Part III – Administrative, Procedural, and Miscellaneous

Foreign tax credit guidance under section 909

Notice 2010-92

SECTION 1. OVERVIEW

This notice provides guidance concerning section 909 of the Internal Revenue Code ("Code"). The Treasury Department and Internal Revenue Service ("IRS") anticipate that this will be the first of several items of published guidance concerning section 909. This notice primarily addresses the application of section 909 to foreign income taxes paid or accrued by a section 902 corporation in taxable years beginning on or before December 31, 2010 ("pre-2011 taxable years"). The Treasury Department and IRS expect to issue regulations that incorporate the guidance described in this notice.

Section 2 of this notice provides background information with respect to section 909. Section 3 provides rules for determining whether foreign income taxes paid or accrued by a section 902 corporation in pre-2011 taxable years ("pre-2011 taxes") are suspended under section 909 in taxable years beginning after December 31, 2010 ("post-2010 taxable years") of a section 902 corporation. Section 4 identifies an exclusive list of arrangements that will be treated as giving rise to foreign tax credit splitting events in pre-2011 taxable years ("pre-2011 splitter arrangements") and provides guidance on determining the amount of related income and pre-2011 taxes paid or accrued with respect to pre-2011 splitter arrangements. Section 5 provides guidance concerning the application of section 909 to partnerships and trusts. Section 6 discusses the interaction between section 909 and other Code provisions. Section 7 provides the effective date of the regulations described in this notice. Section 8 solicits comments and provides contact information.

Unless otherwise provided, the guidance described in this notice applies only to pre-2011 taxes and does not apply to foreign income taxes paid or accrued in post-2010 taxable years. Future guidance

will address the application of section 909 to foreign income taxes paid or accrued in post-2010 taxable years. The Treasury Department and IRS expect that future guidance will provide that foreign tax credit splitting events in post-2010 taxable years will at least include all of the arrangements identified in section 4 of this notice. This future guidance may also provide that section 909 applies to other transactions or arrangements not identified in section 4 of this notice, but any such guidance relating to the definition of a foreign tax credit splitting event will apply only with respect to foreign income taxes paid or accrued in post-2010 taxable years.

Section 909 does not address the determination of the person who paid a foreign income tax for U.S. federal income tax purposes. See §1.901-2(f). Further, nothing in this notice should be construed as providing guidance with respect to that determination.

SECTION 2. BACKGROUND

.01 *Section 909*

Section 211 of the legislation commonly referred to as the Education Jobs and Medicaid Assistance Act ("EJMAA"), enacted on August 10, 2010 (P.L. 111-226, 124 Stat. 2389 (2010)), added section 909 to the Code to address situations where foreign income taxes have been separated from the related income. Section 909(a) provides that if there is a foreign tax credit splitting event with respect to a foreign income tax paid or accrued by a taxpayer, such tax shall not be taken into account for federal tax purposes before the taxable year in which the related income is taken into account by the taxpayer. Section 909(b) provides special rules with respect to a "section 902 corporation," which is defined in section 909(d)(5) as any foreign corporation with respect to which one or more domestic corporations meets the ownership requirements of section 902(a) or (b) (a "section 902 shareholder" of the relevant section 902 corporation). If there is a foreign tax credit splitting event with respect to a foreign income tax paid or accrued by a section 902 corporation, the tax shall not be taken into account for purposes of section 902 or 960, or for purposes of determining earnings and profits under section 964(a), before the taxable year in which the related income is taken into account by such section 902 corporation or a

section 902 shareholder. Thus, the tax is not added to the section 902 corporation's pool of "post-1986 foreign income taxes" (as defined in section 902(c)(2) and §1.902-1(a)(8)), and its pool of "post-1986 undistributed earnings" (as defined in section 902(c)(1) and §1.902-1(a)(9)) is not reduced by such tax. Accordingly, section 909 suspends foreign income taxes paid or accrued by a section 902 corporation at the level of the payor section 902 corporation. In the case of a partnership, section 909(a) and (b) apply at the partner level, and, except as otherwise provided by the Secretary, a similar rule applies in the case of an S corporation or trust. Section 909(c)(1).

