Foreign Insurance Excise Tax

By Frederick Campbell-Mohn, Shuang Tan, and Patrick Styles*

Congress imposes an excise tax on certain premiums paid to foreign insurers and reinsurers. The Internal Revenue Service ("IRS") has a long history of being assertive when applying this excise tax. This article provides the background and summarizes the IRS's historical positions regarding the premium excise tax. Then, the article discusses the most recent IRS audit activity and proposes ways that taxpayers may address the IRS's questions.

Background

Code Sec. 4371[1] imposes a foreign insurance excise tax ("FET") on insurance and reinsurance premiums paid to foreign insurers and reinsurers with regard to certain coverages involving a U.S. insured. Specifically, the rates are (1) 4% of the premium paid to the foreign insurer on casualty insurance and indemnity bonds;[2]; (2) 1% of the premium paid on the policy of life insurance, sickness, or accident insurance, or annuity contracts[3]; and (3) 1% of the premium paid on the policy of reinsurance covering any of the contracts listed in (1) or (2).[4]

For purposes of Code Sec. 4371, a "foreign insurer or reinsurer" is defined as an insurer or reinsurer who is a nonresident alien individual, a foreign partnership, or a foreign corporation.[5] Policies in scope vary depending on whether the insured is domestic or foreign. For Code Sec. 4371(2) policies on life, sickness, or accident insurance, or annuity contracts, this is a relatively simple determination. If the policy is made with respect to the life of or hazards to a U.S. citizen or resident, the policy is in scope.[6]

The determination of whether a policy of casualty insurance is in scope of the tax is more complex. All insurance policies that are not life policies under Code Sec. 4371(2) policies as described above are considered policies of casualty insurance.[7] Where the "Insured" is a domestic corporation or partnership, or a U.S. resident individual, policies that cover risk wholly or partly within the United States are in scope.[8] Alternatively, where the "Insured" is a foreign corporation or partnership or a non-U.S. resident individual, engaged in a trade or business in the United States, policies that cover risk within the United States are in scope.[9] The party the policy is issued to, for or in the name of, is the "Insured."[10]

Reinsurance policies upon either Code Sec. 4371(2) life policies or Code Sec. 4371(1) casualty policies would generally rely on the above scoping rules to determine policies that are in scope.[11]

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Liability for the excise tax is incurred by any person who makes, signs, issues, or sells any of the documents and instruments subject to the tax, or for whose use or benefit the same are made, signed, issued, or sold.[12] Reg. §46.4371-4 also provides requirements for record keeping with respect to foreign insurance policies.

No tax under Code Sec. 4371 is imposed on premium amounts that are effectively connected with the conduct of a trade or business within the United States, unless such amounts would otherwise be exempt from federal income taxes under a treaty provision to which the United States is a signatory.[13]

Treaty Provisions

International tax treaties can also impact the application of the FET. Under the terms of certain income tax treaties between the United States and some countries, policies issued by a foreign insurer or reinsurer that is a resident of any of such countries may be exempt from the insurance excise tax, provided that the insurer or reinsurer meets the Limitation on Benefits Article of the relevant treaty.[14] Rev. Proc. 2003-78, as *modified by* Rev. Proc. 2015-46, provides instructions for establishing an exemption from the Code Sec. 4371 excise tax under an applicable U.S. income tax treaty.[15]

In general, there are two types of treaty exemption: a qualified exemption and an unqualified exemption.[16] Only a few treaties have an unqualified exemption and those that do are not typically with countries that host significant international insurance or reinsurance markets.[17] Under an unqualified exemption, a foreign insurer merely needs to establish residency in the treaty country.[18] The treaties do not contain anti-conduit provisions. Because the unqualified exemption is relatively uncommon, this article will focus on qualified exemptions.

