Guidance Regarding the Foreign Tax Credit and Dual Consolidated Losses in Relation to the GloBE Model Rules, and Extension and Modification of Temporary Relief in Notice 2023-55

Notice 2023-80

SECTION 1. OVERVIEW

.01 Purpose.

This notice announces that the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) intend to issue proposed regulations under §§ 59(l), 78, 704, 901, 903, 951A, 954, 960, and 1503(d) of the Internal Revenue Code (Code)[1] to address the application of those provisions, including the foreign tax credit rules and the dual consolidated loss rules, to certain types of taxes described in the "Tax Challenges Arising from the Digitalisation of the Economy - Global Anti-Base Erosion Model Rules (Pillar Two)" (GloBE Model Rules).[2] The Treasury Department and the IRS anticipate that the proposed regulations will be consistent with the guidance provided in sections 2 and 3 of this notice.

This notice also extends the relief period for the temporary relief described in Notice 2023-55 in determining whether a foreign tax is eligible for a foreign tax credit under §§ 901 and 903. In addition, this notice addresses the application of the temporary relief

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

[2] Org. for Econ. Coop. & Dev. [OECD], *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two)* (Dec. 14, 2021), https://www.oecd-ilibrary.org/taxation/tax-challenges-arising-from-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two_782bac33-en.

with respect to partnerships and their partners.

.02 Overview of the GloBE Model Rules.

The GloBE Model Rules create a coordinated system of minimum taxation intended to ensure that Multinational Enterprise Groups (MNE Groups) with annual revenue of EUR 750 million or more pay a minimum level of tax on the income arising in each jurisdiction in which they operate.[3] Certain jurisdictions have enacted, and others have proposed, legislation to implement the GloBE Model Rules for the IIR and Qualified Domestic Minimum Top-up Tax (QDMTT), effective for Fiscal Years beginning on or after December 31, 2023, and for the UTPR, effective for Fiscal Years beginning on or after December 31, 2024.[4] This notice does not provide guidance regarding the UTPR, except as provided in sections 2.03 and 3.03 of this notice. The Treasury Department and the IRS continue to analyze issues related to the UTPR and intend to issue additional guidance.

Under the GloBE Model Rules, an in-scope MNE Group must calculate its Effective Tax Rate (ETR) for each jurisdiction in which it operates. The ETR determination for a jurisdiction involves calculating the Net GloBE Income in that jurisdiction, based on the net income or loss reflected on financial statements with certain adjustments, and Adjusted Covered Taxes, which is a measure of taxes paid with respect to that income

[3] Capitalized terms used in this notice, but not defined herein, have the meanings ascribed to such terms under the GloBE Model Rules.
[4] Under the European Union (EU) Directive requiring the adoption of the GloBE Model Rules, EU Member States will apply the UTPR for years beginning on or after December 31, 2023 but only in limited circumstances. *See* Council Directive 2022/2523, art. 50, 2022 OJ (L 328) 1, 55.

(including, when computing the ETR for the IIR or UTPR, cross-border taxes such as those imposed on income of a controlled foreign corporation (CFC) or foreign branch located in the jurisdiction). If the ETR for a jurisdiction is below the 15% Minimum Rate, Top-up Tax may be imposed and collected under the QDMTT, IIR, and UTPR. The amount of Top-up Tax is determined by multiplying the Top-up Tax Percentage (the excess of 15% over the ETR in the jurisdiction) by the Excess Profits (the Net GloBE Income in such jurisdiction that exceeds a Substance-based Income Exclusion).

A jurisdiction that enacts a QDMTT will collect tax with respect to low-taxed income in that jurisdiction. Any Top-up Tax not collected under a QDMTT may be collected under the IIR or UTPR. Jurisdictions enacting the QDMTT, IIR, and UTPR into their domestic law may separately enact each such tax or may amend their existing corporate income tax.

The GloBE Model Rules operate so that taxes are imposed on Net GloBE Income in the following order of priority: (1) Covered Taxes (other than Controlled Foreign Company Tax Regimes (CFC Tax Regimes) and certain cross-border taxes); (2) QDMTT; (3) CFC Tax Regimes and certain other cross-border taxes; (4) IIR; and (5) UTPR. Thus, for example, a QDMTT is computed without regard to taxes paid pursuant to a CFC Tax Regime.

SECTION 2. GLOBE MODEL RULES AND THE FOREIGN TAX CREDIT

.01 Background.

Section 901 generally allows a credit for the amount of any income, war profits, and

excess profits taxes (collectively, foreign income taxes) paid or accrued during the taxable year to any foreign country or to any territory of the United States, and in the case of a domestic corporation, the taxes deemed to have been paid under § 960. Section 903 provides that foreign income taxes include a tax paid in lieu of a generally-imposed foreign income tax.

