(2) Section 901(f). Section 901(f) (relating to certain payments with respect to oil and gas not considered as taxes) applies before section 907. Taxes disallowed by section 901(f) are added to the cost or inventory amount of oil or gas.

§1.907(c)–2 Section 907(c)(3) items (for taxable years beginning after December 31, 1982).

(a) Scope. This section provides rules relating to certain items listed in section 907(c)(3). The rules of this section are expressed in terms of FORI but apply for determining FOGEI by substituting “FOGEI” for “FORI” whenever appropriate. FOGEI does not include interest described in section 907(c)(3)(A). Dividends paid prior to January 1, 1987, and described in section 907(c)(3)(B), as in effect prior to amendment by the Technical and Miscellaneous Revenue Act of 1988, are included in FORI and not FOGEI.

(b) Dividend—(1) Section 1248 dividend. A section 1248 dividend is a dividend described in section 907(c)(3)(A). Except as otherwise provided in this paragraph (b)(1), gain (or loss) from the disposition of stock in any corporation is not FOGEI or FORI. See §1.907(c)–1(e) (3) and (4).

(2) Section 78 dividend. A section 78 dividend is FORI to the extent it arises from a dividend described in section 907(c)(3)(A), or an amount described in section 907(c)(3)(C). The term “member” is defined in §1.1502-1(b).

(c) Taxes deemed paid—(1) Voting stock test. Items described in section 907(c)(3)(A) or (C) are FORI only if a deemed-paid-tax test is met under the criteria for the item to qualify as FORI in the hands of the domestic corporation. The test is whether a domestic corporation would be deemed to pay any taxes of a foreign corporation when a dividend or an amount described in section 907(c)(3)(A) or (C), respectively, is included in the domestic corporation’s gross income. In the case of interest described in section 907(c)(3)(A), the test is whether any taxes would be deemed paid if there were a hypothetical dividend.

(d) Amount attributable to certain items—(1) Certain dividends—(i) General
rule. The portion of a dividend described in section 907(c)(3)(A) that is FORI equals—

\[
\text{Amount of dividend} \times \frac{a}{b}
\]

\(a =\) FORI accumulated profits in excess of FORI taxes paid or accrued, and
\(b =\) Total accumulated profits in excess of total foreign taxes paid or accrued.

This paragraph (d)(1)(i) applies even though the FORI accumulated profits arose in a taxable year of a foreign corporation beginning before January 1, 1983. Determination of the FORI amount of dividends under this paragraph (d)(1)(i) must be made separately for FORI accumulated profits and total accumulated profits that arose in taxable years beginning before January 1, 1987, and for FORI accumulated profits and total accumulated profits that arose in taxable years beginning after December 31, 1986. Dividends are deemed to be paid first out of FORI and total accumulated profits that arose in taxable years beginning after December 31, 1986. With regard to FORI accumulated profits and total accumulated profits that arose in taxable years beginning after December 31, 1986, the portion of a dividend that is FORI equals—

\[
\text{Amount of dividend} \times \frac{a}{b}
\]

\(a =\) Post-1986 undistributed FORI earnings determined under the principles of section 902(c)(1), and
\(b =\) Post-1986 undistributed earnings determined under the principles of section 902(c)(1).

(ii) Cross-references. See §1.902-1(g) for the determination of a foreign corporation’s earnings and profits and of those out of which a dividend is paid. See §1.1248-2 or 1.1248-3 for the determination of the earnings and profits attributable to the sale or exchange of stock in certain foreign corporations.

(2) Interest received from certain foreign corporations. Interest described in section 907(c)(3)(A) is FORI to the extent the corresponding interest expense of the paying corporation is properly allocable and apportionable to the gross income of the paying corporation that would be FORI were that corporation a domestic corporation. This allocation and apportionment is made in a manner consistent with the rules of section 954(b)(5) and §1.861–8(e)(2).

