TD 2022/9EC - Compendium

Australian Government
Australian Taxation Office

Public advice and guidance compendium – TD 2022/9

Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Taxation Determination TD 2019/D12 *Income tax: is section 951A of the US Internal Revenue Code a provision of a law of a foreign country that corresponds to section 456 or 457 of the Income Tax Assessment Act 1936 for the purpose of subsection 832-130(5) of the Income Tax Assessment Act 1997?.* It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
All legislative references in this Compendium are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.		
1	**Policy intention**	
	The conclusion in the draft Determination is not aligned with the policy intention of subsection 832-130(5) and of the broader hybrid mismatch regime. The points raised include: • Division 832 (other than Subdivision 832-J) does not specify a minimum rate of foreign tax that should apply but instead considers whether an amount has been included in the tax base in a foreign jurisdiction. • Some or all of the relevant payment will be included in the gross income of a United States shareholder under section 951A of the *Internal Revenue Code of 1986* (Internal Revenue Code). • The purpose of the global intangible low-taxed income (GILTI) regime and Part X of the *Income Tax Assessment Act 1936* (ITAA 1936) is the same. They both operate as an integrity measure to prevent corporations shifting profits on highly mobile assets to low-tax jurisdictions.	Broadly, subsection 832-130(5) adopts the recommendation in the OECD Action 2 Report that, subject to limitations, income inclusion under a CFC regime can be taken into account when determining whether a deduction/non-inclusion mismatch arises (refer to paragraphs 36 to 38 of the OECD Action 2 Report). In the context of Australia's hybrid mismatch rules, not all foreign CFC inclusions are recognised. The 'correspondence' threshold must be met for subsection 832-130(5) to be satisfied. This is the clear intention of Parliament as expressed in the text of the provision. For the reasons given in the final Determination, we do not consider that section 951A of the Internal Revenue Code corresponds to sections 456 or 457 of the ITAA 1936. In particular, we do not agree that the essential purpose of GILTI (minimum tax on high-return income) is the same as Part X of the ITAA 1936 (anti-deferral of tainted income). It is insufficient for the purposes of subsection 832-130(5) that section 951A is found within subpart F of the Internal Revenue Code. It is also insufficient that the OECD Action 3 Report explores the concept of a minimum tax in the context of CFC regimes generally. Subsection 832-130(5) does not simply

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	• The way in which the GILTI rules identify the attributable income does not materially distinguish GILTI from Part X of the ITAA 1936. • The OECD Action 2 Report[1] recommends that a deduction be denied to neutralise hybrid mismatch arrangements if the relevant payment is not included as income by the recipient and is not subject to taxation under controlled foreign company (CFC) or similar rules. • The OECD Action 3 Report[2] explores the concept of a minimum tax, reinforcing the general understanding that a minimum tax such as GILTI is a form of CFC rules and should be regarded as a valid inclusion.	require that the foreign law provision be a form of CFC or attribution provision that includes an amount of CFC income in a shareholder's tax base. It requires that the foreign law provision be a corresponding provision to sections 456 or 457 of the ITAA 1936.
2	**CFC grouping**	
	The grouping of a US shareholder's CFCs under section 951A of the Internal Revenue Code does not prevent section 951A from corresponding to sections 456 or 457 of the ITAA 1936. GILTI should not be distinguished from country-by-country or CFC-by-CFC attribution regimes on the basis of having a different purpose. GILTI has the same purpose as these regimes.	The final Determination does not focus on the grouping of a US shareholder's CFCs under section 951A of the Internal Revenue Code in concluding that section 951A does not correspond to sections 456 or 457 of the ITAA 1936. We do not agree that the essential purpose of GILTI (minimum tax on high-return income) is the same as Part X of the ITAA 1936 (anti-deferral of tainted income).
3	**Calculation of inclusion amounts**	
	Section 951A of the Internal Revenue Code and sections 456 and 457 of the ITAA 1936 are similar because the calculation of the inclusion amount under each provision starts with the	We agree that a GILTI inclusion is calculated based on the actual income and attributes of a CFC.

[1] Organisation for Economic Co-operation and Development (2015) *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 -– 2015 Final Report*, OECD Publishing, Paris.
[2] Organisation for Economic Co-operation and Development (2015) *Designing Effective Controlled Foreign Company Rules, Action 3 – 2015 Final Report*, OECD Publishing, Paris.

