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Notice 2023-64 provides additional corporate AMT guidance

Tax Alert

Overview

The Inflation Reduction Act of 2022 (P.L. 117-169) included a 15-percent corporate alternative minimum tax (CAMT) on "adjusted financial statement income" (AFSI) of Applicable Corporations[1]. The CAMT is effective for taxable years beginning after December 31, 2022.

Treasury and the IRS released interim CAMT guidance in two previous notices, Notice 2023-7 (*see* prior Tax Alert), and Notice 2023-20 (*see* prior Tax Alert). On September 12, 2023, Treasury and IRS released Notice 2023-64 (the "Notice"), which provides additional interim guidance to further clarify the application of the CAMT and is discussed in further detail below.

The government intends to publish forthcoming proposed regulations regarding application of the CAMT that would include proposed rules consistent with the interim guidance provided in the Notice, Notice 2023-7 (as modified by the Notice), and Notice 2023-20 (collectively, the "CAMT Notices"). It is anticipated that the forthcoming proposed regulations would apply for taxable years beginning on or after January 1, 2024. A taxpayer may rely on the interim guidance in the CAMT Notices for any taxable year that begins before January 1, 2024, and, if applicable, for taxable years ending on or before the date the forthcoming proposed regulations are published in the Federal Register.

Section 3: Definition of Taxpayer

For purposes of sections 4 through 16 of the Notice, unless otherwise provided in the Notice, the term "Taxpayer" means any entity identified in section 7701 and the associated regulations, including a disregarded entity[2], regardless of whether the entity meets the definition of a taxpayer under section 7701(a)(14).

Section 4: Determining a Taxpayer's AFS

Section 4 of the Notice clarifies the definition of an applicable financial statement (AFS) for purposes of sections 56A and 59, based largely on the prioritization rules set forth in section 451(b)(3) and the underlying regulations, with two notable additions. First, certain unaudited external financial

statements (or audited but not certified financial statements) other than a tax return, may constitute an AFS if prepared for an external non-tax purpose and prepared using GAAP, IFRS, or any accepted accounting standard issued by an accounting standard board. Second, an income tax return or information return filed with the IRS also constitutes an AFS.

As the regulations under section 451(b) did not specify what constitutes a "certified financial statement," this Notice clarifies that a "certified financial statement" is a financial statement that is subject to a: (i) certified opinion by an independent auditor that the financial statement is in conformity with the relevant financial accounting standards; (ii) qualified or modified opinion by an independent auditor that the financial statement presents fairly the financial position, except for the effects of the matter to which the qualification or modification relates; or (iii) adverse opinion, but only with disclosure of the disagreement with the statement.

If there is a restatement of AFS or the AFS is a qualified or adverse opinion, the Notice provides special provisions to adjust AFSI to prevent certain duplications and omissions. *See* section 11 of the Notice, discussed below.

The Notice provides that if the Taxpayer is a member of a Tax Consolidated Group[3], the Taxpayer must use the consolidated AFS that contains the financial results of the Tax Consolidated Group regardless of whether the corporation's financial results are also reported on a separate AFS that is of equal or higher priority to the Consolidated AFS[4]. *See* section 2 of Notice 2023-7. The Notice adds a provision that applies for Taxpayers that are members of a foreign-parented multinational group (FPMG), where the FPMG Common Parent prepares a Consolidated AFS that includes the Taxpayer's financials.

Section 5: General Rules for Determining AFSI

Section 5 of the Notice adopts the term "**financial statement income**[5]" (FSI), which means the net income or loss of the Taxpayer set forth on the income statement included in the Taxpayer's AFS. The Notice clarifies that FSI includes all items of income, expense, gain, and loss reflected in the net income or loss set forth on such income statement for the taxable year, including nonrecurring items and net income or loss from discontinued operations, and regardless of whether the amount is realized or recognized for federal tax purposes. However, FSI does not include amounts reflected elsewhere in the Taxpayer's AFS, including in equity accounts such as retained earnings and other comprehensive income.

The Notice defines AFSI to mean the Taxpayer's FSI adjusted pursuant to section 56A (or guidance thereunder). This definition is similar to the definition of AFSI in Notice 2023-7, which did not adopt the term FSI. For purposes of section 59(k), the term AFSI is modified, including aggregation modifications and other modifications set forth in guidance under section 59(k). *See* section 13 of the Notice. By comparison, section 2 of Notice 2023-7 adopts a single definition of AFSI for purposes of sections 55-59.

