



March 11, 2020

CC:PA:LPD:PR (REG-112607-19)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Notice of Proposed Rulemaking for Additional Rules Regarding Base Erosion and Anti-Abuse Tax (BEAT) [[REG-112607-19](#)] and Final Regulations [[T.D. 9885](#)]

Dear Sir or Madam:

The American Institute of CPAs (AICPA) appreciates the efforts of the Department of the Treasury (“Treasury”) and the Internal Revenue Service (IRS or “Service”) to address the need for guidance related to Internal Revenue Code (IRC or “Code”) section 59A,¹ as enacted under Pub. L. No. 115-97, commonly referred to as the Tax Cuts and Jobs Act (TCJA or “the Act”). Section 59A imposes on each applicable taxpayer a tax equal to the base erosion minimum tax amount for the taxable year (the “base erosion and anti-abuse tax” or “BEAT”).

On December 6, 2019, Treasury and the IRS issued notice of proposed rulemaking REG-112607-19 (the “proposed regulations”) and final regulations T.D. 9885 (the “final regulations”). This letter is in response to the proposed and final regulations.

Specifically, the AICPA submits recommendations to address the following areas:

- I. Change in Aggregate Group
- II. Election to Waive Deductions
- III. Request for Automatic Relief on 2018 Returns
- IV. Application of Qualified Derivative Payments

The TCJA enacted section 59A, imposing a tax on certain corporate taxpayers in addition to any other regular tax liability. The liability for this additional tax is generally limited to those taxpayers with substantial gross receipts and is determined, in part, by the extent to which the taxpayer has made deductible payments to foreign related parties. Both the final and proposed regulations affect corporations with substantial gross receipts that make payments to foreign related parties. The final regulations also affect any reporting corporations required to furnish information relating to

¹ Unless otherwise indicated, references to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), and references to a “Treas. Reg. §” are to the Treasury regulations promulgated under the Code.

certain related-party transactions and information relating to a trade or business conducted within the U.S. by a foreign corporation.

I. Change in Aggregate Group

The AICPA recommends that Treasury and the IRS provide guidance that the close of any taxable year, for purposes of BEAT, is effective as of the end of day (rather than mid-day) and align any such close of tax year with other provisions of the Code. A change in ownership of an aggregate group member, either joining or leaving the aggregate group, may trigger a close of that member's tax year. Any such close of tax year for BEAT purposes should align with the close of tax year applied under other provisions of the Code. Specifically, any close of a year end for BEAT purposes should become effective as of the end of a day, not the middle of a day.

Proposed Treas. Reg. § 1.59A-2(c)(2)(ii) provides that the change of ownership of a member of an aggregate group (*i.e.*, a sale of the member to a third party) may result in the member joining or leaving the aggregate group of the taxpayer.

Proposed Treas. Reg. § 1.59A-2(f)(2) Example 2, describes a transaction occurring at noon on June 30. The analysis for this example states that the taxpayer's close of the taxable year for BEAT purposes occurs just before noon, the time of the transaction, rather than the end of the day. However, other Code provisions governing this transaction, for other tax purposes, require the change of tax year to occur as of the end of the day.

For example:

- (i) Section 381(a) provides that an acquiring corporation succeeds to and takes into account certain attributes as of the close of the day, not the time of the transaction; and
- (ii) The corporate consolidation rules under Treas. Reg. § 1.1502-76(b)(1)(ii)(A) provide an end of day rule that should govern and control the transaction.

Having a mid-day end of tax year solely for BEAT purposes when other Code provisions governing the same transaction apply an end of day rule, for all other purposes, would cause a substantial unnecessary administrative burden for taxpayers and tax preparers.² Further, no reasonable policy reason is provided for this increase in administrative burden.

II. Election to Waive Deductions

We recommend that Treasury and the IRS allow taxpayers to adjust the amount of waived deductions on amended returns or returns under audit. Taxpayers should have the ability to decrease the amount of deductions they elect to waive on amended returns and returns under

² The administrative burden falls on both the acquirer and the seller, who would potentially have the same year end and start of year dates. For example, a sale on February 10, 2020 at noon would generate an end of year February 10th for the seller and a beginning of year February 10th for the acquirer.

examination, similar to how taxpayers are allowed to increase the amount of deductions that are waived.

Proposed Treas. Reg. § 1.59A-3(c)(6)(iii) provides that taxpayers may elect to waive deductions and increase the amount of deductions waived on an amended return or during the course of an exam. We support this taxpayer-favorable proposed rule. However, the proposal provides that taxpayers can only increase the amount of deductions waived on amended tax returns or during the course of an examination, not decrease the amount of deductions waived.

Per public comments made by Peter Merkel, Branch 5 Chief, IRS Office of Associate Chief Counsel (International) on January 13, 2020 at a webcast sponsored by the Practising Law Institute, the purpose of not allowing taxpayers to reduce the amount of waived deductions “was about administrative ease” – not due to policy concerns. However, the administrative burden for the IRS to allow a decrease in waived deductions seems comparable to the burden created by an increase in waived deductions, especially during an audit where such a change is simply an additional adjustment.

