



Inbound insights: surfing the wave of future trends

June 10, 2024

Ahead
of the **wave**

2024 U.S. Cross-Border Tax Conference



Notices

The following information is not intended to be “written advice concerning one or more Federal tax matters” subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230.

The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

With you today

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Agenda

Inbound Legislative & Regulatory Tax Update

BEAT Planning Panel

Stock Buyback Excise Tax & the Funding Rule

CAMT Practical issues

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Inbound Legislative & Regulatory Tax Update



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Base Erosion and Anti-Abuse Tax (BEAT)

Planning Panel

BEAT Planning Opportunities

Certain outbound expenses not subject to BEAT

- Costs capitalized to inventory and recovered as COGS (subject to exception for certain inverted groups)
- Services cost method, qualified derivative payments, and other exceptions
- Section 174 expenditures (post-2021) and section 59(e) elections (pre-2022)

Potential capitalization/deferral techniques (i.e., methods planning)

- Section 266 costs (interest expense)
- Facilitative costs under §1.263(a)-4(e)(4)(iv) related to intangibles
- Mixed service costs under section 263A
- Depreciation elections—bonus depreciation, ADS, others
- Repair/replacement costs/min cap policy

Structural options

- Modification of intercompany (and third party) contracts
- CTB planning and other operational restructuring
- Reduction of reliance on FTCs

And when all else fails...

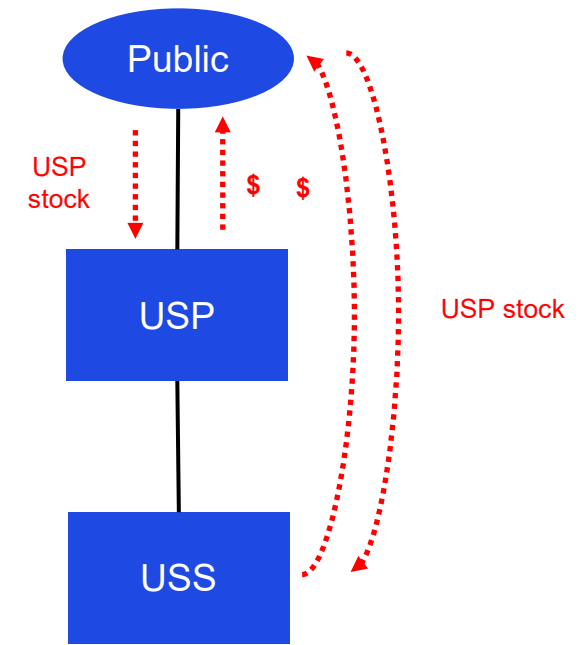
- Waiving deductions

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Stock Buyback Excise Tax & the Funding Rule

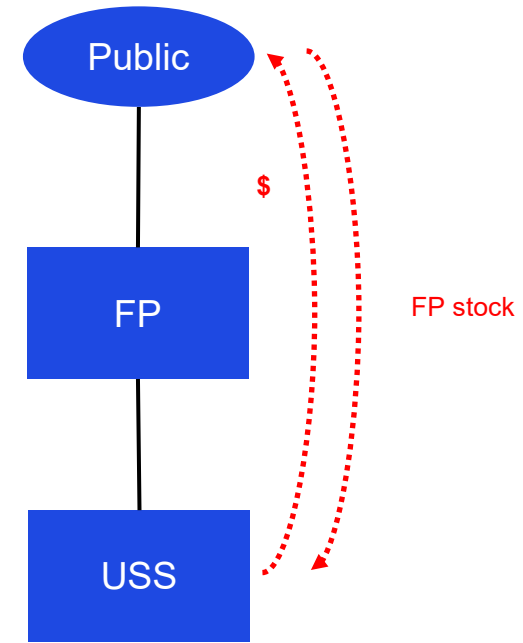
Excise Tax – In General

- Section 4501(a) generally imposes a non-deductible 1% excise tax (the “**excise tax**”) on repurchases of stock of a “**covered corporation.**”
- In general, a covered corporation is publicly-traded U.S. corporation (“**US pubco**”).
 - The excise tax applies to the FMV of US pubco stock repurchased after 2022, subject to certain exceptions and limitations.
 - However, the amount on which the tax is imposed (the “**excise tax base**”) is reduced by the value of US pubco stock issued during the same taxable year (the “**netting rule**”).
- A repurchase of US pubco stock by certain subsidiaries of the US pubco (“**specified affiliates**”) is treated as made by the US pubco itself.
 - A specified affiliate is any corporation or partnership that is majority-owned (directly or indirectly) by the US pubco.



