calculated in *Example 1*. X's allocated portion of the additional tax is \$3,234, as calculated in the manner set forth in *Example 1*. Y's allocated portion of the additional tax is \$1,766, also as calculated in the manner set forth in *Example 1*.

*Example 3. (i) Facts.* The facts are the same as in *Example 2*, except that in 2012, pursuant to an IRS audit, Z's 2007 taxable income was redetermined. It was adjusted by an income increase of \$10,000. Pursuant to the terms of the sales agreement, the members of the M-N group timely notified the members of the X-Y group of Z's income adjustment.

(ii) *Additional tax analysis.* For 2007 the X-Y-Z group owed a revised additional tax in the amount of \$5,500, allocated as follows: \$3,557.40 to X and \$1,942.60 to Y. X and Y each filed an amended 2007 tax return to report their portions of the \$500 increase to the group's additional tax. Pursuant to their apportionment plan for allocating their regular tax, and as a result of defaulting to the proportionate method

for allocating the group's additional tax, X reported \$323.40 as its share of the group's increase to its additional tax and Y reported \$176.60 as its share of the group's increase to its additional tax.

*Example 4.* The facts are the same as in *Example 1*, except that the members elected in their apportionment plan to adopt the FIFO method for apportioning the additional tax. Under the FIFO method, the 5 percent additional tax amount of \$5,000 will be apportioned entirely to those members who would benefit from using the 15 percent tax bracket, by reason that \$5,000 of the group's additional tax is less than \$9,500, which is the full tax-benefit amount inuring to a controlled group from having a 15 percent tax rate applied to the full income bracket subject to that rate. Since X derived 80 percent of the group's tax benefit by its use of the 15 percent tax bracket, its share of the group's 5 percent additional tax is \$4,000 (80% x \$5,000), and Y's share of the group's 5 percent additional tax is, therefore, \$1,000, which is the remaining amount of the group's 5 percent additional tax, attributable to the 15 percent tax bracket.

(b) *Reduction to the amount exempted from the alternative minimum tax— (1) Calculation.* The alternative minimum taxable incomes for all the taxable years of the component members of a controlled group of corporations subjected to the same December 31<sup>st</sup> testing date shall be taken into account in calculating the reduction set forth in section 55(d)(3) to the amount exempted from the alternative minimum tax (the exemption amount).

(2) *Apportionment.* Any reduction to the exemption amount shall be apportioned to the component members of a controlled group in the same manner that the amount of the exemption (provided in section 55(d)(2)) to the alternative minimum tax was allocated under section 1561(a). For rules to apportion the section 55(d)(2) exemption amount among the component members of a controlled group, see §1.1561-3T(b) or (c).

(3) *Example. (i) Facts.* A controlled group of corporations consists of three members: X, Y and Z. X owns all of the stock of Y and Z. Each corporation files its separate return on a calendar year basis. For calendar year 2007, the component members of this controlled group have an apportionment plan in effect. The group has chosen to apportion the entire section 55(d)(2) exemption amount of \$40,000 to Z. For 2007, X had alternative minimum taxable income (AMTI) of \$40,000, Y had AMTI of \$60,000 and Z had AMTI of \$100,000. Thus the total AMTI of the group is \$200,000.

(ii) *Calculating the reduction to the exemption amount.* Section 55(d)(3)(A) provides that the section 55(d)(2) exemption amount shall be reduced by an amount equal to 25 percent of the amount by which the AMTI of a corporation exceeds \$150,000. For the purpose of computing the group's AMTI, the AMTI of each of the component members, for their taxable years that have the same December 31<sup>st</sup> testing date,

shall be taken into account. In accordance with these provisions, the \$40,000 exemption amount is reduced by \$12,500 (25% x \$50,000 (\$200,000 - \$150,000)). Pursuant to the group's allocation plan, the entire \$12,500 reduction to the exemption amount is allocated to Z. Thus, after such allocation, Z's \$40,000 exemption amount is reduced to \$27,500 (\$40,000 - \$12,500).

\* \* \* \* \*

(e) *Short taxable years not including a December 31<sup>st</sup> date— (1) General rule.* If a corporation has a short taxable year not including a December 31<sup>st</sup> testing date and, after applying the rules of section 1561(b) and paragraph (e)(2)(i) of this section, it qualifies as a component member of the group with respect to its short taxable year (short-year member), then, for purposes of subtitle A of the Internal Revenue Code, the amount of any tax-benefit item described in section 1561(b) allocated to that component member's short taxable year shall be the amount specified in section 1561(a) for that item, divided by the number of corporations which are component members of that group on the last day of that component member's short taxable year. The component members of such group may not apportion, by their apportionment plan, an amount of such tax-benefit item to any short-year member that differs from an amount based on equal apportionment.

(2) *Additional rules.* For purposes of paragraph (e)(1) of this section—

(i) Section 1563(b) shall be applied as if the last day of the taxable year of a short-year member were substituted for December 31, and

(ii) The term *short taxable year* does not include any portion of a taxable year of a corporation for which its income is required to be included in a consolidated return under §1.1502-76.

(3) *Examples.* The provisions of this paragraph (e) may be illustrated by the following examples:

*Example 1. Formation of a new member of a controlled group. (i) Facts.* On January 2, 2007, corporation X transfers cash to newly formed corporation Y (which begins business on that date) and receives all of the stock of Y in return. X also owns all of the stock of corporation Z on each day of 2006 and 2007. X, Y and Z have an apportionment plan in effect, apportioning the 15 percent tax-bracket amount as follows: 40% (\$20,000) to each of X and Y and 20% (\$10,000) to Z. X, Y and Z each file a separate return with respect to the group's December 31<sup>st</sup> 2007 testing date. X is on a calendar taxable year and Z is on a fiscal taxable year ending on March 31. Y adopts a fiscal year ending on June 30 and timely files a tax

return for its short taxable year beginning on January 2, 2007, and ending on June 30, 2007.

(ii) *Y's short taxable year.* On June 30, 2007, Y is a component member of a parent-subsidiary controlled group of corporations composed of X, Y and Z. Pursuant to paragraph (e)(1) of this section, the group may not apportion any amount of the 15 percent tax bracket to Y's short taxable year ending on June 30, 2007. Rather, Y is entitled to exactly 1/3 of such bracket amount, or \$16,667.

(iii) *The members' subsequent taxable years.* On December 31, 2007, X, Y and Z are component members of a parent-subsidiary controlled group of corporations. For their taxable years that include December 31, 2007 (X's calendar year ending December 31, 2007, Z's fiscal year ending March 31, 2008 and Y's fiscal year ending June 30, 2008), X, Y and Z apportion among themselves the full amount of all of the applicable tax brackets pursuant to their apportionment plan. For example, 40% of the 15 percent tax-bracket amount, or \$20,000, was apportioned to each of X and Y, and the remaining 10%, or \$10,000, was apportioned to Z.

*Example 2. Allocation of tax bracket to a liquidated member of a controlled group having a short taxable year.* (i) *Facts.* On January 1, 2007, corporation P owns all of the stock of corporations S<sub>1</sub>, S<sub>2</sub> and S<sub>3</sub> (the P group). Each of these four component members of the P group, with respect to the group's December 31, 2007 testing date, files its separate return on a calendar year basis. These members have an apportionment plan in effect (the P group plan) under which S<sub>1</sub> and S<sub>2</sub> are each entitled to 40% of the 15 percent tax-bracket amount (\$20,000), and P and S<sub>3</sub> are each entitled to 10% of the 15 percent tax-bracket amount (\$5,000). On May 31, 2007, S<sub>1</sub> liquidates and therefore files a return for the short taxable year beginning on January 1, 2007, and ending on May 31, 2007. On July 31, 2007, S<sub>2</sub> liquidates and therefore files a return for the short taxable year beginning on January 1, 2007 and ending on July 31, 2007. P and S<sub>3</sub> each file a return for their 2007 calendar taxable years.

