



US International Tax Alert

Proposed regulations terminate section 367(d) application to certain repatriated IP

On May 2, 2023, Treasury and the IRS released proposed regulations under section 367(d) affecting certain US persons that previously transferred intangible property (“section 367(d) IP”) to a foreign corporation in a transaction subject to section 367(d). The regulations are proposed to apply to subsequent dispositions of section 367(d) IP occurring on or after the date final regulations are published in the Federal Register.

The proposed regulations terminate the continued application of section 367(d) following repatriations (“subsequent dispositions”) of section 367(d) IP from a transferee foreign corporation to a “qualified domestic person” (QDP), provided certain requirements are met and subject to a gain recognition rule. Importantly, the proposed regulations provide that if a transferee foreign corporation transfers the section 367(d) IP to a QDP and such section 367(d) IP is not transferred basis property, then the US transferor of the section 367(d) IP (or any person treated as such pursuant to Treas. Reg. § 1.367(d)-1T(e)(1)) recognizes gain equal to the excess, if any, of the fair market value of the section 367(d) IP on the date of the transfer and the US transferor’s former adjusted basis in that property. Gain may also be recognized in certain cases where the section 367(d) IP is transferred basis property.

The proposed regulations also:

1. Clarify that the US transferor (or its successor) is required to recognize a deemed payment under Treas. Reg. § 1.367(d)-1T(c) for that part of its taxable year that the section 367(d) IP was held by the transferee foreign corporation,
2. Provide for adjustments to the E&P of the transferee foreign corporation,
3. Provide limited rules regarding the QDP’s adjusted basis in the section 367(d) IP following a subsequent disposition, and
4. Impose information and reporting requirements.

Updates to various cross references are also proposed, as well as clarifications with respect to the foreign branch category rules under Treas. Reg. § 1.904-4(f).

While the proposed regulations provide rules to determine the QDP’s adjusted basis in the repatriated section 367(d) IP, the preamble specifically notes that “the proposed regulations do not address, nor is any implication intended as to, the appropriate treatment of adjusted basis as to the transferee foreign

corporation in [the section 367(d) IP] subject to section 367(d) while section 367(d) applies.” Treasury and the IRS intend to address general basis rules under section 367(d) in future rulemaking.

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