Section 338.—Certain Stock Purchase Treated as Asset Acquisitions

26 CFR 1.338–4: Asset and stock consistency.

T.D. 8710

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Revisions of the Section 338 Consistency Rules With Respect to Target Affiliates That Are Controlled Foreign Corporations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the consistency rules under section 338 of the Internal Revenue Code of 1986 that are applicable to certain cases involving controlled foreign corporations. The final regulations substantially revise and simplify the stock and asset consistency rules. The final regulations include the provisions of the consistency rules applicable to controlled foreign corporations contained in recent proposed and temporary regulations. The final regulations would affect taxpayers that own controlled foreign corporations.

EFFECTIVE DATE: These regulations are effective January 20, 1997.

FOR FURTHER INFORMATION CONTACT: Kenneth D. Allison at (202) 622–3860 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains final Income Tax Regulations (26 CFR part 1) under section 338 of the Internal Revenue Code.

On January 20, 1994, temporary regulations (T.D. 8516) were published in the **Federal Register** (59 FR 2956) under section 338 of the Internal Revenue Code. See 1994–1 C.B. 119. A notice of proposed rulemaking (INTL–0177–90) cross-referencing the temporary regulations was published in the **Federal Register** for the same day (59 FR 3045). See 1994–1 C.B. 818. The temporary regulations provided rules to replace the asset and stock consistency rules of §§ 1.338–4T and 1.338–5T. The temporary regulations included consistency rules applicable to certain cases involving controlled foreign corporations (CFCs).

No written comments responding to the notice were received. No public hearing was requested or held. The proposed regulations under section 338 are adopted as revised by this Treasury decision, and the corresponding temporary regulations are removed.

Explanation of Provisions

The preamble to the temporary and proposed regulations (1994–1 C.B. 119) contains a discussion of the provisions. Changes to the temporary and proposed regulations are noted below.

Section 1.338–4T(h)(3) of the temporary regulations is clarified by stating that the basis of the stock of a controlled foreign corporate target affiliate is not increased by section 1248 earnings attributable to the disposition of an asset in which a carryover basis is taken under this section.

Section 1.338–4T(h)(4) of the temporary regulations addresses a situation in which the income or gain from the disposition of a controlled foreign corporation target affiliate (CFC T affiliate) asset is not subject to the consistency rules of paragraph (h)(2). The regulation states that if a CFC T affiliate pays a dividend to a target (T) or a domestic T affiliate wholly or partially out of the earnings generated by the disposition of that asset, and the dividend increases the basis of the T stock under § 1.1502–32, then the basis of the stock of the CFC T affiliate is reduced by the amount of the dividend that was paid from the earnings and profits resulting from the asset disposition. This rule applies to any actual dividend, amount treated as a dividend under section 1248 (or that would have been so treated but for section 1291) or amount included in income under section 951(a)(1)(B).

The final regulations retain this rule. The final regulations also add a special ordering rule, in § 1.338–4(h)(4)(ii), clarifying that any such dividend is first considered attributable to earnings and profits resulting from the disposition of the asset.

Section 1.338–4(h)(4)(ii) is clarified to state that the basis of the stock of a controlled foreign corporation may not be reduced below zero under the carryover basis rules of § 1.338–4.

Section 1.338–4(h)(2)(iv)(A) and § 1.338–4(h)(4)(iii)(A) are added to allow the purchasing group in certain instances to increase the basis of the CFC T stock by the amount of either the basis increase denied under § 1.338–4(h)(2)(ii) or the basis reduction required under § 1.338–4(h)(4)(ii). The rule applies when the purchasing group disposes of an asset acquired from CFC T that is subject to the consistency rules to an unrelated party in a taxable transaction and includes in U.S. gross income the greater of (i) the income or gain equal to the basis amount denied to the asset under either § 1.338–4(h)(2)(i) or § 1.338–4(g) and § 1.338–4(h)(4)(i), respectively, or (ii) the gain recognized on the asset.

