

see section 151(a) of Pub. L. 99-514, set out as a note under section 1 of this title.

Amendment by section 1211(b)(1)(C) of Pub. L. 99-514 applicable to taxable years beginning after Dec. 31, 1986, except as otherwise provided, see section 1211(c) of Pub. L. 99-514, set out as an Effective Date note under section 865 of this title.

EFFECTIVE DATE OF 1981 AMENDMENT

Amendment by Pub. L. 97-34 applicable to dispositions after June 18, 1980, in taxable years ending after such date, see section 831(i) of Pub. L. 97-34, set out as a note under section 897 of this title.

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95-30 applicable to taxable years beginning after Dec. 31, 1976, see section 106(a) of Pub. L. 95-30, set out as a note under section 1 of this title.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by section 1036(b) of Pub. L. 94-455 applicable to taxable years beginning after Dec. 31, 1976, see section 1036(c) of Pub. L. 94-455, set out as a note under section 861 of this title.

Amendment by section 1901(b)(26)(C) of Pub. L. 94-455 effective for taxable years beginning after Dec. 31, 1976, see section 1901(d) of Pub. L. 94-455, set out as a note under section 2 of this title.

EFFECTIVE DATE OF 1971 AMENDMENT

Amendment by Pub. L. 92-178 applicable to taxable years ending after Aug. 15, 1971, but only with respect to leases entered into after such date, see section 314(c) of Pub. L. 92-178, set out as a note under section 861 of this title.

APPLICABILITY OF CERTAIN AMENDMENTS BY PUB. L. 99-514 IN RELATION TO TREATY OBLIGATIONS OF UNITED STATES

For nonapplication of amendment by section 1211(b)(1)(C) of Pub. L. 99-514 to the extent application of such amendment would be contrary to any treaty obligation of the United States in effect on Oct. 22, 1986, with provision that for such purposes any amendment by title I of Pub. L. 100-647 be treated as if it had been included in the provision of Pub. L. 99-514 to which such amendment relates, see section 1012(aa)(3), (4) of Pub. L. 100-647, set out as a note under section 861 of this title.

QUALIFIED RESEARCH AND EXPERIMENTAL EXPENDITURES; ALLOCATION AND APPORTIONMENT; DEFINITIONS; SPECIAL RULES; EFFECTIVE DATES

For allocation and apportionment of qualified research and experimental expenditures for purposes of sections 861 to 863 of this title, see section 4009 of Pub. L. 100-647, set out as a note under section 861 of this title.

1-YEAR MODIFICATION IN REGULATIONS PROVIDING FOR ALLOCATION OF RESEARCH AND EXPERIMENTAL EXPENDITURES

For rule governing allocation under subsec. (b) of this section of amounts allowable as a deduction for qualified research and experimental expenditures during taxable years beginning after Aug. 1, 1986, and on or before Aug. 1, 1987, see section 1216 of Pub. L. 99-514, set out as a note under section 861 of this title.

ALLOCATION UNDER SECTION 861 OF RESEARCH AND EXPERIMENTAL EXPENDITURES

For purposes of subsec. (b) of this section, all amounts allowable as a deduction for qualified research and experimental expenditures are to be allocated to income from sources within the United States and deducted from such income in determining the amount of taxable income from sources within the United States

for taxable years beginning after Aug. 13, 1983, and on or before Aug. 1, 1986, see section 126 of Pub. L. 98-369, set out as a note under section 861 of this title.

§ 863. Special rules for determining source

(a) Allocation under regulations

Items of gross income, expenses, losses, and deductions, other than those specified in sections 861(a) and 862(a), shall be allocated or apportioned to sources within or without the United States, under regulations prescribed by the Secretary. Where items of gross income are separately allocated to sources within the United States, there shall be deducted (for the purpose of computing the taxable income therefrom) the expenses, losses, and other deductions properly apportioned or allocated thereto and a ratable part of other expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income. The remainder, if any, shall be included in full as taxable income from sources within the United States.

