

## § 1.367(a)-2

## 26 CFR Ch. I (4-1-13 Edition)

(4) [Reserved] For further guidance see § 1.367(a)-1(g)(4).

[T.D. 8087, 51 FR 17938, May 16, 1986, as amended by T.D. 8280, 55 FR 1408, Jan. 16, 1990; T.D. 8770, 63 FR 33555, June 19, 1998; T.D. 9441, 74 FR 348, Jan. 5, 2009; T.D. 9568, 76 FR 80087, Dec. 22, 2011; T.D. 9614, 78 FR 17031, Mar. 19, 2013]

### § 1.367(a)-2 Exception for transfers of property for use in the active conduct of a trade or business.

(a) through (d) [Reserved] For further guidance, see § 1.367(a)-2T(a) through (d).

(e) *Special rules for certain transfers occurring on or after May 2, 2006*—(1) *General rule.* Whether a trade or business that produces rents or royalties is actively conducted shall be determined under the principles of section 954(c)(2)(A) and the regulations thereunder (but without regard to whether the rents or royalties are received from an unrelated party). See § 1.954-2(c) and (d).

(2) *Effective/applicability date.* The rules of this paragraph (e) apply to transfers occurring on or after May 2, 2006. However, if the transferor makes the election to apply the provisions of § 1.367(a)-4(c)(3) for transfers occurring on or after October 22, 2004, then paragraph (e)(1) of this section will also apply to the transfers occurring on or after October 22, 2004.

[T.D. 9525, 76 FR 26179, May 6, 2011]

### § 1.367(a)-2T Exception for transfers of property for use in the active conduct of a trade or business (temporary).

(a) *In general.* Section 367(a)(1) shall not apply to property transferred to a foreign corporation if—

(1) Such property is transferred for use by that corporation in the active conduct of a trade or business outside of the United States; and

(2) The U.S. person that transfers the property complies with the reporting requirements of section 6038B and regulations thereunder.

Where these conditions are satisfied, the foreign corporate transferee of the property shall be considered to be a corporation for purposes of determining the extent to which gain or loss is required to be recognized upon the

transfer pursuant to section 332, 351, 354 [reserved as to section 355 or so much of section 356 as relates to section 355], 356, or 361. Paragraph (b) of this section provides rules concerning the requirement that property be transferred for use in the active conduct of a trade or business outside of the United States, while paragraph (c) concerns the application of the requirement where the transferee itself retransfers the property. In addition, § 1.367(a)-3T provides rules concerning the treatment of stock or securities transferred to a foreign corporation in an exchange described in section 367(a)(1), and § 1.367(a)-4T provides special rules concerning the treatment of other specified types of property. Finally, §§ 1.367(a)-5T and 1.367(a)-6T provide rules concerning certain transfers of property that are subject to section 367(a)(1) regardless of whether the property is used in the active conduct of a trade or business.

(b) *Active conduct of a trade or business outside the United States*—(1) *In general.* Property qualifies for the exception provided by this section if it is transferred to a foreign corporation for use in the active conduct of a trade or business outside of the United States. Therefore, to determine whether property is subject to the exception provided by this section, four factual determinations must be made:

(i) What is the trade or business of the transferee;

(ii) Do the activities of the transferee constitute the active conduct of that trade or business;

(iii) Is the trade or business conducted outside of the United States; and

(iv) Is the transferred property used or held for use in the trade or business?

Rules concerning these four determinations are provided in paragraphs (b)(2), (3), (4), and (5) of this section.