Similarly, § 1.338–4(h)(2)(iv)(B) and § 1.338–4(h)(4)(iii)(B) are added to allow the purchasing group to increase the basis of an asset acquired from CFC T that is subject to the consistency rules by the basis amount denied to the asset under either § 1.338–4(h)(2)(i) or § 1.338–4(g) and § 1.338–4(h)(4)(i). The rule applies when the purchasing group disposes of the stock of CFC T to an unrelated party in a taxable transaction and includes in U.S. gross income the greater of (i) the gain equal to the basis increase denied under § 1.338–4(h)(2)(ii) or the basis reduction required under § 1.338–4(h)(4)(ii), respectively, or (ii) the gain recognized in the stock.

Special Analyses

It has been determined that this final regulation is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the notice of proposed rulemaking preceding the regulations was issued prior to March 29, 1996 the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small businesses.

Drafting Information

The principal author of these regulations is Kenneth D. Allison of the Office of Associate Chief Counsel (International), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

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Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows: PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by removing the entry for Section 1.338–4T(h) to read as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. In § 1.338–0, the outline of topics is amended by revising the entry for § 1.338–4(h) and removing the entry for § 1.338–4T to read as follows:

§ 1.338–0 Outline of topics.

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§ 1.338–4 Asset and stock consistency.

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(h) Consistency for target affiliates that are controlled foreign corporations.

(1) In general.

(2) Income or gain resulting from asset dispositions.

(i) General rule.

(ii) Basis of controlled foreign corporation stock.

(iii) Operating rule.

(iv) Increase in asset or stock basis.

(3) Stock issued by target affiliate that is a controlled foreign corporation.

(4) Certain distributions.

(i) General rule.

(ii) Basis of controlled foreign corporation stock.

(iii) Increase in asset or stock basis.

(5) Examples.

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Par. 3. Section 1.338–4 is amended as follows:

1. Paragraph (a)(5) is amended by removing the language ‘‘Section 1.338–4T(h)’’ and adding ‘‘Paragraph (h) of this section’’ in its place.

2. Paragraph (c)(4) is amended by removing the language ‘‘§ 1.338–4T(h)(2)’’ and adding ‘‘paragraph (h)(2) of this section’’ in its place.

3. Paragraph (d)(2)(iii) is amended by removing the language ''§ 1.338–4T(h)(3)'' and adding ''paragraph (h)(3) of this section'' in its place.

4. Paragraph (g)(2) is amended by removing the language ''§ 1.338–4T(h)(4)'' and adding ''paragraph (h)(4) of this section'' in its place.

5. Paragraph (h) is revised.

6. Paragraph (j)(3)9i)(A)(2) is amended by removing the language ''§ 1.338–4T(h)'' and adding ''paragraph (h) of this section'' in its place.

The revision reads as follows:

§ 1.338–4 Asset and stock consistency.

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(h) *Consistency for target affiliates that are controlled foreign corporations*—(1) *In general.* This paragraph (h) applies only if target is a domestic corporation. For additional rules that may apply with respect to controlled foreign corporations, see paragraph (g) of this section. The definitions and nomenclature of § 1.338–1(b) and (c) and paragraph (e) of this section apply for purposes of this section.

(2) *Income or gain resulting from asset dispositions*—(i) *General rule.* Income or gain of a target affiliate that is a controlled foreign corporation from the disposition of an asset is not reflected in the basis of target stock under paragraph (c) of this section unless the income or gain results in an inclusion under section 951(a)(1)(A), 951(a)(1)-(C), 1291 or 1293.

(ii) *Basis of controlled foreign corporation stock.* If, by reason of paragraph (h)(2)(i) of this section, the carryover basis rules of this section apply to an asset, no increase in basis in the stock of a controlled foreign corporation under section 961(a) or 1293(d)(1), or under regulations issued pursuant to section 1297(b)(5), is allowed to target or a target affiliate to the extent the increase is attributable to income or gain described in paragraph (h)(2)(i) of this section. A similar rule applies to the basis of any property by reason of which the stock of the controlled foreign corporation is considered owned under section 958(a)(2) or 1297(a).

(iii) *Operating rule.* For purposes of this paragraph (h)(2)—

(A) If there is an income inclusion under section 951 (a)(1)(A) or (C), the shareholder's income inclusion is first attributed to the income or gain of the controlled foreign corporation from the disposition of the asset to the extent of the shareholder's pro rata share of such income or gain; and

(B) Any income or gain under section 1293 is first attributed to the income or gain from the disposition of the asset to the extent of the shareholder's pro rata share of the income or gain.

