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Impact of Tax Reform on the Purchase and Sale of Controlled Foreign Corporations — Selected Considerations

By William Skinner, Esq.*

The application of §1248 and §338(g) in the context of the purchase or sale of a controlled foreign corporation (CFC) has long been one of the most complex areas of the tax code.¹ The recently enacted tax reform act — herein, the “2017 tax act” or the “Act”² — by repealing deferral and replacing it with a combination of worldwide taxation of global intangible low-taxed income (GILTI) and a participation exemption, overturned the settled principles that applied to the purchase and sale of CFC stock. This article briefly explores the new rules on purchases and sales of CFC stock in light of the new rules and considerations applicable to tax reform. From a U.S. C corporation’s perspective as a seller, with the repeal of deferral, the decision of whether to sell stock or assets

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¹ All section references are to the U.S. Internal Revenue Code, as amended, or the Treasury regulations thereunder, unless otherwise indicated.

² Pub. L. No. 115-97 (Dec. 22, 2017). Previously referred to, during the legislative proceedings, as the Tax Cuts and Jobs Act.

of a CFC will depend on an analysis of the particular fact pattern and numbers involved. Unique and potentially drastic consequences also apply in the case of a CFC that is owned by a U.S. partnership or pass-through entity, such as a private equity fund.

BACKGROUND ON THE RELEVANT PROVISIONS

GILTI Under the Act

Perhaps the most sweeping international tax change in the 2017 tax act was the introduction of GILTI as a new category of income of CFCs that is taxed currently to its United States shareholders on a “deemed dividend” or phantom income basis.

Briefly, GILTI imposes U.S. tax on the 10%-or-greater U.S. shareholders of CFCs that earn tested income. “Tested income” is defined as all gross income, minus allocable expenses, other than (i) any income effectively connected with a U.S. business, (ii) any subpart F income, (iii) any income excluded from subpart F by the high-taxed exception, (iv) any dividends from related persons within the meaning of §954(d)(3), and (v) any foreign oil and gas extraction income.³ Thus, tested income is likely to comprise a large portion of the operating income of many CFCs. Through the 50% deduction provided for GILTI inclusions recognized by domestic corporate shareholders under new §250, GILTI of a U.S. C corporation is taxable at a 10.5% federal rate.⁴

The shareholder’s GILTI inclusion is equal to the amount of its CFCs’ net tested income (minus losses

³ §951A(c)(2)(A).

⁴ As with subpart F income or actual repatriation under prior law, an indirect foreign tax credit is available against U.S. tax on GILTI for the foreign income taxes imposed at the CFC level on its tested income. See §960(d). The GILTI credit is subject to a 20% disallowance, however, and placed in a separate §904 basket without carryovers or carrybacks. Thus, obtaining full utilization

in the tested income category) in excess of the shareholder's net deemed tangible income return (NTDIR)⁵ of its CFCs. The NTDIR is equal to 10% of the CFCs' aggregate tax basis in tangible property used in a trade or business of producing tested income.⁶ The exclusion from GILTI for the NTDIR is reduced dollar for dollar by certain CFC-level interest expenses.⁷

Importantly for mergers and acquisitions purposes, the new GILTI rules mean that a CFC's gain on the sale of its assets generally will be subject to immediate U.S. tax, albeit at the reduced 10.5% rate for GILTI. Assume a fact pattern where the U.S. parent company owns CFC1, which owns the target company, CFC2. In a sale of assets by CFC2, the gain would likely constitute tested income. Thus, the U.S. parent would include the gain from the deemed sale of assets in GILTI. This contrasts with the results under prior law, where a deemed sale of CFC2's assets used in its trade or business⁸ would generally have produced non-subpart F income deferred from immediate U.S. taxation.⁹ While the characterization of the asset sale proceeds as subpart F income or GILTI will still be relevant to determine the applicable tax rate, electing asset sale treatment through a check-the-box or §338(g) election is unlikely to permit the U.S. parent to defer the sale proceeds from U.S. tax.

