

Gain on Sales of U.S. Partnership Interests by Foreign Partners: New Sections 864(c)(8) and 1446(f)

Determining and Reporting Gain on Effectively-Connected U.S. Source Income

TUESDAY, JUNE 4, 2019

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Gain on Sales of U.S. Partnership Interests by Foreign Partners

Venable International Tax

June 4, 2019



VENABLE LLP

Agenda

1. Pre-2017 Tax Reform Authority
2. Grecian Magnesite
3. Section 864(c)(8)
4. Section 1446 Withholding Requirements
5. Notice 2018-08 & Notice 2018-29
6. Proposed Regulations under Section 1446(f)

Pre-2017 Tax Reform Authority: Revenue Ruling 91-32

Background

- Analyzed three fact patterns involving a foreign partner's sale of an interest in a partnership engaged in a U.S. trade or business (“**USTB**”) through a U.S. office or other fixed place of business.
- Pertinent facts:
 - FP, a nonresident alien individual, is a partner in PRS, an entity classified as a partnership for U.S. tax purposes
 - FP has a distributive share of 25% of the income, gain, loss, deduction and credit of PRS
 - PRS owns (i) appreciated real and personal property located in Country X and (ii) appreciated personal property located in the United States that is used or held for use in PRS's U.S. trade or business
 - None of the U.S. property constitutes a U.S. real property interest within the meaning of Section 897
- Issue: is any portion of the foreign partner's gain treated as income effectively connected with a USTB (ECI)?

Pre-2017 Tax Reform Authority: Revenue Ruling 91-32

IRS Analysis

- Treatment of the gain depends on its (A) source and (B) connection to PRS's the USTB
- The gain is U.S. source based on the following:
 - Under Section 865(e)(2) (the U.S. Office Rule), income from the sale of personal property by a nonresident is sourced to the United States if (i) the nonresident has an office or other fixed place of business (**Office**) in the United States and (ii) the income is attributable to such fixed place of business
 - Income is considered attributable to a U.S. Office if such Office is a “material factor” in the production of such income and regularly carries on activities of the type from which such income is derived
 - Partnership's U.S. Office is attributable to the foreign partner under the principles of *Unger v. Commissioner*, T. C. Memo. 1990-15; and
 - The partner's gain from disposition of the partnership interest is attributable to the partner's U.S. Office (IRS did not lay out its attribution analysis in the ruling)
- PRS's USTB activity is attributable to its foreign partner under Section 875(1)
- Because the gain is U.S. source, it is properly treated as ECI if (i) it is derived from an asset that is used or held for use in the conduct of a U.S. trade or business, or (ii) the activities of that trade or business were a material factor in the realization of the gain

Pre-2017 Tax Reform Authority: Revenue Ruling 91-32

IRS Analysis (cont'd)

- Because the value of the trade or business activity of a partnership affects the value of an interest therein and, an interest in a partnership that is engaged in a USTB is properly treated as an asset used or held for use in the USTB (and, therefore, an asset that produces ECI when sold at a gain)
- PRS had both U.S. trade or business assets and non-U.S. trade or business assets; in those cases, the IRS applied an *“aggregate” theory* to look through the partnership and treat the FP as selling its proportionate interest in PRS’ assets in order to determine the portion of the gain properly treated as ECI
- Result: the amount of gain or loss treated as ECI is the same as the amount of ECI that would have been allocated to FP if, instead, PRS had disposed of all of its assets at fair market value

Pre-2017 Tax Reform Authority: Grecian Magnesite

Background

- Grecian Magnesite Mining, Industrial & Shipping Co., SA, a foreign corporation (Grecian) held an interest in Premier Chemicals, LLC (Premier), a U.S. limited liability company that was classified as a partnership for U.S. tax purposes and engaged the business of mining and extracting magnesite in the United States
- Grecian did not otherwise have a U.S. trade or business or maintain a U.S. Office
- Premier made payments to Grecian in 2008 and 2009 in redemption of its interest (treated as a sale for tax purposes)
- Grecian took the position that none of its gain (approximately \$6.2 million in total) was ECI
- Grecian later conceded that the approximately \$2.2 million portion of its gain attributable to U.S. real property of Premier was properly treated as ECI under FIRPTA (Section 897(g))

