Feedback for REG-105600-18 (Guidance Related to the Foreign Tax Credit, Including Guidance Implementing the TCJA (as of 2/1/2019))

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Prop. Regs. §1.861-9(e)[1]	**Partnerships**	Partnership loan transactions	Expand the rules for specified partnership loans (SPL) to apply to a loan by a partnership to a US person that owns an interest, directly or indirectly through one or more other partnerships, in the partnership, or to any person in the same affiliated group as that person.	Prop. Regs. §1.861-9(e)(8)(ii) provides a matching rule for SPLs, defined as loans made to a partnership by a person (or a member of the same affiliated group) that owns an interest in the partnership (directly or indirectly through one or more other partnerships). Under the matching rule, the SPL lender assigns all or a portion of the interest income from the SPL to the same statutory and residual groupings as those from which the distributive share of interest expense on the same loan is deducted. According to the Preamble, this rule is intended to prevent "a distortion in the determination of the foreign tax credit limitation under section 904 when the same person takes into account both a distributive share of the interest expense and the interest income with respect to the same loan." The rule in the proposed regulations appears to be aimed at preventing taxpayers from achieving favorable foreign tax credit (FTC) limitation results due to the different sourcing rules for interest income and interest expense. For example, if a US corporate partner makes

[1] Unless otherwise noted, all section references are to the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.

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				a loan to a foreign partnership without effectively connected income, absent the SPL rule, the interest income would be foreign source, but the partner's distributive share of interest expense would be apportioned based on its (or the consolidated group's) foreign asset ratio, which could result in net foreign source income, and therefore additional FTC limitation. The SPL rule prevents this result. However, SPL rule does not address the distortion created by the different sourcing rules where the partnership makes a loan to a partner (or its affiliated group member). In such case, the partner's distributive share of the partnership's interest income would be US source, but the borrower's interest expense would be apportioned based on its (or the consolidated group's) foreign asset ratio, which could result in a reduction in net foreign source income, and therefore less FTC limitation. The SPL rule in the proposed regulations should be expanded to prevent such distortions by sourcing the interest income and expense of the borrower in the same manner.
Prop. Regs. §1.861-17	**Allocation and apportionment of research and**	R&E Expenses & GILTI Basket	For purposes of §904(d)(1)(A), guidance should be issued providing that allocation and apportionment of U.S.-level "R&E" expenses to the GILTI basket is not required unless	In instances where the ownership of the IP resulting from the R&E is in the United States, R&E expenses should only be allocated to

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	experimental expenditures		the controlled foreign corporations (CFC) has an ownership interest in the intellectual property (IP) resulting from the R&E.	classes of income that are directly created or earned by the activities of the U.S. IP owner. In particular, when a U.S. parent owns the IP and contracts with its CFCs solely to perform support functions (whether those functions include sales, manufacturing or other support), the only taxpayer benefitting from the income derived from the R&E is the U.S. parent, and not the foreign CFC. In this context, any income earned by the CFCs arises solely from their functions (e.g., manufacturing/sale of product), and not from any IP generated by the R&E expenses ultimately borne by the U.S. parent. Because the CFC's income does not include any return to IP such income should not attract any R&E expense.
		R&E Expenses and Sales/Gross Income Methods	More generally, for purposes of §904, guidance should be issued to provide that the sales method of allocating and apportioning U.S.-level "R&E" expense takes into account only sales by controlled or uncontrolled parties of products involving intangible property that was licensed or sold by the taxpayer to such parties. Similarly, for purposes of §904, guidance should be issued to provide that the gross income method of allocating and apportioning U.S.-level "R&E" expense takes into account only gross income from the exploitation of intangible property, for example (1) royalty income, or (2) income from sales of a product by a taxpayer that owns or licenses intangible property embedded in the	The recommended rule can be illustrated in the following example. U.S. company performs R&E and owns all intangible property resulting from the R&E. U.S. company contracts with a foreign affiliate, CFC 1, to manufacture products using the IP. CFC 1 has no rights to sell the products to third parties. CFC 1 sells these products to U.S. company. U.S. company sells the products to U.S. customers, and to another affiliate, CFC 2, for on-sale to foreign