Participation Exemption Under §245A

One exception to the current U.S. taxation of a CFC's earnings that is potentially relevant for mergers and acquisitions is the participation exemption of §245A. This new section implements on a limited scale a so-called territorial system. To the extent a CFC's earnings have not been previously taxed under either the GILTI rules or §965, §245A provides a complete 100% dividends received deduction (DRD) for dividends received by a 10% domestic C corporation shareholder from "Specified Foreign Corporations," provided that a holding period requirement is met. The requisite holding period is one year within the two-year period surrounding the ex-dividend

of foreign tax credits in the GILTI basket will be more challenging than was the case for foreign tax credits in the general basket under prior law.

⁵ §951A(b)(1).

⁶ §951A(d)(1).

⁷ See §951A(b)(2)(B) (providing that the NTDIR is reduced, dollar for dollar, by any interest expense of a CFC "to the extent the interest income attributable to such expense is not taken into account in determining such shareholder's net CFC tested income").

⁸ Reg. §1.954-2(e)(3).

⁹ See *Dover v. Commissioner*, 122 T.C. 324 (2004).

date.¹⁰ On a sale of CFC stock, the deemed dividend under §1248 out of the CFC's untaxed earnings is eligible for §245A treatment in the same manner as an actual dividend.¹¹

Thus, in a sale of CFC stock with untaxed earnings, §245A benefits should also factor into the analysis. The portion of sale proceeds that equals previously untaxed earnings generally can be recovered tax free as an exempt dividend, provided the holding period and other requirements of §245A are met. In the case of CFCs with large amounts of earnings excluded from GILTI because of the NTDIR, or the high-taxed exception to subpart F, §245A may be a material consideration to the structure of the sale.

The participation exemption also applies to dividends received by a 10% U.S. corporate shareholder from a specified foreign corporation that is not a CFC.¹² At the same time, the U.S. shareholder will not be subject to GILTI with respect to a foreign corporation that is not a CFC. Thus, in an exit from a foreign corporation that is between 10% and 50% owned (a so-called 10/50 company), the participation exemption may present some interesting planning opportunities, as discussed below.

New §964(e)(4)

Finally, the participation exemption of §245A was also extended to sales of lower-tier CFC stock by an upper-tier CFC where the application of §1248 and §964(e) results in a deemed dividend. As above, assume that the fact pattern is that the U.S. parent owns CFC1, which, in turn, owns CFC2, the target company. On CFC1's sale of its CFC2 stock, the gain would be characterized as a deemed dividend from CFC2 to CFC1 to the extent of CFC2's undistributed earnings.¹³ Prior to the 2017 tax act, this deemed dividend would be excluded from the U.S. parent's subpart F income due to the look-through rule. However, now §964(e)(4) provides that in the case of a sale of

¹⁰ The taxpayer must also be a 10% domestic corporate shareholder of the foreign corporation throughout that one-year period. See §246(c)(5)(B). In addition, since the participation exemption operates by means of a DRD, §1059 also may apply to CFC dividends eligible for §245A. For "extraordinary dividends," §1059 provides for a reduction in stock basis (or recognition of gain) for the amount of the DRD, unless the stock has been held for at least two years preceding the ex-dividend date. A discussion of §1059 is beyond the scope of this article. Suffice it to say, §1059 creates an additional wrinkle in obtaining the benefits of the participation exemption for dividends from CFCs.

¹¹ §1248(j).

¹² See §245A(b) (defining a specified 10% owned foreign corporation as including any foreign corporation, other than a PFIC, with respect to which a domestic corporation is a "United States shareholder").

¹³ §964(e)(1).

CFC2's stock by CFC1, the U.S. parent includes in subpart F income the foreign-source portion of the deemed dividend, and also is allowed a §245A dividends received deduction in the same manner as if the subpart F inclusion were an actual dividend from the selling CFC.

Where the §245A requirements are met with respect to CFC1, the §964(e)(4) dividend would not be subject to U.S. tax. However, if the holding period of CFC1's stock does not satisfy the §245A test, the subpart F income created by §964(e)(4) may be subject to U.S. tax. The application of subpart F, offset by a DRD, also could have different foreign tax credit implications than a movement of earnings and profits up the chain.