For purposes of section 909, there is a foreign tax credit splitting event with respect to a foreign income tax if the related income is (or will be) taken into account by a covered person. Section 909(d)(1). Section 909 does not suspend foreign income taxes if the same person pays the tax but takes into account the related income in a different taxable period (or periods) due to, for example, timing differences between the U.S. and foreign tax accounting rules. The term "foreign income tax" means any income, war profits, or excess profits tax paid or accrued to any foreign country or to any possession of the United States. Section 909(d)(2). A foreign income tax includes any tax paid in lieu of such a tax within the meaning of section 903. Section 909(d)(3) provides that the term "related income" means, with respect to any portion of any foreign income tax, the income (or, as appropriate, earnings and profits) to which such portion of the foreign income tax relates. The term "covered person" means, with respect to any person who pays or accrues a foreign income tax (the "payor"): (1) any entity in which the payor holds, directly or indirectly, at least a 10 percent ownership interest (determined by vote or value); (2) any person that holds, directly or indirectly, at least a 10 percent ownership interest (determined by vote or value) in the payor; (3) any person that bears a relationship to the payor described in section 267(b) or 707(b); and (4) any other person specified by the Secretary. Section 909(d)(4).

Except as otherwise provided by the Secretary, any foreign income tax not currently taken into account by reason of section 909 is taken into account as a foreign income tax paid or accrued in the taxable year in which, and to the extent that, the taxpayer, the section 902 corporation or a section 902 shareholder (as the case may be) takes the related income into account under chapter 1 of the Code.

Section 909(c)(2). Notwithstanding this general rule, foreign income taxes are translated into U.S. dollars under the general rules of section 986 and not as if they were paid or accrued in the year in which the related income is taken into account. Section 909(c)(2).

Section 909(e) provides that the Secretary may issue such regulations or other guidance as is necessary or appropriate to carry out the purposes of section 909, including guidance providing appropriate exceptions from the provisions of section 909 and for its proper application to hybrid instruments. The Joint Committee on Taxation's technical explanation of the revenue provisions of EJMAA states that such guidance may address the proper application of section 909 in cases involving disregarded payments, group relief, or other arrangements having a similar effect. Staff of the Joint Committee on Taxation, Technical Explanation of the Revenue Provisions of the Senate Amendment to the House Amendment to the Senate Amendment to H.R. 1586, Scheduled For Consideration by the House of Representatives on August 10, 2010, at 6 (August 10, 2010) (the "JCT Explanation"). The JCT Explanation also states that such guidance may provide successor rules addressing circumstances such as when, with respect to a foreign tax credit splitting event, the person who pays or accrues the foreign income tax or any covered person is liquidated. Id.

.02 *Effective date*

Section 211(c)(1) of EJMAA provides that section 909 applies to foreign income taxes paid or accrued (including foreign income taxes paid or accrued by section 902 corporations) in post-2010 taxable years. Section 211(c)(2) of EJMAA provides that section 909 also applies to pre-2011 taxes, but only for purposes of applying sections 902 and 960 to periods after December 31, 2010. For this purpose, there is no increase to a section 902 corporation's earnings and profits for the amount of any pre-2011 taxes to which section 909 applies that were previously deducted in computing earnings and profits in a pre-2011 taxable year. EJMAA, section 211(c) (flush text).

The JCT Explanation clarifies that the section 902 effective date rule "applies for purposes of applying sections 902 and 960 to dividends paid, and inclusions under section 951(a) that occur, in taxable years beginning after December 31, 2010." JCT Explanation at 6-7. Consistent with the JCT

Explanation, the Treasury Department and IRS intend to issue regulations providing that section 909 does not apply in computing foreign taxes deemed paid under section 902 or 960 before the first day of the section 902 corporation's first post-2010 taxable year.

The regulations described in this notice will also provide guidance on the application of the section 909 effective date to situations involving partnerships. Specifically, in the case of a section 902 corporation that is a partner in a partnership, the section 902 corporation's distributive share of foreign income taxes paid or accrued by the partnership in a pre-2011 taxable year of the partnership that is included in a post-2010 taxable year of the section 902 corporation will be treated as a tax paid or accrued by the section 902 corporation in a post-2010 taxable year. See §§1.702-1(a)(6), 1.706-1(a)(1).

