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Following the BEAT: IRS Issues Proposed Regulations on Application of Base Erosion and Anti-Abuse Tax

The proposed regulations provide rules for identifying which taxpayers are subject to the BEAT and for computing BEAT liability.

Key Points:

The base erosion and anti-abuse tax (BEAT) proposed regulations:

- Aggregate corporations related by 50% common ownership, including foreign corporations to the extent of their effectively connected income
- Coordinate BEAT liability computation with limitations on business interest expense deductions under Section 163(j)
- Expand base erosion payments to include any form of consideration, including cash, property, the assumption of liabilities, and even stock used in nonrecognition transactions subject to Section 332, 351, or 368
- Look through partnerships in defining payments subject to the BEAT
- Exclude payments for cost component of intercompany services eligible for the services cost method, even if subject to a markup
- Clarify impact of withholding taxes
- Provide special rules for banks and securities dealers (including for qualified derivative payments and total loss-absorbing capacity securities)
- Reiterate the anti-abuse rule

On December 13, 2018, the US Department of the Treasury (Treasury) and the US Internal Revenue Service (IRS) issued proposed regulations (Proposed Regulations) on the BEAT, which was introduced as Section 59A[1] by the Tax Cuts and Jobs Act (TCJA).[2] The BEAT is an additional tax on corporate taxpayers that derive significant US income tax benefits from deductible payments to non-US affiliates if such payments are not subject to US tax, or are subject to a reduced rate of tax via an income tax treaty.

Latham & Watkins has published a white paper analyzing the TCJA generally and will continue to provide analysis and insights through the Latham & Watkins US Tax Reform Resource Center.

BEAT Basics

The BEAT essentially imposes on certain corporate taxpayers a tax equal to at least a specified percentage of their taxable income, as modified to add back certain deductions treated as base erosion

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tax benefits. Specifically, applicable taxpayers must pay the base erosion minimum tax amount (BEMTA), which equals the excess, if any, of (1) the base erosion and anti-abuse tax rate (BEAT rate) multiplied by the applicable taxpayer's modified taxable income over (2) the applicable taxpayer's adjusted regular tax liability. The following formula summarizes the BEMTA calculation:

BEMTA = (BEAT rate x modified taxable income) - adjusted regular tax liability

Summary explanations of these and other key terms follow:

- **Applicable taxpayer:** Generally, a corporation (other than a REIT, a RIC, or an S corporation) that satisfies the gross receipts test and the base erosion percentage test
  - **Aggregate group:** Generally, a group of corporations connected through stock ownership of more than 50% (by vote or value). An aggregate group generally will not include a foreign corporation, except with regard to its effectively connected income (ECI).
  - **Gross receipts test:** Satisfied if the taxpayer's aggregate group has at least $500 million[3] of average annual gross receipts during the three prior taxable years
  - **Base erosion percentage test:** Satisfied if the taxpayer's aggregate group has a base erosion percentage of at least 3% (or 2% if the taxpayer is a member of an affiliated group that includes a domestic bank or a registered securities dealer)
    - **Base erosion percentage:** The quotient of the taxpayer's aggregate group's (1) base erosion tax benefits divided by (2) the sum of the taxpayer's base erosion tax benefits and other gross deductions (but excluding net operating losses (NOLs), the deduction for the foreign-source portion of dividends paid by US corporations, foreign-derived intangible income deductions, global intangible low-taxed income (GILTI) deductions, qualified derivative payments (QDPs) that are not base erosion tax benefits, deductions for the cost component of certain services payments, certain foreign exchange losses, and total loss-absorbing capacity (TLAC) securities payments)

- **BEMTA:** Generally, the excess, if any, of (1) the BEAT rate multiplied by the applicable taxpayer's modified taxable income over (2) the applicable taxpayer's adjusted regular tax liability
  - **BEAT rate:** 5% for taxable years beginning in 2018, 10% for taxable years beginning in 2019 through 2025, and 12.5% thereafter. The BEAT rate is 1 percentage point higher for taxpayers that are members of an affiliated group that includes a bank or registered securities dealer.
  - **Modified taxable income:** The applicable taxpayer's taxable income as computed for regular tax purposes increased by adding back base erosion tax benefits and the base erosion percentage of the taxpayer's deduction for NOLs. The base erosion percentage of NOLs is determined in the year that the NOLs arise, and the base erosion percentage of NOLs arising in taxable years before 2018 (the effective date of the BEAT) is deemed to be 0%. Notably, modified taxable income is computed (1) on a taxpayer-by-taxpayer basis (the applicable taxpayer's aggregate group is not relevant, but a consolidated group is generally treated as a single taxpayer) and (2) on an add-back basis (*i.e.*, not using a recomputation approach like that used to compute the repealed corporate alternative minimum tax).
    - **Base erosion tax benefits:** Generally, the amount of the deductions and certain other tax benefits (*e.g.*, certain reductions in gross income or gross receipts) arising from base erosion payments, including base erosion payments that are themselves deductible and depreciation and amortization deductions for property acquired in exchange for base erosion payments. In this regard:
      - Base erosion payments do not include payments that are fully withheld upon as fixed, determinable, annual, or periodical (FDAP) income. If the withholding rate

on a FDAP payment is reduced pursuant to an income tax treaty, an amount of the tax benefits proportional to the reduction is treated as a base erosion tax benefit.

    - The Proposed Regulations contain rules coordinating the computation of the base erosion tax benefits with the limitation of business interest expense under Section 163(j). These rules generally treat business interest expense that is deductible under Section 163(j) first as attributable to base erosion payments and only then to unrelated party interest, thereby maximizing the amount of base erosion tax benefits.

  - **Base erosion payments:** Generally, payments or accruals by a US corporation or by a foreign corporation that are allocated and apportioned to its ECI made to certain foreign persons related to the taxpayer if such payments or accruals are (1) deductible, (2) used to acquire depreciable or amortizable property, (3) paid for reinsurance and reduce the applicable taxpayer's gross income, or (4) made with respect to certain surrogate foreign corporations or related foreign persons and reduce the applicable taxpayer's gross receipts. There are exceptions for types of payments that would otherwise constitute base erosion payments, including for interest disallowed under Section 163(j) that is carried forward from a taxable year beginning prior to 2018 and deemed paid in a later year, the cost component of certain payments for services eligible for the services cost method (or the SCM exception, discussed below), QDPs, payments that are ECI to the recipient, certain foreign exchange losses, and payments on TLAC securities. Somewhat surprisingly, the Proposed Regulations indicate that stock (and other cash and non-cash) consideration for an acquisition of depreciable assets from a foreign related party in a tax-free transaction governed by Section 332, 351, or 368 may be treated as a base erosion payment.

- **Adjusted regular tax liability:** The applicable taxpayer's regular tax liability reduced by (1) all tax credits (including foreign tax credits) other than credits for overpayment of taxes, credits for US tax withheld at source and, until 2026, the research credit and a portion of certain other Section 38 credits, including the renewable electricity production credit.