Pre-2017 Tax Reform Authority: Grecian Magnesite

Background (cont'd)

- IRS position: Consistent with its position taken in Revenue Ruling 91-32, aggregate principles should be applied to treat the redemption as a disposition by Grecian of its proportionate interest in each of Premier's assets (resulting in the treatment of the remaining \$4.2 million of gain as ECI); in support, the IRS argued that:
 - Section 741 applies only to determine the character of the gain and does not mandate an entity approach for other determinations such as source and attribution to a trade or business; and
 - When applying a Code section outside subchapter K, you must look to the intent and purpose of the Code section involved in determining whether the aggregate or entity approach is most appropriate
- Taxpayer position: An “entity” theory should apply, under which none of the \$4.2 million of gain at issue should be treated as ECI

Pre-2017 Tax Reform Authority: Grecian Magnesite

Tax Court's Analysis

- The analysis set forth in Revenue Ruling 91-32 is not interpreting an ambiguous regulation and its analysis is unpersuasive; therefore, no deference to the ruling is required
- Section 741 requires the use of the entity rather than the aggregate theory (i.e., cannot look through and treat disposition of partnership assets), unless an exception to the general rule of Section 741 applies
 - Sections 897(g) and 751 noted as exceptions by the Tax Court
- The U.S. Office Rule does not apply to determine source of the gain; even if Premier's U.S. Office were attributed to Grecian, Grecian's redemption gain was not attributable to such Office
 - Aggregate principles do not apply to treat the redemption as a sale of Grecian's proportionate interest in Premier's assets
 - Premier's office was not a material factor in the realization of Grecian's disposition gain
 - Irrelevant that the value of Grecian's interest in Premier was attributable to the business activities carried on by Premier's U.S. Office
 - Premier was not regularly engaged in the purchase and sale of partnership interests
- Result: None of the \$4.2 million of gain at issue constitutes ECI; consequently, no portion of the gain is subject to U.S. tax

Pre-2017 Tax Reform Authority: Key Implications of Grecian Ruling

- Incongruity between result of foreign partner's disposition of interest and partnership's disposition of assets
 - Under Grecian approach, sale of assets by a partnership may produce ECI, whereas sale of interests in the partnership would not
 - Does this present a planning opportunity?
 - Beware step transaction and judicial doctrines
- Treatment of partnerships that hold U.S. real property interests or Section 751 “hot” assets
 - Only statutory exceptions to entity approach of Section 741
 - Grecian does not specify how these exceptions would apply in all cases (e.g., disposition of partnership interest at a gain at a time when it has a built-in loss in its hot assets)
- Planning considerations
 - Reexamine use of foreign rather than U.S. blockers in fund structures?
 - Consider structuring partner exits as sales of partnership interests rather than assets?

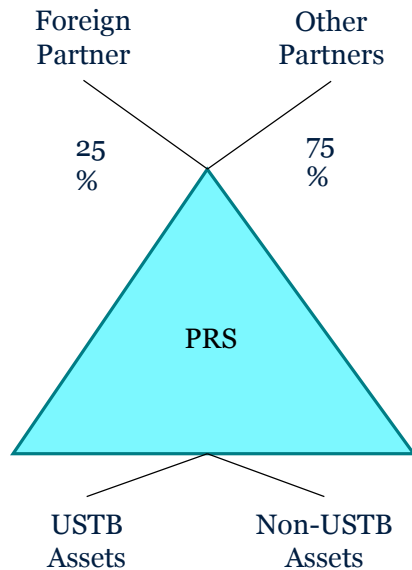
Pre-2017 Tax Reform Authority: Key Implications of Grecian Ruling

- Protective refund claims for prior year dispositions of partnership interests
 - Should a non-U.S. person who reported gain on the sale of a partnership interest as ECI in an open tax year file protective refund claim based on Grecian?
 - Any downside to making the protective refund claim?
 - How is the IRS responding to such claims?
- Impact on NOL carryforwards
 - Should effectively connected NOL carryforwards be adjusted down for any portion attributable to ECI partnership dispositions?
 - If such an NOL is used, is disclosure required?
 - What if such effectively connected NOLs were carried to and used in a tax year that is still open? Do GAAP reserves need to be created/increased?





