the alien’s nonresidence may be overcome by proof—

(i) That the alien, at least six months before the date he so presents himself, has filed a declaration of his intention to become a citizen of the United States under the naturalization laws; or

(ii) That the alien, at least six months before the date he so presents himself, has filed Form 1078 or its equivalent; or

(iii) Of acts and statements of the alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident.

(2) Other aliens. In the case of other aliens, the presumption as to the alien’s nonresidence may be overcome by proof—

(i) That the alien has filed a declaration of his intention to become a citizen of the United States under the naturalization laws; or

(ii) That the alien has filed Form 1078 or its equivalent; or

(iii) Of acts and statements of the alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident.

(d) Certificate. If, in the application of paragraph (c)(1)(iii) or (2)(iii) of this section, the internal revenue officer or employee who examines the alien is in doubt as to the facts, such officer or employee may, to assist him in determining the facts, require a certificate or certificates setting forth the facts relied upon by the alien seeking to overcome the presumption. Each such certificate, which shall contain, or be verified by, a written declaration that it is made under the penalties of perjury, shall be executed by some credible person or persons, other than the alien and members of his family, who have known the alien at least six months before the date of execution of the certificate or certificates.

§ 1.871–5 Loss of residence by an alien.

An alien who has acquired residence in the United States retains his status as a resident until he abandons the same and actually departs from the United States. An intention to change his residence does not change his status as a resident alien to that of a nonresident alien. Thus, an alien who has acquired a residence in the United States is taxable as a resident for the remainder of his stay in the United States.

§ 1.871–6 Duty of withholding agent to determine status of alien payees.

For the obligation of a withholding agent to withhold the tax imposed by this section, see chapter 3 of the Internal Revenue Code and the regulations thereunder.


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

(a) Imposition of tax. (1) This section applies for purposes of determining the tax of a nonresident alien individual who at no time during the taxable year is engaged in trade or business in the United States. However, see also §1.871–8 where such individual is a student or trainee deemed to be engaged in trade or business in the United States or where he has an election in effect for the taxable year in respect to real property income. Except as otherwise provided in §1.871–12, a nonresident alien individual to whom this section applies is not subject to the tax imposed by section 1 or section 1201(b) but, pursuant to the provision of section 871(a), is liable to a flat tax of 30 percent upon the aggregate of the amounts determined under paragraphs (b), (c), and (d) of this section which are received during the taxable year from sources within the United States. Except as specifically provided in such paragraphs, such amounts do not include gains from the sale or exchange of property. To determine the source of such amounts, see sections 861 through 863, and the regulations thereunder.

(2) The tax of 30 percent is imposed by section 871(a) upon an amount only to the extent the amount constitutes gross income. Thus, for example, the amount of an annuity which is subject to such tax shall be determined in accordance with section 72.

(3) Deductions shall not be allowed in determining the amount subject to tax.
under this section except that losses from sales or exchanges of capital assets shall be allowed to the extent provided in section 871(a)(2) and paragraph (d) of this section.

(4) Except as provided in §§1.871–9 and 1.871–10, a nonresident alien individual not engaged in trade or business in the United States during the taxable year has no income, gain, or loss for the taxable year which is effectively connected for the taxable year with the conduct of a trade or business in the United States. See section 864(c)(1)(B) and §1.864–3.

(5) Gains and losses which, by reason of section 871(d) and §1.871–10, are treated as gains or losses which are effectively connected for the taxable year with the conduct of a trade or business in the United States by the nonresident alien individual shall not be taken into account in determining the tax under this section. See, for example, paragraph (c)(2) of §1.871–10.

(6) For special rules applicable in determining the tax of certain nonresident alien individuals, see paragraph (b) of §1.871–1.

(b) Fixed or determinable annual or periodical income—(1) General rule. The tax of 30 percent imposed by section 871(a)(1) applies to the gross amount received from sources within the United States as fixed or determinable annual or periodical gains, profits, or income. Specific items of fixed or determinable annual or periodical income are enumerated in section 871(a)(1)(A) as interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, and emoluments, but other items of fixed or determinable annual or periodical gains, profits, or income are also subject to the tax, as, for instance, royalties, including royalties for the use of patents, copyrights, secret processes and formulas, and other like property. As to the determination of fixed or determinable annual or periodical income see §1.1441–2(b). For special rules treating gain on the disposition of section 306 stock as fixed or determinable annual or periodical income for purposes of section 871(a), see section 306(f) and paragraph (h) of §1.306–3.

