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subject: Eligibility of services provided to the U.S. government outside the United States as foreign-derived deduction eligible income under section 250(b)(4)(B)

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

Whether services provided to the United States government (including any political subdivision, agency, or instrumentality thereof) at a location outside the United States may qualify as services provided to "any person . . . not located within the United States" for purposes of section 250(b)(4)(B) of the Internal Revenue Code ("Code").

The discussion below applies the relevant law to a hypothetical set of facts.

CONCLUSION

For the reasons stated below, based on the Code, proposed and final section 250 regulations, and caselaw, services provided by a taxpayer to the United States government (including any political subdivision, agency, or instrumentality thereof) where the recipient (the U.S. government or its political subdivision, agency, or instrumentality) is not located within the United States, may qualify as services provided

to “any person . . . not located within the United States” for purposes of section 250(b)(4)(B).

STATEMENT OF FACTS

DC, a domestic corporation, is hired by the United States Department of Defense (“U.S. DoD”) to provide general consulting services. DC provides these services to employees of the U.S. DoD located on a military base in country X.[1] The services are provided primarily via electronic communication (via phone, email, teleconference, etc.) with U.S. DoD employees located on the military base in country X, and also in person on the military base in country X. On these simplified facts, DC’s consulting services relate solely to the operation of the military base in country X and do not benefit[2] any other operations of the U.S. DoD.[3] All of DC’s interactions are with U.S. DoD employees located on the military base in country X.

LAW AND ANALYSIS

a. In general

Section 250 of the Code provides deductions for foreign-derived intangible income (FDII) and global intangible low-taxed income (GILTI). For taxable years beginning after December 31, 2017 and before January 1, 2026, section 250(a) allows domestic corporations a deduction equal to the sum of (i) 37.5 percent of their FDII and (ii) 50 percent of their GILTI plus the associated section 78 gross-up that is attributable to the

[1] DC’s activities in country X do not constitute and DC’s income from those activities are not attributable to, a qualified business unit in country X as defined in section 989(a).

[2] “Benefit” is defined for this purpose in Treas. Reg. § 1.250(b)-5(c)(2) by reference to Treas. Reg. § 1.482-9(l)(3).

[3] DC’s services provided to U.S. DoD do not involve advertising services as defined in Treas. Reg. § 1.250(b)-5(c)(1) or electronically supplied services as defined in Treas. Reg. § 1.250(b)-5(c)(5). The term advertising service means a general service that consists primarily of transmitting or displaying content (including via the internet) with a purpose to generate revenue based on the promotion of a product or service. The term electronically supplied service means, with respect to a general service other than an advertising service, a service that is delivered primarily over the internet or an electronic network and for which value of the service to the end user is derived primarily from automation or electronic delivery. It includes the provision of access to digital content (as defined in § 1.250(b)-3), such as streaming content; on-demand network access to computing resources, such as networks, servers, storage, and software; the provision or support of a business or personal presence on a network, such as a website or a web page; online intermediation platform services; services automatically generated from a computer via the internet or other network in response to data input by the recipient; and similar services. It does not include services that primarily involve the application of human effort by the renderer (not considering the human effort involved in the development or maintenance of the technology enabling the electronically supplied services). Accordingly, electronically supplied services do not include certain services (such as legal, accounting, medical, or teaching services) involving primarily human effort that are provided electronically.

corporation's GILTI for the year.[4] For taxable years beginning after December 31, 2025, the FDII and GILTI deductions are reduced to 21.875 percent and 37.5 percent, respectively.[5]

The FDII of any domestic corporation is the amount which bears the same ratio to the deemed intangible income ("DII")[6] of such corporation as the foreign-derived deduction eligible income ("FDDEI") of such corporation bears to the deduction eligible income ("DEI")[7] of such corporation.[8] The FDII deduction is defined by the following formula: FDII = DII x (FDDEI / DEI).[9]

Section 250(b)(4) defines the term FDDEI to mean, with respect to any taxpayer for any taxable year, any DEI of such taxpayer which is derived in connection with—

> (A) property--
> (i) which is sold by the taxpayer to any person who is not a United States person, and
> (ii) which the taxpayer establishes to the satisfaction of the Secretary is for a foreign use, or
> (B) services provided by the taxpayer which the taxpayer establishes to the satisfaction of the Secretary are provided to any person, or with respect to property, not located within the United States.

b. Nationality of the services recipient is irrelevant for determining whether income from services constitutes FDDEI.