(b) Income partly from within and partly from without the United States

In the case of gross income derived from sources partly within and partly without the United States, the taxable income may first be computed by deducting the expenses, losses, or other deductions apportioned or allocated thereto and a ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income; and the portion of such taxable income attributable to sources within the United States may be determined by processes or formulas of general apportionment prescribed by the Secretary. Gains, profits, and income—

(1) from services rendered partly within and partly without the United States,

(2) from the sale or exchange of inventory property (within the meaning of section 865(i)(1)) produced (in whole or in part) by the taxpayer within and sold or exchanged without the United States, or produced (in whole or in part) by the taxpayer without and sold or exchanged within the United States, or

(3) derived from the purchase of inventory property (within the meaning of section 865(i)(1)) within a possession of the United States and its sale or exchange within the United States,

shall be treated as derived partly from sources within and partly from sources without the United States. Gains, profits, and income from the sale or exchange of inventory property described in paragraph (2) shall be allocated and apportioned between sources within and without the United States solely on the basis of the production activities with respect to the property.

(c) Source rule for certain transportation income

(1) Transportation beginning and ending in the United States

All transportation income attributable to transportation which begins and ends in the United States shall be treated as derived from sources within the United States.

(2) Other transportation having United States connection

(A) In general

50 percent of all transportation income attributable to transportation which—

- (i) is not described in paragraph (1), and
 - (ii) begins or ends in the United States,
- shall be treated as from sources in the United States.

(B) Special rule for personal service income

Subparagraph (A) shall not apply to any transportation income which is income derived from personal services performed by the taxpayer, unless such income is attributable to transportation which—

- (i) begins in the United States and ends in a possession of the United States, or
- (ii) begins in a possession of the United States and ends in the United States.

In the case of transportation income derived from, or in connection with, a vessel, this subparagraph shall only apply if the taxpayer is a citizen or resident alien.

(3) Transportation income

For purposes of this subsection, the term “transportation income” means any income derived from, or in connection with—

- (A) the use (or hiring or leasing for use) of a vessel or aircraft, or
- (B) the performance of services directly related to the use of a vessel or aircraft.

For purposes of the preceding sentence, the term “vessel or aircraft” includes any container used in connection with a vessel or aircraft.

(d) Source rules for space and certain ocean activities

(1) In general

Except as provided in regulations, any income derived from a space or ocean activity—

- (A) if derived by a United States person, shall be sourced in the United States, and
- (B) if derived by a person other than a United States person, shall be sourced outside the United States.

(2) Space or ocean activity

For purposes of paragraph (1)—

(A) In general

The term “space or ocean activity” means—

- (i) any activity conducted in space, and
- (ii) any activity conducted on or under water not within the jurisdiction (as recognized by the United States) of a foreign country, possession of the United States, or the United States.

Such term includes any activity conducted in Antarctica.

(B) Exception for certain activities

The term “space or ocean activity” shall not include—

- (i) any activity giving rise to transportation income (as defined in section 863(c)),
- (ii) any activity giving rise to international communications income (as defined in subsection (e)(2)), and

- (iii) any activity with respect to mines, oil and gas wells, or other natural deposits to the extent within the United States or any foreign country or possession of the United States (as defined in section 638).

For purposes of applying section 638, the jurisdiction of any foreign country shall not include any jurisdiction not recognized by the United States.

(e) International communications income

(1) Source rules

(A) United States persons

In the case of any United States person, 50 percent of any international communications income shall be sourced in the United States and 50 percent of such income shall be sourced outside the United States.

(B) Foreign persons

(i) In general

Except as provided in regulations or clause (ii), in the case of any person other than a United States person, any international communications income shall be sourced outside the United States.

