

(as defined in section 383(a)(2)) or net capital loss.

**(e) Ordering rules for net operating losses, etc.**

**(1) Carryover rules**

If any preacquisition loss may not offset a recognized built-in gain by reason of this section, such gain shall not be taken into account in determining under section 172(b)(2) the amount of such loss which may be carried to other taxable years. A similar rule shall apply in the case of any excess credit or net capital loss limited by reason of subsection (d).

**(2) Ordering rule for losses carried from same taxable year**

In any case in which—

(A) a preacquisition loss for any taxable year is subject to limitation under subsection (a), and

(B) a net operating loss from such taxable year is not subject to such limitation,

taxable income shall be treated as having been offset 1st by the loss subject to such limitation.

**(f) Regulations**

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this section, including regulations to ensure that the purposes of this section may not be circumvented through—

(1) the use of any provision of law or regulations (including subchapter K of this chapter), or

(2) contributions of property to a corporation.

(Added Pub. L. 100-203, title X, §10226(a), Dec. 22, 1987, 101 Stat. 1330-414; amended Pub. L. 100-647, title II, §2004(m)(1)-(4), Nov. 10, 1988, 102 Stat. 3606, 3607; Pub. L. 101-239, title VII, §7812(c)(1), Dec. 19, 1989, 103 Stat. 2412.)

**Editorial Notes**

**AMENDMENTS**

1989—Subsec. (e)(1). Pub. L. 101-239 substituted “built-in gain” for “build-in gain”.

1988—Subsec. (a). Pub. L. 100-647, §2004(m)(1)(A), amended subsec. (a) generally, making changes in substance and structure.

Subsec. (b). Pub. L. 100-647, §2004(m)(3), substituted “corporations under common control” for “50 percent of gain corporation held” in heading and amended text generally. Prior to amendment, text read as follows: “Subsection (a) shall not apply if more than 50 percent of the stock (by vote and value) of the gain corporation was held throughout the 5-year period ending on the acquisition date—

“(1) in any case described in subsection (a)(1), by members of the affiliated group referred to in subsection (a)(1), or

“(2) in any case described in subsection (a)(2), by the acquiring corporation or members of such acquiring corporation’s affiliated group.

For purposes of the preceding sentence, stock described in section 1504(a)(4) shall not be taken into account.”

Subsec. (c)(1)(A). Pub. L. 100-647, §2004(m)(1)(D), substituted “subsection (a)(1)(B)” for “subsection (a)(2)”.

Subsec. (c)(2). Pub. L. 100-647, §2004(m)(1)(C), amended par. (2) generally. Prior to amendment, par. (2) read as follows: “The term ‘acquisition date’ means the date on which the gain corporation becomes a member of the affiliated group or, in any case described in subsection

(a)(2), the date of the distribution or transfer in the liquidation or reorganization.”

Subsec. (c)(4) to (8). Pub. L. 100-647, §2004(m)(1)(B), redesignated par. (4) as (8) and added pars. (4) to (7).

Subsecs. (e), (f). Pub. L. 100-647, §2004(m)(2), (4), substituted “a corporation” for “the gain corporation” in subsec. (e)(2), redesignated subsec. (e) as (f), and added subsec. (e).

**Statutory Notes and Related Subsidiaries**

**EFFECTIVE DATE OF 1989 AMENDMENT**

Amendment by Pub. L. 101-239 effective, except as otherwise provided, as if included in the provision of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100-647, to which such amendment relates, see section 7817 of Pub. L. 101-239, set out as a note under section 1 of this title.

**EFFECTIVE DATE OF 1988 AMENDMENT**

Amendment by Pub. L. 100-647 effective, except as otherwise provided, as if included in the provisions of the Revenue Act of 1987, Pub. L. 100-203, title X, to which such amendment relates, see section 2004(u) of Pub. L. 100-647, set out as a note under section 56 of this title.

