



TaxNewsFlash

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GLAM: Allocation and apportionment of deferred compensation expense for purposes of calculating FDII—departure from prior IRS legal advice

The IRS today publicly released a generic legal advice memorandum (GLAM)* that addresses the proper method of allocation and apportionment under the section 861 regulations of deferred compensation expense for purposes of computing a taxpayer's foreign-derived intangible income (FDII) deduction under section 250—specifically in the context deferred compensation expense that relates to services provided prior to the effective date of section 250.

The memorandum concludes that even though deferred compensation expense may relate to gross income derived by the taxpayer in a prior taxable year, it must be allocated to a class of gross income, and apportioned based upon the relevant grouping or groupings within the class, that exists in the taxable year the deductions are taken into account under generally applicable federal income tax accounting rules. According to the reasoning in the memorandum, under general federal income tax principles, the law in effect for the taxable year in which deductions are taken into account is applied in determining how deductions relate to a class of gross income, including which statutory groupings are relevant to apportionment of expenses within such class and the manner of apportionment. Under the reasoning of the memorandum, deferred compensation that relates to services performed for the taxpayer in a year prior to the enactment of Pub. L. No. 115-97 ("Tax Cuts and Jobs Act" or "TCJA") but deducted in a year when section 250 is effective may be allocable to gross deduction eligible income (DEI) or gross foreign-derived deduction eligible income (FDDEI).

KPMG observation

As noted in the memorandum released today, the advice rendered in the memorandum is inconsistent with a prior general legal advice memorandum issued in 2009 (GLAM 2009-001) which dealt with the allocation and apportionment of deferred compensation expense for purposes of computing a taxpayer's qualified production activity income and the section 199 deduction. In the prior memorandum, the Office of Chief Counsel concluded that costs did not have to be allocated and apportioned to the statutory groupings within the class that existed in the taxable year the deductions

are taken into account if they arose from activity before the effective date of such statutory groups, even though the accounting method rules placed them in a post-effective date year.

Read [GLAM 2022-001](#) [PDF 166 KB] (release date of May 6, 2022, and dated May 3, 2022)

*A generic legal advice memorandum constitutes internal IRS legal advice by the Office of Chief Counsel to assist IRS service personnel in administering their duties. It is not binding law and cannot be used or cited as precedent.

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