(ii) Special rule for income attributable to office or fixed place of business in the United States

In the case of any person (other than a United States person) who maintains an office or other fixed place of business in the United States, any international communications income attributable to such office or other fixed place of business shall be sourced in the United States.

(2) Definition

For purposes of this section, the term “international communications income” includes all income derived from the transmission of communications or data from the United States to any foreign country (or possession of the United States) or from any foreign country (or possession of the United States) to the United States.

(Aug. 16, 1954, ch. 736, 68A Stat. 277; Pub. L. 94-455, title XIX, §§1901(b)(26)(C), (D), 1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1798, 1834; Pub. L. 98-369, div. A, title I, §124(a), July 18, 1984, 98 Stat. 646; Pub. L. 99-514, title XII, §§1211(b)(1)(A), 1212(a), (e), 1213(a), Oct. 22, 1986, 100 Stat. 2536, 2539, 2540; Pub. L. 100-647, title I, §1012(e)(3)(A), (f), Nov. 10, 1988, 102 Stat. 3500; Pub. L. 101-239, title VII, §7811(i)(2), Dec. 19, 1989, 103 Stat. 2409; Pub. L. 105-34, title XI, §1174(a)(2), Aug. 5, 1997, 111 Stat. 989; Pub. L. 115-97, title I, §14303(a), Dec. 22, 2017, 131 Stat. 2225.)

Editorial Notes

AMENDMENTS

2017—Subsec. (b). Pub. L. 115-97 inserted at end of concluding provisions “Gains, profits, and income from the sale or exchange of inventory property described in paragraph (2) shall be allocated and apportioned between sources within and without the United States solely on the basis of the production activities with respect to the property.”

1997—Subsec. (c)(2)(B). Pub. L. 105-34 inserted concluding provisions “In the case of transportation in-

come derived from, or in connection with, a vessel, this subparagraph shall only apply if the taxpayer is a citizen or resident alien.”

1989—Subsec. (b)(2), (3). Pub. L. 101-239 substituted “865(i)(1)” for “865(h)(1)”.

1988—Pub. L. 100-647, §1012(e)(3)(A), substituted “Special rules for determining source” for “Item not specified in section 861 or 862” in section catchline.

Subsec. (e)(2). Pub. L. 100-647, §1012(f), substituted “foreign country (or possession of the United States)” for “foreign country” in two places.

1986—Subsec. (b)(1). Pub. L. 99-514, §1212(e), substituted “services” for “transportation or other services”.

Subsec. (b)(2), (3). Pub. L. 99-514, §1211(b)(1)(A), substituted “inventory property (within the meaning of section 865(h)(1))” for “personal property”.

Subsec. (c)(2). Pub. L. 99-514, §1212(a), amended par. (2) generally, in subpar. (A) substituting provisions relating to other transportation having United States connections for provisions relating to transportation between United States and any possession, and in subpar. (B) substituting provisions relating to special rule for personal service income for provisions relating to special rule for certain lessors of aircraft.

Subsecs. (d), (e). Pub. L. 99-514, §1213(a), added subsecs. (d) and (e).

1984—Subsec. (c). Pub. L. 98-369 added subsec. (c).

1976—Subsec. (a). Pub. L. 94-455, §1906(b)(13)(A), struck out “or his delegate” after “Secretary”.

Subsec. (b). Pub. L. 94-455, §§1901(b)(26)(C), (D), 1906(b)(13)(A), struck out “or his delegate” after “Secretary” in introductory provisions, and inserted “or exchange” after “sale” in pars. (2) and (3), and “or exchanged” after “sold” in par. (2) wherever appearing.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2017 AMENDMENT

Pub. L. 115-97, title I, §14303(b), Dec. 22, 2017, 131 Stat. 2225, provided that: “The amendment made by this section [amending this section] shall apply to taxable years beginning after December 31, 2017.”

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105-34 applicable to remuneration for services performed in taxable years beginning after Dec. 31, 1997, see section 1174(c) of Pub. L. 105-34, set out as a note under section 7701 of this title.