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			product. The changes to the international tax rules, in particular the changes to the foreign tax credit system, have put additional pressure on the appropriate allocation of R&E expense.	customers. Under the sales method for allocating R&E expense, the sales by CFC 1 and CFC 2 are not considered because CFC 1 and CFC 2 have not licensed or acquired any intangible property resulting from the R&E. The sales of U.S. company to customers and to CFC 2 are considered. Under the gross income method for allocating R&E expense, only the gross income of U.S. company from the sale of products to U.S. customers and to CFC 2 is considered, because neither CFC 1 nor CFC 2 have licensed or acquired any intangible property resulting from the R&E.
		R&E Expenses and Gross Income Method	For purposes of §904, guidance should be issued to provide that the gross income used for allocating and apportioning U.S.-level "R&E" under the gross income method does not include gross income that is treated as exempt income based on the §250 deduction.	This is consistent with the rule in Regs. §1.861–8(d)(2)(ii)(C)(1). An explicit reference to this rule should be provided in Regs. §1.861-17(d), or an explicit reference to Regs. §1.861-17(d) should be provided in Regs. §1.861–8(d)(2)(ii)(C)(1).
		R&E Expenses and Gross Income Method and Sales Method	Either (1) modify the sales method of Regs. §1.861-17(c) to treat the portion of sales as tax exempt to the extent such sales give rise to tax exempt income as a result of the deduction under §250(a)(1) or (2) remove the requirement under Regs. §1.861-17(d)(3) to reapportion the R&E expenses apportioned under the gross income method to the extent the apportioned amount in the category is below 50% of the amount that would be apportioned under the sales method.	Under Regs. §1.861-17, R&E expenses can be apportioned for purposes of the §904 foreign tax credit limitation either under (1) the sales method, or (2) the gross income method. Under each method, a portion of the R&E expenses is allocated to U.S. or foreign sources based on the location of R&D activities. Under the gross income method, the remaining

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				portion of R&E expenses is apportioned based on gross income of the U.S. taxpayer in each category. Accordingly, a portion of R&E expenses is allocated to income exempt from tax to the extent of a §250(a)(1) deduction under Regs. §1.861-8(d)(2)(ii)(C). However, to the extent the amount apportioned to a category is below 50% of the amount that would be apportioned under the sales method, Regs. §1.861-17(d)(3) requires a reallocation of R&E expenses to other categories to achieve the 50% floor. Because under the sales method the apportionment of the R&E expenses is based on product sales by both the U.S. taxpayer and its CFCs and none of the sales by the CFCs are treated as producing tax exempt income as a result of §250(a)(1) deduction, for multinationals with significant CFC sales the 50% floor requirement would always be failed. Thus, the R&E expenses apportioned under the gross income method to tax exempt income as a result of the deduction under §250(a)(1) would be reapportioned to the §951A category, which would effectively negate the tax exemption. Such outcome is clearly contrary to Congress's intent, as confirmed by the Treasury in recently issued REG-105600-18,

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				to "provide for exempt income and exempt asset treatment with respect to income in the Section 951A category that is offset by the deduction allowed under section 250(a)(1)". Consistent with this intent, the sales method of Regs. §1.861-17(c) should be modified to treat the portion of sales as tax exempt to the extent such sales give rise to tax exempt income as a result of the deduction under §250(a)(1). Alternatively, the 50% floor requirement of Regs. §1.861-17(d)(3) should be removed.
Prop. Regs. §1.904-2(j)	**Transition rules for carryovers and carrybacks of pre-2018 and post-2017 unused foreign tax**	Transition rule for FTC carryforwards	The transition rule for FTC carryforwards in Prop. Regs. 1.904-2(j)(1)(ii), which provides a default allocation of pre-2018 general limitation FTC carryforwards to the post-2017 general limitation category and permissive allocation of unused general limitation FTC carryforwards to the foreign branch basket, should be affirmed in the final rules.	This approach mirrors previous FTC transition rules and provides a reasonable path for all taxpayers to use their tax attributes in a fair and consistent manner during the transitional carryover period.
Prop. Regs. §1.904-4(f)	**Foreign branch category income**	Income Reallocated to Reflect Disregarded Transfers of IP to or from a Foreign Branch (Prop. Regs. §1.904-4(f)(2)(vi)(D))	(1) Provide a transition rule to apply this provision only to transfers of IP executed after the issuance date of the regulations. Income generated from IP transferred prior to the date the regulations were issued (December 7, 2018) should not be subject to the rule. (2) Clarify that transitory ownership of IP by a foreign branch that neither enhances nor exploits the §367(d)(4) property will not be considered a transfer for purposes of this paragraph (f)(2)(vi)(D).	Many companies repatriated IP (and associated income) to the United States to reduce foreign taxes and address BEPS concerns by aligning IP profits with DEMPE functions. While these companies considered it worthwhile for the income to be taxed at the higher FDII rate rather than the GILTI rate to reduce foreign taxes and address BEPS concerns, they did not expect the income to be assigned to (and taxed in) the foreign branch income basket where the transfer is done through a check the box election to treat a CFC as a disregarded entity.