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	actual gross income of a CFC and then makes subtractions from that actual gross income. A GILTI inclusion is not a deemed income amount (a GILTI inclusion represents actual CFC income). Net deemed tangible income return is merely a subtraction from actual gross income.	The final Determination does not focus on the mechanics of how GILTI is calculated in concluding that section 951A of the Internal Revenue Code does not correspond to sections 456 or 457 of the ITAA 1936.
4	**Evidence to substantiate inclusion under GILTI**	
	US tax rules (section 1.951A-5(b)(2) of the US Treasury Regulations) require US taxpayers to identify the amount of GILTI inclusions on a CFC-by-CFC basis. Therefore, the net inclusion in relation to Australian CFCs will be identified. Further, US forms (such as Forms 5471 and 8992) should evidence the particular amount of income or profits of the relevant CFC that are attributed under section 951A of the Internal Revenue Code.	As we consider that section 951A of the Internal Revenue Code does not correspond to sections 456 or 457 of the ITAA 1936, it is not necessary to consider what evidence is available to substantiate that the income of a CFC has been attributed under section 951A of the Internal Revenue Code.
5	**Similarities between GILTI and Part X of the ITAA 1936**	
	The brief analysis in the draft Determination on the differences between section 951A of the Internal Revenue Code and sections 456 and 457 of the ITAA 1936 does not address the wide range of similarities between the US GILTI rules and Australia's CFC rules. The draft Determination seems to imply that subsection 951(a) (traditional subpart F) of the Internal Revenue Code corresponds to sections 456 and 457 of the ITAA 1936, notwithstanding a number of differences between traditional subpart F and Australia's CFC rules.	While we acknowledge that there are some similarities between section 951A of the Internal Revenue Code and sections 456 and 457 of the ITAA 1936, as explained in the final Determination, we consider that the 'gist' of section 951A (as determined by its substance or essential parts) is not the same as that of sections 456 and 457 and therefore that section 951A does not correspond to section 456 or 457. We consider that the purpose of subsection 951(a) of the Internal Revenue Code is more aligned with the purpose of sections 456 and 457 of the ITAA 1936 and therefore that subsection 951(a) is likely to be a provision that corresponds to sections 456 or 457.
6	**Other provisions**	
	The final Determination should indicate if the interpretation of subsection 832-130(5) is relevant to other provisions of Division 832 including, for example, paragraphs 832-725(1)(g), (1)(h), (4)(b) and (5)(a).	The final Determination is limited to the specific question of whether section 951A of the Internal Revenue Code corresponds to sections 456 or 457 of the ITAA 1936 for the purpose of subsection 832-130(5).

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	The final Determination should clarify if and how the US GILTI rules are relevant to all of the tests in Division 832 based on the subject to foreign income tax concept.	The final Determination will be relevant to the interpretation of other provisions in Division 832 where the term 'subject to foreign income tax' appears.
7	**Substantially the same effect**	
	The draft Determination considers the phrase 'corresponds to' in relation to the US GILTI rules and Australia's CFC rules. The same, or a similar, comparison is required in many other aspects of Division 832. It should be expected that taxpayers may be influenced by the ATO's interpretation of 'corresponds to' when considering these other aspects of Division 832. The final Determination should clarify that it is confined to the interpretation of subsection 832-130(5) and will be of limited relevance to other tests which include the broader 'substantially the same effect' test.	Consideration of other aspects of Division 832 is not within the scope of the Determination, which is limited to whether section 951A of the Internal Revenue Code corresponds to sections 456 or 457 of the ITAA 1936 for the purpose of subsection 832-130(5). Consideration of whether, for example, a foreign law corresponds to any of Subdivisions 832-C to 832-H for the purposes of the definition of 'foreign hybrid mismatch rules', or whether a law of a foreign country has 'substantially the same effect' as foreign hybrid mismatch rules, will depend on a different statutory context. The final Determination does not set out the Commissioner's view on those issues. A separate guidance product on those issues may be considered. Taxpayers may also seek specific guidance from the ATO on such issues via early engagement discussions or a private ruling. It is similarly the case that whether section 951A of the Internal Revenue Code corresponds with any other provision (including a future provision) is not the subject of this final Determination, nor can the final Determination address the effect of any future alteration to section 951A of the Internal Revenue Code. As with other public rulings, it is inappropriate to draw inferences for contexts not the subject of the ruling.