This section 2 describes rules that would address the treatment of certain taxes, including IIRs, UTPRs, and QDMTTs, under §§ 59(l), 78, 275, 704, 901, 903, 951A, 954, and 960. For purposes of section 2 of this notice, the term IIR, the term UTPR, and the term QDMTT mean a tax imposed under a foreign tax law[5] that is consistent with the IIR, UTPR, and QDMTT, respectively, described in the GloBE Model Rules.

.02 Final Top-up Tax.

(1) In general. The Treasury Department and the IRS intend to issue proposed regulations consistent with the guidance provided in this section 2.02, which describes the treatment of final top-up taxes under §§ 59(l), 78, 275, 704, 901, 903, 951A, 954, and 960.

(2) Definition of final top-up tax. A foreign income tax (tested tax) is a final top-up tax if, in computing the tested tax, the foreign tax law takes into account:

(a) the amount of tax imposed on the direct or indirect owners of the entity subject to the tested tax by other countries (including the United States) with respect to the income subject to the tested tax, or

[5] The term "foreign tax law" in this notice has the meaning in § 1.901-2(g)(4).

(b) in the case of an entity subject to the tested tax on income attributable to its branch in the foreign country imposing the tested tax, the amount of tax imposed on the entity by its country of residence with respect to such income.

(3) Treatment of a final top-up tax under §§ 901 and 59(l). No credit is allowed under §§ 901 or 59(l) to a person for a final top-up tax if, under the foreign tax law, any amount of United States federal income tax liability of the person would be taken into account in computing the final top-up tax (without regard to whether the person has any amount of United States federal income tax liability that, in fact, is taken into account in such computation).

(4) Treatment of a final top-up tax paid by a partnership or CFC. In general, a final top-up tax is treated as if it were a creditable tax at the partnership and CFC level, with the disallowance of the credit pursuant to section 2.02(3) of this notice applying at the level of the partner or U.S. shareholder, as applicable. This treatment is intended to facilitate appropriate results where a final top-up tax is creditable as to one partner or U.S. shareholder of a partnership or CFC, as applicable, but not as to another. Further, a final top-up tax is not taken into account in determining whether the high-tax exception to foreign base company income in § 1.954-1(d) or the high-tax exclusion from tested income in § 1.951A-2(c)(7) applies.

(a) Creditable foreign tax expenditure. A final top-up tax is treated as a creditable foreign tax expenditure under § 1.704-1(b)(4)(viii)(b).

(b) Eligible current year tax. A final top-up tax is treated as an eligible current

year tax under § 1.960-1(b)(5).

(c) Application of the high-tax exceptions under §§ 951A and 954(b)(4). In computing the effective rate of foreign income tax under § 1.954-1(d)(2) and § 1.951A-2(c)(7)(vi), a final top-up tax is excluded from the amount of foreign income taxes described in § 1.954-1(d)(2)(i) and § 1.951A-2(c)(7)(vi)(A), and increases the amount of the net item of income described in § 1.951-1(d)(2)(ii) and the amount of the tentative tested income item described in § 1.951A-2(c)(7)(vi)(B), as applicable.

(5) Application of §§ 78 and 275(a)(4). If a taxpayer chooses with respect to any taxable year to claim a credit for foreign income taxes, absent a specific statutory provision to the contrary (such as § 901(j)(3)), the gross-up rule of § 78 and the deduction disallowance rule of § 275(a)(4) apply to any foreign income tax paid or accrued in such taxable year regardless of whether a foreign tax credit is allowed for the particular tax. The guidance in this section would confirm that result in the case of a final top-up tax, such as an IIR that is a foreign income tax. As a result, a taxpayer who chooses to credit foreign income taxes would be required to include in gross income under § 78 an amount equal to the amount of a final top-up tax deemed paid by the taxpayer under §§ 960(a), (b), and (d), and would not be able to claim a deduction for a final top-up tax under § 275(a)(4).

(a) Section 78 gross-up amount. Section 78 applies to a final top-up tax deemed paid by a domestic corporation that chooses to have the benefits of subpart A of part III of subchapter N for any taxable year.

(b) Section 275(a)(4) deduction disallowance. Section 275 applies to deny a deduction for a final top-up tax to any person that chooses to take to any extent the benefits of § 901.

(6) Examples. The following examples illustrate the application of this section 2.02.

(a) Example 1—IIR that is a foreign income tax.

