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States, and irrespective of whether any such employee or agent has discretionary authority to make decisions in effecting such transactions. The volume of commodity transactions effect during the taxable year shall not be taken into account in determining whether the taxpayer is engaged in trade or business within the United States. This subparagraph shall not apply to the effecting of transactions in the United States for the account of a dealer in commodities.

(ii) Partnerships. A nonresident alien individual, foreign partnership, foreign estate, foreign trust, or foreign corporation shall not be considered to be engaged in trade or business within the United States solely because such person is a member of a partnership (whether domestic or foreign) which, pursuant to discretionary authority granted to such partnership by such person, effects transactions in the United States in commodities for the account of such partnership. This subdivision shall not apply to any member of a partnership which is a dealer in commodities.

(iii) Illustration. The application of this subparagraph may be illustrated by the following example:

Example. Foreign corporation X, a calendar year taxpayer, is engaged as a merchant in the business of purchasing grain in South America and selling such cash grain outside the United States under long-term contracts for delivery in foreign countries. Foreign corporation X consummates a sale of 100,000 bushels of cash grain in February 1967 for July delivery to Sweden. Because foreign corporation X does not actually own such grain at the time of the sales transaction, such corporation buys as a hedge a July “futures contract” for delivery of 100,000 bushels of grain, in order to protect itself from loss by reason of a possible rise in the price of grain between February and July. The “futures contract” is ordered through domestic corporation Y, a futures commission merchant registered under the Commodity Exchange Act. Foreign corporation X is not engaged in trade or business within the United States during 1967 solely by reason of its effecting of such futures contract for its own account through domestic corporation Y.

(3) Definition of commodity. For purposes of section 864(b)(2)(B) and this paragraph the term “commodities” does not include goods or merchandise in the ordinary channels of commerce.

(e) Other rules. The fact that a person is not determined by reason of this section to be not engaged in trade or business with the United States is not to be considered a determination that such person is engaged in trade or business within the United States. Whether or not such person is engaged in trade or business within the United States shall be determined on the basis of the facts and circumstances in each case. For other rules relating to the determination of whether a taxpayer is engaged in trade or business in the United States see section 875 and the regulations thereunder.

(f) Effective date. The provisions of this section shall apply only in the case of taxable years beginning after December 31, 1966.


§ 1.864–3 Rules for determining income effectively connected with U.S. business of nonresident aliens or foreign corporations.

(a) In general. For purposes of the Internal Revenue Code, in the case of a nonresident alien individual or a foreign corporation that is engaged in a trade or business in the United States at any time during the taxable year, the rules set forth in §§1.864–4 through 1.864–7 and this section shall apply in determining whether income, gain, or loss shall be treated as effectively connected for a taxable year beginning after December 31, 1966, with the conduct of a trade or business in the United States. Except as provided in sections 871 (c) and (d) and 882 (d) and (e), and the regulations thereunder, in the case of a nonresident alien individual or a foreign corporation that is engaged in a trade or business in the United States, no income, gain, or loss shall be treated as effectively connected for the taxable year with the conduct of a trade or business in the United States.
Example 2. In the course of a trade or business in the United States by R, a foreign holding company, during the taxable year ending after December 31, 1971, it receives or accrues a dividend of $10,000 on its investment in an investment subsidiary of its own investment corporation. This section applies only to a nonresident alien individual or a domestic corporation that is engaged in a trade or business in the United States at some time during a taxable year beginning after December 31, 1971.

Example 3. In 1971, B, a nonresident alien individual, whose tax year is the calendar year, is engaged in a trade or business in the United States by reason of the sales activities it carries on in the United States. On December 31, 1971, B is engaged in a trade or business in the United States. In January of 1972, B terminates his employment with M and departs from the United States. At no time during 1972 is B engaged in a trade or business in the United States. The general rule prescribed by the preceding sentence shall apply even though the income, gain, or loss would have been treated as effectively connected with the conduct of a trade or business in the United States by R during the taxable year from its domestic subsidiary corporations, is effectively connected for 1971 with the conduct of a trade or business in the United States by B.

Example 4. During the months of June through December 1971, B, a nonresident alien individual who uses the calendar year as the taxable year, is engaged in a trade or business in the United States by reason of the sales activities it carries on in the United States. On December 31, 1971, B is engaged in a trade or business in the United States. In January of 1972, B terminates his employment with M and departs from the United States. At no time during 1972 is B engaged in a trade or business in the United States. The general rule prescribed by the preceding sentence shall apply even though the income, gain, or loss would have been treated as effectively connected with the conduct of a trade or business in the United States by B.

Example 5. In 1971, B, a nonresident alien individual who uses the calendar year as the taxable year, is engaged in a trade or business in the United States by reason of the sales activities it carries on in the United States. On December 31, 1971, B is engaged in a trade or business in the United States. In January of 1972, B terminates his employment with M and departs from the United States. At no time during 1972 is B engaged in a trade or business in the United States. The general rule prescribed by the preceding sentence shall apply even though the income, gain, or loss would have been treated as effectively connected with the conduct of a trade or business in the United States by B.

Example 6. In 1971, B, a nonresident alien individual who uses the calendar year as the taxable year, is engaged in a trade or business in the United States by reason of the sales activities it carries on in the United States. On December 31, 1971, B is engaged in a trade or business in the United States. In January of 1972, B terminates his employment with M and departs from the United States. At no time during 1972 is B engaged in a trade or business in the United States. The general rule prescribed by the preceding sentence shall apply even though the income, gain, or loss would have been treated as effectively connected with the conduct of a trade or business in the United States by B.

Example 7. In 1971, B, a nonresident alien individual who uses the calendar year as the taxable year, is engaged in a trade or business in the United States by reason of the sales activities it carries on in the United States. On December 31, 1971, B is engaged in a trade or business in the United States. In January of 1972, B terminates his employment with M and departs from the United States. At no time during 1972 is B engaged in a trade or business in the United States. The general rule prescribed by the preceding sentence shall apply even though the income, gain, or loss would have been treated as effectively connected with the conduct of a trade or business in the United States by B.