(iv) *Increase in asset or stock basis*—(A) If the carryover basis rules under paragraph (h)(2)(i) of this section apply to an asset, and the purchasing corporation disposes of the asset to an unrelated party in a taxable transaction and recognizes and includes in its U.S. gross income or the U.S. gross income of its shareholders the greater of the income or gain from the disposition of the asset by the selling controlled foreign corporation that was reflected in the basis of the target stock under paragraph (c) of this section, or the gain recognized on the asset by the purchasing corporation on the disposition of the asset, then the purchasing corporation or the target or a target affiliate, as appropriate, shall increase the basis of the selling controlled foreign corporation stock subject to paragraph (h)(2)(ii) of this section, as of the date of the disposition of the asset by the purchasing corporation, by the amount of the basis increase that was denied under paragraph (h)(2)(ii) of this section. The preceding sentence shall apply only to the extent that the controlled foreign corporation stock is owned (within the meaning of section 958(a)) by a member of the purchasing corporation's affiliated group.

(B) If the carryover basis rules under paragraph (h)(2)(i) of this section apply to an asset, and the purchasing corporation or the target or a target affiliate, as appropriate, disposes of the stock of the selling controlled foreign corporation to an unrelated party in a taxable transaction and recognizes and includes in its U.S. gross income or the U.S. gross income of its shareholders the greater of the gain equal to the basis increase that was denied under paragraph (h)(2)(ii) of this section, or the gain recognized in the stock by the purchasing corporation or by the target or a target affiliate, as appropriate, on the disposition of the stock, then the purchasing corporation shall increase the basis of the asset, as of the date of the disposition of the stock of the selling controlled foreign corporation by the purchasing corporation or by the target or a target affiliate, as appropriate, by the amount of the basis increase that was denied pursuant to paragraph (h)(2)(i) of this section. The preceding sentence shall apply only to the extent that the asset is owned (within the meaning of section 958(a)) by a member of the purchasing corporation's affiliated group.

(3) *Stock issued by target affiliate that is a controlled foreign corporation.* The exception to the carryover basis rules of this section provided in paragraph (d)(2)(iii) of this section does not apply to stock issued by a target affiliate that is a controlled foreign corporation. After applying the carryover basis rules of this section to the stock, the basis in the stock is increased by the amount treated as a dividend under section 1248 on the disposition of the stock (or that would have been so treated but for section 1291), except to the extent the basis increase is attributable to the disposition of an asset in which a carryover basis is taken under this section.

(4) *Certain distributions*—(i) *General rule.* In the case of a target affiliate that is a controlled foreign corporation, paragraph (g) of this section applies with respect to the target affiliate by treating any reference to a dividend to which section 243(a)(3) applies as a reference to any amount taken into account under § 1.1502–32 in determining the basis of target stock that is—

(A) A dividend;

(B) An amount treated as a dividend under section 1248 (or that would have been so treated but for section 1291); or

(C) An amount included in income under section 951(a)(1)(B).

(ii) *Basis of controlled foreign corporation stock.* If the carryover basis rules of this section apply to an asset, the basis in the stock of the controlled foreign corporation (or any property by reason of which the stock is considered owned under section 958(a)(2)) is reduced (but not below zero) by the sum of any amounts that are treated, solely by reason of the disposition of the asset, as a dividend, amount treated as a dividend under section 1248 (or that would have been so treated but for section 1291), or amount included in income under section 951(a)(1)(B). For this purpose, any dividend, amount treated as a dividend under section 1248 (or that would have been so treated but for section 1291), or amount included in income under section 951(a)(1)(B) is considered attributable first to earnings and profits resulting from the disposition of the asset.

