

LB&I Training

Tax Cuts & Jobs Act (TCJA)

Training
Participant Guide
October 2019

Official IRS Training Material

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Welcome

LB&I Tax Cuts & Jobs Act Training



IRS Mission Statement



Mission Statement

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

14 General Principles of Ethical Conduct

Please see [Document 9300](#) for a complete list of the 14 General Principles of Ethical Conduct for Federal Employees.

Taxpayer Bill of Rights

Please see [Publication 1](#) to read the full text of Your Rights as a Taxpayer.

TCJA Course Overview

LB&I Tax Cuts & Jobs Act training sessions are a large part of LB&I's multi-pronged approach to tax reform training. This mandatory training course covers IRC § § 199A, 451, 163(j), 951A, 250, 59A, 965, 367 and 91.

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TCJA Course Agenda

Monday - October 21, 2019

- Executive Opening, Introductions and Admin
- IRC § 199A (Qualified Business Income Deduction)

Tuesday - October 22, 2019

- IRC § 451 (Income Recognition Guidance)
- IRC § 163(j) (Limitation on Business Interest Expense)

Wednesday - October 23, 2019

- IRC § 163(j) (Limitation on Business Interest Expense) (cont'd)
- IRC § 367 & 91 (Transfer Pricing/Outbound Transfers)

TCJA Course Agenda (cont'd)

Thursday - October 24, 2019

- IRC § 951A (Global Intangible Low-Taxed Income)
- IRC § 250 (Foreign Derived Intangible Income)

Tuesday - October 29, 2019

- IRC § 965 (Transition Tax)

Wednesday - October 30, 2019

- IRC § 59A (Base Erosion and Anti-abuse Tax)

Thursday – October 31, 2019

- Final Comments and Executive Closing

LB&I Training

Tax Cuts & Jobs Act (TCJA)

Transfer Pricing and
Outbound Transfers of Property



**Large Business
& International**

Instructor Introductions

Instructor Introductions

Lesson Objectives

At the end of this lesson you will be able to:

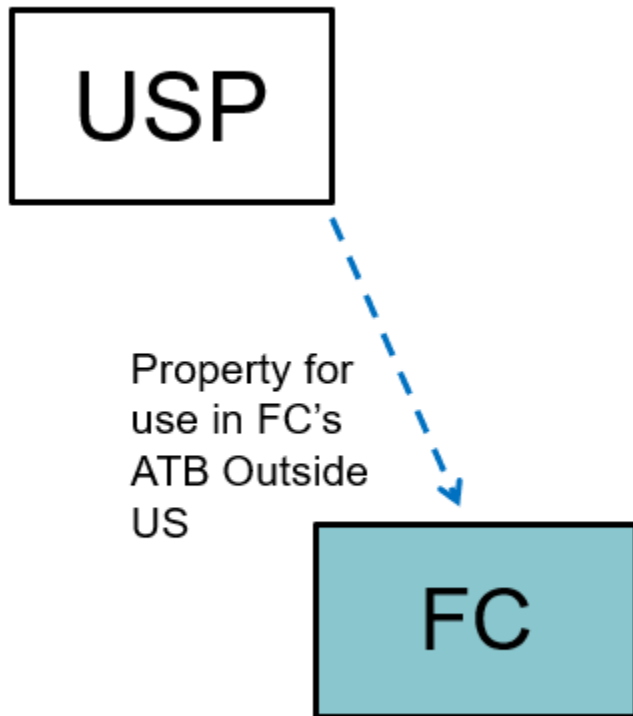
- Apply the rules of IRC 367(a) to outbound transfers occurring after December 31, 2017 (“post-2017 TCJA transfers”)
- Determine the “transferred loss amount” under IRC 91
- Identify intangible property under IRC 367(d)(4)
- Identify potential changes to transfer pricing and outbound transfers due to GILTI, FDII, or BEAT

IRC 367(a) – Post TCJA

Major Areas of IRC 367(a) – Post TCJA:

- General Rule – IRC 367(a)(1) was **unchanged** by 2017 TCJA. Outbound transfers of appreciated property to a foreign corporation pursuant to IRC 351, 354, 356, or 361 exchange are taxable, unless an exception applies.
- Active Trade or Business (ATB) Exception under prior IRC 367(a)(3) - **Repealed** by 2017 TCJA for transfers after December 31, 2017

