Prior to the Taxpayer Relief Act of 1997 dividends from each 10/50 corporation were subject to a separate foreign tax credit limitation. The 1997 Act modified these rules, effective for taxable years beginning after December 31, 2002. The 1997 Act provided that 10/50 dividends out of pre-2003 earnings would be included in a single separate category and 10/50 dividends out of post-2002 earnings would receive look-thru treatment.

The American Jobs Creation Act of 2004 ("AJCA") modified the 10/50 dividend rules and provided that dividends from 10/50 corporations would be eligible for look-thru treatment effective for taxable years beginning after December 31, 2002, without regard to when the distributed earnings were accumulated.

If the look-thru treatment of a dividend out of earnings formerly accumulated in the non-look-thru pool has not been adequately substantiated, the dividend is treated as passive. To substantiate the look-thru characterization of the earnings and taxes in the non-look-thru pools, the taxpayer must reconstruct the non-look-thru pools of earnings and taxes for each year in the non-look-thru period.

Due to potential difficulties in reconstructing historical accumulated earnings and taxes accounts of a 10/50 corporation on a look-thru basis, a safe harbor allows a taxpayer to allocate the earnings and taxes in the non-look-thru pools ratably to the look-thru pools on the first day of the 10/50 corporation's first post-2002 taxable year in the same percentages as the taxpayer (or the qualified group member that owns the 10/50 corporation) properly characterizes the stock of the 10/50 corporation in the separate categories for purposes of apportioning the taxpayer's interest expense in its first taxable year ending after the first day of the 10/50 corporation's first post-2002 taxable year.

The Commissioner is unable to determine the proper look-thru characterization. Thus, all of the earnings and taxes are assigned to the passive category.