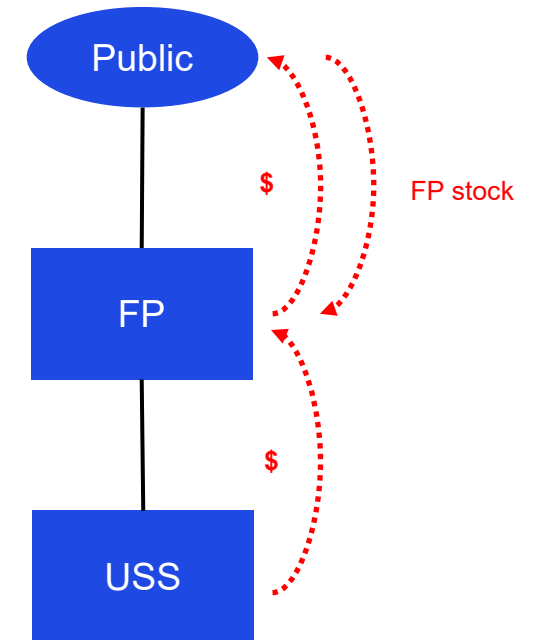
Excise Tax – Foreign-Parented Groups

- Certain US subsidiaries of a publicly-traded foreign corporation (a “**foreign pubco**”) will be treated as covered corporations if they acquire stock of their foreign pubco.
 - US subsidiaries subject to this rule are majority-owned US corporations, US partnerships, and foreign partnerships with more than *de minimis* US ownership.
 - Special rules exist for repurchases of stock by certain foreign pubcos that are subject to the U.S. inversion rules
- The netting rule can apply to reduce the excise tax base of the applicable specified affiliate. However, for purposes of the netting rule, only foreign pubco stock issued or provided by the applicable specified affiliate to its employees is taken into account.



Excise Tax – Notice 2023-2

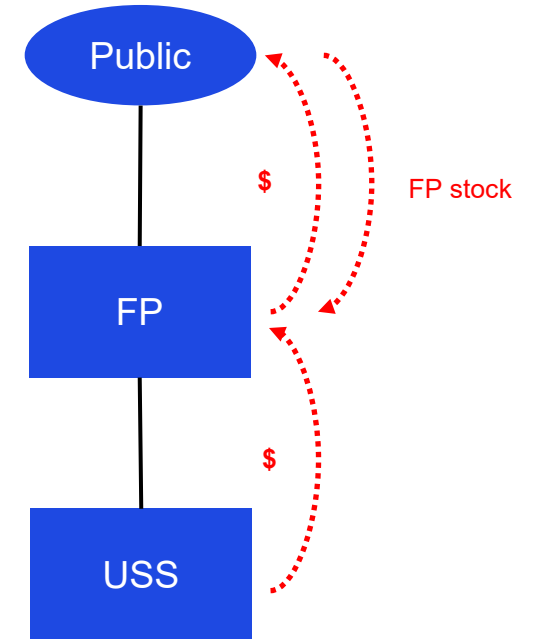
- On December 27, 2022, Treasury released Notice 2023-2 (the “**Notice**”), providing interim guidance on the application and scope of the excise tax.
- The Notice provides that the excise tax will apply not just to acquisitions of foreign pubco stock by a US subsidiary, but also to repurchases by the foreign pubco itself to the extent funded “by any means (including through distributions, debt, or capital contributions)” by a US subsidiary with a principal purpose to avoid the excise tax (the “**funding rule**”).
 - If such funding occurs, other than by a distribution, within 2 years of the acquisition or repurchase, a principal purpose is deemed to exist (the “**per se rule**”).