As stated in the above definition, FDDEI may be derived from either the sale of property (a "FDDEI sale") or provision of services (a "FDDEI service").[10] The statute provides

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[4] Treas. Reg. § 1.250(a)-1(b)(1).

[5] Treas. Reg. § 1.250(a)-1(b)(3).

[6] The term DII means the excess (if any) of (i) the deduction eligible income of the domestic corporation, over (ii) the deemed tangible income return of the corporation ("DTIR"), which is an amount equal to 10 percent of the corporation's qualified business asset investment. Section 250(b)(2) and Treas. Reg. § 1.250(b)-1(c)(3).

[7] The term DEI means, with respect to a domestic corporation for a taxable year, the excess (if any) of the corporation's gross DEI for the year over the deductions properly allocable to gross DEI for the year, as determined under Treas. Reg. § 1.250(b)-1(d)(2). Section 250(b)(3) and Treas. Reg. § 1.250(b)-1(c)(2). Gross DEI is gross income less excepted categories, including Subpart F income, GILTI, and dividends received from controlled foreign corporations. Section 250(b)(3)(A)(i); Treas. Reg. § 1.250(b)-1(c)(15).

[8] Section 250(b)(1) and Treas. Reg. § 1.250(a)-1(b).

[9] Treas. Reg. § 1.250(b)-1(b) and Treas. Reg. § 1.250(b)-1(c)(13).

[10] Section 250(b)(4) and Treas. Reg. § 1.250(b)-5(b).

different rules with respect to (1) sales transactions that qualify as giving rise to FDDEI and (2) services transactions that qualify as giving rise to FDDEI: for sales transactions, the statute requires both that the purchaser is not a U.S. person and that the property is for foreign use; for services transactions, the only requirements are that (where relevant) the service recipient is a person, and that the service recipient to whom or the property with respect to which the services are provided is located outside the United States. In the services context, the recipient may be "any person," without regard to whether such person is or is not a United States person.

The regulations reinforce the statute's focus on the location of the recipient of the services as determinative of whether services are FDDEI services. Under Treas. Reg. § 1.250(b)-5(b), a FDDEI service refers to one of five specific categories of services: a transportation service[11] provided to a recipient, or with respect to property, located outside the United States;[12] a property service[13] provided with respect to tangible property located outside the United States; a proximate service[14] provided to a recipient located outside the United States; a general service[15] provided to a consumer[16] located

[11] The term transportation service means a service to transport a person or property using aircraft, railroad rolling stock, vessel, motor vehicle, or any other mode of transportation, and includes freight forwarding and similar services. Treas. Reg. § 1.250(b)-5(c)(9).

[12] While the statute discusses services provided to a "person," the regulations use the term "recipient," which they define as "a person that purchases property or services from a seller or renderer." Treas. Reg. § 1.250(b)-3(b)(14). Therefore, the term "person" is embedded in the regulatory definitions of the types of FDDEI services within the term "recipient."

[13] The term property service means a service, other than a transportation service, provided with respect to tangible property, but only if substantially all of the service is performed at the location of the property and results in physical manipulation of the property such as through manufacturing, assembly, maintenance, or repair. Substantially all of a service is performed at the location of property only if the renderer spends more than 80 percent of the time providing the service at or near the location of the property. Treas. Reg. § 1.250(b)-5(c)(7).

[14] The term proximate service means a service, other than a property service or a transportation service, provided to a consumer or business recipient, but only if substantially all of the service is performed in the physical presence of the consumer or, in the case of a business recipient, substantially all of the service is performed in the physical presence of persons working for the business recipient such as employees, contractors, or agents. Substantially all of a service is performed in the physical presence of a consumer or persons working for a business recipient only if the renderer spends more than 80 percent of the time providing the service in the physical presence of such persons. Treas. Reg. § 1.250(b)-5(c)(8).

[15] The term, "general service" means any service other than a property service, proximate service, or transportation service, and includes advertising services and electronically supplied services. Treas. Reg. §§ 1.250(b)-5(c)(6).

