What Limitations Apply to the CAMT Foreign Tax Credit?

*By Layla J. Asali, Caroline R. Reaves, and Candice C. James**

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I. Introduction

The Corporate Alternative Minimum Tax ("CAMT") provides for a CAMT foreign tax credit that is highly simplified as compared to the foreign tax credit in the regular tax system. This article considers the scope of the CAMT foreign tax credit of Code Sec. 59(l) and the extent to which the many limitations and restrictions that apply to the foreign tax credit in the regular tax system apply, or should apply, to the CAMT foreign tax credit. While there are some elements of the regular foreign tax credit that clearly should apply to the CAMT foreign tax credit and others that clearly should not, there are several provisions where the question presents a closer call. We assess each of these provisions and make recommendations based on the CAMT statute and its discernible policy objectives.

II. Overview of the CAMT and the CAMT Foreign Tax Credit

The CAMT is a 15-percent minimum tax on the adjusted financial statement income ("AFSI") of certain large corporations with an annual average AFSI that exceeds $1 billion ("applicable corporations"). The CAMT was enacted in the Inflation Reduction Act of 2022, effective for taxable years beginning after December 31, 2022.[1] In its budget proposals introducing the CAMT, the Biden Administration stated that it would reduce "the significant disparity between the income reported by large corporations on their federal income tax returns and the profits reported to shareholders in financial statements by requiring them to pay a minimum amount of tax based on their reported financial income."[2] The Biden Administration described the CAMT as "a targeted approach to ensure that the most aggressive corporate tax avoiders bear meaningful federal income tax liabilities" as well as provide a "backstop to the international tax regime" by preventing taxpayers from paying no federal income tax while still reporting significant profits to their shareholders.[3]

LAYLA J. ASALI is a Member of Miller & Chevalier Chartered in Washington, DC. **CAROLINE R. REAVES** is a Counsel at Miller & Chevalier Chartered in Washington, DC. **CANDICE C. JAMES** is a Senior Associate at Miller & Chevalier Chartered in Washington, DC.

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A. AFSI and Treatment of CFC Income

AFSI is defined generally in Code Sec. 56A as the net income or loss of the taxpayer set forth on its applicable financial statement ("AFS") for the taxable year, with certain adjustments. Code Sec. 56A(c) provides for three AFSI adjustments that are of particular relevance in the context of the CAMT foreign tax credit.

First, Code Sec. 56A(c)(3)(A) provides that if a taxpayer is a U.S. shareholder of one or more controlled foreign corporations ("CFCs"), the AFSI of the taxpayer "shall be adjusted to also take into account such taxpayer's *pro rata* share (determined under rules similar to the rules under Code Sec. 951(a)(2)) of items taken into account in computing the net income or loss set forth on the applicable financial statement" of each of its CFCs. This adjustment is referred to herein as the "CFC *pro rata* share adjustment."[4]

The rules of Code Sec. 951(a)(2) provide for a U.S. shareholder's inclusion of its *pro rata* share of certain CFC income in the regular tax system under the subpart F income and global intangible low-taxed income ("GILTI") current inclusion regimes. Although Code Sec. 56A(c)(3)(A) refers to these rules, the CFC *pro rata* share adjustment in the CAMT is not limited to CFC income that is subpart F income or GILTI tested income. In the regular tax system, several categories of CFC income are effectively exempt from U.S. tax, including for example, the deemed tangible income return (*i.e.*, a U.S. shareholder's 10-percent return on qualified business asset investment ("QBAI")), foreign oil and gas extraction income ("FOGEI"), and income with respect to which the U.S. shareholder has elected the high-tax exception of Code Sec. 954(b)(4) and Reg. §1.951A-2(c)(7). In the CAMT, there is no such category of CFC-exempt income. Rather, all items of CFC income and loss reflected on the AFS of each CFC of a U.S. shareholder are aggregated, and if the result is a positive number, the amount is included in the U.S. shareholder's AFSI through the CFC *pro rata* share adjustment.

Second, the CAMT provides that the AFSI of a taxpayer includes dividends received from a corporation that is not a member of the same U.S. consolidated group, apparently including dividends from CFCs.[5] In the case of CFCs with respect to which the taxpayer is a U.S. shareholder, the inclusion of dividends from a CFC in AFSI under Code Sec. 56A(c)(2)(C) has the potential to result in double counting of CFC income because the CFC *pro rata* share adjustment also requires the U.S. shareholder to include in AFSI the earnings from which such dividends are paid. The statute provides the Treasury and Internal Revenue Service ("IRS") with regulatory authority to provide for further adjustments to AFSI, including adjustments "to prevent the omission or duplication of any item."[6]

On December 15, 2023, the IRS and Treasury issued Notice 2024-10, which provided interim guidance to reduce the potential for double counting of CFC earnings that would otherwise occur if a taxpayer included in AFSI both its CFC *pro rata* share adjustment and dividends received from its CFCs. The general approach of Notice 2024-10 is to provide that CFC dividends do not increase AFSI in cases where the dividends are not taxed under the regular tax system, because either (1) the dividend is excluded from income as previously taxed earnings and profits ("PTEP")[7] or (2) the dividend is included in income but qualifies for a 100-percent dividends received deduction ("DRD") under Code Sec. 245A. Notice 2024-10 does not require any precise tracking of earnings and profits to determine whether the CFC income was included in the AFSI of the U.S. shareholder (or another U.S. shareholder) under the CFC *pro rata* share adjustment. The corollary to this general approach of following the treatment of the CFC dividends in the regular tax system is that if a dividend is taxed under the regular system (because it is not PTEP and does not qualify for the Code Sec. 245A DRD), it is included in AFSI for CAMT purposes, regardless of whether such inclusion results in double counting of CFC earnings. Notice 2024-10 does not provide guidance regarding the treatment of distributions received from a CFC that are not dividends, "dispositions of stock of a CFC (including the treatment of dividends under §1248), or any other amounts that may relate to ownership of stock of a CFC."[8]

Finally, under Code Sec. 56A(c)(5) AFSI is "appropriately adjusted" to disregard any Federal income taxes or any foreign "income, war profits, and excess profits taxes (within the meaning of Code Sec. 901)," which are taken into account on the taxpayer's AFS.

B. The CAMT Foreign Tax Credit

Under the CAMT, the tentative minimum tax of an applicable corporation is the excess of 15 percent of AFSI over the "corporate AMT foreign tax credit for the taxable year."[9] Code Sec. 59(l) provides that if an applicable corporation chooses to have the benefits of the foreign tax credit in the regular tax system, it may claim a CAMT foreign tax credit. The CAMT foreign tax credit

has two elements: an "indirect" foreign tax credit for foreign income taxes paid by CFCs (analogous to a credit for taxes deemed paid under Code Sec. 960 in the regular tax system) and a "direct" foreign tax credit for foreign income taxes paid by the applicable corporation (analogous to a Code Sec. 901 credit in the regular tax system).

The indirect and direct CAMT foreign tax credits share critical statutory elements. As a threshold matter, in order for foreign taxes to be creditable, they must be "income, war profits, and excess profits taxes (within the meaning of Code Sec. 901)."[10] Second, the foreign income taxes must be "taken into account" on the AFS (of either the CFC or the applicable corporation).[11] And finally, the foreign income tax must be "paid or accrued (for Federal income tax purposes) by" the CFC or the applicable corporation.[12]

The amount of the indirect CAMT foreign tax credit is subject to an overall limitation based on 15 percent of the CFC *pro rata* share adjustment. Under the statute, the amount of the indirect CAMT foreign tax credit is the lesser of:

(i) "the aggregate of the applicable corporation's *pro rata* share (as determined under Code Sec. 56A(c)(3)) of the amount of income, war profits, and excess profits taxes (within the meaning of Code Sec. 901) imposed by any foreign country or possession of the United States which are:
   I. taken into account on the applicable financial statement of each [CFC] with respect to which the applicable corporation is a United States shareholder, and
   II. paid or accrued (for Federal income tax purposes) by each such [CFC],"[13] or

(ii) 15 percent of the applicable corporation's CFC *pro rata* share adjustment.[14]

If an applicable corporation's *pro rata* share of otherwise creditable foreign income taxes paid by the CFC exceeds this 15-percent limitation, it may carry forward the excess credits and use them, up to the 15-percent limitation, "in any of the first 5 succeeding taxable years to the extent not taken into account in a prior year."[15]

The direct CAMT foreign tax credit is available for "the amount of income, war profits, and excess profits taxes (within the meaning of Code Sec. 901) imposed by any foreign country or possession of the United States to the extent such taxes are—

(i) taken into account on the applicable corporation's applicable financial statement, and
(ii) paid or accrued (for Federal income tax purposes) by the applicable corporation."[16]

In contrast to the five-year carryover provided with respect to indirect CAMT foreign tax credits, there is no provision that would permit a carryover of direct CAMT foreign tax credits to succeeding years.

The CAMT foreign tax credit provided in Code Sec. 59(l) does not include any other limitations. In particular, the CAMT foreign tax credit is not subject to a net foreign source income limitation similar to that of Code Sec. 904 in the regular tax system. While the indirect CAMT foreign tax credit is limited to 15 percent of the CFC *pro rata* share adjustment, the direct CAMT foreign tax credit does not appear to be subject to any foreign source income limitation. Foreign income taxes that give rise to a direct CAMT foreign tax credit under Code Sec. 59(l)(1)(B) can be used to reduce tentative minimum tax under Code Sec. 55(b)(2)(A) without regard to whether the AFSI that gives rise to that minimum tax would otherwise be considered U.S. source income. Consistent with the absence of any foreign source income limitation, the CAMT foreign tax credit does not provide any rules for determining the source of income that is included in AFSI.

Although Treasury and IRS have published limited guidance on the CAMT foreign tax credit, Notice 2023-64, released on September 12, 2023, addressed certain narrow issues regarding the application of the requirements that foreign income taxes be "taken into account" on an AFS and "paid or accrued" by the applicable corporation or a CFC.[17]

In its explanation of the CAMT, the Joint Committee on Taxation observed that a foreign income tax "must satisfy two conditions to be eligible for the book minimum tax foreign tax credit (*i.e.*, that the foreign tax be taken into account on the applicable financial statement and be paid or accrued for Federal tax purposes), but the two conditions need not be satisfied in the same taxable year. Any such taxes are eligible in the taxable year in which the second (*i.e.*, later in time) of the two conditions (whichever condition that might be) is satisfied."[18] Notice 2023-64 provides a broad definition for when a foreign income tax is considered "taken into account" on an AFS for purposes of the CAMT foreign tax credit. In particular, the term "taken into account" means that "any journal entry has been recorded in the journal used to determine the amounts on the AFS of the taxpayer for any year, or another AFS that includes the taxpayer, to reflect the income tax, even if the income tax does not increase or decrease the taxpayer's financial statement income at the time of the journal entry."[19] Given this broad definition of "taken into account," it is likely that in most

cases, the timing of a CAMT foreign tax credit will be dictated by the requirement that the foreign tax be "paid or accrued for (Federal income tax purposes)."