When determining FSI from a Consolidated AFS, the Notice provides that the Taxpayer must determine the amount of the portion of the net income or loss of the AFS Group set forth on the income statement included in the Consolidated AFS that is the Taxpayer's FSI. The portion of Consolidated FSI that is the Taxpayer's FSI must be supported by the Taxpayer's separate books and records used to create the Consolidated AFS. The Notice further provides the netting of losses against income of Taxpayers within the Consolidated AFS is not permitted. Additionally, for purposes of the Consolidated FSI, elimination journal entries are generally disregarded if they (i) eliminate the effect of transactions between the Taxpayer and another Taxpayer that is a member of the same AFS Group unless such transactions are between a disregarded entity and its owner or between disregarded entities and the same owner; or (ii)

eliminate FSI of the Taxpayer with respect to investment in another Taxpayer that is a member of the AFS Group unless the investment is in a disregarded entity.

The Notice also provides that so called "push down" entries, that are not reflected in the separate books and records of the Taxpayer, must be allocated to each Taxpayer within the Consolidated AFS and provides that the Taxpayer must maintain books and records to support the calculation of its FSI.

Section 6: Determining FSI, AFSI, and Tax Imposed for Tax Consolidated Groups

In general, section 56A(c)(2)(B) provides that if a corporation is a member of a Tax Consolidated Group, AFSI for such Tax Consolidated Group for the particular taxable year must take into account items on the AFS that includes the Tax Consolidated Group and which are properly allocable to members of such group. As described above, section 5 of the Notice provides for the determination of FSI, which is then adjusted pursuant to section 56A and other guidance including this Notice to reach AFSI. Section 6 of the Notice is intended to clarify the application of section 56A(c)(2)(B) by providing guidance with respect to the determination of (i) the FSI (and so the AFSI) of a Tax Consolidated Group, and (ii) the amount of CAMT liability for a Tax Consolidated Group.

Calculation of FSI of a Tax Consolidated Group:

In general, section 6.03 of the Notice provides that the FSI of a Tax Consolidated Group for a taxable year is determined based on whether or not the Consolidated AFS consists solely of Tax Consolidated Group members. In particular,

- If a Consolidated AFS only includes members of a Tax Consolidated Group (for this purpose, including any disregarded entities of members), FSI of such Tax Consolidated Group is the amount of FSI set forth on such Consolidated AFS.
- If a Consolidated AFS includes other entities ("Non-Tax Consolidated AFS Members"), the FSI of the Tax Consolidated Group must be determined in accordance with the rules provided in section 5.02(3)(c) of the Notice by treating the Tax Consolidated Group as a single Taxpayer and such other entities as one or more Taxpayers, as applicable. Accordingly, the members of the Consolidated AFS must,
  - Disregard **AFS Consolidation Entries**[6] related to (i) transactions between the Tax Consolidated Group and Non-Tax Consolidated AFS Members, and (ii) investments by the Tax Consolidated Group in Non-Tax Consolidated AFS Members (and vice versa). By disregarding such AFS Consolidation Entries, the underlying transactions *are taken into account* by each relevant entity (*see* example below for further detail).
  - Take into account AFS Consolidation Entries related to (i) transactions between members of the Tax Consolidated Group, and (ii) investments by one member of the Tax Consolidated Group in another member of such group. By taking into account such AFS Consolidation Entries, the underlying transactions *are disregarded* by each relevant entity (*see* example below for further detail).

The Notice contains an example that illustrates the foregoing rules. In the example, (i) X, Y, and Z are each US corporations, (ii) X owns 90 percent of Y's stock and 60 percent of Z's stock, (iii) X and Y are members of a Tax Consolidated Group, (iv) X, Y, and Z comprise a Consolidated AFS, (v) in 2023, X sells an asset to Y and recognizes a $2 million gain that is eliminated pursuant to an AFS Consolidation Entry, and (vi) in 2024, Y sells the same asset to Z and recognizes a $3 million gain that is also eliminated pursuant to an AFS Consolidation Entry. Because the 2023 sale is between members of the same

Tax Consolidated Group, the corresponding AFS Consolidation Entry is taken into account such that the sale between X and Y is disregarded (*i.e.,* no FSI is created and there is no step-up in the basis of the asset in the hands of Y). Because the 2024 sale is between a Tax Consolidated Member and a Non-Tax Consolidated AFS Member, the AFS Consolidation Entry is disregarded such that the sale between Y and Z is taken into account. As a result, the sale results in FSI for the Tax Consolidated Group and the amount of gain is determined by reference to the basis that X had in the asset such that there is $5 million of gain.