(ii) *Apportionment of the 15 percent tax bracket to S<sub>1</sub> for its short taxable year.* On May 31, 2007, S<sub>1</sub> is a component member of the P group composed of P, S<sub>1</sub>, S<sub>2</sub> and S<sub>3</sub>. Pursuant to paragraph (e)(1) of this section, the group may not apportion any amount of the 15 percent tax bracket to S<sub>1</sub>'s short taxable year ending on June 30, 2007. Rather, S<sub>1</sub> is entitled to exactly 1/4 of such bracket amount, or \$12,500.

(iii) *Apportionment of the 15 percent tax bracket to S<sub>2</sub> for its short taxable year.* On July 31, 2007, S<sub>2</sub> is a component member of the P group composed of P, S<sub>2</sub> and S<sub>3</sub>. Pursuant to paragraph (e)(1) of this section, the group may not apportion any amount of the 15 percent tax bracket to S<sub>2</sub>'s short taxable year ending on June 30, 2007. Rather, S<sub>2</sub> is entitled to exactly 1/3 of such bracket amount, or \$16,667.

(iv) *Apportionment of the 15 percent tax bracket to P and S<sub>3</sub> for each of their calendar taxable years.* On December 31, 2007, P and S<sub>3</sub> are component members of the P group. Accordingly, for P and S<sub>3</sub>'s 2007 calendar taxable year, they are each apportioned \$25,000 of the 15 percent tax bracket, pursuant to the applicable P group plan.

*Example 3. Liquidation of member after its transfer to another controlled group.* (i) *Facts.* The facts are the same as in *Example 2*, except that P, on April

30, 2007, sold all of the stock of S<sub>2</sub> to the M-N controlled group. At the time of the sale, M and N are both unrelated to any members of the P group. As in *Example 2*, S<sub>2</sub> liquidates on July 31, 2007, and therefore files a tax return for its short taxable year beginning on January 1, 2007, and ending on July 31, 2007. Pursuant to the sales agreement, the M-N group timely notified P that S<sub>2</sub> had liquidated.

(ii) *Controlled group analysis.* On April 30, 2007, the date of the sale of S<sub>2</sub>, the P group reasonably expected that S<sub>2</sub> would be treated as an excluded member with respect to its December 31, 2007 testing date. On that April 30<sup>th</sup> date, S<sub>2</sub> had been a member of the P group for less than one-half the number of days of what it expected would be a full 2007 calendar taxable year preceding December 31, 2007 (120 days (January 1-April 30) out of 364 days (January 1-December 30)). Yet, as a result of S<sub>2</sub>'s subsequent liquidation by the M-N group prior to December 31, 2007, S<sub>2</sub> became a component member of the P group with respect to the P group's December 31, 2007 testing date. With respect to that December 31<sup>st</sup> testing date, S<sub>2</sub> thus was a member of the P group for more than one-half of the number of days of its taxable year ending on July 31, 2007, which days preceded December 31<sup>st</sup> 2007 (120 days (January 1-April 30 of 2007) out of 211 days (January 1-July 30 of 2007)). The allocation of the 15 percent tax-bracket amount to the P group members is determined in the same manner as in *Example 2* and, therefore, the bracket amounts allocated to P, S<sub>1</sub>, S<sub>2</sub> and S<sub>3</sub> are the same as determined in *Example 2*. The allocation of the bracket amounts would be the same if, at the time P sold all of the S<sub>2</sub> stock, the parties had made a section 338(h)(10) election.

*Example 4. Short taxable year including a December 31<sup>st</sup> date.* Corporation X owns all of the stock of corporations Y and Z. X, Y and Z each file separate returns. X and Y are on a calendar taxable year and Z is on a fiscal taxable year beginning October 1 and ending September 30. On January 2, 2007, Z liquidates. Because Z's final taxable year (beginning on October 1, 2006 and ending on January 2, 2007) includes a December 31<sup>st</sup> date, that is, December 31, 2006, it is not subject to the short taxable year rule of section 1561(b) and paragraph (e) of this section. Accordingly, Z is a component member of the X-Y-Z group, for the group's December 31, 2006 testing date. Thus, the rules of this paragraph (e) do not limit the amount of any of the tax-benefit items of section 1561(a) available to Z or to this controlled group.

(f) *Effective date—(1) Applicability dates—(i) Paragraphs (a) and (b) of this section.* Paragraphs (a) and (b) of this section apply to any taxable year beginning after December 31, 2007. However, taxpayers may apply paragraphs (a) and (b) of this section to any Federal income tax return filed on or after December 26, 2007, provided that all of the component members of a controlled group of corporations apply such paragraphs (a) and (b).

(ii) *Paragraph (c) of this section.* Paragraph (c) of this section applies to any taxable year beginning on or after December

22, 2006. However, taxpayers may apply paragraph (c) of this section to any Federal income tax return filed on or after December 22, 2006, provided that all of the component members of a controlled group of corporations apply such paragraph (c).

(iii) *Paragraph (e) of this section.* Paragraph (e) of this section applies to any taxable year beginning on or after December 26, 2007. However, taxpayers may apply paragraph (e) of this section to any Federal income tax return filed on or after December 26, 2007.

(2) *Expiration dates.* The applicability of paragraph (c) of this section will expire on December 21, 2009. The applicability of paragraphs (a), (b) and (e) of this section will expire on December 21, 2010.

Par. 6. Section 1.1563-1T is amended by revising the heading and paragraphs (b)(1), 2(i), (2)(ii) introductory text, (b)(3), and (e) to read as follows:

*§1.1563-1T Definition of controlled group of corporations and component members and related concepts (temporary).*

\* \* \* \* \*

(b) *Component members—(1) In general—(i) Definition.* For purposes of sections 1561 through 1563, a corporation is with respect to its taxable year a component member of a controlled group of corporations for the group's testing date if such corporation—

(A) Is a member of such controlled group on such testing date and is not treated as an excluded member under paragraph (b)(2) of this section; or

(B) Is not a member of such controlled group on such testing date but is treated as an additional member under paragraph (b)(3) of this section.

(ii) *Member of a controlled group of corporations.* For purposes of sections 1561 through 1563, a member of a controlled group is a corporation connected with other member(s) of a controlled group under the stock ownership rules and the stock qualification rules set forth in section 1563. Under the above rules, for a corporation to qualify as a component member of the group with respect to a group's December 31<sup>st</sup> testing date (or the short-year testing date for a short-year member), that corporation does not have to be a member of that group on that group's testing date. In addition, a corporation that is a member

of a controlled group on the group's testing date does not necessarily qualify as a component member of that group with respect to that testing date.

(iii) *Additional concepts used in applying the controlled group rules*—

(A) *Testing date* is the date used for determining the status of controlled group members as either component members or excluded members. That testing date is then also used to determine which taxable years of those component members are to be subjected to the controlled group rules. Generally, a member's testing date is the December 31<sup>st</sup> date included within that member's taxable year, whether such member is on a calendar or fiscal taxable year. However, if a component member of a controlled group has a short taxable year that does not include a December 31<sup>st</sup> date, then the last day of that short taxable year becomes that member's testing date; and

(B) *Testing period* is the time period used for determining the status of controlled group members as either component members or excluded members. The testing period begins on the first day of a member's taxable year and ends on the day before its testing date (Generally, the testing date is December 31<sup>st</sup>, but for a component member having a short taxable year not ending on December 31<sup>st</sup>, the testing date for the short taxable year of that member (and only that member) becomes the last day of that member's short taxable year). Thus, for a member on a fiscal taxable year, the portion of its taxable year beginning after December 31<sup>st</sup> and ending on the last day of its taxable year is not taken into account for determining its status as a

component member or an excluded member.

(2) *Excluded members*— (i) A corporation, which is a member of a controlled group of corporations on the group's testing date, a date included within that member's taxable year, but who was a member of such group for less than one-half of the number of days of its testing period, shall be treated as an excluded member of such group for that group's testing date.