[16] The term consumer means a recipient that is an individual that purchases a general service for personal use. Treas. Reg. § 1.250(b)-5(c)(4); 1.250(b)-5(d).

outside the United States; and a general service provided to a business recipient[17] located outside the United States. In short, every category of FDDEI services requires that the recipient to whom, or tangible property with respect to which, the services are provided be located outside the United States.

The preamble to the proposed regulations highlights this distinction between the treatment of services and sales for FDII purposes, noting that "a transaction with a U.S. person that is located outside of the United States may qualify as a FDDEI service, but cannot qualify as a FDDEI sale."[18] The preamble to the proposed regulations also highlights the importance of location, distinguishing between services provided to a recipient versus services provided with respect to property, stating that "a general service that is provided to a recipient located within the United States is not a FDDEI service, even if the service is performed outside the United States, whereas a property service that is performed outside the United States is a FDDEI service, even if the recipient of the service is located within the United States."[19]

c. The location of a services recipient is based on factors other than nationality or place of organization.

To determine the location of the recipient for the four categories of FDDEI services to which such a determination is relevant, the regulations show that nationality or the place of formation or organization of the recipient is not a factor.

For general services provided to consumers, a consumer's location is determined based on where the consumer resides when the services are provided.[20] If the location of the consumer cannot be obtained, generally, the consumer will be treated as residing at the location of the consumer's billing address.[21] A consumer of an electronically supplied service[22] is deemed to reside at the location of the device that is used to receive the service, which may be determined based on the location of the IP address when the electronically supplied service is provided.[23]

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[17] The term business recipient means a recipient other than a consumer and includes all parties related to the recipient. However, if the recipient is a related party of the taxpayer, the term does not include the taxpayer. Treas. Reg. § 1.250(b)-5(c)(3).

[18] 84 Fed. Reg. 8193.

[19] *Id*. at 8196.

[20] Treas. Reg. § 1.250(b)-5(d)(1).

[21] *Id*.

[22] Treas. Reg. § 1.250(b)-5(c)(5).

[23] Treas. Reg. § 1.250(b)-5(d)(2).

For general services provided to a business recipient, the regulations provide that the recipient is located outside the United States "to the extent that the service confers a benefit on the business recipient's operations outside the United States."[24] The regulations explain that:

> the determination of which operations of the business recipient located outside the United States benefit from a general service, and the extent to which such operations benefit, is made under the principles of § 1.482-9 by treating the taxpayer as one controlled taxpayer, the portions of the business recipient's operations within the United States (if any) that may benefit from the general service as one or more controlled taxpayers, and the portions of the business recipient's operations outside the United States (if any) that may benefit from the general service, each as one or more controlled taxpayers. The extent to which a business recipient's operations within or outside of the United States are treated as one or more separate controlled taxpayers is determined under any reasonable method.[25]

Thus, for example, where a business recipient has operations inside the United States and outside the United States, those operations must be treated as separate controlled taxpayers for purposes of determining the extent to which the service confers a benefit outside the United States.

As a general matter, a business recipient's operations are located where it maintains an office or other fixed place of business. In response to comments requesting an expansion of the definition of operations of the business recipient to include operations performed outside of the locations where the business recipient maintains an office or other fixed place of business,[26] the Treasury and IRS clarified in the preamble to the final regulations that:

> The location of a business recipient's operations that benefit from a general service is based on *the geographical location where the business recipient's activities are regular and continuous* and is not based on the current location of mobile property such as satellites or vessels. . . . In the case of services performed with respect to a satellite, *the location of the business recipient that receives services with respect to the satellite is based on where the business*

[24] *See* Treas. Reg. § 1.250(b)-5(e)(1).

[25] Treas. Reg. § 1.250(b)-5(e)(2).

[26] In general, an office or other fixed place of business is a fixed facility, that is, a place, site, structure, or other similar facility, through which the business recipient engages in a trade or business. Treas. Reg. § 1.250(b)-5(e)(3).