These rules only determine FSI and thus the rules in section 59(k) (Applicable Corporation status) and section 56A (adjustments to FSI to determine AFSI) must still be applied. In this regard, the Notice does not provide any further guidance relating to section 56A(c)(2)(C), which contains a rule for determining AFSI where, among other things, a Tax Consolidated Group owns stock of a corporation that is not a member of the Tax Consolidated (*e.g.*, the transaction between Y and Z in the example above) and imports US federal income tax principles.

Calculation of CAMT for Tax Consolidated Group:

The Tax Consolidated Group's CAMT liability is based on the Tax Consolidated Group's (i) tentative minimum tax, (ii) regular US federal consolidated tax liability, and (iii) the tax imposed under the BEAT rules for US federal consolidated groups.

It appears that the Notice is confirming that the CAMT liability is calculated based on the Tax Consolidated Group as a single corporation.

Section 7: Determining AFSI with Respect to Certain Foreign Corporations

The Notice clarifies that for a Taxpayer that is a US shareholder of a controlled foreign corporation (CFC), both sections 56A(c)(2)(C) and (c)(3) apply to determine such Taxpayer's AFSI with respect to such CFC. The Treasury Department and IRS have requested comments on the treatment of these items (*see* section 16 below).

The Notice clarifies that where a Taxpayer is a US shareholder of multiple CFCs, such Taxpayer makes a single adjustment under section 56A(c)(3)(A) that is equal to the sum of its pro rata share of the **Adjusted Net Income or Loss** of each CFC of which the Taxpayer is a US shareholder. Further, if the amount of the single adjustment would be negative, no amount is taken into account under section 56A(c)(3) for such taxable year.[7]

When a CFC is a partner in a partnership, the Notice clarifies, the items taken into account in computing the CFC's Adjusted Net Income or Loss includes the CFC's distributive share of AFSI of such partnership (as determined under section 56A(c)(2)(D), regulations, or other guidance). Further, if a CFC is the owner of a disregarded entity, the items taken into account in computing the CFC's Adjusted Net Income or Loss include the FSI of such disregarded entity, as adjusted under rules similar to those that apply in determining AFSI.

For purposes of section 56A(c)(4), the Notice clarifies, in the case of a foreign corporation that qualifies for and claims the benefits of the business profits provisions of any applicable income tax treaty, the principles of those provisions apply in determining the foreign corporation's AFSI.[8]

Finally, the Notice clarifies that a CFC's Adjusted Net Income or Loss is not limited to the amount of AFSI of the CFC that would be determined if only section 56A(c)(4) and section 7.02, paragraph 4 of the Notice were taken into account (*i.e.,* the Adjusted Net Income or Loss of a CFC could be greater than the AFSI of a CFC determined under the principals of section 882 and/or the

provisions of an applicable income tax treaty). Further, if a CFC is an Applicable Corporation, the CFC's Adjusted Net Income or Loss is reduced by the amount of AFSI of the CFC determined under section 56A(c)(4) and section 7.02, paragraph 4 of the Notice.

Section 8: AFSI Adjustment for Certain Taxes

Section 8 of the Notice provides guidance with respect to adjustments for certain taxes under section 56A(c)(5). Under section 56A(c)(5), AFSI is appropriately adjusted to disregard any federal income taxes, or income war profits, or excess profit taxes (within the meaning of section 901) with respect to a foreign country or possession of the United States ("Foreign Income Taxes"), which are taken into account on the Taxpayer's AFS.

The Notice provides guidance around the timing of the adjustment. It indicates that an appropriate adjustment to AFSI described in section 56A(c)(5) with respect to any federal income taxes or Foreign Income Taxes that are taken into account on the Taxpayer's AFS, including deferred taxes or taxes taken into account through increases or decreases to other AFS accounts (such as those that are used to account for FSI from investments in other entities under the equity method), is made in the taxable year or years in which such taxes increase or decrease the Taxpayer's FSI or are included as a component of an adjustment to AFSI described in section 11.02 of the Notice.

