

not entitled to rely upon such statement and shall remain liable for all applicable penalties.

(B) *Coordination with section 1445.* Pursuant to section 1445 and regulations thereunder, withholding of tax is not required with respect to a foreign person's disposition of an interest in a domestic corporation, if the transferee is furnished with a statement by the corporation under paragraph (h) of this section that the interest is not a U.S. real property interest. A foreign person that obtains a corporation's statement for that purpose prior to the date of disposition may also rely upon the statement for purposes of this paragraph (g)(1)(ii), unless the corporation informs the foreign person (pursuant to paragraph (h)(1)(iv)(C) of this section) that it became a U.S. real property holding corporation after the date of the notice but prior to the actual date of disposition.

(iii) *Determination by Director—(A) In general.* A foreign person disposing of an interest in a domestic corporation may establish that the interest was not a U.S. real property interest as of the date of disposition by requesting and obtaining a determination to that effect from the Director. Such a determination may be requested pursuant to the provisions of subdivision (B) or (C) of this paragraph (g)(1)(iii). A request for a determination should be addressed to: Director, Foreign Operations District, 1325 K St. NW, Washington, DC 20225. A foreign transferor who has requested a determination by the Director pursuant to the rules of this paragraph (g)(1)(iii) is not thereby excused from filing a return and paying any tax due by the date, including any extensions, on which such return and payment would otherwise be due with respect to a disposition. If the Director subsequently determines and notifies the foreign transferor that the interest was not a U.S. real property interest, the foreign transferor shall be entitled to a refund of any taxes, penalties, and interest paid by reason of the application of section 897(a) pursuant to the rules of paragraph (g)(1)(i) of this section, together with any interest otherwise due on such refund, if a claim for refund is made within the applicable time limits.

(B) *Determination based on Director's information.* A foreign person may request that the Director make a determination based on information contained in the Director's records, if:

(1) The foreign person made a request to the corporation for information as to the status of its interest no later than the 90th day before the date, including any extensions, on which a tax return would otherwise be due with respect to a disposition, and

(2) The corporation failed to respond to such request by the 30th day following the date the request was delivered to the corporation.

If the Director is unable to make a determination based on information available to him, he shall inform the foreign person that the interest must be treated as a U.S. real property interest unless the person subsequently obtains either the necessary statement from the corporation or a determination pursuant to subdivision (C) of this paragraph (g)(1)(iii).

(C) *Determination based on information supplied by foreign person.* A foreign person may request that the Director make a determination based on information supplied by the foreign person. Such information may be drawn, for example, from annual reports, financial statements, or records of the corporation, and must establish to the satisfaction of the Director that the foreign person's interest was not a U.S. real property interest as of the date of disposition.

(D) *Determination by Director on his own motion.* Notwithstanding any other provision of this section, a foreign person shall not treat the disposition of an interest in a domestic corporation as a disposition of a U.S. real property interest if such person is notified that the Director has upon his own motion determined that the interest was not a U.S. real property interest as of the date of disposition.

(2) *Corporations determining U.S. real property holding corporation status—(i) In general.* A corporation that must determine whether it is a U.S. real property holding corporation, and that holds an interest in another corporation (other than a controlling interest as defined in paragraph (e)(3) of this section), must determine whether or

not that interest was a U.S. real property interest as of its own determination date, by either:

(A) Obtaining a statement from the second corporation pursuant to the provisions of subdivision (ii) of this paragraph (g)(2);

(B) Obtaining a determination by the Director pursuant to the provisions of subdivision (iii) of this paragraph (g)(2); or

(C) Making an independent determination pursuant to the provisions of subdivision (iv) of this paragraph (g)(2). A corporation that is unable to determine by any of the above methods whether its interest in a second corporation is a U.S. real property interest must presume that such interest is a U.S. real property interest.

(ii) *Statement from corporation.* A corporation may determine whether or not an interest in a second corporation was a U.S. real property interest as of its own determination date by obtaining from the second corporation a statement that the interest was not a U.S. real property interest as of that date. However, the second corporation's statement shall not be valid for purposes of this rule, and thus may not be relied upon for purposes of establishing that an interest was not a U.S. real property interest, unless such corporation complies with the notice requirements of paragraph (h)(2) or (h)(4) of this section.