(ii) A corporation which is a member of a controlled group of corporations on a testing date shall be treated as an excluded member of such group on such date if, for its taxable year including such date, such corporation is—

\* \* \* \* \*

(3) *Additional members*. A corporation shall be treated as an additional member of a controlled group of corporations, that is, an additional component member, on the group's testing date if it—

(i) Is not a member of such group on such date;

(ii) Is not described, with respect to such taxable year, in paragraph (b)(2)(ii)(A), (B), (C), (D), or (E) of this section; and

(iii) Was a member of such group for one-half (or more) of the number of days in its testing period.

\* \* \* \* \*

(e) *Effective date*— (1) *Applicability date*. Paragraph (b) of this section applies to any taxable year beginning on or after December 26, 2007. However, taxpayers may apply paragraph (b) of this section to any Federal income tax return filed on or

after December 26, 2007. Paragraphs (a) and (b) (as contained in 26 CFR part 1 in effect on April 1, 2007), and paragraphs (c)(1), (c)(2)(iv) and (d) of this section apply to taxable years beginning on or after December 22, 2006. However, taxpayers may apply the paragraphs described in the preceding sentence to any Federal income tax return filed on or after December 22, 2006. Paragraphs (c)(2)(i) through (iii) of this section apply to any original Federal income tax return (including any amended return filed on or before the due date (including extensions) of such original return) timely filed on or after May 30, 2006.

(2) *Expiration date*. The applicability of paragraph (b) of this section will expire on December 21, 2010. The applicability of paragraphs (a) and (b) (as contained in 26 CFR part 1 in effect on April 1, 2007), and paragraphs (c)(1), (c)(2)(iv) and (d) of this section will expire on December 21, 2009. The applicability of paragraphs (c)(2)(i) through (iii) of this section will expire on May 26, 2009.

Linda E. Stiff,  
*Deputy Commissioner for  
Services and Enforcement.*

Approved December 17, 2007.

Eric Solomon,  
*Assistant Secretary of  
the Treasury (Tax Policy).*

(Filed by the Office of the Federal Register on December 21, 2007, 8:45 a.m., and published in the issue of the Federal Register for December 26, 2007, 72 F.R. 72929)

# Part II. Treaties and Tax Legislation

## Subpart A.—Tax Conventions and Other Related Items

### Supplemental Tables of Income Tax Rates Under New Income Tax Conventions

#### Announcement 2008–8

The United States recently exchanged instruments of ratification for a new income tax treaty with Belgium and new protocols for the income tax treaties with Denmark, Finland, and Germany. The effective dates are as follows:

**Belgium.** The provisions relating to withholding tax at source are effective for amounts paid or credited on or after February 1, 2008. For other taxes, the treaty is effective for tax periods beginning on or after January 1, 2008.

A person entitled to benefits under the previous treaty can elect to have that treaty apply in its entirety for a twelve-month period following the date the new treaty would otherwise apply.

**Denmark.** The provisions relating to withholding tax at source are effective for amounts paid or credited on or after February 1, 2008. For all other taxes, the protocol is effective for tax periods beginning on or after January 1, 2008.

**Finland.** The provisions relating to withholding tax at source are effective for amounts paid or credited on or after February 1, 2008. However, the provisions for dividends covered by footnotes *d* and *f* in Table 1, are effective January 1, 2007. For all other taxes, the protocol is effective for tax years beginning on or after January 1, 2008.

**Germany.** The provisions relating to withholding tax at source are effective for amounts paid or credited on or after January 1, 2007. For all other taxes, the treaty is effective for tax years beginning on or after January 1, 2008.

A person entitled to benefits under the treaty before modification by this protocol

can elect to have the unmodified treaty apply in its entirety for a twelve-month period following the date the protocol would otherwise apply.

**Tables 1 and 2.** The following tables can be used to supplement Tables 1 and 2 in Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities (For Withholding in 2007)*, and Publication 901, *U.S. Tax Treaties*. The footnotes in those publications that relate to the column headings in these tables generally apply to these entries. The protocols for Denmark and Finland did not change the entries shown in Table 2 of the publications. These tables are intended only as a summary, and the full text of the relevant income tax treaty and protocol should be consulted.

The complete text of the Belgium treaty and the Denmark, Finland, and Germany protocols are available on the IRS website at [www.irs.gov](http://www.irs.gov).

**Table 1. Withholding Tax Rates on Income Other Than Personal Service Income**

Income code number		1	2	3	6	7	9	10	11	12	13	14	21
Country/Code													
Belgium	BE	0 a,b	0 a,b,c	0 a,b	15 a,d,e	5 a,d,e,f	0 a	0 a	0 a	0 a	30	0 g,h	30
Denmark	DA	0 a,i	0 a,c,i	0 a,i	15 a,d,e	5 a,d,e,f	0 a	0 a	0 a	0 a	30	30 g,j,k	30
Finland	FI	0 a,i	0 a,c,i	0 a,i	15 a,d,e	5 a,d,e,f	0 a	0 a	0 a	0 a	30	0 g,h	30
Germany	GM	0 a,b	0 a,b,c	0 a,b	15 a,d,e	5 a,d,e,f	0 a	0 a	0 a,l	0 a	30	0 g,h	0

#### Income Codes

- |   |   |
|---|---|
| 1 Interest paid by U.S. obligors — General          | 10 Industrial royalties                                 |
| 2 Interest on real property mortgages               | 11 Copyright royalties — Motion pictures and Television |
| 3 Interest paid to controlling foreign corporations | 12 Copyright royalties — Other                          |
| 6 Dividends paid by U.S. corporations — General     | 13 Real property income and Natural resources royalties |
| 7 Dividends qualifying for direct dividend rate     | 14 Pensions and annuities                               |
| 9 Capital gains                                     | 21 Social security payments                             |



## Footnotes

- a The exemption or reduction in rate does not apply if the recipient has a permanent establishment in the United States and the income paid is attributable to this permanent establishment. For Denmark and Finland, the exemption or reduction in rate also does not apply if the income is attributable to the performance of independent personal services from a fixed base in the United States.
- b The rate is 15% (30% for Germany) for contingent interest that does not qualify as portfolio interest. Generally, this is interest based on receipts, sales, income, or changes in the value of property.
- c The exemption or reduced rate does not apply to an excess inclusion for a residual interest in a real estate mortgage investment conduit (REMIC).
- d Amounts paid to a pension fund that are not derived from the carrying on of a business by the pension fund (or an associated enterprise for Belgium, Denmark, and Finland) are exempt.
- e The rate in column 6 (or 0% for payments to pension funds described in footnote d) applies to dividends paid by a regulated investment company (RIC) or real estate investment trust (REIT). However, that rate (including 0% for pension funds) applies to dividends paid by a REIT only if the beneficial owner of the dividends is (a) an individual or a pension fund holding not more than a 10% interest in the REIT, (b) a person holding not more than 5% of any class of the REIT's stock and the dividends are paid on stock that is publicly traded, or (c) a person holding not more than a 10% interest in the REIT and the REIT is diversified.
- f Dividends paid by an 80%-owned corporate subsidiary are exempt if certain conditions are met.
- g A 30% rate applies to U.S. government pensions (federal, state, or local); however, pensions paid to an individual who is both a resident and national of the treaty country are exempt from U.S. tax.
- h Includes alimony.
- i The rate is 15% for interest determined with reference to (a) receipts, sales, income, profits or other cash flow of the debtor or related person, (b) any change in the value of any property of the debtor or a related person, or (c) any dividend, partnership distribution or similar payment made by the debtor to a related person.
- j Generally, if the person was receiving pension distributions before March 31, 2000, the distributions continue to be exempt from U.S. tax.
- k Annuities are exempt.
- l The exemption does not apply to cinematographic items, or works on film, tape, or other means of reproduction for use in radio or television broadcasting.