**EFFECTIVE DATE**

Pub. L. 100-203, title X, §10226(c), Dec. 22, 1987, 101 Stat. 1330-416, provided that: “The amendments made by this section [enacting this section] shall apply in cases where the acquisition date (as defined in section 384(c)(2) of the Internal Revenue Code of 1986 as added by this section) is after December 15, 1987; except that such amendments shall not apply in the case of any transaction pursuant to—

“(1) a binding written contract in effect on or before December 15, 1987, or

“(2) a letter of intent or agreement of merger signed on or before December 15, 1987.”

**ELECTION TO HAVE AMENDMENTS BY PUB. L. 100-647 NOT APPLY**

Pub. L. 100-647, title II, §2004(m)(5), Nov. 10, 1988, 102 Stat. 3607, provided that: “In any case where the acquisition date (as defined in section 384(c)(2) of the 1986 Code as amended by this subsection) is before March 31, 1988, the acquiring corporation may elect to have the amendments made by this subsection not apply. Such an election shall be made in such manner as the Secretary of the Treasury or his delegate shall prescribe and shall be made not later than the later of the due date (including extensions) for filing the return for the taxable year of the acquiring corporation in which the acquisition date occurs or the date 120 days after the date of the enactment of this Act [Nov. 10, 1989]. Such an election, once made, shall be irrevocable.”

**PART VI—TREATMENT OF CERTAIN CORPORATE INTERESTS AS STOCK OR INDEBTEDNESS**

Sec.

385. Treatment of certain interests in corporations as stock or indebtedness.

**Editorial Notes**

**AMENDMENTS**

1969—Pub. L. 91-172, title IV, §415(a), Dec. 30, 1969, 83 Stat. 613, added part heading and analysis of sections.

**§ 385. Treatment of certain interests in corporations as stock or indebtedness**

**(a) Authority to prescribe regulations**

The Secretary is authorized to prescribe such regulations as may be necessary or appropriate

to determine whether an interest in a corporation is to be treated for purposes of this title as stock or indebtedness (or as in part stock and in part indebtedness).

**(b) Factors**

The regulations prescribed under this section shall set forth factors which are to be taken into account in determining with respect to a particular factual situation whether a debtor-creditor relationship exists or a corporation-shareholder relationship exists. The factors so set forth in the regulations may include among other factors:

- (1) whether there is a written unconditional promise to pay on demand or on a specified date a sum certain in money in return for an adequate consideration in money or money's worth, and to pay a fixed rate of interest,
- (2) whether there is subordination to or preference over any indebtedness of the corporation,
- (3) the ratio of debt to equity of the corporation,
- (4) whether there is convertibility into the stock of the corporation, and
- (5) the relationship between holdings of stock in the corporation and holdings of the interest in question.

**(c) Effect of classification by issuer**

**(1) In general**

The characterization (as of the time of issuance) by the issuer as to whether an interest in a corporation is stock or indebtedness shall be binding on such issuer and on all holders of such interest (but shall not be binding on the Secretary).

**(2) Notification of inconsistent treatment**

Except as provided in regulations, paragraph (1) shall not apply to any holder of an interest if such holder on his return discloses that he is treating such interest in a manner inconsistent with the characterization referred to in paragraph (1).

**(3) Regulations**

The Secretary is authorized to require such information as the Secretary determines to be necessary to carry out the provisions of this subsection.

(Added Pub. L. 91-172, title IV, §415(a), Dec. 30, 1969, 83 Stat. 613; amended Pub. L. 94-455, title XIX, §1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1834; Pub. L. 101-239, title VII, §7208(a)(1), Dec. 19, 1989, 103 Stat. 2337; Pub. L. 102-486, title XIX, §1936(a), Oct. 24, 1992, 106 Stat. 3032.)