“Old” IRC 367(a)(3) - ATB Exception

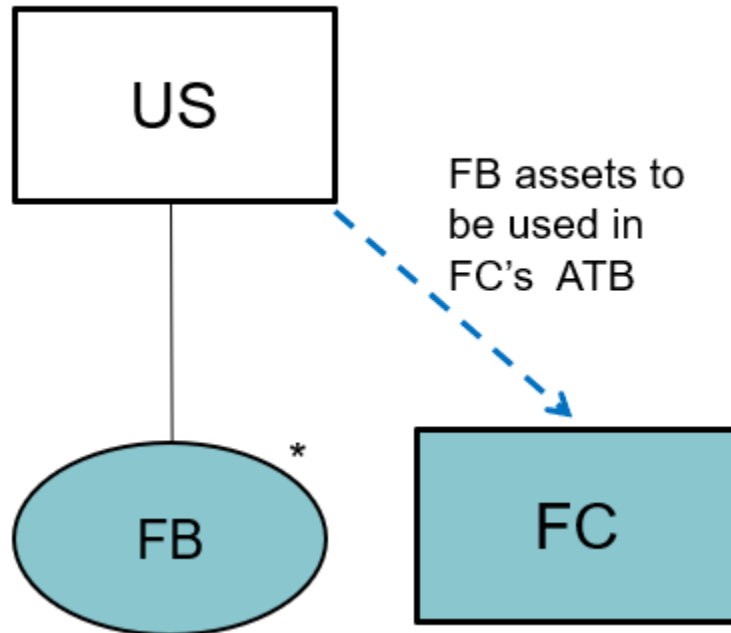


- IRC 367(a)(1) provides, generally, if a U.S. person transfers property to a foreign corporation under certain non-recognition provisions (e.g., IRC 351) the U.S. person must recognize gain currently
- Special rules apply for transfers of intangible property under IRC 367(d)
- Prior to the 2017 TCJA, a major exception to the general rule under IRC 367(a)(1) was the active trade or business (“ATB”) exception under IRC 367(a)(3)
- The ATB exception provided, subject to certain exceptions, a general rule that gain recognition under IRC 367(a)(1) did not apply to property transferred to a FC for its use in the ATB outside the U.S.

Transfers After 12/31/17 – IRC 367(a)(3) Elimination of ATB Exception

- 2017 TCJA removed the IRC 367(a)(3) ATB exception from IRC 367.
- A fundamental change consistent with transition to territoriality/global minimum tax.
- Gain is now recognized on all outbound transfers of property, either as a lump sum, under IRC 367(a), or over time, under IRC 367(d).
 - Special rules exist for outbound transfers of stock.

Old IRC 367(a)(3)(C)- Branch Loss Recapture



* Alternatively, could be the assets of a foreign disregarded entity (FDE)

- Prior to the 2017 TCJA, the ATB exception under IRC 367(a)(3) did not apply to gain realized on the transfer of assets of a foreign branch (FB) to a foreign corporation (FC) to the extent of net losses sustained by the FB before the transfer. “Old IRC 367(a)(3)(C).”
- Old IRC 367(a)(3)(C) branch loss recapture was limited to:
 - Nonrecognition transactions under IRC 367(a)(1) and
 - Gain in the assets transferred.

After 12/31/17 – New IRC 91

- Old IRC 367(a)(3)(C) (just discussed foreign branch loss transfers), as part of the ATB exception regime, was eliminated by 2017 TCJA.
- New IRC 91 added to Code by 2017 TCJA.
- IRC 91 effectively replaces old IRC 367(a)(3)(C) for branch loss recapture, with some notable differences.

New IRC 91

- If a **domestic corporation** (DC) transfers substantially all of the assets of a foreign branch (within the meaning of former IRC 367(a)(3)(C)) to a specified 10-percent owned FC (as defined in new IRC 245A) with respect to which it is a U.S. shareholder after such transfer, DC must include in income, in the tax year of the transfer, an amount equal to the “Transferred Loss Amount”.
- Effective for transfers after December 31, 2017.

New IRC 91 (cont'd)

“Transferred Loss Amount” (with respect to the foreign branch) equals the excess (if any) of:

- The sum of losses:
 - Incurred by the foreign branch after 12/31/17 AND
 - With respect to which a deduction was allowed to the TP

OVER
- The sum of:
 - Taxable income of such branch for a taxable year after the taxable year in which the loss was incurred and through the close of the taxable year of the transfer AND
 - Any amount which is recognized under IRC 904(f)(3) on account of the transfer.

Filing Requirement Changes – Form 8858 (Rev. 12-2018)

- Pre-TCJA, Form 8858 was filed for only FDEs owned by U.S. persons, CFCs, and CFPs.
- Due to TCJA changes surrounding the new FB FTC category and new IRC 91, Transferred Loss Amount, the Form 8858 filing requirement was expanded to include the reporting of FB activities, regardless of the tax owner.
- This new reporting requirement of Form 8858 for FBs fills the long-standing transparency gap of FB reporting and now provides IRS with information relating to FBs that we haven't had in the past.
 - As a result, we will now receive information returns, regardless of whether it is organized as a FDE or a FB in the foreign country.

Form 8858 (Rev. 12/2018) – Summary of Changes

The following changes were made to Form 8858 due to TCJA.

- Name change of Form 8858
- Filing requirements – expanded to include foreign branches (FBs) in addition to foreign disregarded entities (FDEs) of U.S. owners, CFCs, or CFPs
- Identify whether the FB or FDE was owned by U.S., CFC, or CFP
- Revisions to Sch C (Income Statement) and Sch C-1 (Section 987 Gain or Loss Information)
- Changes to questions in Sch G – added BEAT and QBU questions, as well as significantly revised the Dual Consolidated Loss (DCL) questions
- New Sch I – Transferred Loss Amount (IRC 91)
- New Sch J – Income Taxes Paid or Accrued



Filing Requirement Changes – Form 8858 Sch M (Rev. 12.2018)

- A Schedule M must be filed with each Form 8858 if the FDE or FB entered into any transaction with the filer of the Form 8858 or other related entities during the annual accounting period of the FDE or FB, regardless of tax owner (except for Category 5 filers (Form 5471)).
- Every U.S. person that is required to file Schedule M (Form 8858) must file the schedule to report the transactions that occurred during the FDE or FB's annual accounting period ending with or within the U.S. person's tax year.