Qualified exemptions are the most common treaty provisions.[19] Under a qualified exemption, a foreign insurer must be a resident of the treaty country and comply with the anti-conduit treaty provision.[20] Under the typical anti-conduit provision, premiums paid on policies written by a foreign insurer or reinsurer do not qualify for exemption from FET under a treaty with a qualified exemption to the extent that the risks covered by such premiums are reinsured with a person not entitled to the benefits of this or any other treaty that provides exemption from the FET.[21]

The qualified exemption in the US-UK Treaty is unique and merits additional discussion. The US-UK Income Tax Treaty[22] provides its own specific approach to reinsurance transactions from a UK company to a non-treaty eligible company. Generally, the U.S. excise tax is not imposed on insurance policies if the premiums are receipts of a UK insurance business.[23] However, if the policies are entered into as part of a conduit arrangement, the United States may impose excise tax on those policies unless the premiums are included in income of a U.S. permanent establishment of the UK enterprise.[24]

Under the US-UK Income Tax Treaty, a "conduit arrangement" is described as a transaction or series of transactions (i) where an exempt insurer receives a premium arising from another exempt insurer and then pays, directly or indirectly, all or substantially all of that premium, to a non-exempt insurer which, if it had received that premium directly from the other insurer, would not be entitled to exemption; and (ii) which has as its main purpose, or one or more of its main purposes, obtaining such increased benefits as are available under the treaty.[25]

The definition of a conduit arrangement has two unique provisions. First, the conduit arrangement applies if the exempt insurer pays "all or substantially all" of the premium. Second, the subsequent reinsurance arrangement must have "as its main purpose, or one or more of its main purposes, obtaining" benefits under the treaty.

State Department and the Department of Treasury documents provide additional detail on how the treaty anti-conduit rule should be interpreted considering U.S. statutory anti-conduit rules. These documents indicate that the United States interprets this anti-conduit rule co-extensively and consistently with U.S. domestic law, including in particular, the rules of Reg. §1.881-3 and other regulations adopted under the authority of Code Sec. 7701(l).[26] The Annex to the U.S. Department of Treasury's technical explanation[27] provides six illustrations on the application of the treaty anti-conduit rule. Examples 5 and 6 provide insights into the scope of the treaty anti-conduit rule. In Example 5, UKCo, a company organized in the UK, acts as a central clearing house for patents. In practice, UKCo keeps only a small spread with respect to the royalties it receives; most of the profit goes to the subsidiary that developed the patent. Because UKCo entered into these transactions in the ordinary course of its business, and there is no indication that it established its patent licensing business in order to reduce its U.S. withholding tax, the arrangements among UKCo and the entities do not constitute a conduit arrangement. Similarly, in Example 6, the UKCo coordinates the financing of all subsidiaries of its parent, XCo. The activities of UKCo are intended (and reasonably can be expected) to reduce transaction costs and overhead. UKCo has 50 UK employees. As part of its financing

operations, UKCo enters into transactions between U.S. subsidiaries and other non-treaty subsidiaries. Because UKCo performs significant activities with respect to the financing transactions, the participation of UKCo is presumed not to have as one of its main purposes the avoidance of U.S. withholding tax.[28]

These examples highlight Treasury's view that the anti-conduit provision in the US-UK Income Tax Treaty is limited in scope. They emphasize that the underlying facts demonstrating that the transaction occurs in the ordinary course of business or that the "conduit" entity performs significant activities with respect to the transactions provide support that the treaty's anti-conduit provisions are inapplicable.

The limited scope of the anti-conduit rule is also supported by other contemporaneous documents. The Joint Committee on Taxation's technical explanation to the treaty notes that U.S. domestic laws provide specific anti-conduit rules as well as domestic anti-abuse principles, and states that the United States intends to interpret the conduit arrangement provisions of the proposed treaty in accordance with U.S. domestic law, as it may evolve over time. The Technical Explanation further states that the United States will interpret the provision of the treaty by analogy to the anti-conduit rules of Reg. §1.881-3. The Technical Explanation notes that the application of the anti-conduit rule to the insurance excise tax is somewhat narrower than the exception in other U.S. tax treaties that cover the insurance excise tax, because it includes the intent test found in the anti-conduit test applicable to withholding tests.[29]