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			(3) Clarify that taxpayers may re-allocate a proportionate amount of foreign taxes to the extent foreign branch income is reallocated to the general basket under this provision.	This expectation is consistent with the tax treatment afforded by the residence foreign country of the branch, which respects the IP transfer and no longer taxes the profits generated by the IP. The administrative burden imposed on taxpayers by requiring reallocation of income as a result of disregarded IP transfers is incredibly high, particularly with regard to transactions undertaken prior to the date the proposed regulations were issued. Taxpayers are unlikely to have clear information regarding historic transactions that were properly assumed to be disregarded at the time the transactions were executed. Thus, efforts to reconstruct historic §367(d) amounts would be costly and prone to inaccuracy. Even with respect to transactions undertaken after the proposed regulations were issued, the administrative cost of tracking potential reallocations required under this provision is disproportionate to any value derived by Treasury from the re-basketing (whether through lower FTC basket limitations or lower FDII). Additionally, the stated purpose of the proposed regulation is to guard against "non-

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				economic reallocations of gross income attributable to the foreign branch category." There is no non-economic reallocation of gross income attributable to the foreign branch category in the situation of transitory ownership of the IP by a branch in a check the box election to treat a CFC as a disregarded entity. The CFC simply repatriated IP to the US, which was a goal of Congress in enacting the FDII deduction and aligns with BEPS concerns. The form of the transaction should not produce a different result. Finally, Treasury should clarify that a proportionate amount of foreign taxes may be reallocated with any reallocated income. If taxes are not reallocated with income, the provision will distort the appropriate §904(a) limitation in each basket. Further, requiring taxpayers to specifically determine which taxes are properly "related to" reallocated income is overly burdensome.
Prop. Regs. §1.904-6(a)	**Allocation and apportionment of taxes to a separate category or categories of income**	Base vs. timing differences (Prop. Reg. §1.904-6(a)(1)(iv))	Provide that taxes attributable to transactions between a CFC and a disregarded entity (DRE) and transactions among DREs of the same CFC should be considered timing differences, rather than base differences. Although the payments are disregarded for U.S. tax purposes, they are of the types of items included in U.S. taxable income.	Under Prop. Reg. §1.904-6(a)(1)(iv) a base difference arises when "a tax is imposed on a type of item that does not constitute income under Federal income tax principles, such as gifts or life insurance proceeds." The Preamble (p. 63) states that base differences "arise only in limited circumstances, such as in

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				the case of categories of items such as life insurance proceeds or gifts, which are excluded from income for Federal income tax purposes, but may be taxed as income under foreign law" and that "a computational difference attributable to differences in the amounts, as opposed to the types, of items included in U.S. taxable income and the foreign tax base does not give rise to a base difference." Prop. Regs. §1.960-1(d)(3)(ii)(B)(2) provides that a withholding tax imposed on a disregarded payment from a DRE to its CFC owner is treated as a timing difference and is never treated as related to a PTEP group. This appears to relate to a distribution from a DRE to its CFC owner of the earnings that gave rise to PTEP for such CFC (i.e., arising from some income that was recognized as income for U.S. federal income tax purposes ("U.S. recognized income")). Accordingly, the tax can be attributed to a timing difference with respect to U.S. recognized income. However, for transactions between a CFC and a DRE and for transactions between DREs of the same CFC, it is unclear whether the IRS will interpret such transactions as a base