**Table 2. Compensation for Personal Services Performed in United States Exempt from Withholding and U.S. Income Tax Under Income Tax Treaties**

Country	Code	Category of personal services	Maximum presence in U.S.	Required Employer or Payer	Maximum Amount of Compensation	Article No.
		Purpose				
Belgium	16	Independent personal services <sup>1</sup>				
	17	Dependent personal services <sup>4,5</sup>	183 days	Any foreign resident	No limit	14
	20	Public entertainment	No limit	Any U.S. or foreign resident	\$20,000 p.a. <sup>6</sup>	16
	18	Teaching <sup>2</sup>	2 years	U.S. educational or research institution	No limit	19(2)
	19	Studying and training: <sup>11</sup> Remittances or allowances Compensation during study or training	No limit <sup>3</sup> No limit <sup>3</sup>	Any foreign resident Any U.S. or foreign resident	No limit \$9,000 p.a.	19(1)(a) 19(1)(b)

Country	Code	Category of personal services	Maximum presence in U.S.	Required Employer or Payer	Maximum Amount of Compensation	Article No.
		Purpose				
Germany	15	Scholarship or fellowship grant	No limit	Any U.S. or foreign resident <sup>7</sup>	No limit	20(3)
	16	Independent personal services <sup>1</sup>				
	17	Dependent personal services <sup>4,5</sup>	183 days	Any foreign resident	No limit	15
	20	Public entertainment	No limit	Any U.S. or foreign resident	\$20,000 p.a. <sup>6</sup>	17
	18	Teaching <sup>2,8</sup>	2 years	U.S. educational or research institution	No limit	20(1)
	19	Studying and training: <sup>11</sup> Remittances or allowances	No limit	Any foreign resident	No limit	20(2)
		Compensation during study or training	4 years	Any U.S. or foreign resident	\$9,000 p.a.	20(4)
	Compensation while gaining experience <sup>9</sup>	1 year	Any foreign resident	\$10,000 <sup>10</sup>	20(5)	

#### Footnotes

- 1 Treated as business profits under Article 7 of the treaty.
- 2 Does not apply to income from research work primarily for private benefit.
- 3 Two years in the case of a business trainee.
- 4 Fees paid to a resident of the treaty country for services performed in the United States as a director of a U.S. corporation are subject to U.S. tax.
- 5 The exemption does not apply if the employee's compensation is borne by a permanent establishment that the employer has in the United States.
- 6 The exemption does not apply if gross receipts (including reimbursements) exceed this amount during the year. For Germany, income is fully exempt if visit is substantially supported by public funds of Germany or its political subdivisions or local authorities.
- 7 Grant must be from a nonprofit organization.
- 8 The exemption does not apply if during the immediately preceding period, the individual claimed the benefit of Article 20(2), (3), or (4).
- 9 Applies only if training or experience is received from a person other than the individual's employer.
- 10 The exemption does not apply if compensation exceeds this amount.
- 11 Applies only to full-time student or trainee.

# Part III. Administrative, Procedural, and Miscellaneous

## Intermediary Transaction Tax Shelter

### Notice 2008–20

#### SECTION 1. PURPOSE

Notice 2001–16, 2001–1 C.B. 730, identified the Intermediary Transaction Tax Shelter as a listed transaction under § 1.6011–4(b)(2) of the Income Tax Regulations. Since that notice was published, the Internal Revenue Service (Service) has received disclosure statements with respect to Notice 2001–16 transactions pursuant to § 1.6011–4 and other information pursuant to §§ 6111 and 6112 of the Internal Revenue Code and through promoter audits. After reviewing the disclosure statements and other information, the Service and Treasury Department have decided to identify the components of an Intermediary Transaction Tax Shelter. A transaction that does not have all of the components identified herein is not the same as or substantially similar to the listed transaction described in Notice 2001–16. The Service and Treasury Department also are identifying the persons who are treated as participants in an Intermediary Transaction Tax Shelter under § 1.6011–4(c)(3)(i)(A). This notice should not otherwise be construed as limiting the scope or application of Notice 2001–16 and should not otherwise create any inference as to whether or not a transaction was required to be disclosed or registered under § 6011 or § 6111 prior to January 17, 2008.

#### SECTION 2. BACKGROUND

An Intermediary Transaction Tax Shelter attempts to avoid the corporate income tax from a sale of assets. Generally it involves transactions in which shareholders of a corporation dispose of their shares of stock of the corporation, one or more persons purchase the corporation's assets in one or more taxable transactions, and all or a portion of the gain or tax that would otherwise result to the corporation from a sale of the assets is avoided.

#### SECTION 3. DISCUSSION

##### .01 Components of an Intermediary Transaction Tax Shelter

An Intermediary Transaction Tax Shelter involves the use of an intermediary (M) (which can be one or more persons) in facilitating the transaction. However, the Service has received information and comments from taxpayers suggesting that identifying the transaction based on the role of an entity that appears to be an intermediary may result in over-disclosure or under-disclosure of the transaction depending on the circumstances of the transaction. To address these concerns, this notice identifies the four necessary components in an Intermediary Transaction Tax Shelter from the perspective of the target corporation, its shareholders, and the purchasers of the target corporation's assets.

1. A corporation (T) directly or indirectly (*e.g.*, through a pass-through entity or a member of a consolidated group of which T is a member) owns assets the sale of which would result in taxable gain and, as of the time of the stock disposition described in component two, T (or the consolidated group of which T is a member) has insufficient tax benefits to eliminate or offset such taxable gain (or the tax) in whole or in part. The tax that would result from such sale is hereinafter referred to as T's Built-in Tax. In determining whether T's (or the consolidated group's) tax benefits are insufficient for purposes of the first sentence, the following tax benefits shall be excluded: (i) any tax benefits attributable to a listed transaction under § 1.6011–4(b)(2), and (ii) any tax benefits attributable to built-in loss property acquired within 12 months before the stock disposition described in component two, to the extent such built-in losses exceed built-in gains in property acquired in the same transaction(s). All references to T in this notice include successors to T.

2. At least 50 percent of the T stock (by vote or value) is disposed of by T's shareholder(s) (X), other than in liquidation of T, in one or more related transactions within a 12 month period.

3. Either within 12 months before, simultaneously, or within 12 months after the date on which X has disposed of at

least 50 percent of the T stock (by vote or value) (excluding any time T is protected or hedged against price fluctuations), all or most of T's assets are disposed of (Sold T Assets) to one or more buyers (Y) in one or more transactions in which gain is recognized with respect to the Sold T Assets. Where a disposition of Sold T Assets is an intercompany transaction between members of a consolidated group, the disposition will not be a "transaction in which gain is recognized with respect to the Sold T Assets" for purposes of the preceding sentence until such gain must be taken into account under the rules of § 1.1502–13.

4. All or most of T's Built-in Tax described in component one that would otherwise result from the disposition of the Sold T Assets described in component three is purportedly offset or avoided or not paid.

##### .02 Participation in the Listed Transaction

A transaction must have all four of the components identified herein to be the same as or substantially similar to the listed transaction identified in Notice 2001–16 as the Intermediary Transaction Tax Shelter. In determining whether a person is a participant in a transaction identified in Notice 2001–16, the general rule in § 1.6011–4(c)(3)(i)(A) applies, except the following rules apply with respect to persons in the position of X or Y as described below:

- In no event will any X be treated as a participant under § 1.6011–4(c)(3)(i)(A) if the only T stock X disposes of is traded on an established securities market (within the meaning of § 1.453–3(d)(4)) and prior to the disposition X (including related persons described in section 267(b) or 707(b)) did not hold five percent (or more) by vote or value of any class of T stock disposed of by X.
- In no event will any Y be treated as a participant under § 1.6011–4(c)(3)(i)(A) if the only Sold T Assets acquired by Y are either (i) securities (as defined in section 475(c)(2)) that are traded on an established securities market (within

the meaning of § 1.453-3(d)(4) and represent a less-than-five-percent interest in that class of security, or (ii) assets that are not securities and do not include a trade or business as described in § 1.1060-1(b)(2).