.03 *Section 901 Proposed Regulations Issued in 2006*

Section 909 was enacted to address concerns about the inappropriate separation of foreign income taxes and related income. These concerns were also the basis for the issuance in 2006 of proposed regulations under section 901 (the "2006 proposed regulations") concerning the determination of the person who paid a foreign income tax for foreign tax credit purposes. 71 F.R. 44240 (Aug. 4, 2006). The Treasury Department and IRS are evaluating the 2006 proposed regulations following the enactment of section 909. In this regard, the Treasury Department and IRS do not intend to finalize the portion of the 2006 proposed regulations relating to the determination of the person who paid a foreign income tax with respect to the income of a reverse hybrid. See Prop. Reg. §1.901-2(f)(2)(iii). Comments are solicited on whether other portions of the 2006 proposed regulations should be finalized or modified in light of the enactment of section 909.

SECTION 3. TREATMENT OF PRE-2011 TAXES

The Treasury Department and IRS will issue regulations providing that pre-2011 taxes described in paragraphs (a) through (d) of this section 3 will not be suspended under section 909:

(a) Any pre-2011 taxes that were not paid or accrued in connection with a pre-2011 splitter arrangement identified in section 4 of this notice;

(b) Any pre-2011 taxes that were paid or accrued in connection with a pre-2011 splitter arrangement identified in section 4 of this notice ("pre-2011 split taxes") but that were deemed paid under section 902(a) or 960 on or before the last day of the section 902 corporation's last pre-2011 taxable year;

(c) Any pre-2011 split taxes if either (1) the payor section 902 corporation took the related income into account in a pre-2011 taxable year or (2) a section 902 shareholder took the related income into account on or before the last day of the section 902 corporation's last pre-2011 taxable year; and

(d) Any pre-2011 split taxes paid or accrued by a section 902 corporation in taxable years of such section 902 corporation beginning before January 1, 1997 (because it is unlikely that material amounts of foreign income taxes described in that paragraph were accumulated and not previously deemed paid).

To the extent that the section 902 corporation paid or accrued pre-2011 split taxes that are not described in paragraphs (a) through (d) above, section 909 will apply to such pre-2011 split taxes for purposes of applying sections 902 and 960 in post-2010 taxable years of the section 902 corporation. Accordingly, these taxes will be removed from the section 902 corporation's pools of post-1986 foreign income taxes and suspended under section 909 as of the first day of the section 902 corporation's first post-2010 taxable year.

SECTION 4. PRE-2011 SPLITTER ARRANGEMENTS

.01 *Overview*

This section provides an exclusive list of arrangements that will be treated as giving rise to foreign tax credit splitting events for purposes of applying section 909 to pre-2011 taxes and provides guidance on identifying the pre-2011 split taxes and related income with respect to each such arrangement. As noted previously, future guidance may identify additional transactions or arrangements to which section 909 applies (including, for example, additional arrangements involving group relief

regimes), although any such guidance will apply only with respect to foreign taxes paid or accrued in post-2010 taxable years.

.02 *Reverse Hybrid Structures*

A reverse hybrid structure exists when a section 902 corporation owns an interest in a reverse hybrid. A reverse hybrid is an entity that is a corporation for U.S. federal income tax purposes but is a pass-through entity or a branch under the laws of a foreign country imposing tax on the income of the entity. As a result, the owner of the reverse hybrid is subject to tax on the income of the entity under foreign law.

A pre-2011 splitter arrangement involving a reverse hybrid structure exists when pre-2011 taxes are paid or accrued by a section 902 corporation with respect to income of a reverse hybrid that is a covered person with respect to the section 902 corporation. A pre-2011 splitter arrangement involving a reverse hybrid structure may exist even if the reverse hybrid has a deficit in earnings and profits for a particular year (for example, due to a timing difference). Such taxes paid or accrued by the section 902 corporation are pre-2011 split taxes. The related income is the earnings and profits (computed for U.S. federal income tax purposes) of the reverse hybrid attributable to the activities of the reverse hybrid that gave rise to income included in the foreign tax base with respect to which the pre-2011 split taxes were paid or accrued. Accordingly, related income of the reverse hybrid would not include any item of income or expense attributable to a disregarded entity (as defined in §301.7701-2(c)(2)(i)) owned by the reverse hybrid if income attributable to the activities of the disregarded entity is not included in the foreign tax base.

