

TITLE 26 - INTERNAL REVENUE CODE**Subtitle A - Income Taxes****CHAPTER 1 - NORMAL TAXES AND SURTAXES****Subchapter N - Tax Based on Income From Sources Within or Without the United States****PART I - SOURCE RULES AND OTHER GENERAL RULES RELATING TO FOREIGN INCOME****§ 865. Source rules for personal property sales****(a) General rule**

Except as otherwise provided in this section, income from the sale of personal property—

- (1) by a United States resident shall be sourced in the United States, or
- (2) by a nonresident shall be sourced outside the United States.

(b) Exception for inventory property

In the case of income derived from the sale of inventory property—

- (1) this section shall not apply, and
- (2) such income shall be sourced under the rules of sections 861 (a)(6), 862 (a)(6), and 863.

Notwithstanding the preceding sentence, any income from the sale of any unprocessed timber which is a softwood and was cut from an area in the United States shall be sourced in the United States and the rules of sections 862 (a)(6) and 863 (b) shall not apply to any such income. For purposes of the preceding sentence, the term “unprocessed timber” means any log, cant, or similar form of timber.

(c) Exception for depreciable personal property**(1) In general**

Gain (not in excess of the depreciation adjustments) from the sale of depreciable personal property shall be allocated between sources in the United States and sources outside the United States—

- (A) by treating the same proportion of such gain as sourced in the United States as the United States depreciation adjustments with respect to such property bear to the total depreciation adjustments, and
- (B) by treating the remaining portion of such gain as sourced outside the United States.

(2) Gain in excess of depreciation

Gain (in excess of the depreciation adjustments) from the sale of depreciable personal property shall be sourced as if such property were inventory property.

(3) United States depreciation adjustments

For purposes of this subsection—

(A) In general

The term “United States depreciation adjustments” means the portion of the depreciation adjustments to the adjusted basis of the property which are attributable to the depreciation deductions allowable in computing taxable income from sources in the United States.

(B) Special rule for certain property

Except in the case of property of a kind described in section 168 (g)(4), if, for any taxable year—

- (i) such property is used predominantly in the United States, or
- (ii) such property is used predominantly outside the United States,

all of the depreciation deductions allowable for such year shall be treated as having been allocated to income from sources in the United States (or, where clause (ii) applies, from sources outside the United States).

(4) Other definitions

For purposes of this subsection—

(A) Depreciable personal property

The term “depreciable personal property” means any personal property if the adjusted basis of such property includes depreciation adjustments.

(B) Depreciation adjustments

The term “depreciation adjustments” means adjustments reflected in the adjusted basis of any property on account of depreciation deductions (whether allowed with respect to such property or other property and whether allowed to the taxpayer or to any other person).

(C) Depreciation deductions

The term “depreciation deductions” means any deductions for depreciation or amortization or any other deduction allowable under any provision of this chapter which treats an otherwise capital expenditure as a deductible expense.

(d) Exception for intangibles

(1) In general

In the case of any sale of an intangible—

(A) this section shall apply only to the extent the payments in consideration of such sale are not contingent on the productivity, use, or disposition of the intangible, and

(B) to the extent such payments are so contingent, the source of such payments shall be determined under this part in the same manner as if such payments were royalties.

(2) Intangible

For purposes of paragraph (1), the term “intangible” means any patent, copyright, secret process or formula, goodwill, trademark, trade brand, franchise, or other like property.

(3) Special rule in the case of goodwill

To the extent this section applies to the sale of goodwill, payments in consideration of such sale shall be treated as from sources in the country in which such goodwill was generated.

(4) Coordination with subsection (c)

(A) Gain not in excess of depreciation adjustments sourced under subsection (c)

Notwithstanding paragraph (1), any gain from the sale of an intangible shall be sourced under subsection (c) to the extent such gain does not exceed the depreciation adjustments with respect to such intangible.

(B) Subsection (c)(2) not to apply to intangibles

Paragraph (2) of subsection (c) shall not apply to any gain from the sale of an intangible.

(e) Special rules for sales through offices or fixed places of business

(1) Sales by residents

(A) In general

In the case of income not sourced under subsection (b), (c), (d)(1)(B) or (3), or (f), if a United States resident maintains an office or other fixed place of business in a foreign country, income from sales of personal property attributable to such office or other fixed place of business shall be sourced outside the United States.

(B) Tax must be imposed

Subparagraph (A) shall not apply unless an income tax equal to at least 10 percent of the income from the sale is actually paid to a foreign country with respect to such income.

