

tion 1014(f) of Pub. L. 105-34, set out as a note under section 351 of this title.

EFFECTIVE DATE OF 1982 AMENDMENT

Pub. L. 97-248, title II, § 227(c)(2), Sept. 3, 1982, 96 Stat. 492, provided that: "The amendment made by subsection (b) [amending this section] shall apply to distributions after August 31, 1982, in taxable years ending after such date."

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94-253 applicable to taxable years ending after Mar. 31, 1976, see section 2 of Pub. L. 94-253, set out as a note under section 354 of this title.

SAVINGS PROVISION

For provisions that nothing in amendment by Pub. L. 101-508 be construed to affect treatment of certain transactions occurring, property acquired, or items of income, loss, deduction, or credit taken into account prior to Nov. 5, 1990, for purposes of determining liability for tax for periods ending after Nov. 5, 1990, see section 11821(b) of Pub. L. 101-508, set out as a note under section 45K of this title.

§ 357. Assumption of liability

(a) General rule

Except as provided in subsections (b) and (c), if—

- (1) the taxpayer receives property which would be permitted to be received under section 351 or 361 without the recognition of gain if it were the sole consideration, and
- (2) as part of the consideration, another party to the exchange assumes a liability of the taxpayer,

then such assumption shall not be treated as money or other property, and shall not prevent the exchange from being within the provisions of section 351 or 361, as the case may be.

(b) Tax avoidance purpose

(1) In general

If, taking into consideration the nature of the liability and the circumstances in the light of which the arrangement for the assumption was made, it appears that the principal purpose of the taxpayer with respect to the assumption described in subsection (a)—

- (A) was a purpose to avoid Federal income tax on the exchange, or
- (B) if not such purpose, was not a bona fide business purpose,

then such assumption (in the total amount of the liability assumed pursuant to such exchange) shall, for purposes of section 351 or 361 (as the case may be), be considered as money received by the taxpayer on the exchange.

(2) Burden of proof

In any suit or proceeding where the burden is on the taxpayer to prove such assumption is not to be treated as money received by the taxpayer, such burden shall not be considered as sustained unless the taxpayer sustains such burden by the clear preponderance of the evidence.

(c) Liabilities in excess of basis

(1) In general

In the case of an exchange—

- (A) to which section 351 applies, or

(B) to which section 361 applies by reason of a plan of reorganization within the meaning of section 368(a)(1)(D) with respect to which stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 355,

if the sum of the amount of the liabilities assumed exceeds the total of the adjusted basis of the property transferred pursuant to such exchange, then such excess shall be considered as a gain from the sale or exchange of a capital asset or of property which is not a capital asset, as the case may be.

(2) Exceptions

Paragraph (1) shall not apply to any exchange—

- (A) to which subsection (b)(1) of this section applies, or
- (B) which is pursuant to a plan of reorganization within the meaning of section 368(a)(1)(G) where no former shareholder of the transferor corporation receives any consideration for his stock.

(3) Certain liabilities excluded

(A) In general

If a taxpayer transfers, in an exchange to which section 351 applies, a liability the payment of which either—

- (i) would give rise to a deduction, or
- (ii) would be described in section 736(a),

then, for purposes of paragraph (1), the amount of such liability shall be excluded in determining the amount of liabilities assumed.

(B) Exception

Subparagraph (A) shall not apply to any liability to the extent that the incurrence of the liability resulted in the creation of, or an increase in, the basis of any property.

(d) Determination of amount of liability assumed

(1) In general

For purposes of this section, section 358(d), section 358(h), section 361(b)(3), section 362(d), section 368(a)(1)(C), and section 368(a)(2)(B), except as provided in regulations—

(A) a recourse liability (or portion thereof) shall be treated as having been assumed if, as determined on the basis of all facts and circumstances, the transferee has agreed to, and is expected to, satisfy such liability (or portion), whether or not the transferor has been relieved of such liability; and

(B) except to the extent provided in paragraph (2), a nonrecourse liability shall be treated as having been assumed by the transferee of any asset subject to such liability.

(2) Exception for nonrecourse liability

The amount of the nonrecourse liability treated as described in paragraph (1)(B) shall be reduced by the lesser of—

- (A) the amount of such liability which an owner of other assets not transferred to the transferee and also subject to such liability has agreed with the transferee to, and is expected to, satisfy; or

(B) the fair market value of such other assets (determined without regard to section 7701(g)).

(3) Regulations

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subsection and section 362(d). The Secretary may also prescribe regulations which provide that the manner in which a liability is treated as assumed under this subsection is applied, where appropriate, elsewhere in this title.

(Aug. 16, 1954, ch. 736, 68A Stat. 116; June 29, 1956, ch. 463, § 2, 70 Stat. 403; Pub. L. 95-600, title III, § 365(a), Nov. 6, 1978, 92 Stat. 2854; Pub. L. 96-222, title I, § 103(a)(12), Apr. 1, 1980, 94 Stat. 213; Pub. L. 96-589, § 4(h)(2), Dec. 24, 1980, 94 Stat. 3405; Pub. L. 101-508, title XI, § 11801(c)(8)(F), Nov. 5, 1990, 104 Stat. 1388-524; Pub. L. 106-36, title III, § 3001(a)(1), (b)(1), (d)(2)-(5), June 25, 1999, 113 Stat. 181-184; Pub. L. 106-554, § 1(a)(7) [title III, § 309(b)], Dec. 21, 2000, 114 Stat. 2763, 2763A-638; Pub. L. 108-357, title VIII, § 898(b), Oct. 22, 2004, 118 Stat. 1649; Pub. L. 109-135, title IV, § 403(jj)(2), Dec. 21, 2005, 119 Stat. 2632.)