.03 *Certain Foreign Consolidated Groups*

A foreign consolidated group exists when a foreign country imposes tax on the combined income of two or more entities. Tax is considered imposed on the combined income of two or more entities even

if the combined income is computed under foreign law by attributing to one such entity the income of one or more other entities.[1]

A foreign consolidated group is a pre-2011 splitter arrangement to the extent that the taxpayer did not allocate the foreign consolidated tax liability among the members of the foreign consolidated group based on each member's share of the consolidated taxable income included in the foreign tax base under the principles of §1.901-2(f)(3). A pre-2011 splitter arrangement involving a foreign consolidated group may exist even if one or more members has a deficit in earnings and profits for a particular year (for example, due to a timing difference). Pre-2011 taxes paid or accrued with respect to the income of a foreign consolidated group are pre-2011 split taxes to the extent that taxes paid or accrued by one member of the foreign consolidated group are imposed on a covered person's share of the consolidated taxable income included in the foreign tax base. The related income is the earnings and profits (computed for U.S. federal income tax purposes) of such other member attributable to the activities of that other member that gave rise to income included in the foreign tax base with respect to which the pre-2011 split taxes were paid or accrued.

No inference should be drawn from the treatment of foreign consolidated groups under section 909 as to the determination of the person who paid the foreign income tax for U.S. federal income tax purposes.

.04 *Group Relief and Other Loss-Sharing Regimes*

A foreign group relief or other loss-sharing regime exists when one entity with a loss permits the loss to be used to offset the income of one or more other entities (a "shared loss"). A pre-2011 splitter arrangement involving a shared loss exists when the following three conditions are met:

[1] A foreign tax is not considered to be imposed on combined income solely because foreign law: (1) permits one entity to surrender a net loss to another entity pursuant to a group relief or similar regime; (2) requires a shareholder of a corporation to include in income amounts attributable to taxes imposed on the corporation with respect to distributed earnings pursuant to an integrated tax system that allows the shareholder a credit for such taxes; or (3) requires a shareholder to include, pursuant to an anti-deferral regime, income attributable to the shareholder's interest in a corporation.

(a) There is an instrument that is treated as indebtedness under the laws of the jurisdiction in which the issuer is subject to tax and that is disregarded for U.S. federal income tax purposes (a "disregarded debt instrument"). Examples of a disregarded debt instrument include a debt obligation between (1) two disregarded entities that are owned by the same section 902 corporation, (2) two disregarded entities that are owned by a partnership with one or more partners that are section 902 corporations, (3) a section 902 corporation and a disregarded entity that is owned by that section 902 corporation, or (4) a partnership in which the section 902 corporation is a partner and a disregarded entity that is owned by such partnership.

(b) The owner of the disregarded debt instrument pays a foreign income tax attributable to a payment or accrual on the instrument.

(c) The payment or accrual on the disregarded debt instrument gives rise to a deduction for foreign tax purposes and the issuer of the instrument incurs a shared loss that is taken into account under foreign law by one or more entities that are covered persons with respect to the owner of the instrument.

In situations in which the three conditions described above are present, pre-2011 taxes paid or accrued by the owner of the disregarded debt instrument with respect to amounts paid or accrued on the instrument (up to the amount of the shared loss) are pre-2011 split taxes. The related income of a covered person is an amount equal to the shared loss, determined without regard to the actual amount of the covered person's earnings and profits.

.05 *Hybrid Instruments*

A hybrid instrument for purposes of this notice is an instrument that either (1) is treated as equity for U.S. federal income tax purposes but is treated as indebtedness for foreign tax purposes ("U.S. Equity HI") or (2) is treated as indebtedness for U.S. federal income tax purposes but is treated as equity for foreign tax purposes ("U.S. Debt HI").

(a) U.S. Equity HI. If the issuer of a U.S. Equity HI is a covered person with respect to a section 902 corporation that is the owner of the U.S. Equity HI, there is a pre-2011 splitter arrangement with

respect to the portion of the pre-2011 taxes paid or accrued by the owner section 902 corporation with respect to the amounts on the instrument that are deductible by the issuer as interest under the laws of a foreign jurisdiction in which the issuer is subject to tax but that do not give rise to income for U.S. federal income tax purposes. Pre-2011 split taxes paid or accrued by the section 902 corporation equal the total amount of pre-2011 taxes paid by the section 902 corporation less the amount of pre-2011 taxes that would have been paid or accrued had the section 902 corporation not been subject to tax on income from the U.S. Equity HI. The related income of the issuer of the U.S. Equity HI is an amount equal to the amounts that are deductible by the issuer for foreign tax purposes, determined without regard to the actual amount of the issuer's earnings and profits.

