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global foundation FOR EDUCATION AND RESEARCH

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CC:PA:LPD:PR (REG-112096-22)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: IRS: REG-112096-22: Regulations Relating to the Foreign Tax Credit

American Citizens Abroad, Inc. ([ACA](#)) is a leading advocacy organization representing Americans living and working overseas. Headquartered in Washington, DC, ACA is nonpartisan, non-profit (section 501 (c)(4)), with a 40-plus-year history of advocating on behalf of the community of Americans living and working overseas. Alongside ACA is its sister charitable (section 501(c)(3)) research and educational organization, American Citizens Abroad Global Foundation ([ACAGF](#)).

ACA wishes to add its voice to those concerned about the implications for individual non-resident taxpayers of the third set of changes to the regulations relating to Foreign Tax Credits (FTCs). We echo the observations of Mr. Seth Green of KPMG LLC in his testimony at the February 15 IRS public hearings on this matter. Mr. Green notes that the government must take into consideration the vast difference between individual taxpayers and corporate taxpayers when developing rules that will limit access to foreign tax credits. Individual non-resident taxpayers are less sophisticated, knowledgeable, experienced, resourced and connected and are therefore in no position to respond to what the regulations are asking of them.

With regard to the final regulations and their impact on individual non-resident taxpayers we note the following:

Even Greater Filing complexity

- The final regulations require individual non-resident taxpayers seeking creditable taxes to establish separately whether the income taxes they are subjected to passes the four tests: realization, gross receipts, cost recovery and attribution. The final regulations require all individual non-resident taxpayers who live in jurisdictions without a tax on income to establish whether taxes paid qualify as a tax paid in lieu of a tax on income.

For most, these requirements for establishing whether the taxes paid to the foreign countries where the live and work are creditable will be impossible without professional assistance.

- The Treaty Coordination Rule excuses individual taxpayers living and working in foreign countries that are U.S. tax treaty partners from the chore of establishing whether their foreign taxes are creditable. If the taxpayer claims the benefits of the tax treaty, then they may presume that their income taxes are conforming to U.S. definitions and so are creditable. But many non-resident taxpayers do not live in countries with U.S. tax treaties.



Further, some non-resident taxpayers living in tax treaty jurisdictions choose not to claim the benefits of the income tax treaty because to do so would be disadvantageous.

Cost Recovery Test

- Although many non-resident taxpayers have only wage income, those whose income is comprised of wage income and income from other activities (e.g., contract income, small business profits, etc.) may be disallowed FTCs for taxes paid on income from a combination of sources.
- Even those with wage income alone might find the application, in the tax regulations of their country of residence, of a standard allowance against income of unspecified source could render the taxes they paid not creditable.

Source-based Attribution Test

- The new attribution test in the FTC final regulations will deny FTCs to U.S. citizens who live and work in territorial tax systems, such as Hong Kong. U.S. citizens living and/or working in Angola, Guatemala, Honduras, Nicaragua, Panama and Paraguay will similarly be denied FTCs because these countries adopt a territorial tax system and source service income inconsistent with U.S. principles.

Transfer Pricing Rules

- Non-resident taxpayers living in jurisdictions where the transfer pricing rules do not include the OECD's "arm's length principles" – a matter completely unrelated to individual taxation and one in which ordinary, individual taxpayers will certainly have no understanding or orientation - will no longer have access to FTCs and will henceforth be taxed both under the U.S. IRC and the tax jurisdiction of the country where they reside.

Expunged Withholding Exception

- Individuals living and working abroad are exempted from the U.S. federal income tax withholding when income earned in a foreign country is subjected to legally required income tax withholding, and when the amounts withheld are creditable income taxes under U.S. regulations. If, as noted herein, those taxes are no longer creditable, then the U.S. citizen may be relying on an exception to the U.S. federal income tax withholding rules that is no longer available to them.

Conclusions

Individual non-resident taxpayers will require a comprehensive understanding of foreign tax laws and complex corporate taxation issues in order to establish whether the taxes paid in the foreign country where they live are creditable. We believe this is *an unrealistic and unfair expectation to place on individuals, especially considering the foreign language proficiency they would require.*

Many non-resident taxpayers will require the advice and support of tax return preparers who have a comprehensive understanding of both the U.S. tax system and that of the jurisdiction where they reside, *at inordinate expense.*



The FTC final rules will *deny many U.S. citizens living and working abroad access to FTCs and result in them being subjected to double taxation on their income earned abroad.*

The U.S. Treasury has yet to publish a list of countries whose income tax is no longer creditable for the reasons noted herein. Individual taxpayers without access to advisors following these rules changes would certainly not currently know if the taxes they pay abroad are no longer creditable and that *a material decrease in their net household income has occurred.*

Filing from abroad was already inordinately onerous – complex, costly and confusing. For many non-resident taxpayers U.S. tax filing has now become even more so.

TAXATION AND AMERICANS ABROAD

The Taxpayer First Act has identified U.S. citizens living and working overseas as an underserved community and the IRS is working to create systems and provide support to these taxpayers. This cannot come fast enough for the estimated 3.9 million U.S. citizens living and working abroad.¹ Tax filing for U.S. citizens living and working outside the U.S. is complex, costly and confusing, results in onerous taxation of foreign investments considered Passive Foreign Investment Company (PFICs), involves duplicate reporting regimes like the Foreign Account Tax Compliance Act (FATCA) Form 8938 and the Financial Bank Account Report (FBAR)(FinCEN Form 114), is unfair with regard to the application of certain tax credits for non-residents (Child Tax Credit and Earned Income Credit), exposes filers to double taxation with the Net Investment Income Tax (NIIT) and now with the possible disallowance of FTCs, and involves wading through many regulations that overlap with U.S. corporate international tax.

This is just a sampling of the problems on the individual side of reporting, not taking into consideration the filing requirements for small business operations run by U.S. citizens overseas that need to deal with the Transition Tax and Global Intangible Low-Taxed Income (GILTI) regimes (and are denied access to programs available for small businesses through the U.S. tax code such as the Employee Retention Tax Credit and Paycheck Protection Program).

RESIDENCE-BASED TAXATION

ACA has throughout its 40-plus year history advocated for the adoption of residence-based taxation (RBT) and has produced key documents and research that support the move to RBT, which can be made revenue neutral and tight against abuse. ACA was the first organization to develop a [side-by-side analysis](#) that indicates where in the current tax code changes could be made in a move to a system of taxation based on residence (excludes from U.S. taxation foreign earned income). ACA has fielded two research projects on the subject with District Economics Group (DEG), Washington, DC-based economic consulting firm – one in 2017 and one in 2022 that provide valuable information on the income, assets and taxation of U.S. citizens living and working overseas. [This data](#), one of a kind, supports our position that RBT can be adopted and

¹ ACA and District Economics Group estimate that the total number of Americans abroad at present, excluding members of the military and other government employees and contractors, is approximately 3.9 million individuals.



no one will be any worse off, the U.S. Treasury would not lose revenue and the provisions would be protected against tax abuse.

For more information, please visit the ACA website <http://www.americansabroad.org>.

Thank you for your attention to this important subject.

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