Editorial Notes

AMENDMENTS

2005—Subsec. (d)(1). Pub. L. 109-135 inserted “section 361(b)(3),” after “section 358(h).”

2004—Subsec. (c)(1)(B). Pub. L. 108-357 inserted “with respect to which stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 355” after “section 368(a)(1)(D).”

2000—Subsec. (d)(1). Pub. L. 106-554 inserted “section 358(h),” after “section 358(d),” in introductory provisions.

1999—Subsec. (a). Pub. L. 106-36, § 3001(d)(2), struck out “or acquisition” after “assumption” in concluding provisions.

Subsec. (a)(2). Pub. L. 106-36, § 3001(a)(1), struck out “, or acquires from the taxpayer property subject to a liability” before comma at end.

Subsec. (b). Pub. L. 106-36, § 3001(d)(2), (3), struck out “or acquisition” after “assumption” wherever appearing and struck out “or acquired” after “liability assumed” in concluding provisions of par. (1).

Subsec. (c)(1). Pub. L. 106-36, § 3001(d)(4), struck out “, plus the amount of the liabilities to which the property is subject,” after “liabilities assumed” in concluding provisions.

Subsec. (c)(3)(A). Pub. L. 106-36, § 3001(d)(5), struck out “or to which the property transferred is subject” after “liabilities assumed” in concluding provisions.

Subsec. (d). Pub. L. 106-36, § 3001(b)(1), added subsec. (d).

1990—Subsecs. (a), (b)(1). Pub. L. 101-508, § 11801(c)(8)(F)(i), substituted “351 or 361” for “351, 361, 371, or 374” wherever appearing.

Subsec. (c)(2). Pub. L. 101-508, § 11801(c)(8)(F)(ii), inserted “or” at end of subpar. (A), redesignated subpar. (C) as (B), and struck out former subpar. (B) which read as follows: “to which section 371 or 374 applies, or”.

1980—Subsec. (c)(2)(C). Pub. L. 96-589 added subpar. (C).

Subsec. (c)(3)(A). Pub. L. 96-222 struck out requirement that only taxpayers who compute taxable income under the cash receipts and disbursements method of accounting are eligible to exclude certain liabilities in determining the amount of gain realized on a transfer to a controlled corporation and the requirement that the excluded liability must be an account payable.

1978—Subsec. (c)(3). Pub. L. 95-600 added par. (3).

1956—Subsec. (a). Act June 29, 1956, § 2(1), substituted “371, or 374” for “or 371” in two places.

Subsec. (b). Act June 29, 1956, § 2(1), substituted “371, or 374” for “or 371”.

Subsec. (c)(2)(B). Act June 29, 1956, § 2(2), substituted “371 or 374” for “371”.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109-135 effective as if included in the provision of the American Jobs Creation Act of 2004, Pub. L. 108-357, to which such amendment relates, see section 403(nn) of Pub. L. 109-135, set out as a note under section 26 of this title.

EFFECTIVE DATE OF 2004 AMENDMENT

Pub. L. 108-357, title VIII, § 898(c), Oct. 22, 2004, 118 Stat. 1649, provided that: “The amendments made by this section [amending this section and section 361 of this title] shall apply to transfers of money or other property, or liabilities assumed, in connection with a reorganization occurring on or after the date of the enactment of this Act [Oct. 22, 2004].”

EFFECTIVE DATE OF 2000 AMENDMENT

Amendment by Pub. L. 106-554 applicable to assumptions of liability after Oct. 18, 1999, see section 1(a)(7) [title III, § 309(d)] of Pub. L. 106-554, set out as a note under section 358 of this title.

EFFECTIVE DATE OF 1999 AMENDMENT

Amendment by Pub. L. 106-36 applicable to transfers after Oct. 18, 1998, see section 3001(e) of Pub. L. 106-36, set out as a note under section 351 of this title.

EFFECTIVE DATE OF 1980 AMENDMENTS

Amendment by Pub. L. 96-589 applicable to bankruptcy cases or similar judicial proceedings commencing after Dec. 31, 1980, with exception permitting the debtor to make the amendment applicable to such cases or proceedings commencing after Sept. 30, 1979, see section 7(c)(1), (f) of Pub. L. 96-589, set out as a note under section 108 of this title.

Amendment by Pub. L. 96-222 effective, except as otherwise provided, as if it had been included in the provisions of the Revenue Act of 1978, Pub. L. 95-600, to which such amendment relates, see section 201 of Pub. L. 96-222, set out as a note under section 32 of this title.

EFFECTIVE DATE OF 1978 AMENDMENT

Pub. L. 95-600, title III, § 365(c), Nov. 6, 1978, 92 Stat. 2855, provided that: “The amendments made by subsections (a) and (b) [amending this section and section 358 of this title] shall apply to transfers occurring on or after the date of the enactment of this Act [Nov. 6, 1978].”

SAVINGS PROVISION

For provisions that nothing in amendment by Pub. L. 101-508 be construed to affect treatment of certain transactions occurring, property acquired, or items of income, loss, deduction, or credit taken into account prior to Nov. 5, 1990, for purposes of determining liability for tax for periods ending after Nov. 5, 1990, see section 11821(b) of Pub. L. 101-508, set out as a note under section 45K of this title.

§ 358. Basis to distributees

(a) General rule

In the case of an exchange to which section 351, 354, 355, 356, or 361 applies—

(1) Nonrecognition property

The basis of the property permitted to be received under such section without the recogni-