

see section 11821(b) of Pub. L. 101-508, set out as a note under section 45K of this title.

CONSIDERATION OF CERTAIN TAXES TREATED AS PAID OR ACCRUED UNDER SECTION 904(c) IN DETERMINATION OF ALTERNATIVE MINIMUM TAX FOREIGN TAX CREDIT

Pub. L. 100-647, title I, §1007(f)(5), Nov. 10, 1988, 102 Stat. 3434, provided that: "In determining the amount of the alternative minimum tax foreign tax credit under section 59 of the 1986 Code, there shall not be taken into account any taxes paid or accrued in a taxable year beginning after December 31, 1986, which are treated under section 904(c) of the 1986 Code as paid or accrued in a taxable year beginning on or before December 31, 1986."

APPLICABILITY OF CERTAIN AMENDMENTS BY PUB. L. 99-514 IN RELATION TO TREATY OBLIGATIONS OF UNITED STATES

For applicability of amendment by section 701(a) of Pub. L. 99-514 [enacting this section] notwithstanding any treaty obligation of the United States in effect on Oct. 22, 1986, with provision that for such purposes any amendment by title I of Pub. L. 100-647 be treated as if it had been included in the provision of Pub. L. 99-514 to which such amendment relates, see section 1012(aa)(2), (4) of Pub. L. 100-647, set out as a note under section 861 of this title.

PART VII—BASE EROSION AND ANTI-ABUSE TAX

Sec.

59A. Tax on base erosion payments of taxpayers with substantial gross receipts.

PRIOR PROVISIONS

A prior part VII, Environmental Tax, consisted of section 59A, prior to repeal by Pub. L. 113-295, div. A, title II, §221(a)(12)(A), Dec. 19, 2014, 128 Stat. 4038.

§ 59A. Tax on base erosion payments of taxpayers with substantial gross receipts

(a) Imposition of tax

There is hereby imposed on each applicable taxpayer for any taxable year a tax equal to the base erosion minimum tax amount for the taxable year. Such tax shall be in addition to any other tax imposed by this subtitle.

(b) Base erosion minimum tax amount

For purposes of this section—

(1) In general

Except as provided in paragraphs (2) and (3), the term "base erosion minimum tax amount" means, with respect to any applicable taxpayer for any taxable year, the excess (if any) of—

(A) an amount equal to 10 percent (5 percent in the case of taxable years beginning in calendar year 2018) of the modified taxable income of such taxpayer for the taxable year, over

(B) an amount equal to the regular tax liability (as defined in section 26(b)) of the taxpayer for the taxable year, reduced (but not below zero) by the excess (if any) of—

(i) the credits allowed under this chapter against such regular tax liability, over

(ii) the sum of—

(I) the credit allowed under section 38 for the taxable year which is properly allocable to the research credit determined under section 41(a), plus

(II) the portion of the applicable section 38 credits not in excess of 80 percent of the lesser of the amount of such credits or the base erosion minimum tax amount (determined without regard to this subclause).

(2) Modifications for taxable years beginning after 2025

In the case of any taxable year beginning after December 31, 2025, paragraph (1) shall be applied—

(A) by substituting "12.5 percent" for "10 percent" in subparagraph (A) thereof, and

(B) by reducing (but not below zero) the regular tax liability (as defined in section 26(b)) for purposes of subparagraph (B) thereof by the aggregate amount of the credits allowed under this chapter against such regular tax liability rather than the excess described in such subparagraph.

(3) Increased rate for certain banks and securities dealers

(A) In general

In the case of a taxpayer described in subparagraph (B) who is an applicable taxpayer for any taxable year, the percentage otherwise in effect under paragraphs (1)(A) and (2)(A) shall each be increased by one percentage point.

(B) Taxpayer described

A taxpayer is described in this subparagraph if such taxpayer is a member of an affiliated group (as defined in section 1504(a)(1)) which includes—

(i) a bank (as defined in section 581), or

(ii) a registered securities dealer under section 15(a) of the Securities Exchange Act of 1934.

(4) Applicable section 38 credits

For purposes of paragraph (1)(B)(ii)(II), the term "applicable section 38 credits" means the credit allowed under section 38 for the taxable year which is properly allocable to—

(A) the low-income housing credit determined under section 42(a),

(B) the renewable electricity production credit determined under section 45(a), and

(C) the investment credit determined under section 46, but only to the extent properly allocable to the energy credit determined under section 48.