(3) Dividends from domestic corporation. The amount of a dividend from a corporation described in section 907(c)(3)(B), as in effect prior to amend-ment by the Technical and Miscellaneous Revenue Act of 1988, paid in a taxable year of that corporation beginning before December 31, 1986, that is FORI is determined under the principles of paragraph (d)(1)(i) of this section with respect to its current earnings and profits under section 316(a)(2) or its accumulated earnings and profits under section 316(a)(1), as the case may be.

(4) Amounts with respect to which taxes are deemed paid under section 906(a)—(1) Portion attributable to FORI. The portion of an amount described in section 907(c)(3)(C) that is FORI equals:

\[
\frac{B}{C} \times A
\]

\(A =\) Amount described in section 907(c)(3)(C)
\(B =\) FORI earnings and profits
\(C =\) Total earnings and profits

For taxable years ending after January 23, 1989, the facts and circumstances will be used to determined what part of the amount of the section 907(c)(3)(C) amount is directly attributable to FOGEI, FORI and other income.

(i) Earnings and profits. Total earnings and profits are those of the foreign corporation for a taxable year under section 964 and the regulations under that section.

(5) Section 78 dividend. The portion of a section 78 dividend that will be considered FORI will equal the amount of taxes deemed paid under either section 902(a) or section 960(a)(1) with respect to the dividend to the extent the taxes deemed paid are FORI taxes under §1.907(c)–3 (b) or (c). See §1.907(c)–3(a)(1).

(6) Special rule. (i) No item in the formula described in paragraph (d)(1)(i) of this section includes amounts excluded from the gross income of a United States shareholder under section 959(a)(1).

(ii) With respect to a foreign corporation, earnings and profits in the formula described in paragraph (d)(4)(i) of
(7) Deficits—(i) Allocation of deficits within a separate category. In a taxable year in which a foreign corporation described in section 907(c)(3)(A) pays a dividend or has income that is subject to inclusion under section 951, if the foreign corporation has positive post—1986 undistributed earnings in a separate category but within that separate category there is a deficit in post-1986 undistributed earnings attributable to earnings other than FOGEI and FORI, that deficit shall be allocated ratably between the FOGEI and FORI post—1986 undistributed earnings within that separate category. Any deficit in post—1986 undistributed earnings attributable to either FOGEI or FORI shall be allocated first to FOGEI or FORI post—1986 undistributed earnings (as the case may be) to the extent thereof. Post—1986 undistributed FORI earnings are the post—1986 undistributed earnings (as defined in section 902 and the regulations under that section) attributable to FORI as defined in section 907(c) (2) and (3). Post—1986 undistributed FOGEI earnings are the post—1986 undistributed earnings (as defined in section 902 and the regulations under that section) attributable to FOGEI as defined in section 907(c) (1) and (3).

Example. Foreign corporation X for years 1987 and 1988 had the following undistributed earnings (none of which is income that is subject to inclusion under section 951) and foreign taxes:

<table>
<thead>
<tr>
<th>Category</th>
<th>Earnings</th>
<th>Taxes</th>
</tr>
</thead>
<tbody>
<tr>
<td>FOGEI</td>
<td>$800</td>
<td>$400</td>
</tr>
<tr>
<td>FORI</td>
<td>(750)</td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td>700</td>
<td>250</td>
</tr>
<tr>
<td>Total</td>
<td>750</td>
<td>650</td>
</tr>
</tbody>
</table>

On December 31, 1988, X paid a dividend of all of its post—1986 undistributed earnings to its sole shareholder Y. Under paragraph (d)(5) and (7)(i) of this section and §1.907 (c)—2 (d)(5), $450 of Y’s dividend is attributable to FOGEI ($50 from undistributed earnings plus a $400 section 78 dividend) and $300 is attributable to other earnings ($700 from undistributed earnings plus a $250 section 78 dividend).

(ii) Deficits allocated among separate categories. If a deficit in a separate category (“first separate category”) is allocated to another separate category (“second separate category”) under sections 902 and 960 pursuant to notice 88–71, 1988–2 CB 374 and the regulations under those sections, the following rules shall apply. Any deficit in post—1986 undistributed earnings attributable to either FOGEI (or FORI) from the first separate category shall be allocated to post—1986 undistributed earnings in the second separate category to the extent thereof in the following order:

(A) FOGEI (or FORI),
(B) FORI (or FOGEI), and
(C) Other income.