(b) U.S. Debt HI. If the owner of a U.S. Debt HI is a covered person with respect to a section 902 corporation that is the issuer of the U.S. Debt HI, there is a pre-2011 splitter arrangement with respect to the portion of the pre-2011 taxes paid or accrued by the section 902 corporation on income in an amount equal to the interest (including original issue discount) paid or accrued on the instrument that is deductible for U.S. federal income tax purposes but that does not give rise to a deduction under the laws of a foreign jurisdiction in which the issuer is subject to tax. Pre-2011 split taxes are the pre-2011 taxes paid or accrued by the section 902 corporation on the income that would have been offset by the interest paid or accrued on the U.S. Debt HI had such interest been deductible for foreign tax purposes. The related income with respect to a U.S. Debt HI is the gross amount of the interest income recognized for U.S. federal income tax purposes by the owner of the U.S. Debt HI, determined without regard to the actual amount of the owner's earnings and profits.

.06 *Rules for Applying Section 909 to Pre-2011 Split Taxes and Related Income*

(a) General Rules

(1) The determination of related income, other income, pre-2011 split taxes, and other taxes, and the portion of these amounts that were distributed, deemed paid or otherwise transferred or eliminated must be made on an annual basis beginning with the first taxable year of the section 902 corporation

beginning after December 31, 1996 ("post-1996 taxable year") in which the section 902 corporation paid or accrued a pre-2011 tax with respect to a pre-2011 splitter arrangement and ending with the section 902 corporation's last pre-2011 taxable year. Annual amounts of related income and pre-2011 split taxes are aggregated for each separate pre-2011 splitter arrangement.

(2) The determination of annual and aggregate amounts of related income and pre-2011 split taxes with respect to each pre-2011 splitter arrangement must be made for each separate category as defined in §1.904-4(m) of the section 902 corporation, each covered person, and any other person that succeeds to the related income and pre-2011 split taxes. In the case of a pre-2011 splitter arrangement involving a shared loss, the amount of the related income in each separate category of the covered person is equal to the amount of income in that separate category that was offset by the shared loss for foreign tax purposes. In the case of a pre-2011 splitter arrangement involving a U.S. Equity HI, the related income is assigned to the issuer's separate categories in the same proportions as the pre-2011 split taxes. Earnings and profits, including related income, are assigned to separate categories under the rules of §§1.904-4, -5, -7, and -7T. Foreign income taxes, including pre-2011 split taxes, are assigned to separate categories under the rules of §1.904-6. A section 902 shareholder must consistently apply methodologies for determining pre-2011 split taxes and related income with respect to all pre-2011 splitter arrangements.

(b) Rules Regarding Related Income

(1) In the case of each pre-2011 splitter arrangement involving a reverse hybrid or a foreign consolidated group, a covered person's aggregate amount of related income must be adjusted each year by the net amount of income and expense attributable to the activities of the covered person that give rise to income included in the foreign tax base, even if the net amount is negative and regardless of whether the section 902 corporation paid or accrued any pre-2011 split taxes in such year.

(2) Related income is determined without regard to the application of §1.960-1(i)(4) (relating to the effect of separate limitation losses on earnings and profits in another separate category) or section 952(c)(1) (relating to certain earnings and profits deficits).

(3) If the earnings and profits of a covered person include amounts attributable to both related income and other income, including pre-1997 earnings, then distributions, deemed distributions, and inclusions out of earnings and profits (for example, under section 301, 304, 367(b), 951(a), 964(e), 1248, or 1293) of the covered person are considered made out of related income and other income on a pro rata basis. Any reduction of a covered person's earnings and profits that results from a payment on stock that is not treated as a dividend for U.S. federal income tax purposes (e.g., pursuant to section 312(n)(7)) will also reduce related income and other income on a pro rata basis.

(4) In lieu of the rule in paragraph (3) of this section 4.06(b), a section 902 shareholder may choose to treat all distributions, deemed distributions, and inclusions out of earnings and profits of a covered person as attributable first to related income. A section 902 shareholder may choose to use this alternative method on a timely filed original income tax return for the first post-2010 taxable year in which the shareholder computes an amount of foreign taxes deemed paid with respect to a section 902 corporation that paid or accrued pre-2011 split taxes. Such choice by a section 902 shareholder is evidenced by employing the method on its income tax return; the section 902 shareholder need not file a separate statement. A section 902 shareholder that chooses this alternative method must consistently apply it with respect to all pre-2011 splitter arrangements.

