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Excise Tax on Related Party Transactions: Give With One Hand But Take With The Other. Do the International Tax Reform Provisions Align With Tax Treaties?

William Byrnes (Texas A&M University Law) · Friday, November 10th, 2017

In regards to the title of this post, the Ways & Means version of international tax reform moves toward a territorial regime of granting an exemption for foreign profits but then derogates from the exemption with a series of BEPS measures.[1] by William Byrnes, Texas A&M University Law

On Thursday, November 2, 2017, the Republicans of the House of Representatives' Ways & Means Committee published its initial text version salvo of a tax reform bill, including within it international tax reform: the "Tax Cuts and Jobs Act" ("Tax Cuts Bill").[2] The following day, Chairman Kevin Brady submitted his initial amendments to the Tax Cuts Bill[3] and on November 6, 2017, published amendments to his amended document.[4] On November 9, 2017, moments before the Ways and Means Committee passed the bill to the floor of the House for deliberation, Chairman Brady offered a second set of additional amendments to the November 3 version that changed some of the November 6 amendments.[5]

Also on November 9, 2017, the Senate Finance Committee issued its initial, very different, version of the Tax Cuts and Jobs Act in the form of plain language proposals grouped into sections of the bill. The Senate version also addresses U.S. international tax reform, albeit differently than the House version. The actual statutory language will only be drafted and agreed at the last moment before the Finance Committee passes its final version to the Senate Floor. Eventually, the House and Senate (referred to as "chambers") bill versions must be made identical in language that both chambers can vote to pass the same bill. Thus, the House and Senate leadership will each appoint members to a joint committee, known as the 'conference committee'. This committee will negotiate between the two versions of the bill by section until identical language evolves for each section. Upon the completion of this negotiation, the final bill text is sent back to each chamber for approval. Even at this juncture, further amendments may be included in a chamber, but this result causes the bill to be sent back to the other chamber to vote on the amended common language. The back and forth volleys, like a tennis match, will last until one chamber finally votes for the other's amendments without including any further amendments. The bill then is submitted to the President for signature.

Confusing? Welcome to the United States tax legislation process. The tax profession has for months expressed grave concern that low tax rates combined with simplicity would drive taxpayers to pay, rather than plan, their taxes. Talk of a tax reform 'transitional adjustment assistance program' for the tax profession sprung up around the water coolers of law and accounting firms.

But the tax staff of the Ways & Means Committee and the elected representatives heard the pleas and pulled the tax profession back from the collective brink by injecting complexity, uncertainty, and opaqueness into the Tax Cuts Bill and its legislative process.

Give with one hand

The Congressional Research Service summary of the tax provisions applicable to business provides that the Tax Cut bill:

- reduces the corporate tax rate from a maximum of 35 percent to a flat 20 percent rate (25 percent for personal services corporations),
- allows increased expensing of the costs of certain property,
- limits the deductibility of net interest expenses to 30 percent of the business's adjusted taxable income,
- repeals the work opportunity tax credit,
- terminates the exclusion of interest on private activity bonds,
- modifies or repeals various energy-related deductions and credits,
- modifies the taxation of foreign income, and
- imposes an excise tax on certain payments from domestic corporations to related foreign corporations.

As had been expected, the Republicans of Ways & Means are pivoting the U.S. international tax system to a territorial regime. The Tax Cuts Bill includes a participation exemption system that operates by authorizing a deduction from corporate income for the foreign-source portion of such dividends received from foreign subsidiaries.[6] Currently, those dividends from a foreign subsidiary are includable in corporate income with the resulting U.S. tax potentially offset by any foreign tax credits attaching to the dividends. The current U.S. international tax system requires a substantial compliance budget for recording, maintaining, the matching the foreign tax attaching to a company's foreign income by the year the foreign income is earned split between two types of foreign income (either general category income or passive category income).[7] Had the Republicans stopped writing their bill at this point, a U.S. company's foreign income earned through foreign subsidiaries would have fallen outside the U.S. tax base. The simplicity of such a regime may have led to a reduction in international tax compliance budgets that in turn may have led to fewer international tax advisory opportunities.

