

Part III - Administrative, Procedural, and Miscellaneous

Temporary Relief Under Sections 901 and 903 of the Internal Revenue Code

Notice 2023-55

SECTION 1. PURPOSE

This notice announces temporary relief for taxpayers in determining whether a foreign tax is eligible for a foreign tax credit under §§ 901 and 903 of the Internal Revenue Code (Code). This temporary relief, as described in section 3 of this notice, applies with respect to § 1.901-2(a) and (b) (the definition of a foreign income tax and the net gain requirement) and to § 1.903-1(c)(1)(iv) (jurisdiction to tax excluded income) and § 1.903-1(c)(2)(iii) (source-based attribution requirement).¹

SECTION 2. BACKGROUND

Section 901 allows a credit for foreign income, war profits, and excess profits taxes, and § 903 provides that such taxes include a tax paid in lieu of a generally-imposed foreign income, war profits, or excess profits tax (collectively, foreign income taxes). On January 4, 2022, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) published Treasury Decision 9959 in the Federal Register (87 FR 276) (2022 FTC final regulations), which contained final

¹ Unless otherwise specified, all “section” or “§” references are to sections of the Code or the Income Tax Regulations (26 CFR part 1).

regulations under §§ 901 and 903. Correcting amendments to the 2022 FTC final regulations were published in the Federal Register on July 27, 2022 (87 FR 45018 and 87 FR 45021). On November 22, 2022, the Treasury Department and the IRS published proposed regulations (REG-112096-22) in the Federal Register (87 FR 71271), which included proposed rules relating to the cost recovery requirement and the substitution requirement for covered withholding taxes. On April 17, 2023, the Treasury Department and the IRS published Notice 2023-31 in the Internal Revenue Bulletin (IRB 2023-16) relating to proposed § 1.903-1(c)(2)(iii)(B) (the single-country exception).

Following the publication of the 2022 FTC final regulations and subsequent guidance, the Treasury Department and the IRS received questions regarding the application of the 2022 FTC final regulations and requests to modify those regulations. The Treasury Department and the IRS continue to analyze issues related to the 2022 FTC final regulations and are considering proposing amendments to those regulations. As that analysis is ongoing, taxpayers may apply the temporary relief in section 3 of this notice during the relief period, as defined in section 4 of this notice. The Treasury Department and the IRS are considering whether, and under what conditions, to provide additional temporary relief beyond the relief period.

SECTION 3. TEMPORARY RELIEF

To determine whether foreign taxes paid² in the relief period are foreign income taxes, a taxpayer may apply the following temporary relief. First, instead of applying

² The term “paid” in this notice has the meaning in § 1.901-2(g)(5).

existing § 1.901-2(a) and (b), taxpayers may apply § 1.901-2(a) and (b) as contained in 26 CFR part 1, revised as of April 1, 2021 (former § 1.901-2(a) and (b)), except that, for this purpose, the seventh and eighth sentences of former § 1.901-2(b)(4)(i) (flush language),³ which describe the “nonconfiscatory gross basis tax rule,” are deleted and replaced with the following: “No foreign tax whose base is gross receipts or gross income satisfies the net income requirement, except in the case of a foreign tax whose base consists solely of investment income that is not derived from a trade or business, or wage income (or both).” Second, taxpayers may apply existing § 1.903-1 without applying § 1.903-1(c)(1)(iv) (jurisdiction to tax excluded income) and § 1.903-1(c)(2)(iii) (source-based attribution requirement).

Under the temporary relief, a gross basis tax imposed on the gross receipts or gross income arising from the provision of digital services (DST) does not satisfy the net income requirement of former § 1.901-2(b)(4)(i), because the base of the tax is gross receipts or gross income and does not consist solely of investment income that is not derived from a trade or business, or wage income. In addition, under existing § 1.903-1, without taking into account § 1.903-1(c)(1)(iv) and § 1.903-1(c)(2)(iii), a foreign country’s DST that applies by its terms to any income subject to that foreign country’s net income

³ The seventh and eighth sentences in former § 1.901-2(b)(4)(i) (flush language) are the following: “A foreign tax whose base is gross receipts or gross income does not satisfy the net income requirement except in the rare situation where that tax is almost certain to reach some net gain in the normal circumstances in which it applies because costs and expenses will almost never be so high as to offset gross receipts or gross income, respectively, and the rate of the tax is such that after the tax is paid persons subject to the tax are almost certain to have net gain. Thus, a tax on the gross receipts or gross income of businesses can satisfy the net income requirement only if businesses subject to the tax are almost certain never to incur a loss (after payment of the tax).”

tax remains not creditable as a tax in lieu of an income tax. See § 1.903-1(c)(1)(ii) and (c)(2)(ii); see also § 1.903-1(d)(1) (Example 1).

When applying the temporary relief, examples and cross-references in former § 1.901-2(a) and (b) and the existing Income Tax Regulations will be considered modified as appropriate. Appropriate modifications include the following. Examples 1-3 of former § 1.901-2(b)(4)(iv) analyze the nonconfiscatory gross basis tax rule and therefore are inapplicable. References in the existing Income Tax Regulations to a “foreign income tax” include a foreign tax that satisfies the requirements in former § 1.901-2(a) and (b), as modified in this section 3. Additionally, all cross-references in former § 1.901-2(a) and (b) to provisions in former § 1.901-2 (other than former § 1.901-2(a) and (b)) or other former Income Tax Regulations (such as §§ 1.901-2A and 1.903-1) are construed, as applicable, as cross-references to the corresponding provisions (taking into account any renumbering of those provisions) of the existing Income Tax Regulations.

Taxpayers may apply this temporary relief to foreign taxes paid in any relief year, as defined in section 4 of this notice, provided that the taxpayer satisfies the following requirements. First, the taxpayer must apply the temporary relief to (1) all foreign taxes paid by the taxpayer in the taxpayer’s relief year, and (2) all foreign taxes (i) that are paid by any other person in a taxable year that begins on or after December 28, 2021 and that ends with or within the taxpayer’s relief year, and (ii) for which the taxpayer would be eligible to claim a credit, as provided in § 901 (determined without regard to the limitations described in § 1.901-1(b)), if the taxpayer applied the temporary relief to

such foreign taxes. This includes foreign taxes paid by a controlled foreign corporation (CFC) of which the taxpayer is a United States shareholder (U.S. shareholder) in the CFC's taxable year that ends with or within the U.S. shareholder's relief year.

Additionally, a member of a consolidated group may apply the temporary relief to a relief year only if all members of the consolidated group apply the temporary relief to the relief year. Finally, the taxpayer may not apply the temporary relief in a relief year to claim a credit, as provided under § 901, for any amount of foreign tax for which a deduction is allowed in the relief year or any other taxable year.

SECTION 4. RELIEF PERIOD

For purposes of this notice, the relief period means taxable years beginning on or after December 28, 2021, and ending on or before December 31, 2023, and relief year means any taxable year within the relief period.

SECTION 5. DRAFTING INFORMATION

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