Pre-2017 Tax Reform Authority: Key Implications of Grecian Ruling

- Possible legislative response (statutory or regulatory)
 - Could take the form of a broad override, or more targeted measures (e.g., limitation on Section 743 step-up when a partnership interest is sold free of U.S. tax by a foreign partner)
 - Could be retroactive, in whole or in part
- Split in Circuits, absent legislative response?
 - Circuit courts not bound by Tax Court decision, so results could be different in a refund suit
 - Even if Tenth Circuit overturns the Tax Court, does not preclude another Circuit from following the Tax Court (or adopting its own approach)
- IRS litigating position
 - What arguments can the IRS be expected to make in similar cases following Grecian?
 - Might the IRS take the position that Grecian supports attribution to a U.S. office where the U.S. office is regularly involved in redeeming interests in the partnership (e.g., and open-ended fund)?

Example 1 – Sale of Partnership With USTB and non-USTB Assets



U.S. Federal Tax Classifications

-  Corporation/Trust
-  U.S. Partnership
-  Branch
-  Disregarded Entity "DRE"

Facts

1. PRS is a partnership engaged in business both within and without the United States
2. PRS maintains an Office in the United States
3. PRS does not own any U.S. real property interests (within the meaning of Section 897)
4. None of the assets of PRS constitutes an unrealized receivable or inventory item (within the meaning of Section 751)
5. Foreign Partner owns a 25% interest in the capital and profits of PRS and disposes of its interest in PRS in a taxable sale

Rev. Rul. 91-32 Approach

1. Foreign Partner's gain is treated as ECI to the extent attributable to the USTB assets of PRS

Grecian Approach

1. None of Foreign Partner's gain is treated as ECI
2. Gain is treated as foreign source under Section 865(a) and is not subject to any U.S. income tax

Example 2 – Sale of Partnership With U.S. Real Estate/Hot Assets

Facts

1. Facts are the same as in Example 1, except that PRS is engaged in business only in the United States and all of its assets are used in its U.S. business.
2. PRS' assets include the following U.S. real property interests and Section 751 "hot" assets:

<u>Asset</u>	<u>FMV</u>	<u>Adjusted Basis</u>
U.S. real property	\$10,000,000	\$6,000,000
Equipment used in the U.S. business*	\$800,000	\$0
Inventory	\$700,000	\$500,000
Total	\$11,500,000	\$6,500,000

3. Foreign Partner's basis in its 25% interest in PRS is \$3 million; Foreign Partner disposes of its interest in a taxable sale for \$8 million, realizing gain of \$5 million

Rev. Rul. 91-32 Approach

1. Foreign Partner's entire \$5 million gain is treated as ECI

Grecian Approach

1. \$1,000,000 of Foreign Partner's gain (25% of the built-in gain in the U.S. real estate) would be treated as ECI under Section 897(g)
2. Not directly addressed by the Grecian ruling, but the source and ECI character of an additional \$250,000* of Foreign Partner's gain (25% of the built-in gain in the Section 751 hot assets described above) may also be determined under aggregate principles, resulting in ECI treatment in this case
3. The balance of Foreign Partner's gain should be treated as foreign source non-ECI and, therefore, not subject to any U.S. income tax

Example 3 – Sale of Partnership With Built-In Loss ECI Assets

Facts

1. Facts are the same as in Example 2, except that PRS' owns real estate outside the United States and it's balance sheet is as follows:

<u>Asset</u>	<u>FMV</u>	<u>Adjusted Basis</u>	<u>Gain</u>	<u>25% of Gain</u>
U.S. real property	10,000,000	6,000,000	4,000,000	1,000,000
Equipment used in the U.S. business	800,000	600,000	200,000	50,000
Inventory	700,000	1,000,000	(300,000)	(75,000)
Non-U.S. real property	20,000,000	12,000,000	8,000,000	2,000,000
Total	31,500,000	19,600,000	11,900,000	2,975,000

