

Foreign Tax Credits

Parker Fielder Oil, Gas, and Energy Tax Conference
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Panelists

- Layla Asali, Miller & Chevalier (Moderator)
- Daniel Barron, Chevron
- David Noren, McDermott Will & Emery
- Jeffrey Parry, IRS Office of Chief Counsel (International)

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Agenda

- Creditability of Foreign Taxes
- Pillar 2 and the US FTC
- Allocation of Foreign Taxes
- Recent Litigation Relating to FTCs
- Corporate Alternative Minimum Tax FTCs

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Creditability of Foreign Taxes

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Pre-2022 Final Regulations

- **Income taxes under section 901**
 - Foreign tax likely to reach net gain “in the normal circumstances in which it applies” if, “judged based on its predominant character,” satisfies
 - Realization requirement: imposed upon realization or certain pre-realization events
 - Gross receipts requirement: imposed on actual receipts or gross receipts computed under a method likely not to produce result exceeding fair market value
 - Net income requirement: gross receipts reduced by actual expenses or expenses computed under a method likely to produce an amount that approximates, or is greater than, recovery of significant costs
 - “*Nonconfiscatory gross basis tax*” rule allowed section 901 credit for tax on gross income or receipts if it is “almost certain” to reach some net gain in the normal circumstances in which it applies (primarily applies where businesses subject to the tax are almost certain never to incur an after-tax loss)
- **In lieu of taxes under section 903**
 - Foreign tax creditable under section 903 if:
 - Foreign country levies a generally imposed income tax (GIIT)
 - Foreign tax operates as a tax imposed in substitution for, and not in addition to, the GIIT

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2022 Final Regulations

- **Income taxes under section 901**
 - “Predominant character” gloss on the creditability analysis eliminated
 - Foreign tax must satisfy
 - Realization requirement: similar to prior regulations
 - Gross receipts requirement: limitation on use of computed gross receipts to pre-realization events
 - Cost recovery requirement: significant costs and expenses must be recovered, including expenses on a list of “per se” significant expenses
 - Significance determined based on all taxpayers in aggregate
 - “Nonconfiscatory gross basis tax” rule eliminated
 - Attribution requirement: foreign tax generally must be imposed in accordance with U.S. source rules (including ECI rules) and follow arm’s length principle
 - Other changes: separate levy determination, noncompulsory payments and refunds
- **In lieu of taxes under section 903**
 - Foreign tax creditable under section 903 if there is a GIIT and:
 - Non-tested withholding tax: non-duplication, close connection, and jurisdiction to tax requirements satisfied
 - Tested withholding tax: non-duplication and source-based attribution requirements satisfied, and GIIT satisfies jurisdiction to tax requirement

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