A corporation that requests and obtains such a statement is not required to forward the statement to the Internal Revenue Service and is not required to take any further action to establish that the interest in the second corporation was not a U.S. real property interest. If the second corporation's statement is later found to have been incorrect, the first corporation shall not be subject to penalties arising out of past failures to comply with the requirements of section 897 or 1445, if such failures were attributable to reliance upon the second corporation's statement. By the 90th day following receipt of a notification from the Service or from the second corporation that a prior statement was incorrect, the first corporation must redetermine its status (as of its most recent determination date) and if appropriate notify the

Internal Revenue Service that it is a U.S. real property holding corporation in accordance with paragraph (h)(1)(ii)(C) of this section. However, a corporation that knew or had reason to know that a second corporation's statement was incorrect is not entitled to rely upon such statement and shall remain liable for all applicable taxes, penalties, and interest arising out of the second corporation's status as a U.S. real property holding corporation.

(iii) *Determination by Director.*—(A) *In general.* A corporation may determine whether or not an interest in a second corporation was a U.S. real property interest as of its own determination date by requesting and obtaining a determination to that effect from the Director. Such a determination may be requested pursuant to the provisions of subdivision (B) or (C) of this paragraph (g)(2)(iii). A request for a determination must be addressed to: Director, Foreign Operations District, 1325 K St. NW.; Washington, DC 20225. A corporation that has requested a determination by the Director pursuant to the provisions of this paragraph is not thereby excused from taking any action required by section 897 or 1445 by the date on which such action would otherwise be due. However, the Director may grant a reasonable extension of time for the satisfaction of any requirement if the Director is satisfied that the corporation has not sought a determination pursuant to this paragraph (g)(2)(iii) for a principal purpose of delay.

(B) *Determination based on Director's information.* A corporation may request that the Director make a determination based on information contained in the Director's records, if:

(1) The corporation made a request to the second corporation for information as to the status of its interest no later than the fifth day following the first corporation's determination date, and

(2) The second corporation failed to respond to such request by the 30th day following the date the request was delivered to the second corporation.

Pending his resolution of such a request, the Director will generally grant an extension with respect to the change-of-status notification that may

otherwise be required pursuant to paragraph (h)(1)(ii) of this section. If the Director is unable to make a determination based on information available to him, he shall inform the corporation that the interest must be treated as a U.S. real property interest unless the corporation subsequently obtains either the necessary statement from the second corporation or a determination pursuant to paragraph (g)(2)(iii)(C) or (g)(2)(iv) of this section.

(C) *Determination based on information supplied by corporation.* A corporation may request that the Director make a determination based on information supplied by the corporation. Such information may be drawn, for example, from annual reports, financial statements, or records of the second corporation, and must establish to the satisfaction of the Director that the interest in the second corporation was not a U.S. real property interest as of the first corporation's determination date.

(D) *Determination by Director on his own motion.* Notwithstanding any other provision of this section, a corporation shall not treat an interest in a second corporation as a U.S. real property interest if the corporation is notified that the Director has upon his own motion determined that the interest in the second corporation is not a U.S. real property interest.

(iv) *Independent determination by corporation.* A corporation may independently determine whether or not an interest in a second corporation was a U.S. real property interest as of the first corporation's own determination date. Such determination must be based upon the best evidence available, drawn from annual reports, financial statements, records of the second corporation, or from any other source, that demonstrates to a reasonable certainty that the interest in the second corporation was not a U.S. real property interest. A corporation that makes an independent determination pursuant to this paragraph (g)(2)(iv) shall be subject to the special notification rule of paragraph (h)(1)(iii)(D) of the section. If the Director subsequently determines that the corporation's independent determination was incorrect, the corporation shall be sub-

ject to penalties for any past failure to comply with the requirements of section 897 or 1445 only if the corporation's determination was unreasonable in view of facts that the corporation knew or had reason to know.

