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Temporary and Proposed Regulations Under Section 883

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Introduction

On June 22, 2007, the US Treasury Department and the US Internal Revenue Service (the "IRS") released temporary and proposed regulations under section 883 (the "Temporary Regulations"), relating to the reciprocal shipping income exemption.[1] The Temporary Regulations generally apply to taxable years of a foreign corporation beginning after June 25, 2007.[2] A public hearing on the Temporary Regulations has been scheduled for October 24, 2007. In addition, the Treasury and the IRS have invited comments on the Temporary Regulations, which must be received by September 24, 2007.

The Temporary Regulations make important changes to the existing final regulations under section 883 by: (1) replacing the income inclusion test of the controlled foreign corporation (CFC) stock ownership test with a qualified US person ownership test; (2) explicitly broadening the categories of activities that qualify as incidental to the international operation of ships or aircraft to include the provision of certain ground services; (3) providing that a country which provides a reciprocal exemption only through an income tax convention provides an equivalent exemption for purposes of section 883, provided that certain conditions are satisfied; and (4) relaxing the reporting (but not the substantiation) requirements with respect to each of the stock ownership tests by no longer requiring a foreign corporation to provide the names of certain shareholders relied on to qualify for section 883 on its IRS Form 1120-F (U.S. Income Tax Return of a Foreign Corporation).

Section 883(a)(1) provides that a foreign corporation's income from the international operation of ships is excluded from gross income and is exempt from US federal income tax, provided that the foreign country under the laws of which such foreign corporation is organized grants an equivalent exemption to corporations organized in the United States. Section 883(c)(1) provides, in general, that the section 883(a)(1) exemption does not apply to any foreign corporation if 50 percent or more of the value of its stock is owned by individuals who are not residents of a qualified foreign country (the "more-than-50-percent look-through rule"). However, section 883(c)(2) provides that section 883(c)(1) does not apply to any foreign corporation that is a CFC (as defined in section 957(a)).[3] Section 883(c)(3)(A) provides that section 883(c)(1) also does not apply to any foreign corporation organized in a qualified foreign country whose stock is primarily and regularly traded on an established securities market in a qualified country.[4] Treas. Reg. § 1.883-1(c)(2) provides that a foreign corporation must satisfy one of three stock ownership tests to satisfy the ownership requirements of section 883(c): (1) the publicly-traded test of Treas. Reg. § 1.883-2; (2) the CFC stock ownership test of Treas. Reg. § 1.883-3; or (3) the qualified shareholder test of Treas. Reg. § 1.883-4.

CFC Stock Ownership Test

Background

A US shareholder of a CFC generally is required to include in gross income its pro rata share of such CFC's "subpart F income," which includes "foreign base company income."[5] For taxable years of a CFC beginning before January 1, 2005, foreign base company income included "foreign base company shipping income" (FBCSI).[6] Prior to the Temporary Regulations, the regulations provided that a foreign corporation satisfied the CFC stock ownership test if it was a CFC and it satisfied the income inclusion test.[7] The income inclusion test required that more than 50 percent of the CFC's "adjusted net foreign base company income" (as defined in Treas. Reg. § 1.954-1(d) and as increased or decreased by section 952(c)) derived from the international operation of ships or

aircraft was includible in the gross income of one or more US citizens, individual residents of the United States, or domestic corporations, pursuant to section 951(a)(1)(A).[8]

In 2004, Congress repealed the FBCSI provisions effective for taxable years of a foreign corporation beginning after December 31, 2004.[9] Following the repeal of the FBCSI provisions, it was not clear how taxpayers should apply the income inclusion test where, for example, the CFC derives no subpart F income, as will often be the case after 2004.[10] Accordingly, in Treasury Decision 9218, Treasury and the IRS attempted to address taxpayer concerns by providing that a CFC that satisfied the income inclusion test prior to the effective date of the repeal of the FBCSI provisions would continue to satisfy that test after the effective date of the repeal of the FBCSI, provided that the CFC is able to demonstrate that if the FBCSI provisions had not been repealed, more than 50 percent of its current earnings and profits would have been attributable to amounts includible in the gross income of one or more US citizens, individual residents of the United States, or domestic corporations under section 951(a)(1)(A).[11] Treasury and the IRS received several comments letters in response to Treasury Decision 9218, criticizing the above test as too complex for taxpayers to apply in a post-FBCSI repeal world.[12] In response to these letters, Treasury and the IRS announced in Notice 2006-43 that the income inclusion test would be replaced by a new qualified US person ownership test, as more fully described below, with revised substantiation and reporting requirements.[13]