2. Foreign Partner's basis in its 25% interest in PRS is \$3 million; Foreign Partner disposes of its interest in a taxable sale for \$8 million, realizing gain of \$5 million

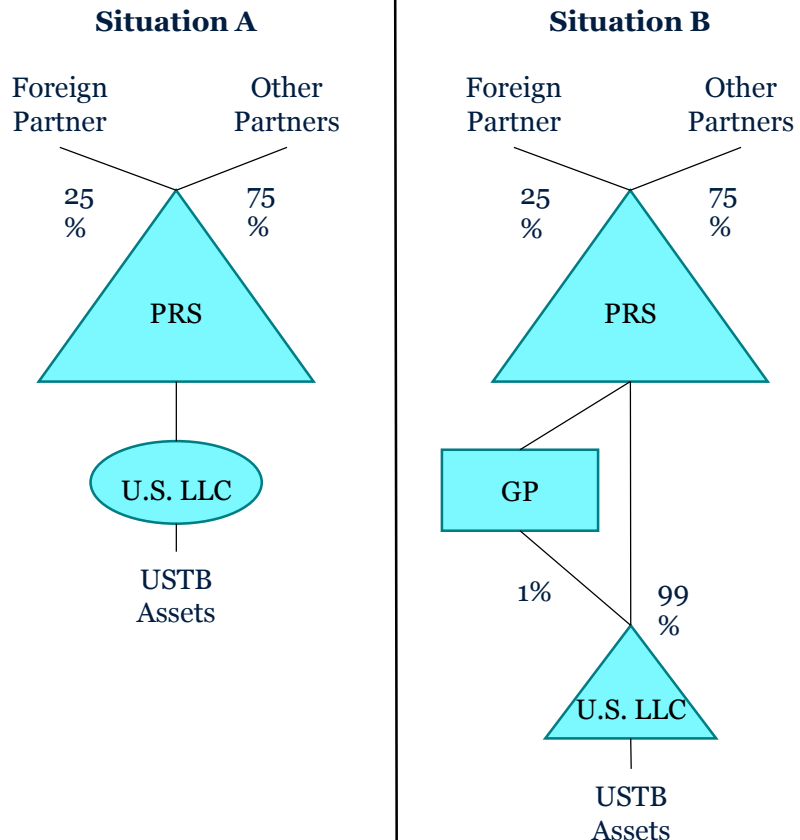
Section 864(c)(8) Approach

1. Foreign Partner's \$5 million gain is treated as ECI in the same proportion as Foreign Partner's distributive share of net ECI would bear to its distributive share of partnership net income, if PRS sold all of its assets at FMV on the date of Foreign Partner's disposition
2. In a deemed disposition of PRS assets at FMV, Foreign partner's distributive shares of ECI net gain and partnership net get would be \$975,000, and \$2,975,000, respectively; thus, Foreign Partner's ECI net gain = 32.77% of Foreign Partner's partnership net gain
3. \$1,638,655 of Foreign Partner's gain (32.77% of \$5,000,000) is treated as ECI

Grecian Approach

1. \$1,000,000 of Foreign Partner's gain (25% of the built-in gain in the U.S. real estate) would be treated as ECI under Section 897(g)
2. Not clear whether the Rev. Rul. 91-32 approach would apply to hot assets; can net loss in hot assets be netted against gain from U.S. real property?
3. What would happen if PRS did not own the U.S. real estate and had only a net loss in its Section 751 assets?