Cash Flow	Analysis	Risk
Distribution	Likely no PP to avoid excise tax	Green
Loan	PP under per se rule	Red
Interest	Arguably no “funding”	Yellow
COGS	Arguably no “funding”	

Excise Tax – Proposed Regs

- On April 9, 2024, the Treasury released REG-115710-22 and REG-118499-23 (the “**Proposed Regs**”) for the excise tax.
- The Proposed Regs generally adopt the Funding Rule, but the regulations and preamble make the following important changes / clarifications:
 - Eliminate the per se rule;
 - Add a rebuttable presumption for certain “downstream fundings” of subsidiaries;
 - Clarify that it also applies to “indirect” fundings;
 - Clarify that a “funding” includes any flow of cash, even pursuant to an arm’s length purchase / ordinary course transaction; and
 - Provide that, if, based on all the facts and circumstances, a principal purpose of the funding is to fund, directly or indirectly, a repurchase of foreign pubco stock, then there is a principal purpose of avoiding the excise tax.



Cash Flow	Analysis	Risk
Distribution	PP if purpose is to fund repurchase	Yellow
Loan	PP if purpose is to fund repurchase	
Interest	Likely no PP	Green
COGS	Likely no PP	

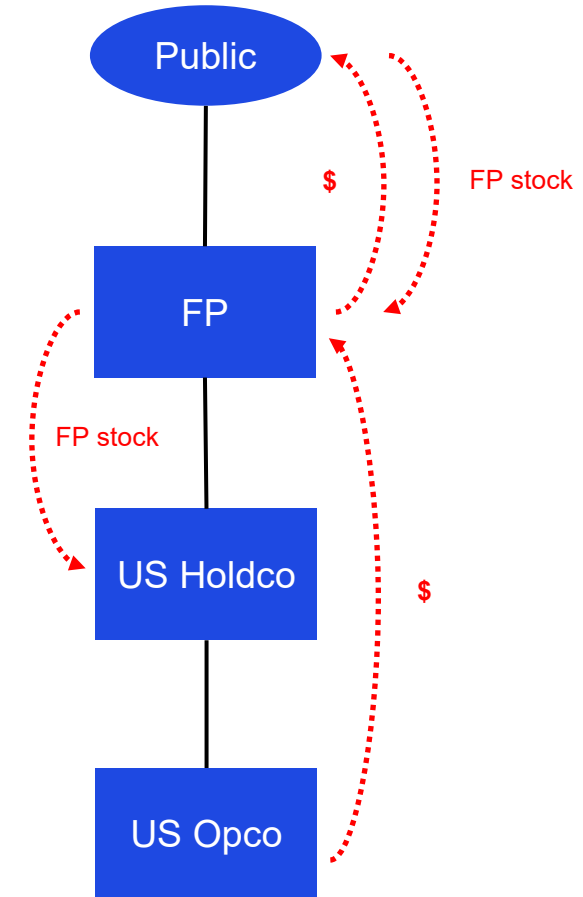
Excise Tax – Netting

Facts

- US Holdco and US Opco are members of the same US group.
- US Opco loans cash to FP with a principal purpose of funding an acquisition of FP stock.
- FP also contributes its own stock to US Holdco to be used by US Holdco in compensating its employees.

Analysis

- The netting rule does not apply here to reduce the excise tax base because the netting rule as applied in the foreign-parented group context only applies for FP stock issued to US Opco employees, and, for this purpose, there is no “single entity” approach for consolidated groups.
- If US Opco instead loans to US Holdco, which then on-lends to FP, does this make US Holdco the funder? Does converting US Opco into a DRE change the result?



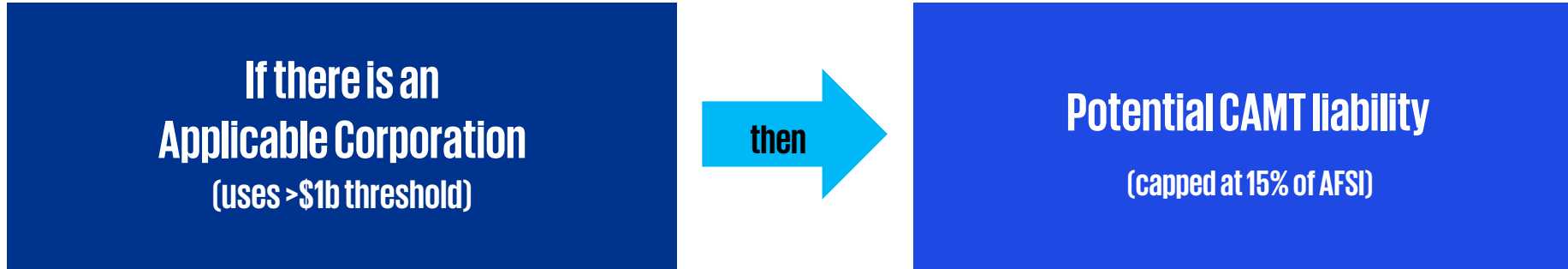
Proposed Regs – Applicability, Reporting, and Payment