Qualified US Person Ownership Test

Treas. Reg. § 1.883-3T provides that a foreign corporation satisfies the qualified US person ownership test if: (1) it is a CFC for more than half the days in the corporation's taxable year; and (2) more than 50 percent of the value of its stock is owned, within the meaning of section 958(a) and by attribution through certain domestic pass-through entities, by one or more "qualified US persons" for more than half the days of the CFC's taxable year. Treas. Reg. § 1.883-3T(b)(2) defines "qualified US person" as a US citizen, resident alien, domestic corporation, or domestic trust described in section 501(a) (relating to tax-exempt entities), but only if such person provides the CFC with an ownership statement and the CFC meets certain reporting requirements with respect to that person. For these purposes, stock of a CFC that is owned, directly or indirectly, through bearer shares is not taken into account in the numerator of the fraction, but is taken into account in the denominator to determine the portion of the overall stock value that is owned by qualified US persons.[14] As described above, for purposes of applying the qualified US person stock ownership test, the attribution rules of section 958(a), relating to attribution of ownership held through foreign entities, apply. In addition, Treas. Reg. § 1.883-3T(b)(4) extends the attribution rules of section 958(a) to certain domestic entities by providing that stock owned, directly or indirectly, by or for a domestic partnership, domestic trust not described in section 501(a), or domestic estate, is treated as owned proportionately by its partners, beneficiaries, grantors, or other interest holders.

The Temporary Regulations provide the following example applying the qualified US person ownership test: Assume that ShipCo, a corporation organized in a country that grants an equivalent exemption to US corporations, is a CFC for more than half the days of its taxable year. Corp A, a foreign corporation all of whose stock is owned by a citizen and resident of a foreign country, owns 40 percent of the value of ShipCo for the entire taxable year. X, a domestic partnership, owns the remaining 60 percent of the value of ShipCo for the entire taxable year. X is owned by 20 partners, all of whom are US citizens and each of whom has owned a 5 percent interest in X for the entire taxable year of ShipCo. Ship Co satisfies the qualified US person ownership test because 60 percent of the value of its stock is owned, applying the attribution rules of Treas. Reg. § 1.883-3T(b)(4), for at least half the number of days of ShipCo's taxable year by the partners of X, all of whom are qualified US persons. If ShipCo satisfies the substantiation and reporting requirements of Treas. Reg. § 1.883-3T(c) and (d), it will meet the CFC stock ownership test.[15]

Treas. Reg. § 1.883-3T(c) sets forth new substantiation requirements that are very similar to the highly burdensome substantiation requirements found in Treas. Reg. § 1.883-4(d), relating to the qualified shareholder test. Very generally, a CFC relying on the CFC stock ownership test must obtain a detailed written ownership statement, signed under penalties of perjury, from each qualified US person upon whose stock ownership it relies to meet the CFC stock ownership test, as well as from each domestic pass-through intermediary, each foreign intermediary, and "mere legal owners or record holders acting as nominees" standing in the chain of ownership between the CFC and each such qualified US person.[16]

Based on our experience with the substantiation requirements under the qualified shareholder test, we believe that it will not be easy to comply with these new substantiation requirements, particularly where ownership statements are required to be provided by foreign intermediaries, including nominees, many of whom are understandably reluctant to provide any information to the IRS, especially when the provider of such information does not otherwise have any connection to the United States and such information must be signed under penalties of perjury.

