

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9536]

RIN 1545-BK40

Determining the Amount of Taxes Paid for Purposes of the Foreign Tax Credit

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations providing guidance relating to the determination of the amount of taxes paid for purposes of the foreign tax credit. These regulations address certain highly structured arrangements that produce inappropriate foreign tax credit results. The regulations affect individuals and corporations that claim direct and indirect foreign tax credits. The text of these temporary regulations also serves as the text of the proposed regulations (REG-126519-11) published in the Proposed Rules section in this issue of the **Federal Register**.

DATES: Effective Date: These regulations are effective on **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

Applicability Date: For dates of applicability, see §1.901-2T(h)(3).

FOR FURTHER INFORMATION CONTACT: Jeffrey P. Cowan, at (202) 622-3850.

SUPPLEMENTARY INFORMATION:

**Background**

On March 30, 2007, the **Federal Register** published proposed regulations (72 FR 15081) under section 901 of the Internal Revenue Code relating to the amount of taxes paid for purposes of the foreign tax credit. The IRS and the Treasury Department received written comments on the 2007 proposed regulations and a public hearing was held on July 30, 2007. On July 16, 2008, a notice of proposed rulemaking by cross-reference to temporary regulations and temporary regulations (TD 9416) (the “2008 temporary regulations”) were published in the **Federal Register** at 73 FR 40792 and 73 FR 40727, respectively. Final regulations were published in the **Federal Register** in July 2011, and adopted the proposed regulations with the changes discussed in the preamble to the final regulations.

### **Explanation of Provision**

Section 1.901-2(e)(5)(iv) of the final regulations provides that an amount paid to a foreign country is not a compulsory payment, and thus is not an amount of tax paid for purposes of the foreign tax credit, if such amount is attributable to a structured passive investment arrangement. An arrangement that satisfies the six conditions described in §1.901-2(e)(5)(iv) is treated as a structured passive investment arrangement. One of the conditions is that the arrangement utilizes an entity that meets two requirements (the “SPV condition”). See §1.901-2(e)(5)(iv)(B)(1).

The first requirement of the SPV condition is that substantially all of the entity’s gross income, as determined under U.S. tax principles, is attributable to passive investment income and substantially all of the entity’s assets are held to produce such passive investment income. The second requirement is that there is a putative foreign tax payment (a “foreign payment”) attributable to income of the entity, as determined

under the laws of the foreign country to which such foreign payment is made. The foreign payment may be paid by the entity itself or by the owner(s) of the entity. Under the 2008 temporary regulations, a foreign payment attributable to income of the entity does not include a withholding tax imposed on a distribution or payment from the entity to a U.S. party. See §1.901-2T(e)(5)(iv)(B)(1)(ii) of the 2008 temporary regulations.

The IRS and the Treasury Department have become aware that taxpayers can enter into arrangements that generate duplicative benefits involving foreign withholding taxes imposed on distributions made by an entity to a U.S. party. For example, if the parties undertake a transaction in which interests in an SPV are transferred by the U.S. party to a counterparty subject to a repurchase obligation, withholding taxes imposed on distributions from the SPV may be claimed as creditable in both jurisdictions.

Accordingly, the exception for withholding taxes imposed on distributions or payments to U.S. parties was eliminated in the 2011 final regulations. These temporary regulations clarify the provisions of §1.901-2(e)(5)(iv)(B)(1) by providing in a new paragraph §1.901-2(e)(5)(iv)(B)(1)(iii) that a foreign payment attributable to income of an entity includes a withholding tax imposed on a dividend or other distribution (including distributions made by a pass-through entity or an entity that is disregarded as an entity separate from its owner for U.S. tax purposes) with respect to the equity of the entity.

### **Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic

impact on a substantial number of small entities. This certification is based on the fact that these regulations will primarily affect affiliated groups of corporations that have foreign operations which tend to be larger businesses. Moreover the number of taxpayers affected and the average burden are minimal. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

### **Drafting Information**

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

### **List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

### **Adoption of Amendments to the Regulations**

Accordingly, 26 CFR part 1 is amended as follows:

#### **PART 1--INCOME TAXES**

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \*

Par. 2. Section 1.901-2 is amended by revising paragraphs (e)(5)(iii) and (iv) and adding paragraph (h)(3) to read as follows:

§1.901-2 Income, war profits, or excess profits tax paid or accrued.

\* \* \* \* \*

(e) \* \* \*

(5) \* \* \*

(iii) through (iv)(B)(1)(ii) [Reserved] For further guidance, see § 1.901-2T(e)(5)(iii) through (e)(5)(iv)(B)(1)(ii).

(iii) [Reserved]. For further guidance, see §1.901-2T(e)(5)(iv)(B)(1)(iii).

\* \* \* \* \*

(h) \* \* \*

(3) [Reserved]. For further guidance, see §1.901-2T(h)(3).

Par. 3. Section 1.901-2T is revised to read as follows:

§1.901-2T Income, war profits, or excess profits tax paid or accrued.

(a) through (e)(5)(iv)(B)(1)(ii) [Reserved]. For further guidance, see §1.901-2(a) through (e)(5)(iv)(B)(1)(ii).

(iii) A foreign payment attributable to income of the entity includes a withholding tax (within the meaning of section 901(k)(1)(B)) imposed on a dividend or other distribution (including distributions made by a pass-through entity or an entity that is disregarded as an entity separate from its owner for U.S. tax purposes) with respect to the equity of the entity.

(e)(5)(iv)(B)(1)(2) through (h)(2) [Reserved]. For further guidance, see §1.901-2(e)(5)(iv)(B)(2) through (h)(2).

(h)(3) Effective/applicability date. This section applies to foreign payments that, if such payments were an amount of tax paid, would be considered paid or accrued under §1.901-2(f) on or after July 14, 2014.

(h)(4) Expiration date. The applicability of this section expires on July 14, 2014.

Steven T. Miller

Deputy Commissioner for Services and Enforcement.

Approved: July 11, 2011

Emily S. McMahon

Acting Assistant Secretary of the Treasury (Tax Policy).

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