§ 1.863–10 Source of income from a qualified fails charge.

(a) In general. Except as provided in paragraphs (b) and (c) of this section, the source of income from a qualified fails charge shall be determined by reference to the residence of the taxpayer as determined under section 988(a)(3)(B)(i).

(b) Qualified business unit exception. The source of income from a qualified fails charge shall be determined by reference to the residence of a qualified business unit (as defined in section 989) of a taxpayer if—

(1) The taxpayer’s residence, determined under section 988(a)(3)(B)(i), is the United States;

(2) The qualified business unit’s residence, determined under section 988(a)(3)(B)(ii), is outside the United States;

(3) The qualified business unit is engaged in the conduct of a trade or business in the country where it is a resident; and

(4) The transaction to which the qualified fails charge relates is attributable to the qualified business unit. A transaction will be treated as attributable to a qualified business unit if it satisfies the principles of §1.864–4(c)(5)(iii) (substituting “qualified business unit” for “U.S. office”).

(c) Effectively connected income exception. Qualified fails charge income that arises from a transaction any income from which is (or would be if the transaction produced income) effectively connected with a United States trade or business pursuant to §1.864–4(c) is treated as from sources within the United States, and the income from the qualified fails charge is treated as effectively connected to the conduct of a United States trade or business.

(d) Qualified fails charge. For purposes of this section, a qualified fails charge is a payment that—

(1) Compensates a party to a transaction that provides for delivery of a...
designated security (as defined in paragraph (e) of this section) in exchange for the payment of cash (delivery-versus-payment settlement) for another party’s failure to deliver the specified designated security on the settlement date specified in the relevant agreement; and

(2) Is made pursuant to—
(i) A trading practice or similar guidance approved or adopted by either an agency of the United States government or the Treasury Market Practices Group, or
(ii) Any trading practice, program, policy or procedure approved by the Commissioner in guidance published in the Internal Revenue Bulletin.

(e) Designated security. For purposes of this section, a designated security means any—
(i) Debt instrument (as defined in §1.1275–1(d)) issued by the United States Treasury Department, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or any Federal Home Loan Bank; or

(g) Effective/applicability date. This section is effective on February 21, 2012. This section applies to a qualified fails charge paid or accrued on or after December 8, 2010.

[T.D. 9579, 77 FR 9847, Feb. 21, 2012]

§ 1.864–1 Meaning of sale, etc.

For purposes of §§1.861 through 1.864–7, the word “sale” includes “exchange”; the word “sold” includes “exchanged”; the word “produced” includes “created”, “fabricated”, “manufactured”, “extracted”, “processed”, “cured”, and “aged”.

[T.D. 6948, 33 FR 5090, Mar. 28, 1968]

§ 1.864–2 Trade or business within the United States.

(a) In general. As used in part I (section 601 and following) and part II (section 671 and following), subchapter N, chapter 1 of the Code, and chapter 3 (section 1441 and following) of the Code, and the regulations thereunder, the term “engaged in trade or business within the United States” does not include the activities described in paragraphs (c) and (d) of this section, but includes the performance of personal services within the United States at any time within the taxable year except to the extent otherwise provided in this section.

(b) Performance of personal services for foreign employer—(1) Excepted services. For purposes of paragraph (a) of this section, the term “engaged in trade or business within the United States” does not include the performance of personal services—
(i) For a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States at any time during the taxable year, or
(ii) For an office or place of business maintained in a foreign country or in a possession of the United States by an individual who is a citizen or resident of the United States or by a domestic partnership or a domestic corporation, by a nonresident alien individual who is temporarily present in the United States for a period or periods not exceeding a total of 90 days during the taxable year and whose compensation for such services does not exceed in the aggregate gross amount of $3,000.

(2) Rules of application. (i) As a general rule, the term “day”, as used in subparagraph (1) of this paragraph, means a calendar day during any portion of which the nonresident alien individual is physically present in the United States.

(ii) Solely for purposes of applying this paragraph, the nonresident alien individual, foreign partnership, or foreign corporation for which the nonresident alien individual is performing personal services in the United States shall not be considered to be engaged in trade or business in the United States by reason of the performance of such services by such individual.

(iii) In applying subparagraph (1) of this paragraph it is immaterial whether the services performed by the nonresident alien individual are performed as an employee for his employer or under any form of contract with the