The Notice further provides that federal income taxes or Foreign Income Taxes are considered taken into account on an AFS of a Taxpayer if any journal entry has been recorded in the journal used to determine the amounts on the AFS that includes the Taxpayer for any year, or another AFS that includes the Taxpayer, to reflect the income tax, even if the income tax does not increase or decrease the Taxpayer's FSI at the time of the journal entry.

Section 9: AFSI Adjustments for Section 168 Property

Section 9 of the Notice provides additional interim guidance with respect to the adjustment to AFSI for tax depreciation. Taxpayers that choose to rely on section 4 of Notice 2023-7 on or after September 12, 2023, must apply the modifications made by section 9 of Notice 2023-64.

Under the Notice, a Taxpayer that makes a change in accounting method for depreciation with respect to any item of **Section 168 Property**[9] must adjust AFSI to reflect the required section 481(a) adjustment ("**Tax Depreciation Section 481(a) Adjustment**") to prevent duplication or omission of depreciation under section 56A(c)(13).

The Notice also provides that if a Taxpayer capitalizes **Tax Depreciation**[10] and recovers the amount capitalized through one or more deduction(s) allowed in computing taxable income, AFSI is reduced by the deduction(s), even if provided under a Code section other than section 167. For example, a Taxpayer that capitalizes and amortizes Tax Depreciation under section 174(a)(2) must reduce AFSI by the amortization deduction attributed to the capitalized Tax Depreciation.

Additionally, under the Notice, AFSI is reduced by Tax Depreciation capitalized to property described in section 1221(a)(1) that is not inventory, which is recovered as part of the Taxpayer's gain/loss computation upon a sale or exchange of such property.

The Notice also provides that a Taxpayer excludes from AFSI a disposition loss (including an abandonment loss) with respect to Section 168 Property included in its FSI and account for the disposition loss (as computed for CAMT purposes) in the tax year the disposition event occurs for purposes of determining the Taxpayer's regular tax liability, as defined in section 26(b) ("Regular Tax"). The Notice also clarifies and modifies section 4.03 of Notice 2023-7—adjustments

for depreciation (including depreciation capitalized to inventory), to include the adjustments described above. Further, section 9.02(7) of the Notice modifies section 4.07 of Notice 2023-7 to provide additional rules regarding adjustments to the AFS basis of Section 168 Property for purposes of redetermining the FSI gain or loss from the disposition of Section 168 Property.

Other AFSI Rules for Section 168 Property

The Notice clarifies that the AFSI adjustment under section 56A(c)(13) does not apply to property that is not depreciated under sections 167 and 168 for Regular Tax purposes (*e.g.*, a Taxpayer not subject to US taxation does not compute depreciation under section 168 for purposes of determining the AFSI adjustment under section 56A(c)(13)). The rules for determining Applicable Corporation status of members of a FPMG under section 59(k)(2)(A) do not change this result. Additionally, except as otherwise provided in section 56A, regulations, or other guidance, the AFSI adjustment under section 56A(c)(13) does not apply to nonrecognition or gain deferral provisions that apply for certain dispositions of Section 168 Property for Regular Tax purposes (*e.g.*, like-kind exchanges under section 1031 or installment sales under section 453). Accordingly, any gain or loss recognized on the FSI with respect to a disposition of a Section 168 Property for Regular Tax purposes is recognized for AFSI purposes, regardless of whether a gain or loss is realized, recognized, or taken into account for Regular Tax purposes. The Notice provides examples to illustrate these rules.

Section 10: AFSI Adjustments for Qualified Wireless Spectrum

Section 10 of the Notice provides interim guidance with respect to the AFSI adjustment for **Qualified Wireless Spectrum**. Section 56A(c)(14)(I) generally provides that AFSI is reduced by section 197 amortization allowed as a deduction in computing taxable income and appropriately adjusted to disregard any amount of amortization expense that is taken into account on the Taxpayer's AFS with respect to such qualified wireless spectrum, and any other item specified by the Secretary in order to provide that such qualified wireless spectrum is accounted for in the same manner as it is accounted for Regular Tax purposes.