(2) Sales by nonresidents

(A) In general

Notwithstanding any other provisions of this part, if a nonresident maintains an office or other fixed place of business in the United States, income from any sale of personal property (including inventory property) attributable to such office or other fixed place of business shall be sourced in the United States. The preceding sentence shall not apply for purposes of section 971 (defining export trade corporation).

(B) Exception

Subparagraph (A) shall not apply to any sale of inventory property which is sold for use, disposition, or consumption outside the United States if an office or other fixed place of business of the taxpayer in a foreign country materially participated in the sale.

(3) Sales attributable to an office or other fixed place of business

The principles of section 864 (c)(5) shall apply in determining whether a taxpayer has an office or other fixed place of business and whether a sale is attributable to such an office or other fixed place of business.

(f) Stock of affiliates

If—

- (1) a United States resident sells stock in an affiliate which is a foreign corporation,
- (2) such sale occurs in a foreign country in which such affiliate is engaged in the active conduct of a trade or business, and
- (3) more than 50 percent of the gross income of such affiliate for the 3-year period ending with the close of such affiliate's taxable year immediately preceding the year in which the sale occurred was derived from the active conduct of a trade or business in such foreign country,

any gain from such sale shall be sourced outside the United States. For purposes of paragraphs (2) and (3), the United States resident may elect to treat an affiliate and all other corporations which are wholly owned (directly or indirectly) by the affiliate as one corporation.

(g) United States resident; nonresident

For purposes of this section—

(1) In general

Except as otherwise provided in this subsection—

(A) United States resident

The term “United States resident” means—

- (i) any individual who—
 - (I) is a United States citizen or a resident alien and does not have a tax home (as defined in section 911 (d)(3)) in a foreign country, or
 - (II) is a nonresident alien and has a tax home (as so defined) in the United States, and
- (ii) any corporation, trust, or estate which is a United States person (as defined in section 7701 (a)(30)).

(B) Nonresident

The term “nonresident” means any person other than a United States resident.

(2) Special rules for United States citizens and resident aliens

For purposes of this section, a United States citizen or resident alien shall not be treated as a nonresident with respect to any sale of personal property unless an income tax equal to at least

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10 percent of the gain derived from such sale is actually paid to a foreign country with respect to that gain.

(3) Special rule for certain stock sales by residents of Puerto Rico

Paragraph (2) shall not apply to the sale by an individual who was a bona fide resident of Puerto Rico during the entire taxable year of stock in a corporation if—

- (A) such corporation is engaged in the active conduct of a trade or business in Puerto Rico, and
- (B) more than 50 percent of its gross income for the 3-year period ending with the close of such corporation's taxable year immediately preceding the year in which such sale occurred was derived from the active conduct of a trade or business in Puerto Rico.

For purposes of the preceding sentence, the taxpayer may elect to treat a corporation and all other corporations which are wholly owned (directly or indirectly) by such corporation as one corporation.

(h) Treatment of gains from sale of certain stock or intangibles and from certain liquidations

(1) In general

In the case of gain to which this subsection applies—

- (A) such gain shall be sourced outside the United States, but
- (B) subsections (a), (b), and (c) of section 904 and sections 902, 907, and 960 shall be applied separately with respect to such gain.

(2) Gain to which subsection applies

This subsection shall apply to—

(A) Gain from sale of certain stock or intangibles

Any gain—

- (i) which is from the sale of stock in a foreign corporation or an intangible (as defined in subsection (d)(2)) and which would otherwise be sourced in the United States under this section,
- (ii) which, under a treaty obligation of the United States (applied without regard to this section), would be sourced outside the United States, and
- (iii) with respect to which the taxpayer chooses the benefits of this subsection.

(B) Gain from liquidation in possession

Any gain which is derived from the receipt of any distribution in liquidation of a corporation—

- (i) which is organized in a possession of the United States, and
- (ii) more than 50 percent of the gross income of which during the 3-taxable year period ending with the close of the taxable year immediately preceding the taxable year in which the distribution is received is from the active conduct of a trade or business in such possession.

(i) Other definitions

For purposes of this section—

(1) Inventory property

The term “inventory property” means personal property described in paragraph (1) of section 1221 (a).

(2) Sale includes exchange

The term “sale” includes an exchange or any other disposition.

(3) Treatment of possessions

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Any possession of the United States shall be treated as a foreign country.

(4) Affiliate

The term “affiliate” means a member of the same affiliated group (within the meaning of section 1504 (a) without regard to section 1504 (b)).

(5) Treatment of partnerships

In the case of a partnership, except as provided in regulations, this section shall be applied at the partner level.