It appears that there are no policy concerns with allowing taxpayers to decrease their waived deductions and there are no substantive additional administrative burdens that arise from allowing taxpayers to decrease their waived deductions. Therefore, we respectfully request that Treasury and the IRS allow taxpayers to decrease the amount of deductions elected to be waived on amended returns and returns under examination.

III. Request for Automatic Relief on 2018 Returns

We recommend that Treasury and the IRS provide relief for 2018 returns if taxpayers retroactively elect to waive expenses on the prior return. Relief is needed in the form of automatic consent to change elections, similar to relief provided under Rev. Proc. 2019-33, to allow taxpayers to change the elections for section 168(k) bonus depreciation and section 59(e)(4) capitalization of research and experimentation (“R&E”) expenses claimed on their 2018 tax return. Specifically, taxpayers may need the ability to change these elections in order to elect to retroactively waive deductions as provided under the proposed regulations.

Proposed Treas. Reg. § 1.59A-3(c)(6)(iii) allows taxpayers to elect to waive deductions on an amended tax return. This proposed regulation (and the election to waive deductions) was issued in December 2019, which, for calendar year taxpayers, was after the 2018 corporate tax return was due in October 2019. The election to waive expenses was not available when calendar taxpayers filed their 2018 returns. Therefore, taxpayers may have availed themselves of the election on their 2018 returns, such as electing to forego bonus depreciation under section 168(k) or electing to capitalize R&E expenses under Treas. Reg. § 59(e)(4), that would not have occurred if the election to waive expenses was available when the 2018 tax returns were filed.

Under Rev. Proc. 2019-33, the IRS has granted relief in other circumstances to allow taxpayers to make a late election or revoke an election under section 168(k)(5), section 168(k)(7), or section 168(k)(10) by providing automatic consent to change accounting methods. We recommend that

Treasury and the IRS expand the relief offered by Rev. Proc. 2019-33 to allow taxpayers to make an automatic change in accounting method related to their 2018 filed return in order to claim bonus depreciation and change the amount of capitalized R&E on a 2018 amended return. This automatic consent would allow taxpayers to take advantage of the election to waive deduction as described in the proposed regulations, which was not available at the time taxpayers filed their 2018 tax return.

This automatic consent request is important because a taxpayer can only revoke both the election out of bonus depreciation and the election to capitalize R&E expenses with the consent of the Secretary.³ Thus, the election to waive deductions for 2018 on an amended return is not helpful without allowing taxpayers to also automatically revoke their elections under section 168(k)(7) and section 59(e)(4)(B). The automatic consent provisions would also provide taxpayers certainty when preparing their 2019 returns, as they would know the depreciation, R&E methods, and amounts carrying forward onto their 2019 tax returns.

IV. Application of Qualified Derivative Payments

Finally, Treasury and the IRS should clarify that the Prop. Treas. Reg. § 1.59A-9(b)(5) anti-abuse rule, which applies to transactions involving the acquisition of a derivative on a partnership interest or partnership assets, is not applicable if derivatives on a partnership interest or partnership assets are qualified derivative payments (QDPs). Section 59A(h)(1) provides that any QDP shall not have treatment as a base erosion payment. Therefore, the anti-abuse rule of Prop. Treas. Reg § 1.59A-9(b)(5) should not apply if derivatives on a partnership interest or partnership assets are QDPs.

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The AICPA is the world's largest member association representing the CPA profession, with more than 429,000 members in the United States and worldwide, and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please contact David Sites, Chair, AICPA International Tax Technical Resource Panel, at (202) 861-4104 or David.Sites@us.gt.com; Amy Wang, AICPA Senior Manager – Tax Policy & Advocacy, at (202) 434-9264 or Amy.Wang@aicpa-cima.com or me at (612) 397-3071 or Chris.Hesse@CLAconnect.com.

³ See IRC sections 168(k)(7) and 59(e)(4)(B).

March 11, 2020

Page 5 of 5

Sincerely,

A handwritten signature in blue ink that reads "Christopher W. Hesse". The signature is fluid and cursive, with a prominent flourish at the end.

Christopher W. Hesse, CPA
Chair, AICPA Tax Executive Committee

cc: The Honorable David J. Kautter, Assistant Secretary for Tax Policy, Department of the Treasury
The Honorable Charles P. Rettig, Commissioner, Internal Revenue Service
The Honorable Michael J. Desmond, Chief Counsel
Mr. Thomas A. Barthold, Chief of Staff, Joint Committee on Taxation
Ms. Sheila Ramaswamy, Attorney-Advisor, Branch 5, Internal Revenue Service
Ms. Azeka J. Abramoff, Attorney-Advisor, Branch 5, Internal Revenue Service
Ms. Karen Walny, Attorney-Advisor, Branch 5, Internal Revenue Service