(2) Exception for certain obligations. If transferred property denominated in a foreign currency—
   (i) Is denominated in the currency of the country in which the transferee foreign corporation is organized; and
   (ii) Was acquired in the ordinary course of the business of the transferor that will be carried on by the transferee foreign corporation,
then section 367(a)(1) shall apply to the transfer only to the extent that gain is required to be recognized with respect to previously realized income reflected in installment obligations subject to paragraph (c) of this section. The rule of this paragraph (d)(2) shall not apply to transfers of foreign currency.

(3) Limitation of gain required to be recognized. If section 367(a)(1) applies to a transfer of property described in this paragraph, then the gain required to be recognized shall be limited to—
   (i) The gain realized upon the transfer of property described in this paragraph (d), minus
   (ii) Any loss realized as part of the same transaction upon the transfer of property described in this paragraph (d).
This limitation applies in lieu of the rule in §1.367(a)–1T(b)(1). No loss shall be recognized with respect to property described in this paragraph (d).

(e) Intangible property. Regardless of use in an active trade or business, a transfer of intangible property pursuant to section 332 shall be subject to section 367(a)(1), unless it constitutes foreign goodwill or going concern value, as defined in §1.367(a)–1T(d)(5)(iii). For rules concerning transfers of intangible property pursuant to section 331 or 361, see section 367(d) and §1.367(d)–1T.

§ 1.367(a)–6T Transfer of foreign branch with previously deducted losses (temporary).

(a) In general. This section provides special rules relating to the transfer of the assets of a foreign branch with previously deducted losses. Paragraph (b) of this section provides generally that such losses must be recaptured by the recognition of the gain realized on the transfer. Paragraph (c) of this section sets forth rules concerning the character of, and limitations on, the gain required to be recognized. Paragraph (d) of this section defines the term previously deducted losses. Paragraph (e) of this section describes certain reductions that are made to the previously deducted losses before they are taken into income under this section. Finally, paragraph (g) of this section defines the term foreign branch.

(b) Recognition of gain required—(1) In general. If a U.S. person transfers any assets of a foreign branch to a foreign corporation in an exchange described in section 367(a)(1), then the transferor shall recognize gain equal to—
   (i) The sum of the previously deducted branch ordinary losses as defined and reduced in paragraphs (d) and (e) of this section; and
   (ii) The sum of the previously deducted branch capital losses as defined
and reduced in paragraphs (d) and (e) of this section.

(2) No active conduct exception. The rules of this paragraph (b) shall apply regardless of whether the assets of the foreign branch are transferred for use in the active conduct of a trade or business outside the United States.

(c) Special rules concerning gain recognized—(1) Character and source of gain. The gain described in paragraph (b)(1)(i) of this section shall be treated as ordinary income of the transferor, and the gain described in paragraph (b)(1)(ii) of this section shall be treated as long-term capital gain of the transferor. Gain that is recognized pursuant to the rules of this section shall be treated as foreign oil and gas extraction income (as defined in section 907) in the same proportion that previously deducted foreign oil and gas extraction losses bore to the total amount of previously deducted losses.

(2) Gain limitation. For a rule limiting the amount of gain required to be recognized under section 367(a) upon any transfer of property to a foreign corporation, including the transfer of assets of a foreign branch with previously deducted losses, see §1.367(d)–1T(b)(3).

(3) Foreign goodwill and going concern value. For purposes of this section, the assets of a foreign branch shall include foreign goodwill and going concern value related to the business of the foreign branch, as defined in §1.367(a)–1T(d)(5)(iii). Thus, gain realized upon the transfer of the foreign goodwill or going concern value of a foreign branch to a foreign corporation will be taken into account in computing the limitation on loss recapture under paragraph (d)(2) of this section.

(4) Transfers of certain intangible property. Gain realized on the transfer of intangible property (computed with reference to the fair market value of the intangible property as of the date of the transfer) that is an asset of a foreign branch shall be taken into account in computing the limitation on loss recapture under paragraph (c)(2) of this section. For rules relating to the crediting of gain recognized under this section against income deemed to arise by operation of section 367(d), see §1.367(d)–1T(g)(3).