Figure 1: Computation of Base Erosion Minimum Tax Amount (BEMTA)

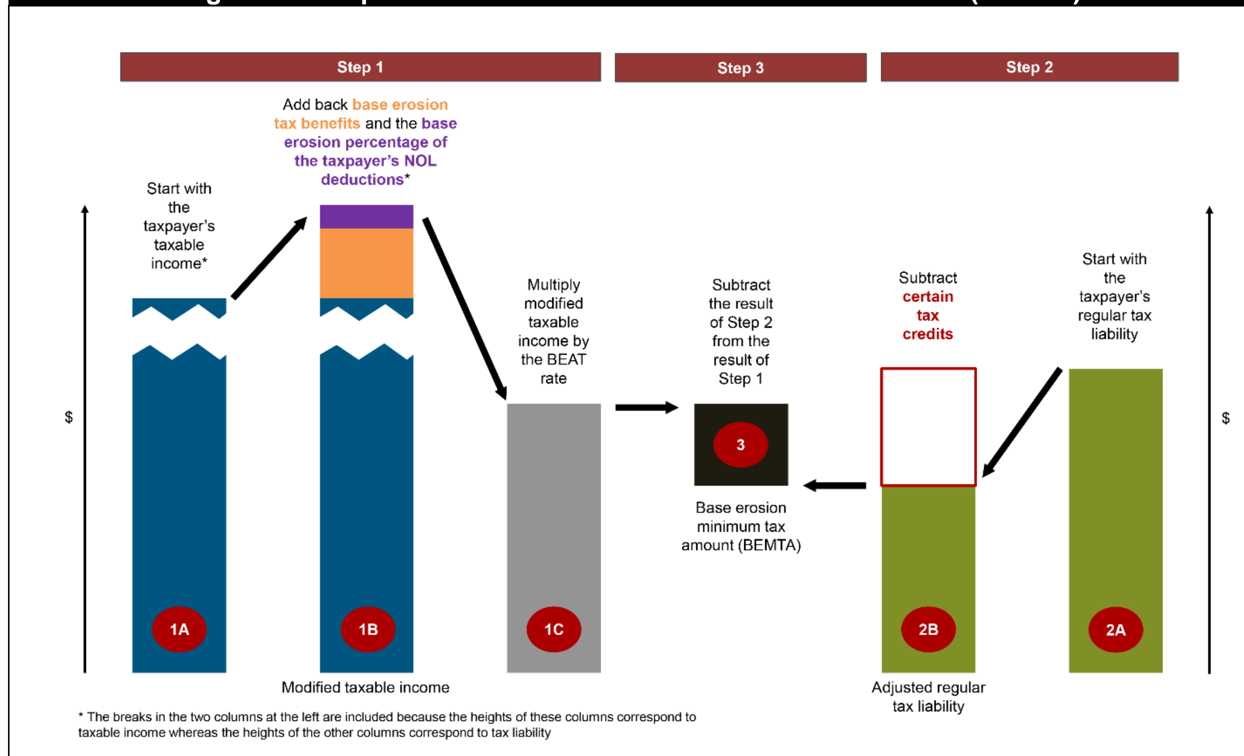
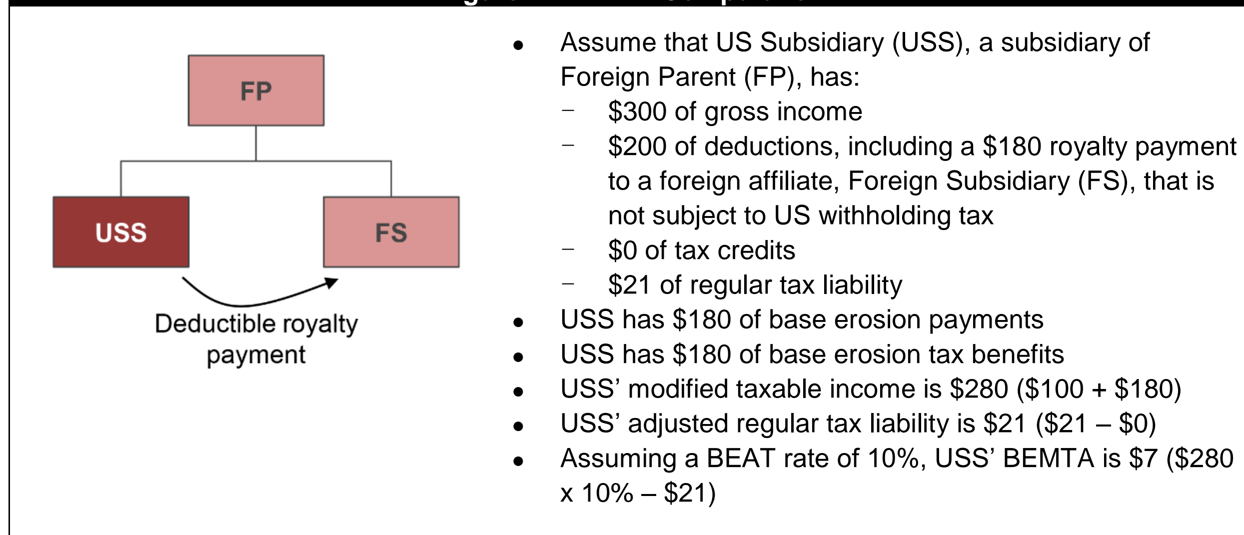


Figure 2: BEMTA Computation



Base Erosion Payments and Base Erosion Tax Benefits

The determination of which payments made by a corporation are base erosion payments and what tax benefits the taxpayer derives from such payments is central both to the determination of whether BEAT applies (by determining the base erosion percentage) and to the computation of BEAT liability. Under the Proposed Regulations, there are several types of payments that are specifically excepted from base erosion payments, such as interest disallowed under the former Section 163(j) (the earnings stripping

limitation) that is carried forward from a taxable year beginning prior to 2018 and deemed paid in a later year, the cost component of certain payments eligible for the SCM exception in the Treasury Regulations under Section 482, QDPs, payments that are ECI to the recipient, certain foreign exchange losses, and payments on TLAC securities. As such, these payments do not give rise to the base erosion tax benefits included in the numerator of the base erosion percentage, thereby reducing the percentage. If the BEAT applies, tax deductions arising from such payments are not added back to the applicable taxpayer's taxable income to arrive at the BEMTA.