Notice 2023-64 also provided welcome guidance on the treatment of entity-level taxes paid by a partnership. In the case of an applicable corporation or CFC that is a partner in a partnership, foreign income taxes paid or accrued by the partner include the partner's share of foreign income taxes paid or accrued by the partnership. For this purpose, the foreign income tax is considered "taken into account" on the AFS of the partners when it is taken into account on the partnership's AFS.[20]

Finally, Notice 2023-64 provided that the "relation back" principles of Code Sec. 905(c) and the regulations thereunder likewise apply in the context of foreign tax redeterminations in the CAMT foreign tax credit. Under Notice 2023-64, a foreign income tax that is paid or accrued as a result of a foreign tax redetermination can only be claimed as a CAMT foreign tax credit in the relation-back year (not in the year of the redetermination), and only if the taxpayer was an applicable corporation in the relation-back year.[21]

Notably absent from Notice 2023-64, Notice 2024-10, or other interim guidance that Treasury and the IRS have issued under the CAMT is any guidance on the potential applicability of the various restrictions and limitations on the foreign tax credit that exist in the regular tax system on the CAMT foreign tax credit.

III. Applicability of Restrictions in the Regular Foreign Tax Credit to the CAMT Foreign Tax Credit

The CAMT foreign tax credit incorporates two key elements of the regular foreign tax credit: (1) the definition of a creditable foreign income tax provided in Code Sec. 901 ("income, war profits, and excess profits taxes (within the meaning of Code Sec. 901) imposed by any foreign country or possession"[22]), and (2) the concept that the CAMT foreign tax credit can be claimed when the foreign tax is "paid or accrued (for Federal income tax purposes) by" the applicable corporation or its CFC.[23] Code Sec. 59(l) does not otherwise make reference to the foreign tax credit provisions of the Code,[24] which include a wide array of restrictions and limitations on the foreign tax credit that apply in the regular tax system.

Commentators have noted the open question as to which subsections of Code Sec. 901 and related provisions should apply to the CAMT foreign tax credit, but this question and its policy implications have not yet been fully explored.[25] As noted above, for purposes of both determining AFSI and for determining the CAMT foreign tax credit, the CAMT statute does not follow the financial accounting definition (or treatment) of foreign income taxes. Instead, Code Sec. 59(l) explicitly incorporates the Code Sec. 901 definition of a foreign income tax and the requirement that a tax be paid or accrued for federal income tax purposes by the applicable corporation or CFC. As such, these elements of the regular foreign tax credit provide a starting point for considering whether to apply any particular restriction in the regular foreign tax credit to the CAMT foreign tax credit. Under the plain text of the statute, a payment of an amount that is not a foreign income tax within the meaning of Code Sec. 901 does not give rise to a CAMT foreign tax credit. And assuming that an amount of foreign tax is a creditable foreign income tax within the meaning of Code Sec. 901, the applicable corporation cannot claim a CAMT foreign tax credit until such amount is paid or accrued for federal income tax purposes by itself or its CFC.

The regular foreign tax credit includes many restrictions and limitations, some of which are found in Code Sec. 901 itself, and some in other Code sections. The requirement in Code Sec. 59(l) that a foreign tax must be a foreign income tax "within the meaning of Code Sec. 901" seems limited to the definition of a foreign income tax and not to the entirety of that section. Furthermore, many of the limitations on the foreign tax credit in the regular tax system, whether they are found in Code Sec. 901 or elsewhere, are intended to restrict the "cross-crediting" of foreign taxes against U.S. source income, income in a different category than the taxes, or otherwise unrelated income. This policy is not an animating policy underlying the CAMT foreign tax credit. The statutory design of the CAMT foreign tax credit enables expansive crediting of CAMT foreign tax credits against tax on AFSI, with little or no regard to historic tax policies surrounding cross-crediting of foreign taxes against different types of income. Code Sec. 59(l) does not include any foreign source income limitation, nor does it include any rules for determining the source of items that are taken into account in AFSI. In the case of indirect foreign tax credits, the CAMT foreign tax credit for foreign income taxes paid by CFCs is limited to 15 percent of aggregate CFC income. This 15-percent limitation prevents cross-crediting of foreign taxes paid by CFCs against AFSI earned directly by the applicable corporation, and could be understood as a sort of rough-justice, foreign source income limitation for CFC income and

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taxes. But in the case of direct taxes, the CAMT foreign tax credit does not include any provisions to prevent cross-crediting.

A. Elements of the Regular Foreign Tax Credit that Apply to the CAMT Foreign Tax Credit

1. Creditable Foreign Income Tax

Code Sec. 901(a) has largely remained unchanged since 1921. Its predecessor was first enacted in the Revenue Act of 1918, which permitted a credit for the "the amount of any income, war-profits and excess-profits taxes paid during the taxable year to any foreign country imposed on income derived from sources therein."[26] Since 1983, the definition of a foreign income tax for Code Sec. 901 purposes has been set forth in Reg. §1.901-2. What is clear from Code Sec. 59(l) is that however we define a "foreign income tax" under Code Sec. 901, the CAMT definition must be consistent.

Longstanding caselaw and Treasury regulations defining a foreign income tax generally provide that in order for a foreign tax to be considered a creditable foreign income tax within the meaning of Code Sec. 901, it must be an income tax "in the U.S. sense."[27] Prior to 2022, the regulations provided that a foreign levy whose "predominant character" was that of an income tax in the U.S. sense, as determined under a three-pronged net gain test, was a creditable foreign income tax.[28] The net gain test considered whether the foreign tax was imposed on events that would trigger the realization of income under U.S. principles (realization requirement)[29]; whether the base of the foreign tax consisted of gross receipts or amounts designed not to exceed gross receipts (gross receipts requirement)[30]; and finally, would the foreign tax permit the recovery of significant costs or expenses attributable to those gross receipts (net income requirement).[31]

In 2022 final regulations, Treasury and IRS modified and narrowed this definition.[32] These regulations introduced a new attribution requirement, requiring that the foreign tax be imposed on activities, income, or property with a sufficient nexus to the country imposing the tax.[33] The 2022 final regulations also eliminated references to "predominant character" and modified the realization, gross receipts, and net income requirements to require closer similarity to the U.S. Internal Revenue Code.[34] The attribution requirement set forth in Reg. §1.901-2(b)(5) was suspended in Notice 2023-55 and Notice 2023-80.[35]

The differing points of view on the wisdom of the 2022 regulations are well-trodden ground.[36] Treasury and IRS officials have stated in Notice 2023-55 and in public fora that they are continuing to "analyze issues related to the 2022 FTC final regulations and are considering proposing amendments to those regulations." However, these issues are resolved; suffice it to say, if a foreign tax is not an income tax within the meaning of Code Sec. 901, no CAMT foreign tax credit is allowed.

2. Disguised Payment for Value

Outside of the well-travelled creditability regulations, other parts of Reg. §1.901-2 as well as subsections of Code Sec. 901 explicitly define what is not a creditable foreign tax. Certain of these provisions identify the foreign levy as disguised payment for something else and, as such, deny the foreign levy its status as an actual tax. Given the explicit statutory language and the policy reasons underlying these provisions, it can be expected that no CAMT foreign tax credit would be allowed should the foreign levy fall under these rules.

a) Dual capacity taxpayers and specific economic benefit. A foreign levy is not considered a tax if it represents compensation for a "specific economic benefit" provided by a foreign country.[37] A specific economic benefit is defined as "an economic benefit that is not made available on substantially the same terms to substantially all persons who are subject to the income tax that is generally imposed by the foreign country." In the case where there is no generally imposed foreign income tax, the economic benefit is measured by reference to whether it is "made available on substantially the same terms to the population of the country in general."[38] In cases where a taxpayer may pay a foreign levy that consists of both a creditable tax and a payment for a specific economic benefit (a "dual capacity taxpayer"), the dual capacity taxpayer may not credit the portion of the foreign levy that is a specific economic benefit. The regulations provide a safe harbor for determining the creditable portion of the levy, generally based on the overall applicable rate of tax under the jurisdiction's income tax.

The specific economic benefit rules reflect one of many attempts by Congress and the Treasury to curtail a U.S. credit for foreign taxes in cases where they believe the payment to the foreign government reflects some arrangement other than an actual tax.[39] The driving force here was the Treasury's prolonged difficulty in distinguishing between a foreign government charging a royalty for extracting natural resources owned by that

government, particularly oil, and charging a higher rate of tax.[40] Beginning in the 1950s, a number of foreign governments began reducing their royalty rates while increasing the tax on such oil and mineral rights.[41] Treasury's response in 1980 temporary regulations was to take an all-or-nothing approach by presuming that all payments to a foreign government were royalties if a person received a specific benefit from that government.[42] That presumption could only be defeated by proving the same charge was applied to taxpayers receiving no specific benefit or by showing that the amount paid was not significantly greater than the amount that would be paid under the foreign income tax.[43] The 1983 final regulations backed away from this presumption and instead disallowed only the portion of the foreign levy that is attributable to a specific economic benefit. However, the current Administration has proposed codifying the safe harbor method based on the foreign country's generally applicable tax rate and making it the sole method for determining the creditable portion of the foreign tax, on the basis that the higher foreign tax rate on income from oil extraction is appropriately characterized as compensating the foreign government in its capacity as the owner of the minerals in place, rather than in its role as tax collector.[44] If legislation were enacted to make the safe harbor method part of the definition of a foreign income tax within the meaning of Code Sec. 901, it would presumably apply for CAMT foreign tax credit purposes as well.

b) Code Sec. 901(f): payments for oil and gas. Under Code Sec. 901(f), the amount of any foreign oil or gas taxes paid or accrued "is not to be considered a tax for purposes of" Code Sec. 901 if the taxpayer has no economic interest in the oil and gas and the purchase or sale price differs from the fair market value. Code Sec. 901(f), enacted in 1975, was another one of several volleys in the effort to distinguish a foreign income tax from a payment to a foreign government for oil and gas.[45] The Senate Report accompanying the enactment of Code Sec. 901(f) stated that Congress was concerned with the taxation of "artificial profit" in nonequity or buyback transactions where the oil or gas was first purchased from an affiliate or from the foreign government at less than market price and then sold at fair market value (or higher).[46] In the targeted transaction, the purported foreign tax was imposed on an inflated amount of gain (the difference between the understated purchase price and overstated sales price) and set at a rate to recoup the loss on the purchase price. If the taxpayer had instead paid a fair market value purchase price, and sold the oil at fair market value, it would have earned less income and paid less foreign tax.[47] Congress was concerned that taxpayers and foreign governments employed these transactional techniques to convert an amount paid for oil into a foreign tax that was intended to be creditable.

Given that Code Sec. 901(f) provides that the amount of the purported tax "is not to be considered a tax for purposes of" Code Sec. 901, the statutory basis for excluding such taxes from the CAMT foreign tax credit is strong. In addition, Code Sec. 901(f) is aimed at situations in which the purported tax is, in fact, a disguised payment for oil and gas, achieved through the manipulation of purchase and sales prices, and not in substance a tax on income. In this respect, the rule is similar to the specific economic benefit rules discussed above, and the policy basis for excluding such a tax from the CAMT foreign tax credit is sound.