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 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 a note under section 1 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by section 1211(b)(1)(A) of Pub. L. 99-514 applicable to taxable years beginning after Dec. 31, 1986, except as otherwise provided, see section 1211(c) of Pub. L. 99-514, set out as an Effective Date note under section 865 of this title.

Pub. L. 99-514, title XII, §1212(f), Oct. 22, 1986, 100 Stat. 2539, provided that:

“(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section [enacting section 867 of this title and amending this section and sections 861, 872, and 883 of this title] shall apply to taxable years beginning after December 31, 1986.

“(2) SPECIAL RULE FOR CERTAIN LEASED PROPERTY.—The amendments made by subsections (a) and (d) [amending this section and section 861 of this title] shall not apply to any income attributable to property held by the taxpayer on January 1, 1986, if such property was first leased by the taxpayer before January 1, 1986, in a lease to which section 863(c)(2)(B) or 861(e) of the Internal Revenue Code of 1954 [now 1986] (as in effect on the day before the date of the enactment of this Act [Oct. 22, 1986]) applied.

“(3) SPECIAL RULE FOR CERTAIN SHIPS LEASED BY THE UNITED STATES NAVY.—

“(A) IN GENERAL.—In the case of any property described in subparagraph (B), paragraph (2) shall be applied by substituting ‘1987’ for ‘1986’ each place it appears.

“(B) PROPERTY TO WHICH PARAGRAPH APPLIES.—Property described in this subparagraph consists of 4 ships which are to be leased by the United States Navy and which are the subject of Internal Revenue Service rulings bearing the following dates and which involved the following amount of financing, respectively:

“March 5, 1986	\$176,844,000
February 5, 1986	64,567,000
April 22, 1986	64,598,000
May 22, 1986	175,300,000.”

Pub. L. 99-514, title XII, §1213(b), Oct. 22, 1986, 100 Stat. 2541, provided that: “The amendment made by subsection (a) [amending this section] shall apply to taxable years beginning after December 31, 1986.”

EFFECTIVE DATE OF 1984 AMENDMENT

Pub. L. 98-369, div. A, title I, §124(b), July 18, 1984, 98 Stat. 647, provided that: “The amendment made by subsection (a) [amending this section] shall apply with respect to transportation beginning after the date of the enactment of this Act [July 18, 1984] in taxable years ending after such date.”

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by section 1901(b)(26)(C), (D) of Pub. L. 94-455 effective for taxable years beginning after Dec. 31, 1976, see section 1901(d) of Pub. L. 94-455, set out as a note under section 2 of this title.

APPLICABILITY OF CERTAIN AMENDMENTS BY PUB. L. 99-514 IN RELATION TO TREATY OBLIGATIONS OF UNITED STATES

For nonapplication of amendments by sections 1211(b)(1)(A) and 1212(a) of Pub. L. 99-514 to the extent application of such amendments would be contrary to any treaty obligation of the United States in effect on Oct. 22, 1986, with provision that for such purposes any amendment by title I of Pub. L. 100-647 be treated as if it had been included in the provision of Pub. L. 99-514 to which such amendment relates, see section 1012(aa)(3), (4) of Pub. L. 100-647, set out as a note under section 861 of this title.

QUALIFIED RESEARCH AND EXPERIMENTAL EXPENDITURES; ALLOCATION AND APPOINTMENT; DEFINITIONS; SPECIAL RULES; EFFECTIVE DATES

For allocation and apportionment of qualified research and experimental expenditures for purposes of sections 861 to 863 of this title, see section 4009 of Pub. L. 100-647, set out as a note under section 861 of this title.

1-YEAR MODIFICATION IN REGULATIONS PROVIDING FOR ALLOCATION OF RESEARCH AND EXPERIMENTAL EXPENDITURES

For rule governing allocation under subsec. (b) of this section of amounts allowable as a deduction for qualified research and experimental expenditures during taxable years beginning after Aug. 1, 1986, and on or before Aug. 1, 1987, see section 1216 of Pub. L. 99-514, set out as a note under section 861 of this title.

