(2) With respect to property that will be leased by the transferee to third persons, the transferee satisfies the conditions set forth in §1.367(a)-4T(c)(1) or (2).

(3) [Reserved] For further guidance see §1.367(a)-5T(3).


§ 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 long-term capital gain of the transferor. Gain that is recognized pursuant to the rules of this section shall be treated as income from sources outside the United States. Such recognized gain 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(a)-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 (c)(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

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loss’) and the total capital loss (‘pre-
viously 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 ordi-
nary 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 ex-
pired net capital losses under para-
graph (d)(3) of this section. For each
branch loss year, the remaining pre-
viously 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 re-
fect expired foreign tax credits under
paragraph (d)(4) of this section. The re-
ductions are made in the order of the
taxable years in which the foreign tax
credits arose. Finally, similar reduc-
tions are made to reflect expired in-
vestment credits under paragraph (d)(5)
of this section.

(2) Reduction by expired net ordinary
loss—(i) In general. The previously de-
ducted 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 re-
spect 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 de-
ducted 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-
ital 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 1222;

(C) That net capital loss has neither
been allowed for any taxable year prior

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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 deduction with respect to that net capital loss has expired.

(4) Reduction for expired foreign tax credit—(i) In general. The previously deducted branch ordinary loss and the previously deducted branch capital loss for each branch loss year remaining after the reductions described in paragraph (d)(2) and (3) of this section shall be further reduced under this paragraph (d)(4) proportionately by the amount of any expired foreign tax credit loss equivalent with respect to that branch loss 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 foreign tax credit loss equivalents shall be applied 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 taxable 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);
(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)(4)(i)) 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)(i) 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 loss 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 39;
(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 property of the branch shall be treated as attributable to the losses of the foreign branch.

(B) **Non-branch property.** The portion of the amount previously recognized under section 904(f)(3) upon a 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:

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

For purposes of this fraction, the term **losses of the foreign branch for the year** means the losses of the foreign branch that were taken into account under section 904(f)(2) in determining the amount of the transferor’s overall foreign loss for the year, and the term **all foreign losses for the year** means all of the losses of the transferor that were taken into account under section 904(f)(2).

(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...
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upon a previous transfer of assets of the foreign branch.

(f) 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 established a branch in foreign country A to manufacture and sell X’s products in country A. On July 1, 1986, 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 A branch earned income and incurred losses in the following amounts:

<table>
<thead>
<tr>
<th>YEAR</th>
<th>ORDINARY LOSS</th>
<th>CAPITAL 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, $200 of which was carried back to prior years. An additional $50 of the 1984 net operating loss was carried over to 1985. The remaining $150 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, $300 were carried over and claimed as a credit in 1983, but the remaining $30 were not used in any year prior to the transfer. X was not required to recognize any gain under section 966(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 losses of $100. (See paragraph (d)(1) of this section.)

(ii) Expended 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 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 $325 to $25, 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 ($250+$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
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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 of products, customers, operational facilities, operational processes, accounting and record-keeping functions, management, employees, distribution channels, or sales and purchasing forces. For examples of the application of the principles of this paragraph (g)(2), see Revenue Ruling 81–82, 1981–1 C.B. 127.

(3) Consolidated group. For purposes of this section, the activities of each of two domestic corporations outside the United States will be considered to constitute a single foreign branch if—

(i) The two corporations are members of the same consolidated group of corporations; and

(ii) The activities of the two corporations in the aggregate would constitute a single foreign branch if conducted by a single corporation.

Notwithstanding the preceding rule of this paragraph (g)(3), gains of a foreign branch of a domestic corporation arising in a year in which that corporation did not file a consolidated return with a second domestic corporation shall not be applied to reduce the previously deducted losses of a foreign branch of the second corporation (but may be applied to reduce such losses of the foreign branch of the first corporation) upon the transfer of the two branches to a foreign corporation, even though the two domestic corporations file a consolidated return for the year in which the transfer occurs and the two branches are considered at that time to constitute a single foreign branch. For an example of the application of the principles of this paragraph (g)(3), see Revenue Ruling 81–89, 1981–1 C.B. 129.

(4) Property not transferred. A U.S. transferor’s failure to transfer any property of a foreign branch shall be irrelevant to the determination of the previously deducted losses of the branch subject to recapture under the rules of this section. Thus, if the activities with respect to untransferred property constituted a part of the branch operation under the rules of this paragraph (g), then the losses generated by those activities shall be subject to recapture, notwithstanding the failure to transfer the property. For an example of the application of the principles of this paragraph (g)(4), see Revenue Ruling 80–247, 1980–2 C.B. 127, 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]

§ 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 provides exceptions for certain events that would otherwise require gain to be recognized under a gain recognition agreement. Paragraph (l) of this section is reserved. Paragraph (m) of this section provides rules that require gain to be recognized in connection with certain events to which an exception under paragraph (k) of this section otherwise applies. Paragraph (n) of this section provides special rules in the case of a distribution of property with respect to stock to which section 301 applies. Paragraph (o) of this section provides rules for certain transactions that terminate or reduce the amount of gain subject to a gain recognition agreement. Paragraph (p) of this section provides relief for reasonable cause for certain failures to comply with the requirements of this section. Paragraph (q) of this section provides examples that illustrate the rules of the section. Paragraph (r) of this section provides effective dates for the provisions of this section.

(b) Definitions and special rules. The following definitions and special rules apply for purposes of this section.

(1) Definitions—(i) Asset reorganization—(A) General rule. Except as provided in paragraph (b)(1)(ii)(B) of this section, an asset reorganization is a reorganization described in section 368(a)(1) that involves an exchange of property described in section 361(a) or (b) (a section 361 exchange).

(ii) A consolidated group has the meaning set forth in §1.1502–1(h).

(iii) Disposition. Except as provided in this paragraph (b)(1)(iii), a disposition includes any transfer that would constitute a disposition for any purpose of the Internal Revenue Code. A disposition includes an indirect disposition of the stock of the transferred corporation as described in §1.367(a)–3(d). Except as provided in paragraph (n)(1) of this section, a disposition does not include the receipt of a distribution of property with respect to stock to which section 301 applies (including by reason of section 302(d)). See paragraphs (n)(2) and (o)(3) of this section for rules that apply if gain is recognized under section 301(a) of (b) (a section 361 exchange).

(B) Exceptions. An asset reorganization does not include the following:

(1) A reorganization described in section 368(a)(1)(D) or (G) if the requirements of section 354(b)(1)(A) and (B) are not met.

(2) For purposes of paragraphs (j)(2)(i)(B), (k)(6)(ii), and (k)(6)(iii) of this section, a triangular asset reorganization. For rules applicable to a triangular asset reorganization, see paragraph (k)(7) of this section.

(ii) A consolidated group has the meaning set forth in §1.1502–1(h).

(iii) Disposition. Except as provided in this paragraph (b)(1)(iii), a disposition includes any transfer that would constitute a disposition for any purpose of the Internal Revenue Code. A disposition includes an indirect disposition of the stock of the transferred corporation as described in §1.367(a)–3(d). Except as provided in paragraph (n)(1) of this section, a disposition does not include the receipt of a distribution of property with respect to stock to which section 301 applies (including by reason of section 302(d)). See paragraphs (n)(2) and (o)(3) of this section for rules that apply if gain is recognized under section 301(a) of (b) (a section 361 exchange).

Complete or partial disposition by installment sale (under section 453) shall be