Countries That Provide An Equivalent Exemption Only By Income Tax Convention

Background

Prior to 1997, it appeared to be the position of Treasury and the IRS that a foreign country that provided an exemption only through an income tax convention with the United States (e.g., under the shipping and air transport article or under the capital gains article) provided an equivalent exemption for purposes of section 883.[17] Between 1997 and 2001, it was less clear whether, in the view of Treasury and the IRS, a country that provided an equivalent exemption only through an income tax convention with the United States provided an exemption for purposes of section 883.[18] In Revenue Ruling 2001-48, Treasury and the IRS unambiguously took the position that a country that provides an exemption only through an income tax convention with the United States did not provide an equivalent exemption for purposes of section 883, except for purposes of applying the more-than-50-percent look-through rule of section 883(c)(1).[19] Consequently, according to Treasury and the IRS, a foreign corporation organized in a foreign country that provided an exemption only through an income tax convention with the United States could not rely on such exemption for purposes of claiming section 883; rather, such foreign corporation was required to rely on the provisions of the income tax treaty to claim relief from US taxation.[20]

In Treas. Reg. § 1.883-1(h)(3)(i), Treasury and the IRS continued to take the position that a foreign country that provides an exemption only through an income tax convention with the United States does not provide an equivalent exemption, and is not a qualified foreign country, for purposes of section 883. However, as in Revenue Ruling 2001-48, the section 883 regulations provide that, for purposes of satisfying the qualified shareholder test of Treas. Reg. § 1.883-4 (as opposed to the foreign corporation claiming the exemption itself), a shareholder resident in a foreign country that provides an exemption by means of an income tax convention with the United States generally is considered to be a resident of, or organized in, a qualified foreign country.[21]

Section 6038C and Treas. Reg. § 1.6038A-1 generally require certain foreign-owned US corporations and foreign corporations engaged in a US trade or business (each, a "reporting corporation") to, among other things, file an annual information return on a Form 5472 (Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business) and to maintain certain records with respect to transactions with each related party with which the reporting corporation has had any "reportable transaction" (generally including consideration paid or received for services) during the taxable year. Treas. Reg. § 1.6038A-4 generally imposes a $10,000 penalty for each failure by a reporting corporation either to file a Form 5472 or to comply with the record maintenance requirements. Excepted from the definition of a reporting corporation is: (1) a foreign corporation that has no US permanent establishment under an applicable income tax convention;[22] and (2) a foreign corporation whose gross income is exempt from US taxation under section 883, provided that it fully complies with the reporting requirements required to claim such exemption.[23] It is not clear whether a foreign corporation that has a US permanent establishment and whose gross income from the operation of ships in international traffic is exempt from US taxation pursuant to an income tax convention with the United States is required to file a Form 5472 and comply with the record maintenance requirements, although good arguments exist that it should not be so required.

New Rule for Exemptions by US Income Tax Convention

After further consideration, Treasury and the IRS decided in the Temporary Regulations that a country that provides an exemption only by an income tax convention with the United States is considered to grant an equivalent exemption for purposes of section 883(a), provided certain conditions are satisfied.[24] Specifically, a foreign corporation organized in a foreign country that only provides an exemption from tax for profits from the operation of ships or aircraft in international traffic under the shipping and air transport or gains article of an income tax convention with the United States, may treat such exemption as an equivalent exemption for purposes of section 883 if: (1) the foreign corporation meets all the

conditions for claiming benefits with respect to such profits under the income tax convention (e.g., the requirements of any limitation on benefits article under the income tax convention); and (2) the profits that are exempt pursuant to the income tax convention also fall within a category of income described in Treas. Reg. § 1.883-1(h)(2), which sets forth the eight separate categories of income for which an exemption may be separately claimed under section 883.