In a sale of CFC2 that is treated as a stock sale, it is also worth considering the implication of previously taxed income (PTI). Such PTI would generally be reflected in CFC1's stock basis in CFC2, reducing the total gain on sale of CFC2's stock.¹⁴ However, there may well be unrecognized currency gain or loss under §986(c) in the U.S. shareholder's dollar-basis PTI accounts. Is this gain or loss triggered on a deemed distribution of PTI immediately before the sale of CFC2's stock? This question could be important given that §986(c) gain or loss could have a different character than stock sale gain under §964(e)(4) (i.e., as GILTI or potentially an adjustment to amounts realized under §965), which could be more important given the large amounts of PTI that will be in the system after tax reform. In Notice 88-71, guidance was provided that a §1248 sale was treated as triggering §986(c) gain or loss, but this rule has not been incorporated in regulations.¹⁵

PURCHASE AND SALE OF CFC STOCK UNDER THE ACT

In disposing of a foreign subsidiary, one key U.S. tax structuring decision facing the U.S. buyer or U.S. seller will be whether to treat the stock sale as a deemed sale of assets, either by virtue of a check-the-box election by the seller (a "check-and-sell transaction") or through a §338(g) election by the buyer. Since the §338(g) election is made unilaterally by the buyer, it will be important for the seller to identify this issue and foreclose the election contractually if stock sale treatment is desired. The relevant considerations underlying this decision, particularly for the seller, have changed in light of tax reform, and now will be more dependent on the specifics of the seller's fact pattern.

¹⁴ See §961(c); Prop. Reg. §1.961-4 (2006).

¹⁵ See Notice 88-71, §2(c) and Ex. 6.

Buyer Considerations

In the new environment, the motivations of a U.S. buyer of a CFC will not have changed dramatically. All else being equal, it will generally be beneficial to the buyer to treat the stock purchase as an asset sale for U.S. tax purposes so as to obtain an amortizable step-up in basis of the target company's assets. To the extent the step-up in basis is applied to tangible assets, this will create additional qualified business asset investment (QBAI) and allow the buyer to exclude a portion of its CFCs' net tested income from GILTI. Amortization deductions resulting from a step-up basis would also be deductible as expenses in computing tested income and GILTI.¹⁶ In the new quasi-worldwide tax system of GILTI, a CFC's amortization deductions will be taken into account immediately. While this will generally be beneficial to the buyer, it should be noted that the 2017 tax act did not repeal §901(m), so that part of the buyer's foreign tax credits will likely be disallowed as a result of the basis difference created by the §338(g) election.

Also, the Act's transition tax and new participation exemption generally eliminated the tax on repatriation of foreign earnings. With GILTI and §965, many U.S. corporations will have large stockpiles of PTI that can be repatriated without further tax (other than currency gain or loss). Therefore, the PTI created by a purchase of CFC stock without a §338 election¹⁷ likely no longer has any value to the buyer.

In short, a U.S. corporation purchasing a foreign corporation's stock will normally still want to make a §338(g) election and obtain an asset sale treatment.

Seller Considerations — U.S. Corporate Seller

Previously, a seller of CFC stock would often prefer to treat the sale of CFC stock as an asset sale by means of a check-the-box election to characterize the sale proceeds as active business income, exempt from tax under subpart F, rather than passive basket subpart F income on the sale of stock. Under the Act, a deemed asset sale of assets held for use in a trade or business will produce GILTI, rather than deferred income. On the other hand, a sale of CFC stock without a §338(g) election will produce a gain that is generally included in foreign personal holding company income under §954(c)(1)(B), except to the extent of any deemed dividend that is potentially tax free under §964(e)(4) and §245A. How this plays out in a particular situation will depend on several factors, such as whether the seller has higher stock basis than asset

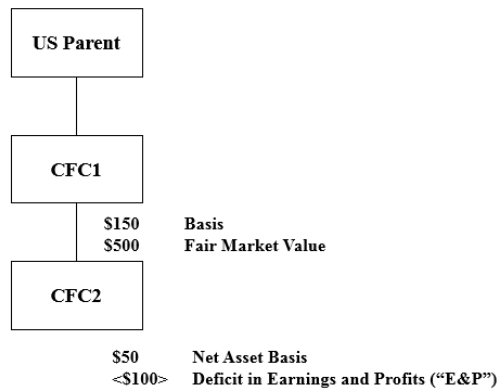
¹⁶ See §951A(c)(2)(A)(ii).