The treaty commentary and examples do not include a definition of the phrase "substantially all." Similarly, the anti-conduit rules under Code Sec. 881 do not use the term "substantially all."[30] In the absence of specific guidance, it is helpful to understand how "substantially all" is construed elsewhere in the Internal Revenue Code. The term "substantially all" is used throughout the Internal Revenue Code in a variety of contexts.[31] One area where the IRS has provided guidance regarding its interpretation of "substantially all" is when interpretating the "C reorganization" rules under Code Sec. 368(a)(1)(C). Under that provision, substantially all of the properties of a target corporation must be acquired by the acquirer. The IRS's advance ruling guidelines provide that the "substantially all" requirement is met if at least 90% of the fair market value of the net assets and 70% of the fair market value of the gross assets are transferred.[32] These guidelines do not delineate the minimum percentage of gross and net assets that would qualify as "substantially all." However, the 70 and 90 percent tests are consistent with the IRS approach to "substantially all" in other contexts.[33]

The examples and the discussions of the anti-conduit provision in the Treasury, Joint Committee on Taxation and Senate documents highlight the limited nature of the anti-conduit provision of the US-UK Income Tax Treaty. Absent the reinsurance of substantially all of the US-sourced premiums and the existence of a principal purpose to obtain treaty benefits, the anti-conduit provisions will not apply to reinsurance agreements between UK companies and reinsurers residing in countries that do not have a treaty with the United States.

Closing Agreements

Rev. Proc. 2003-78 provides instructions for establishing an exemption from the Code Sec. 4371 excise tax under an applicable U.S. income tax treaty.[34] In order to establish exemption from the federal excise tax, the foreign insurer may enter into a closing agreement with the IRS.[35] In order to receive such a closing agreement, the foreign insurer must agree to be liable as a U.S. taxpayer for the insurance excise tax if the foreign insurer does not qualify for treaty benefits.

An irrevocable letter of credit from an eligible institution is also required as part of the closing agreement. The letter of credit must be in the amount of at least $75,000 and must be issued in favor of the IRS. The letter of credit must be issued by a U.S. bank that is a member of the Federal Reserve System, or by a U.S. branch or agency of a foreign bank that is on the National Association of Insurance Commissioners list of banks from which letters of credit may be accepted.[36]

As part of entering into a closing agreement with the IRS, the IRS typically publishes the names and addresses of companies that have entered into a closing agreement with the IRS.[37] This public record provides assurance to potential insureds that the foreign insurance company is eligible for treaty benefits and generally exempt from the excise taxes. The closing agreement is valid for a period provided in Reg. §1.1441-1(e)(4)(ii) and taxpayers need to recertify their qualification for treaty benefits on or before the expiration period.[38]

Under the closing agreement, the treaty exemption for premiums does not apply to reinsurance agreements to companies that are ineligible for treaty benefits. The determination of the portion of premiums subject to excise taxes is computed based on the percentage of such policies reinsured. An insurance company may consider a reinsurer to be entitled to exemption from the excise tax if the reinsurer

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is a party to a closing agreement with the IRS, pursuant to Rev. Proc. 2003-78 or a predecessor revenue procedure, under an income tax treaty or convention between the United States and another country. Where an exempt foreign insurance company with a closing agreement reinsures in scope policies with a foreign reinsurer that is ineligible for treaty benefits, the tax that was originally exempted is reimposed. As part of the closing agreement, the foreign insurer agrees to remit such reimposed tax by filing Form 720 with the IRS. This reimposition of tax should be distinguished from the cascading excise tax theory that was the subject of the *Validus* decision,[39] a common point of confusion. The liability for tax when an exempt insurer reinsures to a non-exempt insurer is not a cascading tax. It is the reimposition of the originally exempt excise tax under the relevant anti-conduit provision.

In sum, the excise tax imposed by Code Sec. 4371 has been and continues to be a source of IRS audit activity. Currently, the IRS has focused on documenting treaty benefits in the light of subsequent reinsurance agreements.