With respect to the first requirement, a foreign corporation that bases its claim for an exemption under section 883 under this new rule is required to satisfy one of the stock ownership tests set forth in Treas. Reg. § 1.883-1(c)(2) (including the substantiation and reporting requirements thereof) in addition to satisfying the requirements under the income tax convention for claiming the exemption (e.g., any limitation on benefits article): "[A] foreign corporation that does not meet one of the stock ownership tests described in § 1.883-1(c)(2) is not a qualified foreign corporation under § 1.883-1(c)(1), and may not claim an exclusion from gross income under section 883, *even though it would satisfy the limitation on benefits article under the relevant convention.*"[25] Similarly, a foreign corporation that is treated as a resident of a treaty jurisdiction because that is where it is managed and controlled is not entitled to treat an income tax convention as providing an equivalent exemption for purposes of section 883 if it is not also organized under the laws of such foreign country.[26]

With respect to the second requirement, it should be noted that the scope of the exemptions provided by section 883 and by an income tax convention with the United States may differ. For example, Article 8(3) of the US Model Income Tax Convention exempts from source state taxation the profits of an enterprise from the use, maintenance, or rental of containers (including trailers, barges, and related equipment for the transportation of containers), except where such containers are used for transport solely between places within such state.[27] This exemption applies regardless of whether the recipient of the income is engaged in the operation of ships in international traffic. In contrast, the position of Treasury and the IRS under the section 883 regulations is that such income may be exempt from US federal income taxation, but only if it is derived in connection with a foreign corporation's international carriage of cargo (i.e., the income must be incidental to the international operation of ships).[28] Therefore, because non-incidental container-related income is not covered by the section 883 regulations, a corporation that seeks an exemption with respect to such income under an income tax convention with the United States may not treat such exemption as an equivalent exemption for purposes of section 883.[29]

The new rule for exemptions that are provided only by an income tax convention with the United States also raises two issues relating to reporting requirements. First, it is not entirely clear whether a foreign corporation that relies solely on an income tax convention with the United States to claim an exemption under section 883 is required to file a Form 8833 (Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)) in addition to complying with the substantiation and reporting requirements under the section 883 regulations. It appears that a Form 8833 is still required to be filed,[30] although Treasury and the IRS may wish to clarify whether this is in fact the case. Second, it appears that a foreign corporation that relies solely on an income tax convention with the United States to claim an exemption under section 883 is now clearly not required to file a Form 5472 and comply with the record maintenance requirements under the section 6038A regulations, provided that it satisfies the reporting requirements under the section 883 regulations.[31]

Treatment of Income From Ground and Other Services

Background

Treas. Reg. § 1.883-1(g)(1) provides: "Certain activities derived by a foreign corporation engaged in the international operation of ships or aircraft are so closely related to the international operation of ships or aircraft that they are considered incidental to such operation, and income derived by the foreign corporation from its performance of these incidental activities is deemed to be income derived from the international operation of ships or aircraft." Treas. Reg. § 1.883-1(g)(1) sets forth a non-exclusive list of such activities, the income from which is deemed to be income derived from the international operation of ships or aircraft. Treas. Reg. § 1.883-1(g)(2) sets forth a list of activities that, in the view of Treasury and the IRS, do not result in income derived from the international operation of ships or aircraft. However, the existing final section 883 regulations are reserved with respect to "[g]round services, maintenance and catering" and "[o]ther services."[32]

According to the preamble to the existing final regulations, Treasury and the IRS reserved with respect to such services because no "clear international norm or standard regarding

the appropriate treatment of such services" existed at the time the final regulations were published in August 2003.[33] In December 2004, the Organisation for Economic Co-operation and Development (the "OECD") revised its Commentary under Article 8 (Shipping and Air Transport).[34] The revised Commentary explains that, in addition to profits directly obtained by an enterprise from the transportation of passengers by ships that it operates in international traffic, Article 8(1) also covers profits from activities "directly connected" with such operations, as well as "profits from activities which are not directly connected with the operation of the enterprise's ships …in international traffic as long as they are ancillary to such operation."[35] Examples of profits from activities that the Commentary to Article 8 considers to be ancillary to the operation of ships in international traffic include: (1) advertising that the enterprise may do for other enterprises in magazines offered aboard ships that it operates or at its business locations (e.g., ticket offices); and (2) providing goods or services to other transport enterprises in a foreign country where the enterprise has assets or personnel for purposes of operating its ships in international traffic (e.g., the provision of goods and services by engineers, ground and equipment-maintenance staff, cargo handlers, catering staff and customer services personnel).[36] In each case, the decisive criteria for determining whether the income from such activities is considered to be ancillary to the operation of ships in international traffic are: (1) whether such activities "make a minor contribution relative to [the] operation [of ships in international traffic by the enterprise deriving the income]"; and (2) whether such activities are "so closely related to such operation that they should not be regarded as a separate business or source of income."[37] If both of these criteria are present, then the income in question is considered to be income from activities ancillary to the operation of ships in international traffic.