The Notice provides AFSI is reduced by **Deductible Tax Amortization** to the extent of the amount allowed as a deduction in computing taxable income for the taxable year. AFSI is also reduced by a positive **Section 481(a) Adjustment for Amortization** to the extent of the amount of such Section 481(a) Adjustment for Amortization that is taken into account in computing taxable income for the taxable year. Additionally, the Notice also provides an AFSI adjustment to disregard **Covered Book Amortization Expense** and **Covered Book Wireless Spectrum Expense**, as well as any other adjustments provided in future guidance, as applicable.

With respect to dispositions of Qualified Wireless Spectrum, the Notice provides a Taxpayer must adjust its AFSI for the taxable year of the disposition to redetermine any gain or loss taken into account in the Taxpayer's FSI (including a gain or loss of zero) by adjusting the remaining AFS basis, including adjustments that would have been made in taxable years prior to the effective date of the CAMT. The Notice includes an examples involving dispositions that illustrate the Section 168 Property and Qualified Wireless Spectrum rules.

The Notice provides AFSI is not adjusted under section 56A(c)(14) for wireless spectrum property that is not subject to section 197 amortization for Regular Tax purposes (*e.g.,* because the Taxpayer is not subject to US Taxation). The special rules for determining Applicable Corporation status of members of a FPMG (section 59(k)(2)(A)), including the rules on effectively connected income (section 56A(c)(4)), do not change this result.

Section 11: AFSI Adjustments to Prevent Certain Duplications and Omissions

The Notice provides guidance on adjustments that must be made to AFSI to prevent certain duplications and omissions of AFSI, pursuant to section 56A(c)(15)(A), prior to forthcoming proposed regulations.

Change in Financial Accounting Principle

The Notice provides that AFSI must be adjusted to take into account any cumulative adjustment to the retained earnings from an Accounting Principle Change Adjustment. If the Accounting Principle Change Adjustment has any related income tax effects, then it is the Net Accounting Principle Change Adjustment that should be reflected in AFSI.

The Accounting Principle Change Adjustment and Net Accounting Change Adjustment are taken into account in AFSI in accordance with the Adjustment Spread Principle Rule, which operates as follows:

- If the adjustment is necessary to prevent a duplication of an item of income, expense, gain or loss for AFSI purposes, it is taken into account in AFSI ratably over the four-taxable-year period. However, if the Taxpayer is able to demonstrate that the duplication is reasonably anticipated to occur over a different period, then the corresponding adjustment may be taken into account in AFSI ratably over such period (not to exceed fifteen years) beginning with the taxable year for which the change in financial accounting principle is implemented in the Taxpayer's AFS.
- If the adjustment is necessary to prevent an omission of an item of income, expense, gain or loss for AFSI purposes and the adjustment results in an increase in AFSI, it is taken into account in AFSI ratably over the four-taxable-year period beginning with the taxable year for which the change in financial accounting principle is implemented in the Taxpayer's AFS.
- If the adjustment is necessary to prevent an omission of an item of income, expenses, gain or loss for AFSI purposes and the adjustment results in a decrease in AFSI, it is taken into account in full in the taxable year for which the change in financial accounting principle is implemented in the Taxpayer's AFS.
- If the Taxpayer ceases to engage in the trade or business, it must take into account in AFSI for such taxable year any portion of the adjustment not taken into account in previous years.

The Notice also provides that if the priority of a Taxpayer's AFS for the current taxable year is different than the priority of the Taxpayer's AFS for the preceding taxable year, it is treated as if the Taxpayer implemented a change in financial accounting principle.

Restatement of Prior Year's AFS

The Notice provides that if a Taxpayer restates its FSI prior to the date the original federal income tax return for such taxable year is filed, the AFS that reflects the restated FSI ("**Restated AFS**") must be prioritized over the first AFS that is issued for the specific accounting period ("**Original AFS**"). A Restated AFS is a revised AFS for a specific accounting period that is reissued to correct the Original AFS for that accounting period.

If a Taxpayer restates it FSI after the date the original federal income tax return for such taxable year is filed, the Taxpayer must account for the restatement by adjusting the AFSI for the first taxable year after such taxable year for which the Taxpayer has not filed an original return as of the restatement date.

The Notice provides that if, after restating an AFS for a taxable year, a Taxpayer files an amended return or an administrative adjustment request under section

6227 (AAR) to adjust regular taxable income as result of the restatement, the Taxpayer must use the Restated AFS for purposes of determining AFSI on the amended return or AAR.