(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)(i)(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).

(c) Other income and gains—(1) Items subject to tax. The tax of 30 percent imposed by section 871(a)(1) also applies to the following gains received during the taxable year from sources within the United States:

(i) Gains described in section 402(a)(2), relating to the treatment of total distributions from certain employees' trusts; section 403(a)(2), relating to treatment of certain payments under certain employee annuity plans; and section 631(b) or (c), relating to treatment of gain on the disposal of timber, coal, or iron ore with a retained economic interest;

(ii) [Reserved]

(iii) Gains on transfers described in section 1235, relating to certain transfers of patent rights, made on or before October 4, 1966; and
(iv) Gains from the sale or exchange after October 4, 1966, of patents, copyrights, secret processes and formulas, goodwill, trademarks, trade brands, franchises, or other like property, or of any interest in any such property, to the extent the gains are from payments (whether in a lump sum or in installments) which are contingent on the productivity, use or disposition of the property or interest sold or exchanged, or from payments which are treated under section 871(e) and §1.871–11 as being so contingent.

(2) Nonapplication of 183-day rule. The provisions of section 871(a)(2), relating to gains from the sale or exchange of capital assets, and paragraph (d)(2) of this section do not apply to the gains described in this paragraph; as a consequence, the taxpayer receiving gains described in subparagraph (1) of this paragraph during a taxable year is subject to the tax of 30 percent thereon without regard to the 183-day rule contained in such provisions.

(3) Determination of amount of gain. The tax of 30 percent imposed upon the gains described in subparagraph (1) of this paragraph applies to the full amount of the gains and is determined (i) without regard to the alternative tax imposed by section 1201(b) upon the excess of the net long-term capital gain over the net short-term capital loss; (ii) without regard to the deduction allowed by section 1202 in respect of capital gains; (iii) without regard to section 1231, relating to property used in the trade or business and involuntary conversions; and (iv), except in the case of gains described in subparagraph (1)(ii) of this paragraph, whether or not the gains are considered to be gains from the sale or exchange of property which is a capital asset.

(d) Gains from sale or exchange of capital assets—(1) Gains subject to tax. The tax of 30 percent imposed by section 871(a)(2) applies to the excess of gains derived from sources within the United States over losses allocable to sources within the United States, which are derived from the sale or exchange of capital assets, determined in accordance with the provisions of subparagraphs (2) through (4) of this paragraph.

(2) Presence in the United States 183 days or more. (i) If the nonresident alien individual has been present in the United States for a period or periods aggregating 183 days or more during the taxable year, he is liable to a tax of 30 percent upon the amount by which his gains, derived from sources within the United States, from sales or exchanges of capital assets effected at any time during the year exceed his losses, allocable to sources within the United States, from sales or exchanges of capital assets effected at any time during that year. Gains and losses from sales or exchanges of capital assets effected at any time during such taxable year are to be taken into account for this purpose even though the nonresident alien individual is not present in the United States at the time the sales or exchanges are effected. In addition, if the nonresident alien individual has been present in the United States for a period or periods aggregating 183 days or more during the taxable year, gains and losses for such taxable year from sales or exchanges of capital assets effected during a previous taxable year beginning after December 31, 1966, are to be taken into account, but only if he was also present in the United States during such previous taxable year for a period or periods aggregating 183 days or more.

(ii) If the nonresident alien individual has not been present in the United States during the taxable year, or if he has been present in the United States for a period or periods aggregating less than 183 days during the taxable year, gains and losses from sales or exchanges of capital assets effected during the year are not to be taken into account, except as required by paragraph (c) of this section, in determining the tax of such individual even though the sales or exchanges are effected during his presence in the United States. Moreover, gains and losses for such taxable year from sales or exchanges of capital assets effected during a previous taxable year beginning after December 31, 1966, are not to be taken into account, even though the nonresident alien individual was present in the United States during such previous year for a period or periods aggregating 183 days or more.