New Rule for Certain Ground Services; Regulations Continue to Reserve with Respect to "Other Services"

Treas. Reg. § 1.883-1T(g)(1)(xi) expands the list of incidental income to include income derived by a foreign corporation engaged in the international operation of ships from the "provision of goods and services by engineers, ground and equipment maintenance staff, cargo handlers, catering staff, and customer services personnel, and the provision of facilities such as passenger lounges, counter space, ground handling equipment, and hanger facilities." The preamble to the Temporary Regulations states that such services are treated as incidental regardless of whether they are provided to another enterprise as part of a pooling arrangement, alliance, or other joint venture.[38] The Temporary Regulations continue to reserve with respect to "[o]ther services."[39]

Interestingly, in broadening the list of incidental activities to include the above ground services, Treasury and the IRS noted in the preamble to the Temporary Regulations that commentators had pointed to the revised OECD Commentary to Article 8. It remains to be seen, however, whether Treasury and the IRS intend to follow the approach of the revised OECD Commentary to Article 8 in respect of other services, although they appear to have very closely followed the OECD approach with respect to the provision of ground services. Until such time as Treasury and the IRS promulgate regulations regarding income from the provision of other services, the appropriate inquiry should be whether the provision of such services "are so closely related to the international operation of ships or aircraft that they are considered incidental to such operation" within the meaning of Treas. Reg. § 1.883-1(g)(1).

Reporting Requirements

Background

In order to qualify for section 883, a foreign corporation is required to comply with certain substantiation and reporting requirements.[40] Each of the three stock ownership tests (the publicly-traded test, the CFC stock ownership test, and the qualified shareholder test) sets forth its own specific substantiation and reporting requirements.[41] The substantiation requirements set forth the information that a foreign corporation claiming section 883 must obtain in order to satisfy the IRS that it has met a particular stock ownership test (e.g., ownership statements from certain shareholders). The reporting requirements set forth what information a foreign corporation claiming section 883 must include with its Form 1120-F (U.S. Income Tax Return of a Foreign Corporation). For each of the stock ownership tests, the existing final regulations require a foreign corporation to include the names and addresses of certain shareholders relied on to satisfy the particular stock ownership test.[42] For example, Treas. Reg. § 1.883-4(e)(2) of the existing final regulations requires a foreign corporation that relies on the qualified shareholder test to disclose on its Form 1120-F the name and address of each *individual* qualified shareholder that owns (applying the attribution rules of Treas. Reg. § 1.883-4(c)) 5 percent or more of the foreign corporation and upon whom the foreign corporation relies to satisfy such test.

Requirement to Disclose Information with Respect to Individual Shareholders Eliminated

In response to comments expressing concern over the requirement to disclose the names and addresses of certain individual shareholders on Form 1120-F, the Temporary Regulations eliminate the requirement to disclose the names and addresses of certain individual shareholders relied on by a foreign corporation claiming section 883 on its Form 1120-F.[43] Rather, the disclosure now need only contain summary information regarding the shareholdings that are relied on to satisfy the applicable stock ownership test (e.g., the total number of qualified shareholders, the total percentage of the value of the outstanding shares owned, applying the attribution rules of Treas. Reg. § 1.883-4(c), by such shareholders by country of residence or organization, and the period of time during the taxable year that such stock was held by qualified shareholders).[44] In lieu of disclosing the names and addresses of certain individual shareholders on its Form 1120-F, a foreign corporation is now required to furnish the IRS with such information within 30 days following a written request from the IRS.[45]

The Temporary Regulations also modify the reporting requirements by requiring a foreign corporation to disclose on its Form 1120-F whether any shareholder whose stock holdings are relied upon to meet an ownership test holds such stock either directly or indirectly through bearer shares.[46] Corresponding changes were made to the substantiation requirements.[47]

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1 T.D. 9332, 72 Fed. Reg. 34,600 (June 25, 2007) (temporary regulations); 72 Fed. Reg. 34,650 (June 25, 2007) (proposed regulations). Unless otherwise provided, all section references are to the US Internal Revenue Code of 1986, as amended (the "Code"), or to the Treasury regulations promulgated thereunder.