3. Paid or Accrued by the Taxpayer

A foreign tax is considered "paid" for federal income tax purposes when it is either paid or accrued, depending on the taxpayer's method of accounting.[48] In the case of a taxpayer using the accrual method, foreign income taxes accrue "in the taxable year in which all the events have occurred that establish the fact of the liability and the amount of the liability can be determined with reasonable accuracy."[49] In the case of a foreign tax adjustment, a "relation back" rule applies under which additional tax paid as a result of a change in foreign tax liability "relates back and is considered to accrue at the end of the foreign taxable year with respect to which the tax is imposed."[50]

a) Rebates and compulsory payments. An amount paid to a foreign country "is not an amount of income tax paid to the extent that it is reasonably certain that the amount will be refunded, rebated, abated, or forgiven."[51] Furthermore, an amount remitted to a foreign country is not considered an amount of foreign income tax paid "to the extent that the foreign payment exceeds the amount of liability for foreign income tax under the foreign tax law."[52] Taxpayers are required to apply a "reasonable interpretation and application" of both foreign law and tax treaties, if applicable, so as to reduce over time their expected foreign tax liability. In addition, taxpayers must exhaust "all effective and practical remedies" to satisfy the compulsory payment rule, including seeking relief from competent authority if available.[53] A remedy is effective and practical only if its cost is reasonable in light of the amount at issue and its likelihood of success, though a

taxpayer is not required to change its business operations to reduce its foreign tax liability.[54]

The above rules are focused on ensuring that a taxpayer contests its foreign tax liabilities as vigorously as it would if no U.S. foreign tax credit was available. A taxpayer eligible for a foreign tax credit otherwise would not have an incentive to minimize its foreign tax liabilities if a U.S. foreign tax credit is available to offset the burden. Because a payment to a foreign country that is expected to be refunded, or is considered noncompulsory because the taxpayer fails to exhaust its remedies, is not a tax "within the meaning of Code Sec. 901" that is "paid or accrued (for Federal income tax purposes)," no CAMT foreign tax credit would be allowed for such an amount.[55]

b) Code Sec. 901(i): subsidies. Code Sec. 901(i) provides that a foreign income tax "shall not be treated as a tax" to the extent that (1) the tax is used (directly or indirectly) by the foreign country "to provide a subsidy by any means to the taxpayer, a related person (within the meaning of Code Sec. 482), or any party to the transaction or to a related transaction," and (2) such subsidy is determined by reference to the amount of the tax, or the base used to compute the tax.

Prior to the enactment of Code Sec. 901(i) in the Tax Reform Act of 1986,[56] regulations had provided for a similar rule providing that an "amount is not an amount of income tax paid by a taxpayer to a foreign country to the extent that" it is used to "provide a subsidy by any means" and the subsidy is determined directly or indirectly by reference to the foreign tax or the foreign tax base.[57] Prior to the issuance of this regulation, the IRS had lost a series of cases regarding the creditability of a Mexican withholding tax on U.S. rental income from the use of the U.S. railroad cars in Mexico.[58] The courts held that the Mexican withholding tax paid by the Mexican railroad companies was creditable, notwithstanding that the Mexican government later granted subsidies to the Mexican railroads equal to the amount of the withholding tax. The regulation led to a series of disputes regarding its validity[59] as well as the creditability of a tax if the subsidy was made to an agent of the foreign government.[60]

Congress enacted Code Sec. 901(i) in response to these cases to eliminate uncertainty and codify the rule provided in the 1983 regulations. Congress did not believe that a foreign tax credit should be allowed for foreign taxes "which, while ostensibly borne by a U.S. taxpayer, are effectively rebated by the levying country by means of a government subsidy."[61] Congress shared the view of the IRS and Treasury that in these circumstances the foreign tax was not paid or accrued by the taxpayer.

There is a statutory basis for denying a CAMT foreign tax credit for foreign taxes used to provide a subsidy. The language of Code Sec. 901(i) provides that such foreign taxes "shall not be treated as a tax." The rationale for this rule is based on the historic IRS position that the taxpayer has not paid or accrued the foreign tax in cases where the foreign government has provided a subsidy to a taxpayer, related person, or party to a transaction. To the extent this policy concern has merit, it seems equally valid in the context of the CAMT foreign tax credit.[62]

B. Elements of the Regular Foreign Tax Credit that Do Not Apply to the CAMT Foreign Tax Credit

1. Code Sec. 904 Foreign Source Income Limitation and Separate Categories

A longstanding feature of the foreign tax credit in the regular tax system is the foreign source income limitation of Code Sec. 904. Code Sec. 904(a) limits the foreign tax credit taken under Code Sec. 901(a) based on a ratio of the taxpayer's taxable income from foreign sources over its entire taxable income for the year. The Code Sec. 904 limitation was initially enacted in the Revenue Act of 1921[63] and can be regarded as fundamental to the U.S. foreign tax credit system, even if its specific application has changed over time.[64] The U.S. foreign tax credit is intended to alleviate double taxation of income that has already been subject to foreign tax, and Code Sec. 904(a) further promotes the policy of preventing the foreign tax credit from offsetting U.S. tax on U.S. source income. The 1921 Senate Report observed, "[w]here foreign income or profits taxes are imposed at rates higher than those carried by the similar taxes in this country, this credit may wipe out part of our tax properly attributable to income derived from sources within the United States."[65]

Code Sec. 904(d) extends this limitation to specific categories of income: currently (since 2018), GILTI income, foreign branch income, passive category income, and general category income.[66] Generally, the U.S. foreign tax credit system does not apply an item-by-item approach to limit a foreign tax credit to the U.S. tax imposed on an item (or amount) of income that is included for both foreign and U.S. tax purposes. Rather, the U.S. foreign tax credit system generally permits crediting of foreign taxes

on an item of income against U.S. tax on other foreign source income, but relies on the separate limitations of Code Sec. 904(d) to prevent what is considered to be inappropriate cross-crediting of foreign taxes against U.S. tax on one category of income against U.S. taxes on another category of income. In connection with the 1986 amendments to Code Sec. 904(d), the Joint Committee on Taxation explained the policy underlying this limitation on cross-crediting as follows: "A special or separate limitation generally is applied to a category of income for one of three reasons: the income's source (foreign or U.S.) can be manipulated; the income typically bears little or no foreign tax; or the income often bears a rate of foreign tax that is abnormally high or in excess of rates on other types of income."[67]

The CAMT foreign tax credit contains no provisions that are analogous to Code Sec. 904. The only limitation against cross-crediting within the CAMT foreign tax credit is the limitation of the indirect foreign tax credit to 15 percent of CFC earnings included in AFSI through the CFC *pro rata* share adjustment. There are no rules for determining the source of financial statement income as foreign or U.S. in the CAMT, which would be necessary to apply a foreign source income limitation. While there is no policy statement in the legislative history or Joint Committee materials addressing this point, the absence of a Code Sec. 904-style foreign source income limitation or separate limitation in Code Sec. 59(l) speaks for itself. It seems clear that the CAMT drafters intended for cross-crediting of foreign taxes against AFSI to a much broader degree than is seen in the regular foreign tax credit system, and that the crediting of foreign taxes on one item or category of income against U.S. tax on unrelated items comprising AFSI is not a policy concern in the CAMT foreign tax credit.

2. Code Sec. 907 Foreign Oil and Gas Income Limitation

Code Sec. 907 provides for a limitation on the foreign tax credit for foreign oil and gas taxes based on the amount of combined foreign oil and gas income. The limitation reduces the Code Sec. 901 credit otherwise allowed by the amount by which foreign oil and gas taxes exceed the U.S. tax on the taxpayer's combined foreign oil and gas income, calculated by reference to the highest statutory rate.[68]

Congress enacted Code Sec. 907 because it was concerned about the crediting of high-taxed income from foreign oil and gas extraction activities against U.S. tax on unrelated low-taxed income.[69] Code Sec. 907 was proposed in the Energy Tax and Individual Relief Act of 1974 and then enacted in the Tax Reduction Act of 1975.[70] In the legislative history, Congress explained that cross-crediting was not appropriate for taxes on oil and gas income because oil extraction activities often incur heavy losses, ensuring a low U.S. tax base, while foreign governments tended to impose much higher taxes on such income.[71]

Code Sec. 907 was motivated in part by the difficulty in distinguishing between deductible royalty payments made to a foreign government in order to extract the oil or gas *versus* creditable foreign taxes imposed on the income. While this policy concern is similar to the concerns addressed in the specific economic benefit or subsidy rules, ultimately, Congress decided to address the concern through a cross-crediting limitation in Code Sec. 907 that is similar to the separate category limitations of Code Sec. 904. Limitations on cross-crediting are not a policy concern of the CAMT foreign tax credit, and Code Sec. 907 should not apply to the CAMT foreign tax credit. Put more generally, the CAMT foreign tax credit should not be affected by limitations against cross-crediting of foreign taxes in the regular foreign tax credit even where those limitations were motivated by a concern that the foreign taxes were, to some extent, not taxes.

C. Closer Calls: Should Any of these Limitations Apply?

1. Denial of Credit Where Holding Period Not Met

a) Code Sec. 901(k): dividend withholding taxes. Code Sec. 901(k) denies a foreign tax credit for withholding taxes on dividends in situations where the recipient of the dividend fails to satisfy a holding period with respect to the dividend-paying stock, including in circumstances where the recipient is economically shielded from the benefits and burdens of stock ownership. The statute does not specifically provide that a foreign withholding tax that is subject to Code Sec. 901(k) is not considered a foreign income tax, nor does it provide that the tax is not considered paid or accrued by the taxpayer. Rather, it provides that "[i]n no event shall a credit be allowed under [Code Sec. 901(a)] for any withholding tax on a dividend with respect to stock" if (i) "such stock is held by the recipient of the dividend for 15 days or less during the 31-day period" surrounding the date on which the share becomes ex-dividend, or (ii) "the recipient of the

dividend is under an obligation (whether pursuant to a short sale or otherwise) to make related payments with respect to positions in substantially similar or related property."[72]

Enacted in 1997, the purpose behind Code Sec. 901(k) was to deny credits to U.S. persons engaging in abusive tax-motivated transactions by extending the holding period requirements under Code Sec. 246 for dividend received deductions to foreign tax credits.[73] Congress was specifically concerned with transactions that involved a short-term transfer of ownership of dividend-paying shares or the use of derivatives to transfer foreign tax credits from "persons that are unable to benefit from such credits (such as a tax-exempt entity or a taxpayer whose use of foreign tax credits is prevented by the limitation) to persons that can use such credits."[74] Leading up to the enactment, the IRS was actively litigating cases involving foreign tax credits claimed by taxpayers that had engaged in temporary purchases of American Depository Receipts, or ADRs, of foreign dividend-paying corporations.[75] In those cases, the taxpayer, through an investment firm acting on behalf of a tax-exempt entity, purchased ADRs "cum dividend," *i.e.*, the price of the ADR reflected the purchaser's entitlement to a declared dividend. The taxpayer then immediately resold the same ADRs "ex dividend," *i.e.*, the price of the ADR without entitlement to the dividend.[76] Although the sale trade took place immediately after the purchase trade, under the settlement terms for the sales transactions, the resale would occur several days later with the taxpayer considered the owner of the ADR for purposes of receiving the dividend and paying the related foreign withholding tax. The taxpayers included the full amount of the dividend in income, claimed foreign tax credits for the foreign withholding tax on the dividend, and claimed a capital loss generated from the difference in the purchase price of the stock cum dividend and the sales price of the stock ex-dividend.