Take with the other

This post and its Part 2 follow up are concerned with two of the international tax provisions of the Tax Cuts Bill. Originally, the posts contained three parts covering three provisions. The third provision provided for a BEPS treaty shopping mechanism (Section 4502: "Limitation on Treaty Benefits for Certain Deductible Payments") that proposed to replace the withholding rate upon the income of a recipient subsidiary of a group with the withholding rate that applies to the group parent had it been the recipient instead. But Chairman Brady redacted this provision from his amended version of the bill published the following day.[8] Yet, come crunch time of looking for offsetting revenue during reconciliation between the bill passed by the House and passed by the Senate, it may reappear in the final law. It read in the November 2, 2017, version of the Tax Cuts Bill:

> (d) ***Limitation On Treaty Benefits For Certain Deductible Payments***.
>
> (1) ***In General***. In the case of any deductible related-party payment, any withholding tax imposed under chapter 3 (and any tax imposed under subpart A or B of this part) with respect to such payment may not be reduced under any treaty of the United States unless any such withholding tax would be reduced under a treaty of the United States if such payment were made directly to the foreign parent corporation.
>
> (2) ***Deductible Related-Party Payment***. For purposes of this subsection, the term 'deductible related-party payment' means any payment made, directly or indirectly, by any person to any other person if the payment is allowable as a deduction under this chapter and both persons are members of the same foreign controlled group of entities.

The two provisions highlighted in this post and next are contained within the Subtitle "Prevention of Base Erosion" (Subtitle D). Readers may upon first glance think that the provisions derive from the OECD's Base Erosion and Profit Shifting (BEPS) project, or at least align to the same concerns raised by the BEPS project. However, the provisions are a result of the "Pay-As-You-Go" (also known as "Pay-Go") deficit control mechanism established initially by Congress in 1990, and signed into law by George Bush as the excuse for his infamous squelching on his pledge of "no new taxes".[9] Pay-Go requires that any legislation increasing direct spending or decreasing revenues be offset by an equal amount of revenue raised from other sources. Pay-Go was most recently continued by Congress in 2010.[10] Thus, Republicans must identify substantial revenue-raising provisions to offset the proposed tax rate reductions and move to a territorial corporate income tax system. The two provisions are as of November 6, 2017, forecast over 10 years to raise an additional $231.6 billion.

The first provision, section 4303, adds what some commentators are referring to as a watered-down version of the maligned Border Adjustment Tax (BAT light). Section 4303 is a transfer pricing mitigation provision that adds a new Internal Revenue Code (IRC) section, being section 4491 "Imposition of tax on certain amounts from domestic corporations to foreign affiliates". The crux of the new provision is an excise tax of 20 percent on payments to foreign related parties. U.S. trade partners are questioning whether the 20 percent 'excise' tax is purposely crafted to avoid application of tax treaties that mitigate the U.S.' current 30 percent withholding tax for most payments to foreign parties, related or not.

The second provision, section 4301, is also a transfer pricing mitigation initiative that amends the U.S. controlled foreign corporation regime to deem to U.S. shareholders an annual taxable distribution of foreign profits above a routine return for foreign subsidiaries.

Part 1 Focus: 20 Percent Excise Tax On Related Party Payments

Currently, the U.S. tax law imposes a tax on a foreign corporation only on its U.S.-source income that is fixed or determinable, annual or periodical ("FDAP") and on its income effectively connected with the conduct of a U.S. trade or business ("ECI"). The 58 U.S. tax treaties in force often reduce or eliminate the 30 percent standard rate of U.S. tax imposed on FDAP income. Moreover, these tax treaties via the operation of the "business profits" article and "permanent establishment" definition restrict the application of ECI. The Ways and Means Committee pointed out that multinational enterprises and in particular those with foreign-parents may act to reduce the

U.S. tax base by shifting profits to foreign affiliates through transfer pricing rules that allow the attribution of profit to risks, assets, and functions located with foreign affiliates outside of the United States. Unlike U.S. companies, the foreign profits of foreign affiliates will not be repatriated to the U.S. and thus not eventually subject to U.S. tax. Foreign companies that hold significant effective tax rate advantage over U.S. companies can leverage the tax differential to out-compete their U.S. counterparts. Tax pundits have noted that this differential has incentivized U.S. corporations to be acquired by foreign companies.