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				difference because the payments give rise to foreign tax, but are disregarded for U.S. tax purposes and do not generally result in U.S. recognized income. However, the payments are of the "types" of items included in U.S. taxable income. For example, if there is a loan between DREs of the same CFC the interest income (and expense) on such loan would be disregarded for U.S. federal income tax purposes. However, such interest income would be taxed in the jurisdiction of the creditor DRE, and the expense of the DRE borrower would reduce its foreign tax. In this scenario, there is significant ambiguity as to whether foreign tax imposed on such interest income would be treated as attributable to a timing difference or base difference. Other than the statements that base differences should arise in "limited circumstances" or be construed narrowly in the preamble and some older IRS guidance, the authorities limiting the scope of base differences. Prior to the regulations, base difference taxes were allocated to the general basket and thus, the issue was not as important in most cases. However, now that base difference taxes of a CFC are assigned to the residual income group

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				under Prop. Regs. §1.960-1(d)(3)(ii)(B)(1) and thus are no longer creditable, the limit of what constitutes a base difference should be clearly defined.
Prop. Regs. §1.960-1	**Overview, definitions, and computational rules for determining foreign income taxes deemed paid under §960(a), (b), and (d)**	Subpart F income group rules	Guidance should be issued to provide that all items of general limitation subpart F income should be considered one item for purpose of determining whether foreign income taxes are "properly attributable" to subpart F income under §960(a).	Prop. Regs. §1.960-1(d)(2)(ii)(B) creates multiple general limitation subpart F income groups for purposes of §960(a). The proposed regulations provide that no foreign taxes attributable to a subpart F income group are deemed paid by the U.S. shareholder unless there is positive net subpart F income in that subpart F income group. This can result in stranded foreign taxes due to timing differences even when there is a general limitation subpart F inclusion, thereby resulting in double taxation of general limitation subpart F income over time.
Prop. Regs. §1.960-1(a), (b)	**Overview, Definitions**	Section 1293	While a shareholder can rely on §1293(f) to take foreign tax credits on amounts included from a qualified electing fund, a reference to the §1293 rules would be a helpful clarification in these proposed regulations.	Section 1293(f) grants a 10-percent corporate shareholder a foreign tax credit for amounts included from owning stock of a qualified electing fund under §1293(a) by including such amounts as if included under §951(a). Prop. Regs. §1.960-1(a)(1) states that "These regulations provide the exclusive rules for determining the foreign income taxes deemed paid by a domestic corporation." The proposed rules allow foreign taxes paid with respect to a controlled foreign corporation.

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				Prop. Regs. §1.960-1(b)(2) defines a controlled foreign corporation to mean a foreign corporation described in §957(a). By not referencing §1293(f), the proposed regulations under §960 do not consider directly the credibility provided by §1293(f).
Prop. Regs. §1.960-1(d)	**Computing income in a §904 category and an income group within a §904 category**	Foreign taxes attributable to a timing difference	Revise regulations to allow the foreign taxes attributable to a timing difference on income included in the taxable income of a U.S. shareholder in a prior tax year to attach to the PTEP account that gave rise to the foreign taxes if taxpayers do not have income in such income group for the taxable year (i.e., §960(b) taxes should not be limited solely to withholding and income taxes imposed on the upper-tier CFC).	As a general rule, current year taxes that are attributable to a "timing difference" are "treated as related to the appropriate section 904 category and income group within a section 904 category to which the particular tax would be assigned if the income on which the tax is imposed were recognized under Federal income tax principles in the year in which the tax was imposed." However, there is a separate timing difference rule for current year taxes with respect to PTEP. Under Prop. Regs. §1.960-1(d)(3)(ii)(B)(2), current year taxes imposed on a distribution of PTEP (including withholding taxes or income taxes of the recipient CFC) are allocated to the same PTEP group of the recipient CFC from which the distribution was sourced. Accordingly, any withholding taxes or income taxes of the recipient CFC on the distribution of PTEP is allocated to the PTEP group while any other taxes attributable to a timing difference with respect to PTEP are allocated to the same

