Answer-to-Question-_Part A Question 1_

1)

As a US citizen Robert will always be taxable on his worldwide income. If he is deemed to be tax resident in both then certain tests might determine whether or not he will be taxable in Country X as well as in the US and then consideration will be needed to determine whether he can get any relief should there be double taxation. It is stated that Robert is tax resident in Country X.

There are different considerations for Robert (as a US citizen) than for Rina such as in respect of the bona fide residence and permanent home test which can lead to employment income of Robert falling outside the US tax net. The key factors here are the number of days Robert is in Country X, whether he has a permanent home, his intention to remain indefinitely.

As a Country X resident and citizen the initial assumption is that Rina would not be a US resident (subject to meeting tax residency criteria).

As they both spent equal days in the US in each of the years 2020 to 2022 and identical circumstances in terms of employment, residence whilst in the US etc then the facts and circumstances tests for each can be done concurrently.

2020

For 2020 the number of days that either spend in the US was less than 183 days and therefore neither is tax resident (albeit as

stated Robert is taxed on worldwide income as a US citizen).

2021

The number of days that each was present in the US for 2021 was 165. This does not cross the threshold of tax residence based on the single year test. Using the lookback test in s.7701(b), however, they would meet the residency test as all of the following are met:

-In country for more than 31 days

-The number of days in 2021 plus 1/3 of the days from 2020 exceed 183 days

2022

For 2022 the similar conclusion is reached as 2021. On a standalone basis the 183 days have not been met but factoring in 1/3 of the days from 2021 and 1/6 of the days from 2020 then under the lookback rule the number of days required is met.

On the basic test of residency by number of days it would therefore appear that they are tax resident in both of 2021 and 2022. There is, however, a closer connection exemption that can take income paid by an overseas company outside of the US tax net if it is deemed that dual residents have a closer connection to the other country (Country X) than the US.

As Robert and Rina have a house in Country X and friends/family in that country then the closer connection exemption can apply in years in which they are resident by virtue of the lookback rule. This could treat them as non-US resident for each of 2021 and 2022 based that. It is a facts and circumstances test but it is likely they would meet it based on the permanent home and closer

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connection. Under slightly different rules and tests this could apply to both Robert (as a US citizen) and Rina (as a non-US citizen)

2) Robert will likely always be taxable on his worldwide income as a US citizen. He can then seek double tax relief, likely through foreign tax credits albeit it is likely he will have a US tax liability given the lower rate of tax in Country X. There is also the scope for non-taxation on overseas employment income through the substantial presence test, although he might struggle to meet this based on the number of days outside of Country X in all the years under consideration.

For each of the years Rina is likely to fall outside of being deemed tax residence (as above) however will still likely be taxed in the US as a business visitor. The key reason for this is that the work undertaken in the US on behalf of InterTech Ltd will be personal services (s.864 (b)) and can be taxable. The key reason for this is that in each of the years Rina will have earned more than the $3000 allowance. She breaches that threshold with around 14 days of work needed to cross that threshold (and her far exceeding that) and has undertaken that amount in each of the years.

3. a) If there was a DTA in place between Country X and the US then the tax treatment for Rina would differ. The income from employment article 14 of the treaty is a broader exemption to the personal services treatment in domestic US legislation. There is no de minimis threshold like the $3000 and as Rina would have been in the US for less than 183 days in each of the years and payment made by an overseas entity without a US PE then her

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income can remain taxable only in Country X.

b)Without the DTA then income is taxable for the days that they are in the US. Extending the stay would bring 15 more days into the US tax net. There is scope to disregard 10 days of stay in the US where it is for purposes such as a vacation. The extra 15 days is not going to change anything substantial as they will still remain below the 183 days in 2022 on a standalone basis and have already breached the lookback criteria. On that basis I recommend them staying noting the possibility of some additional incremental US tax.

--------------ANSWER-1-ABOVE---------------

--------------ANSWER-2-BELOW---------------

Answer-to-Question-_Part A Question 2_

1.

USCO

-US sales

These will be taxed at the federal tax rate of 21% in the US. $10.5m of tax.

-Direct foreign sales

These will be Foreign Derived Intangible income (FDII) as they relate to sales of goods from a USCo to an overseas unrelated party for use overseas. These benefit from a preferential rate of tax after deduction of the s.250 FDII deduction of 37.5%. We are told that the average adjusted basis in assets is $60m. Assuming an equal split for the asset use in generating sales then the apportionment against the deduction eligible income of FDII will be $18m (30% = FDII/Total income x 60m). This amount is the Qualifying Business Asset Investment (QBAI). The calculation for the tax on FDII will be.

QBAI x 10% $1.8m is taxed at 21%.

The remaining $28.2 will see a deduction of 37.5% (10.575) leaving 17.625 x 21% = $3.71m US tax.