**OUTBOUND Transfers Involving
Intangible Property
after December 31, 2017**

—

IRC 367(d) and IRC 482

IRC 367(d) – Statute

IRC 367(d) - Special rule applies to Outbound (O/B) transfers of intangible property via IRC 351 exchanges or IRC 361 exchanges in an O/B asset reorganization of a domestic corporation.

2017 TCJA – Definition of Intangible Property

2017 TCJA revised the definition of “intangible property” under IRC 936(h)(3)(B) to expressly include:

- Goodwill
- Going Concern Value
- Workforce in place and
- Any other item the value or potential value of which is not attributable to tangible property or the services of any individual.

2018 Consolidated Appropriations Act – Definition of Intangible Property

The 2018 Consolidated Appropriations Act included technical tax corrections to the Code following the TCJA.

- Struck IRC 936 in its entirety from the Code.
- In effect, moved the definition of “intangible property” under IRC 936(h)(3)(B), as just modified by the TCJA, to a new section of the Code, IRC 367(d)(4).
- **Now, the definition of “intangible property” for purposes of both IRC 367(d) and IRC 482 is found at IRC 367(d)(4).**

Form 926 and 2017 TCJA (Rev. 11-2018)

The Form 926, *Return by a U.S. Transferor of Property to a Foreign Corporation*, was substantially revised in November 2018 to account for changes made by the 2017 TCJA, including:

- Repeal of the ATB exception
- New IRC 91
- Change to intangible property definition.

No inference with respect to earlier years

Note: The 2017 TCJA provides that the amendments made to IRC 936(h)(3)(B) expressly including items such as goodwill, going concern value, and workforce in place in the definition of intangible property (which eventually settle at IRC 367(d)(4)), do not create any inference with respect to the application of IRC 936(h)(3)(B) with respect to tax years beginning before January 1, 2018.

2017 TCJA - IRC 482 & IRC 367(d)

For purposes of sections 482 and 367(d)(2)(A)(ii), 2017 TCJA adds the following language to both **IRC 367(d)** and **IRC 482**:

the Secretary shall require the valuation of transfers of intangible property (including intangible property transferred with other property or services), on an aggregate basis, or the valuation of such a transfer on the basis of the realistic alternatives to such a transfer, if the Secretary determines that such basis is the most reliable means of valuation of such transfers. (emphasis added).

2017 TCJA – Transfer Pricing Impact General Framework

Transfer Pricing Related Implications of the 2017 TCJA Tax Cut & Jobs Act (“TCJA”):

- **Cross Border Taxation – TCJA’s Transfer Pricing Conceptual Framework/Focus:**
 - Taxation of **Routine** Returns – **Territorial** (Source) Based
 - Taxation of **Residual** Returns – **World Wide** (Residence) Based

2017 TCJA – Transfer Pricing Impact Specific Regimes

Transfer Pricing Related Implications of the 2017 TCJA:

- Introduction of Several Major International Tax Provisions Including:
 - Base Erosion Anti-Abuse Tax “**BEAT**”
 - Foreign Derived Intangible Income “**FDII**”
 - Global Intangible Low Taxed Income “**GILTI**”

Transfer Pricing Related Implications of the TCJA:

- **Clarification regarding**
 - **Definition** of Intangible Property
 - **Application** of Aggregation & Realistic Alternatives Valuation Principles

2017 TCJA – Transfer Pricing Impact of BEAT

Transfer Pricing Related Implications of BEAT:

- **BEAT** by its structural nature is a tax provision that applies exclusively to transactions with foreign related parties
- Consequently, nearly every **BEAT** transaction will:
 - Qualify as a controlled transaction falling squarely with the scope of **IRC 482** requiring ongoing development of transfer pricing related determinations.
 - Be an item of interest to TPs attempting to strategically manage their tax liability under the **BEAT** regime via the transfer pricing related determinations just noted.

2017 TCJA – Transfer Pricing Impact of FDII

Transfer Pricing Related Implications of FDII:

- **FDII** by its structural nature is a tax provision that may apply to transactions with related & unrelated, foreign & domestic parties
- Consequently, **FDII** transactions may:
 - Constitute controlled transactions clearly falling within the scope of IRC 482 requiring transfer pricing related determinations.
 - Be an item of interest to TPs attempting to strategically manage their tax liability under the **FDII** provision via transfer pricing related determinations.

2017 TCJA – Transfer Pricing Impact of GILTI

Transfer Pricing Related Implications of GILTI:

- **GILTI** by its formulaic nature taxes earning inclusions of certain foreign related parties (CFCs) through a GILTI inclusion calculation at the U.S. Shareholder level.

2017 TCJA – Transfer Pricing Impact of GILTI (cont'd)

Transfer Pricing Related Implications of GILTI:

- **GILTI** regime mechanics may implicate both greater and lesser reliance on transfer pricing determinations:
 - **GILTI** related transfers of intangible and tangible property between related parties may require **IRC 482** related valuation determinations.
 - **GILTI** calculations may in part be made independent of IRC 482 valuation related determinations, for example Qualified Business Asset Investment (“QBAI”) related adjustments that utilize a formulary determination applied to the tax basis of QBAI assets.