Unlike the language in Code Sec. 901(i), Code Sec. 901(k) does not state that a foreign tax paid on dividends that do not meet the holding period requirement is "not a tax" within the meaning of Code Sec. 901; it merely denies a credit. As a result, it is not clear from the face of the statute that Code Sec. 901(k) applies for purposes of the CAMT foreign tax credit. However, there is a strong policy rationale in support of applying Code Sec. 901(k) to the CAMT foreign tax credit. Code Sec. 901(k) was enacted to prevent U.S. taxpayers from essentially purchasing foreign tax credits from tax-indifferent parties. In the cases at issue prior to the enactment of Code Sec. 901(k), the government argued that transactions must be characterized as shams because there was no risk of loss and there was no economic benefit to the transaction, absent the foreign tax credit.[77] Congress enacted Code Sec. 901(k) because it agreed with the IRS' policy position and wanted to curtail the type of structured transactions that the IRS was pursuing in litigation. The same policy concerns that animated Code Sec. 901(k) are potentially present in the case of the CAMT foreign tax credit, in the sense that policymakers may object to an applicable corporation using a Code Sec. 901(k)-style transaction to purchase CAMT foreign tax credits that can offset CAMT liability.

Although there is no explicit statutory basis for applying Code Sec. 901(k) to the CAMT foreign tax credit, it is possible that Code Sec. 901(k) could be interpreted as additional legislative gloss on what it means for a tax to be "paid or accrued by" a taxpayer. If the Treasury and IRS issue regulations that incorporate Code Sec. 901(k) into the CAMT foreign tax credit, one might expect that they would point to this language as support for their authority. That is, it can be argued that the reason Congress enacted Code Sec. 901(k) was that it believed that in these circumstances, the taxpayer in substance did not pay or accrue the foreign tax, and instead paid the foreign tax on behalf of another person as part of a contractual arrangement.[78] While the taxpayer may have technically paid the tax, and technically been liable to do so under foreign law, it did not economically bear its incidence. Nor did it earn the related dividend income due to the structure of the transaction pursuant to which the dividend income was inevitably offset by an amount equal to the loss and the foreign tax. Incorporating Code Sec. 901(k) would also ensure that taxpayers could not reduce or eliminate their CAMT liability by engaging in artificial transactions in which taxpayers purchase foreign credits from otherwise tax-indifferent persons.

If future regulations do not specifically incorporate a Code Sec. 901(k)-style holding period requirement in the CAMT foreign tax credit, or if such regulations are successfully challenged, it is nonetheless possible that transactions structured to result in purchases of CAMT foreign tax credits could be challenged under the economic substance doctrine. In both the *Compaq Computer*[79] and the *IES Industries*[80] cases, the 5th and 8th Circuits, respectively, determined that the ADR transactions at issue satisfied the objective economic effect requirement and had a substantial nontax purpose. In analyzing the economic effect, the courts assessed the profit potential on a pretax basis (*i.e.*, without accounting for the foreign tax),

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ultimately concluding that the taxpayer received a profit from the ADR transactions, and thus the transaction had economic substance.

The landscape of the economic substance doctrine has changed since these two cases. The doctrine was codified as Code Sec. 7701(o) in 2010, and Code Sec. 7701(o)(2)(B) provides that in determining whether a transaction has the potential for profit, "[t]he Secretary shall issue regulations requiring foreign taxes to be treated as expenses in determining pre-tax profit in appropriate cases." Although the legislative history Code Sec. 7701(o) appears to indicate an intention to overrule the *Compaq Computer* and *IES Industries* decisions, Treasury and IRS have not issued any regulations under Code Sec. 7701(o)(2)(B).[81] As a result, it is unclear whether a court applying Code Sec. 7701(o) would follow the approach of *Compaq* and *IES Industries* and assess profit potential on a pre-tax basis, or would instead treat a similar foreign withholding tax as an expense. If the foreign tax were treated as an expense, it would be more difficult for the taxpayer to show that the transaction has potential for profit and thus has economic substance.

b) Code Sec. 901(l): other withholding taxes. Code Sec. 901(l) imposes a holding period requirement similar to that of Code Sec. 901(k) on withholding taxes on income other than dividends.[82] After the enactment of Code Sec. 901(k), the IRS and Treasury issued Notice 98-5, which identified other transactions they believed were designed to generate foreign tax credits without a corresponding economic profit. The IRS and Treasury were concerned with transactions that were "structured to yield little or no economic profits relative to the expected U.S. tax benefits," particularly those involving "(1) the acquisition of an asset that generates an income stream subject to foreign withholding tax, or (2) effective duplication of tax benefits through the use of certain structures designed to exploit inconsistencies between U.S. and foreign tax laws." Notice 98-5 provided examples of such transactions, including the purchase of a copyright shortly before expiration that would generate a foreign royalty withholding tax, the purchase of a bond coupon shortly before payment was due, followed by its sale, and a notional principal contract involving the transfer of the foreign income but not the foreign tax.[83] Certain of these examples were targeted by Code Sec. 901(l), enacted in 2004,[84] but commentators have observed that the broad language of Code Sec. 901(l) and the difficulty of applying the Code Sec. 246 holding period rules to income other than dividends have caused Code Sec. 901(l) to be overbroad and in need of regulatory guidance.[85] For instance, credits may be denied for routine short-term borrowing subject to a foreign interest withholding tax or taxes on transactions that would fail Code Sec. 246(c), such as interest payments under a loan agreement that include a parental guarantee, and certain hedging transactions.[86]

In the sparse legislative history to Code Sec. 901(l), Congress noted that it "anticipate[s] that [] regulations will provide that credits are not disallowed merely because a taxpayer eliminates its risk of loss from interest rate or currency fluctuations" as well as certain other hedging activities.[87] To date, Treasury has exercised this authority narrowly, exempting only royalty withholding taxes on "ordinary course" back-to-back licensing agreements of intellectual property, including computer software, and withholding taxes on certain retail distribution arrangements of copyrighted property.[88]

Like Code Sec. 901(k), the statutory language of Code Sec. 901(l) merely denies a credit for taxes on income that does not meet the required holding period or is subject to an obligation to make a related payment. However, the policy underpinnings of Code Sec. 901(k) seem stronger than those of Code Sec. 901(l), given that Code Sec. 901(k) is limited to transactions where the taxpayer has arguably not paid or accrued the tax because the dividend income is designed to be offset by a loss and the foreign tax. Due to the inadequate guidance under Code Sec. 901(l) and the overbroad language in the statute, Code Sec. 901(l) potentially sweeps in both routine and abusive transactions. As a result, if Code Sec. 901(l) were applied to the CAMT foreign tax credit, it would be preferable that such guidance be issued in the context of broader guidance under Code Sec. 901(l). Further, as with Code Sec. 901(k) taxes, taxpayers would still need to prove that a transaction generating a foreign tax had economic substance, and so eliminating a holding period for Code Sec. 901(l) taxes does not necessarily open the door to the desired results in the transactions identified in Notice 98-5.

2. Denial of or Reduction in Credit Where Income Is Exempt or Partially Exempt

a) Code Sec. 245A(d): taxes on exempt dividends. Since its enactment in 2017, Code Sec. 245A has provided for a 100-percent DRD with respect to the foreign-source portion of dividends received by a U.S. shareholder from a specified 10-percent-owned foreign corporation.[89] No foreign tax credit is allowed for any foreign taxes paid or

accrued with respect to a dividend for which a DRD is allowed under Code Sec. 245A.[90] Final regulations under Code Sec. 245A(d) interpret the provision to disallow a foreign tax credit for foreign income taxes that are paid and accrued with respect to "Code Sec. 245(d) income," which is defined broadly to include actual dividends as well as other types of income for which a Code Sec. 245A DRD is allowed.[91]

The reason that Code Sec. 245A(d) disallows a foreign tax credit is to prevent taxpayers from receiving the benefit of a foreign tax credit with respect to foreign subsidiary earnings that are exempt from U.S. tax. The foreign tax credit disallowance under Code Sec. 245A(d) applies to all foreign income taxes that are paid and accrued either directly or indirectly by U.S. shareholders, including withholding taxes.[92]

As with Code Sec. 901(j), the CAMT statute does not provide explicit or implicit reference to the anti-boycott rules, but the policy concerns surrounding Code Sec. 908 seem equally relevant in the CAMT context.

The CAMT statute does not provide any clear textual basis for excluding foreign income taxes allocable to Code Sec. 245A(d) income from the CAMT foreign tax credit to the extent such foreign income taxes are paid or accrued by an applicable corporation and otherwise fall within the meaning of foreign income taxes under Code Sec. 901. In addition, there is no strong policy basis for applying the Code Sec. 245A(d) foreign tax credit disallowance to the CAMT foreign tax credit. Unlike the regular tax system, the CAMT has no category of exempt CFC income. All CFC income is included in the AFSI of a U.S. shareholder under the CFC *pro rata* share adjustment.

The policy that animates Code Sec. 245A(d) in the regular tax system is that a foreign tax credit is not needed to alleviate double taxation when the regular tax system already provides for an exemption of CFC earnings.[93] Because there is no exemption of CFC earnings in the CAMT, a foreign tax credit should be allowed to mitigate double taxation. One could argue that no CAMT foreign tax credit should be allowed for a withholding tax on a distribution to the extent that the underlying CFC earnings were not actually subject to CAMT, for example, because the CFC earnings arose prior to 2023 or because the CFC was acquired from a person that was not subject to CAMT. But such an approach would be inconsistent with the decision taken in Notice 2024-10 not to trace underlying CFC earnings to determine whether they were previously included in AFSI under the CFC *pro rata* share adjustment, presumably in the name of administrability.

