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Tax Insights

A Publication of the Stradley Ronon Tax Practice Group

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FEBRUARY 27, 2019

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NYSBA Requests Clarifications of and Submits Recommendations on the BEAT Regulations

The New York State Bar Association (NYSBA) submitted a report (http://www.nysba.org/Sections/Tax/Tax_Section_Reports/Tax_Section_Reports_2019/1409_Report.html) to the IRS asking for clarification and recommending changes to the Treasury Regulations under Section 59A (https://www.irs.gov/pub/irs-drop/reg-104259-18.pdf) of the 2017 Tax Cuts and Jobs Act (TCJA), which covers the base erosion and anti-abuse tax (BEAT). Section 59A generally requires that certain corporations, excluding RICs, REITs and S corporations, that have gross receipts of $500 million or more over the applicable three-year period pay a tax equal to such entities' "base erosion minimum tax." (See our prior coverage here: https://www.stradley.com/insights/publications/2018/12/tax-insights-december-19-2018). (Section references are to the Internal Revenue Code of 1986, as amended (the Code).) The NYSBA report asks for clarification of the definition of "gross receipts" in Treasury Regulation Section 1.59A-1(b)(13) and on the mark-to-market rule applicable to physical securities, repurchase agreements and securities loans. Recommendations made in the report include:

- Section 351 exchanges, Section 332 liquidations and Section 368 reorganizations should not give rise to base erosion payments.
- Section 988 losses should be included in the denominator of the base erosion percentage to the extent that such losses arise out of transactions with unrelated parties.
- A payment made to a controlled foreign corporation (CFC) that results in income inclusion to a U.S. taxpayer (under Subpart F or GILTI) should not be treated as a base erosion payment.
- A transfer of property to a foreign related party resulting in a recognized loss should not be treated as a base erosion payment.
- The mark-to-market rule used to determine the amount of base erosion payments should be withdrawn.
- The BEAT rate for a fiscal year taxpayer for its taxable year that began in 2018 should be 5 percent for the entire taxable year.
- Repurchase premium and rebate interest amounts paid with respect to securities lending transactions and sale-repurchase transactions should be excluded from the definition of qualified derivative payments.
- Securities loans should be treated as derivatives for purposes of Section 59A that accordingly may give rise to qualified derivative payments.

AICPA Requests Narrower Definition of Interest Under Section 163(j)

The American Institute of CPAs (AICPA) submitted comments and recommendations (https://www.stradley.com/-/media/files/publications/2019/02/aicpa-letter.pdf?la=en&hash=D2F0924CC04C466CAC4317B14E9AEF5F) to the IRS on the Treasury Regulations under Section 163(j). Section 163(j) was added by the TCJA and limits the deduction of business interest expense for taxable years beginning after Dec. 31, 2017. (See our prior coverage here: https://www.stradley.com/insights/publications/2018/12/tax-insights-december-5-2018) The AICPA generally requests that the IRS narrow the definition of interest in the regulations so that it is consistent with the definition elsewhere in the Code. The AICPA letter also commented on the consolidated group rules, allocation rules, and ordering and operating rules under the regulations.

EBF Requests Clarification on TCJA Impact on CFCs

The European Banking Federation (EBF) submitted a letter (https://www.stradley.com/-/media/files/publications/2019/02/ebf-letter.pdf?la=en&hash=BAD931A947B4008044DBDC4446D119D9) to the IRS requesting clarification on the consequences of the TCJA to CFCs. The TCJA repealed Section 958(b)(4), which now results in a downward attribution of stock from a non-U.S. subsidiary to a U.S. subsidiary. The letter states this repeal created large quantities of new CFCs and being compliant with the administrative requirements for such an increase in CFCs would be difficult, since the law was effective in 2017. The EBF states that the potential noncompliance should be resolved immediately.

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