2017 TCJA - Transfer Pricing Impact of Intangible Property Related Changes

Transfer Pricing Impact of Intangible Property Related Changes:

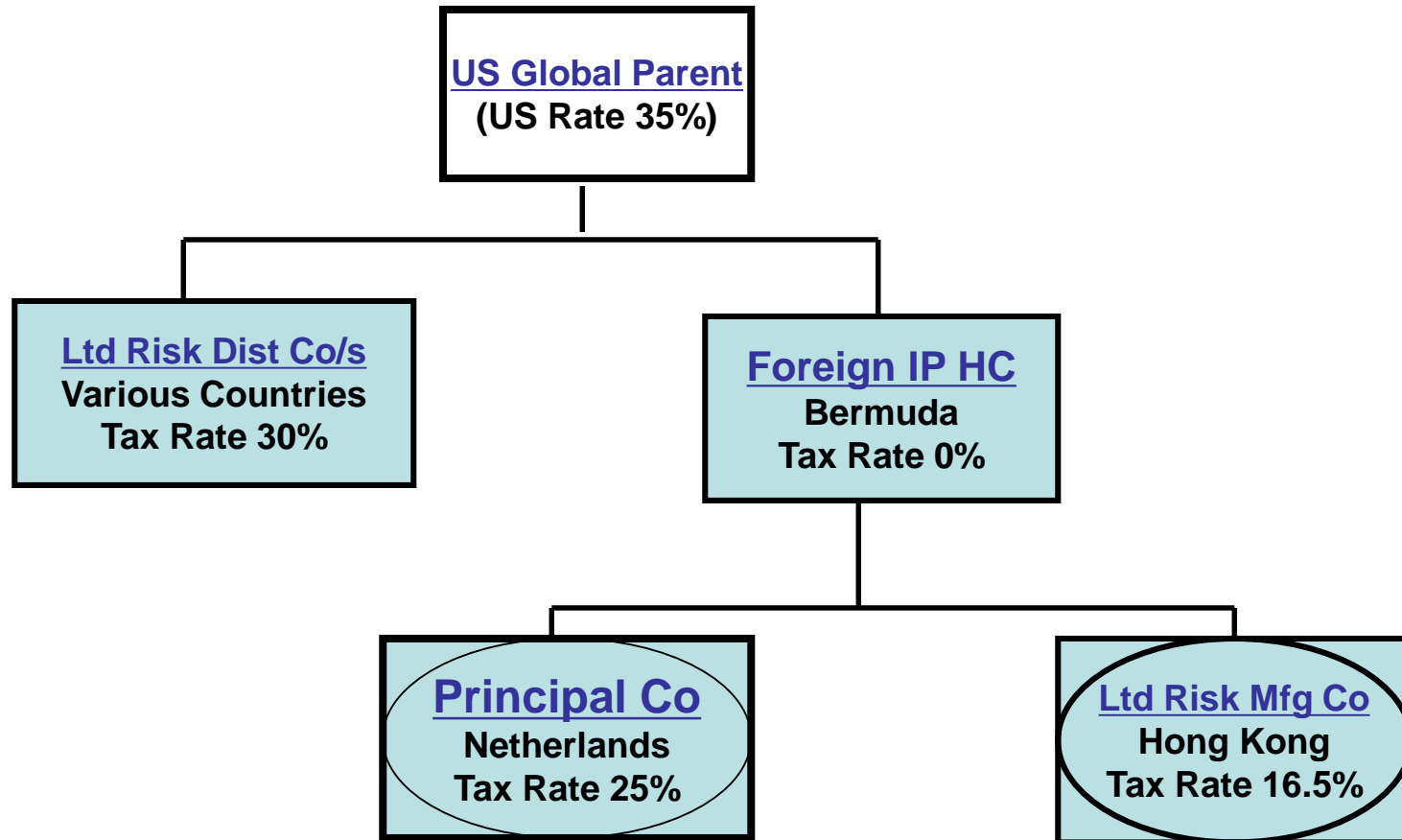
- **Intangible Property Related Changes:**
 - **Clarification** of Intangible Property Definition to Specifically include/capture:
 - Foreign Goodwill, Workforce In Place, Going Concern Value
 - Value not attributable to tangible property or the services of any individual
 - **Clarification** of Intangible Property Valuation Principles to Emphasize Increased Reliability of Pricing Results:
 - Aggregation
 - Realistic Alternatives

Real World Transfer Pricing Impact of GILTI & Intangible Property Related Changes

Transfer Pricing Impact of TCJA's GILTI Regime & Intangible Property related changes on a Real World Case:

- **2017 TCJA** application to a real world case (as analyzed in the Joint Committee on Taxation Report of July 22, 2010)
 - First, let's analyze at a very high level how the Intangible Property migration paradigm operated in this real world case.
 - Then we'll assess how the 2017 TCJA's **GILTI Regime** and **Intangible Property** related changes might significantly alter future Taxpayer IP migration structures and strategies.
 - The **primary** (but not necessarily exclusive) analysis/focus will be on the **US transfer pricing effects** of these TCJA provisions.