(iii) *Increase in asset or stock basis*—(A) If the carryover basis rules under paragraphs (g) and (h)(4)(i) of this section apply to an asset, and the purchasing corporation disposes of the asset to an unrelated party in a taxable transaction and recognizes and includes in its U.S. gross income or the U.S. gross income of its shareholders the greater of the gain equal to the basis increase denied in the asset pursuant to paragraphs (g) and (h)(4)(i) of this section, or the gain recognized on the asset by the purchasing corporation on the disposition of the asset, then the purchasing corporation or the target or a target affiliate, as appropriate, shall increase the basis of the selling controlled foreign corporation stock subject to paragraph (h)(4)(ii) of this section, as of the date of the disposition of the asset by the purchasing corporation, by the amount of the basis reduction under paragraph (h)(4)(ii) of this section. The preceding sentence shall apply only to the extent that the controlled foreign corporation stock is owned (within the meaning of section 958(a)) by a member of the purchasing corporation's affiliated group.

(B) If the carryover basis rules under paragraphs (g) and (h)(4)(i) of this section apply to an asset, and the purchasing corporation or the target or a target affiliate, as appropriate, disposes of the stock of the selling controlled foreign corporation to an unrelated party in a taxable transaction and recognizes and includes in its U.S. gross income or the U.S. gross income of its shareholders the greater of the amount of the basis reduction under paragraph (h)(4)(ii) of this section, or the gain recognized in the stock by the purchasing corporation or by the target or a target affiliate, as appropriate, on the disposition of the stock, then the purchasing corporation shall increase the basis of the asset, as of the date of the disposition of the stock of the selling controlled foreign corporation by the purchasing corporation or by the target or a target affiliate, as appropriate, by the amount of the basis increase that was denied pursuant to paragraphs (g) and (h)(4)(i) of this section. The preceding sentence shall apply only to the extent that the asset is owned (within the meaning of section 958(a)) by a member of the purchasing corporation's affiliated group.

(5) *Examples.* This paragraph (h) may be illustrated by the following examples:

Example 1. Stock of target affiliate that is a CFC. (a) The S group files a consolidated return; however, T2 is a controlled foreign corporation. On December 1 of Year 1, T1 sells the T2 stock to P and recognizes gain. On January 2 of Year 2, P makes a qualified stock purchase of T from S. No section 338 election is made for T.

(b) Under paragraph (b)(1) of this section, paragraph (d) of this section applies to the T2 stock. Under paragraph (h)(3) of this section, paragraph (d)(2)(iii) of this section does not apply to the T2 stock. Consequently, paragraph (d)(1) of this section applies to the T2 stock. However, after applying paragraph (d)(1) of this section, P's basis in the T2 stock is increased by the amount of T1's gain on the sale of the T2 stock that is treated as a dividend under section 1248. Because P has a carryover basis in the T2 stock, the T2 stock is not considered purchased within the meaning of section 338(h)(3) and no section 338 election may be made for T2.

Example 2. Stock of target affiliate CFC; inclusion under subpart F. (a) The S group files a consolidated return; however, T2 is a controlled foreign corporation. On December 1 of Year 1, T2 sells an asset to P and recognizes subpart F income that results in an inclusion in T1's gross income under section 951(a)(1)(A). On January 2 of Year 2, P makes a qualified stock purchase of T from S. No section 338 election is made for T.

(b) Because gain from the disposition of the asset results in an inclusion under section 951(a)(1)(A), the gain is reflected in the basis of the T stock as of T's acquisition date. See paragraph (h)(2)(i) of this section. Consequently, under paragraph (b)(1) of this section, paragraph (d)(1) of this section applies to the asset. In addition, under paragraph (h)(2)(ii) of this section, T1's basis in the T2 stock is not increased under section 961(a) by the amount of the inclusion that is attributable to the sale of the asset.

(c) If, in addition to making a qualified stock purchase of T, P acquires the T2 stock from T1 on January 1 of Year 2, the results are the same for the asset sold by T2. In addition, under paragraph (h)(2)(ii) of this section, T1's basis in the T2 stock is not increased by the amount of the inclusion that is attributable to the gain on the sale of the asset. Further, under paragraph (h)(3) of this section, paragraph (d)(1) of this section applies to the T2 stock. However, after applying paragraph (d)(1) of this section, P's basis in the T2 stock is increased by the amount of T1's gain on the sale of the T2 stock that is treated as a dividend under section 1248. Finally, because P has a carryover basis in the T2 stock, the T2 stock is not considered purchased within the meaning of section 338(h)(3) and no section 338 election may be made for T2.