(3) *Requirements not applicable.* If at any time during the calendar year any class of stock of a corporation is regularly traded on an established securities market, the requirements of this paragraph (g) shall not apply with respect to any holder of an interest in such corporation other than a person who holds an interest described in § 1.897-1(c)(2)(iii) (A) or (B). For example, a corporation determining whether it is a U.S. real property holding corporation need not ascertain from a regularly traded corporation in which it neither holds, nor has held during the period described in section 897(c)(1)(A)(ii), more than a 5 percent interest whether that regularly traded corporation is itself a U.S. real property holding corporation.

In addition, the requirements of this paragraph (g) do not apply to any holder of an interest in a domestically-controlled RETT, as defined in section 897(h)(4)(B).

(h) *Notice requirements applicable to corporations—(1) Statement to foreign interest-holder—(i) In general.* A domestic corporation must, within a reasonable period after receipt of a request from a foreign person holding an interest in it, inform that person whether the interest constitutes a U.S. real property interest. No particular form is required for this statement, which need only indicate the corporation's determination. The statement must be dated and signed by a responsible corporate officer who must verify under penalties of perjury that the statement is correct to his knowledge and belief.

(ii) *Required determination.* For purposes of the statement required by paragraph (h)(1)(i) of this section, an interest in a corporation is a U.S. real property interest if the corporation was a U.S. real property holding corporation on any determination date during the 5-year period ending on the date specified in the interest-holder's request, or on the date such request was received if no date is specified (or during such shorter period ending on

the date that is applicable pursuant to section 897(c)(1)(A)(ii). However, an interest in a corporation is not a U.S. real property interest if such interest is excluded under section 897(c)(1)(B).

(2) *Notice to the Internal Revenue Service.* If a foreign interest holder requests that a domestic corporation provide a statement described in paragraph (h)(1) of this section, then such corporation must provide a notice to the Internal Revenue Service in accordance with this paragraph (h)(2). No particular form is required for such notice, but the following must be provided:

(i) A statement that the notice is provided pursuant to the requirements of § 1.897-2(h)(2);

(ii) The name, address, and identifying number of the corporation providing the notice;

(iii) The name, address, and identifying number (if any) of the foreign interest holder that requested the statement (this information may be omitted from the notice if fully set forth in the statement to the foreign interest holder attached to the notice).

(iv) Whether the interest in question is a U.S. real property interest;

(v) A statement signed by a responsible corporate officer verifying under penalties of perjury that the notice (including any attachments thereto) is correct to his knowledge and belief. A copy of any statement provided to the foreign interest holder must be attached to the notice. The notice must be mailed to the Assistant Commissioner (International), Director, Office of Compliance, OP:I:C:E:666, 950 L'Enfant Plaza South, SW, COMSAT Building, Washington, DC 20024 on or before the 30th day after the statement referred to in § 1.897-2(h)(1) is mailed to the interest holder that requested it. Failure to mail such notice within the time period set forth in the preceding sentence will cause the statement provided pursuant to § 1.897-2(h)(1) to become an invalid statement.

(3) *Requirements not applicable.* The requirements of this paragraph (h) do not apply to domestically-controlled REITS, as defined in section 897(h)(4)(B). These requirements also do not apply to a corporation any class of stock in which is regularly traded on an established securities market at any

time during the calendar year. However, such a corporation may voluntarily choose to comply with the requirements of paragraph (h)(4) of this section.

(4) *Voluntary notice to Internal Revenue Service—*(i) *In general.* A domestic corporation which determines that it is not a U.S. real property holding corporation—

(A) On each of the applicable determination dates in a taxable year, or

(B) Pursuant to section 897(c)(1)(B), may attach to its income tax return for that year a statement informing the Internal Revenue Service of its determination. A corporation that has provided a voluntary notice described in this § 1.897-2(h)(4)(i) for the immediately preceding taxable year and that does not have an event described in § 1.897-2(c)(1) (ii), (iii) or (iv) prior to receiving a request from a foreign person under § 1.897-2(h)(1), is exempt from the notice requirement of § 1.897-2(h)(2).