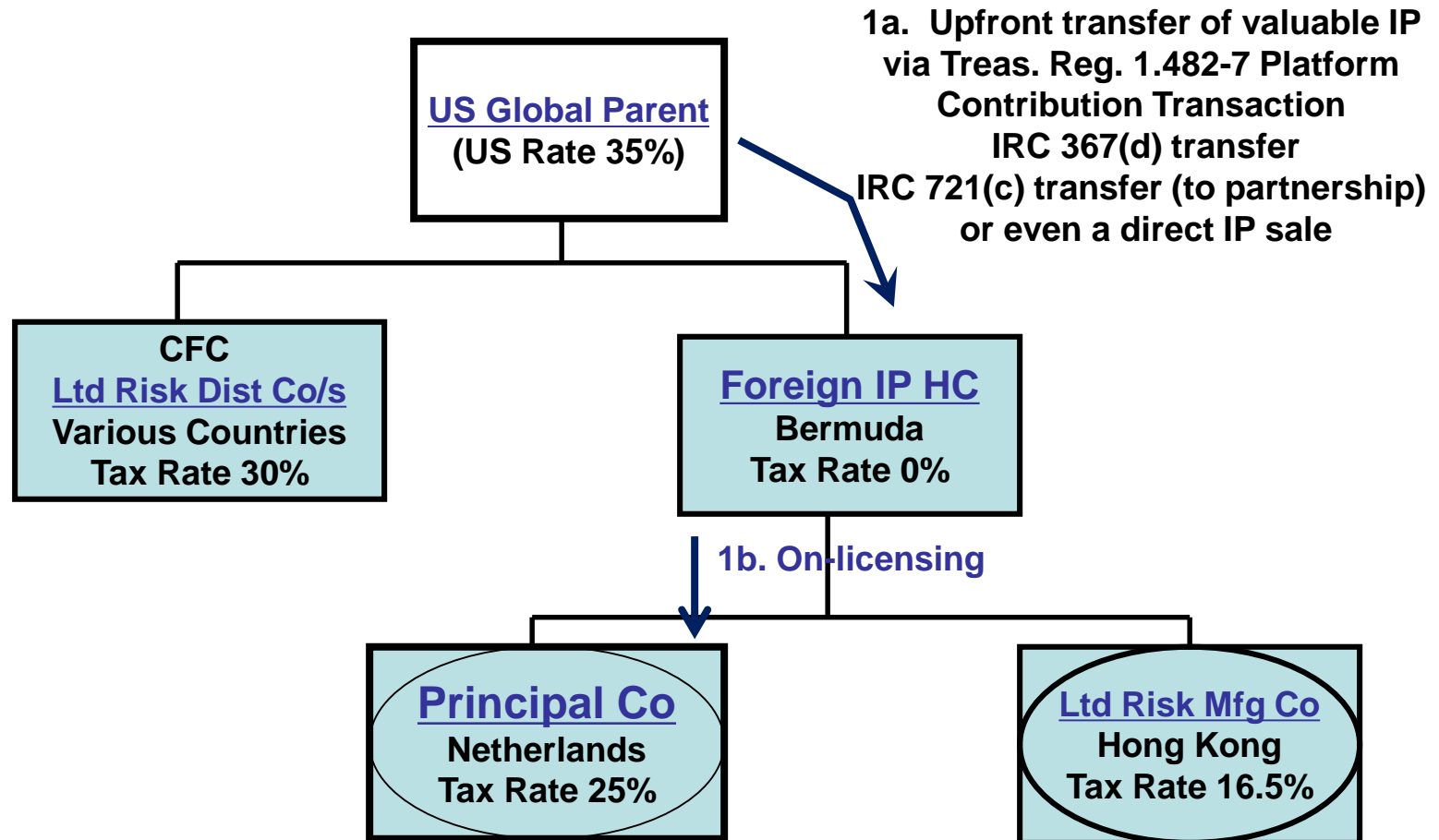
Real World – Pre-TCJA Paradigm



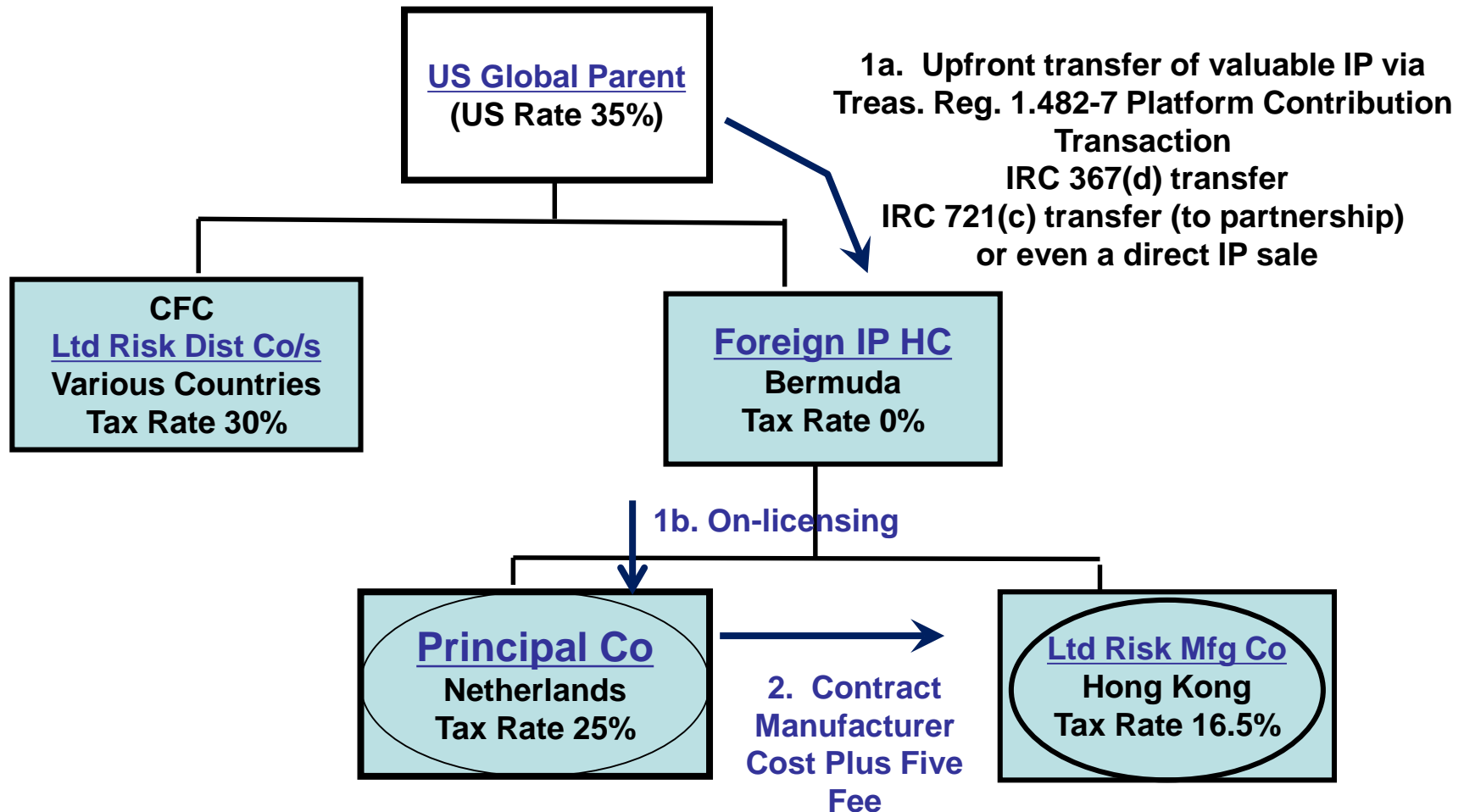
ACTUAL CASE STUDY from: "PRESENT LAW AND BACKGROUND RELATED TO POSSIBLE INCOME