It could also be argued that if a CAMT foreign tax credit is permitted for foreign taxes on Code Sec. 245A income, the 15-percent limitation on CFC foreign taxes should apply to foreign withholding taxes on CFC dividends because withholding taxes on the U.S. shareholder is another form of taxes on CFC income. The position has merit as a policy proposal but would be difficult to defend as an interpretation of Code Sec. 59(l), which applies the 15-percent limitation only to foreign income taxes "paid or accrued by" a CFC and not to foreign income taxes paid or accrued by the applicable corporation. A foreign withholding tax on a dividend paid by a CFC to a U.S. shareholder would be considered paid or accrued by the U.S. shareholder for federal income tax purposes.[94]

Although all items of CFC income and expense are included in AFSI and there is no exemption for categories of income such as a return on QBAI, the netting of CFC income and loss on an aggregate basis could be thought of as giving rise to a type of CFC income that is exempt from AFSI. If CFC income that is offset by CFC losses under the *pro rata* share adjustment were regarded as exempt income, it could be argued that the policy of Code Sec. 245A(d) is implicated. According to this argument, a foreign tax credit should not be allowed in this scenario because the U.S. shareholder has not included CFC income through the CFC *pro rata* share adjustment, and a foreign tax credit for a foreign withholding tax would reduce CAMT on income of the applicable corporation without any limitation. In the regular tax system, CFC tested income that is offset by CFC tested losses is treated as exempt income that qualifies for Code Sec. 245A DRD when it is distributed, and Code Sec. 245A(d) disallows a credit for foreign withholding taxes on such a dividend. A parallel result in the CAMT would be to disallow the CAMT foreign tax credit on CFC dividends, specifically when the Code Sec. 245A exemption arises from CFC losses

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(rather than the 10-percent return on QBAI or other types of exempt income). Even in the regular tax system, however, the policy in favor of disallowing the foreign tax credit in this circumstance seems weak. It is not clear why CFC income should be regarded as exempt when it is offset by a loss in another CFC: all items of income and loss are taken into account in the tax base. Moreover, disallowing a CAMT foreign tax credit in this circumstance would require identifying a type of CFC income that is not currently tracked separately even in the regular tax system (Code Sec. 245A-eligible income attributable specifically to offset by CFC tested losses). The strong policy arguments against applying Code Sec. 245A(d) in the CAMT should prevail over any concern regarding CFC income that is offset by losses.

b) Code Sec. 960(d): "haircut" on GILTI taxes. The GILTI regime in effect since 2018 permits a foreign tax credit for foreign income taxes properly attributable to the tested income of a CFC. Under Code Sec. 960(d)(1), the amount of foreign taxes deemed paid by the U.S. shareholder is limited to 80 percent of the "inclusion percentage" of the CFC's tested foreign income taxes. The inclusion percentage is a percentage equal to the U.S. shareholder's GILTI inclusion divided by its aggregate tested income, and reflects the reduction in the U.S. shareholder's GILTI inclusion for its 10-percent return on QBAI and tested losses.[95] No credit is allowed under Code Sec. 960(d) for foreign income taxes paid by a CFC with a tested loss.[96]

The limitation in the Code Sec. 960(d) foreign tax credit to the inclusion percentage of foreign income taxes seems intended to reflect the fact that the tested income to which those foreign taxes are properly attributable is partially exempt from U.S. tax to that extent. This aspect of the Code Sec. 960(d) "haircut" on GILTI taxes is similar to the Code Sec. 245A(d) disallowance discussed above. The intention of the 80-percent limitation on Code Sec. 960(d) foreign tax credits is less clear. The effect of the limitation, in light of the 21-percent corporate tax rate and the 50-percent Code Sec. 250 deduction for GILTI, is that "the minimum foreign tax rate, with respect to GILTI, at which no residual U.S. tax is owed by a domestic corporation is 13.125 percent" (*i.e.*, the U.S. tax rate on foreign-derived intangible income ("FDII"), after the Code Sec. 250 deduction for FDII).[97] It is commonly thought that a 20-percent haircut on GILTI taxes is intended to provide an incentive for taxpayers to reduce their foreign taxes, but the policy underpinnings have been questioned.[98]

There is no textual or policy basis in the CAMT foreign tax credit for applying the Code Sec. 960(d) haircut to foreign income taxes paid by CFCs or with respect to distributions from CFCs, or for disallowing a CAMT foreign tax credit for foreign taxes paid by a CFC with a loss. Code Sec. 59(l) includes its own limitation applicable to foreign income taxes paid by CFCs. The policy basis for limiting CFC foreign taxes to an "inclusion percentage" in Code Sec. 960(d) is absent in the CAMT because the CAMT does not have any category of exempt income (as discussed above in the context of Code Sec. 245A(d)). Furthermore, whatever the policy basis is for the 20-percent haircut for GILTI taxes in Code Sec. 960(d), there is no similar percentage reduction in the CAMT foreign tax credit.[99]

c) Code Sec. 965(g): "haircut" on taxes on distributions of Code Sec. 965 PTEP. Code Sec. 965(g) provides that no credit is allowed under Code Sec. 901 for the "applicable percentage" of taxes paid or accrued with respect to any amount for which a Code Sec. 965(c) deduction is allowed. This reduction or "haircut" of foreign tax credits is intended to correspond to the reduced rate of tax at which deferred earnings were taxed under Code Sec. 965. Under the transition tax, Code Sec. 965(c) provided for a deduction that was designed to apply a partial participation exemption or reduced effective tax rate on the post-1986 deferred foreign income of foreign subsidiaries of U.S. shareholders. In the case of deferred foreign income held in the form of cash and cash equivalents, the Code Sec. 965(c) deduction produced an effective tax rate of 15.5 percent and a rate of 8 percent in the case of non-cash earnings.[100] Foreign tax credits were generally allowed to offset Code Sec. 965 transition tax, but the Code Sec. 965(g) haircut reduced allowable foreign tax credits by an amount that corresponded to the reduced rate of tax.[101] Accordingly, under Code Sec. 965(g), the foreign taxes treated as paid or accrued by a domestic corporation with respect to a Code Sec. 965 inclusion were "limited to those taxes in proportion to the taxable portion of the Code Sec. 965 inclusion."[102]

Treasury regulations under Code Sec. 965(g) extended this foreign tax credit haircut to "the applicable percentage of any foreign income taxes attributable to a distribution of Code Sec. 965(a) previously taxed earnings and profits or Code Sec. 965(b) previously taxed

earnings and profits."[103]As a result of this rule, if a U.S. shareholder pays foreign withholding taxes on a distribution of Code Sec. 965 PTEP, the U.S. shareholder's foreign tax credit is subject to a Code Sec. 965(g) haircut.[104] Withholding taxes properly attributable to a distribution of Code Sec. 965 PTEP, are creditable subject to the Code Sec. 965(g) haircut.

Although the Code Sec. 965 transition tax applied in 2017 and 2018, well before the enactment of the CAMT, the Code Sec. 965(g) foreign tax credit haircut continues to have ongoing relevance to the extent it applies to foreign withholding taxes on distributions of Code Sec. 965 PTEP. There is no textual basis in Code Sec. 59(l) for applying the Code Sec. 965(g) haircut to foreign withholding taxes on dividends that are treated as Code Sec. 965 PTEP distributions in the regular tax system.

The policy considerations are inconclusive, but given the constraints of the statute, they do not weigh in favor of applying Code Sec. 965(g) in the CAMT. The original earnings from which a Code Sec. 965 PTEP distribution is paid were not included in AFSI (because the CAMT did not exist in 2017 or 2018), and, assuming the payor is a CFC, the distribution itself is likewise excluded from AFSI under Notice 2024-10. As in the case of Code Sec. 245A(d), one could argue that no foreign tax credit should be allowed for a withholding tax to the extent the CFC earnings were not subject to the CAMT. But this result seems precluded by the statute: even if Code Sec. 965(g) could be extended to the CAMT, it would require a haircut, not a complete disallowance. Furthermore, as noted above, Treasury and IRS rejected a tracing approach to CFC earnings in Notice 2024-10. The reduced tax rate of Code Sec. 965 seems irrelevant in the context of the CAMT, and the best defense of applying Code Sec. 965(g) in the CAMT would be that the CAMT foreign tax credit should be no broader than the regular foreign tax credit. But this proposition itself is difficult to defend because the CAMT foreign tax credit is in many ways broader than the regular foreign tax credit, including most prominently the absence of a Code Sec. 904 limitation.

3. Suspension of Credit for Taxes Separated from Income

a) Code Sec. 909: splitter transactions. In the case of a "foreign tax credit splitting event," Code Sec. 909 provides a foreign income tax that has been paid or accrued by the taxpayer is not taken into account "for purposes of this title" until the "related income" is taken into account by the taxpayer. A "foreign tax credit splitting event" is an arrangement where the income associated with the tax is taken into account by a related party other than the payor of the tax for U.S. tax purposes.[105] Code Sec. 909 was enacted in the Education, Jobs, and Medicaid Assistance Act of 2010 to "prevent the separation of creditable foreign taxes from the associated foreign income."[106] Prior to its enactment, Treasury had struggled to prevent similar splitting arrangements, which they saw as an abusive attempt to circumvent Code Sec. 904.[107] In 2006, to "address the inappropriate separation of foreign income taxes from the income on which the tax was imposed," Treasury issued proposed regulations regarding the allocation of legal liability for a tax that is imposed on the combined income of two or more persons.[108] These provisions were put in place in the context of the pre-2017 international tax system, which generally permitted taxpayers to defer U.S. tax on CFC earnings until such earnings were repatriated. Treasury and Congress were concerned that taxpayers could achieve inappropriate results by selectively pulling foreign income taxes into the U.S. system while deferring U.S. tax on the related foreign income.[109]

The CAMT statute does not provide a clear textual basis for suspending foreign income taxes described in Code Sec. 909 from the CAMT foreign tax credit. Code Sec. 909 does not deny that a foreign income tax has been paid or accrued; it merely does not permit the tax "to be taken into account" before the related income has been taken into account. It is possible that the phrase "taken into account" could be interpreted as meaning that the foreign income tax has not been "paid or accrued" if it is suspended under Code Sec. 909. In that case, a foreign income tax could arguably be considered paid or accrued by the taxpayer for purposes of the CAMT at the time that the "related income" is included by the taxpayer. Likewise, it is possible to read the statement in Code Sec. 909(a) that suspended taxes are not taken into account "for purposes of this title" as encompassing the CAMT statute; that is, the tax is not paid or accrued for CAMT purposes since Code Sec. 59(l) falls under the same title.

Even if Code Sec. 909 could be interpreted as a legislative gloss on the meaning of "paid or accrued," there is no policy rationale for applying Code Sec. 909 to the CAMT. In the CAMT, CFC income is included in the AFSI of the U.S. shareholder when earned through the *pro rata* share adjustment. The taxpayer has no ability

to "split" the foreign tax from the related income and defer U.S. tax on such income.[110] Further, as noted above, part of the policy rationale of Code Sec. 909 appears to be driven by concerns that taxpayers were undermining Code Sec. 904 by taking foreign taxes into account without subjecting the related income to U.S. tax.[111] As discussed above, the cross-crediting limitations of Code Sec. 904 are not a policy concern of the CAMT. More fundamentally, the CAMT does not permit taxpayers to defer U.S. tax on foreign income in a manner similar to the pre-2018 international tax system.