(i) Facts. Country X imposes an IIR on certain entities resident in Country X. The IIR imposed by Country X is a foreign income tax within the meaning of § 1.901-2(a) and (b). Under Country X tax law, in computing the amount of the IIR, the foreign tax liability of the direct and indirect owners of the Country X taxpayers that relates to income subject to the IIR is taken into account if those owners are part of the same MNE Group (as defined under Country X tax law) as the Country X taxpayers. USP is a domestic corporation that owns all the stock of CFCX, a CFC that is organized in, and is a tax resident of, Country X. CFCX owns all the stock of CFCY, a CFC that is organized in, and is a tax resident of, Country Y. Under Country X tax law, USP is considered part of the same MNE Group as CFCX and CFCY, and, therefore, any U.S. tax liability of USP that relates to income subject to the IIR is taken into account in computing the IIR. In 2024, CFCX is liable for 5u (units of Country X currency) of the Country X IIR. At all relevant times, 1u = $1. USP is deemed to pay $4 of the Country X IIR under § 960(d). USP chooses to credit foreign income taxes for 2024.

(ii) Analysis. The Country X IIR is a final top-up tax because it is a foreign

income tax that takes into account the amount of tax imposed by other countries on the direct or indirect owners of the entity subject to the Country X IIR with respect to the income subject to the Country X IIR. No credit is allowed under § 901 to USP for the $4 of Country X IIR that USP is deemed to pay because, under Country X tax law, USP's U.S. federal income tax liability may be taken into account in computing the Country X IIR. This result does not depend on whether USP has any amount of U.S. federal income tax liability or whether any of that liability is, in fact, taken into account in computing the Country X IIR. The amount included in USP's income by reason of § 78 and § 1.78-1(a) is $5.

(b) Example 2—Minority U.S. shareholder.

(i) Facts. The facts are the same as in Example 1, except that: (i) USP and USM, a domestic corporation, own 70% and 30%, respectively, of the stock of HoldCo, a CFC that is organized in, and is a tax resident of, Country A, and HoldCo owns all the stock of CFCX, (ii) USM is not considered part of the same MNE Group as USP, CFCX and CFCY under Country X tax law, (iii) CFCX is liable for 6.5u of the Country X IIR, and (iv) under § 960(d), USP is deemed to pay $3.64 of the Country X IIR, and USM is deemed to pay $1.56 of the Country X IIR.

(ii) Analysis. Similar to the analysis in Example 1, the Country X IIR is a final top-up tax, and no credit is allowed under § 901 to USP for the $3.64 of Country X IIR that USP is deemed to pay because, under Country X tax law, USP's U.S. federal income tax liability may be taken into account in computing the Country X IIR. USM,

however, may be allowed a credit under § 901 for the $1.56 of the Country X IIR that USM is deemed to pay under § 960(d) because, under Country X tax law, no amount of USM's U.S. federal income tax liability can be taken into account in computing the Country X IIR as USM is not considered part of the same MNE Group as CFCX. Under § 78 and § 1.78-1(a), the amount included in USP's income is $4.55, and the amount included in USM's income is $1.95.

(c) Example 3—QDMTT that is a foreign income tax.

(i) Facts. The facts are the same as in Example 1, except that Country Y imposes a QDMTT. The QDMTT imposed by Country Y is a foreign income tax within the meaning of § 1.901-2(a) and (b). Under Country Y tax law, in computing the amount of the QDMTT, the foreign tax liability of direct and indirect owners of the entity subject to the QDMTT is not taken into account. Therefore, any U.S. tax liability of USP is not taken into account in computing the QDMTT. In 2024, CFCX is liable for no amount of Country X IIR, and CFCY is liable for 10y (units of Country Y currency) of Country Y QDMTT. At all relevant times, 1y= $1. USP is deemed to pay $8 of the Country Y QDMTT under § 960(d).

(ii) Analysis. The Country Y QDMTT is not a final top-up tax because Country Y tax law does not take into account in computing the Country Y QDMTT the amount of tax imposed by other countries on the direct and indirect owners of the entity subject to the Country Y QDMTT. Therefore, USP may be allowed a credit under § 901 for the $8 of Country Y QDMTT deemed paid under § 960(d). The amount included in USP's

income by reason of § 78 and § 1.78-1(a) is $10.

.03 Separate Levy Rules.

(1) In general. The Treasury Department and the IRS intend to issue proposed regulations consistent with the guidance provided in this section 2.03, which describes how the separate levy rules of § 1.901-2(d) apply with respect to an IIR, UTPR, and QDMTT. This treatment would reflect that the amount of tax imposed under an IIR, UTPR, or QDMTT is computed separately from any other levy imposed by a foreign country, and would ensure consistent treatment of an IIR, UTPR, and QDMTT regardless of the manner in which a foreign country enacts an IIR, UTPR, or QDMTT under its foreign tax law.

(2) Application of separate levy rules. Each of an IIR, UTPR, and QDMTT imposed by a foreign country is a separate levy within the meaning of § 1.901-2(d) from any other levy imposed by that country, even if the country imposes the IIR, UTPR, or QDMTT by adjusting the base of any other levy (such as through an addition to income or denial of deductions).