### .03 Disclosure, List Maintenance, and Registration Requirements; Penalties; Other Considerations

Independent of their classification as “listed transactions,” transactions that are the same as, or substantially similar to, the transaction described in Notice 2001-16 may already be subject to the requirements of § 6011, § 6111, or § 6112, or the regulations thereunder.

Persons involved with these transactions are alerted to certain responsibilities that may arise from their involvement with these transactions. Persons required to disclose these transactions under § 1.6011-4 and who fail to do so may be subject to the penalty under § 6707A. Persons required to disclose or register these transactions under § 6111 who have failed to do so may be subject to the penalty under § 6707(a). Persons required to maintain lists of investors under § 6112 who fail to provide such lists when requested by the Service may be subject to the penalty under § 6708(a). A person that is a tax-exempt entity within the meaning of § 4965(c), or an entity manager within the meaning of § 4965(d), may be subject to excise tax, disclosure, filing or payment obligations under § 4965, § 6033(a)(2), § 6011, and § 6071. Some taxable entities may be subject to disclosure obligations under § 6011(g) that apply to “prohibited tax shelter transactions” as defined by § 4965(e) (including listed transactions).

In addition, the Service may impose other penalties on persons involved in this transaction or substantially similar transactions (including an accuracy-related penalty under § 6662 or 6662A) and, as applicable, on persons who participate in the promotion or reporting of this transaction or substantially similar transactions (including the return preparer penalty under § 6694, the promoter penalty under § 6700, and the aiding and abetting penalty under § 6701).

Further, under § 6501(c)(10), the period of limitations on assessment may be extended beyond the general three-year

period of limitations for persons required to disclose transactions under § 1.6011-4 who fail to do so. See Rev. Proc. 2005-26, 2005-1 C.B. 965.

The Service and the Treasury Department recognize that some taxpayers may have filed tax returns taking the position that they were entitled to the purported tax benefits of the types of transactions described in Notice 2001-16. These taxpayers should consult with a tax advisor to ensure that their transactions are disclosed properly and to take appropriate corrective action.

### SECTION 4. EFFECTIVE DATE

This notice is effective as of January 17, 2008. This notice is applicable to returns and statements due under § 6011 or § 6111 after January 17, 2008.

### SECTION 5. EFFECT ON OTHER DOCUMENTS

Notice 2001-16 is modified with respect to the types of persons who may be treated as participants in an Intermediary Transaction Tax Shelter under § 1.6011-4(c)(3)(i)(A).

### DRAFTING INFORMATION

The principal author of this notice is T. Ian Russell of the Office of Associate Chief Counsel (Corporate). For further information regarding this notice, contact Mr. Russell at (202) 622-7550 (not a toll-free call).

*26 CFR 1.61-21: Taxation of fringe benefits. (Also: §§ 61, 280F.)*

## Rev. Proc. 2008-13

### SECTION 1. PURPOSE

.01 This revenue procedure provides: (1) the maximum value of employer-provided vehicles first made available to employees for personal use in calendar year 2008 for which the vehicle cents-per-mile valuation rule provided under section 1.61-21(e) of the Income Tax Regulations may be applicable is \$15,400 for a passenger automobile and \$16,700 for a truck or van; (2) the maximum value of employer-provided vehicles first made

available to employees for personal use in calendar year 2008 for which the fleet-average valuation rule provided under section 1.61-21(d) of the regulations may be applicable is \$19,900 for a passenger automobile and \$20,800 for a truck or van.

### SECTION 2. BACKGROUND

.01 If an employer provides an employee with a vehicle that is available to the employee for personal use, the value of the personal use must generally be included in the employee’s income and wages. Internal Revenue Code § 61; Treas. Reg. § 1.61-21.

.02 For employer-provided passenger automobiles (including trucks and vans) made available to employees for personal use that meet the requirements of section 1.61-21(e)(1) of the regulations, generally the value of the personal use may be determined under the vehicle cents-per-mile valuation rule of section 1.61-21(e). However, regulations section 1.61-21(e)(1)(iii)(A) provides that for a passenger automobile first made available after 1988 to any employee of the employer for personal use, the value of the personal use may not be determined under the vehicle cents-per-mile valuation rule for a calendar year if the fair market value of the passenger automobile (determined pursuant to regulations section 1.61-21(d)(5)(i) through (iv)) on the first date the passenger automobile is made available to the employee exceeds a specified dollar limit.

.03 For employer-provided vehicles available to employees for personal use for an entire year, generally the value of the personal use may be determined under the automobile lease valuation rule of section 1.61-21(d) of the regulations. Under this valuation rule, the value of the personal use is the Annual Lease Value. Provided the requirements of regulations section 1.61-21(d)(5)(v) are met, an employer with a fleet of 20 or more automobiles may use a fleet-average value for purposes of calculating the Annual Lease Values of the automobiles in the employer’s fleet. The fleet-average value is the average of the fair market values of all the automobiles in the fleet. However, section 1.61-21(d)(5)(v)(D) of the regulations provides that for an automobile first made available after 1988 to an employee of the

employer for personal use, the value of the personal use may not be determined under the fleet-average valuation rule for a calendar year if the fair market value of the automobile (determined pursuant to regulations section 1.61-21(d)(5)(i) through (v)) on the first date the passenger automobile is made available to the employee exceeds a specified dollar limit.

.04 The maximum passenger automobile values for applying the vehicle cents-per-mile and the fleet-average value rules reflect the automobile price inflation adjustment of Code section 280F(d)(7). The method of calculating this price inflation amount for automobiles other than trucks and vans uses the “new car” component of the Consumer Price Index (CPI) “automobile component”. When calculating this price inflation adjustment for trucks and vans, the “new trucks” component of the CPI is used. This results in somewhat higher maximum values for trucks and vans. This change reflects the higher rate of price inflation that trucks and vans have been subject to since 1988, and is consistent the change announced in Rev. Proc. 2003-75, 2003-2 C.B. 1018, for purposes of calculating depreciation deductions. *See also* Rev. Proc. 2007-30, 2007-18 I.R.B. 1104. For purposes of this revenue procedure, the term “trucks and vans” refers to passenger automobiles that are built on a truck chassis, including mini-vans and sport utility vehicles (SUVs) that are built on a truck chassis.

### SECTION 3. PROCEDURE

.01 Maximum Automobile Value for Using the Cents-per-mile Valuation Rule. An employer providing a passenger automobile for the first time in calendar year

2008 for the personal use of any employee may determine the value of the personal use by using the vehicle cents-per-mile valuation rule in section 1.61-21(e) of the regulations if its fair market value on the date it is first made available does not exceed \$15,400 for a passenger automobile other than a truck or van, or \$16,700 for a truck or van. If the fair market value of the passenger automobile exceeds this amount, the employer may determine the value of the personal use under the general valuation rules of regulations section 1.61-21(b) or under the special valuation rules of section 1.61-21(d) (Automobile lease valuation) or section 1.61-21(f) (Commuting valuation) if the applicable requirements are met. *See* Rev. Proc. 2006-15, 2006-1 C.B. 387, for guidance on determining the maximum value of passenger automobiles first made available during calendar year 2006, and Rev. Proc. 2007-11, 2007-2 I.R.B. 261, for guidance on determining the maximum value of passenger automobiles first made available during calendar year 2007.

.02 Maximum Automobile Value for Using the Fleet-Average Valuation Rule. An employer with a fleet of 20 or more automobiles providing an automobile for the first time in calendar year 2008 for the personal use of any employee for an entire year may determine the value of the personal use by using the fleet-average valuation rule in regulations section 1.61-21(d)(5)(v) to calculate the Annual Lease Values of the automobiles in the fleet. The fleet-average valuation rule may not be used to determine the Annual Lease Value of any automobile if its fair market value on the date it is first made available exceeds \$19,900 for a passenger automobile other than a truck or van, or \$20,800

for a truck or van. If all other applicable requirements are met, an employer with a fleet of 20 or more vehicles consisting of passenger automobiles other than trucks or vans as well as trucks and vans may use the fleet-average valuation rule as long as none of the vehicles exceed their respective maximum allowable values. If the fair market value of any passenger automobile in the fleet exceeds these amounts, the employer may determine the value of the personal use under regulations section 1.61-21(f) (Commuting valuation) or the general valuation rules of section 1.61-21(b) or may determine the Annual Lease Value of such automobile separately under the automobile lease valuation rule of section 1.61-21(d)(2) if the applicable requirements are met.