To mitigate the potential tax differential and to generate revenue to pay for the lowering of the corporate tax rate, the House version of the Tax Cuts bill proposes that payments made by a U.S. corporation to a related foreign corporation that are deductible[11], includible in costs of goods sold, or includible in the basis of a depreciable or amortizable asset[12], would be subject to a 20 percent excise tax subject to several exceptions. The Senate version does not mention such excise tax but instead includes a "base erosion minimum tax amount" on related party payments. However, the Senate has stricter rules about generating offsetting revenue to pay for any tax cuts and thus, expect this provisions to generate serious discussion in the conference between the chambers.

The Ways & Means provision would apply only to 'international financial reporting groups' with payments from U.S. corporations to their related foreign affiliates totaling at least $100 million annually.[13] The Senate version substantially increases the threshold to $500 million and requires that the reporting group has a base erosion percentage of four percent or higher for the taxable year.

To these large international financial reporting groups, the Ways & Means excise tax will not apply to intercompany interest because that is addressed in a different thin capitalization section, to intercompany services which a U.S. company elects to pay using the IRC Section 482 Service Cost Method (*i.e.*, total service costs with no markup), to certain commodities transactions, and when the standard withholding is imposed under IRC section 881(a) (e.g. 30 percent withholding upon FDAP).[14] Most related party payments are the subject of section 881(a). The potential issue in this regard may be whether the word "imposed" means "paid" or whether it allows for mitigation by an applicable tax treaty article's maximum rate. If the latter, then it is a very small pool of payments to which this potential excise tax would apply, and its revenue-raising score is likely significantly lower. If the former, the applicable payment pool greatly expands, but see the issues that will be raised by treaty partners below under the section "Is this Excise Tax Mitigated by U.S. Tax Treaties". Perhaps the Ways & Means pool is meant to capture inventory type goods. Yet the exemption for 'certain commodities' is broader than a common understanding and includes, by reference to IRC section 475(e)(2), the meaning of IRC section 1092(d)(1) that states a commodity is "personal property" of a type which is actively traded.

The Senate Finance Committee Chair's Mark of November 9 states:

> Under the proposal, an applicable taxpayer is required to pay a tax equal to the base erosion minimum tax amount for the taxable year. The base erosion minimum tax amount means, with respect to an applicable taxpayer for any taxable year, the excess of 10-percent of the modified taxable income of the taxpayer for the taxable year over an amount equal to the regular tax liability …

> … A base erosion payment generally means any amount paid or accrued by a taxpayer to a foreign person that is a related party of the taxpayer and with respect to which a deduction is allowable, including any amount paid or accrued by the taxpayer to the related party in connection with the acquisition by the taxpayer from the related party of property of a character subject to the allowance of depreciation (or amortization in lieu of depreciation). A base erosion payment also includes any amount that constitutes reductions in gross receipts of the taxpayer that is paid to or accrued by the taxpayer with respect to: (1) a surrogate foreign corporation which is a related party of the taxpayer, and (2) a foreign person that is a member of the same expanded affiliated group as the surrogate foreign corporation.

Avoid the Excise Tax By Electing Branch or Permanent Establishment Tax Treatment

Instead of attracting the 20 percent excise tax on the gross deductions, the related foreign corporation may elect to treat such payments as ECI (income connected to a U.S. trade or business) and file a U.S. tax return recognizing attribution of income. The bill requires a 'deemed' markup with the allowance of the corresponding deductions, other than the related party expenses, to generate a taxable net income.

The Chair's amendment to his initial amendment included a deeming formula of "the sum of 104 percent plus the annual Federal short-term rate multiplied by the deemed expenses with respect to such amount".[15] However, the Chair's last-minute amendment before committee passage rejected the formulae mark-up approach.[16] The final committee version includes that the deemed markup is to be determined by reference to the foreign profit margins reported on the group's consolidated financial statements for the relevant product line.[17] The net ECI will then attract the standard 20 percent corporate tax rate.