.04 Determining the Taxpayer for a QDMTT.

(1) In general. The Treasury Department and the IRS intend to issue proposed regulations consistent with the guidance provided in this section 2.04, which describes rules for determining the person by whom a QDMTT is considered paid under § 1.901-2(f) when a QDMTT is computed by reference to the income of two or more persons.

(2) QDMTT on income of two or more persons. The legal liability for a QDMTT

imposed on the income of two or more persons is determined under the rules of this section 2.04(2) through (4) rather than under § 1.901-2(f)(3) (regarding taxes imposed on combined income of two or more persons). If a QDMTT is computed by reference to the income of two or more persons, foreign tax law is considered to impose legal liability for the QDMTT on each person in proportion to the person's QDMTT Allocation Key, as determined under this section 2.04(2). A person's QDMTT Allocation Key is the product of (i) the excess (if any) of the QDMTT Rate over the person's Separate Pre-QDMTT ETR, and (ii) the person's Separate QDMTT Income (such terms as defined in section 2.04(3)). If a person's Separate QDMTT Income is zero or less than zero, then the person's QDMTT Allocation Key will be treated as zero. The rules of this section 2.04 apply regardless of how the foreign tax law allocates the QDMTT liability among two or more persons, which person is obligated to remit the tax, which person actually remits the tax, or which person the foreign country could proceed against to collect the tax in the event all or a portion of the tax is not paid.

(3) Definitions. The following definitions apply for purposes of this section 2.04.

(a) Person. Person means an individual or an entity (including a disregarded entity described in § 301.7701-2(c)(2)(i)) that is subject to a QDMTT imposed by a foreign country. In determining the amount of the QDMTT paid by an owner of a partnership or a disregarded entity, the rule described in section 2.04(2) first applies to determine the amount of the QDMTT paid by the partnership or disregarded entity, and then § 1.901-2(f)(4) applies to allocate the amount of such QDMTT to the owner.

(b) QDMTT Rate. QDMTT Rate means the minimum effective tax rate (ETR), as stated in the foreign tax law, to which the actual ETR of a person or persons is compared for purposes of computing the QDMTT.

(c) Separate Pre-QDMTT Taxes. A person's Separate Pre-QDMTT Taxes means the taxes (whether positive or negative) of the person that are taken into account under the foreign tax law for purposes of computing the QDMTT.

(d) Separate QDMTT Income. A person's Separate QDMTT Income means the income or loss of the person that is taken into account under the foreign tax law for purposes of computing the QDMTT.

(e) Separate Pre-QDMTT ETR. A person's Separate Pre-QDMTT ETR means the person's Separate Pre-QDMTT Taxes (whether positive or negative) divided by the person's Separate QDMTT Income.

(4) Separate QDMTT Income and Separate Pre-QDMTT Taxes. A person's Separate QDMTT Income and a person's Separate Pre-QDMTT Taxes are determined by reference to the relevant amounts (not reduced by negative amounts attributable to any other person) provided on any return, schedule or other document that, under the foreign tax law, must be filed or maintained for purposes of the QDMTT. If no return, schedule, or other document that provides a person's Separate QDMTT Income and a person's Separate Pre-QDMTT Taxes is required to be filed or maintained, then, a person's Separate QDMTT Income and a person's Separate Pre-QDMTT Taxes are determined by reference to the relevant amounts provided in the books of account

regularly maintained by or on behalf of the person and used for purposes of computing the QDMTT.

(5) Examples. The following examples illustrate the application of this section 2.04(2) through (4).

(a) Example 1—QDMTT imposed on two or more persons.

(i) Facts. Country X has enacted a QDMTT. Under Country X tax law, entities that are resident in, or have a taxable presence in, Country X and that are members of the same MNE Group, are jointly and severally liable for the QDMTT. USP is a United States person that owns all of the stock of each of CFC1 and CFC2, each of which is a CFC that is a tax resident of Country X. CFC1 and CFC2 are members of the same MNE Group under Country X tax law. In Year 1, CFC1's Separate QDMTT Income is 100u (units of Country X currency) and CFC1's Separate Pre-QDMTT Taxes is 5u. In the same year, CFC2's Separate QDMTT Income is 50u, and CFC2's Separate Pre-QDMTT Taxes is 5u. The QDMTT Rate in Country X is 15%. Country X imposes 12.5u of QDMTT with respect to CFC1 and CFC2 collectively.

(ii) Analysis. Under Country X tax law, the amount of the QDMTT is computed by reference to the income of both CFC1 and CFC2. Under section 2.04(2) through (4) of this notice, the 12.5u of the Country X QDMTT is allocated between CFC1 and CFC2 in proportion to each person's QDMTT Allocation Key. CFC1's QDMTT Allocation Key is 10u ((15% - (5u / 100u)) x 100u), and CFC2's QDMTT Allocation Key is 2.5u ((15% - (5u / 50u)) x 50u). Accordingly, 10u of the Country X QDMTT (12.5u x (10u / 12.5u)) is

allocated to CFC1, and 2.5u of the Country X QDMTT (12.5u x (2.5u / 12.5u)) is allocated to CFC2.