**Editorial Notes**

**AMENDMENTS**

- 1992—Subsec. (c). Pub. L. 102-486 added subsec. (c).  
 1989—Subsec. (a). Pub. L. 101-239 inserted “(or as in part stock and in part indebtedness)” before period at end.  
 1976—Subsec. (a). Pub. L. 94-455 struck out “or his delegate” after “Secretary”.

**Statutory Notes and Related Subsidiaries**

**EFFECTIVE DATE OF 1992 AMENDMENT**

Pub. L. 102-486, title XIX, §1936(b), Oct. 24, 1992, 106 Stat. 3032, provided that: “The amendment made by

subsection (a) [amending this section] shall apply to instruments issued after the date of the enactment of this Act [Oct. 24, 1992].”

**REGULATIONS NOT TO BE APPLIED RETROACTIVELY**

Pub. L. 101-239, title VII, §7208(a)(2), Dec. 19, 1989, 103 Stat. 2337, provided that: “Any regulations issued pursuant to the authority granted by the amendment made by paragraph (1) [amending this section] shall only apply with respect to instruments issued after the date on which the Secretary of the Treasury or his delegate provides public guidance as to the characterization of such instruments whether by regulation, ruling, or otherwise.”

**[PART VII—REPEALED]**

**[§ 386. Repealed. Pub. L. 100-647, title I, § 1006(e)(8)(A), Nov. 10, 1988, 102 Stat. 3401]**

Section, added Pub. L. 98-369, div. A, title I, §75(a), July 18, 1984, 98 Stat. 594; amended Pub. L. 99-514, title XVIII, §1805(c)(1), Oct. 22, 1986, 100 Stat. 2810, related to transfers of partnership and trust interests by corporations.

**Statutory Notes and Related Subsidiaries**

**EFFECTIVE DATE OF REPEAL**

Repeal effective, except as otherwise provided, as if included in the provision of the Tax Reform Act of 1986, Pub. L. 99-514, to which such amendment relates, see section 1019(a) of Pub. L. 100-647, set out as an Effective Date of 1988 Amendment note under section 1 of this title.

**[§§ 391 to 395. Repealed. Pub. L. 94-455, title XIX, § 1901(a)(55), Oct. 4, 1976, 90 Stat. 1773]**

Section 391, acts Aug. 16, 1954, ch. 736, 68A Stat. 131; Sept. 2, 1958, Pub. L. 85-866, title I, §22(a), 72 Stat. 1620, related to effective date of section 301 et seq. of this title.

Section 392, act Aug. 16, 1954, ch. 736, 68A Stat. 131, related to effective date of section 331 et seq. of this title.

Section 393, act Aug. 16, 1954, ch. 736, 68A Stat. 132, related to effective date of section 351 et seq. of this title.

Section 394, act Aug. 16, 1954, ch. 736, 68A Stat. 133, related to effective date of section 381 et seq. of this title.

Section 395, act Aug. 16, 1954, ch. 736, 68A Stat. 133, related to special rules for application of this subchapter.

**Statutory Notes and Related Subsidiaries**

**EFFECTIVE DATE OF REPEAL**

Repeal effective for taxable years beginning after Dec. 31, 1976, see section 1901(d) of Pub. L. 94-455, set out as an Effective Date of 1976 Amendment note under section 2 of this title.

**Subchapter D—Deferred Compensation, Etc.**

**Part**

- I. Pension, profit-sharing, stock bonus plans, etc.
- II. Certain stock options.
- III.<sup>1</sup> Rules relating to minimum funding standards and benefit limitations.<sup>1</sup>

**Editorial Notes**

**AMENDMENTS**

2006—Pub. L. 109-280, title I, §113(a)(2), Aug. 17, 2006, 120 Stat. 852, added item for part III.

1964—Pub. L. 88-272, title II, §221(d)(1), Feb. 26, 1964, 78 Stat. 75, substituted “Certain stock options” for “Miscellaneous provisions” in heading to part II.

<sup>1</sup> Period editorially supplied.