> *recipient remotely performs activities with respect to the satellite* (which could be within the United States or in a foreign country), rather than in space."[27]

The Treasury Department and the IRS also rejected comments suggesting that where the business recipient does not have an identifiable office or fixed place of business, the regulations consider place of formation or incorporation for determining the location of operations of a business recipient.[28] The regulations concluded instead that such a recipient should be treated as located at its primary billing address.[29] And the final regulations explicitly provide that the location of residence, incorporation, or formation of a business recipient is not relevant to determining the location of the business recipient's operations that benefit from a general service.[30]

General services provided to a business recipient include advertising services and electronically supplied services.[31] For advertising services, the operations of the business recipient that benefit from advertising services provided by the renderer are deemed to be located where the advertisements are viewed by individuals.[32] With respect to electronically supplied services, the operations of the business recipient that benefit from the services provided by the renderer are deemed to be located where the business recipient (including employees, contractors, or agents) accesses the service or otherwise uses the service.[33]

A proximate services recipient is located outside the United States if the proximate services are performed outside the United States;[34] and property services are generally provided with respect to tangible property located outside the United States only if the property is located outside the United States for the duration of the period the services

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[27] Emphasis added. 85 Fed. Reg. 43062.

[28] *Id*.

[29] *Id*.

[30] Treas. Reg. § 1.250(b)-5(e)(1).

[31] Treas. Reg. § 1.250(b)-5(c)(6).

[32] Advertising services displayed via the internet are viewed at the location of the device on which the advertisements are viewed. The IP address may be used to establish the location of a device on which an advertisement is viewed. Treas. Reg. § 1.250(b)-5(e)(2)(ii).

[33] Additional rules are provided for situations where the location of electronically supplied services cannot be determined. Treas. Reg. § 1.250(b)-5(e)(2)(iii).

[34] If proximate services are performed partly within the United States and partly outside of the United States, a proportionate amount of the service is treated as provided to a recipient located outside the United States corresponding to the portion of time the renderer spends providing the service outside of the United States. Treas. Reg. § 1.250(b)-5(f).

are performed.[35] Transportation services however, are provided to a recipient, or with respect to property, located outside the United States only if both the origin and the destination of the services are outside of the United States.[36]

Thus, at the core of determining FDDEI services is the location of the recipient (or property), and the nationality or place of organization of the recipient is irrelevant for purposes of that determination.

d. The Code, Treasury Regulations, and case law support treating the U.S. government as included within the definition of a "person" as the term is used in Section 250(b)(4)(B).

In addition to the requirement that non-property services be provided to a recipient located outside the United States, for those services to qualify as FDDEI services, they must be provided to a "person." The proper interpretation of that term in this context depends on the text of the Code, analysis in caselaw, and the preamble and text of the proposed and final section 250 regulations.

Section 7701(a)(1) provides that, for purposes of the Code, "[t]he term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." While this definition does not expressly include a government (or any political subdivision, agency, or instrumentality thereof), section 7701(c) provides that "[t]he terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined." On the other hand, section 7701(a)(1) says "mean" as well as "include," which may be read to support that the definition of person under section 7701(a)(1) is exhaustive.

Defining "United States person," a term which (as discussed above) is not invoked in the definition of FDDEI services but nonetheless might provide some indication of what type of entity can qualify as a person, section 7701(a)(30) states the following:

> The term "United States person" means—
> (A) a citizen or resident of the United States,
> (B) a domestic partnership,
> (C) a domestic corporation,

[35] Treas. Reg. § 1.250(b)-5(g)(1); an exception is provided for services provided with respect to property temporarily in the United States if certain specified conditions are met. Treas. Reg. § 1.250(b)-5(g)(2)(i)-(iv).

[36] However, where either the origin or the destination of the service is outside of the United States, but not both, then 50 percent of the gross income from the transportation service is considered derived from services provided to a recipient, or with respect to property, located outside the United States. Treas. Reg. § 1.250(b)-5(h).

> (D) any estate (other than a foreign estate, within the meaning of paragraph (31)), and
> (E) any trust if-
>
> (i) a court within the United States is able to exercise primary supervision over the administration of the trust, and
> (ii) one or more United States persons have the authority to control all substantial decisions of the trust.