(d) Previously deducted losses—(1) In general. This paragraph (d) provides rules for determining, for purposes of paragraph (b)(1) of this section, the previously deducted losses of a foreign branch any of whose assets are transferred to a foreign corporation in an exchange described in section 367(a)(1). Initially, the two previously deducted losses of a foreign branch for a taxable year are the total ordinary loss ("previously deducted branch ordinary loss") and the total capital loss ("previously deducted branch capital loss") that were realized by the foreign branch in that taxable year (a "branch loss year") prior to the transfer and that were or will be reflected on a U.S. income tax return of the transferor. The previously deducted branch ordinary loss for each branch loss year is reduced by expired net ordinary losses under paragraph (d)(2) of this section, while the previously deducted capital loss for each loss year is reduced by expired net capital losses under paragraph (d)(3) of this section. For each branch loss year, the remaining previously deducted branch ordinary loss and the remaining previously deducted branch capital loss are then reduced, proceeding from the first branch loss year to the last branch loss year, to reflect expired foreign tax credits under paragraph (d)(4) of this section. The reductions are made in the order of the taxable years in which the foreign tax credits arose. Finally, similar reductions are made to reflect expired investment credits under paragraph (d)(5) of this section.

(2) Reduction by expired net ordinary loss—(i) In general. The previously deducted branch ordinary loss for each branch loss year shall be reduced under this paragraph (d)(2) by the amount of any expired net ordinary loss with respect to that branch loss year. Expired net ordinary losses arising in years other than the branch loss year shall reduce the previously deducted branch ordinary loss for the branch loss year only to the extent that the previously deducted branch ordinary loss exceeds the net operating loss, if any, incurred by the transferor in the branch loss year. The previously deducted branch
ordinary losses shall be reduced pro-
ceeding from the first branch loss year
to the last branch loss year. For each
branch loss year, expired net operating
losses shall be applied to reduce the
previously deducted branch ordinary
loss for that year in the order in which
the expired net ordinary losses arose.

(ii) Existence of expired net ordinary
loss. An expired net ordinary loss exists
with respect to a branch loss year to the
extent that—

(A) The transferor incurred a net op-
erating loss (within the meaning of sec-
tion 172(c));

(B) That net operating loss arose in
the branch loss year or was available
for carryover or carryback to the
branch loss year under section 172(b)(1);

(C) That net operating loss has nei-
ther given rise to a net operating loss
deduction (within the meaning of sec-
tion 172(a)) for any taxable year prior
to the year of the transfer, nor given rise
to a reduction of any previously
deducted branch ordinary loss (pursu-
ant to paragraph (d)(2) of this section)
of any foreign branch of the transferor
upon a previous transfer to a foreign
corporation; and

(D) The period during which the
transferor may claim a net operating loss
deduction with respect to that net
operating loss has expired.

(3) Reduction by expired net capital
loss—(i) In general. The previously de-
ducted branch capital loss for each
branch loss year shall be reduced under
this paragraph (d)(3) by the amount of
any expired net capital loss with re-
spect to that branch loss year. Expired
net capital losses arising in years other
than the branch loss year shall reduce
the previously deducted branch capital
loss for the branch loss year only to the
extent that the previously de-
ducted branch capital loss exceeds the
net capital loss, if any, incurred by the
transferor in the branch loss year. The
previously deducted branch capital
losses shall be reduced proceeding from
the first branch loss year to the last
branch loss year. For each branch loss
year, expired net capital losses shall be
applied to reduce the previously de-
ducted branch capital loss for that year
in the order in which the expired net
capital losses arose.

(ii) Existence of expired net capital loss.
An expired net capital loss exists with
respect to a branch loss year to the ex-
tent that—

(A) The transferor incurred a net cap-
itual loss (within the meaning of section
1222(10));

(B) That net capital loss arose in the
branch loss year or was available for
carryover or carryback to the branch
loss year under section 1212;

(C) That net capital loss has neither
been allowed for any taxable year prior
to the year of the transfer, nor given rise
to a reduction of any previously
deducted branch capital loss (pursuant
to paragraph (c)(3) of this section) of
any foreign branch of the transferor
upon any previous transfer to a foreign
corporation; and

(D) The period during which the
transferor may claim a capital loss de-
donation with respect to that net cap-
itual loss has expired.