SCM Exception

The Proposed Regulations clarify the scope of the SCM exception, providing guidance on one of the more ambiguous aspects of the BEAT. In general, the SCM exception provides that an amount paid or accrued by a taxpayer to a foreign related party for certain ancillary or incidental low margin services[4] will not constitute a base erosion payment if (1) the services are eligible for services cost method (determined without regard to the requirement that the services do not contribute significantly to fundamental risks of business success or failure, known as the business judgment rule) and (2) the amount constitutes the total services cost with no markup component. The Proposed Regulations interpret the statutory language in a taxpayer-friendly way to exclude the cost component of the SCM-eligible payment from the definition of a base erosion payment, so that only the portion of the payment representing the markup is to be treated as a base erosion payment. As the preamble to the Proposed Regulations points out, this interpretation allows taxpayers required by non-tax law or non-US transfer pricing rules to include a markup on the cost of related party services to at least partially avail themselves of the SCM exception, without subjecting the entire amount of the payment to the BEAT rules.

Both US-parented and foreign-parented multinational groups may benefit from the SCM exception, as illustrated below.

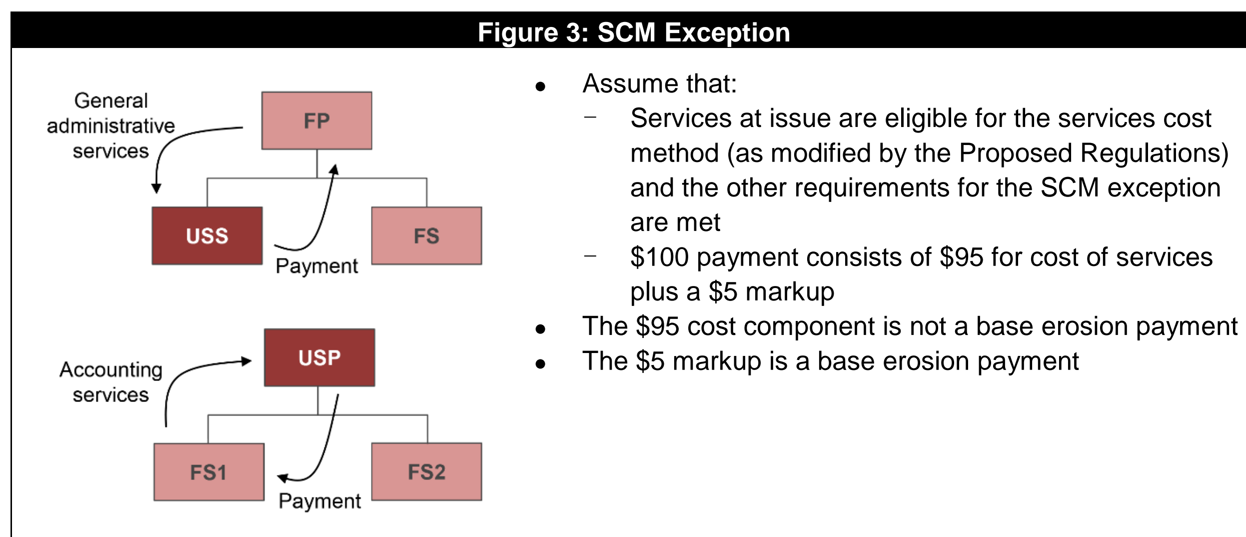


Figure 3: SCM Exception

In order for the cost component to qualify for the SCM exception, the Proposed Regulations provide that the services and amount paid must satisfy the requirements in the applicable Treasury Regulations relating to the services cost method (without regard to the business judgment rule). Additionally, the Proposed Regulations impose certain record-keeping requirements that a taxpayer must satisfy to qualify for the SCM exception.

Impact of FDAP Withholding on the Computation of Base Erosion Tax Benefits

If a payment is determined to be a base erosion payment but is subject to 30% FDAP withholding tax and that tax is actually deducted and withheld, then the payment does not give rise to a base erosion tax benefit. If the withholding rate is reduced under an income tax treaty, and the withholding tax is actually deducted and withheld, the base erosion payment is treated as a base erosion tax benefit only proportionally to the reduction, as illustrated below.

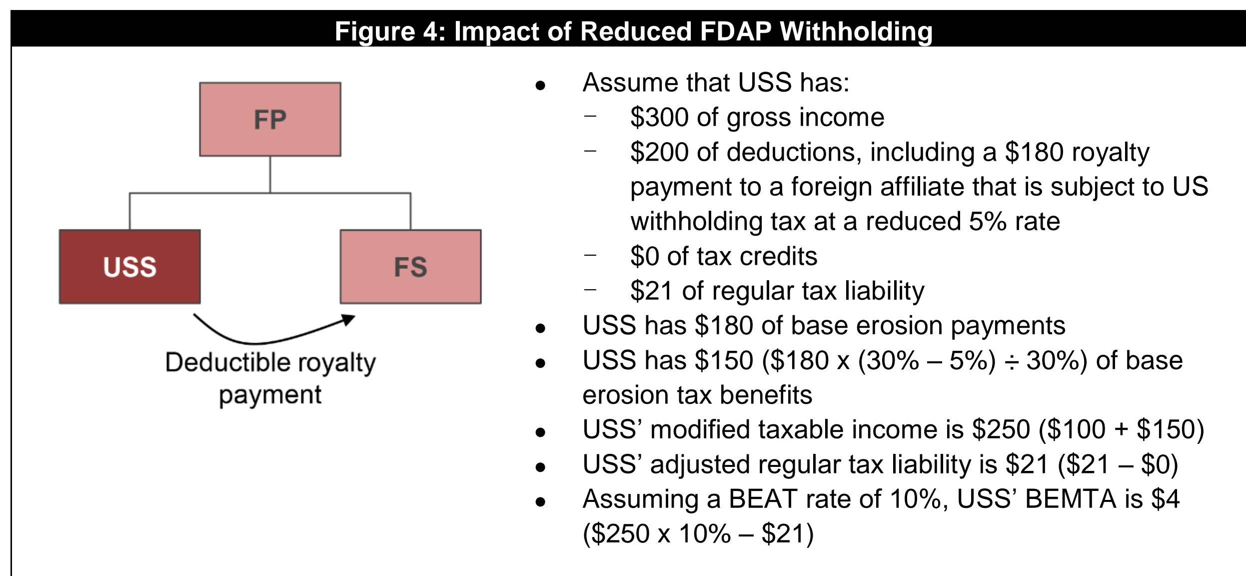


Figure 4: Impact of Reduced FDAP Withholding

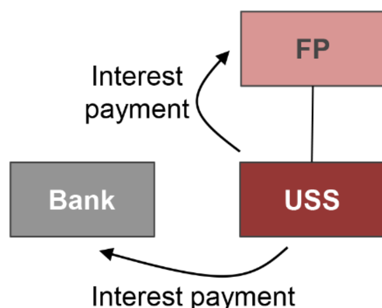
Impact of Business Interest Expense Limitations on the Computation of Base Erosion Tax Benefits

Section 163(j) generally limits the deductibility of net business interest expense paid to related and unrelated parties to 30% of adjusted taxable income, with disallowed amounts carried forward to subsequent years. When Section 163(j) applies to limit the deductibility of business interest expense and some, but not all, of an applicable taxpayer's interest payments are made to foreign related parties, and therefore are base erosion payments, the taxpayer must determine how much of the business interest expense deduction allowed under Section 163(j) is treated as a base erosion tax benefit. The Proposed Regulations provide the following ordering rules to address this issue:

- Current year business interest expense is deducted before any disallowed business interest expense carryforwards.
- Generally, disallowed business interest expense carryforwards are deducted in the order of the taxable years in which they arose, beginning with the earliest taxable year.
- Business interest expense arising in a given year that is allowed to be deducted under Section 163(j) is treated first as related party business interest expense (divided between foreign and domestic business interest expense on a pro-rata basis) and second as unrelated business interest expense.