(b) Example 2—Effect of SBIE.

(i) Facts. The facts are the same as in Example 1, except that CFC1 and CFC2 collectively have 15u of Substance-based Income Exclusion (SBIE) which, under Country X tax law, can reduce an MNE Group's QDMTT liability. After taking into account the SBIE, Country X imposes 11.25u of QDMTT with respect to CFC1 and CFC2 collectively.

(ii) Analysis. The amount of SBIE (if any), and the entity to which it may be attributable, is not taken into account in the calculation of each person's QDMTT Allocation Key. The QDMTT Allocation Key for each of CFC1 (10u) and CFC2 (2.5u) remains the same as in Example 1 because each of CFC1 and CFC2 has the same Separate QDMTT Income and Separate Pre-QDMTT Taxes as in Example 1. Accordingly, 9u of the Country X QDMTT (11.25u x (10u / 12.5u)) is allocated to CFC1, and 2.25u of the Country X QDMTT (11.25u x (2.5u / 12.5u)) is allocated to CFC2.

(c) Example 3—Negative Separate QDMTT Income.

(i) Facts. The facts are the same as in Example 1, except that USP also owns all of the stock of CFC3, which is a CFC that is a tax resident of Country X. CFC3 is a member of the same MNE Group as CFC1 and CFC2 under Country X tax law. In Year 1, CFC3's Separate QDMTT Income is a net loss of 50u, and its Separate Pre-QDMTT Taxes is zero. Country X imposes 5u of QDMTT with respect to CFC1, CFC2, and

CFC3 collectively.

(ii) Analysis. Under Country X tax law, the amount of the QDMTT is computed by reference to the income of CFC1, CFC2, and CFC3. Under section 2.04(2) through (4) of this notice, the 5u of Country X QDMTT is allocated among CFC1, CFC2, and CFC3 in proportion to each person's QDMTT Allocation Key. The QDMTT Allocation Key for CFC1 (10u) and for CFC2 (2.5u) remain the same as in Example 1 because they have the same Separate QDMTT Income and Separate Pre-QDMTT Taxes as in Example 1. CFC3's QDMTT Allocation Key is treated as zero because its Separate QDMTT Income is less than zero. Accordingly, 4u of the Country X QDMTT (5u x (10u / 12.5u)) is allocated to CFC1, 1u of the Country X QDMTT (5u x (2.5u / 12.5u)) is allocated to CFC2, and none of the Country X QDMTT (5u x 0u / 12.5u) is allocated to CFC3.

(d) Example 4—Negative Separate Pre-QDMTT Taxes.

(i) Facts. The facts are the same as in Example 1, except that: (i) in Year 1, CFC1's Separate Pre-QDMTT Taxes is -5u, representing a negative amount of income tax expense (a tax benefit), and (ii) Country X imposes 22.5u of QDMTT with respect to CFC1 and CFC2 collectively.

(ii) Analysis. As in Example 1, under Country X tax law, the amount of the QDMTT is computed by reference to the income of both CFC1 and CFC2. Under section 2.04(2) through (4) of this notice, the 22.5u of Country X QDMTT is allocated between CFC1 and CFC2 in proportion to each person's QDMTT Allocation Key. The

QDMTT Allocation Key for CFC2 (2.5u) remains the same as in Example 1 because CFC2 has the same Separate QDMTT Income and Separate Pre-QDMTT Taxes as in Example 1. However, CFC1's QDMTT Allocation Key is now 20u ((15% - (-5x / 100u)) x 100u), reflecting the change in CFC1's Separate Pre-QDMTT Taxes. Accordingly, 20u of the Country X QDMTT (22.5u x (20u / 22.5u)) is allocated to CFC1, and 2.5u of the Country X QDMTT (22.5u x (2.5u / 22.5u)) is allocated to CFC2.

.05 The Non-duplication Requirement for In Lieu of Taxes.

(1) In general. The Treasury Department and the IRS intend to amend the non-duplication requirement in § 1.903-1(c)(1)(ii) as described in this section 2.05.

(2) Non-duplication requirement. A foreign tax, in order to qualify as an in lieu of tax, need only be in substitution for a generally-imposed net income tax and not in substitution for all net income taxes imposed by that country. Accordingly, the first sentence of the non-duplication requirement in § 1.903-1(c)(1)(ii) would be revised as follows: "The generally-imposed net income tax for which the tested foreign tax is imposed in substitution is not also imposed, in addition to the tested foreign tax, on any persons with respect to any portion of the income to which the amounts (such as sales or units of production) that form the base of the tested foreign tax relate (the 'excluded income')." Conforming changes to the second sentence of § 1.903-1(c)(1)(ii) and the examples in § 1.903-1(d) would be made as appropriate.