Unlike the definition of "person" in section 7701(a)(1), this definition, using the word "means" and not "including," is exclusive. It does not include the U.S. government, which indicates that the U.S. government is not a "United States person" under this definition. But this is not determinative of whether it is a person more generally.[37]

The issue has been resolved by the courts, which have focused on the word "include," in section 7701(a)(1), rather than the word "mean." Cases interpreting section 7701(a)(1) and its predecessors have concluded that a government can be a person in the context of the Code, holding section 7701(a)(1) (and its similarly worded predecessor) not to be exhaustive in order to have a sensible result in the statute's broader context. Therefore, although there is a general "manifestly incompatible" exception to the definitions contained in the flush language of section 7701(a), recourse to the exception is unnecessary here.

In *Estate of Wycoff v. Commissioner*,[38] for example, the Tenth Circuit held that both the state of Utah and the United States are persons within the meaning of section 7701(a). The case concerned the marital deduction in section 2056 of the Code, which reduces the value of an estate subject to the estate tax in section 2001 by the amount that passes to a surviving spouse. So-called "terminable interests" passing to a surviving spouse do not qualify for the deduction (i.e., do not reduce the value of the estate), but an exception to this rule in section 2056(b)(5) permits certain terminable interests to qualify, provided that neither the executor of the estate nor anyone else is empowered to transfer any part of the interest to "any other person." In *Wycoff*, the executor was empowered to pay state and Federal taxes out of the terminable interest. The question in the case was whether that constituted the power to transfer the interest to another person, such that the terminable interest did not qualify for the marital deduction.[39]

The petitioner in *Wycoff* argued that an executor did not have the power to transfer any part of the surviving spouse's life estate to "any other person" because the executor had

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[37] Because section 250(b)(4)(B) refers to the provision of services "to any person" without more, this discussion need not and does not address whether the U.S. government is a "person who is not a United States person," the term used in section 250(b)(4)(A)(i) in the FDDEI sales context that is not at issue here.

[38] 506 F.2d 1144 (10th Cir. 1974).

[39] *Id*. at 1151.

power to pay only death taxes from the spouse's life estate, and death taxes would be paid to the United States or the state of Utah, which Wycoff argued were not persons under section 7701(a)(1).[40] The court rejected the petitioner's argument and pointed to what is now section 7701(c) (located at I.R.C. § 7701(b) at the time of the opinion) as providing that the definition is not exhaustive.[41] The court reasoned that, "[w]hether 'person' includes a state or the United States depends on the legislative context in which the word is found,"[42] and noted that the marital deduction "contemplates . . . that the interest will be available for state taxation when the surviving spouse dies," which would not be the case if payment of taxes out of the interest were permitted.[43] The court concluded: "Thus, when considered in this context the United States and the state of Utah should not be . . . excluded from the term 'persons,' for to do this would be out of harmony with the marital deduction provision" and "would carve out a judicial loophole which Congress did not intend to create."[44]

Similarly, in *Ohio v. Helvering*,[45] the Supreme Court held that the government of a state qualified as a person under a predecessor to present-law section 7701(a)(1). There, the state of Ohio argued that it was not subject to an excise tax that used the term "every person" in the definition of a retail or wholesale liquor dealer. The Supreme Court looked to the definition of "person" in section 11 (a predecessor to present-law section 7701), which provided that, "the word 'person,' as used in this title, shall be construed to mean and include a partnership association, company, or corporation, as well as a natural person."[46] Noting that "whether the word 'person' or 'corporation' includes a state or the United States depends upon the connection in which the word is found,"[47] the Court held that the state was a person within that definition.[48]

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[40] *Id*.

[41] *Id.*

[42] On this point, the court cited *Ohio v. Helvering*, 292 U.S. 360, 370 (1934) (discussed herein), and *Sims v. United States*, 359 U.S. 108, 112 (1959), both of which hold that states are included in the definition of the term "person" as used in the Code (in a predecessor to section 7701(a)(1) in *Ohio v. Helvering*, and in I.R.C. § 6332, which has its own non-exhaustive definition of person, in *Sims*).

[43] *Wycoff*, at 1151.

[44] *Id*. The 10th Circuit reached a similar conclusion in *Chickasaw Nation v. United States*, 208 F.3d 871, 878 (10th Cir. 2000). There, the court found that the definition of the word "person" in section 7701(a)(1) was not exhaustive and held that the Chickasaw Nation tribal government was a person subject to certain federal excise taxes.