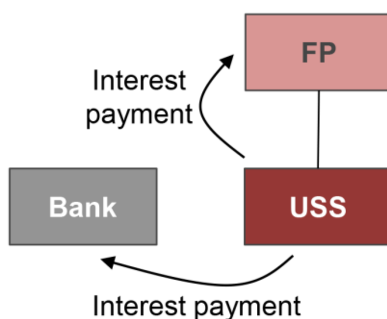
These rules accelerate related party business interest expense for purposes of the BEAT and, thus, the treatment of interest deductions as base erosion tax benefits. The following examples illustrate these general ordering rules.

Figure 5: Interaction With Excess Current Business Interest Expense



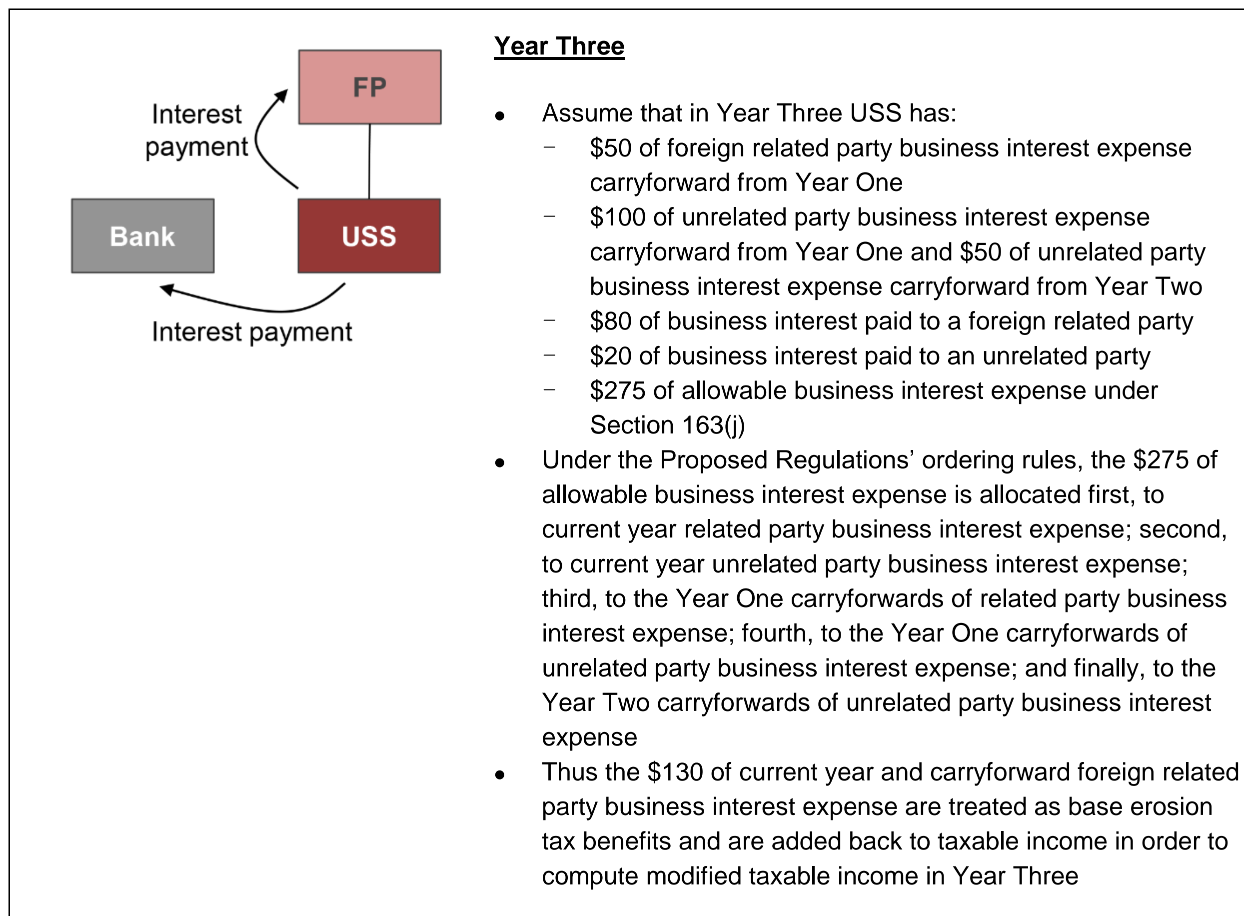
Year One

- Assume that in Year One USS has:
  - $350 of business interest paid to a foreign related party
  - $100 of business interest paid to an unrelated party
  - $300 of allowable business interest expense under Section 163(j)
- Under the Proposed Regulations' ordering rules, the $300 of allowable business interest expense is first allocated to related party business interest expense
- Thus, all of USS' $300 of allowable business interest expense is treated as foreign related party business expense and as a base erosion tax benefit, and is added back to USS' taxable income to compute its modified taxable income
- Under the Proposed Regulations, the remaining $50 of foreign related party business interest expense and all $100 of the unrelated party business interest expense are carried forward



Year Two

- Assume that in Year Two USS has:
  - $50 of foreign related party business interest expense carryforward from Year One
  - $100 of unrelated party business interest expense carryforward from Year One
  - $100 of business interest paid to a foreign related party
  - $200 of business interest paid to an unrelated party
  - $250 of allowable business interest expense under Section 163(j)
- Under the Proposed Regulations' ordering rules, the $250 of allowable business interest expense is first allocated to current year related party business interest expense and then to current year unrelated party business interest expense, so that all of USS' $100 of current year foreign related party business expense is treated as a base erosion tax benefit and added back to USS' taxable income to compute its modified taxable income in Year Two
- The remaining $150 of allowable deductions for business interest expense are not treated as a base erosion tax benefit
- The disallowed $50 of current year unrelated party business interest expense is carried forward



Year Three

- Assume that in Year Three USS has:
  - $50 of foreign related party business interest expense carryforward from Year One
  - $100 of unrelated party business interest expense carryforward from Year One and $50 of unrelated party business interest expense carryforward from Year Two
  - $80 of business interest paid to a foreign related party
  - $20 of business interest paid to an unrelated party
  - $275 of allowable business interest expense under Section 163(j)
- Under the Proposed Regulations' ordering rules, the $275 of allowable business interest expense is allocated first, to current year related party business interest expense; second, to current year unrelated party business interest expense; third, to the Year One carryforwards of related party business interest expense; fourth, to the Year One carryforwards of unrelated party business interest expense; and finally, to the Year Two carryforwards of unrelated party business interest expense
- Thus the $130 of current year and carryforward foreign related party business interest expense are treated as base erosion tax benefits and are added back to taxable income in order to compute modified taxable income in Year Three

As illustrated by the examples above, the treatment of carryforward business interest expense deductions as foreign related party, domestic related party or unrelated party business interest expense is determined in the year in which the deductions arise rather than in the year in which the deductions are taken by the applicable taxpayer. For taxpayers that expect that they may be subject to the BEAT, this rule adds significant complexity by introducing a requirement to keep records of the annual vintage and related/unrelated status of interest expense carryforwards.