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Generally, when filing Form 720, semimonthly deposits of excise taxes of at least 95% of the net tax liability for that period are required, unless the safe harbor rule applies. Under the safe harbor rule, taxpayers who filed Form 720 for the lookback quarter (the second calendar quarter preceding the current quarter) are considered to meet the semimonthly deposit requirement if the deposit for each semimonthly period in the current quarter is at least 1/6 (16.67%) of the net tax liability reported for the lookback quarter. For the safe harbor rule to apply, a taxpayer must pay any underpayment for the current quarter by the due date of the return and check the box on line 5 of Form 720.[40]

It is also important to note that entering into a closing agreement with the IRS is not a requirement in order to establish benefits under the treaty. However, the closing agreement is effectively the only practical way to document exemption and satisfy the anti-conduit provisions. The necessity of the closing agreement is brought about because the exemption relies not only on an insurer's or a reinsurer's general qualification for treaty benefits, but also on subsequent actions by the exempt party in complying with the anti-conduit provisions. The reimposition of tax to the foreign insurer rather than the insured is a key feature of the closing agreement and allows for the practical application of the treaty exemptions and anti-conduit provisions. In almost all cases, the insured will want their counterparty to have in place a valid closing agreement or face liability for the tax. Likewise, a foreign insurer with a valid closing agreement seeking to reinsure to another foreign reinsurer will want its counterparty to also have a closing agreement. Even if the retrocessionaire were to initially establish its eligibility for treaty benefits, there is no assurance that it would not subsequently reinsure with an ineligible party. Furthermore, the foreign insurer would not be able to satisfy information requests by the IRS under audit related to whether the policies were subsequently reinsured by the retrocessionaire and the IRS might assess the tax under audit.

In short, in a chained reinsurance scenario, the last party with a valid closing agreement is the party that holds the tax risk should a subsequent reinsurer itself reinsure to a non-exempt party.

A logical exception to the need for a closing agreement exists with internal retrocessions with related party reinsurers who are also eligible for treaty benefits. As long as the related party retrocessionaire does not subsequently reinsure the policy, the foreign insurance company should be able to factually establish to an IRS auditor that, although the policy has been reinsured, it has been reinsured to a party that is eligible for treaty benefits.

Companies have also evaluated the application of the anti-conduit rules to various types of insurance. It seems clear that proportional reinsurance could trigger the anti-conduit provisions. Thus, if a foreign company eligible for treaty benefits insures a block of business from a U.S. company and then reinsures a proportional amount of that business with a non-treaty eligible company, then the anti-conduit provisions may apply. However, it is less clear whether the anti-conduit provisions apply when the foreign company purchases reinsurance covering those risks, or a portfolio of risks that includes those and other non-U.S. risks *via* a non-proportional contract such as excess or stop loss. For example, the foreign company may reinsure its U.S. and non-U.S. liabilities for claims over a certain threshold. In this case, the reinsurer may be taking on a portfolio of risks that economically and operationally significantly differs from the original risks insured from the U.S. companies. Depending on the facts,

it seems difficult to conclude that the foreign company is acting as a "conduit" for the risks being transferred by the U.S. company.[41]

Cascading Premium Issue

In Rev. Rul. 2008-15,[42] the IRS highlighted its litigating position in four scenarios subjecting insurance policies to FET. Scenario 2 illustrated the IRS's position regarding cascading excise taxes. Scenario 2 addressed a U.S. insurer that reinsures U.S. risks with Foreign Reinsurer A, which then reinsures those risks with Foreign Reinsurer B. Neither Foreign Reinsurer A nor Foreign Reinsurer B is eligible for a FET treaty exemption. The revenue ruling concluded that there would be an FET due on both reinsurance transactions. In other words, the IRS's position was that a "cascading" FET can be imposed on wholly foreign-to-foreign retrocessions.[43]