Example 4 – Sale of Partnership Assets



Facts

1. PRS holds USTB assets through U.S. LLC, a disregarded entity
2. Situation A: PRS sells its entire interest in U.S. LLC to an unrelated buyer
3. Situation B: For good business reasons, PRS converts U.S. LLC into a tax partnership by contributing 1% of its U.S. LLC interest to GP, a U.S. corporation; PRS and GP subsequently sell their entire interest in U.S. LLC to an unrelated buyer

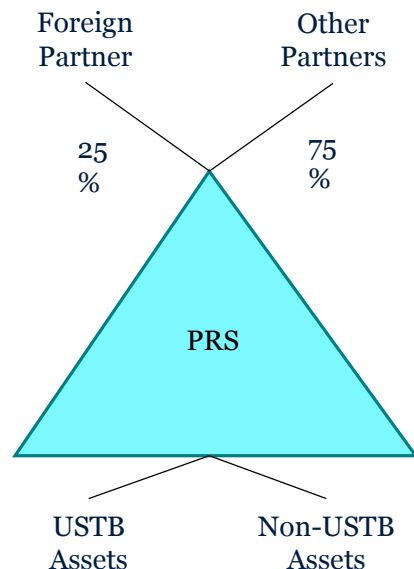
Rev. Rul. 91-32 Approach

1. Situation A: Foreign Partner's distributive share of PRS' gain is treated as ECI
2. Situation B: Foreign Partner's distributive share of PRS' gain on disposition of its 99% direct interest is treated as ECI (1% held through GP is subject to U.S. net income tax at the GP level)

Grecian Approach

1. Situation A: Foreign Partner's distributive share of PRS' gain is treated as ECI
2. Situation B: If form is respected, Foreign Partner's distributive share of PRS' gain on disposition of its 99% direct interest should be treated as foreign source non-ECI
 - a. Consider risk that the partnership conversion could be disregarded if considered transitory
 - b. Does it matter how much time elapses between partnership conversion and disposition?

Example 5 – Effect of Section 754 Election



Facts

1. Assume same facts as in Example 1; also assume that PRS has substantial built-in gain in its assets at the time of the sale

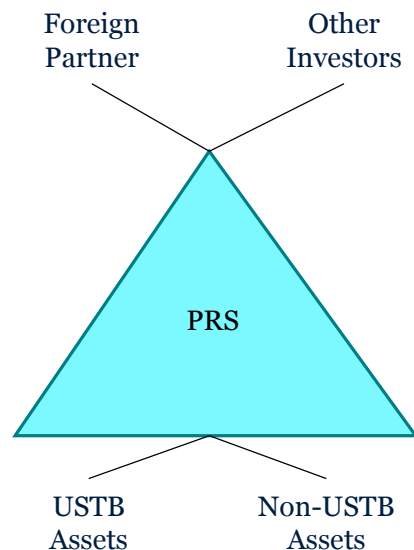
Rev. Rul. 91-32 Approach

1. Foreign Partner's gain is treated as ECI to the extent attributable to the USTB assets of PRS
2. If PRS has a Section 754 election in effect, the buyer will receive a 743(b) adjustment and effectively receive the benefit of a basis step-up
3. If PRS does not have a Section 754 election in effect, buyer will not get the benefit of a step-up and would be expected to discount its offer to account for the lost benefit

Grecian Approach

1. Foreign Partner's gain should be treated as foreign source non-ECI and, therefore, not subject to any U.S. income tax
2. If PRS has a Section 754 election in effect:
 - a. The built-in gain in the PRS assets would be permanently exempt from U.S. tax (Foreign Partner would not owe U.S. tax on the gain and buyer would receive a step-up)
 - b. Buyer presumably would not discount its offer, because receiving a step-up

Example 6 – Redemption of Partnership Interest



Facts

1. Assume same facts as in Example 1, except:
 - a. PRS is a U.S.-managed open-ended investment fund that makes regular redemptions, subject to restrictions intended to avoid publicly traded partner status;
 - b. PRS does not make fill-up allocations in connection with redemptions; and
 - c. Foreign Partner's interest in PRS is redeemed for cash

