taxnotes federal

Volume 164, Number 9 ▪ August 26, 2019

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Reprinted from *Tax Notes Federal*, August 26, 2019, p. 1409

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by Marc Schwartz and Paul Tadros

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In this article, Schwartz and Tadros lament the complications that the Tax Cuts and Jobs Act has added to existing regulations, focusing in particular on section 245A and the global intangible low-taxed income regime.

Ugh! I'm tired. Maybe because it's 5:30 a.m. and I've been awake for over two hours reading tax literature and hoping I'll fall back to sleep. Or maybe it's the howling winds that woke me up in the first place.

In any case, I'm tired. It used to be that keeping the tax code by my bed put me right to sleep in case I unexpectedly woke in the middle of the night. But now it just keeps me awake. Today's reading list includes literature on:

- proposed regulations addressing tax withholding and information reporting on partnerships with a U.S. trade or business;
- proposed regulations on qualified foreign pension funds related to the 1980 Foreign Investment in Real Property Tax Act; and
- temporary regulations under section 245A.

My brain simply wants to give up. Why must our international tax rules be so complicated? Even extremely diligent and reasonably intelligent tax advisers have to worry about whether they are providing accurate advice. I feel like I'm in a maze, or maybe in the dark basement of an old haunted house. Once I master an issue, I climb the stairway hoping to reach ground level and exit — only to find I'm still below ground and need to solve yet another puzzle to rise to the next floor. I can only hope I'll be able to see the sun one day.

Since I started practicing in the mid-1990s, tax law has been byzantine (at least for me). But it's getting worse. Just from what I've read in the past two hours, I've become frustrated and, yes, tired. This is a nonpartisan vent. Forget about political party affiliation; I'm just talking about good tax policy and how to implement it.

But it can't just be me. Companies and individuals will need to direct more resources to tax planning and compliance if they are to have any chance of accomplishing the herculean task of filing a materially accurate tax return. Although my firm and I may benefit financially, this complexity is suboptimal. Many of my industry colleagues cringe when I say these things. "Be quiet," they say. "It's good for business." Aren't we better off if we let individuals and businesses focus their attention on growth, entrepreneurship, and customer experience? Won't there still be enough work examining treaties and, ideally, adding value elsewhere?

Instead taxpayers must increase internal compliance headcount and advisory budgets. Yes, I realize compliance is necessary and antiabuse rules serve an important purpose, but haven't we gone off the deep end with the Internal Revenue Code? Every new rule is like an extra layer of paint on the basement wall of the haunted house, adding thickness and darkness without long-lasting value. At some point all the layers need to be scraped off.

Take section 245A, for example. This was supposed to move us closer to a territorial system:

- See foreign subsidiary earn.
- See foreign subsidiary distribute dividend.
- See U.S. parent receive tax-free cash.

Of course it's not so simple, whether we're talking about the code section itself or the temporary regulations. Let's forget about whether section 245A even has had or will have the impact we thought it might when we first read the new law and were trying to digest the transition tax in December 2017. With the advent of global intangible low-taxed income, what percentage of

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foreign income will really qualify anyway? With the new guidance, now we're tracking section 954(c)(6) transactions to see whether some earnings and profits should be excluded from section 245A benefits.

Remember that whether there's one controlled foreign corporation or dozens, the same rules apply. Thus, smaller entrepreneurs must apply the same general rules as the *Fortune* 100. The same issues are relevant; it's just that the number of digits before the decimal point likely differs. Does that seem right? This gets more complex when we see that most companies in the United States are passthrough for tax purposes and most of the new benefits of the international tax law go to C corporations. (Section 245A applies to C corporations only.) It's the same for the section 250 deduction (foreign-derived intangible income/ GILTI). Passthroughs unfortunately don't enjoy these benefits.

Would you like another example? Let's look at the recently issued GILTI regulations, both final and proposed. The final regs don't have a broad high-tax exception. However, the proposed regulations do. This differentiation was confusing at best, as can be seen when reading summaries of the regulations by various firms. From a policy perspective, it would seem that a general high-tax exception would be appropriate, especially because there is one for subpart F income. Why wouldn't there be one for GILTI, which is typically active business income? In any case, although the GILTI statute is convoluted in parts and is best read with a full caffeine jolt, the definition of tested income seems quite clear. The statute doesn't provide for a general high-tax exception. Given the relative clarity of the statute, is a non-legislative body empowered to issue regulations authorizing a general high-tax exception? That seems like more than a technical correction, and it also goes beyond implementation as it adds an exception that's not in the statute. Again, a more straightforward tax code would remove many of these convoluted issues.

To add even more to the confusion, the proposed regs require the high-tax exception to be on a qualified business unit by qualified business unit basis, which means the foreign taxes attached to QBUs meeting the exception cannot be used for the qualified business units that don't meet the exception. Thus, building models for decision-making is both an administrative burden and an inefficient use of resources. Does anyone think this will help curtail deliberate planning involving subpart F? And will GILTI truly bring more jobs back to the United States?

Companies and individuals might simply be better off with subpart F income than with GILTI. For taxpayers that historically generated subpart F income and are in compliance, there are templates for efficient numerical calculations: income, expense allocation, foreign taxes, and so forth. Corporate taxpayers may claim a credit for foreign taxes paid, as they've done previously. There's also a comfort for the taxpayers who are likely accustomed to the annual exercise.

For GILTI, on the other hand, the system is new and untested. For corporations, although there's a 20 percent foreign tax credit haircut, there's a 50 percent deduction (of course, subject to taxable income limitations). For individuals and passthroughs such as S corporations and partnerships, the historic indirect FTC wasn't a reality, but if they were able to achieve deferral, that was an option to be considered seriously. Of course, GILTI ends the deferral except for the 10 percent qualified business asset investment item, which for most companies is rather small. Many noncorporate taxpayers are planning to make their global structures passthrough, yet this could create upfront taxes. In any case, whether the U.S. shareholders are individuals or passthroughs rather than corporations, electing passthrough treatment is appealing because it eliminates GILTI (and could have the effect of reducing the global effective tax rate). If I'm a tax director and can keep advisory fees and internal headcount down by planning into subpart F or eliminating both subpart F and GILTI by creating passthrough treatment, and if it has the added value of reducing global tax (or at least not increasing it), why would I bother with GILTI?

My clients don't care about the complexity, but they care when my invoices get bigger for what they perceive is the same value of services. I get tired of explaining that the new tax law has done anything but simplify our tax code. We don't take shortcuts; we've never been able to afford it. As a boutique firm, our reputation is everything. That means one major error could be our doom.

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Our clients expect perfection, or at least as close as reasonably possible. The more rules that are issued, the more likely something is to fall through the cracks.

Side note: Although it's easy to cast blame on the IRS, the real problem lies with the lawmakers who aren't thinking through all the work entailed in mere compliance, much less planning. They often give Treasury broad leeway to draft implementing regulations, but I don't think that's the best way to address the issue. Let's pass more straightforward laws that don't need so much regulatory guidance.

When and how do we as practitioners stand up and demand simplification? When is enough enough? How do we speak with a strong voice to all levels of government? If the authorities simplify the tax system so much that we need to shut our firm's doors (however unlikely), and if that means tax planning and compliance costs are a smaller percentage of GDP, is that a bad macroeconomic answer?

Added to the complexities of domestic law, we are now seeing other countries — especially in the European Union — introduce new rules to impose more taxes, leading to further complications in the international arena.

If governments can get their act together, maybe I'll apply for a job at the local burger joint. In the meantime, I think I'll have another cup of coffee and read some more regulations. I'm tired. Ugh! ■

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