(j) Regulations

The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purpose of this section, including regulations—

- (1) relating to the treatment of losses from sales of personal property,
- (2) applying the rules of this section to income derived from trading in futures contracts, forward contracts, options contracts, and other instruments, and
- (3) providing that, subject to such conditions (which may include provisions comparable to section 877) as may be provided in such regulations, subsections (e)(1)(B) and (g)(2) shall not apply for purposes of sections 931, 933, and 936.

(k) Cross references

- (1) For provisions relating to the characterization as dividends for source purposes of gains from the sale of stock in certain foreign corporations, see section 1248.
- (2) For sourcing of income from certain foreign currency transactions, see section 988.

(Added Pub. L. 99–514, title XII, § 1211(a), Oct. 22, 1986, 100 Stat. 2533; amended Pub. L. 100–647, title I, § 1012(d)(1)–(6), (8), (9), (11), (12), Nov. 10, 1988, 102 Stat. 3497–3499; Pub. L. 101–508, title XI, § 11813(b)(18), Nov. 5, 1990, 104 Stat. 1388–555; Pub. L. 103–66, title XIII, § 13239(c), Aug. 10, 1993, 107 Stat. 509; Pub. L. 104–188, title I, § 1704(f)(4)(A), Aug. 20, 1996, 110 Stat. 1880; Pub. L. 106–170, title V, § 532(c)(1)(E), Dec. 17, 1999, 113 Stat. 1930.)

Amendments

1999—Subsec. (i)(1). Pub. L. 106–170 substituted “section 1221 (a)” for “section 1221”.

1996—Subsec. (b)(2). Pub. L. 104–188 substituted “863” for “863(b)”.

1993—Subsec. (b). Pub. L. 103–66 inserted at end “Notwithstanding the preceding sentence, any income from the sale of any unprocessed timber which is a softwood and was cut from an area in the United States shall be sourced in the United States and the rules of sections 862 (a)(6) and 863 (b) shall not apply to any such income. For purposes of the preceding sentence, the term ‘unprocessed timber’ means any log, cant, or similar form of timber.”

1990—Subsec. (c)(3)(B). Pub. L. 101–508 substituted “section 168 (g)(4)” for “section 48 (a)(2)(B)”.

1988—Subsec. (d)(2). Pub. L. 100–647, § 1012(d)(12), inserted “franchise,” after “trade brand.”

Subsec. (d)(4). Pub. L. 100–647, § 1012(d)(1), added par. (4).

Subsec. (e)(1)(A). Pub. L. 100–647, § 1012(d)(2), (9), substituted “(d)(1)(B) or (3)” for “(d)” and “in a foreign country” for first reference to “outside the United States”.

Subsec. (e)(2)(B). Pub. L. 100–647, § 1012(d)(5), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: “Subparagraph (A) shall not apply to—

“(i) any sale of inventory property which is sold for use, disposition, or consumption outside the United States if an office or other fixed place of business of the taxpayer outside the United States materially participated in the sale, or

“(ii) any amount included in gross income under section 951 (a)(1)(A).”

Subsec. (f). Pub. L. 100–647, § 1012(d)(4), amended subsec. (f) generally. Prior to amendment, subsec. (f) read as follows: “If—

“(1) a United States resident sells stock in an affiliate which is a foreign corporation,

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“(2) such affiliate is engaged in the active conduct of a trade or business, and

“(3) such sale occurs in the foreign country in which the affiliate derived more than 50 percent of its gross income for the 3-year period ending with the close of the affiliate’s taxable year immediately preceding the year during which such sale occurred,

any gain from such sale shall be sourced outside the United States.”

Subsec. (g)(1)(A)(i). Pub. L. 100–647, § 1012(d)(11), amended cl. (i) generally. Prior to amendment, cl. (i) read as follows: “any individual who has a tax home (as defined in section 911 (d)(3)) in the United States, and”.

Subsec. (g)(1)(A)(ii). Pub. L. 100–647, § 1012(d)(3)(A), struck out “partnership,” after “corporation,”.

Subsec. (g)(3). Pub. L. 100–647, § 1012(d)(6)(A), added par. (3).

Subsec. (h). Pub. L. 100–647, § 1012(d)(8), added subsec. (h) and redesignated former subsec. (h) as (i).

Pub. L. 100–647, § 1012(d)(3)(B), added par. (5) to subsec. (h) prior to redesignation as subsec. (i).

Subsec. (i). Pub. L. 100–647, § 1012(d)(8), redesignated former subsec. (h) as (i). Former subsec. (i) redesignated (j).

Pub. L. 100–647, § 1012(d)(6)(B), added par. (3) to subsec. (i) prior to redesignation as subsec. (j).

