

Section 861.—Income From Sources Within the United States

26 CFR 1.861–2: *Interest.*

T.D. 8735

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Certain Payments Made Pursuant to a Securities Lending Transaction

A G E N C Y: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

S U M M A R Y: This document contains final Income Tax Regulations relating to the taxation of certain payments made pursuant to a cross-border securities lending transaction. These regulations provide guidance concerning the source, character, and income tax treaty treatment of such payments and affect United States payors and recipients and foreign payors and recipients.

D A T E S: These regulations are effective October 14, 1997.

A p p l i c a b i l i t y: These regulations are applicable to payments made after November 13, 1997.

F O R F U R T H E R I N F O R M A T I O N C O N T A C T: Ramon Camacho or Paul Epstein at (202) 622-3870 (not a toll-free number) of the Office of Associate Chief Counsel (International), within the Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Background

On January 9, 1992, the IRS published proposed amendments (INTL–106–89) to the Income Tax Regulations (26 CFR part 1) under sections 861, 871, 881, 894, and 1441 of the Internal Revenue Code of 1986 (Code) in the **Federal Register** (57

FR 860). A public hearing was scheduled but was subsequently cancelled because no one requested to testify. However, several written comments were received. After consideration of all of the comments, the regulations proposed by INTL–106–89 are adopted by this Treasury decision, as modified.

Explanation of Provisions

I. *The 1992 Proposed Regulations*

On January 9, 1992, the Internal Revenue Service (IRS) issued proposed regulations that provided guidance on the source and character of substitute payments made in cross-border securities lending transactions. In general, the regulations proposed to source substitute payments by reference to the source of the payments (dividend or interest) for which they substitute. In addition, the regulations proposed to characterize substitute payments under a transparency rule. Under the transparency rule, substitute payments are treated as having the same character as the dividend or interest income for which they substitute.

Under the proposed regulations, the source rule applies for all purposes of the Code in cross-border securities lending transactions. In contrast, the transparency rule addressing the character of substitute payments applies only for purposes of determining the tax liability under sections 871 and 881 and nonresident alien withholding under chapter 3 of the Code and for treaty purposes. Generally, public comments welcomed the transparency rule because it eliminated unjustifiable tax biases between similar economic investments. After considering all the public comments, the proposed regulations are adopted as final regulations by this Treasury decision, substantially as proposed.

II. *The Final Regulations*

1. General rule

The final regulations, like the proposed regulations, provide that a substitute payment made with respect to a securities lending or sale-repurchase transaction is sourced using the general rules governing the source of interest or dividend income contained in sections 861 and 862. The

definitions of securities lending transactions and sale-repurchase transactions are provided in §§1.861–2(a)(7) and 1.861–3(a)(6) of the regulations. These provisions define a substitute payment as a payment made to the transferor of a security of an amount equal to any distributions of dividends or interest which the owner of the transferred security would normally receive. The regulations also provide that substitute interest or dividend payments have the same character as interest or dividend income, respectively, for purposes of applying sections 864(c)(4)(B), 871, 881, 894, 4948(a) and the withholding provisions under chapter 3 of the Internal Revenue Code.

2. Scope of regulation

Some commentators questioned whether a sale-repurchase transaction is considered a transaction that is substantially similar to a securities lending transaction for purposes of the proposed regulations. They noted that most sale-repurchase transactions contractually permit the purchaser to deal freely with the underlying securities, specifying only that substantially identical securities be returned on the repurchase date. In such cases the purchaser must also make substitute payments to the seller. The final regulations clarify that substitute payments made in a sale-repurchase transaction are sourced and characterized in the same manner that substitute payments are sourced and characterized in securities lending transactions.

The final regulations only address the tax treatment of substitute payments received by the transferor in securities lending or sale-repurchase transactions. The regulations do not address the treatment of fees or interest paid to the transferee in such transactions. For example, the transparency rule does not extend to characterize the interest component of the repurchase price of a sale-repurchase agreement, which is treated as interest and sourced under the general source rules for interest contained in sections 861 and 862. See Rev. Rul. 74-27 (1974–1 C.B. 24); Rev. Rul. 77–59 (1977–1 C.B. 196); *Nebraska Department of Revenue v. Loewenstei*, 115 S. Ct. 557 (1994).