(c) Modified taxable income

For purposes of this section—

(1) In general

The term "modified taxable income" means the taxable income of the taxpayer computed under this chapter for the taxable year, determined without regard to—

(A) any base erosion tax benefit with respect to any base erosion payment, or

(B) the base erosion percentage of any net operating loss deduction allowed under section 172 for the taxable year.

(2) Base erosion tax benefit

(A) In general

The term "base erosion tax benefit" means—

(i) any deduction described in subsection (d)(1) which is allowed under this chapter for the taxable year with respect to any base erosion payment,

(ii) in the case of a base erosion payment described in subsection (d)(2), any deduction allowed under this chapter for the taxable year for depreciation (or amortization in lieu of depreciation) with respect to the property acquired with such payment,

(iii) in the case of a base erosion payment described in subsection (d)(3)—

(I) any reduction under section 803(a)(1)(B) in the gross amount of premiums and other consideration on insurance and annuity contracts for premiums and other consideration arising out of indemnity insurance, and

(II) any deduction under section 832(b)(4)(A) from the amount of gross premiums written on insurance contracts during the taxable year for premiums paid for reinsurance, and

(iv) in the case of a base erosion payment described in subsection (d)(4), any reduction in gross receipts with respect to such payment in computing gross income of the taxpayer for the taxable year for purposes of this chapter.

(B) Tax benefits disregarded if tax withheld on base erosion payment

(i) In general

Except as provided in clause (ii), any base erosion tax benefit attributable to any base erosion payment—

(I) on which tax is imposed by section 871 or 881, and

(II) with respect to which tax has been deducted and withheld under section 1441 or 1442,

shall not be taken into account in computing modified taxable income under paragraph (1)(A) or the base erosion percentage under paragraph (4).

(ii) Exception

The amount not taken into account in computing modified taxable income by reason of clause (i) shall be reduced under rules similar to the rules under section 163(j)(5)(B) (as in effect before the date of the enactment of the Tax Cuts and Jobs Act).

(3) Special rules for determining interest for which deduction allowed

For purposes of applying paragraph (1), in the case of a taxpayer to which section 163(j) applies for the taxable year, the reduction in the amount of interest for which a deduction is allowed by reason of such subsection shall be treated as allocable first to interest paid or accrued to persons who are not related parties with respect to the taxpayer and then to such related parties.

(4) Base erosion percentage

For purposes of paragraph (1)(B)—

(A) In general

The term “base erosion percentage” means, for any taxable year, the percentage determined by dividing—

(i) the aggregate amount of base erosion tax benefits of the taxpayer for the taxable year, by

(ii) the sum of—

(I) the aggregate amount of the deductions (including deductions described in clauses (i) and (ii) of paragraph (2)(A)) allowable to the taxpayer under this chapter for the taxable year, plus

(II) the base erosion tax benefits described in clauses (iii) and (iv) of paragraph (2)(A) allowable to the taxpayer for the taxable year.

(B) Certain items not taken into account

The amount under subparagraph (A)(ii) shall be determined by not taking into account—

(i) any deduction allowed under section 172, 245A, or 250 for the taxable year,

(ii) any deduction for amounts paid or accrued for services to which the exception under subsection (d)(5) applies, and

(iii) any deduction for qualified derivative payments which are not treated as a base erosion payment by reason of subsection (h).

(d) Base erosion payment

For purposes of this section—

(1) In general

The term “base erosion payment” means any amount paid or accrued by the taxpayer to a foreign person which is a related party of the taxpayer and with respect to which a deduction is allowable under this chapter.

(2) Purchase of depreciable property

Such term shall also include any amount paid or accrued by the taxpayer to a foreign person which is a related party of the taxpayer in connection with the acquisition by the taxpayer from such person of property of a character subject to the allowance for depreciation (or amortization in lieu of depreciation).

(3) Reinsurance payments

Such term shall also include any premium or other consideration paid or accrued by the taxpayer to a foreign person which is a related party of the taxpayer for any reinsurance payments which are taken into account under sections 803(a)(1)(B) or 832(b)(4)(A).

(4) Certain payments to expatriated entities

(A) In general

Such term shall also include any amount paid or accrued by the taxpayer with respect to a person described in subparagraph (B) which results in a reduction of the gross receipts of the taxpayer.

(B) Person described

A person is described in this subparagraph if such person is a—

(i) surrogate foreign corporation which is a related party of the taxpayer, but only if such person first became a surrogate foreign corporation after November 9, 2017, or

(ii) foreign person which is a member of the same expanded affiliated group as the surrogate foreign corporation.

(C) Definitions

For purposes of this paragraph—

(i) Surrogate foreign corporation

The term “surrogate foreign corporation” has the meaning given such term by section 7874(a)(2)(B) but does not include a foreign corporation treated as a domestic corporation under section 7874(b).