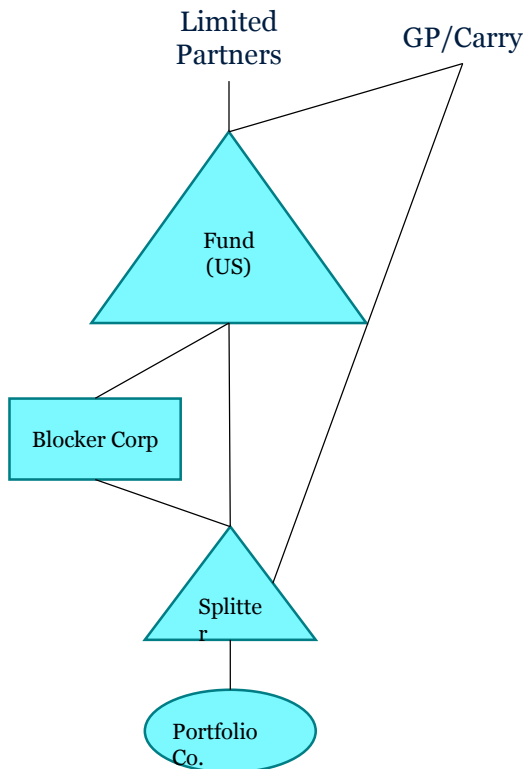
Rev. Rul. 91-32 Approach

1. Foreign Partner is treated as selling its interest in PRS in exchange for the redemption payment from PRS
2. Foreign Partner's gain is treated as ECI to the extent attributable to the USTB assets of PRS

Grecian Approach

1. Foreign Partner is treated as selling its interest in PRS in exchange for the redemption payment from PRS
2. Arguably, none of Foreign Partner's gain is treated as ECI under Grecian
3. Might IRS argue that Foreign Partner's gain is U.S. source under the U.S. Office Rule (opening the door to ECI treatment), because of the regular involvement of PRS's U.S. office in redeeming its own interests?

Example 7 – Foreign Blocker v. U.S. Blocker



Facts

1. Fund has invested in pass-through portfolio company engaged in a USTB
2. Blocker Corp is interposed for investors who want to avoid direct exposure to ECI or UBTI
3. Should Blocker Corp be organized as a U.S. or foreign corp?

Rev. Rul. 91-32 Approach

1. U.S. blocker is generally preferable for current income
 - a. U.S. blocker subject to U.S. net income tax on all of its income, but often possible to reduce its effective tax rate through leverage and withholding tax on distributions often reduced/eliminated via treaty
 - b. Foreign blocker can be subject to U.S. branch profits tax on current income that is ECI; very difficult to manage; where applicable, produces a 54.5% effective federal tax rate
2. On exit, little difference; both U.S. and foreign blocker subject to U.S. net income tax on ECI; generally possible to avoid a second level of tax upon liquidation

Grecian Approach

1. For current income, results are the same as under the Rev. Rul. 91-32 approach
2. On exit:
 - a. U.S. blocker pays U.S. net income tax on entire gain
 - b. No portion of the gain is ECI; foreign blocker pays no U.S. tax

Settlement to 91-32 versus Grecian - New Section 864(c)(8)

New Rule

- The 2017 Tax Cuts and Jobs Act expanded the section 864(c) definition of ECI to include the transfer by a nonresident alien individual or foreign corporation of an interest, owned directly or indirectly, in a partnership which is engaged in any trade or business within the U.S. (“**USTB**”)
 - The new law effectively overrules Grecian Magnesite
 - On December 20, 2018 the IRS released proposed regulations to implement these rules
- Amount of gain subject to U.S. tax: A foreign person’s ECI is the lesser of:
 - a) The foreign partner’s built in gain or loss in its partnership interest; and
 - b) The foreign partner’s share of gain or loss in the partnership’s assets used in the conduct of the partnership’s USTB
- Character of gain: The proposed regulations instruct that gain and loss be categorized into ordinary or capital buckets for purposes of measuring the lesser of limitation described above

New Section 864(c)(8)

- Key Limitations
 - Foreign Investment in Real Property Tax Act: Reduced by the amount treated as gain or loss of U.S. real property under section 897 to prevent double taxation of this income
 - Nonrecognition transactions: Gain or loss is limited to the extent otherwise unrecognized under the Code, such that nonrecognition provisions can defer the imposition of tax
 - Treaty exemptions: To the extent the transfer of a partnership is exempt from tax under a tax treaty, Section 864(c) should not apply (e.g., if a treaty prohibits the U.S. from taxing the gain from the disposition of certain asset)
- Tiered partnerships: The amount of gain treated as ECI is calculated at each tier, with the lower tier calculations being allocated to the upper tier partnership
- Applicability of rules: The proposed regulations apply to transfers occurring on or after November 27, 2017, but if finalized after June 22, 2019, the final regulations would only apply to transfers occurring on or after the date filed in the Federal Register