The Notice provides that the Taxpayer will be deemed to have restated its AFS for the preceding taxable year if:

- The beginning balance of retained earnings on the Taxpayer's AFS for the current taxable year is adjusted to be different than the ending balance of retained earnings on the Taxpayer's AFS for the preceding taxable year (for example, as a result of a prior period adjustment),
- Such difference is attributable to items that would otherwise be reflected in the Taxpayer's FSI under the relevant accounting standards, and
- The Taxpayer is not otherwise subject to the adjustment rules in sections 11.02(2) or (3)(a) or (b) of the Notice.

Adjustments for Amounts Disclosed in an Auditor's Opinion

The Notice provides that AFSI must be adjusted to take into account amounts disclosed in an auditor's qualified or modified opinion (section 4.02(2)(b)) or an adverse opinion (section 4.02(2)(c)) from an independent financial statement auditor.

No Adjustments for Timing Differences

The Notice provides that timing differences, *i.e.,* difference between when an item is taken into account in FSI and when that item is taken into account for Regular Tax purposes do not give rise to the duplication or omissions within the meaning of section 56A(c)(15)(A) or section 11.02 of the Notice, even if the timing difference originated before the effective date of the CAMT and reverse after such effective date.

Section 12: Financial Statement Net Operating Losses

In general, under section 56A(d), financial statement net operating loss (FSNOLs) generated by an Applicable Corporation can be carried forward and reduce AFSI for a subsequent taxable year by an amount equal to the lesser of (i) the amount of FSNOLs, and (ii) 80 percent of the Applicable Corporation's AFSI (which generally is the same rule for US corporations under section 172). An FSNOL generally means the amount of net loss set forth on a corporation's AFS for a taxable year ending after December 31, 2019, as adjusted pursuant to section 56A(c). Section 12 of the Notice provides corporations with additional clarity regarding the use of FSNOLs in the first year that a corporation becomes an Applicable Corporation and thus is subject to CAMT.

In general, section 12 of the Notice provides that FSNOLs of an Applicable Corporation can be carried forward even where the FSNOLs were generated in a taxable year ending after December 31, 2019, but prior to the corporation becoming an Applicable Corporation. However, such FSNOLs are treated as reducing AFSI (and therefore being absorbed) for any intervening taxable years. Thus, although the FSNOLs would not be relevant for such intervening years (because the corporation was not an Applicable Corporation and therefore not subject to CAMT), the corporation must effectively treat itself as an applicable corporation during such intervening years for purposes of determining FSNOL amounts.

The Notice contains an example that illustrates the foregoing rules. The example provides that a corporation generated an FSNOL in the 2020 taxable year and became an applicable corporation for the 2024 taxable year (*i.e.,* there was sufficient average AFSI for the taxable years 2021-2023 without regard to the FSNOL from the 2020 taxable year). In the intervening years between 2020 and 2024, the corporation was required to reduce the positive AFSI by the applicable amount of the FSNOL (here, 80 percent of the relevant

AFSI). Accordingly, in order to determine the amount of the 2020 FSNOL available in 2024, X had to reduce its 2020 FSNOL for the amount treated as offsetting AFSI in each of the 2021, 2022, and 2023 taxable years.

The Notice does not provide any additional guidance relating to FSNOLs such as any potential limitations following a change in ownership of the Applicable Corporation or how FSNOLs of a Tax Consolidated Group may be allocated to a departing member (and the Notice generally provides that US federal income tax principles are not relevant for AFSI except as otherwise provided in the Code or guidance).

Section 13: Determining Applicable Corporation Status

Section 13 of the Notice is intended to provide corporations with additional clarity in determining whether they are an Applicable Corporation.

Aggregation Rules under Section 59(k)(1)(D)

In general, solely for purposes of determining whether a corporation is an Applicable Corporation, all AFSI of persons treated as a single employer with the corporation under section 52(a) or (b) is treated as AFSI of that corporation[11].

The Notice provides little additional guidance in this area. Importantly, the Notice does not clarify what a trade or business is for these purposes.

The Notice does clarify that, because section 52(a), the regulations under section 1563, and the regulations under section 52(b) do not exclude S corporations, RICs, or REITs from being members of a controlled group, these entities are included for purposes of applying the aggregation rules.