### SECTION 4. EFFECTIVE DATE

This revenue procedure applies to employer-provided passenger automobiles first made available to employees for personal use in calendar year 2008.

### SECTION 5. DRAFTING INFORMATION

The principal author of this revenue procedure is Don M. Parkinson of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt & Government Entities). For further information regarding the maximum automobile value for applying the valuation rules of regulations section 1.61-21(e)(1)(iii)(A) (the vehicle cents-per-mile valuation rule), and section 1.61-21(d)(5)(v)(D) (the fleet average valuation rule), contact Don M. Parkinson at (202) 622-6040 (not a toll-free call).

# Part IV. Items of General Interest

## Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations

### Calculating and Apportioning the Section 11(b)(1) Additional Tax Under Section 1561 for Controlled Groups

#### REG-104713-07

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In this issue of the Bulletin, the IRS is issuing temporary regulations that affect component members of a controlled group of corporations and consolidated groups filing life-nonlife Federal income tax returns. These temporary regulations provide guidance for calculating and apportioning between component members any amount of additional tax and any reduction in the amount exempted from the alternative minimum tax. These temporary regulations also update and clarify the allocation of tax-benefit items in the case in which a component member has a short taxable year not including a December 31<sup>st</sup> date. Finally, these temporary regulations provide explanations of two concepts: a group's testing date and a member's testing period for use in determining which members of the group and which taxable years of those members are subject to the controlled group rules. The text of those regulations (T.D. 9369) also serves as the text of these proposed regulations.

DATES: Written or electronic comments and a request for a public hearing must be received by March 25, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-104713-07), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday

between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-104713-07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-104713-07).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulation, Grid Glycer, (202) 622-7930, concerning submissions of comments and requests for public hearings, Richard A. Hurst (202) 622-7180 (not toll-free numbers).

#### SUPPLEMENTARY INFORMATION:

#### Background and Explanation of Provisions

Temporary regulations in this issue of the Bulletin amend 26 CFR Part 1 to add §§1.1502-47T and 1.1561-0T, remove §1.1561-2, and amend §§1.1561-2T and 1.1563-1T. The text of those regulations also serves as the text of these proposed regulations. The preamble to the final and temporary regulations explains these proposed regulations.

#### Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. With respect to §1.1502-47, it is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these regulations primarily affect affiliated groups of corporations that have elected to file consolidated returns, which tend to be larger businesses. Further, these regulations do not require any additional collection of information under §1.1502-47 because these regulations simply add a section that had been inadvertently removed from the Code of Federal

Regulations. Therefore, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

#### Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department specifically request comments on the clarity of the proposed regulations and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by any person that timely submits written or electronic comments. If a public hearing is scheduled, notice of the date, time and place for the public hearing will be published in the **Federal Register**.

#### Drafting Information

The principal author of these regulations is Grid Glycer of the Office of Associate Chief Counsel (Corporate). Other personnel from the Treasury Department and the IRS participated in their development.

\* \* \* \* \*

#### Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

#### 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 1.1561-0 is added to read as follows:

*§1.1561-0 Table of contents.*

[The text of the proposed §1.1561-0 is the same as the text for §1.1561-0T published elsewhere in this issue of the Bulletin].

Par. 3. Section 1.1561-2 is added to read as follows:

*§1.1561-2 Special rules for allocating reductions to certain section 1561(a) tax-benefit items.*

[The text of the proposed §1.1561-2 is the same as the text for §1.1561-2T(a) through (f)(1) published elsewhere in this issue of the Bulletin].

Par. 4. Section 1.1563-1 is amended to read as follows:

*§1.1563-1 Definition of controlled group of corporations and component members and related concepts.*

[The text of the proposed §1.1563-1 is the same as the text for §1.1563-1T published elsewhere in this issue of the Bulletin].

Linda E. Stiff,  
*Deputy Commissioner for  
Services and Enforcement.*

(Filed by the Office of the Federal Register on December 21, 2007, 8:45 a.m., and published in the issue of the Federal Register for December 26, 2007, 72 F.R. 72970)

## **Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations**

### **Reduction of Foreign Tax Credit Limitation Categories Under Section 904(d)**

#### **REG-114126-07**

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations and notice of public hearing.

SUMMARY: In this issue of the Bulletin, the IRS is issuing temporary regulations that provide guidance relating to the reduction of the number of separate foreign

tax credit limitation categories under section 904(d) of the Internal Revenue Code. Changes to the applicable law were made by the American Jobs Creation Act of 2004 (AJCA) reducing the number of section 904(d) separate categories from eight to two, effective for taxable years beginning after December 31, 2006. The temporary regulations provide guidance needed to comply with these changes and affect individuals and corporations claiming foreign tax credits. The text of those temporary regulations (T.D. 9368) published in this issue of the Bulletin also serves as the text of these proposed regulations. This document also provides a notice of public hearing on these proposed regulations.

**DATES:** Written or electronic comments must be received by March 20, 2008. Outlines of topics to be discussed at the public hearing scheduled for April 22, 2008, at 10:00 a.m. must be received by April 1, 2008.

**ADDRESSES:** Send submissions to CC:PA:LPD:PR (REG-114126-07), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-114126-07), Courier's desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20044, or sent electronically, via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (IRS REG-114126-07). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

#### **FOR FURTHER INFORMATION CONTACT:**

Concerning the regulations, Jeffrey L. Parry, (202) 622-3850; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Kelly Banks, (202) 622-7180 (not toll-free numbers).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background and Explanation of Provisions**

Temporary regulations in this issue of the Bulletin contain amendments to the Income Tax Regulations (26 CFR Part 1)

which provide rules relating to the reduction of the number of separate foreign tax credit limitation categories under section 904(d). The text of those regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations. The regulations affect individuals and corporations claiming foreign tax credits.

#### **Special Analyses**

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f), these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

#### **Comments and Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any electronic or written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. The Treasury Department and the IRS specifically request comments on the clarity of the proposed regulations and how they may be made easier to understand, as well as comments on additional guidance that may be needed to implement changes made by the AJCA. All comments will be available for public inspection and copying.

A public hearing has been scheduled for April 22, 2008, in the auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance more than 30 minutes before the hearing starts. For information about

having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit electronic or written comments by March 20, 2008, and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by April 1, 2008. A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

### Drafting Information

The principal author of these regulations is Jeffrey L. Parry of the Office of Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

\* \* \* \* \*

### Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

#### 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 1.904-2(i) is added to read as follows:

*§1.904-2 Carryback and carryover of unused foreign tax.*

\* \* \* \* \*

(i) [The text of proposed §1.904-2(i) is the same as the text of §1.904-2T(i)(1) through (3) published elsewhere in this issue of the Bulletin.]

Par. 3. In §1.904-4, paragraphs (a), (b), (h)(3), and (l) are revised and paragraph (n) is added to read as follows:

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

(a) [The text of the proposed amendment to §1.904-4(a) is the same as the text of §1.904-4T(a) published elsewhere in this issue of the Bulletin.]

(b) [The text of the proposed amendment to §1.904-4(b) is the same as the text of §1.904-4T(b) published elsewhere in this issue of the Bulletin.]

\* \* \* \* \*

(h) \* \* \*

(3) [The text of the proposed amendment to §1.904-4(h)(3) is the same as the text of §1.904-4T(h)(3) published elsewhere in this issue of the Bulletin.]

\* \* \* \* \*

(l) [The text of the proposed amendment to §1.904-4(l) is the same as the text of §1.904-4T(l) published elsewhere in this issue of the Bulletin.]

