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Subchapter N Tax Based on Income From Sources Within or Without the United States

§§861-999

Part I DETERMINATION OF SOURCES OF INCOME §§861-865

§865 Source rules for personal property sales.

Internal Revenue Code

§ 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 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 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.

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 .

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