(ii) Expanded affiliated group

The term “expanded affiliated group” has the meaning given such term by section 7874(c)(1).

(5) Exception for certain amounts with respect to services

Paragraph (1) shall not apply to any amount paid or accrued by a taxpayer for services if—

(A) such services are services which meet the requirements for eligibility for use of the services cost method under section 482 (determined without regard to the requirement that the services not contribute significantly to fundamental risks of business success or failure), and

(B) such amount constitutes the total services cost with no markup component.

(e) Applicable taxpayer

For purposes of this section—

(1) In general

The term “applicable taxpayer” means, with respect to any taxable year, a taxpayer—

(A) which is a corporation other than a regulated investment company, a real estate investment trust, or an S corporation,

(B) the average annual gross receipts of which for the 3-taxable-year period ending with the preceding taxable year are at least \$500,000,000, and

(C) the base erosion percentage (as determined under subsection (c)(4)) of which for the taxable year is 3 percent (2 percent in the case of a taxpayer described in subsection (b)(3)(B)) or higher.

(2) Gross receipts

(A) Special rule for foreign persons

In the case of a foreign person the gross receipts of which are taken into account for purposes of paragraph (1)(B), only gross receipts which are taken into account in determining income which is effectively connected with the conduct of a trade or business within the United States shall be taken into account. In the case of a taxpayer which is a foreign person, the preceding sentence shall not apply to the gross receipts of any United States person which are aggregated with the taxpayer’s gross receipts by reason of paragraph (3).

(B) Other rules made applicable

Rules similar to the rules of subparagraphs (B), (C), and (D) of section 448(c)(3) shall apply in determining gross receipts for purposes of this section.

(3) Aggregation rules

All persons treated as a single employer under subsection (a) of section 52 shall be treated as 1 person for purposes of this subsection and subsection (c)(4), except that in applying section 1563 for purposes of section 52, the exception for foreign corporations under section 1563(b)(2)(C) shall be disregarded.

(f) Foreign person

For purposes of this section, the term “foreign person” has the meaning given such term by section 6038A(c)(3).

(g) Related party

For purposes of this section—

(1) In general

The term “related party” means, with respect to any applicable taxpayer—

(A) any 25-percent owner of the taxpayer,

(B) any person who is related (within the meaning of section 267(b) or 707(b)(1)) to the taxpayer or any 25-percent owner of the taxpayer, and

(C) any other person who is related (within the meaning of section 482) to the taxpayer.

(2) 25-percent owner

The term “25-percent owner” means, with respect to any corporation, any person who owns at least 25 percent of—

(A) the total voting power of all classes of stock of a corporation entitled to vote, or

(B) the total value of all classes of stock of such corporation.

(3) Section 318 to apply

Section 318 shall apply for purposes of paragraphs (1) and (2), except that—

(A) “10 percent” shall be substituted for “50 percent” in section 318(a)(2)(C), and

(B) subparagraphs (A), (B), and (C) of section 318(a)(3) shall not be applied so as to consider a United States person as owning stock which is owned by a person who is not a United States person.

(h) Exception for certain payments made in the ordinary course of trade or business

For purposes of this section—

(1) In general

Except as provided in paragraph (3), any qualified derivative payment shall not be treated as a base erosion payment.

(2) Qualified derivative payment

(A) In general

The term “qualified derivative payment” means any payment made by a taxpayer pursuant to a derivative with respect to which the taxpayer—

(i) recognizes gain or loss as if such derivative were sold for its fair market value on the last business day of the taxable year (and such additional times as required by this title or the taxpayer’s method of accounting),

(ii) treats any gain or loss so recognized as ordinary, and

(iii) treats the character of all items of income, deduction, gain, or loss with re-

spect to a payment pursuant to the derivative as ordinary.

(B) Reporting requirement

No payments shall be treated as qualified derivative payments under subparagraph (A) for any taxable year unless the taxpayer includes in the information required to be reported under section 6038B(b)(2) with respect to such taxable year such information as is necessary to identify the payments to be so treated and such other information as the Secretary determines necessary to carry out the provisions of this subsection.

(3) Exceptions for payments otherwise treated as base erosion payments

This subsection shall not apply to any qualified derivative payment if—

(A) the payment would be treated as a base erosion payment if it were not made pursuant to a derivative, including any interest, royalty, or service payment, or

(B) in the case of a contract which has derivative and nonderivative components, the payment is properly allocable to the nonderivative component.

