Example 2. (i) P, a domestic corporation, has a calendar taxable year. On March 10, 1988, P recognizes a $100 capital loss on the sale of N, a foreign corporation. Pursuant to sections 1211(a) and 1212(a), the loss is not allowed in 1988 and is carried back to the 1985 taxable year. The loss is allocated against foreign source income under §1.861–8(e)(7) on P’s federal income tax return for 1985 and increases an overall foreign loss account under §1.904(f)-(1).

(ii) In 1999, P chooses to apply this section to all losses recognized in its 1987 taxable year and in all subsequent years. Consequently, the loss on the sale of N is allocated against U.S. source income under paragraph (a)(1) of this section. Allocation of the loss against U.S. source income reduces P’s overall foreign loss account and increases P’s tax liability in 2 years: 1990, a year that will not be open for assessment on June 30, 1999, and 1997, a year that will be open for assessment on June 30, 1999. Pursuant to paragraph (e)(2)(i) of this section, P must file an amended federal income tax return that reflects the rules of this section for 1997, but not for 1999.

Example 3. (i) P, a domestic corporation, has a calendar taxable year. On March 10, 1989, P recognizes a $100 capital loss on the sale of N, a foreign corporation. The loss is allocated against foreign source income under §1.861–8(e)(7) on P’s federal income tax return for 1989 and results in excess foreign tax credits for that year. The excess credit is carried back to 1988, pursuant to section 904(c). In 1999, P chooses to apply this section to all losses recognized in its 1989 taxable year and in all subsequent years. On June 30, 1999, P’s 1988 taxable year is closed for assessment, but P’s 1989 taxable year is open with respect to claims for refund.

(ii) Because P chooses to apply this section to its 1989 taxable year, the loss on the sale of N is allocated against U.S. source income under paragraph (a)(1) of this section. Allocation of the loss against U.S. source income would have permitted the foreign tax credit to be used in 1989, reducing P’s tax liability in 1989. Nevertheless, under paragraph (e)(2)(ii) of this section, because the credit was carried back to 1988, P may not claim the foreign tax credit in 1989.

§ 1.871–2

Determining residence of alien individuals.

(a) General. The term nonresident alien individual means an individual whose residence is not within the United States, and who is not a citizen of the United States. The term includes a nonresident alien fiduciary. For such purpose the term fiduciary shall have the meaning assigned to it by section 7701(a)(6) and the regulations in part 301 of this chapter (Regulations on Procedure and Administration). For presumption as to an alien’s nonresidence, see paragraph (b) of § 1.871–4.

(b) Residence defined. An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but, if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

(c) Effective/applicability date. This section shall apply for taxable years beginning after December 31, 1966. For corresponding rules applicable to taxable years beginning before January 1, 1967, see 26 CFR 1.871–1 and 1.871–7(a) (Revised as of January 1, 1971). Paragraph (b)(1)(iii) of this section applies to taxable years ending after April 9, 2008.