In response to comments, the final regulations apply for purposes of determin-

ing the source of substitute payments, regardless of whether the recipient of the income is U.S. or foreign. When source is determined under these regulations, it applies for all purposes of the Code (e.g., foreign tax credit limitations under sections 904 and 906). However, with respect to the characterization of substitute payments, the IRS and Treasury believe that it is appropriate, and more consistent with existing guidance regarding the treatment of substitute payments, to apply the transparency rule only with respect to foreign taxpayers and only for limited purposes. Accordingly, the transparency rule applies to determine character only for certain purposes of sections 864, 871, 881, 894, 4948(a) and chapter 3 of the Code. For example, under this rule, substitute payments to a foreign person with respect to stocks and securities that, absent the securities lending transaction, would give rise to foreign source effectively connected income in the hands of such person, will retain their character as dividend or interest income for purposes of determining whether the income is effectively connected to the U.S. trade or business of such person.

The transparency rule does not apply, however, to characterize the U.S. source income of U.S. trades or businesses of foreign taxpayers. Accordingly, U.S. source effectively connected income of foreign taxpayers and U.S. source income of U.S. taxpayers will be treated the same. In this regard, the final regulations do not affect existing guidance applicable to both U.S. and foreign taxpayers concerning the characterization of substitute payments for purposes of other sections not specifically identified in these final regulations. See, e.g., Rev. Rul. 60-177 (1960-1 C.B. 9), (substitute payments are ineligible for the dividends received deduction under section 243); Rev. Rul. 80-135 (1980-1 C.B. 18), (substitute payments are ineligible for the tax-exemption on state and local bonds under section 103).

Because the transparency rule does not apply for purposes of sections 901 and 903, nothing in the final regulations affects the determination required under §1.901-2(f) concerning the identity of the person by whom a foreign tax is considered paid for purposes of sections 901 and 903.

3. Substitute payments on portfolio debt instruments

Under the final regulations, substitute interest payments made with respect to a debt instrument, the interest on which qualifies as portfolio interest under section 871(h) or section 881(c) in the hands of the lender, is characterized as portfolio interest if, in the case of an obligation in registered form, the lender provides the withholding agent with a beneficial owner withholding certificate or documentary evidence in accordance with §1.871-14(c) and no exception from the portfolio interest exemption applies. For example, if a bank lends securities in a transaction that the facts and circumstances indicate in substance is an extension of credit pursuant to a loan agreement in the ordinary course of the bank's trade or business, the substitute payment may be characterized as interest which would not qualify as portfolio interest under section 881(c)(3)(A).

4. Tax treaties

Some commentators noted that the transparency rule adversely affects foreign taxpayers that might otherwise rely on a different characterization of substitute payments in order to claim benefits under certain income tax treaties. The transparency rule would eliminate these benefits in a number of cases. Those commentators questioned the government's authority to issue regulations that would characterize substitute payments as dividend or interest income in light of U.S. income tax treaty provisions.

The IRS and Treasury believe that the transparency rule in general is properly issued pursuant to the general grant of authority under section 7805 because it eliminates opportunities for abuse that arise from a rule that would characterize substitute payments in a manner different from the treatment of the underlying payment. A transparency approach provides uniform results for economically similar investments.

Moreover, the IRS and Treasury believe that, in the absence of a transparency rule, many taxpayers would use securities lending transactions in order to avoid tax under tax treaties or under the Code. For this reason, authority to characterize substitute payments for Code and

treaty purposes in the manner proposed in 1992 also is amply provided in section 7701(l), which was enacted after these comments were received. Section 7701(l) provides a broad grant of authority to issue regulations recharacterizing multiple party financing arrangements to prevent the avoidance of any tax.