Any deficit in post—1986 undistributed earnings attributable to other income from the first separate category shall be allocated first to other post—1986 undistributed earnings and then ratably to FOGEI and FORI post—1986 undistributed earnings in the second separate category.

(iii) Pre—1987 deficits. The amount of a dividend paid by a foreign corporation described in section 907(c)(3)(A) out of positive pre—1987 earnings that is attributable to FOGEI and FORI shall be determined in a manner similar to that used in paragraph (d)(7) (i) and (ii) of this section except that the determinations shall be made on an annual basis.

(8) Illustrations. The application of this paragraph (d) is illustrated by the following examples.

Example 1. X, a domestic corporation, owns all of the stock of Y, a foreign corporation organized in country S. Y owns all of the stock of Z, a foreign corporation also organized in country S. Each corporation uses the calendar year as its taxable year. In 1983, Z has $150 of FOGEI earnings and profits and $250 of earnings and profits other than FOGEI or FORI. Assume that Z paid no taxes to S and X must include $100 in its gross income under section 951(a) with respect to Z. Under paragraph (d)(4)(i) of this section, $37.50 of the amount described in section 951(a) is FOGEI ($100–$62.50+$37.50). the remaining $62.50 of the section 951(a) amount represents other income.

Example 2. Assume the same facts as in Example 1 except that the taxable year in question is 1988. In addition, under the facts and circumstances, it is determined that of the $100 section 951(a) amount included in X’s gross income, $30 is directly attributable to
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Z’s FOGEI activity, $60 is directly attributable to Z’s FORI activity and $10 is directly attributable to Z’s other activity. Accordingly, under paragraph (d)(4)(i), $30 will be FOGEI and $30 will be FORI.

Example 3. (i) Assume the same facts as in Example 1. Assume further that, in 1983, Z distributes its entire earnings and profits ($300) to Y which consists of a dividend of $300 and a section 959(a)(1) distribution of $100. Y has no other earnings and profits during 1983. Assume that the dividend and distribution are not foreign personal holding company income under section 954(c).

Example 4. Assume further that, in 1983, Z existed in 1988, and if the $40 included in X’s gross income under section 951(a) is FORI ($40×$60/$100). Had these circumstances existed in 1988, and if the $40 included in X’s gross income under section 951(a) was directly attributable to FORI activity, all of that income would be FORI to X.

(e) Dividends, interest, and other amounts from sources within a possession. FORI includes the items listed in (A) and (C) to the extent attributable to FORI of a corporation that is created or organized in or under the laws of a possession of the United States.

(f) Income from partnerships, trusts, etc. FORI and FOGEI include a person’s distributive share (determined under the principles of section 704) of the income of any partnership and amounts included in income under subchapter J of chapter 1 of the Code (relating to the taxation of trusts, estates, and beneficiaries) to the extent the income and amounts are attributable to FORI and FOGEI. For taxable years beginning after 1986, the principles of §1.904–5(h) and (i) shall be applied to determine whether (and to what extent) a person’s distributive share is FORI and FOGEI. Thus, for example, a less-than-10 percent corporate partner’s share of income of the partnership would generally be treated as passive income to the partner, and not as FORI or FOGEI, unless an exception under §1.904–5(h) and (i) applies.

T.D. 8338, 56 FR 11071, Mar. 15, 1991

§ 1.907(c)–3 FOGEI and FORI taxes (for taxable years beginning after December 31, 1982).

(a) Tax characterization, allocation and apportionment—(1) Scope. Paragraphs (a) (2) through (6) of this section provides rules for the characterization, allocation, and apportionment of the income taxes (other than withholding taxes) paid or accrued to a foreign country among FOGEI, FORI, and other income relevant for purposes of sections 907 and 904. Some of the rules in this section are expressed in terms of FOGEI taxes but they apply to FORI taxes by substituting “FORI taxes” for “FOGEI taxes” whenever appropriate. For the treatment of withholding taxes, see paragraph (a)(8) of this section. FOGEI taxes are determined