Determining Applicable Corporation status of members of a FPMG

- The Notice provides an aggregation rule for corporations that are members of a FPMG. The Notice clarifies that for purposes of applying the $1 billion test for an FPMG, the AFSI of the Taxpayer being evaluated for Applicable Corporation status (the "**Tested Corporation**") includes both (i) the AFSI of all other members of the FPMG (the "**FPMG Aggregation**"), and (ii) the AFSI of all persons treated as a single employer with the Tested Corporation by reason of the aggregation rules of section 52(a) and (b) (the "**Section 52 Aggregation**") to the extent such AFSI is not AFSI of a member of the FPMG.
- The Notice provides that for purposes of applying both the Section 52 Aggregation and FPMG Aggregation rules in determining whether a Tested Corporation meets the $1 billion test, the AFSI of all relevant persons is determined without regard to:
  - Section 56A(c)(2)(D)(i) (*i.e.,* rule providing if the Taxpayer is a partner in a partnership, AFSI of the Taxpayer shall be adjusted to only take into account the Taxpayer's distributive share of AFSI of such partnership);
  - Section 56A(c)(3) (*i.e.*, rule providing for an adjustment to include a US shareholder's pro-rata share of CFC net income or loss set forth on the AFS of the CFC, determined under rules similar to section 951(a)(2) and those that apply in determining AFSI);
  - Section 56A(c)(4) (*i.e.*, rule providing that in the case of a foreign corporation, AFSI is determined under the principles of section 882, which provide rules for determining effectively connected income); or
  - Section 56A(c)(11) (*i.e.*, rule providing for adjustments with respect to defined benefit pensions).

Disregarding the Distributive Share Adjustment and Duplication of Income or Loss

In general, for purposes of calculating an Applicable Corporation's AFSI, if the Applicable Corporation is a partner in a partnership, AFSI of the Taxpayer with

respect to that partnership is adjusted to only take into account the Taxpayer's distributive share of AFSI of the partnership (the "**Distributive Share Adjustment Rule**"). However, for purposes of determining whether a corporation is an Applicable Corporation (the "**Status Test**"), the statute provided that the Distributive Share Adjustment Rule is turned off. The Notice confirms this but also provides for additional guidance in this regard.

First, it provides that solely for purposes of the Status Test, a Taxpayer that is a partner in a partnership includes in its AFSI the FSI amount it reports with respect to its partnership investment (for example, under the fair value method or equity method).

Second, if a Taxpayer is a partner in a partnership and the Taxpayer and partnership have a Consolidated AFS, there are additional rules in section 5 of the Notice addressing the determination of the Taxpayer's FSI amount (*see* section 5.02(3)(c)(iii)(B); section 5.02(3)(c)(vii) Example). Although not entirely clear, these additional rules and the corresponding example in section 5.02 of the Notice suggest that a corporation that consolidates a partnership but is not related to that partnership under section 52(b) does not include partnership income attributable to non-controlling interests for purposes of the Status Test.

In certain situations, a Taxpayer that is a partner in a partnership will include all of the AFSI of the partnership (*e.g.*, because the Taxpayer and the partnership are treated as a single employer under section 52(a) or (b) or under the special aggregation rule for FPMGs). In order to avoid duplication of the partnership's income, for purposes of the Status Test, the Taxpayer does not include in its AFSI the FSI amount it reports with respect to the partnership investment.

Section 14: CAMT FTC

The Notice provides that a Foreign Income Tax is eligible to be claimed as a CAMT FTC ("**Eligible Tax**") in the taxable year in which it is paid or accrued for federal income tax purposes by either (i) an Applicable Corporation, or (ii) a CFC with respect to which the Applicable Corporation is a US shareholder, provided that the Foreign Income Tax has been taken into account on the AFS of such Applicable Corporation or CFC. For purposes of the CAMT FTC, a Foreign Income Tax is taken into account on an AFS of an Applicable Corporation or CFC as provided in section 8, as described above.

Additionally, the Notice clarifies the treatment of foreign tax redeterminations (as defined in Treas. Reg. § 1.905-3(a)). A foreign tax redetermination is an Eligible Tax only if the Taxpayer is an Applicable Corporation in the taxable year to which the foreign tax redetermination relates ("**Relation-Back Year**"). For this purpose, such Eligible Tax may be claimed as a CAMT FTC only in the Relation-Back Year, even if the tax is reflected in a journal entry on an AFS within a taxable year that is later than the Relation-Back Year.