\* \* \* \* \*

(n) [The text of proposed §1.904-4(n) is the same as the text of §1.904-4T(n) published elsewhere in this issue of the Bulletin.]

Par. 4. In §1.904-5, paragraph (h)(3) is revised and paragraph (o)(3) is added to read as follows:

*§1.904-5 Look-through rules as applied to controlled foreign corporations and other entities.*

\* \* \* \* \*

(h) \* \* \*

(3) [The text of the proposed amendment to §1.904-5(h)(3) is the same as the text of §1.904-5T(h)(3) published elsewhere in this issue of the Bulletin.]

\* \* \* \* \*

(o) \* \* \*

(3) [The text of proposed §1.904-5(o)(3) is the same as the text of §1.904-5T(o)(3) published elsewhere in this issue of the Bulletin.]

Par. 5. Section 1.904-7(g) is added to read as follows:

*§1.904-7 Transition rules.*

\* \* \* \* \*

(g) [The text of proposed §1.904-7(g) is the same as the text of §1.904-7T(g)(1) through (6) published elsewhere in this issue of the Bulletin.]

Par. 6. §1.904(f)-12(h) is added to read as follows:

*§1.904(f)-12 Transition rules.*

\* \* \* \* \*

(h) [The text of proposed §1.904-12(h) is the same as the text of §1.904-12T(h)(1) through (h)(6) published elsewhere in this issue of the Bulletin.]

Linda E. Stiff,  
*Deputy Commissioner for  
Services and Enforcement.*

(Filed by the Office of the Federal Register on December 20, 2007, 8:45 a.m., and published in the issue of the Federal Register for December 21, 2007, 72 F.R. 72645)



# Announcement of Disciplinary Actions Involving Attorneys, Certified Public Accountants, Enrolled Agents, and Enrolled Actuaries — Reinstatements, Suspensions, Censures, Disbarments, and Resignations

## Announcement 2008-5

Under Title 31, Code of Federal Regulations, Part 10, attorneys, certified public accountants, enrolled agents, and enrolled actuaries may not accept assistance from, or assist, any person who is under disbarment or suspension from practice before the Internal Revenue Service if the assistance relates to a matter constituting practice before the Internal Revenue Service and may not knowingly aid or abet another

person to practice before the Internal Revenue Service during a period of suspension, disbarment, or ineligibility of such other person.

To enable attorneys, certified public accountants, enrolled agents, and enrolled actuaries to identify persons to whom these restrictions apply, the Director, Office of Professional Responsibility, will announce in the Internal Revenue Bulletin

their names, their city and state, their professional designation, the effective date of disciplinary action, and the period of suspension. This announcement will appear in the weekly Bulletin at the earliest practicable date after such action and will continue to appear in the weekly Bulletins for five successive weeks.

## Reinstatement To Practice Before the Internal Revenue Service

Under Title 31, Code of Federal Regulations, Part 10, The Director, Office of Professional Responsibility, may entertain a petition for reinstatement for any attor-

ney, certified public accountant, enrolled agent, or enrolled actuary censured, suspended, or disbarred, from practice before the Internal Revenue Service.

The following individuals' eligibility to practice before the Internal Revenue Service has been restored:

Name	Address	Designation	Date of Reinstatement
Cohen, Peter	Edison, NJ	CPA	June 01, 2004
Brunelle, Roswell J.	Queensbury, NY	CPA	June 10, 2004
Cohick, Jeffrey S.	Newville, PA	Enrolled Agent	October 30, 2004
Cotroneo, Nicholas	McLean, VA	CPA	February 28, 2007
Layson, David A.	Corydon, IN	Attorney	October 06, 2007
Tomasulo, Maria V.	Wantagh, NY	CPA	October 16, 2007
Emeziem, Kelechi C.	Antioch, CA	Attorney	October 17, 2007
Johnston, Gregory A.	Muscatine, IA	Attorney	October 17, 2007
Shapiro, Sidney C.	West Palm Beach, FL	CPA	October 29, 2007
Hubbard, Cynthia A.	Geneva, IL	Attorney	October 31, 2007
Moss, Steve E.	Henderson, NC	CPA	November 29, 2007
Schaffer, Robert J.	Baiting Hollow, NY	CPA	December 04, 2007
Woods, Dalton C.	Carrollton, TX	Enrolled Agent	December 04, 2007
Brown, Arthur I.	Miami, FL	CPA	December 14, 2007

# Consent Suspensions From Practice Before the Internal Revenue Service

Under Title 31, Code of Federal Regulations, Part 10, an attorney, certified public accountant, enrolled agent, or enrolled actuary, in order to avoid the institution or conclusion of a proceeding for his or her disbarment or suspension from practice before the Internal Revenue Service,

may offer his or her consent to suspension from such practice. The Director, Office of Professional Responsibility, in his discretion, may suspend an attorney, certified public accountant, enrolled agent, or enrolled actuary in accordance with the consent offered.

The following individuals have been placed under consent suspension from practice before the Internal Revenue Service:

Name	Address	Designation	Date of Suspension
Bauman, John J.	Battle Creek, MI	CPA	Indefinite from October 1, 2007
Montgomery, Dwight M.	Redlands, CA	Attorney	Indefinite from October 1, 2007
Deku, John V.	Toledo, OH	Attorney	Indefinite from October 8, 2007
Ying, William F.	Beverly Hills, CA	CPA	Indefinite from October 9, 2007
Brill, Ann M.	Sheboygan, WI	CPA	Indefinite from October 10, 2007
Benvin, Anne C.	Phoenix, AZ	Enrolled Agent	Indefinite from October 22, 2007
Kingman, William B.	San Antonio, TX	Attorney	Indefinite from October 22, 2007
Nurney, J. Christopher	Hatboro, PA	CPA	Indefinite from October 22, 2007
Wren, Gary M.	Redding, CA	Enrolled Agent	Indefinite from October 29, 2007
Beck, Brian S.	Boston, MA	CPA	Indefinite from November 1, 2007
Draper, Jeffrey L.	Olathe, KS	CPA	Indefinite from November 1, 2007
Ehrlich, Gary P.	Chevy Chase, MD	CPA	Indefinite from November 1, 2007

Name	Address	Designation	Date of Suspension
Garrison, John C.	Prairie Village, KS	CPA	Indefinite from November 1, 2007
Greenslit, Wayne	Keene, NH	CPA	Indefinite from November 1, 2007
Moran, Philip D.	Salem, MA	Attorney	Indefinite from November 1, 2007
Wright, Cory	Reno, NV	CPA	Indefinite from November 1, 2007
Turbeville, Mary A.	Geyserville, CA	Enrolled Agent	Indefinite from November 16, 2007
Saffold, Rodger P.	Cleveland, OH	CPA	Indefinite from December 1, 2007
Voss, Patrick W.	Metairie, LA	CPA	Indefinite from December 1, 2007
Rosner, Ronald I.	Manahawkin, NJ	CPA	Indefinite from December 13, 2007
Johnson, Jr., Stanley	Miami, FL	Attorney	Indefinite from December 14, 2007

## Expedited Suspensions From Practice Before the Internal Revenue Service

Under Title 31, Code of Federal Regulations, Part 10, the Director, Office of Professional Responsibility, is authorized to immediately suspend from practice before the Internal Revenue Service any practitioner who, within five years from the date

the expedited proceeding is instituted (1) has had a license to practice as an attorney, certified public accountant, or actuary suspended or revoked for cause or (2) has been convicted of certain crimes.