(3) Example.

(a) Facts. Country X imposes a net income tax within the meaning of § 1.901-

2(a)(3) on the income of nonresident companies that is attributable to the nonresident's activities within Country X (NRCIT) and that constitutes a generally-imposed net income tax. The NRCIT applies to all nonresident corporations that engage in business in Country X except for nonresident corporations that engage in activities related to Industry B, which are instead subject to the Industry B Tax. The NRCIT and the Industry B Tax were enacted contemporaneously, and the statutory language of the NRCIT expressly excludes gross income derived by corporations engaged in activities related to Industry B. Country X enacts a QDMTT that is a net income tax within the meaning of § 1.901-2(a)(3). The Country X QDMTT is imposed with respect to gross income that is also included in the base of the Industry B Tax.

(b) Analysis. The Industry B Tax meets the requirement in § 1.903-1(c)(1)(i) because Country X has a generally-imposed net income tax, the NRCIT. In addition, the Industry B Tax meets the requirement in § 1.903-1(c)(1)(ii), modified as described in section 2.05(2), because the generally-imposed net income tax for which the tested foreign tax is imposed in substitution, the NRCIT, is not also imposed, in addition to the Industry B Tax, on any persons with respect to any portion of the income to which the amounts that form the base of the Industry B Tax relate ("excluded income"). It is not relevant that the Country X QDMTT is also imposed on the excluded income.

(4) Additional changes to § 1.903-1. The Treasury Department and the IRS are considering whether additional changes to § 1.903-1 would be needed to ensure that foreign taxes continue to be creditable only where consistent with the scope and

purposes of § 903. These additional changes may include defining a generally-imposed net income tax.

.06 Applicability Date and Reliance.

(1) Applicability date. It is anticipated that the proposed regulations will provide that rules consistent with the rules described in section 2 of this notice apply to taxable years ending after December 11, 2023.

(2) Reliance. A taxpayer may rely on the guidance described in sections 2.02 through 2.05 of this notice for taxable years that end after December 11, 2023, and on or before the date proposed regulations are published in the Federal Register, provided that the taxpayer consistently follows the guidance in its entirety for all those taxable years. Additionally, for taxable years that begin on or after December 28, 2021, and end on or before December 11, 2023, a taxpayer may rely on the guidance described in section 2.05 of this notice.

SECTION 3. GLOBE MODEL RULES AND DUAL CONSOLIDATED LOSSES

.01 Background.

Section 1503(d) and the regulations thereunder (DCL rules) prevent “double dipping” of losses, which occurs when the same economic loss offsets or reduces both income subject to U.S. tax (but not a foreign jurisdiction's tax) and income subject to the foreign jurisdiction's tax (but not U.S. tax). *See* S. Rep. 313, 99th Cong., 2d Sess., at 419-20 (1986). A dual consolidated loss (DCL) is defined as a net operating loss of a dual resident corporation and a net loss of a domestic corporation that is attributable to

certain foreign branches or interests in hybrid entities (separate units). *See* § 1.1503(d)-1(b)(5). Under the DCL rules, a DCL cannot offset the income of a domestic affiliate (a domestic use), subject to certain exceptions. *See* § 1.1503(d)-4(b).

Under one exception, a domestic use of a DCL is permitted if the taxpayer makes a domestic use election, which requires the taxpayer to certify that there has not been, and will not be, a foreign use of the DCL. *See* § 1.1503(d)-6(d) and § 1.1503(d)-1(b)(20). In general, a foreign use of a DCL occurs when any portion of the DCL is made available under the income tax laws of a foreign country to offset or reduce, directly or indirectly, any income that under U.S. tax principles is income of a foreign corporation or a direct or indirect owner of certain interests in hybrid entities. *See* § 1.1503(d)-3(a)(1). In the event of a foreign use (or other triggering event) during the certification period, the taxpayer must recapture the DCL as ordinary income and pay an interest charge. § 1.1503(d)-6(e)(1). However, among other exceptions, a foreign use is not considered to occur if the laws of a foreign country provide an election that would enable a foreign use and such election is not made. § 1.1503(d)-3(c)(2). Under this domestic use election, a taxpayer effectively has the choice to put a DCL to a domestic use or a foreign use (but not both).

.02 Interaction with GloBE Model Rules.