(ii) *Early termination of real property holding corporation status.* A corporation that determines during the course of its taxable year that interests in it have ceased to be U.S. real property interests pursuant to the rules of section 897(c)(1)(B) may, on the day of its determination or thereafter, provide a statement to the Assistant Commissioner (International); Director, Office of Compliance, OP:I:C:E: 666; 950 L'Enfant Plaza South, SW.; COMSAT Building; Washington, DC 20024, informing the Service of its determination. No particular form is required but the statement must set forth the corporation's name, address, identification number, a brief statement regarding its determination and the date such determination was made. Such statement will enable foreign interest-holders to dispose of their interests without being subject to section 897(a), as provided in paragraph (g) of this section.

(5) *Supplemental statements—*(i) *By corporations with substantial intangible assets.* A corporation that is subject to the requirements of paragraph (h)(2) of this section (or that voluntarily complies with the requirements of paragraph (h)(4) of this section) must submit a supplemental statement to the Internal Revenue Service if—

(A) Such corporation values any of the intangible assets described in § 1.897-1(f)(1)(ii) (other than goodwill or going concern value) by a method other than the purchase price or book value methods described in § 1.897-1(o)(4); and

(B) The fair market value of such intangible assets equals or exceeds 25 percent of the total of the fair market values of the assets the corporation is considered to hold in accordance with the provisions of paragraphs (d) and (e) of this section.

The supplemental statement must inform the Internal Revenue Service that the corporation meets the criteria of subdivisions (A) and (B) of this paragraph (h)(5)(i), and must summarize the methods and calculations upon which the corporation's determination of the fair market value of its intangible assets is based. In addition, the supplemental statement must list any intangible assets that were purchased from any person that have been valued by the corporation at an amount other than their purchase price, and must provide a justification for such a departure from the purchase price. The supplemental statement must be attached to or incorporated in the statement provided under paragraph (h)(2) or (h)(4) of this section.

(ii) *Corporation not valuing goodwill or going concern value at purchase price.* A corporation that is subject to the requirements of paragraph (h)(2) of this section (or that voluntarily complies with the requirements of paragraph (h)(4) of this section) must submit a supplemental statement to the Internal Revenue Service if such corporation values goodwill or going concern value pursuant to § 1.897-1(o)(4)(iii). The supplemental statement must set forth that it is made pursuant to this paragraph (h)(5)(ii), and must summarize the methods and calculations upon which the corporation's determination of the fair market value of such intangible assets is based. In addition, the supplemental statement must list any such assets that were purchased from any person that have been valued by the corporation at an amount other than their purchase price, and must provide a justification for such a departure from the purchase price. The supplemental statement must be attached

to or incorporated in the statement provided under paragraph (h)(2) or (h)(4) of this section.

(iii) *Corporation using alternative U.S. real property holding corporation test.* A corporation that is subject to the requirements of paragraph (h)(2) of this section (or that voluntarily complies with the requirements of paragraph (h)(4) of this section) must submit a supplemental statement to the Internal Revenue Service if—

(A) Such corporation utilizes the rule of paragraph (b)(2) of this section (regarding the book values of assets held by the corporation) to presume that it is not a U.S. real property holding corporation; and

(B) Such corporation is engaged in or is planning to engage in a trade or business of mining, farming, or forestry, or of buying and selling or developing real property, or of leasing real property to tenants.

The supplemental statement must inform the Internal Revenue Service that the corporation meets the criteria of subdivisions (A) and (B) of this paragraph (h)(5)(iii), and must be attached to or incorporated in the statement provided under paragraph (h)(2) or (h)(4) of this section.

(iv) *Corporation determining real property holding corporation status of second corporation.* A corporation that is subject to the requirements of paragraph (h)(2) of this section (or that voluntarily complies with the requirements of paragraph (h)(4) of this section) must submit a supplemental statement to the Internal Revenue Service if such corporation independently determines whether or not an interest in a second corporation is a U.S. real property interest, pursuant to paragraph (g)(2)(iv) of this section. The supplemental statement must set forth that it is made pursuant to this paragraph (h)(5)(iv) and must briefly summarize the facts upon which the corporation's determination is based and the sources of the information relied upon by the corporation. The supplemental statement must be attached to or incorporated in the statement provided under paragraph (h)(2) or (h)(4) of this section.