SHIFTING AND TRANSFER PRICING JOINT COMMITTEE ON TAXATION HOUSE COMMITTEE ON WAYS AND MEANS - July 22, 2010."



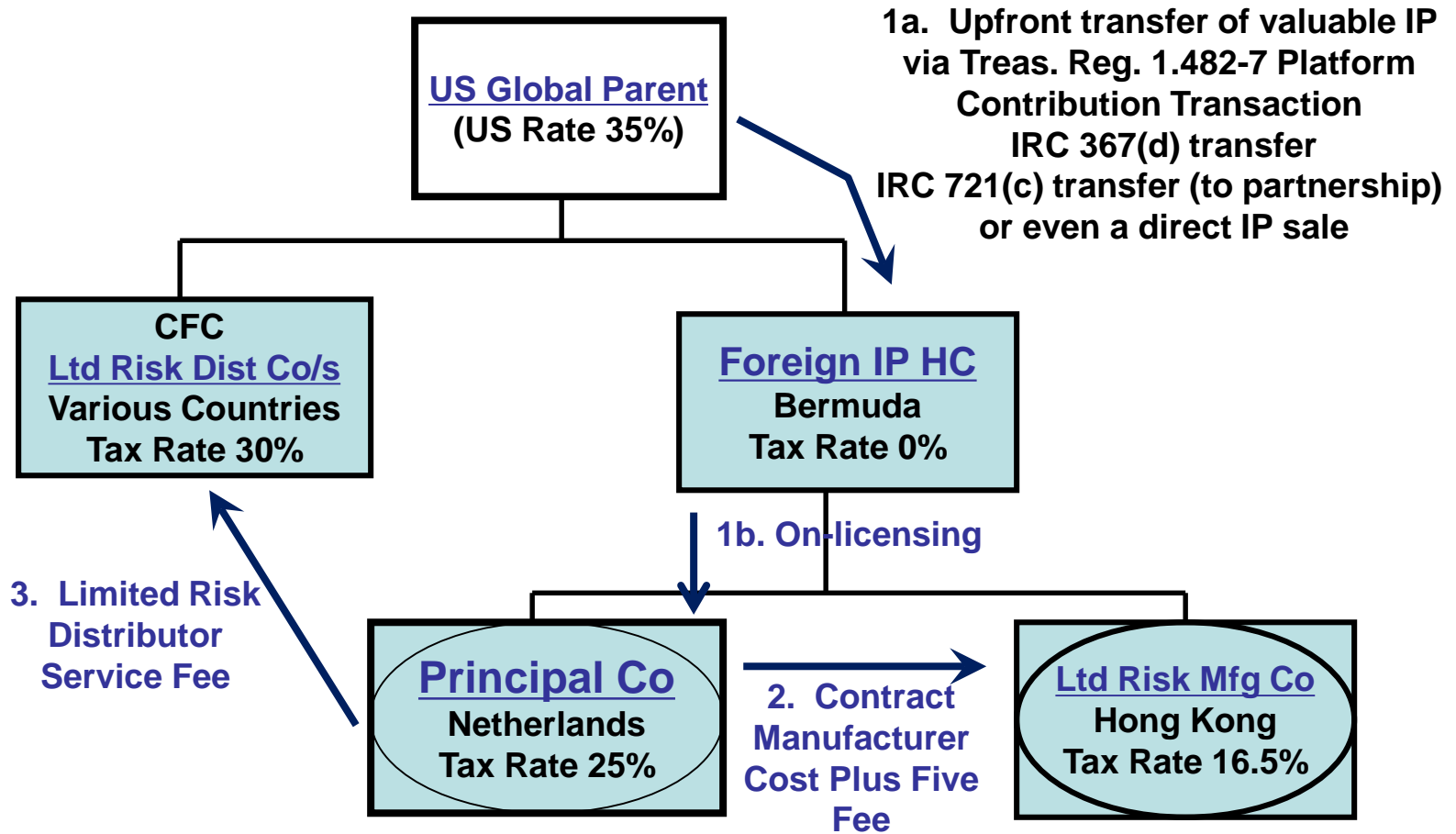
Real World – Pre-TCJA Paradigm (cont'd) 1