4. Reduction in Credit to Reflect Base Differences

a) Code Sec. 901(m): reduction in foreign taxes following a covered asset acquisition. Code Sec. 901(m) denies a foreign tax credit for the disqualified portion of any foreign income tax paid or accrued in connection with a covered asset acquisition. A covered asset acquisition is a transaction that results in an increase in the basis of an asset for U.S. tax purposes without a corresponding increase to the basis of such asset for foreign income tax purposes, such as a qualified stock purchase with a Code Sec. 338 election, an acquisition of a partnership interest with a Code Sec. 754 election in effect, and a purchase of an entity treated as a disregarded entity for U.S. federal tax purposes.[112] Code Sec. 901(m) measures the "disqualified portion" of foreign taxes based on the aggregate basis differences for all relevant foreign assets (*i.e.*, differences between the basis for U.S. and foreign tax purposes), divided by the foreign income tax base.[113]

Congress intended for Code Sec. 901(m) to apply to transactions that resulted in the creation of an additional asset basis eligible for cost recovery for U.S. tax purposes without a corresponding increase in the basis of such assets for foreign tax purposes.[114] These transactional techniques could be used to enhance the U.S. foreign tax credit. As a result of the difference in asset basis for U.S. and foreign tax purposes, depreciation and amortization deductions for U.S. tax purposes were enhanced as compared to foreign tax purposes. Foreign taxes therefore would be high as compared to the income taken into account for U.S. tax purposes.[115] Prior to 2018, these transactions could be used to selectively pull foreign income taxes into the U.S. system while otherwise deferring foreign income.

The CAMT statute does not provide a clear textual basis for disallowing foreign income taxes described in Code Sec. 901(m) from the CAMT foreign tax credit. Code Sec. 901(m) does not provide that a foreign tax is "not treated as a tax," nor does it state that the foreign tax is not "paid or accrued by" the taxpayer.

In addition, the policy rationale in favor of applying Code Sec. 901(m) to the CAMT foreign tax credit is weak. At a high level, the concern underlying Code Sec. 901(m) is that due to a mismatch of the U.S. and foreign tax base, foreign taxes are high as compared to the amount of income included for U.S. tax purposes. In an idealized item-by-item foreign tax credit, there would be no foreign tax credit to the extent the foreign tax exceeds the U.S. tax on a particular item. This policy concern is a concern about cross-crediting, and as we have seen, cross-crediting is not a concern of the CAMT foreign tax credit.

Nonetheless, if covered asset acquisitions could be employed to generate foreign tax credits in an artificial way through structured transactions, one might consider whether a limitation is needed to protect the CAMT tax base. However, the transactional techniques targeted by Code Sec. 901(m) are of much less relevance in the context of the CAMT. The CAMT provides for tax depreciation on Code Sec. 168 property, but it does not provide for Code Sec. 197 amortization of intangible property.[116] It is possible that there could be a mismatch between the U.S. and foreign tax base in the CAMT as a result of Code Sec. 168 depreciation from a covered asset acquisition, but it seems more likely that the more meaningful tax benefit targeted by Code Sec. 901(m) arose from mismatches resulting from the amortization of intangible property (including goodwill) under Code Sec. 197 rather than tangible property.

In light of the statutory hurdles, the weak policy basis, and the complexity of Code Sec. 901(m) itself, there is little to recommend applying Code Sec. 901(m) to the CAMT foreign tax credit.

b) Code Sec. 901(e): reduction in foreign taxes on foreign mineral income. Code Sec. 901(e) limits the credits available for foreign taxes imposed on foreign mineral income for taxpayers using percentage depletion under Code Sec. 613. As background, Code Sec. 613 provides a percentage-based deduction for certain mines and other natural deposits as opposed to cost-depletion deductions under Code Sec. 611.[117] Code Sec. 901(e)

"reduces" the amount of creditable tax to the extent (i) the foreign tax exceeds the U.S. tax on the foreign mineral income or (ii) the extent to which the U.S. tax on the foreign mineral income computed using the cost-depletion deduction exceeds the U.S. tax on the foreign mineral income computed using the percentage-depletion deduction.[118]

As with other limitations on cross-crediting high-taxed income against low-taxed income, Code Sec. 901(e) was enacted in 1969 to address situations where the foreign tax on the same income would almost always be higher than the U.S. tax.[119] Because foreign countries typically did not allow for percentage depletion, foreign taxes were imposed on a tax base that was larger than the amount of income recognized for U.S. federal tax purposes. The result was that the foreign tax rate was enhanced, when seen from a U.S. perspective.[120] Congress thus deemed it an "impermissible benefit" to allow that foreign tax that was computed without regard to percentage depletion to reduce income from activities that were not related to the mineral income.[121]

Code Sec. 901(e) provides that "the amount of any" foreign income tax "which would (but for [Code Sec. 901(e)]) be allowed under [Code Sec. 901(b)]" is reduced to reflect the limitation described above. The language does not state that the disallowed amount is "not treated as a tax," and the reference to Code Sec. 901(b), which defines the amount "allowed as the credit under [Code Sec. 901(a)]" could be interpreted as a disallowance of a credit rather than part of the definition of a foreign income tax. In any event, the policy considerations strongly militate against applying Code Sec. 901(e) to the CAMT foreign tax credit. The policy animating Congress to enact Code Sec. 901(e) was a policy against crediting high-taxed foreign mineral income against unrelated low-taxed income. There is no discernible policy in the CAMT foreign tax credit against such cross-crediting. Furthermore, because financial accounting does not use percentage depletion, the specific policy concern underlying Code Sec. 901(e) is absent in the CAMT. For these reasons, Code Sec. 901(e) should not be extended to the CAMT foreign tax credit.

5. Limitations Reflecting U.S. Foreign Policy

a) Code Sec. 901(j). Code Sec. 901(j) disallows a credit for foreign taxes paid on income attributable to certain blacklisted countries. Blacklisted countries—currently North Korea, Iran, Syria, and Sudan—include those with no diplomatic relations with the United States, with governments the United States does not recognize, or those that have been designated as providing support for international terrorism.[122]

Enacted in the Omnibus Budget Reconciliation Act of 1986, the legislative history behind Code Sec. 901(j) is scant. Self-evidently, however, its purpose is to deny foreign tax credits for taxes paid to foreign countries or regimes to which the U.S. government has strong foreign policy objections.[123]

Because Code Sec. 901(j) does not state that the foreign tax is "not treated as a tax" or that the tax is not "paid or accrued by" the U.S. person, the statutory basis for applying Code Sec. 901(j) to the CAMT foreign tax credit in Code Sec. 59(l) is uncertain. The policy basis for Code Sec. 901(j), however, is rooted in foreign policy, not tax policy. Although the drafters of the CAMT left no evidence as to their views of Code Sec. 901(j), one suspects that the U.S. foreign policy concerns that animated Code Sec. 901(j) in the regular foreign tax credit are equally strong as applied to the CAMT foreign tax credit.

b) Code Sec. 908. The anti-boycott rules include a provision, Code Sec. 908, which "reduces the amount of the Code Sec. 901 credit" for deemed taxes paid under Code Sec. 960 by the amount of the Code Sec. 901 credit multiplied by the "international boycott factor." The international boycott factor, determined under Code Sec. 999, is based on the operations of a taxpayer in countries participating in "an international boycott" (identified in a list published by Treasury quarterly).

The anti-boycott rules grew out of concerns in the 1970s over the growing oil wealth of Middle Eastern countries that boycotted Israel and the increase in related restrictions on U.S. businesses.[124] In an effort to deny tax incentives to taxpayers "engag[ing] in misconduct," Congress enacted Code Sec. 908 in 1976, along with Code Sec. 999 and other provisions that limited deferral of CFC income earned in boycott countries and denied benefits of the domestic international sales corporation incentive.[125]

As with Code Sec. 901(j), the CAMT statute does not provide explicit or implicit reference to the anti-boycott rules, but the policy concerns surrounding Code Sec. 908 seem equally relevant in the CAMT context.

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ENDNOTES

* Thank you to members of the Washington International Tax Study Group for their helpful discussion and comments on an earlier draft of this article.

[1] Inflation Reduction Act of 2022, Pub. L. No. 117-169, §10101.

[2] U.S. Department of the Treasury, General Explanations of the Administration's Fiscal Year 2022 Revenue Proposals (May 2021), available at *home.treasury.gov/system/files/131/General-Explanations-FY2022.pdf*, at 21.

[3] *Id.*

[4] If there is an aggregate loss in the taxpayer's CFCs, the CFC *pro rata* share adjustment cannot reduce the AFSI of the taxpayer. Rather, Code Sec. 56A(c)(3)(B) provides for a carryover that reduces the CFC *pro rata* share adjustment in the succeeding year.

[5] Code Sec. 56A(c)(2)(C) provides in the case of corporate subsidiaries that are not included on a consolidated return with the taxpayer, the AFSI of the taxpayer "with respect to such other corporation shall be determined by only taking into account the dividends received from such other corporation (reduced to the extent provided by the Secretary in regulations or other guidance) and other amounts which are includible in gross income or deductible as a loss under this chapter (other than amounts required to be included under Code Sec. 951 and 951A or such other amounts as provided by the Secretary) with respect to such other corporation."

[6] Code Sec. 56A(c)(15)(A).

[7] In the regular tax system, distributions of PTEP are excluded from income under Code Sec. 959(a), and Code Sec. 959(d) provides that such distributions are not treated as dividends.

[8] Notice 2024-10, IRB 2024-3, 406, §3.01 (Jan. 16, 2024).

[9] Code Sec. 55(b)(2)(A).

[10] Code Secs. 59(l)(1)(A)(i) and 59(l)(1)(B).

[11] Code Secs. 59(l)(1)(A)(i)(I) and 59(l)(1)(B)(i).

[12] Code Secs. 59(l)(1)(A)(i)(II) and 59(l)(1)(B)(ii).

[13] Code Sec. 59(l)(1)(A)(i).

[14] Code Sec. 59(l)(1)(A)(ii).

[15] Code Sec. 59(l)(2).

[16] Code Sec. 59(l)(1)(B).

[17] Notice 2023-64, IRB 2023-40, 974 (Oct. 2, 2023).

[18] Staff of J. Comm. on Tax'n, General Explanation of Tax Legislation Enacted in the 117th Congress, JCS-1-23 (2023), at 179–80, n. 810.

[19] Notice 2023-64, IRB 2023-40, 974, §§14.02(2), 8.02(2).

[20] Notice 2023-64, IRB 2023-40, 974, §14.02(5).

[21] Notice 2023-64, IRB 2023-40, 974, §14.02(3).

[22] Code Secs. 59(l)(1)(A)(i) and 59(l)(1)(B).

[23] Code Secs. 59(l)(1)(A)(i)(II) and 59(l)(1)(B)(ii). The requirement in the CAMT that foreign taxes be "taken into account on the applicable financial statement" of the applicable corporation or its CFC is unique to the CAMT foreign tax credit, but it appears its impact as an additional timing rule will be minimal in light of the broad definition adopted in Notice 2023-64, IRB 2023-40, 974.

[24] Subpart A of Part III of Subchapter N of Chapter I, or Code Secs. 901–909.