(5) Distributions, deemed distributions, and inclusions of related income (including indirectly through a partnership) to persons other than the payor section 902 corporation retain their character as related income with respect to the associated pre-2011 split taxes.

(6) Related income carries over to other corporations in the same manner as earnings and profits carry over under section 381, §1.367(b)-7, or similar rules, and retains its character as related income with respect to the associated pre-2011 split taxes.

(7) Related income will be considered taken into account by a section 902 shareholder to the extent that the related income is recognized as gross income by the section 902 shareholder, or by an affiliated corporation described in paragraph (9) of this section 4.06(b), upon a distribution, deemed

distribution, or inclusion (such as under section 951(a)) out of the earnings and profits of the covered person attributable to such related income.

(8) Related income will be considered taken into account by a payor section 902 corporation if (a) the related income is reflected in the earnings and profits of such section 902 corporation for U.S. federal income tax purposes by reason of a distribution, deemed distribution, or inclusion out of the earnings and profits of the covered person attributable to such related income or (b) the payor section 902 corporation and the covered person are combined in a transaction described in section 381(a)(1) or (2).

(9) A section 902 shareholder will be considered to have taken related income into account if one or more members of an affiliated group of corporations (as defined in section 1504) that files a consolidated federal income tax return that includes the section 902 shareholder takes the related income into account.

(10) Distributions and deemed distributions described in this section 4.06(b) (including in the case of a section 902 shareholder that has chosen the alternative method described in paragraph (4) of this section 4.06(b)) do not include distributions of amounts described in section 959(c)(1) or (c)(2), which are distributed before amounts described in section 959(c)(3).

(c) Rules Regarding Pre-2011 Split Taxes

(1) If the pre-2011 taxes of a section 902 corporation include both pre-2011 split taxes and other taxes, including pre-1997 taxes, then foreign taxes deemed paid under section 902 or 960 or otherwise removed from post-1986 foreign income taxes in pre-2011 taxable years will be treated as attributable to pre-2011 split taxes and other taxes on a pro rata basis.

(2) Pre-2011 split taxes deemed paid in pre-2011 taxable years in connection with a dividend paid to a shareholder described in section 902(b) retain their character as pre-2011 split taxes. The section 902(b) shareholder will be treated as the payor section 902 corporation with respect to those pre-2011 split taxes.

(3) Pre-2011 split taxes that carry over to another foreign corporation, including under section 381, §1.367(b)-7 or similar rules, retain their character as pre-2011 split taxes. The transferee foreign corporation will be treated as the payor section 902 corporation with respect to those pre-2011 split taxes.

(4) For each pre-2011 splitter arrangement, as related income is taken into account by the payor section 902 corporation or a section 902 shareholder as provided in section 4.06(b), a ratable portion of the associated pre-2011 split taxes will no longer be treated as pre-2011 split taxes. In the case of a pre-2011 splitter arrangement involving a reverse hybrid or a foreign consolidated group, if aggregate related income is reduced to zero (other than as a result of a distribution, deemed distribution, or inclusion described in section 4.06(b)) or less than zero, pre-2011 split taxes will retain their character as pre-2011 split taxes until the amount of aggregate related income is positive and the related income is taken into account by the payor section 902 corporation or a section 902 shareholder as provided in section 4.06(b).

SECTION 5. RULES RELATING TO PARTNERSHIPS AND TRUSTS

.01 *Taxes Paid or Accrued by Partnerships*

Section 909(c)(1) provides that in the case of a partnership, section 909(a) and (b) will be applied at the partner level. Accordingly, in the case of foreign income taxes paid or accrued by a partnership, the taxes will be treated as pre-2011 split taxes to the extent such taxes are allocated to one or more section 902 corporations and would be pre-2011 split taxes if the partner section 902 corporation had paid or accrued the taxes directly on the date such taxes are included by the section 902 corporation under sections 702 and 706(a). Further, any foreign income taxes subject to section 909 will be suspended in the hands of the partner section 902 corporation.