(4) Reduction for expired foreign tax
credit—(i) In general. The previously de-
ducted branch ordinary loss and the
previously deducted branch capital loss
for each branch loss year remaining
after the reductions described in para-
graph (d)(2) and (3) of this section shall
be further reduced under this para-
graph (d)(4) proportionately by the
amount of any expired foreign tax cred-
it loss equivalent with respect to that
branch loss year. The previously de-
ducted branch losses shall be reduced
proceeding from the first branch loss
year to the last branch loss year. For
each branch loss year, expired foreign
tax credit loss equivalents shall be ap-
plicated to reduce the previously deducted
branch loss for that year in the order
in which the expired foreign tax credits
arose.

(ii) Existence of foreign tax credit loss
equivalent. A foreign tax credit loss
equivalent exists with respect to a
branch loss year if—

(A) The transferor paid, accrued, or is
deemed under section 902 or 960 to have
paid creditable foreign taxes in a tax-
able year;

(B) The creditable foreign taxes were
paid, accrued, or deemed paid in the
branch loss year or were available for
carryover or carryback to the branch
loss year under section 904(c);
§ 1.367(a)–6T 26 CFR Ch. I (4–1–10 Edition)

(C) No foreign tax credit with respect to the foreign taxes paid, accrued, or deemed paid has been taken because of the operation of section 904(a) or similar limitations provided by the Code or an applicable treaty, and such taxes have not given rise to a reduction (pursuant to this paragraph (d)(5)) of any previously deducted branch loss of the foreign branch for a prior taxable year or of any previously deducted branch losses of any foreign branch of the transferor upon a prior transfer to a foreign corporation; and

(D) The period during which the transferor may claim a foreign tax credit for the foreign taxes paid, accrued, or deemed paid has expired.

(iii) Amount of foreign tax credit loss equivalent. The amount of the foreign tax credit loss equivalent for the branch loss year with respect to the creditable foreign taxes described in paragraph (d)(4)(ii) of this section is the amount of those creditable foreign taxes divided by the highest rate of tax to which the transferor was subject in the loss year.

(5) Reduction for expired investment credits—(i) In general. The previously deducted branch ordinary loss and the previously deducted branch capital loss for each branch loss year shall be further reduced under this paragraph (d)(5) proportionately by the amount of any expired investment credit loss equivalent with respect to that branch year. The previously deducted branch losses shall be reduced proceeding from the first branch loss year to the last branch loss year. For each branch loss year, expired investment credit loss equivalents shall be applied to reduce the previously deducted branch loss for that year in the order in which the expired investment credits were earned.

(ii) Existence of investment credit loss equivalent. An investment credit loss equivalent exists with respect to a branch loss year if—

(A) The transferor earned an investment credit (within the meaning of section 46(a)) in a taxable year;

(B) The investment credit was earned in the branch loss year or was available for carryover or carryback to the branch loss year under section 38;

(C) The investment credit earned by the transferor in the credit year has been denied by section 38(a) or by similar provisions of the Code and has not given rise to a reduction (pursuant to this paragraph (d)(5)) of any previously deducted branch loss of the foreign branch for a preceding taxable year or of the previously deducted losses of any foreign branch of the transferor upon any previous transfer to a foreign corporation; and

(D) The period during which the transferor may claim the investment credit has expired.

(iii) Amount of investment tax credit loss equivalent. The amount of the investment credit loss equivalent for the branch loss year with respect to the investment credit described in paragraph (d)(5)(ii) of this section is 85 percent of the amount of that investment credit divided by the highest rate of tax to which the transferor was subject in the loss year.

(e) Amounts that reduce previously deducted losses subject to recapture—(1) In general. This paragraph (e) describes five amounts that reduce the sum of the previously deducted branch ordinary losses and the sum of the previously deducted branch capital losses before they are taken into income under paragraph (b) of this section. Amounts representing ordinary income shall be applied to reduce first the sum of the previously deducted branch ordinary losses to the extent thereof, and then the sum of the previously deducted branch capital losses to the extent thereof. Similarly, amounts representing capital gains shall be applied to reduce first the sum of the previously deducted branch capital losses and then the sum of the previously deducted branch ordinary losses.

(2) Taxable income. The previously deducted losses shall be reduced by any taxable income of the foreign branch recognized through the close of the taxable year of the transfer, whether before or after any taxable year in which losses were incurred.

(3) Amounts currently recaptured under section 904(f)(3). The previously deducted losses shall be reduced by the amount recognized under section 904(f)(3) on account of the transfer.

(4) Gain recognized under section 367(a). The previously deducted branch
losses shall be reduced by any gain recognized pursuant to section 367(a)(1) (other than by reason of the provisions of this section) upon the transfer of the assets of the foreign branch to the foreign corporation.