The validity of the IRS's position with respect to cascading excise taxes was tested in the *Validus* case.[44] Validus, a Bermuda reinsurer, challenged the IRS position on wholly foreign retrocessions taken in Rev. Rul. 2008-15. Validus purchased nine reinsurance policies from a foreign reinsurer (retrocessionaires). These nine policies reinsured U.S. risks and neither of these two parties was eligible for treaty exemption. The retrocession policies at issue were negotiated, executed, and performed outside of the United States. Validus paid the assessed FET and filed claims for refund on the grounds that the tax did not apply under the statute. The district court granted summary judgment for Validus, ruling that the Code Sec. 4371 tax reached only reinsurance policies (first-level reinsurer) but not retrocessions (second-level reinsurer) according to the plain language of the statute.[45]

On appeal, the U.S. Court of Appeals for the DC Circuit affirmed the district court's judgment on different grounds.[46] The court found the statute was ambiguous with regard to wholly foreign retrocessions, and resolved the case by applying the presumption against extraterritoriality, which generally requires courts to avoid reading U.S. statutes as applicable on foreign soil without Congress's clear indication. Neither the text of the statute nor the legislative history of Code Sec. 4371 shows that Congress intended to apply to premiums on wholly foreign retrocessions.[47] Consequently, the appeals court ruled in favor of Validus.

Rev. Rul. 2016-3

As a result of its loss in *Validus*, in 2016, the IRS issued Rev. Rul. 2016-3. The ruling states that the IRS reconsidered Rev. Rul. 2008-15 in light of the appellate court's *Validus* decision holding that Code Sec. 4371 does not impose FET on foreign-to-foreign retrocession transactions, and that "the IRS will no longer apply the one percent cascading FET imposed by Code Sec. 4371(3) to premiums paid on a policy of reinsurance issued by one foreign reinsurer to another foreign insurer or reinsurer under the situations described in Rev. Rul. 2008-15."[48] However, the revenue ruling also states that IRS will continue to apply FET to premiums paid on a policy of reinsurance issued by a foreign reinsurer to a foreign insurance company that has made an/the Code Sec. 953(d) election, or a foreign insurer or reinsurer that is exempt from the FET because the premiums are effectively connected to the conduct of U.S. trade or business and taxable under Code Sec. 882(a).

Current IRS Audit Activity

In the wake of the *Validus* decision, the IRS has shifted its focus to examining and enforcing the terms of the anti-conduit provisions of the closing agreements. IRS audit techniques generally include a request for a copy of closing agreement and an information document request focusing on whether the foreign insurer satisfies the limitations on benefits.

The closing agreement focuses on the concept of applying the excise tax based on the percentage of policies covering U.S. risks reinsured with a foreign insurance company not eligible for treaty benefits. This simple concept becomes a very complex calculation when applying it to hundreds of reinsurance agreements where the U.S. insureds are not necessarily segregated from other insured.[49]

As a result, taxpayer should be prepared to respond to IRS requests regarding its reinsurance policies. Under the closing agreement, the foreign insurer agrees to maintain for a period of six years (i) accounts and records of items of insurance and reinsurance, and (ii) records to establish eligibility for benefits under the Convention, in each case, that will be made available upon written request by the IRS at the place mutually agreed upon by the IRS and the taxpayer. Unless otherwise agreed to by the IRS, the insurance company has 60 days within which to make available its accounts and records.[50] In light of these reporting obligations, some taxpayers have built into their reinsurance administration systems the underlying details to support the application or non-application of the treaty exemption. For these insurance companies, they may be able to respond to the IRS's request using the information detailed within their administration system.

However, even if it may be administratively feasible to collect and organize the relevant data for the IRS, the foreign insurer may prefer to address the IRS's information request using statistical sampling techniques. The good news is that the IRS may be open to taking a statistical sampling approach in these cases. Specifically, the IRS has a formal statistical sampling process.[51] Under this audit technique, the IRS agent can request assistance from a computer audit specialist ("CAS") to sample in examination of a large amount of policies. The IRS LB&I Statistical Sampling Application is designed to be used on all IRS-initiated statistical samples and to test the validity of all taxpayer proposed statistical samples.[52] The proposed population adjustment will be determined, such that, 95% of the time, it will not be greater than the actual adjustment obtainable by a 100% examination of the population.[53]

Even outside the IRS's formal statistical sampling process, based on our experience, some IRS agents are willing to work with the insurance company to develop a reasonable sample group such that the sample group can be the basis of extrapolating to the foreign insurer's entire population. Similar to discussions with IRS agents who use the Statistical Sampling Application, some of the discussion will focus on the quantitative details of the sample population: Is it representative? Is it a reasonable size? This more informal approach allows more leeway for the foreign insurer to make qualitative arguments about the nature of its business.