The BEAT rules may be especially harsh to taxpayers that generate GILTI, Subpart F, or other income that is subject to creditable foreign taxes. As described more fully below, increases in GILTI, Subpart F income, or foreign branch income (which might be subject to foreign income and/or withholding taxes that give rise to substantial foreign tax credits) may increase the taxpayer's tax liability under the BEAT, causing some taxpayers to consider replacing related party debt with third-party debt or otherwise restructuring related party debt.

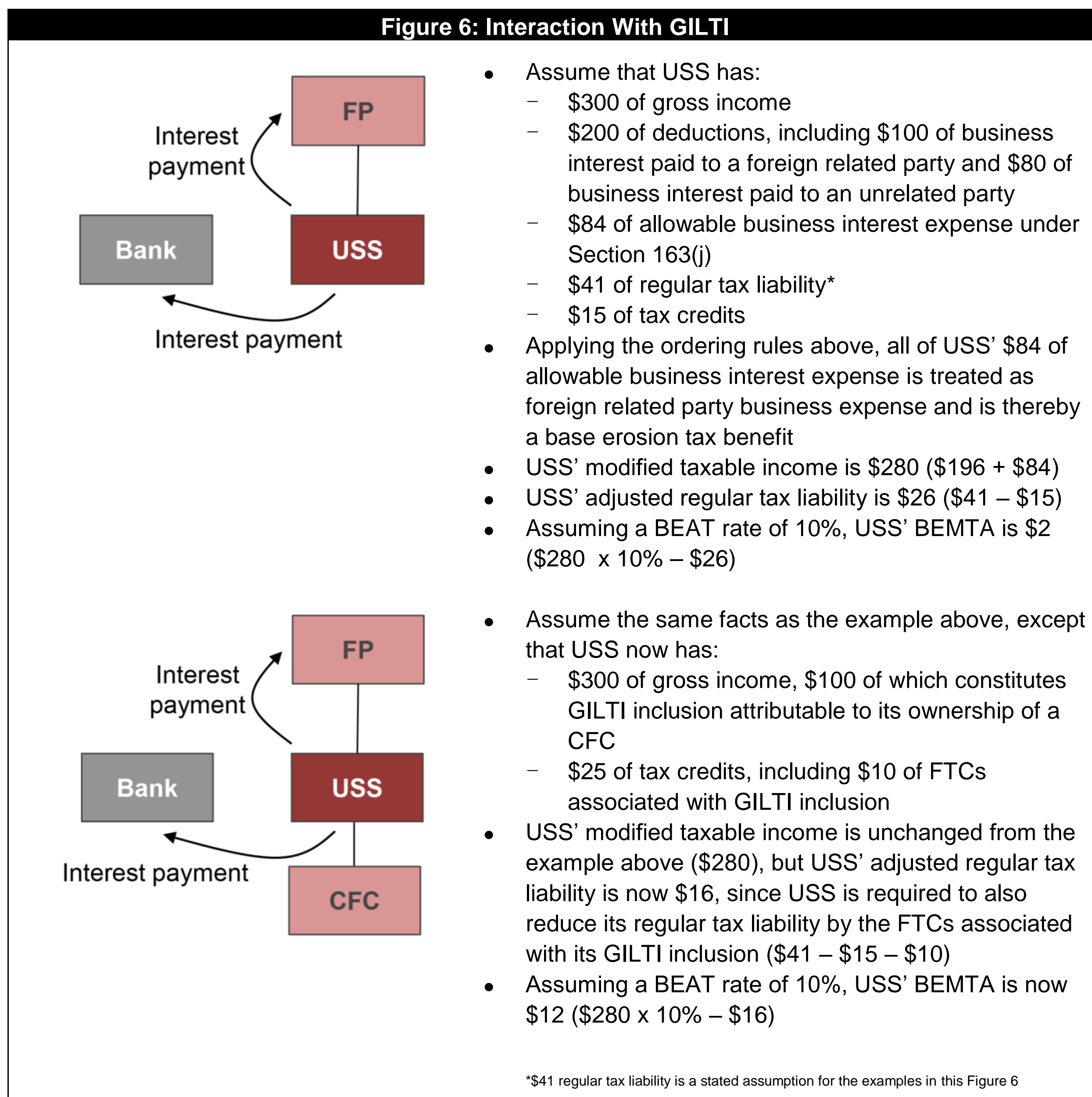
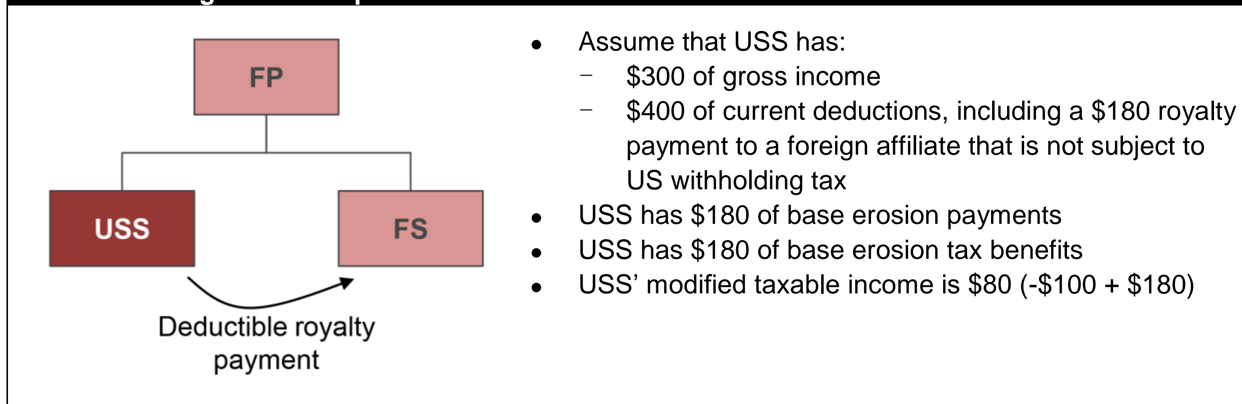


