



Les Schneider and Pat Smith Speak to Law360 About Concerns Over Foreign Tax Credit Rules

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March 8, 2021

IPB partners Les Schneider and Pat Smith were interviewed by Law360 for the article, *Foreign Tax Credit Rules Spur Worries Beyond Technicalities*.

According to the article about proposed rules recently released by IRS, "As some see it, Treasury lacked legislative backing to take its proposed position on the creditability of foreign income taxes.

Such a contention was made by Les Schneider and Patrick J. Smith, partners at Ivins Phillips & Barker Chtd., who said Congress was aware that Treasury in 1980 proposed rules similar to the jurisdictional nexus requirement. Those proposed regulations didn't make it into final guidance issued in 1983, and Congress took no subsequent steps to change what constitutes a creditable tax, they wrote in a letter to Treasury last month.

Given the lack of congressional action, it follows that lawmakers must have agreed with Treasury's approach "and felt no need to make additional changes to the definition of what it means to be an income tax," Schneider and Smith wrote. The same review of rules took place again in 2017 when Congress enacted the Tax Cuts and Jobs Act (115 P.L. 97) and adopted no "wholesale changes" to the definition of creditable foreign tax, according to their letter.

Schneider told Law360 that the proposed jurisdictional nexus requirement should be withdrawn based on the legislative reenactment doctrine, which concerns rules of statutory interpretation that are in part based on whether legislation was enacted with the consideration of long-standing regulations. If it can be shown that Congress thought about and agreed with those rules when they passed legislation, "then it really is up to Congress to change the rules and not the Treasury,"



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he said."

The article goes on to note that "several government officials have said the U.S. decision to drop the safe harbor provision signals progress in the negotiations, which face a mid-2021 deadline (2021 Law360 56-12). Meanwhile, the OECD recently issued a report that reiterated warnings about how the absence of a global agreement would likely lead to "a proliferation of unilateral and uncoordinated tax measures, retaliatory trade sanctions and an undermining of tax certainty and investment."

According to Smith at Ivins Phillips & Barker, the U.S. government's abandonment of the safe harbor stance "makes it much more likely that the U.S. will sign on to whatever the OECD eventually adopts."

Citing the preamble, where Treasury said it might need to revisit the foreign tax credit regime, he said "the fact that a new administration has come in and seems to have a different attitude is clearly a very major development here."