(iii) For purposes of this subparagraph, a nonresident alien individual is
Example 1. B, a nonresident alien individual not engaged in trade or business in the United States and using the calendar year as the taxable year, is present in the United States from May 1, 1971, to November 15, 1971, a period of more than 182 days. While present in the United States, B effects for his own account on various dates a number of transactions in stocks and securities on the stock exchange, as a result of which he has recognized capital gains of $10,000. During the period from January 1, 1971, to April 30, 1971, he carries out similar transactions through an agent in the United States, as a result of which B has recognized capital gains of $5,000. On December 15, 1971, through an agent in the United States B sells a capital asset on the installment plan, no payments being made by the purchaser in 1971. During 1972, B receives installment payments of $50,000 on the installment sale made in 1971, and the capital gain from sources within the United States for 1972 attributable to such payments is $12,500. In addition, during the period from January 1, 1972, to May 31, 1972, B effects for his own account, through an agent in the United States, a number of transactions in stocks and securities on the stock exchange, as a result of which B has recognized capital gains of $20,000. At no time during 1972 is B present in the United States or engaged in trade or business in the United States. Accordingly, B is not subject to tax for 1971 or 1972 on any of his recognized capital gains.

Example 2. The facts are the same as in example 1 except that B is present in the United States from June 15, 1972, to December 31, 1972, a period of more than 182 days. Accordingly, B is subject to tax under section 871(a)(2) for 1971 on his capital gains of $15,000 from the transactions in that year on the stock exchange. He is also subject to tax under section 871(a)(2) for 1972 on his capital gains of $32,500 ($12,500 from the installment sale in 1971 plus $20,000 from the transactions in 1972 on the stock exchange).
year will be treated as a change in the
taxpayer’s annual accounting period to
which section 442 applies, and the
change must be authorized under this
part (Income Tax Regulations) or prior
approval must be obtained by filing an
application on Form 1128 in accordance
with paragraph (b) of §1.442–1. If in the
course of his taxable year the non-
resident alien individual changes his
status from that of a citizen or resi-
dent of the United States to that of a
nonresident alien individual, or vice versa, the determination of whether
the individual has been present in the
United States for 183 days or more dur-
ing the taxable year shall be made by
taking into account the entire taxable
year, and not just that part of the tax-
able year during which he has the sta-
tus of a nonresident alien individual.

(ii) Definition of “day”. The term
“day”, as used in subparagraph (2) of
this paragraph, means a calendar day
during any portion of which the non-
resident alien individual is physically
present in the United States (within
the meaning of sections 7701(a)(9) and
638) except that, in the case of an indi-
vidual who is a resident of Canada or
Mexico and, in the normal course of his
employment in transportation service
touching points within both Canada or
Mexico and the United States, per-
forms personal services in both the for-
eign country and the United States,
the following rules shall apply:

(a) The performance of labor or per-
sonal services during 8 hours or more
in any 1 day within the United States
shall be considered as 1 day in the
United States, except that if a period
of more or less than 8 hours is consid-
ered a full workday in the transpor-
tation job involved, such period shall
be considered as 1 day within the
United States.

(b) The performance of labor or per-
sonal services during less than 8 hours
in any day in the United States shall,
except as provided in (a) of this sub-
division, be considered as a fractional
part of a day in the United States. The
total number of hours during which
such services are performed in the
United States during the taxable year,
when divided by eight, shall be the
number of days during which such indi-
vidual shall be considered present in
the United States during the taxable
year.

(c) The aggregate number of days de-
determined under (a) and (b) of this sub-
division shall be considered the total
number of days during which such indi-
vidual is present in the United States
during the taxable year.