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				income group that gave rise to such PTEP. The preamble to the proposed regulations provides for an example of this rule stating: "a timing difference described in proposed §1.904-6(a)(1)(iv) could include a situation in which Federal income tax principles require marking-to-market gain on an asset, *resulting in an inclusion under section 951A(a)*, but the foreign jurisdiction only imposes tax when the asset is disposed of in a later year. Under Prop. Regs. §1.960-1(d)(3)(ii)(B), the later-imposed foreign income tax is treated as *related to the tested income group* (if any) for the year in which the tax is imposed, and not to a PTEP group in an annual PTEP account for the earlier year in which the gain was recognized for Federal income tax purposes." (emphasis added). The rules above combined with the decision in the proposed regulation to limit taxes deemed paid under §960(a) and (d) solely to taxes allocated and apportioned to each income group in the current year (i.e., defining "properly attributable" in §960 based on the principles under Regs. §1.904-6 that allocate taxes to income groups for purposes of determining deductions) will result in double taxation of income without offset for foreign

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				taxes that are related to such income. This problem arises to the extent there is any difference in the timing of the recognition of income for U.S. and foreign tax purposes and the income of a CFC is not consistent from year to year. In addition, the issue is exacerbated by CFCs that do not have a U.S. taxable year that aligns with its foreign taxable year. Example: U.S. parent company ("US Parent") wholly owns a controlled foreign corporation ("CFC"). US Parent has the calendar year as its taxable year for U.S. federal income tax purposes. CFC has the fiscal year ending Nov. 30 as its taxable year for U.S. federal income tax purposes, but a calendar year for foreign income tax purposes. CFC conducts Business A and Business B. With respect to Business B, CFC only owns IP for which it only receives royalties from related parties which qualify for §954(c)(6). This IP has a basis of 0 for U.S. and foreign tax purposes. In year 1, all of CFC's income from Business A and Business B is foreign source tested income. In the middle of year 2, CFC sells its Business B assets, consisting of only the IP, and recognizes foreign personal holding company income ("FPHCI") with respect to the IP.

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				Prop. Regs. §1.960-2(b)(1) provides that for a subpart F inclusion, a U.S. shareholder is deemed to have paid the amount of foreign income taxes of a CFC that are "properly attributable to the items of income in a subpart F income group taxes" within the §904 category. Under the proposed regulations, "properly attributable" under §960(a) is limited to the "current year taxes" that are "allocated and apportioned" to the subpart F income group within the §904 category. Prop. Regs. §1.960-2(b)(2), (3). Current year taxes are defined as the taxes that were paid or accrued in the current taxable year for U.S. tax purposes. Prop. Regs. §1.960-1(b)(4). Foreign taxes are paid or accrued in the U.S. taxable year within which the foreign taxable year ends, except for withholding taxes which are paid or accrued at the time of the payment that is subject to the withholding. *Id.* Pursuant to Prop. Regs. §1.960-1(d)(3)(ii)(B)(2), for purposes of determining what is creditable under §960(b) (i.e., distributions of PTEP), only withholding taxes or income taxes of the recipient CFC on the distribution of PTEP is allocated to the PTEP group while any other taxes attributable to a

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				timing difference with respect to PTEP are allocated to the same income group that gave rise to such PTEP. In year 2, the foreign taxes accrue with respect to the income recognized in year 1 from Businesses A and B. According to Prop. Regs. §1.960-1(d)(3)(ii)(B), all of these foreign taxes should be allocated solely to the foreign source tested income group in year 2. Accordingly, US Parent would not be deemed to pay any taxes with respect to the FPHCI of CFC as no taxes were allocated to such subpart F income group in year 2. In year 3, CFC only recognizes foreign source tested income with respect to Business A. In year 3, the foreign taxes accrue with respect to the gain recognized on the sale of Business B. According to Prop. Regs. §1.960-1(d)(3)(ii)(B), the taxes resulting from the gain recognized on the sale of the IP should be allocated to one of the FPHCI subpart F income groups in year 3 even though CFC only has tested income in year 3; and not to any of the PTEP groups (i.e., under the proposed regulations, it cannot be deemed paid on future distributions of the PTEP from year 2