In this regard, the legislative history provides that "the committee seeks to bolster the Treasury's ability to prevent unwarranted avoidance of tax through multiple-party financial engineering as well as to provide a mechanism for issuing additional guidance to taxpayers entering into financial transactions." See H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 729 (1993). The committee also made clear that this authority was not limited to the types of back-to-back loan transactions addressed in prior rulings. See Rev. Rul. 84-152 (1984-2 C.B. 381); Rev. Rul. 84-153 (1984-2 C.B. 383); Rev. Rul. 87-89 (1987-2 C.B. 195). Section 7701(l) in fact has been applied to a broad range of financial transactions. See, e.g., Prop. Regs. §1.7701(l)-2 (treatment of obligation-shifting transactions); and Notice 97-21 (IRB 1997-11, March 17, 1997), (tax avoidance using self-amortizing investments in conduit financing entities).

The 1992 proposed regulation under section 894 provided that where an income tax convention refers to United States law, the relevant law is the section or sections of the Internal Revenue Code and regulations thereunder governing the tax which is the subject of the provision. Some commentators have suggested that the proposed securities lending regulations would be invalid for purposes of characterizing dividends that are specifically defined by treaties. However, under conduit principles and additional authority to characterize payments pursuant to section 7701(l), the regulations adopted under §1.894-1(c) address the identity of the owner of dividend and interest income for treaty purposes as opposed to the character of the payments received under varying treaty definitions. These regulations therefore are consistent with the government's authority under treaties to determine the identity of the beneficial owner of income.

Special Analyses

It has been determined that this Tre a-

surey decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. A c c o r d i n g l y, a regulatory flexibility analysis is not required. This certification is based on the information that follows. These regulations affect entities engaged in cross-border multiple-party financing arrangements. These regulations affect the tax treatment of substitute payments made with respect to stocks and debt securities. The primary participants who engage in cross-border multiple party financing arrangements of this type are large regulated commercial banks and brokerage firms. In addition, comments received in response to the notice of proposed rulemaking were from law associations, other associations that represent large regulated financial companies or from individuals. A c c o r d i n g l y, Treasury and IRS do not believe that a substantial number of small entities engages in cross-border multiple party financing arrangements of the type covered by these regulations. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Ramon Camacho of the Office of the Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

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Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding entries in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *
Section 1.861–2 also issued under 26 U.S.C. 863(a).
Section 1.861–3 also issued under 26

U.S.C. 863(a). * * *
Section 1.864–5 also issued under 26 U.S.C. 7701(l). * * *
Section 1.871–7 also issued under 26 U.S.C. 7701(l). * * *
Section 1.881–2 also issued under 26 U.S.C. 7701(l). * * *
Section 1.894–1 also issued under 26 U.S.C. 7701(l). * * *

Par. 2. Section 1.861–2 is amended by adding a sentence at the end of paragraph (a)(1); adding paragraph (a)(7); and revising paragraph (e) to read as follows:

§1.861–2 Interest.

(a) * * * (1) * * * See paragraph (a)(7) of this section for special rules concerning substitute interest paid or accrued pursuant to a securities lending transaction.

* * * * *

(7) A substitute interest payment is a payment, made to the transferor of a security in a securities lending transaction or a sale-repurchase transaction, of an amount equivalent to an interest payment which the owner of the transferred security is entitled to receive during the term of the transaction. A securities lending transaction is a transfer of one or more securities that is described in section 1058(a) or a substantially similar transaction. A sale-repurchase transaction is an agreement under which a person transfers a security in exchange for cash and simultaneously agrees to receive substantially identical securities from the transferee in the future in exchange for cash. A substitute interest payment shall be sourced in the same manner as the interest accruing on the transferred security for purposes of this section and §1.862–1. See also §§1.864–5(b)(2)(iii), 1.871–7(b)(2), 1.881–2(b)(2) and for the character of such payments and §1.894–1(c) for the application tax treaties to these transactions.

* * * * *

(e) *Effective dates.* Except as otherwise provided, this section applies with respect to taxable years beginning after December 31, 1966. For corresponding rules applicable to taxable years beginning before January 1, 1967, (see 26 CFR part 1 revised April 1, 1971). Paragraph (a)(7) of this section is applicable to payments made after November 13, 1997.