(d) If P makes a qualified stock purchase of T2 from T1, rather than of T from S, and T1's gain on the sale of T2 is treated as a dividend under section 1248, under paragraph (h)(1) of this section, paragraphs (h)(2) and (3) of this section do not apply because there is no target that is a domestic corporation. Consequently, the carryover basis rules of paragraph do not apply to the asset sold by T2 or the T2 stock.

Example 3. Gain reflected by reason of section 1248 dividend; gain from non-subpart F asset. (a) The S group files a consolidated return; however, T2 is a controlled foreign corporation. In Years 1 through 4, T2 does not pay any dividends to T1 and no amount is included in T1's income under section 951(a)(1)(B). On December 1 of Year 4, T2 sells an asset with a basis of $400,000 to P for $900,000. T2's gain of $500,000 is not subpart F income. On December 15 of Year 4, T1 sells T2, in which it has a basis of $600,000, to P for $1,600,000. Under section 1248, $800,000 of T1's gain of $1,000,000 is treated as a dividend. However, in the absence of the sale of the asset by T2 to P, only $300,000 would have been treated as a dividend under section 1248. On December 30 of Year 4, P makes a qualified stock purchase of T1 from T. No section 338 election is made for T1. (b) Under paragraph (h)(4) of this section, paragraph (g)(2) of this section applies by reference to the amount treated as a dividend under section 1248 on the disposition of the T2 stock. Because the amount treated as a dividend is taken into account in determining T's basis in the T1 stock under § 1.1502–32, the sale of the T2 stock and the deemed dividend have the effect of a transaction described in paragraph (g)(1) of this section. Consequently, paragraph (d)(1) of this section applies to the asset sold by T2 to P and P's basis in the asset is $400,000 as of December 1 of Year 4.

(c) Under paragraph (h)(3) of this section, paragraph (d)(1) of this section applies to the T2 stock and P's basis in the T2 stock is $600,000 as of December 15 of Year 4. Under paragraphs (h)(3) and (4)(ii) of this section, however, P's basis in the T2 stock is increased by $300,000 (the amount of T1's gain treated as a dividend under section 1248 ($800,000), other than the amount treated as a dividend solely as a result of the sale of the asset by T2 to P ($500,000)) to $900,000.

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§ 1.338–4T [Removed]

Par. 4. Section 1.338–4T is removed.

Par. 5. In § 1.338(i)–1, paragraphs (a) and (b) are revised to read as follows:

§ 1.338(i)–1 Effective dates.

(a) *In general.* Sections 1.338–1 through 1.338–5 (except § 1.338–4(h)), 1.338(b)–1, and 1.338(h)(10)–1 generally are applicable for targets with acquisition dates on or after January 20, 1994. Section 1.338–4(h) is applicable for targets with acquisition dates on or after January 20, 1997. Section 1.338–4T(h) (as contained in 26 CFR part 1 as revised April 1, 1996) is generally applicable for targets with acquisition dates on or after January 20, 1994, and before January 20, 1997.

(b) *Elective retroactive application.* A target with an acquisition date on or after January 14, 1992 and before January 20, 1994 may apply §§ 1.338–1 through 1.338–5, 1.338–4T(h) (as contained in 26 CFR part 1 as revised April 1, 1996), 1.338(b)–1, and 1.338(h)(10)–1 by including a statement with its return (including a timely filed amended return) for the period that includes the acquisition date to the effect that it is applying all of these sections pursuant to this paragraph (b). A target with an acquisition date on or after January 14, 1992, and before January 20, 1997, may choose to apply § 1.338–4(h) for the period that includes the acquisition date pursuant to paragraph (b) of this section.

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Margaret Milner Richardson,
Commissioner of Internal Revenue.

Approved January 13, 1997.

Donald C. Lubick,
Assistant Secretary of the Treasury.

(Filed by the Office of the Federal Register on January 22, 1997, 8:45 a.m., and published in the issue of the Federal Register for January 23, 1997, 62 F.R. 3458)