¹⁷ See §959(e).

basis in the CFC, whether the seller is entitled to a §250 deduction or has net operating losses, the U.S. parent's foreign tax credit profile, and the amount of earnings eligible for §245A.

Consider first a fact pattern where a U.S. parent owns CFC1, which sells the stock of CFC2. CFC2 was originally formed by CFC1, which invested \$150 in the stock of CFC2. CFC2 has incurred operating losses of \$100 and has \$50 of remaining basis in its assets. CFC1 sells CFC2 to an unrelated buyer for \$500, and the question is whether or not the seller wants to cause the transaction to be treated as a deemed asset sale for U.S. tax purposes by means of a §338(g) election or a "check-and-sell" transaction.

Example 1



On a stock sale without any elections, CFC1 would recognize a \$350 gain, all of which would generally be taxable to US Parent as passive basket, subpart F income under §954(c). To the extent CFC1 incurred taxes on the sale, those taxes could be claimed as a foreign tax credit under §960(a). Assume no other foreign tax credits would be available in the passive basket to shelter this gain.¹⁸ Assuming no foreign tax on CFC1's sale of stock, the \$350 gain would be subject to full U.S. taxes at 21% (\$73.5 of federal tax).

Alternatively, if CFC1 "checked the box" on the target prior to sale, the result would be a deemed asset sale of CFC2's assets, producing \$450 of gain. Assuming CFC2's assets were held for use in a trade or business,¹⁹ the gain would not be subpart F income but would be included in net tested income. Assuming that US Parent's CFCs otherwise produced tested income in excess of the NTDIR, the entire \$450 of asset sale gain would be taxable to US Parent as GILTI.

While deferral of gain recognized by "check-and-sell" transactions is no longer possible as it was under prior law, due to GILTI, nonetheless, assuming US

Parent is entitled to the §250 deduction, the check-and-sell transaction (and deemed asset sale) would result in a dramatic reduction in tax due to the lower rate of tax on GILTI. US Parent's pre-credit U.S. tax rate on the GILTI from the sale would be \$47.3 (10.5% x \$450). Even with the lower asset basis than stock basis, the lower rate of tax on an asset sale as GILTI results in significant tax savings as compared to a simple sale of CFC2's stock.

In addition, the characterization of the gain as GILTI, rather than passive basket income, also potentially allows for utilization of foreign tax credits. Namely, if US Parent's tested foreign income taxes exceeded the 13.125% "tax indifferent rate," or the applicable §904 limitation for GILTI if expenses must be allocated and apportioned to GILTI, the GILTI created by a check-and-sell transaction of CFC2 would be eligible for cross-crediting against other taxes in the GILTI basket. In this regard, as under prior law, check-and-sell would generally be better than asking the buyer to make a §338(g) election due to §338(h)(16).²⁰

In short, the seller in the fact pattern above would prefer a deemed asset sale to a stock sale of CFC2 due to the lower rate of tax on GILTI and cross-crediting possibilities.

Impact of Higher Stock Basis Adjustments and Untaxed E&P on the Seller's Tax Treatment

Several factors could change the seller's preference for an asset sale for U.S. tax purposes. For example, there is a taxable income limitation on the §250 deduction that provides the reduced rate of tax on GILTI.²¹ If US Parent were in a net operating loss (NOL) position, the GILTI created by a deemed asset sale would offset the taxpayer's NOLs, without any §250 deduction, and thus effectively be subject to tax at the normal 21% rate. Foreign income taxes imposed on CFC1's deemed asset sale would also be eliminated if the parent were in an NOL position, whereas the indirect credit on a stock sale could potentially carry over under §904(c). Thus, where the seller has NOLs, the seller in the prior fact pattern might prefer a stock sale over an asset sale because of the smaller overall amount of gain subject to tax, from \$450 down to \$350.