- In general, the Proposed Regulations would apply to any transactions occurring in tax years ending after December 31, 2022.
 - However, the Proposed Regs' funding rule applies if both the funding and the repurchase occur on or after April 12, 2024. For transactions that occur before that date, the Notice's funding rule would apply unless the taxpayer chooses to early adopt all the rules in the Proposed Regs (including the Proposed Regs' funding rule).
- A covered corporation (including a US subsidiary of a foreign pubco) that makes any stock repurchase (or is deemed to make a stock repurchase under the funding rule) after December 31, 2022, would be required to file a stock repurchase excise tax return for the tax year in which the repurchase occurs, even if each repurchase in that year is eligible for a statutory exception or is fully offset by issuances
 - The “**stock repurchase excise tax return**” consists of a Form 720, *Quarterly Federal Excise Tax Return*, where the excise tax liability is reported, and an attached Form 7208, *Excise Tax on Repurchase of Corporate Stock*, which the excise tax is calculated.
- Payment is due the same date as the due date of the stock repurchase excise tax return, which is generally the last day of the first month after the first full calendar quarter after the close of taxable year of the covered corporation (including the US subsidiary of a foreign pubco) (e.g., April 30th for calendar year taxpayer).
 - For taxable years ending prior to the time final regulations are published, the due date would be the last day of the first month after the first full calendar quarter after the final regulations are published.

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Corporate Alternative Minimum Tax (CAMT) Practical Issues

CAMT Overview: Two-Part Analysis



Scope Determination

- Aggregate average annual adjusted financial statement income (AFSI) over prior three-year period exceeds \$1b
- Foreign-parented multinational groups (FPMGs) must consider **global** AFSI for \$1b test; additional \$100m US-only AFSI test
- Excludes S corps, RICs, and REITs
- Tax aggregation rules apply
- In-scope status, once attained, is hard to shake
- Limited safe harbor available for 2023

Liability Determination

- 15% of AFSI (less allowed CAMT FTCs) over the regular tax (less regular tax FTCs) plus BEAT
- General business credits (GBCs) allowed to offset up to approx. 75% of combined regular tax and CAMT
- Credit for CAMT may be **carried forward** to offset future regular tax; limitations apply

CAMT Guidance To-Date

[Notice 2023-7](#) (December 27, 2022)

Among other rules, provides a safe harbor for determining whether a corporation is an “applicable corporation”

[Notice 2023-20](#) (February 17, 2023) and [Notice 2023-42](#) (June 7, 2023)

Provide certain relief to insurance industry and estimated tax payment relief for corporations subject to CAMT

[Notice 2023-64](#) (September 12, 2023) and [Notice 2024-10](#) (December 15, 2023)

Provide guidance on wide range of issues, including exclusion for CFC dividends

[IRS CAMT Compliance Campaign](#) (December 8, 2023)

Campaign goals: promote voluntary compliance, focus resources on highest risk issues, and ensure consistency

[Final Form 4626 and Instructions, Alternative Minimum Tax – Corporations](#) (February 2024)

Indicates extensive reporting will be required by any corporation that does not satisfy the safe harbor

Applicability of Existing Guidance:

- For TYBB January 1, 2024, taxpayers generally may, but are not required to, apply the Notices described above
- Appears that taxpayers may pick and choose certain provisions of the Notices (i.e., no consistency requirement)

What’s Next?

- ✓ Will there be additional CAMT notices?..... **Unlikely**
- ✓ When will the proposed regulation package drop?..... **Expected later this year**
- ✓ Will taxpayers have enough time to engage in a CAMT analysis if they wait for proposed regulations?..... **No**