ALLOCATION UNDER SECTION 861 OF RESEARCH AND
EXPERIMENTAL EXPENDITURES

For purposes of subsec. (b) of this section, all amounts allowable as a deduction for qualified research and experimental expenditures are to be allocated to income from sources within the United States and deducted from such income in determining the amount of taxable income from sources within the United States for taxable years beginning after Aug. 13, 1983, and on or before Aug. 1, 1986, see section 126 of Pub. L. 98-369, set out as a note under section 861 of this title.

§ 864. Definitions and special rules

(a) Produced

For purposes of this part, the term “produced” includes created, fabricated, manufactured, extracted, processed, cured, or aged.

(b) Trade or business within the United States

For purposes of this part, part II, and chapter 3, the term “trade or business within the United States” includes the performance of personal services within the United States at any time within the taxable year, but does not include—

(1) Performance of personal services for foreign employer

The performance of personal services—

(A) for a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, or

(B) 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 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 \$3,000.

(2) Trading in securities or commodities

(A) Stocks and securities

(i) In general

Trading in stocks or securities through a resident broker, commission agent, custodian, or other independent agent.

(ii) Trading for taxpayer's own account

Trading in stocks or securities for the taxpayer's own account, whether by the taxpayer or his employees or through a resident broker, commission agent, custodian, or other agent, and whether or not any such employee or agent has discretionary authority to make decisions in effecting the transactions. This clause shall not apply in the case of a dealer in stocks or securities.

(B) Commodities

(i) In general

Trading in commodities through a resident broker, commission agent, custodian, or other independent agent.

(ii) Trading for taxpayer's own account

Trading in commodities for the taxpayer's own account, whether by the tax-

payer or his employees or through a resident broker, commission agent, custodian, or other agent, and whether or not any such employee or agent has discretionary authority to make decisions in effecting the transactions. This clause shall not apply in the case of a dealer in commodities.

(iii) Limitation

Clauses (i) and (ii) shall apply only if the commodities are of a kind customarily dealt in on an organized commodity exchange and if the transaction is of a kind customarily consummated at such place.

(C) Limitation

Subparagraphs (A)(i) and (B)(i) shall apply only if, at no time during the taxable year, the taxpayer has an office or other fixed place of business in the United States through which or by the direction of which the transactions in stocks or securities, or in commodities, as the case may be, are effected.

(c) Effectively connected income, etc.

(1) General rule

For purposes of this title—

(A) In the case of a nonresident alien individual or a foreign corporation engaged in trade or business within the United States during the taxable year, the rules set forth in paragraphs (2), (3), (4), (6), (7), and (8) shall apply in determining the income, gain, or loss which shall be treated as effectively connected with the conduct of a trade or business within the United States.

(B) Except as provided in paragraph (6)¹ (7), or (8) or in section 871(d) or sections 882(d) and (e), in the case of a nonresident alien individual or a foreign corporation not engaged in trade or business within the United States during the taxable year, no income, gain, or loss shall be treated as effectively connected with the conduct of a trade or business within the United States.

(2) Periodical, etc., income from sources within United States—factors

In determining whether income from sources within the United States of the types described in section 871(a)(1), section 871(h), section 881(a), or section 881(c), or whether gain or loss from sources within the United States from the sale or exchange of capital assets, is effectively connected with the conduct of a trade or business within the United States, the factors taken into account shall include whether—

(A) the income, gain, or loss is derived from assets used in or held for use in the conduct of such trade or business, or

(B) the activities of such trade or business were a material factor in the realization of the income, gain, or loss.

In determining whether an asset is used in or held for use in the conduct of such trade or business or whether the activities of such

¹ So in original. Probably should be followed by a comma.