-Country U branch sales

Branch sales will be taxed at US federal rate of 21% = $4.2m

XCO

The tax of XCo will depend on a few things. The portion of sales made related to products acquired from USCo will be subpart F income under s.951 as Foreign Base Company Sales Income. Depending on the level to which the manufacturing is done by XCo in Country X, however, might change this analysis albeit it is not clear as it refers to some mechanical and assembly operations rather than full on manufacturing. There is a manufacturing exemption that could exclude income from SubPart F. The portion related to parts acquired from unrelated parties will not be Subpart F but instead GILTI under s.951A. Dependent on the split between SubPart F and GILTI the full inclusion rule might be relevant if more than 70% of XCo's income is deeemed SubPart F then full inclusion applies and would tax all as SubPart F. This would be detrimental on an effective tax rate basis due to the benefit of GILTI.

YCO

As YCO manufactures in country and sells in country it can not be Subpart F income and due to the rate of tax in country Y exceeding the high tax exemption within the GILTI regime (as 20% exceeds 90% of 21%) then there will be no GILTI apportionment either. Under the US dividend received deduction there will be no tax on the dividend receipt from YCO for USCo as it is a 100% owned foreign sub so full 100% DRD is available.

ZCO

ZCo will be liable to GILTI on its income. We are not informed of

any QBAI in respect of its assets so it's tax base will be a deduction of 50% against its income of $20m. This will then result in tax of $2.1m aginst post s.250 deduction income of $10m.

2.

Per s.904 there are different baskets for foreign tax credits and rules regarding there offsetting between basket, carryforward, carryback etc.

In respect of each:

-**USCO's branch income** - this will be restricted by 0.8m as the tax rate applicable is 25%. USCo can claim and offset 4.2m against its full US tax liability from this and carryforward 20 years or back one year the remaining 0.8m in the branch basket. There is no scope against other income in this period to offset it.

-**XCO -** a full claim of the 1.5m tax suffered can be used as the tax rate is lower than the applicable rate (assuming Subpart F treatment, see below depending on the split to GILTI).

-**YCo -** a full FTC claim of the 0.4m credit as the rate of tax in Y Country is lower than the 21% in the US.

-**ZCo -** as ZCo has GILTI income then there will be an 80% restriction on its FTC. This will mean the FTC is restriced to 1.6m rather than 2.0m. There is no scope for carryforward or back either and no other scope to use in this year (subject to YCo above). USCo will also have to do a full s.78 gross up of the income which will result in further incremental US tax due to the

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80% limitation.

--------------ANSWER-2-ABOVE---------------

--------------ANSWER-3-BELOW---------------

Answer-to-Question-_Part B Question 3_

1) US tests regarding whether business activities will result in determination of a US trade or business are quite subjective and facts and circumstance based. The key determining factors will include the nature of business, the type of agents involved (if relevant) and the type premises used in the US for that business. Other factors would include the frequency of business activity and the profit making intentions of it.

It is worth noting from the outset that the assumption is that at no point has Giulia met the thresholds to be deemed a US tax resident. We do not have the information to know if she might be liable to some US tax as a business visitor.

2020

In 2020 Giulia was merely meeting with relevant people in the US and no substantial transactions were undertaken that might result in US source income.

2021

From 1 July 2021 Giulia entered into an agreement with FAB Clothing Inc. They agreed to act as a sales agent in the US for Giulia through their retail business. At this point in time, however, it would appear that all her income would be foreign source and not ECI to a US business. This is on the basis that

FAB were purchasing from her and she had manufactured these goods in Country X. That FAB would then onsell her products for profit should not alter the tax position of Giulia and therefore for 2021 as well Giulia should not be liable to any US tax.

One point that is not exactly clear is the nature of the contracting between Giulia and FAB. If it is the case that FAB are selling and then subsequently reimbursing Giulia possibly just with a small margin this would be closer to an agency arrangement. The US tax rules can bring more agency type arrangements into US tax than under a treaty (or some other countries). It would be expected that FAB is an independent agent rather than a dependent agent as it has a network of retail shops (presumably selling goods from various manufacturers). If it is deemed that it is a pure agency arrangement rather than Giulia just onselling goods to FAB with little or no say beyond that point that then it is likely Giulia would be taxable in 2021.

2022

From 2022 the activities that Giulia was undertaking in the US had ramped up significantly, In signing for a warehouse she now had a fixed place of business in the US and hired a number of employees to manage the inventory. For US tax purposes it is likely that at this point Giulia would now be taxable on her business activities in the US as they would be effectively connected income to a US trade or business. At this point the tests are quite subjective and a number of cases such as Pietras Negras and others inform judgments on this area. There could still be arguments at this point that income at this point was not liable to US tax but it is more likely it would be.