Par. 3. Section 1.861–3 is amended by

adding a sentence at the end of paragraph (a)(1); adding paragraph (a)(6); and removing the first sentence of paragraph (d) and adding three sentences in its place to read as follows:

§1.861–3 Dividends.

(a) * * * (1) * * * See also paragraph (a)(6) of this section for special rules concerning substitute dividend payments received pursuant to a securities lending transaction.

* * * * *

(6) *Substitute dividend payments.* A substitute dividend payment is a payment, made to the transferor of a security in a securities lending transaction or a sale-repurchase transaction, of an amount equivalent to a dividend distribution which the owner of the transferred security is entitled to receive during the term of the transaction. A securities lending transaction is a transfer of one or more securities that is described in section 1058(a) or a substantially similar transaction. A sale-repurchase transaction is an agreement under which a person transfers a security in exchange for cash and simultaneously agrees to receive substantially identical securities from the transferee in the future in exchange for cash. A substitute dividend payment shall be sourced in the same manner as the distributions with respect to the transferred security for purposes of this section and §1.862–1. See also §§1.864–5(b)(2)(iii), 1.871–7(b)(2) and 1.881–2(b)(2) for the character of such payments and §1.894–1(c) for the application of tax treaties to these transactions.

* * * * *

(d) * * * Except as otherwise provided in this paragraph this section applies with respect to dividends received or accrued after December 31, 1966. Paragraph (a)(5) of this section applies to certain dividends from a DISC or former DISC in taxable years ending after December 31, 1971. Paragraph (a)(6) of this section is applicable to payments made after November 13, 1997. * * *

Par. 4. Section 1.864–5 is amended by redesignating paragraph (b)(2)(ii) as paragraph (b)(2)(iii) and adding new paragraph (b)(2)(ii) to read as follows:

§1.864-5 Foreign source income effectively connected with U.S. business.

* * * * *

- (b) * * *
(2) * * *

(ii) Substitute payments. For purposes of this paragraph (b)(2), a substitute interest payment (as defined in §1.861-2(a)(7)) received by a foreign person subject to tax under this paragraph (b) pursuant to a securities lending transaction or a sale-repurchase transaction (as defined in §1.861-2(a)(7)) with respect to a security (as defined in §1.864-6(b)(2)(ii)(c)) shall have the same character as interest income paid or accrued with respect to the terms of the transferred security. Similarly, for purposes of this paragraph (b)(2), a substitute dividend payment (as defined in §1.861-3(a)(6)) received by a foreign person pursuant to a securities lending transaction or a sale-repurchase transaction (as defined in §1.861-3(a)(6)) with respect to a stock shall have the same character as a distribution received with respect to the transferred security. This paragraph (b)(2)(ii) is applicable to payments made after November 13, 1997.

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Par. 5. Section 1.871-7 is amended by redesignating the text of paragraph (b) as paragraph (b)(1); adding a paragraph heading for newly designated paragraph (b)(1); adding paragraph (b)(2); and removing the first sentence of paragraph (f) and adding two sentences in its place to read as follows:

§1.871-7 Taxation of nonresident alien individuals not engaged in U.S. business.

* * * * *

(b) Fixed or determinable annual or periodical income—(1) General rule. * * *

(2) Substitute payments. For purposes of this section, a substitute interest payment (as defined in §1.861-2(a)(7)) received by a foreign person pursuant to a securities lending transaction or a sale-repurchase transaction (as defined in §1.861-2(a)(7)) shall have the same character as interest income paid or accrued with respect to the terms of the transferred security. Similarly, for purposes of this

section, a substitute dividend payment (as defined in §1.861-3(a)(6)) received by a foreign person pursuant to a securities lending transaction or a sale-repurchase transaction (as defined in §1.861-3(a)(6)) shall have the same character as a distribution received with respect to the transferred security. Where, pursuant to a securities lending transaction or a sale-repurchase transaction, a foreign person transfers to another person a security the interest on which would qualify as portfolio interest under section 871(h) in the hands of the lender, substitute interest payments made with respect to the transferred security will be treated as portfolio interest, provided that in the case of interest on an obligation in registered form (as defined in §1.871-14(c)(1)(i)), the transferor complies with the documentation requirement described in §1.871-14(c)(1)(ii)(C) with respect to the payment of the substitute interest and none of the exceptions to the portfolio interest exemption in sections 871(h)(3) and (4) apply. See also §§1.861-2(b)(2) and 1.894-1(c).