Subsec. (i)(5). Pub. L. 100–647, § 1012(d)(3)(B), added par. (5) to subsec. (h) prior to redesignation as subsec. (i).

Subsec. (j). Pub. L. 100–647, § 1012(d)(8), redesignated former subsec. (i) as (j). Former subsec. (j) redesignated (k).

Subsec. (j)(3). Pub. L. 100–647, § 1012(d)(6)(B), added par. (3) to subsec. (i) prior to redesignation as subsec. (j).

Subsec. (k). Pub. L. 100–647, § 1012(d)(8), redesignated former subsec. (j) as (k).

Effective Date of 1999 Amendment

Amendment by Pub. L. 106–170 applicable to any instrument held, acquired, or entered into, any transaction entered into, and supplies held or acquired on or after Dec. 17, 1999, see section 532(d) of Pub. L. 106–170, set out as a note under section 170 of this title.

Effective Date of 1996 Amendment

Section 1704(f)(4)(B) of Pub. L. 104–188 provided that: “The amendment made by subparagraph (A) [amending this section] shall take effect as if included in the amendments made by section 1211 of the Tax Reform Act of 1986 [Pub. L. 99–514].”

Effective Date of 1993 Amendment

Section 13239(e) of Pub. L. 103–66 provided that: “The amendments made by this section [amending this section and sections 927, 954, and 993 of this title] shall apply to sales, exchanges, or other dispositions after the date of the enactment of this Act [Aug. 10, 1993].”

Effective Date of 1990 Amendment

Amendment by Pub. L. 101–508 applicable to property placed in service after Dec. 31, 1990, but not applicable to any transition property (as defined in section 49 (e) of this title), any property with respect to which qualified progress expenditures were previously taken into account under section 46 (d) of this title, and any property described in section 46 (b)(2)(C) of this title, as such sections were in effect on Nov. 4, 1990, see section 11813(c) of Pub. L. 101–508, set out as a note under section 45K of this title.

Effective Date of 1988 Amendment

Section 1012(d)(5) of Pub. L. 100–647 provided that the amendment made by that section is effective with respect to taxable years beginning after Dec. 31, 1987.

Amendment by section 1012 (d)(1)–(4), (6), (8), (9), (11), (12) of Pub. L. 100–647 effective, except as otherwise provided, as if included in the provision of the Tax Reform Act of 1986, Pub. L. 99–514, to which such amendment relates, see section 1019(a) of Pub. L. 100–647, set out as a note under section 1 of this title.

Effective Date

Section 1211(c) of Pub. L. 99–514 provided that:

“(1) In general.—Except as provided in paragraph (2), the amendments made by this section [enacting this section, amending sections 861 to 864, 871, 881, and 904 of this title, and enacting provisions set out below] shall apply to taxable years beginning after December 31, 1986.

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“(2) Special rule for foreign persons.—In the case of any foreign person other than any controlled foreign corporations (within the meaning of section 957(a) of the Internal Revenue Code of 1954 [now 1986]), the amendments made by this section shall apply to transactions entered into after March 18, 1986.”

Savings Provision

For provisions that nothing in amendment by Pub. L. 101–508 be construed to affect treatment of certain transactions occurring, property acquired, or items of income, loss, deduction, or credit taken into account prior to Nov. 5, 1990, for purposes of determining liability for tax for periods ending after Nov. 5, 1990, see section 11821(b) of Pub. L. 101–508, set out as a note under section 45K of this title.

Applicability of Certain Amendments by Pub. L. 99–514 in Relation to Treaty Obligations of United States

For nonapplication of amendment by section 1211(a) of Pub. L. 99–514 (enacting this section) to the extent application of such amendment would be contrary to any treaty obligation of the United States in effect on Oct. 22, 1986, with provision that for such purposes any amendment by title I of Pub. L. 100–647 be treated as if it had been included in the provision of Pub. L. 99–514 to which such amendment relates, see section 1012(aa)(3), (4) of Pub. L. 100–647, set out as a note under section 861 of this title.

Study of Source Rules for Sales of Inventory Property

Section 1211(d) of Pub. L. 99–514 directed Secretary of the Treasury or his delegate to conduct a study of source rules for sales of inventory property and, not later than Sept. 30, 1987 (due date extended to Jan. 1, 1992, by Pub. L. 101–508, title XI, § 11831(b), Nov. 5, 1990, 104 Stat. 1388–559), to submit to Committee on Ways and Means of House of Representatives and Committee on Finance of Senate a report of such study (together with recommendations he deemed advisable).