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				under §960(b)). Accordingly, US Parent would be subject to tax on the FPHCI in year 2 without any offset for foreign taxes in year 2. In addition, these foreign taxes accrued in year 3 would never be deemed paid by US Parent and thus, would never be creditable by US Parent. This outcome is not limited to situations in which there is a mismatch between the U.S. and foreign taxable year ends. The same result as above would apply in a situation where the U.S. and foreign tax years were both on the calendar year, but the income on the sale of the IP was not recognized for foreign tax purposes until year 3. Further, this outcome is not limited to tested income and FPHCI as in the above example. Instead, the issue arises every time a CFC's income groups from year to year are not consistent (e.g., foreign base company services income in year 1 but tested income in year 2), when foreign taxes do not accrue in the year the income is recognized for U.S. tax purposes. To rectify this issue, the regulations should be revised to allow the foreign taxes attributable to a timing difference on income included in the taxable income of a U.S. shareholder in a

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				prior tax year to attach to the PTEP account that gave rise to the foreign taxes if taxpayers do not have income in such income group for the taxable year (i.e., §960(b) taxes should not be limited solely to withholding and income taxes imposed on the upper-tier CFC).
Prop. Regs. §1.960-2(b)	**Foreign income taxes deemed paid under §960(a)**	Impact of timing differences, qualified deficits and current year E&P deficits on proportionate share of foreign income taxes deemed paid	Taxes should be properly attributable to economic income and permitted, in certain instances, to be taken into account across multiple years or in a manner that does not result in the permanent loss of foreign tax credits that are in fact properly attributable to income that is included or includible in subpart F income. In particular, Prop. Regs. §1.960-2(b)(3)(iii), as drafted, creates a cliff effect that results in the loss of all FTC's when subpart F income drops to $0 because of the §952(c)(1)(A) limitation, but otherwise allows all of the FTCs associated with the §952(c)(1)(A) limited subpart F income as long as the limitation is >$0. Amend Prop. Regs. §1.960-2(b)(3)(ii) to allow adjustments to the denominator related to qualified deficits or to specify that if qualified deficits reduce the numerator, the properly attributable taxes would be equal to current year taxes (proportionate share is 100%). Amend Prop. Regs. §1.960-2(b)(3)(ii) and (iii) to allow a carryforward of taxes for a limited period of time.	The determination of when taxes are "properly attributable" to an item of income would benefit from further guidance. Timing differences between the recognition of items for local tax purposes and U.S. tax purposes (examples include limitations on utilization of NOLs for local tax purposes and other timing differences where recognition of an item for local tax purposes is different than under U.S. tax principles) can result in situations where total income subject to local tax is equal to total subpart F income but local taxes paid on the same economic income can be "stranded" or permanently lost. Specifically, the "proportionate share" rule can result in a loss of FTC if either the numerator or denominator of the fraction used to determine deemed paid taxes is zero or if the numerator is reduced by a qualified deficit. If a local country limits the ability to apply NOL carryforwards (say limited to 80% of local taxable income, as in US), a CFC could be

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				paying local taxes but have no subpart F income (due to qualified deficit). These taxes are permanently lost/not available as FTC. Similarly, a U.S. timing difference could result in a deficit in current year E&P with local tax paid. The mechanical test of numerator/denominator in proposed regulations would result in no FTC allowed.
Prop. Regs. §1.965-5	**Allowance of a credit or deduction for foreign income taxes**	Foreign Taxes Attributable to Earnings Offset by Allocated §965(b) Deficits Cannot Be Credited (Prop. Regs. §1.965-5(c)(1)(iii))	These taxes should meet the requirements of §960(b) as they are income taxes properly attributable to §965(b) PTI.	Section 965(b)(4)(A) requires that an amount of earnings equal to the earnings of a DFIC offset by allocated EDFC deficits are to be treated as having been included in income under §951(a) only for purposes of applying §959. Such earnings are not included in income under §951(a) and thus the associated foreign taxes are not deemed paid under §960(a)(1) at the time of the DFIC's §965 inclusion. The earnings are instead taxed upon distribution through the consumption of basis under §961(b), similar to the manner in which earnings are taxed under §301(c)(2). Foreign taxes should be creditable under §960(b) at the time of the §965(b) PTI distribution to offset this consumption of basis.