(i) *Transition Rules—(1) General waiver of penalties for failure to file.* If a foreign

person disposed of an interest in a domestic corporation between June 18, 1980 and January 23, 1987, and such person establishes under the rules of paragraph (g) of this section at any time that the interest disposed of was not a U.S. real property interest, then such person shall not be subject to tax under section 897 and shall not be subject to penalties (or interest) for failure to file an income tax return with respect to such disposition.

(2) *Foreign persons that met the requirements of prior regulations.* A foreign person that disposed of an interest in a domestic corporation between June 18, 1980 and January 23, 1987, shall be deemed to have satisfied the requirements of paragraph (g) of this section with respect to such disposition if such person established under prior temporary or prior final regulations issued under section 897 that the interest disposed of was not a U.S. real property interest.

(Sec. 897 (94 Stat. 2683; 26 U.S.C. 897), sec. 6011 (68A Stat. 732; 26 U.S.C. 6011) and sec. 7805 (68A Stat. 917; 26 U.S.C. 7805) of the Internal Revenue Code of 1954)

[T.D. 7999, 49 FR 50702, Dec. 31, 1984; 50 FR 12531, Mar. 29, 1985; T.D. 8113, 51 FR 46627, Dec. 24, 1986; 52 FR 3796, 3916, Feb. 6, 1987]

§ 1.897-3 Election by foreign corporation to be treated as a domestic corporation under section 897(i).

(a) *Purpose and scope.* This section provides rules pursuant to which a foreign corporation may elect under section 897(i) to be treated as a domestic corporation for purposes of sections 897, 1445, and 6039C and the regulations thereunder. A foreign corporation with respect to which an election under section 897(i) is in effect is subject to all rules under sections 897 and 1445 that apply to domestic corporations. Thus, for example, if a foreign corporation that has made an election under section 897(i) is a U.S. real property holding corporation, interests in it are U.S. real property interests that are subject to withholding under section 1445, and any gain or loss from the disposition of such interests by a foreign person will be treated as effectively connected with a U.S. trade or business under section 897(a). Similarly, if a foreign corporation makes an election under sec-

tion 897(i), its distribution of a U.S. real property interest pursuant to section 301 will be subject to the carryover basis rule of section 897(f). However, an interest in an electing corporation is not a U.S. real property interest if following the election the interest is described in section 897(c)(1)(B) or § 1.897-1(c)(2) (subject to the exceptions of subdivisions (i) and (ii) of that section). In addition, section 897(d) will not apply to any distribution of a U.S. real property interest by such corporation or to any sale or exchange of such interest pursuant to a plan of complete liquidation under section 337. A foreign corporation that makes an election under section 897(i) shall not be treated as a domestic corporation for purposes of any other provision of the Code or regulations, except to the extent that it is required to consent to such treatment as a condition to making the election. For further information concerning the effect of an election under section 897(i) upon the withholding requirements of section 1445, see § 1.1445-7. An election under section 897(i) is the exclusive remedy of any foreign person claiming discriminatory treatment under any treaty with respect to the application of sections 897, 1445, and 6039C to a foreign corporation. Therefore, if a corporation does not make an effective election, relief under a non-discrimination article of any treaty shall not be otherwise available with respect to the application of sections 897, 1445, and 6039C to such corporation.

(b) *General conditions.* A foreign corporation may make an election under section 897(i) only if it meets all three of the following conditions.

(1) *Holding a U.S. real property interest.* The foreign corporation must hold a U.S. real property interest at the time of the election. This condition is satisfied when a U.S. real property interest is acquired simultaneously with the effective date of an election. For example, this condition is satisfied when real property is acquired in an exchange described in section 351 that is carried out simultaneously with the effective date of the election. This condition is also satisfied by a corporation that indirectly holds a U.S. real property interest through a partnership, trust, or estate.