* * * * *

(f) * * * Except as otherwise provided in this paragraph, this section shall apply for taxable years beginning after December 31, 1966. Paragraph (b)(2) of this section is applicable to payments made after November 13, 1997. * * *

Par. 6. Section 1.881-2 is amended by redesignating the text of paragraph (b) as paragraph (b)(1); adding a paragraph heading for newly designated paragraph (b)(1); adding a paragraph (b)(2); and removing the first sentence of paragraph (e) and adding two sentences in its place to read as follows:

§1.881-2 Taxation of foreign corporations not engaged in U.S. business.

* * * * *

(b) Fixed or determinable annual or periodical income—(1) General rule. * * *

(2) Substitute payments. For purposes of this section, a substitute interest payment (as defined in §1.861-2(a)(7)) received by a foreign person pursuant to a securities lending transaction or a sale-repurchase transaction (as defined in §1.861-2(a)(7)) shall have the same character as interest income received pursuant

to the terms of the transferred security. Similarly, for purposes of this section, a substitute dividend payment (as defined in §1.861-3(a)(6)) received by a foreign person pursuant to a securities lending transaction or a sale-repurchase transaction (as defined in §1.861-2(a)(7)) shall have the same character as a distribution received with respect to the transferred security. Where, pursuant to a securities lending transaction or a sale-repurchase transaction, a foreign person transfers to another person a security the interest on which would qualify as portfolio interest under section 881(c) in the hands of the lender, substitute interest payments made with respect to the transferred security will be treated as portfolio interest, provided that in the case of interest on an obligation in registered form (as defined in §1.871-14(c)(1)(i)), the transferor complies with the documentation requirement described in §1.871-14(c)(1)(ii)(C) with respect to the payment of substitute interest and none of the exceptions to the portfolio interest exemption in sections 881(c)(3) and (4) apply. See also §§1.871-7(b)(2) and 1.894-1(c).

* * * * *

(e) * * * Except as otherwise provided in this paragraph, this section applies for taxable years beginning after December 31, 1966. Paragraph (b)(2) of this section is applicable to payments made after November 13, 1997. * * *

Par. 7. Section 1.894-1 is amended by revising paragraph (c) and adding paragraph (d) to read as follows:

§1.894-1 Income affected by treaty.

* * * * *

(c) Substitute interest and dividend payments. The provisions of an income tax convention dealing with interest or dividends paid to or derived by a foreign person include substitute interest or dividend payments that have the same character as interest or dividends under §1.864-5(b)(2)(ii), 1.871-7(b)(2) or 1.881-2(b)(2). The provisions of this paragraph (c) shall apply for purposes of securities lending transactions or sale-repurchase transactions as defined in §1.861-2(a)(7) and §1.861-3(a)(6).

(d) Effective dates. Paragraphs (a) and (b) of this section apply for taxable years

beginning after December 31, 1966. For corresponding rules applicable to taxable years beginning before January 1, 1967, (see 26 CFR part 1 revised April 1, 1971). Paragraph (c) of this section is applicable to payments made after November 13, 1997.

§1.7701(l)-1 [Amended]

Par. 10. Section 1.7701(l)-1 is amended as follows:

1. Paragraph (a) is amended by removing the paragraph designation (a) and the heading.

2. Paragraph (b) is removed.

Michael P. Dolan,
*Acting Commissioner of
Internal Revenue.*

Approved August 28, 1997.

Donald C. Lubick,
*Acting Assistant Secretary
of the Treasury.*

(Filed by the Office of the Federal Register on October 6, 1997, 8:45 a.m., and published in the issue of the Federal Register for October 14, 1997, 62 F.R. 53498)