Whether any foreign tax applicable to the related party payments may offset the excise tax is a moving target. The Chair's November 6, 2017, amendment to the November 3 version provided a determination of any applicable foreign tax credit as follows:

> (8) Treatment Of Foreign Taxes.
>
> (A) Allowance Of Credit. In the case of any foreign corporation which receives specified amounts to which paragraph (1) applies during any taxable year, there shall be allowed as a credit against the tax imposed by this chapter for such taxable year an amount equal to the product of—
>
> (i) the excess (if any) of—
>
> (I) the aggregate specified amounts received by such foreign corporation to which paragraph (1) applies for such taxable year,
>
> over
>
> (II) the aggregate amount of deductions allowed under paragraph (1)(C) with respect to such foreign corporation for such taxable year,

> multiplied by
>
> (ii) the lesser of—
>
> (I) 50 percent of the international financial reporting group's effective foreign tax rate for the reporting year during which or with which such taxable year ends, or
>
> (II) 20 percent.
>
> (B) Disallowance Of Foreign Tax Credit.
>
> No credit shall be allowed under section 901 for any taxes paid or accrued (or treated as paid or accrued) with respect to any specified amount to which paragraph (1) applies.
>
> (C) Denial Of Deduction. No deduction shall be allowed under this chapter for any tax for which credit is not allowable under section 901 by reason of subparagraph (B) (determined by treating the taxpayer as having elected the benefits of subpart A of part III of subchapter N).
>
> (D) Effective Foreign Tax Rate.
>
> For purposes of this paragraph, the term 'effective foreign tax rate' means, with respect to any reporting year of any international financial reporting group, the ratio (expressed as a percentage and not less than zero) of—
>
> (i) the foreign income taxes paid by the international financial reporting group during such reporting year, divided by
>
> (ii) the net income of the international financial reporting group determined without regard to interest income, interest expense, and income taxes.
>
> Amounts described in this subparagraph shall be determined as provided in paragraph (3)(C).
>
> (E) Foreign Income Taxes. For purposes of this paragraph, the term 'foreign income taxes' means any income, war profits, or excess profits taxes paid to any foreign country or possession of the United States.

But on November 9, this foreign tax credit language was greatly shortened, expanding the foreign tax credit to apply to 80 percent of foreign taxes. Moreover, the final committee version refines the measurement of foreign taxes paid by reference to current IRC section 906 rather than a formula based on financial accounting information. The excise tax foreign tax credit provision now reads:

> (8) Foreign Tax Credit Allowed. The credit allowed under section 906(a) with respect to amounts taken into account in income under paragraph (1)(A) shall be limited to 80 percent of the amount of taxes paid or accrued and determined without regard to section 906(b)(1).

In summary, the Chair's amendments modified the bill's excise tax proposal in several respects.

- eliminates the markup on deemed expenses,
- allowance of an 80 percent foreign tax credit,
- exempt foreign affiliates' routine returns,
- compute a foreign affiliate's profits based on foreign profit margins instead of global profit margins,
- exclude acquisitions of property priced on a public exchange, and
- coordinate the existing withholding tax rules.

This new excise tax would be effective for tax years beginning after 2018.

Is this Excise Tax Mitigated by U.S. Tax Treaties?

U.S. trade partners are questioning whether the 20 percent 'excise' tax is purposely crafted to avoid application of tax treaties that mitigate the U.S.' current 30 percent withholding tax for most payments to foreign parties, related or not. The 2016 version of the U.S. Model states under Article 2 Taxes Covered:

> 1. This Convention shall apply to taxes on income imposed on behalf of a Contracting State irrespective of the manner in which they are levied.

> 2. There shall be regarded as taxes on income all taxes imposed on total income, or on elements of income, including taxes on gains from the alienation of property.
> 3. b) in the case of the United States: the Federal income taxes imposed by the Internal Revenue Code (which do not include social security and unemployment taxes) and the Federal taxes imposed on the investment income of foreign private foundations.

> 4. This Convention also shall apply to any identical or substantially similar taxes that are imposed after the date of signature of this Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their taxation laws or other laws that relate to the application of this Convention.

This BEPS excise tax is not the only excise that the federal government has imposed on payments to foreign persons. IRC section 5000C imposes a two percent excise tax on any foreign person that receives a specified Federal procurement payment.[18] This federal government procurement excise tax is subject to mitigation by U.S. tax treaties.[19] IRS Notice 2015-35 explains that a "qualified income tax treaty" is a U.S. income tax treaty in force that contains a nondiscrimination article that prohibits taxation that is more burdensome on a foreign national than on a U.S. national. But the potential related foreign party transaction excise tax and the foreign procurement

excise tax contain one critical difference. Section 301(c) of the 'James Zadroga 9/11 Health and Compensation Act of 2010' specifically states: "(c) Application. This section and the amendments made by this section shall be applied in a manner *consistent with United States obligations under international agreements*." Equivalent language is missing from the current November 9, 2017, version of the Tax Cuts bill.