(5) Amounts previously recaptured under section 904(f)(3)—(i) In general. The previously deducted branch losses shall be reduced by the portion of any amount recognized under section 904(f)(3) upon a previous transfer of property that was attributable to the losses of the foreign branch, provided that the amount did not reduce any gain otherwise required to be recognized under section 367(a)(3)(C) and this section (or Revenue Ruling 78–201, 1978–1 C.B. 91).

(ii) Portion attributable to the losses of the foreign branch—(A) Branch property. The full amount recognized under section 904(f)(3) upon a previous transfer of non-branch property that was attributable to the losses of the foreign branch shall be the sum, over the taxable years in which the transferor sustained an overall foreign loss some portion of which was recaptured on the disposition, of the recaptured portions of those overall foreign losses after multiplication by the following fraction:

\[
\text{Losses of the foreign branch for the year} \quad \text{All foreign losses for the year}
\]

(6) Amounts previously recognized under the rules of this section. The previously deducted losses shall be reduced by the amounts previously recognized under the rules of this section upon a previous transfer of assets of the foreign branch.

(ii) Example. The rules of paragraphs (b) through (e) of this section are illustrated by the following example.

Example. (1) Facts. X, a U.S. corporation, is a calendar year taxpayer. On January 1, 1981, X organized corporation Y, a country A subsidiary, and transferred to Y all of the assets of its country A branch, including goodwill and going concern value. During the period from January 1, 1981, through July 1, 1986, X's country branch earned income and incurred losses in the following amounts:

<table>
<thead>
<tr>
<th>COUNTRY A BRANCH</th>
<th>Ordinary income (loss)</th>
<th>Capital gain (loss)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1981</td>
<td>(200)</td>
<td>0</td>
</tr>
<tr>
<td>1982</td>
<td>(300)</td>
<td>(100)</td>
</tr>
<tr>
<td>1983</td>
<td>(400)</td>
<td>0</td>
</tr>
<tr>
<td>1984</td>
<td>(200)</td>
<td>0</td>
</tr>
<tr>
<td>1985</td>
<td>(100)</td>
<td>0</td>
</tr>
<tr>
<td>1986</td>
<td>50</td>
<td>0</td>
</tr>
</tbody>
</table>

At the time of the transfer of X's country A branch assets to Y, those assets had a fair market value of $2,500 and an adjusted basis of $1,000. For each of the assets, fair market value exceeded adjusted basis. X had no net capital loss or unused investment credit during any taxable year relevant to the transfer. In 1984, X incurred a net operating loss of $400, $300 of which was carried back to prior years. An additional $50 of the 1984 net operating loss was not used in any year prior to the transfer. In 1979, X paid creditable foreign taxes of $330 that could not be claimed as a credit in that year or any earlier year because of section 904. Of those foreign taxes, $100 were carried over and claimed as a credit in 1983, but the remaining $230 were not used in any year prior to the transfer. X was not required to recognize any gain under section 904(f)(3).
on account of the 1986 transfer or any prior transfer, X was not required to recognize gain upon the transfer under section 367(a) (other than by reason of the provisions of this section).

(ii) Previously deducted losses. The previously deducted losses of X’s country A branch are $575 of ordinary losses and $25 of capital losses, computed as follows: Initially, the branch has previously deducted ordinary losses of $1,000 ($200+$300+$400+$100), and previously deducted capital loss for 1982 is reduced from $300 to $75. (See paragraph (d)(1) of this section.) It reduces the previously deducted capital losses of $100. (See paragraph (d)(1) of this section.)

(iii) Expired losses and credits. Under the facts of this example, there are no reductions for expired net ordinary losses or expired net capital losses under paragraph (d)(2) or (3) of this section. However, the previously deducted losses are reduced proceeding from the first branch loss year to the last branch loss year to reflect the expired foreign tax credit from 1979. The amount of the foreign tax credit loss equivalent with respect to 1981 is $500 ($225/.46). It reduces the previously deducted losses for 1981 proportionately. Thus, the previously deducted ordinary loss for 1981 is reduced from $300 to $0. (See paragraph (d)(4) of this section.) The amount of the foreign tax credit loss equivalent with respect to 1982 is $300 ($500−$200, i.e., $138/.46). (See paragraph (d)(4)(ii)(C) of this section.) It reduces the previously deducted losses for 1982 proportionately. Thus, the previously deducted ordinary loss for 1982 is reduced from $300 to $75, and the previously deducted capital loss for 1982 is reduced from $100 to $25.