[25] *See e.g.*, New York State Bar Association Tax Section, *Report on Selected International Issues Relating to the Corporate Alternative Minimum Tax*, 58–59 (Oct. 12, 2023); David Abrahams, Jeff Michalak, Colleen O'Neill, & Saurav Agarwala, *The Next Chapter in the Book Minimum Tax Saga: Understanding the CAMT Foreign Tax Credit*, 51 Tax Mgmt. Int'l J. 11 (Nov. 04, 2022).

[26] Revenue Act of 1918, Pub. L. No. 65-254, §238 (1919). In the Revenue Act of 1921, the language limiting the credit to taxes imposed by a foreign country on "income derived from sources therein" was deleted, and a foreign source income limitation was enacted as the predecessor of section 904(a). Revenue Act of 1921, Pub. L. No. 67-98, §238 (1921).

[27] *M.D. Biddle*, SCt, 38-1 ustc ¶9040, 302 US 573, 579, 58 SCt 379 (1938).

[28] Prior Reg. §1.901-2(a)(3) (2021). The Supreme Court observed in *PPL Corp.*, SCt, 2013-1 ustc ¶50,335, 569 US 329, 334, 133 SCt 1897 (2013), that Reg. §1.901-2 codified longstanding doctrine and provided the relevant legal standard for assessing the creditability of a foreign tax.

[29] Prior Reg. §1.901-2(b)(2) (2021).

[30] Prior Reg. §1.901-2(b)(3) (2021).

[31] Prior Reg. §1.901-2(b)(4) (2021).

[32] *See* Preamble to Regulations Related to Foreign Tax Credits, T.D. 9959, 87 FR 276 (Jun. 4, 2022) (stating that "the purpose of the regulations under Code Sec. 901 is to provide clarity and certainty as to which income tax principles reflected in the Code the foreign tax law must have for a tax to be an income tax in the U.S. sense within the meaning of Code Sec. 901.").

[33] Reg. §1.901-2(b)(5).

[34] *See generally*, T.D. 9959 and Corrections to the Guidance Related to the Foreign Tax Credit, RIN 1545–BP70, 87 FR 45018 (Jul. 27, 2022)

[35] Notice 2023-55, IRB 2023-32, 427 (Aug. 7, 2023). Notice 2023-55 permits taxpayers to apply a modified version of Reg. §1.901-2(a) and (b) as in effect on April 1, 2021; Notice 2023-80, IRB 2023-52, 1583 extended this relief indefinitely.

[36] *See, e.g.*, Robert E. Culbertson, *Sense and Sensibility and Creditability: Redefining an Income Tax 'in the U.S. Sense,'* 2021 Tax Notes Fed. 173 (Oct. 11, 2021); New York State Bar Association Tax Section, *Report on Proposed Regulations Providing Guidance Related to the Foreign Tax Credit* (Feb. 9, 2021); Lee Sheppard, *Do the Proposed Foreign Tax Credit Regulations Cure the Problems?* 2023 TNTI 48-1 (Mar. 13, 2023); Kevin Kenworthy & Caroline Reaves, *Proposed FTC Regulations Would Upend Creditability Standards*, 2023 Tax Notes Int'l 103 (Jul. 26, 2021).

[37] Reg. §1.901-2(a)(2).

[38] Reg. §1.901-2(a)(2)(ii)(B).

[39] *See* Bret Wells, *The Foreign Tax Credit War*, 2016 BYU L. Rev. 1895, 1907-08 (2016).

[40] *See* Joseph Isenbergh, *The Foreign Tax Credit: Royalties, Subsidies, and Creditable Taxes*, 39 Tax L. Rev. 227 (1984).

[41] *See* Joint Hearings before Senate Comm. on the Judiciary and on Interior and Insular Affairs, 86th Cong., 1st Sess., pt. 2, at 1235-1449 (1959); Staff of House Subcomm. On Government Operations 95th Cong., 1st Sess., Foreign Tax Credits Claimed By U.S. Petroleum Companies 335 (Comm. Print 1977).

[42] Temporary Reg. §4.901-1(b)(1), T.D. 7739, 1981-1 CB 396.

[43] Temporary Reg. §4.901-2(b)(2).

[44] U.S. Department of the Treasury, General Explanations of the Administration's Fiscal Year 2025 Revenue Proposals (Mar. 2024), available at *home.treasury.gov/policy-issues/tax-policy/revenue-proposals* at 52–53.

[45] *See* Frank M. Burke Jr., *Taxation of International Petroleum Exploration and Support Activities*, 27 TLSLJ 525, 535 (1993).

[46] S. Rep. No. 94-938, at 251-252 (1976).

[47] *See* Raphael Sherfy, *Recent Changes and New Considerations in the International Tax Area*, 53 Taxes 857, 864 (December 1975).

[48] Reg. §1.901-2(g)(5). In finalizing the 2022 regulations, Treasury and the IRS clarified that the term "paid" for the purposes of Code Sec. 901 does not include taxes deemed paid under Code Sec. 904 or Code Sec. 960. Preamble to Regulations Related to Foreign Tax Credits, T.D. 9959, 87 FR 276, 303.

[49] Reg. §1.905-1(d)(1)(i).

[50] Reg. §1.905-1(d)(1)(ii). As noted above, Notice 2023-64 provides that this relation back rule applies to the CAMT foreign tax credit.

[51] Reg. §1.901-2(e)(2)(i).

[52] Reg. §1.901-2(e)(5).

[53] *Id.* The IRS takes the position that the failure to seek competent authority relief results in a noncompulsory payment by the taxpayer. *See, e.g.*, Internal Revenue Service, LB&I International Practice Service -Process Unit- Audit, Sub-chapter 3.1.2.1 Exhaustion of Remedies, p. 16, available at *www.irs.gov/pub/int_practice_units/FTM9413_01-02_01.PDF*.

[54] Reg. §1.901-2(e)(5).

[55] The regular tax system also provides that an amount is "not an amount of foreign income tax paid to the extent that liability for the foreign income tax is dependent (by its terms or otherwise) on the availability of a credit for the tax against income tax liability to another country." Reg. §1.901-2(e)(6). Because such "soak-up taxes" are not considered foreign income taxes paid for purposes of Code Sec. 901, they would not give rise to a CAMT foreign tax credit.

[56] *See* Pub. L. No. 99-514, §1204(a).

[57] Reg. §1.901-2(e)(3); *see* T.D. 7918, 48 FR 46272 (Nov. 16, 1983).

[58] *See Chicago Burlington & Quincy Railroad Co.*, CtCls, 72-1 USTC ¶9253, 455 F2d 993, 197 CtCls 264, (1972), *reversed on other grounds*, SCt, 73-1 USTC ¶9478, 412 US 401 (1973); *Missouri Pacific R.R. Co.*, DC-MO, 68-1 USTC ¶9354, 301 FSupp 839 (E.D. Mo. 1967), *aff'd in part and reversed in part on other grounds* CA-8, 69-1 USTC ¶9374, 411 F2d 327 (1969); *Missouri-Illinois R.R. Co.*, CtCls, 67-2 USTC ¶9569, 381 F2d 1001 (1967).

[59] *Nissho Iwai Am. Corp.*, 89 TC 765, 777, Dec. 44,267 (1987) (declining to follow the holding in "the Mexican railroad car rental cases" and upholding the subsidy regulation as valid).

[60] *See Amoco Corp.*, CA-7, 98-1 USTC ¶50,250, 138 F3d 1139 (1998) (holding that a foreign government could not make a subsidy payment to itself); *PNC Fin. Servs. Grp., Inc.*, CA-DC, 2007-2 USTC ¶50,650, 503 F3d 119, 123 (2007) (discussing the history of cases involving a Brazilian withholding tax on interest and finding that the Brazilian government effectively returned 40 percent of any tax payment made by Brazilian borrowers in international net loans made on their foreign lenders' behalf).

[61] Staff of J. Comm. on Tax'n, General Explanation of the Tax Reform Act of 1986 ("1986 Blue Book"), JCS-10-87 (May 4, 1987), at 871.

[62] For a discussion of the subsidy rule expressing skepticism of the IRS' assumption "that a payment received by a person with whom a U.S. taxpayer has transacted business has in fact benefitted the taxpayer," *see* Isenbergh, *supra* note 40, at 247.

[63] Revenue Act of 1921, Pub. L. No. 67-98, §228.

[64] For example, from 1960 to 1976, Code Sec. 904(a) provided for a per-country limitation, with an election to apply an overall limitation. The per-country limitation was repealed in the Tax Reform Act of 1976, Pub. L. No. 94-455, §1031(a).

[65] S. Rep. No. 67-275, 17 (1921), reprinted in 1939-1 CB (Part 2), at 178.

[66] Code Sec. 904(d) has been subject to frequent amendment. *See, e.g.*, Tax Reform Act of 1986, Pub. L. No. 99-514 (1986) (creating nine separate limitation baskets); American Jobs Creation Act of 2004, Pub. L. No. 108-357, §404(b) (2004) (reducing the number of baskets to two); Education Jobs and Medicaid Assistance Act of 2010, Pub. L. No. 111-226, §213(a) (2010) (adding the treaty resourcing limitation basket); Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, §14101 (adding the foreign branch income and GILTI limitation baskets).

[67] 1986 Blue Book, *supra* note 61, at 856.

[68] The limitation in Code Sec. 907 has been amended several times. Prior to 2008, it applied to foreign oil and gas extraction income, with separate rules for foreign oil related income. Since 2008, it has applied to combined foreign oil and gas income, which is defined as the sum of foreign oil and gas extraction income and foreign oil related income. *See* Code Sec. 907(b)(1).

[69] *See also* Wells, *supra* note 39, at 1908.

[70] Tax Reduction Act of 1975, Pub. L. No. 94-12 (1975).

[71] H.R. Rep. No. 93-1502, H.R. 17488, at 61–62 (noting that foreign countries generally "do not allow a deduction from income for percentage depletion" and also "effect overstate the income subject to tax by basing the tax on an artificially high posted price rather than on the market price for the oil").

[72] If a credit is disallowed under Code Sec. 901(k), neither Code Sec. 78 nor Code Sec. 275 apply; that is, the taxpayer is entitled to deduct the withholding tax (even if the taxpayer claims a credit for other taxes) and is not required to include any deemed paid tax in income as a gross-up.

[73] Taxpayer Relief Act of 1997, Pub. L. No. 105-34 (1997); H.R. Rep. No. 105-148, at 543.

[74] *Id.*

[75] *See, e.g.*, *Compaq Computer Corp. & Subsidiaries*, 113 TC 214, 225, Dec. 53,549 (1999), *rev'd*, CA-5, 2002-1 USTC ¶50,144, 277 F3d 778 (2001) (noting that Code Sec. 901(k) was enacted in response to these transactions); *IES Indus., Inc.*, CA-8, 2001-2 USTC ¶50,471, 253 F3d 350, 355 (2001). *See also* Avakian-Martin, *Foreign Tax Credit Holding Period Proposal Generates Comment*, 97 TNT 100-5 (May 23, 1997).