(4) Derivative defined

For purposes of this subsection—

(A) In general

The term “derivative” means any contract (including any option, forward contract, futures contract, short position, swap, or similar contract) the value of which, or any payment or other transfer with respect to which, is (directly or indirectly) determined by reference to one or more of the following:

- (i) Any share of stock in a corporation.
- (ii) Any evidence of indebtedness.
- (iii) Any commodity which is actively traded.
- (iv) Any currency.
- (v) Any rate, price, amount, index, formula, or algorithm.

Such term shall not include any item described in clauses (i) through (v).

(B) Treatment of American depository receipts and similar instruments

Except as otherwise provided by the Secretary, for purposes of this part, American depository receipts (and similar instruments) with respect to shares of stock in foreign corporations shall be treated as shares of stock in such foreign corporations.

(C) Exception for certain contracts

Such term shall not include any insurance, annuity, or endowment contract issued by an insurance company to which subchapter L applies (or issued by any foreign corporation to which such subchapter would apply if such foreign corporation were a domestic corporation).

(i) Regulations

The Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the provisions of this section, including regulations—

- (1) providing for such adjustments to the application of this section as are necessary to

prevent the avoidance of the purposes of this section, including through—

(A) the use of unrelated persons, conduit transactions, or other intermediaries, or

(B) transactions or arrangements designed, in whole or in part—

(i) to characterize payments otherwise subject to this section as payments not subject to this section, or

(ii) to substitute payments not subject to this section for payments otherwise subject to this section and

(2) for the application of subsection (g), including rules to prevent the avoidance of the exceptions under subsection (g)(3).

(Added Pub. L. 115-97, title I, §14401(a), Dec. 22, 2017, 131 Stat. 2226.)

REFERENCES IN TEXT

Section 15(a) of the Securities Exchange Act of 1934, referred to in subsec. (b)(3)(B)(ii), is classified to section 780(a) of Title 15, Commerce and Trade.

The date of the enactment of the Tax Cuts and Jobs Act, referred to in subsec. (c)(2)(B)(ii), probably means the date of enactment of title I of Pub. L. 115-97, which was approved Dec. 22, 2017. Prior versions of the bill that was enacted into law as Pub. L. 115-97 included such Short Title, but it was not enacted as part of title I of Pub. L. 115-97.

PRIOR PROVISIONS

A prior section 59A, added Pub. L. 99-499, title V, §516(a), Oct. 17, 1986, 100 Stat. 1770; amended Pub. L. 100-647, title II, §2001(c)(1), (3)(B), Nov. 10, 1988, 102 Stat. 3594; Pub. L. 101-508, title XI, §§11231(a)(1)(A), 11531(b)(3), 11801(c)(2)(E), Nov. 5, 1990, 104 Stat. 1388-444, 1388-490, 1388-523; Pub. L. 102-486, title XIX, §1915(c)(4), Oct. 24, 1992, 106 Stat. 3024, related to environmental tax, prior to repeal by Pub. L. 113-295, div. A, title II, §221(a)(12)(A), Dec. 19, 2014, 128 Stat. 4038.

EFFECTIVE DATE

Section applicable to base erosion payments (as defined in subsec. (d) of this section) paid or accrued in taxable years beginning after Dec. 31, 2017, see section 14401(e) of Pub. L. 115-97, set out as an Effective Date of 2017 Amendment note under section 26 of this title.

[PART VIII—REPEALED]

[§ 59B. Repealed. Pub. L. 101-234, title I, § 102(a), Dec. 13, 1989, 103 Stat. 1980]

Section, added Pub. L. 100-360, title I, §111(a), July 1, 1988, 102 Stat. 690, provided for imposition of a supplemental medicare premium.

EFFECTIVE DATE OF REPEAL

Pub. L. 101-234, title I, §102(d), Dec. 13, 1989, 103 Stat. 1981, provided that:

“(1) IN GENERAL.—Except as provided in this subsection, the provisions of this section [repealing section 1395i-1a of Title 42, The Public Health and Welfare, enacting provisions set out as notes under section 6050F of this title and section 1395t of Title 42, and repealing provisions set out as a note under section 1395i-1a of Title 42] shall take effect January 1, 1990.

“(2) REPEAL OF SUPPLEMENTAL MEDICARE PREMIUM.—The repeal of section 111 of MCCA [Pub. L. 100-360, which enacted this section, amended section 6050F of this title, and enacted provisions set out as notes below] shall apply to taxable years beginning after December 31, 1988.”

EFFECTIVE DATE

Pub. L. 100-360, title I, §111(e), July 1, 1988, 102 Stat. 698, which provided that the enactment of this section