Section 1446(f) Withholding

New Rule

- The 2017 Tax Cuts and Jobs Act added section 1446(f), which requires the transferee of a partnership interest to deduct and withhold 10% of the amount realized by a transferor on its transfer of the partnership interest if a portion of gain would be treated under section 864(c)(8) as ECI
 - Proposed regulations were released May 7, 2019 to provide implementation rules
- Filing impact on transferee and partnership: Withholding must be paid to the IRS and reported to the IRS and the partnership on Forms 8288 and 8288-A by the 20th day after the date of the transfer
 - If a transferee fails to withhold the partnership must withhold from any distribution made to the transferee prospectively
 - The transferee remains liable until it is withheld upon and interest and penalties could apply.
- Filing impact on transferor: Transferor is allowed a credit against its U.S. tax liability for amounts withheld under section 1446(f)
 - To claim the credit the transferor must file a U.S. tax return and attach a copy of Form 8288-A that includes the transferor's TIN

Section 1446(f) Withholding

Transferors Impacted

- Undocumented transferors are deemed to be foreign unless it can certify that it is a U.S. person, with a Form W-9 being sufficient.
- Foreign partnerships can receive look-through treatment by certification through Form W-8IMY (e.g., limiting amount realized for amounts attributable to non-U.S. partners)

Notification Requirements

- The transferor partner has an obligation to inform the partnership of the transfer within 30 days of the transfer
- The statement must specify the date of the transfer and the transferor and transferee's identifying information
- After receipt of the statement or knowledge of a transfer, the partnership has an obligation to provide information relevant to make calculations under section 864(c)(8) (this includes upon distributions treated as transfers for non-PTPs)

Section 1446(f) Withholding

Transfers

- A transfer is a sale, exchange or other disposition of an interest in a partnership
- Section 1446(f) withholding also treats as a transfer certain distributions from partnerships in excess of a partners' partnership interest
 - For publicly traded partnerships (**PTP**) a distribution may be exempt if the partnership certifies that the distribution does not exceed the net income earned by the partnership since its last distribution
 - For all other partnerships an exception to withholding must apply

Amount Realized

- The amount realized is the purchase price (cash and property) plus the he amount of cash paid plus the transferor's share of partnership liabilities (i.e., the withholding is not limited to just the portion of proceeds that qualify as ECI)
 - The amount realized on the transfer of a PTP does not include the transferor's share of partnership liabilities

Section 1446(f) Withholding

Liabilities

- Transferee can rely on a certification from the transferor or partnership as to the amount of the transferor's share of partnership liabilities in certain situations:
 - *Transferee certification*: Among other requirements, if the transferee owns less than 50% of the partnership throughout the 12 months prior to the transfer and has a U.S. taxpayer ID, the transferee can certify its share of partnership liabilities using the Schedule K-1.
 - Use of the latest Schedule K-1 is permitted provided the transferee has no knowledge of events occurring that would cause the liabilities to be more than 25% different from the amount shown
 - The Schedule K-1 must be for a taxable year that closed no more than 22 months before the date of the transfer
 - *Partnership certification*: The partnership can certify the transferee's share of partnership liabilities as of the “Determination Date”
- If liabilities cause withholding to exceed the purchase price, the withholding is limited to 100% of the purchase price
- If the partnership liabilities cannot be established, the transferee can withhold 100% of the purchase price

Section 1446(f) Withholding

Maximum Tax Liability

- The proposed regulations allow for a procedure to estimate tax liability under section 864(c)(8) and limit withholding to this amount
- Transferor must provide a certificate that specifies the gain that would be ECI on the Determination Date and represents that the partnership has provided necessary information to calculate the gain that is ECI