For purposes of the CAMT FTC, the Notice clarifies that a Taxpayer determines the amount of Foreign Income Taxes that are paid or accrued by CFCs on an aggregate basis with respect to all CFCs in which the Taxpayer is a US shareholder.

Finally, the Notice clarifies that for purposes of the CAMT FTC, an Applicable Corporation or a CFC that is a partner in a partnership (or an indirect partner in the partnership through another partnership or pass-through entity), includes its share of any Foreign Income Taxes paid or accrued by the partnership.

Section 16: Request for Comments

The Notice requests comments on any questions arising from the interim guidance, including comments to address the following specific topics:

- Use of simplified methods and safe harbors relating to depreciation adjustments;
- AFSI adjustments and procedures for a change in the timing of an item for AFSI that does not affect Regular Tax.
- AFSI adjustments for a change in method of accounting for Regular Tax from deducting to capitalizing and depreciating under sections 167 or 168 (or vice versa),
- Definitions and classifications relating to qualified wireless spectrum adjustments, and
- AFSI adjustments for prevention of duplications and omissions.

Further, the Notice requests comments regarding rules not included or addressed in the Notice, including, but not limited to:

- The manner in which a partner in a partnership determines its distributive share of partnership AFSI;
- The extent to which any unrealized marked-to-market gains and losses that are recognized in the Taxpayer's FSI should be adjusted in determining the Taxpayer's AFSI;
- Whether there are circumstances in which adjustments to AFSI are required to clearly reflect income;
- The scope of the definition of covered benefit plan as defined in section 56A(c)(11)(B)(iii), and adjustments to AFSI relating to covered benefit plans which provide post-employment benefits other than pension benefits;
- Treatment of dividends received from, and gains or losses from dispositions of stock of, foreign corporations for purposes of computing a Taxpayer's AFSI;
- Application of rules in section 5 of the Notice to disregarded entities as they relate to foreign branches and determining a Taxpayer's FSI.

Accounting Considerations

For financial reporting purposes, the Notice represents new information that generally should be ***considered in the reporting period that includes the issuance date (i.e., September 12, 2023).*** In determining the implications, an entity should consider, in the reporting period the Notice was issued, whether or not it intends to follow the proposed rules described in the Notice. If an entity intends to follow the proposed rules described in the Notice, and is permitted to rely on the Notice, the impact on the current year tax payable and any related deferred tax asset (and corresponding valuation allowance, if any) for the AMT credit carryforward would generally be recognized as an adjustment to the annual effective tax rate (AETR).

Footnotes

1 An Applicable Corporation is any corporation (other than an S corporation, regulated investment company, or a real estate investment trust) that meets the $1 billion three-year average annual AFSI test, applied based on a three-year look-back period ending with the relevant taxable year. Under the interim guidance, a corporation can first qualify as an Applicable Corporation in a taxable year ending after December 31, 2021.
2 An entity that is disregarded as an entity separate from its owner under Treas. Reg. § 301.7701-3.
3 In general, an affiliated group of corporations filing a consolidated return for any taxable year under section 1502.
4 A Consolidated AFS is the AFS for the AFS Group.

5 Specifically defined terms in the Notice are bolded.
6 Section 5.02, paragraph 3(c)(vi) defines AFS Consolidation Entries as the financial accounting journal entries that are made for AFS purposes in order to present the financial results of an AFS Group as though all members of the AFS Group were a single company, including journal entries to eliminate the effect of transactions between members of the AFS Group, to report amounts that are not recorded in the separate books and records of one or more members of the AFS Group, and to correct or otherwise adjust amounts that are reported in the separate books and records of one or more members of the AFS Group.
7 Section 2.03, paragraph 5 defines Adjusted Net Income or Loss as the net income or loss of a CFC set forth on its AFS (as adjusted under rules similar to those that apply in determining AFSI).
8 Section 56A(c)(4) provides that in the case of a foreign corporation, to determine AFSI, the principles of section 882 apply.
9 The term "Section 168 Property" means property to which section 168 applies. *See* section 9.02(5) of the Notice modifying and clarifying the terms in section 4.02 of Notice 2023-7.
10 The term "Tax Depreciation" means depreciation deduction allowed under section 167, with respect to Section 168 Property. *See* section 9.02(5) of the Notice modifying and clarifying the terms in section 4.02 of Notice 2023-7.
11 Section 59(k)(1)(D).

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