In sum, the excise tax imposed by Code Sec. 4371 has been and continues to be a source of IRS audit activity. Currently, the IRS has focused on documenting treaty benefits in the light of subsequent reinsurance agreements. Potential exposures can be quantified and understood through documenting the underlying tax treaties and the details of the relevant reinsurance agreements. By having this documentation available, the insurance company can be prepared for potential IRS auditors.

ENDNOTES

* The information in this article is not intended to be "written advice concerning one or more Federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230. The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser. This article represents the views of the author(s) only, and does not necessarily represent the views or professional advice of KPMG LLP.

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1 Unless otherwise indicated, all references to the "Code Sec." or "Reg. §" are to the Internal Revenue Code of 1986, as amended, or to regulations promulgated thereunder.

2 Code Sec. 4371(1).

3 Code Sec. 4371(2).

4 Code Sec. 4371(3).

5 Code Sec. 4372(a).

6 Code Sec. 4372(e).

7 Code Sec. 4372(b).

8 Code Sec. 4372(d)(1).

9 Code Sec. 4372(d)(2).

10 Reg. §46.4371-2(a)(2); Reg. §46.4371-2(a)(3).

11 Code Sec. 4372(f).

12 Code Sec. 4374; Reg. §46.4374-1(a).

13 Code Sec. 4373(1).

14 *See, e.g.*, US-UK Income Tax Treaty, Article 7.5; US-Germany Income Tax Treaty, Article 2.1(a); US-France Income Tax Treaty, Article 2.1(a)(ii).

15 Rev. Proc. 2003-78, 2003-2 CB 1029, *modified by* Rev. Proc. 2015-46, 2015-2 CB 414.

16 *See* IRS, *Excise Tax—Foreign Insurance Audit Techniques Guide (ATG)*, ch. 5 (rev. 04/08), available online at *www.irs.gov/pub/irs-mssp/foreign_insurance.pdf*. Although the ATG has not been revised since 2008, it continues to provide insights into the IRS approach to excise tax exams.

17 For example, Hungary, Romania, and the Soviet countries of Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

18 Except U.S.-Ukraine Income Tax Treaty.

19 For example, treaties with Cypress, Finland, France, Germany, India, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, Spain, Sweden, Switzerland, and the United Kingdom have qualified exemption provisions.

20 *See* Rev. Proc. 2003-78, 2003-2 CB 1029, *modified by* Rev. Proc. 2015-46, 2015-2 CB 414.

21 Rev. Proc. 2003-78, 2003-2 CB 1029, *modified by* Rev. Proc. 2015-46, 2015-2 CB 414.

22 Convention between the government of the United States of America and the government of the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital gains ("US-UK Income Tax Treaty").

23 US-UK Income Tax Treaty, Article 7.5.

24 US-UK Income Tax Treaty, Article 7.5.

25 US-UK Income Tax Treaty, Article 3.1 n).

26 *See* Diplomatic Note, *Letter of Submittal from the Department of State to the President* (Oct. 7, 2002). *See also* Dep't of the Treasury, *Technical Explanation of the US-UK Income Tax Treaty*, at 55.

27 Dep't of the Treasury, *Technical Explanation of the US-UK Income Tax Treaty*, at 21–22.

28 *Id.* at 55.

29 Joint Comm. on Taxation, *Explanation of Proposed Income Tax Treaty Between the United States and the United Kingdom*, JCS 4-03, at 14 (Mar. 3, 2003). *See also* S. Exec. Rep. No. 108-2, at 6–7 (Mar. 13, 2003) (Report of the Senate Foreign Relations Committee on the U.S.-U.K. Income Tax Treaty).