2 Taxpayers may elect to apply Treas. Reg. § 1.883-3T (relating to the CFC stock ownership test) to any open taxable years of the foreign corporation beginning on or after December 31, 2004. Treas. Reg. § 1.883-5T(e).

3 Very generally, a CFC is any foreign corporation more than 50 percent of the vote or of the value of which is owned (directly, indirectly, or constructively) by one or more US persons each of whom own (directly, indirectly, or constructively) 10 percent or more of the voting power of such corporation (a "US shareholder"). I.R.C. §§ 957(a), 951(b), 958.

4 Section 883(c)(3)(B) provides that any stock in another corporation that is owned (directly or indirectly) by a corporation that meets the requirements of section 883(c)(3)(A) is treated as owned by individuals who are residents of the foreign country in which the corporation meeting the requirements of section 883(c)(3)(A) is organized.

5 I.R.C. §§ 951(a)(1)(A)(i), 952(a)(2).

6 *See* I.R.C. § 954(a)(4) and (f) (prior to the American Jobs Creation Act of 2004, P.L. No. 108-37 (118 Stat. 1418) (the "ACJA")). In general, section 954(f) defined the term FBCSI as "income derived from, or in connection with, the use (or hiring or lease for use) of any aircraft or vessel in foreign commerce, or from, or in connection with, the performance of services directly related to the use of any such aircraft, or vessel, or from the sale, exchange or other disposition of any such aircraft or vessel."

7 Treas. Reg. § 1.883-3(a). The statute itself does not provide an income inclusion test.

8 Treas. Reg. § 1.883-3(b)(1). Treasury and the IRS included the income inclusion test in the section 883 regulations in order to address a perceived circumvention of the more-than-50-percent look-through rule of section 883(c)(1) involving so-called "technical CFCs." Persons resident in a non-qualified foreign country might form a US domestic partnership, which would in turn own the majority of the shares in a foreign corporation. Such foreign corporation was, technically, a CFC because more than 50 percent of its vote or value was owned by US shareholders. *See* 65 Fed. Reg. 6,065, 6,072 (Feb. 18, 2000). It is not clear that Treasury and the IRS had the authority to promulgate the income inclusion test.

9 Section 415 of the AJCA.

10 *See* T.D. 9218, 70 Fed. Reg. 45,529 (Aug. 5, 2005).

11 *Id.*

12 *See*, e.g., Kenneth Klein, Letter to Treasury and the IRS of November 10, 2005, 2005 TNT 226-29.

13 Notice 2006-43, 2006-21 I.R.B. 921 (May 22, 2006).

14 Treas. Reg. § 1.883-3T(b)(3).

15 Treas. Reg. § 1.883-3T(b)(5), ex. 2.

16 Treas. Reg. § 1.883-3T(c). The ownership statements remain valid until the earlier of the last day of the third calendar year following the year in which the ownership statement is signed, or the day that a change in circumstances occurs that makes any information of the ownership statement incorrect. Treas. Reg. § 1.883-3T(c)(4) (cross-referencing Treas. Reg. § 1.883-4(d)(2)(ii)).

17 *See* Rev. Rul. 89-42, 1989-1 C.B. 234. Revenue Ruling 89-42 provided that "[a] foreign country may grant an exemption from tax by exempting persons from that tax through an income tax convention." As such, it included in Part I of the table of "countries granting an equivalent exemption" those countries that provided an exemption only by an income tax convention with the United States and noted that "[a] reciprocal exemption based on treaty relief is limited to the circumstances in which the treaty itself would be available."

18 *See* Rev. Rul. 97-31, 1997-2 C.B. 77. While maintaining similar language to that found in Revenue Ruling 89-42, footnote 1 to Revenue Ruling 97-31 added the following language: "In … cases [where a country provides an exemption based on a treaty,] the exemption is based on section 894 and the treaty itself, rather than on section 872(b) or section 883."