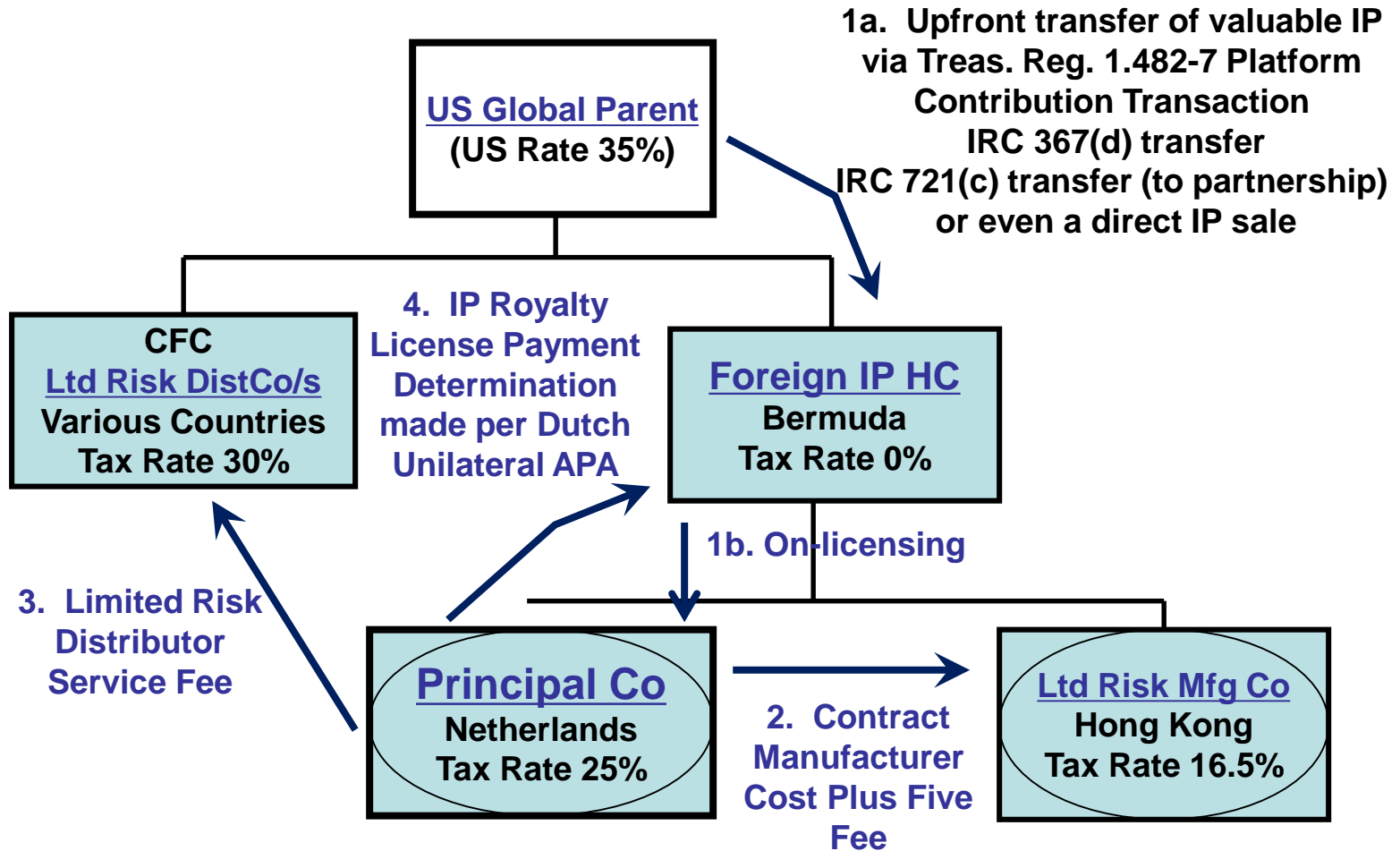
Real World – Pre-TCJA Paradigm (cont'd) 2