Another factor that should be considered is the potential application of §245A by means of §964(e)(4)

¹⁸ The high-taxed kick-out of §904(d)(2)(F) continues to apply after the 2017 tax act, so that the taxpayer would generally not have foreign tax credit carryovers in the passive basket.

¹⁹ Reg. §1.954-2(e)(3). Also, assume that no §954(d) issues are present.

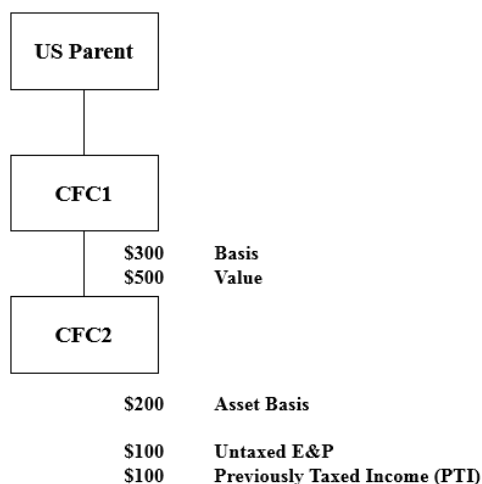
²⁰ Section 338(h)(16) remains in the Code after the 2017 tax act and, thus, in the case of a §338(g) election, would seem to provide that the deemed asset gain remains in the passive basket for foreign tax credit purposes. However, as under prior law, a check-and-sell transaction would not be subject to §338(h)(16).

²¹ §250(a)(2).

on a stock sale. For example, again, consider a case where US Parent owns CFC1, which sells the stock of CFC2. Where CFC2 has undistributed earnings and profits, the stock sale without a check-the-box election or §338(g) election would cause part of CFC1's gain to be recharacterized as subpart F income that is offset by a §245A deduction, assuming US Parent would satisfy the requirements of §245A on an actual dividend by CFC1. For taxpayers in industries with large amounts of QBAI, the potential to realize stock sale, but not asset sale, proceeds tax free under §964(e)(4), and §245A will also need to be considered.

Assume, as illustrated by the second diagram, that CFC1 has \$250 of cost basis in CFC2's stock (plus \$100 of §961 basis) and sells CFC2 for \$500. CFC2 has \$200 of basis in its assets, and \$200 of earnings and profits, of which \$100 are PTI and \$100 are undistributed E&P. What impact do these new facts have on the stock-sale-versus-asset-sale calculus of the seller?

Example 2



In a stock sale, US Parent would benefit from both CFC1's high stock basis in CFC2 and CFC2's undistributed earnings to reduce its tax from sale. Specifically, on a stock sale, CFC1 would recognize \$150 of total gain, calculated as \$500 of proceeds, minus \$350 of basis. Of this \$150 of gain, \$100 would be characterized as a deemed dividend under §964(e) and subpart F income to US Parent under §964(e)(4). Assuming the holding period is satisfied, US Parent would be entitled to a \$100 deduction under §245A.²² Essentially, this \$100 of gain would be exempt from tax. At the end of the day, US Parent would include \$50 of passive basket subpart F income and be subject to \$10.5 of pre-credit U.S. tax ($\$50 \times 21\% = \10.5).

²² Unlike the 50% deduction for GILTI under §250, the dividends received deduction has no taxable income limitation. Thus, §245A treatment would also be beneficial to U.S. sellers with NOLs.

By a contrast, in a deemed asset sale through check-the-box or §338(g), the target would recognize \$300 of gain on the deemed sale of its assets. Even taxed at the lower rate applicable to GILTI, US Parent would recognize \$31.5 of pre-credit U.S. tax ($\$300 \times 10.5\% = \31.5).