The U.S. 'Last-in-Time' doctrine thus may push the excise tax outside the Article 2 scope of its tax treaties. The Last-in-Time' doctrine refers to the situation of two U.S. statutes that are in conflict of application. Pursuant to the U.S. court developed Last-in-Time doctrine, a U.S. court will suppress the legal effect of a past statute that conflicts with a later statute. The U.S. Supreme Court ruled that U.S. treaties are on the same footing as U.S. statutes. In **Whitney v Roberson, 124 US 190 (1888)** the Court stated, in relevant parts:

> *By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance.*

Thus, it is possible for a new U.S. tax statute to be applied without regard to mitigation by U.S. tax treaties entering into force before the statute date. This situation most recently occurred in 2010 with the passage of a new 30 percent withholding on payments to foreign residents by application of IRC chapter 4 (FATCA).

On the other hand, most U.S. tax treaties provide that the treaty country cannot discriminate by imposing more burdensome taxes on the other countries citizens who are residents of the treaty country than it imposes on its own citizens in the same circumstances. By example, the **US – Netherlands Double Tax Agreement** reads in pertinent part –

> *ARTICLE 28 Non-discrimination*

> 1. *Nationals of one of the States shall not be subjected in the other State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected.*

Upon whom is this excise tax imposed? The U.S. payor or the foreign payee? The proposed IRC section states: "The tax imposed … shall be *paid* by the domestic corporation". But does this term paid mean that the tax is imposed on the domestic taxpayer or is the U.S. taxpayer merely the collecting agent as in withholding? The U.S. payor is likely acting like a withholding agent because the rest of the provision allows the foreign taxpayer to elect to avoid the excise through subjecting itself to the ECI regime, much like avoidance of FIRPTA withholding on income from the sale of real (immovable) property by a non-U.S. taxpayer.

Turning to another issue of whether the excise is covered by Article 2, the U.S. Model Article 1 General Scope states:

> … the Contracting States agree that any question arising as to the interpretation or application of this Convention and, in particular, *whether a taxation measure is within the scope of this Convention*, shall be determined exclusively in accordance with the provisions of Article 25 (Mutual Agreement Procedure) of this Convention …

If the excise tax on payments to related foreign parties is enacted, then I will expect the Netherlands, Luxembourg, and Ireland to immediately seek an Article 25 discussion for an Article 2 determination.

I'll stop here as this post has doubled over its space allowance and welcome your comments and analysis. Check back for a deeper analysis of the many uncertainties that this potential provision raises should it survive the conference committee negotiations.

Regards from Texas – Prof. William Byrnes (free downloads of my articles and book chapters from SSRN here)

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[1] Title refers to *Hill v Northern Pacific Railway Co*, 51 CCA reports 544, 548 (9th Cir. 1902). This reference is meant to provide flavor instead of context, in that it refers to a property law doctrine of non-derogation from a grant.

[2] Tax Cuts and Jobs Act, H.R. 1 (115th Cong. 1st Sess. 2017) (hereafter "Tax Cut Act").

[3] Amendment In The Nature Of A Substitute To H.R. 1 Offered By Mr. Brady Of Texas (Nov. 3, 2017).

[4] Amendment To The Amendment In The Nature Of A Substitute To H.R. 1 Offered By Mr. Brady Of Texas (Nov. 6, 2017).

[5] Amendment #2 to the Amendment in the Nature of a Substitute to H.R. 1 Offered by Mr.Brady of Texas. (Nov. 9, 2017).

[6] Sec. 4001. Deduction for foreign-source portion of dividends received by domestic corporations from specified 10-percent owned foreign corporations.

[7] I.R.C. § 904 – Limitation on credit.

[8] Available at https://waysandmeans.house.gov/wp-content/uploads/2017/11/20171106-JCT-Description-of-Amendment-in-the-Nature-of-a-Substitute-to-H.R.-1-Green-Sheet.pdf (last visited Nov. 6, 2017).

[9] Budget Enforcement Act Of 1990, Pub. L. 101-508 (101st Cong., 2nd Sess.).

[10] Statutory Pay-As-You-Go Act of 2010 Public Law 111-139 (111th Cong., 1st Sess).