Under the GloBE Model Rules, an MNE Group whose ETR for a jurisdiction is below the 15% Minimum Rate must compute the amount of Jurisdictional Top-up Tax owed with respect to the jurisdiction. That Jurisdictional Top-up Tax is based on, among other

factors such as Adjusted Covered Taxes, the Net GloBE Income of Constituent Entities within the jurisdiction. For this purpose, the GloBE Model Rules take a jurisdictional blending approach under which all income and loss of Constituent Entities in the same jurisdiction are generally aggregated. This aggregation can be viewed as giving rise to double dipping concerns that the DCL rules were intended to address. For example, if, in determining Net GloBE Income of a jurisdiction, a loss giving rise to a DCL is aggregated with items that under U.S. tax principles are items of a foreign corporation in that jurisdiction, the loss would be available to reduce both U.S. tax (if a domestic use election were permitted) and the Jurisdictional Top-up Tax. These concerns could exist with respect to a DCL incurred in a taxable year ending before the time at which the GloBE Model Rules are anticipated to be effective (for instance, a taxable year ending on December 31, 2023) if timing differences between U.S. tax law and applicable financial accounting standards result in a portion of the loss comprising the DCL being taken into account as an expense under the GloBE Model Rules in a later year.

Additionally, the GloBE Model Rules include certain features that may differ from traditional foreign income tax systems. For example, the GloBE Model Rules do not include a mechanism through which a taxpayer can decline aggregation, with the result that the taxpayer might effectively be required to put a DCL to a foreign use (thereby removing what otherwise may have been a choice between a domestic use and a foreign use). In addition, a loss may never produce a benefit under the Jurisdictional Top-up Tax, for example, if the ETR in the jurisdiction is at or above the Minimum Rate

(without regard to the loss) and the loss is not carried over in determining Jurisdictional Top-Up Tax in another year.

Accordingly, the Treasury Department and the IRS are studying the extent to which the DCL rules should apply with respect to the GloBE Model Rules, including the extent to which aggregation should result in a foreign use of a DCL, and the extent to which the GloBE Model Rules should cause an entity that is not otherwise subject to an income tax of a foreign jurisdiction to be a dual resident corporation or a hybrid entity under § 1.1503(d)-1(b)(2) or (3), or should prevent such an entity from being a transparent entity under § 1.1503(d)-1(b)(16). The Treasury Department and the IRS are also studying similar issues in the context of other provisions (for example, the interaction of the anti-hybrid rules under §§ 245A(e) and 267A with the GloBE Model Rules).

.03 Treatment of Legacy DCLs.

In the interest of providing certainty while the Treasury Department and the IRS develop guidance addressing the interaction of the DCL rules with the GloBE Model Rules, the Treasury Department and the IRS intend to issue proposed regulations with respect to DCLs incurred in (i) taxable years ending on or before December 31, 2023, or (ii) provided the taxpayer's taxable year begins and ends on the same dates as the Fiscal Year of the MNE Group that could take into account as an expense any portion of a deduction or loss comprising such a DCL, taxable years beginning before January 1, 2024, and ending after December 31, 2023 (collectively, legacy DCLs). Under this

proposed rule, a foreign use would not be considered to occur with respect to a legacy DCL solely because all or a portion of the deductions or losses that comprise the legacy DCL are taken into account in determining the Net GloBE Income for a particular jurisdiction. However, this proposed rule would not apply to any DCL that was incurred or increased with a view to reducing the Jurisdictional Top-Up Tax or qualifying for the proposed rule described in this notice.

.04 Reliance.

Taxpayers may rely on the guidance described in this section 3 until proposed regulations are published in the Federal Register.

SECTION 4. REQUEST FOR COMMENTS

.01 Comments.

The Treasury Department and the IRS request comments on the rules described in sections 2 and 3 of this notice. The Treasury Department and the IRS specifically solicit comments on the interaction of the DCL rules with the GloBE Model Rules, including Article 3.2.7 of the GloBE Model Rules (relating to Intragroup Financing Arrangements).

.02 Procedures for Submitting Comments.

(1) Deadline. Written comments should be submitted by February 9, 2024. Consideration will be given, however, to any written comment submitted after February 9, 2024, if such consideration will not delay the issuance of proposed regulations.

(2) Form and manner. The subject line for the comments should include a reference to Notice 2023-80. All commenters are strongly encouraged to submit comments electronically. However, comments may be submitted in one of two ways:

(a) Electronically via the Federal eRulemaking Portal at www.regulations.gov (type IRS-2023-0060 in the search field on the regulations.gov homepage to find this notice and submit comments); or

(b) By mail to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2023-80), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, D.C., 20044.

(3) Publication of comments. The Treasury Department and the IRS will publish for public availability any comment submitted electronically and on paper to its public docket on regulations.gov.

SECTION 5. EXTENSION AND MODIFICATION OF TEMPORARY RELIEF IN NOTICE 2023-55

.01 Background.