[76] While the ADRs were generally sold in the open market, and so a third party could break up the sales, the transactions were structured to ensure that only the same initial entity would be incentivized to repurchase the ADRs.

[77] *IES Indus., Inc.*, CA-8, 2001-2 USTC ¶50,471, 253 F3d at 355.

[78] S. Rep. No. 105-33, 105th Cong., 1st Sess. (1997) at 175–176 (noting Congress' concern with transactions "in which a person that cannot benefit from the foreign tax credits with respect to a dividend to retain the economic benefit of the dividend while another person receives the foreign tax credit benefits").

[79] CA-5, 2002-1 USTC ¶50,144, 277 F3d 778 (2001).

[80] CA-8, 2001-2 USTC ¶50,471, 253 F3d 350 (2001).

[81] *See* Staff of J. Comm. on Tax'n, Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as amended, in combination with the "Patient Protection and Affordable Care Act" (JCX-18-10) (Mar. 21, 2010) at 155 (citing *Compaq Computer* and *IES Industries* for the principle that "if a taxpayer relies on a profit potential [for purposes of the economic substance test], the present value of the reasonably expected pre-tax profit must be substantial in relation to the present value of the expected net tax benefits that would be allowed if the transaction were respected" and then immediately noting that fees, transaction expenses, and foreign taxes are to be treated as expenses in determining pre-tax profit).

[82] The provision generally replicates Code Sec. 901(k) and allows for regulations exempting property where denial of a credit is not necessary to carry out the purposes of Code Sec. 901(l).

[83] Notice 98-5, 1998-1 CB 334, Examples 1–3 (Jan. 20, 1998).

[84] American Jobs Creation Act, Pub. L. No. 108-357, §832(a) (2004).

[85] *See* L.G. Harter & Michael Harper, *Financing International Operations*, 6 J. Tax'n Global Transactions 11, 16 (Fall 2006). Noting that Code Sec. 901(l), though enacted as a means to target tax arbitrage transactions, is so broadly drafted that it could be read to deny foreign tax credits arising from common business transactions that are entered into with little or no tax motivation.

[86] *See* David Rosenbloom, Michael Lloyd, & Sae Jin Yoon, *Surprise! Your Foreign Tax Credit Is Not Allowed Under Section 901(l)*, 73 Tax Notes Int'l 171 (Jan. 13, 2014).

[87] H.R. Conf. Rep. No. 108-755, 530 (2004).

[88] Notice 2005-90, 2005-2 CB 1163 (May 10, 2006); Notice 2010-65, IRB 2010-41, 424 (Nov. 5, 2010).

[89] Tax Cuts and Jobs Act of 2017, *supra* note 66, at §14101(a).

[90] Code Sec. 245A(d)(1). Code Sec. 245A(d)(2) likewise disallows a deduction with respect to any foreign taxes paid or accrued for which a credit is disallowed under Code Sec. 245A(d).

[91] Reg. §1.245A(d)-1. Foreign income taxes are treated as being attributable to Code Sec. 245(d) income to the extent that such foreign income taxes are allocated and apportioned to foreign sourced income in the Code Sec. 245A(d) income group under the principles of Reg. §1.861-20.

[92] H.R. Rep. No. 115-466, at 596 (2017).

[93] There remains considerable uncertainty regarding the treatment of dividends from 10-percent owned foreign subsidiaries that are not CFCs (so-called "10/50 companies"). Notice 2024-10 did not extend this exemption to dividends from 10/50 companies in the same manner as it did for CFC dividends. If dividends from 10/50 companies are included in AFSI, there is no exemption from income in the CAMT and a foreign tax credit should be permitted for any foreign income taxes paid with respect to such dividends.

[94] As discussed below, a similar question arises in the case of foreign withholding taxes on CFC dividends that are treated as PTEP attributable to GILTI in the regular tax system.

[95] Code Sec. 960(d)(2). The 20-percent haircut in Code Sec. 960(d) does not apply to the foreign tax credit that is available under Code Sec. 960(b) for foreign withholding taxes on a distribution of PTEP that is attributable to GILTI.

[96] Foreign income taxes paid by a CFC must be "properly attributable to the tested income of such [CFC]" in order for a credit to be allowed under Code Sec. 960(d). Code Sec. 960(d)(3).

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[97] H.R. Rep. No. 115-466 (2017) at 626.

[98] *See* Ron Dabrowski, *Bad Haircuts? Evaluating Policy Choices Under Biden's International Tax Proposals*, 103 TAX NOTES INT'L 1573, 1580, 1581 (2021).

[99] As in the case of withholding taxes on dividends that would be subject to Code Sec. 245A(d) in the regular tax system, it could be argued as a policy matter that the CAMT foreign tax credit's 15-percent limitation on CFC foreign taxes should apply to foreign withholding taxes on dividends from CFCs, but the result seems precluded by the statute.

[100] Code Secs. 965(c)(2)(A) and 965(c)(2)(B).

[101] *See* Code Sec. 965(g)(2). The Code Sec. 965(g) haircut disallows foreign tax credits in proportion to the percentage rates upon which the Code Sec. 965(c) deduction was calculated by "haircutting" foreign taxes paid or accrued by 77.1% for non-cash assets and 55.7% for cash assets.

[102] H. Rep. No. 115-466, at 620. *See also* Hsuany Shan, Prae Kriengwatana, & Marty Collins, *For Whom the Toll (Charge) Tolls: Foreign Tax Credits and the Tax Cuts and Jobs Act*, 46 TAX MGMT. INT'L J. 743, at 13 (2017). The alignment of the "applicable percentage" in Code Sec. 965(g) with the Code Sec. 965(c)(1) deduction demonstrates that "the TCJA intends for foreign tax credits to be available to offset the U.S. tax on the toll charge in the same proportion as the income recognized."

[103] Reg. §1.965-5(b)(1).

[104] The validity of this regulation is the subject of litigation. *See Sysco Corp.*, Docket No. 5728-23 (TC Apr. 18, 2023).

[105] Regulations provide that a splitting event only occurs in four specific situations involving: reverse hybrids; the sharing of group losses under a foreign loss-sharing regimes; hybrid instruments; and certain allocations of foreign income taxes by a partnership with respect to its inter-branch payments. Reg. §1.909-2.

[106] Education Jobs and Medicaid Assistance Act of 2010, *supra* note 66, at §211(a); Staff of J. Comm. on Tax'n, GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 111TH CONGRESS, JCS-2-11, at 428 (Mar. 2011).

[107] *See* Notice 2004-19, 2004-1 CB 606 (Mar. 15, 2004) (notifying taxpayers that the IRS will continue to scrutinize transactions with inappropriate foreign tax credit results, such as special allocations of foreign taxes among the partners inconsistent with the related income, because the purported tax benefits "are inconsistent with the purposes of the foreign tax credit provisions, including the foreign tax credit limitation of Code Sec. 904"). *See also* Robert Holo & Seojung Park, *Legislative and Regulatory Attempts to End FTC Splitters*, 133 TAX NOTES 591 (Oct. 31, 2011).

[108] REG-124152-06, 71 FR 44240 (Aug. 4, 2006). When finalizing those regulations in 2012, Treasury withdrew the portions of the 2006 proposed regulations that it believed would instead be addressed by then-recently enacted Code Sec. 909. T.D. 9576, 77 FR 8120, 8121 (Feb. 14, 2012).

[109] *See also* Layla J. Aksakal & Rocco Femia, *Section 909 and Loss Surrender: Temporary Regulations Strike Balance*, 41 TAX MGMT. INT'L J. 660, at 2 (2012).

[110] The policy rationale for Code Sec. 909 in the regular tax system after the enactment of GILTI in 2017 is itself dubious for similar reasons.

[111] *See* Lawrence Lokken, *Split Taxes: Code Sec. 909 as Interpreted by the 2012 Regulations*, 38 INT'L TAX J. 15 (2012).

[112] Code Sec. 901(m)(2); *see also* Staff of J. Comm. on Tax'n, "TECHNICAL EXPLANATION OF THE REVENUE PROVISIONS OF THE SENATE AMENDMENT TO THE HOUSE AMENDMENT TO THE SENATE AMENDMENT TO H.R. 1586, SCHEDULED FOR CONSIDERATION BY THE HOUSE OF REPRESENTATIVES ON AUGUST 10, 2010" (JCX-46-10) (Aug. 10, 2010) at 10; *see also* Notice 2004-20, IRB 2004-11, 608 (Feb. 18, 2004). The IRS included similar economic arrangements as covered asset acquisitions as "listed transactions" in Notice 2004-20, which was withdrawn by Notice 2020-19 in light of the enactment of Code Sec. 901(m).

[113] Code Sec. 901(m)(3)(A).

[114] *See* Education, Jobs, and Medicaid Assistance Act of 2010, *supra* note 66; *see also* Staff of J. Comm. on Tax'n, JCS-2-11 *supra* note 109, at 433–38. *See also* John McDonald, Steward Lipeles, & Jordan Hughes, *Treasury Issues Code Sec. 901(m) Regulations*, 95 TAXES 9, 10 (2017).

[115] *See* New York State Bar Association Tax Section, *Report on Section 901(m)* (Jan. 28, 2011), at 60.

[116] Code Sec. 56A(c)(13)(A) permits an adjustment to AFSI for depreciation on Code Sec. 168 property.

[117] Since 1975, the application of percentage depletion to oil and gas wells has been limited to independent producers and royalty owners. *See* Code Sec. 613A.

[118] Reg. §1.901-3(a)(3)(i).

[119] Tax Reform Act of 1969, Pub. L. No. 91-172, §506(a)(1). At the time of the enactment of Code Sec. 901(e), oil and gas wells qualified for percentage depletion, and Code Sec. 613 enhanced the potential benefit of cross-crediting high-taxed income from oil and gas wells against other low-taxed income.

[120] *See also* Frank Burke, Jr., *supra* note 45, at 543.

[121] Staff of J. Comm. on Tax'n, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1969, JCS-16-70 (Dec. 3, 1970), at 166–167.

[122] Code Sec. 901(j)(2). In addition to disallowing the foreign tax credit, Code Sec. 901(j) treats income attributable to a blacklisted country as income in a separate category for purposes of Code Sec. 904.

[123] H.R. Conf. Rep. No. 99-1012 (1986). *See, e.g.*, Calvin J. Allen, *The Effective Role of United States International Tax Law in Dismantling Apartheid in the Union of South Africa*, 27 T. MARSHALL L. REV. 165, 180 (2002). Discussing the legislative history of former Code Sec. 901(j)(2)(c) (which denied foreign tax credits for foreign taxes paid to South Africa) as a visible attempt by the U.S. government to undermine apartheid in South Africa during the late 1980s. With the end of apartheid, this provision has since been repealed to remove South Africa from the list of blacklisted countries.

[124] *See* Richard L. Kaplan, *Income Taxes and the Arab Boycott*, 32 TAX LAW. 313, 315–17 (1979).

[125] Tax Reform Act of 1976, *supra* note 64, at §1061; S. Rep. No. 94-938, *supra* note 46, at 4.

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