[11] Subchapter E—Tax on Certain Amounts to Foreign Affiliates

IRC § 4491. Imposition Of Tax On Certain Amounts From Domestic Corporations To Foreign Affiliates

- In General. There is hereby imposed on each specified amount paid or incurred by a domestic corporation to a foreign corporation which is a member of the same international financial reporting group as such domestic corporation a tax equal to the highest rate of tax in effect under section 11 multiplied by such amount.
- By Whom Paid. The tax imposed by subsection (a) shall be paid by the domestic corporation described in such subsection.

[12] (2) Specified Amount.

(A) In General. The term 'specified amount' means any amount which is, with respect to the payor, allowable as a deduction or includible in costs of goods sold, inventory, or the basis of a depreciable or amortizable asset.

[13] (4) International Financial Reporting Group.

(A) In General.—The term 'international financial reporting group' means any group of entities, with respect to any specified amount, if such amount is paid or incurred during a reporting year of such group with respect to which —

(i) such group prepares consolidated financial statements (within the meaning of section 163(n)(4)) with respect to such year, and

(ii) the average annual aggregate payment amount of such group for the 3-reporting-year period ending with such reporting year exceeds $100,000,000.

[14] (B) Exceptions. The term 'specified amount' shall not include—

(i) interest

(ii) any amount paid or incurred for the acquisition of any of any security described in section 475(c)(2) or commodity described in section 475(e)(2)(A) or section 475(e)(2)(D) (determined without regard to subclause (i) thereof),

(iii) except as provided in subparagraph (C), any amount with respect to which tax is imposed under section 881(a), and

(iv) in the case of a payor which has elected to use a services cost method for purposes of section 482, any amount paid or incurred for services if such amount is the total services cost with no markup.

[15] Amendment to the Amendment in the Nature of a Substitute to H.R. 1 (Nov. 6, 2017) at p. 29.

[16] (c) Exception For Effectively Connected Income. Subsection (a) shall not apply to so much of any specified amount as is effectively connected with the conduct of a trade or business within the United States if such amount is subject to tax under chapter 1. In the case of any amount which is treated as effectively connected with the conduct of a trade or business within the United States by reason of section 882(g), the preceding sentence shall apply to such amount only if the domestic corporation provides to the Secretary (at such time and in such form and manner as the Secretary may provide) a copy of the election made under section 882(g) by the foreign corporation referred to in subsection (a).

[17] (3) Deemed Expenses.

(A) In General. The deemed expenses with respect to any specified amount received by a foreign corporation during any reporting year is the amount of expenses such that the net income ratio of such foreign corporation with respect to such amount (taking into account only such specified amount and such deemed expenses) is equal to the net income ratio of the international financial reporting group determined for such reporting year with respect to the product line to which the specified amount relates.

(B) Net Income Ratio. For purposes of this paragraph, the term ‘net income ratio’ means the ratio of — (i) net income determined without regard to interest income, interest expense, and income taxes, divided by (ii) revenues.

(C) Method Of Determination. Amounts described in subparagraph (B) shall be determined with respect to the international financial reporting group on the basis of the consolidated financial statements referred to in paragraph (4)(A)(i) and the book and records of the members of the internal financial reporting group which are used in preparing such statements taking into account only revenues and expenses of the members of such group (other than the members of such group which are treated as domestic for purposes of this subsection) derived from, or incurred with respect to—

(i) persons who are not members of such group, and

(ii) members of such group which are treated as a domestic corporation for purposes of this subsection.

[18] Enacted in 2010 by the James Zadroga 9/11 Health and Compensation Act of 2010, Pub. L. 111-347 (111th Cong. 1st Sess.) (“2010 Act”).

[19] IRS Notice 2015-35.

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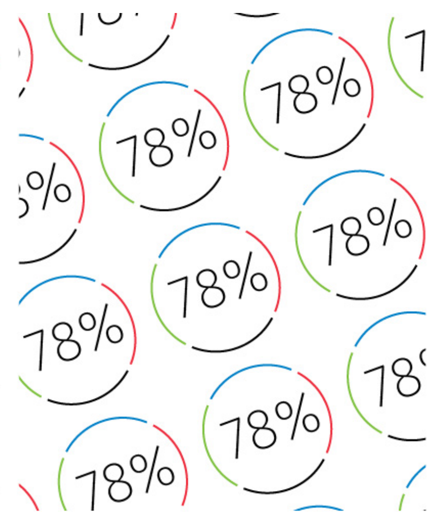

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