Figure 6: Interaction With GILTI

Impact of Current Year Losses and NOLs on the Computation of Modified Taxable Income

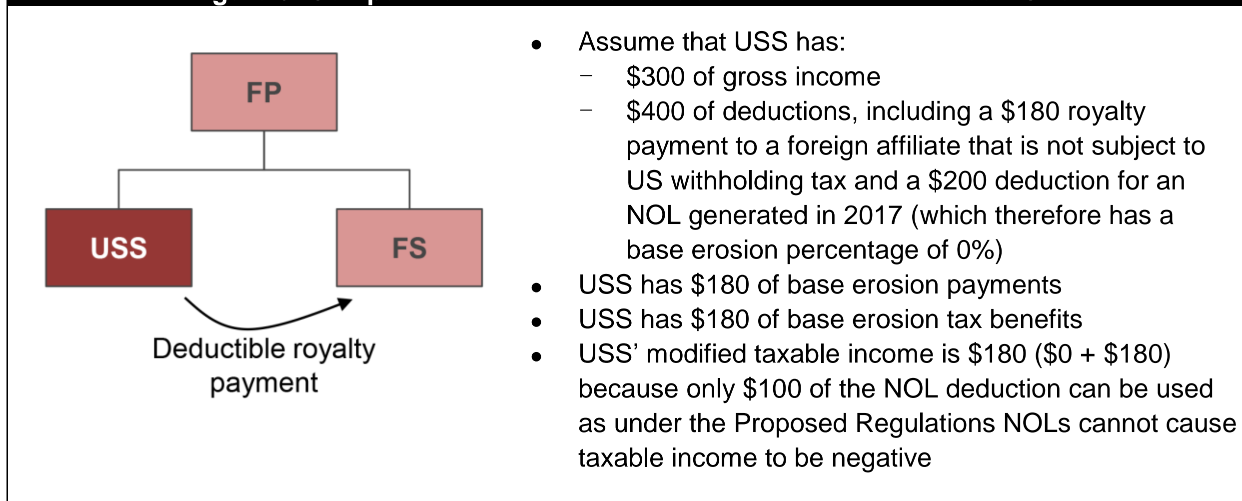
The computation of modified taxable income begins with the applicable taxpayer's taxable income, which may be negative (computed without regard to NOL deductions) as a result of current year losses.

Figure 7: Computation of Modified Taxable Income With Current Losses



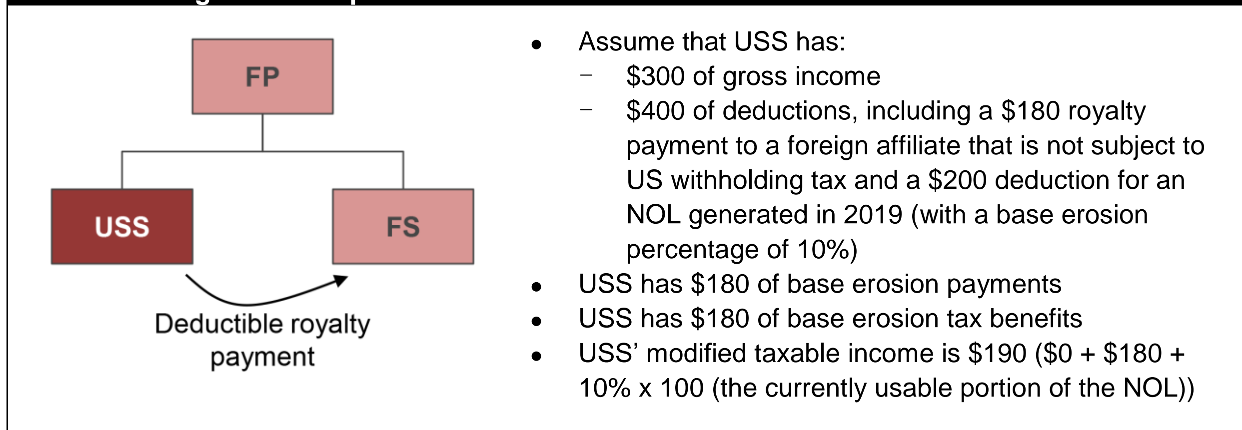
Although the computation of modified taxable income may begin with negative taxable income as a result of current year losses, NOL carryforwards are allowed only to the extent of positive taxable income as illustrated in the following example.

Figure 8: Computation of Modified Taxable Income With Excess NOLs



Consistent with this approach, only the base erosion percentage of NOLs allowed in computing taxable income are added back to taxable income to compute modified taxable income as illustrated in the following example.

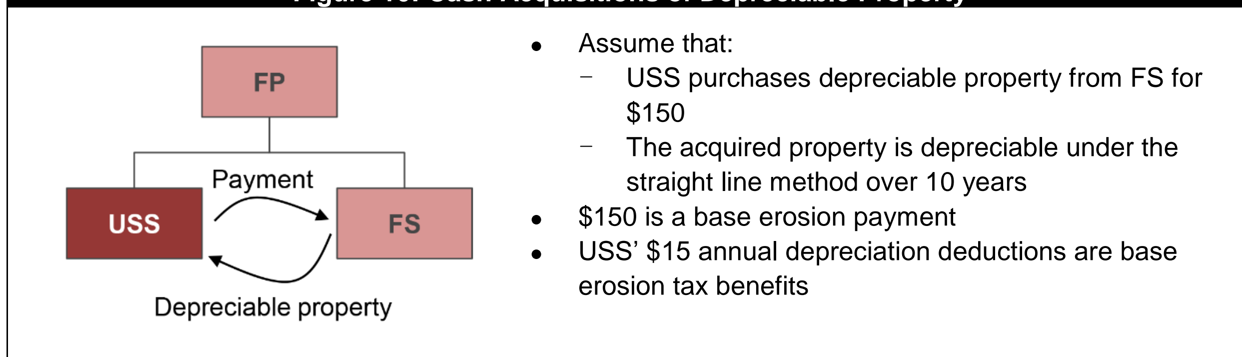
Figure 9: Computation of Modified Taxable Income With Post-2017 NOLs



Acquisitions of Depreciable Property in Taxable and Tax-Free Transactions

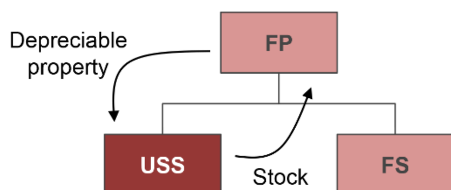
The Proposed Regulations provide that the acquisition of property subject to a deduction for depreciation or amortization (depreciable property) from a foreign related party may generate base erosion tax benefits not only in taxable transactions but also tax-free transactions. In a tax-free transaction (such as those governed by Section 332, 351, or 368), base erosion payments may consist of stock received or deemed received and/or liabilities assumed as consideration for depreciable property. However, a dividend of depreciable property from a foreign related party does not give rise to a base erosion tax benefit, because there is no payment.