The following individuals have been placed under suspension from practice before the Internal Revenue Service by virtue of the expedited proceeding provisions:

Name	Address	Designation	Date of Suspension
Crotts, William P.	Phoenix, AZ	Attorney	Indefinite from October 16, 2007
Daugherty, Troy L.	Olathe, KS	Attorney	Indefinite from October 16, 2007

Name	Address	Designation	Date of Suspension
Driscoll, Jr., Wilfred C.	Somerset, MA	Attorney	Indefinite from October 16, 2007
Shah, Ashok S.	Manalapan, NJ	CPA	Indefinite from October 16, 2007
Sheline, Calvin L.	Camp Verde, AZ	CPA	Indefinite from October 16, 2007
Bosse, Leigh D.	Hillsborough, NH	Attorney	Indefinite from October 24, 2007
Webb, James E.	Nashville, TN	CPA	Indefinite from October 25, 2007
Gottschalk, Don E.	Cedar Falls, IA	Attorney	Indefinite from October 31, 2007
Joy, Steven B.	Paton, IA	Attorney	Indefinite from October 31, 2007
Smallwood, Teresa L.	Durham, NC	Attorney	Indefinite from November 2, 2007
Donaldson, James F.	Denver, CO	Attorney	Indefinite from November 15, 2007
Roux, Johnathan M.	Fair Oaks, CA	CPA	Indefinite from November 20, 2007
Linville, Wiley T.	Denver, CO	Attorney	Indefinite from December 4, 2007
Andrade, Sergio R.	Inver Grove Hghts, MN	Attorney	Indefinite from December 13, 2007
Arzani, Mitzi H.	Charlotte, NC	CPA	Indefinite from December 13, 2007
Catron, Stephen B.	Knoxville, TN	Attorney	Indefinite from December 13, 2007
Coulagouri, Louis A.	Moorestown, NJ	Attorney	Indefinite from December 13, 2007

Name	Address	Designation	Date of Suspension
Crown, Charles K.	Blakeslee, PA	CPA	Indefinite from December 13, 2007
George, Philip J.	Great Falls, VA	Attorney	Indefinite from December 13, 2007
Heitz, John P.	Oneill, NE	Attorney	Indefinite from December 13, 2007
Jones, William F.	Park Rapids, MN	Attorney	Indefinite from December 13, 2007
Khoury, Arthur M.	Lawrence, MA	Attorney	Indefinite from December 13, 2007
McGree, Charles A.	Fort Payne, AL	Attorney	Indefinite from December 13, 2007
Nason, George H.	Franklin, TN	Attorney	Indefinite from December 13, 2007
Owen, Thomas A.	Arlington, TX	Attorney	Indefinite from December 13, 2007
Ozulumba, Michael	Boston, MA	Attorney	Indefinite from December 13, 2007
Phillips, Mark A.	Elm Grove, WI	Attorney	Indefinite from December 13, 2007
Simpson, Joseph H.	Amite, LA	Attorney	Indefinite from December 13, 2007
Sipes, Laura A.	St. Charles, MO	Attorney	Indefinite from December 13, 2007
Sullivan, Joseph O.	Warwick, NY	Attorney	Indefinite from December 13, 2007
Szegda, Michael A.	Old Tappan, NJ	Attorney	Indefinite from December 13, 2007
Misch, Paul M.	Akron, OH	Attorney	Indefinite from December 17, 2007

Name	Address	Designation	Date of Suspension
Brenner, Allen L.	Long Beach, NY	Attorney	Indefinite from December 20, 2007
Cook, Rirchard B.	Cockeysville, MD	Attorney	Indefinite from December 20, 2007
Shang, Wade V.	S. San Francisco, CA	CPA	Indefinite from December 20, 2007

## Suspensions From Practice Before the Internal Revenue Service After Appeal

Under Title 31, Code of Federal Regulations, Part 10, after a decision is issued by an Administrative Law Judge, either party may appeal to the Secretary of the Treasury. The following individuals have been placed under suspension from practice before the Internal Revenue Service **AFTER** an appeal:

Name	Address	Designation	Effective Date
Andrews, Ted E.	Avon, IN	CPA	Indefinite from October 19, 2007

## Disbarments From Practice Before the Internal Revenue Service After Notice and an Opportunity for a Proceeding

Under Title 31, Code of Federal Regulations, Part 10, after notice and an opportunity for a proceeding before an administrative law judge, the following individuals have been disbarred from practice before the Internal Revenue Service:

Name	Address	Designation	Effective Date
Ruocchio, Raymond	Havertown, PA	CPA	April 30, 2007
Roseman, Eric W.	Scottsdale, AZ	CPA	August 20, 2007
Solomon, Stanley	Brooklyn, NY	CPA	September 04, 2007
Marks, Robert	Medfield, MA	Attorney	October 15, 2007

# Censure Issued by Consent

Under Title 31, Code of Federal Regulations, Part 10, in lieu of a proceeding being instituted or continued, an attorney, certified public accountant, enrolled agent,

or enrolled actuary, may offer his or her consent to the issuance of a censure. Censure is a public reprimand.

The following individuals have consented to the issuance of a Censure:

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Name	Address	Designation	Date of Censure
Villarreal, Ricardo	Houston, TX	EA	September 24, 2007
Meisgeier, Deborah K.	Richmond, TX	EA	October 16, 2007
O'Brien, Colleen D.	Winter Park, FL	CPA	October 24, 2007
Staver, Peter J.	Southgate, MI	Attorney	November 06, 2007
Weiss, Ira	Pittsburgh, PA	Attorney	November 29, 2007
Orr, William S.	Kerrville, TX	CPA	December 04, 2007
Whitsitt, Richard	Panama City, FL	CPA	December 04, 2007

# Definition of Terms

*Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:*

*Amplified* describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

*Clarified* is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

*Distinguished* describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

*Modified* is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A

and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

*Obsoleted* describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

*Revoked* describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

*Superseded* describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance

of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

*Supplemented* is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

*Suspended* is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

# Abbreviations

*The following abbreviations in current use and formerly used will appear in material published in the Bulletin.*

A—Individual.  
Acq.—Acquiescence.  
B—Individual.  
BE—Beneficiary.  
BK—Bank.  
B.T.A.—Board of Tax Appeals.  
C—Individual.  
C.B.—Cumulative Bulletin.  
CFR—Code of Federal Regulations.  
CI—City.  
COOP—Cooperative.  
Ct.D.—Court Decision.  
CY—County.  
D—Decedent.  
DC—Dummy Corporation.  
DE—Donee.  
Del. Order—Delegation Order.  
DISC—Domestic International Sales Corporation.  
DR—Donor.  
E—Estate.  
EE—Employee.  
E.O.—Executive Order.

ER—Employer.  
ERISA—Employee Retirement Income Security Act.  
EX—Executor.  
F—Fiduciary.  
FC—Foreign Country.  
FICA—Federal Insurance Contributions Act.  
FISC—Foreign International Sales Company.  
FPH—Foreign Personal Holding Company.  
F.R.—Federal Register.  
FUTA—Federal Unemployment Tax Act.  
FX—Foreign corporation.  
G.C.M.—Chief Counsel's Memorandum.  
GE—Grantee.  
GP—General Partner.  
GR—Grantor.  
IC—Insurance Company.  
I.R.B.—Internal Revenue Bulletin.  
LE—Lessee.  
LP—Limited Partner.  
LR—Lessor.  
M—Minor.  
Nonacq.—Nonacquiescence.  
O—Organization.  
P—Parent Corporation.  
PHC—Personal Holding Company.  
PO—Possession of the U.S.  
PR—Partner.

PRS—Partnership.  
PTE—Prohibited Transaction Exemption.  
Pub. L.—Public Law.  
REIT—Real Estate Investment Trust.  
Rev. Proc.—Revenue Procedure.  
Rev. Rul.—Revenue Ruling.  
S—Subsidiary.  
S.P.R.—Statement of Procedural Rules.  
Stat.—Statutes at Large.  
T—Target Corporation.  
T.C.—Tax Court.  
T.D.—Treasury Decision.  
TFE—Transferee.  
TFR—Transferor.  
T.I.R.—Technical Information Release.  
TP—Taxpayer.  
TR—Trust.  
TT—Trustee.  
U.S.C.—United States Code.  
X—Corporation.  
Y—Corporation.  
Z—Corporation.



## **Numerical Finding List<sup>1</sup>**

Bulletins 2008–1 through 2008–6

### **Announcements:**

2008-1, 2008-1 I.R.B. 246  
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