19 Rev. Rul. 2001-48, 2001-48, 2001-2 C.B. 324 ("For the sole purpose of determining if an individual shareholder's country of residence grants an equivalent exemption for purposes of section 883(c), a foreign country will also be considered to grant an equivalent exemption if it grants such an exemption through an income tax convention with the United States.").

20 Curiously, the preamble to the Temporary Regulations states: "Prior to 2001, a foreign country that provided an exemption from taxation for income from the international operation of ships or aircraft through an income tax convention was treated as granting an equivalent exemption for purposes of section 883." 72 Fed. Reg. 34,600, 34,602.

21 Treas. Reg. § 1.883-4(b)(3). Such shareholder is also required to establish that: (1) it is a resident of such foreign country under the income tax convention; (2) it qualifies for benefits under any limitation on benefits article; (3) the convention provides an exemption for the relevant category of income for which the foreign corporation is claiming an exemption under section 883. *Id.*

22 Such foreign corporation is required to timely and fully provide the required notice to the IRS under section 6114 (i.e., a Form 8833 (Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)).

23 Treas. Reg. § 1.6038A-1(c)(5).

24 Treas. Reg. § 1.883-1(h)(1)(ii), (h)(3)(i).

25 72 Fed. Reg. 34,600, 34,603 (emphasis added).

26 *Id.*

27 *Convention Between the Government of the United States of America and the Government of _____ for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (Nov. 15, 2006).

28 Treas. Reg. § 1.883-1(h)(1)(x).

29 *See* 72 Fed. Reg. 34,600, 34,603.

30 *See* Treas. Reg. § 301.6114-1(a)(2) ("To determine whether a return position is a 'treaty-based return position' so that reporting is required . . . the taxpayer must compare: (A) The tax liability . . . to be reported on a return of the taxpayer, and (B) The tax liability . . . that would be reported if the relevant treaty provision did not exist. If there is a difference (or potential difference) in these two amounts, the position taken on a return is a treaty-based return position that must be reported.").

31 Treas. Reg. § 1.6038A-1(c)(5)(ii).

32 Treas. Reg. § 1.883-1(g)(3).

33 T.D. 9087, 68 Fed. Reg. 51,394 (Aug. 26, 2003).

34 OECD, *Income from International Transport: Updating of the Commentary to the OECD Model Tax Convention* (Dec. 12, 2004) (hereinafter "OECD Commentary to Article 8").

35 *Id.* at ¶ 4.

36 *See* OECD Commentary to Article 8 at ¶¶ 8.1 and 10.

37 *Id.* at ¶ 4.2.

38 72 Fed. Reg. 34,600, 34,603. *Compare* Treas. Reg. § 1.883-1T(g)(1)(xi) *with* paragraphs 10 and 10.1 of the OECD Commentary to Article 8. This appears to be the same result as under the revised OECD Commentary to Article 8.

39 Treas. Reg. § 1.883-1T(g)(3).

40 Treas. Reg. § 1.883-1(c)(3).

41 Treas. Reg. §§ 1.883-2(e)-(f), -3(c)-(d), -4(d)-(e).

42 *See*, e.g., Treas. Reg. § 1.883-2(f)(4)(ii)(B) (requiring a publicly traded corporation that relies on the qualified shareholder exception to the closely-held test to provide the name, address, and country of residence of each shareholder relied on to satisfy such exception).

43 Treas. Reg. §§ 1.883-2T(f), -3T(c), and -4T(e).

44 Treas. Reg. § 1.883-4T(e)(2); *see also* Treas. Reg. §§ 1.883-2T(f)(3), -3T(e).

45 Treas. Reg. § 1.883-1T(c)(3)(ii)(B). Other information requests from the IRS must be answered within 60 days following a written request from the IRS. Treas. Reg. § 1.883-1T(c)(3)(ii)(A).

46 Treas. Reg. § 1.883-1T(c)(3)(i)(G).

47 Treas. Reg. § 1.883-3T(c)(2), -4T(d)(4).

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