In short, under the 2017 tax act, the decision to sell assets or stock will, from the seller's perspective, depend on the fact pattern and the analysis of the numbers. Several different variables could drive a seller to prefer stock sale or asset sale treatment for a disposition of its CFCs. Such variables include basis differences between stock and assets, availability of excess foreign tax credits, whether the seller is taxable-income-limited on its §250 deduction for GILTI, and the amount of earnings that can potentially be distributed tax free under §245A. The taxpayer will need to review the numbers of each fact pattern to reach a conclusion on the proper treatment of a sale.

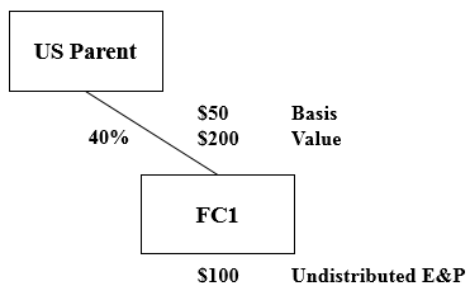
Sale of Stock in a So-Called 10/50 Company

The discussion above considers a common situation of a U.S. company selling off one or more wholly owned foreign subsidiaries as part of a disposition. While less common, from time to time, U.S. companies also exit from foreign corporation investments that are significant (e.g., >10%) positions, but are not controlling positions — such as joint ventures — and thus are not sales of CFCs. In the exit from a greater than 10%, but less than 50%, owned foreign corporation (a 10/50 company), the §245A deduction presents a potentially significant planning opportunity.

Section 245A, as noted above, provides the same dividends received deduction to a dividend received by a 10% domestic corporate shareholder of a specified foreign corporation that is a 10/50 company. At the same time, such a 10/50 company, because by definition it is not a CFC, may accumulate earnings that are not subject to GILTI. In the sale of a 10/50 company, the U.S. seller will have a significantly different treatment from a sale at a capital gain, from a sale preceded by a dividend out of the foreign corporation's E&P.

For example, assume that US Parent owns a 40% interest in FC1, a foreign corporation that is not a CFC. US Parent has \$50 of basis in the stock of FC1, which is worth \$200. FC1 has accumulated E&P of \$100. US Parent sells its FC1 stock for \$200. Without further planning, US Parent would pay tax of \$31.5 on the stock sale ($\$150 \text{ gain} \times 21\% = \31.5).

Example 3



Alternatively, assume that FC1 paid a dividend to all of its shareholders of \$100 before US Parent sold its stock. In this case, US Parent would recognize \$40 of dividend income under §245A and then, assuming no basis adjustments under §1059, would recognize gain of \$110 on the sale of its stock, ex-dividend for \$160. US Parent would pay tax of \$23.10 ($\$110 \times 21\%$) as a result of receiving its share of FC1's earnings as an exempt dividend under §245A. All else equal, as in the case of a sale of stock of a domestic subsidiary, US Parent would benefit from receiving dividend income rather than capital gain.

This difference between exempt dividends and fully taxable capital gains is likely to put renewed focus on the “bootstrap acquisition” line of cases.²³ Also, in claiming §245A dividends, US Parent should also carefully consider the rules of §1059, which, if applicable, would provide for a reduction of basis and negate the benefit of receiving a dividend prior to sale.

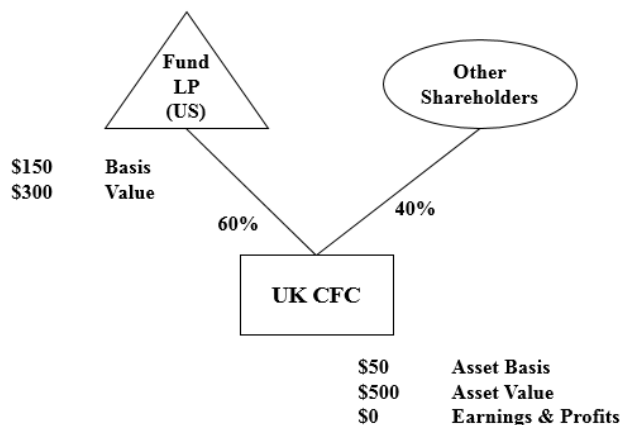
Sale of CFC Stock Owned by Individuals or Partnerships

The examples above focus on the sale of a CFC's stock by a U.S. shareholder that is a C corporation. However, some CFCs are owned by non-corporate shareholders, such as private equity funds or domestic partnerships and pass-through entities. With the modification of the constructive ownership rules of §958(b)(4), it is also possible for 10% U.S. owners in certain foreign-parented companies by virtue of constructive ownership to be subject to subpart F and GILTI. Unlike U.S. corporate shareholders, which will prefer to cause CFCs selling a target business to check and sell to obtain asset sale treatment, a fund or other non-corporate U.S. shareholder of a CFC will likely find an asset sale by a CFC to be toxic.