30 The anti-conduit rules under Reg. §1.881-3 provide a set of rules distinct from the treaty language. Generally, those rules require a financing arrangement (A) that results in a reduction of taxes associated with the financing arrangement; (B) the participation in which is part of a tax avoidance plan; and either (i) the intermediate entity is related to the financing entity; or (ii) the intermediate entity would not have participated in the financing arrangement on substantially the same terms but for the fact that the financing entity engaged in the financing transaction with the intermediate entity. Reg. §1.881-3(a)(4).

31 *See, e.g.*, Code Sec. 41(b)(2)(B) (research credit); Code Sec. 368(a)(1)(C) (definition of C reorganization); Code Sec. 49(a)(1)(E)(iii)(II) (at-risk rules); Code Sec. 409(d)(2) (employee stock ownership plans); Code Sec. 414(e)(2)(B) (church plans); Code Sec. 457A(b)(2) (nonqualified deferred compensation plans); Code Sec. 465(c)(5)(B)(i) (deductions limited to amount at risk); Code Sec. 501(c)(7) (tax exempt recreational clubs); Code Sec. 856(d)(6)(A) (real estate investment trusts);

Code Sec. 954(c)(1)(C)(ii) (foreign personal holding company income); Code Sec. 1400Z-2(d)(2)(C) (qualified opportunity zone property); Code Sec. 3121(a)(1) (definition of wages for employment taxes); Code Sec. 4942(j)(3)(B)(iii) (taxes on failure to distribute income); Code Sec. 7701(e)(3)(B) (definition of qualified solid waste disposal facility); Code Sec. 7872((g)(4)(B) (qualifying continuing care facilities); Code Sec. 9812(a)(1)(A) (parity in mental health and substance use disorder benefits).

[32] Rev. Proc. 77-37, 1977-2 CB 568, *amplified by* Rev. Proc. 86-42, 1986-2 CB 722.

[33] *See, e.g.*, Code Sec. 1400Z-2(d)(2)(C).

[34] Rev. Proc. 2003-78, 2003-2 CB 1029, *modified by* Rev. Proc. 2015-46, 2015-2 CB 414.

[35] Rev. Proc. 2003-78, §3.01.

[36] Rev. Proc. 2003-78.

[37] *Exemption from Section 4371 Excise Tax*, available online at *www.irs.gov/businesses/international-businesses/exemption-from-section-4371-excise-tax*.

[38] *Validus Reinsurance, Ltd.*, CA-DC, 2015-1 USTC ¶70,335, 786 F3d 1039; Rev. Proc. 2003-78.

[39] Discussed *infra*.

[40] Instructions for Form 720, Part III.

[41] Even if the foreign company concluded that the excise taxes applied, it may be difficult to segregate the reinsurance premium for the U.S. risks separate from the total bundle of U.S. and non-U.S. risks.

[42] Rev. Rul. 2008-15, 2008-1 CB 633, *revoked by* Rev. Rul. 2016-3, 2016-3 IRB 282.

[43] *Id.*

[44] *Validus Reinsurance, Ltd.*, CA-DC, 2015-1 USTC ¶70,335, 786 F3d 1039.

[45] *Validus Reinsurance, Ltd.*, DC-DC, 19 FSupp3d 225 (2014).

[46] *Validus Reinsurance, Ltd.*, 786 F3d 1039.

[47] *Id.*

[48] Rev. Rul. 2016-3, 2016-3 IRB 282.

[49] IRS, *Excise Tax—Foreign Insurance Audit Techniques Guide (ATG)* (rev. 04/08), available online at *www.irs.gov/pub/irs-mssp/foreign_insurance.pdf*.

[50] Rev. Proc. 2015-46, app. A, para. 4.

[51] IRM 4.47.3 Statistical Sampling Auditing Techniques (Feb. 22, 2021).

[52] IRM 4.47.3.3.1(2).

[53] IRM 4.47.3.3.1(1).

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