On January 4, 2022, the Treasury Department and the IRS published Treasury Decision 9959 in the Federal Register (87 FR 276) (2022 FTC final regulations), which contained final 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). 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).

On August 7, 2023, the Treasury Department and the IRS published Notice 2023-55 in the Internal Revenue Bulletin (IRB 2023-32). Notice 2023-55 provides temporary relief in determining whether a foreign tax meets the definition of a foreign income tax under §§ 901 and 903 for foreign taxes paid in any taxable year (a relief year) beginning on or after December 28, 2021, and ending on or before December 31, 2023 (the relief period), provided that the taxpayer satisfies certain requirements.

.02 Application of Temporary Relief in Notice 2023-55 to Partnerships.

The Treasury Department and the IRS have received questions regarding the application of the temporary relief provided in Notice 2023-55 to partnerships, including whether the partnership or its partners would apply the temporary relief with respect to foreign taxes paid or otherwise required to be reported by such partnership.[6]

This section 5.02 provides that, with respect to foreign taxes paid or otherwise required to be reported by such partnership,[7] which could include foreign taxes paid by a CFC (collectively, the partnership's foreign taxes), the partnership would apply (or not apply) the temporary relief. However, if, before December 11, 2023, a partnership did not apply the temporary relief for a partnership's relief year ending on or before

[6] For purposes of this section 5, references to a partnership only include partnerships with a U.S. federal tax return filing obligation under § 6031 in a relief year.

[7] For the avoidance of doubt, "required to be reported" means foreign taxes which would be required to be reported if the partnership applied the temporary relief.

December 31, 2022 (a partnership 2022 tax year), a partner may apply the temporary relief to its share of the partnership's foreign taxes for a partnership 2022 tax year. In certain circumstances, the IRS may make adjustments relating to the foreign tax credits claimed by a partner with respect to such foreign taxes on audit of the partner.

.03 Modification and Clarification of the Consistent Application Requirement and Single-Benefit Requirement of Notice 2023-55.

Section 3 of Notice 2023-55 states that, if a taxpayer applies the temporary relief, then 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 (the consistent application requirement). Additionally, 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 (the single-benefit requirement). This section 5.03 modifies and clarifies the consistent application requirement and the single-benefit requirement in Notice 2023-55 with respect to partnerships and their partners.

Partnerships and their partners are each subject to the consistent application requirement. Therefore, a partnership that applies the temporary relief to a relief year

must apply the temporary relief to all the partnership's foreign taxes (as defined in section 5.02 of this notice). For a partnership's taxable year beginning after December 31, 2022, a partnership's application (or non-application) of the temporary relief for a relief year will cause a partner to be required to apply (or to be precluded from applying) the temporary relief for the relief year to all other foreign taxes for which the partner would be eligible to claim a credit as provided in § 901 (determined without regard to the limitations described in § 1.901-1(b)), unless the partner does not control whether the partnership applies (or does not apply) the temporary relief for the relief year.[8]

Furthermore, partnerships and their partners are each subject to the single-benefit requirement. Therefore, a partnership cannot apply the temporary relief to report any amount of foreign tax as a creditable foreign tax expenditure if the partnership reports the amount as a deduction in the relief year or any other taxable year.

.04 Extension of Temporary Relief.

Section 4 of Notice 2023-55 defines the relief period as taxable years beginning on or after December 28, 2021, and ending on or before December 31, 2023, and defines relief year as any taxable year within the relief period. This section 5.04 modifies the relief period to mean taxable years beginning on or after December 28, 2021, and ending before the date that a notice or other guidance withdrawing or modifying the

[8] Whether a partner controls the partnership's application (or non-application) of the temporary relief will be determined based on the facts and circumstances, including the partnership agreement. For example, a partner may control a partnership's application (or non-application) of the temporary relief by reason of being a general partner or owning, individually or together with related persons, a majority of the capital or profits interests in the partnership.

temporary relief is issued (or any later date specified in such notice or other guidance).

If final regulations consistent with the guidance provided in section 2 apply in a relief year, those final regulations apply regardless of whether the taxpayer applies the temporary relief described in Notice 2023-55, as modified by section 5.02 through 5.04 of this notice, for the relief year.

.05 Effect on Other Documents.

Sections 3 (Temporary Relief) and 4 (Relief Period) of Notice 2023-55, 2023-32 I.R.B. 427, are modified.

SECTION 6. DRAFTING AND CONTACT INFORMATION

The principal author of this notice is the Office of Associate Chief Counsel (International). For further information concerning section 3 of this notice, contact Brady Plastaras at (202) 317-6937. For further information regarding section 5 of this notice, contact Moshe Dlott at (202) 317-4967 or Larry Pounders at (202) 317-5465. For all other sections, contact Jeffrey Cowan at (202) 317-4924 or Hayley Rassuchine at (202) 317-5282 (not toll-free calls).