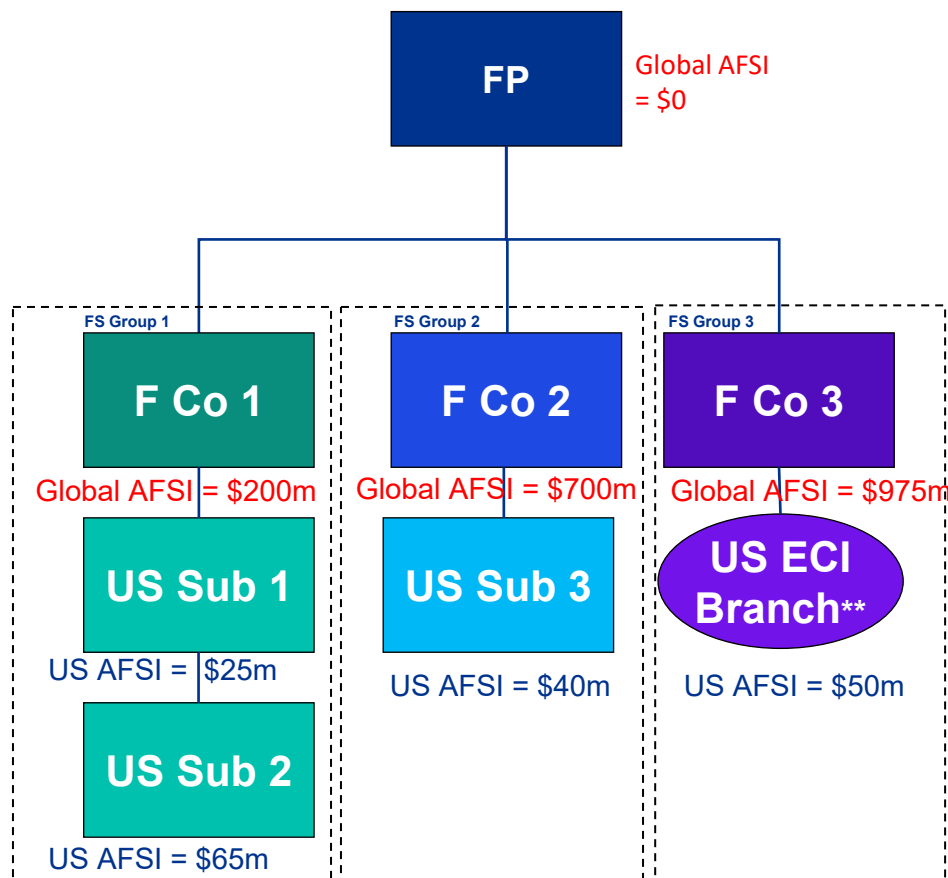
Practical Opportunities and Approaches to CAMT

Uncertainty in statute and state of guidance may lead to certain opportunities to optimize AFSI

- Which financials do I need to use?
- How do I allocate consolidated financial statement income among entities?
- How do I determine which entities are included for FPMG and section 52 group scope testing?
 - How do I account for members joining/leaving the group?
- How do I apply the various adjustments to AFSI?
 - Dividends and other amounts received from corporations that are not tax consolidated
 - Distributive share of partnership AFSI
 - ECI adjustment
 - Section 168 property depreciation adjustment

What are the operational, accounting, or tax strategies available to minimize CAMT?

FPMG and Section 52 Aggregation – Example



*AFSI = 3-yr average

**Does not include treaty protected ECI

- Assume FP does not prepare consolidated financial statements, but that all three FS groups prepare consolidated financial statements that consolidate the entities in their groups

Are US Sub 1 and US Sub 2 in scope for CAMT?

- \$100m Test:** Aggregate US AFSI of §52 group = **\$180M**
- \$1b Test:** Aggregate US and non-US AFSI (i.e., “global” AFSI) of F Co 1 FPMG AND §52 group (per Notice 2023-64)?
 - F Co 1 (\$200M non-US AFSI)
 - US Sub 1 (\$25M US AFSI)
 - US Sub 2 (\$65M US AFSI)
 - F Co 2 (\$700M non-US AFSI)
 - US Sub 3 (\$40M US AFSI)
 - F Co 3 (\$975M non-US AFSI)
 - US ECI Branch (\$50M non-US AFSI)

FPMG

§52 group, but not FPMG

Total global AFSI: \$2.055B

RESULT: US Sub 1 and US Sub 2 are in scope under the Notice.

- If entities that are in the §52 group, but not the FPMG, were ignored for the \$1b test, or only the US AFSI of entities in the §52 group were taken into account, US Sub 1 and US Sub 2 would not be in scope. Query whether a position can be taken under the statute to exclude those entities (or at least their US AFSI) for the first prong.

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Q&A





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