(iv) Further reductions. The previously deducted ordinary losses of $575 and the previously deducted capital losses of $25 are reduced by the taxable income earned by the branch prior to the date of the transfer ($250). (See paragraph (e)(2) of this section.) Since that income was ordinary income, it is applied first to reduce the previously deducted ordinary losses of $575 to $325. (See paragraph (e)(1) of this section.)

(v) Recapture. Since the gain realized by X upon its transfer of the branch assets to Y exceeds the sum of the previously deducted branch losses as defined and reduced above ($325+$25), the limitation in paragraph (c)(2) of this section does not apply. Thus, X is required to recognize $325 of ordinary income and $25 of long-term capital gain upon the transfer. (See paragraph (b) and (c)(1) of this section.)

(g) Definition of foreign branch—(1) In general. For purposes of this section, the term foreign branch means an integral business operation carried on by a U.S. person outside the United States. Whether the activities of a U.S. person outside the United States constitute a foreign branch operation must be determined under all the facts and circumstances. Evidence of the existence of a foreign branch includes, but is not limited to, the existence of a separate set of books and records, and the existence of an office or other fixed place of business used by employees or officers of the U.S. person in carrying out business activities outside the United States. Activities outside the United States shall be deemed to constitute a foreign branch for purposes of this section if the activities constitute a permanent establishment under the terms of a treaty between the United States and the country in which the activities are carried out. Any U.S. person may be treated as having a foreign branch for purposes of this section, whether that person is a corporation, partnership, trust, estate, or individual.

(2) More than one branch. If a U.S. person carries on more than one branch operation outside the United States, then the rules of this section must be separately applied with respect to each foreign branch that is transferred to a foreign corporation. Thus, the previously deducted losses of one branch may not be offset, for purposes of determining the gain required to be recognized under the rules of this section, by the income of another branch that is also transferred to a foreign corporation. Similarly, the losses of one branch shall not be recaptured upon a transfer of the assets of a separate branch. Whether the foreign activities of a U.S. person are carried out through more than one branch must be determined under all of the facts and circumstances. In general, a separate branch exists if a particular group of activities is sufficiently integrated to constitute a single business that could be operated as an independent enterprise. For purposes of determining the combination of activities that constitute a branch operation as defined in this paragraph (g), the nominal relationship among those activities shall not be controlling. Factors suggesting that nominally separate business operations constitute a single foreign branch include a substantial identity.
§ 1.367(a)–8

Gain recognition agreement requirements.

(a) Scope. This section provides the terms and conditions for a gain recognition agreement entered into by a United States person pursuant to §1.367(a)–3(b) through (e) in connection with a transfer of stock or securities to a foreign corporation pursuant to an exchange that would otherwise be subject to section 367(a)(1). Paragraph (b) of this section provides definitions and special rules. Paragraphs (c) through (h) of this section identify the form, content, and other conditions of a gain recognition agreement. Paragraph (i) of this section is reserved. Paragraph (j) of this section identifies certain events that may require gain to be recognized under a gain recognition agreement. Paragraph (k) of this section relating to property abandoned by the U.S. transferor.

(b) Anti-abuse rule. If—

(1) A U.S. person transfers property of a foreign branch to a domestic corporation for a principal purpose of avoiding the effect of this section; and

(2) The domestic corporation thereafter transfers the property of the foreign branch to a foreign corporation,

Then, solely for purposes of this section, that U.S. person shall be treated as having transferred the property of the branch directly to the foreign corporation. A U.S. person shall be presumed to have transferred property of a foreign branch for a principal purpose of avoiding the effect of this section if the property is transferred to the domestic corporation less than two years prior to the domestic corporation’s transfer of the property to a foreign corporation. This presumption may be rebutted by clear evidence that the subsequent transfer of the property was not contemplated at the time of the initial transfer to the domestic corporation and that avoidance of the effect of this section was not a principal purpose for the transaction. A transfer may have more than one principal purpose.

(i) Basis adjustments. Basis adjustments reflecting gain recognized pursuant to this section shall be made as described in §1.367(a)–1T(b)(4)(ii).

[T.D. 8087, 51 FR 17950, May 16, 1986]