Expat Group Incensed Over GILTI Regs' Small Business Brush-Off

by Andrew Velarde

An advocacy group representing the interests of American expatriates is calling Treasury out on its global intangible low-taxed income high-tax exclusion rules for what it views as a dereliction of duty owed to small businesses.

In an August 6 release, American Citizens Abroad (ACA) attacked Treasury's attempts to "tread carefully" around the Regulatory Flexibility Act (RFA) in its July 20 final regs (T.D. 9902) on the exclusion.

Those final regs pertain to rules that allow domestic shareholders of a controlled foreign corporation to elect to exclude from gross tested income amounts taxed at 18.9 percent. The guidance says the regs will not have a significant economic impact on a substantial number of small entities, while noting that the data needed to assess the impact of portions of the guidance is "not readily available."

"However, businesses that are U.S. shareholders of CFCs are generally not small businesses because the ownership of sufficient stock in a CFC in order to be a U.S. shareholder generally entails significant resources and investment," the final regs state, adding that the rules only apply if a taxpayer chooses to make the election.

That rationale led to an acerbic reaction from the ACA.

"This approach is the sort of thing that drives Americans abroad crazy. Treasury Department should do its homework. It should dig into the data. It has access to every snippet of data that could possibly exist. It should figure out how many small businesses are affected and, of these, how many, in fact, are expat small businesses. Then, with the facts in hand, it should insert a *de minimis* rule in the regulations. This situation screams for a *de minimis* rule," the ACA release states.

The release argues that the high-tax exclusion can significantly aid expatriates facing high taxes in Europe. But it notes that an election must be made to obtain the benefit, and that that could entail high compliance costs.

The release says that Treasury may be especially attuned to the RFA — which was largely ignored by the tax community until recently — because of several developments, including comments and hearing testimony from the ACA alluding to its requirements with regard to the transition tax, as well as litigation that is "not going well for the Treasury Department."

In *Silver v. IRS*, No. 19-cv-00247 (D.D.C. 2019), a taxpayer sued Treasury over its section 965 transition tax rules imposed on accumulated offshore earnings, alleging that the IRS ignored the requirements of the RFA as well as the Paperwork Reduction Act. After fending off a motion to dismiss for lack of standing and subject matter jurisdiction, the taxpayer moved for summary judgment in May.

Under the RFA, an agency is required to perform an initial and final regulatory flexibility analysis when issuing proposed and final regs. The final analysis, under 5 U.S.C. section 604, must include a statement on the significant issues raised by public comments, a description of the number of small entities to which the rule will apply and the projected reporting and compliance requirements for those entities, and a description of the steps the agency has taken to minimize the economic impact on small entities. There is an exception to the analysis if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. That exception requires a statement providing the factual basis for the certification.

The ACA release reiterates the organization's calls for a de minimis exception in both the transition tax and GILTI regs, something that it argues Treasury should have provided initially. It asserts that doing so now would "go a long ways towards sidestepping questions as to why they 'blew past' the niceties of the Paperwork Reduction Act and the Regulatory Flexibility Act." ■

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