.02 *Taxes Paid or Accrued by Partners*

For purposes of applying section 909 in post-2010 taxable years, there will not be a foreign tax credit splitting event with respect to a foreign income tax paid or accrued by a partner with respect to its distributive share of the related income of a partnership that is a covered person with respect to the partner to the extent the related income is taken into account by the partner.

.03 *Section 704(b) Allocations*

The Treasury Department and IRS recognize that certain allocations of creditable foreign tax expenditures and income of a partnership can result in the separation of the creditable foreign tax expenditures and the related income for purposes of section 909, notwithstanding that these allocations satisfy the requirements of section 704(b) and the regulations thereunder. See, e.g., §1.704-1(b)(4)(viii)(*d*) and §1.704-1(b)(5), Example 24. Partnership allocations that satisfy the requirements of section 704(b) and the regulations thereunder will not constitute pre-2011 splitter arrangements except to the extent the arrangement is otherwise described in section 4 of this notice (for example, a payment or accrual on a disregarded debt instrument that gives rise to a shared loss). However, the Treasury Department and IRS will provide in future guidance that allocations described in §1.704-1(b)(4)(viii)(*d*)(*3*) will result in a foreign tax credit splitting event in post-2010 taxable years to the extent such allocations result in foreign income taxes being allocated to a different partner than the related income. The Treasury Department and IRS solicit comments on the extent to which §1.704-1(b)(4)(viii)(*d*) and §1.704-1(b)(5), Example 24 should be modified in light of the enactment of section 909.

04. *Trusts*

Rules similar to the rules of sections 5.01 and 5.02 of this notice will apply in the case of any trust with one or more beneficiaries that is a section 902 corporation.

SECTION 6. INTERACTION BETWEEN SECTION 909 AND OTHER CODE PROVISIONS

.01 *Section 904(c)*

Section 904(c) provides a 10-year carryforward period and a one-year carryback period for foreign income taxes in excess of a taxpayer's foreign tax credit limitation in any separate category. Section 904(c) implements the carryover of excess foreign income taxes by providing that the excess taxes are "deemed paid or accrued" in the carryover year. Questions have arisen concerning whether section 909 applies to excess foreign income taxes carried forward from pre-2011 taxable years and

deemed paid or accrued under section 904(c) in post-2010 taxable years. The Treasury Department and IRS intend to issue regulations providing that section 909 does not apply to excess foreign income taxes that were paid or accrued in pre-2011 taxable years and carried forward and deemed paid or accrued under section 904(c) in a post-2010 taxable year.

.02 *Section 905(a)*

Section 909 does not alter the general rules for determining when a creditable foreign tax is paid or accrued. Under §1.461-4(g)(6)(iii)(B), a creditable foreign tax accrues when all of the events have occurred that fix the fact and amount of foreign tax liability with reasonable accuracy, without regard to the economic performance (payment) requirement of section 461(h). See also Dixie Pine Products Co. v. Commissioner, 320 U.S. 516 (1944) (a contested foreign tax accrues in the year the contest is resolved). Under the "relation-back" doctrine, once a creditable foreign tax accrues, it "relates back" to the year with respect to which the tax was imposed. Cuba Railroad Co. v. United States, 124 F. Supp. 182 (SDNY 1954); Rev. Rul. 84-125, 1984-2 C.B. 125. However, section 909(c)(2) provides that notwithstanding the general rule, except for purposes of section 986(a) and as otherwise provided by the Secretary, suspended taxes are taken into account and treated as paid or accrued in the year the related income is taken into account. Thus, for purposes of determining in post-2010 taxable years the allowable deduction for foreign taxes paid or accrued under section 164(a), the carryover of excess foreign income taxes under section 904(c), and the extended period for claiming a credit or refund under section 6511(d)(3)(A), foreign income taxes to which section 909 applies are first taken into account and treated as paid or accrued in the year in which the related income is taken into account, and not in the earlier year to which the tax relates (determined without regard to section 909).