As illustrated by the fourth diagram, consider an example where Fund LP, a U.S. partnership, owns

60% of the stock of a U.K. corporation that is a CFC. Fund LP has \$150 of basis in the CFC's stock. CFC has tax basis in its assets for U.S. tax purposes of \$50 and no earnings and profits. Fund LP and the other shareholders sell CFC's stock for \$500. The buyer is a U.S. corporation that, unless contractually prohibited from doing so, will make a §338(g) election.

Example 4



Without a §338(g) election, Fund LP's results would be the recognition of a \$150 of gain on sale that likely flows through as a capital gain ($\$500 \times 60\% = \$300 - \$150$ of basis). Assuming all of the fund's partners are taxable U.S. individuals, the net result would be \$35.7 of federal tax ($\150 gain $\times 23.8\%$ tax rate).

If a buyer were to make a §338(g) election, however, the U.K. CFC would first be deemed to sell all of its assets and recognize a corporate-level gain of \$450. Absent QBAI or tested losses the fund would include GILTI of \$270 ($\450 gain $\times 60\% = \$270$), taxed to U.S. investors at ordinary rates. The reduced rate of tax provided by the §250 deduction is only available to C corporations. This \$270 of GILTI inclusion would result in U.S. tax to the fund's partners on GILTI of \$99.9 ($\$270 \times 37\%$),²⁴ a more than doubling of the total U.S. tax burden of the sale. Due to the positive stock basis adjustments provided by §961(a) for GILTI, fund LP would recognize an additional capital loss of \$120 ($\300 proceeds $- \$150$ cost basis $- \$270$ basis adjustment under §961(a)) on the actual sale of stock. The net effect of the buyer's §338(g) election is to recharacterize \$150 of long-term capital gain into \$270 of ordinary income (total tax of \$100

²³ See *Litton Indus. Inc. v. Commissioner*, 89 T.C. 1086 (1987); *Steel Improvement & Forge Co. v. Commissioner*, 314 F.2d 96 (6th Cir. 1963). Cf. *Waterman Steamship Corp v. Commissioner*, 430 F.2d 1185 (5th Cir. 1970).

²⁴ Net investment income tax generally does not apply to subpart F income and by extension should not apply to GILTI. See *Treas. Reg. §1.1411-10*.

at 37%) and a \$120 capital loss — a disastrous result.²⁵

The taxpayer will likely be surprised by this result in that, under prior law, a §338 election would result in the sale proceeds being treated as a §1248 dividend, which in the case of a foreign corporation organized in a treaty country would likely constitute “qualified dividend income” under §1(h)(11)(C) that is still taxed at long-term capital gains rates.²⁶ The 2017 tax act turns this result on its head.

²⁵ To the extent the Fund’s members are individuals, a §962 election may be available to mitigate the results above. However, the benefits of the §962 election in a sale context are likely to provide only a partial solution.

²⁶ See Notice 2004-70, §4.01 (treating a §1248 deemed divi-

CONCLUSION

As discussed above, one of the many areas of international tax law radically changed by the 2017 tax act was the treatment of a U.S. shareholder disposing of an interest in a CFC or other foreign business entity. While in many cases, both the buyer and the seller will be aligned on deemed asset sale treatment under §338(g) (or through check-and-sell), the GILTI rules and participation exemption create new aspects to the analysis that will have to be considered afresh. More so than before, the best answer for any particular fact pattern will depend on thorough understanding of the relevant numbers and careful analysis.

dend as eligible for §1(h)(11)).