(4) Determination of amount of excess
 gains—(i) In general. For the purpose of
determining the excess of gains over
losses subject to tax under this para-
graph, gains and losses shall be taken
into account only if, and to the extent
that, they would be recognized and
taken into account if the nonresident
alien individual were engaged in trade
or business in the United States during
the taxable year and such gains and
losses were effectively connected for
such year with the conduct of a trade
or business in the United States by
such individual. However, in deter-
mining such excess of gains over losses
no deduction may be taken under sec-
section 1202, relating to the deduction for
capital gains, or section 1212, relating
to the capital loss carryover. Thus, for
example, in determining such excess
gains all amounts considered under
chapter 1 of the Code as gains or losses
from the sale or exchange of capital as-
sets shall be taken into account, except
those gains which are described in sec-
section 871(a)(1) (B) or (D) and taken into
account under paragraph (c) of this sec-
tion and are considered to be gains
from the sale or exchange of capital as-
sets. Also, for example, a loss described
in section 631 (b) or (c) which is consid-
ered to be a loss from the sale of a cap-
itual asset shall be taken into account in
determining the excess gains which
are subject to tax under this para-
graph. In further illustration, in deter-
mining such excess gains no deduction
shall be allowed, pursuant to the provi-
sions of section 267, for losses from
sales or exchanges of property between
related taxpayers. Any gains which are
taken into account under section
871(a)(1) and paragraph (c) of this sec-
tion shall not be taken into account in
applying section 1231 for purposes of
this paragraph. Gains and losses are to
be taken into account under this para-
graph whether they are short-term or
long-term capital gains or losses with-
in the meaning of section 1222.
(ii) Gains not included. The provisions of this paragraph do not apply to any gains described in section 871(a)(1) (B) or (D), and in subdivision (i), (iii), or (iv) of paragraph (c)(1) of this section, which are considered to be gains from the sale or exchange of capital assets.

(iii) Allowance of losses. In determining the excess of gains over losses subject to tax under this paragraph losses shall be allowed only to the extent provided by section 165(c). Losses from sales or exchanges of capital assets in excess of gains from sales or exchanges of capital assets shall not be taken into account.

(e) Credits against tax. The credits allowed by section 31 (relating to tax withheld on wages), by section 32 (relating to tax withheld at source on nonresident aliens), by section 39 (relating to certain uses of gasoline and lubricating oil), and by section 6402 (relating to overpayments of tax) shall be allowed against the tax of a nonresident alien individual determined in accordance with this section.

(f) Effective date. 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. For corresponding rules applicable to taxable years beginning before January 1, 1967, see 26 CFR 1.871–7 (b) and (c) (Revised as of January 1, 1971).


§ 1.871–8 Taxation of nonresident alien individuals engaged in U.S. business or treated as having effectively connected income.

(a) Segregation of income. This section applies for purposes of determining the tax of a nonresident alien individual who at any time during the taxable year is engaged in trade or business in the United States. It also applies for purposes of determining the tax of a nonresident alien student or trainee who is deemed under section 871(c) and § 1.871–9 to be engaged in trade or business in the United States but has an election in effect for the taxable year under section 871(d) and § 1.871–10 in respect to real property income. A nonresident alien individual to whom this section applies must segregate his gross income for the taxable year into two categories, namely (1) the income which is effectively connected for the taxable year with the conduct of a trade or business in the United States by that individual, and (2) the income which is not effectively connected for the taxable year with the conduct of a trade or business in the United States by that individual. A separate tax shall then be determined upon each such category of income, as provided in paragraph (b) of this section. The determination of whether income or gain is or is not effectively connected for the taxable year with the conduct of a trade or business in the United States includes all income which is treated under section 871(c) or (d) and § 1.871–9 or § 1.871–10 as income which is effectively connected for such year with the conduct of a trade or business in the United States by the nonresident alien individual.

(b) Imposition of tax—(1) Income not effectively connected with the conduct of a trade or business in the United States. If a nonresident alien individual who is engaged in trade or business in the United States at any time during the taxable year derives during such year from sources within the United States income or gains described in section 871(a)(1), and paragraph (b) or (c) of § 1.871–7 or gains from the sale or exchange of capital assets determined as provided in section 871(a)(2) and paragraph (d) of § 1.871–7, which are not effectively connected for the taxable year with the conduct of a trade or business in the United States by that individual, such income or gains shall be subject to a flat tax of 30 percent of the aggregate amount of such items. This tax shall be determined in the