Figure 10: Cash Acquisitions of Depreciable Property



Any consideration, including stock, property, and the assumption of liabilities, that is provided in an acquisition of depreciable property may constitute a base erosion payment even if it occurs as part of a tax-free transaction. For example, when a domestic corporation issues stock to a foreign related party in exchange for depreciable property in a tax-free exchange under Section 351 or a reorganization under Section 368, the issuance of stock to the foreign related party may constitute a base erosion payment and the depreciation or amortization deductions taken on the acquired property may constitute base erosion tax benefits.

Figure 11: Non-Cash Acquisitions of Depreciable Property



- Assume that:
  - FP contributes property to USS in exchange for USS stock in a transaction that qualifies as an exchange under Section 351
  - The property generates $15 of annual depreciation deductions
- The issuance of USS stock is base erosion payment
- USS' annual $15 depreciation deduction on the property are base erosion tax benefits

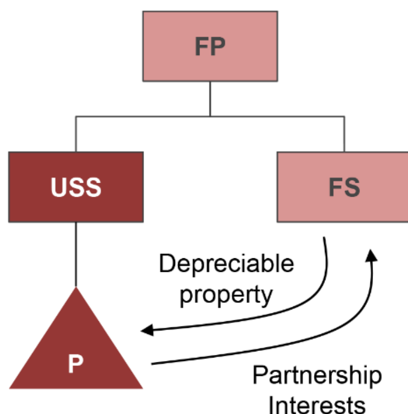
Application of the BEAT to Partnerships

The language of Section 59A is silent on how the BEAT applies to partnerships, which are not included in entities that can be applicable taxpayers. The Proposed Regulations provide guidance on the application of the BEAT to multinational groups operating through partnerships. The Proposed Regulations generally treat a partnership as an aggregate of its partners, applying the BEAT at the partner level. For purposes of determining applicable taxpayer status, each member of an aggregate group that is a partner in a partnership generally includes its share of the partnership's gross receipts in proportion to its distributive share of gross income from the partnership. In treating the partnership as an aggregate of its partners, consistent with Section 59A, the partnership itself would not be an applicable taxpayer and would not be a member of an aggregate group.

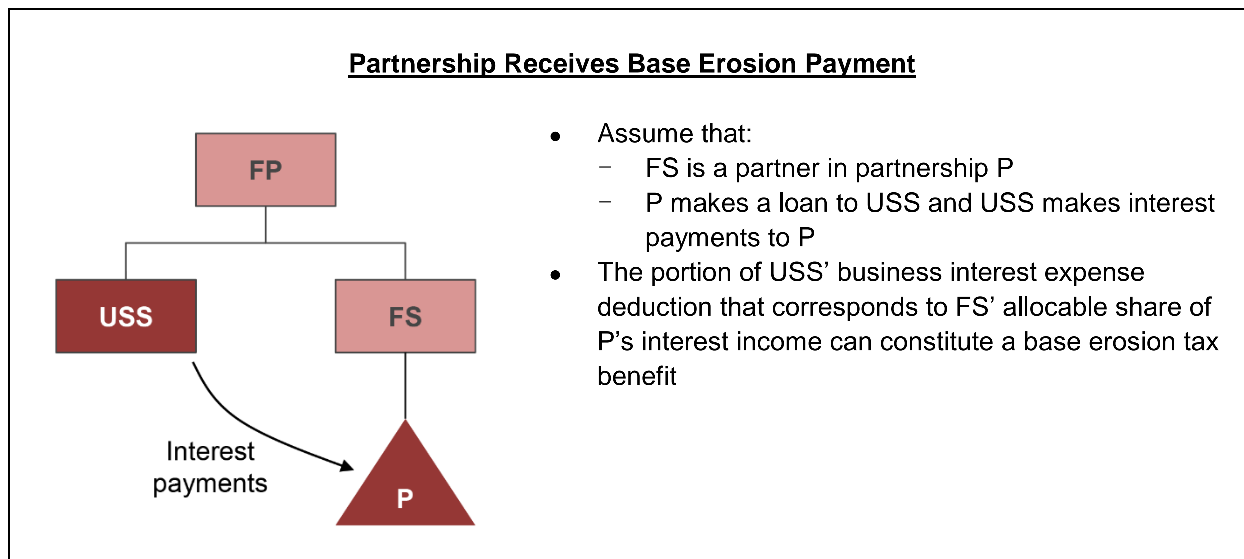
Under the Proposed Regulations, payments to or from partnerships can constitute base erosion payments, depending on the status of the partners. Amounts received by a partnership are treated as being received by each partner to the extent a corresponding item of income or gain is allocated to the partner. Similarly, amounts paid by a partnership are treated as being paid by each partner to the extent a corresponding item of expense is allocated to the partner. Accordingly, transactions involving partnerships in which either a foreign related party or an applicable taxpayer is a partner (including nonrecognition transactions) may generate base erosion tax benefits as illustrated below.

Figure 12: Application of the BEAT to Partnerships

Partnership Makes Base Erosion Payment



- Assume that:
  - USS is a partner in partnership P
  - FS contributes depreciable property to P in exchange for a partnership interest
- USS' allocable share of depreciation deductions on the property are base erosion tax benefits
- As discussed above in the context of corporate nonrecognition transactions, qualification of the transaction under Section 721 does not preclude the generation of base erosion tax benefits



Partners with an interest of less than 10% of the capital and profits of the partnership, who are allocated less than 10% of each item of the partnership's items of income, gain, loss, deduction, and credit, and the fair market value of whose partnership interest is less than $25 million, are excepted from these rules under the Proposed Regulations.

GILTI and the BEAT

Taxpayers should note another, more direct interaction between the BEAT and GILTI, as compared to that demonstrated in Figure 6. GILTI operates as a minimum tax on certain income earned by controlled foreign corporations (CFCs), taxing each 10% US shareholder of a CFC on its share of the CFC's GILTI tested income (net of certain items). Unlike payments to a foreign related party that constitute ECI, payments to a foreign related party that constitute GILTI tested income may still constitute base erosion payments, despite such income being subject to US income tax.

As noted above in the discussion of Figure 6, a corporate taxpayer is entitled to reduce its GILTI liability by foreign tax credits (FTCs) relating to certain foreign taxes deemed paid on its GILTI inclusion, but only for the year in which such foreign taxes are paid or accrued, without carryforward. Such FTCs, however, would increase the taxpayer's BEMTA by decreasing the taxpayer's adjusted regular tax liability. Accordingly, a US multinational that is subject to the BEAT and generates significant GILTI in high-tax jurisdictions may face a particularly steep increase in BEMTA attributable primarily to the FTC treatment rather than the addback of the base erosion tax benefits.