2023

At the point of entering into leases for shops and making sales directly to customers in the US then Giulia would definitely be liable for US tax on her business activities as she would definitely have US ECI arising from a business and trade. She has tangible business assets generating US source income.

2)

If there was a Country X DTA in place based on the US model convention then the above analysis would likely change considerably. The US determination of a trade or business are slightly more subjective than under a DTT. One reason for this is the 'force of attraction' interpretation to a trade or business. Another reason is that under DTT's there are clear and specific exemptions to Permanent Establishments.

The two key distinctions are in respect of 1) fixed place of business and 2) nature of agents. Therse are mainly found n Article 5 Permanent Establishment of the model treaty.

In respect of fixed place of business from 2022 Giulia had a warehouse only then getting shops in 2023. Under US tax this would likely be enough to create a US trade or business. Under Article 5 of the treaty, however, there are specific exemptions for the types of premises Giulia would have used in 2022 such as '...for the purpose of storage, display' '...maintenance of stock', '...preparatory or auxilliary'.

The other key distinction is required the nature of agents and in particular whether they are independent or dependent. In para 4 a

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PE is not deemed to exist merely because business is carried on through a general commision agent or any other agent of an independent status.

Based on the above extracts from the treaty analysis would change in that 2020, 2021 and 2022 would not result in Giulia having a US tax liability. The key reasons would be that the fixed places of business used in the US would specifically meet the exemption within the treaty.

One potential issue which is not clear is the role of all of the employees. If the general managers, for example, were able to habitually conclude contracts etc then 2022 might still have a PE by treaty interpretation.

The answer would not change for 2023 and under US domestic legislation and the DTT then Giulia would be tabxable from 1 March 2023 on her business activities.

--------------ANSWER-3-ABOVE---------------

--------------ANSWER-4-BELOW---------------

Answer-to-Question-_Part C Question 5_

1) Albert's income from BigCorp will be Fixed, Determinable, Annual or Periodic (FDAP) income. As there is a treaty in place the rate of FDAP withholding is reduced to the treaty dividend cap of 5% (as he owns more than 10% of the shares of BigCorp).

BigCorp must, therefore, withhold $5,000

2)Becky's income is split in two:

Interest on bond - the interest will be exempt from witholding via the portfolio exemption as she owns less than 10%.

Dividend - this will be FDAP income but as no treaty in place this will be taxed at the full FDAP rate of 30% meaning a witholding obligation of $24k for BigCorp.

3)The key issue with the dividend to Capital Investments Limited is in respect of the Limitation of Benefits Clause (22 of the model treaty). There could be instances where a company such as Capital Investments Limited is used as a conduit company for investors to access treaty benefits that would otherwise not be available to them (such as the 'unknown investors in multiple countries'.

It is clear from the 'negligible operating expenses' that Capital Investments Limited is likely a portfolio holding company. As Claire is the majority shareholder and her share exceeds 50% and she is eligible for treaty benefits under the LOB cluase of the treaty then Capital Investments Limited as a whole can avail itself of the reduced dividend WHT under the DTA.

This therefore results in a WHT obligation for BigCorp Inc of $12.5k as the ownership exceeds 10% so benefits from the 5% rate of WHT.

--------------ANSWER-4-ABOVE---------------

--------------ANSWER-5-BELOW---------------

Answer-to-Question-_Part C Question 7_

1. For 2021 MNC's tax liability is nil as it's net income for the year is 0 and therefore tax is zero.

It's FTC is limited in the year to $42k as the lower of the tax suffered and the amount that would have been suffered in the US on that income. However, as the, $50k is not used to offset any US tax in the year the full $50k is carried forward in the general basket of FTC's.

2. Based on a purely standalone 2022 basis MNC Co has total income of $420k (220 FS and 200 US source). This would result in $88,200 of tax before any FTC's. Due to the higher rate of tax in Country X the FTC restriction on the $55k is $46.2, which would reduce tax to $42k (i.e. just the US tax on the US source income)

As there is no residual US tax in 2022 on the 2022 FS income the carryforward FTC from 2021 can not reduce that income further or reduce the tax on US source income.

Per 904(f), however, there is a requirement to recapture losses in each basket. As the 2021 FTC had not been used and the particular numbers, single stream of FS income etc ordinarily the FTC would remain carried forward and might reduce future tax.

Instead the FS income from 2021 must effectively be brought into account in 2022 and the 2021 FTC offset against that. The result on US tax is the same as the FTC fully offsets again the 2021 income brought into account but it has the effect of reducing the FTC carried forward to $8k rather than $50k.

One other option in respect of 2021 is that MNCCo could have looked to deduct foreign tax suffered rather than carryforward the FTC. This can sometimes be beneficial in circumstances where there is no expectation of future income in the associated basket as FTC's expire after 20 years whereas NOL's will be carried forward indefinitely.