.03 *Section 905(c)*

Under section 905(c) and the regulations under that section, a taxpayer that claims a foreign tax credit for taxes paid or accrued under section 901 or deemed paid under section 902 or 960 generally must notify the IRS when there has been a change to the amount of foreign taxes paid or accrued. Generally, in the case of a redetermination of foreign taxes claimed as a direct credit under section 901, the taxpayer's

U.S. tax liability for the year to which the tax relates and other affected years must be redetermined. Section 905(c)(1). In the case of a redetermination of foreign taxes included in the computation of foreign taxes deemed paid under section 902 or 960, in lieu of recomputing the section 902 shareholder's U.S. tax liability, the foreign corporation's pools of post-1986 undistributed earnings and post-1986 foreign income taxes generally must be adjusted at the time of the foreign tax redetermination to reflect the effect of the foreign tax redetermination in calculating foreign taxes deemed paid with respect to subsequent distributions and inclusions (and the amount of such distributions and inclusions). Section 905(c)(2)(B)(i)(I). Under section 905(c)(1)(B) and section 905(c)(2)(B), a foreign tax redetermination includes a failure to pay accrued tax within two years of the close of the taxable year to which such taxes relate and any subsequent payment of such accrued tax.

If a redetermination of foreign taxes claimed as a direct credit under section 901 occurs in a post-2010 taxable year and the foreign tax redetermination relates to a pre-2011 taxable year, to the extent such foreign tax redetermination increased the amount of foreign taxes paid or accrued with respect to the pre-2011 taxable year (e.g., due to an additional assessment of foreign tax or a payment of a previously accrued tax not paid within two years), section 909 will not apply to such taxes.

If a redetermination of foreign tax paid or accrued by a section 902 corporation occurs in a post-2010 taxable year and increases the amount of foreign taxes paid or accrued by the section 902 corporation with respect to a pre-2011 taxable year (e.g., due to an additional assessment of foreign tax or a payment of a previously accrued tax not paid within two years), such taxes will be treated as pre-2011 taxes. Section 909 will apply to such taxes if they are pre-2011 split taxes. In that case, they will be suspended in the post-2010 taxable year in which they would otherwise be taken into account as a prospective adjustment to the section 902 corporation's pools of post-1986 foreign income taxes.

.04 *Other foreign tax credit provisions*

Section 909 does not affect the applicability of other restrictions or limitations on the foreign tax credit under existing law, including the substantiation requirements of section 905(b).

SECTION 7. EFFECTIVE DATE

The regulations described in this notice will apply in post-2010 taxable years, including for purposes of applying sections 902 and 960 to pre-2011 taxes. Until regulations incorporating the guidance set forth in this notice are issued, taxpayers may rely on the guidance contained in this notice.

SECTION 8. REQUEST FOR COMMENTS AND CONTACT INFORMATION

The Treasury Department and IRS solicit comments on the rules described in this notice, including specifically the extent to which the 2006 proposed regulations should be finalized and §1.704-1(b)(4)(viii)(*d*) and §1.704-1(b)(5), Example 24 should be modified. The Treasury Department and IRS expect future guidance will treat pre-2011 splitter arrangements as giving rise to foreign tax credit splitting events in post-2010 taxable years. The Treasury Department and IRS request comments on the appropriateness of such treatment and whether and to what extent other transactions or arrangements should give rise to foreign tax credit splitting events in post-2010 taxable years. In particular, comments are requested on whether and to what extent the following transactions (or circumstances, as appropriate) should be treated as giving rise to foreign tax credit splitting events: (1) covered asset acquisitions described in section 901(m); (2) the incorporation of a disregarded entity or a hybrid partnership with respect to foreign income taxes paid in the year of the incorporation or attributable to a significant timing difference; (3) certain transfer pricing adjustments; (4) group relief structures not otherwise described in this notice; (5) sale and repurchase agreements in the related and unrelated counterparty contexts; (6) foreign anti-deferral regimes; and (7) foreign consolidated groups in which members have losses.

The Treasury Department and IRS also solicit comments concerning: (1) rules for associating foreign income taxes with related income; (2) ordering rules for dividends out of earnings and profits comprising both related income and other income; (3) the effect on related income of losses and deficits in earnings; and (4) additional rules for assigning foreign income taxes and related income to separate categories.

Written comments may be submitted to the Office of Associate Chief Counsel (International), Attention: Jeffrey L. Parry, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224. Alternatively, taxpayers may submit comments electronically to Notice.comments@irscounsel.treas.gov. Comments will be available for public inspection and copying. For further information regarding this notice, contact Mr. Parry of the Office of Associate Chief Counsel (International) at (202)-622-3850 (not a toll-free call).