Application of the BEAT to Financial Institutions

As discussed above, members of affiliated groups that contain a bank or a registered securities dealer (Financial Institutions) are subject to special rules under the BEAT, which include a lower base erosion percentage that triggers the application of the BEAT (2%, compared with the 3% applicable to other taxpayers) and the higher BEAT rate (higher by 1 percentage point than the generally applicable rate — 6% in 2018, 11% in 2019-2025, and 13.5% thereafter). The Proposed Regulations contain several rules that are either specific to or highly relevant to Financial Institutions, both in determining whether a payment is a base erosion payment and for computing the numerator and the denominator of the base erosion percentage. Summary explanations of these rules follow:

- **Mark-to-market:** For each transaction subject to a mark-to-market method of accounting (*e.g.*, Section 475 for dealers), all items of income, deduction, gain, or loss incurred during the same year are combined and only the net amount is taken into account both for purposes of the base erosion percentage numerator and denominator computation. Marking a position more frequently than annually would not have any impact. These rules are particularly relevant for notional principal contracts that may give rise to payments made and received during the year and an offsetting mark. These rules generally would decrease the total amount of deductions that could be included in the denominator, making it more likely a Financial Institution will meet the 2% threshold.
- **Foreign currency losses:** Base erosion payments do not include foreign currency losses, which are excluded from both the numerator and denominator of the base erosion percentage, regardless of whether they are incurred in connection with transactions that would be marked to market. The exclusion of all foreign currency losses from the denominator may mean that Financial Institutions that are dealers in foreign currency, and therefore engage in large volumes of foreign currency transactions, may be more likely to meet the 2% threshold.
- **Revenue and profit allocations:** The Proposed Regulations remain silent on whether revenue and profit allocations are respected for BEAT purposes as payments that give rise to a reduction of revenue rather than deductions (*i.e.*, are not treated as base erosion payments), but confirm that the existing law applies to determine the owner of income for purposes of the BEAT.
- **Foreign-parented Financial Institutions**
  - **TLAC securities:** Payments to related parties with respect to TLAC securities are excluded from base erosion payments to the extent that such TLAC securities do not exceed the amount required by the US Federal Reserve. The excluded amount is scaled back if the outstanding TLAC securities exceed the required amount. Although this TLAC exclusion is generally a welcome relief for foreign-parented Financial Institutions, it does not cover securities issued pursuant to the requirements imposed by non-US regulators.
  - **Payments treated as ECI:** Payments that are ECI in the hands of the recipient are not treated as base erosion payments, which is important for foreign-parented Financial Institutions that conduct activities through US subsidiaries and US branches that frequently transact with each other.
  - **Excess interest under Treasury Regulation Section 1.882-5:** Excess interest deductions are treated as base erosion tax benefits to the extent that such deductions are paid or accrued to a foreign related party.
- **Qualified Derivative Payments**
  - **Exceptions to QDP treatment:** The Proposed Regulations note that the exceptions from QDP treatment (for payments properly allocable to non-derivative components and for payments that would not qualify if they were not made pursuant to a derivative) are self-executing, but do not provide any guidance on these exceptions.
  - **Securities loans:** The Proposed Regulations view securities loans as transactions similar to repurchase agreements (treated as secured loans) and therefore do not treat them as derivatives that could give rise to QDPs.
  - **QDP reporting:** The Proposed Regulations clarify that a failure to properly report a payment that would otherwise qualify as a QDP disqualifies only that payment and not all of the payments that would otherwise so qualify for that year as may have been suggested by the statute. The reporting requirement applies only for tax years beginning after final regulations are published. Until then, reporting an aggregate amount of QDPs would satisfy the requirement.

Finally, the Proposed Regulations provide a de minimis exception from the special rules for members of an affiliated group whose gross receipts attributable to the bank or the registered securities dealer are less than 2% of the aggregate group's total gross revenue, and such members are not required to apply the reduced 2% base erosion percentage threshold.

BEAT Changes Post-2025

After 2025, taxpayers may have a relatively larger BEMTA due to an increase in (1) the BEAT rate and (2) the expansion of the types of tax credits that reduce a taxpayer's adjusted regular tax liability. For taxable years beginning after December 31, 2025, a taxpayer's BEAT rate will increase to 12.5% (or 13.5% in the case of members of an affiliated group that includes a bank or registered securities dealer). Further, taxpayers will no longer be able to exclude certain research credits and the credits under Section 38 (discussed above) when reducing regular tax liability to calculate adjusted regular tax liability for taxable years beginning after December 31, 2025. The Proposed Regulations, however, do provide that even in taxable years following 2025, a taxpayer's regular tax liability will not be reduced by any credits relating to US tax withheld at the source under Section 33 or to the overpayment of tax under Section 37 for purposes of the adjusted regular tax liability calculation.

Other Highlights

The Proposed Regulations include the following additional highlights.

- **Anti-abuse and recharacterization rules:** The Proposed Regulations largely reiterate the anti-abuse rules contained in Section 59A that disregard the form of certain transactions that have a principal purpose of avoiding the BEAT. If such rules apply, a transaction may be disregarded or deemed to result in a base erosion payment. The anti-abuse rules target three categories of transactions: (1) those involving intermediaries acting as a conduit to avoid a base erosion payment, (2) those entered into to increase the deductions taken into account in the denominator of the base erosion percentage, and (3) those among related parties entered into to avoid the special BEAT rules applicable to Financial Institutions.
- **Application to consolidated groups:** The Proposed Regulations contain a complex set of rules addressing the application of the BEAT to applicable taxpayers that are members of a consolidated group. Although a detailed discussion of these rules is outside the scope of this *Client Alert*, very generally, the Proposed Regulations treat members of a consolidated group as a single taxpayer but provide computational rules for determining the BEAT allocated to each member of the group and describe various considerations relevant for stock basis and other separate attributes.
- **Proposed applicability date and comment period:** Until the Proposed Regulations are finalized, a taxpayer may rely on the Proposed Regulations for taxable years beginning after December 31, 2017. The taxpayer and all related parties (as defined by the Proposed Regulations) must consistently apply the Proposed Regulations for all taxable years that end before the taxable year in which the Proposed Regulations are finalized. The IRS and Treasury have requested comments on the Proposed Regulations and will accept comments until February 19, 2019.

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Endnotes

[1] All "Section" references are to the Internal Revenue Code of 1986, as amended, unless otherwise specified.

[2] Public Law No. 115-97 (Dec. 22, 2017). Shortly before final Congressional approval of the legislation, the Senate parliamentarian struck the previously attached short title, the "Tax Cuts and Jobs Act." While the final legislation no longer bore a short title, many commentators have continued to refer to it as the Tax Cuts and Jobs Act.

[3] All values are in US dollars.

[4] These services must constitute either specified covered services or low margin covered services, each as defined in the applicable Treasury Regulations. *See* Treas. Reg. § 1.482-9(b)(3).