[45] 292 U.S. 360 (1934).

[46] *Id*. at 370.

[47] *Id*. (citing *Stanley v. Schwalby*, 147 U.S. 508, 517, which found that the word 'person' in the statute under consideration would include the United States as a body politic and corporate.)

[48] *Id*. at 371.

In contrast, in *Return Mail Inc. v. United States Postal Service*,[49] the Supreme Court held that the United States Postal Service was not a "person" for purposes of certain patent law statutes.[50] The Court concluded that there was no "indication in the text or context of the statute that affirmatively shows that Congress intended to include the Government" within the term "person" as used in the patent statutes.[51] Return Mail, Inc., which owned a patent on a method for processing undeliverable mail, had sued the U.S. Postal Service seeking compensation for the unauthorized use of the invention. The issue before the Court was whether a federal agency is a "person" that could seek review under administrative review proceedings established under the Leahy-Smith America Invents Act ("AIA") of 2011,[52] to allow a person other than the patent owner to challenge the validity of a patent post-issuance. The term "person" was not defined in the patent statutes.

The Court's ruling in *Return Mail* can be distinguished. There, the Court was interpreting the term "person" for purposes of who could challenge the validity of a patent post-issuance under the patent statutes, and determined that "person" should not include a federal agency in that context. The Court employed an "interpretive presumption that 'person' does not include the sovereign," which was applicable only "[i]n the absence of an express statutory definition" (i.e., because "[t]he patent statutes do not define the term 'person'").[53] This presumption is a construction of the definition of "person" in the Dictionary Act,[54] which is used when a term is not specifically defined in the operative statute.[55] By contrast, sec. 7701(a)(1) contains an express and specific statutory definition. The Court's reasoning in *Return Mail* thus interpreted the term in the absence of an affirmative definition from Congress in the relevant patent statutes, and the Court made no indication that this same meaning would apply in a statute containing an

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[49] 587 U.S. 618 (2019).

[50] *Id*. at 637.

[51] *Id*. at 628-29.

[52] The three types of proceedings established under the AIA are: (1) inter partes review, (2) post-grant review, and (3) covered-business-method review.

[53] *Return Mail*, at 626.

[54] Under the Dictionary Act, 1 U.S. Code § 1, "the words 'person' and 'whoever' are defined to include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."

[55] *Return Mail* at 627. *See also Rowland v. Calif. Men's Colony*, 506 U.S. 194, 200 (1993) ("[C]ourts would hardly need direction where Congress had thought to include an express, specialized definition for the purpose of a particular Act; ordinary rules of statutory construction would prefer the specific definition over the Dictionary Act's general one. Where a court needs help is in the awkward case where Congress provides no particular definition."); *Mine Workers*, 330 U.S. 258,275 (1947) ("The Act does not define 'persons'").

express and previously construed definition of "person." For example, no inconsistency was noted with respect to the Court's earlier decision in *Ohio v. Helvering*, discussed above, in which the Court considered and concluded in the context of a tax statute that a state or the United States could be included in the term "person." In other words, *Return Mail* construed "person" for purposes of the Dictionary Act, and thus for purposes of statutes lacking a specific definition of the term, whereas *Ohio* construed "person" for purposes of the Code, where a specific definition is provided. While the texts of the Dictionary Act definition and the Internal Revenue Code definition of "person" are similar, the Court has emphasized the importance of statutory context in construing "person."[56] The other tax cases discussed above have reached the same conclusion in interpreting the term "person" for other purposes of the Code.

Turning to the statute and regulations at issue here, a condition for claiming the section 250 deduction with respect to certain income from services is that the services be provided (as relevant here) "to any person" not located within the United States. In connection with the provision of services (other than a property service or a transportation service with respect to property), there is, by definition, a recipient (beneficiary, counterparty),[57] and the sole factor the statute looks to is the location of that recipient. There is no indication in the statute or the legislative history that, by using the word "person," Congress thought it was excluding services performed abroad for the U.S. government from eligibility. Accordingly, in this context, the text of section 250 does not suggest that the word "person" should exclude the U.S. DoD, a part of the U.S. government.

