



Federal Tax ADVISORY ■

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Sales of CFCs Got Harder?

Now that the first wave of analysis of the Tax Cuts and Jobs Act of 2017 has passed, many commentators are focusing on the sea change in taxation of the disposition of controlled foreign corporations (CFCs), directly or indirectly, or of their assets. The standard visual is a chain of corporations running from the U.S. holding company through a U.S. subsidiary, to the top-level foreign holding company, to lower-tier CFCs and disregarded entities.

Selling the U.S. sub may allow a Section 338(h)(10) election, but not a Section 338(g) election for the CFCs. Selling the CFCs will allow a Section 338(g) election, but that now can have dramatically different consequences. The regulation has long provided that any Subpart F income of the sold CFC's short year will fall on the U.S. shareholder's return. But now most of the rest of the deemed gain income will flow through to the U.S. shareholder as global intangible low-taxed income (GILTI), reduced only by the deemed tangible income return that reduces the net GILTI inclusion, plus foreign tax credits.

GILTI is taxed at a lower effective rate than Subpart F income or gain on the sale of stock that is not taxed as a dividend (and thus not taxed to a shareholder that is a U.S. corporation), and so choosing to incur GILTI can be a new option—or can be a threat to be avoided by preventing a Section 338(g) election.

If the Section 338(g) election is not made, whether the “normal” Subpart F and GILTI of the sold CFC falls on the U.S. shareholder/seller's return can depend on whether the buyer is domestic or a foreign corporation with a U.S. sub. In either case, the CFC's year as a CFC will not end upon the stock sale, and the seller may have escaped liability for those inclusions for the year; but then the seller might prefer those inclusions, which would create previously taxed income, increase stock basis for the CFC, and possibly net out at a reduced overall tax.

This should be just enough of a glimpse into the brave new world of selling foreign assets and stock to encourage a slow and measured analysis of the options when such transactions are presented.

For more information, please contact [Jack Cummings](#) at 919.862.2302.

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