Real World – Pre-TCJA Paradigm (cont'd) 3



Real World – Pre-TCJA Paradigm (cont'd) 4



Real World Transfer Pricing Impact of GILTI & Intangible Property Related Changes 1

Transfer Pricing Impact of 2017 TCJA's GILTI Regime & Intangible Property Changes on a Real World Case (*Pre-TCJA*):

- What might be three primary tax minimization goals of establishing this Intangible Property migration structure?
 - First, minimize the **US tax consequences** that emanate from the initial migration of the Intangible Property.
 - *Basic Transfer Pricing Techniques for Minimization of Intangible Property Transfer Values under Pre-TCJA Intangible Property Definition and Application Standards.*

Real World Transfer Pricing Impact of GILTI & Intangible Property Related Changes 2

Transfer Pricing Impact of 2017 TCJA's GILTI Regime & Intangible Property Changes on a Real World Case (*Pre-TCJA*):

- What might be **three primary tax minimization goals** of establishing this Intangible Property migration structure?
 - **Second**, minimize the **US tax consequences** that emanate from the post transfer activity generated within the foreign structure.
 - ***General Avoidance of the Pre-TCJA US Sub Part F provisions (generally very easily done), and if/as Applicable Minimize the Negative Tax Impact of US Repatriation and Foreign Tax Credit provisions.***

Real World Transfer Pricing Impact of GILTI & Intangible Property Related Changes 3

Transfer Pricing Impact of 2017 TCJA's GILTI Regime & Intangible Property Changes on a Real World Case (*Pre-TCJA*):

- What might be **three primary tax minimization goals** of establishing this Intangible Property migration structure?
 - **Third**, minimize the **Foreign tax consequences** that emanate from the post-transfer activity generated with the foreign structure.
 - *Did We Typically Care That Much About Foreign Tax Law Consequences Under Pre-TCJA Paradigms (Maybe)?*

Real World Transfer Pricing Impact of GILTI & Intangible Property Related Changes 4

Transfer Pricing Impact of 2017 TCJA's GILTI Regime & Intangible Property Changes on a Real World Case (*Post-TCJA*):

- What might be **three primary tax minimization goals** of establishing this Intangible Property migration structure?
 - **First**, minimize the **US tax consequences** that emanate from the **initial migration of the Intangible Property**.
 - ***Impact of Intangible Property Pricing Changes, including both an Expanded Definition of Intangible Property, and a Statutory Restatement of Enhanced Valuation Techniques (e.g., Aggregation and Realistic Alternatives Principles)***

Real World Transfer Pricing Impact of GILTI & Intangible Property Related Changes 5

Transfer Pricing Impact of 2017 TCJA's GILTI Regime & Intangible Property Changes on a Real World Case (*Post-TCJA*):

- What might be **three primary tax minimization goals** of establishing this Intangible Property migration structure?
 - **Second**, minimize the **US tax consequences** that emanate from the post transfer activity generated within the foreign structure.
 - ***Impact of both Pricing and Non-pricing Related Changes. Establishing GILTI Structuring Techniques Intended to Minimize the U.S. Tax Capture of Foreign Generated Residual Returns and Associated Foreign Tax Credit Benefits.***

Real World Transfer Pricing Impact of GILTI & Intangible Property Related Changes 6

Transfer Pricing Impact of 2017 TCJA's GILTI Regime & Intangible Property Changes on a Real World Case (*Post-TCJA*):

- What might be three primary tax minimization goals of establishing this Intangible Property migration structure?
 - Third, minimize the **Foreign tax consequences** that emanate from the post transfer activity generated with the foreign structure.
 - *What About Recent EU and OECD Transfer Pricing Tax and Non-Tax Governance Changes? Is This Emerging Trend Becoming Significant Enough for Us Performing Tax Administration Duties in a Post-TCJA World to Care About?*

Real World Transfer Pricing Impact of GILTI & Intangible Property Related Changes 7

Transfer Pricing Impact of 2017 TCJA's GILTI Regime & Intangible Property Changes on a Real World Case (*Post-TCJA*):

- After Having Completed This Exercise, What Are Your Thoughts on How These Two Specific TCJA Changes Might Shape and Alter TP's IP Migration Structuring in the Future?

Lesson Summary

Today, you have learned to:

- Apply the rules of IRC 367(a) to outbound transfers occurring after December 31, 2017 (“post-2017 TCJA* transfers”)
- Determine the “transferred loss amount” under IRC 91
- Identify intangible property under IRC 367(d)(4)
- Identify potential changes to transfer pricing and outbound transfers due to GILTI, FDII, or BEAT

Questions



Thank You

Thank you for your participation!