Further, section 250 and the accompanying regulations do not define the term person, but they indicate that a government can be a person. Specifically, in defining "foreign person" for purposes of the regulations addressing FDDEI, Treas. Reg. § 1.250(b)-3(b)(5) provides, "[t]he term foreign person means a person (as defined in section 7701(a)(1)) that is not a United States person and *includes a foreign government* or an international organization."[58] Thus, the regulations under section 250 clarify that a government can be a person, and that a foreign government is a non-U.S. person. It stands to reason that the U.S. government would therefore be a person in this context.[59]

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[56] *See*, *e.g., Rowland*, at 199 (1993) (explaining that the Dictionary Act's proviso that its definition of person applies "unless the context indicates otherwise" should be read to require inquiry into how "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts" affect the proper understanding of how the word is used).

[57] *Cf*. Treas. Reg. § 1.482-9(*l*)(1) (defining "controlled services transaction" by reference to a benefit provided to another member of a controlled group of corporations).

[58] Emphasis added.

[59] The specificity with respect to foreign governments does not create a negative inference about similar treatment of the U.S. government because the treatment of foreign governments is specified in the context of the FDDEI sales rules, where the only relevant persons are foreign persons. Therefore, the rule merely clarifies that governments are persons in the context of that rule.

Furthermore, the policy embodied in the statutory text and regulations supports reading the word "person" in section 250(b)(4)(B) to include the U.S. government. As discussed above, in *Wycoff*, the Tenth Circuit reasoned that, "[w]hether 'person' includes a state or the United States depends on the legislative context in which the word is found."[60] Here, the legislative context supports reading the term "person" to refer to the United States government. When serving as a purchaser of a service, as contemplated here, the United States or an agency or instrumentality thereof is acting in its capacity as a commercial entity, which supports treating it as a "person," like any other commercial entity.[61] Further, the preamble to the proposed regulations states that the purpose of the section 250 deduction is generally intended "to help neutralize the role that tax considerations play when a domestic corporation chooses the location of intangible income attributable to foreign-market activity, that is, whether to earn such income through its U.S.-based operations or through its CFCs."[62] If services provided by a domestic corporation outside the United States to a foreign government, which is clearly a person under the regulations, can qualify as FDDEI services, but services provided to the U.S. government outside the United States could not, that discrepancy would perversely make providing services to the U.S. government outside the United States one of the few activities, if not the only activity, involving the performance of services outside the United States with respect to which Congress preserved an incentive for offshoring. That cannot have been congressional intent, and the statute should not be interpreted to provide that result.

CONCLUSION

DC's consulting services provided to U.S. DoD employees located on a military base in country X qualify as general services provided to a business recipient. They qualify as general services because they are not property services (because they are not provided with respect to tangible property), transportation services (because they do not involve the transportation of persons or property), or proximate services (because not substantially all of the services are performed in the physical presence of U.S. DoD employees located on the military base). The general services are treated as provided to a business because they are not provided to a consumer and because the U.S. DoD is not a related party of DC. The U.S. DoD is the recipient of the service. A general service is treated as provided to the U.S. DoD outside the United States to the extent that the service confers a benefit on the U.S. DoD's operations outside the United States. The determination of which operations of the U.S. DoD outside the United States benefit from the service, and the extent of such benefit, is determined by treating

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[60] *Wycoff*, at 1151.

[61] *See Ohio v. Helvering*, at 371 ("the state itself, when it becomes a dealer in intoxicating liquors, falls within the reach of the tax either as a 'person' under the statutory extension of that word to include a corporation, or as a 'person' without regard to such extension.").

[62] 85 Fed. Reg. 43065.

the U.S. DoD's operations outside the United States as one or more controlled taxpayers separate from the U.S. DoD's operations inside the United States. In particular, here, where the services benefit only the military base in country X, it is appropriate to treat that military base as a separate controlled taxpayer located outside the United States and to treat the general services as 100 percent for the benefit of that controlled taxpayer. Therefore, the service recipient is treated as located outside the United States. Finally, it is appropriate to treat U.S. DoD, a part of the U.S. government, as a person for these purposes. Therefore, the consulting services provided by DC to U.S. DoD with respect to its military base in country X are "services provided . . . to any person . . . not located within the United States," and the income derived therefrom qualifies as FDDEI.

Please call (202) 317-6939 if you have any further questions.