Logistics to Calculate Withholding

- Under the proposed regulations the “Determination Date” for calculating key elements of withholding can be made as of:
 - The date of the transfer;
 - A date no more than 60 days before the date of transfer (e.g., at a quarter end); or
 - The later of (a) the first day of the tax year in which the transfer occurs, or (b) the date of the most recent Section 704 revaluation event before the transfer
- The “Determination Date” methodology is selected transfer by transfer and once selected, consistently within the transfer

Section 1446(f) Withholding

Non-PTP exceptions to withholding

Exemptions under proposed regulations	Material Difference from Prior Notices
The transferor certifies that it is not a foreign person (Form W-9)	Proposed regulations specify that Form W-9 is sufficient
The transferor certifies that no gain is recognized on the transfer, taking into consideration section 751 ordinary income recognition for “hot assets”	“Hot asset” rules not taken into account in Notice 2018-29
The partnership certifies that the amount of ECI from the hypothetical sale of all assets of the partnership would be less than 10% of total net gain	25% of total net gain used in Notice 2018-29
The transferor certifies that (1) it was a partner in the partnership at all times for the three preceding taxable years and (2) its allocation of ECI for the three preceding taxable years was less than \$1 million and less than 10% of the transfer’s total distributive share of the partnership income;	25% of transfer’s total distributive share used in Notice 2018-29
The transferor certifies that gain is limited under other nonrecognized provisions of the code	N/A
The transferor certifies that gain is exempt under an applicable tax treaty (exemption must apply to entire gain)	N/A

Section 1446(f) Withholding

Treaty Exemption to Withholding

- The transferor can certify that gain is exempt under an applicable tax treaty between the U.S. and a foreign country (exemption must apply to entire gain) and provide the transferee with a valid Form W-8BEN or W-8BEN-E
- The transferee must mail the IRS a copy of the certification and withholding certificate by the 30th day after the date of the transfer
- Example of treaty exemptions
 - If a treaty prohibits the U.S. from taxing the gain on the disposition of assets held by the partnership
 - If a non-U.S. partnership lends money in the U.S. such that the income received is ECI, but the partnership has no permanent establishment in the U.S. under a treaty

Section 1446(f) Withholding

PTP Specific Rules

- Once effective, the regulations should lift the suspension of withholding on transfers of publicly traded interests granted by Notice 2018-08
- Generally, a broker and not the transferee is required to withhold and provide Forms 1042-S and 1040
- Key exceptions to withholding on PTP transfers:
 1. The transferor certifies that it is not a foreign person (by providing a valid Form W-9);
 2. The partnership certifies that less than 10% of the total gain on the hypothetical sale of assets would be ECI (posted online for brokers' reference);
 3. For distributions, the partnership certifies that distributions does not exceed the net income earned by the partnership since its last distribution (posted on PTP's website); and
 4. The transferor certifies that gain is exempt under an applicable tax treaty (posted on PTP's website); and
 5. The transferor is already subject to backup withholding under section 3406.
- A broker can rely upon exceptions posted online by PTP posted within a period of 92 days ending on the transfer date

Section 1446(f) Withholding

Applicability of Rules

- The proposed regulations apply to transfers that occur 60 days after the final regulations are issued. In the meantime, the taxpayers may apply more lenient guidance of Notice 2018-08 and Notice 2018-29
 - *Temporary suspension of withholding of PTP*: Notice 2018-08 suspends withholding on publicly traded partnerships and Notice 2018-29 suspends partnership withholding requirements when a transferee fails to withhold under section 1446(f)
 - *Exceptions to withholding*: Notice 2018-29 provides the same exceptions as the proposed regulations except for several key modifications:
 - The 10% ECI thresholds on exceptions #3 and #4 apply at a more generous 25%
 - Exception for transfers that do not result in gain under exception #2 do not consider ordinary income arising as a result of section 751 “hot assets”
 - *Reliance on proposed regulations permitted*: Taxpayers can apply the proposed regulation rules with regard to transfers on or after May 7, 2019 before finalization (e.g., Notice 2018-29 required the Schedule K-1 be no more than 10 months before a transfer for transferee liability certification, but the proposed regulations allow a 22-month look back)

Thank You

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